TABLE OF CONTENTS

ARTICLES

“Share the Pain, Share the Gain”: Airline Bankruptcies and the Railway Labor Act

Francis Grab .................. 1

Attempts at Ensuring Peace and Security in International Aviation

R.I.R. Abeyratne ............... 27

Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure

Paul Stephen Dempsey ........ 73

INDEX

Subject Index to Volume 23 .............................................. 121

Case Name Index to Volume 23 ........................................... 125
# TABLE OF CONTENTS

## ARTICLES

- The *New* Single Process Initiative Threatens to Erode the *Boyle Military Contractor Defense*
  
  *Robert F. Hedrick* .............. 129

- The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers
  
  *Robert E. McFarland* ............. 155

- GARA's Achilles: The Problematic Application of the Knowing Misrepresentation Exception
  
  *Todd R. Steggerda* .............. 191

## BOOKNOTES

- Transportation Planning on Trial: The Clean Air Act and Travel Forecasting
  
  *Mark Garrett and Martin Wachs*
  
  *Thomas H. McConnell* ............. 237
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# TABLE OF CONTENTS

## ARTICLES

- The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act  
  *William G. Mahoney*  
  241

- A Comparative Analysis of the Aviation Network Within the European Community and the Ad-Hoc Network Between the United States and Central America  
  *E. Rebecca Kreis*  
  303

- Statutory and Common Law Relief for Overworked Truck Drivers  
  *Andrea Baker*  
  393

## 1996 HAROLD A. SHERTZ WINNER

- Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific  
  *Salvatore Massa*  
  413

## BOOK NOTES

- Aircraft Accident Reconstruction and Litigation: Barnes W. McCormick and Capt. M.P. Papadakis  
  *Dylan Lewis*  
  443

- Flying Blind, Flying Safe: Mary Schiavo with Sabra Chartrand  
  *Dylan Lewis*  
  449
Articles

“Share the Pain, Share the Gain”:1 Airline Bankruptcies and the Railway Labor Act

Francis Grab*

Table of Contents

I. Introduction ......................................................... 1
II. Bankruptcy Courts as Courts of Equity .......................... 4
III. The Nature of the Airline Industry Since Deregulation ...... 5
    B. Current State of the Airline Industry ....................... 7
    C. The Centrality of Labor Management Relations in
        Airline Bankruptcies ......................................... 8
IV. A Short Primer to the Railway Labor Act ...................... 8
V. Case Studies of three Troubled Airlines ....................... 10
    B. Eastern Airlines ............................................. 16
    C. Northwest Airlines .......................................... 20
VI. Analysis .................................................................... 23
VII. Conclusion ............................................................. 24

I. Introduction

Clearly, the general public perceives the airline industry as a
troubled institution. From the much ballyhooed “price wars” to the fre-
quent labor disputes, media images bombard the public, emphasizing the
precarious condition of the industry. The bankruptcy proceedings of ma-

* Francis Grab is a 1995 graduate of Emory Law School. He is currently serving as a
Legislative Assistant to U.S. Representative Gerald Kleczka (D-Wis.).

1. Jill Hodges, Machinists Union Made All-out Effort to Get Members to Approve Accord,
Star Trib., August 26, 1993 at D1 (button circulating among Northwest Airlines’ union’s
employees).
ajor national and international air carriers\(^2\), coupled with the inability of many of these airlines to emerge successfully from Chapter 11\(^3\) reorganizations, has sent troubling signals to the American public about the financial health of the airline industry.

Tension between labor and management interests is an important factor in industry economic woes. In an attempt to compete in the post-deregulation era, airline managers focused on perceived exorbitant labor costs; and dedicated themselves to sharply reducing those costs, hoping to achieve levels of business efficiency necessary for economic prosperity. They met with varying degrees of success.\(^4\)

Following the Supreme Court decision in *NLRB v. Bildisco & Bildisco*,\(^5\) airline executives began to view bankruptcy proceedings as a method of ridding themselves of onerous collective bargaining contracts.\(^6\) Labor groups, however, have strongly objected to these measures.\(^7\) They were partially vindicated when Congress added § 1113\(^8\) to the Bankruptcy Code in 1984,\(^9\) which allows management to reject a collective bar-

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2. Athanassios Papaioannou, *The Duty to Bargain and Rejections of Collective Agreement under Section 1113 by a Bankrupt Airline: Trying to Reconcile R.L.A. with Bankruptcy Code*, 18 Transp. L.J. 219 (1990). “[M]ore than 120 airlines have gone into bankruptcy since 1978... Air Florida, which went bankrupt in July, 1984, was the eighteenth largest certified air carrier in the U.S. Braniff Airlines which filed for bankruptcy reorganization in May, 1982 employed among 9,000 employees and was among the largest air carriers. When Continental Airlines petitioned for reorganization in September, 1983, it employed 12,000 employees and was heavily unionized. Another recent example is the Eastern Airlines bankruptcy. Eastern was once ranked at the top of the carrier...” *Id.* at 220.


5. 465 U.S. 513 (1984) (permitting rejection of a collective bargaining agreement where debtor can demonstrate that the agreement burdens the estate, and that the equities balance in favor of rejection).

6. See infra note 68 and accompanying text.


gaining agreement only if three requirements are satisfied. First, management has to make a proposal to the labor group representatives which provides for only the most needed modifications in employee benefits that are necessary to permit reorganization. Second, the labor groups have to refuse the proposal without good cause. Third, the balance of the equities have to clearly favor rejection of the agreement.\textsuperscript{10}

It is the premise of this article that the strictures of § 1113 do not go far enough in protecting labor interests in bankruptcy proceedings; leaving these interests unprotected reduces the chances of a successful reorganization of the debtor airline. Undergirding this premise is the jurisprudential observation that federal labor and bankruptcy laws co-exist in a considerable degree of tension. On one hand, the Railway Labor Act, which controls airline labor practices,\textsuperscript{11} stresses the need for increased labor participation in the bargaining process through "purposely long and drawn out" dispute resolution procedures.\textsuperscript{12} On the other hand, the reorganizational chapter of the bankruptcy code emphasizes speedy financial rehabilitation of the debtor.

These two goals often conflict with each other. For example, a bankrupt airline's quickest way out of Chapter 11 might be to pay lip service to the procedural safeguards of § 1113, while at the same time, imposing drastic cuts in employee benefits and work rule changes.\textsuperscript{13} Alternatively, labor's most effective strategy might be to drag out the contract negotiations as long as possible in an effort to increase bargaining leverage.\textsuperscript{14} A resolution of these conflicting strategies demands a weighing of the labor and bankruptcy policy objectives in the context of airline bankruptcies. Generally, bankruptcy courts have placed greater emphasis on ensuring that a financially troubled airline successfully emerges from bankruptcy proceedings. Such results detrimentally affect the Chapter 11 proceedings of airlines because they tend to weaken labor/management relations.


\textsuperscript{10.} 11 U.S.C. § 1113 (1988) (detailing the requirements the court must find to accept an application for rejection of a collective bargaining agreement).


\textsuperscript{13.} In the process, such strategy will surely increase tensions between labor and management.

For this reason, the RLA should be construed more expansively by bankruptcy courts.

This article examines the recent history of three airlines—Continental, Eastern, and Northwest—their descent into near financial collapse, and their different strategies for reorganization. Then, using the contours of the RLA as a guide, this article proposes alternatives that offer both management and union lawyers, as well as bankruptcy judges, a road map for effectuating workable reorganizational plans. Part II focuses on exactly why bankruptcy courts should concern themselves with the important national interests at stake in a healthy airline industry. Part IIIA discusses the effects the Airline Deregulation Act of 1978 has had on the airline industry. Part IIIB details the current state of the industry and Part IIIC examines the crucial importance of labor relations in airline bankruptcies. Part IV then briefly discusses the main points of the RLA. Finally, Part V provides a case study of Continental's, Eastern's, and Northwest's financial problems, and analyzes labor, management, and judicial strategies. Parts VI and VII conclude with an analysis of the various methods bankruptcy courts mimic the successful labor/management cooperation at Northwest and adopt a broader reading of the RLA while developing a keener appreciation of the policy objectives and philosophical assumptions upon which it is based.

II. Bankruptcy Courts as Courts of Equity

Bankruptcy law is equitable in nature. Thus, bankruptcy courts possess the broad range of powers and responsibilities traditionally associated with courts of equity. As courts of equity, they can take into consideration issues that are of pressing national concern. A healthy
airline industry is of utmost national concern; Congress clearly articulated this in the Deregulation Act. It therefore follows from these elementary principles that when faced with airlines in bankruptcy, bankruptcy courts should exercise their discretion to stretch equitable remedies to their limit.

Despite the need for change in the manner bankruptcy courts handle airline bankruptcies, there are inherent limitations in the bankruptcy system that should be noted. For one, bankruptcy courts can only address a small portion of the problems of a troubled industry; specifically, airlines in Chapter 11 proceedings. Nor can bankruptcy courts assume the role of the old regulatory system—they are neither equipped for this task nor would they desire to.

A court's ability to effectively deal with an airline bankruptcy is also limited by the fact that organizations tend to file for bankruptcy long after they really need it. Regardless of the aspirations of the Code, a social stigma still attaches on the debtor with the filing of the bankruptcy petition. Moreover, waiting until the last minute to file tends to exacerbate an already bad situation. However, while these limitations are formidable, bankruptcy courts can improve their ability to effect successful reorganizations in airline bankruptcies.

III. THE NATURE OF THE AIRLINE INDUSTRY SINCE DEREGULATION

A. PURPOSE OF THE AIRLINE DEREGULATION ACT

Congress enacted legislation regulating the nation's nascent airline industry in 1938. Congressional intent behind this legislation was the

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Env. Protection, 474 U.S. 494, 514 (1986) (Rehnquist, J. dissenting) ("The Bankruptcy Court may not, in the exercise of its equitable powers, enforce its view of sound public policy at the expense of the interests the Code is designed to protect.").

20. See infra notes 26-34 and accompanying text.
21. See infra notes 26-31 and accompanying text.
22. DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 244 (1993) ("Bankruptcy filings happen too late rather than too soon.").
24. As well as a very real economic one. See infra notes 160, 178 and accompanying text.
26. Congress passed the Civil Aeronautics Act of 1938; in 1958, its name was changed to the Federal Aviation Act, codified at 49 U.S.C. § 1301 et seq.

At least in part, Congress' action can be seen as a response to the disastrous consequences of interstate commerce that resulted from the fierce anti-competitive business practices of the great late 19th-century railroads. Heuer & Vogel, supra note 4, at 250.
promotion of stability in an industry deemed vital to the nation’s economic prosperity.\textsuperscript{27} Although this policy was later attacked as “highly anti-competitive,”\textsuperscript{28} the regulations were recognized by some as a beneficial source of stability as the industry was maturing.\textsuperscript{29} As the U.S. economy evolved following the post-World War II boom, regulation grew less attractive; many even called for its elimination.\textsuperscript{30}

Congress conducted hearings on the subject in which a majority of experts criticized the regulatory system.\textsuperscript{31} One of the most compelling arguments was delivered by John Robson, former Chairman of the Civil Aeronautics Board (CAB), who said that regulation was not achieving its goals because it:

\begin{quote}
Induced costly inefficiencies through overscheduling, overcapacity, competition in frills and equipment races. . . . It has not provided the environment or the incentives for the basic price competition. Because of these inefficiencies, and the regulatory system’s insulation of labor-management bargaining, neither the airline investor nor the consumer has fully reaped the potential benefits of the industry’s enormous past productivity gains and growth. Nor has financial regulation produced a financially strong airline industry.\textsuperscript{32}
\end{quote}

Largely on the strength of such testimony, Congress enacted reform legislation in 1978.\textsuperscript{33} The resultant Deregulation Act stressed competition among carriers and encouraged “low-fare” carriers to enter the market. It was hoped that the addition of more airlines would result in lower fare costs, and thus open the sky to more of the American public.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{27} Heuer & Vogel, supra note 4, at 251. “The regulatory scheme called for regulation of three economic areas: 1) airline entry/exit of the market, inclusive of the power to grant certification to enter the market, approval, allocation and assignment of routes, and service to certain communities; 2) rates and air fares; and 3) anti-trust.” \textit{Id.}
\item \textsuperscript{28} H.R. Rep. No. 1211, 95th Cong., 2d Sess. 3737, 3738 (1978).
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} Heuer & Vogel, supra note 4, at 251. “Regulation of the airline industry was desirable when the economic environment after the Depression was favorable and technology was rapidly changing. Forty years later, deregulation became favorable because the economic environment caused sluggish productivity, moderate traffic growth and rising costs.” \textit{Id.}
\item \textsuperscript{31} \textit{Aviation Regulatory Reform: Hearings Before the House of Representatives Subcomm. on Aviation,} 94th Cong., 1st Sess. 62, 74 (1977).
\item \textsuperscript{32} \textit{Id.} at 70.
\item \textsuperscript{33} Heuer & Vogel, supra note 4, at 253. “The relevant parts of the [Deregulation] Act required the following: 1) Federal subsidization for air carriers in small communities with a prohibition against discontinuing essential service until the CAB can find a satisfactory replacement. 2) Fares falling within a ‘zone of reasonableness’ are not suspendable or subject to the jurisdiction of the CAB or the Department of Transportation upon the dissolution of the CAB. 3) Two or more carriers may not merge if unlawful according to the consolidation and merger guidelines in the Act.” \textit{Id.}
\item \textsuperscript{34} H.R. Rep. No. 1211, 95 Cong., Sess. 3737, 3768 (1978) (Rep. Elliot H. Levitas’s (D-Ga.) commented that, “[t]he time has come to move decision making to the private boardrooms of the industry and away from the lawyers, economists, and beuracrats at the CAB. Free enterprise has served our country well, and it is time to move the airline industry into a more competitive
B. CURRENT STATE OF THE AIRLINE INDUSTRY

While the goals of the Deregulation Act appeared attainable, the results have not been what Congress had hoped for. Today, the state of the airline industry is, if anything, precarious. A number of factors have contributed to the current situation including a tremendous debt burden;\textsuperscript{35} an expensive and unreliable fuel supply;\textsuperscript{36} the cyclical nature of the industry;\textsuperscript{37} drastically under-funded pension plans;\textsuperscript{38} and very high labor costs.\textsuperscript{39}

Perhaps the Act’s biggest disappointment, however, is that the number of airline actually decreased.\textsuperscript{40} As the legislative history of the Deregulation Act indicates, Congress hoped that by easing the CAB entrance requirements for airline carriers, the public would benefit from lower fares; the new carriers would “police” the market.\textsuperscript{41} Excessive regulations, it was believed, impeded the access of new airlines, and their removal would allow for more entrants into the industry. The drafters of the Deregulation Act believed in the mystical concept of the “free market;” that it could better protect the vital national interests in a healthy airline industry than a staid bureaucratic department. Now, fifteen years after the passage of the Deregulation Act, the airline industry is even more susceptible to the dangers of oligopolistic and monopolistic

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\textsuperscript{35} Michele M. Jochner, \textit{The Detrimental Effects of Hostile Takeovers, Leveraged Buyouts, and Excessive Debt on the Airline Industry}, 19 Transp. L.J. 219, 220 (1990) (“[A]n industry which has been marginally profitable during most of the 1980’s cannot afford to be saddled with the mountain of debt which can result from hostile takeovers or leveraged buyouts (LBOs”). \textit{See also} Sheets & Dworkin, \textit{A Dogfight for Dominance of the Skies}, U.S. News & World Report, Sept. 11, 1989, at 54 (as of 1989, the debt of the entire airline industry had been estimated at about $15 billion).

\textsuperscript{36} Id. at 220. \textit{See also} Heuer & Vogel, \textit{supra} note 4, at 254 (blaming the rise in airline fuel costs on the OPEC oil embargo).

\textsuperscript{37} Id. at 220. A cyclical industry is one that fluctuates with the cycles of the economy.

\textsuperscript{38} \textit{See} PBGC Soon May Take Action on Eastern’s Underfunded Plans, BNA Bankr. L. Daily, April 25, 1990. “According to PBGC, [Eastern] airline’s seven defined benefit pension plans have a total unfunded liability of $1.1 billion. The plans cover 50,000 participants.” \textit{Id. See also} Bryan, \textit{supra} note 7.

\textsuperscript{39} \textit{See} Stone, \textit{supra} note 14, at 1489 n.26 (quoting from Elizabeth E. Bailey \textit{et al.}, \textit{Deregulating the Airlines} 27-37 (1985); \textit{Airline Deregulation: The Early Experience} (J. Meyer & C. Oster eds. 1981)). “In 1978, labor costs were 47.1% of airline total costs for domestic operations. In 1981, they comprised 39.8% of the total.” \textit{Id.}

\textsuperscript{40} \textit{See generally} Bill Poling, \textit{Senate Subcommittee Ponders Decreasing Number of Airlines}, Travel Weekly, March 5, 1992 at 7; and Andrew R. Goetz & Paul S. Dempsey, \textit{Airline Deregulation Ten Years After: Something Foul in the Air}, 54 J. Air L. & Com. 927, 931-33 (1989) (noting that in 1978, the six largest carriers accounted for 71% of domestic traffic, and in 1987, the six largest accounted for 79%).

\textsuperscript{41} Heuer & Vogel, \textit{supra} note 4, at 253.
C. The Centrality of Labor Management Relations in Airline Bankruptcies

In the post-Deregulation period, airline managers scrambled to cut costs in an attempt to make their airlines profitable. This was a formidable task, as oil prices had tripled in response to the Organization of the Petroleum Exporting Countries (OPEC) oil embargo and the energy crisis of the mid 1970s. Thus, the logical strategy for airline executives was to "go after" labor expenses. For managers, the reason was obvious—labor expenditures were consuming 47.1% of the total costs of the industry in 1978. Through a variety of mechanisms, airline management slashed the 47.1% cost figure down to 34% in 1992. Still, labor expenses represent a significant outlay, and are the only real cost that airlines in trouble can bargain down. For example, an airline on the brink of financial collapse cannot get oil suppliers to reduce the going-rate for airline fuel nor can they have their jets serviced less often. For these reasons, labor costs—in addition to union work rules—have been the principal concern of the reorganizational struggles of bankrupt airlines.

Accordingly, the challenge is to determine ways in which bankruptcy courts can effectuate a greater number of successfully reorganized airlines, while considering the ultimately unified interests of management and labor in the future of their airline. One way bankruptcy courts can meet this challenge is to interpret the RLA more broadly than it has been in the past. By design, the RLA grants greater participation rights to unions in bargaining contexts. Such a forward-looking, cooperative model of management-labor relations is vital for airlines seeking to emerge from, or avoiding, Chapter 11 bankruptcy.

IV. A Short Primer to the Railway Labor Act

Congress passed the RLA in 1926. In 1936 the Act was broadened to include the airline industry. The stated policy objectives of this law

42. Id. at 255.
43. Stone, supra note 14, at 1490.
44. Id. at 1489. ("Between 1978 and 1980, the price of airline fuel increased three-fold.").
45. Id. at 1489 n.26.
47. See infra discussion of Continental Air Lines and Eastern Air Lines.
48. Stone, supra note 14, at 1486; See infra notes notes 49-62 and accompanying text.
were:

(1) [t]o avoid any interruption to commerce or to the operation of any carrier engaged therein;

(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;

(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter;

(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.51

The latter two policy objectives have given rise to one of the RLA’s most noticeable traits: the dichotomy between “major” and “minor” disputes.52 Depending upon how they are characterized, the RLA contains an extensive variety of procedures for resolving labor disputes. The Act provides no standard for making such characterizations, however, so a great deal of judicial energy is expended on resolving these abstract distinctions.53

For “major” disputes, § 156 of the RLA controls. It provides that the party seeking to change a substantive term of the collective bargaining agreement must give the other side at least 30 days written notice.54 The Act then mandates a period of bargaining between the carrier and its employees over the proposed change. If this fails to resolve the dispute, either party may summon the National Mediation Board (NMB), or the NMB can offer its services sua sponte.55

While the NMB mediates a dispute, neither party may engage in hostile economic actions.56 If the agency finds that its mediation efforts have failed, it then advises the parties to accept binding arbitration. If this

52. Nowhere in the RLA are the terms “major” and “minor” used; they were first articulated by the Supreme Court in Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711 (1945) (employing the terminology of the railway industry).
56. So that unions cannot strike, and employers cannot institute the proposed changes in rates of pay, or work rules. 45 U.S.C. § 156 (1988).
offer is rejected by either side, a statutorily-imposed “cooling-off” period of 30 days is imposed, during which the status quo must be maintained.\(^\text{57}\) After the expiration of this 30-day period, economic war may begin: the union is free to strike, and the company can unilaterally institute the changes it sought in its earlier written notice.\(^\text{58}\)

Focusing on the interpretation of existing collective bargaining agreements, “minor” disputes are subject to a less stringent set of procedures. In these cases, the parties argue their position before an arbitration panel known as an adjustment board, which is made up of an equal number of labor and management designees.\(^\text{59}\) Unless a party can raise a legitimate claim of unfair representation, the decision reached by the adjustment board will bind the parties.\(^\text{60}\)

As noted, the RLA’s dispute resolution mechanisms include both compulsory bargaining and “cooling-off” periods. The policy reason for these time-consuming procedures was articulated by the Supreme Court:

> [S]ince disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.\(^\text{61}\)

Hence, it is clear the Act envisages a workplace where labor possesses a substantial power to influence major corporate decisions; management cannot unilaterally impose serious changes in the workplace without either securing labor’s consent or enduring the “almost interminable”\(^\text{62}\) statutorily-proscribed negotiations. These provisions of the RLA embody the concept of “workplace democracy”—a concept with crucial ramifications for financially troubled airlines.

V. Case Studies of three Troubled Airlines

A. Continental

In the years following the passage of the Deregulation Act, Continental Airlines suffered tremendous financial losses totaling over a half-


\(^{58}\) However, before the “economic war” commences, the President of the U.S.—after finding the dispute threatens any region of the nation of essential transportation service—may convene a panel to offer its recommendations on how the dispute should be resolved; and as this panel gathers its information, each side must maintain the status quo for an additional sixty days. 45 U.S.C. § 160 (1988).

\(^{59}\) 45 U.S.C. § 184 (1988). In the event that the panel deadlocks, an impartial member is appointed to break the tie. T. Kheel, Labor Law § 50.02, at 50-40 (rev. ed. 1984).

\(^{60}\) Adler, supra note 53, at 1008.


\(^{62}\) Id. at 149.
billion dollars.63 These losses compelled the airline, one of the major domestic carriers,64 to file a voluntary Chapter 11 petition on September 24, 1983.65 Indicative of the centrality of labor costs to the decision to file for bankruptcy protection, Continental and Texas International waited just three days before filing a joint motion to the bankruptcy court to reject their collective bargaining agreement.66 Upon the filing of the bankruptcy petition, Continental unilaterally imposed new wage rates and work rules67—comparable to new low-cost airlines—in apparent violation of the RLA.

In response, the Air Line Pilots’ Association (ALPA), the Union of Flight Attendants (UFA), and the International Association of Machinist and Aerospace Workers (IAM) filed motions seeking to dismiss Continental’s involuntary bankruptcy proceedings as a bad faith filing.68 The unions argued that the “sole, or at least the primary purpose in filing was to reject these agreements and that Continental Airlines has not shown that it intends to reorganize through and by a Plan of Arrangement.”69 While the unions acknowledged the dire financial condition of the airline, and were willing to agree to the dollar amount of concessions requested by the airline, the “apparent feeling of distrust of management”70 prevented the reaching of a voluntary settlement.

The bankruptcy court denied the union’s request, however, and allowed the Continental bankruptcy proceedings to go forward. The court’s conclusions differed from those of the union on the basis that Continental had suffered a worse financial crisis in the winter of 1982-3 than the present crisis; the court determined that Continental had exhausted its cash reserves in the earlier crisis, and was thus unable to weather its current financial troubles.71 Also, the court felt that Continental had not entered these proceedings lightly, but rather, it had filed for bankruptcy as a matter of corporate survival: “Had the airline not

63. In re Continental Airlines Corp., 38 B.R. 67, 69 (Bankr. S.D. Tex.). In 1979, the airline lost $27.4 million; in 1980, $76.8 million; in 1981, $138.6 million; in 1982, $119.9 million; in 1983 (up to Sept. 24, the date of filing), $159.2 million. Id.
64. Goetz & Dempsey, supra note 40.
65. In re Continental Airlines Corp., 38 B.R. at 69. Jointly filing with Continental Airlines Corporation were the related entities: Continental Airlines, Inc., Texas International Airlines, Inc., and TXIA Holdings Corporation. Id.
66. Id.
67. Id.
68. Id. The provision in the Code which condemns bad faith filings is § 1129(a)(3). That section reads, “(a) The court shall confirm a plan only if all of the following requirements are met: . . . (3) The plan has been proposed in good faith and not by any means forbidden by law.” 11 U.S.C. § 1129(a)(3) (1988).
70. Id. at 70.
71. Id.
filed its Chapter 11 proceedings when it did, it would not have been flying for very much longer, its 6,000 remaining employees would now be out of a job or working elsewhere, and its ability to reorganize would have been further seriously impaired.”

The court further noted that if this voluntary proceeding was dismissed, the Unsecured Trade Creditors Committee had advised the court that it would automatically file an involuntary proceeding.

In addition, this court dismissed implicit concerns that the unilateral rejection of the collective bargaining agreement would violate the RLA. It noted:

Indeed, this court feels that the Railway Labor Act and the Bankruptcy Code are compatible. Each has a special and a separate purpose. . . A number of cases had already held that collective bargaining agreements can be rejected by a Chapter 11 debtor under the provisions of the prior Bankruptcy Act under certain circumstances. But the Congress did not see fit to provide otherwise in the language of the Bankruptcy Code. This must have been intentional on the part of Congress; although differences still exist among authorities as to what circumstances are required to be shown before such agreements can be rejected.

While the court stated that the RLA and the Bankruptcy Code were compatible, it did not explain how it had reached this conclusion.

Indeed, the court’s own holding shows that while it acknowledged the compatibility of the two statutes, the policies of the bankruptcy law clearly predominated. The court allowed Continental to reject a collective bargaining agreement and impose unilateral changes in working conditions—both clearly forbidden by the RLA—with only a showing of financial troubles, and without the mandatory bargaining imposed by the RLA.

The next piece of litigation in the Continental bankruptcy also witnessed a clash between the statutory policies of the Code and the RLA. The dispute centered over the efforts of the International Brotherhood of Teamsters, Airline Division (IBT) to be certified as the bargaining representative of the Fleet Service and Passenger Service employees. The

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72. Id.
73. Id. at 71. As Continental filed for Chapter 11 protection, it “had $42 million in unsecured trade debts which it had not paid timely and which it could not pay in full.” Id. at 70.
74. Id. at 71.
76. Id.
78. Id. at 301. The IBT notified the National Mediation Board of its intention on October 1, 1982. “This application was apparently precipitated by notification of Texas International Airlines, one of the mergees in the Continental/Texas International merger, to the IBT that, on
NMB processed the IBT's application, held hearings concerning proper employee "craft or class" designations, issued orders concerning those determinations, and "put its administrative wheels in motion for purposes of conducting [an] election." As those wheels were turning, Continental filed its voluntary bankruptcy proceedings, and one month later, sought the invocation of the automatic stay against further NMB proceedings.

The bankruptcy court limited its decision to whether the automatic stay provision of the Code applied to the actions of the NMB in the instant case. The court ruled that it did since the NMB proceedings did not fall under the "police or regulatory power" exceptions to the automatic stay embodied in § 362(b)(4). The court's ruling relied on the fact that the "police or regulatory power" exceptions dealt with the enforcement of laws regarding health, welfare, morals, or safety, and not to "administrative or regulatory laws that directly conflict with the control or reorganization of the res or property." In the opinion of the court, the NMB's lack of enforcement power distinguished it from the National Labor Relations Board (NLRB), which possesses enforcement power; in prior bankruptcy cases, the NLRB had fit within the exception to the automatic stay.

The importance of this case lies principally in the fact that, unlike the previous case, the bankruptcy judge acknowledged the tensions between the RLA and the Code. The court stated:

At the outset of this analysis, let it be said that this Court is acutely aware that a significant part of the litigation in the Continental Chapter 11 matters stem from a perceived conflict between the federal labor statutes and histori-

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79. Id. "On August 11, 1983 the NMB issued an Order involving craft/class determination holding that the facts required that the affected employees of Continental be grouped into two separate crafts or classes for purposes of a potential election." Id.
80. Id.
81. Id. Continental also filed a motion with the NMB to stay proceedings or in the alternative to reconsider the factual findings made by the Board. The NMB rejected Continental's position, finding that the airline remained "subject to the Railway Labor Act and that a stay of the representation case would deny the employees their rights under that Act." Id. at 301-2.
83. In re Continental Airlines Corp., 40 B.R. at 301.
cal labor policy of our nation, and the federal bankruptcy statutes and the
problems relating to the debtor's employees rights which may be affected by
the debtor's exercise of its statutory right of reorganization.\footnote{88}

The court posited no solution to this conflict, but merely observed that its
resolution would occur on a case-by-case basis in adversary
proceedings.\footnote{89}

The next labor-management dispute in the Continental bankruptcy
involved the Air Line Pilots Association's (ALPA) scheduling of discipli-
nary hearings for 317 Continental pilots on the same day in Washington,
D.C.\footnote{90} The bankruptcy court had little trouble in finding this a blatant
attempt by the union creditor\footnote{91} to harass the debtor's reorganization
efforts, and issued an order enjoining the union from proceeding with those
hearings.\footnote{92} The court then suggested that the disciplinary hearings be
conducted over a 30 to 60 day period.\footnote{93}

Of interest for purposes of this article, the court situated the tension
between the federal labor and bankruptcy law policies. Thus:

The Court finds that under equitable principles, it is under an obligation to
balance the equities of the interests of the parties and to attempt to reach an
accommodation between the various statutes if possible. The focus is there-
fore upon whether the debtor, the assets of the estate and the interests of the
substantial creditor's groups and the equity security holders will suffer more
from the denial of the relief requested than would the interest of the Unions
from the granting of relief.\footnote{94}

Again, a bankruptcy court declares itself bound by equitable prin-
ciples to weigh the competing interests of the RLA and the Code. It does
so, however in only the most cursory fashion, considering only factors
that are important in bankruptcy law, e.g., whether the union action
would harm the debtor's estate, creditors or equity security holders.

The last relevant chapter in the Continental bankruptcy proceedings
was an appeal heard in the United States District Court from the above
discussed bankruptcy court opinion holding that the NMB's union certifi-
cation procedures at Continental were subject to the automatic stay pro-

\footnote{88} Id. at 303.
\footnote{89} Id.
\footnote{90} Continental Air Lines, Inc. v. Air Line Pilots Association \textit{(In re Continental Airlines Corp.)}, 43 B.R. 127, 128 (Bankr. S.D. Tex. 1984). All of the hearings were scheduled for April
24, 1984 at 10 o'clock in the morning. \textit{Id.}
\footnote{91} \textit{Id.} The court noted that “ALPA appears to be a creditor of CAL and its Chapter 11
estate.”
\footnote{92} \textit{Id.} at 128-9.
\footnote{93} \textit{Id.} at 128.
\footnote{94} \textit{Id.} at 129.
visions of the Code.\textsuperscript{95} The district court held the invocation of the automatic stay improper, and ordered it lifted.\textsuperscript{96} In the course of its "regrettably long opinion,"\textsuperscript{97} the court articulated some important rationales in its "equitable balancing" of the competing federal policies behind the labor and bankruptcy laws.

First, the court briefly noted that Continental's bankruptcy did not remove it from the jurisdiction of the RLA.\textsuperscript{98} The Court later expanded upon this position: "Continental's invocation of shelter under the Bankruptcy Code should neither relieve it of its obligation of noninterference\textsuperscript{99} nor rob its employees of their representational rights."\textsuperscript{100} The court surveyed the law of labor relations in the airline industry and concluded that Continental lacked a legitimate interest—within the meaning of the RLA—in the outcome of the representational dispute.\textsuperscript{101} The NMB proceedings thus could not properly be considered "proceedings against the debtor" for purposes of the automatic stay.\textsuperscript{102}

Second, in the court's opinion, the union and the NMB did not fit the definition of "creditors" as set forth in § 101(9).\textsuperscript{103} The union and the NMB did not possess a "right to payment";\textsuperscript{104} the RLA\textsuperscript{105} entitled them instead, a right to compel Continental to the bargaining table by means of a civil injunction.\textsuperscript{106}

In concluding, the court rejected Continental’s argument in favor of the automatic stay because it would unduly delay the NMB certification proceedings of the IBT. In ruling for the NMB, the court accorded greater weight to the "RLA's premium on speedy resolutions free from carrier interference,"\textsuperscript{107} than Continental's claim that such actions would unduly burden its reorganization efforts, an argument which the bank-

\textsuperscript{95} National Mediation Board v. Continental Airlines Corp. (\textit{In re} Continental Airlines Corp.), 50 B.R. 342 (S.D. Tex. 1985).
\textsuperscript{96} Id. at 374.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 348. "[T]he RLA specifically provides that "[t]he term 'carrier' includes ... any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier.'" 45 U.S.C. § 151 (1988). Id.
\textsuperscript{99} The court uses "noninterference" in reference to the selection of the employee's bargaining representatives.
\textsuperscript{100} \textit{In re} Continental Airlines Corp., 50 B.R. at 351 (footnote omitted).
\textsuperscript{101} Id. at 350.
\textsuperscript{102} Id. at 351.
\textsuperscript{104} \textit{In re} Continental Airlines Corp., 50 B.R. at 353.
\textsuperscript{106} \textit{In re} Continental Airlines Corp., 50 B.R. at 353-4. The United States District Court here furthered the notion that the IBT and the NMB were not creditors by noting, "[t]he U.S. Supreme Court has emphasized that the RLA does not compel carriers to reach any agreement with their employees' certified representative." Id.
\textsuperscript{107} Id. at 370.
ruptcy court below found so persuasive. 108

B. Eastern Air Lines

The disputes comprising the Eastern Air Lines bankruptcy proceedings also involved the debtor airline and its unions. Eastern Air Lines filed a voluntary Chapter 11 petition on March 9, 1989, 109 only five days after their mechanics, represented by the IAM, began a primary strike. The mechanics' strike was supported by Eastern's pilots, who were represented by ALPA. 110

Eastern had been attempting to negotiate new collective bargaining agreements with these unions, keeping in mind the possibility that if these talks were unsuccessful, the airline would be acquired by Texas Air. 111 However, Eastern did come to terms with ALPA after months of intensive negotiations. 112 The agreement, consisting of only four handwritten pages, did not explicitly address the effects significant changes in the corporate structure had on the rights of Eastern's employees. The court noted that, "[t]he parties were unclear on the material terms . . . [of the] Labor Protective Provisions ('LPPs'). That provision, in its entirety, read: 'LPP's & Takeover: Similar to TWA—need to work out between EAL/ALPA legal counsel.'" 113

After a bit of legal wrangling, the parties submitted their hastily-drafted provision to the arbitrating body specified in the bargaining agreement. On the day before Eastern filed for bankruptcy, the arbitrator entered his draft order. He concluded that "the parties' cryptic language evinced an agreement to incorporate into their collective bargaining agreement sections 2(a), 3 and 13 of the LPPs applied to airline employees by the Civil Aeronautics Board (CAB) in the Allegheny-Mohawk airline merger in 1972." 114 The issue of the LPPs gained prominence with the acquisition of Eastern by Texas Air. The ALPA argued that due to certain transactions between Eastern and Continental, which was owned by Texas Air, the LPPs of the bargaining agreement had been triggered, and therefore, should be invoked. 115

The pilots' union petitioned the bankruptcy court in two separate

108. *In re Continental Airlines Corp.*, 40 B.R. at 299.
110. *Id*.
111. *Id* at 382.
112. *Id*.
113. *In re Ionosphere Clubs*, 114 B.R. at 382-3.
115. *In re Ionosphere Clubs*, 114 B.R. at 384.
actions.\textsuperscript{116} The union first argued that the automatic stay of § 362 did not apply to the arbitrator’s decision since it had been reached the day before Eastern had filed for bankruptcy.\textsuperscript{117} Additionally, it requested relief from the automatic stay “to commence a new arbitration proceeding to ‘implement’ the [arbitrator’s] decision.”\textsuperscript{118} ALPA’s second action sought to gauge the effect of Texas Air’s purchase of Eastern, and various prepetition “asset transactions” between Eastern, Continental, and Texas Air; it sought to determine whether these actions constituted a “merger” pursuant to § 2(a) of the LPP.\textsuperscript{119} ALPA maintained that in the event that a merger did occur, it would be entitled to damages, “and more significantly, to the merger, or ‘integration’ of the pilot work forces of Continental and Eastern.”\textsuperscript{120}

The bankruptcy court ruled against the union on both counts. It held that ALPA had not established the necessary cause\textsuperscript{121} in order to obtain relief from the automatic stay, even though it allowed the formal entry of the arbitrator’s award.\textsuperscript{122} Also, the court found the union’s second action—a request for arbitration to determine whether the Continental/Eastern dealings had triggered the LPPs of the collective bargaining agreement—could not be maintained since it would “usurp the bankruptcy court’s critical role in the reorganization proceedings, affect special bankruptcy interests, and thwart the goal of judicial speed and economy [necessary to rehabilitate Eastern].”\textsuperscript{123} The bankruptcy court feared the arbitration proceedings requested by ALPA would be an expensive affair, believing that arbitration might result in a “substantial” money judgment for the union.\textsuperscript{124} At no time did the bankruptcy court focus on the terms of the collective bargaining agreement between Eastern and ALPA, or whether that agreement called for the resolution of the current disputes through arbitration.\textsuperscript{125}

\begin{footnotes}
\item[117] The alternative argument to the union’s first pleading was a request for relief from the automatic stay, in order to enable the arbitrating body to complete the arbitration process by formally promulgating the arbitrator’s decision.
\item[118] \textit{In re Ionosphere Clubs}, 114 B.R. at 384.
\item[119] \textit{Id.}
\item[120] \textit{Id.}
\item[121] \textit{Id.} See 11 U.S.C. § 362 (d)(1) (1988): “(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay (1) for cause, including lack of adequate protection of an interest in property of such party in interest. . . .” 11 U.S.C. § 362(d)(1) (1988).
\item[122] \textit{In re Ionosphere Clubs}, 105 B.R. at 771.
\item[123] \textit{Id.}
\item[124] \textit{Id.} at 772.
\item[125] \textit{In re Ionosphere Clubs}, 114 B.R. at 385.
\end{footnotes}
Yet another dispute arose between Eastern and ALPA that raised difficult labor law issues in a bankruptcy context. On September 1, 1989, some six months after Eastern filed, ALPA filed a lawsuit in federal district court to set aside Eastern’s practice of “wet-leasing”—renting out planes and crews from competing airlines to fly Eastern routes. The complaint sought both a termination of this practice, and restitution to ALPA-represented Eastern Air Line pilots.

In response, Eastern petitioned the bankruptcy courts for relief. The court granted Eastern’s petition for an injunction, and pursuant to §§ 362 and 105 of the Code, enjoined the union’s lawsuit. The bankruptcy court acknowledged ALPA’s argument that the only procedure by which a Chapter 11 debtor could reject or modify a collective bargaining agreement lay in § 1113. However, it did not directly address the union’s concerns that Eastern’s wet-leasing program accomplished a substantial modification of the agreement without going through the procedural safeguards of § 1113.

Immediately preceding those rulings, ALPA decided to end its sympathy strike in support of the striking mechanics and return to work. The resulting flurry of legal proceedings left United States District Court for the Southern District of New York grappling with a host of issues, “[E]ach bear[ing] on the larger question of when and in what forum collectively bargained-for rights may be enforced against an employer who has sought protection from creditors in bankruptcy.” The district court saw the litigation in the following terms:

1. Does section 362(a) of the Bankruptcy Code automatically stay actions to enforce a collective bargaining agreement, where the debtor has not sought rejection or alteration of the terms of the agreement under section 1113 of the Bankruptcy Code?

2. If section 362(a) stays such actions, did the Bankruptcy Court abuse its discretion in refusing ALPA’s request for relief from the stay to arbitrate the LPP merger dispute?

3. If section 362(a) does not stay such actions, did section 105 of the Bank-

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127. In re Ionosphere Clubs, 105 B.R. at 777. The court held that the unions’ action ran afoul of § 362(a)(3), because it blocked “Eastern in its rebuilding efforts by controlling the manner in which it uses its assets.” Id.
128. See supra notes 5-10 and accompanying text.
129. In re Ionosphere Clubs, 114 B.R. at 386.
ruptcy Code nevertheless authorize the Bankruptcy Court to enjoin the wet-leasing suit?\textsuperscript{132}

After an extensive review of the workings of the automatic stay,\textsuperscript{133} the purposes of § 1113,\textsuperscript{134} and a review of the Supreme Court decision in \textit{NLRB v. Bildisco & Bildisco},\textsuperscript{135} as well as the Congressional response to that decision culminating in the passage of § 1113 of the Code,\textsuperscript{136} the court noted that "the very point of section 1113 was to prevent employers from using the act of a bankruptcy filing to obtain an automatic 'breathing spell' from their labor obligations, although the stay promised just such a spell with respect to other obligations."\textsuperscript{137} The district court vacated the lower court's refusal to lift the automatic stay to permit arbitration of the LPP dispute. It also reversed the lower court's decision enjoining ALPA from prosecuting its wet-leasing action against Eastern.\textsuperscript{138}

The final chapter in the Eastern bankruptcy proceedings involves \textit{International Assoc. of Machinists and Aerospace Workers v. Eastern Air Lines, Inc.},\textsuperscript{139} Arising out of the Eastern Air Lines machinists strike, this case clearly illustrates the difficulty bankruptcy courts face in balancing the competing policy interests of bankruptcy and labor laws.

In this case, Eastern alleged that the striking machinists had committed numerous torts throughout the 15-month long dispute,\textsuperscript{140} and sought injunctive relief from the bankruptcy court.\textsuperscript{141} The bankruptcy court granted Eastern's request and enjoined IAM from engaging in certain strike-related activities.\textsuperscript{142}

\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 389-90.
\textsuperscript{134} \textit{Id.} at 390-92.
\textsuperscript{135} \textit{Id.} at 392-94.
\textsuperscript{136} \textit{Id.} at 394-95.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 406.
\textsuperscript{139} 121 B.R. 428 (S.D.N.Y. 1990).
\textsuperscript{140} The district court detailed the tortious acts: "At LaGuardia Airport in New York, IAM members stormed Eastern's facilities, discouraged customers from patronizing Eastern's flights and interfered with non-union employee's efforts to report to work. Specific unlawful acts at the Eastern terminal included flooding bathrooms, interfering with skycaps assisting passengers and sabotaging baggage conveyor belts with 'crazy glue.' Harassment was commonplace during this strike. The bankruptcy court found that strikers called passengers 'scab' and 'cheap ass' while telling them to have a 'shit flight,' that they would be 'killed' and not to forget their 'body bag.'" \textit{Id.} at 431 (footnotes omitted).
\textsuperscript{142} \textit{In re Ionsphere Clubs,} 121 B.R. at 431. "The strikers were not allowed, among other things, to shout, bang or clap in a disruptive way, to trespass onto Eastern property, engage in mass picketing that interfered in any way with Eastern employees' and passengers' use of the public roads, or vandalize and assault property or persons." \textit{Id.}
The union appealed, urging that the injunction violated provisions of the Norris-LaGuardia Act, which divests, to a considerable extent, the power of federal courts to issue injunctions in labor disputes.\textsuperscript{143} After reviewing the history of the dispute between IAM and Eastern, the district court noted that Eastern had refused the NMB’s voluntary request to meet with IAM in a further arbitration proceeding.\textsuperscript{144} The bankruptcy court found this refusal reasonable given Easter’s dire financial problems. The district court, however, noted that “presumably every party’s decision not to arbitrate is predicated on its perception of its economic benefit,”\textsuperscript{145} and since Eastern had not exhausted every possible means of settling its dispute with IAM,\textsuperscript{146} it had forfeited its right to a federal court injunction against the union.\textsuperscript{147} Hence, the bankruptcy court’s order was vacated.

As noted, bitter conflicts characterized the labor-management dispute throughout Eastern’s bankruptcy proceedings.\textsuperscript{148} In such an atmosphere, the chances for a successful bankruptcy were slim indeed, and in 1989, the airline ceased operations.\textsuperscript{149} Without the active participation of labor in the reorganization process, such a result was probably inevitable. The next case study, however, provides an illuminating contrast and an alternative to bankruptcy.

C. Northwest Airlines

Once the nation’s fourth largest carrier,\textsuperscript{150} Northwest’s descent into financial chaos came about largely as the result of a leveraged buyout, engineered in 1989 by Al Checchi and Gary Wilson, former executive officers of the Marriot Corporation.\textsuperscript{151} The buyout left Northwest with an obligation to make repayments on $3.7 billion of principal—by 1999—to a financial group led by the Bankers Trust New York Corporation.\textsuperscript{152}

Following the buyout, Northwest—dubbed “Northworst” because of its poor performance—lost a total of $618 million in 1990 and 1991; in-

\textsuperscript{143} Id. at 434. “The NLGA [Norris-LaGuardia Act] provides ‘No court of the United States . . . shall have jurisdiction to issue any injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter.’” \textit{Id.}
\textsuperscript{144} Id. at 430.
\textsuperscript{145} Id. at 436.
\textsuperscript{146} Namely, in refusing the NMB’s voluntary arbitration request.
\textsuperscript{147} \textit{In re Ionosphere Clubs}, 121 B.R. at 435.
\textsuperscript{149} Wicker, \textit{supra} note 4.
\textsuperscript{151} Adam Bryant, \textit{At Northwest, Chairmen Defend a Turbulent Ride}, \textit{N.Y. TIMES}, Aug. 19, 1993, at D1.
Industry analysts also predicted a $300 million loss for the company in 1992. A variety of culprits were to blame for the airline's poor performance, chiefly, the overall airline industry slump, and the "near-insane summer fare war" of 1992. In spite of these obstacles, the airline seemed determined to right itself and by 1992, it had finished first in on-time performance ratings, was steadily improving baggage loss rates, and had boosted its advertising budget by 50%.

Regardless of these initiatives, however, the prospects of bankruptcy seemed imminent. Northwest's management strenuously denied these rumors, as even the vaguest suggestions of a financial crisis could cripple their efforts to overhaul the airline. In addition to eroding consumer confidence, a bankruptcy filing would place a number of constraints on the management of the company. Northwest was not adverse, however, to using the threat of a bankruptcy filing to compel their unions to the bargaining table.

Because of their massive debt burden, Northwest was vulnerable to a downturn in the economy. Unlike its capital-rich rivals, Northwest could ill afford a slump in passenger travel; a certain portion of its earnings were marked for debt repayment and failure to make those payments could lead to the commencement of involuntary bankruptcy proceedings. Following negotiations, with its various unions, however, labor agreed to important concessions. Northwest was then able to refinance its debt and reached an agreement with a consortium of banks and lending institutions to defer most of its debt-related payments of $1.5 billion until 1997. This postponement was directly linked to the agreement reached by labor and management.

Instead of taking the traditionally hostile management approach to

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155. Id.
156. Id.
157. Id.
158. See generally 11 U.S.C. § 363(c)(3) (1994) (permitting a debtor to complete only transactions which are "in the ordinary course of business, without notice or a hearing"); and 11 U.S.C. § 364 (1994) (requiring a debtor to obtain bankruptcy court approval for the acquisition of most types of credit).
159. See supra note 37 and accompanying text.
161. See infra notes 164-173 and accompanying text.
163. Id.
unions.\textsuperscript{164} Northwest’s management sought a “work-out” with their biggest cash outlay—labor—and in the process, hoped to avoid the significant costs and risks of bankruptcy. In negotiations with their six labor unions,\textsuperscript{165} Northwest attempted to wrest some $886 million worth of wage cuts, vacation curtailments, and work rule changes, spread over three years, that promised to increase efficiency. The deal with the airline pilots’ union called for the union to “invest” $365 million into the company; $304 million would come from direct wage reductions, and $61 million was to be saved with work rule changes.\textsuperscript{166}

In consideration for these cuts, the agreement provided that union employees would receive a 30% equity share in the company, with the possibility of increasing that share to 37.5%.\textsuperscript{167} Northwest provided for this equity interest by issuing to its employees a new class of preferred stock, which could be redeemed for the corporation’s common stock or, in 10 years, for an amount equal to the cost cuts.\textsuperscript{168} Perhaps most importantly, the airline granted labor three seats\textsuperscript{169} on the Board of Directors, and agreed that a quorum of five of the fifteen board seats could effectively halt major corporate decisions.\textsuperscript{170} Assuming that labor could make the requisite alliances, the unions, in effect, had been granted a broad veto power over the operation of the company.\textsuperscript{171} The agreement included a provision that called for the employees’ equity share in the company to rise to 50.5% if the airline did not raise an additional $500 million in new equity.\textsuperscript{172} Another provision prevented top management from

\textsuperscript{164} See generally Robert A. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining 1-6 (1976).

\textsuperscript{165} Jill Hodges, NWA’s Negotiations with Unions Seen as Making Labor History, STAR TRIB., Feb. 3, 1993, at D1. The six unions had bargained collectively as the Labor Leadership Forum. Id.

\textsuperscript{166} Northwest Airlines and Pilots Agree on $365 Million “Investment” Package, BNA PENSIONS & BENEFITS DAILY, July 9, 1993.

\textsuperscript{167} Machinists at Northwest Question Whether Pilots’ Agreement Improves on Rejected Pact, BNA DAILY LAB. REP., July 9, 1993.

\textsuperscript{168} Northwest Airlines Sets Restructuring Pacts, REUTER BUS. REP., August 6, 1993.

\textsuperscript{169} Jill Hodges & David Phelps, NWA Finalizes Concessions Deals with Last Two Unions, STAR TRIB., July 31, 1993. The Teamsters—representing flight attendants, the Air Craft Technical Support Association, and the International Association of Machinists—each were given the power to name a director to the Board. Id.

\textsuperscript{170} Kevin Kelley & Aaron Bernstein, Labor Deals That Offer a Break from “Us vs. Them”, BUS. Wk., Aug. 2, 1993, at 30. Such major corporate decisions would include asset sales, financing plans, or bankruptcy filings. Id.

\textsuperscript{171} Id. Labor assumed they could make the necessary alliances.

\textsuperscript{172} Machinists at Northwest Question Whether Pilots Agreement Improves Rejected Pact, BNA DAILY LAB. REP., July 8, 1993. See also Neal St. Anthony & John J. Oslund, Northwest Poised to Peddle Stock; Airline’s Pitch to Potential Investors Is Timed Just Right, STAR TRIB., Jan. 31, 1994, at D1 (the proposed sale of some $400 million in common stock of Northwest in early 1994 would satisfy this provision; but this public offering would also dilute employee ownership to around 22% of the company).
pulling their equity in the corporation until 1997. This insured that management would not profit from the sacrifices made by the unions and commit them to the long term survival and success of the airline.\textsuperscript{173}

Through these negotiations with unions, lenders and suppliers, Northwest effected a bankruptcy\textsuperscript{174} without actually utilizing the bankruptcy process. By taking a different approach, Northwest saved itself the significant costs associated with a bankruptcy filing.\textsuperscript{175} However, averting bankruptcy came with a price-tag as well, in the form of fees charged by suppliers and lenders for debt deferral,\textsuperscript{176} and accumulated interest on Northwest’s debt.\textsuperscript{177} Accordingly, some bankruptcy attorneys argued that Chapter 11 afforded Northwest greater protections than did its refinancing package.\textsuperscript{178} That view, however, fails to fully appreciate the negative ramifications of a bankruptcy filing on public confidence in the debtor company, and by extension, the possibility of financial recovery. In addition, this position takes an unnecessarily myopic view of airline bankruptcies; the industry as a whole benefited from Northwest’s prudence. It has long been argued that bankrupt airlines “damage other carriers by initiating unexpected, steep fare cuts to raise quick cash and stimulate traffic.”\textsuperscript{179} And as Northwest could surely attest,\textsuperscript{180} the fragile airline industry most certainly did not need another price war.

VI. Analysis

In the Northwest “bankruptcy outside of bankruptcy” proceedings, labor and management sat down at the bargaining table only after both sides realized that the future of their airline was at stake. Further, both sides appreciated that the other had a significant interest in ensuring the profitability of that future. Not every financially-troubled airline, however, can structure its negotiations so as to avoid the bankruptcy process; traditionally hostile labor relations in the airline industry are often the blame for these failures.\textsuperscript{181}

\begin{itemize}
  \item \textsuperscript{173} BNA Daily Lab. Rep., \textit{supra} note 172.
  \item \textsuperscript{174} In the sense of a collective reorganization designed to maximize the firm’s chances of survival for the benefit of creditors, equity-holders, and workers.
  \item \textsuperscript{175} Such costs include: a tarnished image, associated lost revenues, and restraints on management discretion.
  \item \textsuperscript{176} Dale Kurschner, \textit{Key Pieces of Debt Deferral Plan Eludes NWA}, MINNEAPOLIS-ST. PAUL CITY BUSINESS, Vol. 11, No. 5, at 1 (“Pratt & Whitney [a supplier] wants Northwest to pay more than $100 million in fees in return for deferral of payments on [the debt], . . . Upwards of $200 million in fees and additional stock dividends tied to restructuring or debt deferral could be paid to financing sources under Northwest’s plans to defer some of its debt payments to 1997.”).
  \item \textsuperscript{177} See 11 U.S.C. § 502(b)(2) (1994) (making unmatured interest unavailable to creditors).
  \item \textsuperscript{178} MINNEAPOLIS-ST. PAUL CITY BUSINESS, \textit{supra} note 176.
  \item \textsuperscript{179} Northwest Airlines Sees Restructuring Facts, REUTER BUS. REP., Aug. 6, 1993.
  \item \textsuperscript{180} See supra note 154 and accompanying text.
  \item \textsuperscript{181} See supra note 164 and accompanying text.
\end{itemize}
When a pre-bankruptcy workout cannot be effectuated, bankruptcy courts must attempt to equitably resolve the issues that separate management and labor; both of whom, after all, desire the same ultimate objective—the resurrection of a healthy airline. As evidenced in the litigation surrounding the Continental and Eastern Air Line bankruptcies, the legal disputes were primarily focused on the competing policies behind the federal labor and bankruptcy laws. While labor laws seek to preserve employees' rights to bargain collectively, bankruptcy law emphasizes getting the troubled company on its feet quickly.

While there appears to be a basic conflict between the objectives of the Bankruptcy code and the RLA, Congress has provided no clear mandate as to which objective should prevail. It is the opinion of this author that bankruptcy courts place too much emphasis on the bankruptcy priorities of the dispute before them, and do not give sufficient consideration to the federal labor interests involved. If one statute is considered inferior to the other, this tends to weaken the credibility of that statute by the people whom it supposedly protects. In other words, as the Code continues to trump the RLA, labor's belief in the bankruptcy process—as well as their confidence in their future with the debtor firm—will be irrevocably shaken.

This would be a crucial mistake. As with other labor intensive industries, the survival of an airline embroiled in bankruptcy proceedings depends on the active involvement of labor. The results of the Continental and Eastern bankruptcies as compared to the Northwest "bankruptcy outside of bankruptcy" lend credence to this proposition. As bankruptcy courts show a greater regard for the substantive and procedural aspects of the RLA, the greater involvement of unions in the reorganization effort will result in more successful airline reorganizations.

VII. Conclusion

This article has repeatedly stressed that the enmity between labor and management interests poses a serious threat to the continued vitality of the airline industry, as measured by the number of airline carriers servicing the United States. As airlines encounter turbulent financial conditions, labor disputes have the potential to make the economic ride even bumpier. For airlines in bankruptcy proceedings, they can prove disastrous.

To avert this problem, all interested parties—bankruptcy courts, as well as management and labor lawyers—need to abandon their adver-

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182. See supra note 4.
183. See supra note 40.
184. See supra notes 35-42.
serial approach to labor relations; an attitude which many commentators argue sabotages America's industrial efficiency. The recent negotiations at Northwest represent a good model for future management-labor negotiations. Realistically, however, not every labor dispute can be resolved in such an amicable fashion. Thus, bankruptcy courts must undertake efforts designed to implement these forward-looking labor-management negotiations.

Obviously, this article does not mean to suggest that mere judicial decrees can wipe clean the often-times bitter and rancorous slate of labor-management history. Instead, bankruptcy courts should strive to foster the recognition—on both sides of the negotiating table—that one side's financial interests are inextricably tied up with the other's. While this rather nebulous goal could be reached in a variety of methods, bankruptcy courts must now truly balance the competing federal policies which underpin the labor and bankruptcy laws. Although such a position seems counter-intuitive to the financial sense of airline management, this article observes that such management “victories” are hardly worth the distrust they engender among a debtor airline’s labor groups.

185. See supra note 164 and accompanying text.
186. Perhaps “consciousness-raising” sessions might prove effective.
Attempts at Ensuring Peace and Security in International Aviation

R.I.R. Abeyratne*

TABLE OF CONTENTS

I. Introduction .......................................................... 28
II. The Geneva Convention on the High Seas (1958) ............ 29
III. The Tokyo Convention (1963) ...................................... 32
     A. Powers Given in Order to Combat Hijackings ............... 37
     B. Jurisdiction to Punish Terrorists ............................ 38
     C. Powers and Duties of States ................................. 40
     D. Extradition ................................................... 41

* R.I.R. Abeyratne is an aviation consultant working as Air Transport Officer at 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 specialized in international law and air law. Currently, he is a doctoral research scholar at the Institute of Air and Space Law, McGill University, Montreal. After his graduation from Monash in 1982, he joined Air Lanka and worked as the airline's Chief Coordinator and Head of International Relations and Insurance, holding the positions concurrently, until he joined ICAO in 1990.

Mr. Abeyratne has published 3 books on international air law and over 80 articles on international law and aerospace law in leading law journals. He has also published numerous articles on international trade law in contemporary journals. He is a Fellow of the Chartered Institute of Transport and 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 and the Space Law Committee.

The contents of this paper should not necessarily be attributed to the author's position in the ICAO Secretariat or any other professional or academic body.
I. INTRODUCTION

Transportation systems have historically attracted terrorist attacks. As such, the international community has come to terms with the vulnerability of modern aviation, taking sustained steps towards the protection of aviation.

The earliest form of terrorism against international transportation was piracy. Pirates are considered by international law as common enemies of all mankind. The international world has an interest in the punishment of offenders and is justified in adopting international measures for the application of universal rules regarding the control of terrorism. The common understanding between States has been that pirates should be lawfully captured on the high seas by an armed vessel of any particular State, and brought within its territorial jurisdiction for trial and punishment. Lauterpacht recognized that:

Before international law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a hostis humani generis. According to the Law of Nations, the act of piracy makes the pirate lose the protection of his home State, and thereby his national character. Piracy is a so-called international crime, the pirate is considered enemy of all States and can be brought to justice anywhere.¹

It is worthy to note that under the rules of customary international law the international community had no difficulty in dealing with acts of terrorism which formed the offense of sea piracy. Due to the seriousness of the offense and the serious terrorist acts involved, the offense was met with the most severe punishment available - death. The universal condemnation of the offense is reflected by the statement that “in the former times it was said to be a customary rule of international law that after the seizure, pirates could at once be hanged or drowned by the captor.”

The laws dealing with the offense of piracy went through a sustained process of evolution. In 1956, while considering legal matters pertaining to the law of the sea, the International Law Association addressed the offense of piracy and recommended that the subject of piracy at sea be incorporated in the Draft Convention of the Law of the Sea. This was followed by the United Nations General Assembly Resolution (Resolution No. 1105 (XI) in 1957 which called for the convening of a diplomatic conference to further evaluate the Law of the Sea). Accordingly, the Convention of the High Seas was adopted in 1958 and came into force in September 1962.

II. The Geneva Convention on the High Seas (1958)

The Geneva Convention of the High Seas of 1958 was the first attempt at an international accord to harmonize the application of rules to both piracy at sea and in air. The Convention adopted authoritative legal statements on civil aviation security, as it touched on piracy over the high seas. Article 5 of the Convention inclusively defines piracy as follows:

Piracy consists of any of the following acts:
1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passenger of a private ship or a private aircraft, and directed:
   a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   b) against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state;
2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
3) Any act of inciting or of internationally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

As provided for by Article 14 of the Convention, there is incumbent on all States a general duty to “co-operate” to the fullest extent in the

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repression of piracy as defined by the Convention. One commentator has observed:

The International Law Commission in its 1956 report, however, deemed it desirable to enjoin co-operation in the repression of piracy, to define the act to include piracy by aircraft, as set forth in the repressive measures that may justifiably be taken. The United Nations conference on the Law of the Sea in Geneva in 1958 accordingly incorporated these adjustments of the law to modern times in its convention on the High Seas.4

Article 14 seemingly makes it a duty incumbent upon every State to take necessary measures to combat piracy by either prosecuting the pirate or extraditing him to the State which might be in a better position to undertake such prosecution. The Convention, in Article 19, gives all States universal jurisdiction under which the person charged with the offense of aerial or sea piracy may be tried and punished by any State into whose jurisdiction he may come. This measure is a proactive one in that it eliminates any boundaries that a State may have which would preclude the extradition or trial of an offender in that State. Universal jurisdiction was also conferred upon the States by the Convention to solve the somewhat complex problem of jurisdiction, which often arose under municipal law where the crime was committed, outside the territorial jurisdiction of the particular State seeking to prosecute an offender. The underlying salutary effects of universal jurisdiction in cases of piracy and hijacking, which were emphasized by the Convention, has been described by one commentator:

The absence of universal jurisdiction in relation to a given offense, means that, if a particular State has no jurisdiction either on the basis of territoriality or protection, or on the personality principle, whether passive or active, it will not be authorized to put the offender on trial, even if he is to be found within the territorial boundaries of the State.5

The inclusion of the offense of piracy in the Convention brings to bear the glaring fact that the crime is international in nature, giving the international community the right to take appropriate measures to combat or at least control the occurrence of the offense. The Convention by its very nature and adoption has demonstrably conveyed the message that piracy is a heinous crime which requires severe punishment. The Convention also calls for solidarity and collectivity on the part of nations in combating the offense in the interests of all nations concerned.6

Notwithstanding the above, it is worthy of note that the phenomenon

6. Id. at 212.
of hijacking as it exists today need not necessarily fall within the definition of piracy as referred in Article 15 of the Convention. Although there exists a marked similarity between the offense of unlawful seizure of an aircraft and the act of piracy directed against ships on the high seas, in that in both cases the mode of transportation is threatened and abused and the safety of the passengers, crew members and the craft itself is endangered by the unlawful use of force or threat, there may still be a subtle difference between the offense as applied to sea transport and to air transport. The legal differences between the acts of piracy against ships and those against aircraft that may must be determined in order to inquire whether aircraft hijacking amounts to piracy as defined by the Convention.

The essential features of the definition of piracy incorporated in the Geneva Convention are as follows: (1) the pirate must be motivated by "private" as opposed to "public" ends; (2) the act of piracy involves an action affecting a ship, an aircraft; (3) the acts of violence, detention, and depredation take place outside the jurisdiction of any State, meaning both territorial jurisdiction and airspace above the State; (4) acts committed on board a ship or aircraft, by the crew or passengers of such ship or aircraft and directed against the ship or aircraft itself, or against persons or property, do not constitute the offense of piracy.

Upon close examination, it appears that the definition of piracy does not apply to the phenomenon of aerial piracy or hijacking. It is a fact that most hijackings are not carried out in pursuance of private ends. INTERPOL reported in 1977 that the percentage of cases in which political motives had impelled the offender was 64.4%.7 Hijacking of aircraft for political motives would thus not relate to Article 15(1) of the Convention, since acts solely inspired by political motives are excluded from the notion of piracy jure gentium. Sami Shubber has observed of the 1958 Convention that its inapplicability to the notion of aerial piracy may lie in the fact that private ends do not necessarily mean that they can affect private groups acting either in pursuance of their political aims or gain. The fact that it is not always possible to distinguish between private ends and public ends in defiance of the political regime of the flag State may be said to be covered by Article 15(1) of the Convention; the reason given by Shubber was that "private ends" do not necessarily equal private gain.8

Under the definition of piracy, the act of illegal violence or detention must be directed on the high seas against another ship or aircraft. It is

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7. INTERPOL had submitted to the Legal Committee of ICAO in 1977 that out of recorded hijackings up to that year, the percentage of instances of hijackings which were motivated politically was 6.2 at a ratio of 64.4. See ICAO Doc 8877-LC/161, at 132.
8. SAMI SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 226 (1973).
obvious therefore that this interpretation does not apply to hijacking since the offense of hijacking is committed by the offender who travels in the aircraft. It is hard to imagine that an offender could enter an aircraft from outside while the aircraft is in flight. The Convention also excludes acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, from the scope of piracy, which will also make the definition inconsistent with the exigencies related to the offense of aerial piracy.

Although piracy, according to the Convention, must be committed on the “high seas”, instances of hijacking may occur anywhere. Furthermore, piracy under Article 15 of the Convention must involve acts of violence, detention or depredation. Most hijackings, however, have been carried out simply by the use of threats, and may even be carried out through a variety of means other than those involving violence or force.

It is therefore reasonable to conclude that hijacking does not necessarily and absolutely fall within the definition of “aircraft piracy” as defined by the Geneva Convention. The hopes of the international community to control the crime of hijacking through the application of the Geneva Convention on the High Seas may therefore have been frustrated by the exclusivity of the nature of the two offenses of aerial piracy and piracy related to the high seas. The Convention therefore remains to be of mere academic interest for those addressing the issue of aerial piracy.

III. The Tokyo Convention (1963)

Shocked by the rising trend of aircraft hijacking in the early 1960s and the failure of the Geneva Convention on the High Seas to offer rules applicable to the offense of hijacking, the international community considered adopting the Tokyo Convention of 1963, which was adopted under the aegis of the International Civil Aviation Organization (ICAO). This Convention attempted to provide certain rules that would address the offense of hijacking.

Prior to 1960, most of the collective action to combat international terrorism was undertaken by the United Nations or its predecessor, the League of Nations. Although the League of Nations made cohesive efforts to create an international criminal court to deal with, among other things, acts of international terrorism by drafting a Convention to Com-

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bat International Terrorism in 1937, this Convention was only signed by thirteen States and ratified by one State effectively precluding the Convention from coming in force.

At the end of 1950, a new crusader against international terrorism, which particularly applied to aerial incidents of terrorism, appeared in the international scene to adopt necessary international measures to combat terrorism against air transport. This new entity was the ICAO. In retrospect, it is noted that although the United Nations was unsuccessful in adopting sufficiently compelling measures of international co-operation to deal with aircraft hijacking, the ICAO has made significant strides in the area of adoption of multilateral conventions. The primary aim of these Conventions has been to adopt measures, through international agreement, to control and arrest terrorist activities which are aimed against international air transport. It has been said of ICAO on its regulatory attempts in this field:

[These menacing incidents during the last few years have resulted in intense activities aimed at finding possible solutions on the basis of universally accepted international treaty and/or other technical remedies. The beginning of concerted international effort since the formation of ICAO in relation to the so-called problem of hijacking can be traced back to the formulation of certain provisions in the “Convention on Offenses and Certain Other Acts Committed on Board Aircraft Commonly Known as the Tokyo Convention 1963.”]

The Tokyo Convention was the first substantial effort at dealing with terrorism in the air. It was followed by the Hague and the Montreal Conventions.

In 1950, the Legal Committee of ICAO, upon a proposal from the Mexican Representative on the ICAO Council for the study of the legal status of airports, referred the subject to the ad hoc Sub-Committee established by the Legal Committee. After a survey had been made of all the problems relating to the legal status of aircraft, it was decided by the Committee that the best course would be to confine the work to a detailed examination of some particularly important matters, namely crimes and offenses committed on board aircraft, jurisdiction relating to such crimes and the resolution of jurisdictional conflicts. The Sub-Committee

11. This Convention was opened for signature at Geneva on 16 November 1937. See 7 Manley O. Hudson, International Legislation, 862 (1931).
thought that resolving these problems was of vital importance for the following reasons:

(1) One characteristic of aviation is that aircraft fly over the high seas or over seas having no territorial sovereign. While national laws of some States confer jurisdiction on their courts to try offenses committed on aircraft during such flights, this was not the case in others, and there was no internationally agreed system which would co-ordinate the exercise of national jurisdiction in such cases. Further, with (the) high speed of modern aircraft, the great altitudes at which they fly, meteorological conditions, and, the fact that several States may be overflown by aircraft within a small space of time, there could be occasions when it would be impossible to establish the territory in which the aircraft was at the time a crime was committed on board. There was, therefore, the possibility that in such a case, and in the absence of an internationally recognized system with regard to exercise of national jurisdiction, the offender may go unpunished;

(2) National jurisdictions with respect to criminal acts are based on criteria which are not uniform; for example, on the nationality of the offender, the nationality of the victim, on the locality where the offense was committed, or on the nationality of the aircraft on which the crime occurred. Thus, several States may claim jurisdiction over the same offense committed on board aircraft, in certain cases. Such conflict of jurisdictions could be avoided only by international agreement;[and]

(3) The possibility that the same offense may be triable in different States might result in the offender being punished more than once for the same offense. This undesirable possibility could be avoided by a suitable provision in the Convention.15

After sustained deliberation and contradiction, the Sub-Committee on the Legal Status of Aircraft produced a draft convention which was submitted to the Legal Committee on 9 September 1958.16 The Legal Committee in turn considered the draft convention at its 12th Session held in Munich in 195917, undertaking a substantial revision of the draft. The revised text was subsequently submitted to the ICAO Council, which in turn submitted the draft to Member States and various international organizations for their comments. A new Sub-Committee was formed to examine the Convention of State organization in 1961, in order to examine and prepare a report. This report was studied by the Legal Committee in its 14th Session held in Rome in 1962. A final text of a Convention was drawn up at this meeting and communicated to Member States with a view towards convening a diplomatic conference in Tokyo with the long-term prospect of adopting a Convention on aerial rights. This Convention was signed in Tokyo on 14 September 1963 by the repre-

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15. Id. at 316-17, citing the Report of the Sub-Committee, LC/SC Legal Status, WD No. 23, October 10, 1956.
16. Id. at 320.
17. Id. at 321.
sentatives of 49 ICAO Member States, and entered into force after six years, on 4 December 1969. This slow process of ratification of the Convention (5 years) was by no means due to the ineptitude of the Convention, as has been claimed, but was due to the fact that the Convention was drafted prior to the series of hijacking in the late sixties and was not implemented with due dispatch by most States. Another reason for the delayed process was the complicated legal and political issues facing many countries at the time of the adoption of the Convention. A significant feature of the Tokyo Convention was that although at first States were slow in acceding to or ratifying the Convention, 80 States ratified the convention within one year (1969-70), presumably in response to the spate of hijackings that occurred during that period.

The main purpose of the Tokyo Convention was to secure the collaboration of States in restraining terrorist activity directed at air transport. It has therefore been said that "[t]he first action taken by the international community to combat hijacking was the Tokyo Convention 1963. This Convention was originally designed to solve the problem of the commission of crimes on board aircraft while in flight where for any number of reasons the criminal might escape punishment."

The objectives of the Tokyo convention may be summarized into four principal areas:

1) The Convention makes it clear that the State of registration of the aircraft has the authority to apply its laws. From the standpoint of States such as the United States, this is probably the most important aspect of the Convention, since it accords international recognition to the exercise of extraterritorial jurisdiction under the circumstances contemplated in the Convention;

2) The Convention provides the aircraft commander with the necessary authority to deal with persons who have committed, or are about to commit, a crime or an act jeopardizing safety on board his aircraft through use of reasonable force when required, and without fear of subsequent retaliation through civil suit or otherwise;

3) The Convention delineates the duties and responsibilities of the contracting State in which an aircraft lands after the commission of a crime on board, including its authority over, and responsibilities to, any offenders that may be either disembarked within territory of that State or delivered to its authorities;


19. Id. at 463.


4) The crime of 'hijacking' has been addressed in some degree of depth.\textsuperscript{22}

The Convention applies to any act that is an offense under the penal laws of a contracting State, as well as to acts which, whether or not they are offenses, may jeopardize safety, good order and discipline on board an aircraft. The Convention thus does not define the offense at the international level nor does it explicitly explain the nature of the offense. Alona E. Evans has observed that the offense is not made a crime under international law; its definition is to be determined by the municipal laws of the contracting State.\textsuperscript{23} Admittedly, there are some limitations placed upon the scope of the application of the Convention. Firstly, the Convention excluded from its operations aircraft used in military, customs or police services. It should be noted that reference is not made in the Convention to "State aircraft" as mentioned in Article 3 of the Chicago Convention, which does not apply to such aircraft. This difference in terminology is explained by the fact that State aircraft provide air transport that is usually provided by civil aircraft and civil transport in some cases.

Secondly, offenses against penal laws of a political nature or those based on racial or religious discrimination are not covered by the Convention, except to the extent that the Convention addressed such acts which jeopardized safety or good order and discipline on board.

Penal laws forbidding various forms of racial and religious discrimination take many and varied forms, and the views of the Courts of the Contracting States may differ on the issue of whether one or the other is within or without the Convention. Even more divergence of view can be expected in decisions which involve the question of whether a particular offense is of a "political nature."\textsuperscript{24}

Although the Convention does not define the offense of hijacking, Article 11 specifies the circumstances that would constitute the offense as "[w]hen a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight or such an act is bound to be committed."

When the offense of hijacking is committed in the above manner, the State in which the aircraft lands has obligations which it must satisfy according to the terms of the Convention. The first obligation is that the landing State "shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve control of the aircraft and shall return the aircraft and its cargo to the person lawfully entitled to possession."

\textsuperscript{22} Tokyo Convention, supra note 14, at 328-29.
\textsuperscript{24} Tokyo Convention, supra note 14, at 333.
Robert P. Boyle emphasized the above contention when he stated:

The obligation assumed by a State under the Tokyo Convention with respect to the disposition of the hijacker...is to take all appropriate measures to restore control of the aircraft to its lawful commander and to permit the passengers and crew to continue their journey as soon as practicable and to return the aircraft and cargo to persons lawfully entitled.25

A. Powers Given in Order to Combat Hijackings

The Convention gives wide powers to the aircraft commander to control the offense of hijacking. Article 6 enables the aircraft commander to use reasonable measures, including restraint, to protect the safety of the aircraft, and maintain good order and discipline when he has reasonable grounds to believe that a person has committed an offense contemplated in Article I(1), viz.:

a) offenses against penal laws;
b) acts which, whether or not they are offenses, may jeopardize the safety of the aircraft or of persons or property therein or which jeopardizes good order and discipline on board.

An interesting observation may be made with respect to offenses against penal laws. The aircraft commander will have, according to that paragraph, the power to take measures and restrain a passenger even if his act did not amount to jeopardizing the safety of the aircraft or the person or the property therein. This may lead to absurdity. If, for example, two passengers conspire while on board the aircraft to commit some illegal act upon landing, or upon termination of the flight, according to sub-paragraph (a) above, the commander can restrain them on the suspicion that the act they are conspiring to commit is against penal law of a particular jurisdiction. This seems to be illogical when one recalls that the principal objective of the Convention is to assure the maintenance of safety and good order “on board” the aircraft.

The aircraft commander in discharging his duties, according to the Convention, can require or authorize the assistance of the crew and request the assistance of passengers. Even passengers and crew members are authorized under Article 6(2) to take reasonable preventive measures without any authorization from the aircraft commander whenever they have reasonable grounds to believe that such action is immediately necessary for safety reasons. Although this clause has attempted to give powers to people other than the aircraft commander in order to assist in thwarting acts of unlawful interference against civil aviation, some delegates at the Tokyo Conference attacked this approach on the ground that

25. Tokyo Convention, supra note 14, at 331.
passengers normally would not be qualified to determine whether a particular act jeopardized the safety of the aircraft or persons and property therein. For this reason, it was deemed unwise to give this authority to passengers.  

However, this argument was rejected "on the ground that this provision contemplated an emergency type of situation on which the danger of the aircraft or persons and property on board was clearly present, and in fact no special technical knowledge would be required to recognize the peril."  

The powers entrusted to the commander in order to suppress any unlawful act which threatens the safety of the aircraft goes as far as requiring the disembarking of any person who commits any of the acts referred to in Article 1(1) in the territory of any State in which he lands and delivering him to its competent authorities. The State is under an obligation to allow the disembarkation and to take delivery of the person so apprehended by the aircraft commander, but such custody may only be continued for such time as is reasonably necessary to enable the criminal extradition proceedings (if any) to be instituted. The State of landing should make a preliminary inquiry into the facts and notify the State of registration of the aircraft.  

In any event, the commander as well as the crew members and passengers are given immunity from suits by the alleged offender against whom they acted. Article 10 expressly provides that "[n]either the aircraft commander, any member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight is performed shall be held responsible in any proceedings on account of the treatment undergone by the person against whom the actions were taken." This protection was given to the aircraft commander and other persons in order to encourage them to fight the wrongful acts contemplated by the Convention.

B. Jurisdiction to Punish Terrorists

The major problem that States often face in the process of combating terrorism is the issue of jurisdiction. This is most evident in cases of hijacking, where the crime often takes place outside the jurisdiction of the receiving State, although in most, if not all of the cases, it could be argued that the offense is of a continuing nature. Under international law, State jurisdiction to prosecute is founded upon two traditional concepts. First, there must exist a substantial link between the person or the act and the

26. Id. at 340.
27. Id.
State claiming sovereign jurisdiction; and second, this theoretical basis must be actualized through a sovereign act, i.e. legislation for implementation of this theoretical act. In an act of international nature, such as hijacking, two or more States involved may possess jurisdiction to prosecute. As a result, jurisdictional conflicts are eminent, since two or more of those States can claim the right to prosecute and press claims against each other through diplomatic channels. In order to eliminate these conflicts, the jurisdictional rules incorporated in the Tokyo Convention were preferred. The Tokyo Convention was adopted to grant powers to States to establish jurisdiction which would be uncomplicated by diplomatic claims over criminal acts committed on board aircraft.

Jurisdiction over offenses and acts committed on board appertain primarily to the State of registration of the aircraft (Article 3(1)). The adoption of this rule guarantees to the flights over the High Seas the assured presence of the criminal law. It provides a sound legal basis for extra-territorial exercise of criminal jurisdiction extending even to cases of flight within foreign airspace. A.I. Mendelssohn has observed:

As a matter of international law, therefore, any crime abroad an international carrier, no matter where, by or against whom it is committed, can be punished by at least one sovereign - the State of registration of the carrier. All doubts are removed on the question whether the flag will henceforth follow the aircraft as it traditionally has followed a vessel.30

Article 3(2) of the Convention provides that “[e]ach Contracting State shall take measures as may be necessary to establish its jurisdiction as State of registration over offenses committed on board aircraft registered in such State.” It is clear that the fundamental objective of this sub-paragraph was to make the act of combating hijacking an international issue in which all States must take part when the need arises.

Article 3(3) went on to provide more grounds of jurisdiction in order to eliminate the gravity of the obstacles that hindered the prosecution of hijackers. It provides that the Convention does not exclude criminal jurisdiction exercised in accordance with the national law. Mendelssohn has commented on this sub-paragraph:

Its objectives are (a) to retain all existing jurisdiction presently asserted by the various States; (b) to enable them to enact further legislation providing for even more extensive jurisdiction; and most important, (c) to require the State of registration to extend at least some of its criminal laws to its aircraft and to provide an internationally accepted basis for the application and enforcement of these laws.31

31. Id. at 518.
The Convention also authorizes a contracting State which is not a State of registration to interfere with an aircraft in flight in which the offense (a) has an effect on the territory of State; (b) has been committed by or against a national or permanent resident of State; (c) is against the security of the State; (d) consists of a breach of any rules or regulations relating to the flight or maneuver of aircraft in force in such State; or (e) that the exercise of such jurisdiction is necessary in order to ensure the observance of any obligation of such State under a multilateral international agreement.

As regards the geographic scope of the Convention for jurisdictional purposes, Article 1 provides that the Convention applies with respect to acts or offenses committed while the aircraft is "in flight" or on the surface of the High Seas or on another area which does not have a territorial sovereign. The term "in flight" is defined in Article 1(3) as "from the moment when the power is applied for the purpose of take-off until the moment when the landing run ends." Hence, hijacking attempts initiated during the time the aircraft is parked or taxiing are not considered to be within the scope of the Convention. As a consequence, the provisions of Tokyo convention fell short of curbing the crime of sabotage of air transport facilities. This shortcoming of the Tokyo Convention, _inter alia_, led to the adoption of the Montreal Convention (1971).

C. POWERS AND DUTIES OF STATES

It is a basic obligation of a State to co-operate with other States in order to ensure the safety of international civil aviation. Article 11 of the Tokyo Convention, which is referred to above, provides that contracting states have certain obligations whenever a person on board an aircraft has unlawfully committed by force or threat an act of interference, seizure or other wrongful exercise of control. The question of whether a particular act is lawful or unlawful is to be judged by the law of the State of registration of the aircraft or the law of the State in whose airspace the aircraft may be in flight. Paragraph 1 of Article 11 imposes on all the contracting states the obligation to take appropriate measures to restore or to preserve the aircraft commanders control of the aircraft. The words "appropriate measures" are intended to mean only those things which are feasible for a contracting State to do and also only those which it is lawful for a contracting State to do. Thus, a contracting State, which is situated thousands of miles away from the scene of the hijacking is not under any obligation to take any action, because it would not be feasible for it do so.

Article 12 imposes another obligation on each contracting State. This Article is a corollary to Articles 6 and 8 of the Convention. The latter two Articles authorize the aircraft commander to disembark any person who has committed, or is about to commit, an act of the type
described in Article I of the Convention. Article 12 obliges a contracting State to allow the commander of an aircraft registered in another contracting State to disembark the alleged offender. Article 12 provides “[a]ny Contracting State shall allow the commander of an aircraft registered in another contracting state to disembark any person pursuant to Article 8, paragraph 1.” Thus, it is clear that the obligation of a Contracting State to permit disembarkation of a hijacker, at the request of the aircraft commander, is an unqualified obligation.

Article 13 of the Convention deals with the obligation of a contracting State to take delivery of a person from the aircraft commander. This provision should be contrasted with the authority of the aircraft commander to disembark. The obligation of the contracting State under this Article is a corollary to the authority given to the aircraft commander under Articles 6, 7 and 9.

Paragraph 1 of Article 13 states the primary unqualified obligation of each contracting State to “take delivery” of the hijacker. Paragraph 2 addresses the obligation of a contracting State, after having taken delivery, to take custody. It provides that the contracting State is under an obligation to take “custody” only if it is satisfied that the circumstances so warrant such action. Thus, the State is left free to judge for itself whether the act is of such a nature as to warrant such action on its part and whether it would be consistent with its law, since under paragraph 2 any such custody is to be affected only pursuant to the law of the State taking custody. However, such custody may only be continued for that period of time which is reasonably necessary to enable criminal proceedings to be brought by the State taking custody, or for extradition proceedings to be instituted by another interested or affected State. On the other hand, any person taken into custody must be given assistance in communicating immediately with the nearest appropriate representative of the State of which he is a national (Article 13(3)).

D. Extradition

Article 16 of the Convention provides that offenses committed on aircraft registered in a contracting State are to be treated, for the purpose of extradition, as if they had been not only in the place where the offense has occurred, but also in the territory of the State of registration of the aircraft. Without prejudice to this provision it is declared that “nothing in this Convention shall be deemed to create an obligation to grant extradition.” One commentator observes:

The Tokyo Convention does not oblige the Contracting State to punish an alleged offender upon his disembarkation or delivery. Ironically, the landing State must set him free and let him proceed to the destination of his choice as soon as is practicable if it does not wish to extradite or prosecute him. The
Contracting States are obliged to extradite the offenders, if at all, only under provisions of other treaties between them.32

The failure to provide for a process of mandatory extradition if prosecution was not conducted was considered a major set-back of the Tokyo Convention. However, the above loopholes from which the Convention severely suffers are not the only problems:

Looking for the vantage point today, it is obvious that the Tokyo convention left major gaps in the international legal system in attempting to cope with the scope of aircraft hijacking. There were no undertakings by anyone to make aircraft hijacking a crime under its national law, no undertakings to see to it the crime was one punishable by severe penalties and most important, no undertaking to either submit the case for prosecution or to extradite the offender to a State which would wish to prosecute.33

E. Responsibilities of States

As has been mentioned, all States party to the Convention undertake to permit disembarkation of any person when the commander considers that it is necessary to protect the safety of the flight or for the maintenance of good order and discipline on board. States also commit themselves to take delivery of any person the commander reasonably believes has committed a serious offense on board.34 In this case, when they have taken delivery, concerned States must make an immediate inquiry into the facts of the matter and report the findings to both the State of registration and to the State of which the person is a national.35 Where the State considers the circumstances warrant such action, it shall take custodial or other measures, in accordance with its laws, to ensure that the person delivered to it remains available while the inquiry is conducted. Such measures may be continued for a reasonable time to permit criminal or extradition proceedings to be instituted when such proceedings follow from the inquiry.36

Although the Convention is unequivocal in providing that all contracting States should ensure their legal competence in respect of aircraft on their register, thus addressing jurisdictional issues with regard to crimes on bound aircraft, there are a number of lapses in the Convention which leave it open for criticism. First, the Convention does not apply to “aircraft used in military, customs or police services.”37 This is a topical

37. Id. at art. 1(4), 20 U.S.T. at 2943, 704 U.N.T.S. at 222.
issue which requires clarity, because in modern exigencies of airlines, there are instances when civilian aircraft are called upon to carry military personnel or supplies, as much as military aircraft are sometimes deployed to execute civilian flights.

Problems concerning registration, particularly when the Convention insists on registration as a pivotal issue, may also change the circumstances, although commanders could be totally ignorant of the laws of the State in which the aircraft they are flying is registered. The commander may be required to determine whether a certain action on his aircraft does in fact constitute a crime and more particularly, a serious crime, since at most, a commander may have some familiarity with the laws of the State of the operator. The United Kingdom, for example, has elected to incorporate the terms of the Convention into its domestic legislation, thereby widening its scope to cover any aircraft controlled by its own nationals.38

The Convention could also be improved under its terms of chronology for the offenses in that its applicability extends to the period from "the moment when power is applied for the purpose of take-off until the moment when the landing run ends,"39 and in relation to the powers of the commander, who has authority for the purposes of the Convention only from the time at which external doors closed following embarkation to the time when doors open for disembarkation.40

These parameters are far from satisfactory. In relation to the first, courts have been inconsistent in interpreting similar definitions of flights used in insurance policies. It has been contended that power is first applied "for the purpose of take-off" when the aircraft first begins to move under its own power to the take-off position41. In relation to the second, the term "all its external doors" also leaves confusion in that it makes it unclear whether "all its external doors" includes, for example, cargo or baggage hold doors, or doors giving access to such areas as the electronic compartment of the aircraft. It is not difficult to envision circumstances in which these areas could be of significance. The main problem, however, is that the Convention does not provide for the manner in which the

38. Civil Aviation Act, 1982, Section 92 (Eng.).
40. Id. at art. 6(2), 20 U.S.T. at 2945, 704 U.N.T.S. at 226.
41. For a discussion of this issue see R.D. MARGO, AVIATION INSURANCE 154 (2d ed. 1989). The editors of the fourth edition of SHAWCROSS AND BEAUMONT, AIR LAW, consider that there is now no doubt that the "meaning, as suggested by the natural and ordinary meaning of the words used", that is, "the period between starting to accelerate down the runway and turning off it after landing is the correct one" (although on many occasions pilots would consider that their landing run had been completed long before taxiing to the turning off point). See CHRISTOPHER N. SHAWCROSS & KENNETH M. BEAUMONT, AIR LAW ¶ VIII(2) n.3 (Petermartin et al., eds., 4th ed., 1995).
offender should be dealt with after he has been removed from the aircraft. The somewhat poor and inadequate drafting in Articles 14 and 15 seems to suggest that it is only where the person disembarked or delivered cannot or does not wish to continue his journey, that the State of landing can take action. They do not offer a State any guidance as to questions arising from requests for extradition of an offender or extradition by the state's own initiation.

The Convention also fails to identify the "offenses and certain other acts committed on board" which are its subject matter as extraditable offenses; therefore, all requests for extradition arising out of an offense under the Convention must be dealt with under existing extradition arrangements. Even where those agreements exist between the two States concerned, this could often lead to confusion and delay. Furthermore, in any case, many "jeopardizing" acts are unlikely to be recognized as forming a basis for extradition. A marked omission from the Convention is that while it creates and defines "jeopardizing" acts, it does not require States to treat these as "serious crimes" although the Convention's procedures with respect to delivery and extradition are applicable only to serious crimes.

With respect to extradition, the State of registration of a leased aircraft which is involved in an offense will have little interest in pursuing a matter in which none of its nationals have been involved. A dry lease can further complicate the issue of extradition, since often in these circumstances such a state which is not directly involved in the offense is unlikely to be enthusiastic about incurring the trouble and expense associated with extradition and subsequent trial.

F. An answer?

It was no less a personage than the Roman Emperor, Marcus Aurelius, who concluded sadly that the choice in most human issues was to "educate, or endure."

The international community must take cognizance of the fact that the Tokyo Convention is relatively ineffective if States do not make provisions in their own laws to give legal effect to the concerted action that is required at international law to combat terrorism. They must be persuaded to ensure, for example, that their laws of custody are such as to permit the immediate inquiry prescribed by the Convention to be properly conducted, an essential requirement if the evidence required for a successful prosecution is to be gathered. For this reason there should also be a requirement that an inquiry should follow any disembarkation.

States must also ensure that their laws with respect to extradition are

42. Aircraft Convention, supra note 28, at art. 16(2), 20 U.S.T. at 2950, 704 U.N.T.S. at 234.
framed in such a manner as to facilitate the process for the State of registration in taking action against the perpetrators of crime or "jeopardizing" acts on board its aircraft. These laws should also be at least receptive to the idea of the State of the operator exercising a jurisdiction with respect to events on board aircraft controlled by its nationals.

States must also be persuaded of the need to exercise their criminal jurisdiction with respect to their own aircraft in such a manner as to deter potential offenders. States might embark upon a process of education to make their airport immigration and police authorities aware of the existence of the Tokyo Convention and of its provisions for disembarkation and delivery.

The airlines must also embark on a program of education within their own ranks. In general, there is great uncertainty on the part of captains as to the extent and limits of their authority; they are often in total ignorance of the Tokyo Convention. All airlines should use guidance material on the relevant sections of the Convention along with any material of assistance together with a current list of the contracting States for carriage in the cockpit. This material can prove invaluable when a commander is confronted by an official whose first reaction is often to refuse to permit a requested disembarkation or delivery.

Airlines need to inform their pilots on the contents of the Convention and to brief them on how to collect evidence, how to request an investigation and how to file a complete report of the incident. They also need to liaise with their own local authorities to ensure that they are aware of the extent and seriousness of the problem and of the measures which the international community has devised for dealing with it. There is much work to be accomplished by the security, legal and operations departments of the individual airlines. A further incentive is that such a program of benign propaganda may have the collateral effect of persuading immigration authorities of the folly of insisting on putting potentially violent deportees on board our aircraft.

Finally, the airlines themselves can and must do more to deal with the problem themselves. Alcohol is the underlying cause of the majority of incidents. Yet too often, obviously drunk and unruly passengers are boarded - regardless of laws which make it an offense to enter any aircraft when drunk, or to be drunk in an aircraft, as in the United Kingdom,43 or for a pilot to allow a person obviously under the influence of drink or drugs to be carried in aircraft, as in the U.S.A. The airlines should be careful to include in their contract with their passengers a condition which permits them to refuse carriage for reasons of safety, or, if in the exercise of its reasonable discretion, the carrier determines that “. . .(b)

the conduct, age or mental or physical state of the passenger is such as to . . . (ii) cause discomfort or make himself or herself objectionable to other passengers or (iii) involve any hazard or risk to himself or herself or to other persons or property. . . ."44

Too often airlines fail to exercise reasonable discretion to avoid potential offenses from being committed. It is all too common an occurrence that, once airborne, cabin crew members, in the absence of clear instructions from their employer, continue to supply alcohol to passengers even when the signs of impending trouble are obvious.

Airlines are often strangely reluctant to impose the very effective sanction available to them of refusing to carry on the return leg a passenger who has been troublesome on the outbound leg of his journey. This is a powerful measure of deterrent and each airline should explore the possibility of using it with their own legal adviser. If potential troublemakers were aware that their disruptive behavior was likely to be followed not only by effective action by the State authorities but also likely to result in their being blacklisted by airlines, it is probable that the aviation community would be advance a considerable distance towards at least preventing the problem of crime and unruliness on our aircraft from spiraling out of control.

IV. THE HAGUE CONVENTION ON HIJACKING (1970)

The vast increase in the number of aircraft hijackings and the growth of peril to international civil aviation posed by such incidents, together with the inadequacy of Tokyo Convention, led the ICAO Assembly to adopt resolution A16-37 at its 15th Session held in Buenos Aires from 3 to 28 September 1968. This Resolution reads as follows:

WHEREAS unlawful seizure of civil aircraft has a serious adverse effect, on the safety, efficiency and regularity of air navigation.
NOTING that Article 11 of the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft provides certain remedies for the situation envisaged.
BEING however of the opinion that this Article does not provide a complete remedy.
THE ASSEMBLY
(1) URGES all States to become parties as soon as possible to the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft.
(2) INVITES States, even before ratification of, or adherence to the Tokyo Convention, to give effect to the principles of Article 11 of that Convention.
(3) REQUESTS the Council, at the earliest possible date, to institute study of other measures to cope with the problem of unlawful seizure.

44. IATA General Conditions of Carriage/Passenger and Baggage, art. VIII, March 1988.
In connection with Clause (3) above, the Council, by its resolution of 16 December, 1968, decided to refer the question of unlawful seizure to the Legal Committee of ICAO. Thus, the Legal Committee was once again ordered to draft a new Convention on the subject.

The Legal Committee held its first session from 10 to 22 February 1969 in Montreal. It considered that the basic objective in its search for a solution to the problem under study should be to deter persons from committing unlawful seizure of aircraft and, more specifically, to ensure, as far as practicable, the prosecution and punishment of these persons. The most efficient way of attaining this objective would be, in the opinion of the Sub-Committee of the Legal Committee, through an international agreement between States (either a protocol to the Tokyo Convention or an independent convention) which would be capable of ratification or adherence independently of the Tokyo Convention.

On 1 December 1970, the draft Convention was submitted to the ICAO Conference at the Hague, which was attended by 77 States; there, the Convention was adopted on 16 December without any alteration.

The Hague Convention, unlike the Tokyo Convention, makes hijacking a distinct offense and calls for severe punishment of any person found within the territory of a Contracting State who hijacked an aircraft. As one writer succinctly observed “[t]he Hague Convention specifically defined the offense of unlawful seizure of aircraft as a model for individual national legislation, and provides . . . that each Contracting State undertakes to make the offense punishable by severe penalties.”

Whereas Article I of the Tokyo Convention applied to acts whether or not they were offenses, the Hague Convention appears to provide the answer to the first of the problems left by Tokyo Convention. That offense, as defined by Hague Convention, reads as follows:

Any person who on board an aircraft in flight
(a) unlawfully, by force, or threat thereof, or by any other form of intimidation, seizes, or exercise control of, that aircraft, or attempts to perform any such act; or
(b) is an accomplice of a person who performs or attempt to perform any such act commit an offense.

Article 2 of the Convention provides that each contracting State should make the offense punishable by severe penalties. However, the Convention does not list the exact penalties to be imposed by the Contracting State, other than describing them as severe penalties.

45. Feller, supra note 5, at 215.
A. THE SCOPE OF THE CONVENTION

There are several limitations placed on the application of the Convention as expressed by the articles of the Convention. Under Article I, the act must be committed by a person on board an aircraft “in flight” and it thereby excludes offenses committed by persons not on board the aircraft, such as saboteurs who remain on the ground. Thus, the Hague Convention seems to suffer in this respect from the same defects which its predecessor, the Tokyo Convention, had suffered from. D.Y. Chung has observed:

The question of hijacking has been pretty well covered by the Tokyo and Hague Conventions. However, the type of hijacking these two Conventions dealt with is only “on board hijacking”, while “non-on board hijacking” is not included. It is possible that someone who is not on board but who has placed a bomb or some destructive device on an airliner, may practice extortion on the airline or divert the plane to another destination. In other words, it is possible to hijack the plane by remote seizure or remote control. Another possibility is that of sabotage. Such a situation is not also covered by the above two Conventions, i.e. Hague and Tokyo.46

Similarly, according to Article I, the Hague Convention only applies to accomplices who are on board an aircraft in flight, and not to those who may be on the ground aiding and abetting the unlawful act. The Representative of the Netherlands on the ICAO Legal Committee once said in this respect that “it is obviously possible to be an accomplice without being on board an aircraft.”47

Article 3 of the Convention provides that the aircraft is deemed to be “in flight” at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. Hence, any hijacking initiated or attempted before the closing of the doors of aircraft after embarkation or after the opening of the doors for disembarkation is not covered by the Convention. Rene Mankiewicz observes:

This limitation leaves outside the scope of the Convention any hijacking initiated or attempted before the closing or after the opening of the aircraft doors. As a consequence, such acts are punishable only under the law of the State where committed; the jurisdictional articles of the new Convention do not apply thereto. Furthermore, it follows that such acts are punished merely by the general criminal or air law of the concerned State, unless special legislation is introduced for punishing unlawful seizure committed or attempted on the ground.48

46. Chung, supra note 32, at 643.
47. ICAO Doc. 9050 LC/169-2 at 72.
A further limitation expressed by the Convention (Article 3 (2)) is that it shall not apply to aircraft used in military, custom or police service, nor in the cases of joint air "transport" operating organizations or international operating agencies which operate aircrafts subject to joint or international registration (Article 5), if the place of take-off or landing of the aircraft on board which the offense is committed is situated in the state of registration of such aircraft (Article 3 (4)). On the other hand, the Convention would apply if the place of take-off or that of actual landing is situated outside the territory of the state of registration of the aircraft, on the understanding that it is immaterial whether the aircraft is engaged in an international or a domestic flight.

B. Powers and Duties Imposed Upon States

Beside the obligation to make the offense of hijacking punishable by severe penalties, the Convention imposes upon the Contracting States a series of obligations that are geared towards stamping out hijacking. These obligations include:

Each State shall take measures as may be necessary to establish - apart from any existing national criminal jurisdiction (Article 4 (3)) - its jurisdiction over the offense and any act of violence against a passenger or crew when (Article 4 (1)):

(a) the offense is committed on board an aircraft registered in that State;
(b) the aircraft on board which the offense is committed lands in the territory with the alleged offender still on board;
(c) the offense is committed on board an aircraft leased without crew to lessee who has his principle place of business or, if he has no such place of business, his permanent residence in that State.

In addition, every contracting State must take necessary measures to establish its jurisdiction over the offense in cases where the alleged offender is present in its territory and it does not extradite him (Article 4(2)). Mankiewicz further observes:

[T]his provision is necessary in order to increase the effective punishment even if the hijacker is not prosecuted in, or escaped from, the State of landing or is not extradited to the State of registration of the aircraft. Thus, the alleged hijacker can be arrested no matter where the offense took place as long as he is present in a Contracting State. This provision seems to introduce the principle of universal jurisdiction into the Hague Convention.49

The jurisdictional powers conferred upon States by paragraph 1(b) of Article 4 above may be considered an important factor in the attempts of the international community to stamp out and deter hijacking, giving con-

49. Id.
tracting States a legal instrument which they may otherwise lack; in view of the absence of any link between them and the State of landing, to act in these situations. This is an acceptable situation whereby contracting States can extend the basis of jurisdiction under international law.

On the other hand, according to Article 4(1), three States possess concurrent jurisdiction over an alleged offender: first, the State of registration of the aircraft; second, the State of landing if the offender is on board the aircraft; and third, any Party to the Convention within whose boundaries the alleged offender is present, once that State has chosen not to extradite him to the State of registration of the aircraft, or to the State in which he landed while he is still on board the hijacked aircraft, or to the State described in subdivision 1 (c). In addition, subsection (3) sanctions such bases of jurisdiction as "passive nationality" where the national law so provides. It is interesting to note that the jurisdiction of the State of registration of the aircraft is equal to the other States described in Article 4.

A third instance of concurrent jurisdiction was added to Article 4 of the Hague Convention during the diplomatic Conference at the Hague. Jurisdiction was granted to the State where the carrier, who operates an aircraft but is not the owner of this aircraft, has his principal place of business, or his permanent residence. Article 4(c) of the Convention covers the case of the so-called "bare hull Charter agreements" or "dry leases", i.e. when an aircraft is hired without crew to an operator. Thus, when an offense is committed on board an aircraft which is registered in a contracting or non-contracting State, and which is "dry leased" to an operator having his head office or permanent residence in a contracting State, the latter shall take necessary measures to establish its jurisdiction over the offense. This has been a useful improvement of Article 4 of the Convention in view of the great frequency of the leased agreements that the air transport industry is using at present.

Although Article 4 requires the contracting State to assume jurisdiction over the unlawful seizure of aircraft within the limit of Article 3, it does not provide for obligation on the part of any State to actually prosecute the alleged offender. However, a provision which may be of some relevance is found in Article 7, which reads:

The Contracting State is whose territory the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever, and whether or not the offense is committed in the territory, to submit the case to its competent authorities, for the purpose of prosecution. Those authorities shall make their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State.

Thus, Article 7 states that authorities having jurisdiction under Arti-
Article 4 are at liberty not to prosecute the hijacker or his accomplice if it is determined that the offenders would not be prosecuted. Robert P. Boyle has observed that the Diplomatic Conference which discussed the draft of the Hague Convention rejected the contention to apply compulsory prosecution or alternatively extradition because:

[T]his obligation is only to submit the offender for prosecution. There is no obligation to prosecute. Many careful distinctions have been adduced. One obvious one is that in case of universal jurisdiction, the State having the hijacker may not have available to it proof of the crime since conceivably it was committed in a distant State and thus the witnesses and other necessary evidence to the State having custody of the hijacker.

However, the reason for rejection of adopting compulsory prosecution appears to me to be a political one for some which States do not want any interference in their sovereign right to permit political asylum in some form for whatever purpose, despite the gravity of the offense. It is interesting to note that both U.S.A. and the Soviet Union have urged that States should be compelled to prosecute the alleged offender if extradition was not granted. It is submitted that this lack of either compulsory jurisdiction or extradition is a serious weakness in the Convention, and stands in the way of an effective international solution to hijacking. 50

Another obligation which is imposed upon contracting States is that each State is required to include the offense referred to in the Convention as an extraditable one in every new extradition treaty; existing treaties are deemed to already include it. The Convention may, in case of a request for extradition and in the absence of an extradition treaty, be given consideration by the States which make extradition conditional on the existence of an extradition treaty, as the necessary legal basis for extradition. For the purpose of extradition, the offense is treated as if it had been committed not in the place in which it occurred but in the territory of the State required to establish their jurisdiction in accordance with Article 4 above. Article 8 of the Convention states:

1. The offense shall be deemed to be included as an extraditable offense in any extradition treaty existing between contracting States. Contracting States undertake to include the offense as an extraditable offense in every extradition treaty to be concluded between them.

2. If a contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another contracting State with which it has no extradition treaty, it may as its option consider this Convention as the legal basis for extradition in respect of the offense. Extradition shall be subject to the other conditions provided by the law of the requested state.

3. Contracting states which do not make extradition conditional on the

50. International Combat, supra note 18, at 473.
existence of a treaty shall recognize the offense between themselves subject to the conditions provided by the law of the requested state.

4. The offense shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred, but also in the territories of the states required to establish their jurisdiction in accordance with Article 4, paragraph 1.

Thus, according to Article 8, if a contracting State receives a request for extradition from a State with which it has no extradition treaty the Convention shall be considered as the legal basis for extradition. The effect of this provision is to enlarge the scope of existing international treaties on extradition to include hijacking. Where a State is usually prohibited by domestic law from extraditing a hijacker in the absence of a treaty, the State must extradite the offender under the provisions of the Convention.

The obligation to extradite an airline hijacker is subject to all other customary and conventional rules of law governing extraditable offenses. As a general rule, extradition is denied where an individual is accused of committing a political offense. Most states recognize the granting of political asylum as a right to be determined by the state from which it is requested. As the laws of a state may preclude extradition of an airline hijacker if the offense is regarded as political, the existence of hijacking in an extradition treaty may not result in mandatory extradition. However, if a state does not extradite the offender, according to Article 7, the case must be submitted to the proper authorities for prosecution. I.D. Johnston has stated the following in relation to Article 8:

The Convention obliges the parties to include hijacking in extradition treaties to be concluded between them and insert it retrospectively into existing extradition treaties. Parties which have not concluded extradition treaties but which make extradition conditional on a treaty can regard the Convention itself as a legal basis for extradition. These provisions increase the possibility of extradition but by no means make it a certainty. The Russian Proposal, supported by the U.S.A., that hijackers be returned in all cases was rejected at the Conference. Automatic extradition, though probably the best deterrent, was considered too drastic a commitment by most of the negotiating States. What they are prepared to accept however, was the duty to prosecute offenders whom they did not extradite as provided for by Article 7. 51

There is no indication in the Convention as to what the position is regarding the extradition of nationals. Shubber believes that even though there is no mention of the extradition of the States own nationals according to the Convention or to the term “offender” in Article 8, such extradition is possible:

There is no reason to suppose that hijackers who happened to be nationals of the State requested to extradite him should be excluded from the scope of extradition under the Convention, provided that course of action is compatible with the national law of the State concerned. This interpretation is not incompatible with the intention of the drafters and the purpose for which the Convention has been created.52

C. OTHER PROVISIONS

The Hague Convention imposed further obligations on the contracting State to preserve the security and efficiency of air transport. States are obliged to take reasonable measures to restore control of aircraft to its lawful commander or to preserve his control over it and to facilitate the continuation of the journey of the passenger and the crew. In addition, States are obliged to return the aircraft and its cargo to those entitled without delay (Article 9) and report promptly as possible to the Council of ICAO any relevant information (Article 11). Article 10 imposes an obligation on all contracting States to give one another the greatest measure of assistance in connection with the criminal proceedings.

When comparing the contents of the Hague Convention with that of the Tokyo Convention, one observes that the two Conventions overlap and are even contradictory on some issues and their inter-relation is far from clear. The Hague Convention may be considered as a significant step forward in the endeavor of the international community to suppress the hijacking of aircraft and remove the threat caused by it to international civil aviation. The Convention has enlarged the number of the States competent to exercise jurisdiction over a hijacker and included the introduction of new basis for the exercise of jurisdiction of the State where the charterer of an aircraft has his principal place of business or permanent residence.

Another encouraging fact is that the Hague Convention grants every Contracting State the power to exercise jurisdiction over a hijacker if such States are affected by an offense committed under the Convention, thus making it impossible for a hijacker to escape the normal process of the law.

The Hague Convention, despite its efficiency in some areas, is not without its weaknesses. Mankiewicz comments, the Hague Convention deals only with "unlawful seizure committed on board aircraft" and does not apply to sabotage committed on ground, nor does it cover unlawful interference with air navigation, facilities and services such as airports, air control towers or radio communications. Attempts made further to ex-

tend the scope of the Convention were unsuccessful. Nevertheless, the Seventeenth Session of the Assembly of ICAO, held in Montreal in June, 1970, adopted a Resolution directing the Council of ICAO to convene the Legal Committee, if possible not later than November, 1970, in order to prepare . . . a draft Convention on Acts of Unlawful Interference Against Civil Aviation with the view to its adoption . . . as soon as practicable. Consequently, the draft Convention was prepared and was opened for signature at Montreal on September 23, 1971.53

V. THE MONTREAL CONVENTION (1971)

Since both the Tokyo and the Hague Conventions dealt only with unlawful seizure committed on board aircraft, it did not cover sabotage committed on the ground, nor unlawful interference with air navigation facilities and services. The Montreal Convention was drafted to remedy those lapses. The objectives of the Montreal Convention are best discussed as follows:

The primary aim of the Montreal Convention was to arrive at a generally acceptable method of dealing with alleged perpetrators of acts of unlawful interference with aircraft. In general, the nations represented at the Montreal Conference agreed that acts of sabotage, or violence and related offenses interfering with the safety and development of international civil aviation constituted a global problem which had to be combated collectively by concerned nations of the international community. A multilateral international convention had to be adopted which extended both the scope and efficacy of national legislation and provided the legal framework for international co-operation in the apprehension, prosecution an punishment of alleged offender.54

A. DEFINITION OF “IN SERVICE”

To achieve the above objectives, the Montreal Convention first sought to expand the scope of the activity covered by the Convention in order to include a new series of offenses which could be committed without the offender being on board the aircraft. The same definition for an aircraft in flight as given in Article 3(1) of the Hague Convention applies but the Montreal Convention introduces a new term, “aircraft in service”, which is defined as follows:

Aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for specific

53. Mankiewicz, supra note 48, at 209.
period until twenty-four hours after the landing. The period of the service shall, in any event, extend for the entire period during which the aircraft is in flight.\textsuperscript{55}

This expression was deemed important as it covered a more extended period than that covered by the expression “in flight,” as defined in Article 3(1) in the preceding Hague Convention. The term “in service” would cover such acts as the bombing of and discharge of weapons against aircraft on ground, as well as similar acts against aircraft in flight, whether or not the acts were performed by a person on board or outside the aircraft. Another significance of the term “in service” is that it serves to specify the physical position in which the aircraft must be if the offenses covered by the sub-paragraph of Article 2 are to come under the Convention. An extensive definition of the expression could encompass attacks against an aircraft while in the hangar or at a parking area. The States at the Montreal Conference, however, were not willing to go that far. This is because an extensive definition would mean that the States would, under another provision of the Convention, be bound either to extradite the suspected author of such attack, or if it did not extradite him, submit the case to its competent authorities for the purpose of prosecution. States are notoriously reluctant to enter into international arrangements on criminal matters if those arrangements markedly reduce domestic jurisdiction. Yet, too narrow a definition of the expression aircraft in service would compromise the utility of the Convention.\textsuperscript{56}

The definition of the term “in service” posed a difficult problem during the deliberation of the Montreal Conference. Although the beginning of the “in service period” afforded few problems, the main difficulty was in the definition of the end of the “in service” period when applied to lengthy stopovers or night stops in a country, awaiting turn around before commencement of the homeward-bound journey. It was decided that the aircraft should be protected by the Convention, that is, it should be deemed to be “in service” when it makes a stopover or night stop in another country. The present wording of the term “in service” attempts to solve the problem by specifying that an aircraft shall be considered in service 24 hours after any landing. The expression “in service” as it stands include the term “in flight” under Article 2(a). Therefore, in the event of a forced landing occasioned by hijacking, the period “in service” is deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

\textsuperscript{56} Gerald F. Fitzgerald, Toward Legal Suppression of Acts Against Civil Aviation, 585 INT’L CONCILIATION 42, 71 (1971).
B. Definition of the Offense

Another approach adopted by the Montreal Convention in its endeavors to curb hostile acts against civil aviation is to define the offense broadly in order to embrace all the possible acts that might occur. The first issue which faced the drafters of the Convention in this respect related to the provision of substantial coverage of serious offenses and at the same time avoiding the difficulties that may arise in connection with the listing of specific crimes in a convention intended for adoption by a great many States. After much debate and deliberation, this issue was settled and the final conclusion of the meeting is reflected in Article I. G.F. Fitzgerald described the method of enumerating the offenses in the Convention as being "novel": "[a]rticle I is novel in that it describes a number of penal offenses within the framework of a multilateral convention."\(^{57}\)

Article 1 of the Convention defines and enumerates the offenses of unlawful interference with aircraft as follows:

1. Any person commits an offense if he unlawfully and intentionally:
   (a) Performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft in flight, or
   (b) Destroys an aircraft in service or causes damage to such an aircraft in flight if that act is likely to endanger its safety in flight, or
   (c) Places or causes to be placed on board an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight, or
   (d) Destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety or aircraft in flight, or
   (e) Communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offense if he:
   (a) Attempts to commit any of the offenses mentioned in paragraph 1 of this Article;
   (b) Is an accomplice of a person who commits or attempts to commit any such offense.

It should be noted that while Article 1 delineates several different offenses, the dual requisites of unlawfulness and intent apply to act of the offenses enumerated. Fitzgerald further observes:

The introductory language of paragraph 1 makes it clear that the dual element of unlawfulness and intention must be present in all of the acts covered by sub-paragraphs (a) to (e); otherwise those acts will not be offenses. The dual element would also apply to attempts and complicity covered by sub-

\(^{57}\) Id. at 67.
paragraph 2.  

Sub-paragraph (a) of Article 1 is designed to deter and punish acts of violence committed against persons on board aircraft in flight. It should be noted that not all acts of violence come within the scope of the offense; only those likely to endanger the safety of the aircraft are within the scope as well. The notion of an act of violence referred to in this sub-paragraph includes armed attacks, as well as attacks against the lives of persons on board the aircraft by other means, such as, blows, strangling, poisoning or lethal injection. The word “violence” used in sub-paragraph (a) can be interpreted as including not only an armed attack or physical assault, but also administration of poison through, for example, its introduction into the food or drink served on board aircraft.  

The manner in which sub-paragraph (a) is worded, when it is read with the opening language of Article 1, would lead one to conclude that the person performing the act of violence does not have to be on board the aircraft in order to come under the Convention. This means that the convention would apply to a person who, being outside the aircraft (for example a low flying and slow-moving helicopter or light aircraft) in flight or who, while on the ground, has poisoned food which is later consumed by a person on board such aircraft.  

According to this sub-paragraph, the act of violence is not restricted to those acts which imperil the life of the victim. Any act of violence perpetrated against a person on board and which is likely to interfere with the safety of the aircraft falls within the scope of the offense. Hence, the standard for determining whether the Convention is applicable in a given situation does not hinge on the gravity or the heinousness of the act but rather on its effect on the safety of the aircraft in flight. The same definition as given in Article 3 of the Hague Convention for an “aircraft in flight” applies in Article 2(a) of the Montreal Convention.  

The two offenses which can be committed on board an aircraft in service are enclosed in sub-paragraphs (b) and (c) of Article 1 of the Montreal Convention. Sub-paragraph (b) is designed to deter and penalize acts of sabotage perpetrated against the aircraft itself. The sub-paragraph encompasses attacks both from within and without the aircraft. The destruction and damage referred to in the sub-paragraph must occur while the aircraft is “in service,” as the particular act, the consequence of which is the destruction of the aircraft, may be performed before the aircraft is “in service.” Destruction includes substantial destruction of the aircraft beyond the possibility of rendering it airworthy through repair.

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58. Id.
59. Id.
60. Id. at 68.
while the concept of “causing damage” is intended to cover “the damaging of a vital but inexpensive piece of wiring, would render the aircraft incapable of flight. It could also cover any damage, whether caused to an aircraft on the ground or in the air, where there is a likelihood that the safety of the aircraft in flight would be endangered.”

Sub-paragraph (c) is an attempt by the Convention to encompass, through using the term “by any means whatsoever”, all situations in which explosives or other devices are placed on board an aircraft.

The words “by any means whatsoever” cover the placing of explosives on board an aircraft whether carried on board by the author of the act or any unwitting accomplice, sent on board in air cargo or by mail, or even attached to the outside of the aircraft before it undertakes its journey.

Sub-paragraph (d) is intended to address hostile acts against “air navigation facilities” which may include airports, towers, radio services and meteorological services used in international flights.

Sub-paragraph (e) is concerned with making it an offense for anyone to pass, or cause to pass false information relating to an offense (for example, the presence of an explosive device or would-be hijacker on board the aircraft). Although most national legislatures may have already enacted legislation concerning this subject, it was felt that measures to restrain such acts could especially be included in this Convention, as it was intended to cover a type of offense which very definitely interferes with the orderly conduct of commercial air services. In order for the act to fall within the Convention, the offender who communicates the information must know that the information is false.

Article 1(2) covers the attempt to commit an offense and being an accomplice to commit one of the offenses listed in the sub-paragraphs of the Article. During the debate on the Montreal Convention, there was an attempt to include conspiracy in the definition, but some delegations, including France, were of the view that since conspiracy was not an offense under their national systems of penal law, it should not be included in the convention. After long deliberations, it was decided by a vote that reference to conspiracy would not be made in the Convention.

C. Penalties and the Scope of the Convention

Like the Hague Convention, the Montreal Convention provides for the undertaking by each contracting State to make the offenses covered by the Convention punishable by “severe penalties.” Article 3 of the Montreal Convention states that each contracting State undertakes to

61. Id.
62. Id.
make the offenses mentioned in Article 1 punishable with severe penalties. Unlawful acts against the safety of civil aviation are thus considered to be serious crimes which the Contracting States must punish by severe penalties. The term "severe penalties" is, however, not defined.

The Delegate of France explained at the discussions leading to the adoption of the Hague Convention that with respect to Article 2, the subcommittee and the Committee relating to the Hague deliberations had been faced with the question as to whether or not the severity of the punishment to be imposed upon the offender should be stated. The subcommittee had come to the conclusion that this could not be done, considering the diversity of criminal codes in different countries. A more general wording, i.e. "severe penalties", was therefore considered more appropriate. It was not customary for international conventions of this type to stipulate minimum penalties, and a number of States did not have any provisions for them in their national legislation. This omission has been criticized as one of the weaknesses of the convention.

Article 4 of the Convention stipulates which flights are to be covered by the Convention. Paragraph 1 excludes from the operation of the Convention aircraft used in military, customs, or police services. According to Paragraph 2 of Article 4, the scope of the Convention is determined primarily in terms of the international element of aviation. In case of the offenses contemplated in clauses (a), (b), (c) and (e) of Article 1(1), the Convention applies irrespective of whether the aircraft is engaged in an international or domestic flight, only if, as stated in Article 4(2):

(a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft; or
(b) the offense is committed in the territory of a State other than the State of registration of the aircraft.

The Convention also applies in cases of international flights if the offender or the alleged offender is found in the territory of the State other than the State of registration of the aircraft. Paragraph 5 of Article 4 provided: "[i]n the case contemplated in sub-paragraph (d) of paragraph 1 of Article 1, this convention shall apply only if the air navigation facilities are used in international air navigation."

Hence, the Convention will apply only if the air navigation facilities are used in international air navigation, i.e. the sabotage of domestic air navigation facilities is outside the scope of the Convention, notwithstanding the fact that the saboteur of domestic facilities may be found in another State. G.F. Fitzgerald observes, "[i]n case of air navigation facilities mentioned in sub-paragraph (d) of Article 1(1), the Convention applies

63. Id.
64. See Gary N. Horlick, International Response, 176.
only if the facilities destroyed, damaged, or interfered with are used in international navigation. 65

D. JURISDICTIONAL POWERS GIVEN TO STATES UNDER THE MONTREAL CONVENTION (1971)

Article 5 of the Convention, which concerns jurisdiction, provides that each contracting State shall take such measures as may be necessary to establish its jurisdiction over offenses in the same three instances as those contained in the Hague Convention, and a fourth instance, when the offense is committed in the territory of that State. This Convention like its predecessor 66 does not exclude any criminal jurisdiction exercised in accordance with national law. Fitzgerald states, "[a] controversial topic in the Montreal Convention is that of jurisdiction, since, like the Hague Convention, this Convention attempts to establish a form of universal jurisdiction over the alleged offender." 67

Article 5 of Montreal Convention provides that each contracting State shall take such measures as may be necessary to establish its jurisdiction over the offenders in the following cases:

1. (a) When the offense is committed in the territory of that State.
   (b) When the offense is committed against or on board an aircraft registered in that State;
   (c) When the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board; and,
   (d) When the offense is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses mentioned in Article 1, paragraphs 1(a), (b) and (c) and in Article 1, paragraph 2, in so far as that paragraph relates to those offenses, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article, i.e. Article 5.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with the national law.

An analysis of Article 5 would lead to the conclusion that at least four States are specifically empowered to exercise concurrent jurisdiction over an alleged offender. These States are: (1) the State within whose territorial boundaries the offense is committed whether the offense takes

65. Gerald F. Fitzgerald, Address at the Third Annual Conference of the Canadian Council of International Law International Terrorism and Civil Aviation (October 2, 1974).
67. Gerald F. Fitzgerald, supra note 56, at 73 n.311.
place on its territory or within its airspace, thus reaffirming and codifying the traditional basis of territoriality; (2) the State of registration of the aircraft (hence, such State is empowered to exercise its jurisdiction over offenders who commit their crimes on board aircraft registered in those States); (3) the State of landing, if the offender is on board the aircraft; and (4) any party to the convention within whose boundaries the alleged offender is present, if that State refuses to extradite the offender to any of the States having jurisdiction under Article 5(1).

Article 5(2) adopts the interpretation of universal jurisdiction as contained in the Hague Convention. Furthermore, Article 5, paragraph 3, provides that the jurisdictional basis delineated by the Convention does not supersede any criminal jurisdiction that has derived from national laws of the parties to the Convention. Consequently, the jurisdictional relation to nationality may be asserted by the State of nationality of the alleged offender, and the States which are the targets of the offense or whose nationals are threatened, maimed or killed by the offender may invoke the protective principle or the lesser recognized jurisdictional basis of passive nationality. These additional bases of jurisdiction are expected to further increase the possibility of suppressing the offenders. In his concluding remarks, Professor Fitzgerald has observed, "[T]hus, the Montreal Convention breaks new grounds and goes beyond codification in providing for the international legal action to be taken by States in respect of many acts..."68

By adopting the Montreal convention, concerned States have attempted to provide a framework which would substantially widen the scope and application of national legislation and thereby both penalize and deter unlawful interference with aircraft.

E. Extradition or Prosecution

Article 7 of the Montreal Convention, like its predecessor, embodies the principle of aut dedere aut judicare, which is the basis of the whole draft. It reads as follows:

The State party in whose territory the alleged offender is present shall, if it does not extradite him, submit without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceeding in accordance with the laws of that State.

According to this provision, a contracting State has an obligation either to extradite the alleged offender found in its territory or submit his case to the competent authorities for the purpose of prosecution. It appears from the overall reading of "without exception whatsoever" that

68. Id. at 75.
the Convention makes prosecution mandatory. However, a deeper analysis of the Article brings to bear the fact that it does not mandate the actual prosecution of the offender but merely the submission of the case to the competent domestic prosecuting authorities. This contention is supported by the fact that during the Montreal conference the Israeli delegation proposed that the Convention include a mandatory prosecution provision, although this proposal was defeated by vote of 35 to 2, with 6 abstentions.

The failure of the Montreal Convention to provide for an objection to prosecute, when the offender is not extradited, was considered a weakness regarding the system of sanctions aut dedere aut punire. One commentator observed:

The lack of mandatory system of prosecution with respect to aerial terrorism must be emphasized. Despite the repeated efforts of some delegations during the Hague and Montreal Conferences, the existing texts on aerial terrorism do not recognize the system of mandatory prosecution in case of denial of extradition requests. On the contrary, the State authorities in charge of the handling of prosecution may well decide that according to their domestic law, the alleged offender should not be prosecuted at all.69

F. EXTRADITION AND OTHER PRINCIPLES

As far as extradition is concerned, the Montreal Convention repeats verbatim the Hague provision regarding extradition. The Convention also repeats the Hague convention provisions, discussed above, relating to: the taking of alleged offender into custody; joint air transport operating organizations or international operating agencies, which operate aircraft that are subject to joint international registration; continuation of the journey of the passengers, crew, and aircraft; assistance between States in connection with criminal proceeding; and, the reporting of the process to the ICAO Council.

Although the Montreal convention was considered a breakthrough in combating terrorism against air transport, it remains, like its predecessors, tenuous and destitute of real effect. It would be a platitude to state that the effectiveness of any convention, however well drafted and universally accepted, would depend on the willingness and ability of States to enforce within their own territory the rule of law.

Even if it is widely ratified, a small number of States can undermine its (a treaty’s) effectiveness by actively supporting or condoning acts of unlawful interference and by providing havens for the perpetrators of such acts. Because of conflicting ideologies and political exegesis, such events have in fact

Another problem is that although all three Conventions have entered into force, barely half of the world community subscribes to either one or all of these agreements, and therefore their total impact has been less than inhibiting. Thus far, 153 States have ratified the Tokyo Convention, 153 States have ratified the Hague Convention and 155 States have ratified the Montreal Convention of 1971.\textsuperscript{71} This low rate of ratification of the Conventions, when compared to the number of 183 member States of ICAO, has drastically reduced their effectiveness:

Whether the Convention will fulfill its aims is dependent upon the breadth of support it obtains, indicated in part by the number of ramifications it receives. For the Convention to be effective, it must be acceded to by almost all nations.\textsuperscript{72}

Some States have not only failed to ratify the conventions, but have also undermined the Conventions’ effectiveness by providing sanctuaries to alleged offenders. Motivated by political and economic interests, other States have granted tacit support, and occasionally even active aid, to the perpetrators.

As a direct effect of the failure of the international community to provide an effective machinery for combating terrorism against air transport, threats to international civil aviation have consistently become more alarming and grave. New facets and more spectacular types of offenses have evolved as a result.

In an effort to redress the situation, concerned nations, under the auspices of ICAO, have attempted to formulate and adopt multilateral international accord which would compel recalcitrant States into adherence both of customary and international law and with the provisions of the Tokyo, Hague and Montreal Conventions.

VI. THE BONN DECLARATION (1978)

At a close of a two-day economic meeting held at Bonn, Germany, July 16-17, 1978, leaders of the Governments of Canada, France, the federal Republic of Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland, and the United States of America agreed to act jointly in common undertaking against countries failing to act swiftly against hijacking. The declaration on co-operative action reads:

\textsuperscript{70} Abraham Abramovsky, Multilateral Convention for the Suppression of Unlawful Seizure and Interference with Aircraft, Part II of the Montreal Convention, 14 Columbia J. Transnat'l L. 300 (1975).
\textsuperscript{71} See ICAO Doc A31-WP/26, LE/2, 4/7/95, at 11.
\textsuperscript{72} Id.
The heads of States and governments concerned about terrorism and the taking of hostages, declare that their governments will intensify their joint efforts to combat international terrorism. To this end, in cases where a country refuses extradition or prosecution of those who have hijacked an aircraft and/or do not return such aircraft, the heads of States and governments are jointly resolved that their governments should take immediate action to cease all flights to that country. At the same time, their governments will initiate action to halt all incoming flights from that country or from any country by the airlines of the country concerned. The heads of States and governments urge other governments to join in this commitment.

It is evident that the declaration was intended to create an international regime for preventing and deterring acts of unlawful interference with civil aviation by the imposition of stringent sanctions that would adversely affect the economic and political interests of a delinquent State. Mark E. Fingerman observes:

The Declaration focuses on sanctions designed to deter nations from encouraging the commission of the offense. 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 and thereby reducing the attractiveness of the offense.73

The object of the Bonn Declaration as is indicated in its preamble is to intensify the joint effort of States to combat international terrorism. In order to achieve this objective, the Declaration has set out respective obligations on third-party States in the event that a hijacked aircraft landed in the territory of such State. If the third-party State failed to meet the obligations specified in the Declaration, the Declaration envisaged that a definite sanction would be inflicted upon the State as a sort of punishment.

The Declaration refers to an act of hijacking, without actually defining the offense. It can be assumed that the act referred to would be interpreted in accordance with the definition in Article 1 of the Hague Convention. The Declaration seemingly refers to an act that has been completed, which means that the hijackers should have reached their final destination. Thus, a State in whose territory a hijacked aircraft lands only for the purpose of refueling would not act contrary to the Declaration if it allows the landing without taking action against the hijacker.

The Declaration applies in instances where a State refuses to prosecute or extradite the hijackers and/or return the hijacked aircraft. The words “prosecution and extradition” as contained in the Declaration have

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the same meaning as used in Articles 8 and 7 of the Hague and Montreal Conventions respectively. Of course, for this provision to be applicable a State must be in a position to prosecute or extradite, *i.e.* the hijacker must stay in the country and be available for prosecution by the competent authorities. However, once a State is able to take appropriate action but does not act and the hijacker disappears, such omission would be regarded as defaulting according to the spirit of the declaration.

The sanctions imposed by the contracting States include taking immediate action to cease all flights to that country, and initiating suspension of all incoming flights which arrive from the defaulting State or are operated by airlines of a defaulting State. These sanctions are in essence an economic boycott or a "reprisal" in international law and are meant as a deterrent. The Declaration is recognizes that some States may act as *de facto* accomplices to acts of hijacking and may give refuge and safe haven to an offender.

A. THE LEGAL STATUS OF THE BONN DECLARATION

The suspension of aerial communication as envisaged in the Bonn Declaration has been considered a serious measure in the context of international relations.

Naturally, the suspension of aerial communications was not an economic step... This was a political sanction, because the suspension of aerial communications meant in practice a deterioration in relations between States. It meant stoppage of the carriage of cargo and passengers, it would interfere with diplomatic communications, etc.74

Another contentious aspect of the Bonn sanction machinery is that the boycott of a delinquent State would not only affect the interests of the specific State that was violating the obligations specified in the Declaration, but also of those States which applied or agreed to apply such sanctions and third party States.

There is a strong feeling among some jurists that the imposition of sanctions against offending States fall exclusively within the domain of the Security Council of the United Nations, and thus, any independent convention or declaration permitting the use of sanctions by party States themselves would violate the United Nations Charter. In support of this argument, Articles 39 and 41 of the Charter of the United Nations have been cited.

Article 39 of the Charter provides:

The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or

74. ICAO Doc. 9050-LC/169-1 at 41.
decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.

Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications and the severance of diplomatic relations.

It is customarily accepted therefore that States cannot take joint sanctions against another State unless such action was authorized by the Security Council of the United Nations.

The above view had also been voiced in the ICAO Legal Committee where delegates of France and U.S.S.R. expressed the opinion that to apply sanctions against States in the form of interruption of full or partial air services was within the exclusive jurisdiction of the Security Council. The French delegate observed:

The sanctions approach had been very thoroughly discussed in the Special Sub-Committee and some rather serious objections to it had been raised. The first was whether the machinery for consideration of sanctions was compatible with Article 41 of the United Nations Charter, which empowered the Security Council to decide upon measures in the nature of sanctions, including the complete or partial interruption of air services, and called upon members of the United Nations to apply them.75

A similar opinion is voiced by the delegate of Soviet Union who argued that joint action in a form of suspension of flight, if implemented, would be in contradiction with the competence of the Security Council:

Indeed, according to Article 41 of the United Nations Charter, one of the measures that the Security Council of the United Nations was empowered to apply included the suspension of air communications. The imposition of collective sanctions against States, outside the framework of the United Nations, would be precluded by U.N. Charter.76

Another approach which indicates the incompatibility of the measures adopted by the Bonn Declaration with international law is reflected in Article 2(3) and Chapter VII of the United Nations Charter. Under Article 2(3), all members of the United Nations pledge themselves to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered. Article 33 then enumerates various procedures for the settlement of such dis-

75. ICAO Doc. 9050-LC/169-1 at 10.
76. Id. at 41.
putes, notably "negotiation, inquiry, mediation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means (chosen by parties to the dispute)."

It has been observed by Brosche that:

Even if this list is not considered to be exhaustive, it is quite clear that embargo, boycott, blockade, reprisal or other kinds of economic pressure do not constitute procedures of pacific settlement. They are not peaceful means and not appropriate for the solution of disputes. The use or imposition of such measures would constitute a violation of the obligation to settle international disputes by peaceful means. Due to these facts, it becomes evident that the use of any kind of [economic] pressure is contrary to the [Charter] principles of peaceful settlement of disputes.77

It is clear from the above that the aerial boycott adopted by the Bonn Declaration is not permissible according to international law as incorporated in the Charter of the United Nations. It is clear that States will be held responsible for a boycott instituted directly by their governments if such measure is found by the international community to be ultra vires the established norms of international law.

Furthermore, it may also be relevant to view the Bonn Declaration by reference to the doctrine of non-intervention, as elaborated in various international instruments in recent years. Thus, paragraph 2 of its Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty of 21 December, 1965 [(Resolution 2131(XX)], the United Nations Assembly decreed that:

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it an advantage of any kind.

B. INCOMPATIBILITY WITH THE VIENNA CONVENTION

The Bonn Declaration was designed to be invoked by seven States against an allegedly defaulting State, whether or not the latter was a party to the Declaration. Mark E. Fingerman opines:

The legal force of the Bonn Declaration upon non-parties is of critical importance; it is against these nations that the Declaration's sanctions were most intended to apply. The Declaration calls for the imposition of its sanctions upon any State that violates its provisions, whether or not the State in question is a party to the Declaration or any civil aviation convention.78

78. Fingerman, supra note 73, at 144 n.327.
Articles 33 and 34 of the Vienna Convention on the Law of Treaties specifically states that Nations which do not become party to a treaty would not be bound by that treaty unless they expressly agree in writing to be bound by it. Only the states which are parties to a treaty (including a declaration) could be considered as being bound by the provisions of that treaty. While it may be conceded that a treaty could create rights for third states which those states could accept, it cannot impose obligations on third states in terms of requiring them to commit acts such as prosecuting or extraditing offenders against civil aviation or returning the aircraft against which such offense is committed. International law does not envision the imposition of obligations on States which are not parties to a treaty. Therefore, the scope of application of the Declaration should be limited to States which are parties to it. The Note presented by the French Government on the Resolution adopted by the Council of ICAO on 19 June, 1972 on the question of joint sanction stated:

The Convention can establish obligations only for States parties to it and would permit imposing sanctions only on those parties, pursuant to Articles 34 and 35 of the Vienna Convention on the Law of Treaties. Therefore, the Convention could be effective only if it was universally accepted.79

Thus, the Declaration will be ineffective as far as it intended to impose an obligation upon third parties to prosecute or extradite the hijacker and to release the aircraft.

C. INCOMPATIBILITY WITH THE CONVENTION ON INTERNATIONAL CIVIL AVIATION

Another difficulty emerging from the Bonn Declaration was the relationship of the Declaration to other international conventions. The problem of suspension of air transport services as a sanction under the Bonn Declaration becomes particularly relevant in this context. Article 5 of the Chicago Convention confers certain rights upon Contracting States:

Each Contracting State agrees that all aircraft of the other Contracting States, being aircraft not engaged in scheduled international air services shall have the right subject to the observation of this Convention to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the States flown over to require landing.

The Transit Agreement or the so-called “Two Freedoms Agreement” also contains a reciprocal grant among ICAO members relating to their scheduled air services, whereby their carriers could fly across the territory of a State without landing or land in its territory for non-traffic purposes.

79. ICAO Doc. 9050-LC/169-2 at 42.
Therefore, it appears that the imposition of a restriction upon the airline of a defaulting State to fly over or to land in the States subscribing to the Bonn Declaration is incompatible with the provisions of the Chicago Convention and the Transit Agreement. The rights to fly over or land belong to States which are parties to the Chicago Convention, and those rights could not be derogated by a contrary provision in another treaty, such as the Bonn Declaration. The Spanish delegate to the ICAO Legal Committee observed the following about sanctions against air services, "[o]ne of the problems . . . was the compatibility of the air services with the right of the States parties to the Chicago Convention and Air Transit Agreement." 80

The French Government stated the following in regard to the question of suspension of air services as a sanction, "[d]ecisions on the suspension of air services could not be taken without amending the bilateral agreement which grants traffic rights, and, perhaps, even the Chicago Convention itself." 81

In negotiating air transport agreements, both parties will endeavor to promote safe commercial operations of the type contemplated by the Chicago Convention and seek the grant of rights for their carriers. Bilateral agreements on air traffic rights are usually not intended to cover the continuation of operation into and from victim States by aircraft of the States which are seen to promote the disruption of safe commercial aviation, in a manner specified in the Declaration. Failure by States to take practicable measures necessary to prevent the disruption of international aviation - which is caused by such acts of detention and seizure of aircraft as specified by the Declaration - would therefore not be consistent with the grant by peace-loving States of rights necessary for the conduct of air traffic by another State. Therefore, it is not logical to say that bilateral air transport agreements can properly be interpreted as granting rights to airlines of States to continue air services to and from a delinquent State if such state detains passengers, crew or aircraft or fails to prosecute or extradite the perpetrators. Walter Schwenk agrees, stating that:

In interpreting the bilateral, the conclusion may be reached, however, that there seems to be sufficient justification for the suspension of air traffic rights under the bilateral itself without the need to resort to general principles of international law. 82

The Chicago Convention established principles and arrangements designed to insure that international civil aviation would develop in a safe and orderly manner. It imposes an obligation upon each contracting state

80. ICAO Doc. 8936-LC/164-1 at 216.
81. ICAO Doc. 9050-LC/169-2, loc. cit.
“not to use civil aviation for any purpose inconsistent with” such aims.

More directly, the Convention specifically requires each contracting State "to adopt all practicable measures . . . to facilitate and expedite navigation by aircraft between the territories of Contracting States, and to prevent unnecessary delays to aircraft crews, passengers and cargo." Refusal by a State to adopt generally agreed upon procedures to eliminate the threat to international civil aviation posed by such acts of detention and unlawful seizure as are specified in the Bonn Declaration, would constitute a failure by that State to carry out its obligation under Articles 2 and/or 44 of the Chicago Convention. Therefore, suspension of flights in the circumstances referred to in the Declaration would not be incompatible with the Chicago Convention or the Transit Agreement, contrary to the views of some scholars.

Moreover, the sanction adopted by the Bonn Declaration involving suspension of air services in no way deprives a State of a fair opportunity to operate an international airline pursuant to Article 44(f). On the contrary, a State found to be in default would not be giving a fair opportunity to other States. The U.S. Representative in the Legal Committee held in Montreal in 1973 stated:

Defaulting States had no longer had the privilege of Article 44(f) until such time as it provided a fair opportunity to the rest of the community. Article 44(f) would have to be read in context with Articles 44(d) and (h), and with the directive as stated in Article 44(a) that the Organization shall ensure safe and orderly growth of international civil aviation throughout the world.

The U.S. Representative said that the power to suspend air services as a sanction is not only compatible with the Chicago Convention but also with international law.

If a party to the Chicago Convention committed a material breach of the obligation to ensure the safety of civil aviation, then other parties individually had the right to suspend the operation of the Convention in whole or in part with respect to the defaulting State in accordance with customary international law, as specified in Article 60 of the Vienna Convention on the Law of Treaties.

When nations ratify or adhere to the Chicago Convention, they not only become members of the ICAO, but they also agree to take appropriate steps to ensure the safety and security of international civil aviation. Hence, the harboring of perpetrators by way of failure to prosecute or

84. Id. at art. 22.
85. ICAO Doc. 8936-LC/164-1 at 228.
86. ICAO Doc. 9050-LC/169-1 at 39.
extradite may be said to constitute a violation of the basic rationale of the Chicago Convention. To breach the obligation set forth by the Chicago Convention is to impliedly denounce the Convention. Therefore, the defaulting State in such an instance cannot claim the rights conferred upon it by the Convention.

D. Problem of Prosecution or Extradition

The fourth problem of the Bonn Declaration is the issue of prosecution or extradition. Sanctions under the Declaration are expected to follow the failure of the delinquent State to prosecute, extradite and/or return the aircraft. However, public international law provides no rule which imposes a duty to extradite or prosecute. Hence extradition or prosecution becomes either a matter of comity or treaty between States. Even when a treaty exists, extradition may be refused in certain circumstances. Therefore, surrender of an alleged criminal cannot be demanded as of a right in the absence of a binding treaty between the respective parties. Any attempt to bind States to extradite or prosecute offenders in the absence of a treaty to that effect would definitely be an encroachment on State-sovereignty, making such act a violation of customary international law.

Besides the above problems surfacing from the Bonn Declaration, there also exists also certain gaps with respect to the application of the Declaration:

1. How would the decision to suspend air services be taken by the members of the Declaration, would it be by majority or unanimously?
2. Who will judge that a State is no longer in default, and when will the services be resumed? Should there be disagreement among the seven States parties on these points and should a procedure be needed to be laid down in order to regulate these matters?
3. Did the Declaration take into account the diversity of violations attributable to the defaulting State and that whether there would be the same penalty automatically applicable to every case?

VII. Conclusion

The Bonn Declaration, unlike the three other Conventions discussed above, represents a fragmented attempt on the part of the international community to control terrorism or unlawful interference with international civil aviation. This, however, by no means confirms the fact that the three international conventions were comprehensive attempts by the entirety of the international community. While the conventions lacked a certain compulsion in their requirements, the Bonn Declaration, which seemingly had a punitive flavor, lacked respectable representation by the
international community. It is time to examine both these approaches with a view to coalescing them to form a synthesis of action. The element of sanction as introduced by the Bonn Declaration should be fused with the international flavor of the three conventions. The international community may be able to work out a workable, effective and enforceable instrument on this basis.
Taxi Industry Regulation, Deregulation & Reregulation: the Paradox of Market Failure

Paul Stephen Dempsey*

Table of Contents

I. Introduction ........................................ 74  
II. Historical Antecedents of Modern Taxicab Regulation .... 76
III. Contemporary Statutory & Regulatory Criteria Governing the Taxi Industry ........................................ 77  
A. New York ........................................ 78
B. Los Angeles ........................................ 78
C. Houston ........................................ 79

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* Paul Stephen Dempsey is Professor of Law and Director of the Transportation Law Program at the University of Denver. He formerly served as an attorney with the Civil Aeronautics Board and the Interstate Commerce Commission in Washington, D.C.

Professor Dempsey has written more than forty law review articles and six books: Aviation Law & Regulation (two volumes, Butterworth 1993); Airline Deregulation & Laissez Faire Mythology (Quorum Books, 1992); Flying Blind: The Failure of Airline Deregulation (Economic Policy Institute, 1990); The Social and Economic Consequences of Deregulation (Quorum Books, 1989); Law & Foreign Policy in International Aviation (Transnational Publishers, 1987); and Law & Economic Regulation in Transportation (Quorum Books, 1986).

Dr. Dempsey holds the following degrees: A.B.J., J.D., University of Georgia; LL.M., George Washington University; D.C.L., McGill University. He is admitted to practice law in Colorado, Georgia and the District of Columbia.

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I. INTRODUCTION

During the last fifteen years, Congress has deregulated, wholly or partly, a number of infrastructure industries, including most modes of transport—aeroplanes, motor carriers, railroads, and intercity bus compa-
Deregulation emerged in a comprehensive ideological movement which abhorred governmental pricing and entry controls as manifestly causing waste and inefficiency, while denying consumers the range of price and service options they desire.

In a nation dedicated to free market capitalism, governmental restraints on the freedom to enter into a business or allowing the competitive market to set the price seem fundamentally at odds with immutable notions of economic liberty. While in the late 19th and early 20th Century, market failure gave birth to economic regulation of infrastructure industries, today, we live in an era where the conventional wisdom is that government can do little good and the market can do little wrong.

Despite this passionate and powerful contemporary political/economic ideological movement, one mode of transportation has come full circle from regulation, through deregulation, and back again to re-regulation—the taxi industry. American cities began regulating local taxi firms in the 1920s. Beginning a half century later, more than 20 cities, most located in the Sunbelt, totally or partially deregulated their taxi companies. However, the experience with taxicab deregulation was so profoundly unsatisfactory that virtually every city that embraced it has since jettisoned it in favor of resumed economic regulation.

Today, nearly all large and medium-sized communities regulate their local taxicab companies. Typically, regulation of taxicabs involves: (1) limited entry (restricting the number of firms, and/or the ratio of taxis to population), usually under a standard of "public convenience and necessity," [PC&N] (2) just, reasonable, and nondiscriminatory fares, (3) service standards (e.g., vehicular and driver safety standards, as well as a common carrier obligation of nondiscriminatory service, 24-hour radio

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dispatch capability, and a minimum level of response time), and (4) financial responsibility standards (e.g., insurance).\textsuperscript{4}

This article explores the legal, historical, economic, and philosophical bases of regulation and deregulation in the taxi industry, as well as the empirical results of taxi deregulation. The paradoxical metamorphosis from regulation, to deregulation, and back again, to regulation is an interesting case study of the collision of economic theory an ideology, with empirical reality. We begin with a look at the historical origins of taxi regulation.

II. Historical Antecedents of Modern Taxicab Regulation

Hackneys (horse drawn coaches for hire), the predecessors of today’s taxicabs, were regulated shortly after they appeared on the streets of London and Paris between 1600 and 1620.\textsuperscript{5} In 1635, Charles I ordered that London hackneys be licensed so as “to restrain the multitude and promiscuous use of coaches.”\textsuperscript{6} Nineteen years later the British Parliament adopted a regulatory regime which limited the number of hackneys.\textsuperscript{7}

In the United States, governmental regulation of private firms, rather than public ownership, has been deemed the appropriate means of protecting the public interest in economically viable modes of transportation.\textsuperscript{8} Although some attribute comprehensive regulation of taxicabs to the Great Depression, in fact, regulation began in earnest during the 1920s.\textsuperscript{9} In the 1930s, the growth in unemployment and unsold

\textsuperscript{4} See Michael Kemp, Taxicab Service, in PARA-TRANSIT: NEGLECTED OPTIONS FOR URBAN MOBILITY 64 (Urban Institute 1984); Dempsey & Thom, supra note 1, at 1; Roger Teal & Mary Berglund, The Impacts of Taxicab Deregulation in the USA, J. TRANSP. ECON. & POL’Y 37 (Jan. 1987).


\textsuperscript{6} U.S. DEPT OF TRANSP., TAXICAB REGULATION IN U.S. CITIES 5 (1983).

\textsuperscript{7} Id. at 6. The London Hackney Carriage Act of 1831 (as amended in 1843) was the first comprehensive taxicab regulation ordinance; Gene Stalians, Regulatory Revision and the Taxicab Industry: What We Have Learned 1, Address before the 50th Annual Convention of the New Zealand Taxi Proprietors’ Federation, Wellington, New Zealand, Aug. 30, 1988.

\textsuperscript{8} William Barker & Mary Beard, Urban Taxicabs: Problems, Potential, and Planning, in PROCEEDINGS OF THE CONFERENCE ON TAXIS AS PUBLIC TRANSIT 40 (Univ. of California, 1978). Modes of transport which were not economically viable in the market (e.g., urban railways, Amtrak and the U.S. Postal Service) were provided by government in a process John Kenneth Galbraith is said to have referred to as “Lemon Socialism.”

\textsuperscript{9} Mark Frankena & Paul Pauiter, An Economic Analysis of Taxicab Regulation 75 (Fed. Trade Comm., 1984); See Kemp, supra note 4, at 65. “The campaigns of professional cab associations for vehicle licensing during the late 1920s were a direct response to the disruption in the market created by hit-and-run entrants.”; see also Edward Gallick & David Sisk, A Reconsideration of Taxi Regulation, 3 J.L. ECON. & ORG. 117, 123 (1987).
automobiles produced a drastic increase in the number of taxicabs.\textsuperscript{10} While fewer people could afford to ride a taxi, the number of taxicabs skyrocketed, while occupancy rates and revenue per taxi declined.\textsuperscript{11} Capacity and demand were moving in opposite directions.

An editorial published by the Washington Post in January 1933 illustrates the public's perception of the chaotic state in which the taxicab industry found itself:

Cut-throat competition in a business of this kind always produces chaos. Drivers are working as long as sixteen hours per day, in their desperate efforts to eke out a living. Cabs are allowed to go unrepaid. . . .

Together with the rise in the accident rate there has been a sharp decline in the financial responsibility of taxicab operators. Too frequently the victims of taxicab accidents must bear the loss because the operator has no resources of his own and no liability insurance. There is no excuse for a city exposing its people to such dangers.\textsuperscript{12}

Economists of the era argued that taxis were a declining cost industry; excessive competition between numerous small operators decreased carrier efficiency and increased consumer costs.\textsuperscript{13} The U.S. Department of Transportation also summarized the tenor of the times:

The excess supply of taxis led to fare wars, extortion, and a lack of insurance and financial responsibility among operators and drivers. Public officials and the press in cities across the country cried out for public control over the taxi industry.

The response was municipal control over fares, licenses, insurance and other aspects of taxi service.\textsuperscript{14}

III. Contemporary Statutory and Regulatory Criteria Governing the Taxi Industry

Virtually all municipalities engage in taxi industry regulation under state legislation requiring or permitting such regulation, which itself acts under the guise of the state's police power. Although sometimes challenged as unconstitutional on various grounds, or preempted by federal law, these statutes and municipal ordinances have been nearly universally

\textsuperscript{11} Frankena & Pautler, supra note 9, at 75.
\textsuperscript{12} Taxicab Chaos, Wash. Post, Jan. 25, 1933, editorial page.
\textsuperscript{14} U.S. Dept of Transp., supra note 6, at 6-7.
Typically, taxis are regulated at the local level, with city or county boards restricting the number of firms and number of taxis (with the issuance of medallions), and setting prices (usually on a mileage basis), safety, insurance and service standards. Their decisions are given extreme deference by reviewing courts. In this section, several of the approaches to economic regulation of taxis in some of the nation’s major cities are examined. As we shall see, their similarities are far more numerous than their differences.

A. New York

The state of New York permits its municipalities to adopt ordinances which require the registration and licensing of taxicabs. New York municipalities may also establish restrictions concerning parking and passenger pick-up and discharges. Jurisdiction to promulgate rules and regulations concerning the supervision and operation of taxis has been vested in the Police Commissioner. Typically, the municipal ordinances require that taxis be insured for specific amounts.

New York City has regulated its taxis since the 1930s. Medallions were limited to 11,787 in 1937, causing the medallion price to reach exorbitant levels, itself generating some measure of legitimate criticism of taxi regulation.

B. Los Angeles

In contrast to New York, which permits municipalities to enact taxi regulations, the Texas and California state statutes require municipalities to regulate the local taxi industry. These municipalities may enact ordinances which regulate entry, such as “controls, limits or other restrictions

15. See e.g., Golden State Transit Corp. v. City of Los Angeles 726 F.2d 1430 (D.C. Cir. 1983), cert. denied, 105 S. Ct. 1865 (1983). Here, a municipality’s taxicab regulation survived scrutiny under the Sherman Act, as it fell under the “state action” exemption to that legislation. Although Title VI of the Federal Aviation Act of 1994 preempted intrastate regulation of motor carriers of property, it did not preempt intrastate regulation of the transportation of passengers. The Bus Regulatory Reform Act of 1982, although providing for Interstate Commerce Commission review of intrastate entry, exit and rate regulation, did not apply to the taxi industry. See also Rudack v. Valentine, 295 N.Y.S. 976 (1937) (taxi statute unsuccessfully challenged on grounds that it violated claimant’s due process rights).
17. Id.
21. California’s statute is typical:
[Every city or county shall protect the public health, safety, and welfare by adopting an ordinance or resolution in regard to taxicab transportation service rendered in
on the total number of persons providing the services, rates, safety and insurance requirements” and other requirements which will “ensure safe and reliable passenger transportation service.”

The city of Los Angeles requires an applicant to prove “public convenience and necessity” in order to gain entry into the taxicab industry, with entry, rates and business practices governed by the Los Angeles Board of Transportation Commissioners. In evaluating the PC\&N criterion, the Board may consider the applicant’s financial capability, evidence that existing taxicabs “are not, under efficient management, earning a fair and reasonable return on their capital devoted to such service . . .”, that existing taxicabs “. . . are or are not, under normal conditions, adequately serving the public . . .”, and “. . . whether existing services are meeting the need or demand.”

The Los Angeles ordinance includes the typical requirements of insurance, an approved identification system of color and signage, rate regulation, a requirement that the driver take the most direct route and not charge more than the prescribed fare, and describes the circumstances under which a driver or vehicle permit may be temporarily or permanently suspended or revoked. The rules adopted by the Board of Transportation Commissioners include precise safety regulations (including maximum age of vehicles, inspection, maintenance, repair, seat belt and other requirements), cleanliness of vehicle, courtesy and honesty of driver, and common carrier service obligations.

C. Houston

The licensing of new entrants under the Houston municipal Code requires a hearing by the city Department of Finance and Administration

vehicles for carrying not more than eight persons, excluding the driver, which is operated within the jurisdiction of the city or county . . . .

CAL. GOV’T CODE § 53075.5 (West Supp. 1996). The California Public Utilities Commission may not regulate the local taxi industry if it is already licensed and regulated by the city. People v. San Francisco, 155 Cal. Rptr. 319 (1979). Texas requires the municipality to regulate not only the area within its jurisdiction, but also jointly owned municipal property and property “in which the municipality possesses an ownership interest.” TEX. LOCAL GOV’T. § 215.004 (West 1995)

23. LOS ANGELES MUN. CODE, ch. VII, art. 1, §§ 71.00, 71.12.
24. Id. § 71.13.
25. Id. § 71.14.
26. Id. §§ 71.16, 71.19, 71.20, 71.21.
27. Id. § 71.22.
28. Id. § 71.25.
29. Id. § 71.23.
30. Id. § 71.24.
31. Id. §§ 71.01 - 71.10.
under a “public convenience and necessity” standard, in which applications are denied unless the applicants are able to prove, by clear and convincing evidence, that the standard is met. In assessing the PC&N standard, the director of the Department must evaluate the number of vehicles to be operated, the effect of new entry on traffic congestion (vehicular and pedestrian), the number of permits in operation, the impact on existing permit holders, and “any other facts the director may deem relevant.”

33. Houston, Tex., Code of Ordinances § 46-66 (1968). The Houston Code requires all applications for the $400 taxicab permits to be filed in January of even-numbered years for a hearing the following month. Ordinance 93-155 of the City of Houston amended § 46-64 of the Houston Code, requiring taxicab permit hearings to be held in even-numbered calendar years, where previous hearing were conducted annually. The director of the department of finance and administration conducts the hearings under a “public convenience and necessity standard” in which all applicants are denied unless they are able to provide clear and convincing evidence that the standard is met. Houston, Tex., Code of Ordinances § 46-66 (1968). However, the director retains absolute discretion in determining whether public convenience and necessity requires the issuance of additional permits, since Houston ordinances require the director to consider not only enumerated factors such as effects on traffic congestion, the number of existing permits in operation, and potential economic impact on existing permit holders, but also “any other facts the director may deem relevant.” The Houston Code § 46-66 provides in part:

In determining whether public convenience and necessity require the issuance of the taxicab permit to the application, the director shall take into consideration:

(3) Number of vehicles to be operated.

(6) The effect of additional vehicles upon the traffic congestion, vehicular and pedestrian alike.

(10) The total number of taxicab permits in operation.

(11) Whether the requirements of public convenience and necessity can be met and complied with only by the issuance of additional permits.

(12) The resulting effect upon the business of existing permit holders and upon existing agencies of mass transportation in the city.

(13) Any other facts the director may deem relevant.

34. The taxicab business in Houston, Texas, has traditionally been controlled by Yellow Cab company, which prior to 1993 held almost 70% of the 2,098 annual permits issued by the City of Houston. Cab Deregulation Draws Praise, Criticism, Houston Post, Sept. 13, 1993. In September, 1993, the Houston City Council voted to award 49 new taxicab permits, predominantly to smaller cab companies, in an effort to respond to a rosier economic outlook and a perceived need for more competition in the industry. The partial deregulation by the City Council signaled a new approach by the Regulatory Affairs Office of the City of Houston in allowing an increase in the number of permits, an action which was vigorously opposed by Yellow Cab. In addition to the increase in the number of taxicab permits in Houston, the city increased the taxi fares slightly from $1.50 for the first 2/11 mile and $0.30 for each additional 11/45 mile to $1.50 for the first 1/9 mile and $0.30 for each additional 2/9 mile, while eliminating a provision providing a maximum per-cab fare for trips within the downtown area. Houston, Tex., Ordinance § 93-9 (1993). Flat rates to Houston Intercontinental Airport (IAH) and maximum waiting time charges also increased under the amended ordinance, so while Houston has increased the level of taxicab competition by allowing easier entry, it appears that pricing controls will remain in effect to prevent fare wars among the larger taxi fleet.

Despite Houston’s relaxation of entry, the city retains firm control of the taxicab routes
D. ChicAgO

The Municipal Code of Chicago provides a system of strict regulation of license acquisition and fare setting. The code is typical of the entry criteria imposed by most cities on the taxi industry. It requires that new entry be permitted only where consistent with the "public convenience and necessity", which is to be determined with an evaluation of public demand, safety, the economic impact on competitors, and the wages, hours and conditions of drivers.

between the city and its two major airports, IAH and William P. Hobby Airport (HOU). Any taxicab departing either airport with passengers is required to pay a flat fee to cover the city's administrative and related expenses, and pricing to and from IAH is controlled by a flat rate scheme based on the division of the city of Houston into seven zones. Taxicab standing queues have been established at IAH, limiting passenger pick up to only those cabs that are operating under a valid city permit, and eligible cabs may receive a priority reassignment (thereby moving to the front of the queue) if the taxicab returns to the departure zone within forty-five minutes of its previous departure. Houston, Tex., Code of Ordinances § 46-26 (1968). Although the city of Houston continues to regulate the lucrative airport routes, and general meter pricing, it remains to be seen what effect relaxed entry standards will have on Houston's taxicab business. One Houston City Councilman has suggested that relaxed entry has signaled the death knell of regulation. Cab Deregulation Draws Praise, Criticism, Houston Post, Sept. 13, 1993. City Councilman Frank Mancuso is quoted as saying: "In my opinion, we no longer regulate cabs. It's that simple. Everybody and anybody is going to be out there now. It doesn't bode well to lose complete control like that."

In determining whether public convenience and necessity require additional taxicab service, due consideration shall be given to the following:
1. The public demand for taxicab service;
2. The effect of an increase in the number of taxicabs on the safety of existing vehicular and pedestrian traffic;
3. The effect of increased competition;
a. On revenues of taxicab operators;
b. On the cost of rendering taxicab service, including provisions for proper reserves and a fair return on investment in property devoted to such service;
c. On the wages or compensation, hours and conditions of service of taxicab chauffeurs;
4. The effect of a reduction, if any, in the level of net revenues to taxicab operators on reasonable rates of fare for taxicab service;
5. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional taxicab service, the council, by ordinance, may fix the maximum number of taxicab licenses to be issued, not to exceed the number recommended by the commissioner.

36. Chicago, Ill., Mun. Code, ch. 4-348 (1956). In 1960, the public vehicle license commissioner of Chicago was granted authority to issue additional taxicab licenses up to a maximum of 4,600, increasing the prior limitation of 3,761 medallions. Under the municipal code, the commissioner was required to report a finding of "public convenience and necessity" based on public demand, traffic safety considerations, industry competition effects, and commissioner discretion, before licenses could be increased up to the 4,600 ceiling. Over the last twenty-five years, taxicab medallions were predominantly in the hands of the two largest cab companies, Checker Taxi Company and Yellow Cab Company. These two companies controlled 80% of the Chicago licenses, prompting the Chicago City Council to propose the issuance of 1,500 additional licenses in 1988, to be distributed over a three year period, with open entry slated for 1991. Faced with
The St. Louis city ordinance is also typical of those governing the taxi industry. It establishes a Board of Public Service to issue certificates of PC&N, determined on the basis of:

[Whether the demands of the public require the proposed or additional taxicab service within the City; that existing taxicab service is not sufficient to properly meet the needs of the public; the financial responsibility of the applicant; the number, kind, type of equipment and color scheme proposed to be used; the increased traffic congestion and demand for increased parking space upon the streets of the city which may result, and whether the safe use of the streets by the public, both vehicular and pedestrian, will be preserved by the granting of the additional license; and other relevant facts as the Board may deem advisable or necessary.37]

Vehicles must be painted in distinctive colors38 and must be “in a thoroughly safe condition for the transportation of passengers, clean, fit, of good appearance and well painted.”39 Taxis must be equipped with posted fares and taximeters, with fare schedules filed with and approved

the prospect of rapid deregulation, Checker and Yellow Cab forged an agreement with the City of Chicago, providing an increase in medallions of 1,100, coupled with the relinquishing of 1,300 medallions by Checker and Yellow Cab for reassignment, over a ten year period. Ann Marie Lipinshi & Jane Tanner, Taxi Deal Gets Council’s O.K After a Battle Royal, CHI. TRIB., Jan. 28, 1988, at C1, C2. The new and relinquished licenses are awarded to independent drivers by lottery, whose market share will increase to 59% by 1998.

Chicago’s movement toward liberalized entry will particularly impact medallion owners, who received $20,000 on the open market for a medallion in 1988. With each issuance of a medallion through the lottery, the medallion value drops, as lottery winners are able to limit their taxicab license investment to $250. The Chicago agreement may also affect taxicab fare regulation, in which the Chicago City Council has been traditionally hesitant to increase fares. Despite rate increases of roughly 30% in March, 1990, Chicago’s rates were significantly lower than those of other major U.S cities. See James Strong, Time to Dig Deeper for Taxi Rides, CHI. TRIB., Mar. 9, 1990, at C4, C5. Rate increases made by the City of Chicago in 1991 were the first since 1981. Jerry Feldman, the president of Checker Taxi Company, Inc., testified before a City Council hearing in 1991 that a three-mile taxi ride in Chicago which costs $3.60 would be at least $6.50 in Los Angeles, $5.50 in Philadelphia, and $4.60 in New York City.

Within three years, the City of Chicago survived a challenge to its deregulation scheme when Checker and Yellow Cab were determined to have violated the 1988 ordinance by setting up “sham companies” which financed the purchase of licenses for drivers in return for the driver putting the medallion up for collateral. P. Davis Szymczak, City Gets Rare Victory Over Cab Companies, CHI. TRIB., May 24, 1991, at C2. If the driver defaulted on the financing, the medallion passed to the cab company, effectively circumventing the city’s goal of limiting the market share of Checker and Yellow Cab. Although the City of Chicago was able to keep the move to liberalized entry alive, given the resistance by the large taxicab companies in Chicago, it is unclear whether the market will be open in 1988, or whether the City will forge another limited regulation agreement.

37. ST. LOUIS, MO., ORDINANCES 58795, § 8.98.023.
38. Id. § 8.98.113.
39. Id. § 8.98.101.
by the Board of Public Service. To ensure compliance, vehicles shall be inspected annually. Liability insurance must be maintained. To eliminate conflict between drivers, specific rules of conduct apply at taxi stands:

Taxicab drivers entering a taxicab stand shall do so from the rear, and shall progress toward the front thereof whenever the opportunity to do so is present. The driver in the foremost position shall be entitled to serve the first customer arriving at that location, provided, however, that should the customer elect to employ any other taxicab, he shall have a free choice thereof at all times.

A common carrier obligation is imposed on drivers to accept all potential patrons, except service “to anyone who is intoxicated or may present a personal safety hazard, and . . . any person in furtherance of any unlawful purpose.”

F. BOSTON

Legislation promulgated by the Massachusetts legislature in the 1930s gave the police commissioner of Boston the power to authorize not more than 1,525 taxis to “suitable persons, firms and corporations who are owners of vehicles known as hackney carriages . . . .” Regulations promulgated by the Boston Police Commissioner call for a $10 fee for a hackney carriage license, and a $2 fee for a hackney driver’s license, probably the lowest such fees in the nation. Nonetheless, because of the limited number of medallions issued, the market price for an existing medallion has approached $90,000 in recent years.

In 1989, metered fares were increased 19%, raising the fare for a two-mile trip from $3.50 to $4.30. Boston Police regulations also call for annual vehicle inspections, a card displaying rates in the rear compartment of the taxicab, etiquette in taxi stands, appropriate driver ap-

40. Id. §§ 8.98.107, 305.
41. Id. §§ 8.98.155-167.
42. Id. §§ 8.98.172-173, 185-186.
43. Id. § 8.98.425.
44. Id. § 8.98.449.
46. See City of Boston, Rules and Regulations Established by the Police Commissioner for the City of Boston for Hackney Carriages and Hackney Stands in Accordance with Chapter 392 of the Acts of 1930, as amended, §§ 2, 4. See also, City of Boston, Hackney Carriage Training Manual.
47. Suzuki, supra note 20, at 130.
49. City of Boston, supra note 46, § 7.
50. Id. §§ 8, 17.
51. Id. § 12.
pearance\textsuperscript{52} and behavior,\textsuperscript{53} including a prohibition against transporting dead bodies.\textsuperscript{54}

G. MINNEAPOLIS

The Minneapolis Taxicab Ordinance has three purposes: (1) to achieve "...a better cab service for the riding public..."; (2) provide "greater safety and protection to the public..."; and (3) establish "better operating conditions for cab owners and drivers."\textsuperscript{55} In determining whether the public convenience and necessity warrant new entry, the city council must conduct a hearing, at which the following criteria shall be considered:

[T]he level and quality of service being provided by existing taxicab operators; whether additional competition would improve the level and quality of service or the degree of innovation in delivery of services; the impact upon the safety of vehicular and pedestrian traffic; the impact upon traffic congestion and pollution; the available taxicab stand capacity; the public need and demand for service; the impact on existing taxicab operators; and such other factors as the city council may deem relevant.\textsuperscript{56}

The Minneapolis ordinance also specifies requirements regarding the qualifications of new entrants, requiring the city council consider:

[T]he financial capability and responsibility of the applicant; the applicant's prior experience in the taxicab business; the level and quality of taxicab service provided by the applicant in the past in areas in which it has operated; the experience and competence of the applicant's drivers; the applicant's prior record of compliance with the taxicab ordinance including complaints and disciplinary actions against drivers and vehicle owners; the applicant's prior record of service complaints; the age and condition of the vehicles proposed to be licensed by the applicant; and such other factors as the city council may deem relevant.\textsuperscript{57}

Drivers must be courteous,\textsuperscript{58} assist passengers,\textsuperscript{59} accept all paying passengers,\textsuperscript{60} give them receipts upon request,\textsuperscript{61} not smoke without their permission,\textsuperscript{62} not overcharge them,\textsuperscript{63} drive safely,\textsuperscript{64} carry liability insur-
ance, and pass a driver training course. The ordinance goes so far as to prescribe the clothing drivers shall wear, prohibiting as outergarments: “T-shirts, underwear, tank tops, swimwear, jogging suits, body shirts, shorts, cut-offs, trunks, or similar attire . . . .” Licenses may be revoked or suspended for good cause after notice and hearing.

H. Denver

While most city governments regulate their own taxi companies, Colorado is something of an anomaly in that the state Public Utilities Commission [PUC] regulates the taxi industry of Colorado’s major cities. Until 1994, entry licensing in the Colorado taxi industry was governed by the standard of “regulated monopoly”; beginning in 1994, it was governed by the standard of “regulated competition.”

Under the prior “regulated monopoly” regime, no finding of public convenience and necessity for additional common carrier authority was justified unless the applicant could demonstrate that the existing operations were substantially inadequate, for “the existence of an adequate

63. Id. § 341.250(n). Rates are dealt with in §§ 341.710-810.
64. Id. § 341.120.
65. Id. § 341.500.
66. Id. § 341.380.
67. Id. § 341.130.
68. Id. § 341.980.
70. Prior to 1967, motor common carriers of property were governed by a statutory provision restricting new entry under a standard of “regulated monopoly.” In 1967, the Colorado legislature changed the standard to one of “regulated competition.” See Denver Cleanup Serv., Inc. v. Pub. Util. Comm’n, 192 Colo. 537, 541, 561 P.2d 1252, 1254 (1977) (by changing the law, “without question [the General Assembly] intended to protect the public health, safety, and general welfare by providing a framework for the better transportation of persons or property.”)
71. Judicial and agency precedent interpreting the import of the parallel 1967 statutory change is instructive as to the standards to be employed in considering the parallel legislative change in 1994 by the Colorado legislature of entry standards governing taxi companies.
72. The Colorado Supreme Court observed that: [U]nder the policy of regulated monopoly, additional common carrier authority was not granted where adequate service was already being rendered. . . . In accordance with this theory of regulated monopoly, we have held that a common carrier serving a particular area is entitled to protection against competition so long as the offered service is adequate to satisfy the needs of the area, and no finding of public convenience and necessity for common carrier service is justified unless present service offered in the area is inadequate.

and satisfactory service by motor carriers already in the area is a negation of public need and demand for added service by another carrier."\textsuperscript{73}

The Colorado Supreme Court held that while inadequacy of existing services may be considered by the PUC in a "regulated competition" environment, it is no longer the controlling criterion that it had been in a "regulated monopoly" regime.\textsuperscript{74} Under the "regulated competition" standard, the controlling criterion is the "public interest" or the "public need."\textsuperscript{75}

In its seminal decision of \textit{C.M. Morey v. Public Utilities Commission}\textsuperscript{76} [\textit{Morey II}], the Colorado Supreme Court observed that the consideration of the public need for safe, adequate, dependable, efficient and reasonably priced transportation services warrants an evaluation of the impact that potential new entry may have in creating excessive or destructive competition.\textsuperscript{77} In assessing new entry proposals for taxi service in Colorado, the issue of destructive competition is at the heart of an assessment of the public's interest in avoiding impaired transportation services or higher rates. Neither can "regulated competition" reasonably be interpreted as supporting unlimited entry.\textsuperscript{78}


\textsuperscript{75} C.M. Morey, 196 Colo. at 157-58, 582 P.2d at 688; C.M. Morey v. Pub. Util. Comm’n, 629 P.2d 1061, 1065 (Colo. 1981) (hereinafter \textit{Morey II}). In assessing the evidence, the public need is broader than the individual needs or preferences of an applicant's customers. In determining whether a public need exists, the PUC may consider the needs and preferences of the witnesses who testify in favor of the applicant, although they are not determinative. \textit{Morey II}, 629 P.2d 1061, 1066 (Colo. 1981). The public need consists of the needs of the public as a whole.

\textit{Id}. at 1067.

\textsuperscript{76} \textit{Morey II}, 629 P.2d 1061, (Colo. 1981).

\textsuperscript{77} The court held:

"As a corollary of our holding that the "public need" is broader than the individual needs and preferences of an applicant's customers, we agree that the Commission may consider the impact additional competition may have, not only on the conflicting economic interests of competing carriers, but also on the ability of existing carriers to provide their customers and the public generally with safe, efficient and economical transportation services. The obligation to safeguard the general public against the impaired services and/or higher rates accompanying destructive or excessive competition is at the heart of the policy of regulated competition."

\textit{Id}. at 1066 [citations omitted]. "Because of this obligation, the PUC can require a carrier to serve unprofitable routes that are important to certain segments of the population as a condition of granting it authority to operate more lucrative routes." Durango Transp., Inc. v. Durango, 786 P.2d 428, 431 (Colo. Ct. App. 1989).

\textsuperscript{78} In \textit{Morey II}, the Colorado Supreme Court affirmed the PUC, which denied a new application on the basis of evidence which established that:

- The market for transportation services in the affected areas was relatively inelastic;
- The operating capacities of existing common carriers were underutilized;
- The operating revenues of existing carriers were low; and
IV. THE ECONOMIC CHARACTERISTICS OF THE TAXI INDUSTRY

A. INDUSTRY SIZE & STRUCTURE

Taxicab companies comprise a $6.5 billion industry employing nearly 300,000 people,\textsuperscript{79} of whom 225,000 are drivers.\textsuperscript{80} It has been estimated that the taxicab industry transports more passengers than all U.S. mass transportation systems combined.\textsuperscript{81}

The taxi industry is a common carrier form of urban transportation, differing from its mass transit rivals in that it is privately owned, operates over public streets on no fixed routes, and provides door-to-door (or point-to-point) service in small vehicles on behalf of, and at the direction of, individual or very small numbers of patrons.\textsuperscript{82} Typically, the contract between the driver and passenger is informal and \textit{ad hoc}. Where regulated, the price is usually based on the distance (and sometimes the dura-

\textsuperscript{79} Additional competition for present and prospective business would seriously impair the ability of existing carriers to continue to provide efficient and economical service to the public.

\textit{Morey II}, 629 P.2d at 1066.

The Colorado Supreme Court subsequently reaffirmed each of these principles. In Trans-Western Express, Ltd. v. Pub. Util. Comm’n, 877 P.2d 350 (Colo. 1994), the Supreme Court concluded that the entry standard of “regulated competition” is to be applied as follows:

1. Under the doctrine of regulated competition, the controlling consideration is the “public need” or the “public interest.” \textit{Id}. at 353;
2. The burden of proof in establishing public need is on the applicant. \textit{Id}.;
3. The public need is broader than the individual needs and preferences of an applicant’s customers, and consists of the needs of the public as a whole. \textit{Id} at 354;
4. The public need is advanced by “safe, efficient, and economical transportation services.” \textit{Id}.;
5. The PUC may consider the adequacy or inadequacy of existing services in determining the public need. \textit{Id}.;
6. The Commission may consider the impact of additional competition on the economic health of existing carriers, as well as their ability to provide the public with safe, efficient and economical service. \textit{Id}.;
7. “Providing for the public need and regulating competition demands that some restraints be placed upon inter-carrier competition therefore avoiding destructive competition.” \textit{Id}. at 353, n.7 \textit{citing Morey II}, 629 P.2d 1061, 1066;
8. “The doctrine of regulated competition requires the PUC to deny an application for common-carrier authority if granting the application would create ‘excessive’ or ‘destructive’ competition.” \textit{Id}. at 354 citing \textit{Morey II} 629 P.2d at 1066-67.


\textsuperscript{80} Eno Transportation Foundation, Transportation in America 62 (12th ed. 1994).

\textsuperscript{81} Rosenbloom, \textit{supra} note 13.

tion) of the ride. Airport vans and limousines differ in that they typically operate over fixed routes while taxicabs proceed directly to the destination designated by the patron.

The taxi industry may be divided into several distinct segments:

1. **Radio-Dispatched Cabs**

   The radio dispatched portion of the taxicab industry involves a central dispatching system whereby patrons call by telephone and cabs are summoned by radio. Taxis are equipped with two-way radios, and fleets are typically larger and have centralized maintenance and repair facilities. Economies of scale have been acknowledged to exist in this segment of the industry due to indivisibilities of the inputs employed in marketing, dispatching, and management, as well as the need for a sufficiently large fleet to provide adequate service within reasonable time within a designated service territory. Thus, this segment of the industry is likely to be relatively concentrated. In most cities, the telephone order market accounts for 70%-80% of the overall demand for taxi service.

2. **The Cabstand Business.**

   Cabstands exist with queues for both taxis and passengers at concentrated locations such as airports and hotels.

3. **Cruising Cabs.**

   The cruising cab business consists of taxis driving along streets on which pedestrians congregate, searching for a random patron to hail them. It is profitable only in downtown urban areas of large cities where a high density of potential riders exists at random locations; the cruising cab business does not work well in cities with low density populations.

83. Kemp, *supra* note 4, at 57.
84. *Id.*
85. Frankena & Pautler, *supra* note 9, at 11-12.
87. Frankena & Pautler, *supra* note 9, at 54-55; Gilbert & Samuels, *supra* note 10, at 150 ("When revenue, and hence profit, is considered ... it appears that larger firms do have access to significant economies of scale. First, they are more likely to be able to respond quickly to trip requests than are many small firms serving the same area independent of each other."). See also Teal & Berglund, *supra* note 4, at 49 ("Costs for a new entrant include radio equipment, facilities, personnel and a fleet large enough to provide responsive city-wide service where there are thought be 'economies of scope'.").
88. Teal & Berglund, *supra* note 4, at 38.
89. *Id.* at 39.

Sometimes a public agency contracts with a taxi company to provide one of more of the following services:

(A) traditional fixed route transit or demand-responsive services in low-density areas, or late at night, often in lieu of existing fixed-route services;
(B) feeder services to fixed routes;
(C) paratransit services for special target groups such as the poor, the elderly, and the handicapped;
(D) involvement in user-side subsidy program; and
(E) brokerage services matching travelers to the most cost-effective provider for each service.91

B. Industry Costs

The costs of entry into the cabstand or cruising segments of the taxi industry are exceptionally modest, consisting principally of a chauffeur’s license, a down payment on a car, four re-tread tires, a few gallons of gasoline, and a couple of quarts of oil.

In the radio dispatch segment of the industry, fixed costs include the purchase price of a fleet of automobiles, depreciation, regular maintenance, the radio dispatching equipment and personnel to run it, marketing and advertising costs, insurance, driver training, and license and permit fees. Variable costs in the industry are generally a function of distance, duration and destination which consume variable rates of fuel, oil and labor.92 Labor expenses have been estimated to constitute 50% of the cost of taxi service.93

Many costs are joint costs, spread over the outbound and inbound segments of the journey. A trip without dead heading enjoys two segments of revenue over which to spread both fixed and variable costs. For example, a thirty-mile passenger trip to a commercial airport enjoys a high probability of returning with a paying passenger, while a thirty-mile passenger trip to a remote suburban community has a high probability the taxi will return empty.94 The relationship between cost and revenue of these two equivalent trips will differ significantly because of the existence or non-existence of a paying patron on the return leg of the journey.95 In the absence of regulation, a taxi driver has a strong incentive either to refuse service to a patron seeking transportation to a remote community from which there is unlikely to be a return trip (or to charge a

92. See Gallick & Sisk, supra note 9, at 117-8.
93. Teal & Berglund, supra note 4, at 49.
94. Gallick & Sisk, supra note 9.
95. Id.
price much higher, on a per-mile basis, than is charged elsewhere), and to queue for profitable trips at cabstands.96

Where profits are inadequate (as results for example, where entry is deregulated) the principal costs which can be trimmed are drivers' wages, vehicle maintenance, and the purchase of new equipment. However, taxi driver wage rates are already among the lowest in the labor force.97

C. THE PASSENGER MARKET

The market for taxicab services can be divided into several distinct segments, each with its own demand characteristics:

1. The Transportation Disadvantaged.

The "transportation disadvantaged" include the elderly, unemployed, handicapped, children and low-income persons. In fact, a large proportion (perhaps most) of the users of taxicab service are persons of low income.98 For example, a 1970 study of taxi use in Pittsburgh revealed that 58% of those who used taxis regularly did not own an automobile; 60% of the trips were made by housewives, students, or unemployed, retired or incapacitated individuals.99 The 1975 National Personal Transportation Study revealed that 60% of all taxi services are provided to the transportation disadvantaged. A Federal Trade Commission study concluded that, "the low-income population spends higher shares of their income, and often simply more dollars, on taxis than does the high-income population."100

Hence taxis play an essential role in transporting the disadvantaged, low mobility, and lower income segments of the population.101 The poor are particularly reliant on the radio dispatched segment of the market.102

2. Non-Residents.

In large cities, the market also consists of a substantial number of out-of-town business, convention or vacation visitors.103 These travelers do have a competitive alternative in the form of rental cars, although usually at a much higher price than taxicabs.104 Business travelers also may not be as highly sensitive to the price of taxicab service since many are on

96. Id. at 120.
97. Teal & Berglund, supra note 4, at 49.
98. See supra note 13.
99. Teal, supra note 82.
100. Frankena & Pautler, supra note 9, at 3.
101. See Gilbert & Samuels, supra note 10, at 112.
102. Frankena & Pautler, supra note 9, at 12.
103. See Teal, supra note 82, at 14.
104. Barker & Beard, supra note 8, at 44.
their company's expense accounts. 105

3. Affluent Residents.

The wealthy are not financially burdened by the regular use of taxicabs, and enjoy the personalized nature of the service and its convenience. 106 In certain densely populated cities, particularly those in the Eastern United States, with their congested streets and limited and expensive parking, a large number of residents find a private automobile an inconvenient way to travel.

V. MARKET IMPERFECTIONS

A. THE ABSENCE OF A COMPETITIVE MARKET.

In the cabstand market, the “first in, first out” rule severely restricts comparative shopping by consumers. 107 In both the cabstand, and the cruising cab market, competitive shopping is impractical, and the transaction costs to prospective passengers of finding the taxi with the lowest price can be problematic. 108 One source summarized the practical problems with competitive shopping at cabstands:

First, space on airport or hotel stands is usually severely limited and cabs not at the head of the line often do not have a safe manner in which to pull out from the queue when hired. Second, there is no way in which one cab can be made to wait while a prospective passenger goes shopping. 109

Another observed:

[The cab stand market] is a system that impedes price competition, because it puts drivers in a stronger position than customers. . . . Moreover, airport customers are unlikely to dicker with or refuse a cab that seems to be assigned to them, especially when they do not know local fares or know that legal fares may vary, or when they are on expense accounts and not much concerned about costs. . . .

In cab lines . . . the deterioration in quality also occurs because there can be little competition on the basis of either quality or price. 110

Given these practical difficulties, it is not at all clear that a competitive market for taxi services either exists or can be created. 111 As one

105. FRANKENA & PAULTR, supra note 9, at 129.
106. See BARKER & BEARD, supra note 8 at 44; GILBERT & SAMUELS, supra note 10, at 111; SAMPSON, ET AL., supra note 79, at 150.
107. FRANKENA & PAULTR, supra note 9, at 142.
108. GILBERT & SAMUELS, supra note 10, at 151; FRANKENA & PAULTR, supra note 9, at 51.
109. GILBERT & SAMUELS, supra note 10, at 152.
111. “Supply and demand analysis is inapplicable to the cruising taxicab market. The condi-
source observed, "It is not certain . . . that a 'market' in the pure economic sense even exists."\(^{112}\) Moreover, visitors from other cities may be unaware of the prevailing price for taxicab services, or whether the passenger is protected from exorbitant pricing by a regulatory authority.\(^{113}\)

Absence of a competitive market exists not only at cabstands, but in the cruising market as well. Competition in the cruising market is unlikely unless a number of taxis congregate in a single location at the same time the patron is present.\(^{114}\) One commentator lamented the absence of a traditional competitive market in the taxi business, noting that time is of the essence in the procurement of taxi services:

> Commuters almost always grab the first cab that drives by, as opposed to shopping for a taxi like, say, a restaurant, where the choices are arrayed and where the business with the best or most efficient service wins. All of which means that the fruits of a free market—namely that competition allows the best to thrive and prompts the worst to go broke—are lost. Ultimately, deregulation in the cab industry provides an incentive for all involved to offer the cheapest service allowable.\(^{115}\)

The spatial nature of the industry inhibits price shopping, thereby creating somewhat inelastic demand.\(^{116}\) Professor Chanoch Shreiber put it best:

> Unlike other atomistic markets, a taxicab market in which cruising is the main method of operation will seldom give rise to pricing competition. In most industries sellers are at a fixed location, and customers have the ability to shop around for price and return to the seller offering the best terms. A seller can thus, by reducing his price expect to gain more business, since some customers shopping for price will switch to him from his competitors. Not so in the case of taxicabs. An individual cab operator, acting independently, cannot gain more passengers if he alone reduces his price below the going market rate.\(^{117}\)

Professor Shreiber goes on to point out that because a prospective

\(^{112}\) Gilbert & Samuels, supra note 10, at 151.

\(^{113}\) Frankena & Pautler, supra note 9, at 50.


passenger who values his or her time will not likely turn down the first available cab on the basis of price, this will have an “upward pressure on the price.”118 A consumer hailing a cab from a sidewalk has an incentive to take the first taxi encountered, because both the waiting time for the next cab and its price are unknown.119 Paradoxically, in an open entry regime, prices tend to rise while vehicular utilization rates tend to fall.120 Potential patrons for whom price is a determinative factor, but time is not, may take the bus, subway, or some other form of public transport, where and when it is available. However, little cross-elasticity of demand appears to exist between the taxicab and mass transit industries, for most taxi demand is time sensitive.121

B. IMPERFECT INFORMATION & TRANSACTIONS COSTS.

The free market competitive model assumes consumers have “perfect information.” Yet consumers buying taxi service in a deregulated market often have little comparative pricing or service information, for the opportunity costs of acquiring it are high. As one source observed, “there is little incentive for price comparison for the occasional taxi user, as transaction costs (in time and effort) are high in relation to the potential savings (less than $1 for a $5 to $6 trip).”122

It is, quite simply, difficult for a consumer to assess the quality of transportation service at the time it is ordered, for transportation is in the nature of a “credence good”—one that cannot be examined prior to consumption.123 A prospective patron can tell something about a taxi visually by the make and model of the automobile, as well as its dents, scrapes and paint job. But not until s/he enters the taxi will s/he know how long the trip will take or how circuitous the trip will be, how smooth and comfortable the ride will be, how knowledgeable and courteous the driver may be, and whether the price will be a fair one.

The efficient acquisition by consumers of useful information on pricing is problematic in the cab stand and cruising markets, for reasons explained above. Comparative shopping on the basis of price is difficult even if fares are posted because of the number of variables which comprise the total price—drop, mileage, wait time, baggage, and additional passenger charges.

Economist Alfred Kahn has observed several problems emerging from destructive competition, including consumers having a “limited abil-

118. Id. at 271.
119. Teal & Berglund, supra note 4, at 38.
120. Foerster & Gilbert, supra note 114, at 378.
121. Shreiber, supra note 90, at 82.
122. Teal & Berglund, supra note 4, at 50.
123. Dempsey & Goetz, supra note 2, at 276.
ity to judge the quality of products and hence to keep it at acceptable levels even when they have a wide range of competitive suppliers to choose from." 124 Given that comparative shopping by patrons for the best price/service combination is severely circumscribed by the absence of a true competitive market, regulation of prices and services can significantly reduce consumer transactions costs, thereby increasing the number and variety of taxi trips. 125

C. EXTERNALITIES.

An external effect of a transaction is the positive or negative impact upon a person not a party to it. 126 The negative externalities of taxicab service are felt by other users of finite road and highway resources, and the environment. Again, Professor Shreiber observes that "[i]taxicabs impose various external costs. Mainly, they increase traffic congestion and raise the level of air pollution. . . . The price of a ride in a system of free entry will cover only the private cost. The social cost per ride, which includes the externalities, will necessarily exceed the price." 127

It has been argued that restrictions on entry increase efficiency by reducing the street congestion and air pollution caused by an excessive number of vehicles. 128 Garrett Hardin, in his powerful essay, "The Tragedy of the Commons," provides insight as to the economic forces leading a rational wealth maximizer to advance his own economic interests by externalizing his costs:

"Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?" This utility has one negative and one positive component.

(1) The positive component is a function of the increment of one animal.

125. Gallick & Sisk, supra note 9, at 117, 119, 127.
126. Dempsey, supra note 3, at 17.
127. Shreiber, supra note 117, at 274.
128. See FRANKENA & PAUTLER, supra note 9, at 38, 42 ("[T]he operation of taxicabs on congested streets slows down other road users, increasing their time and money costs of travel."). Id. at 38.
Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.

(2) The negative component is a function of the additional over-grazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsman, the negative utility for any particular decision-making herdsman is only a fraction of 1.

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another. . . . [b]ut that is the conclusion reached by each and every rational herdsman sharing a commons. Therein lies the tragedy. Each man is locked into a system that compels him to increase his herd without limit — in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedoms of the commons. Freedom in a commons brings ruin to all.129

In an environment of excessive competition created by excessively liberalized entry, the city streets are commons, the taxi companies are herdsman, and the taxis themselves are cattle. Every additional taxi on the street brings the taxi company additional revenue (particularly where driver leasing creates an intermediate market between the taxi firm and its customers),130 although average taxi revenue will fall for all taxis as the streets become congested with more vehicles than necessary to meet aggregate passenger demand. Since each individual taxi company has an incentive to increase the size of its fleet beyond the collectively rational level, according to Hardin, "[r]uin is the destination toward which all men rush, each pursuing his own best interest in a freedom that believes in the freedoms of the commons."131

As we shall see in greater detail below, excessive taxicab entry has a negative impact in terms of industry productivity and profitability. But Hardin's main thesis is not about the economic decline of herdsman, but of the negative externality of another sort — pollution. He says:

In a reverse way, the tragedy of the commons reappears in problems of pollution. Here it is not a question of taking something out of the commons, but of putting something in. . . . The calculations of utility are much the same as before. . . . Since this is true for everyone, we are locked into a system of 'fouling our own nests,' so long as we behave only as independent, rational, free-enterprisers.132

The pollution impact of allowing an excessive number of underutilized automobiles on the streets for any environmentally conscious com-

130. See Teal & Berglund, supra note 4, at 54.
131. See Hardin, supra note 129.
132. Id.
munity is manifest. Hardin further points out that one means of avoiding the tragedy is by ascribing private property rights, or in effect, "de-commonizing" the commons. Licensing is one mechanism for creating such property rights, for no rational herdsman will overgraze land which is his, nor will a taxi company flood the streets within his certificated service territory with an excessive number of vehicles.\textsuperscript{133}

Still another externality involves the impact taxi service has upon a city's image, for the economy of a city as a whole may be adversely affected by poor or highly priced transportation services. The taxi is the first and last impression a city will make on visiting tourists, conventioneers, and businessmen. A city's hotels, restaurants, airport, convention and business traffic, are dependent upon ubiquitous, reasonably priced, and efficient on-demand taxi service.\textsuperscript{134}

Further, non-discriminatory pricing based on average costs can serve a significant social objective of assuring reasonably priced service to less affluent passengers or more remote communities, in effect requiring cross-subsidization by more affluent patrons or dense markets. In reviewing taxi regulatory issues, the U.S. Department of Transportation has observed, "[c]ross-subsidization, per se, is not automatically frowned upon if designed to meet some public policy objectives."\textsuperscript{135}

D. CROSS-SUBSIDIES AND CREAM SKIMMING.

Most governmental authorities insist, by regulation or local ordinance, that licensed taxis operate as "common carriers." That is, taxis are required to provide service to low-density areas or at nonpeak times without pricing discrimination (i.e., the same distance-based fare be charged to all on an "average cost" basis).\textsuperscript{136} Thus, dense markets cross-subsidize low-density and impoverished areas; peak traffic cross-subsidizes off-peak service.

Unlimited or excessive entry causes owner-operators to gravitate to high-peak high-density traffic, predominantly at the airport and hotel cabstands. As one source noted:

When gypsy, or unlicensed, taxis siphon business and profits they severely limit the profits that licensed carriers need to sustain other required services. The possibility of opening entry to a taxi market also raises fears that newcomers would focus on these more lucrative areas, and experience in some cities has validated these fears.\textsuperscript{137}

\textsuperscript{133} See generally, Dempsey, supra note 3, at 17-21.
\textsuperscript{134} Gilbert & Samuels, supra note 10, at 153-4.
\textsuperscript{135} U.S. DEP'T OF TRANSP., supra note 4.
\textsuperscript{136} See Gallick & Sisk, supra note 9, at 117.
\textsuperscript{137} Gilbert & Samuels, supra note 10, at 153; See generally Suzuki, supra note 20, at 129.
Deregulation results in some trips becoming very expensive while others decrease in price, with the cost of service no longer averaged over space and time. Professor James Foerster and Gorman Gilbert observed:

Persons with a low ability to pay, but a high need for transportation, may no longer be able to use taxi service.

These results might occur because there will no longer be any geographic or inter-temporal cross-subsidization. . . . The elimination of whatever cross-subsidies now exist without income transfers could lead to socially undesirable results. 138

And, as noted above, given that demand for taxi services is often time sensitive, economic regulation can reduce the transaction costs of comparative shopping. 139

E. ECONOMIES OF SCALE AND SCOPE

Given the minuscule economic barriers to entry, one intuitively would not expect there to be economies of scale in the taxicab industry. Yet the per passenger overhead costs of marketing, advertising, dispatching, accounting, and cab maintenance generally decline as the size of the company's fleet grows. An ability to provide ubiquitous service also significantly enhances the marketability of the firm's product in the radio-dispatch market, for passengers thereby enjoy shorter waits, better service, and one-stop shopping, reducing customers' transaction and opportunity costs.

Economies of scope are also present in the taxicab industry. A company which dedicates its primary business to the radio-dispatch market can easily park temporarily idle cabs in hotel and airport queues. A taxi company can easily dedicate capacity to the express document delivery business.

F. THE ABSENCE OF SOUND ECONOMIC CONDITIONS.

Absent regulation, few economic barriers impede entry in the owner-operator cruising and cabstand markets — all one needs is a chauffeur's license and a down payment on car. An open entry regime tends to put too many taxis on the roads when they are least needed, thereby injuring the economic health of existing firms and their drivers. Professor Shreiber observed:

138. Foerster & Gilbert, supra note 114, at 385.
139. "Given that the demand by riders is generally for immediate service, the aggregate search performed by riders and drivers would tend to be extremely costly." Gallick & Sisk, supra note 9, at 118; "[R]egulation can increase the number and variety of taxi trips by reducing search costs." Id. at 119.
In the absence of legal restrictions, the number of cabs most probably will vary in the opposite direction to general business conditions. Very little skill is required to be a cab driver, and not much money is needed to buy or rent a car that can be used as a cab. The absence of barriers to entry makes cab operation the natural occupation to turn to for those that are unemployed. The disadvantage of such fluctuations is that they will bring about a larger supply of cabs when there is less demand for them (i.e., in times of recession) and a smaller supply of cabs when the demand for them rises (in times of prosperity). Moreover, cyclical fluctuations will tend to hurt those who make cab driving their permanent job — their income will necessarily decline sharply in times of recession. Restrictions are needed to provide some income stability for these drivers, who will anyway suffer in times of recession because of the decrease in demand.\textsuperscript{140}

Thus, the supply of labor and equipment by the industry appears to have an inverse relationship with the level of economic activity.\textsuperscript{141}

Professor Shreiber wrote his pragmatic assessment of the economic characteristics of the taxicab industry in 1975. He was criticized at the time because the competitive model was not rejected on the basis of empirical testing.\textsuperscript{142} Yet, as we shall see, the empirical results of deregulation confirm, rather than reject, Professor Shreiber’s analysis.

Professors Lester Telser of the University of Chicago and William Sjostrom of the University College Cork have argued that various modes of transport are subject to core theory, which “really amounts to saying that competition just isn’t possible in some industries . . . .”\textsuperscript{143} Core theory emerged from game theory, and as we shall see, offers a fascinating insight into the question of why the taxicab market fails to perform the way one would expect under neo-classical economic theory.

Game theory is broken down into two general types of “games”, or market environments — cooperative, and non-cooperative. The former are those in which the players (buyers and sellers in a market environment) can communicate and form coalitions so as to best meet their individual needs. Players make decisions as to which coalition they should enter based on individual needs; any large-scale benefit which arises for the players is simply a by-product. In non-cooperative “games,” (such as the infamous “prisoner’s dilemma”) players are unable to communicate, and therefore any decisions made are not based on mutuality.\textsuperscript{144}

\textsuperscript{140} Shreiber, supra note 117, at 275-76.
\textsuperscript{141} Williams, supra note 5, at 36.
\textsuperscript{142} Richard Coffman, supra note 116, at 290.
Core theory is a subset of cooperative game theory; a core is formed when the coalitions are aligned in such a way that no player can advance his needs by defecting to another coalition or operate on his own. By contrast, an empty core arises when players can continuously form new coalitions which bring better players. Whether a core exists or not depends on the number of players in the game, and the market environment, or rules of the game.

Several economists have described various alternatives for which a taxi trip reflects an empty core. Professor John Shepard Wiley, Jr., proffers an illustration of a market with an empty core:

For example, say that three strangers are willing to pay up to $7 each for a cab to the airport. Two cabs stop nearby. Each cab can carry one or two passengers, and each driver is willing to make the trip (with either one or two passengers) for a minimum of $6. Given these demands and costs, the worst-off or excluded player can block any arrangement by tempting some players to abandon others for a more attractive arrangement. Suppose, for instance passengers A and B force driver X down to her minimum $6 total fare, thus yielding for A and B a fare of $3 each. As a result, passenger C is stuck paying at least $6 to travel alone with driver Y. But driver X could gain an added $2 by dumping B and offering C a ride for $5—which C should accept because a $5 fare is cheaper than a $6 fare. This new coalition between X, A and C however, is vulnerable in turn to raiding by the excluded players, Y and B. Now passenger B faces a trip alone with driver Y at a fare of at least $6, and both will improve their lots if they attract passenger C with a $4 fare offer, which Y and B split between themselves and which C will prefer to the $5 that C pays as a member of the existing X-A-C coalition. This coalition instability occurs for every possible combination of players.

As Professor Abagail McWilliams points out, an empty core exists when each and every coalition can be outbid by a rival coalition, so that the market cannot achieve stability; quantity and price fluctuate constantly. With an empty core, the market finds itself mired in unsatisfactory results, unable to achieve competitive equilibrium. Another source summarized this illustration of dysfunctional economics more succinctly:

Imagine, for instance, a market in which a taxi holds two people, and only two. Three people are waiting at a taxi stand, bound for the same destination, and two taxis show up. How much does it costs a taxi to make the trip

doesn’t depend on the number of passengers. One taxi driver can try to make the same amount of revenue by offering the third passenger a fare of $20, but that passenger will likely take a bus or not travel at all, rather than pay that much. So the second driver tries to upset the first driver’s arrangement, undercutting his fare for two passengers. You can see what happens: Any price agreement struck by a coalition of two passengers and one taxi can be upset by a slightly better offer from the other taxi (or the other passenger), cascading until it is no longer profitable to operate one of the taxis.\footnote{Smith, supra note 143, at 45-46.}

Professor Telser found six prerequisites for an empty core: (1) demand is uncertain or periodic; (2) plant capacities are large relative to demand; (3) plants exhibit increasing returns to scale; (4) plants have fixed capacities; (5) there are avoidable fixed costs; and (6) it is costly to store the product.\footnote{Lester Telser, Economic Theory and the Core (University of Chicago Press 1978); Competition, Collusion and Game Theory (Aldine and Atherton, 1972); Cooperation, Competition, and Efficiency, 28 J.L. & Econ. 271 (1985);} Several modes of transport exhibit these characteristics, including, as noted from the hypotheticals, unregulated taxicabs. The remedy advanced by Telser is that some measure of cooperation be allowed to producers in these markets, although such intra-industry collusion would be antithetical to contemporary antitrust notions.

Of course, a long-recognized alternative remedy to destructive competition has been economic regulation, which allows the market to stabilize along a more satisfactory axis.

VI. Bipolar Views on Regulation and Deregulation

Unfortunately, much of the political debate over whether taxicabs (and, indeed, any other mode of transportation) should be regulated or deregulated has become highly ideological and polarized. The proponents and opponents of deregulated entry have two vastly different views of what such a change in regulatory policy would produce.\footnote{Some proponents of regulation have argued that entry controls are necessary to: Ensure taxicab owners a satisfactory income; Ensure the financial responsibility of taxicab owners; Prevent traffic congestion; Protect mass transit systems; and Avoid destructive competition among taxi owners and operators; Edmund Kitch, et al., The Regulation of Taxicabs in Chicago, 14 J.L. & Econ. 285, 321-25 (1971). U.S. DOT Urban Mass Transp. Admin., The Application of the Federal Antitrust Laws to Municipal Taxicab Regulation 32 (1983). Opponents of regulation have argued that these limitations: Increase taxicab fares; Unfairly limit competition; and Raise regulatory costs. U.S. DOT Urban Mass Transp. Admin., supra, at 32.}
Proponents of deregulation argued that eliminating pricing and entry regulation of the taxicab industry would lower prices, improve service, and provide a wider variety of price and service options dictated by consumer demand, thereby fostering efficient resource allocation. As one source observed, “the argument is often made solely on ideological grounds: the competitive free market in search of profit will always provide better and more efficient services.” More specifically, it has been alleged that deregulation would:

- Produce more taxi service and faster response times;
- Create service innovations and service expansion to poorly served neighborhoods;
- Lower fares; and
- Reduce government costs by eliminating oversight of pricing, service and entry.

Most of these predictions have been based on free market economic theory which has driven much of deregulation in transportation since the late-1970s, insisting that government creates distortions which thwart market incentives for productivity, efficiency, and lower consumer prices. Unfortunately, as we have seen, the taxi industry fails to reflect the perfect competition model described in micro-economic textbooks. Professor Roger Teal, who has written extensively on the subject of taxicab deregulation, offered an explanation for the wide divergence between free market predictions of what deregulation should produce, and the empirical reality of what it actually has produced:

- The emphasis placed by industrial organization principles on actual conditions in markets (and on the distortions which monopoly power creates in real-world markets) proves more useful than simple micro-economic theory.

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151. “Students of economics and urban transportation frequently cite the limitation on the number of taxicabs in most American cities as a clear case of unwise government policy. They argue that a limitation on the number of cabs can only operate to raise the price and decrease the supply of taxicab service as compared to that which would otherwise be provided.” Kitch, et al., supra note 150, at 285. (“The authors of this article share the academic view.”) Id. See also Roger Teal & Mary Berglund, Explaining the Impacts of Taxicab Deregulation in the USA 2 (1986); Roger Teal, et al., Urban Transportation Deregulation in Arizona 26 (1983); Gilbert & Samuels, supra note 10, at 146.

152. Rosenbloom, supra note 13.

153. Frankena & Pautler, supra note 9, at 75; Price Waterhouse, Analysis of Taxicab Deregulation and Re-Regulation I, 6 (1993); Teal & Berglund, supra note 4, at 39. In contrast, opponents of deregulation contend that deregulation will:
- Result in poorer service;
- Reduce safety;
- Produce less accountability; and
- Produce less reliability.

Price Waterhouse, supra at 1.

154. See, e.g., Paul Dempsey, The Social & Economic Consequences of Deregulation (1989); Dempsey & Goetz, supra note 2; Paul Dempsey, et al., supra note 1.
for analyzing the impacts of taxicab deregulation. Simple models of competitive behavior involving atomistic producers selling to completely-informed consumers are often used, but these theoretical generalizations of ideal types provide no useful or interesting explanations for the results observed in the dominant taxi markets — telephone orders and cabstands.155

Similarly, Sandra Rosenbloom, a scholar whose earlier literature embraced the unregulated free market position on this subject, concludes:

Unfortunately, an examination of empirical data on regulatory reform of the taxi industry to date shows few of the benefits claimed by proponents. . . .

[M]ost anticipated economic outcomes did not materialize. The irony is that free-market private taxis simply don’t act like entrepreneurs in a free market.156

VII. Empirical Results of Open Entry in the Taxicab Industry

Yet we need not rely on the theoretical assumptions of what unlimited entry will produce. We have empirical results which we can assess to determine what deregulation of the taxicab industry has produced. Before 1983, some twenty-one cities deregulated taxicabs in whole or part.157

The experiences of these cities reveal that taxicab deregulation resulted in:

1. A significant increase in new entry;
2. A decline in operational efficiency and productivity;
3. An increase in highway congestion, energy consumption and environmental pollution;
4. An increase in rates;
5. A decline in driver income;
6. A deterioration in service; and
7. Little or no improvement in administrative costs.

Let us examine each of these results.

A. ENTRY

Deregulation proponents were correct in their predictions that removing entry restrictions would result in increased entry into the industry. Because of the low cost of entry into the taxicab business (i.e., a driver’s license, and a down payment on an automobile),158 deregulation

155. Teal & Berglund, supra note 4, at 47 [citation omitted, and the King’s English spelling employed in the original].
156. Rosenbloom, supra note 13.
157. U.S. DEP’T OF TRANSP., supra note 6, at III.
158. Shreiber, supra note 117, at 275.
produced a sharp increase in the number of new taxis on the road, rising an average of 23% in the deregulated cities. In Phoenix, the number of taxis in active service increased by more than 50% in the first year of deregulation. In Atlanta, which deregulated in 1965, the number of vehicles more than doubled, from approximately 700 before deregulation, to 1,900 in 1970.

Most new entrants were independent owner/operators or small firms, who concentrated their taxis at cab stands at hotels and airports, venues which already were well served prior to deregulation. Hotels and airports guarantee a patron if the driver is willing to wait at the increasingly lengthy queues. A driver need not invest in a radio dispatch system to serve hotels and airports.

The cabstand market quickly became saturated, forcing the established companies to focus on the radio dispatch telephone order market, which has relatively higher entry costs in terms of dispatching equipment, facilities and personnel, and requires a sufficiently large fleet to provide city-wide service. Thus, the deregulated taxi industry divided into two sub-industries—a large number of independent owner-operators serving the cab stands, and a small number of larger companies focusing on the

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159. Price Waterhouse, supra note 153, at 11. See also Paratransit Services, Inc., The Experiences of U.S. Cities With Taxicab Open Entry 29 (1983); U.S. Dep't of Transp., Taxi Regulatory Revision in Oakland and Berkeley, California 49 (1983) ("[U]nchecked growth could eventually lead to increased financial difficulties for the companies.").


161. Frankena & Pautler, supra note 9, at 144; Multiplications, Inc., Decontrol and Recontrol: Atlanta's Experience With Taxi Regulation I (1982) (Prepared for the International Taxicab Association). The following chart provides data on the number of taxi permits in selected cities before and after entry deregulation:

<table>
<thead>
<tr>
<th>City</th>
<th>Before</th>
<th>After</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta</td>
<td>700 (1965)</td>
<td>1,538 (1983)</td>
</tr>
<tr>
<td>Fresno</td>
<td>70 (1979)</td>
<td>45 (1983)</td>
</tr>
<tr>
<td>Indianapolis</td>
<td>502 (1972)</td>
<td>466 (1974)</td>
</tr>
<tr>
<td>Milwaukee</td>
<td>308 (1979)</td>
<td>351 (1983)</td>
</tr>
<tr>
<td>Seattle</td>
<td>129 (1979)</td>
<td>230 (1983)</td>
</tr>
<tr>
<td>Spokane</td>
<td>100 (1980)</td>
<td>80 (1983)</td>
</tr>
</tbody>
</table>

Frankena & Pautler, supra note 9, at 144.

162. Teal & Berglund, supra note 151, at 8; Paratransit Services, Inc., supra note 159, at 43.

163. See Teal & Berglund, supra note 4, at 40.

164. Teal & Berglund, supra note 151, at 28.
telephone order market.\footnote{165}

Because the oversaturation of the market caused inadequate profitability (resulting from more taxis serving the same, or a declining, number of patrons), taxi companies have suffered a very high turnover rate.\footnote{166} For example, 40\% of the new taxi companies serving the Phoenix airport failed during the first fifteen months of deregulation.\footnote{167} Within eighteen months of an entry moratorium in San Diego, a third of taxi firms not affiliated with the two largest companies left the industry.\footnote{168}

Nonetheless, a large number of potential entrants are ignorant of marketing conditions, and/or willing to accept subsistence earnings in order to be self-employed.\footnote{169} Entering the taxi business is one of the few opportunities for self-employment by individuals with minimum skills and little capital.\footnote{170} Inadequate profitability has also dissuaded investment in large taxi firms, so that most of the new entry has been at the owner-operator level, again, satiating an oversaturated cabstand market. Except in Phoenix, in the fully deregulated cities, no new taxi companies have emerged with more than twenty-five cabs.\footnote{171}

Deregulation produced relatively small structural changes in the radio dispatch segment of the industry, reflecting the relatively higher entry costs associated with the purchase of radio equipment, dispatch person-

\begin{verbatim}
\begin{tabular}{lll}
Occupation & Number of Homicides & Rate per 100,000 workers \\
Taxicab driver-chaffeur & 140 & 22.7 \\
Sheriff-bailiff & 36 & 10.7 \\
Police and detective & 86 & 6.1 \\
Gas station, garage worker & 37 & 5.9 \\
Security guard & 115 & 5.5 \\
Stock handler, bagger & 95 & 3.5 \\
Supervisor, proprietor-sales & 372 & 3.3 \\
Sales counter clerk & 183 & 0.1 \\
Bartender & 20 & 2.3 \\
Logging & 6 & 2.3 \\
Hotel Clerk & 6 & 2.0 \\
Salesperson, vehicles & 17 & 2.0 \\
Salesperson, other & 73 & 1.7 \\
Butcher, meatcutter & 12 & 1.5 \\
Firefighter & 8 & 1.3 \\
\end{tabular}
\end{verbatim}

\footnote{171} Teal & Berglund, \textit{supra} note 151, at 8.
nel, marketing, and a fleet sufficiently large to provide ubiquitous city-wide service where there may be "economies of scope." Thus, in most cities in which entry has been deregulated, the large incumbent firms still dominate the industry, although their market share has declined as the new entrants have swarmed to dominate the cabstand markets.

The robust entry of new firms and entrepreneurs into the taxi industry, accurately predicted by deregulation proponents, has been among the most significant impediments to the achievement of consumer benefits predicted to result from deregulation:

Low entry costs, an inherent characteristic of a totally deregulated taxi industry, represent the factor which is probably of greatest significance in preventing a more successful outcome to taxi deregulation. Because capital requirements to enter the deregulated industry are minimal, virtually any self-motivated individual can become a taxi operator. Individual operators cannot effectively compete in the telephone order market, however, so they quickly oversubscribe the airport and cabstand markets, causing full-service companies to abandon these markets except for passenger drop-offs. This results in a reduction in economies of scope for the full-service operators. With demand for taxi service stagnant or even declining, operator productivity inevitably declines with many more operators in the market.

B. OPERATING EFFICIENCY AND PRODUCTIVITY.

Putting more taxis on the streets rarely produces more patrons. In fact, most deregulated cities have faced stable or declining demand as measured by the number of daily trips per cab or the trips per shift. Passenger demand declined significantly in the deregulated cities, falling for example, 34% in Phoenix, 37% in San Diego, and 48% in Seattle. This is not at all surprising, given the higher prices and deteriorating

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172. Teal & Berglund, supra note 4, at 49.
173. Id. at 40, 47.
175. PARATRANSIT SERVICES, INC., supra note 159, at 29, 33; TEAL & BERGLUND, supra note 151, at 16, 27; TEAL, ET AL., supra note 151, at 13.
176. INT'L TAXICAB ASS'N, DOES TAXICAB DeregULATION MAKE SENSE? 6 (1984). "By any measure, the productivity of the Phoenix taxi industry has declined significantly since deregulation. . . . [T]he number of passenger trips per active taxi per day has declined by about one-third for the entire industry, while the number of trips per shift has decreased by one-quarter (the difference reflects lower utilization of taxis by operators after deregulation)." TEAL, ET AL., supra note 151, at 13-14. In San Diego, the number of vehicles increased by 30%, while each vehicle provided only 85% as much service per day. In Seattle, deregulation produced more than a 50% increase in the number of taxis, but each vehicle was providing only 76% as much service. Stilans, supra note 7, at 5.
levels of service deregulation produced.\(^{177}\)

After deregulation, taxi productivity, measured by the number of revenue trips per day or trips per shift, fell by at least one-third.\(^{178}\) As Professor Teal observed, “The decline in taxi productivity after deregulation is a natural consequence of an increase in the number of vehicles in the industry, stable or declining taxi demand, and the lack of productivity-enhancing service innovations such as shared-ride taxi services.”\(^{179}\)

Putting more taxis on the roads merely increases the number of empty taxis and the length of the queues at the taxi stands.\(^{180}\) As noted above, new entrants tend not to have radio dispatch equipment and gravitate toward the already well served hotel and airport cabstands, competing for a constant or decreasing number of passengers.\(^{181}\) As one source observed, “When transportation demand is stable or declining and attractive substitutes to the deregulated modes exist, the impacts of deregulation may be largely confined to increased competition within existing industries with few or no corollary benefits to consumers and providers.”\(^{182}\)

That source went on to point out that, “Opportunities for productivity improvements in urban common carriage transportation are highly limited by the basic economics of the industries inasmuch as costs for most factor inputs can hardly be reduced.”\(^{183}\) The one variable cost in which there is some play is driver wages, which, as we shall see, have plummeted (although not enough to offset the steep drop in driver productivity caused by unlimited entry).

C. HIGHWAY CONGESTION, ENERGY CONSUMPTION & ENVIRONMENTAL POLLUTION

Putting more, and emptier, cabs on the streets not only increases highway congestion and wear and tear on the asphalt, it burns more gasoline and produces more carbon monoxide, ozone, and other pollutants. For example, after Atlanta deregulated, 300-400 taxis lined up at airport queues; waits of three to four hours were not uncommon, and waits of up to six hours were reported.\(^{184}\)

Given the Damocles Sword contained in federal Clean Air Act

\(^{177}\) Gorman Gilbert, Effect of Open Entry and Variable Fares on the Cost of Taxicab Service to Residential Areas 2 (1984).
\(^{178}\) Teal & Berglund, supra note 4, at 46.
\(^{179}\) Id. at 52.
\(^{180}\) See Frankena & Pautler, supra note 9, at 8.
\(^{181}\) Gilbert, supra note 177, at 2.
\(^{182}\) Teal, et al., supra note 151, at 27.
\(^{183}\) Id. at 13-14.
\(^{184}\) Multiplications, Inc., supra note 161, at 32, 37.
Amendments of 1990, threatening draconian cuts in federal money for states and communities which fail to meet the carbon monoxide, ozone, particulate and other pollutant standards, the problems of adding more, but emptier, vehicles to city streets should be manifest. Thirty-two of the thirty-five busiest airports in the United States are located in metropolitan areas which have been designated nonattainment for ozone and carbon monoxide. The two means of transport responsible for the most vehicle miles traveled to airports, automobiles and taxis, are also the most significant sources of pollution.

D. Price

One would expect that excess capacity would drive prices down, as it allegedly has, for example, in the deregulated airline industry. Paradoxically, precisely the opposite has occurred in the deregulated taxi industry. As Price Waterhouse observed, "prices rose following taxi deregulation in every documented case." Professor Roger Teal of the University of California studied pricing at nine cities which deregulated (i.e., Fresno, Kansas City, Oakland, Phoenix, Sacramento, San Diego, Seattle, Tacoma, and Tucson). He concluded, "In every city in this study taxi rates are now higher in real terms than before deregulation, often by a substantial amount." Before deregulation, in none of these cities did rates rise as rapidly as the Consumer Price Index [CPI]; after deregulation, price increases exceeded the CPI in each of these cities. Professor Teal concludes, "taxi rates may have increased as much as 10 per cent more in the deregulated cities than they would have done under continued regulation."

At San Diego, Seattle and Portland, prices increased 35% during the first 18-24 months of deregulation. One source summarized the results

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186. See id. at 383-84.
187. Dempsey & Goetz, supra note 3. Actually, estimates of consumer savings resulting from airline deregulation have been grossly overstated. Id. at 243-63, 281-95.
188. Price Waterhouse, supra note 153, at 8.
189. Teal & Berglund, supra note 4, at 37, 42. This confirms his earlier research on the experience of deregulation in seven U.S. cities. Teal & Berglund, supra note 151, at 11. "The important policy lesson to be learned from the Arizona experience is that favorable impacts do not necessarily follow the removal of institutional barriers to competition in the transportation industries." Teal, et al., supra note 160, at 27.
190. Teal & Berglund, supra note 4, at 37, 42; Teal & Berglund, supra note 151, at 14-15.
191. Teal & Berglund, supra note 4, at 37, 44.
192. Pat Gelb, Early Responses to Taxi Regulatory Changes 16 (1981); S.B. Colman, Recent Developments in the Revision of Taxi Regulations in Seattle and San Diego, Transp. Res. Rec. 20 (1980); See Paratransit Services, Inc., supra note 159, at 34. Prices rose 60% in San Diego. Statlers, supra note 7, at 1, Address before the 50th Annual Convention
of higher taxi fares in Seattle: "[t]he high fares led to a large number of cabs, long cab lines, refusals to serve short trips, and quarrels among drivers concerning positions in the taxi queue, but did not lead to an above-normal profit because of free entry."\(^{193}\)

Cabstand rate increases were even more pronounced.\(^{194}\) This is because there is, and can be, little comparative shopping at the cabstand because of the formal and informal pressure patrons feel to take the next taxi in the queue under the "first in, first out" rule.\(^{195}\) Because of the overcapacity created by unlimited entry, queues lengthen, discouraging drivers from competing on the basis of price.\(^{196}\) Therefore, there is little effective competition. In an economic environment of declining productivity created by excessive entry and stable or declining demand, taxi operators can survive only if they can increase the revenue derived from each trip, which places upward pressure on taxi fares.\(^{197}\)

Moreover, airport travelers and hotel patrons are frequently tourists or out-of-town businessmen with little information about local taxicab regulatory practices or rates, and whose travel expenses are often paid by a third party with pre-tax dollars.\(^{198}\) Further, some of the economics literature reveals that much of passenger demand for taxi service is relatively inelastic with respect to fare changes.\(^{199}\) Thus, most passengers who need a taxi pay the rate, even if inflated.

One source described the impact of price increases on low-income individuals:

The increase in taxicab fares in residential areas produces a particularly bitter impact on low-income persons. A major and increasing proportion of residential taxicab business originates in low-income or minority neighborhoods. . . .[t]his is not surprising since residents in these areas are often dependent on taxicab service for mobility. These trips are for essential purposes, such as trips to grocery stores and medical facilities. In contrast, the trips from airports and downtown hotel stands are made by persons who are clearly more affluent businesspersons, vacationers, and conventioneers.

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193. Frankena & Pautler, supra note 9, at 129.
194. Teal & Berglund, supra note 151, at 16.
195. Gelb, supra note 192, at 17; Teal & Berglund, supra note 151, at 5, 23-4 (1986); Teal, et al., supra note 160, at 8.
197. Int'l Taxicab Ass'n, supra note 176, at 5.
199. Frederic Frael & Gorman Gilbert, Fare Elasticities for Exclusive-Ride Taxi Services (U.S. DOT, 1978); Teal & Berglund, supra note 4, at 50.
Increasing fares to residential areas means that the impact of more taxicabs is borne disproportionately by low-income persons. In other words, those who can least afford to pay would be charged the most.

Those who follow the academic argument of “letting the market decide” taxicab fares are really “letting the poor pay more.”

Neither did deregulation result in lower fares in the telephone dispatch markets, and it appears to be correlated with somewhat higher prices. This occurred because of the loss of cabstand business to new entrants, and the resultant loss of economies of scope associated therewith.

Even the local patron may refrain from price shopping. Forty percent of all resident users take a taxi trip one or fewer times a month. Patrons employing taxi services so infrequently have little incentive to take the time to engage in comparative price shopping. Of course, higher prices may force some low-income riders either to reduce the number of their taxi trips, or decline spending their limited money purchasing other necessities, as much taxi demand appears to be price inelastic.

Deregulated cities experienced growing complaints of price gouging and overcharging, particularly at the cabstands. A study of pricing in Washington, D.C., in June, 1985, which then had open entry and more taxi cabs per capita than any other city in the nation, revealed that taxi drivers overcharge their patrons 36% of the time, and the average overcharge was 22%. In Seattle, overcharging of up to 50% above the average fare was reported.

Firms which have lowered prices generally have not stimulated lower price responses by competitors, nor have their market shares appreciably

200. Gorman Gilbert, Effect of Open Entry and Variable Fares on the Cost of Taxicab Service to Residential Areas 6-7 (1984) [emphasis in original].
201. Teal & Berglund, supra note 4, at 44; Teal & Berglund, supra note 151, at 15.
202. Id. at 23.
203. Teal & Berglund, supra note 4, at 50.
204. Id.
205. See Paratransit Services, Inc., supra note 159, at 10.
206. One study performed in 1970 reviewed taxi entry regulation by 30 cities with a population of 325,000 or more. It revealed that the number of licenses varied from 0.2 in Phoenix to 11.3 in Washington, D.C. (which had no entry restrictions), and that the number of licenses per square mile ranged from 0.4 in Phoenix to 139.3 in Washington, D.C.; Utterback, A Summary of Recent Taxicab Studies 12 (City of Milwaukee, Legislative Reference Bureau, 1975) in U.S. DOT Urban Mass Transp. Admin., The Application of the Federal Antitrust Laws to Municipal Taxicab Regulation 31, n.31 (1983).
208. Gelb, supra note 192, at 18.
We have explored several reasons why excessive capacity in the taxi-cab industry has not resulted in lower fares, as we would intuitively expect. Professor Roger Teal has succinctly summarized three supply factors and four demand factors which militate against lower fares. The supply factors are:

"Monopoly" profits earned under regulation were significantly less than estimated;
Deregulation did not create a competitive industry structure in the telephone order market; and
There is no apparent cost basis with on which to predicate price reductions.  

On the demand side, Professor Teal offered these explanations:
Demand for taxi service is characterized by imperfect information and strong name recognition;
The demand for taxi service may be inelastic;
Per capita demand for taxi service is either stable or suffering from long-term decline; and
Leasing partially insulates taxi firms from the passenger market.

E. INCOME

In the deregulated cities, driver income decreased despite higher fares. The fare increases imposed by taxis under deregulation have not offset the sharp decline in productivity (the reduction of revenue trips per day) caused by excessive entry.

The shift from employee drivers to owner-operator or lease drivers results in a loss of minimum wage guarantees for taxi drivers. Most taxi drivers in deregulated cities earned less (often despite spending more hours behind the wheel) than before deregulation.

For example, under deregulation in Phoenix, drivers worked an average of 10-14 hours per day, six days a week, earning only about $2.00-$4.00 per hour. In San Diego, driver wages declined 30% from pre-

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209. Teal & Berglund, supra note 4, at 44.
210. Id.
211. Id. at 37, 48.
212. See Teal, et al., supra note 160, at 14; Roger Teal, Taxicab Regulatory Change in San Diego, Taxicab Management 28, 32 (Fall 1986); Teal & Berglund, supra note 4, at 46.
213. Teal & Berglund, supra note 4, at 46.
214. Pat Gelb, Effects of Taxi Regulatory Revision in San Diego, California (U.S. Dep't of Transp., 1983); Pat Gelb, Effects of Taxi Regulatory Revision in Seattle, Washington, (U.S. Dep't of Transp., 1983); Teal & Berglund, supra note 151 (unpublished manuscript), at 17-18; Teal & Berglund, supra note 4, at 46.
deregulation levels, to only $135 a week. Such poor pay is for a job which has the highest homicide rate of any profession.

F. Service

As we have seen, most of the new entry unleashed by deregulation has been by small companies in the airport and hotel cabstand market—a market traditionally well served—in effect, "cream skimming" the least costly market. The telephone dispatch market, upon which most local residents rely, is generally left with the same, or poorer (and more highly priced), service as before, since taxis in the larger firms are now dissuaded from entering the end of a longer queue at the cabstand market, and forced to focus on the higher-cost radio dispatch market. The radio dispatch firms have lost between 10% to 25% of their business because of the need to abandon the cabstand markets, which were the least expensive markets to serve (for it requires neither dispatching operations nor equipment dead heading).

As we have seen, excessive entry leads to declining productivity, and because fare increases failed to keep pace, declining profitability. A carrier facing profit erosion can reduce costs by "lowering the quality of taxi services (for example, employing a small or deteriorated vehicle, reducing insurance coverage, or driving recklessly)." Not only has deregulation generated little service innovation, it is not unusual to see several service problems arise when the regulatory system collapses, including:

- Excessive fares;
- Circuitous routing; and
- Refused service.

Most cities which deregulated experienced a deterioration in service. The taxi refusal and "no show" rates increased, particularly in low income areas, although there were many short haul refusals at cabstands as well (probably by drivers who had sat in the queue too long and needed a long trip and a decent fare to compensate them for their inactivity).

216. Teal, supra note 212, at 32; Teal & Berglund, supra note 4, at 42.
218. Teal & Berglund, supra note 4, at 54.
219. Gallick & Sisk, supra note 9, at 120.
220. "Exclusive ride taxi service remains the only service offered in the deregulated cities." Teal & Berglund, supra note 4, at 46. See Teal, et al., supra note 160, at 13; Rosenbloom, supra note 13.
221. Robert Russell, Recent Taxicab Developments in Los Angeles, in Proceedings of the Conference on Taxis as Public Transit 65 (Univ. of California, 1978) (describing the illegal activities of taxi "bandits" which emerged after a major taxi company fell into bankruptcy). See generally, Suzuki, supra note 20, at 129.
223. See Price Waterhouse, supra note 153, at 15.
The “no show” rate at Seattle increased 35% after deregulation; the “no show” rate at San Diego increased from 5% in 1976 to 18% in 1979.\textsuperscript{224} The oversupply of cabs reduced the earning potential of drivers, causing a decline in the quality of the drivers, and leading them to engage in overcharging and discourteous behavior.\textsuperscript{225} Indianapolis, among the first cities to deregulate entry in the taxi industry, experienced the following problems:

After the first winter the independent operators found they had no money to maintain or repair their vehicles. Insurance cancellation notices received by the City . . . increased from “one or two” per month to “about one hundred fifty” per month. Complaints to the City about cab service “tripled” . . . .

Added to these difficulties was a reported rise in the amount of crime by taxi drivers and operators. . . [t]he reported rapes and robberies committed by taxi drivers also increased.\textsuperscript{226}

Reviewing the Indianapolis experience, the U.S. Urban Mass Transportation Administration concluded, “adding new owners into a highly competitive supply-rich market is beneficial neither to the public nor to the taxi operators.”\textsuperscript{227}

Customer complaints in Fresno, California (where deregulation lasted only eighteen months), tripled, and they ranged from price gouging to the poor upkeep of the vehicles.\textsuperscript{228} In San Diego, many drivers refused short trips, and drivers at the end of the queue sometimes sought to serve passengers at the head of the line — often generating physical altercations.\textsuperscript{229} In Phoenix and San Diego, the visitor and convention bureaus pushed for re-regulation.\textsuperscript{230} The Washington state legislator who led the successful fight for taxi re-regulation said, “taxicab riders have been getting ‘raped’ by poor service and expensive fares ever since Seattle area taxicabs were deregulated . . . .”\textsuperscript{231} Another source summarized the Seattle community’s response to the problems created by taxicab deregulation:

\textsuperscript{224} Teal & Berglund, supra note 151, at 10.
\textsuperscript{225} Multiplications, Inc., supra note 161, at 40.
\textsuperscript{226} U.S. DOT Urban Mass Transp. Admin., The Indianapolis Experience with Open Entry in the Taxi Industry 9-10 (1980). Drug and prostitution rings were also operated by the unregulated taxis. \textit{Id.}\textsuperscript{227} at 15.
\textsuperscript{228} See Paratransit Services, Inc., supra note 159, at 10.
\textsuperscript{229} Rosenbloom, supra note 13.
\textsuperscript{230} See Shane, supra note 207, at 46; Paratransit Services, Inc., supra note 159, at 23.
\textsuperscript{231} Doug Underwood, Taxi Regulation Is Back in Laps of Local Governments, Seattle Times, Feb. 26, 1984, at 52.
The troubles in the cab lines—large increases in fares, substantial variation in fares among taxis, much longer taxi lines, refusals by drivers to carry passengers short distances, and minor violence—convinced area officials, hotels, and the tourist industry that this market was not suited to full-scale decontrol.\footnote{Richard Zerbe, Jr., Seattle Taxis: Deregulation Hits a Pothole, \textit{Regulation}, Nov./Dec. 1983, at 43, 47. At the Seattle Amtrak station, "There were reports of physical intimidation, of drivers who lied about the availability of bus service, who were slovenly, vulgar, and rude — and so on." \textit{Id.} at 46. "The Sea-Tac airport has had even worse problems in its cab lines . . . . Many [drivers] refused short-haul customers . . . . Drivers were less knowledgeable, cabs dirtier." \textit{Id.} at 46.}

After deregulation, both Washington, D.C., and Atlanta, Georgia, experienced increasing problems with drivers who had a language problem and poor knowledge of city streets, were overcharging customers, and were dishonest by not taking the most direct route.\footnote{\textit{Paratransit Services, Inc.}, supra note 207, at 14, 20; \textit{Multiplications, Inc.}, supra note 161, at 18-19.} Service quality deterioration under deregulation also prompted calls for entry regulation by Congressional and media leaders in Washington, D.C.\footnote{\textit{U.S. Dep't of Transp.}, supra note 4, at 130.} The \textit{Washington Post} recently had this to say about taxi service in the \textit{de facto} deregulated District of Columbia market (one out of four D.C. cabs operate with an illegal permit, and bribes for the issuance of inspection stickers and operating permits were under criminal investigation):

\textit{[T]he District's cab fleet averaged 10 accidents a day last year — around 3,800 annually. That's more crashes than there are cabs in Los Angeles, Philadelphia, San Diego and San Antonio combined . . . .}

\textit{[D]rivers routinely overcharge passengers, bribe their way through safety inspections, swap cars and drive without insurance . . . .}

Though ours is the nation's 19th largest city, Washington harbors at least three times the number of cabs of any other city in America except New York and Chicago. (Only one, New York, has more cabs—11,500.) Since this massive oversupply means fewer fares per driver, many cabbies make ends meet by cutting corners—for instance, refusing trips to out-of-the-way places, overcharging or skimping on repairs.\footnote{Christopher Georges, \textit{D.C.'s Checkered Cabs: Why Washington's Taxis Are America's Worst}, \textit{Wash. Post}, Mar. 21, 1993, at C1, C2.}

Atlanta suffered many of the same problems under deregulation:

The taxi industry . . . has historically been criticized by city visitors for the poor condition of its vehicle fleet, the sloppy appearance of drivers and their negative attitudes, apparent driver lack of knowledge of the city, and frequent instances of overcharging. Officials of local commerce and trade organizations consistently complained that the industry was an embarrassment to
the city and lobbied strongly for reform.\textsuperscript{236}

As a result, in 1981, Atlanta reimposed entry controls.\textsuperscript{237}

Poor profitability made it impossible for many taxi companies to invest in new cabs, causing the average age of vehicles to grow.\textsuperscript{238} For example, Washington, D.C., with the most taxis per capita of any city in the nation,\textsuperscript{239} also suffers from the oldest fleet.\textsuperscript{240} Seattle's average fleet age increased 50% during the first three years of deregulation.\textsuperscript{241} Charges of inadequate equipment maintenance, lack of cleanliness, and poor appearance also have been levied.

The taxi operator is the first introduction to the city that a convention, vacation or business traveler has, and the last impression he has prior to departure. Consequently, the convention and hotel industries often lead the charge for re-regulating the taxi industry.

G. Administrative Costs

Although one would intuitively expect government administrative costs to fall under regulation, in fact, the U.S. Department of Transportation case studies reveal that such costs either did not change or increased.\textsuperscript{242} In several instances, consumer complaints led to enhanced governmental scrutiny of the industry, and correspondingly increased administrative costs. For example, under deregulation, Seattle estimated it spent more money that it ever had in enforcing the remaining vehicle regulations.\textsuperscript{243}

VIII. Summary of the Empirical Results of Taxi Deregulation

After concluding several exhaustive studies of the empirical results of taxicab deregulation, Professor Roger Teal concluded:

Taxicab deregulation cannot be demonstrated to have produced, in most cases, the benefits its proponents expected. Prices do not usually fall, improvements in service are difficult to detect, and new price-service combinations have not been developed. There is little evidence that either

\textsuperscript{236} Multiplications, Inc., supra note 161, at 34.
\textsuperscript{237} Rosenbloom, supra note 13.
\textsuperscript{238} Price Waterhouse, supra note 153, at 15.
\textsuperscript{239} A 1979 telephone survey revealed that Washington, D.C., had five times the number of taxicabs per capita as the next highest city, Atlanta. Washington had 14.7 per 1,000 residents, while Atlanta had 2.8. U.S. Dep't of Transp., supra note 4, at 61-62.
\textsuperscript{240} Paratransit Services, Inc., supra note 207, at 11.
\textsuperscript{241} Rosenbloom, supra note 13.
\textsuperscript{242} Price Waterhouse, supra note 153, at 16; Paratransit Services, Inc., supra note 159, at 45.
\textsuperscript{243} Rosenbloom, supra note 13.
consumers or producers are better off. The one important exception is new entrants to the industry, who now have an opportunity to serve a market to which they were previously denied access. Even for them, however, deregulation is a mixed blessing. Many have been unable to survive in the more competitive unregulated environment, and those who have survived are apparently obtaining low earnings.\textsuperscript{244}

A more recent study by Price Waterhouse of twenty-one cities which deregulated reached similar conclusions:

[T]he benefits of deregulation were devaluated by unanticipated and unattractive side effects:

\textit{Although the supply of taxi services expanded dramatically, only marginal service improvements were experienced by consumers.} Within a year of deregulation, the supply of taxi services increased an average of 23%. Because most new entrants were independent operators and small fleet owners with limited capability to serve the telephone-based market, most new service was concentrated at already well-served locations—such as airports and major cabstands. Customer wait times at these locations, already short, were reduced further. Response times in the telephone market were similar to pre-deregulation performance. Trip refusals and no-shows, however, increased significantly.

\textit{Prices rose in every instance.} Paradoxically, the influx of new entrants did not invoke the price competition typically experienced in other newly-deregulated industries. Prices rose an average of 29% in the year following deregulation. There appear to be two sources of this unexpected event. First, fare increases prior to deregulation had consistently lagged cost increases. Veteran operators thus corrected prices at the first opportunity. Second, new entrants generally charged higher fares than veteran operators. The cabstand markets on which these operators focused their services are generally price insensitive and, because of the first-in first-out nature of the taxi queues, comparison shopping is discouraged. For these reasons, the new entrants had no incentive to introduce price competition.

\textit{Service quality declined.} Trip refusals, a decline in vehicle age and condition, and aggressive passenger solicitation associated with an over-supply of taxis are characteristic of a worsening in service quality following deregulation.\textsuperscript{245}

Given the failure of deregulation to produce consumer pricing and service benefits, coupled with its propensity to injure carrier productivity and profitability, most communities which have experimented with deregulation have rejected it, and re-regulated, in whole or part, their taxi industry. Of the twenty-one cities which deregulated prior to 1993, the experience with deregulation was so poor that only four of the smallest cities in the group (i.e., Berkeley, California, Spokane, Washington, Ta-

\textsuperscript{244} Teal & Berglund, \textit{supra} note 4, at 54; See also Teal & Berglund, \textit{supra} note 151, at 30-31.

\textsuperscript{245} Price Waterhouse, \textit{supra} note 153, at II-III [emphasis in original].
coma, Washington, and Springfield, Illinois) retained a fully unregulated system.246

Cities which continued to embrace deregulation tended to have one of the following characteristics: (1) a relatively smaller population; (2) less reliant on airport activity; or (3) had implemented other measures which created barriers to market entry.247 In contrast, “[c]ities which had a relatively large population, a high level of airport activity, and conditions conducive to low-cost market entry tended to have a negative experience with deregulation. As a result, these cities either fully or partially re-regulated taxi services . . . .”248 The wave of re-regulation was led by the largest cities with the most airport activity among the group that had deregulated.249

IX. THE NEED FOR GOVERNMENTAL PLANNING & OVERSIGHT

Taxicabs are an essential part of the urban transportation infrastructure, and some would argue, in the nature of a public utility.250 As we have seen, the unregulated taxi market suffers from the absence of a competitive market, imperfect information, significant transactions costs, externalities, cream skimming, the loss of economies of scale and scope, and destructive or excessive competition, collectively producing demonstrable deleterious economic and social consequences. While deregulation produces a significant increase in new entrants, it appears to cause declining operational efficiency and productivity, an increase in highway congestion, energy consumption and environmental pollution, a decline in driver income, a deterioration in service, and paradoxically, an increase in passenger rates, with little or no improvement in administrative costs. Any objective assessment of the empirical evidence would conclude that the costs of taxicab deregulation outweigh its benefits. Virtually every major

246. Id. at 1-III, 19.
247. Id. at 6.
248. Id. at 8.
249. Id at 17.
250. One source provided a comprehensive rationale for economic regulation of the taxicab industry:

Government regulation is deemed necessary because taxicabs supply a service which is considered publicly indispensable and because taxicab firms often operate as monopolies or oligopolies. Moreover, in theory, government regulation of monopolies can keep prices at a reasonable level. Early common law established that certain businesses could harm those who wanted or needed service by refusing to serve them or by charging exorbitant prices, thereby justifying public regulation of such businesses.

Taxicabs, as public utilities, are required to serve every customer in their service area at reasonable rates and without unjust discrimination. Public utilities are also prohibited from entering a new market, supplying a new service, or abandoning an existing market without the consent of a public authority. The “public interest” is the determining factor in most governmental decisions involving public utilities.

Barker & Beard, supra note 8, at 33.
city which has tasted economic deregulation of the taxi industry has lived to regret it, and reversed course.

The fundamental question is not whether taxis should be regulated, but how they might best be regulated. That requires careful oversight by the regulatory body to assure the appropriate ratio of taxis to passengers to ensure prompt, safe, and reasonably priced service for the public, while allowing efficient and well managed firms to earn a reasonable return on investment.\textsuperscript{251} Too few taxicabs results in excessive waiting times (and opportunity costs) for passengers. Too many taxicabs results in lower productivity and lower profitability for service providers, despite higher fares for consumers.

If there is a legitimate criticism to be levied at regulators, it is that they too often skirt this difficult task. As one commentator said of the New York medallion system:

The main deficiency of the New York system of price/entry regulation was the total lack of any planning. Neither the fares nor the number of medallions issued was determined on the basis of what was needed to achieve economic efficiency in city transport. . . . The shortcomings of the New York City system of price/entry regulation is a result of poor administration, and not of any inherent deficiencies of a system of regulation.\textsuperscript{252}

Generally speaking, taxi demand is a function of two major variables — the overall economic activity in the market (including population, employment and income), and the relative price and quality of service of taxis vis-à-vis alternatives modes of transport (automobiles and public transportation). The appropriate level of taxis per thousand citizens should be determined in light of the unique transportation needs of each city, ascertained on the basis of the density of its population,\textsuperscript{253} street congestion, air pollution, and perhaps such factors as the price and availability of downtown parking,\textsuperscript{254} the number of automobiles per capita, the

\textsuperscript{251} See generally, Dempsey, supra note 2, at 220-77.

\textsuperscript{252} Shreiber, supra note 90, at 278-79.

\textsuperscript{253} The following chart provides data on population densities in selected cities:

\begin{center}
\begin{tabular}{|l|c|c|}
\hline
City & Population/Square Mile & Land Area (Sq. Miles) \\
\hline
Chicago & 12,251 & 227.2 \\
Denver & 3,051 & 153.3 \\
Los Angeles & 7,426 & 469.3 \\
Philadelphia & 11,734 & 135.1 \\
Phoenix & 2,342 & 419.9 \\
San Francisco & 15,502 & 46.7 \\
San Diego & 3,428 & 324.0 \\
Seattle & 6,154 & 83.9 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{American Almanac (1993-94).}

\textsuperscript{254} The following chart provides data on the number of parking spaces per employees for selected cities:
number of hotel rooms, the distance of the airport from downtown,255 the volume of passenger traffic derived therefrom, and the economic health of existing taxi firms.256

For example, in the mid-1970s, taxis carried a million passengers a day (one fifth as many passengers as the subways) in a huge urban city like New York, with its rush hour gridlock.257 Cities like New York, Boston, Philadelphia, Detroit or Chicago are densely concentrated urban centers where streets are congested and private automobile parking is expensive. Many residents do not own an automobile, nor need they, given the well developed public urban transit systems. Taxi service consumption would likely be at a much higher level in an Eastern city (built for the horse and carriage) than in a Western city (built for the automobile), like Denver, Salt Lake City, or Dallas, with their suburban sprawl, relatively uncongested streets, and relatively plentiful and inexpensive

<table>
<thead>
<tr>
<th>Ratio of Parking Spaces/Employees in Selected Cities</th>
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</thead>
<tbody>
<tr>
<td>City</td>
</tr>
<tr>
<td>Charlotte</td>
</tr>
<tr>
<td>Dallas</td>
</tr>
<tr>
<td>Denver</td>
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<td>Minneapolis</td>
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<td>Phoenix</td>
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<td>Portland</td>
</tr>
<tr>
<td>Salt Lake City</td>
</tr>
<tr>
<td>Seattle</td>
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</tbody>
</table>

Denver Downtown Partnership, Inc.

255. The following are the approximate driving distance of the airport from downtown in selected cities:

<table>
<thead>
<tr>
<th>Airport</th>
<th>City Served</th>
<th>Distance to Downtown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dulles</td>
<td>Washington, D.C.</td>
<td>26.5</td>
</tr>
<tr>
<td>Denver International</td>
<td>Denver</td>
<td>24</td>
</tr>
<tr>
<td>Houston Intercontinental</td>
<td>Houston</td>
<td>22</td>
</tr>
<tr>
<td>DFW International</td>
<td>Dallas</td>
<td>17</td>
</tr>
<tr>
<td>K.C. International</td>
<td>Kansas City</td>
<td>17</td>
</tr>
<tr>
<td>John F. Kennedy</td>
<td>New York</td>
<td>15</td>
</tr>
</tbody>
</table>

256. In assessing the economic health of existing firms, the following data provide some indication of national industry average performance:

<table>
<thead>
<tr>
<th>Selected National Taxicab Performance Data (1993)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Annual Miles Per Taxi</td>
</tr>
<tr>
<td>Average Paid Miles Per Trip</td>
</tr>
<tr>
<td>Average Annual Trips Per Taxi</td>
</tr>
<tr>
<td>Average Annual Passengers Per Taxi</td>
</tr>
<tr>
<td>Average Cost Per Mile</td>
</tr>
</tbody>
</table>

Industry Sources.

257. Shreiber, supra note 90, at 278.
parking.\textsuperscript{258}

New entry should be modest, measured and monitored. In deciding which among several applicants should be allowed to operate in the market, a prudent regulatory authority might choose the applicant which, for example, has a sound financial base and a seasoned and experienced managerial team, a minimum fleet size with centralized radio dispatch to serve the entire community adequately,\textsuperscript{259} trained and experienced drivers, adequate insurance, and a young, safe and environmentally sound fleet of cabs. On the last point, there is significant concern as to whether a number of cities will be able to comply with Federal Clean Air Standards. If not, they stand to lose hundreds of millions of dollars in Federal grants.

The regulatory authority might also phase-in additional taxicabs over a period of years, regularly monitoring their impact upon the public in terms of price, safety and service (including customer complaints, service response times, and such), and upon the health of the industry. If the regulatory authority found that the problems of destructive competition, described above, were emerging, it might well reduce the number of taxicabs to be licensed during the prescribed forthcoming period. Thus, the regulatory authority must be careful to expand entry on a phased-in basis only very gradually, and monitor the results closely.

In the final analysis, the suitability of taxicab service and pricing is a

\textsuperscript{258} The following chart provides data on the distribution of vehicles-to-population of a sample of 741 cities:

\begin{tabular}{|c|c|}
\hline
\textbf{Distribution of the Cabs-to-Population Ratio, 1970} & \textbf{Proportion of Sample Jurisdictions} \\
\hline
\textbf{Cab licenses per thousand population} & \textbf{\%} \\
\hline
Under 0.2 & 10 \\
0.2 to under 0.4 & 20 \\
0.4 to under 0.6 & 23 \\
0.6 to under 0.8 & 16 \\
0.8 to under 1.0 & 10 \\
1.0 to under 1.2 & 8 \\
1.2 to under 2.0 & 9 \\
2.0 and over & 5 \\
\hline
Median licenses per thousand = 0.57 & \\
\hline
\end{tabular}

\textsuperscript{259} J.D. Wells & F.F. Selover, Characteristics of the Urban Taxicab Transit Industry (1972).

259. The city officials of Indianapolis, which experimented with open entry in the early 1970s, concluded that "they should have required a minimum of ten vehicles per owner and radios in each cab." U.S. DOT Urban Mass Transp. Admin., supra note 226, at 9-10. Another source concluded, "all taxicabs should be required to be affiliated with a fleet large enough to serve all parts of the city 24 hours a day (e.g., 25 vehicles) and that every taxicab be required to have a two-way radio and meter. Gene Stilans, supra note 7, at 11, Address before the 50th Annual Convention of the New Zealand Taxi Proprietors' Federation, Wellington, New Zealand, Aug. 30, 1988.
peculiarly local issue, best tailored by local governments based on their unique populations, spatial densities, road congestion, air pollution, and airport and hotel traffic. For that reason, whatever the national ideological infatuation with comprehensive infrastructure deregulation, Congress should instead embrace an alternative national political movement—one which champions devolution, or reversing the 20th Century megatrend of power flowing from the states to Washington—in favor of local control.\textsuperscript{260} In this area, the state and local governments should be left alone to foster the unique local public and private transportation system that suits them best.

VOLUME 23, SUBJECT INDEX

-A-
Airline Deregulation Act of 1978 . . . . 21, 30, 41, 182, 314
Airline Owners and Pilots Association . . . . 318, 320, 326
Airport Development Acceleration Act of 1973 . . . . 516
American Bus Association (ABA) . . . . 504
American Merchant Marine Institute (AMMI) . . . . 481
American Trial Lawyers Association (ATLA) . . . . 309, 327
American Trucking Association (ATA) . . . . 350
Amtrak . . . . 179, 181, 193, 203, 513
Amtrak Reform and Privatization Act of 1995 . . . . 518

-B-
Blocked Space Arrangements . . . . 60
Buy America Act of 1993 . . . . 208-213, 229

-C-D-
Canada Agreement on Internal Trade . . . . 347
Canadian Trucking Association (CTA) . . . . 350
Carriage of Goods by Sea Act (COGSA) . . . . 477
Carriage of Goods by Sea Act of 1999 . . . . 495
Carriage of Goods by Water Act of 1993 . . . . 492
Civil Aeronautics Act of 1938 . . . . 98
Civil Aeronautics Board (CAB) . . . . 67, 88, 182
Clean Air Act Amendments of 1990 (CAA) . . . . 239, 240, 245, 246, 248, 249, 253, 254, 255, 256, 258, 263, 264, 265, 275
Code Sharing . . . . 60-64, 65-68, 69, 92
Computer Reservation Systems (CRS) . . . . 31, 50-51, 59, 61, 63, 64, 66, 69, 70, 129-130
Congestion Mitigation and Air Quality Improvement Program (CMAQ) . . . . 260
Consumers United for Rail Equity (CURE) . . . . 13
Contracts (Applicable Law) Act of 1990 . . . . 418
Convention on International Civil Aviation of 1944 (Chicago Convention) . . . . 279, 281, 283, 284, 288, 298, 427, 431

-E-
Emergency Railroad Transportation Act of 1933 . . . . 177
European Community Air Fare Regulation . . . . 146-148
European Community Licensing Regulation . . . . 154-155
European Community Route Access Regulation . . . . 142-146
European Community Slot Allocation Regulation . . . . 149-154, 156-157
European Convention on Human Rights . . . . 296-298
European Court of Justice (ECJ) . . . . 123, 125, 126, 127, 131, 295, 453
European Free Trade Agreement (EFTA) . . . . 453

-F-
Fair Practice Committee (FPC) . . . . 374
Federal Aviation Act of 1958 . . . . 302
Federal Transit Administration (FTA) . . . . 208, 221, 224, 225
Federal Transportation Act of 1920 . . . . 4, 5
Federal-Aid Highway Act of 1978 . . . . 214
Fifth Freedom Rights . . . . 136, 137
Fixed Base Operators (FBO's) . . . . 303, 305, 306
Flag of Convenience (FOC) Shipping . . . . 371
Flag of Convenience Union (FOCU) . . . . 380
Frequent Flyer Programs . . . . 49-50, 70-71
Funnel Flights . . . . 60, 62-68, 69

-G-
General Agreement on Aviation Services (GATAS) . . . . 464
General Agreement on Tariffs and Trade (GATT) . . . . 221, 226, 436

121
General Agreement on Trade in Services (GATS) ............... 428, 437
General Aviation Revitalization Act of 1994 (GARA) ... 302, 303, 310-322, 324-328, 331, 341, 342-343
Geneva Policy .................................. 379

-H-

Hague-Visby Amendments ............ 480
Harter Act of 1893 .................. 475
High Speed Ground Transportation .. 270
High Speed Rail Development Act of 1993 (HSRDA) ........ 269
Hub-and-Spoke Networks .......... 35-38

-I-

ICAO Conference of 1994 .............. 452
Intelligent Vehicle Highway System (IVHS) ....... 253, 261-263
Intelligent Vehicle Highway Systems Act of 1991 ........ 261
Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) ... 239, 249, 251, 258, 259, 260, 268, 271, 272, 275
International Air Services Transport Agreement (IASTA) ........ 434
International Air Transport Association (IATA) ........ 81-82, 284, 428
International Civil Aviation Organization (ICAO) . 18, 81, 83, 279, 281, 283, 284, 285, 286, 288, 289, 291, 428
International Committee on Seafarers' Welfare (ICSW) ........ 400
International Longshoremen's and Warehousemen's Union (ILWU) ... 377
International Longshoremen's Association .................. 404
International Maritime Employers' Committee (IMEC) .......... 379
International Monetary Fund (IMF) ........ 482
International Shipping Federation (ISF) ................. 370
International Transport Workers' Federation (ITF) ............ 370
Interstate Commerce Commission (ICC) . 5, 6, 7, 8, 9, 10, 178, 180, 182, 192, 198, 202-205
Interstate Commerce Commission (ICC) Termination Act of 1995 . 504, 515
ITF Fair Practice Committee ........ 421
ITF Seafarers' International Assistance, Welfare and Protection Fund ........ 390

-J-

Joint Stock Companies Regulation, Russia .................. 110-111

-K-

Kahn, Alfred ................................ 23, 84, 88
Korean Seamen's Union (KSU) .... 379

-L-

Labor Protective Programs (LPP's) . 176, 180, 182, 183, 184, 188, 190, 193, 194, 195, 196, 197, 199, 201
Leveraged Buy-Outs (LBO's), Airline Industry ................ 32, 43, 72, 90
Linear Route Systems .................. 38-39

-M-

Madrid Policy ................................ 379
Maldives Cases .......................... 411
Mendocino Coast Conditions .... 179, 202, 204
Motor Vehicle Transport Act of Canada .......... 346

-N-

NAFTA Temporary Admission of Conveyances or Containers .... 352
National Ambient Air Quality Standards (NAAQS) . 240, 245, 253, 254
National Industrial Transportation League .................. 500
National Labor Relations Act (NLRA) ................. 386
National Railroad Passenger Corporation (NRPC) ........ 181
National Trails System Act .............. 11
National Transportation Safety Board (NTSB) ............. 310
New York Dock Conditions .179, 180, 186, 192, 194, 197, 199, 201, 202, 204
Norfolk and Western Conditions ........ 180, 202, 204
North American Free Trade Agreement (NAFTA) ... 208, 221-226, 229, 233, 235, 347
Northeast Rail Service Act of 1981 (NERSA) .............. 185

-O-

Open Skies ................................ 39, 90-92
Oregon Short Line Conditions .... 179, 180, 202, 204
1996] Subject Index

Organization for Economic Cooperation and Development (OECD) .......... 397
Organization for Economic Cooperation and Development (OECD) .......... 81

-P-Q-

Privatization Law, Russia .......... 102, 104

-R-

Rail Corridors ...................... 10-11
Rail Passenger Service Act of 1970 . 179, 193
Railbanking ......................... 11
Railroad Revitalization and Reform Act of 1976 (4R) .... 7, 179, 203, 269
Regional Feeders .................... 39
Regional Rail Reorganization Act of 1973 (3R) .................. 184
RSFR Law on Business and Entrepreneurial Activity, Russia ... 110
Russian Ministry of Transport . 113, 114, 116, 117

-S-

S Curve" Phenomenon ................ 37
Seafarers' Trust ..................... 390
Seafarers International Union (SIU) .. 380
Staggers Rail Act of 1980 .......... 9, 185
State Committee for the Administration of Russian State Property (GCI) ... 102, 105, 106, 107, 112, 113, 114, 116
Surface Transportation and Relocation Assistance Act of 1987 ........ 209, 219-220
Surface Transportation Assistance Act of 1978 .............. 209, 214, 216, 229, 235
Surface Transportation Assistance Act of 1982 ............ 217, 219, 220
Swedish Co-Determination Act (Lex Britannia) ............. 419

-T-

Tariff Act of 1930 ................. 367
Trade Union and Labour Relations Act of 1974 .......... 390
Transportation Act of 1920 ........ 177
Transportation Act of 1940 ........ 178-179
Treaty of Rome . 123, 124, 125, 127, 131, 148, 149, 286, 288, 292

-U-

U.N. International Civil Aviation Organization (ICAO) .......... 69, 81-82
U.S. Department of Transportation (DOT) .. 62, 63, 67, 68, 90, 94, 96, 182, 484
U.S. Federal Aviation Administration (FAA) ............... 82, 320, 324
U.S. General Accounting Office (GAO) .............. 10, 31, 36, 68
U.S. International Air Transportation Competition Act of 1979 ...... 94-95
U.S. Maritime Lawyers Association (MLA) ................. 481
U.S. National Commission to Ensure a Strong Competitive Airline Industry ... 33, 79, 90
U.S. Shipping Act of 1984 ............ 499
U.S.-Canada Free Trade Agreement (CFTA) ........... 221, 235
Union of International Seamen (UIS) .............. 380
United Nations Commission on International Trade Law (UNCITRAL) ........ 482
United States-Netherlands Open Skies Agreement of 1992 .... 456

-V-

Visby Amendments of 1968 ........ 480

-W-X-Y-Z-

Warsaw Convention ............... 490
Washington Agreement .......... 177-178
Waterside Workers' Union .......... 420
World Maritime University .......... 399
World Trade Organization (WTO) .... 428
Wright Amendment .............. 34
VOLUME 23, CASE NAME INDEX

-A-

Alexander v. Beech Aircraft Corp. .................. 334,335,336
Aloha Airlines, Inc. v. Director of Taxation .................. 517
American Trucking Assn's., Inc. v. Scheiner .................. 508
Anderson v. The M.W. Kellogg Co. ........... 330,331
Angad v. M/V Fareast Trader .................. 405

-B-

Baltimore & Susquehanna R.R. Co. v. Compton .......... 2
Batilla v. Allis Chalmers Mfg. Co. ........... 332,339
Berry v. Beech Aircraft Corp .................. 341
Bramlett v. Avco Corp .................. 340
Bryan v. Louisville & N. R.R. Co. ........... 4
Bryant v. Continental Conveyor & Equip. Co. ........... 329

-C-

Carr v. Beech Aircraft Corp .................. 329
Case 222/84 ................................ 298
Central Greyhound Lines v. Mealey ........... 504, 505, 517
Chaplin v. Boys ................................ 416
Chevron USA v. Natural Resources Defense Council ........... 166
Chicago & E. Illinois R.R. .................. 190,193
Chicago & N.W. Transp. Co. v. United States ........... 9
Cipollone v. Liggett Group, Inc. ........... 315
Cleveland v. Piper Aircraft, Inc. ........... 314
Colorado v. United States .................. 5
Complete Auto Transit, Inc. v. Brady ........... 506
Cosby v. ICC ................................ 183

-D-

Dague v. Piper Aircraft Corp .................. 334
Daily v. New Britain Machine Co. ........... 332
Daval Steel Products v. M/V Acadia Foost .................. 485

Davis v. Cessna Aircraft Corp .................. 330
Dimskal Shipping Co., SA v. Int'l Transport Workers Federation ........... 415
Driver v. Burlington Aviation, Inc. ........... 338

-E-

Erickson Air-Crane Co. v. United Technologies Corp. ........... 339
Estoril ................................ 419
European Parliament v. Commission and Council ........... 293

-F-

Foster v. British Gas p.l.c. ........... 294
Francosteel Corp. v. M/V Deppe Europe ........... 485
Freeman v. Hewit ................................ 518
Frontier Airlines v. United Airlines ........... 315

-G-

General Motors of Canada Ltd. ........... 219
Gibbons v. Ogden ................................ 226
Glosemeyer v. Missouri-Kan.-Tex. R.R. ........... 11
Goldberg v. Sweet ................................ 506, 510
Great N. Pac. & Burlington Lines Inc. ........... 186

-H-

Hanson v. Williams County ........... 338
Hazine v. Montgomery Elevator Co. ........... 329
Heath v. Sears, Roebuck & Co. ........... 337,339
Hodder v. Goodyear Tire & Rubber Co. ........... 337
Hussain Shakit v. Forum Trader ........... 410

-I-

Idaho v. Oregon Short Line R.R. ........... 11
Inter-American v. Consolidated Caribbean Transport ........... 479

125
Transportation Law Journal

-J-
Jose v. M/V Fir Grove 406, 407
JSS Britannia 415

-K-
Kansas City S. Indus. Inc. v. ICC 183
Kennedy v. Cumberland Engineering Co. 339
Kinealy v. St. Louis, Kansas City & N. Ry. Co. 2

-L-
L. Hyeon Su v. M/V Southern Aster 406
Lankford v. Sullivan, Long & Hagerty 328, 329
Lawson v. State 11
Lelemen v. Rimrock Corp. 332

-M-
Mateo v. M/S Kiso 408, 409
McCullouch v. Soviedad Nacional de Marineros de Honduras 403
McGoldrick v. Berwind-White Coal Mining Co. 506
Mendocino Coast Ry. - Lease & Operate - California Western R.R. 179
Miller v. G & W Elec. Co. 336
Ministere Public v. Asjes 126, 453
Miss. & Tenn. R.R. Co v. Devaney 2
Missouri Pac. Truck Lines v. United States 183

-N-
National Ins. Underwriters v. Cessna Aircraft Inc. 332
Nelson R. Raby v. M/V Pine Forest 406
Nervion 415
Norfolk & Western Ry. Co. 180
NWL Ltd. v. Woods, NWL Ltd. v. Nelson 411

-O-
Oklahoma Tax Commission v. Greyhound Lines, Inc. 504, 517
Olsen v. J.A. Freeman Co. 333

-P-
People ex rel. Walker v. Louisville & N. R.R. Co. 3
Phillips Arkansas 418
Powell v. Raynor 297
Powell v. U.K. 296
Preseault v. ICC 12
Publico Ministero v. Ratti 294
Pullman v. Cincinnati, Inc. 332

-Q-

-R-
R. v. Kirk 298
Ray v. Atlantic Richfield Co. 314
Rayner v. U.K. 296
Re: Housing of Migrant Workers: EC Comm'n v. Germany 298
Rives II v. ICC 184
Roy v. Illinois Commerce Comm'n 4
Rutili v. Minister of the Interior 298

-S-
St. Paul Bridge & Terminal Ry. Co. Control 178
Schamel v. Textron-Lycoming 334, 335
Standard Electrica v. Hamburg SudAmerica 479
Su v. M/V Souther Aster 407, 408
Sunbird Air Service v. Beech Aircraft Corp. 314

-T-
Tomas C. Urdas v. Panley Inc. & Eckoxa Co., Ltd. 404
Thornton v. Cessna Aircraft Co. 340
<table>
<thead>
<tr>
<th>Case Name Index</th>
<th>127</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>U.</strong></td>
<td></td>
</tr>
<tr>
<td>Uhl-Baumaschinen GMBH v. M/V Federal Seaway        485</td>
<td></td>
</tr>
<tr>
<td>Union Pac. Corp. -Control- Chicago &amp; Northwestern Transp. Co. 190</td>
<td></td>
</tr>
<tr>
<td>Union Pac. Corp. -Control- Missouri Pac. Corp.       190</td>
<td></td>
</tr>
<tr>
<td>United States v. Lowden                           178</td>
<td></td>
</tr>
<tr>
<td>Universe Tankships Inc., of Monrovia v. Int'l Transport Workers Federation and others 414</td>
<td></td>
</tr>
<tr>
<td>The Utica &amp; Schenectady R.R. v. Brinkerhoff        3</td>
<td></td>
</tr>
<tr>
<td><strong>V.</strong></td>
<td></td>
</tr>
<tr>
<td>Van Duyn v. Home Office                           294</td>
<td></td>
</tr>
<tr>
<td>Van Gend en Loos v. Nederlandse Administratie der Belastingen 294</td>
<td></td>
</tr>
<tr>
<td><strong>W-X-Y-Z</strong></td>
<td></td>
</tr>
<tr>
<td>Western Live Stock v. Bureau of Revenue            505 - 506</td>
<td></td>
</tr>
<tr>
<td>Windward Shipping (London) Ltd. v. Am. Radio Ass'n 403</td>
<td></td>
</tr>
<tr>
<td>Witherspoon v. Sides Constr. Co.                  337</td>
<td></td>
</tr>
</tbody>
</table>
Articles

The New Single Process Initiative Threatens to Erode the Boyle Military Contractor Defense

Robert F. Hedrick*

TABLE OF CONTENTS

I. Introduction ................................................................. 130
II. The Military Contractor Defense as Established by the
Supreme Court in Boyle v. United Technologies
Corporation ........................................................................ 130
A. Facts and Procedural History ........................................... 131
B. The Supreme Court Decision .......................................... 132
III. The Single Process Initiative .......................................... 134
IV. SPI and the Erosion of the Boyle Defense ......................... 136
   A. Reasonably Precise Specifications and the Scope of the
      Government Approval .................................................. 136
      1. Trevino v. General Dynamics Corporation ............ 137
      2. Smith v. Xerox Corporation ................................. 139
      3. Skyline Air Service v. G.L. Capps Company ......... 140
      4. Harduvel v. General Dynamics Corporation .......... 142
      5. Bailey v. McDonnel Douglas Corporation ............ 144

* The author recently completed his LL.M. degree in Air and Space Law at McGill University in Montreal. He has a Bachelor of Sciences degree in Aeronautical Studies, and is a commercial pilot and aircraft mechanic. He currently practices law in Colorado.
I. INTRODUCTION

There has recently been a strong shift in the rules and procedures regarding acquisitions by the U.S. Government. The most significant reform in the military contract industry is what has been termed the “Single Process Initiative” (“SPI”) which allows Government contractors to make block changes to existing contracts. The changes include a shift from mandatory strict compliance with detailed military specifications (“milspecs”), to the use of commercial practices and performance standards. One underlying effect of this shift is that it may open the door to claims against Government contractors that were otherwise immune from suit under the Military Contractor Defense (“MCD”), which was established in the 1988 by the Supreme Court in Boyle v. United Technologies Corp.¹

This article discusses the ramification of the SPI on the Boyle defense. The Part II discusses the Military Contractor Defense (“MCD”), its underlying policy, and historical significance. The Part III analyzes the SPI and gives examples of its early application. Part IV takes a look at the MCD’s breadth of application, the limitations contained in numerous post-Boyle cases, and the anticipated effect when the SPI becomes part of a product design and/or manufacturing process. Lastly, this article discusses the policy goals of the MCD in light of the SPI.

II. THE MILITARY CONTRACTOR DEFENSE AS ESTABLISHED BY BOYLE V. UNITED TECHNOLOGIES CORP.

Boyle was the first time the MCD was adopted at the highest level of the U.S. judiciary system. However, it was not the first time that the legal industry had seen or used the defense. For years, the MCD had worked its way through the federal courts where there was inconsistent application of the doctrine among the circuits. The Supreme Court granted certiorari to resolve the dispute.²

² Certiorari was granted in Boyle v. United Technologies Corp., 479 U.S. 1029 (1987).
A. FACTS AND PROCEDURAL HISTORY

Boyle involved the unfortunate death of Marine helicopter pilot David A. Boyle in an accident on April 27, 1983. Boyle was piloting a Sikorsky CH-53D off the coast of Virginia with another pilot and two crew members. As the helicopter made its approach to land on the USS Shreveport, the approach was aborted. As Boyle initiated a right turn, the left cyclic control failed and the aircraft crashed into the sea. Three crew members were able to escape, however Boyle could not and drowned. After the helicopter was recovered, it was determined that the cyclic control had probably failed either because the flight control servos suffered hydraulic fluid contamination, or because the control mechanism was improperly rigged. Therefore, if fault for the accident could be placed, it would probably lie with the Navy due to negligent maintenance practice.

Since Boyle was a military employee suit could not be brought against the U.S. Government. Boyle’s father brought suit against the helicopter manufacturer, Sikorsky Aircraft Division of United Technologies Corporation (“Sikorsky”). One issue at trial, which became the primary issue on appeal, involved an allegation of design defect related to the crash-worthiness of the helicopter. This claim was based on the undisputed fact that Boyle had survived the aircraft’s initial impact with the water, but drowned before he could escape. It was claimed that Sikorsky had “defectively designed the copilot’s emergency escape system; the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch handle was obstructed by other equipment.”

At trial the jury awarded plaintiff $725,000. The District Court denied Sikorsky’s post-trial motion for judgment notwithstanding the verdict. Sikorsky then appealed to the Fourth Circuit Court of Appeals, who reversed, finding in part that Sikorsky had satisfied the requirements of the “Military Contractor Defense.” Boyle appealed to the U.S. Supreme Court which accepted certiorari and subsequently affirmed the

3. 487 U.S. at 502. The Boyle facts are taken from both the Supreme Court’s decision and from a more detailed article by C. Cahoon, Boyle Under Siege 59 J. AIR L. & COMM. 815, 818-825 (1994).

4. The cyclic control directs the helicopter left, right, forward and backward. When the helicopter was in a descending right-hand turn the failure of the left cyclic rendered it impossible to come out of the right turn.

5. C. Cahoon, supra note 3 at 825, n.43.


Fourth Circuit by a 5 to 4 margin. Justice Scalia delivered the opinion of the majority.

B. THE SUPREME COURT DECISION

First, in order to avoid the constitutional rule of separation of powers between Congress and the Judiciary, Scalia recognized that the police powers of states are not superseded "unless that was the clear and manifest purpose of Congress." Federal preemption must therefore be based on constitutional or statutory grounds unless the issue falls within one of the areas that involving "uniquely federal interests," where the courts may establish what is, in essence, federal common law. The Court held that the procurement of equipment for the Federal Government involves a unique federal interest because holding Government contractors liable in suits between private parties will have a direct effect on the terms of the contracts.

A second reason for allowing preemption without statutory basis is when there is a direct conflict between federal and state law. The Court recognized that military contractor liability under state law would conflict with the Government's discretionary exception under the Federal Tort Claims Act ("FTCA"). The Court stated that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision." The Court found that when state law holds Government contractors liable for design defects in military equipment, there may exist a significant conflict with federal policy, and if so, state law will be preempted. The immunity is based on the belief that design decisions involve a balancing of many factors including technical, military, and social considerations, and "specifically the trade-off between greater safety and greater combat effectiveness."

Proponents of the MCD argue the defense is needed to uphold Gov-

also held that Boyle had failed to meet his burden of proof against Sikorsky to prove fault for the original accident. Id.
11. Id. at 506, 507.
12. Id. at 510. The FTCA allows suit against the U.S. Government under certain circumstances. See 28 U.S.C. 2680(g). The discretionary function provides:

Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations.
14. Id. The Court in essence is claiming that since Government military contractors work...
ernmental immunity for discretionary acts. Placing liability on contractors would result in the increased costs being passed on to the Government, which is exactly what the immunity was intended to prevent. Thus, the defense arises from the principle that when a contractor acts at the direction and under the authority of the Government it is entitled to assert the sovereign immunity of the Government. In the field of military contracts this policy "shield[s] sensitive military decisions from scrutiny by the judiciary, the branch of Government least competent to review them." The Court held ordinary tort law is not meant to apply to Government military design decisions because the Government "is required by the exigencies of our defense effort to push technology towards its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods."

The Court declined to expand the Feres doctrine, which provides immunity to the Government for injuries suffered by military members incident to their military service. Barring suits, the Court reasoned, was too broad because it would unreasonably extend to injuries caused by stock products "or by any standard equipment purchased by the Government."

Justice Scalia then adopted the scope of displacement that was used by the Fourth Circuit:

"Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself."

The Court found that Sikorsky had established Governmental approval of "reasonably precise specifications" for the escape hatch. Among nu-

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for the Government and have their plans and specifications reviewed and approved by the Government, they too are entitled protection under the discretionary immunity test.

16. Id.
17. Id. (quoting McKay v. Rockwell International Corp., 704 F.2d 444, 449-50 (9th Cir. 1983)). One concern is that most military activities do not involve risks any greater than those which would be accepted by the ordinary consumer. The problem is that the MCD may apply to all Government procured equipment, regardless of the associated risks involved with operation of that equipment.
19. Id.
20. Id. at 512.
merous detailed facts regarding the procurement of the helicopter design specifications, there was evidence that Sikorsky and the Navy had many “back-and-forth discussions.” The Supreme Court then vacated and remanded the case back to the Court of Appeals to clarify its factual evaluation consistent with their decision. On remand, the Fourth Circuit Court of Appeals held that no reasonable jury could have found for the plaintiff on the facts presented, and held that Sikorsky had established the military contractor defense as a matter of law, and was therefore immune from liability.

III. THE SINGLE PROCESS INITIATIVE

Acquisition reform has continuously been at the forefront of Congressional concerns since the mid-1980’s. In 1994, however, Congress finally passed the Federal Acquisition Streamlining Act which was signed into law by President Clinton on October 13 of that year. The Act represents significant federal procurement reform measures, including reform of over 200 different sections of Armed Forces Procurement regulations. On December 8, 1995, Secretary of Defense William Perry issued a memorandum requesting guidance to promulgate rules in order to make certain block changes to existing contracts between the Government and private industry. Using a modification approach of “block change” allows consolidation or elimination of “multiple processes, speci-

22. Id. Since the Boyle decision was 5 to 4, it is certainly worth mentioning the strong dissent by Justice Brennan, who noted that it was not right that Boyle could sue Sikorsky had Boyle been flying one of its civilian aircraft, but could not maintain a viable action when the helicopter was designed for the Federal Government. Brennan criticized the majority for unauthorized judicial legislating, and pointed out the fact that Government contractors had already extensively lobbied Congress for a defense, which efforts failed to produce any results. Boyle, 487 U.S. at 515. He noted that if children playing on a beach were injured or killed by a defective Government helicopter falling out of the sky, they would not have any recourse against the manufacturer. “In my view, this Court lacks both authority and expertise to fashion such a rule, whether to protect the Treasury of the United States or the coffers of industry.” Id. at 516.

Aviation law expert Lee Kreindler stated:

As the dissenting opinion of Justice Brennan points out, the majority’s decision to carve out a new area of uniquely federal interest and then displace state law for no better reason than to prevent what it perceives to be a potential prejudicial impact upon the federal treasury is unprecedented, shocking, and an unabashed act of judicial law-making.

Lee Kreindler, AVIATION ACCIDENT LAW, 7-90, (Matthew Bender, 1989).
24. With the end of the cold war, reform in the military has accelerated at an unprecedented rate. Federal law governing procurement for the Armed Forces is found at 10 U.S.C. 2200, et seq.
fications, and standards in all contracts on a facility-wide basis." The term "Single Process Initiative" defines this new process and applies to existing contracts and to those areas in which the Government can technically accept the proposed changes.

Historically, significant inefficiencies existed because in many contractor facilities, there were several different specifications or processes that were used for similar operations in manufacturing or management; these were caused by different requirements existing for different contracts. The goal of the SPI is to allow implementation of common processes to contractors which "will result in more efficient, consistent and stable processes, with greater ease of contract administration for both contractor and Government, and savings for the taxpayer." In one example involving the commercial engine pilot program, it was determined that use of a regular commercial engines on the C-17A aircraft allowed the Air Force to avoid significant development costs that would have otherwise been incurred on a military-unique engine. It also allowed access to competitive commercial production prices, and lowered support costs with commercial support provisions.

Another example is the Joint Primary Aircraft Training Systems ("JPATS") program which involves replacement of the Air Force and Navy entry-level training aircraft. JPATS acquisition reform allowed a "50 percent reduction in military standards and a 60 percent reduction in contract data requirements."

The first block change modifications formally permitted under the SPI were signed on April 4, 1996. These modifications affect 770 contracts that Texas Instruments signed with the Government. One change which involved paint and primer materials for a metals and fabrication process, deletes four different military specifications, and substitutes in their place Texas Instruments' single process specifications for alternative coatings. Another block change modification substitutes Texas Instruments' standard procedure while deleting 19 different military or service specific specifications.

Another example of the SPI in action involved Boeing's recent offer

26. Id. at 2.
27. Department of Defense, Immediate Release No. 138-96 (15 March 1996). The commercial engine involved in the C-17A program was the Pratt and Whitney F-117 engine.
28. Id. at 2.
29. Id. The final financial results are not in, however the JPATS program resulted in a 50% savings in program office staffing, and a reduction in development time by 12%. Id.
30. Department of Defense, Immediate Release No. 194-96 (8 April 1996). The changes reflected in this paragraph are cited for example purposes only, and do not suggest any type of fault based conduct.
31. Id.
to re-engine the B-52H bomber fleet of 94 aircraft with engines leased from Rolls-Royce. Under Boeing’s plans each of the aircraft’s eight Pratt & Whitney engines would be replaced with four Rolls-Royce commercial engines. Boeing would also provide maintenance for the engines. Boeing would also add auxiliary power units and cockpit displays that are identical as those used on the Boeing 757, and install a power generator similar to that on the Boeing 777. Identical nacelles, struts and engines are used on the Boeing 757.

The Joint Standoff Weapon (“JSOW”) development program adopted acquisition reform to streamline its development processes and costs. “Instead of mandating detailed design requirements, backed by tedious Government reviews and approvals of contractor processes and technical data, JSOW program leaders only defined top-level performance requirements.” As part of the new streamlined acquisition process, officials now play a broader role as participants in the JSOW Integrated Products Teams. These teams are comprised of military officials, contractor employees, test experts, and suppliers. According to officials, the program has worked so well that it is being extended to other programs.

As a result of the changes to acquisition procedures, the Government will realize substantial savings under the SPI. Government contractors will also reap immediate and significant financial benefits from the SPI due to the fact that the process allows change-overs of contracts currently in force. It is estimated that the bottom line of pure profit could reach 1% to 4% in 1996 alone. Specific programs may experience even larger cost savings, such as the JSOW program, where streamlining is expected to reduce overall costs by 30%.

IV. SPI AND THE EROSION OF THE MILITARY CONTRACTOR DEFENSE

A. REASONABLY PRECISE SPECIFICATIONS AND THE SCOPE OF GOVERNMENT APPROVAL

Post-Boyle cases consistently apply the three-part test to determine MCD immunity. A brief review of some of those cases is important in order to evaluate and estimate the effect of the Single Process Initiative.

32. Stanley W. Kandebo, Boeing Proposes Reengining B-52s, AVIATION WEEK & SPACE TECHNOLOGY, June 24, 1996 at 75.
33. Id. at 76.
34. William B. Scott, Acquisition Reform, Teaming Speed JSOW Development, AVIATION WEEK & SPACE TECHNOLOGY, July 22, 1996 at 59.
35. Id.
37. Supra note 34.
on the *Boyle* defense. Since the SPI looks to change the role of government in the approval process, only the first *Boyle* element will be affected, namely that which pertains to issues involving Government approval of “reasonably precise specifications.”

The first *Boyle* element can be broken down into two subparts: 1) the requirement of Governmental approval; and 2) the requirement of reasonably precise specifications. Some decisions do not distinguish between these two subparts and mistakenly treat them interchangeably. The danger is that a court will use these cases to support one subpart, when in fact, the decision involves the other subpart.

I. Trevino v. General Dynamics Corporation

*Trevino v. General Dynamics Corp* is one of the leading cases addressing the Governmental “approval” issue.\(^{38}\) *Trevino* involved the accidental deaths of five U.S. Navy scuba divers in a submarine diving chamber. The accident occurred when a ventilation valve failed to fully open and allow air in when the divers activated the pumps to drain water from the chamber. With no air flowing into the chamber as water was being pumped out, a deadly vacuum was created within the chamber. The families of the divers brought suit against General Dynamics, which was contractor responsible for designing the system. The Navy determined there were four design deficiencies.\(^{39}\) At trial, the District Court found General Dynamics negligent on seven separate grounds and the Navy negligent on three grounds. The Court allocated 80% liability to General Dynamics and 20% to the Navy. General Dynamics appealed the District Court’s decision on numerous grounds, including its failure to grant General Dynamics immunity under the MCD.

As to the Government “approval” requirement of the first *Boyle* element, the Court of Appeals noted that the *Boyle* decision offered little guidance because the sufficiency of the approval was not at issue in *Boyle*. In *Trevino*, there was evidence that the Navy had merely signed off on a number of the diving chamber specifications, and that there was a lack of serious review and evaluation of the design by the Navy. In light of this, the Court held that ‘approval’ under the *Boyle* defense requires more than a *rubber stamp*.\(^{40}\) The Court stated that the defense is meant to protect the Government’s discretionary functions, and that only those decisions which truly involve the use of some “policy judgment” are discretionary. The Court reasoned that a “rubber stamp is not a discretionary

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39. *Id.* at 1477.
40. *Id.* at 1480 (emphasis added).
function; therefore, a rubber stamp is not ‘approval’ under Boyle.’

Trevino recognized that Government approval must be of “reasonably precise specifications.” This means that the Government must exercise discretion over all critical design choices. Thus, if the specifications are imprecise or merely general guidelines or standards, then it is the contractor, not the Government, who is left with discretion over the design choices. This is also true when the contractor has flexibility to deviate from the specifications. In both instances the defense will not apply. One key factor is whether the discretionary function lies with the Government officer or with the contractor. The Court summarized its Government “approval” approach as follows:

The Government exercises its discretion over the design when it actually chooses a design feature. The Government delegates the design discretion when it buys a product designed by a private manufacturer; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the Government, requiring only that the final design satisfy minimal or general standards established by the Government. If the Government delegates the design discretion to the contractor, the exercise of that discretion does not revert to the Government by the mere retention of a right of “final approval” of a design nor by the mere “approval” of the design without any substantive review or evaluation of the relevant design features or with a review to determine only that the design complies with the general requirements initially established by the Government. The mere signature of a Government employee on the “approval line” of a contractor’s working drawings, without more, does not establish the Government contractor defense.

The Court also recognized that the purpose of the Boyle three-part test was to not disallow the defense “to a Government contractor ‘that is itself ultimately responsible for the design defect.’” The bottom line is that the Government must exercise discretion over the design feature in question. The District Court in Trevino had found that contracts between the Navy and General Dynamics left design features entirely up to General Dynamics. While the Navy set only certain general performance standards, it left specific details to General Dynamics. The fact that the Navy internal investigation found no formal Navy design review also proved critical to the case. The Court of Appeals affirmed the lower

41. Id.
42. Id. at 1480.
43. Id. at 1481 (quoting Bynum v. FMC Corp., 770 F.2d 556, 574 (5th Cir. 1985).
44. Id. at 1487. See also n.12. (decisions and accompanying text discussing the importance of the lack of Navy design review. The District Court also found that the design did not conform to the general requirements as provided by the Navy).
court's holding that General Dynamics did not meet its burden in establishing the MCD and was therefore liable to the plaintiffs.

The *Trevino* decision, termed "pro-plaintiff" by many, is on the leading edge of cases restricting the *Boyle* defense.\(^{45}\) Nevertheless, *Trevino* directly applies the policy behind the MCD as established by the Supreme Court in *Boyle*. The reason that *Trevino* is considered by some as being incorrectly decided, is that other post-*Boyle* cases have taken the defense beyond the scope of *Boyle* and into areas where the Government does not *per se* exercise discretion in approving the reasonably precise design specifications of the failed component. As to the requisite Government approval element established in *Boyle*, numerous cases have chiseled away the strict approval requirements and have allowed the defense even when the contractor exercises the requisite design discretion. The fear of abuse, as reflected in Justice Brennan's dissent in *Boyle*, has come to fruition.

The Government approval standard set out in *Trevino* favors claimants who will seek to avoid the military contractor defense in cases involving the SPI. Under *Trevino* the Government must exercise its discretion in reviewing and evaluating selection of the specific design feature at issue. Any delegation of discretion, retention of "approval" authority, or mere compliance with Government standards will not suffice. As discussed below, commercially-available products (and some commercially-modified products) will not meet MCD muster, especially under the *Trevino* approval standard.

2. Smith v. Xerox Corporation

*Smith v. Xerox Corporation*\(^{46}\) involves claims for personal injuries by an Army private after a weapon simulator he was using prematurely exploded and burned him. It was believed that the weapon misfired because of damp conditions. In its analysis, the Court first determined what type of "reasonably precise specifications" were approved by the Government. Even though Xerox could not produce the complete specifications, it did produce a list of specifications, as well as a copy of the Government-mandated performance criteria. The criteria included environmental requirements for temperature, humidity, and salt resistance. Moreover, a former Xerox employee testified the Army had reviewed and approved the drawings and specifications prepared by Xerox, which testimony was not rebutted.\(^{47}\) Because the Government supplied the rel-


\(^{46}\) 866 F.2d 135 (5th Cir. 1989). It is interesting to note that Smith was decided by a three member panel of the Fifth Circuit on the same day that *Trevino* was decided, also by a three member panel of the Fifth Circuit.

\(^{47}\) Id. at 138.
evant specifications it wanted the weapon to meet, which were incorporated into Xerox's production contract, and considering the unrebuted testimony, the Court found Xerox had met its burden of proof, as a matter of law, that the Government had approved the specifications.48

One weakness of the Smith decision is that even though the evidence did not clearly establish Government approval of the specific design specifications, the Court nonetheless created its own standard in order to find MCD immunity. Mere Government-supplied performance standards (such as operation within certain environmental perimeters), without more, clearly falls short of the Boyle requirement of Government approval of reasonably precise design specifications.

It is apparent that Smith will be favorable to military contractors who defend cases involving the SPI in product design or manufacture because it holds that incorporation of Government-supplied performance requirements into the production contract constitutes "reasonably precise" specifications. Thus, under Smith, if the Government sets forth certain product performance requirements, which are adopted by the contractor, the MCD may prevail. Arguably, even if the product is available on the commercial market, under Smith the design need not change per se from that offered in the civilian market, as long as the performance requirements as incorporated are approved by the Government.49


In Skyline Air Service, Inc. v. G.L. Capps Company,50 the insurer of a civilian helicopter that crashed brought a subrogation action against the helicopter manufacturer. Since the helicopter was a former military helicopter, the manufacturer sought immunity under the MCD, and brought a motion for summary judgment which was granted by the trial court and affirmed by the Fifth Circuit Court of Appeals. The issue was whether Bell, the helicopter manufacturer, could invoke immunity under the MCD, even though Bell could not produce the original contract it had

48. Id. It is important to note that the Smith case never made it to trial. Xerox had brought a Rule 56 motion for summary judgment asking the District Court Judge to decide that the MCD applied as a matter of law. The Federal Rules of Civil Procedure allow the granting of summary judgment when there is no genuine issue as to any material fact, and the facts available are sufficient for a legal determination as a matter of law. It was not originally anticipated that the MCD would be allowed to be determined by the trial judge based on a contractor's Rule 56 motion. Boyle unequivocally states that "whether the facts establish the conditions for the defense is a question for the jury." Boyle, 487 U.S. at 514.

49. This result is inconsistent with Trevino, which was also decided by the Fifth Circuit Court of Appeals. Trevino held that design approval without Government review and evaluation, or mere compliance with general Government requirements, do not suffice to meet the MCD. Trevino, 865 F.2d at 1480.

50. 916 F.2d 977 (5th Cir. 1990).
entered into with the Government to produce the helicopter. The insurer disputed the sufficiency of the evidence, however, the Court recognized:

The affidavit and contract . . . show that Bell was required to “strictly adhere to previously established, Government-approved specifications”; to follow Government specified procedures to assure compliance with those specifications; and to design and manufacture the helicopter precisely in accordance with the specifications—"[n]o deviations to the specifications or drawings were permitted without Government approval."51

After recognizing the complete lack of evidence opposing the Government’s approval of Bell’s specifications, the District Court entered summary judgment for Bell.

One significant aspect of the Skyline decision is its holding that the MCD permanently attaches to Government-procured aircraft even if the aircraft is subsequently sold as surplus on the civilian market. One problem is that military surplus aircraft often have identical civilian counterpart aircraft which are built by the same manufacturer. In order to lawfully fly in the civilian market, military surplus aircraft must obtain an airworthiness certificate issued by the FAA, which in part, may rely on the type of certificates issued for their identical civilian counterpart aircraft. However, this aircraft may be protected by the MCD, even though both aircraft are built to identical standards; the military surplus aircraft in the civilian market are not protected by the same policy concerns as their purely military counterparts, namely military, technical, and social considerations. Moreover, no policy statement exists that addresses the trade-off between safety concerns and “greater combat effectiveness.”52

Skyline is significant to products manufactured under the SPI because it extends the MCD to suppliers of military equipment that end up in the civilian market. From a policy standpoint, it is difficult to reconcile when a product is sold to the military before it ends up in the civilian market, yet when the same product is sold directly in the civilian market, liability does arise.53 Thus, the contractor will not incur risks beyond those for ordinary consumer goods once the product ends up on the civilian market. The once principle concerns involving national defense no longer exist.

Civilian marketability of military-type product enhance their value for both the contractor and the Government, especially when the product is immune from state tort law. When the Government profits commercially by acting as a reseller of military hardware in the private sector and competes with other manufacturers, extending immunity pursuant to the

51. Id. at 978.
52. Boyle, 487 U.S. at 511.
53. This assumes the defect was not related to a military specific modification.
Federal Tort Claims Act to nonmilitary commercial activity lacks justification. The balance of interest shifts from "the exigencies of National defense" to the significant state interest of product liability law.

4. Harduvel v. General Dynamics Corporation

*Harduvel v. General Dynamics Corp.*, 54 involved a claim for wrongful death brought by the wife of Air Force Captain Theodore Harduvel, who was killed when his F-16 crashed while on a daytime training mission in South Korea. After flying into a solid cloud bank, he lost control of his aircraft and crashed into a mountain. There were no eyewitnesses and the plane was completely destroyed. Little physical evidence remained. Both parties thus relied on expert witnesses to establish the cause of the crash.55

Plaintiff brought a diversity action in Florida federal court against the F-16's manufacturer, General Dynamics. At trial, plaintiff alleged that a manufacturing defect in the aircraft's electrical wiring system caused by chafing (undesired friction of the wires) caused the electrical "fly-by-wire"56 system to short out and fail. Plaintiff's experts testified that the F-16 had a history of wire-chafing problems. The plaintiff, by framing the alleged defect as a manufacturing defect as opposed to a design defect, allowed General Dynamics to establish the *Boyle* defense.57 General Dynamics asserted that Harduvel suffered an adverse reaction to medication he was taking. According to General Dynamics, the medication caused Harduvel to experience nausea and discomfort, which made him lose control of the aircraft.58

The jury returned its verdict in favor of the plaintiff and awarded $3.1 million. General Dynamics immediately moved for judgment notwithstanding the verdict which the District Court denied based upon Eleventh Circuit case law.59 The District Court decided the motion, how-

55. *Id.* at 1314.
56. The "fly-by-wire" system allows the flight controls to be operated via electrical impulses as opposed to direct cable or hydraulic operation. *Id.* at 1313.
57. *Boyle*, by its own terms, only applies to design defect cases and not to manufacturing defects.
58. *Harduvel*, 878 F.2d at 1314.
59. *Id.* at 1315. The District Court relied on the military contractor defense test set out in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 745-46 (11th Cir. 1985), where the defense is available to the contractor:
only if it affirmatively proves: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.
*Harduvel*, 878 F.2d at 1315.
ever, before the Supreme Court handed down its decision in the Boyle case. When General Dynamics appealed to the Eleventh Circuit, they had the benefit of the Boyle decision.

The Eleventh Circuit recognized that, in light of Boyle, the distinction between design defects and manufacturing defects “takes on special significance.” The jury found that the wire-chafing constituted a manufacturing defect under Florida state law. However, since the general contractor defense was a matter of federal common law, it preempted state law. The Court held that an inference of a manufacturing defect under Florida law was incompatible with the MCD and did not promote uniformity in the law. Accordingly, it fashioned its own definition and held that “the distinction is between an unintended configuration (a manufacturing defect), and an intended configuration that may produce unintended and unwanted results (a design defect).” After reviewing the defect-related facts, the Court concluded that it was the aircraft’s design that had “potential for unwanted wire chafing.”

In reviewing the Air Force approval of the design, the Court looked to the extensive evaluation of the specifications, blueprints, and drawings, and concluded that the design resulted from the “continuous back and forth” action between General Dynamics and the Air Force. As for the second element of the Boyle defense, the Court stated: “To say that a product failed to conform to specifications is just another way of saying that it was defectively manufactured.” Since the Court found that a manufacturing defect did not exist under federal common law, it held that the second element was met.

One significant problem arises from this reasoning: the Court overlooks the fact that the contractor maintains the burden of proving the aircraft conformed to the approved specifications. In an accident such as Harduvel’s, however, with a product almost completely destroyed, the burden would otherwise remain impossible to meet with direct evidence. Since the third Boyle element was also met, i.e., General Dynamics knew no more about the chafing problem than the Air Force and thus had no duty to warn, the Court held that the MCD applied and reversed the District Court’s denial of General Dynamics’ motion notwithstanding the verdict.

The Court’s creation and application of federal common law to define the difference between manufacturing defect and design defect is the most important aspect of the Harduvel decision. It also appeared the Court was dissatisfied with the plaintiff’s evidence and her burden of

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60. Harduvel, 878 F.2d at 1317.
61. Id.
62. Id. at 1318.
63. Id. at 1321.
proof. For example, even though the subject aircraft was almost completely destroyed, the jury found a manufacturing defect by inference under Florida law. It is difficult to imagine, however, how a manufacturing defect could otherwise be found if not by inference. If a manufacturing defect requires conformity to specifications,\textsuperscript{64} the plaintiff must present evidence of the noncompliance as it relates to that specific defect. However, when the product is completely destroyed, the burden cannot be met without some type of additional extrinsic circumstantial evidence.

The importance of Hawevel, in light of the SPI, is that it defines and distinguishes manufacturing defects from design defects under federal common law. A product's failure to conform to its specifications "is just another way of saying that it was defectively manufactured."\textsuperscript{65} Claimants will continue to argue that defects are one of manufacturing, even if the equipment was manufactured under the SPI. Yet Hawevel requires claimants to prove nonconformity by more than mere circumstantial evidence in order to avoid MCD application.

For claimants, Hawevel contains valuable insight into the policy behind MCD. For one, the case draws a strict distinction between military and civilian products. As stated by retired Justice Powell, military pilots and aircraft crews:

> are not the 'military doubles of civilian motorists,' . . . or ordinary purchasers of consumer products. . . . [The MCD] recognizes that one of these risks is the operation of equipment in which safety concerns have been balanced against cost and performance. With respect to consumer goods, state tort law may hold manufacturers liable where such a balance is found unreasonable. In the sensitive area of federal military procurement, however, the balance is not one for state tort law to strike. Although the defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense.\textsuperscript{66}


When product specifications do not include specific features of the defect in question, it appears that the first element of Boyle cannot be established. In other words, even though specifications may have been approved, they cannot be "reasonably precise" when they do not cover

\textsuperscript{64} A dangerous inference could arise if the existence of a manufacturing defect requires nonconformity to specifications. For example, product specifications may not be entirely complete so that if a product fails due to material defect and there is no adherence to the material specifications because they are vague, the product could still comply with the specifications yet be defective by a manufacturing fault.

\textsuperscript{65} Id. at 1321.

\textsuperscript{66} Id. at 1322.
the defect at issue. Bailey v. McDonnell Douglas Corporation, 67 illustrates this point.

In Bailey, Air Force Major John Bailey was killed when his F-4 Phantom II aircraft crashed during a landing approach. Bailey's wife brought suit in Texas claiming that the aircraft controls, which apparently locked, were defectively designed. In addition, the bellows canister failed which caused loss of control of the aircraft's pitch movement. The plaintiff claimed the bellows problem was a metallurgic defect, which constituted a manufacturing defect. 68

The trial court granted summary judgment for defendant based upon the Boyle defense. One issue on appeal was whether the contractor met its Boyle burden of proof when the specifications were silent as to the defect in question. The Fifth Circuit Court of Appeals held that the contractor did not introduce evidence "to support a finding that the canister's metallurgic content conformed with Government specifications." 69 Thus, the contractor did not sustain its requisite burden of proof, and summary judgment was reversed on the metallurgic defect. The Court acknowledged, however, that the application of the Government contractor defense does not necessarily "only apply to claims labeled 'design defect'." 70 Application of the defense only considers whether the three elements of Boyle are met "with respect to the particular product feature upon which the claim is based." 71

The significance of Bailey is that unless the specifications clearly delineate the particular defect in issue, then the specifications are probably not "reasonably precise," making it is impossible for the contractor to clear the first Boyle element. 72 As discussed above, when it comes to the use of commercial standards under the Single Process Initiative, it is anticipated that many of the specifications will not be reasonably precise, which will result in failure of the Boyle defense.

As with all cases brought against Government contractors for defectively designed products, the determination of immunity under the MCD involves a fact intensive review and analysis of the exact nature and extent of the Government's role in approving the "reasonably precise speci-

67. 989 F.2d 794 (5th Cir. 1993).
68. Id. at 796.
69. Id. at 800.
70. Id. at 801.
71. Id. at 802 (emphasis in original).
72. This point is expressed in the decision where the Court states:
Again, we note that where the Government specifications are silent with respect to the particular feature in issue, Boyle's first condition— Government approved reasonably precise specifications—would probably be in issue if the defense were applied to that feature.
Id. at 801, n.15 (emphasis in original).
fications.” Design defects in products manufactured under the SPI will be decided on a case-by-case basis. It is impossible to determine the long term effect of the SPI on the industry as a whole. Manufacturers will probably see an increase in premiums for design defect liability insurance covering products manufactured under the SPI. Yet, there can be little doubt the SPI will erode the MCD, and that erosion could be significant.

For example, as discussed above, the SPI caused a deletion of Government standards and specifications in the C-17A commercial engine program, the JPATS program and the Texas Instruments block change. Clearly the shift from Government-controlled standards to those of the industry contractors will affect the application of MCD. If there is a design defect in one of the Texas Instruments’ specifications which replaced the Government’s own specification, it would be difficult for TI to convince a court that the Government seriously reviewed and approved TI’s specifications, while at the same time the Government specifications were being deleted. Additionally, with the stroke of a pen, changes that affected 700 contracts were instantly implemented. Thus, it is highly unlikely that any significant review or modification to any of these 700 contracts ever took place.

The SPI’s elimination or replacement of the Government’s previously approved specifications of contractor procedures will result in a serious erosion of the MCD Government-approval element. The importance here is that with the reduced application of military standards, and a strong shift toward commercial processes, the Government-approval element of the MCD application may disappear, which can cause the defense to fail, and the umbrella of immunity to collapse.

B. Commercially Available Equipment

The strongest erosion of MCD will occur in those areas where contractors adopt commercial specifications, especially where commercial products are used which are also available on the civilian market. A number of cases reflect judicial reluctance to extend the MCD to commercial products that are bought and used in the military.

_In re Hawaii Federal Asbestos Cases_, 73 held that the military contractor defense was not available to a manufacturer of asbestos insulation that was sold both to the Navy and commercial buyers. Dust from the insulation caused asbestosis and cancer in hundreds of military and civilian workers. The Court did not consider the insulation to be “military equipment” because it was “not manufactured with the special needs of the military in mind,” and the Navy was “a relatively insignificant purchaser of products that were primarily designed for applications by pri-

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73. 960 F.2d 806 (9th Cir. 1992).
vate industry." Therefore, the Court held, Boyle did not provide authority to displace state tort law.

If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered. . . If the Government contractor defense is to prohibit suit against the manufacturer whenever Feres would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock . . . or by any standard equipment purchased by the Government, would be covered. 75

In addition, the Ninth Circuit held that the policy supporting Boyle did not exist in In re Hawaii. The policy judgments made by the manufacturer were not specifically made for the military, but for the manufacturer's commercial customers in the private sector. The Court recognized this:

The contractor, furthermore, already will have factored the costs of ordinary tort liability into the price of their goods. That they will not enjoy immunity from tort liability with respect to the goods sold to one of their customers, the Government, is unlikely to affect their marketing behavior or their pricing. 76

In Nielsen v. George Diamond Vogel Paint Co., 77 the Ninth Circuit rejected the MCD for damages allegedly arising from inhalation of paint fumes by an employee of the Army Corps of Engineers. The Court recognized that manufacture of the paint did not involve any "special military purpose," 78 as the paint was designed for civilian use. Thus, the MCD does not apply to consumer products that are purchased by the armed forces, including (as recognized in Boyle), standard and stock equipment. In these instances, there is simply a lack of Government involvement in approving reasonably precise specifications, and no significant conflict with state tort law.

Under the SPI, when the Government accepts a contractor's shift from military-type specifications and/or manufacturing procedures, to commercial common processes, the issue will arise as to whether or not the new procedure constitutes acceptance of reasonably precise specifications sufficient to satisfy the first Boyle element. First, the design feature

74. Id. at 812.
75. Id. at 811, quoting Boyle, 487 U.S. at 510 (emphasis in original In re Hawaii opinion).
76. Id. at 811.
77. 892 F.2d 1450 (9th Cir. 1990).
78. Id. at 1453.
in question must be a unique specification for military purposes. It cannot merely repeat a specification that was already developed for the civilian market. In other words, even though the Government approves use of commercial specifications, if those specifications are already used in the civilian market, there is nothing military-unique about them, and the Boyle defense should fail. Second, as recognized in In re Hawaii, the original design policy judgment may be made for private industry application and not for specific military needs. Whether or not the Government approves previously-adopted private industry standards is essentially no different than purchasing stock or standard equipment which, as unequivocally noted in Boyle, is not subject to the MCD.

Finally, if a contractor designs and manufactures a product it believes complies with state tort standards, and the military approves the products design without change, no significant conflict would arise between federal military policy and state tort law because the contract specifications are not different than the tort standards. Therefore, the case would not be pre-empted under Boyle.

C. Modified Commercially Available Equipment

It is anticipated the SPI will cause an increase in cases involving products that are both manufactured for civilian consumer use, but are also modified for military use. When this occurs, the application of the MCD will depend upon both the facts of each case and the jurisdictional law applied. For example, in Oliver v. Oshkosh Truck Corp., suit was filed against the manufacturer of a military MK-48 truck which exploded after impact with another vehicle during the Gulf War. Even though the vehicle was commercially available, its development was based on military considerations, and thus it was considered military equipment for application of the MCD. The Court held that the underlying facts supported the manufacturer's position that the Government approved reasonably precise specifications for military use. The Court noted that "if the performance specifications were such that Oshkosh could not 'comply with both its contractual obligations and the state-prescribed duty of care,' then a significant conflict exists." The Court found that the Marine Corps role was extensive throughout the testing and contract specifications, and hence, there existed a significant conflict with state law.

In Augustine v. Bell Helicopter Textron, Inc., plaintiffs decedents

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80. Id. at 1175.
81. Id. at 1170 (citation omitted) (emphasis in original).
were killed when flying a UH-1N helicopter that crashed during training exercises in California. Suit was brought in Texas state court alleging a design defect in the engine driveshaft system. The manufacturer moved for summary judgment based on the MCD. In reversing the trial court’s granting of summary judgment, the Texas Court of Appeals held that Bell did not establish, as a matter of law, the MCD. Bell had originally developed the twin-engine helicopter for civilian use, but was called to develop a militarized version of it for the Vietnam War. The Court recognized that Bell was involved with certain design changes, but none of the changes involved the main driveshaft. The Court noted “acceptance by the Air Force of Bell’s design of the main driveshaft certainly does not per se constitute a discretionary design choice or ‘approval’ as contemplated by Boyle.” The Court concluded that factual issues surrounding the application of the MCD warrants jury determination. Hence, in cases where 1) commercially-available products are modified for military use; 2) the modification to the specific feature in question causes a significant conflict with state tort law; and 3) the elements of Boyle are met, the MCD will apply.

D. SPI and the Duty to Warn

Even though Boyle did not deal with state tort “failure to warn” claims, it has been used to guide courts in determining federal MCD pre-emption of such claims. It is therefore important to distinguish the Boyle test from the state tort “duty to warn” law. The third element of Boyle requires the contractor to warn the Government about dangers in the equipment of which they are aware but the Government is not. The purpose of this policy is to encourage full disclosure to the Government so that the Government can be fully informed to use it’s discretion in selecting product design. Tort law concerning “failure to warn,” on the other hand, is intended to protect users and consumers from unreasonably dangerous products. When the MCD is established with respect to design defect claims, this does not in itself encompass “failure to warn” claims. “Simply because the Government exercises discretion in approving a design does not mean that the Government considered the appropriate warnings, if any, that should accompany the product.”

The role of the Government must also be substantial in “failure to warn” cases. In other words, when warnings are left to be provided by the contractor without Government discretion there will not be a significant conflict between the federal contract and state tort law because the

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83. Id.
84. See generally Tate v. Boeing Helicopters, 55 F.3d 1150, 1156 (6th Cir. 1995).
85. Id. at 1156.
Government does not play any role in the warning process. In In re Joint E. & S. District New York Asbestos Litigation, the plaintiffs moved to strike the defendant manufacturer’s military contractor defense by claiming that there was no significant conflict between the specifications and the state tort law duty to warn. The Second Circuit Court of Appeals reversed the trial court’s granting of the motion, holding that MCD factual issues existed. With regard to the duty to warn issue, the Court stated:

[The defendant] must show that the applicable federal contract includes warning requirements that significantly conflict with those that might be imposed by state law. Moreover, it seems clear to us that Boyle’s requirement of Government approval of “reasonably precise specifications” mandates that the federal duties be imposed upon the contractor. The contractor must show that whatever warnings accompanied a product resulted from a determination of a Government official . . . and thus that the Government itself “dictated” the content of the warnings meant to accompany the product. . . . Put differently, under Boyle, for the military contractor defense to apply, Government officials ultimately must remain the agents of decision.

Tate v. Boeing Helicopters set forth its own elements for preemption of failure to warn claims:

When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment’s use about which the contractor knew, but the United States did not.

The “duty to warn” issue is certain to arise in cases where military products are either designed, manufactured, or sold under the SPI, especially for those products that were already available on the commercial market. Product warnings will, in many cases, have already been taken care of in the civilian consumer market. Unless the Government determines and dictates the content of the warnings, or exercises its discretion and approves the contractor’s warnings, the MCD will fail. In addition, if the contractor fails to provide conforming warnings or fails to warn of information known to the contractor and not to the government, the MCD defense will also fail.

86. 897 F.2d 626 (2nd Cir. 1990).
87. Id. at 630 (citations omitted).
88. 55 F.3d 1150 (6th Cir. 1995).
89. Id. at 1157.
90. See generally In re Joint E. & S., 897 F.2d 626.
91. See generally Tate, 55 F.3d 1150.
E. Approval Through Knowledge and Continued Use

It is also suggested that evidence of the Government's approval is established by its continued use of the product after it is made aware of the alleged defect. Two cases are worth mentioning and distinguishing. First, in *Ramey v. Martin-Baker Aircraft Co.*,\(^{92}\) the plaintiff was injured while working on an F-18 military jet fighter after the ejection seat accidentally fired. The alleged defect had existed for years and the Navy was aware of the defect, but determined that it was not so significant as to warrant change. The Court held that the Navy's continued use of the system helped establish its design approval, and therefore the contractor was entitled to MCD immunity.

The second case, *Dowd v. Textron, Inc.*,\(^{93}\) involved claims for wrongful death arising from the crash of a Navy helicopter which was allegedly defective in design. Regarding the "approval" element of the MCD, the Fourth Circuit Court of Appeals held that:

> [t]he length and breadth of the army's experience with the [product] — and its decision to continue using it — amply establish Governmental approval of the alleged design defects.\(^{94}\)

Contrary to what at least one author expresses,\(^{95}\) *Ramey* and *Dowd* cannot be used for authority supporting the proposition that Government knowledge of defect and continued use constitutes "approval." First, both cases were decided in 1986 which is two years before the Supreme Court rendered its *Boyle* decision. *Boyle* unequivocally requires approval of the "reasonably precise specifications," and not mere continued use with knowledge. Second, *Ramey* and *Dowd* had applied the *Feres* doctrine as the policy supporting the MCD immunity. However, the Supreme Court in *Boyle* expressly rejected the *Feres* doctrine, and instead adopted the policy behind the discretionary immunity exception under the Federal Tort Claims Act.\(^{96}\) Thus, in adopting the requisite element of Government-approval of reasonably precise specifications, *Boyle*, in effect, overrules any other "approval" test. The implicit approval with continued use and knowledge as contained in *Ramey* and *Dowd* must fail for SPI products as well, in light of *Boyle*, because that approval has abso-

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92. 874 F.2d 946 (4th Cir. 1989).
93. 792 F.2d 409 (4th Cir. 1986).
94. Id. at 412.
95. See Colin P. Cahoon, *Boyle Under Siege*, 59 J. AIR L. & COMM. 815 (1994), where the author cites *Ramey* and *Dowd* as support that continued use after defect knowledge is sufficient to constitute approval. *Id.* at 836-37. This article was published six years after the *Boyle* decision.
lately nothing to do with specific review and approval of design specifications.

V. SPI AND THE POLICY OF THE MILITARY CONTRACTOR DEFENSE

The SPI sheds new light on the numerous policies underlying the MCD. First, the policy that justifies different treatment between military products and consumer products purchased in the private commercial industry will erode under the SPI. The "significant conflict" element between federal contracts and state tort law will be weakened because the shift to commercial processes brings the design and manufacturing standards of military products closer to that of private industry. Second, the policy that Government contractors need protection to push technological limits, as required by the exigencies of national defense through greater combat effectiveness, and incur risks beyond those acceptable for ordinary consumer goods, is no longer viable when the military equipment is commercially available, and where the risk is essentially the same. The MCD is not a necessary result of the incompatibility of modern product liability law and defense needs, when the design and/or manufacturing processes are themselves compatible. However, national defense objectives, including increased risk, remain viable objectives for military-unique equipment.

Third, the policy to shield the Government's sensitive military equipment decisions from judicial scrutiny is tarnished when design and manufacturing choices are based on common processes and purchases of commercially available equipment. Decisions involving the SPI in design or manufacture may be de-sensitized. Fourth, the policy not to have product liability costs ultimately passed on to the Government appears valid under SPI, except in light of the significant savings enjoyed by the Government via SPI implementation. In other words, since the Government is saving so much money, from a public policy standpoint, maybe some of those savings should be used in favor of military personnel injured or killed by defective products. Lastly, the policy that the contractor is innocent when its only role is the proper performance of a plan approved by the Government, that is, where the Government is actually at fault, may no longer be a legitimate policy to invoke the MCD for certain SPI products. The contractor's role under the SPI is much more significant, as they implement many of their own specifications, standards, testing and manufacturing processes, which replace previous Government guidelines and specifications.

VI. CONCLUSION

It is anticipated that in light of the substantial projected savings to
the Government and significant increased profits to Government contractors, the switch to the SPI will run rampant throughout the military contractor industry. One concern is that with the anticipated large increase in competitive bidding, combined with the shift in design discretion from the Government to the contractors, there is an increased possibility that safety will take a back seat to cost-efficiency. Continued application of the MCD to “protect” the contractors certainly will not be an incentive for safety, as would the potential for product liability. Yet, the implementation of the SPI will not necessarily strip the Government contractors of MCD immunity.

The future review by courts of the MCD to SPI products must include a strong understanding of the original policy behind of the Boyle defense, as reflected in Boyle and subsequent cases. The contractor must be acting under the direction and authority of the Government, whose discretion includes a balance of safety and combat effectiveness. Boyle considers the “back and forth discussions” between the Government and the contractor with regard to specification review and approval. When the Government merely requires that certain guidelines be met (such as performance guidelines) it is the contractor, and not the Government, who is left with unprotected discretion. Thus, the delegation of too much discretionary authority to the contractor under the SPI will act to inhibit the availability of the MCD immunity.

In certain circumstances, where strict Government review and approval is needed for unique military products which in fact require a policy to balance decisions, and where the Boyle elements are met, the MCD will be available. However, under the SPI, contractors who use identical standards and specifications for products that are manufactured for both Government and civilian use, should not be allowed MCD protection as the Government is just one customer and not the only customer.
The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers

By Robert E. McFarland*

I. INTRODUCTION

Among the questions still being answered after 18 years of federal preemption by the Airline Deregulation Act of 1978 (ADA)¹ of state regulation over price, route, and service in the airline industry, and 26 years after the conditional preemption of state laws relating to railway safety by the Federal Railway Safety Act of 1970 (FRSA)² are the extent to which and in what circumstances state common law claims have been preempted. Despite the guidance provided by the United States Supreme Court in decisions such as Morales v. Trans World Airlines³ and American Airlines v. Wolens⁴ in the air carrier area, and CSX Transportation v. Easterwood⁵ in the rail carrier area, numerous issues still remain concerning the scope of the preemption. Additionally, Congress has, through its application of the ADA preemptive language to state motor carrier regulat-

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* Robert E. McFarland is a shareholder in the law firm of Foster, Swift, Collins & Smith, P.C., at its offices located in Farmington Hills, Michigan. A portion of this paper was presented at the 1996 Transportation Law Institute on October 21, 1996 in Arlington, Virginia.

tion accomplished by Section 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), transferred to the motor carrier field as well, those same vexing questions with regard to the scope of the preemption. This article will examine the preemption issues as they concern airline-motor and rail tort liability as well as review other recent preemption cases concerning those segments of the transportation industry.

II. THE STATE OF FEDERAL PREEMPTION IN THE AIRLINE INDUSTRY

A. TORTS

An analysis of the recent Morales and Wolens decisions by the United States Supreme Court would not necessarily have led to the conclusion that sufficient ambiguity was present in the opinions as to create within months a conflict among the circuit courts of appeals about whether the ADA preemption extends to state tort cases. The Supreme Court, in Morales, clearly established the broad scope of the ADA preemption concerning laws relating to rates, routes, or services of any air carrier, in the statutory language that has now been recodified and amended at 49 U.S.C. § 41713. In interpreting similar language in the Employment Retirement Income Security Act of 1974, the Supreme Court noted in Morales that “[w]e have said, for example, that the ‘breadth of [that provision’s] pre-emptive reach is apparent from [its] language,’ that it has a ‘broad scope,’ and an ‘expansive sweep,’ and that it is ‘broadly worded,’ ‘deliberately expansive,’ and ‘conspicuous for its breadth.’” (citations omitted).

Morales, however, concerned National Association of Attorneys General (NAAG) guidelines on advertising which, in the court’s view, were “obviously” related to rates. The Court denied that it was setting out on a road which would lead to preemption of state laws applied to airlines of such criminal acts as gambling and prostitution. The Court stated that “[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner” to have a preemptive effect.

9. Id. at 2039.
10. Id. at 2040.
but ruled that claims based on common law breach of contract were not preempted. The Court further rejected the notion that the ADA conferred upon the federal courts the business of fashioning a federal common law for breach of contract claims on the subject of airline rates, routes, or services.\(^{11}\) The Supreme Court emphasized in *Wolens* that “[w]e do not read the ADA’s preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline’s alleged breach of its own, self-imposed undertakings”\(^{12}\) (emphasis supplied). Concerning contractual liability itself, the Court cautioned that there could be no enlargement of the parties’ bargain as a result of state laws or policies not a part of the agreement.

The *Wolens* court did not have before it the issue of preemption of state court liability. However, the majority referenced airline liability for personal injury claims in two footnotes in its decision.\(^{13}\) It was emphasized that neither the United States as *amicus curiae* nor the petitioner American had urged that personal injury claims would generally be preempted. In partial dissent, Justice Stevens, while agreeing in *Wolens* with the majority’s conclusion on the breach of contract claims, dissented as to the conclusion on the state law based consumer fraud claims. He stated: “In my opinion, private tort actions based on common-law negligence or fraud, or on a statutory prohibition against fraud, are not preempted.”\(^{14}\) Two Justices, O’Connor and Thomas, would have held the common law contract claims preempted as well.\(^{15}\) Justice O’Connor, however, made plain that she would not hold all personal injury claims against airlines preempted, and expressed support for several decisions resting on the notion that particular tort claims did not “relate” to “services” provided by airlines.\(^{16}\)

*Morales* and *Wolens* did not possess sufficient clarity, however, to prevent a conflict as to whether state tort claims were preempted under the scope of the ADA preemption. In *Harris v. American Airlines, Inc.*,\(^{17}\) the court affirmed the district court’s dismissal of an action brought by an airline passenger against an airline and another passenger for violation of an Oregon state statute, as well as claims of intentional infliction of emotional distress and negligence, on the ground that the state law claims were preempted under the ADA. The plaintiff in *Harris*, a women pas-

\(^{11}\) *Wolens*, 115 S. Ct. at 825.

\(^{12}\) *Id.* at 824.

\(^{13}\) *Id.* at 825, fn.7, and 827, fn.9.

\(^{14}\) *Id.* at 827.

\(^{15}\) *Id.* at 829.

\(^{16}\) *See id.* at 830.

\(^{17}\) *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995).
senger traveling in first class, had been subjected to racial slurs from a male passenger who had consumed several drinks on the flight and had returned from the galley with a drink even after one flight attendant informed him that he could have no more alcoholic beverages. The *Harris* court analyzed plaintiff's claims pursuant to *Morales* and *Wolens*.18 It then concluded that the allegations arose from an aspect of airline service, i.e., the provision of drink and the treatment of passengers who become intoxicated. The court further read the "narrow exclusion" to preemption present in *Wolens* as applying only to "private contract terms."19 Thus the claims were preempted. Dissenting, Judge Norris noted the contrary decisions from the United States Court of Appeals for the Fifth Circuit in *Hodges v. Delta Airlines, Inc.*20 and *Smith v. America West Airlines, Inc.*21

The Fifth Circuit and the Seventh Circuit have, in post-*Wolens* opinions, addressed the issue of tort liability preemption, reaching a different result than did the *Harris* court. In *Hodges* and *Smith*, the Fifth Circuit, sitting *en banc* in two companion cases, found that a state law tort claim brought by a passenger based on alleged negligent operation of an aircraft was not preempted by the ADA. A panel in *Hodges* and its companion case *Smith*, had earlier felt compelled to follow the precedent of an unpublished decision in *Baugh v. Trans World Airlines, Inc.*22 finding a tort claim preempted.23 In *Hodges*, the plaintiff had been injured after a fellow passenger, while opening an overhead bin, dislodged a case of rum, which then fell on the plaintiff, cutting her arm and wrist. In reversing the earlier decision in *Hodges*, the *en banc* decision held that "[f]ederal preemption of state laws, even certain common law actions 'related to services' of an air carrier, does not displace state tort actions for personal physical injuries or property damage caused by the operation

18. The *Harris* tribunal also referenced a pre-*Wolens* decision of the Ninth Circuit in West v. Northwest Airlines, 995 F.2d 148 (9th Cir. 1993), cert. denied, 510 U.S. 1111 (1994), in which the court held preempted a claim for punitive damages for over-booking and ruled a claim for compensatory damages under state contract and tort law not preempted.

19. *Harris*, 55 F.3d at 1477.


21. *Smith v. America West Airlines, Inc.*, 4 F.3d 356 (5th Cir. 1993). Interestingly, the Ninth Circuit decision in *Harris* did not cite another recent pre-*Wolens* ruling of that circuit in *Lathigra v. British Airways, PLC*, 41 F.3d 535 (9th Cir. 1994). In *Lathigra*, plaintiffs were not notified by *British Airways* that their connecting flight had been cancelled, leaving them stranded in Nairobi, Kenya for five days. Plaintiffs' state law negligence claim in that case was held not preempted by the ADA, on the ground that the complained-of conduct was too tenuous, within the language of *Morales*.


23. See the initial decision of the Fifth Circuit panel in *Hodges*, 4 F.3d 350 (5th Cir. 1993), and *Smith*, 4 F.3d at 356, in which the judges set forth at length their disagreement with the *Baugh* panel's conclusions and suggested *en banc* review.
and maintenance of aircraft." The court held that whether certain luggage can be placed in overhead bins is a matter pertaining to the safe operation of a flight, not provision of services. **Baugh** was thus explicitly overruled.

Significantly, the court in **Hodges** noted that its general vindication of state tort claims did not extend to all conceivable state court actions. It re-endorsed its prior decision in **O’Carroll v. American Airlines**, in which the court had held state law claims brought by two passengers after they had been removed from a commercial flight for intoxication as pre-empted. The airline had not breached any safety-related tort duty in that case and, furthermore, an airline’s boarding practices involve services. The Fifth Circuit also indicated in **Hodges** that it would disagree with the holding of the pre-**Wolens** Ninth Circuit case of **West v. Northwest Airlines**, in which a panel of that court had concluded that state law claims were not pre-empted in an action where a passenger had been bumped from an over-booked airline flight. The Fifth Circuit was of a mind that the court in the **West** case felt over-booking was dealing with an airline’s contract for services.

In the **Hodges** companion case of **Smith**, plaintiffs had been passengers on a flight which was hijacked. The **Smith** plaintiffs claimed that the defendant airline and its employees negligently allowed a “visibly deranged” hijacker to board the aircraft, failed to train its employees and failed to warn passengers. The Fifth Circuit determined that the passengers’ claim was grounded in the safety aspects of the flight, involving as it did a charge that the airline had permitted the hijacker to board. It was therefore not pre-empted, even though the judgment could affect the airline’s ticket selling, training, or security practices. The effects on airline fares would be too tenuous to have a preemptive effect, under the **Morales** language, in the **Smith** court’s view.

The Seventh Circuit has also visited the issue of ADA preemption scope, in **Travel All Over the World, Inc. v. Kingdom of Saudi Arabia**. In **Travel All**, a travel agency and its owner sued an airline for tortious conduct and breach of contract. The Seventh Circuit reversed the district court’s dismissal of all counts against the airline on ADA preemption grounds. The court concluded that the breach of contract claims were not pre-empted, consistent with the **Wolens** precedent. It did not matter that plaintiffs’ claims in **Travel All** were based on an airline’s bumping prac-

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24. **Hodges**, 44 F.3d at 336.
27. **Travel All Over the World, Inc. v. Kingdom of Saudi Arabia**, 73 F.3d 1423 (7th Cir. 1996).
tices, as the basis of the claim was a privately ordered obligation. Further, alleged defamatory statements made by an airline about a travel agency were not part and parcel of an airline’s rates, routes, or services, according to the Travel All court, and were thus not preempted. The court specifically adopted the Hodges definition of services:

“Services” generally represent a bargained-for or anticipated provision of labor from one party to another... [This] leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. However, the Travel All court ruled that the intentional tort claims expressly involving airline “services,” such as tortious interference with a contractual relationship, were related to provision of services, and therefore were preempted. As stated by the court, “[u]nder our approach, ‘services’ include all elements of the air carrier service bargain.” At the same time, the Travel All panel specifically took issue with the conclusions of the Fifth Circuit, in Smith, that an airline’s boarding decisions motivated by economic concerns, as opposed to safety concerns, would be preempted. It declared that “[t]he crucial inquiry is the underlying nature of the actions taken rather than the manner in which they are accomplished,” and further commented:

[W]hile Wolens protects contract claims that seek to enforce private agreements from preemption, it does not similarly shelter tort claims. The intentional tort claims therefore constitute the ‘enactment or enforcement’ of a law. Moreover, to the extent that the intentional tort claims are based on Saudi’s refusal to transport passengers who had booked their flights through Travel All, such claims ‘relate to’ Saudi’s services and are preempted by the ADA.

In light of Wolens and Morales, most federal district courts confronted with the issue of whether state tort claims are preempted pursuant to the provisions of the ADA have concluded, as have the Fifth and Seventh Circuits, that such claims are generally not preempted. Still, there is disagreement, even among the district court decisions within given circuits. In the Second Circuit, for example, numerous cases were handed down in the year prior to Wolens, all of which held that the Airline Deregulation Act did not preempt state common law tort causes of

28. Id. at 1433.
29. Hodges, 43 F.3d at 336.
30. Travel All, 73 F.3d at 1434.
31. See the Smith court’s attempt at 44 F. 3d 346-47 to reconcile its en banc holding with the earlier ruling in O’Carroll.
32. Travel All, 73 F.3d at 1435.
action. These included Stagli v. Delta Airlines, Inc. (a negligence action against an airline arising out of damages sustained by passenger attempting to retrieve luggage from an airline’s airport baggage carousel deemed not preempted, although summary judgment granted to airline on basis that it owed no duty for injuries caused to airline’s passenger by a third party at the baggage carousel area); Curley v. American Airlines, Inc. (an action by a passenger for negligence and false imprisonment against airline, after passenger had been falsely identified by the airline captain as having smoked marijuana in aircraft, held not preempted); Sedigh v. Delta Airlines, Inc. (an action against an airline for unlawful imprisonment, assault, intentional infliction of emotional distress, slander, loss of comfort and breach of contract held not preempted, where passenger, after being suspiciously, had been detained, although summary judgment granted to airline on the facts of case); Pittman v. Grayson (an action for intentional infliction of emotional distress, false imprisonment, and intentional interference with custodial rights, based on airline’s alleged role in smuggling plaintiff’s daughter out of country held not preempted); and Rombom v. United Airlines (an action based on airline’s role in having passenger arrested, after passenger had departed the plane, held not preempted).

However, the court in Rombom was also unable to conclude that the ADA “never preempts state tort claims.” The court held that charges based upon the alleged rude and unprofessional service of airline personnel in an attempt to quiet a passenger were related to service and thus preempted, along with claims arising out of a pilot’s decision to return to the gate so that an unruly passenger could be removed. Still another district court in the Second Circuit has also concluded In re Hijacking of Pan American World Airways, Inc. Aircraft, that a state common law claim against an airline for false advertisement of heightened security measures, when plaintiffs were then injured or murdered in a hijacking attempt, was deemed preempted, as the personal injuries suffered were based on plaintiffs’ reliance on false advertising representations, an element of pricing, as in Morales.

Most other post-Wolens decisions concerning tort claims have come

38. Id. at 221.
down on the side of non-preemption. In Seals v. Delta Airlines, Inc., an action based in contract and negligence because of an airline's failure to provide ground transport between gates at an airport, leading to plaintiff's decision to run down the concourse and her consequent fall, was held not preempted. In Seals, the court noted that "[f]rom an analysis of the dicta in Wolens, this court can reach but one conclusion, that the Supreme Court does not interpret the ADA preemption clause to extend to personal injury suits against air carriers." At the same time, the court had no difficulty finding that the breach of contract claim had not been preempted.

Other district courts have held similarly, in cases such as Katonah v. US Air, Inc. (a negligence action not preempted when alleged acts led to air crash); Torraco v. American Airlines (a tort action for personal injuries not preempted, where an airline failed to provide a wheelchair and an attendant to passenger, leading to the passenger's fall); Rodriguez v. American Airlines, Inc. (an action for negligence by decedents' estates after an air crash held not preempted); Diaz Aguasviva v. Iberia Lineas Aereas De Espana (an action for defamation, false imprisonment, false arrest, assault, and negligence arising out of an airline's failure to inform a passenger of her need for a visa and the airline's subsequent reporting that the passenger in question was an illegal alien, deemed not preempted); and Moore v. Northwest Airlines, Inc. (an action for negligence when passenger's wheelchair turned over backwards in the jetbridge while exiting the plane held not preempted).

Decisions from the Ninth Circuit, however, continue to hold tort claims preempted. In Costa v. American Airlines, Inc., a case in which a passenger was injured after a fellow passenger had opened an overhead bin, causing luggage to fall on the plaintiff, the court found the action preempted based on the Harris precedent. Also, in Stone v. Continental Airlines, a passenger's claim against an airline for assault and battery and breach of duty of reasonable care, after the passenger was punched by a fellow passenger, was held preempted, again based on the authority of Harris. Significantly, the court in Stone refused to allow the plaintiff to proceed with an implied breach of warranty claim, on the ground that it was merely a re-characterized tort action, which constituted an attempt to

42. Id. at 859.
fit within the *Wolens* exception.\(^{50}\)

Another series of decisions of note on the preemption issue, holding tort but not contract claims preempted, arises out of the First Circuit.\(^{51}\) In *Chukwu* I, the court found that a claim for breach of contract for refusal to transport was not preempted by the ADA. In *Chukwu* II, a complaint grounded in tort on the airline’s failure to prevent a passenger from boarding a flight was held clearly related to an airline service and therefore preempted. In *Chukwu* III, the court held that a breach of contract action was not preempted, but that the contract was not breached as a matter of law, based on the airline’s tariff provisions.

**B. Other Causes of Action**

1. *State Employment Laws*

An extremely significant line of cases has held state employment laws to be preempted in their application against air carriers. For example, in *Abdu-Brisson v. Delta Airlines, Inc.*\(^{52}\), former Pan Am pilots hired by Delta in conjunction with Delta’s purchase of certain Pan Am assets brought an action against Delta, claiming that the terms and conditions of their employment were in violation of the New York State Human Rights Law and New York City Human Rights Law. The court in *Abdu-Brisson* found that the prescriptive state and local statutes were related to prices or services and, therefore, preempted. The court stated that “[w]e agree with Delta that the claims based on the medical benefits and pay scale provisions of plaintiffs’ employment contracts are sufficiently related to price and therefore preempted.”\(^{53}\) The court similarly concluded that the order of a pilot seniority list was related to the provision of air carrier services within the meaning of *Morales* and therefore preempted.

A similar conclusion was reached in *Marlow v. AMR Services Corp.*,\(^{54}\) in which an employee’s wrongful termination claims, based on alleged violations of the Hawaii Whistleblowers’ Protection Act, were held preempted by the ADA. In that case, the court found that a jetbridge maintenance company was a service under the ADA. Similar results were reached in *Belgard v. United Airlines*,\(^{55}\) in which claims

\(^{50}\) See *id.* at 826.


\(^{53}\) *Id.* at 112.


brought by pilots under the Colorado Handicap Discrimination Statute were held preempted by the ADA, and *Lewonchuk v. Business Express, Inc.*, 56 in which a wrongful termination action based on the public policy of a state law was held preempted. Also of note is *Fitzpatrick v. Simmons Airline, Inc.*, 57 in which the Michigan Court of Appeals found that the ADA preempted an action under the Michigan Civil Rights Act brought by a baggage handler and aircraft maintenance worker discharged because he was overweight.

2. **Common Law Unfair Competition Claims**

    In *Virgin Atlantic Airways, Ltd. v. British Airways, PLC.*, 58 the court held preempted an action brought by an airline against its competitor, based in part on common law unfair competition claims. As the court stated, "[t]he theory underlying plaintiff's common law claims is that defendant has used sharp practices to lure away customers. That is within the broad meaning of 'rates, routes or services.'" 59 Similarly, unfair competition claims by one airline against another were deemed preempted in two earlier decisions in *Continental Airlines, Inc. v. American Airlines, Inc.* 60 and *Frontier Airlines, Inc. v. United Airlines, Inc.* 61

3. **State Regulation of Ancillary Airline Services**

    In *Huntleigh Corp. v. Louisiana State Board of Private Security Examiners*, 62 the district court held preempted the provisions of the Louisiana Private Security Regulatory and Licensing Law, which governed registration and training of private security officers performing pre-departure screening at airports. It did not matter that the regulated entity was not itself an air carrier. 63 The regulatory statute affected the service of air carriers with regard to pre-departure screening and, accordingly, would not pass muster. To allow the states to independently prescribe qualification and training standards for either airline employees or their agents in the security area would conflict with a uniform federal scheme.

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59. *Id.* at 66.
63. *See Marlow v. AMR Services Corp.*, 870 F.Supp. 295, along these same lines.
4. **Contract, Conversion and Unjust Enrichment Claims**

In two recent cases, plaintiffs seeking refunds of expired federal excise taxes failed on preemption grounds. In *Kaucky v. Southwestern Airlines*, 64 a class of plaintiffs sought refund of federal excise taxes on tickets purchased before January 1, 1996, for travel after December 31, 1995, on preemption grounds. The airline had collected the excise tax on such ticket purchases, prior to expiration of the tax on December 31, 1995. The plaintiffs asserted common law claims for breach of contract and conversion, but such claims were found to relate to the airline’s ticket prices and therefore were preempted. A similar conclusion was reached in *Lehman v. US Air Group, Inc.* 65.

5. **Rate and Cargo Claims**

The courts have also dismissed several recent actions against Federal Express Corporation resulting from rate disputes and cargo loss, based on preemption and the status of Federal Express as an air carrier. In *Musson Theatrical, Inc. v. Federal Express Corp.*, 66 the court determined that no federal jurisdiction existed for a self-styled federal common law claim of fraud and misrepresentation against Federal Express. The court indicated “[i]t is not the role of federal courts to articulate federal interests—but to enforce the federal interests identified by Congress.” 67 Citing *Wolens*, the court noted that the possibility that the ADA left room for a federal common law cause of action against air carriers had been explicitly rejected by the Supreme Court in the case of contract claims. The court believed that the same reasoning applied to fraud claims. As it stated, “[s]tate law fraud claims are preempted because Congress intended DOT to be the sole legal control on possible advertising fraud by air carriers, and a federal common law fraud claim is inappropriate for the same reason.” 68 Neither did the existence of the general savings clause in the statute permit federal courts to create federal causes of action. The court in *Musson*, while affirming the district court’s decision that there was no federal cause of action for fraud against airlines, at the same time reversed the district court decision to assume jurisdiction over state law claims filed by the plaintiff in a separate state court action, finding those claims preempted as well. The Sixth Circuit cautioned that, given the Supreme Court’s language in *Wolens* that the ADA was not

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67. *Id.* at 1250.
68. *Id.* at 1251.
intended to "channel actions into federal court," it would only be appropriate for a state court, or a federal court sitting in diversity, to resolve such state court claims.

A breach of contract suit against an air carrier was also dismissed in Roberts Distrib., Inc. v. Federal Express Corp. In Roberts, the court found that given the substantial deregulation of domestic air carriers, "[n]o statutory or regulatory foundation exists on which to construct a federal common law governing air carrier-shipper suits." The court again found that the federal courts were not authorized, in the absence of statutory authority, to create federal common law governing contract disputes between interstate air carriers and their customers. In still another action, Merkel v. Federal Express Corp., a cause was remanded to state court for want of federal jurisdiction. A shipper had brought suit against the air carrier in state court for loss of a package. The "complete preemption" doctrine did not justify removal to federal court. The ADA in and of itself did not serve to create removal jurisdiction. Finally, in Wagman v. Federal Express Corp., the ADA was held to preclude a state law claim for misrepresentation based on an air carrier's advertising in an action seeking to recover damages for the late delivery of documents.

C. Conclusions on the Present State of Air Preemption

Courts continue to look at the air preemption as expansive in scope, in line with the Morales-Wolens Supreme Court pronouncements. The preemption of state employment laws in their application against air carriers reinforces the sweeping nature of the ADA. Principles of the ADA preemption include the following: 1) the ADA preemption extends to state-imposed obligations generally, not just those state-imposed obligations contained in economic regulatory statutes; 2) there is no developing federal common law for actions against air carriers; 3) there is no general federal subject matter jurisdiction for actions against air carriers; and 4) the preemption applies not only to air carriers, but also to their agents.

As to whether particular state common law causes of action are preempted, the law is still unsettled. Morales referred to actions which are "too tenuous, remote, or peripheral" to be deemed preempted. Although the Ninth Circuit has regarded this exception as a narrow one, other courts continue to rely upon this language to find common-law causes of actions not preempted. Other courts have found the preemption not to apply, as in the Hodges and Smith decisions, when the com-

70. Id. at 637.
plained of action concerned operation and maintenance of the aircraft, as opposed to provision of services. Exactly what is the provision of services, as opposed to operation or maintenance of an aircraft, will in and of itself be a matter of continued debate, as the Seventh Circuit made plain in *Travel All.*74

III. *BROAD PREEMPTION AND THE ISSUE OF THE MOTOR PROVISIONS’ CONSTITUTIONALITY*

The constitutionality of the price-route-service preemption as applied to motor carriers and cloned from the ADA75 was challenged in the federal courts in *Kelley v. United States,*76 and the scope of the preemption specifically was made an issue. Petitioners in *Kelley*, which included officials or agencies of four states, the International Brotherhood of Teamsters, and the Coalition Against Federal Preemption of State Motor Carrier Regulation, argued that the sweeping range of the preemption exceeded congressional authority under the Commerce Clause of the U.S. Constitution,77 and offended the Tenth Amendment.78

Petitioners in *Kelley* emphasized that, while Congress’ power under the Commerce Clause is plenary, it is not unlimited. For preemption to pass muster under the Commerce Clause, it must meet the two-part test of *Hodel v. Virginia Surface Min. & Recl. Assn.*79 *Hodel* requires 1) a rational basis for Congress’ finding that the activity to be regulated has a substantial effect on interstate commerce; and 2) that the means by which Congress has chosen to regulate be reasonably adapted to a constitutional end.

The *Kelley* petitioners submitted that the scope of Section 601 failed

74. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996).
75. The ADA, recently recodified at 49 U.S.C. § 41713, allows for continued federal regulation of the airline industry while prohibiting the states from enacting or enforcing laws “relating to rates, routes, or services.” As noted in the Conference Report on Section 601, the use of the similar language in Section 601 was intentional. Congress “did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines*” H.R. Conf. Rep. No. 103-677, at 83 (1994), reprinted in 1994 U.S.C.C.A.N. (103 Stat.) 677 at 1755. The Conference Report further stated that “the central purpose of this legislation is to extend to all affected carriers . . . the identical intrastate preemption of prices, routes, and services as that originally contained in Section 105(a), 49 U.S.C. App. 1305(a)(1) of the Federal Aviation Act.” Id. at 83. (emphasis supplied).
77. The Commerce Clause states that “the Congress shall have power to . . . regulate commerce . . . among the several states.” U.S. CONST., art. I, §8, cl. 3.
78. The Tenth Amendment states that “the powers not delegated to the United States by the Constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people,” U.S. CONST., amend. X.
both the first and second parts of Hodel. Under the first part, Section 601 encompasses activities outside the realm of interstate commerce that Congress may regulate. In many instances, Section 601 preempts purely intrastate activity which has no substantial impact on interstate commerce. Under the second part of the test, they contended that the overbreadth of this legislation makes it impossible to find that the legislative means are reasonably adapted to a permissible constitutional end.

The challengers to Section 601 underscored that the power of Congress under the Commerce Clause also has particular limits, where intrastate activities are concerned, as established in Maryland v. Wirtz. Congress cannot usurp the authority of states to regulate purely local and intrastate forms of transportation. Local and intrastate activity may be regulated by Congress under the Commerce Clause only “if it exerts a substantial economic effect on interstate commerce,” as established in Wickard v. Filburn (emphasis supplied). More recently, the Supreme Court noted that the commerce power . . . “extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.” If Congress has exceeded its power under the Commerce Clause, the Kelley petitioners maintained, the preemption of state regulation by Section 601 could not be upheld.

The court of appeals in Kelley, along with the Justice Department in response, relied substantially upon the Supreme Court’s decision in United States v. Lopez, in finding that Congress acted within its Commerce Clause authority in enacting Section 601. The Tenth Circuit held that pursuant to Lopez, state regulation of intrastate motor carrier activities was an area that Congress could regulate because this area of state regulation substantially affects interstate commerce. The court quoted the Congressional findings, set forth in Section 601(a), along with a portion of the accompanying Conference Report, which asserted that state regulation in this area burdens interstate commerce by causing inefficiencies, increasing costs, reducing competition, inhibiting innovation, and curtailing market expansion. Despite the Petitioners’ urging, the Tenth

86. Id. at 1507-08.
Circuit refused to look beyond these Congressional declarations.

Petitioners contended that the Congressional findings that accompanied Section 601 were shortsighted, oversimplified, and did not deal with the diverse forms of transportation service within its scope. More specifically, they pointed out the findings did not in any way reflect a rationale as to why preemption is needed to extend to every conceivable form of state and local motor regulation that could exist, nor did they indicate how state consumer protection laws, antitrust laws, or Uniform Commercial Codes affected interstate commerce. In this regard, it was argued, Section 601 preempts a myriad of intrastate activities, properly regulated by the states, which have no impact upon interstate commerce, substantial or otherwise. Indeed, the Tenth Circuit's opinion in *Kelley* recognized that there are aspects of intrastate truck transportation which have no effect on interstate commerce, but failed to apply that rationale in the case of motor carrier preemption, when it stated "[g]rated, there are undoubtedly various state regulations that affect and pertain only to purely intrastate motor carrier activities, and have little or no effect on interstate commerce" (emphasis supplied). The preemption opponents provided examples illustrating why, in their view, the regulation of this industry had always been left to the states as well as the extent to which Congress had impermissibly interfered with purely intrastate regulation.

It was asserted by the *Kelley* petitioners that the regulation of tow trucks is unquestionably a matter of purely intrastate commerce. Some states, such as Michigan, Kansas and Oklahoma, had regulated tow trucks within the context of their motor carrier regulatory laws, while other jurisdictions, such as New York City, regulated such operations through local ordinances or resolutions. Regardless of the method of regulation, it was all preempted by Section 601 as initially passed. Petitioners asserted that when a tow truck picks up a stranded automobile outside of a city and tows it ten miles to the closest service station, this activity had nothing remotely to do with interstate commerce. Likewise, when the state

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87. The regulation of intrastate truck transportation had always been regarded as a matter of state concern. See, for example, those cases which interpreted whether an ICC certificate was being utilized as a subterfuge to avoid intrastate regulation, such as Eichholz v. Public Service Commission of Missouri, 306 U.S. 288 (1939); Service Storage and Transfer Co., Inc. v. Virginia, 259 U.S. 171 (1915); and Leonard Express v. United States, 298 F. Supp. 556 (W.D. Pa. 1969). Prior to 1980, 48 states had in place some form of economic regulation for their motor carrier industry. Seven states, between January 1, 1980 and January 1, 1995, elected to deregulate economically, through the exercise of state sovereignty. All 50 states had in effect, through the exercise of state sovereignty, laws imposing obligations on their motor carriers as businesses (i.e., loss and damage liability, consumer protection, antitrust, Uniform Commercial Code), at the time that Section 601 became effective.

88. *Kelley*, 69 F.3d at 1508.

89. *Id.* at 1508.
required that tow truck operators be licensed for safety and consumer protection reasons, there was no effect on interstate commerce in petitioners' view. The court of appeals explicitly recognized Congress' over-reaching when it acknowledged that "601 may have some unintended effects, such as freeing the reins on intrastate towing and wrecking services . . . ." Congress' late attempt to correct such an error, by expanding the exemption in the ICC Termination Act of 1995, at 49 U.S.C. § 14501, to allow state or local regulation of non-consensual tows failed to cure this situation. It merely highlighted the problem.

The Section 601 opponents stated that regulatory oversight of the collection and disposal of solid waste and recyclables was another area of sole intrastate concern barred by Section 601. While the legislative history of Section 601 indicates that the intention of the House and Senate conferees was not to preempt state regulation of garbage and refuse collection, the statute as enacted made no such exception. Indeed, the Department of Transportation opined that regulation of recyclables was preempted. This was true, despite the states' direct public health and safety interest in closely regulating this industry to ensure that their streets and communities were safe. The transportation of solid waste typically involves movement of only a short distance from point of pickup to destination and, accordingly, makes local garbage collection an intrastate activity. Also, the regulation of saltwater carriers by states such as Oklahoma and Kansas in the transportation of brine from the oil fields to

90. Id. at 1509.
91. Congress has allowed states or localities, through the newly revised preemption language in 49 U.S.C. § 14501, to regulate only "non-consent" tows. As stated in the Conference Report, in explaining this term,
Non-consent tows occur when vehicle owners/operators are unable to give their voluntary consent to the tow. Non-consent tows typically occur in emergency situations and when tows are made from private property. The tow truck provision in this section is designed to allow states and local governments to regulate the price of tows in non-consent cases.

H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. (1995). This does not even come close to addressing the full extent of the regulatory void in this area. If a stranded motorist arranges himself or herself for the towing service, the regulations no longer apply, despite the consumer's total inability to comparison shop while broken down or stuck in a snow drift.

92. Even under the decisions of the then-existing Interstate Commerce Commission, which are not determinative of the issue under state law, it appears that refuse, trash and other waste materials are considered "property" and therefore would be covered by the terms of Section 601. See Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application, 131 M.C.C. 578, 1979 WL 11177 (I.C.C.) (1979) ("Property connotes ownership as well as value. Something that is owned can be property notwithstanding its lack of economic value."); accord Al Cordeiro d/b/a Cordeiro Trucking - Extension - Contract Carrier Service; No. MC-160678 (Sub 1) 1984 Fed. Carrier Cases, 47,475 (September 1984). Recyclables had repeatedly been recognized by the I.C.C. to be subject to full economic regulation. See Transportation of "Waste" Products for Reuse, Ex Parte MC-85, 114 M.C.C. 92 (1971), 120 M.C.C. 597 (1974), and 124 M.C.C. 583 (1976).
disposal sites involves still another purely intrastate activity of a local nature.

Similarly, voiced the *Kelley* petitioners, a sand and gravel operation moving loads from a sand pit to a building site fifteen miles away in the same state did not substantially affect interstate commerce. Neither did operations of a concrete mixer truck or an asphalt rig substantially affect interstate commerce. It was urged that states had a direct interest in controlling the prices charged by such carriers and insuring that a minimal return exists for their service, as this contributed positively to the safety of the public traveling on the roads of a state.

In petitioners' opinion, the extent and diversity of intrastate truck transportation was significant, and there was no rational basis for the conclusion that state regulation of purely intrastate motor carrier activity affected interstate commerce. Such extensive preemption might be defensible in the area of air transportation, since there are relatively few air carriers operating solely in intrastate service. That was not, however, the situation with motor transportation, where there are thousands of motor carriers providing myriad forms of strictly intrastate transportation services to local communities.93

Further, under the second part of the *Hodel* test, the preemption foes pointed out that Congressional action must also have a reasonable connection between the regulatory means selected and an end permitted by the Constitution.94 As Congress purported to be regulating pursuant to the Commerce Clause, the means chosen must result in valid regulation of interstate commerce. The *Kelley* petitioners submitted that the blunderbuss impact of Section 601 clearly was so excessive that it could not be deemed reasonably adapted to Congress' authority under the Commerce Clause.

However, the Tenth Circuit refused to apply strictly the *Morales-Wolens* precedent of the Supreme Court as to the effect of the preemptive language in Section 601, relying instead on assertions by the Department

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93. It is important to note that the Airline Deregulation Act ("ADA") involved a different type of preemption scheme in a vastly different industry, with far different implications on intrastate commerce. A federal agency, the Federal Aviation Administration (successor to the Civil Aeronautics Board), was charged with a regulatory role concerning intrastate transportation in the airline industry, a factor not present with Section 601. Only three states (California, Florida, and Texas) regulated intrastate airline transportation when the ADA was enacted, as opposed to the forty-one states that regulated intrastate motor carrier transportation at the time Section 601 was enacted. Furthermore, the intrastate trucking industry has a far more significant impact on state economies than was true of intrastate airline transportation. Finally it is important to recognize that the Supreme Court in *Morales* did not address the constitutionality of the ADA, as the lower court in the Section 601 challenge had implied in footnote 8 at page 21 of its decision in Oklahoma Corporation Commission v. United States, CIV-94-1999-R (W.D. Okla. 1994).

of Justice and the U.S. Department of Transportation that Petitioners had somehow exaggerated the scope of the preemption. However, since the language used in Section 601 is the same as the language used to preempt state action in the ADA, the broad scope and nature of the preemption had already been pre-ordained by Morales and Wolens.

The Kelley petitioners displayed no doubts about the all-encompassing preemption effort of Section 601. The provision preempted state economic regulation of intrastate trucking as contained in state motor carrier economic regulatory acts, of course, but petitioners contended it also preempted state antitrust laws, state consumer protection laws, state laws regarding cargo loss and damage claims, state laws governing the transportation of solid and hazardous waste, and state uniform commercial codes. All of these state laws, they pointed out, relate to a carrier’s “price, route or service,” and are all “state-imposed obligations.” It was also asserted that even state laws regarding safety of motor carrier operations, as opposed to safety of motor vehicles, are in jeopardy as a result of Section 601.

Petitioners argued that the fact that portions of a state’s Uniform Commercial Code will be preempted by Section 601 underscored the irrational nature of the legislation. They contended to no avail that the numerous state laws that have been preempted are evidence that Congress has not legislated according to means reasonably connected to a permissible constitutional end.

The Tenth Circuit in Kelley did not dispute the general proposition that the preemption had a broad scope. The court did note that the United States did not share petitioners’ beliefs with regard to “many of the examples,” and that the preemptive effect may not be as far reaching

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95. Kelley, 69 F.3d at 1508-09.
96. The federal government argued that Section 601, by its very terms, preserves state regulation over motor carrier safety. This argument ignores the perplexing manner in which Congress threw a safety “bone” to the states in Section 601. The states were not given safety regulatory authority over motor carriers or motor carrier operations; they were only given safety authority over motor vehicles, at Section 601(b) and (c). Motor carrier authority is limited to insurance requirements alone. Thus, it could be contended that a state retains the ability to oversee the safety of the motor vehicle, but not the motor carrier operations in general. Hours of service, driver qualifications, and drug testing provisions are all put at risk by the intrusiveness of the federal preemption.
97. It must be remembered that the ability conceded in Section 601 to a state to regulate any one of the four state standard transportation practices, such as bills of lading or carrier liability for loss and damage, is directly dependent upon whether a carrier elects to be so regulated. 49 U.S.C. §14501 (c)(3)(B)(ii). Thus, a carrier can choose whether it wishes to be covered by certain of the U.C.C. Article VII provisions, for example, or laws imposing liability as to full value for lost or damaged shipments. One can only speculate as to the number of carriers that would choose to be so regulated, when their competitors were not.
as Petitioners believed. Even given the broad preemptive effect on a "wide range of state regulations," the court held that: "[a]ssuming the rationality of Congress' findings with respect to the negative impact of state regulations on interstate commerce, what choice did Congress have except to enact a statute that preempts a fairly broad range of state economic regulations." The court also noted that it was not up to the courts to second guess Congress on its findings. Further, even conceding that the law may have unintended effects, such effects did not make the law irrational under a Commerce Clause analysis. A broad preemption, then, did not make for an unconstitutional preemption in the Kelley panel's view.

Only the early returns are in from the Section 601 preemption. One cannot as of yet conclude that the Kelley petitioners were correct with regard to their predictions on an all-encompassing preemption. The substantial body of case law under the ADA, however, lends support to the proposition that the motor preemption will be far-reaching, if not all-encompassing.

IV. THE FIRST WAVE OF MOTOR CARRIER PREEMPTION CASES.

Again, only a smattering of cases have reached the decisional stage in applying the ADA precedents to the Section 601 context in the motor carrier field. Those early cases, however, suggest that the broad preemption will apply, as Congress had intended it. A variety of commentators have spotlighted the myriad applications to which preemption may be held to apply. Whether preemption situations are "multiplying like rabbits from a magician's hat," it remains clear that the preemption "encompasses a myriad of state and local law and regulations which relate to a 'price, route, or service' of an intrastate motor carrier of property."

A series of cases involve an interpretation of the scope of the preemption vis-a-vis truck operators. Two of these three cases were

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98. Kelley, 69 F.3d at 1508.
99. Id.
100. Id. at 1509 (emphasis added).
101. Id.
102. See Part IV, "The First Wave of Motor Carrier Preemption Cases."
comenced in the state of Louisiana. In Giddens v. City of Shreveport, the court found that a local city ordinance regulating vehicle towing and the storage of towed vehicles was not preempted by Section 601 as the Interstate Commerce Commission did not have jurisdiction under the Interstate Commerce Act of the towing of an accidentally wrecked or disabled motor vehicle. The court also based its ruling on statements in Congress by Representative Nick J. Rahall (D. W. Va.), that there was no intent to affect motor carriers generally, such as tow truck drivers, by the provisions of Section 601. In the second Louisiana case, Brumfield Towing Serv., Inc. v. City of Baton Rouge, the court, again within the context of a motion for preliminary injunction, held that a local ordinance, which required that the City utilize contracts with designated tow truck operators in certain areas of the city, had not been preempted by Section 601, relying upon “policy issues and plain common sense.” The court in Brumfield relied heavily upon the analysis of the decision in 426 Bloomfield Avenue Corp. v. Newark.

In Bloomfield, the U.S. District Court arrived at the conclusion that the City of Newark ordinance establishing a rotational system for provision of the City’s towing and storage needs had not been preempted by Section 601. The court analyzed the issue from the standpoint of congressional intent. The court recognized that it was interpreting a “linguistic morass.” In finding that there was no preemption, the court in Bloomfield rested its decision upon policy considerations, stating:

At oral argument, plaintiffs answered this concern by asserting that it is now Congress’ responsibility to issue towing regulations. Given the public’s vulnerability to corruption and extortion in the context of non-consensual tow-

107. Giddens, 901 F. Supp. at 1183, Cong. Rec. H. 1830 (daily ed. Sept. 12, 1994) (statement of Rep. Rahall). Rep. Rahall pointed to the initial focus of Section 601, i.e., that of levelling the playing field for package delivery carriers in the aftermath of Federal Express Corp. v. California Public Util. Comm., 936 F.2d 1075 (9th Cir. 1991), cert. denied, 112 S. Ct. 2956 (1996). However, the scope of Section 601’s application was drastically enlarged from package delivery carriers only to the entire industry after Congress held a single day’s hearing on the preemption proviso. The Giddens decision was issued in the context of a request for preliminary injunction, and was, in actuality, a determination by the court that plaintiffs, arguing in favor of preemption, had failed to establish a substantial likelihood of prevailing on the merits.
109. Id. at 220.
111. Id. at 368.
112. Id. at 370. The Bloomfield court concluded that, as Congress, in enacting Section 601, had as its initial purpose the leveling of a “competitive playing field among intermodal shippers and truckers,” clearly tow trucks were not intended to be included in the broad preemption. Id. at 371.
ing, however, it would be grossly irresponsible for Congress to have preempted all state and local regulation before adopting its own federal consumer protection scheme which, of course, it has not done. Plaintiffs have offered no compelling reason why this court should assume that Congress intended such an unfathomable legislative design.

In addition, this case must be approached against the backdrop of alleged monopoly protection and government bribery in the awarding of municipal contracts in Newark's towing industry... Here, defendant has a compelling argument that, like similar ordinances nationwide, the Newark ordinance represents a local response to the towing industry's allegedly corrupt history. The responsibility for such corrective measures should be left to the state and municipal governments which are in the best position to address the nuances of their own locality's regulatory needs.113

A fair reading of the legislative history of Section 601, however, would yield a contrary result. Congress was plain that it meant all motor carrier services (except motor carriers of household goods) to be included within the preemption. Congress in essence recognized this, by amending the scope of Section 601, through the vehicle of the Interstate Commerce Commission Termination Act ("ICCTA"). Through ICCTA, non-consensual tows were exempted from the preemption.114

A federal court decision also has been issued on whether a state law claim for price discrimination can be maintained against a common carrier in violation of state law. In Carsten v. United Parcel Services, Inc.,115 the court found that a claim for price discrimination in violation of a California state statute had been preempted by Section 601. In Carsten, plaintiff had alleged that the defendant motor carrier had offered certain preferred shippers secret competitive benefits and discounts which were not available to the plaintiff or other similarly situated shippers within the state of California. In light of Section 601, the court found that no state laws could be applied to regulate and control the prices of a motor carrier. The court rejected out of hand the contention of plaintiff that state laws were no longer preempted, after passage of ICCTA, because ICCTA did not grant the Surface Transportation Board of the United States Department of Transportation jurisdiction over intrastate transportation by motor carriers.116 The court noted that ICCTA had actually recodified the preemption provision and "... clearly reaffirms Congress' intent to

113. Id. at 374 (citations omitted) (emphasis added). Accordingly, it was concluded that there was no preemption. Plaintiffs in Kelley made the same argument that there could be no field preemption, when Congress had determined not to regulate intrastate transportation itself. This was rejected by the court. See Kelley v. United States, 69 F.3d 1503, 1510.

114. See note 6, supra.


116. Again, the court refused to find as significant the lack of federal regulation. See note 111.
preempt state laws relating to the prices of motor carriers."\textsuperscript{117}

Another case which focuses on a dispute between a shipper and carrier is \textit{Ready Transp., Inc. v. Best Foam Fabricators, Inc.}\textsuperscript{118} In \textit{Ready}, a carrier brought a breach of contract action for unpaid freight charges against its shipper in state court. The shipper filed notice of removal, and the carrier responded with a motion for remand to state court. The federal court noted that there was not an issue in the suit as to the lawfulness of the rates which the carrier had charged. The fact that the Interstate Commerce Commission had jurisdiction over the rates of the carrier at the time that the suit was brought did not transform the carrier's cause of action into a suit arising under federal law, either. In other words the carrier's breach of contract action was not explicitly preempted, under a \textit{Wolens} analysis. Also, there was not the "complete preemption" necessary to confer subject matter jurisdiction over such a complaint.

Three cases have arisen in the undercharge context, all of which have found that Section 601 preempted state filed rate doctrines and consequently barred adversary proceedings filed after January 1, 1995, Section 601's effective date, despite the fact that the transportation upon which the actions were based had occurred prior to the effective date of the act. In \textit{In re Industrial Freight Sys., Inc.}\textsuperscript{119} the court found that, as the action had been commenced after the effective date of the act, it was based upon state legislation, i.e., a filed rate requirement, that already been preempted by the act. As the case was not pending at the time that the premption took effect, the court ruled that \textit{Landgraf v. USI Film Products}\textsuperscript{120} was inapplicable to the facts of that case. In \textit{In re St. Johnsbury Trucking Company, Inc.}\textsuperscript{121} the federal court, as in the \textit{Industrial Freight} case, found that Section 601 barred intrastate undercharge claims brought after January 1, 1995, but which claims had accrued before that date. The court rejected the carrier's argument that the undercharge claims had become vested upon accrual.\textsuperscript{122} Again, the court distinguished \textit{Landgraf}, based on the fact that the \textit{Landgraf} suit had been pending on appeal when the statute in question had been enacted. The court further noted that the plaintiff had been on notice during the congressional debate, as well as during the four month period between the passage of Section 601 and its effective date, as to the prospective consequences of the act. The Court stated that "[t]he benefits of prospective relief under a

\textsuperscript{117} \textit{Carsten}, 1996 WL 335421 at 4.


\textsuperscript{119} \textit{In re Industrial Freight Sys., Inc.}, 191 B.R. 825, (Bankr. C.D. Cal. 1996).

\textsuperscript{120} \textit{Landgraf v. USI Film Products}, 511 U.S. 244 (1994).

\textsuperscript{121} \textit{In re St. Johnsbury Trucking Co., Inc.}, 199 B.R. 84 (Bankr. S.D. N.Y. 1996).

\textsuperscript{122} \textit{Id.} at 87-88
protestation of retroactivity strains credulity."\(^{123}\)

In still another proceeding, *In re Palmer Trucking Comp., Inc.*,\(^{124}\) the court again determined that preemption had occurred on state undercharge claims brought after the effective date of January 1, 1995. It rejected arguments that Section 601 applied only to actions brought by a state, as well as the argument that it applied only to motor carriers still in operation. In *Palmer*, however, the court utilized a *Landgraf* analysis to conclude that enforcement of the preemption provisions of Section 601 did not constitute retroactive application of a federal statute. The court determined that the purpose of the filed rate doctrine was not to confer a benefit on motor carriers, but to regulate intrastate commerce. As no private rights were conferred by the Massachusetts Rate Statute, the passage of Section 601 "... overrode the Commonwealth's statutory scheme prospectively, rather than took away rights from carriers retroactively."\(^{125}\)

Interestingly, the courts in *Ready, Industrial Freight, St. Johnsbury*, and *Palmer* all relied upon the *Morales-Wolens* Supreme Court pronouncements in interpreting the scope of Section 601 preemption. This, of course, is in keeping with the plain legislative history of Section 601 that Congress intended to effectuate the same preemption over state regulation of motor carriers as had previously been accomplished for air carriers through the ADA. The next year will determine the extent of Section 601's dragnet effect, as courts reach decisions on claims that a wide variety of local and state regulations are unenforceable against carriers.

V. The State of Federal Preemption in the Railroad Industry

A. Torts

Preemption questions also have been unsettled in the rail area. The issue of preemption of common law negligence actions against railroads under the Federal Railroad Safety Act of 1970 (FRSA), recently recodified at 49 U.S.C. § 20101 *et seq.*\(^{126}\) and regulations promulgated thereunder, also has prompted conflicting opinions from the United States Circuit Courts of Appeals, as they have interpreted the recent United States Supreme Court opinion in *CSX Transp., Inc. v Easterwood.*\(^{127}\)

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123. *Id.* at 88.
125. *Id.* at 16.
126. *See 45 U.S.C. § 421* *et seq.* (repealed 1994), where the FRSA was initially codified. The recodification was accomplished by Pub. L. No. 103-272 (July 5, 1994).
These varying opinions are not a complete surprise, given the conditional nature of the preemption in the first instance. The preemptive language in FRSA allows for a continued state role in the safety area, if the Secretary of Transportation has not yet exercised his or her rulemaking authority conferred upon him or her in “all areas of railroad safety.” In addition to this rulemaking authority, the Secretary was also directed in FRSA to find solutions to safety problems involving grade crossings. The preemption provision in FRSA states that:

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—
(1) is necessary to eliminate or reduce an essentially local safety hazard;
(2) is not incompatible with a law, regulation, or order of the United States Government; and
(3) does not unreasonably burden interstate commerce.

The Secretary thereafter exercised his rulemaking authority under both FRSA and the Highway Safety Act of 1973.

In Easterwood, the high court was confronted with a preemption claim under the safety and grade crossing regulations as applied to a state negligence action in two respects: 1) that of failure to maintain adequate warning devices at a crossing and 2) that of train operation at an excessive speed. The Supreme Court affirmed the Eleventh Circuit’s holding that the speed claim was preempted, but the lack of adequate warning devices claim was not. In so ruling, the majority held that the regulations must do more than “relate to” the subject matter, as the use of the word “covering” in the preemptive language of the statute “... indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.”

129. See 45 U.S.C. § 433 (repealed 1994). The Secretary, in response to this duty, presented two reports to Congress, ultimately leading to the passage of the Highway Safety Act of 1973, 87 Stat. 282, note following 23 U.S.C. § 130. This legislation made federal funds available to the states for the improvement of grade crossings in exchange for which the states must conduct systematic surveys of railroad crossings in order to identify those needing improvements and further establish a schedule for such projects. Regulations were then promulgated by the Secretary of Transportation imposing conditions for state use of federal grade crossing funds at 23 C.F.R. parts 646, 655, 924, and 1204. Also, see recodified 49 U.S.C. § 20134.
130. This is the recodified language at present 49 U.S.C. § 20106 (1996), substantially similar to 49 U.S.C. § 434.
131. See note 2, supra.
132. Easterwood, 507 U.S. at 664.
The *Easterwood* decision concluded that a framework of state negligence liability could be complementary to the funding process regulations found at 23 C.F.R. Part 924. The federal regulations mandating the steps which must be taken by the states to receive federal funds only "establish the general terms of the bargain between the federal and state governments . . . "133 Such rules "ha[ve] little to say about the subject matter of negligence law, because, with respect to grade crossing safety, the responsibilities of railroads and the State are, and traditionally have been quite distinct."134

Thus, only the regulations which set forth standards for the installation of specific warning devices, in the court's view, preempt state tort law.135 These rules require that, if federal funds are utilized in the installation of the warning devices, the improvement project must either include an automatic gate, based on the existence of certain conditions,136 or receive Federal Highway Administration (FHWA) approval. In this case, the Court noted,

In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.137

However, the facts did not establish that federal funds had been utilized in *Easterwood* for the installation of warning devices, as they were defined in the regulations.138 Thus, the negligence grade crossing claim was not preempted.

Concerning the plaintiff's claim that the defendant railroad had been negligent in traveling at an excessive speed; however, preemption did apply. The Secretary, pursuant to his authority under FRSA, had issued comprehensive speed limit rules for all freight and passenger trains according to each class of track over which they travel. It was conceded that the train in question was traveling at less than the speed limit. The state common law claim was accordingly preempted, as it was "'incompatible with' FRSA and the Secretary's regulations."139 The Court opined that the Secretary clearly had the power under 45 U.S.C. § 434 to preempt state common law.

133. *Id.* at 667.
134. *Id.*
135. See 23 C.F.R. § 646.214(b)(3), (4).
136. See 23 C.F.R. § 646.214(a)(3).
138. See the definition for active and passive warning devices at 23 C.F.R. § 646.204 (i), (j).
The dispute among the circuit courts of appeals concerns the issues as to whether a specific determination by the Secretary is required, when the grade crossing preemption occurs, and, if federal preemption occurs, whether subsequent events can negate that preemption.

On the pro-preemption side, the decision in *Hester v. CSX Transp., Inc.*, is illustrative. The court in *Hester* defined the issue as to whether federal monies “‘participated’ in the installation of ‘warning devices’” at the grade crossing in question. As federal funds had been expended between 1981 and 1983 for the installation of passive warning devices, the preemption applied. It did not matter, in the court’s view, whether or not the Secretary of Transportation had made a determination that passive devices were adequate at the specific grade crossing in question, as there is a legal presupposition that the Secretary must have determined that the safety devices installed were adequate in order to have approved and authorized the expenditure in question. As the court stated in footnote eight, “[i]t is the Secretary’s authorization that triggers the participation of federal funds.” State law negligence claims based on adequate warning were held preempted.

The recent decision in *Armijo v. Atchison, Topeka, and Santa Fe Ry. Co.* is in accord with the decision in *Hester*. The plaintiff in a wrongful death action contended in part that the defendant railroad was negligent in providing passive grade crossing warning devices which were inadequate. In *Armijo*, the court noted the circuit’s earlier decision in *Hatfield v. Burlington Northern R.R. Co.*, in which the court had found preemption to have occurred at the time that $619.17 in federal funds had been expended, active warning devices had been selected, and installation of the active warning devices had been scheduled. The court in *Hatfield* had concluded that the federal participation must be significant, the federal financial participation must be more than “casual” in the project itself, the federal financial participation may be non-cash in nature, and the crossing project must be examined broadly from planning to construction completion.

Applying its *Hatfield* principles to the *Armijo* facts, preemption was again deemed to have occurred. In *Armijo*, the Secretary of Transpor-
tation had agreed to provide ninety percent of the funding for reflectorized crossbucks on a group of railroad grade crossings in New Mexico, including the crossing in question. At the point of agreement, the warning device came under the control of the Secretary, in the absence of clear evidence to the contrary that the Secretary had determined that “the crossbucks, though desirable, were not adequate in themselves to warn the public of the danger” at the specific crossing at issue.\textsuperscript{148} That a diagnostic team subsequently determined that the grade crossing required an active warning system, once funds became available, did not invalidate the federal preemption, as that later decision was still under federal control.\textsuperscript{149}

A similar conclusion was reached by the Eighth Circuit in \textit{Elrod v. Burlington Northern R.R. Co.},\textsuperscript{150} albeit with a significant additional condition imposed. As the Court there declared, “[f]ederal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators.”\textsuperscript{151} However, the court in \textit{Elrod} went on to say that it was necessary for the warning devices \textbf{to be installed and operating}, citing an earlier decision in the Eighth Circuit of \textit{St. Louis Southwestern Ry. Co. v. Malone Freight Lines, Inc.}.\textsuperscript{152} In \textit{Malone}, the FHWA had approved the addition of gates to a crossing, but the accident occurred before the completion of the project. The \textit{Malone} court held that no preemption existed, in the absence of complete installation and operation. As the warning devices in \textit{Elrod} were operational, however, preemption did exist on those facts.

The Eighth Circuit, in its most recent pronouncement in \textit{Kiemele v. Soo Line R.R. Co.},\textsuperscript{153} held to the \textit{Malone-Elrod} line. In \textit{Kiemele}, the court reversed a summary judgment decision in the railroad’s favor on a grade crossing negligence claim, in that a question of fact existed as to whether crossbucks installed with federal funds twelve years before the accident in question had lost their reflectivity, thus making them potentially non-operational.

Still another recent case in the \textit{Easterwood} category at the circuit court of appeals level is \textit{Michael v. Norfolk Southern Ry. Co.}.\textsuperscript{154} The

\textsuperscript{148} See Armijo, 87 F.3d at 1192.
\textsuperscript{149} Judge Ebel, in dissent, disagreed both with the finding that agreement itself, without the expenditure of funds, triggers preemption, and that the preemption could not be invalidated by subsequent events, i.e., the diagnostic team’s later recommendation of automatic gate installation. See id. at 1192-93.
\textsuperscript{150} Elrod v. Burlington Northern R.R. Co., 68 F.3d 241 (8th Cir. 1995).
\textsuperscript{151} Id. at 244.
\textsuperscript{153} Kiemele v. Soo Line R.R. Co., 93 F.3d 472 (8th Cir. 1996).
\textsuperscript{154} Michael v. Norfolk Southern Ry. Co., 74 F.3d 271 (11th Cir. 1996).
court agreed that preemption of state tort claims would occur for the federally funded crossing devices, "so long as the railroad complied with the federal regulations." The plaintiffs, however, alleged that the automatic gate arm was shorter than required by federal strictures. The court pronounced that if such were the case, a state tort claim could be maintained for negligent design or construction. Moreover, the court ruled that plaintiffs' claims for negligent maintenance of the crossing and failure to warn the public of its defective nature as a result of the negligent maintenance would not be preempted, under its more narrow reading of Easterwood.  

The leading case finding against preemption is Shots v. CSX Transp., Inc. In Shots, the Seventh Circuit held that federal financial assistance, standing alone, would not result in preemption. There, Indiana had entered into an agreement with a railroad to install, largely at the federal government's expense, reflectorized crossbucks at 2638 railroad crossings, which agreement was approved by the Secretary. Fourteen years later, an accident occurred resulting in the lawsuit. The court refused to read the agreement to mean that the minimum level warning device, i.e., reflectorized crossbucks, was adequate from a safety standpoint. As the Shots court lectured,

Indeed, it would have been an extraordinary act of irresponsibility for the Secretary of Transportation, by approving the agreement, to preclude tort liability for the railroad's failing to have active warning devices at any of the thousands of crossings covered by the agreement, or otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings, when no one in the federal government had made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal requirements.

No specific approval had been made concerning the warning devices at the crossing in that particular case. The Shots court thus held against preemption.

Also of note is the later Seventh Circuit decision in Thiele v. Norfolk & Western Ry. Co., in which the court again held against preemption. Although the Secretary in Thiele had approved an upgrade, with an automatic crossing guard to be installed at largely federal expense, the construction was underway but not yet completed at the time of the accident. The court held that preemption would not occur "until the warning de-

155. Id. at 273.
157. Shots v. CSX Transp., Inc., 38 F.3d 304 (7th Cir. 1994).
158. Id. at 309.
vices are installed and fully operational.\textsuperscript{160}

Other recent state and federal court decisions reflect this split over the Easterwood preemption in grade crossing negligence actions. Again, the majority view appears to favor preemption. Along these lines, the decisions supporting this view include Cartwright v. Burlington Northern R.R. Co.\textsuperscript{161} (inadequate warning device claim preempted, where device was federally funded, approved, and installed at time of accident); McDaniell v. Southern Pacific Transp.\textsuperscript{162} (negligence claim based on operation of hazardous crossing deemed preempted where federal funds used to install reflectorized crossbucks over decade prior to accident); Dallari v. Southern Pacific R.R.\textsuperscript{163} (inadequate warning device claim preempted, where federally funded device was installed and fully operational); Williams v. CSX Transp., Inc.\textsuperscript{164} (inadequate warning device claim preempted, where federal funds participated in the installation of crossbucks in place at the time of accident); and Bashir v. National R.R. Passenger Corp.\textsuperscript{165} (inadequate warning device claim preempted, where automatic gates had been installed with significant federal participation).

In two other recent state appellate cases, however, the courts have held against preemption. In Hamlin v. Norfolk Southern Ry. Co.,\textsuperscript{166} the Alabama Supreme Court relied upon the opinion of the Eleventh Circuit in Michael, in holding that the negligence claims were not preempted, avoiding Easterwood by treating plaintiffs' actions as based upon negligent maintenance of the crossing and failure to warn the public of the defective nature of the crossing. In Martin v. Consolidated Rail Corp.,\textsuperscript{167} the court, relying upon Thiele, found an inadequate warning device claim not preempted, where a grade crossing at which crossbucks were in place had been approved for an "upgrade" to active warning signals, but the new signals had not yet been installed. There was no discussion by the court, however, of whether federal funds had been expended in the installation of the passive warning devices that were already in place.

Other cases have converted what are in essence inadequate warning claims into negligence causes for failure to maintain properly a crossing, avoiding the preemption issue. For example, in Sheets v. Norfolk South-
ern Ry. Corp.,\textsuperscript{168} the court, while acknowledging the *Easterwood* preemption decision, held tort claims not preempted, because they related to negligence to use ordinary care in maintaining a safe railroad crossing. Likewise, in *Mott v. Missouri Pacific R.R. Co.*,\textsuperscript{169} the court, confronted with a crossing grade accident, allowed that a claim that unreasonable vegetation blocked the signal’s view was proper for jury submission, without discussion of *Easterwood*, except in an excessive speed context.

Even with regard to the *Easterwood* excessive speed preemption, a degree of uncertainty exists. Again, most courts have come down on the side of preemption, consistent with the clear language of *Easterwood*. For example, in *St. Louis Southwestern Ry. Co. v. Pierce*,\textsuperscript{170} the court ruled an excessive speed counterclaim based on negligence preempted, when the railroad was operating within federal speed standards, even though it was traveling in excess of its own internal procedures.\textsuperscript{171}

However, the *Easterwood* opinion had indicated that while it was preempting claims of excessive speed for trains operating within federal standards, it was leaving open the question of whether preemption occurred for “breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard.”\textsuperscript{172} Courts have seized upon this language, to allow such related claims to go forward, even while finding excessive speed claims preempted.\textsuperscript{173} In *Bukhuyzen v. National Rail Passenger Corp.*\textsuperscript{,} the court, while acknowledging the excessive speed claim preempted, found viable a claim as to whether the train should have slowed based upon snowy weather conditions.\textsuperscript{174} In *Mott*, the court allowed into evidence a violation of a town’s ordinance as to train speed set 19 miles an hour lower than the federal speed limit, because the ordinance might deal with “an essentially local safety hazard,” within the meaning of the language of 45 U.S.C. section 434.

Another recent preemption case of a products liability nature also resulted in a finding of preemption. In *Ouellette v. Union Tank Car*
Co.,\textsuperscript{175} an action had been brought against a tank car manufacturer, as well as the railroad delivering the car, grounded in the charge that plaintiff's fall from the car was the result of wrongly placed handholds. The action was deemed preempted by the court under regulations issued by the Secretary of Transportation under FRSA. The court commented that "[w]hile federal preemption often means that there is no remedy available to a claimant, in many instances unfortunately this result is necessary to vindicate the intent of Congress."\textsuperscript{176} The preemption was applied under FRSA, even though the plaintiff claimed that there had not been compliance by the manufacturer with the federal regulations. As the court further commented, "while these penalty provisions call for Attorney General enforcement action, allowing only minimal per diem sanctions for violations, and do not allow for a private right of action, they do show Congressional intent to regulate the field of railroad safety under one comprehensive statute."\textsuperscript{177}

Another recent state court case, In re New Orleans Train Car Leakage Fire Litig., however, found preemption not to apply under the FRSA.\textsuperscript{178} In Train Car Leakage, a class action suit was filed after an explosion and fire caused by a leaking railroad car. The class action plaintiffs sought exemplary damages, under a Louisiana state statute allowing such damages for "wanton and reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances."\textsuperscript{179} Three of the defendants raised a federal preemption claim, including defendants Illinois Central Railroad Company and CSX Transportation, Inc. The court relied upon an earlier decision by the Louisiana Court of Appeal in Haydel v. Hercules Transp., Inc.\textsuperscript{180} in reaching its non-preemption conclusion. It found that the Louisiana exemplary damages statute addressed separate and distinct subject matters from FRSA. The court stated,

The penalty provisions of the FRSA provide for fines and penalties to be paid to the federal government, not to the individual persons injured as a result of the improper storage, handling, or transportation of hazardous materials. Because the fines and penalties of the two provisions have different purposes, we hold that the FRSA does not preempt La. C.C. Art. 2315.3.\textsuperscript{181}

The public policy analysis of the Louisiana appellate court in Train Car

\begin{itemize}
\item 176. Id. at 10.
\item 177. Id.
\item 179. See LA. CIV. CODE, art. 2315.3 (repealed 1996).
\item 181. Train Car Leakage, 671 So. 2d at 547.
\end{itemize}
Leakage, thus, is directly contrary to that in the *Union Tank Car Co.* proceeding.

The present state of the *Easterwood* precedent is muddled, at best. Controversies exist with regard to 1) whether a blanket project, covering a large geographic area, qualifies for preemption as a project where the Secretary has actually determined the devices to be installed, as opposed to a determination by the Secretary for a particular project; 2) whether installation must be completed to trigger preemption as contrasted with mere authorization and expenditure of funds; 3) whether conditions subsequent can invalidate an earlier preemption; 4) if conditions subsequent can invalidate an earlier preemption, what are those conditions (i.e., subsequent authorization by the Secretary of upgraded warning devices, non-operational warning devices, changed traffic patterns, the passage of time); and 5) whether, despite preemption, actions can be brought for failure to adequately maintain the approved devices, and/or failure to warn that the approved devices were not being adequately maintained. Similarly, in negligent speed cases, courts have grabbed onto the handhold provided by the Supreme Court’s language leaving open questions of preemption concerning related tort law duties to sustain actions for failure to take into account local conditions, such as the weather. It is evident that the ebb and flow of the preemption line will continue, without further guidance from the Supreme Court.

B. Loca l Ordinances

Several other cases involved the issue of whether state or local ordinances ostensibly governing train operations had been preempted. In *CSX Transp., Inc. v. City of Plymouth*,182 the Sixth Circuit held preempted by FRSA a municipal ordinance prohibiting trains from obstructing free passage of traffic on the city streets for more than five minutes. The court noted that the exceptions at 49 U.S.C. § 20106 apply only to states and not to local municipalities.183 The claim of the local municipality that its ordinance did not address safety but rather general welfare was rejected by the court on the broad interpretation of “related to” language, as in *Morales* and *Wolens*. In *Civil City of South Bend v. Conrail*,184 a district court held not preempted a local ordinance prohibiting audible train warnings at certain railroad crossings. In that case, the court held that the local ordinances were not preempted by provisions of the High-Speed Rail Development Act of 1994,185 FRSA, or other fed-

182. CSX Transp., Inc. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996).
eral statutes. The court noted that the Secretary of Transportation had been directed to promulgate regulations concerning the sounding of a locomotive horn, but had not yet done so. As the court stated,

Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but the High-Speed Rail Development Act discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same as preempting the field; here, Congress has done only the former.\textsuperscript{186}

The court conceded that future preemption might very well occur inevitably, but added that “no analysis of preemption involves predicting the future.”\textsuperscript{187} Finally, in \textit{Wisconsin v. Wisconsin Cent. Transp. Corp.},\textsuperscript{188} the Wisconsin Court of Appeals found preemption to exist against the Wisconsin Conductor Law. The court held that the federal requirements regulating “train operators” in fact covered the traditional conductor job description, and therefore subsumed the field.\textsuperscript{189}

\section*{C. Employment Relations}

Three recent rail cases have addressed preemption issues in an employment law context. In \textit{Peters v. Union Pacific R.R. Co.},\textsuperscript{190} a railroad engineer brought an action for conversion in state court against a railroad for refusing to return his locomotive engineer certificate. The defendant railroad removed the action to federal court, and moved for dismissal of the state law claim on preemption grounds, which dismissal motion was granted. In affirming the lower court’s action, the Court of Appeals stated “because Peters’ conversion claim is necessarily a challenge to Union Pacific’s certification decision, it follows that the claim comes within the scope of the FRSA regulations and is preempted. Congress has expressly preempted state laws affecting railroad safety where the Secretary of Transportation has promulgated regulations.”\textsuperscript{191} Dismissal of the action had been appropriate by the district court, in that the engineer had failed to exhaust his administrative remedies by filing a review petition with the Federal Railroad Administration. In \textit{Stiffarm v. Burlington R.R. Co.},\textsuperscript{192} the court found a railroad employee’s state law claim of intentional infliction of emotional distress preempted. However, the court rested its decision not on the Railway Labor Act, as had the lower

\textsuperscript{186} \textit{Civil City}, 880 F. Supp. at 600.

\textsuperscript{187} \textit{Id}.


\textsuperscript{189} \textit{Id} at 210.

\textsuperscript{190} \textit{Peters v. Union Pacific R.R. Co.}, 80 F.3d 257 (8th Cir. 1996).

\textsuperscript{191} \textit{Id} at 262.

court, but upon the Federal Employers' Liability Act (FELA). The court ruled that intentional infliction of emotional distress claims fell within the field Congress intended for FELA to occupy. Intentional infliction of emotional distress, in the court's view, was similar to FELA-covered intentional torts such as assault.

In still another case which was brought under FELA, with preemption aspects, the court, in *Miller v. Chicago and Northwestern Transp. Co.*,¹⁹³ held that a municipal building code as applied to an open pit at a locomotive repair shop had not been preempted by a Federal Railway Administration policy statement. The court cautioned that a policy statement divesting another federal agency of authority is very different from preemption of state or local laws in an area traditionally regulated by state or local governments. An expert would accordingly be allowed to base his opinion on non-compliance by a railroad with the local ordinance.

D. SHIPPER - CARRIER DISPUTES

Two other cases addressed rail preemption issues in a shipper-carrier relationship context. In the first case, *Pietro Culotta Grapes v. Southern Pacific Transp. Co.*,¹⁹⁴ a complaint by shippers against defendant rail carriers, based on state law claims for breach of contract, negligence, fraud, negligent misrepresentation and interference with economic advantage was held preempted by the Carmack Amendment. Plaintiffs alleged that 48 rail cars of wine grapes and grape juice were delivered in an untimely fashion and, in some cases, the produce had been damaged. The court rejected the view that plaintiffs' state law claims were based, not upon the actual shipping and delivery of the grapes, but upon the pre-shipment conduct of defendants.¹⁹⁵ The state common law causes of action were held to be inconsistent with the uniformity goal of the Carmack Amendment.

In a second case, a rail carrier brought an action against a city for rail car demurrage charges in *CSX Transp., Inc. v. City of Pensacola*.¹⁹⁶ Among other defenses, the city argued that the railroad's third party beneficiary claim was meritless, because any alleged contract had been preempted by the Federal Bill of Lading Act. However, the court found that demurrage charges could be allocated by contract and accordingly were not preempted.¹⁹⁷

¹⁹⁵. Id.
¹⁹⁷. Id.
V. CONCLUSION

It is an understatement that the scope of federal preemption of state laws in both the airline and rail areas continues to be a matter of concern for these industries. The breadth of the preemption occasioned by the Airline Deregulation Act remains a source of controversy in the courts, and this controversy has relevance, not only for the airlines, but also for motor carriers, given the express intention of Congress to effect the same broad preemption through deregulation of price, routes, and service in the motor carrier industry as had previously been accomplished in the air carrier field. Similarly, the preemption issues in the rail carrier area after Easterwood are far from settled. The conflicting views expressed by the United States Circuit Courts of Appeals on the extent of preemption under FRSA, as well as preemption under the ADA, will ultimately require resolution by the U.S. Supreme Court, in the (hopefully) not too distant future.198 No one ever promised that preemption would be accompanied by certainty, however. Certainty can be a scarce commodity, in an area where the law is changing rapidly, on “our impending adventure down the yellow brick road.”199 And, as Robert Frost so aptly observed,

Most of the change we think we see in life
Is due to truths being in and out of favor.200

The conflicting goals of a need for uniformity of safety and other standards for the nation’s transportation companies and the need to compensate victims for perceived wrongs will, in and of itself, create future disputes about the extent of federal preemption, even with additional Supreme Court clarification.

198. The answer, at least, as to “who shall decide when doctors disagree?” is, when applied to lawyers and the U.S. Circuit Courts of Appeal, the U.S. Supreme Court (with apologies to Alexander Pope, Moral Essays, III).
199. Pougiales, supra note 103 at 44.
GARA’s Achilles: The Problematic Application of the Knowing Misrepresentation Exception

Todd R. Steggerda*

Table of Contents

I. Introduction ........................................... 192
II. GARA the Statute ...................................... 195
III. The Issues Emerging in GARA’s Wake ............ 196
    A. The Preemption Provision and Proof of Product Age... 196
    B. The Applicability Provision ............................ 198
    C. GARA as a Source of Federal Question Jurisdiction .. 200
    D. The Knowing Misrepresentation Exception ............ 203
       1. The Cartman and Rickert Courts’ Application of
          the Exception .................................... 204
       2. The Proper Analysis under the Knowing
          Misrepresentation Exception ....................... 214
IV. GARA’s Achilles ....................................... 221
    A. The Problematic Application of the Knowing
       Misrepresentation Exception ....................... 221

* B.S., Aerospace Engineering, United States Naval Academy (1987). J.D., University of
  Iowa College of Law (Expected May, 1997). Formerly a naval aviator, the author flew F-18’s
  with the “Gunslingers” of Strike-Fighter Squadron 105 in Jacksonville, FL. The Author is
currently serving as Editor-in-Chief of the JOURNAL OF CORPORATION LAW. Upon graduation, the
Author will be joining the Aviation Practice Group at Schnader, Harrison, Segal & Lewis, in
their Philadelphia office. The author would like to thank Professors Randall P. Bezanson and
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I. Introduction

Two years have passed since President Clinton signed the General Aviation Revitalization Act of 1994 (GARA)\(^1\) into law.\(^2\) Until very recently, the popular question regarding GARA's eighteen-year statute of repose was whether it would produce some resurgence in the aircraft manufacturing industry.\(^3\) Today, that question has changed form and now asks whether the undisputed revitalization of the industry\(^4\) can be directly\(^5\) linked to GARA. The debate over this question surely will rage

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3. Past discussions considered the projected effect of GARA on the general aircraft industry. This dialogue has taken place in Congress, see, e.g., 140 CONG. REC. H4999 (daily ed. June 27, 1994) (statement of Rep. Oberstar) (“Mr. Speaker, this day may well be known as the day in which the liberation of general aviation aircraft manufacturing began.”), in the academic journals, see, e.g., Timothy S. McAllister, A "Tail" of Liability Reform: General Aviation Revitalization Act of 1994 & the General Aviation Industry in the United States, 23 TRANSP. L.J. 301, 321 (1995) (“Far from signaling a rebirth of the general aviation industry . . ., GARA places the . . . industry in a more precarious position.”), and among the business community, see, e.g., 1994 U.S.C.C.A.N. 1646 (statement of Mr. Russell Meyer, Jr., CEO of Cessna Aircraft Company, Before the Subcommittee on Economic and Commercial Law on May 12, 1994) (pledging that Cessna would reenter the single-piston engine aircraft manufacturing business “the day [GARA] is enacted”).
4. There have been many signs of industry resurgence. The most notable was Cessna's opening of a state-of-the-art single-engine aircraft assembly plant in Independence, Kansas, on July 3, 1996. Cessna Aircraft, Wkly. Bus. Aviat.ion, July 1, 1996, at 1. Another example is the revitalization of Maule Air, a family-owned aircraft manufacturer, which had been driven into bankruptcy in the early 1980s after dropping liability coverage due to the excessive costs that the coverage added to its airplanes. Since 1993, however, the orders for Maule Air aircraft have continually increased. Sig Christenson, Family-Owned Aircraft Manufacturer Flyin' High in Moultrie, Fla. Times-Union (Jacksonville), June 2, 1996, at B3. Piper has been revitalized, as well. In 1978, Piper manufactured nearly 6,000 aircraft. The liability cost for the average airplane was about $1,000. By 1985, the company was producing only about 500 airplanes per year, with a liability cost of over $70,000 per airplane. Today, “Piper's four cavernous hangars buzz with the sounds of productivity once again. The New Piper Aircraft Co . . . exists today thanks to product liability reform in Washington.” Henry Payne, Getting Off the Ground: Liability Reform Gives Lift to Battered Aircraft Industry, Rocky Mt. News, Mar. 31, 1996, at 53A.
5. Whether one believes GARA has single-handedly revitalized the industry largely depends on one's views on the reasons for the industry's demise. Many have argued that several factors, in addition to increased liability costs, may be responsible for this downfall. See David Moffitt, The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994, 1 SYRACUSE J. LEGIS. & POL'Y 215, 220 (1995) (suggesting that several factors probably contributed to the industry's demise, such as tax burdens, the increased use and availa-
on for years, even though some already have declared GARA victorious.\(^6\)

The issue which likely raises more concern to the practicing bar is not whether GARA created more jobs,\(^7\) increased the number of student pilots who take up flying each year,\(^8\) made single-engine aircraft affordable to those of average income, or single-handedly rescued Cessna and Piper from the dead. Rather, the aviation litigation bar is concerned about, at least between the hours of nine and five,\(^9\) GARA’s practical effect on aviation litigation. Until now, discussions about GARA’s anticipated effect on the litigation of aviation cases have been qualified discussions; these predictions have been limited by the absence of case law interpreting the statute. Such limits on the discussion are dissolving, though, as the first courts have begun to grapple with the effect of GARA’s repose mandate on real, not hypothetical, aviation cases.\(^10\) The

\(^6\) As with many arguments, though, the message is quite inseparable from the messenger. One recent “messenger” from the Senate has already announced GARA’s victory, yet did so within the context of his arguments in support of the Common Sense Product Liability Legal Reform Act of 1996. See \textit{142 Cong. Rec. S2341-05} (daily ed. Mar. 20, 1996) (statement of Sen. Groton). The message was that the “broader legislation”—i.e., the new Reform Act—will have an even more “magnificently positive impact on the general aviation industry” than did GARA, whose statute of repose created Cessna and Piper’s rebirth, and the resurgence in jobs throughout the industry. \textit{Id.}


\(^8\) Industry analysts often view the number of student pilot starts as illustrative of industry growth. See, e.g., \textit{General Aviation Act of 1993: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation}, 103d Cong. 25 (1993) [hereinafter \textit{1993 Hearings}] (statement of Mr. Stimpson, describing a 61% reduction in the number of student pilots in recent years).

\(^9\) That is not to suggest that aviation attorneys are not interested, on a personal level, in the revitalization of the industry. Indeed, the love of flight is, in many cases, common ground among the aviation bar. For the many who “moonlight” as private pilots, the thought of purchasing a new Cessna right off the assembly line in Independence, Kansas surely is accompanied by visions of a full tank of gas, smooth air, and VFR to the moon.

\(^10\) As of September, 1996, courts have written at least six decisions concerning GARA, one of which is unreported. This Article explores the effect of five of these decisions: Alter v.
time has arrived for this dialogue to step forward from the speculative.11

This Article focuses on the issues emerging in the first group of GARA cases. After describing GARA in Part II, this Article turns to the aviation cases interpreting this eighteen-year statute of repose. In Part III.A, the Article deals with GARA’s preemptive provision, which states that GARA preempts state law that would otherwise permit the product liability action. Part III.B addresses GARA’s applicability provision and asks whether GARA applies to cases accruing before, but filed after, GARA’s effective date. Part III.C summarizes the first decision holding that GARA, alone, cannot confer federal question jurisdiction.

The final issue, discussed in Part III.D, concerns GARA’s “knowing misrepresentation” exception, which bars GARA’s repose protection if the manufacturer misrepresented required safety information to the FAA. Because the knowing misrepresentation exception, if satisfied, provides a complete bar to the application of GARA’s repose mandate, the exception’s importance to both the plaintiff and defense bar is evident. Part III.D analyzes and critiques the decisions that clearly struggled with, and ultimately misapplied, this problematic exception.

Finally, Part IV discusses whether the first round of judicial interpretations weakened GARA in any way. This part concludes that these cases have not weakened GARA, per se, but have highlighted the weaknesses inherent in the statute as written. Part IV argues that GARA’s Achilles is the problematic application of the knowing misrepresentation exception and that this exception may ultimately undermine GARA’s long-term ability to achieve its stated purpose. Further, the Washington policy-makers responsible for the exception’s inclusion in the statute largely did not consider the exception’s potential to add massive drag to the eighteen-year statute of repose. This Article concludes that Congress should re-address the knowing misrepresentation exception.


11. On June 28, 1996, the Aviation Litigation Section of the ABA sponsored a seminar in New York City, at which Edward W. Stimpson, President of the General Aviation Manufacturers’ Association (GAMA), was scheduled to discuss the emerging body of GARA case law. Although Mr. Stimpson could not attend due to a late conflict, his prepared remarks, presented by Mr. Ed Bolin of GAMA, discussed the importance of the new body of emerging case law. Clearly, the discussion has now changed forms. See Edward W. Stimpson, Remarks Before the American Bar Association Section of Litigation, Second Annual Seminar on Aviation Litigation (June 28, 1996), New York, New York (on file with author).
II. GARA THE STATUTE

The General Aviation Revitalization Act of 1994 seeks to revitalize the general aviation industry by "limit[ing] excessive product liability costs."12 By establishing a federal eighteen-year statute of repose, Congress sought to "protect general aviation manufacturers from long-term liability in those instances where a product has been in operation for a considerable number of years."13 Under GARA, "no civil action . . . arising out of an accident involving a general aviation aircraft14 may be brought against the manufacturer of the aircraft [or the component-part manufacturer] . . . if the accident occur[s]" more than eighteen years after the date of delivery of the aircraft, or after the replacement of an old component with a new component.15 This period of repose "supersedes any State law to the extent that such law permits . . . [these] civil action[s]."16 GARA became effective immediately upon its passage on August 17, 1994, and is not applicable "to civil actions commenced before the date of the enactment."17

GARA's repose period is not applicable in four explicit situations. First, under section 2(b)(2), GARA's eighteen-year repose period does not apply "if the person for whose injury or death the claim is being made [was] a passenger for purposes of receiving treatment for a medical or other emergency."18 GARA also is not applicable where "the person . . . was not aboard the aircraft at the time of the accident . . . or to an action brought under written warranty enforceable under law but for the operation of [the] Act."19 Finally, GARA does not bar an action involving an aircraft or its components which are greater than eighteen years old when the claimant proves that the manufacturer knowingly misrepresented, withheld, or concealed from the Federal Aviation Administration (FAA) required information that is material and relevant to the performance, maintenance, or operation of the aircraft or its components, and where it is shown that the misrepresentation was "causally related" to the harm

12. H.R. REP. NO. 103-525 pt. 1, at 1 (1994). The report notes that "[l]iability costs have been increasing even though the industry safety record has been improving." Id. at 2. Moreover, the Committee recognized that one manufacturer, Beech Aircraft, had incurred an average liability cost of $500,000 per case, "even though Beech was generally successful in defen[se]." Id. at 3. The report attributed much of the industry's demise to excessive product liability costs. Id. at 4.
14. GARA defines "general aviation aircraft" as those "for which a type certificate or an airworthiness certificate has been issued," and also those having a maximum seating capacity of less than 20 passengers. 49 U.S.C. § 40101 note § 2(c) (1994).
15. Id. § 2(a).
16. Id. § 2(d).
17. Id. § 4(b).
18. Id. § 2(b)(2).
19. Id. §§ 2(b)(3)-(4).
III. THE ISSUES EMERGING IN GARA'S WAKE

A. THE PREEMPTION PROVISION AND PROOF OF PRODUCT AGE

The United States District Court for the Eastern District of California recently considered the effect of GARA's section 2(d), which states that GARA "supersedes any State law to the extent that such law permits" a product liability claim. In *Alseimer v. Bell Helicopter Textron Inc.*, the court considered whether GARA precluded a personal injury suit stemming from a helicopter crash in which the helicopter was greater than eighteen years old. Granting the defendant's motion for summary judgment, the court held that GARA "effectively preempt[ed] the plaintiffs' action." Although the court recognized the "harsh" result of precluding the suit, the court found GARA's purpose supported such an outcome.

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20. GARA's "knowing misrepresentation" exception states in full:
   (b) Exceptions.—Subsection (a) does not apply—
   (1) if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered.

21. *Id.* § 2(b)(1).
22. *Id.* § 2(d).
24. *Id.* at 342. The complaint alleged the defective condition of both the helicopter and the 42 degree gearbox, which performs an important stability and control function in flight. *Id.* at 341. The court found that Bell had provided "undisputed evidence that the helicopter and [the] gearbox . . . were more than 18 years old at the time of the crash." *Id.* at 342. The court also found undisputed evidence that a component part of the gearbox, the pinion gear, was greater than 18 years old. *Id.*
25. *Id.* at 342.
26. The court quoted Rep. Fish, who had supported GARA in its congressional battle. Rep. Fish described both the purpose of, and one rationale for, the statute of repose:
   [The purpose of GARA is to] establish a Federal statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years. A statute of repose is a legal recognition that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury occurring after that much time has elapsed.

The *Altseimer* opinion is notable for several reasons. First, the court clearly indicates that if a defendant presents “undisputed” evidence that the defective product at issue is, in fact, greater than eighteen years old, then GARA applies with full force and precludes the suit in the absence of criteria satisfying one of GARA’s four exceptions. The court did not waiver from GARA’s strict application, despite recognizing the “harsh” result which would follow.

Second, the *Altseimer* case indicates that GARA is not applicable unless *every* component which allegedly causes the accident is greater than eighteen years old. In *Altseimer*, the defendant proved not only that the pinion gear box was greater than eighteen years old, but also that the pinion gear, a component of the gearbox, was greater than eighteen years old. In addition, *Altseimer* likewise highlights GARA’s “rolling” repose feature; if *any* of the components at issue are less than eighteen years old (even though the aircraft itself is greater than eighteen years old), GARA will not automatically preclude the suit. The action would then proceed on the issue of the newer component’s defectiveness, since the repose clock restarts when old components are replaced with new ones.27

The importance of GARA’s “rolling” provision to the litigation bar is evident. To the plaintiff’s bar, it places a premium on causation theories that incorporate replacement components into the causation chain. To the defense, the provision highlights the importance of accurate business record-keeping. The age of an aircraft and all of its component parts are now critical factors in aviation cases, and businesses should now devise systems for infinite-duration record-keeping. To the extent feasible,28 businesses should also begin reconstructing their “ancient” records, the importance of which is now undisputed.29

Finally, *Altseimer* highlights GARA’s strict application to cases involving products of the requisite age and forecasts the important question

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27. This section states that GARA precludes the suit if:

[T]he accident occurred—(2) with respect to any new component, system, subassembly, or other part which replaced another component . . . originally in, or which was added to, the aircraft, and which is alleged to have caused such death or injury, or damage, after the applicable limitation period beginning on the date of the replacement or addition.

28. The process of resurrecting documentary proof of the age of all aviation products that the manufacturer believes are still the sources of potential liability can be a demanding task. This is especially apparent when tracing the product through the corporate history of mergers, acquisitions, product line assumptions and other predecessor/successor circumstances.

29. Because the age of the product at issue in a given case traditionally had less effect on liability, a manufacturer’s record-keeping—e.g., manufacturing, sales, and delivery dates—perhaps was not as detailed as it now must be in the wake of GARA. The new repose period clearly invalidates any notion that these records lose their value after a given number of years. A quick look to the sky often reminds us of the durability of the American aviation product.
to the defense bar. Specifically, what type of evidence will prove product age? In Alseimer, the court addressed the plaintiffs' objection to a declaration by one of Bell's employees. The plaintiffs argued that the employee lacked the requisite personal knowledge to declare that the products had been in use for greater than eighteen years. The employee was the Chief of the Product Assurance Parts Integrity and, in that position, was responsible for "maintaining production records." In overruling the plaintiffs' objection, the court held that the employee's declaration was, in fact, based upon personal knowledge. However, the court did not state what type of documents were discussed in the declaration, or the types of documents offered as separate evidence. Thus, although the Alseimer court held that the products were greater than eighteen years old for the purposes of defendant's motion for summary judgment, the opinion provides little explanation as to what type of factual proof—e.g., business records, statements—would "undisputedly" show no genuine issue of material fact. Although other GARA cases do not add much to the analysis, one recent case illustrates how simply the issue is resolved when accurate and detailed records are presented in support of the product's age.

B. THE APPLICABILITY PROVISION

GARA's applicability provision states that the date of enactment, August 17, 1994, is the effective date of the Act. Section 4(b) states that GARA "shall not apply with respect to civil actions commenced before the date of enactment." In Alseimer, the court considered whether section 4(b) makes GARA applicable to all actions commenced after that.

30. Alseimer, 919 F. Supp. at 342 n.3.
31. Id.
32. Id. (stating the "[o]ffendants' objection . . . is wholly without merit").
33. Id. at 341 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).
35. See Alter v. Bell Helicopter Textron, Inc., 944 F. Supp 531 (S.D. Tex. 1996), wherein the plaintiff admitted that both the helicopter and the compressor section were greater than 18 years old, after facing detailed records from the defendant—e.g., manufacturing dates, serial numbers, delivery dates, etc.—covering both products.
37. The court noted that under both federal and state law, an action is commenced when a complaint is filed. Alseimer, 919 F. Supp. at 342 (citing FED. R. CIV. P. 3 and CAL. CIV. PROC. CODE § 330 (West 1996)).
In Alseimer, the action accrued prior to August 17, 1994, but the plaintiffs did not file the complaint until May 23, 1995. The United States District Court for the Eastern District of California rejected plaintiffs' argument that GARA should not apply because the action accrued prior to the effective date. The court held that because the plaintiffs' complaint was filed after the enactment of GARA, their claims [were] unambiguously subjected to GARA's preemptive provisions.

At the time the plaintiffs wrote their reply brief to the defendant's motion for summary judgment, no reported case had interpreted GARA's applicability provision. As such, it is not unexpected that the plaintiffs made the "commenced equals accrued" argument. However, it seems doubtful that this argument would achieve future success due to the relatively clear meaning of the term "commenced" when used in the "Applicability" section of the statute. Notably, this argument does not seem to have been made in any of the other GARA cases.

The United States District Court for the Eastern District of Michigan also interpreted GARA's applicability provision. In Cartman v. Textron Lycoming Reciprocating Engine Div., the action accrued and the original complaint was filed prior to GARA's enactment. Clearly, GARA did not preclude this action. However, the plaintiff attempted to add a defendant through an amended complaint served on Mar. 22, 1995, seven months after GARA's enactment. The plaintiff argued that the amended complaint related back to the date of the original complaint.

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40. Id. at 342.
41. Id.
42. Id. The argument effectively suggests that the meaning of the term "commenced" in GARA is not necessarily identical to the term's meaning in the civil procedure context.
43. Id.
45. For instance, in Cartman, the plaintiff filed an amended complaint after August 17, 1994, although the original complaint was filed prior to the date of GARA's enactment. Cartman, 1996 WL 316575, at *2. The plaintiff in that case argued that the amended complaint related back to the original complaint's filing date. Id. The plaintiff did not argue (or the court merely did not address the argument) that the amended complaint was not covered by GARA because the action actually accrued prior to GARA's passage date, an argument similar to the one asserted by the plaintiff in Alseimer. Id. Similarly, in Rickert I, the action accrued prior to GARA's adoption, but evidently, the claim was filed after that date. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert I), 923 F. Supp. 1453 (D. Wyo. 1996). The court did not address whether the accrual date is the appropriate date to test against GARA's requirement that the action must commence prior to GARA's date of enactment, most likely because the plaintiff did not make the argument. Id.
46. 1996 WL 316575.
47. Id. at *2.
48. Id.
The court disagreed. Applying the four requirements of Rule 15(c) of the Federal Rules of Civil Procedure, the court noted that the plaintiff argued only that the complaints arose out of the same occurrence. Stat- ing that the only evidence of notice to the new defendant was the subpoena date of March 22, 1995, the court found that the amended complaint did not relate back. Thus, the court treated the amended complaint as a separate claim, holding that GARA precluded the product liability claim against the new defendant.

Cartman is important to current, ongoing litigation. For claims brought prior to GARA—those that are not precluded by GARA—but in which discovery is still proceeding, GARA now erects a serious barrier to the addition of defendants through an amended complaint. Cartman clearly supports the proposition that, unless it can be demonstrated that the amended complaint relates back to the original, the amended complaint will stand as a separate entity and will be subjected to GARA’s strict repose mandate.

C. GARA AS A SOURCE OF FEDERAL QUESTION JURISDICTION

Theories of liability in most product liability cases are based on a state’s substantive law. Whether that theory is strict liability, negligence, warranty, or misrepresentation, state law, not federal law, is the source of those doctrines. Of course, state causes of action can fall within federal jurisdiction if the action “arises under” federal law, thereby conferring subject matter jurisdiction to the federal courts. One way federal subject matter jurisdiction can be proven is to demonstrate that “the vindication of a right under state law necessarily turn[s] on some construction of federal law.”

This demonstration was at issue in Wright v. Bond-Air, Ltd. On February 5, 1995, James Wright was piloting a twin-engine Cessna 310L when a fatal crash occurred. The plaintiff’s complaint, brought in state court by the deceased’s personal representative, asserted

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49. Id. at *3.
50. Under Rule 15, an amended complaint which adds a new party can relate back to the original complaint if 1) the basic claim arose out of the conduct outlined in the original complaint, 2) the new party received notice that it would not be prejudiced by it in its defense, 3) the party knew, or should have known, that “but for a mistake concerning identity, the action would have been brought against it,” and 4) requirements #2 and #3 were fulfilled prior to the expiration of the applicable period. Id. at *2 (citing Fed. R. Civ. P. 15(c)). See also Simmons v. South Cent. Skyworker’s, Inc., 936 F.2d 268, 270 (6th Cir. 1991).
52. Id.
56. Id. at 301.
product liability theories in negligence and warranty. The defendants removed the case to the United States District Court for the Eastern District of Michigan, asserting that the case arose under federal law. The plaintiff moved to remand the case to state court for lack of subject matter jurisdiction. The court granted the motion, holding that GARA does not create a federal cause of action.

The court based its decision almost exclusively on the reasoning articulated by the Supreme Court in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*. In so doing, the court rejected two arguments asserted by the defendants. First, the court rejected defendants’ notion that a “strong federal interest [exists] in assuring the federal act is given uniform interpretation and that federal review is the best way to accomplish this goal.” The court noted that the Supreme Court rejected the same argument in *Merrell Dow* and stated that a federal court still retains the authority to review federal issues mitigated in state causes of action.

The defendants’ second argument, more interestingly, was that under the “artful pleading” exception to the well-pleaded complaint rule, the plaintiff had disguised the federal nature of the state law claim. The defendants pointed out that the complaint, although it did not mention GARA, alleged facts attempting to satisfy GARA’s “knowing misrepresentation” exception. The defendants argued that whether the exception is satisfied remains substantially a federal question because the exception creates a “federal condition precedent that [p]laintiff must necessarily plead and prove. Without such proof, a court cannot recognize

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57. *Id.*
58. *Id.*
59. *Id.* at 301-02.
60. *Id.* at 302 (“The federal issue presented in Plaintiff’s state law cause of action is not sufficiently substantial as to confer federal question jurisdiction under 28 U.S.C. § 1331.”).
61. *Id.* at 303-04 (citing *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809-13 (1986)).
63. *Id.*
64. *Id.* at 302. Generally, the well-pleaded complaint rule requires that the face of the complaint determine the jurisdiction of the claim. However, if the state law is totally preempted—exception number one which the defendants did not argue—or if the complaint is really based on federal law but pled in an “artful” manner that disguises that fact, then the cause of action may be removed to federal court under 28 U.S.C. § 1441(b) (1994).
65. Although the plaintiff was certainly not required to plead under GARA in the complaint, it was prudent to assert the exception’s requirement, anticipating GARA’s potentially fatal effect on the cause of action.
67. See supra part II (explaining that GARA is not applicable if one of GARA’s four exceptions can be demonstrated, one of which applies if the defendant “knowingly misrepresents” to the FAA important safety information).
that [p]laintiff’s state law cause of action has accrued and cannot permit her state-law tort claims to be litigated.” 68 The court reframed the defendants’ argument as follows: “Specifically, Plaintiff must allege and prove that Defendants, in connection with the Federal Aviation Administration (‘FAA’)’s certification process, which is defined exclusively by federal law in federal aviation regulations (FARs or CFRs), knowingly misrepresented, concealed, or withheld ‘required information’ from the FAA.” 69

The United States District Court for the Eastern District of Michigan rejected that argument. 70 The court first noted that it could not “ignore the fact that GARA does not create a federal cause of action. Rather, GARA is a statute of repose and merely serves a gatekeeping function.” 71 The court then turned to the legislative history, stating that Congress did not intend to “create a body of federal common law” and that GARA does not preempt a state’s substantive law. 72 Instead, the court stated that “GARA is narrowly drafted to preempt only state law statutes of limitation or repose that would permit lawsuits beyond GARA’s eighteen-year limitation period.” 73 Addressing defendants’ knowing misrepresentation argument, the court stated that “the mere fact that GARA requires consideration of FAA regulations, does not raise a sufficiently substantial federal issue so as to confer federal question jurisdiction.” 74

The court’s holding that GARA, in itself, does not confer federal question jurisdiction under 28 U.S.C. § 1331 is a well-reasoned decision. Although the Wright case appears to be the only GARA case thus far that, due to an obvious lack of diversity, is proceeding in state court, it is likely that future cases, which otherwise have no basis for federal jurisdiction, will suffer a similar fate. However, while it is clear that GARA does not create a federal cause of action, the defendants’ second argument concerning the knowing misrepresentation exception was intriguing and, perhaps, has the best chance—albeit a small chance—at success in future cases. Because many battles over GARA’s application likely will be

68. Wright, 930 F. Supp. at 304.
69. Id. at 304-05.
70. Id. at 305.
71. Id.
72. Id.
73. Id.
74. Id. The court’s rejection of the argument rested upon its prior decision in Margolis v. United Airlines, Inc., 811 F. Supp. 318 (E.D. Mich. 1993), where the court held that the “Federal Aviation Act of 1958. . . does not preempt traditional state law claims for negligence and does not provide for private right of actions for violations of FAA regulations.” Thus, the court concluded that “[p]laintiff’s complaint alleging violations of FAA regulations in an attempt to invoke a GARA exception, when Congress has determined that there should be no private federal cause of action under GARA and when Congress has not provided a private federal remedy for FAA violations, does not state a claim ‘arising under’ federal law.” Wright, 930 F. Supp. at 305.
fought within the knowing misrepresentation exception,75 and because one of the critical questions under the exception concerns a manufacturer's explicit duties under the Federal Aviation Regulations (FAR), the importance of federal law to the success—i.e., the very existence—of a state cause of action coming under GARA is undisputed. Clearly, a cause of action will survive GARA’s mandate if the defendant manufacturer fails to perform its duties under the FAR and the plaintiff proves the other requirements of the knowing misrepresentation exception.76

The manufacturer’s duties are those explicitly and implicitly defined in the FAR and other federal sources. As such, it is the interpretation of federal regulations that will, in many cases, determine if the cause of action will continue. Thus, although it is quite correct to say that GARA does not create a federal cause of action,77 it must be recognized that the federal questions associated with GARA’s knowing misrepresentation exception stand singularly capable of sustaining a suit that otherwise would be summarily dismissed. Therefore, it is likely that in the lion's share of future cases, the very existence of the cause of action will primarily depend on the interpretation of federal law. As such, one can at least appreciate the argument that in cases where GARA applies, “the vindication of a right under state law necessarily turn[s] on some construction of federal law.”78 Nevertheless, one will never be able to escape the conclusion that GARA, in all its glory, simply does not create a federal cause of action and, therefore, one would expect the Wright holding to be followed.

D. THE KNOWING MISREPRESENTATION EXCEPTION

GARA provides an exception to the eighteen-year repose period if the manufacturer knowingly misrepresented, withheld or concealed from the FAA “required information that is material and relevant to the performance or the maintenance or operation of [the] aircraft.”79 The required information is the information relevant to obtaining a type certificate or an airworthiness certificate and the continuing obligations of the certificate holders to maintain such certificates.80 Moreover, the exception only applies if the manufacturer’s conduct is “causally related

75. See infra part IV (explaining the importance of the knowing misrepresentation exception).
76. See generally supra part II and infra part III.D.
78. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986). One other plaintiff has made the argument. See Alter, 944 F. Supp. at 541 n.6 (failing to reach the issue).
80. Id.
to the harm which the claimant allegedly suffered." 81 Further, the exception mandates that the claimant "plead[ ] with specificity the facts necessary to prove, and proves" that the manufacturer committed such conduct. 82 The remainder of this section explores the first two judicial interpretations of the exception, which addressed the provision in the context of summary judgment motions.

I. The Cartman and Rickert Courts' Application of the Exception

In Cartman v. Textron Lycoming Reciprocating Engine Div., 83 the court rejected the plaintiff's claim that the defendant "knowingly misrepresented, concealed and withheld information regarding the safety of the composite float to and from the FAA." 84 In support of its assertion, the plaintiff proffered a memorandum written by a person that the court unilluminatingly identified as a "representative" of the defendant corporation. The plaintiff argued that the memorandum "misrepresented to the FAA that auto fuel, rather than known design and manufacturing defects, accounted for the composite float's propensity to cause unexpected engine failure." 85 The plaintiff "never explicitly assert[ed]" that the defendant had knowledge of the memorandum, but did assert that the "defendant was aware of the alleged design and manufacturing defects in the float." 86

In granting defendant's motion for summary judgment, the court added meaning to the knowing misrepresentation exception. First, the court declared that the "period . . . is not waived merely because a defendant has not informed the FAA about either possible safety concerns regarding a part or possible misrepresentation by other parties." 87 Second, the court suggested that the exception consists of alternative tiers of requirements, broad and specific, either of which could support the applicability of the exception. 88 The court explained that a "specific" requirement is a misrepresentation or concealment of information "with respect to a type or airworthiness certificate." 89 The "broad" requirement, the requirement indicated by the "broadest language in the exception," is satisfied when the plaintiff offers proof that the manufacturer violated its obligations to submit to the FAA information with respect to the continuing airworthiness of the component part.

81. Id.
82. Id. (emphasis added).
84. Id. at *3.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id. (stating that the plaintiff had produced no such evidence).
The *Cartman* court outlined a third aspect of the knowing misrepresentation exception. The court made clear that the plaintiff must show, via a statute, case or regulation, that the manufacturer had an affirmative duty to provide the information to the FAA. Thus, due to the "narrow wording" of the exception, the court stated that it would not infer such a duty to "volunteer information which is (1) not required by statute or regulation, (2) not in response to a direct inquiry by the FAA, or (3) not necessary to correct information previously supplied directly by the defendant to the FAA."\(^{90}\)

Under this interpretation, the court found the evidence insufficient to meet the "very particular requirements of the Act's 'knowing misrepresentation or concealment' exception to the limitations period."\(^{91}\) The court stated that the plaintiff had "failed to identify any statute, regulation, or case suggesting that defendant had an affirmative duty under . . . [the exception] to provide to the FAA information about the alleged problems with the float."\(^{92}\) As such, the court held that the "plaintiff is not excepted from the Act's period of limitations"\(^{93}\) and granted the defendant's motion for summary judgment.

The second case to interpret and apply the knowing misrepresentation exception was *Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert I)*,\(^{94}\) which involved the crash of a Mitsubishi MU-2B-35-J twin-engine aircraft. Descending on an IFR approach to the Casper Airport with a ceiling of 400 feet, the airplane crashed into a tall ridge eight miles from the airport. The widow of the pilot brought a wrongful death action against the aircraft manufacturer, alleging negligence and strict liability. The plaintiff theorized that icing caused the tragic accident.

The court granted the defendant's motion for summary judgment, holding that GARA barred the claim since the aircraft was greater than eighteen years old and because the plaintiff's evidence did not meet the requirements of the knowing misrepresentation exception.\(^{95}\) However, after dismissing the claim, the court reopened discovery for 30 days.\(^{96}\) During this period, the plaintiff obtained "highly probative evidence," and the court ordered the parties to file supplemental summary judgment briefs.\(^{97}\) Assessing the plaintiff's new evidence in *Rickert II*, the court

\(^{90}\) *Id.*
\(^{91}\) *Id.*
\(^{92}\) *Id.*
\(^{93}\) *Id.* at *4.*
\(^{95}\) *Id.* at 1462.
\(^{96}\) See *Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert II)*, 929 F. Supp. 380, 381 (D. Wyo. 1996) (explaining that the court granted plaintiff's motion to reconsider based on the allegation that defendant "stonewalled her discovery efforts").
\(^{97}\) *Id.*
reversed its earlier grant of summary judgment.98

The remainder of this section first explores the standards of the exception, as promulgated by the Rickert court. The section then examines the plaintiff's evidence which, in Rickert I, unsuccessfully withstood defendant's motion for summary judgment, as well as the evidence which satisfied the knowing misrepresentation exception in Rickert II. Further, this section critiques the Rickert court's analysis and illustratively reevaluates some of the evidence under a more careful analysis. Finally, this part concludes that the knowing misrepresentation exception is not as "formidable" as the Rickert court asserts.

The Rickert I court began its analysis by emphasizing the procedural context of the case.99 First, the court pointed out that GARA's knowing misrepresentation exception contains both a pleading and a judgment standard. While Rule 9(b) of the Federal Rules of Civil Procedure requires that fraud be pled with "particularity," GARA states that the knowing misrepresentation exception must be pled with "specificity," indicating a more detailed pleading standard. The court phrased the requisite showing when the pleading and the judgment standards are properly read together: "[T]he plaintiff must plead the following matters 'with specificity': (1) knowledge; (2) misrepresentation, concealment, or withholding of required information to the FAA; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident."100

Next, the court noted that although the defendant characterized the motion as one for summary judgment, at least part of its motion—the part that challenged the adequacy of the plaintiff's pleadings—was actually a Rule 12(b)(6) motion to dismiss for failure to state a claim or a 12(c) motion for judgment on the pleadings. "Regardless of the motion's classification," the court continued, the motion will not be granted if, "now that discovery is nearly complete, Rickert can produce facts sufficient to create a genuine issue of fact under GARA's 'knowing misrepresentation' exception."101 Thus, the court treated the motion in its totality as one for summary judgment.

After confronting the procedural aspects of the exception, the United States District Court for the District of Wyoming assessed the sufficiency of primarily102 two types of evidence: The expert reports and

98. Id. at 384.
99. 923 F. Supp. at 1456.
100. Id.
101. Id.
102. Of secondary reliance to the plaintiff were several items, none of which persuaded the court, after it "canvassed" the evidence in its entirety, that there was a genuine issue of material fact that Mitsubishi knowingly misrepresented to the FAA. Id. First, the court rejected MU-2
the so-called "Vinton letters." In *Rickert I*, the evidence failed to meet the exception's standards at the summary judgment stage. Examining this evidence in great detail provides the necessary groundwork for contrasting the *Rickert* court's understanding of the exception with the author's, described below. If the aviation bar is currently wondering what type of evidence will put their case in, or keep it out of, the hands of a jury, it should not base its decision solely on the *Rickert* decision.

The first evidence the *Rickert I* court considered was the expert opinion of Dr. Kennedy, who in his first affidavit explained that Mitsubishi made three misrepresentations. First, Dr. Kennedy asserted that Mitsubishi “misrepresented to the FAA [the aspects of the MU-2’s de-icing system] in terms of the design of the de-ice system used on the aerodynamic surfaces of the aircraft.” The court viewed the assertion as merely a conclusion with little explanation. For instance, the expert did not explain “whether Mitsubishi represented to the FAA that it used one design but in fact used another, or whether it represented to the FAA that the deicing system had design characteristics that it did not in fact have.” Further, the expert’s mentioning of the design reports did not clarify the matter, failing to explain which design reports were the basis of the misrepresentation. Finally, the court found that the expert’s assertion that the de-ice boots did not extend far enough along the chord to provide icing protection to the control surfaces was simply a statement of fact or opinion, not concrete proof of Mitsubishi’s misrepresentation.

Dr. Kennedy’s amended disclosure statement similarly failed to

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103. *Id.* at 1457. “Although Rickert's response to Mitsubishi’s motion also discusse[d] the allegations in her complaint and her interrogatory responses,” the court stated that it would not consider the pleadings for the purposes of a summary judgment motion. *Id.*


106. *Id.*

107. *Id.*
prove, with specificity, a misrepresentation by Mitsubishi. The expert's statement that the FAA approved the MU-2 for flight into known icing conditions, even though Mitsubishi had never tested the MU-2 in that regime, was insufficient to show a misrepresentation. The court held that the assertion did not explain how the defendant misrepresented.\textsuperscript{108} Similarly, the court rejected the assertion that the defendant misrepresented to the FAA the true aerodynamic properties of the MU-2 because the deicing testing was conducted with an airfoil which was dissimilar to the actual airfoils found on the MU-2.\textsuperscript{109} The court, assuming the defendant had, in fact, used the " antiquated" airfoil, again explained that Mitsubishi, in doing so, had not lied to the FAA as to which airfoil it used. Even if the airfoil was improperly used, the court stated that such conduct would be a "mistake, not a misrepresentation."\textsuperscript{110} In sum, the court concluded that all of the expert's assertions were incapable of proving a genuine issue of material fact as to whether the defendant knowingly misrepresented: "Nothing that Kennedy says in his report concerning deicing leads this court to conclude that Mitsubishi represented something to the FAA that it knew to be untrue or that it made any representations to the FAA with the intent to deceive."\textsuperscript{111}

The second set of Dr. Kennedy's assertions concerned Mitsubishi's design decisions regarding the controllability of the MU-2 aircraft.\textsuperscript{112} Evidently, the expert had argued that the defendant had emphasized aircraft performance over aircraft safety in the controllability design process. Further, the expert argued that these design decisions "w[ere] never explained in the [FAA's] certification process."\textsuperscript{113} The court rejected the argument, holding that although the opinions might be highly relevant on the question of negligence or strict liability design claims, they did not address the issue of whether Mitsubishi deceived the FAA.\textsuperscript{114} Importantly, the court "commonsensical[ly]" recognized that "there appear[ed] to be an inverse relationship between performance and safety with respect to all modes of transportation, whether it be an aircraft, a car, a motorcycle, or a boat. The faster something goes, the more dangerous it

\textsuperscript{108} For example, did the defendant tell the FAA that the flights were performed when in actuality they were not? \textit{Id.}
\textsuperscript{109} \textit{Id.} at 1458.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} The expert also stated that, in his opinion, "the aircraft fails to meet CAR 3.106 Controllability." \textit{Id.} In Dr. Kennedy's amended disclosure statement, he continued this argument, which explored the adequacy of Mitsubishi's design choices with respect to many parameters, such as wing loading, design comparisons between the MU-2 and other aircraft, as well as the safety tradeoff between high cruise speeds and landing speeds. \textit{Id.} at 1458-59.
\textsuperscript{114} \textit{Id.} at 1459.
Further, the court stated that it could find no "statute or regulation that requires aircraft manufacturers to notify the FAA every time they make design decisions that to some degree place performance over safety." The court concluded that Dr. Kennedy's apparent disagreement with Mitsubishi's design choices regarding performance/safety tradeoffs did not support a claim for knowing misrepresentation under GARA.

The final set of knowing misrepresentation claims made by the plaintiff's expert involved "misrepresentations" of three design characteristics of the MU-2. Dr. Kennedy's first "design" misrepresentation concerned the choice of airfoils on the MU-2 and the conducting of flight tests. Dr. Kennedy stated that the MU-2's airfoil choice was a design defect, to which the court responded that even if the "airfoils are unstable, this understanding is a fact, not a misrepresentation." Next, Dr. Kennedy claimed that Mitsubishi did not document flight tests into icing conditions. The failure of Dr. Kennedy to connect this "fact" to another statement that would suggest that Mitsubishi then told the FAA that the tests were, in fact, performed left Kennedy's argument weightless in the face of a requirement to show a misrepresentation. Without the requisite linkage, the court concluded that "Mitsubishi's failure to perform such tests and its failure to understand these design issues do not constitute knowing misrepresentations to the FAA."

Dr. Kennedy's next set of "design misrepresentations" involved the assertion that the MU-2 did not have an ice detection system, and as such, was defectively designed. Claiming that Mitsubishi did not meet its "obligations" when it offered an ice detection system as an option on MU-2 aircraft, but failed to include the system on every aircraft, plaintiff's ex-

115. Id. at 1458.
116. Id. The court commented in a footnote that "[g]iven the nature of aircraft design—which is a process that constantly involves the trade-off between performance and safety with respect to most components—the Court doubts that such a regulation would be either feasible or workable." Id.
117. Id. at 1459. The court rejected Kennedy's final controllability argument, which first suggested that the National Transportation Safety Board (NTSB)'s ordering of a "special certification review" of the MU-2 was due to the NTSB's "suspicions that the MU-2's accident rate might be design-related." Id. After noting that Dr. Kennedy failed to state that the NTSB ultimately gave Mitsubishi a "clean bill of health," the court stated that the expert "fail[ed] to link the NTSB's review to any alleged misrepresentations or omissions." Id. Dr. Kennedy also relied on two magazine articles noting the relatively high accident rates of the MU-2 and concluding that MU-2 pilots should possess a great amount of skill. Id. The court rejected this line of argument as well, stating that even if these assertions are true, and the MU-2 has relatively low controllability, these are merely differences of opinion as to the MU-2's proper design, and do not support the assertion that Mitsubishi knowingly made misrepresentations to the FAA regarding the controllability characteristics of the MU-2. Id.
118. Id.
119. Id. at 1460.
pert stated that this was proof that Mitsubishi recognized that there was a problem. The court, again, rejected the argument.

Dr. Kennedy’s final assertions involved Mitsubishi’s design decision to use spoilers for roll control. Kennedy asserted not only that the spoilers do not act effectively as control surfaces, but also that this “design defect” has tremendous ill-effects during an MU-2’s flight into icing regimes. The court concluded, in the same summary fashion, that these assertions were not indicative of a misrepresentation by the manufacturer.

The court summarized its reasons for rejecting all of the plaintiff’s theories of misrepresentations, advanced by Dr. Kennedy, as follows:

In the end, there is nothing . . . [in either disclosure statement] which causes this court to conclude that Mitsubishi knowingly misrepresented anything to, or knowingly concealed anything from, the FAA. Although Kennedy attempts to garb his opinions in the GARA-eluding guise of “misrepresentation,” the Court sees his opinions for what they essentially are: differences of opinion concerning design issues. At most, Kennedy’s opinions (accepted as true) cause the Court to conclude that Mitsubishi was negligent, perhaps even grossly negligent, when it designed and manufactured the MU-2. Gross negligence is not, however, a knowing misrepresentation.

The Rickert I court also interpreted GARA’s knowing misrepresentation exception in light of the plaintiff’s proffered letters between Mitsubishi’s former general counsel, Mr. Vinton, and its president. Three letters were from the president of Mitsubishi. The letter dated March 12, 1990 reminded the former general counsel that Mitsubishi had a history of cooperation with the agencies charged with the investigation and prevention of aircraft mishaps and requested that Mr. Vinton provide any information which might assist the investigation. In the second letter, the president again sought Mr. Vinton’s knowledge of any alleged concealment of information which would be relevant to any accident, or information that would link such an accident to a defect in a Mitsubishi product. The third letter, dated May 7, 1990, stated that Mitsubishi

120. Id.
121. Id. The court stated that these statements do not mean, “and Kennedy has not said, that Mitsubishi misrepresented [or concealed] anything about ice detection systems to the FAA.” Id.
122. Id. (footnote omitted).
123. The evidence consisted of five letters, and although the plaintiff did not explain the relevance of the letters, the court evaluated them as being proffered to satisfy the knowing misrepresentation exception. Id.
124. Mr. Vinton was no longer serving as Mitsubishi’s general counsel when the correspondence took place. Id.
125. Id. at 1461.
126. Id.
would not change the MU-2 design until it could be shown that the accidents could be causally linked to the design.\textsuperscript{127} This third letter adds insight to the reason why Mitsubishi's president was concerned about Mr. Vinton's opinion. In the letter, the president informed the former general counsel that counsel's theory that airframe icing was the cause of the accidents was not supported by the evidence.

The \textit{Rickert I} court found the letters inconclusive. The court could not "find anything in [them] which suggest[ed] that Mitsubishi misrepresented anything to ... the FAA."\textsuperscript{128} Further, even though the last letter indicated to the court Mr. Vinton's concern\textsuperscript{129} that icing was the cause of the MU-2's poor accident rating, the court nevertheless held that "this vague indication d[id] not lead to the conclusion ... that Mitsubishi knowingly misrepresented."\textsuperscript{130}

Mr. Vinton's two response letters to his former employer were similarly rejected by the court as inconclusive evidence of Mitsubishi's misconduct under GARA. In the first letter, Mr. Vinton accused the president of preoccupation with product liability claims, rather than the MU-2's safety. Moreover, Mr. Vinton stated that he would make his best effort to ensure that the MU-2's "problem ... [would] receive[ ] the attention it deserves," after accusing the president of not investigating accident theories suggested to him.\textsuperscript{131} In the second letter, dated May 24, 1990, Mr. Vinton enclosed a letter\textsuperscript{132} written by a former MU-2 test pilot\textsuperscript{133} in which the pilot "earnestly recommend[ed]" that the MU-2's FAA certification for operations into regimes of known icing be withdrawn until further testing was performed. Mr. Vinton, in conclusion, accused Mitsubishi of being uninterested in exploring the theory that icing was causing the MU-2 accidents.

Like the letters from Mitsubishi's president, the court held that the letters to the president did not demonstrate with "specificity" that Mitsubishi knowingly misrepresented. The court reasoned that the letters simply did not create a genuine issue of material fact in this regard even though the letters could support the conclusion that "Mitsubishi has, with respect to the design and performance of the MU-2, been obstinate, short-sighted, negligent, and perhaps reckless."\textsuperscript{134}

\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} According to the court, Mr. Vinton was willing to "approach the appropriate regulatory agencies." Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} The letter was published in \textit{Aviation Int'l News}. Id.
\textsuperscript{133} The test pilot had flown the MU-2 during French, German, and Italian flight certification. Id.
\textsuperscript{134} Id.
concluded:

The terms "misrepresentation" and "concealment" are not infinitely malleable. Rickert cannot avoid GARA’s period of repose simply by dressing up her evidence (most of which would be relevant to and probative of the issues of negligence and strict liability) as "misrepresentations" and "concealments." GARA requires more than innuendo and inference; it demands "specificity."  

After the court granted Mitsubishi’s motion for summary judgment, the plaintiff filed a motion to reconsider, arguing that the defendant had "stonewalled" her discovery efforts. The court found the plaintiff’s argument persuasive. Thus, three weeks after granting defendant’s motion for summary judgment, the court granted plaintiff’s motion to stay the judgment and permitted additional discovery.

After noting the effect of its “wake-up call” to the plaintiff in its Rickert I decision, the court in Rickert II assessed the sufficiency of plaintiff’s new evidence. The court found that the new evidence, if true, would indeed satisfy GARA’s knowing misrepresentation exception. The evidence consisted of affidavits from two former employees of defendant, Mitsubishi.

Mr. McGregor, the former Director of Flight Operations at Mitsu-

135. Id. at 1462.

136. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert II), 929 F. Supp. 380, 381 (D. Wyo. 1996). The plaintiff had also re-argued the merits of the summary judgment motion, which the court found "singularly unpersuasive." Id.

137. The court in Rickert II explained that it permitted the additional discovery "[b]ecause [it] knew that Mitsubishi had in fact been less than forthcoming with its discovery responses." Id. The actual order is attached to the Rickert II opinion as Appendix A. In the order, the court addressed several arguments. First, the court rejected the plaintiff’s argument that the court considered only whether Mitsubishi “misrepresented” or “concealed,” but failed to consider whether the defendant “withheld” information from the FAA. The court explained that it, in fact, considered all three types of conduct, as required by the statute, but as a practical matter, stated that it could “discern little difference between ‘concealing’ something and ‘withholding’ something.” Id. at 384. Second, the court reiterated its view that 14 C.F.R § 21.3 (1996) [FAR] does not require manufacturers to report all design opinions to the FAA. Such an interpretation would “gut GARA,” according to the court. Id. at 384. See infra part IV (explaining the knowing misrepresentation’s potential to “gut GARA”). Moving to the discovery conduct issue, the court agreed with the plaintiff that Mitsubishi’s conduct had been “abysmal,” and ordered “limited additional discovery.” In the Rickert II opinion, the court dismissed defendant’s arguments which sought to exclude the additionally discovered evidence as being untimely, and beyond the limits of the discovery specifically authorized by the court. However, the court stated that it was not “willing to uphold finality at the expense of truth,” and that its earlier order authorizing specific discovery did not prohibit the plaintiff from conducting further discovery not involving defendant’s involvement. Id. at 381.

138. According to the court, this wake-up call caused the plaintiff to realize that “GARA has altered the legal landscape for aviation product liability suits,” and that merely creating issues of material fact as to the defendant’s negligence or strict liability will not suffice in response to the defendant’s motion for summary judgment. Id. at 381.
ishi, submitted the first affidavit. Mr. McGregor, who had logged more than 3400 flight hours in the MU-2, stated that he and other employees attributed most of the MU-2's accidents to icing problems. The court found this statement, like those proffered in Rickert I, unresponsive to the knowing misrepresentation issue. However, the court found the next four statements sufficient to withstand the summary judgment motion, creating a genuine issue of material fact as to whether Mitsubishi knowingly misrepresented under GARA:

(1) That this problem was virtually kept within the company and neither seriously investigated nor disclosed to the public or the [FAA]. . . .
(2) That even after the [FAA's] . . . Special Certification Review, we only tested the short-body aircraft when we knew that the long body aircraft was the problem. . . .
(3) [That] [w]e withheld serious limitations to safety of flight in icing conditions from the FAA and the public; [and]
(4) [That] Mitsubishi continues to maintain an office in Texas which I believe is used primarily to defend liability and conceal the icing problem.\textsuperscript{139}

The court did not categorize these statements into those that were sufficient, and those that were not. The court merely stated that if the statements are true, the plaintiff "will be able to prove that Mitsubishi misrepresented certain things about the MU-2 to the FAA, and that it withheld certain information concerning the MU-2 from the FAA."\textsuperscript{140}

The second affidavit was submitted by Mr. Cole, a former Vice President of Mitsubishi, and provided similar statements. In Mr. Cole's twelve years of employment, he investigated many MU-2 crashes and logged over 1500 flight hours in the MU-2. In the affidavit, Mr. Cole offered three statements which, if true, would satisfy GARA's exception:

(1) The problem of horizontal (tail) plane icing on long body MU-2 aircraft was secretly maintained within Mitsubishi, and never properly investigated or disclosed to the public or the [FAA];
(2) [That Mitsubishi and its president] actively covered-up the [icing] problem . . . on the long body MU-2 aircraft, and withheld and concealed this information from the FAA before, during and after the Special Certification Review; and
(3) [That] during the . . . Review, Mitsubishi only tested the short body aircraft when its upper level management clearly knew that it was the long body aircraft which had a dangerous loss of control problem due to . . . icing.\textsuperscript{141}

The court, repeating verbatim its approval of the McGregor affidavit, stated that if Mr. Cole's statements are likewise true, the plaintiff "will be

\textsuperscript{139} Id. at 382.
\textsuperscript{140} Id. The court used identical language in approving the Cole affidavit.
\textsuperscript{141} Id.
able to prove that Mitsubishi misrepresented certain things about the MU-2 to the FAA, and that it withheld certain information concerning the MU-2 from the FAA.” Summarily rejecting the defendant’s challenges to both affidavits,\(^{142}\) the court reversed its prior summary judgment.

2. *The Proper Analysis under the Knowing Misrepresentation Exception*

Examining both *Rickert* opinions, one tends to be persuaded by the court that there is a very bright line between evidence that satisfies the knowing misrepresentation exception and evidence that does not. However, the argument below suggests, perhaps, that the line is not so bright and, more important, that the barrier is not so formidable. The basis of the argument is that the *Rickert* court blended two distinct requirements into its second criteria of the knowing misrepresentation exception, which led to an erroneous analysis.

As noted, the *Rickert* court stated that the knowing misrepresentation exception is satisfied if a claimant can prove the following with “specificity”: “(1) knowledge; (2) misrepresentation, concealment, or withholding of required information; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident.”\(^{143}\) Importantly, whether a manufacturer misrepresents should be a distinct question from whether the information misrepresented was, in fact, required information. Although the court’s grouping of these distinct questions into one requirement seems unimportant at first glance, the effect of that grouping was that the court glossed over one critical aspect of the exception. Specifically, the court failed to appropriately define “required information” in the exception. Moreover, the court on some occasions blended the applicable conduct—i.e., misrepresentation, concealment, and withholding—which is explicitly separated in the statute.\(^{144}\) Blending

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142. The defendant attacked the affidavits on several grounds, suggesting that: 1) the former employees had no personal knowledge; 2) the former employees offered contradictory opinions; 3) Mr. Cole and Mr. McGregor's allegations were “vague” and “unsubstantiated”; 4) the statements contradicted deposition testimony of these former employees in prior MU-2 litigation; 5) the statements were “speculative and factually erroneous”; and 6) the statements were self-serving and “full of hearsay.” The court dismissed the arguments as merely “pok[ing] factual and credibility holes (however large) in McGregor's and Cole's testimony,” anticipating the upcoming trial: “If all of these things are true, then the stage should be set for explosive and devastating cross-examinations. Yet, at this juncture of the litigation, the Court cannot share Mitsubishi's opinions about the . . . affidavits.” *Id.* at 383.


144. In fact, the plaintiff accused the court of something similar. Specifically, the plaintiff asserted that the court considered only whether Mitsubishi “misrepresented” or “concealed,” but failed to consider if Mitsubishi “withheld.” The court dismissed the argument, stating that it
all of these distinct requirements into one part of its four-part test, the court performed an incorrect analysis. More importantly, in doing so the court actually set the knowing misrepresentation hurdle at an artificially "formidable" height.

Under a more careful analysis, the second part of the *Rickert* test must be further separated. Thus, the proper analysis would ask whether the claimant can prove: (1) knowledge; (2) misrepresentation, concealment, or withholding; (3) required information; (4) materiality and relevance; and (5) causation. With this division, a court will be less likely to gloss over the third requirement. Under this approach, a court must first ask whether the information which is asserted to have been misrepresented, withheld, or concealed is required information. Logically, one simply cannot discuss whether something is misrepresented until one identifies the "something." GARA defines "required information" as the information concerning a "type certificate or airworthiness certificate for, or obligations with respect to the continuing airworthiness of, an aircraft or a component."145 Once the court determines that the information is required, the court must ask, as distinct questions, whether the required information was either misrepresented, concealed or withheld. Although the *Rickert* court likely believed that it, in fact, performed this very analysis,146 a reexamination of some of the evidence shows that another court could, under a more careful analysis, reach a different conclusion than the *Rickert* court.

For instance, the Dr. Kennedy affidavit in *Rickert I* presented many pieces of evidence which, under this five-part test, could satisfy the exception.147 Kennedy's de-icing representations are illustrative.148 Dr. Kennedy's theory was that icing had caused much of the MU-2's well-documented poor safety record.149 The first question under a careful

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146. *See Rickert I*, 923 F. Supp. at 1458 (indicating that the court had combed the appropriate statutes and regulations to determine the FAA's mandatory reporting requirements).
147. The evidence in *Rickert I* consisted of expert reports and correspondence between Mitsubishi's president and its former general counsel. The reports asserted de-icing misrepresentations, controllability misrepresentations, and design misrepresentations. *Id.* at 1457-62. For a detailed analysis of the evidence, along with the court's reasons for finding the evidence insufficient under the knowing misrepresentation exception, see *supra* notes 94-140 and accompanying text.
148. The de-ice representations are presented for illustration because these assertions are probably the least likely to satisfy the exception's standards.
149. *See generally Rickert I*, 923 F. Supp. at 1457-60 (addressing the plaintiff's proffered expert affidavit detailing Mitsubishi's alleged misrepresentations concerning the design of the MU-2 for flight into icing conditions).
analysis is whether a holder of a type certificate under the FAR has a duty to report information concerning a defectively designed aircraft. FAR part 21 (Certification Procedures for Products and Parts) prescribes the "[p]rocedural requirements for the issue of type certificates and changes to those certificates . . . [as well as] the issue of airworthiness certificates." In section 21.3 (Reporting of Failures, Malfunctions, and Defects), the FAR states that a holder of a type certificate "shall report any failure, malfunction, or defect in any product . . . manufactured by it that it determines has resulted" in occurrences listed in 21.3(c). One of these occurrences, listed in part 21.3(c)(11), is "any structural or flight control system malfunction, defect, or failure which causes an interference with normal control of the aircraft or which derogates the flying qualities." Arguably, a poor design of a de-ice system—e.g., the size and position of the de-ice boots, the airfoil choice, etc.—could reasonably fall within this definition. Thus, an icing design system defect would be a "structural or flight control system . . . defect" which interferes with normal control of the aircraft, derogating flying qualities of the aircraft. Assume for now that the icing design was, in fact, a defect in the MU-2, that Mitsubishi had determined that it was a defect, and that this defect was, therefore, "required information" under GARA. The next question under the five-part test is whether any of the required information was misrepresented, withheld or concealed.

In Kennedy's amended disclosure statement, he asserts that Mitsubishi never tested the MU-2 in actual icing conditions when the FAA authorized MU-2 flight into this dangerous regime. The court rejected this evidence, stating that the assertion was not indicative of a misrepresentation or a concealment: "Kennedy nowhere states that Mitsubishi told the FAA it conducted such flights, but actually did not, and nowhere alleges that Mitsubishi concealed from the FAA its failure to conduct such flights. Moreover, if the FAA required actual flights into known icing conditions, it certainly could have asked for such flights." The court is correct that this evidence probably does not prove a misrepresentation. However, the court similarly states that it is also not a concealment because Mitsubishi did not conceal its failure to engage in actual icing flight tests. This analysis, in glossing over the "required information" aspect of its second requirement, misidentified the information of which the statute demands disclosure.

151. Id. § 21.3(a).
152. Id. § 21.3(c)(11).
153. Id.
155. Id. at 1458.
The court erroneously viewed the flight tests as the required information. However, the required information is not the lack of performance of a flight test. Rather, the required information is the icing design defect that causes the MU-2 to suffer control degradations in icing regimes. That is not to say that the flight tests are not important to the analysis. In fact, these flight tests are critical to the analysis, but in a different capacity: The refusal to flight test the MU-2 in icing regimes could be proffered as proof of the concealment, not the required information itself. The argument is that Mitsubishi concealed the icing defects in the MU-2 from the FAA by choosing not to conduct flight tests into actual icing conditions. Under this analysis, Rickert's second requirement, that the defendant misrepresented, withheld or concealed required information, would be satisfied. Or, under the five-part test outlined above, this icing evidence from Rickert I satisfies part two.

The court's statement that the FAA did not, but could have, asked for flights into known icing regimes is somewhat deceptive and misunderstands the nature of the FAA's reporting system. The FAA cannot monitor every design decision and later-discovered malfunction associated with every aircraft flying today. As such, the FAA instituted affirmative duties to report known safety problems, such as those listed in FAR § 21.3. This places the responsibility to bring to light known safety concerns on the party that has the best opportunity to discover the deficiencies. If potential safety defects are properly reported, then it is true that the FAA can ask for flights into known icing regimes. However, the FAA cannot ask for more extensive examinations of a problem that it does not know exists because a manufacturer withheld or concealed the required information. Thus, to say that the FAA did not require flights into known icing conditions may miss the point. The FAA may well have required the MU-2 to conduct flight tests into actual icing conditions had the manufacturer accurately and timely reported the known defect.

The evidence involving the airfoil choice also could satisfy part two of the five-part test. Dr. Kennedy theorized that Mitsubishi's use of the Joukowski airfoil in its icing calculations was conduct that satisfied GARA's knowing misrepresentation exception. Kennedy asserted that this airfoil was not representative of the airfoils on the MU-2, suggesting that Mitsubishi used an airfoil design that was more friendly to the icing calculations than the actual MU-2 airfoil design. Again, the court rejected the expert's assertion that the airfoil choice evidenced a misrepresentation. That much is correct. However, like the court's con-

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156. Id.
157. Id.
158. Id.
clusion regarding the icing flight tests, the court held that the airfoil choice was also not a concealment: "[T]his does not mean . . . that Mitsubishi concealed from the FAA the fact that it used the Joukowski airfoil in its calculations." 159

Under a more careful application of the exception's standards, the fact that Mitsubishi used the Joukowski airfoil is potential proof of a concealment, not the required information that is the subject of the concealment. The required information is the alleged fact that the MU-2's icing design was defective. Thus, although the Rickert court held that this piece of evidence did not satisfy the Rickert's second requirement—i.e., that the manufacturer concealed required information—another court could reasonably reach the opposite conclusion if it clarifies what information is required before considering the separate elements of withholdings, concealments and misrepresentations. In that regard, a court might find that the icing problem was the "required information" and that Mitsubishi's use of an "antiquated," non-similar airfoil for its calculations was a concealment of the problem. Similar flaws permeate the Rickert court's rejection of the evidence that was proffered to show both controllability and design misrepresentations. 160

The heart of the difference between Rickert's "soft" analysis and the "careful," five-part test performed above is largely based on a disagreement as to the breadth of a manufacturer's explicit duties to report safety information under the FAR. That is, if one broadly interprets the range of "required information" in the exception, one can find a concealment or withholding quite easily. Conversely, if one views the FAR's disclosure duties as quite narrow, like the Rickert court, then the concealment or withholding aspect of the exception loses its force; there simply may be nothing to conceal or withhold. Under this latter interpretation, it is very easy to gloss over the "required information" requirement, as Rickert demonstrated. The Rickert court's narrow view is readily apparent in its order granting the plaintiff's motion to stay the first summary judgment and to permit additional discovery:

As Rickert would have it, Mitsubishi has an obligation—under Federal Aviation Regulation § 21.3—to report these differences of opinion to the FAA. This regulation cannot and does not require aircraft manufacturers to notify the FAA every time that an engineer, a pilot, or a civilian writes that a particular aircraft should have been designed differently or that it is flawed. Were that the rule, aircraft manufacturers would spend most of their time reporting to the FAA and the FAA would be buried in reports noting differences in opinion concerning aircraft design and aircraft failure. More impor-

159. Id.
160. See id. at 1458-60 (finding that none of plaintiff's proffered evidence satisfies the knowing misrepresentation exception's requirements).
GARA's Achilles

1997]

tantly, Rickert's understanding of Mitsubishi's obligations under FAR § 21.3 would effectively gut GARA. . . . [T]he failure to report would constitute a "withholding" . . . [which], in turn, would satisfy . . . GARA's exceptions and allow parties to bring suits 20, 30, or 40 years after the manufacture of an aircraft. . . . That is not the law, and neither GARA nor FAR § 21.3 produce such an absurd result.161

Clearly, the proper line to be drawn when interpreting duties under the FAR was evident to the Rickert court. However, one must agree that an affirmative reporting duty under FAR does arise somewhere between a passing opinion by a casual observer that the MU-2 icing characteristics are relatively weak and the situation in which planes are dropping out of the clouds. The proper interpretation of the FAR part 21, however, leads to the conclusion that a court should take neither a broad nor narrow view. Under the FAR, the scope of the duties are defined in a specific manner, having little to do with the court's general opinion as to whether a particularly broad interpretation would "gut GARA."162 The scope of the duties under the FAR is measured and defined by the actual knowledge of the type certificate holder: A manufacturer must only report those defects that the manufacturer has determined to cause the situations in part 21(c).163

Thus, the critical factual aspect under the knowing misrepresentation exception is not whether the evidence is illustrative of a misrepresentation, concealment, or withholding. Rather, the critical question—and the first question—concerns the type of information that a holder of a type certificate is required to report to the FAA. When one looks to the regulations, it is apparent that such a holder is not required to report a defect until it has determined—i.e., has knowledge of and believes—that a defect has caused one of the problems in FAR part 21.3(c).164 In Rickert, that meant asking whether Mitsubishi knew that the poor icing characteristics were causing the MU-2 mishaps. If the answer to that question is yes, or at the summary judgment stage the answer was that there was a genuine issue of material fact as to whether that answer was yes, then, and only then, would one ask whether there is evidence showing that a manufacturer misrepresented, concealed, or withheld information about the defect.

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162. Id. at 384.
163. See 14 C.F.R. § 21.3 (1996) ("The holder of a Type Certificate . . . shall report any defect in any product, part, or article manufactured by it that has left its quality control system and that it determines could result in any of the occurrences listed in paragraph (c) . . . ").
164. This, in turn, begs the question: What is a defect? For further discussion of this problematic aspect of the knowing misrepresentation exception, see infra part IV.
Although the *Rickert I* court never reached the knowledge issue, the plaintiff proffered evidence which arguably could have satisfied the requirement. Of course, it is relatively clear that the icing evidence—the airfoil choice, the lack of performance of flight tests—does not, alone, demonstrate Mitsubishi’s knowledge of icing defects in the MU-2. However, perhaps similarly obvious is the notion that the Vinton letters, which the *Rickert I* court dismissed as non-misrepresentations, could potentially satisfy the FAR’s knowledge requirement. Specifically, the correspondence between Mitsubishi’s president and its former general counsel potentially creates a genuine issue of material fact as to whether the president of Mitsubishi, and therefore Mitsubishi itself, had determined that the MU-2 suffered from an icing defect. As noted above, Mr. Vinton in the correspondence accuses the president of failing to “look into the [icing] theory” presented to him, and then threatens the president by ensuring him that the “[icing] problem with the long-body MU-2” will get the attention it deserves. Although these statements do not prove a misrepresentation or concealment, they arguably could demonstrate Mitsubishi’s knowledge of the MU-2’s icing defect, which in turn makes the icing defect “required information” under GARA. Under this interpretation, parts two and three of the five-part test would be satisfied.

Next, the court must ask whether the claimant knowingly engaged in the applicable conduct—part one of the five-part test. In the present circumstances, where the scope of the duties under the FAR are determined by the knowledge of the certificate holder, the knowledge requirement of part one will be identical (or nearly identical) to the knowledge requirement within the required information determination of part three. In most cases, then, a finding that the certificate holder had determined that a defect was causing the flight degradations will have two effects. First, it will mean that the defect is now “required information” under part three. Second, it will likely show that in cases where there is proof of a misrepresentation, concealment, or withholding, that such was done so know-

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165. *Rickert I*, 923 F. Supp. at 1457-61. In fact, throughout the court’s entire discussion of “The Alleged De-Icing Misrepresentations,” the court at only one point mentions the knowledge requirement: “Nothing that Kennedy says in his report . . . leads this Court to conclude that Mitsubishi represented something to the FAA that it knew to be untrue or that it made any representations to the FAA with the intent to deceive.” *Id.* at 1457-58 (emphasis added).

166. *Id.* at 1461-62 (“[T]he court cannot conclude that Vinton’s letters show anything other than that Mitsubishi has, with respect to the design and performance of the MU-2, been obstinate, short-sighted, negligent, and perhaps reckless. Again, however, this does not mean that Mitsubishi knowingly misrepresented anything to, or concealed anything from, the FAA.”).

167. The FAR’s choice of the word “defect” is problematic. See 14 C.F.R. § 21.3(a); see also infra part IV.

GARA's Achilles

I. GARA's Achilles

A. The Problematic Application of the Knowing Misrepresentation Exception

At first glance, the initial decisions interpreting GARA did so with unwavering attention to the literal meaning of the statute and an impressive commitment to the policies behind the Act. The cases held that GARA applied even if the cause of action accrued before the effective

169. The Cartman opinion may suffer from the same analysis flaws, but that analysis is difficult to evaluate because of the brevity with which the court both restated and analyzed the evidence presented in that case. Notably, though, the court’s statement that it would not infer a manufacturer’s duty to “volunteer information which is . . . not required by statute or regulation” does seem to evince a misunderstanding of the nature of the FAA’s system. Nevertheless, in concluding that the manufacturer did not have a duty to volunteer information about the composite float, the court never pointed out the critical aspect of the FAR—i.e., that information becomes required when the manufacturer determines a product is defective. See generally Cartman v. Textron Lycoming Reciprocating Engine Div., No. 94-CV-72582-DT, 1996 WL 316575, at *3 (E.D. Mich. Feb. 27, 1996); supra part III.D.1.
date of the statute,170 that GARA preempted state law,171 and that the knowing misrepresentation exception “erect[ed] a formidable first hurdle.”172 Moreover, an influential observer recently declared that the GARA case law had been very true to the statute.173 Indeed, it looked as though GARA had not been weakened in the first series of decisions.

However, whether GARA had been weakened is a question that, at least to some degree, presupposes that GARA was strong to begin with. After all, GARA’s purpose is to preclude product liability actions, with limited exceptions, against aviation manufacturers when the product has been in service for many years.174 GARA was developed as a response to the “serious decline” in the general aviation industry, an “important cause” of which was “the tremendous increase in the industry’s liability insurance costs.”175 The statute was justifiable on the theory that “after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible . . . after that much time has elapsed.”176 To fight the important problem of exploding liability costs, GARA was intended to cut off the “tail” of liability. GARA, at least on its muscular face, was intended to perform that task smoothly and efficiently.

After examining the case law emerging in GARA’s wake, this author holds a less optimistic view of GARA’s ability to accomplish its purpose. This view, however, is a by-product of the choice of measuring sticks: GARA’s strength should be measured at the summary judgment stage. For GARA to be truly effective, it must possess the ability to substantially preclude liability costs, which means an early “out” for a defendant, assuming the plaintiff brings the action. If GARA’s goal is to “unbridge” the general aviation manufacturers from liability costs, then GARA must apply quickly and decisively. If an aviation case in which GARA is an issue goes to trial, significant liability costs are incurred, even if GARA precludes the action in the end. In those cases, GARA has done very little in the way of “unbridled” liability protection. Similarly, if massive discovery efforts are necessary to even reach the summary judgment stage, then substantial liability costs likewise are incurred. In both cases,
a settlement becomes a realistic option for manufacturers—and in most circumstances, a cost-saving one. The result is that manufacturers will likely continue settling many of these cases, even though GARA arguably should have quickly precluded the suit. In sum, if extensive discovery efforts are necessary to the determination at the summary judgment stage as to whether GARA applies, or if there are factual issues within GARA about which a plaintiff is quite capable of demonstrating a genuine issue of material fact, then GARA is not as strong as once believed.

The GARA cases have not weakened the Act, but they have clearly demonstrated GARA’s Achilles—the very difficult issues within the knowing misrepresentation exception. These issues will be litigated in nearly all future cases falling under GARA’s repose mandate. Although the primary issue under the Rickert facts was whether Mitsubishi had knowledge of the icing “defect” of the MU-2, the exception contains other factual issues of equal difficulty. For instance, the exception also requires the claimant to prove that the misrepresentation was causally related to the accident. Clearly, these are the very issues at the heart of the plaintiff’s claims. Thus, adjudicating the merits of the knowing misrepresentation exception will involve factual issues as difficult and extensive as those at the heart of the case. Litigating these issues is a discovery-intensive, and therefore costly, endeavor. In many cases, just reaching the summary judgment stage will be expensive. But as this Article in Part III.D concluded, even the evidence obtained within a limited discovery period, as in Rickert I, could potentially withstand a summary judgment motion under a reasonable interpretation of the knowing misrepresentation exception. In that regard, the exception’s hurdle is not as “formidable” as most believe. And with an even longer discovery period, the Rickert II plaintiff easily satisfied the exception even under the

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177. Of course, there are factual issues in GARA’s other exceptions. However, the factual issues in the application of the “medical emergency” and “non-passenger” exceptions are relatively easy to resolve. See supra part II (listing GARA’s four exceptions). Further, the presence or absence of a written warranty is likewise simply adjudicated. As such, these issues do not possess the same ability as the issues inherent in the knowing misrepresentation exception to create a genuine issue of fact, and therefore, do not possess the same potential to undermine GARA’s ability to achieve its lofty purposes.

178. The assumption here is that the manufacturer’s knowing misrepresentation will become an issue—most likely the issue—in nearly every GARA case. Some commentators predicted that the exception’s “substantive hurdles” would prevent plaintiffs from circumventing the Act. See Leonard E. Nagi, General Aviation Revitalization Act of 1994 (1994) (unpublished manuscript on file with author) (“While [the exception] . . . would appear to be an invitation to circumvent the Act . . . .”). This author believes, however, that: 1) the exception’s hurdles are not so high, and 2) as such, they will not provide enough incentive for plaintiffs to not attempt to “circumvent the Act.”

179. See generally supra part III.D (concluding that the Rickert court’s knowing misrepresentation hurdle was artificially high).
Rickert court’s rather narrow interpretation.\textsuperscript{180}

Unfortunately, the factual issues within the knowing misrepresentation exception are only half of the problem. And perhaps they are the “easy” half when considering that the resolution of these issues is what courts generally do. To ask a fact-finder whether a defect caused an accident is a question that is, at least, familiar. Conversely, asking a court to define “required information” based on the FAR or other authority is asking it to navigate virgin skies. Under the FAR, whether the information concealed is “required information” is a question of two parts: Did the manufacturer determine that there is a defect? Part III.D assumed, arguendo, that the icing design of the MU-2 was a defect under the FAR in order to concentrate on the very difficult factual issue of whether the manufacturer had determined that there was a defect. Unfortunately, this aspect of the test does not even become a factual issue until the court defines a “malfunction, defect, or failure” under the FAR. Just as a court cannot determine whether a manufacturer misrepresented until it defines required information, a court also cannot determine whether a manufacturer determined that there was a defect until “defect” is defined.

To properly apply the knowing misrepresentation exception, a court will have to define “required information.” In cases asserting duties under FAR part 21, this assessment will likewise require a court to determine whether a manufacturer determined that a defect existed. The term “defect” in the FAR could have many meanings. A court could define “defect” very narrowly, such as by an Airworthiness Directive (AD). Under this approach, only if the FAA has issued an AD would the problem be a defect. This, in turn, would de-emphasize the factual finding of manufacturer knowledge of the defect. In fact, a court could reasonably infer constructive knowledge on the knowledge issue. Alternatively, a court might define “defect” very broadly, such as by an aircraft “problem.” This approach would emphasize the factual issue of manufacturer knowledge—i.e., had the manufacturer determined that there was a “problem.” A court could also interpret defect in a manner consistent with product liability law, which would produce new problems.

The “broad” view is the one the Rickert court tried to avoid. The Rickert court’s narrow interpretation of manufacturer reporting duties under the FAR is implicitly based on a narrow interpretation of “defect.” Because the court made a general assumption that the icing problem was not “required information,” it never truly considered the questions that Congress has implicitly asked courts to resolve. When courts begin to

squarely address these issues, however, it is likely that some courts will take the broader view, finding much room for manufacturer misconduct in the FAR. In doing so, the courts will expand the applicability of the knowing misrepresentation exception. Depending on the number of courts that adopt the broader approach, the knowing misrepresentation exception, in totally barring application of the eighteen-year statute of repose, stands ready to swallow the rule. Unfortunately, there is little congressional guidance to help avoid this unfortunate result.

Turning to the legislative history of GARA, this Article in the next section shows that Congress offered little justification for the knowing misrepresentation exception and, more importantly, showed little recognition of the difficult questions—both factual and policy-based—that it was implicitly asking courts to decide. Moreover, the history evinces little congressional regard for the exception’s potential to undermine GARA’s ability to substantially preclude liability costs associated with aircraft and products greater than eighteen years old. Instead, the legislative history indicates that the exception was born of a political compromise in the Senate.

B. THE LEGISLATIVE HISTORY

Congress began considering the imposition of a time limitation on aviation manufacturer liability nearly ten years prior to GARA’s enactment in 1994.\textsuperscript{181} In its first appearance, a twelve-year statute of repose was one aspect of the never-enacted “General Aviation Tort Reform Act of 1986,” which sought to accomplish larger goals, including the establishment of uniform liability standards and the elimination of joint and several liability.\textsuperscript{182} The statute of repose, in a twenty-year form, also appeared in the Senate’s first attempt at reform, entitled the “General Aviation Accident Liability Standards Act of 1986.”\textsuperscript{183} Notably, neither

\textsuperscript{181} See, e.g., Aviation Product Liability: The Effect on Technology Application: Hearing Before the Subcomm. on Transportation, Aviation, and Materials of the Comm. on Science and Technology, 99th Cong. 5 (1985) (statement of Milton R. Copulos, Senior Analyst, the Heritage Foundation) (“Now there are a few simple things we can look at that might help this, one of which is called a statute of repose. One should not be held eternally liable for a product.”).

\textsuperscript{182} H.R. 4142, 99th Cong. § 2803 (1986) (providing for a 12-year statute of repose with an exception in the case of an express warranty). See also Hearings on H.R. 4142: Aviation Tort Reform Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 99th Cong. 98 (1986) (statement of Robert L. Habush, President, Association of Trial Lawyers of America) (“[A] statute of repose for 12 years would exclude maybe 80% of the general aviation planes in existence, and that’s why I suggest 20 years is a much fairer figure in the Senate.”).

\textsuperscript{183} S. 2794, 99th Cong. § 7 (1986) (providing for a 20-year statute of repose in addition to promulgating uniform standards for liability arising out of general aviation aircraft accidents).
of the early reform efforts contained any exceptions to the statute of repose similar to the knowing misrepresentation exception.

In 1987, the reform effort continued, but with new names and bill numbers. In the House, the aviation reform effort was entitled the “General Aviation Standards Act of 1987,”184 and in the Senate, the “General Aviation Accident Liability Standards Act of 1987.”185 For the next several years, the statute of repose appeared in one form or another within these larger aviation reform packages.186 However, a statute of repose, as a separate reform effort, began to take shape in the 103d Congress.

In September of 1993, Senator Kassebaum introduced the “General Aviation Revitalization Act of 1993.”187 This bill consisted solely of a fifteen-year time limitation on liability and contained no exceptions to the repose mandate.188 In the House, Mr. Glickman introduced an identical bill.189 Thus, in 1993, roughly eight years after the initiation of the aviation reform effort, an identical fifteen-year statute of repose bill was introduced in both houses of Congress. Because the knowing misrepresentation exception had no existence to this point, the hearings on the earlier bills contain little relevant discussion regarding manufacturer misconduct and its relation to a statute of repose. Unfortunately, the final stages of GARA’s legislative journey contain similar deficits in relevant dialogue.

In the 103d Congress, the Senate acted first, passing the “General Aviation Revitalization Act of 1994” on Mar. 16, 1994 by a margin of 91 to 8.190 This version of GARA consisted of an eighteen-year statute of repose, with three exceptions,191 including the knowing misrepresentation exception.192 However, the bill reported out of the Senate Committee on Commerce, Science, and Transportation five months earlier consisted of the original fifteen-year repose period with no exceptions.193 Not surprisingly, then, neither the Senate report nor the hearing testi-

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188. Id. § (a)(1).
191. Id. This version, S. 1458, contained no exception for the case of an express written warranty. Id.
mony provides justification for the exception.\textsuperscript{194} In fact, the Senate Committee expressly recognized the comprehensive effect of the fifteen-year statute of repose, stating that “[t]he Committee is aware that the manufacturers of most of the aircraft produced [over fifteen years earlier] would no longer be liable for the design or manufacture of those 17,811 aircraft.”\textsuperscript{195} Nevertheless, the bill passed by the Senate in March of 1994 differed from the earlier bill, containing the knowing misrepresentation exception and consisting of an eighteen-year, not a fifteen-year, repose period. On the Senate floor, the justifications for the exception were provided, first, by Senator Pressler:

[Product liability reform] is a very tricky issue. We must protect the ability of the little guy to be able to hire a law firm on a contingency basis and sue the big guy, otherwise the little guy will not have a chance. At the same time, we must ensure that all of our products and services are not being priced out of the market. The point is, under this piece of [modified] legislation the little guy can still sue when it is appropriate. We must always protect the right of people to receive justice under our legal system. . . . [In this modified bill], provisions have been incorporated that would provide exemptions [from the 18-year statute of repose] . . . under certain limited conditions, such as failure by the manufacturer to be forthright with the FAA during the certification process. I believe even with these exemptions, the overall goal of this liability reform initiative is reached. That is, to give those negligently injured by an airplane manufacturer legal recourse commensurate with a level more appropriate to the industry.\textsuperscript{196}

Senator Metzenbaum\textsuperscript{197} provided additional insight to the justifications for the knowing misrepresentation exception, stating that without the knowing misrepresentation exception, the bill would create an incentive for manufacturers to misrepresent to the FAA. The Senator reasoned: “Because there would be complete immunity from private suits after the statutory period, if a manufacturer learned of a defect or other problem, it could simply sit on the information and hope that an accident does not occur within the time frame. Frankly, in my view, . . . regulatory penalties [are not enough].”\textsuperscript{198} Senator Metzenbaum also noted the existence of “procedural and substantive hurdles [within the exception] that will be difficult for victims to overcome in many, if not most

\textsuperscript{197} This Senator seems to be responsible for the addition of the exception. See id. at S2995 (statement of Sen. Metzenbaum) (“Now, the modified bill that I have worked out with the distinguished Senator from Kansas. . . .”).
\textsuperscript{198} Id.
cases.\textsuperscript{199} Senator Metzenbaum concluded that he would vote for the bill, "not because [he thought] it [was] the right bill, but because [he thought] it [was] just as well to pass it."\textsuperscript{200} The Senator recognized that the legislation would be sent over to the House "where they can give it more attention and look at it more fully than we have on the floor of the Senate."\textsuperscript{201} Unfortunately, that did not occur.

The Senate dialogue indicates that the knowing misrepresentation exception was added despite little public discussion, yet also suggests that its addition was a necessary precondition to GARA's passage in the Senate. Thus, as is usually the case in politics, the justifications for the exception were not as important as the political reasons for adding it to the bill. It looks as though the bill in its unaltered form would have had difficulty passing the Senate. Moreover, it is notable that not one Senator who spoke in favor of the bill on March 16, 1994 indicated her disapproval of the added exception, perhaps providing further indication that compromise, at least in GARA's terms, meant that GARA would simply not exist without the knowing misrepresentation exception. Under this theory, the view held by GARA's proponents was most likely either that the addition of the exception would probably not appreciably undermine the effect of the statute, or that the exception would undermine the Act to some degree, but that a "little" GARA was better than "no" GARA.

GARA's passage through the House is similarly void of evidence showing that the knowing misrepresentation exception was thoroughly analyzed. In October 1993, the House Subcommittee on Aviation called hearings on H.R. 3087, consisting of a fifteen-year statute of repose with no exceptions.\textsuperscript{202} At the hearing, there were some limited discussions regarding the principles of a knowing misrepresentation exception, despite the fact that the hearings were conducted prior to the addition of the exception to the Senate version, and that the citizens testifying before the committee were largely proponents of the measure. Although the American Trial Lawyers Association did not attend the hearings,\textsuperscript{203} one trial attorney, Mr. David Katzman, testified and presented arguments in favor of a knowing misrepresentation exception.\textsuperscript{204}

\textsuperscript{199} Id. One important procedural hurdle in this Senate version, which never made it to the final version of GARA, was the requirement that the claimant prove the applicable conduct by clear and convincing evidence. See id. at S3009.
\textsuperscript{200} Id. at S2995.
\textsuperscript{201} Id.
\textsuperscript{202} See 1993 Hearings, supra note 8, at VII, 2-4 (memorandum from Committee's Aviation Staff). This bill was identical to the Senate Bill, S. 1458, later modified and passed by the Senate in March of 1994.
\textsuperscript{203} Id. at XVII (memorandum from the Committee's Aviation Staff) ("The Association of Trial Lawyers of America was notified of the hearing but decided against testifying.").
\textsuperscript{204} Id. at 68-77 (testimony of Mr. David Ian Katzman).
Mr. Katzman suggested that many airplanes flying today have known defects and that under GARA, the manufacturer would get immunity in suits involving many of the airplanes. The first example that Mr. Katzman listed was the Cessna 411 which, he argued, has been flying for years with a known defect (loss of rudder control during single engine flight): “Were you to enact this legislation in its present form, you would simply be handing Cessna immunity for a product defect that it knows exists.” Noting that “there is no provision [in the bill] for concealment, . . . [and that] it does happen,” Mr. Katzman suggested that GARA should have exceptions for two cases—concealment and prior knowledge.

Apparently intrigued by Mr. Katzman’s views, the Chairman of the Subcommittee, Mr. Oberstar, asked the earlier panel, consisting of strong proponents of the legislation, to respond to the concealment argument. Mr. Meyer, Chairman and CEO of Cessna Aircraft Co., responded by calling it “a typical unsubstantiated comment by a trial lawyer to imply that a manufacturer who lives as we should in a highly regulatory environment . . . would or could try to hide some defect in an airplane over a fifteen-year period.” Mr. Meyer concluded that the accusation “[was] without any substantiation and [that such a concealment] is impossible.” Mr. Stimpson, representing the General Aviation Manufacturers Association, also responded to Mr. Katzman’s testimony, noting that manufacturers are under strict duties to report known defects to the FAA. Finally, Mr. Meyer also suggested that the addition of a concealment exception would produce “a lot of litigation over something that is irrelevant.” This brief acknowledgment of the “cost” of the exception is unique to the exception’s legislative history. Although the debate continued among the Committee members, it failed to further address Mr. Meyer’s concern that such an exception would produce additional litigation. In fact, one committee member seemed to be operating under a different assumption.

Mr. DeFazio, responding to Mr. Meyer’s suggestion that it would be

205. Id. at 69.
206. Id. at 70. Mr. Katzman listed other examples, such as the Cessna 210, the Turbo 210, the V-tail Bonanza, and the Lear 23. See id.
207. Id. at 74. “Prior knowledge would be . . . if Cessna today has knowledge of . . . bladder tanks in the fuel system that accumulate water and cause engine stoppage. . . . If those tanks are out there and they know about them today and they haven’t solved the problem, that is prior knowledge.” Id.
208. Id. at 35 (statement of Mr. Oberstar).
209. Id. (statement of Mr. Meyer).
210. Id. at 36. Mr. Stimpson also provided a written response at a later time that clearly outlined a manufacturer’s duties under 14 C.F.R § 21.3(a) (1996) [FAR] to report known defects to the FAA. Id. at 40.
211. See 1993 Hearings, supra note 8, at 44 (statement of Mr. Meyer).
impossible for a manufacturer to conceal in the heavily-regulated industry, theorized that the addition of the exception, in effect, could not hurt:

[T]he point is that you are saying that [concealment] couldn’t happen; and if it can’t happen, why don’t we specify it. And if it does happen, then the fifteen year statute of repose doesn’t apply. And then that would help you with bad actors . . . . You can’t say it could never happen with any and every manufacturer out there; and so why not accommodate it since you are not going to violate it.\textsuperscript{212}

Mr. DeFazio’s views evidently were persuasive\textsuperscript{213} to the Aviation Subcommittee and, ultimately, the Public Works and Transportation Committee members. When the Committee reported the bill on May 24, 1994, GARA consisted of an eighteen-year statute of repose with an exception for knowing misrepresentations.\textsuperscript{214} The Committee report, though, does little to clarify the purpose of the provision, other than to say that it was added as a “fairness” element.\textsuperscript{215}

By May, 1994, when the House Subcommittee on Economic Law of the Committee on the Judiciary held its hearings,\textsuperscript{216} perhaps the fate of the knowing misrepresentation exception already had been sealed. At these last GARA hearings, there were considerable attacks on the legislation by its opponents.\textsuperscript{217} Every opponent directly or indirectly argued for the necessity of a knowing misrepresentation exception to GARA\textsuperscript{218} within their general arguments that a statute of repose would create an unsafe aviation environment.\textsuperscript{219} Not surprisingly, the Committee of the Judiciary reported a bill that also contained the knowing misrepresentation exception.\textsuperscript{220} Similar to the report from the Committee on Public Works and Transportation, the report provides little explanation for the

\textsuperscript{212} Id. at 44-45 (statement of Mr. DeFazio).

\textsuperscript{213} This is not meant to suggest that there were no other influences at work here. For instance, by the time the Committee reported the bill, nearly eight months after the hearings, the Senate had already added the exception to its version. Thus, perhaps it was already becoming apparent to GARA supporters that early compromises would be required to avoid the result of the earlier aviation reform efforts.


\textsuperscript{215} Id. at 3 (“Another element of fairness in the reported bill . . . [is that it] provides that the statute of repose does not apply if the manufacturer knows of a defect and fails to comply with its obligation to report the defect to the FAA.”).


\textsuperscript{217} See generally id. at 75-131.

\textsuperscript{218} For example, a trial attorney, Mr. Hvass, showed a tape of a Cessna 411 crashing in the desert during single-engine testing, arguing that “those airplanes are still out there,” and despite the known defect, Cessna would have no liability under GARA. Id. at 76-77.

\textsuperscript{219} See, e.g., id. at 76 (“The real inherent problem with the bill . . . is safety.”).

C. The Need for Further Discussion

This Article does not intend to identify the ultimate solutions to the inherent problems within the knowing misrepresentation exception. To do so, without extensive study of the relevant issues, would be dishonest. For instance, to summarily suggest that the exception should be stripped from the statute without a close analysis of whether it is possible for an

221. See Id. at 6 ("The legislation attempts to strike a fair balance by providing some certainty to manufacturers, which will spur the development of new jobs, while preserving victims' right to bring suit . . . in certain particularly compelling circumstances.").

222. See 140 CONG. REC. H4998-5005 (daily ed. June 27, 1994) (discussing the justifications for the reform effort and the differences between a fifteen and eighteen-year version).

223. See supra note 2. The President did not mention the misrepresentation exception to the eighteen-year statute of repose. Id.


225. See supra note 197 and accompanying text (describing the behind-the-scenes compromise between Senators Metzenbaum and Kassebaum).
aviation manufacturer to successfully conceal a known defect in today's regulatory environment is to engage in politics. Conversely, to support the exception and its problematic application in a blind recognition that it helps the "little guy" is to do the same. Nevertheless, during the process of identifying the exception's difficulties, this Article has identified many of the issues that should serve as the starting point for further discussion, which should begin immediately. In future discussions, both Washington policy-makers and interested parties should consider three aspects of the knowing misrepresentation exception.

First, policy-makers should empirically assess the truth of the premises upon which the exception is based. The primary premise of the knowing misrepresentation exception appears to be that it is not only possible for a manufacturer to successfully conceal a product defect for eighteen years, but that this defect will not present itself to the public on its own. Although one could argue that Congress implicitly believed that defects could, in fact, go undiscovered for eighteen years simply by pointing to the exception's addition to the statute, the comments made by Mr. DeFazio stand ready to diffuse such a suggestion. After assessing this premise, if it is discovered that such a concealment is extremely rare, or even impossible, then perhaps the exception's inclusion in GARA should be reconsidered. The alternative finding would support the opposite conclusion. However, this assessment is not an easy one, and it necessarily implicates the second topic in the future discussions.

Second, policy-makers should seek ways to ease the burden of litigating the issue of "required information" under the FAR. As shown above, for courts to determine whether the information is required, they must also define "defect" as used in the FAR, which can only be regarded as a policy decision. Assuming the exception cannot exist without the linkage to the FAA's requirements, perhaps Congress could add an amendment to GARA consisting of a congressional understanding of the standard, or by creating a system of judicial referral to agency rulings on whether the information is required.

Currently, neither the statute nor the legislative history provides any insight as to how this term should be defined. For instance, should "defect" be determined with reference to FAA Airworthiness Directives, a

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227. See supra note 196 and accompanying text (quoting Sen. Pressler's rationale for the exception).

228. See supra note 212 (statement by Mr. DeFazio suggesting that even if the concealment couldn't happen, there would be no harm in adding the exception to GARA).
GARA’s Achilles

prior jury verdict, or something else? Moreover, without a working definition of “defect,” it is even impossible to assess the primary premise of the exception—that it is possible for a manufacturer to conceal a “defect” in the highly-regulatory environment. In fact, both sides of the reform movement have presented evidence purporting to address the justifications for the exception. For instance, the aircraft manufacturers produced FAA statistics showing that most defects are discovered very early in an aircraft’s life, suggesting that the exception is unnecessary. The plaintiff’s bar, on the other hand, linked the “defect” determination to a prior verdict for plaintiff on the defectiveness issue. Clearly, there is much to resolve regarding the difficult task of defining a “defect” under the “required information” aspect of the exception.

One solution to the “required information” indeterminacy problem under the FAR may be an amendment to GARA adding a definition of “defect” to the knowing misrepresentation exception. This new definition, based upon evidence presented at a hearing on this issue alone, would take the courts out of this policy-maker role. More important, it would also save many plaintiffs and defendants much time and expense litigating an issue to which, in theory, they should already know the answer. Further, the definition addition to the exception might prevent courts from broadly interpreting the “required information” standard and, therefore, completely “gutting” GARA. Without further guidance, the exception is poised to swallow the rule. An amendment defining “defect” could prevent that result.

Finally, future discussions should balance the justifications of the exception against its drag on the overall effect of the eighteen-year statute of repose. Over the next few years, the cost of the knowing misrepresentation exception will be readily determinable. This Article suggests that the dollar figure will be significant, due to the difficult, factual and policy-based issues within the knowing misrepresentation exception and the exception’s natural tendency to draw plaintiffs to its umbrella. This cost should be balanced against the purpose of GARA, which is to substantially preclude the liability costs associated with that portion of the aviation fleet that is greater than eighteen years old. Because roughly 70% of registered aircraft are older than eighteen years, GARA’s implicit pur-

229. Roughly 80% of all FAA Airworthiness Directives, issued to correct defects in products, are issued within the first four years after the issuance of an airworthiness certificate. See General Aviation Standards Act of 1989: Hearing on H.R. 1307 Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation, 101st Cong. 41 (1989) (prepared reply of Mr. Stimpson). Further, 95% of the Airworthiness Directives are issued within 8 years. Id.

230. See supra notes 205-07 (describing Mr. Katzman’s comments regarding aircraft with known defects).

231. See 1993 Hearings, supra note 8, at XII (memorandum from Committee’s Aviation Staff).
pose is to preclude roughly 70% of the liability costs of the segment of the market covered by GARA. But that can only be achieved if no claims are filed, which is unlikely, especially if courts broadly construe the knowing misrepresentation exception. When the data is accumulated and studied, perhaps it will show that GARA, in practice, saved the manufacturers only 60% instead of 70%, of their litigation costs. Or perhaps the effects of adding the exception will be even more devastating, saving only 30-40%. Further, the data may show that only one out of two hundred manufacturers was found to have engaged in the applicable conduct under the exception.

Confronted with the actual figures, Congress will face the policy question it has avoided to this point: Is the cost of GARA's Achilles justifiable? By simply stating that the exception was added as a measure of "fairness" with no further description, Congress has not yet answered that question. Without further guidance, the knowing misrepresentation exception's costs could potentially be greater than its savings. In the end, perhaps GARA will be just another unfulfilled legislative promise to remedy the "exploding" liability costs in the aviation manufacturing industry, with the litigants and the courts picking up the pieces.

V. Conclusion

This Article suggests that GARA is not the strict repose mandate it purports to be. Although the case law appeared to evince the strength of GARA, it actually highlighted GARA's weakness in the real practice of litigation. Although one could reasonably argue that Rickert actually strengthened GARA by erecting an artificially high barrier, section III.D responded that the Rickert court performed an erroneous analysis in an effort to not "gut GARA." Under a more formal analysis, perhaps the knowing misrepresentation hurdle is not so "formidable" and, correspondingly, the statute is not so strong.

GARA's Achilles is its inability to smoothly preclude, at the summary judgment stage, causes of action involving products of the requisite age due to the difficult factual and policy-based issues within the knowing

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233. See supra part IV.A.
234. See supra parts III.A-D.
235. See supra part III.D.2.
237. See supra part III.D (examining the foundation—the interpretation of the FAR—of the Rickert court's interpretation of the knowing misrepresentation exception).
238. See supra notes 143-45 and accompanying text (explaining the proper analysis under the knowing misrepresentation exception).
misrepresentation exception. Litigating the difficult factual issues will be extremely costly to the parties. More problematic, the results will be highly unpredictable because the exception’s application necessarily implicates a difficult definition problem within the FAR, one that can only be characterized as a policy question. Unfortunately, GARA’s legislative history provides little assistance to the courts in making the elusive interpretation. Both of these, in turn, are likely to sustain the current incentives for settlements. The net result is that the knowing misrepresentation exception stands poised to swallow GARA’s “strict” eighteen-year repose mandate. This Article, in identifying GARA’s Achilles, concludes that the policy-makers who unknowingly created the weakness should engage in further discussion of the problematic exception, and perhaps consider an amendment to the strict repose mandate called GARA.
Booknote


By Thomas H. McConnell*

California’s air quality is the worst in the nation. It is reported that although it has improved markedly in recent years, more than three-quarters of all Californians are currently exposed to health-threatening levels of air pollution, and the South Coast air basin exceeded national health standards for smog ninety eight days in 1995. Although many of the efforts of the federal government to regulate air quality in a way that promotes urban planning have been unsuccessful, recent litigation in Northern California has offered interpretations of the Clean Air Act and the amendments made to it which bolster hope of continued air quality improvement.

The recent litigation is the focus of Transportation Planning on Trial. The book supplies a balanced examination of the interaction between regional transportation planning and environmental concerns, with an emphasis on air quality. This examination lends well to a reasoned forecast of the direction of future transportation planning.

The discussion involves the extensive litigation comprising Citizens for a Better Environment v. Deukmejian, a federal case which involved the enforceability of state air quality plans. The case received national attention including criticism of the presiding judge for failing to consider the practical implications of his rulings.

One of the authors of Transportation Planning on Trial played an

* University of Denver College of Law/Daniels College of Business Juris Doctor, Masters of Business Administration, Candidate 1997.
2. Id.
3. Books Received, 26 Envtl. L. 951, 953 (Fall 1996).
integral role in this lengthy and complex litigation. Both the authors present the subject matter of this complex litigation and its implications in a straightforward, well-organized manner. The book is very useful for transportation planners, policymakers, and practitioners. Its concise overview of the relevant issues and general insight also make it worthwhile for anyone seeking a better understanding of the issues incident to improved air quality.

The book introduces the issues of improved air quality through a synopsis of congressional efforts toward cleaner air. The 1970 amendments to the 1955 Clean Air Act directed the Environmental Protection Agency ("EPA") to establish National Ambient Air Quality Standards. The amendments also required each state to prepare an implementation plan to control air quality. The implementation plan had to bring its respective state into compliance with the Air Quality Standards within three to five years. If the plan failed, the EPA would replace it with a federal mandatory plan.

A number of states' plans failed. Congress amended the Clean Air Act to extend the deadlines for compliance. Even with the extensions, California's plan still failed to bring the San Francisco area into compliance. Thereby setting the stage for the litigation that is the focus of this book.

During the course of the litigation, Congress again amended the Clean Air Act. The legislation included automatic penalties for inadequate state implementation plans, contingency measures to accelerate compliance with the federal standards, and pollution "budgets" for noncomplying regions, such as San Francisco. These additions coupled with passage of the 1991 Intermodal Surface Transportation Efficiency Act comprised the current state of federal efforts for cleaner air at the time of the litigation.

Chapter two introduces the litigation. In June 1989 two separate cases were filed by two environmental organizations in San Francisco Federal District Court. In each action, the state was being prosecuted for noncompliance with the Clean Air Act, as amended. The cases were consolidated to determine the legal enforceability of the commitment made by the state in submitting its implementation plan.

The court held the state bound to its original implementation plan as well as its own proposed contingency measures. In addition, the state had to supplement ineffective contingency measures with additional measures

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6. Dr. Martin Wachs participated in Deukmejian as a neutral technical expert.
8. The cases were consolidated under the title Citizens for a Better Environment, et al. v. Deukmejian, et al., supra by order of the court dated August 8, 1989.
quantitatively proven to result in compliance with the federal law. The court emphasized its "get tough" posture by granting an injunction barring future transportation projects until adequate pollution assessment procedures were implemented.

The court went on to make it clear that actual future emission must be consistent with emissions estimates used in the original state implementation plans. Chapter three focuses on how this holding translated into heightened requirements for San Francisco regional transportation models to meet the standards. In order to demonstrate the need for improvement, the authors point out that the standard travel demand models were designed for evaluating different highway lay outs and were not intended to forecast vehicle emissions.

Chapter four evaluates the effectiveness of transportation control measures in controlling air quality, for which there is a understandable dearth of empirical data. The Settlement Agreement and stipulated judgment ending the litigation in August 1992. Major provisions included agreement that procedures and transportation control measures were adequate in making reasonable progress toward compliance. The authors opine that the environmental groups achieved as much as possible by forcing the development of new modeling procedures and the adoption of additional transportation control measures.

Chapter five summarizes the meaning of the holding in the case. Regional agencies will be held to the commitments made in the state implementation plans. The holding serves to alert other regional transportation agencies that current planning models are inadequate in their ability to assess the impact of future transportation projects on air quality. The holding also sparked a major federal research program to improve urban planning models.
Articles

The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor’s Rights and Deregulator of Railroads’ Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act

William G. Mahoney*

TABLE OF CONTENTS

I. The Congress and Railroad Labor Relations .............. 245
II. The Congress and the Protection of Employee Interests ... 251
III. The Congress Deregulation ........................................ 262
IV. The ICC and the Protection of Employee Interests ........ 264
V. The ICC as Labor Relations Expert ............................. 275
VI. From Regulator of Railroads to Regulator of Labor ...... 300

* William G. Mahoney is a founding partner in the law firm of Highsaw, Mahoney & Clarke, P.C. He holds a law degree from the University of Notre Dame Law School. He has represented railroad and airline unions in state and federal courts and is counsel for the Railway Labor Executives Association. He has been involved in various legislative campaigns including participating in the drafting of a number of statutes and amendments to statutes affecting railroad and airline labor relations as well as representing the rail unions in the negotiation of the legislation and agreements that created and privatized Conrail.
For almost a century the predecessor of the Surface Transportation Board, the Interstate Commerce Commission ['’STB” and “ICC”], regulated the financial and economic aspects of the railroad industry. For most of the latter half of that century, when the ICC approved railroad for financial transactions (mergers, stock controls, purchases of railroad assets, leases, trackage rights agreements), it imposed upon individual railroads seeking that approval conditions for the protection of the interests of their employees which the approval might affect. Then in late 1983, without benefit of legislative or judicial sanction, the Commission reversed course and began to protect the interests of the railroads against those of their employees, whether the employees’ interests were protected by contract or by the Railway Labor Act. The ICC simply injected itself directly into the relationship between management and labor to the benefit of the former and to the decided detriment of the employee interests it was mandated to protect.

Prior to that time, the ICC had deliberately and very carefully avoided involvement in labor matters as being outside its jurisdiction and beyond its area of expertise.1 The Commission’s practical reasons for such avoidance would be evident to anyone who, for the first time, compared point, district and system seniority rosters; attempted to fathom the workings of a pool extra board; reviewed the work rules at a railroad terminal; or just read a railroad collective bargaining agreement. Unless one has had daily practical experience in the application of these key elements of the working relationship between railroad labor and management, one simply cannot make judgments about the extent to which modifications to any of those elements would affect the rights of individual employees or the operations of the railroads for which they work. Also, without knowledge of the content of the negotiations which culminated in a collective bargaining agreement and the consideration traded by the parties to reach that agreement, one cannot intelligently assess the effects of the removal from one party of its contract obligations to the other.

The Commission’s reasons for expressly avoiding involvement in railroad labor relations matters for over 50 years were based not only upon its lack of knowledge and expertise, both legal and practical, but also upon Congress’ acknowledged purpose in creating the ICC and in the duties and responsibilities Congress imposed upon that agency. The ICC was created as a reaction to abuses of the so-called “Robber Barons”

of the late nineteenth century. The discriminatory rates charged farmers
and other shippers had forced reaction from state legislatures, which
enacted "Granger Laws" that were intended to end the rate-setting
abuses of the railroads. At that time the railroads were the dominant
economic force in this country. The frenzy of railroad industry
expansion between the end of the Civil War and the turn of the century,
coupled with its absolute monopoly of transportation, led author-
historian Henry Adams to describe his generation as one "mortgaged" to
the railroads. He wrote:

[S]ociety dropped every thought of dealing with anything more than the sin-
gle fraction [of society] called a railroad system. This relatively small part of
its task was still so big as to need the energies of a generation, for it required
all the new machinery to be created—capital, banks, mines, furnaces, shops,
powerhouse, technical knowledge, mechanical population, together with a
steady remodeling of social and political habits, ideas and institutions to fit
the new scale and suit the new conditions. The generation between 1865 and
1895 was already mortgaged to the railways, and no one knew it better than
the generation itself.

Other industry abuses included stock frauds, manipulation of financial
markets and corruption of public officials in connection with the building
of the western railroads. Congress stepped in and created the Interstate
Commerce Commission in an attempt to end these industry abuses on a
nationwide basis. The ICC was not authorized by the Act of February 4,
1887 (which created it) to interfere in any way with the daily operations
of individual railroads, but only in the pricing of their transportation serv-
ices to their customers and in their intercorporate financial dealings.

In time, as the deplorable working conditions of railroad employees
fomented labor unrest, which in turn threatened the economic fabric of
the nation, Congress enacted a series of laws independent of the Inter-
state Commerce Act which sought a solution to that problem. Its efforts
culminated in the enactment of the Railway Labor Act of 1926.

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2. Between 1869 and 1889 the railroads laid 114,442 miles of main line track and 31,443
miles of other track. Shelton Stromquist, A Generation of Boomers, The Pattern of
Railroad Labor Conflict in Nineteenth Century America, 7 (1987).
3. Henry Adams, The Education of Henry Adams: An Autobiography 240 (Boston,
1918), as quoted in Stromquist, 15.
6. ICC Act of 1887, Ch. 104, § 1, 24 Stat. 379 (1887) (codified as amended in scattered
30 Stat. 424 (1898); Newlands Act of 1913, ch. 6, 38 Stat. 103 (1913); Adamson Act of 1916, ch.
436, 39 Stat. 721 (1916); Transportation Act of 1920, Title III, Pub. L. No. 66-152, 41 Stat. 456
ever, as the Supreme Court has noted, that Act merely provided a process for dispute resolution; it was, and is, indifferent to the substantive terms of the parties’ agreement which may be as favorable or unfavorable to labor or management as they choose.9 When Congress did address itself directly to railroad labor concerns within the parameters of the Interstate Commerce Act or other laws involving railroads and their service to the public, it was to provide employees with the protection of their interests against the effects of railroad actions taken pursuant to those statutes.10

Yet, in late 1983, the ICC suddenly concluded, with little explanation and no reference to its history, that it had “expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements”11 and within two more years the Commission held that its orders, “not the RLA [Railway Labor Act] or the [collectively bargained] WJPA [Washington Job Protection Agreement], . . . govern employee-management relations in connection with the approved transaction.”12 Since 1983 those orders, without exception, have approved carrier-desired changes in employees’ contractual and statutory rights over the objections of the affected employees.13

The 1983 and 1985 holdings of the ICC constituted a radical break with its traditional statutory role as viewed by the ICC itself,14 the railroads15 and their employees. In order to obtain some understanding of the Congressional approach to railroad labor relations and to evaluate the more recent ICC/STB assumption of the role of labor relations ex-

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13. See cases cited infra, Section V and note 318.
15. See infra, pp. 258-259.
pert, in addition to its traditional congressionally mandated role of transportation expert, one must examine the history of transportation, labor and deregulation legislation as that history relates to railroad employee interests.

I. THE CONGRESS AND RAILROAD LABOR RELATIONS

Congressional interest in railroad labor relations has a long history dating well into the last century. It was born in the turmoil and bloodshed of the major railroad strikes of 1877, 1886 and 1888 along with the many lesser strikes of that time. The railroads utilized two types of government assistance in combating those strikes: first, they sought and obtained federal court injunctions against the strikes and related activity; and, second, they sought and obtained the aid of federal troops to suppress the strikers. The railroads successfully lobbied for the establishment of armories and federal military establishments in or near large population centers so that federal troops would be handy to put down "civil disturbances." Following a bloody strike on the Chicago, Burlington & Quincy Railroad in 1886, Congress knew it had to do something to avoid these repeated disruptions to the commerce and economy of the nation.

The first federal statute directly dealing with labor disputes, the Arbitration Act of 1888, was enacted one year after the Interstate Commerce Act. It provided for investigation and voluntary arbitration of labor disputes, but no arbitrations were handled pursuant to its provisions. Then came the economic recession of 1893 and the Pullman Strike of 1894.

The Pullman Company maintained the company-owned town of Pullman, Illinois, near Chicago. The Pullman Company workers lived in this town and paid Pullman for their rent and their utilities. The Pullman Company imposed the rules by which the town was governed, and it was considered by some to be a model city: no saloons, no brothels, no public speaking and, no union activity.

During the 1893 recession, Pullman cut jobs and wages by 25% to 40%. However, Pullman did not reduce its rents or its charges for utilities. At the time Pullman paid $.33 for one thousand cubic feet of gas and charged its tenants $2.25; it paid $.04 for one thousand gallons of water

16. Stromquist, supra note 2, at 19.
17. Id.
18. Id.
19. Id. at 27. Between 1881 and 1894 some 668 strikes occurred on the railroads. Id. 27.
and charged its tenants $.10.\textsuperscript{22}

The situation became so serious that Governor John P. Altgeld of Illinois visited the town of Pullman, and then wrote a personal letter to George M. Pullman pleading for him to relieve the suffering of his employees. He closed his letter with these lines:

I repeat now that it seems to me your Company cannot afford to have me appeal to the charity and humanity of the State to save the lives of your employees. Four-fifths of those people are women and children. No matter what caused this distress, it must be met.\textsuperscript{23}

Pullman did nothing. The strike began in the spring of 1894.

As the strike broadened through employee boycotts of the use of Pullman equipment on other railroads, particularly in the West, U.S. Attorney General Richard B. Olney entered the picture. As a lawyer and legislative draftsman, Olney would have a significant impact on railroad labor relations into the Twentieth Century.

Prior to his cabinet appointment, Mr. Olney had been a leading attorney for and director of the Chicago, Burlington & Quincy Railroad. Still on the payroll of that railroad even as U.S. Attorney General, Olney quickly proved his worth. When Governor Altgeld refused to ask for federal troops, Olney had them called out over Altgeld's protest. Olney sought injunctions against the strikers as well as the unions and employees of other railroads who were boycotting Pullman equipment. His first theory was that the strike and boycott interfered with the U.S. mail, but if a national general strike of railroad workers was developing as it seemed to be, he considered that argument to be too narrow to obtain the relief he sought. He modified his arguments to rely upon the Sherman Anti-Trust Act and its prohibitions upon restraint of trade and interference with interstate commerce. Olney obtained broad injunctions based upon this theory and, using them, broke the strike.\textsuperscript{24} Later, before the Supreme Court, Olney would shift his arguments once again, relying on the historic right of government to prevent public nuisances and obstructions of "public highways" which, it was argued, the railroads had become since the enactment of the Interstate Commerce Act.\textsuperscript{25}

The Supreme Court decision in \textit{In Re Debs}, upheld Mr. Olney's theories, virtually outlawing all future railroad strikes as obstructions of the public highways or interstate commerce.\textsuperscript{26} Olney however, knew that a

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Some of the injunctions issued during the strike and boycott included prohibitions against workers consulting with the heads of their unions. \textsc{stromquist}, \textit{supra} note 2, at 88.

\textsuperscript{25} Id. at 257-9.

\textsuperscript{26} 158 U.S. 564, 584-7 (1895).
Supreme Court decision outlawing strikes would neither eliminate strikes or the severe labor unrest then prevalent throughout the industry. Moreover, to the surprise and shock of many of his colleagues, Olney believed that workers had the right to associate themselves into unions.

Shortly after he had won the *In Re Debs* case Olney submitted a proposed bill to the Congress in which he incorporated many of the recommendations of the Strike Commission appointed by President Cleveland to investigate the Pullman Strike along with many other ideas. For example, Olney proposed that since the government should be able to enjoin strikes, it should also be able to appoint receivers to operate railroads that were at fault in labor disputes and refused to correct the situation.27

Many of Olney's recommendations were incorporated into the Erdman Act of 1898, including a broad provision, Section 10,28 which made it a misdemeanor for a carrier to require an employee, as a condition of employment, to promise to join or not join or to remain a member of a union; to blacklist employees;29 to threaten employees with dismissal or unjustly discriminate against them, because of their membership in a union; or to require an employee to contribute to any type of fund. In 1908, Section 10 was declared unconstitutional by the Supreme Court on the ground that it deprived carriers of their freedom of contract (a right which the Court found to be protected by the Fifth Amendment) and was not justified by the Commerce Clause.30 The Erdman Act covered only operating employees and telegraphers, as these crafts of employees were the most highly organized in late 1898.31 It provided for government involvement through mediation before arbitration, and if mediation failed, voluntary, binding (for one year) arbitration. It made unions "parties" to the labor dispute and authorized them to select one member of the three-person arbitration panel.32

In 1899 a union requested mediation, but the railroads refused to participate, and the Act lay unused for eight years,33 during which time there were some 105 strikes.34 However, in 1906 the Southern Pacific sought the aid of the ICC Chairman and the Commissioner of Labor who were the designated Erdman Act mediators, to mediate a dispute with

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27. STROMQUIST, supra note 2, at 260.
29. The blacklist had been an extremely effective weapon of the railroads after the Pullman Strike and Boycott with employees being required to change their names in order to secure railroad work. See STROMQUIST, supra note 2, at 274.
33. ABA, supra note 31, at 17.
34. Id. at 18.
the Brotherhood of Locomotive Firemen and Enginemen. Following the successful conclusion of that dispute, those officials resolved some 42 cases by mediation, arbitration, or a combination of the two over the next seven years.35

The Erdman Act was amended by the Newlands Act of 1913.36 Like its predecessor, it applied only to operating employees and telegraphers. The Act created a permanent Board of Mediation and Conciliation consisting of a Commissioner, two other government officials, and an Assistant Commissioner.37 In the four years of its existence, the Board was quite successful, as it entertained 71 disputes and helped resolve 52 by mediation and 6 by a combination of mediation and voluntary arbitration.38 During its life, there were fewer than half a dozen strikes on the railroads, all of which were relatively minor.39

In 1915 the four operating brotherhoods began a movement for an 8-hour work day. President Wilson convened a conference of the parties and asked the unions to arbitrate. They refused. He then asked the railroads to agree to the 8-hour day. They refused. The unions set a strike date of September 4, 1916. The President went before Congress and requested enactment of an 8-hour law, a rate increase for the railroads, and a prohibition against strikes pending an investigation of the dispute. Congress enacted the 8-hour day, but rejected Wilson's other proposals.40

The railroads refused to implement the law and sought to have it declared unconstitutional. The Supreme Court held Congress' action to be constitutional because under the Commerce Clause the Congress could "compulsorily arbitrate [a] dispute" that labor and management could not "fix by agreement."

This holding became the basis for Congressional imposition of President Emergency Board recommendations in future years. Thus, from the time of enactment of the Arbitration Act of 1888 through passage of the eight-hour day, the Congress' only role in the regulation of relations between railroad labor and railroad management was to seek means of facilitating the voluntary resolution of railroad labor disputes. The ICC never entered the legislative picture.

Because the United States had entered World War I in desperate need of the services of a coordinated continental railway system which did not exist in 1917, on December 26, 1917, President Wilson ordered

35. Id.
36. The Newlands Act of 1913, ch. 6, 38 Stat. 103 (1913).
37. Id. at 104.
38. ABA, supra note 31, at 21.
39. Id.
40. Id. at 22.
the takeover of the railroads by the government42 pursuant to the Army Appropriations Act of 1919.43

A Director General of the Railroads was appointed to operate the railroads. He, in turn, appointed Directors of Divisions, including a Division of Labor.44 The results of the government’s operation of the railroads between 1918 and 1920 had far-reaching effects upon the future of railroad labor relations in the United States.45 For example,

- Wages, and to a large extent rules and working conditions, were standardized throughout the country,
- Negotiations between railroads and unions were conducted on a national basis,
- A National Board of Adjustment was created to consider all disputes involving “the interpretation or application of . . . agreements.”46

After the war, the government had to decide what to do with the railroads. It was determined to return them to their owners, but “not to be operated in the future as they had been under the old system.”47 Among other things, there was a realization that the pre-war system had resulted in a hodge-podge rail network which had hindered war effort transportation and could not provide efficient service for shippers. Ultimately, the Transportation Act of 1920,48 was signed into law on February 8, 1920.

The first two titles of the Act dealt with amendments to the Interstate Commerce Act, and Title III dealt with labor relations matters. The ICC was given greater control over the economic affairs of the railroads by regulating market entry and exit. The Commission was also to prepare a plan for the consolidation of the many railroad companies then operating into fewer, larger systems. Only future railroad merger or consolidation operations consistent with that plan could be approved by the ICC.49

Title III of the 1920 Act created the U.S. Railroad Labor Board, an agency wholly separate from the ICC. A number of the provisions and much of the language of Title III presaged the Railway Labor Act. For example: it required the carriers and their employees “to exert every reasonable effort . . . to avoid any interruption” to commerce;50 it empha-
sized negotiation to resolve disputes; and, it authorized establishment of adjustment boards. Any disputes, including those involving wages, rules and working conditions, not resolved by negotiation could be submitted to an adjustment board and then appealed to the U.S. Railroad Labor Board. The latter, as created by the 1920 Act, could hold hearings and issue decisions providing “just and reasonable” wages and working conditions, but its decisions were not binding, and its only power was the “moral constraint . . . of publication of its decision.”

While labor had agreed to abide by the Board’s decisions, several large railroads, primarily the Pennsylvania Railroad, repeatedly violated or ignored its decisions. Representative Alben Barkley reflected labor’s feelings in an April 1924 statement:

[U]p until November, 1923, there had been 148 violations of the decisions of the Railroad Labor Board by the carriers . . . . If an employee or group of employees is dissatisfied with the decision of the Railroad Labor Board all they can do is quit work. They either must abide by the decision or subject themselves to discharge by their employer, or quit work. In other words, the carrier has the means of enforcing the law against the employee by compelling him either to quit or to go on strike, while the employee has no remedy either legal or economic against the carrier who disobeys the orders of the commission except to strike.

A spokesman for rail labor, D.B. Robertson, testifying before the Senate, described the Railroad Labor Board as a single-edged sword that had no effect upon railroad employers, but when used against their employees “is sharp and cuts deep.”

Following a national strike by shopcraft employees in 1922 and labor’s boycott of Board procedures thereafter, it was clear that Title III had to be replaced. Indeed, in the election year of 1924, the platforms of both major political parties recognized the shortcomings of Title III and called for changes in its provisions.

The change came about with the enactment of the Railway Labor Act of 1926. Rail labor had submitted a bill to Congress in 1924, but Congress had not acted upon it. In late 1924, President Coolidge urged the carriers and the unions jointly to work out a procedure for labor peace. Labor and management met during 1925, and a draft bill similar

51. Id.
54. Id.
to the 1924 bill submitted by rail labor was agreed upon. As Professor Charles Rehmus has said, the “underlying philosophy of the [RLA]... was, as it still is almost total reliance on collective bargaining for the settlement of labor-management disputes.” Congress strictly adhered to that philosophy in the intervening 70 years, even when in 1973 it forced the merger of the five bankrupt northeast railroads and parts of three other railroads which now comprise Conrail. In creating Conrail, Congress sought the consolidation of the agreements of each craft on each of the eight railroads into one agreement for each craft on Conrail, with suggested time limits for achieving the consolidations; but, it did not mandate the parties’ agreements by any means other than negotiation.

In dealing with management-labor relations, Congressional history is pristine in authorizing the creation, modification, or termination of contracts covering rates of pay, rules, and working conditions only by negotiation between the parties. The ICC was never mentioned in the legislation creating our national rail labor policy, and the agencies which were mentioned and were authorized to implement that policy were provided no authority to devise or change the terms of rail labor contracts, whether directly or by means of compelling interest arbitration.

II. THE CONGRESS AND THE PROTECTION OF EMPLOYEE INTERESTS

Beginning in 1933, the Congress enacted a series of laws to improve the finances and services of the railroad system in the United States. These laws were not addressed to the ongoing relationship between rail management and labor. They did, however, contain provisions directed to the protection of the interests of employees which might be affected by implementing the laws.

The first example of a direct and specific provision for the protection of railroad employees is to be found in the Emergency Railroad Trans-


61. The National Mediation Board and the National Railroad Adjustment Board are both authorized to implement national rail labor policy.

62. Congress has expressed a concern for railroad employees for almost a century in its attempts to shield them from arbitrary and unilateral acts of employers. See Rehmus supra note 58, at 1-22.
portation Act of 1933.63 This law was enacted in a time of great financial peril for the railroad industry. It was passed to save certain railroads from bankruptcy and to perpetuate an efficient means of railroad transportation in the United States.64 In the words of the district court in Louisville, the 1933 Act evidenced "the announced policy of the Government to render assistance to all carriers and keep their heads above water until calmer times appeared".65

Certain provisions of the 1933 Act amended the merger provisions of the Transportation Act of 1920. Other provisions of the 1933 Act provided for the appointment of a federal coordinator of railroad transportation who was charged with the duty of encouraging, promoting, or requiring action on the part of railroads to avoid unnecessary duplication of their services and facilities and promote financial reorganization. There was also provision for the immediate study of other means of improving conditions surrounding railroad transportation.66 All actions taken to carry out the purposes of the 1933 Act were governed by Section 7(b) which provided:

The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay rolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the pay rolls after the effective date of this Act by reason of death, normal retirements, or resignations, but not more in any one year than 5 percentum of said number in service during May, 1933; nor shall any employee be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.67

Section 7(b) of the 1933 Act clearly provided that in mergers or other matters to which it applied, an employee must be given a job at least equivalent to his former position and compensation equal to that which he formerly received; in other words, he must be placed in no "worse position with respect to [his] . . . employment".

Section 17 of the 1933 Act provided that the provisions relating to

67. *Id.* at 213. Paragraph (d) of § 7 directed the Federal Coordinator of Railroads to require the railroads to compensate employees for financial losses caused by reason of moving to follow their work when it had been transferred:

The Coordinator is authorized and directed to provide means for determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title.
the Federal Coordinator would expire on June 16, 1934, unless extended by proclamation of the President. The Act was extended to June 17, 1936, on which date it expired.

One month before the 1933 Act was to expire, an agreement was executed in Washington, D.C., by 85% of the major railroads in the United States and all of the standard railroad labor unions. This agreement was entitled “Agreement of May, 1936, Washington, D.C.”. It is commonly referred to in the railroad industry as the “Washington Job Protection Agreement” (a misnomer, as it does not protect jobs), or the “Washington Agreement.”68 Much of the Washington Agreement was based upon provisions of the 1933 Act. Its purpose was to provide partial financial protection to employees who were deprived of their employment or otherwise adversely affected in their employment as a result of a “coordination”69 and to provide by specific provision for the negotiation of a means of protecting employees in their seniority rights, and their place and type of work, before the railroad could take any action to affect them.

The expiration of the 1933 Act did not affect the merger provisions of the Transportation Act of 1920 which had amended the Interstate Commerce Act. Among these amendments, Section 5(4) of the Interstate Commerce Act permitted approval of a merger upon findings by the Commission that such merger would “be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and will promote the public interest”.70 The Commission had the power to approve a merger “upon the terms and conditions and with the modifications so found to be just and reasonable.”

In 1939, the Supreme Court unanimously reversed a three-judge dis-

68. The WJPA provides a monthly “dismissal” allowance for those deprived of employment, or at the employee’s option, a “separation” allowance upon resignation; a monthly “displacement” allowance for retained employees who received reduced compensation; preservation of benefits attaching to previous employment; moving expenses when required to move to retain employment; and protection against loss on sale of home. The employee is protected up to five years depending upon length of previous service. Prior to the negotiation of the WJPA, the ICC had concluded that it had discretionary authority to impose, as a condition of its approval of a consolidation application, “just and reasonable requirements . . . in the interests of employees of the railways concerned.” St. Paul Bridge & T. Ry.—Control, 199 I.C.C. 588, 596 (1934). After the Washington Agreement was negotiated, the Commission used that agreement as a model for its employee protective conditions. See U.S. v. Lowden, 308 U.S. 225 (1939).

69. A “coordination” is defined in section 2(a) of the Agreement as “joint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such facilities.”

70. Transportation Act of 1920, ch. 91, 41 Stat. 480, 482 (1920); Interstate Commerce Act of 1933, ch. 91, Title II, 48 Stat. 217-220 (1933).
strict court decision and affirmed the Commission’s conclusion that Congress had empowered it under the Interstate Commerce Act to impose employee protective conditions as “just and reasonable conditions” in the public interest.\textsuperscript{71} In its decision, the Court said:

One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.\textsuperscript{72}

Soon after the Supreme Court rendered its Lowden decision, Congress enacted the Transportation Act of 1940.\textsuperscript{73} This legislation, particularly Section 5(2), effected a considerable liberalization of the merger requirements of the Interstate Commerce Act. No longer would railroads seeking authority to merge be required to prove that their merger would be “in harmony with and in furtherance of” a national plan for railroad consolidation established by the Commission or would “promote” the public interest. The railroads now need only show that the merger would be “consistent” with the public interest.\textsuperscript{74}

Congress was thoroughly familiar with the serious and extensive adverse effects which the railroads’ utilization of Section 5(2) would have upon railroad employees. Therefore, in enacting those provisions, Congress added a subparagraph (f) which required mandatory protection for railroad employee interests similar to those Congress had provided for such employees in the 1933 Act. Specifically, Congress provided that employees could not be placed “in a worse position with respect to their employment” as a result of the use of the liberalized merger provisions for a period of at least four years after the merger had been approved.\textsuperscript{75} These provisions protecting the interests of employees flowed directly from the Congressional policy of encouraging mergers deemed to be in the public interest, since advancement of that public interest clearly would have an impact on railroad workers. The protections remained unchanged until 1976.

In 1964 the Congress, faced with the collapse of privately owned ur-

\textsuperscript{71} United States v. Lowden, 308 U.S. 225 (1939).

\textsuperscript{72} Id. at 234.


\textsuperscript{74} See County of Marin v. U.S., 356 U.S. 412, 416-17 (1958) (“The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system.”).

ban bus, transit and rail commuter systems throughout the country, enacted the Urban Mass Transportation Act of 1964. Congress' purpose was to provide federal assistance to support continued mass transit. Again, aware that promotion of public interest would affect employees, Congress balanced its action by providing protections for affected employees. Section 10(c) of that Act, later renumbered Section 13(c), provided not only for protection of the economic interests of employees by guaranteeing them protections no less beneficial than those established by the ICC under Section 5(2)(f), but five additional protections, only one of which was specifically set forth in the Interstate Commerce Act:

1. preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
2. continuation of collective bargaining rights;
3. protection of individual employees against a worsening of their positions with respect to their employment [similar to the requirement in section 5(2)(f)];
4. assurance of employment to employees of acquired mass transportation systems and priority of re-employment of employees terminated or laid off;
5. paid training or retraining programs.

In 1970, when confronted with the ever-worsening rail passenger service crisis, Congress created Amtrak through the enactment of the Rail Passenger Service Act of 1970 [hereinafter "RPSA"]. Congress had been apprised of the adverse effects this legislation would have upon railroad employees and required each contract between Amtrak and each railroad transferring its passenger service obligations to Amtrak to provide protections for the interests of its employees. The Congress lifted virtually verbatim the employee protection language found in the Urban Mass Transportation Act and placed it in Section 405 of RPSA. Section 405(a) of that Act, provided that a "railroad shall provide fair and equitable arrangements to protect the interests of employees affected by discontinuance of intercity rail passenger service . . . ," and Section 405(b), amplified the directive in subsection (a) by mandating that such "protective arrangements shall include, without being limited to, such provisions as may be necessary" to accomplish the same five objectives as set forth

77. Identical employee protective provisions were enacted into the High Speed Ground Transportation Act of 1965, 49 U.S.C. § 1636(a).
79. Section 405(a) of RPSA; 45 U.S.C. § 565(a).
in Section 13(c) of the Urban Mass Transportation Act listed above. Moreover, that subsection, like Section 13(c), further provided:

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.

Finally, Congress entrusted the Secretary of Labor with the responsibility of certifying whether the protective arrangement afforded affected employees “fair and equitable protection . . . “\(^82\)

Rail labor and management were unable to agree upon a protective formula under section 405, and on April 16, 1971, President Nixon’s Secretary of Labor, James D. Hodgson, promulgated a protective arrangement and certified that it complied with the statutory mandate.\(^83\) That arrangement, which was designated Appendix C-1 to the National Railroad Passenger Corporation [Amtrak] Contract, expressly provided those levels of protection specified in section 405(b)(1) through (5) of the RSA and contained certain protections which exceeded in several respects the protections the ICC was providing under section 5(2)(f): First, article 1, sections 5 and 6 of Appendix C-1 extended the protective period from five to six years for employees with six or more years of service; second, in the arbitration of disputes on the issue whether an employee had been “affected,” article 1, section 11(e) placed the burden of proof upon the carrier after the employee had merely “[identified] the transaction and [specified] the pertinent facts . . . relied upon;”\(^84\) and, finally, article 1, sections 5 and 6, provided that the monthly guarantee should be increased by general wage increases during the protective periods.

The most notable deficiency of Appendix C-1 from the employees’ viewpoint was that, while it required carriers to give notice before they consummated a transaction,\(^85\) it permitted the carriers to consummate the transaction before they executed an implementing agreement.\(^86\) Also, Appendix C-1, unlike the WJPA portion of the New Orleans conditions\(^87\) then being imposed by the Commission, limited the protective period for

\(^82\) Id.
\(^84\) See Affidavit of Secretary Hodgson, Hodgson, 326 F.Supp. 68 (D.D.C. 1971), at para. 9(i).
\(^85\) Art. 1, § 4.
\(^86\) Id.
\(^87\) New Orleans, the immediate predecessor of the New York Dock conditions, simply incorporated by reference a slightly modified WJPA and, in addition, for the first four years following ICC approval, superimposed upon WJPA the so-called Oklahoma conditions. These
a displaced employee who had less than six years of service (art. 1, section 1(d)). Unlike the Oklahoma portion of the New Orleans conditions, Appendix C-1 required an employee to relocate before he became a “dismissed” employee (Article 1, section 1(c)). Appendix C-1 limited the protective period of the fringe benefits protections to six years, or to the period of the employee’s length of service, if less.88

Several unions brought suit against Secretary Hodgson and others to enjoin Amtrak from taking over the rail passenger service on May 1, 1971. They asserted that Appendix C-1 did not comply with the mandatory requirements of Section 405(b) of the RPSA.89 On April 30, 1971, the District Court, after reviewing Secretary Hodgson’s affidavit which cured all the defects complained of but one, denied the unions’ request for a preliminary injunction. In so doing, the Court concluded that, in the unusual circumstances of that case, particularly the statutory deadline of May 1, 1971, for Amtrak to take over passenger service, the failure of the Secretary to include the precise language of Sections 4 and 5 of the WJPA did not invalidate the provisions certified.90 Appendix C-1 and the equivalent protective arrangement applicable to employees of Amtrak (Appendix C-2) continue in place for the protection of employee interests affected by discontinuances of intercity rail passenger service.91

Between 1959 and 1970, many railroad merger and control cases were approved by the Commission in which the unions and managements involved had agreed to guarantees of lifetime employment in return for a management right to transfer work and employees throughout the merged system.92 In 1973, the Congress extended the protection of employee interests by providing lifetime attrition-type protection to employ-

88. Compare WJPA section 8 with Appendix C-1, Art. 1, § 8.
89. Hodgson, 326 F.Supp. at 75.
90. Id. at 76.
91. Section 405 has been amended over the years to restrict the application of Appendix C-2 and is currently the subject of pending legislation that would repeal it.
ees affected by the legislation creating Conrail.93

After the collapse of the Penn Central and other Northeast railroads, Congress enacted the Regional Rail Reorganization Act of 1973 (hereafter "3R Act"), to preserve the rail service in that region. Penn Central had agreed to lifetime protection for its employees, as had other merging railroads, and for the same reasons. During the course of the hearings on the 3R Act, representatives of labor and the managements of other railroads who had formed a committee to negotiate and submit to Congress for its consideration a statutory provision to replace the Penn Central attrition agreement, testified before the Senate Committee on Commerce. The labor witness testified that in reaching agreement with the railroads on this proposed statutory provision, which became Title V of the 3R Act,94 labor wished to assure to the corporation to be created [now Conrail] "the widest possible latitude . . . in getting . . . underway" by placing in the statute unprecedented provisions for transfer of employees and work as between all these various preexisting [railroad] corporations."95 The provisions referred to became Section 503 of Title V of the 3R Act.96

Graham Claytor, then president of the Southern Railway System and a management witness, when questioned as to the reason for such extensive protection being accorded employees by the proposed Title V, testified that, in return for that protection, the railroads involved had been given "the right to transfer [sic] people within their craft outside of their seniority district"; that "this is terribly important as a practical matter . . . [w]ork can be transferred freely . . . you may close a shop here and concentrate all the work in another shop there." Mr. Claytor further stated that the freedoms to transfer work and employees "were the principal items that we [the railroads] . . . felt, principal reasons that we felt this agreement made . . . this new corporation [Conrail] a viable thing . . . ."97 Significantly therefore, the relief granted Conrail's management from provisions in collective bargaining agreements (CBAs) was part of a special agreement between management and labor which was enacted into law by the Congress. Obviously, at the time the 3R Act was enacted,

95. Hearings before the Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, on S. 2188 and H.R. 9142, 93rd Cong. 952-53 (1973) (Testimony of William G. Mahoney) [hereinafter "Hearings before the STS"]).
97. Hearings before the STS supra note 95, at 972-73.
no one in the railroad industry or in the three branches of government thought that modification of employee CBA rights by transfer of employees from one agreement to another or by consolidation of seniority rosters could be accomplished by compulsory arbitration, an ICC order, or by any means other than by voluntary negotiation between management and labor. The industry has never requested the Congress to provide it with such authority.

In February 1976, the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter "4R Act"], 98 was signed into law. Section 402(a) of that Act amended former Section 5(2)(f) of the Interstate Commerce Act by inserting near the end of that provision the following sentence: "Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."

In Section 802 of the 4R Act, Congress enacted a new abandonment procedure for rail carriers. While prior to that amendment, the decision whether to impose protective conditions rested within the sound discretion of the Commission, 99 the new abandonment provisions made the imposition of employee protective provisions mandatory.100 Moreover, that amendment also specified the minimum levels of protection which must be imposed in future abandonment cases: "Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."

These two amendments for the first time expressly incorporated into the Interstate Commerce Act the five specific requirements for the protection of bargaining agreements, representation, retraining and employment rights as established by the Secretary of Labor under the Amtrak statute although most of those rights had always been considered un-touchable by the ICC, as well as the railroads101, except through negotiation. As minimum protection for employees, the amendments required the Commission to combine the more beneficial employee protections contained in the New Orleans conditions with those provided in Appendix C-1.102 To meet the requirements imposed upon it by the 4R Act, the

100. 49 U.S.C. § 10903(b)(2).
101. See supra note 93. See also Claytor Testimony supra, p. 258.
102. New York Dock Ry. v. United States, 609 F.2d 83, 94 (2nd Cir. 1979). In RLEA v. ICC, 930 F.2d 511, 517 (6th Cir. 1991) the Court held that Congress deliberately chose not to incorporate the protections established under Urban Mass Transit Act, but "directly incorporated" the protections of C-1.
ICC developed the *New York Dock* conditions\textsuperscript{103} including a specific prohibition against interference with employees' Railway Labor Act and collective bargaining agreement rights. These conditions required:

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.\textsuperscript{104}

From the date it promulgated its *New York Dock* conditions (February 11, 1979) to the date of its decision in DRGW (October, 1983), the Commission and *New York Dock* arbitrators interpreted and applied those conditions as they had its predecessors, that is, they uniformly recognized and adhered to the rule that employee collective bargaining agreement rights were not to be affected.

Between 1983 and 1995, the ICC presented a public image of nonactivity in virtually every area of its responsibilities except that dealing with the protection of employee interests.\textsuperscript{105} There were calls for eliminating the Commission and the Interstate Commerce Act altogether as being unnecessary. The Congress, however, decided not to eliminate all of the functions of that agency but to severely curtail the jurisdiction the ICC then had over all forms of surface transportation.\textsuperscript{106} In 1995, the agency itself was "terminated"\textsuperscript{107} and a new agency was created as an independent agency within the U.S. Department of Transportation.\textsuperscript{108} The new law neither expanded nor contracted the coverage of employers and employees by the Railway Labor Act and other railroad labor laws.\textsuperscript{109} The new Surface Transportation Board, as it was named, became the successor to the ICC on January 1, 1996, with the same members and address, but with its staff reduced. Its duties were far fewer than those of its predecessor in terms of regulating transportation industries, but Congress made no changes in the substantive protections it had provided employees of Class I carriers involved in merger, control, lease, and other

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id. See also} New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979).
\item 360 I.C.C. at 84 and 99. \textit{See also} ICC's statement in its original *New York Dock* decision that a special provision to protect subcontracting agreements was unnecessary because of the existing broad contract preservation language of Art. I, § 2. \textit{Id.} at 73.
\item \textit{See infra Section V.}
\item \textit{Id.}
\item \textit{Id.} at 109 Stat. 932-33.
\item \textit{Id.} at 109 Stat. 808.
\end{enumerate}
\end{footnotesize}
financial transactions or in abandonments.\textsuperscript{110} It did modify protections for employees of Class II and Class III carriers\textsuperscript{111} (in transactions involving such carriers) to “one year of severance” pay to be reduced by the amount of earnings an affected employee receives from “the acquiring carrier during the 12-month period immediately following the effective date of the transaction.”\textsuperscript{112} The Congress also excluded employees of Class III carriers from protection.\textsuperscript{113} A provision was added, however, that prohibits a transaction involving a Class II carrier and one or more Class III carriers from “having the effect of avoiding a collective bargaining agreement or shifting work from a rail carrier with a CBA to a rail carrier without a CBA.”\textsuperscript{114}

The employee protections in abandonment cases under the Interstate Commerce Act as amended by the 4R Act remained unchanged.\textsuperscript{115}

There is no indication in the entire history of Congressional handling of the subject of employee interests that Congress intended to authorize the ICC or its successor to involve itself in the area of labor relations and collective bargaining agreements. To the contrary, Congress refused to permit such involvement when it created the Railway Labor Act in 1926 and even when Congress considered the consolidation of labor agreements to be essential to the resurgence of rail service in the Northeast\textsuperscript{116} and, in its latest enactment (the “ICC Termination Act of 1995“)\textsuperscript{117}, when Congress removed monetary protections from employees on Class III railroads and encouraged virtual regulatory freedom in the consolidation of Class II and III carriers.\textsuperscript{118}

Railroads have been subject to federal regulation for more than 100 years,\textsuperscript{119} and during virtually that same period Congress has also regulated to some extent railroad labor relations.\textsuperscript{120} And although rail regula-

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.} at 109 Stat. 824, 842-43.
  \item \textsuperscript{111} Carriers by railroad are classified by the ICC/STB in accord with their annual revenues: Class I, $250 million or more; Class II, between $20 million and $250 million; and, Class III, $20 million or less. 49 CFR Pt. 1201-A, 1-1.
  \item \textsuperscript{112} 49 U.S.C. § 11326(b).
  \item \textsuperscript{113} 49 U.S.C. § 11326(c).
  \item \textsuperscript{114} 49 U.S.C. § 11324(e).
  \item \textsuperscript{116} Congress rejected a proposed amendment to the RLA which would have empowered the ICC to reject CBAs which the ICC considered as not to be in the public interest. \textit{History of the Railway Labor Act, 1988 A.B.A. Sec. Lab. & Emp. Rep.}, 89-90; \textit{see also}, S. 606, 69th Cong. 5-6 (1926); as to its refusal to compel consolidation of CBAs in the creation of Conrail, \textit{see supra} text accompanying notes 94-98.
  \item \textsuperscript{117} \textit{See supra} note 115.
  \item \textsuperscript{118} \textit{See supra} text accompanying notes 111-114.
  \item \textsuperscript{119} Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified at 49 U.S.C. § 1, \textit{et seq.}).
  \item \textsuperscript{120} \textit{See supra} note 10.
\end{itemize}
tion became more extensive after the railroads were returned to private ownership by the Transportation Act of 1920,\textsuperscript{121} Congress consistently refused to authorize the ICC to exercise any control over labor relations matters, even though that control had been proposed on several occasions.\textsuperscript{122} The legislative records of the enactment of employee protection provisions from 1933 to 1995, as well as the language of the enactments themselves, contain no suggestion by Congress or anyone else that those protective provisions could be used to override any of the rights protected or conveyed by the Railway Labor Act or collective bargaining agreements or any statutory or contractual provisions.\textsuperscript{123} As just discussed, the actions of the ICC and the railroads during this period affirm the absence of any such intent.

III. The Congress and Deregulation

In the late 1950's, the 1960's and 1970's it was widely held—and not without reason—that the railroad industry was being stifled, if indeed not strangled, by regulations imposed by the federal and state governments. Abandonments of unprofitable railroad lines, mergers, and control cases sometimes took years to process and required the employment of scores of transportation experts in various specialities along with a virtual army of lawyers. Passenger train service, always a money-losing operation, was extremely difficult to discontinue because jurisdiction was retained by state, not federal, agencies. A railroad wishing to discontinue the operation of a passenger train was required to obtain authority from each state in which the train operated. On occasion, a state agency would simply refuse to permit discontinuance regardless of the merit of the railroad's case.

The first effort to relieve that oppressive situation—although it was not considered "deregulation" at the time—is found in the swiftly enacted Transportation Act of 1958.\textsuperscript{124} In 1958, the railroad industry persuaded Congress of the merit of transferring passenger train discontinuance authority away from the states.\textsuperscript{125} Congress responded by including provisions in the 1958 Transportation Act which not only trans-

\textsuperscript{121} Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920).
\textsuperscript{122} See infra, pp. 269-271.
\textsuperscript{123} Until 1983, the ICC repeatedly agreed with this position despite the continued presence since 1920 of the predecessors of § 11341(a) [now § 11321(a)] on which ICC/STB now relies as exempting railroads from CBA obligations. In considering the "ICC Termination Act" two members of Congress, without analysis or discussion, echoed the post-1983 holding of the ICC/STB that it can override CBAs virtually at will. See 141 Cong. Rec. S1076 (daily ed. Dec. 21, 1995); 141 Cong. Rec. H12306 (daily ed. Nov. 14, 1995).
\textsuperscript{125} Among the statistics presented to Congress by the railroads was the claim that 15% of
ferred jurisdiction over interstate passenger train discontinuances from the states to the ICC, but also provided railroads with a unique right of appeal to the ICC from state agencies which had denied, failed to act, or delayed action upon applications to discontinue wholly intrastate trains (The public had no similar right or appeal if the state approved a railroad’s application.).

The Congress also shifted the burden of proof in interstate train discontinuance cases from the applicant railroad to the public by permitting the railroads to abandon their trains upon filing a 30-day notice with the Commission, unless the Commission, after investigation, concluded that the continuation of the train’s operation was required by the public convenience and was not unduly burdensome to interstate commerce. 126

The 1958 Act resulted in an immediate and continuing deterioration in the quality and quantity of rail passenger service throughout the country. 127 By 1970, it was clear that this country had to choose between no rail passenger service at all or an underfunded attempt at revivifying its lifeless carcass. The attempt at resurrection was chosen and resulted in the creation of Amtrak through the enactment of the Rail Passenger Service Act of 1970. 128

A few years after Amtrak began its first tentative steps as a passenger railroad, Congress decided it was time to consider reforming the law and the procedures governing the air carrier industry. It could not be denied that the regulation of this industry required reformation. The Administration of President Gerald Ford opposed outright deregulation of the industry and pressed for enactment of a regulatory reform act. When President Carter took office, and the chairmanship of the Civil Aeronautics Board passed from John Robson to Alfred Kahn, “regulatory reform” was discarded in favor of “deregulation” that was as total and complete as its advocates could make it. The result was the Airline Deregulation Act of 1978. 129

While consideration was being given to regulatory reform in the air carrier industry, Congress also undertook consideration and enactment of the Railroad Rehabilitation and Regulatory Reform Act of 1976 [4R

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126. Supra note 125, at 571-72.
127. The Commission repeatedly held railroads to have deliberately destroyed the quality of their passenger service in order to drive passengers away so they might abandon that service and invest in more profitable operations. See e.g., Adequacies—Passenger Service—Southern Pacific Company Between California and Louisiana, 335 I.C.C. 415, 439-40, 453-56 (1969).
129. 49 U.S.C. § 40101, et seq.
Act]. That statute, signed by President Ford on February 5, 1976, provided the first steps toward railroad industry deregulation by reforming the procedures employed by the ICC to review applications involving abandonment, extension, and acquisition of rail lines and the consolidation of railroads through merger, control, lease, or acquisition of assets. In each of those areas, as it loosened or removed regulations governing railroads, Congress expanded and strengthened the protections provided employee interests.

The 4 R Act was followed four years later by the Staggers Rail Act of 1980, which provided for partial deregulation of the railroad industry. In the Staggers Act, Congress did not affect the increased protections it had afforded employees in the 4 R Act, and, indeed, it attached additional specific mandatory or discretionary employee protection provisions to each section of the Act in which it relieved railroads of specific ICC regulations.

Recently the Congress further reduced regulation of the railroad industry by enactment of the somewhat inappropriately named “ICC Termination Act of 1995,” but again did not affect railroad employee rights.

IV. THE ICC AND THE PROTECTION OF EMPLOYEE INTERESTS

The protection of the interests of employees adversely affected by ICC approval of railroad applications was not new in 1940 when the Congress mandated such protection. Since 1934, the Commission had recognized that the impact of an ICC-approved transaction upon employees was an integral part of the public interest to be considered in deciding whether to approve a transaction. It imposed employee protective

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130. See supra notes 99-106 and accompanying text.
131. 49 U.S.C. §§ 10326(a) and 10903(a)(2) (1978).
133. 49 U.S.C. § 10505 (relief from all ICA requirements and ICC regulations except (1) employee protection and (2) prohibited intermodal ownership); 49 U.S.C. § 10706 lessened the need for rate bureaus but required Section 11347 employee protection; 49 U.S.C. § 10901 (construction of rail lines, discretionary employee protection); 49 U.S.C. § 11123 (limitations on issuance of car service, orders, required hiring of employees who had performed that work); 11 U.S.C. § 1170 (bankruptcy courts bound by Section 11347); Section 228 (liberalized merger provisions but left Section 11347 untouched); 49 U.S.C. § 10910 (sales of lines to financially responsible persons for feeder line development, required use of employees who normally would have performed the work); 49 U.S.C. §§ 10903, 10904 (liberalized abandonment provisions, but required Section 11347 protection).
135. See supra notes 107-119 and accompanying text.
136. St. Paul Bridge & Terminal Ry.—Control, 199 I.C.C. 588, 596 (1934). See also the ICC's first Burlington Northern Merger decision which rejected the merger because of its adverse ef-
conditions upon carriers which had to accept those conditions if they wished to implement their approved transactions.\textsuperscript{137}

The ICC's 1934 decision in the \textit{St. Paul Bridge} case was based upon the conclusion that its authority to approve a merger or consolidation upon just and reasonable terms and conditions included conditions for the protection of the interests of employees.\textsuperscript{138} The Supreme Court agreed.\textsuperscript{139}

Following the \textit{St. Paul Bridge} case, the ICC was asked to impose protective conditions in a rail line abandonment case, but refused to do so, concluding that the statutory criterion for abandonments (public convenience and necessity) was narrower than the criterion established for mergers and consolidations (public interest).\textsuperscript{140} The Supreme Court disagreed. It affirmed the three-judge district court which had reversed the ICC\textsuperscript{141}, holding that these two criteria should be given the same meaning.\textsuperscript{142}

During the decade following the passage of the Transportation Act of 1940, the Commission slowly began to evolve what it deemed to be fair and equitable arrangements to protect railroad employees in the event of consolidations or mergers. At first, the Commission reserved jurisdiction to consider what protections, if any, should be imposed if it subsequently learned that railroad employees had in fact been adversely affected.\textsuperscript{143} Then, in \textit{Oklahoma Ry. Trustees—Abandonment of Operations},\textsuperscript{144} a Section 5(2) purchase proceeding, the Commission attached five detailed conditions to its approval which were intended to protect railroad employees. Those conditions were commonly referred to as the \textit{Oklahoma

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\textsuperscript{137} In Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, 295 I.C.C. 696, 701 (1958), the Commission stated:

\begin{quote}
Under section 5 of the Act [now 49 U.S.C. § 11321, \textit{et seq.}] we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction . . . .
\end{quote}

Under section 5(2)(f) of the Act [49 U.S.C. § 11326(a)], we are required to impose upon the carriers in each approved transaction conditions for the protection of railroad employees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything . . . .

The permissive character of ICC/STB approval orders has not changed.

\textsuperscript{138} See supra note 68.

\textsuperscript{139} U.S. v. Lowden, 308 U.S. 225 (1939).

\textsuperscript{140} Pacific Electric Ry.—Abandonment, 242 I.C.C. 9 (1940).


\textsuperscript{142} \textit{Rail Labor Executives' Ass'n.,} 315 U.S. at 376-78.

\textsuperscript{143} Minneapolis & St. L.R.R.—Reorganization, 244 I.C.C. 357 (1941).

\textsuperscript{144} Oklahoma Ry. Trustees—Abandonment of Operations, 257 I.C.C. 177 (1944).
conditions. They provided that the period during which the protections were to be afforded the employees "shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our order herein . . . ," but for a shorter period if the employee had fewer than four years of service.\textsuperscript{145} At almost the same time, the ICC developed the \textit{Burlington} conditions for imposition in abandonment cases.\textsuperscript{146} These protective arrangements were based upon the compensatory provisions of the Washington Agreement and were virtually identical except that, unlike \textit{Burlington}, the \textit{Oklahoma} conditions did not require an employee to relocate to retain protection (unless he was required to do so by a collective bargaining agreement).

In 1946, the Commission issued its decision in the \textit{Chicago & N.W. Ry.\textemdash Merger} case.\textsuperscript{147} In that proceeding, rather than impose a specific formula for the protection of employees, the ICC simply imposed a paraphrase of the second sentence of Section 5(2)(f) as a condition of its approval.\textsuperscript{148} In subsequent cases, rather than spelling out anew with appropriate name changes the specific provisions imposed to protect railroad employees, the ICC incorporated protective provisions into its orders by reference, titling each formula with the name of the case in which it initially was imposed.

In 1950, a question arose whether the four-year period referred to in the second sentence of Section 5(2)(f) should be regarded as a maximum limitation upon the power of the Commission to impose conditions or only a minimum requirement. The Commission had approved an application under Section 5(2)(f) to consolidate the various rail passenger terminal facilities at New Orleans by the construction of a joint terminal to be called the New Orleans Union Passenger Terminal. The ICC regarded the statutory four-year period as a maximum limitation upon its power. Accordingly, it limited the period of employee protection granted in that case to four years from the date of its order approving construction of the terminal. That limitation would have meant the loss of protection to employees affected by that construction, since the terminal could not be completed within four years from the date of the Commission's order, and the employees would not be affected until the terminal had been completed.

\textsuperscript{145} Oklahoma Ry. Trustees, 257 I.C.C. at 198.
\textsuperscript{146} Chicago, Burlington & Quincy R. Co.\textemdash Abandonment, 257 I.C.C. 700 (1944).
\textsuperscript{147} Chicago & N.W. Ry.\textemdash Merger, 271 I.C.C. 672 (1946).
\textsuperscript{148} The sentence read: "In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction shall not result in employees of the carrier or carriers affected by such order being in a worse position with respect to their employment . . . ." Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 899, 906 (1940) (codified in scattered sections of 31 U.S.C. and 49 U.S.C.).
completed.\textsuperscript{149}

The ICC's order was appealed to a three-judge panel of the United States District Court for the District of Columbia. The Court upheld the Commission. The case was further appealed to the Supreme Court which reversed the District Court and the Commission.\textsuperscript{150} The Supreme Court reviewed the legislative history of Section 5(2)(f) and concluded that the four-year limitation in the statute provided a minimum, not a maximum, period of protection for affected employees.\textsuperscript{151}

Upon remand, the Commission imposed, as an employee protective arrangement, the Washington Agreement,\textsuperscript{152} modified as to earnings from outside employment. The Commission also required that employees affected within four years from the effective date of the original order receive the protections of the Oklahoma conditions.\textsuperscript{153} The conditions imposed in this New Orleans case, commonly called the New Orleans conditions, incorporated by reference both the Washington Agreement and the Oklahoma conditions. It became the basic arrangement imposed by the ICC in cases arising under Section 5(2).\textsuperscript{154} The conditions have been imposed by the Commission in consolidation,\textsuperscript{155} trackage rights,\textsuperscript{156} merger,\textsuperscript{157} reorganization,\textsuperscript{158} and lease\textsuperscript{159} cases.

The Commission, however, did not impose the New Orleans conditions in all proceedings arising under former Section 5(2). After 1952 it continued to impose the Oklahoma conditions in some Section 5(2) cases. However, it consistently imposed the Burlington conditions in most abandonment cases under former Section 1(18) of the Act (now 49 U.S.C. § 10903). While it appears that the Commission may have drawn an arbitrary distinction between the types of transactions regulated by former Section 5(2)(a) in determining whether to apply the New Orleans or Oklahoma conditions\textsuperscript{160} it explained its selection process as follows:

\textsuperscript{149} New Orleans Union Passenger Terminal Case, 267 I.C.C. 763 (1948).
\textsuperscript{151} Railway Labor Executives Ass'n, 339 U.S. at 155.
\textsuperscript{152} The WJPA protective period commenced when the employee was first affected.
\textsuperscript{154} In a decision on remand in Southern Ry.—Control—Central of Ga. Ry., 331 I.C.C. 151, 162 (1967), the Commission described the New Orleans conditions as follows:
We consider the net effect of our decision in the New Orleans case was to formulate and impose a separate code of employee protective conditions as a minimum fair and equitable standard, which superimposes the Oklahoma conditions upon the provisions of the Washington Agreement.
\textsuperscript{155} New Orleans Union Passenger Terminal, 282 I.C.C. 271 (1952).
\textsuperscript{156} Erie R. Co. Trackage Rights, 295 I.C.C. 303 (1956).
\textsuperscript{157} Louisville & N.R. Co. Merger, 295 I.C.C. 457 (1957).
\textsuperscript{159} St. Louis S.W. Ry. Co. of Texas Lease, 290 I.C.C. 205 (1953).
While there have been certain section 5 proceedings decided after the New Orleans case in which we have imposed the Oklahoma conditions for the protection of employees, they have been cases in which (1) there was no showing of adverse effect, or (2) measures already taken for the protection of employees had been developed to the point where the Oklahoma conditions alone thereafter would satisfy the statutory requirements.\textsuperscript{161}

In 1962, a case arose which ultimately required the Commission to delineate carefully and deliberately the Commission’s view of its authority under the Interstate Commerce Act vis-a-vis employees’ rights under that Act, under the Railway Labor Act, and under collective bargaining agreements.

Dissatisfied with the New Orleans method of adopting by reference two other protective arrangements, the Commission decided to codify the standard protective formula by combining the protective features of each of the sources into a single definitive arrangement. On November 7, 1962, the Commission issued its decision in Southern Ry.—Control—Central of Ga. Ry.,\textsuperscript{162} in which it stated that it was imposing the New Orleans conditions, with a modified arbitration procedure, as an employee protective arrangement. However, instead of incorporating those conditions by reference as it had in the past, the ICC attached an appendix to its order detailing a formula of protective provisions that it intended be a codification of the New Orleans conditions. Unfortunately, the appended detailed conditions failed to contain some of the essential protections found in the New Orleans conditions. The Railway Labor Executives’ Association (RLEA)\textsuperscript{163} challenged those conditions, and in December 1964, the Supreme Court, without oral argument, remanded the case back to the Commission for clarification of its order.\textsuperscript{164} Upon remand, the Commission held a hearing at the request of the railroads. But after listening to the testimony of 206 employee witnesses and numerous management witnesses, it found “a callous disregard by [the railroads involved] for the established rights and interests of the employees”.\textsuperscript{165} It then unanimously set forth in extensive detail what it perceived to be the Commission’s very limited role in labor relations and the limited authority in that area granted it by Congress. The Commission’s report state that when it

\textsuperscript{161} See supra note 155, at 163.


\textsuperscript{163} The RLEA is an association of the chief executive officers of railroad labor unions. It was established in 1926.

\textsuperscript{164} RLEA had challenged the failure of the ICC to include Sections 4 and 5 [notice and negotiation of implementing agreements] and 9 [lump sum separation pay] of the Washington Agreement in its codified provisions, and the Supreme Court’s remand referred to those provisions only. See Ry. Labor Executives’ Ass’n. v. U.S., 379 U.S. 199 (1964).

\textsuperscript{165} Southern Ry.—Control—Central of Ga. Ry., 331 I.C.C. at 185.
had imposed the *Southern—Central of Georgia* conditions,\(^{166}\) it fully intended to impose the *New Orleans* conditions with one modification—a compulsory arbitration procedure: "Except for this minor change in the arbitration procedure [making it mandatory and binding], we made no change in the original *New Orleans* conditions."\(^{167}\)

The Commission then spelled out its views of the law: it concluded it had no authority to supersede collective bargaining agreements; protective conditions were imposed "*upon the carriers* . . . *to protect* the interests of the employees;" employee rights under collective bargaining agreements, protective agreements (such as the Washington Agreement) and conditions imposed by the Commission were "*separate, independent and distinct rights*" of employees; the Commission-imposed conditions were "*designed to apply after the carriers had arrived at their adjustments of labor forces in accordance* with the governing provisions of their collective bargaining agreements;" and the transportation and labor laws of the nation must be accommodated to each other, neither being subordinate to the other.\(^{168}\) These expressions of lack of authority over collective bargaining agreements or of jurisdiction over labor relations matters were consistent with the Commission's statements on that subject long before and well after they were uttered in the *Southern—Central of Georgia* case.

One of the first to express an authoritative opinion on the lack of ICC jurisdiction over labor relations was Joseph B. Eastman, Federal Coordinator of Transportation and Chairman of the ICC. In 1934, Congress was considering amendments to the Railway Labor Act. Section 2 of the pending bill related to the railroads' collective bargaining duties. It contained a provision requiring any U.S. Attorney to prosecute violations of the provisions of the Act upon the application of the employees' union representative. Representative Holmes suggested deleting the union as an applicant to seek prosecution and, instead, to give that responsibility to the ICC. Mr. Eastman responded: "*It certainly should not be the Interstate Commerce Commission, because they have no jurisdiction over labor matters at all and never have had.*"\(^{169}\)

Commissioner Eastman's testimony appeared to put to rest the question of ICC jurisdiction in labor relations matters until, some 24 years later, the Chicago and North Western Railway Co. attempted to use Section 5(11)\(^{170}\) to equip the ICC with authority to immunize railroads from the provisions of the Railway Labor Act and from the railroads' collect-

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166. I.e., the faulty Appendix which it was correcting.
167. *Id.* at 164.
168. *Id.* at 168-170; (italics in original; underlining added)
169. *Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce,* 73rd Cong. 54 (1934).
170. Later 49 U.S.C. §11341(a) and now 49 U.S.C. §11321(a). This provision exempts rail-
tive bargaining agreements. In 1958, the C&NW had obtained ICC authority to lease all of the lines of the Chicago, St. Paul, Minneapolis and Omaha Railway ("Omaha"). It returned to the Commission complaining that it had tried and failed to obtain agreements with certain of the unions involved which were necessary to enable it to carry out the approved transaction by integrating C&NW and Omaha properties under the lease. The Commission rejected the request of the C&NW on the ground that it had no authority to grant C&NW's request because its order approving the lease was permissive as to the carriers and required nothing of the employees; Section 5(2)(f) required that certain duties be imposed upon the carriers, but did not authorize the ICC to direct the employees or the unions to do anything; and, Section 5(11) was self-executing and did not authorize the ICC to declare particular laws to be superceded by its orders. Most significantly for the purposes of history of the ICC's view of its authority over labor relations matters was the following holding of the Commission:

Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction to of the National Mediation Board, which, in effect, is what North Western requests us to do. It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease of North Western of the line of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished. The order did not provide any particular method for integration of the physical operations involved, and, except for the imposition of the above-mentioned conditions for the protection of employees, did not deal with employer-employee relationships.

In addition to affirming its lack of authority to interfere with labor relations on the railroads, the Commission repeatedly acknowledged its lack of expertise in that area. The statements of Commissioner Eastman before Congress and the ICC in the Omaha case, just quoted, as well as in the Southern—Central of Georgia case, indicated that until at least 1967, the ICC believed itself to lack jurisdiction over labor related matters.

roads from all laws which would prevent them from carrying into effect ICC orders approving railroad applications for merger, control, lease, etc. filed under 49 U.S.C. §11343 (now §11323). 171. The railroads unsuccessfully attempted such use of that provision again in 1967 in the Southern Central of Georgia case and in 1981 in the N&W/IT arbitrations, see infra pp. 273-274. 172. Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, 295 I.C.C 696, 701 (1958). 173. Later §11347 and now 49 U.S.C. §11326(a). 174. Id. 175. Id. Chicago, St. Paul, Minneapolis & Omaha Ry., 295 I.C.C at 702. 176. Id. (emphasis added). The nature of the ICC/STB orders today is identical to that of the order imposed in the Omaha case in that ICC/STB orders authorize the effectuation of a financial transaction and do “not provide any particular method for integration of the physical operations involved.”
The issue did not arise again until 1977 when the Commission expounded at length on its lack of expertise in labor relations, rejecting a request from a union which it perceived as a "matter[] relating to labor relations."\footnote{177} The Commission repeated this repudiation of its expertise and involvement in labor matters when, in 1982, a union asked it to declare a railroad in violation of the employee protective conditions that the Commission had imposed. On January 26, 1983, the Commission refused to make this declaration, citing its lack of "expertise to place ourselves into the field of collective bargaining or labor management relations."\footnote{178}

In years following its decision in the \textit{Southern-Central of Georgia} case, the ICC consistently adhered to its view of the law as expressed in that case as well as its conviction that the \textit{New Orleans} conditions were the "minimum protections which the applicants must provide in order to obtain our approval of the transactions" under former Section 5(2) of the Act.\footnote{179}

The \textit{New Orleans}, \textit{Oklahoma}, and \textit{Burlington} conditions would be supplanted by protective arrangements\footnote{180} which had their genesis in a series of legislative events beginning in 1964. In that year, Congress enacted the \textit{Urban Mass Transportation Act} of 1964. In 1970, the \textit{Rail Passenger Service Act} creating Amtrak was enacted and in February 1976, the \textit{4R Act} was signed into law.\footnote{181} As a result of these enactments, particularly the \textit{4R Act}, the ICC crafted the \textit{New York Dock} and \textit{Oregon Short Line} conditions with considerable help from the unions.\footnote{182} These conditions incorporated the substance of sections 4 and 5 of the \textit{Washington Agreement}, as adapted into the \textit{New Orleans} conditions and considered vital by the unions, requiring: notice and the execution of implementing agreements prior to a railroad's effectuating a "transaction" (as defined in the conditions) in furtherance of Commission-granted authority;\footnote{183} most of the improvements in protection developed by Secretary of Labor Hodgson in Appendix C-1 as required by §11347; and in

\footnote{180} \textit{i.e.}, the \textit{New York Dock} and \textit{Oregon Short Line} conditions.
\footnote{181} \textit{See supra} notes 76-99 and accompanying text.
\footnote{183} Ironically, it is this protection for which the employees battled so strenuously that has been turned inward upon them as a basis for overriding their rights under the \textit{Railway Labor Act} and their collective bargaining agreements. \textit{See infra}, Section V.
Article I, Section 2, a specific prohibition against interference with an employee's Railway Labor Act and collective bargaining agreement rights established by Secretary Hodgson and therefore required by §11347:

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes. 184

In the course of its decision in the New York Dock case, the Commission clearly stated that this provision was intended to preserve collective bargaining agreement rights. Rejecting a request by the RLEA to add a sentence in Article I, Section 2 designed to protect employees' agreement rights against the subcontracting of their work, the ICC said:

Article I, section 2, appears acceptable to all parties. RLEA does propose an additional sentence dealing with the effectiveness of subcontracting agreements subsequent to a transaction; however, the section, as now written, preserves all existing agreements and, therefore, the suggested language is redundant and unnecessary. 185

The Commission had also inserted a provision in its first version of the New York Dock conditions to protect employees against deprivation of their rights under so-called protection agreements, such as the Washington Agreement, which they had negotiated with their employers. The RLEA felt that the wording of this provision might be subject to misinterpretation. The Commission adopted the modified language suggested by the RLEA 186 with the following comment:

185. Id. at 73 (emphasis added); RLEA's proposed sentence read:
The various agreements dealing with subcontracting, scope rules, and classification of work rules in effect at the time of a transaction, shall continue in effect unless and until changed by agreement between the railroads and labor organizations involved in such transaction, and work performed on such properties shall not be subcontracted except as may be expressly, or by reasonable necessary implication, permitted by said agreements. Disputes concerning subcontracting of work shall be disposed of on the basis of existing collective bargaining agreements between the parties.
Id. at 77.
186. The RLEA's suggested wording appears in Article 1, Section 3, and reads:
Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provision which he so elects, he shall not be entitled to the same type of benefit under the provisions which he
Our study of the provision suggested by RLEA indicates that it preserves protections yet with the required prohibitions against duplication of benefits (see the first proviso) and against pyramiding (see the later portion of the final proviso). We will adopt the proposed provision as we feel it is an appropriate clarification of the intent of that section.187

The Commission’s adoption of provisions that preserved employees’ existing statutory and contract rights was in conformity with the literal language of the statutory requirement and consistent with the stated purpose of Secretary of Labor Hodgson in placing those protections in Appendix C-1. Secretary Hodgson, when challenged that his Section 3 actually deprived employees of benefits of other protective agreements that applied to them, said, in his affidavit filed with the U.S. District Court: “[S]ection 3 specifically preserves the rights of an employee under other protective agreements, although it does prohibit the pyramiding and duplication of benefits.”188

Two years following the introduction of the New York Dock conditions, the ICC authorized the acquisition of the Illinois Terminal Railroad Company (“IT”) by the Norforkl & Western Railway Company (“N&W”), conditioning the acquisition upon N&W’s acceptance of the New York Dock conditions. In July 1981, N&W served notice under New York Dock Article I, Section 4 that it intended to unify and consolidate the operations of IT with those of N&W’s affiliate Wabash Railroad and that the IT employees would be integrated into the appropriate Wabash rosters and be subject to Wabash collective bargaining agreements. The N&W argued that Section 4 authorized the arbitrator to change the provisions of existing collective bargaining agreements and that such changes were necessary if N&W and IT were to carry out the transaction. The unions objected to the railroads’ proposal, and the railroads submitted the matter to arbitration under Section 4. The unions challenged the jurisdiction of the Section 4 arbitrators to modify the employees’ agreement rights. Because different crafts with different seniority rights and agreements were involved, the issues were tried in three separate arbitration proceedings at different times by three different arbitrators. All three reached the same conclusion: New York Dock Section 4 arbitrators had no jurisdiction to modify employees’ collective bargaining agreement rights. Arbitrator Nicholas H. Zumas, who heard the case involving the

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does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits, and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement for the remainder, if any, of his protective period under that arrangement.


Brotherhood of Locomotive Engineers and the United Transportation Union, expressly held that *New York Dock* did not authorize mandatory "interest arbitration" (which even the Railway Labor Act had never required) and did not authorize him "to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are 'preserved' under Section 2 [of *New York Dock*]."189

The arbitrators in those cases limited their awards to ordering the consolidation of seniority rosters by a method each arbitrator specified. These cases constituted the first time the issue of a railroad's right to modify employee rights under section 4 of *New York Dock* or its predecessors had been raised in such a proceeding;190 the railroads did not appeal the decisions.

The Commission varied the provisions of the *New York Dock* conditions as they were imposed in lease,191 trackage rights,192 and sale193 cases, but the basic compensatory and perservation-of-rights provisions remained the same.

One year after the N&W/IT awards were issued, the Commission again professed its lack of "expertise to place ourselves into the field of


Carriers argued that the Commission's order authorizing the purchase and consolidation of IT by N&W and requiring arbitration of disputes involving the "rearrangement of forces" supersedes any other agreements or laws, including the Railway Labor Act. Central to the position of the Carriers is the question of whether the negotiation and arbitration provisions of employee protection conditions in consolidation cases provide a mechanism that supersedes Railway Labor Act requirements and permits an Arbitrator to transfer work and employees despite any such prohibitions contained in collective bargaining agreements pursuant to the Railway Labor Act.

This Arbitrator is of the opinion that the question must be answered in the negative.

An arbitrator's authority under Article I, Section 4 of *New York Dock*, where the parties are unable to reach agreement, is limited to the determination of employee protections contained in Appendix III [i.e. *New York Dock*], and to provide a basis for the selection of work forces of the employees involved. Article I, Section 4 does not give an Arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are "preserved" under Section 2. It follows that an Arbitrator is not empowered, without mutual agreement of the parties, to substitute, modify or terminate agreement [sic] negotiated pursuant to the provisions of the Railway Labor Act. Carrier's contention that the arbitration process (provided for in Section 4) is an integral part of the collective bargaining process, and, as such, an agreement may be changed (as provided in Section 2) either by negotiation by the parties or by an arbitration award is, in this Arbitrator's view, based on the erroneous premise that the ICC mandated involuntary "interest arbitration" in contravention of the provisions of the Railway Labor Act. No persuasive authority has been presented that supports or warrants such a far-reaching result.

190. See infra note 225.


collective bargaining or labor management relations." 194 But ten months after that reaffirmance of its historical position, the ICC would reverse its 96-year history of non-intrusion into labor matters. It would do so without reference to that history.

V. THE ICC AS LABOR RELATIONS EXPERT

At the beginning of 1983, the Commission had remained consistent in its avoidance of any involvement in labor matters when reviewing transactions placed before it for approval. It had restricted its activities to the imposition of conditions upon carriers for the protection of employee interests and had repeatedly held that the conditions were, indeed, imposed upon carriers, not employees, their "purpose being to protect the interests of the employees, some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act." 195 Near the end of 1983 however, the Commission's well-documented 50-year old view of the law governing its authority changed when abruptly it held itself to have "extensive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements." 196

Almost a year before the Commission had last protested its lack of expertise in the Brotherhood of Locomotive Engineers case, supra, it approve the consolidation of the Union Pacific Railroad Company ("UP") and the Missouri-Pacific Railroad Company ("MP") under the common control of a holding company. The ICC, however, conditioned the approval upon the grant of trackage rights by MP to the Denver and Rio Grande Western Railroad ("DRGW") and the Missouri-Kansas-Texas Railroad Company ("MKT") to operate over certain MP lines. 197 The ICC then approved the proposed trackage rights agreement submitted by DRGW and MKT subject to a determination of fair compensation to MP and the so-called Mendocino Coast employee protective conditions. 198

After consummation of the UP-MP control transaction, DRGW began operating over the designated tracks of MP with DRGW crews.

198. Norfolk & W. Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653, 664 (1980). These conditions are imposed by the ICC in trackage rights/lease cases and are identical to New York Dock except they require a 20-day notice instead of a 90-day notice and permit the carrier to proceed with its proposed changes after 20 days.
Brotherhood of Locomotive Engineers ("BLE") objected on the ground that the engineers it represented on MP had the exclusive right by contract to operate trains over MP lines and the ICC had no jurisdiction over UP-MP/ BLE contracts. BLE filed a petition for clarification with the ICC requesting reaffirmation of its oft-stated position that the Commission's decision did not affect labor relations or interfere with collective bargaining agreements. The BLE was in for a surprise. The ICC simply denied the requested relief without substantive comment. BLE, now joined by the United Transportation Union ("UTU"), sought reconsideration of that decision. UTU argued that the ICC's jurisdiction over railroad consolidations did not authorize it to immunize railroads from the requirements of the Railway Labor Act or to approve unilateral railroad changes in collective bargaining agreements.

A reading of the Commission's decision on reconsideration\textsuperscript{199} conveys the impression that the ICC had never before addressed the issue of its expertise in, or authority over, labor relations, and that modification of labor agreements by ICC orders had been an accepted practice by the Commission since its creation. Nowhere in the opinion is there any reference whatsoever to any of the Commission's decisions discussed above, although both unions emphasized that the ICC's denial of BLE's petition for clarification was inconsistent with the ICC's historic policy of not injecting itself into labor disputes.

Despite the fact that the trackage rights agreements clearly contravened the provisions of the MP/ BLE collectively bargained contract which restricted work over MP tracks to MP employees, the Commission held that the trackage rights agreements did not involve a change in UP/ MP employees' working conditions because DRGW had testified that fewer employees would be displaced if the trackage rights were granted than if they were denied;\textsuperscript{200} because the trackage rights agreements stating that DRGW and MKT crews would perform the work were agreements between the railroads, and the labor parties had not proved they had a right to participate in their negotiation;\textsuperscript{201} and because the unions did not suggest that their collective bargaining agreements or the Railway Labor Act protected the employees they represented after the trackage agreements went into effect.\textsuperscript{202} For the first time the Commission took the position, contrary to its earlier practice, that 49 U.S.C. §11341(a)

\textsuperscript{199} See supra note 11 and accompanying text.

\textsuperscript{200} The relevancy of this reasoning is obscure.

\textsuperscript{201} A reason which would appear to confirm the unions' right to the perservation of their contracts. See Omaha, supra note 137 and Texas & N.O.R. Co. v. Brotherhood of R.R. Trainmen, 307 F.2d 151, 159-60 (5th Cir. 1962).

\textsuperscript{202} Yet the basis for the unions' claim was their contract right to perform work on MP tracks before and after the trackage rights agreement went effect.
overrode collective bargaining agreements and working conditions: where those agreements and conditions “conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.” The ICC’s long-time holding that the conditions were imposed upon carriers to protect employees was now disavowed by implication.

It seemed to the unions that the Commission had irresponsibly reversed its consistent, historic position without acknowledging that fact; that the ICC had arbitrarily and abruptly swept aside the statutory and collective bargaining agreement rights of employees guaranteed them by the Railway Labor Act; and, had rendered a nullity the employees’ right to preservation of “rates of pay, rules, working conditions and other rights, privileges and benefits” as required by Section 11347 by holding that those rights must “give way to the implementation of the transaction.”

The Commission’s decision was appealed to the U.S. Court of Appeals for the D.C. Circuit which vacated and remanded it to the Commission. The Court held that the ICC gave “no justification for a view that waiver of the Railway Labor Act [was] necessary to effectuate the [track-age rights] transactions at issue.” The Court relied upon and quoted from the Fifth Circuit’s decision in the City of Palestine, Texas v. United States. There, the City had a contract with the MP to maintain 4.5% of its entire workforce in Palestine. As an element of its merger with the Texas & Pacific Railway Company, MP asked the ICC to relieve it from the requirements of that agreement. The ICC ruled that it had the power to abrogate the agreement because “of the agreement’s unduly burdensome effect on MoPac and on interstate commerce.” The D.C. Circuit relied upon the following quotation from City of Palestine:

The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved transaction. In its grant of

204. See supra notes 166-179, 196 and accompanying text.
205. Brotherhood of Locomotive Eng’r v. ICC, 761 F.2d 714, 725 (D.C. Cir. 1985):
We thus vacate the 1983 orders and remand the case to the Commission. The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.
206. Id.
approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger.208

The next question, of course, became when, as a matter of statutory application, was the "carrying out" of a merger considered as having been completed.209 As the unions were soon to learn, the answer would be "never".

The Circuit Court's decision was appealed to the Supreme Court, where five Justices decided to side-step the issues presented and dismiss the case on a technical deficiency: the time for filing an appeal from an ICC decision, although tolled by a petition for reconsideration, is not tolled by a petition for clarification which the ICC had ruled on in that case. The Court held that the appeal to the Circuit Court had been filed too late and that Court therefore had no jurisdiction. The Court then vacated the Circuit Court's decision and remanded it with instructions to dismiss for a lack of jurisdiction.210

It took four years of continuous litigation for the issue to be returned to the Supreme Court, and the Court again refused to confront it. During this time, the Commission continued to broaden its intervention in the area of railroad labor relations. In DRGW, the Commission had relied on its view that a trackage rights agreement, even one that overrode the contract rights of employees to perform certain work, was an agreement between railroads and not a labor agreement. Therefore, said the ICC, it could not affect working conditions within the meaning of Section 11347. As time passed, the ICC determined it could intervene not only to over-ride agreements, but also to modify them, and it could do so even when no contracts between carriers were involved.

Shortly after the DRGW case had been decided by the Circuit Court, the Commission published its decision in the Maine Central case.211 In that case, the ICC had exempted Maine Central from the requirements of the Interstate Commerce Act in leasing to the Georgia Pacific Corporation four specific lines of railroad near Woodland, Maine. Georgia Pacific had contracted with the Springfield Terminal Company to operate the lines and would pool its existing traffic with that obtained by Maine

208. Brotherhood of Locomotive Eng'rs, 761 F.2d at 724 (quoting City of Palestine, 559 F.2d at 414).
209. The court here viewed the term "carrying out" the approved transaction in the same sense as the Commission had used the term "effectuating" in the Omaha case in 1958. See supra notes 173-177 and accompanying text.
The IC imposed the *Mendocino Coast* conditions on the leasing aspect of the case, but not its pooling aspect, because the Commission felt it was not required to protect employee interests in pooling cases.

The UTU sought reconsideration by the ICC, contending that because of the interrelated nature of the case, the *New York Dock* conditions should be imposed and applied to the pooling arrangements as well as the leases. The UTU pointed out that the Maine Central Railroad was a party to the Washington Agreement which covered pooling, and the Commission's decision could be read as denying to employees rights they had under that agreement, including negotiation and execution of implementing agreements before the carriers made any changes to affect them. The ICC rejected the UTU arguments, stating that prior to 1976, it had imposed the *Oklahoma* conditions in lease cases and *Mendocino Coast* was similar to *Oklahoma* in not requiring an implementing agreement before a carrier implements its approved transaction. The Commission, however, went a giant step further and held that "[i]t is that [ICC] order, not the RLA or WJPA, that is to govern employee-management relations in connection with an approved transaction."213

The Commission's decision regarding its supervening authority over employee rights under negotiated protective agreements, as well as the RLA and collective bargaining agreements, appeared to be based upon authority provided by 49 U.S.C. §11347 alone, for at one point it said that the "preemptive power of Section. . .[11341(a)], [is] not an issue here."214 However, the decision closes by saying that the result requested by UTU was "unacceptable and inconsistent with section 11341." In any event, the Commission had made it clear that whether Section 11341 or Section 11347 applied in a given case, it considered itself authorized to override any employee statutory or contractual rights which impeded a railroad in implementing a transaction that the agency had approved. Its decision was appealed to the D.C. Circuit, but was *affirmed per curiam*.215

In August 1986, CSXT served notice on the Brotherhood of Railway Carmen ("BRC") that the SCL216 freight car heavy repair shop in Waycross, Georgia, would be closed on December 31, 1986, and that the

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212. The ICC/STB may not exempt a carrier from employee protective conditions which absent the exemption, would be required to be imposed. 49 U.S.C. §10502 [formerly §10505].


214. This conclusion may have been reached because the case involved an exemption from 49 U.S.C. §10505 to which Section 11341(a) does not apply. See Railway Labor Executives Ass'n v. United States, 987 F.2d 806, 812-13 (D.C.Cir. 1993).


216. The SCL System had become a part of the CSXT System as of result of ICC approval of the common control of the SCL and Chessie System by the CSX Corporation in CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus., 363 I.C.C. 521 (1980).
freight car heavy repair work as well as certain storeroom work at Waycross, would be transferred to the C&O’s\textsuperscript{217} Raceland, Kentucky, repair facility and made subject to the C&O collective bargaining agreement. CSXT proposed to abolish 121 positions in the carman craft at Waycross and to establish 99 positions in the carman craft at Raceland. All of the carman craft employees were subject to a collective bargaining agreement with CSXT, and about one-half of those employees were also entitled to the protections of the “Orange Book” protective agreement between the union and the SCL which prohibited the transfer of the work and the protected employees beyond the property of the SCL, \textit{i.e.}, to Raceland.\textsuperscript{218}

About two weeks after CSXT’s intended transfer, Norfolk Southern notified the American Train Dispatchers’ Association (“ATDA”) of its intention to transfer all work of locomotive power distribution and assignment from the N&W at Roanoke, Virginia, where employees were represented by ATDA, to the Southern in Atlanta, Georgia, where the employees performing that work were unrepresented, being considered by Southern to be management personnel. Norfolk Southern said the N&W employees would be “considered” for work in Atlanta.\textsuperscript{219}

The parties were unable to reach agreement under section 4 of the \textit{New York Dock} conditions in either case. The respective disputes between the parties were submitted to arbitrators. The BRC and the ATDA disputed the jurisdiction of the arbitrators to change the wages, rules, or working conditions or employees or to eliminate any of their existing Railway Labor Act or collective bargaining agreement rights. Regarding the separate Orange Book protection applicable to half of the affected carman employees at Waycross, BRC argued that the arbitrator had no jurisdiction to modify any of the substantive rights provided employees by that agreement, and that “section 3 of the \textit{New York Dock} conditions absolutely preserves workers’ rights and benefits under existing protection agreements.”\textsuperscript{220}

On behalf of the N&W employees it represented, the ATDA argued

\textsuperscript{217} C&O had been part of the Chessie System.

\textsuperscript{218} The “Orange Book”, so-called from the color of its cover, was negotiated during the much earlier merger of the Atlantic Coast Line Railroad and the Seaboard Air Line Railroad which became the SCL. It guaranteed employees income for the remainder of their working lives and also guaranteed that neither they nor their work would be transferred beyond the boundaries of the SCL System, Inc. In exchange for those protections, SCL was granted the right to transfer work and employees within the merged ACL-SAL (\textit{i.e.}, SCL) system but not beyond it.

\textsuperscript{219} The Norfolk and Western Railway Company and the Southern Railway Company were joined under the common control of Norfolk Southern Corporation as a result of ICC approval in Norfolk S. Corp.-Control-Norfolk & W. Ry. Co. and S. Ry. Co., 366 I.C.C. 173 (1982).

\textsuperscript{220} \textit{See} text accompanying notes 187-188, \textit{supra}. 
that the ICC could not eliminate the agreement rights or the collective bargaining rights the employees has established with ATDA representation through the device of removing them and their work to a railroad where they would have no contract and no representation. The *Carmen* arbitration award was issued in March 1987, followed by the ATDA award in May 1987.

Holding that an arbitrator under section 4 was a "quasi-judicial extension of the ICC" and therefore "must strictly follow the ICC's interpretation of its own authority", the *Carmen* case arbitrator followed the ICC's decision in the *DRGW* case and stated that "[a]ccording to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation." The arbitrator then held that CSXT could transfer work and employees from the CSXT and the SCL agreement to the C&O and the C&O agreement because to permit the preservation of the CSXT employees' agreement rights, including their Orange Book guarantee that their work would not be transferred, "would for all practical purposes block...[that particular] transaction," that is, the 1986 transfer of SCL work and employees to the C&O.

The arbitrator, however, felt that some of the Orange Book rights of the employees could be protected without impeding the completion of the transfer. He found that without the right granted by the employees in 1962 to the then newly-merged SCL to "transfer work and workers throughout the merged (SAL-ACL) system...the point seniority terms of the [collective bargaining] working agreement would have restricted the Carriers from moving employees."221 The arbitrator concluded that the Orange Book prohibited the movement of work and workers beyond the limits of the former SCL property and therefore would bar "transfers of work and employees to the C&O at Raceland, KY." He held that employees' rights "must be subordinated to the Carrier's right to engage in the authorized New York Dock transaction"222 by permitting the transfer of their work; but, he prohibited the transfer of the "Orange Book" employees because he made the factual finding that recognition of that particular agreement right of the employees would "only slightly impair the transaction", i.e., the transfer of work and employees.

Some two months following issuance of the *Carmen* award, the decision and award in the ATDA case was issued. The arbitrator in that case,

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221. Here the arbitrator acknowledges a railroad's inability to move work or employees without voluntary agreement. The agreement he refers to had been negotiated over 20 years before the ICC first ruled that its orders effectively authorized transfer of work and employees from one collective bargaining agreement or one railroad property to another.

222. The arbitrator, following the ICC's rulings, viewed the 1986 transfer of work as itself having been authorized by the Commission rather than having been simply a result of the 1980 underlying statutory transaction (the control) authorized by the Commission.
former National Mediation Board Chairman Robert O. Harris, noted that between “1981 and 1983 at least five arbitrators [had] ruled that the ICC did not desire that changes of rates of pay, rules or working conditions, or of representation under Railway Labor Act, occur through arbitration under Section 4 of the New York Dock conditions.” He then proceeded to quote extensively from the Commission’s 1985 Maine Central decision to the contrary. Mr. Harris also quoted that portion of the Commission’s decision in the Maine Central case in which it had made clear its intent to use section 4 of the New York Dock conditions to compel arbitration or new collective bargaining agreements:

Such a result [governing labor relations by ICC orders] is essential if transactions approved by use are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transaction.\textsuperscript{223}

Holding that he derived this authority from the ICC and the “it is clear that the ICC believes that its order supersedes Railway Labor Act protection”, the arbitrator held that the N&W could transfer the work and the employees to the Southern at Atlanta.\textsuperscript{224} He imposed the implementing agreement proposed by the N&W transferring the work and the employees to Southern without their existing agreement or representation rights as the employees performing locomotive power on the Southern portion of Norfolk Southern property had no agreement and were not represented.

Both awards were appealed to the Commission. In the Carmen case, the Commission held that the arbitrator had correctly interpreted the Commission’s view of its authority that Section 11341(a) overrode the Railway Labor Act and collective bargaining agreements and affirmed the arbitrator on that point. However, the Commission concluded that the arbitrator had committed “egregious error” in holding that the employees covered by the Orange Book could not be required to transfer to Raceland, KY. The “slight impairment of the transaction” found by the arbitrator was held to be an unacceptable “standard” as it would “permit[] a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction” and thereby “effectively undercut the Commission’s authorization of the transaction here.”\textsuperscript{225} The

\textsuperscript{223} In Maine Central the ICC made no attempt to square this language with section 11347’s requirement that employees’ working conditions be preserved. See supra pp. 259-260.

\textsuperscript{224} In the course of his opinion Arbitrator Harris stated that “[p]rior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised in a section 4 proceeding.” Such changes had been made, of course, but by agreement as noted supra note 92.

\textsuperscript{225} Here the ICC held that it not only approved for purposes of statutory immunity the
Commission concluded that the evidence did not support the arbitrator’s factual finding of “slight impairment” of the transaction.\textsuperscript{226} It reversed that finding and remanded the case to the arbitrator for a further review consistent with the Commission’s decision.

In reviewing the ATDA award, the Commission relied upon its decision in \textit{Maine Central} and affirmed the arbitrator’s holding that the terms of its 1982 order approving the Norfolk Southern control of N&W and Southern “and specifically the compulsory, binding arbitration required by Article I, Section 4 of \textit{New York Dock}, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements,” and that any “action taken under our control authorization is immunized from conflicting laws by section 11341(a).”\textsuperscript{227}

The unions sought review of the Commission’s decisions in the Court of Appeals, which heard the cases simultaneously and issued a consolidated opinion.\textsuperscript{228} The Court of Appeals held that “Section 11341(a) of the Act [did] not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees.”\textsuperscript{229} The Court reversed the ICC’s decision and remanded the cases “with respect to the ICC’s RLA holding in order that the agency may determine whether further proceedings are necessary.”\textsuperscript{230} The Court of Appeals felt it unnecessary to address the issues presented by the unions in light of its threshold interpretation of Section 11341(a).

Nine days after the Court of Appeals issued its decision, the Commission issued its next decision showing how it wished to apply and interpret Section 11341(a) in a case involving the purchase by a shortline

\begin{itemize}
\item express “transactions” the Congress authorized it to approve in §11343 but also “approved” by implication all actions taken as a result of those transactions regardless of when they might occur. In the \textit{New York Dock} conditions, the ICC had defined the results of approved §11343 transactions as “transactions” to which \textit{New York Dock} and its other conditions would apply. The effect was to confuse the specific statutory transactions which Congress listed as subject to authorization by the ICC with carrier activities resulting from ICC approval which ICC had no statutory authority to approve simply because of the use of the term “transactions” to describe two entirely disparate concepts. \textit{See Omaha, supra} pp. 269-270.
\item The only evidence relied upon by the Commission to reach its conclusion were general statements relating to reductions in cost savings and operating efficiencies which were not quantified.
\item The issue whether the employees' pre-existing right to representation by the ATDA was preserved by \textit{New York Dock}, Article I, Section 2 and 49 U.S.C. §11347, was not addressed by the ICC nor was the Commission's purpose in crafting Article I, Section 3 of those conditions which purportedly preserved the Employees' Protective Agreement ("Orange Book") rights. \textit{See supra} notes 186-188 and accompanying text.
\item Brotherhood of Ry. Carmen, 880 F.2d at 574.
\item \textit{Id.}
\end{itemize}
railroad of 102 miles of CSXT line in Florida. The Commission held
that it did "not dispute the validity" of the Court of Appeals holding in
Carmen; that it had never "relied upon...§11341(a)...to require that
agreements be modified"; and that its authority to override collective
bargaining agreements was derived from Section 11347.232

The Commission's Carmen decision following remand from the
Court of Appeals233 adhered to that court's ruling that it was not autho-
ried by Section 11341(a) to override provisions of collective bargaining
agreements, but concluded that such authority was unnecessary in any
event since that authority had been afforded the Commission by Con-
gress' inclusion of the employee protective provisions of section 5(2)(f)
in the 1940 Act234 (later §11347 now §11326(a)) and held that section
11341(a) empowered the ICC "to exempt mergers and consolidations
from the RLA at least to the extent of our authority under section
11347."235

The Commission did "concede that our assertion of this power is
fairly recent, as both RLEA and the Carmen court assert."236 It admitted
that its decisions in 1983 (DRGW) and 1985 (Maine Central) had contrib-
uted to a deterioration of labor-management relations which had not
theretofore existed in this area.237 The Commission noted that "a rela-
tively harmonious working relationship...when implementing ICC-ap-
proved consolidations" had existed for almost forty years prior to its 1983
and 1985 decisions and the inclusion of Section 2 in New York Dock in
1979.238

The Commission interpreted Section 2 of New York Dock as providing
employees with "the opportunity to bargain collectively over their
basic and continuing conditions of employment, as contemplated by the


232. Brandywine, 5 I.C.C.2d at 772 n.5. After the railroads appealed the Circuit Court's
Carmen decision to the Supreme Court and certiorari had been granted, the ICC changed its
position and disputed the validity of the Court of Appeals' decision, contending that its "abso-
lute authority" over labor management relations in cases subject to Section 11343 of the Act was
derived both from Section 11341(a) and Section 11347.

233. CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc., 6
I.C.C.2d 715 (1990). The issuance of this decision preceded the Supreme Court's grant of certio-
rari in that case.

234. Id. at 750-51.

235. Id. at 754.

236. Id. at 755.

237. Id. at 745-746.

238. Id. at 745. The ICC's conclusion that the 1979 inclusion of Section 2 of the New York
Dock conditions (set forth at p. 272, supra), as required by section 402(a) of the 4R Act, had
contributed to the labor unrest that began in 1983 was based upon an assumption that Section 2
had added something new to the law instead of simply confirming the law as it had always been
interpreted and applied to that time.
RLA”, but permitting modifications of collective bargaining agreements “when necessary to complete an approved merger or consolidation.” To support that interpretation, the ICC was compelled to rely solely upon speculations and assumptions of what “must have happened”: the 1940-1980 arbitrators “must have defined them [the terms ‘selection of forces’ and assignment of employees’ in New York Dock and the Washington Agreement] broadly enough to include contract changes involving the movement of work (and probably employees) as well as adjustments in seniority”; “[i]t appears that arbitrators, management and labor developed approaches in the 1940-80 period for resolution of the inevitable conflicts with CBAs that permitted the carrying out of the transaction while maintaining labor peace”; between 1940 and 1980 “the disruptive effect on labor appears to have been successfully handled through WJPA-type negotiation and arbitration”; “[m]ost of the changes were presumably made through WJPA (or New Orleans) negotiations, with only the more difficult issues being decided by an arbitrator”; while the scope of the terms “selection of forces and assignment of employees” is “not well-defined. . .[i]t must extend beyond the mere mechanism for selection or assignment of employees, and include the modification of certain important contractual rights”; “[w]e assume they [labor and management] did what was necessary to permit the carrying out of the merger, including . . . those projects that were direct results of the merger”; “[w]e believe that arbitrators have successfully followed this narrow and difficult path in the past . . .”.

The evidence upon which the ICC has based its speculations as to what “must have happened” between 1940 and 1980, consisted of a list submitted by CSX of 95 labor/management agreements relating to transfers. The Commission did acknowledge that the list “cover[ed] a later

240. Id. at 721, (emphasis added). But it cited no such decisions of arbitrators.
241. Id. at 721-22. The “approach developed” was the negotiation of protection agreements granting to management the right to transfer work and employees in return for lifetime protection for the employees. See supra note 92.
242. Id. at 740; (emphasis added). The only “WJPA-type negotiation and arbitration” which occurred during this period was the decision in WJPA Docket No. 14 in which the arbitrator rejected Southern’s defense of §§11341(a) against employees’ WJPA claims.
243. Id. at 741; (emphasis added). The ICC cited no such arbitration decisions.
244. Id. at 742; (emphasis added). This single bald speculation is elevated in later ICC decisions to a finding and still later, as precedent for ICC action in this area.
246. Id. at 753; (emphasis added). See supra note 224 where Arbitrator Harris noted that the issue of a carrier changing rates of pay, rules, or working conditions “had never been raised in a section 4 proceeding” before 1981.
247. Id. at 743.
period” and was referred to only for “some guidance,” but, as Commissioner Lamboley’s dissent noted, those agreements afforded no assistance on the issue whether employees or unions had ever been required to arbitrate contract modifications or elimination prior to 1981. Of the 95 agreements listed, only nine were arbitrated, and none of these indicated whether they were voluntary or compulsory arbitrations.

As noted by Commissioner Lamboley in his dissent, the Commission had ignored the meaning it had given Section 2 when it created the New York Dock conditions:

When adopting §2, the Commission noted that it “appears acceptable to all parties” and rejected a labor proposal addition relating to [preserving] subcontracting agreements, stating that “the section, as now written, preserves all existing agreements and, therefore, the suggested language is redundant and unnecessary.”

The remand decision did not address the provisions of Section 3 of New York Dock which preserved to employees covered by protective agreements the rights and benefits provided by those agreements and afforded employees the option to choose between benefits of an applicable protective agreement (the Orange Book) and those provided by the conditions imposed by the Commission.

As the Commission was rendering its remand decision, the Supreme Court took up the appeal by the railroads from the Court of Appeals Carmen decision. The ICC then joined the railroads in their appeal. On March 19, 1991, the Court issued its decision reversing the Court of Appeals and remanding the case to that court.

The Supreme Court again refused to confront the issue of the effect of the Section 11347 requirement for the preservation of “rates of pay, rules, working conditions and other rights, privileges and benefits” although it was fully aware of the parties’ positions on those issues. Instead, the Court took what was, for it, the very unusual step of basing its decision upon assumptions. The Court assumed, but did not hold, that the requirements of Section 11347 and the “necessity” requirements of Section 11341(a) had been met and addressed itself only to the issue of whether Section 11341(a), in a proper case, could immunize a railroad from the provisions of the Railway Labor Act and from collective bar-

248. Id.
249. Id. at 764 n.55.
250. Id. at 763 (quoting New York Dock, 360 I.C.C. at 73.)
253. See dissent of Justices Stevens and Marshall, 499 U.S. at 134-143.
254. The Court did not decide that the cases before it were proper for the application of
gaining agreements executed pursuant to those provisions. The Court remanded the case to the Court of Appeals for "proceedings consistent with" its decision.

At the time Dispatchers was remanded to the Court of Appeals, there was pending before that Court a number of appeals from the Commission involving Sections 11341(a) and 11347. The ICC decisions involved in the appeals were consistent in that each overrode employee statutory or contractual rights, but their rationales for doing so were not so consistent.

In reviewing the Carmen and ATDA arbitration awards prior to the Court of Appeals decision, the ICC's primary claim of authority to override employee rights had been grounded in Section 11341(a). But immediately after that Court's decision, the ICC agreed with the validity of the Court's ruling, it disavowed ever having relied on section 11341(a) and it placed its full reliance on Section 11347 as the source of its authority. Then, following the Supreme Court's grant of the railroads' petitions for certiorari in that case, the Commission adopted its present position that both Section 11341(a) and Section 11347 independently provided it with the authority to modify or eliminate employee contract rights.

In addition, then, to the Carmen and ATDA cases remanded by the Supreme Court, that Court had pending before it an additional eight separate appeals from the ICC. On July 11, 1991, the Court, on its own motion, issued an order in those cases requiring the ICC to show cause why all of them should not be remanded back to it in light of the Supreme Court's decision in Dispatchers', stating that "[s]uch a remand will enable the Commission to develop a coherent position on the issues remaining after the Supreme Court's decision." The ICC responded to the Court's order, and as a result all of the remaining pending cases,255 except one, were remanded to the Commission by the Court's order dated September 17, 1991.

Upon remand, the Commission requested comments from the parties and the public. These comments were filed in March 1993. The ICC issued a decision in one case, but did nothing further in the remaining cases before the agency was terminated by Congress on December 31, 1995. At this writing,256 its successor, the Surface Transportation Board, had done nothing with them.

In the one case that was not remanded, the Court of Appeals noted that the issue whether "§11357 limits the ICC's power to modify a CBA"

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255. One had been settled in the interim by the union and the railroad involved.
had been “expressly reserved by the [Supreme] Court in Norfolk and Western”, i.e., Dispatchers. The Court went on to hold:

The statute clearly mandates that “rights, privileges and benefits” afforded employees under the existing CBAs be preserved. Unless, however, every word of every CBA were thought to establish a right, privilege or benefit for labor—an obviously absurd proposition—§565 (and hence §11347) does seem to contemplate that the ICC may modify a CBA.

The Court concluded that, at the level of generality it had just announced, the ICC’s interpretation “seems eminently reasonable”.

The Court then held that the Commission had “not...addressed the meaning, and thus the scope, of those ‘rights, privileges and benefits,’ that must be preserved, nor has it determined specifically whether the CBA provisions at issue here are entitled to statutory protections under that rubric.” It remanded the case “for the ICC to make that determination in the first instance.”

The Court also addressed the issue when it might become “necessary” to modify a CBA to effectuate a proposed transaction:

In this case the Commission reasonably interpreted this standard to mean “necessary to effectuate the purposes of the transaction.” If the purpose of the lease transaction were merely to abrogate the terms of the CBA, however, then “necessity” would be no limitation at all upon the Commission’s authority to set a CBA aside. We look therefore to the purpose for which the ICC has been given this authority. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. Viewed in that light, we do not see how the agency can be said to have shown the “necessity” for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease).

The case was remanded to the Commission where it has remained in a “pending” status.

Rail labor viewed the decisions in Dispatchers and Executives as governing future action of the Commission as follows:

1. Section 11341(a) permits a carrier subject to its provisions to supersede a CBA provided the public interest, necessity and Section 11347 requirements have been satisfied.

257. Railway Labor Executives Ass'n v. United States, 987 F.2d 806, 813 (D.C.Cir. 1993) ("Executives").
258. Id. at 814; (footnotes omitted).
259. Id.
260. Id.
261. Id.
262. Id. at 815; (emphasis added).
2. Section 11347 "mandates that 'rights, privileges and benefits' afforded employees under existing CBAs must be preserved".

3. Section 11347 permits "words", i.e., contract terms, which do not confer "rights, privileges or benefits", to be modified but, only if "necessary".

4. The "necessity" requirement is met when the ICC/STB shows that a public transportation benefit flowing from the merger, control, etc., authority granted by the agency would be unavailable otherwise.

5. The arbitration provisions of New York Dock's Article I, Section 4 are strictly limited to selecting the percentage of the work forces involved to perform consolidated work and preparing consolidated rosters to permit employees to assign themselves to the available work.

Executives required the Commission to define what comes within the meaning of the term "rights, privileges and benefits" and then to apply that definition to the facts of the case before it.263

The cases remanded by the Court of Appeals had been pending since 1991 and 1993, and the Commission had taken steps to carry out the remand orders, when, in an unprinted decision reviewing an arbitration award unrelated to the remanded cases, the Commission decided all of the issues pending in those cases. It issued that decision on December 7, 1995.264 That decision was followed by three more decisions (issued by the Surface Transportation Board) which addressed some of the same issues disposed of by the O'Brien Award Decision.265 In each case all of the issues were decided adversely to the employees.

In O'Brien, CSXT had grouped some seven separate ICC finance docket approvals together as authority to transfer employees working under Western Maryland, Richmond, Fredericksburg & Potomac, and C&O railroad contracts to the Baltimore & Ohio Railroad contract.266 In no case could CSXT link any single finance docket authority to any "transaction" it intended to accomplish. Additionally, all but one of the finance docket approvals has been obtained by exemption under 49 U.S.C. § 10505 to which the immunizing effects of Section 11341(a) did not apply. The one finance docket of which Section 11341(a) did apply

263. American Train Dispatchers' Ass'n v. ICC, 26 F.3d 1157 (D.C.Cir. 1994)—the one remanded case acted on by the ICC following Dispatchers—held that union counsel had conceded that no "rights, privileges or benefits" were involved in that case. 26 F.3d at 1163.

264. CSX Corp.—Control—Chesapeake Sys., Inc., Etc., Finance Docket No. 28905 (Sub-No. 27) (Arbitration Review) (December 7, 1995) (unprinted) ("O'Brien Award Decision").


266. Formerly independent railroads that are now part of the CSXT.
did not involve any of the employees or properties on which CSXT desired to make changes, except perhaps RF&P. The unions noted that when employees make claims under employee protective conditions, they are required to identify the particular finance docket transaction in which the conditions were imposed and show that they were affected by actions taken pursuant to that specifically approved transaction.\footnote{The O'Brien Award Decision therefore effectively held that a railroad wishing to employ the New York Dock conditions would not be subject to the same restriction requiring identification of a specific Finance Docket transaction as would employees seeking to invoke those conditions.}

The ICC held that the arbitrator had found “linkage” between the finance docket s and the CSXT proposed changes\footnote{Atlantic Richfield Co. & Anaconda & Pacific R. Co. and Tooele Valley R. Co., Finance Docket No. 28490 (Sub-No. 1) (Arbitration Review) (Mar. 2, 1988) (unprinted), at page 8: 
BAP next seeks a finding that New York Dock benefits are limited to displacements or dismissals caused by the control transaction only. We so find.} and that this finding “was not egregious error”\footnote{No attempt was made to identify the “linkage”.} that the fact that the Section 11341(a) exemption did not apply to the finance docket authority relied upon by CSXT was immaterial because the proposed changes could be traced back to the original B&O - C&O control case of 1963 upon which CSXT had not relied for its authority, but to which Section 11341(a) did apply\footnote{CSX Corp.—Control—Chessie Sys., Inc. (slip op. at 8).} and, in any event, “the basis for a carrier’s action [no longer] must be found in a single Commission-approved transaction”, but can now be based on “a series of them”—“[i]t does not matter whether these conditions were imposed in one transaction or several.”\footnote{CSX Corp.—Control—Chessie Sys., Inc., Finance Docket No. 2805 (Sub-No. 27) (slip op. at 8) (Arbitration Review) (Dec. 7, 1995) (unprinted).}

It would seem that the Commission has held that railroads need not show a cause-and-effect relationship between any particular finance docket approval and any change they propose to make and that a carrier may reach back in time as much as 33 years if it must in order to find Section 11341(a) exemption authority on which to base its proposed changes in employees’ Railway Labor Act and CBA rights. While in former years the Commission was totally averse to interfering in the labor relations of railroads, it now seemed to rail labor that the ICC could not find enough ways to relieve railroads of their obligations to their employees.

In O'Brien, the ICC also struck down the parties’ agreement in a prior implementing contract executed under Section 4 of New York Dock to modify that contract only “in accordance with the procedures of the Railway Labor Act”. The unions had contended that the railroads, hav-
ing agreed to that restriction, could not use *New York Dock* to modify or eliminate those contract obligations. The Commission upheld Arbitrator O’Brien’s holding that this agreed-to requirement to follow Railway Labor Act procedures was ineffective because “neither party had any reason to view this [RLA restriction] language as restricting CSXT’s ability to implement future operational changes, an ability that CSXT would not readily have given up.”272 This holding of the ICC would indicate that language in future (and current) *New York Dock* Section 4 implementing agreements that restrict future modifications of their provisions to Railway Labor Act procedures would have no effect if the railroads decide to modify or eliminate them by service of another *New York Dock*, Section 4 notice.

In its *O’Brien Award Decision*, the Commission also disposed of the issue remanded to it by the Court of Appeals in *Executives* involving the preservation of employees’ rights, privileges, and benefits. It did so without reference to that case or to the cases pending before it on remand from the Supreme Court. It simply held the standard on which an employee’s rights are to be preserved is whether the change the railroad desires to make “is necessary to effect a public benefit of the transaction”273 and that a “public transportation benefit” is realized when “improvements in efficiency reduce a carrier’s costs of service,” because the Commission assumed that “such reductions result[ ] in reduced rates for shippers and ultimately consumers.”274

The Commission identified “rights, privileges and benefits” as relating only to “ancillary emoluments or fringe benefits—as opposed to the more central aspects of the work itself—pay, rules and working conditions.”275 The Commission based this conclusion upon an earlier protective arrangement crafted by the Secretary of Labor for application to employees affected by provisions of the Urban Mass Transportation Act of 1964, 78 Stat. 302, *i.e.*, Section 10 of the so-called UMTA “Model Agreement”.276 The Commission relied upon the protections established

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272. CSX Corp.—Control—Chessie Sys., Inc. (slip op. at 12). It is difficult to understand how the ICC could have held that the CSXT would not readily have agreed to the Railway Labor Act restriction when it did not know or inquire into the consideration CSXT had obtained in return for that provision.

273. *Id.* The “transaction” here meaning the resulting particular change the carrier proposes to make as distinguished from the “transaction” the agency is authorized to approve by 49 U.S.C. §11343 [now § 11323].


275. *Id.* at 14. Yet Section 11347 requires preservation of “rates of pay, rules, working conditions and other rights privileges and benefits.” *See supra* p. 272.

276. *Id.* at 14-15.
under UMTA even though the U.S. Court of Appeals for the Sixth Circuit had held that Congress had deliberately chosen not to incorporate the UMTA protections, but "directly incorporated protections" of the Rail Passenger Service Act.\textsuperscript{277}

The Commission's reliance on this particular provision in another agreement crafted under a different statute, rather than upon the provisions established by the Secretary of Labor under the Rail Passenger Service Act as required by Section 11347, is puzzling in itself, but is doubly so when one realizes that Section 10 of the so-called "Model Agreement" crafted under Section 13(c) of the Federal Transit Act (formerly the Urban Mass Transportation Act) covers only "fringe benefits". Such a fringe benefit provision is also found in Article I, Section 8 of \textit{New York Dock}. The "fringe benefit" provisions of the two protective arrangements require protection of fringe benefit rights, privileges, and benefits "including without limitation, group life insurance, hospitalization," etc. The fringe benefit provision of Section 8 of \textit{New York Dock} has an entirely different purpose and covers an entirely different subject matter than does Section 2, the provision governing ICC action in \textit{O'Brien} and remanded by the Court in \textit{Executives} for Commission definition. The Model Agreement's counterpart to \textit{New York Dock} Section 2, is that Agreement's Section 3. Yet the Commission, instead of comparing Section 2 with Section 3, for reasons it does not mention, decided to compare the disparate provisions of Section 2 with those of Section 10 and found the fringe benefit protection of Section 10 of the FTA (or UMTA) arrangement to be "compelling evidence" that because Section 10 covers only fringe benefits, so \textit{New York Dock} Article I, Section 2, includes only "so-called incidents of employment, or fringe benefits."\textsuperscript{278} The Commission also failed to note that Section 11347, by requiring adoption of the Secretary of Labor's protections, specifically identifies certain of the "rights, privileges and benefits" which must be preserved: "rates of pay, rules, working conditions and other rights, privileges and benefits under existing collective bargaining agreements or otherwise . . . ."\textsuperscript{279}

It certainly could be argued with reason that an effect of the Commission's resolution of this issue in this manner is that employees' rights, privileges, and benefits, including rates of pay, rules, and working conditions as secured by collective bargaining agreements, need not be preserved if they impede a carrier in making a change which the railroad \textit{claims} will be cost-efficient, even if that change is to occur as long as 33 years after the ICC approval authority upon which it relies.

\textsuperscript{277} Railway Labor Executives' Association v. I.C.C., 930 F.2d 511, 517 (6th Cir. 1991).
\textsuperscript{278} If Section 2 is to cover only fringe benefits and Section 8 already covers fringe benefits, one of those provisions is obviously superfluous.
\textsuperscript{279} Italicics supplied.
The O'Brien Award Decision was followed by three decisions reversing awards favorable to the employees.\textsuperscript{280} The first of these cases reviewed a decision by Arbitrator Harris who, as a New York Dock Section 4 arbitrator, had held that he had no jurisdiction to modify or otherwise affect an earlier New York Dock implementing agreement which the parties had agreed to modify only through the procedures of the Railway Labor Act. The STB cited the ICC's O'Brien Award Decision and held that, in referring to the Railway Labor Act, the parties were merely reciting existing law "which provides that RLA procedures apply to modification of rates of pay and rules (i.e., matters which are outside the scope of modification to CBA's which can be made by an implementing agreement), . . ."\textsuperscript{281} While the ruling on the parties' restriction to RLA procedures was consistent with the ICC's ruling on the same issue in O'Brien, the rationale for the ruling in Harris only served to further confuse just what elements of employment are contained within the "rights, privileges and benefits" that must be preserved under Section 11347.

On July 31, 1996, the STB issued two decisions that further muddled the picture of employee rights under the Interstate Commerce Act, as amended. In the first of these, the Eischen Award Decision,\textsuperscript{282} the STB vacated and remanded the arbitrator's decision which had held that a carrier's proposed merger of two seniority districts was not, standing alone, a "transaction" as that term is defined in New York Dock and that therefore the arbitrator had no jurisdiction to hear the case. The STB noted that integration of operations had already occurred and that the case had arisen "because of the UP's attempt to make an employment change that the railroad says is related to, and necessary to realize the operational benefits from, the 1982 acquisition by UP of MP in Union Pacific—Control." (Italics supplied.) The STB also noted UP's basic concession that no change in operations, services or facilities was involved\textsuperscript{283} and that UP had stated the issue in the case as involving only the question whether a "change in the status of employees of two consolidated railroads—such as

\textsuperscript{280} See cases cited supra note 265.
\textsuperscript{281} See cases cited supra note 265.
\textsuperscript{282} See cases cited supra note 265.
\textsuperscript{283} Union Pac. Corp.—Control—Missouri Pac. R.R. Corp., Finance Docket No. 30000 (Sub-No. 48) (slip op. at 2) (Arbitration Review) (unprinted). The Second Circuit in New York Dock v. U.S., supra, note 182, held that "transaction," as defined in New York Dock, was meant by the ICC "to encompass . . . the same situations that were within the parallel term 'coordination' employed in . . . the Washington Agreement" (609 F.2d at 95), i.e., consolidations of railroad facilities or railroad operations or services performed through such facilities. (See supra, note 69) Only when a railroad contemplates such a "transaction" which "may cause the dismissal or displacement of any employees, or rearrangement of forces" may it serve the required 90-day notice which activates the New York Dock conditions. New York Dock Ry, supra 360 ICC at 85.
the consolidation of seniority districts—which [does not involve a change in railroad operations, services or facilities and which] results in operating efficiencies and economies is a ‘transaction’ under the New York Dock conditions.”

Arbitrator Eischen said “no” and rested that conclusion upon the precedent of Arbitrator N.H. Zumas in a case involving the same legal issue as phrased by UP to Eischen.

Arbitrator Zumas had held himself to be without jurisdiction because the sole object of Seaboard was to rearrange forces—not to take action pursuant to an ICC order “the result of which would be a rearrangement of forces.”

The STB said that it would vacate the Eischen Award because the Zumas award on which Eischen had relied involved “corporate restructuring” and that the UP Control is “no mere corporate restructuring” but “involved the acquisition of control of two large Class I railroads by a third,” and because Eischen allegedly undertook “no analysis of the facts of this case to support his conclusion.”

The Board also placed great weight upon its conclusion that consolidation of seniority districts was “the sort of efficiency improvement that caused the ICC to approve the underlying merger transaction.”

The STB thus rejected Arbitrator Eischen’s reliance on precedent, which held that the moving party in a New York Dock arbitration “must demonstrate a causal nexus between the merger and the alleged transaction (Eischen, 12):

By now, it is firmly established that the moving Party in a New York [Dock] matter has the burden of demonstrating a causal nexus between the proposed action and the ICC’s merger authorization. Typically, railroads have relied upon the principle in avoiding New York Dock arbitration but the present case presents a mirror image of the typical situation. In this case, the Carrier faces the Organization contention that no causal nexus exists between the proposed merger of the seniority districts in May 1993, and the 1982 merger in which the New York Dock conditions were imposed.
Eischen then made the factual finding that the record had demonstrated that UP, as the moving party, had not discharged its burden and therefore, had not demonstrated the existence of a "transaction" under *New York Dock.*

Concurrently with its reversal of Eischen, the STB issued a decision reversing another arbitrator, Preston Moore. Arbitrator Moore had found that the circumstances presented to him and to Eischen were the same:

"An award by Arbitrator Eischen (12-9-94) ... appears to be squarely in point with this case. Therein Arbitrator Eischen stated: 'This dispute concerns Carrier’s attempt to incorporate an existing Union Pacific seniority [sic] into existing Missouri Pacific seniority districts.' The same circumstances exist in this case, with the addition that the Union Pacific is attempting to require some employees who are represented by the IAM to merge with the employees of another carrier and then be represented by BMWE." Since the material circumstances of the two cases were identical and since he saw no error in *Eischen*, Moore also held that no "transaction" existed and dismissed the railroad’s case.

The STB found that Moore had "conducted no analysis at all of the record and made no independent findings of fact" and had "merely relied on the expertise of another arbitrator in a different proceeding with respect to a different transaction." As it had vacated and remanded *Eischen*, so it vacated and remanded *Moore.*

The ICC/STB policy, born with the agency’s issuance of its *DRGW* decision in 1983 and culminating in its decisions affirming *O’Brien* and reversing *Harris, Eischen and Moore,* has placed the railroads in a uniquely dominant position in dealing with their employees’ rights under the Railway Labor Act, their collective bargaining agreements, and their established rules and working conditions.

Although the STB has issued apparently contradictory definitions as

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291. *Id.* at 15. Because the parties in *Eischen* had resolved their dispute, the union moved to dismiss voluntarily the action brought by it against the STB provided the STB would vacate its *Eischen Award Decision.* The STB agreed, the appeal was dismissed, and, the *Eischen Award Decision* was vacated by STB order on February 26, 1997.

292. See cases cited *supra* note 265.


294. *Id.* at 4. If by "transaction" the ICC here means the carriers’ proposed actions, they, of course, were the same: consolidation of seniority districts.

295. See *supra* pp. 275-278.

296. See *supra* pp. 289-295.
to the "rights, privileges and benefits" which the statute requires it to preserve, employees can have little doubt that their contract and other rights traditionally held to be beyond ICC/STB jurisdiction or expertise are now in serious jeopardy. The ICC/STB not only has reversed the traditional policy of non-interference in labor relations matters as established both by itself and by the Congress in crafting its national rail transportation and rail labor policies in the Interstate Commerce Act and Railway Labor Act, but also has expanded the railroads' ability to employ this new policy to rid themselves of certain of their obligations to their employees under the RLA and their contracts.

The STB has established a railroad's right to rely upon its 30-plus year old original merger approval upon which the New York Dock conditions or a predecessor arrangement was imposed as authority to override the rights of the railroad's employees who may not even have been born when the original merger took place. Since virtually all Class I railroads are the products of mergers which have occurred since 1957, and the STB has ruled that a railroad need not identify any particular approved statutory transaction to invoke the "rights override" provisions of Sections 11341(a) and 11347, but may aggregate any number of transactions approved under Section 11343 so long as a claim can be made that some "link" exists between those aggregated authorized transactions and the carrier's proposed actions, every Class I railroad in the United States is now free to invoke the New York Dock conditions as means of modifying its CBA obligations. Once those conditions are invoked and a railroad claims that it will save money (e.g. even the elimination of but one job) by carrying out its proposal, "efficiency" is served and the elimination or modification of employee rights becomes "necessary" in the eyes of the STB. The employees then may be removed involuntarily from the protection of their contract and placed under a different contract with a different bargaining representative or they may be completely deprived of contract protection and any collective bargaining representation depending upon the carrier's discretionary choice in moving its work.

This "necessary" change or elimination of employee rights need no longer be caused by some change in railroad operations, services, or facilities in order to activate the New York Dock conditions. After the Eisen and Moore Award Decisions, a railroad's consolidation of seniority districts and its consequent modification or elimination of employee rights has become a "transaction" without reference to any change in rail-

297. See supra pp. 291-292.
299. See supra p. 290.
300. See supra note 288.
road operations, services or facilities.\textsuperscript{301} The many agreements negotiated by the railroads and unions in collective bargaining in which each side gave up something to achieve limited objectives now have little integrity before the STB should a railroad wish to change or eliminate them without returning the consideration the railroad received from the union. While the railroads may alter or eliminate these contracts in the name of efficiency by simply invoking the procedures of \textit{New York Dock}, the employees have no such option; they remain bound to the terms of their agreements.\textsuperscript{302}

The U.S. Court of Appeals for the District of Columbia Circuit saw the danger in an ICC that was authorized to modify the wording of collective bargaining agreements even if those modifications did not affect "rights, privileges and benefits" secured to employees. In \textit{Executives} that Court held that such modifications must be shown to be necessary "to secure to the public some transportation benefit" "flowing from the underlying transaction" identified in the railroads' basic merger or control application approved under the ICA "that would not be available if the CBA were left in place, not merely to transfer wealth from employees to employer."\textsuperscript{303}

The ICC considered the "necessity" requirement as described by the Court to be met in the \textit{O'Brien Award Decision} by its presumptive conclusion that improvements in efficiency reduce a railroads costs which in itself is a public transportation benefit, because it results in reduced rates for shippers and consumers. The actual quotation is as follows:

\begin{quote}
Improvements in efficiency reduce a carrier's costs of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers. The savings realized by CSXT can be expected to be passed on to the public because of the presence of competition. Where the transportation market for particular commodities is not competitive, regulation is available to ensure that costs efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad thereby benefits from these lower costs, so does the public.\textsuperscript{304}
\end{quote}

Regarding the Court's admonition against transfer of wealth from em-

\begin{itemize}
\item \textsuperscript{301} See supra note 289.
\item \textsuperscript{302} The reference to elimination or modification of contracts is not altogether accurate. The statute and \textit{New York Dock} preserve the employee's rights under the contracts, and it is the individual employee's rights that are eliminated or modified when he or she is removed to another, or to no contract.
\item \textsuperscript{303} \textit{Executives} at 815; see supra p. 288.
\item \textsuperscript{304} CSX Corp.—Control—Chessie Sys., Finance Docket No. 2805 (Sub-No. 27) (slip op. at 13) (Arbitration Review) (unprinted). While this statement may seem theoretically acceptable, the \textit{O'Brien} record contained no evidence on this subject.
\end{itemize}
ployee to employer, the ICC said: 305

The changes sought by CSXT do not appear to be a device merely to transfer wealth from employees to the railroad. Indeed, there does not appear to be a significant diminution of the wealth of the employees. The extent of unionization will not change. The reduction in labor costs will occur through more efficient use of employees and equipment, not by any reduction in current hourly rates and benefits. In order to use employees more efficiently, CSXT will require some employees to work different territories and report to different staging areas. Some employees may have to move. Moving expenses are a benefit under our New York Dock compensation formula.

These statements of the ICC/STB are contrary to earlier statements of the Commission which neither it nor the STB have formally disavowed:

"... [S]ection 2 of New York Dock ... as now written, preserves all existing agreements and, therefore the [RLEA] suggested language is redundant and unnecessary." (Italics supplied.) 306

* * *

"... [The] purpose ... [is] to protect the interests of employees, some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act." (Italics in original.) 307

The ambiguous language of its current statements also reflects a reluctance in that agency to confront the plain language of the governing statute and an intention to establish an ad hoc approach to the STB's statutory obligations. The Court of Appeals had said that changes in contracts could not be made "merely to transfer wealth from employees to employers." The Court said nothing about a transfer of "significant" wealth. And while the ICC appeared to consider the lack of effect upon the "extent of unionization" to be a material factor in the O'Brien case, the employees' complete loss of representation and of their contract in the ATDA/N&W case 308 was not considered material to the decision in that case.

On March 21, 1997, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision on the unions' appeal from the ICC's O'Brien Award Decision. 309 Although the case involved removing CSXT employees from the coverage of Western Maryland, C&O and RF&P agreements to that of the B&O agreements, the Court did not mention

305. Id. (footnote omitted).
306. See supra text accompanying notes 186-188.
307. See supra text and accompanying note 168.
308. See supra pp. 281-282.
that fact but found that the "only contested changes to CBAs are seniority provisions," that it did not involve "rates of pay, rules or working conditions," but only "other rights, privileges and benefits" required to be preserved by section 11347, and presented the issue of whether consolidation of seniority rosters fell within the proscription against change of "other rights," etc. The Court, citing the principle of judicial deference, upheld the ICC's ruling that it did not. The Court however, confirmed ATDA and Executives as holding that 'certain contractual provisions,' that is, those treading upon any rights, privileges or benefits in a CBA, 'are immutable.' 26 F.3d at 1163.

On June 13, 1997, the D.C. Circuit issued its decision in the appeal from the Harris Award Decision. The Court held that the STB's reversal of an arbitrator's interpretation of an ambiguous contract provision was acceptable because in that Courts' opinion, the STB could take into consideration the "impact of their (the arbitrators') decision on the STB's administration of the Act."

In its 1991 order, the Court of Appeals remanded a number of cases to the ICC in order to "enable the Commission to develop a coherent position on the issues." Five years later the Court and the employees still await a response to that order. The ICC/STB decisions rendered since 1991, while clearly setting forth the agency's view that employee statutory and contract rights must give way to efficiency in railroad operations, do not yet state consistent or coherent positions in their ratio-

310. Id. at 1430.
311. Id.
312. American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994).
314. 108 F.3d at 1430.
315. United Transportation Union v. Surface Transportation Board, No. 96-1201, D.C. Circuit (June 12, 1997).
316. Id., Slip op. 10.
317. See supra p. 287.
318. As of this writing, the ICC/STB has uniformly granted each railroad's request to eliminate its obligations under a given collection bargaining agreement, whether the ICC/STB had to do so by affirming or reversing the decisions of its arbitrators. In a recent article in the Journal of Commerce, (June 2, 1997), Frank N. Wilner, an Assistant Vice President of the Association of American Railroads at the time about which he was writing, noted the "zealous pro-management bias" of the ICC in dealing with labor contracts. Writing of a dispute between Guilford Transportation Co., a New England freight railroad, and a member of union he said:

The Interstate Commerce Commission—with a zealous pro-management bias in those days—sanctioned the lease agreement and referred certain labor issues to binding arbitration. When a neutral arbitrator ruled in favor employees—concluding that existing collective bargaining agreements could no more be scrapped than existing contracts for locomotive fuel—the ICC partially overturned the award. A second arbitration ruling—more to the ICC's liking—provided for a single seniority system, smaller train crews and partial elimination of craft distinctions in assigning work.

The ICC approved the second arbitration ruling.
nales. But regardless of the merit of the ICC/STB decisions rendered since October 1983, the basic question remains unanswered: why did the commission abruptly reverse a historic policy that had been reaffirmed only nine months earlier? The ICC never answer that question, nor has the STB.

VI. FROM REGULATOR OF RAILROADS TO REGULATOR OF LABOR

The Interstate Commerce Commission's sudden change of policy cannot be grounded upon Congressional action. No language in the amendments to the Interstate Commerce Act can be cited to support the result reached by the post-1983 ICC/STB decisions. Indeed, as Congress deregulated the industry, it increased and expanded the protections it afforded employees. Nowhere in the legislative history of the 4R Act or the Staggers Rail Act is there any mention of Congressional dissatisfaction with the Commission's lack of jurisdiction over, or expertise in, labor relations matters nor can there be found any indication at all of any affirmative grant to the ICC of jurisdiction to affect CBAs or other rights of employees.

If Congress did not change the Commission's role, why did the ICC take it upon itself to do so? Was it because the ICC believed that, in relieving railroads of the burdens imposed by the Railway Labor Act and collective bargaining agreements, it was carrying out the "spirit" of the Staggers Rail Act to help railroads achieve "revenue adequacy through perceived "efficiencies"? Was it because new ICC Commissioners were appointed by a new Administration with a very different philosophy of government, a philosophy that included within governmental deregulation the deregulation of employers' contractual obligations to their employees? Or was it simply a way of justifying the continued existence of an agency whose raison d'être was being diminished along with the regulations it once administered?

319. See supra text accompanying notes 194-204.
320. See supra, 263-264.
321. As the ICC/STB's statutory duties and responsibilities with regard to regulation of surface transport have dwindled, its involvement in labor matters has increased. Prior to 1987 the ICC refused to review disputes arising under the conditions it imposed. (Bell v. Western Md. Ry. Co., 366 I.C.C. 64, 67 (1981); Brotherhood of Locomotive Engineers v. Chicago N.W.T. Co., 366 I.C.C. 857, 859-861 (1983). Since 1987 when it first decided to review arbitration decisions rendered by arbitrators in Chicago & North Western Transp. Co.—Abandonment, 3 I.C.C. 2d 729 (1987) aff'd sub nom. International Brotherhood of Electrical Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988), it has issued over eighty decisions involving appeals from arbitrators (fourteen in 1996 alone). Many of these cases have also involved appeals from its decisions to the courts. In all but a very few cases the ICC held against the employee—even to the extent of reversing an employee's award rendered by a Public Law Board established under the Railway Labor Act which the 8th Circuit held to be beyond ICC jurisdiction. (Brotherhood of Locomotive Engineers v. ICC, 885 F.2d 446 (8th Cir. 1989)). In cases involving the loss of employees' CBA or
Whatever the agency's reason for assuming the role of labor relations expert, none of its decisions requiring employees to move from one contract and bargaining representative to another, or to none at all, have addressed the effects such moves have upon the rules, working conditions, or other rights, privileges, and benefits of the individual employees involved. Whatever else may be said of the requirements of Section 11347, it is accepted by all that Section 11347 imposes a duty upon the ICC/STB to preserve some type of employee rights. Yet since 1983, the ICC/STB has consistently acceded to whatever changes in employee rights a carrier wished to obtain. It has never required the railroad to adduce evidence of the effects upon employees' rights of moving them from one collective bargaining agreement to another or to no agreement. Nor has the ICC/STB on any occasion compared the agreements to determine whether "rates of pay, rules, working conditions and other rights, privileges and benefits" or even "ancillary emoluments and fringe benefits" have been preserved.

In the end, the ICC/STB has placed the burden of proof upon the employees to demonstrate that they would be deprived of rights unnecessarily because the railroad's proposal would not result in an increase in efficiency of any kind. Such a burden cannot be sustained. However, employees can demonstrate to arbitrators the specific loss of specific rules, working conditions and "other rights, privileges and benefits" under existing CBAs "or otherwise," including "ancillary emoluments and fringe benefits" and this they undoubtedly will do in future arbitrations.

The courts, of course, have been loathe to interfere with the Commission. Thus far, they have accepted the ICC/STB's generalized conclusions of the lack of employee loss of rights or economic injury as the conclusions of an administrative agency expert in the administration of its governing statute. As a result, over a period of fourteen years the Commission has proceeded, one step at a time, from an override of employee rights because the override was written into a trackage rights agreement between railroads (to which labor was not a party) and was specifically approved by the ICC, to the STB's direct approval of the consolidation of seniority districts which moved employees from one contract and bar-

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322. In the O'Brien Award Decision the ICC made no explicit finding as to what "ancillary emoluments or fringe benefits" it held to be preserved by Section 11347, would indeed be preserved in that case.


324. See supra pp. 275-278.
gaining representative to another and which it justified as “necessary” because of the elimination of one job, even though the railroad employer conceded that railroad operations were not involved and it was a straight move to modify employee rights by consolidating seniority districts.325

The individual employee’s loss of statutory and contract rights is a tragedy personal to the employee, but the even greater tragedy is the official adoption by the government of the view that a mere “claim” of a railroad that it may save money by eliminating employee statutory and contract rights is a sufficient “efficiency” to justify the “necessity” of such an act. That determination has created a regime of unprecedented regulation of labor-management relations that has abandoned the traditionally held view that “efficiency of [railroad] service is advanced by the just and reasonable treatment of those who serve.”326 The STB has sanctioned an effectively unilateral right in railroad managements to eliminate employees’ CBA rights. This STB policy conflicts with Congress’ historical policy of protecting employees’ collectively bargained rights in order to safeguard such “collective action [as] an instrument of peace rather than strife.”327

The managements of the railroads certainly should be experienced enough in their dealings with their employees to realize that their insistence upon returning to the laissez faire tactics of the latter decades of the nineteenth century will only recreate in the latter twentieth century and early twenty-first centuries the same atmosphere of employee mistrust and disaffection that existed one hundred years ago. The railroads, even with the sanction of the Surface Transportation Board, cannot be permitted to walk away from solemn contract obligations solemnly undertaken in good faith by the unions representing their employees. The railroads can reasonably expect the unions to continue to fight vigorously to protect the employees’ statutory and contract rights by every available lawful means for as long as it proves necessary to do so. In a labor-intensive service industry such as the railroad industry, everyone, including the shipping public, will be losers if that battle is joined. Railroad actions which evade their collective bargaining agreement obligations and deprive railroad workers of their rights can never provide a foundation for the development of an efficient and responsive railroad industry.

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325. See supra pp. 293-294, 296-297.
326. United States v. Lowden, 308 U.S. at 238; See supra note 72 and accompanying text.
A Comparative Analysis of the Aviation Network within The European Community and the Ad-Hoc Network between the United States and Central America

E. Rebecca Kreis*

TABLE OF CONTENTS

I. History of International Aviation Agreements and Aviation Law .......................................................... 305
   A. History up to 1944 ...................................................... 305
   B. WWII and Post WWII ............................................. 307
      1. International Civil Aviation Agreement ................. 307
   C. Post 1946 Attempts to Create Free Skies .............. 311
      1. Bilateral Aviation Agreements ............................ 311
      2. Alliances .......................................................... 312
      3. Code Sharing ..................................................... 313

II. International Aviation & Aviation Laws .............. 315
    A. Current Status in United States of America ........ 315
    B. Current Status in the European Community: European Liberalization ........................................... 316

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* Ms. Kreis is a joint Juris Doctorate candidate at The Columbia University School of Law, and Master of Law and Diplomacy candidate (M.A.L.D. in Development Economics and Law and Development) at the Fletcher School of Law and Diplomacy. The author would like to thank Tomás Nassar and José Giralt for their support.
1. Air Transport Problems in the European Community ........................................... 316
2. Unification of Air Transport Regulations ............................................................. 318
3. The “Third Package Liberalizations” ...................................................................... 320
C. Current Status in Central America ....................................................................... 323
   1. Aviation History in Central America Prior to the Push for Free Skies ................... 324
   2. The Air Transport Agreement between the USA and Costa Rica .......................... 324
   3. Central American Take-Over of Scheduled Passenger Flights by TACA .............. 326
   4. Cargo Flights in Costa Rica ................................................................................. 327
   5. Bilateral Aviation Treaties between Costa Rica and Foreign Countries .............. 328

III. Possible Changes to Current Aviation Laws ....................................................... 329
   A. United States ........................................................................................................ 330
   B. Europe .................................................................................................................... 332
   C. Latin America ........................................................................................................ 332
      1. Costa Rica ........................................................................................................... 332
      2. A Multilateral Aviation Agreement for Central America .................................. 334

IV. Conclusion ............................................................................................................. 335

Appendix 1: Comparison of Costa Rica’s International Aviation Agreements ............... 337

Appendix 2: International Aviation Agreements Held by Costa Rica .......................... 342

Appendix 3: Memorandums of Understanding Held by Costa Rica ............................ 382

This paper compares the aviation network within the European Community to the network established between Central America and the United States. It begins by looking at the history of aviation law up until World War II, then examines the current international aviation laws in Europe, the United States, and in Central America. With respect to Central America, the paper concentrates on the bilateral aviation agreement between Costa Rica and the United States, signed in 1979.¹ Costa Rica has always been a leader in global aviation liberalization and a role model for Central America. However, after 16 years with the same bilateral “Free Skies” agreement with the United States, the developments for international aviation which the treaty heralded are now not as progressive as they appeared in 1979. By examining the

¹ T.I.A.S. no. 10,894. Effected by an exchange of notes signed at San José, October 20 and November 23, 1983.
changes underway within Europe and the United States, this paper suggests changes which Central America and Costa Rica may be able to implement in order to create aviation policies more relevant to the late 1990's.

**History of International Aviation Agreements and Aviation Law**

Aviation law, like aviation itself, has changed dramatically over the past century. With the advances in technology brought about by World Wars I and II came increasingly specific international aviation laws, both in multilateral and bilateral forms. In the late 1970's, with an increasingly liberal and procompetitive government in the United States, aviation law liberalizations in the form of "Free Skies" bilateral agreements were initiated. Beginning in the late 1980's, and continuing to the current period, the European Union also worked to draw its aviation laws together into a unified, and more liberal, whole.

**History up to 1944**

International air law includes both public and private branches of law, which arise from aircraft navigation rules, aeronautical rules, and international principles. The International Aeronautical Congress of 1889, held in Paris, was the birthplace of international air law. The first international aeronautical organization, the International Aeronautical Federation, was established sixteen years later, and was one of the first forums where these laws were discussed. In 1901, the first scientific work on international air law was announced in Paris, written by a Frenchman, P.A.J. Fauchille (1858-1926), in the *Revue Générale de Droit International Public*, and titled *Le Domaine Aérien et le Régime Juridique des Aérostes*. This publication was followed shortly by the 1902 conference in Brussels on International Law. One of the main topics of this conference was the legal status of free balloons. In 1906, the Convention International Aérienne was drafted by the French, stating that airspace, like the high seas, is open to trade and travel. However, this draft was never approved by any country.²

The first bilateral air agreement in history took place with the exchange of notes between the government of France and the German Reich in Berlin on July 26; 1913. This agreement stated that until a multilateral air convention could be established, both parties would allow, under special conditions, each other's aircraft into their airspace. Due to the air bombardments of World War I, the principle of *cuius solum*, that

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“each state has full and exclusive sovereignty over its territory’s air space,” was adopted immediately after the conclusion of the war. This principle was later included in the Paris Aeronautical Convention of October 13, 1919. As this was the first time that international aeronautical norms and principles were formulated, this convention may be seen as the “cradle of international air law.” These norms included general principles for the regulation of air navigation, the nationality of airplanes, certification of airplanes as airworthy, certificates of competence for pilots, rights of passage over the territories of the signatories and restrictions on military airplanes, rules which must be observed in flight, restrictions on air routes, promotion of civil aviation for the contracting states, and mechanisms for the settlement and resolution of disputes between parties. At the same time, the International Convention on Air Navigation (CINA) was formed, which served as the governing international air organization until 1943.

Due to a few clauses contained in the convention which indirectly discriminated against neutral countries and the losers of the first World War, the convention was not ratified by Russia or by the United States of America. This created difficulties for negotiating developments in international air law. The first air agreement to concern Central America was the Ibero-American Convention on Air Navigation (Convención Ibero-Americana sobre Navegación Aérea) written in Madrid, and signed on November 1, 1926 by Spain, Costa Rica, Mexico, Paraguay, and the Dominican Republic. This agreement was virtually identical to the Paris convention, with the exception of the elimination of the controversial articles.

The next convention concerning international air law also concerned Central America. The Convention on Trade Navigation (Convención sobre Aviación Internacional) was signed on February 20, 1928 by eleven Latin American states, including Costa Rica. This convention was prepared specifically to regulate private commercial aviation in the Americas, thereby defending the Latin American states against the unrestricted expansion of United States airline routes within the western hemisphere.

On October 12, 1929, the Warsaw Aeronautical Convention on inter-

3. Id. at 18.
5. Id.
6. Id.
7. ENCYCLOPEDIA, supra note 2, at 18.
8. Giralt, supra note 4, at 3.
9. Id.
10. ENCYCLOPEDIA, supra note 2, at 18.
national aircraft transport, prepared by CINA, was signed. This convention established multilateral regulations with respect to the limits of responsibility for airlines, and the standardization of transportation documents. Next, the conference in the Hague produced the “Hague Aeronautical Convention on Sanitary Conditions of Air Navigation” on April 12, 1933. This convention was replaced by the Washington Convention of December 15, 1944. On May 29, 1933, the Rome Aeronautical Conventions on the Protection of Aircraft and on the Unification of Some of the Provisions on Damages Caused by Aircraft to Third Persons on the Ground were signed. The latter of these was replaced by the Brussels Protocol of November 30, 1938. The Brussels convention of November 29, 1938 was the last agreement signed before World War II, and concerned assistance and salvage of aircraft at sea; however this agreement was never enacted as it was not ratified by a sufficient number of signatories.

Of these pre-war conventions, a few are still in force. These are the Warsaw Convention, which was modified three times, May 27, 1947, June 7, 1954, and May 21, 1961; the Hague Convention; and the Rome Convention, both modified November 28, 1955.

**WWII and Post WWII**

From 1926 to 1946, the International Technical Committee of Experts in Aeronautical Legislation, under the auspices of the League of Nations, acted as promoter for, and governing body over, international air law. Its duties were taken over in 1947 by the creation of the International Civil Aviation Organization (ICAO).

**International Civil Aviation Agreement**

The International Civil Aviation Organization was created during World War II when England and the United States started negotiations for the creation of a new aeronautical convention to replace the Paris Convention of 1919. The United States wanted the internationalization of air routes, due to the potentials for air transportation created by the war. The United States, with the hope of using its military aircraft for civilian purposes after WWII, hosted the International Civil Aviation Conference in Chicago from Nov. 1 to Dec. 7, 1944. Fifty-four States attended, with the noticeable absence of the USSR, which did not participate due to the presence of Portugal and Spain.\(^{14}\)

\(^{11}\) *Id.*  
\(^{12}\) *Id.*  
\(^{13}\) *Id.*  
\(^{14}\) *Id.*
The negotiating states came with different expectations. Consequently, the resulting treaty was both extraordinarily flexible and lacking in clout. The United States wanted to pass a clause giving "the privilege of friendly passage accorded to nations." This would have opened the airspace of the world to those powers with the ability to establish a global network of air routes. France opposed this clause. The four treaties which came out of the convention strove to provide a compromise for all nations. These four treaties include:

- the Treaty on the Transit of Air Services, which establishes the first two a provisional civil aviation treaty, which allowed the creation of the Provisional Civil Aviation Organization on August 15, 1945, two years before the ICAO was established;
- the Convention on International Civil Aviation, also known as the Chicago Aeronautical Convention of 1944, which served to replace the Paris Convention of 1919 and the Havana convention of 1928;
- the Treaty on the Transit of Air Services; and
- the Treaty on International Air Transportation.\textsuperscript{15}

The Treaty on the Transit of Air Services, a provisional civil aviation treaty which establishes the first two freedoms, has been ratified by over 100 states. The Treaty on International Air Transport, which establishes the "five freedoms" however, has only been signed by eleven states, including Costa Rica, but not the United States.\textsuperscript{16} Two other documents which came out of the Chicago Convention were a model bilateral agreement for exchange of routes and services which has been used as a model around the world, and a set of fifteen technical annexes.\textsuperscript{17}

The freedoms of the air which the signatories defined as law covering air transport of people, machines, and mail. The first two consider technical issues, the rest, commercial. In total there are eight freedoms, although not all are adhered to by all states, and a few, especially the last four, are contentious. The first two are adhered to by all signatories of the Treaty on the Transit of Air Services, while the rest are mainly established in bilateral agreements:

- **First Freedom** - Flight over the territory of another state without landing;
- **Second Freedom** - Landing in the territory of another state for technical reasons;

\textsuperscript{15} Id.

\textsuperscript{16} Other signatories include Bolivia, Burundi, El Salvador, Ethiopia, Greece, Honduras, Liberia, the Netherlands, Paraguay, Sweden, and Turkey. Sweden withdrew in 1983. The ICAO states the document is still in force for those who wish to abide by it. See Joan M. Feldman, *On Getting From Here to There (International Aviation Structure is Becoming Obsolete)*, AIR TRANSP. WORLD, October 1995, at 24.

\textsuperscript{17} Giralt, supra note 4, at 4.
• **THIRD FREEDOM** - Transport of commercial traffic from the state of origin of the operator to the territory of another state;

• **FOURTH FREEDOM** - Transport of commercial traffic from the territory of another state to the state of origin of the operator;

• **FIFTH FREEDOM** - The right of the operator of one state to transport commercial traffic between two other states along a route that has the origin or final destination in the territory of the state of the operator;

• **SIXTH FREEDOM** - The transport of commercial air traffic between two other states through the property of the operator;

• **SEVENTH FREEDOM** - The transport of commercial air traffic entirely outside the territory of the operator; and

• **EIGHTH FREEDOM** - The transport of commercial air traffic entirely inside another state, known as "cabotage."\(^{18}\)

The technical annexes are sets of standards and recommended practices, and are, in effect, annexes to the ICAO convention, applicable to all territories of ICAO member states. The original annexes include:

• Personnel licensing - indicating the technical requirements and experience necessary for pilots and air-crews flying on international routes;

• Aeronautical maps and charts - providing specifications for the production of all maps and charts required in international flying;

• Rules of air - including general flight rules, instrument flight rules, and right-of-way rules;

• Dimensional practices - providing progressive measures to improve air-ground communications;

• Meteorological codes - specifying the various systems used for the transmission of meteorological information;

• Operation of aircraft in scheduled international air services - governing flight preparations, aircraft equipment and maintenance, and in general, the manner in which aircraft must be operated to achieve the desired levels of safety on any kind of route;

• Aircraft nationality and registration marks;

• Airworthiness of aircraft;

• Facilitation of international air transport - simplifying customs, immigration and health inspection regulations at border airports;

• Aeronautical telecommunications - dealing with the standardization of communications systems and radio air navigation aids;

• Air traffic services - dealing with the establishment and operation of air traffic control, flight information and alerting services;

• Search and rescue - dealing with the organization to be established by states for the integration of facilities and services necessary for search and rescue;

• Aircraft accident inquiry - dealing with the promotion of uniformity in the notification, investigation of, and reporting on aircraft accidents;

• Aerodromes - dealing with the physical requirements, lighting and marking of international aerodromes; and

\(^{18}\) *Id.* at 5.
Aeronautical information services - dealing with the uniformity in methods of collection and dissemination of aeronautical information.\textsuperscript{19}

In addition, the ICAO plays a role as a governing body over all of the member states.\textsuperscript{20} Individual bilateral and multilateral agreements as well as contracts concluded by member states or airlines operating in those states must be registered with the ICAO. The ICAO also keeps copies of all national aviation laws.

There are two weaknesses in the ICAO. First, the ICAO can not mandate or enforce any regulations or agreements. Its job is mainly to develop and to recommend the implementation of international technical standards. The signatories of the convention are then required to impose the standards on their airlines. This does not always happen.\textsuperscript{21} Second, the ICAO has little impact on international airline economic regulation, due to a schism between delegates. This task has fallen to individual governments, in part due to a 1946 meeting in Bermuda.

However, these weaknesses have not kept the ICAO from evolving. Since 1946 there have been three more additions made to the annexes, and one amendment made to the convention. The new annexes include:

- a 1971 regulation overseeing noise reduction and pollution caused by the operation of airplanes;
- regulations concerning air security; and
- a 1984 regulation concerning the transport of dangerous materials on board airplanes.

An amendment to the convention was also proposed in 1984, and was unanimously adopted by the assembly. This amendment stated that every State must "refrain from resorting to the use of weapons against civil aircraft in flight and ... in cases of interception, the lives of persons on board and the safety of the aircraft must not be endangered."\textsuperscript{22}

After the ICAO convention, there were many more international agreements signed, including the Geneva Convention of 1948 in the International Recognition of Rights Aboard Aircraft, signed on June 19, 1948; the 1952 Convention on Damages Caused to the Surface of the Earth to Third Persons Caused by Alien Aircraft, which replaced the Rome Convention of 1933; the Hague Protocol of 1955, along with recommendations to settle issues arising from chartering, renting and exploiting of aircraft, and to examine the possibility of unifying private international air law and regulating international air disputes; the Con-

\textsuperscript{19} ENCYCLOPEDIA, supra note 2, at 366.
\textsuperscript{20} Id.
\textsuperscript{21} Joan M. Feldman, Navigating Change; Chicago Convention Fete, AIR TRANSP. WORLD, Oct. 1, 1994, at 77.
\textsuperscript{22} ENCYCLOPEDIA, supra note 2, at 366.
viction on Crimes and Other Offenses Committed on Board an Aircraft, adopted in Tokyo on October 14, 1963; the Hague Convention on Combating Unlawful Seizure of Aircraft, signed on December 16, 1970, which supplanted the Tokyo agreement; the Guatemala Air Protocol of March 8, 1978; a revision of the Warsaw Convention of 1929; and the revised Hague Protocol of 1955. In addition, there have been many regional aeronautical agreements to aid the integration process.23

**POST 1946 ATTEMPTS TO CREATE FREE SKIES**

After 1946, and following the Bermuda One Agreement,24 world aviation law turned to bilateral aviation agreements to establish freedom of the skies for individual countries. Later, a new approach was taken concurrent with the existing bilaterals; the formation of alliances and the use of code sharing between airlines of different nations.

**Bilateral Aviation Agreements**

The Chicago Conference of 1944 made an attempt to establish a multilateral framework for commercial air transport services. However, due to conflicts primarily between the United States and the United Kingdom over the regulation of the first five air freedoms, no multilateral conclusion was reached. The United States wanted a multilateral guarantee of the five freedoms with no restrictions of frequencies or capacities. The United Kingdom was in favor of strict regulation. The agreements reached were discussed above; the agreements which were not reached, especially those concerning the fifth air freedom commercial traffic, were left to bilateral agreements. The dispute over the fifth air freedom rights between the United States and the United Kingdom finally was resolved in the Bermuda One agreement. This agreement set a precedent for bilateral negotiations world wide, and was widely used as a model for post-war route exchange agreements. However, as countries tried to balance the numerous points needed to create a bilateral agreement, the outcome often was unfairly skewed in the points of access or carrying capacity granted to each country.25

Britain canceled the Bermuda One agreement in 1977, and subsequently negotiated the Bermuda Two, signed on July 23, 1977. This

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23. *Id.* at 18

24. The Bermuda Conference held in 1946 was a means for the United Kingdom and the United States to reach an agreement over international air transport services. The need for a bilateral agreement to establish regulations concerning capacity, frequency, fares, and rates, as well as the fifth air freedom commercial traffic rights between two of the worlds strongest nations, resulted in a template for others to follow. See Nawal K. Taneja, *Airlines in Transition* 42-43 (D.C. Heath & Co., 1984).

25. *Id.*
agreement was a successful attempt by the British to remove some of the excess capacity of United States carriers in the United Kingdom. The agreement made it easier to review and change capacity of carriers. Still, there continued to be tension over how liberal the air transport agreements should be, coupled with a desire by the United States to have greater freedom of the skies. The United States pushed for free skies continuously, culminating its previous efforts with the passage of the Airline Deregulation Act of 1978. This act removed regulations on United States aircraft, establishing free entry into the market and removing price regulations. The goal of the act was to open the industry to competition and thereby increase economic efficiency and service. It marked a commitment to freedom of the skies, and was the impetus for several highly liberal bilateral agreements which were signed in the late 1970’s, including the 1979 agreement with Costa Rica.

Alliances

Alliances are one solution to the problems arising from restrictive domestic aviation policies. British Airways and American Airlines demonstrated this clearly in their recent alliance of June 12, 1996. This move gave the pair 11.3% of the traffic of all American, Asian, and European air carriers. They now dominate the major routes between the United States’ east coast and Europe, as well as those between eastern Canada and Europe.

Before liberalization took place in the European Community, there were two niches in the air transport world which accommodated the major flag carriers and independent regional airlines. The larger companies focused on frequent trips on well charted routes, while the smaller independent airlines were free to identify newly emerging markets. With deregulation, however, both sides saw that they could benefit from relations with the other. The major airlines could guarantee access to their hubs, allowing the creation of separate profit centers, especially if financial investments were made. The regional airline would, in return, be able to maintain its position in the increasingly congested hubs, and benefit from the agreement through greater financial credibility, increased marketing ability, and assurance that its aircraft would be fully employed.

Richard Heidecker, Managing Director of DLT, a regional airline allied with Lufthansa, remarked: “It is essential for the regional airline to

forge an alliance with a major partner. The idea is to build up a separate regional-airline profit center. Our belief is that the best way to do that is to leave the decision making to the regional partners. [This] system provides more motivation to the staff, because at the end of the day, it will be down to them whether we keep flying these routes. And on top of our own ideas and skills, we still have Lufthansa to back us up on the aspects that do not concern the day-to-day flight operations.”

Air France adds that an affiliated airline can gain from increased public awareness of their operations when a customer uses their airline for a connecting flight.

The system used in these alliances is generally a “wet-lease,” where the flag carrier buys capacity on the regional’s planes, taking any profit or loss incurred by the services. Regionals have also diversified into such sectors as aircraft leasing, ground handling, third-party Flight-crew handling, and airport management.

**Code Sharing**

A different form of alliance used frequently is “code sharing,” the use of an airline’s two letter designation on a partner’s flight. The result is the equivalent of a on-line connection, and therefore a more favorable computer display when consumers look to purchase their tickets. There are many benefits from these links. The first and foremost is access to restricted markets. Following this are increased revenues, lower costs, new traffic, and “seamless” service.

Code sharing has opened the United States market to foreign competitors. However, a Canadian economist, Doug Wilson, points out that before deregulation, there were several aircraft interchanges and pools, similar to code sharing. After deregulation, these were discontinued, as airlines focused on expanding their own operations. Now they are returning.

The United States Department of Transportation (DOT) has concerns over the possible negative impact on competition which code sharing may create. DOT, nonetheless, is a major sponsor of the practice among governments, likely due to its lack of success in opening the skies of major countries. Code sharing may be the next best way, after a bilateral or a multilateral free sky agreement, to gain access abroad. As of mid-1995, DOT had approved over 60 code sharing agreements.

Problems exist with code sharing in that little to no data is available concerning the profits generated. It is difficult for the regulating bodies,

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29. Id. at 108.
30. Id. at 109.
32. Id. at 26.
33. Id.
like the United States DOT, to know if alliances enhance or reduce competition, create or reduce access, increase traffic for carriers or only rearrange existing traffic, and if alliances make or lose money for the airlines.\footnote{Id.} To deal with the surge in code sharing, DOT created a policy for the United States which has had repercussions abroad, and has been widely imitated. This policy states that when a foreign carrier wishes to form an alliance with a United States airline, the foreign carrier must have underlying rights to the United States routes proposed. As a result, there is now the need to negotiate with the foreign carriers to create provisions to accommodate extensions beyond United States gateways. Other nations have followed suit, placing the same restrictions on foreign countries, complicating matters greatly.\footnote{Id. at 31.}

Moreover, DOT's policy to require "statements of authorization" for airlines which want to codeshare could also be used as a trade barrier. Codesharing would be an effective way for the United States Government to switch to a multinational arena. It could write a global standard on codesharing requirements and opportunities. Carriers of nations which signed such an agreement would have the ability to codeshare with any other carrier of a signatory of the agreement without limitations. This agreement in turn could set the stage for more multinational agreements on more difficult topics.\footnote{Michael Goldman & Cyril Murphy, \textit{Multilateral Age Approaches}, \textit{Airline Bus.}, Feb. 1, 1994, at 44-47.}

Additionally, DOT has provided foreign airlines immunity to the United States anti-trust laws, as a means to entice foreign countries to sign open-skies agreements. The first example of this tactic was the Northwest-KLM alliance, stemming from the United States-Netherlands bilateral. However, this action too has provided complications for the United States, as every existing alliance then claimed that it also needed immunity. Non-United States airlines whose governments have signed open-skies deals have very compelling arguments, based on precedent.\footnote{Feldman, \textit{supra} note 31, at 31.} Other airlines which have benefited from anti-trust protection include UAL Corp.'s United Airlines and Germany's Lufthansa, Delta Airlines and Sabena, Swissair, and Austrian Airlines, and most recently, American Airlines and British Air.\footnote{Dwyer, \textit{supra} note 27, at 51.} Exemption from anti-trust laws allows greater market share, and greater returns to scale, making the alliances more profitable than independent standing.
INTERNATIONAL AVIATION & AVIATION LAWS

The current international aviation laws are as much reflections of history as the trends in international politics current when the laws were written. As the world undergoes the changes inherent to the end of the Cold War, there is expectation for more liberal and cooperative international aviation laws.

CURRENT STATUS IN THE UNITED STATES OF AMERICA

Current policy in the United States concerning aviation is to pursue “Open Skies.” The United States DOT has defined open skies for the European Community as:

- Open entry on all routes;
- Unrestricted capacity and frequency on all routes;
- Unrestricted route and traffic rights, i.e., the right to operate service between any point in the United States and any point in the European country;
- Double-disapproval pricing in third and fourth-freedom markets, and
  - in intra European Community markets, price matching rights in third-country markets;
  - in non-intra -European Community markets, price leadership in third country-markets to the extent that the third and fourth freedom carriers have it.
- Liberal charter arrangement;
- Liberal cargo regime;
- Conversion and remittance arrangement (Promptly and without restriction);
- Open code sharing opportunities;
- Self-handling provisions;
- Procompetitive provisions on commercial opportunities, user charges, fair competition and intermodal rights; and
- Nondiscriminatory operation of and access for CRSs.39

What this definition is conspicuously missing are regulations liberalizing airline ownership, control, or cabotage. These elements are key to true competition, but DOT’s silence on these issues arises from domestic political problems, including lobbying from the major airlines. These issues should have been included in the definition. Ironically, the new liberalizations in the European Community cover most of the points on the United States agenda for free skies, including the three overlooked by DOT, with the exception of price setting based on market demand, and open entry on all routes.

Within the United States’ pledged support of free skies, over several years the United States has turned down offers from Scandinavia, the

Netherlands, Singapore, Switzerland, and Germany - either because the country was “too small” or because, like Germany, they would not agree to some of the United States’ demands.\textsuperscript{40} In general, the United States’ attempt to create free skies globally is stalled. The countries in Europe which the United States would like to have sign a liberal bilateral aviation treaty are unwilling because the United States insists upon several contentious points, such as price deregulation. Asia too is hesitant to sign. As a result, while there has been some progress on cargo agreements, passenger air transport is much where it was at the end of World War II.\textsuperscript{41}

**Current Status in the European Community: European Liberalization**

Current changes in the structure of international relations in Europe have brought about changes in the European aviation structures. With the birth of the European Community have come measures to achieve unified regulation and to create some form of freedom of the skies for member countries. These measures have also tried to address some of the larger air transportation problems in the European Community.

*Air Transport problems in the European Community*

**Slot-Allocation**

One issue that is a major problem in the European Community is slot-allocation. “Slots” are the times designated to airlines for take off and landing. In allocating slots, consideration must be given to air traffic control capacity, runway capacity, and building capacity. Airports are congested, and the slots available are minimal. The slots are allocated on a basis of “historical precedence.” This means that take off and landing spots, once they are assigned to an airline, remain the “property” of that airline as long as they wish to renew their application for possession. Up to 80\% of the slots in many of Europe’s most congested airports, such as London’s Heathrow, or Paris’ Charles de Gaulle, are awarded on this principle. For example, British Midland Airways has 13\% of London’s Heathrow Airport slots.\textsuperscript{42} With the beginning of airline liberalization in the European Community, there were calls from abroad to reform this method of slot-allocation. Richard Branson, for example, the head of Virgin Atlantic, called the “grandfather doctrine” absurd.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{40} Id. at 59.
\item \textsuperscript{41} Id.
\end{itemize}
pean Community Commission (ECC) did assess the situation, and decided that as the system was functioning well, there was no need to change it. However, some bureaucrats in the ECC would like to see the system reformed. When the ECC examined the slot system initially, it determined that it restricted free market access and entrance, and was therefore illegal. However, "pragmatism ruled" and a group exemption was granted to make it legal.\textsuperscript{44}

In December 1990, a draft regulation proposed by ECC Commissioner of Transport Karel van Miert, was adopted to create common rules for the allocation of slots in crowded European Community airports. This regulation provided for:

- governments to appoint traffic coordinators responsible for allocating slots at congested airports;
- increased transparency in the allocation of slots among airlines by making available for consultation all the information on which slot-allocation decisions are based; and
- the creation of pools of available slots, allocating at least 50% of the pool to new entrants, giving up slots to new entrants under specific conditions by certain holders if the pools proved inadequate, and reciprocally allocating slots when new routes were created.\textsuperscript{45}

In addition, the Council requested the ECC to create a code of conduct for slot-allocation predicated on the principle of nondiscrimination based on nationality.\textsuperscript{46} The European Community’s concept of slot-confiscation has the European Community airlines worried; the International Air Transit Authority (IATA) argues that this act would spell disaster for scheduling. IATA is also worried by the ECC’s desire to distance the flight schedulers from the airlines. The ECC wants to make flight schedulers answerable to their government, and not dependent on the airlines. Without slot-allocation, however, the need for increased code sharing would be mitigated.

Additional Problems

There are other problems in the European Community, which may or may not be solved through liberalization. Airport congestion, air traffic control (ATC), and competition from high speed trains are three such areas. ATC in Europe is currently fractured, each country maintaining control over their own airspace. While most agree that the system needs to be unified, it is more of a political problem than a technical problem; states do not want to give up sovereignty over their airspace. In addition,

\textsuperscript{44} Id. at 66.
\textsuperscript{45} Id. at 65.
\textsuperscript{46} Id.
issues remain over state aid to loss-making European Community airlines, and the question of whether the European Community should take over the formation of bilateral agreements for the countries which are members.

Unification of Air Transport Regulations

Joint Airworthiness Requirements

While the European Community is still deciding if it should negotiate bilateral aviation agreements for its member countries, one step which has been taken to unify the air transport regulations in Europe is the harmonization of maintenance standards. Known as Joint Airworthiness Requirements (JARs), these air transport standards apply to aircraft constructed and operated internationally, and have been evolving since the Chicago Convention of 1944.\textsuperscript{47} However, only the United States, with FARs, and the United Kingdom, with BCARs, have developed detailed codes of practice. The rest of the world generally chose between following the United States or the United Kingdom, although some countries amend the codes to suit their needs.

The first move toward creating an international standard of airworthiness came in the early 1960’s when France, Britain and the United States entered into an agreement to develop a supersonic jet. The United States subsequently withdrew from the project, but France and Britain went ahead with the construction, and as construction of the jet proceeded in both countries, air standards and requirements were developed jointly. The same process occurred for the development of the Airbus in

\textsuperscript{47} As of 1992, the current state of the JARs was:

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Code</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Large a/c design</td>
<td>JAR25</td>
<td>Complete</td>
</tr>
<tr>
<td>Engine design</td>
<td>JAR E</td>
<td>Complete</td>
</tr>
<tr>
<td>APU design</td>
<td>JAR APU</td>
<td>Complete</td>
</tr>
<tr>
<td>Very light a/c design</td>
<td>JAR VLA</td>
<td>Complete</td>
</tr>
<tr>
<td>Equipment</td>
<td>JAR TSO</td>
<td>Complete</td>
</tr>
<tr>
<td>Commuter a/c</td>
<td>JAR23</td>
<td>Spring ’92</td>
</tr>
<tr>
<td>Helicopter design certification procedures</td>
<td>JAR21</td>
<td>work in hand</td>
</tr>
<tr>
<td>Operators maintenance</td>
<td>JAR-OP 1/3</td>
<td>Chapter 7 to be finalized</td>
</tr>
<tr>
<td>Certifying staff qualifications</td>
<td>JAR65 (E)</td>
<td>preparation</td>
</tr>
<tr>
<td>Airworthiness directives</td>
<td>JAR39</td>
<td>Not begun</td>
</tr>
<tr>
<td>All Weather Operations</td>
<td>JAR AWO</td>
<td>Complete</td>
</tr>
<tr>
<td>Propeller design</td>
<td>JAR P</td>
<td>Complete</td>
</tr>
<tr>
<td>Sailplanes</td>
<td>JAR22</td>
<td>Complete</td>
</tr>
<tr>
<td>Maintenance organizations</td>
<td>JAR145</td>
<td>Complete</td>
</tr>
<tr>
<td>Light a/c (not commuters)</td>
<td>JAR23</td>
<td>Complete</td>
</tr>
<tr>
<td>Helicopter design</td>
<td>JAR29</td>
<td>Started ’91</td>
</tr>
<tr>
<td>Ops (commercial air transport)</td>
<td>JAR-OPS 1&amp;2</td>
<td>in preparation</td>
</tr>
<tr>
<td>Ops (other than public transport)</td>
<td>JAR-OPS Pt. 2</td>
<td>begun ’92</td>
</tr>
<tr>
<td>Recreational a/c maintenance</td>
<td>JAR91</td>
<td>not begun</td>
</tr>
</tbody>
</table>

Arthur Reed, \textit{JARS at Hand, AIR TRANSP. WORLD}, June 1, 1992, at 44-45.
the late 1960's and early 1970's. Here, Germany, Britain, and France developed JARs to address, initially, large transports, their engines, and their components. By 1989, the scope of the JARs had been widened to include operational requirements. The ECC adopted a regulation in December of 1991 to incorporate all existing JARs into European Community law. The regulation came into effect on January 1, 1992. It is expected that all future JARs will also be incorporated.

JARs are not only applicable to the European Community states. JARs are developed and enforced by members of the Joint Aviation Authority (JAA), who are all members of the European Civil Aviation Conference, (ECAC), established in 1955 with the support of the ICAO. There are 19 member states of the JAA. Each of these 19 states sends a representative to form a committee to oversee the work of the JAA. The FAA is responsible for JARs concerning airworthiness, design and maintenance, and operations. It does not regulate air-traffic control, accident investigation, or airfield licensing. The FAA committee delegates the bulk of its work to an executive board consisting of five of its members: France, Germany, the Netherlands, Britain, and Sweden. The first four were chosen because their countries have adopted JARs as their sole codes, the latter was chosen as a representative of the smaller countries. Chairmanship rotates annually among the primary four representatives. The final authority on policy decisions is the JAA board, composed of the general directors of aviation of the 19 member countries.

Aircraft must receive JAA certification for the JAA standards to apply, but the authority plans to review additional national requirements for most larger aircraft to create a commonly accepted safety standard which will meet the intentions of the JAR for larger aircraft design (JAR25).

The JAA and the United States Federal Aviation Association (FAA) cooperate to reduce differences between the FAA and JAA regulations. The head of Britain's operating standards, John Saul, notes that many JAA FARS are much more comprehensive than the safety standards established by the FAA. "From a comparative study of FARS, ICAO Annex 6 Part 1 and existing national operating regulations within JAA states, the finding was that many areas were inadequately covered by [existing] United States regulations." How to deal with such differences remains an issue; negotiations between the FAA and JAA continue.

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48. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the former Yugoslavia. Id. at 44.
49. Id.
50. Id. at 44-45.
51. Id. at 46.
The "Third Package Liberalizations"

The European Community has been introducing changes to its air traffic laws over the past decade. The most recent change is the European Community's "Third Package" of liberalization rules, introduced in February of 1993. Before the Third Package was introduced, the then European Community Transport Commissioner, Karl Van Miert, stated that the scheduled liberalization of aviation in Europe was "a real revolution" slated to be in full swing by the end of 1992. The system which will replace the aviation norms established by the Chicago Convention is a large, single market with more competition than originally available. The policy in the European Community will not be complete deregulation, as in the United States. Instead, there will be competition rules, with the hope that such rules will prevent the domination of the market by a few big carriers. This, according to the Transport Commissioner, should prevent the smaller routes from losing their viability.

The "Third Package Liberalizations" Successes

The Third Package consists of measures designed to liberalize aviation in the European Community. Rules for air carrier licensing, long the prerogative of individual states, have been codified for the whole of the European Community. Licenses continue to be delivered by individual states, but in accordance with the new regulations, which were developed to be community-wide, nondiscriminatory, and generally more liberal than the previously existing rules. The new rules will be coordinated through the JAA. The main accomplishment of the renovated air carrier licensing rules is the ability of citizens of one European Community country to establish airlines in another European Community country, as long as financial and safety standards are met.

As a result of the Third Package, market access has also changed to a more liberal format. When a carrier is licensed as an European Community carrier, the airline is able to fly any route within the European Community, including all intra-European Community third, fourth, fifth, sixth, and seventh air freedoms international routes. Eighth air freedom flights, domestic cabotage, were not scheduled to come into effect until this year. However, a compromise was reached until then, because "consecutive cabotage" was allowed. This meant that if an international carrier wanted to fly another country's domestic route, it had to add this route as a leg of an international flight into the foreign country. Capacity on such

53. Id.
54. Id. at 64.
domestic flights was limited to 50% of seasonal capacity on the international leg of the flight. Both of these restrictions ended on April 1st of this year, when "stand alone" cabotage took effect. Three European Community members, Britain, Ireland, and the Netherlands, wanted stand alone cabotage from the onset of the agreements, but the requests for an extended transitional period from France, Spain, Germany, and Italy were honored.\footnote{Id. at 67.}

Finally, the Third Package also liberalizes schedules for fares and rates. There is now complete pricing freedom for European Community airlines on intra-European Community cargo flights and for chartered flights. Scheduled international passenger flights within the European Community will be protected from fares that are "excessively" high or "predatorily" low. In either case, a European Community country can challenge a fare by withdrawing it, known as "single disapproval." The withdrawal will stand as long as it is not challenged by another European Community country involved in the fare, or by the ECC, known as "double disapproval." Protest must be lodged within fourteen days, and disputes between European Community states are resolved by the ECC.\footnote{Id.}

The "Third Package Liberalizations" Shortcomings

For all of these liberalizations, the Third Package fails to address a few serious problems in the current European Community air transport system. First, it does not resolve the problem of slot-allocation discussed above. There have been proposals drafted on this subject, suggesting the confiscation of slots from incumbent airlines and handing them over to new market entrants.

Second, the Third Package does not open all European Community routes to all European Community airlines. Instead, it gives member states, with the approval of the ECC, the right to limit access to routes where problems of congestion or environmental stress can be proven, or where other modes of transport are present and providing sufficient levels of service.

Third, the Third Package does not address aeronautical relations with respect to the applicability of European Community competition law to air routes to and from the European Community, or the applicability of European Community law to the field of traffic rights, with countries located outside of Europe. To address these issues, the European Community is considering negotiating bilateral agreements on behalf of all
member states.\textsuperscript{58}

Finally, the Third Package does not address external aviation relations with non-European Community countries located within Europe. With the creation of several new nations in the past decade, the situation has become extremely complicated. One step that the European Community has taken to address this issue is to sign the European Economic Area Agreement with the seven signatories of the European Free Trade Association (EFTA) countries.\textsuperscript{59} This agreement created a free-trade area between the European Community countries and the EFTA in 1993, making a liberalized air-transport zone which embraced the Third Package. In addition, the European Community has signed "general association agreements" with the former Czechoslovakia, as well as Hungary and Poland. These agreements ensure that mutual market access conditions should be dealt with by special transport agreements negotiated after the general association agreements came into force.\textsuperscript{60}

Consequences of the "Third Package Liberalizations"

The consequences of the Third Package have been favorable for liberalization. As of January 1, 1995, \textit{Air Transit World}, noted several trends resulting from it. First, some fares are down and spread over a wider range of products, leading to lower yields. This has led airlines to seek better means of yield management. Second, there is increased competition, with new routes open and increased frequencies on existing routes. Third, there are fewer airlines than expected, although there has been an increase in numbers. Fourth, the true impacts of the liberalizations have been occluded by recession, and often are hindered by decisions of the states, most notably France, to nationalize airlines. For instance, there has been some conflict over France's bailout of Air France (to the tune of $3.6 billion), because it is seen as distorting competition in the marketplace and violating the Treaty of Rome.\textsuperscript{61} With this infusion of cash, liberalization faces a set back. Although airlines from Holland and Britain both filed suit claiming unfair competition, this action may be seen as precedent for future infusions of cash into failing national airlines.

The Third Package is viewed by many as only a starting point. For example, Herman De Croo, former Belgian Transport Minister, and chairman of the \textit{Comite des Sages}\textsuperscript{62} thinks that liberalization in the Euro-

\textsuperscript{58} As stated above, however, this idea has met resistance.
\textsuperscript{59} The EFTA includes Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland. Reed, \textit{supra} note 55, at 67.
\textsuperscript{60} Id.
\textsuperscript{61} Bruce Crumley, \textit{Liberalization After Two Years; the Government}, \textit{Air Transp. World}, January 1, 1995, at 45-46. This article provides an overview of these four points.
\textsuperscript{62} A group of twelve independent experts appointed by the European Community Com-
pean Community is on track, but needs to be pursued further. As far as
the European Community's relation to the United States, De Croo states
that the European Community "must adopt a common position and rela-
tionship with the United States. The combination of increased business,
greater prosperity, and an improved relationship with the United States
would bring about complete liberalization even faster."63 However,
others caution against allowing the European Community to negotiate
bilateral treaties for the whole of Europe, cautioning that a gain for one
country may be a loss for another. For example, the European Commu-
nity could make a bilateral aviation treaty with the United States creating
a new route for United States airlines into France, in exchange for the
United States providing a new route for a German carrier.

CURRENT STATUS IN CENTRAL AMERICA

Many of the same problems facing airlines in the European Commu-
nity are being faced by the Central American countries. These problems
include airport congestion, outdated ATC's, and incompatible hardware.
Airport congestion results from the size of most of the airports. In addi-
tion, many smaller countries share their civilian airports with their mili-
tary, which results in unscheduled closures related to military exercises.
Slot-allocation in Central America does not face the same problems as in
Europe, as it is not subject to grandfathering. The governments, how-
ever, normally assign the slots, which leaves the system vulnerable to
political influences.

ATC in Central America is controlled by COCESNA (Corporación
Centro-Americana de Servicios de Navegación Aérea).64 One goal of
COCESNA is to unify ATC, which is currently different in each country
in Central America. As one airline representative said, due to differences
in ATC, it is safer to land in some countries than in others. If it can be
avoided, he advised, never fly into Tegucigalpa, and if the urge strikes to
travel to Guatemala, try to arrive at noon, because the fog in the morning
and the darkness at night create challenges for the navigation system to
overcome. ATC could be coordinated internationally by the govern-
ments of each country since it is a service provided by the governments,
and installing compatible equipment would be an excellent start. How-
ever, because COCESNA is not a highly unified body due to the fact that

63. Id.
64. COCESNA was established in Tegucigalpa on February 26, 1960 and ratified by Costa
Rica on November 20, 1963 through Law No. 324.
its leadership rotates between countries every two years, such an action is unlikely.

Unlike the situation in Europe, there are no government run airlines in Central America. The problem of government bailouts, which exists in Europe, is therefore non-existent. Governments do, however, protect the airlines in their countries with some restrictions, similar to the situation in Europe prior to the Third Package Liberalization.

Aviation History in Central America Prior to the Push for Free Skies

Prior to 1978, when the United States began its push for free skies, there were two major players in Central America, TACA (Transportes Aéreos Centro-Americanos) and Pan Am, struggling for dominance. Based in El Salvador, TACA had a virtual monopoly on air transport in Latin America prior to 1945. When Pan Am entered the market at the end of World War II, it bought roughly 40% of most domestic airlines. Pan Am became the national airlines of Latin America, in part due to its access to technology and its commitment to the technical support of the national airlines in which it had invested. Even so, Pan Am’s competition with TACA nearly drove it out of business. However, as local national investors began to purchase the stock of Pan Am, Pan Am lost interest in Latin America. Pam Am began to compete with local airlines, but was protective of them due to its history. Before the United States moved to create liberal bilateralts, the general state of aviation in Latin America was that each country had a duopoly; their own national airline, and Pan Am. For example, Pan Am flew from Miami to San José, stopping over in Guatemala, while LACSA, Costa Rica’s national airline, flew directly to Miami. There were no restrictions on types of aircraft, and no other airlines could take part.65

The Air Transport Agreement between the USA and Costa Rica

The 1979 bilateral agreement between Costa Rica and the United States changed all of this. It was a result of the United States’ commitment to freedom of the skies, as well as of other countries’ hesitance to commit to open skies. Costa Rica was an easy target because it had already signed the ICAO’s Treaty on International Air Transport, adhering to the five aeronautical freedoms. While the United States had not initially thought to sign an international air transport agreement creating open skies with such a small country, it eventually approached Costa Rica in order to entice some of the larger countries in Europe and Asia to also take part.

José Giralt, current President of the Costa Rican Air Line Associa-

65. Interview with José Giralt, Challenge Air Cargo, Alajuela, Costa Rica (May 23, 1996).
tion (ALA), was the commercial director at LACSA when the bilateral agreement was being negotiated, and took part in the negotiations. The idea of the treaty, he said, was for Costa Rican airlines to be able to fly anywhere in the United States, and for the United States to be able to fly any carrier into Costa Rica. While Costa Rica was flying planes only seating 99 passengers, and in all likelihood would have benefited from continued protection, it realized "the protective environment could not continue. The idea [of free skies] was unavoidable. But it needed to be done gradually and on an equal basis."66

The treaty which was proposed to Costa Rica by the United States was built around five principle points, reflecting the United States' perspective:

- No restrictions on capacity;
- No restrictions on point of origin from the United States;
- No restrictions on flight frequency;
- No restrictions on pricing; and
- No restrictions on traffic.

The same points would apply to Costa Rican Airlines, with one exception: Costa Rican airlines would be limited to five points of destination in the United States, later changed to seven. They are Miami, Orlando, Atlanta, Los Angeles, New York, San Juan, and New Orleans. These terms, said Mr. Giralt, were eventually imposed upon the Costa Rican negotiators on a take-it-or-leave-it basis. Costa Rica chose to sign.

After 1979, due to the new bilateral agreement, many United States airlines arrived in Costa Rica, including direct flights by Pan Am and Eastern. LACSA had to move to larger planes, and had to learn to compete. They were nearly driven out of business. One advantage that LACSA had was that it was a smaller organization, and therefore could make decisions much more rapidly. In Mr. Giralt's opinion, this is what allowed LACSA to survive. He sums up that Costa Rica has gained from the agreement through increased tourism, increased traffic, and increased efficiency from competition. Still, he adds that it is ironic that a "free skies" agreement limits Costa Rica's points of entry, and that these limits were established by the country that originally proposed the free skies bilateral.67

While Costa Rica has signed bilateral aviation treaties with the United States, Mexico, Spain, Luxembourg, and several of the Central American countries, and while other Central American countries have signed bilateral aviation treaties with industrialized nations, the aviation network in Central America is currently still based on reciprocity. The

66. Id.
67. Id.
lack of international aviation agreements between Central American States is, according to Luis Brenes, ex-president of the ALA and the representative of United Airlines in the early 1980's, most likely due to competition among the Central American states that to continue to vie for the ability to be the strongest in the region. There is not a strong spirit of cooperation among Central American countries in the field of aviation. The concept of a Central American Aviation Agreement has been discussed on and off for the past 25 years. However, no action has been taken to move toward the realization of this idea.

The future for aviation agreements in Costa Rica specifically, and Central America in general, is uncertain. The United States has proposed a Central American Multilateral Agreement, but little action has been taken.

Central American Take-Over of Scheduled Passenger Flights by TACA

Even without a multilateral aviation agreement, Central America is nevertheless being drawn together by TACA, the largest carrier in the region. Over the past decade it has been buying controlling interests of stock in other countries' national airlines. In some cases (e.g., Costa Rica's LACSA) its official stock holdings are capped by government ceilings (in Costa Rica at 40%), but it still has control of the airline through stock held by citizens working for TACA. While the Costa Rican government officially denies that LACSA is controlled by TACA, one insider noted "if you stop any person on the street and ask him who controls LACSA, he will tell you TACA." Other airlines in which TACA has a controlling interest include Guatemala’s Aviateca, Honduras’ Sahsa, and Nicaragua’s Nica. Due to this strategy, TACA can now offer connections from every capital in Central America to New York, Washington DC, Houston, Los Angeles, Miami, New Orleans, and San Francisco. In addition, the group of carriers has access to Orlando, Chicago, and San Juan. Its major hubs are San Salvador, Guatemala City, and San José, and there is one regional hub in Panama.

TACA has been able to standardize rates throughout the network of countries, invest in new planes, and install a central reservation system for passengers and a parallel system for cargo. TACA’s control of other airlines allows it to share equipment, and to make an arrangement similar to code sharing in order to gain access to new ports of entry. However, this has created some problems for free competition. For example, TACA leases planes to LACSA, charging LACSA as much as it wants to,

68. Id.
69. Id.
because LACSA is controlled by TACA. This money is then expatriated from Costa Rica. TACA also sets all of the rates for the airlines which it controls, instead of allowing market forces to determine the price. Additionally, the four airlines which TACA owns are all flying similar routes, in part, it is said, to prevent the smaller airlines from creating new routes and thereby competing with TACA. By thus preventing competition, TACA hopes to take over all air traffic service in Central America.

The bilateral aviation agreements signed by the United States clearly state that the privileges of the agreement will be revoked from a designated airline if a substantive portion and effective control of that designated airline comes into the hands of citizens of countries not party to the agreement. This clause exists in most bilateral aviation agreements. However, the United States, and others, have chosen to overlook this clause.71

Cargo Flights in Costa Rica

Most airlines carry some belly cargo on international passenger routes; however they face a limit on the weight they can carry for long distances. In general this weight limit is about two tons. In contrast, a cargo plane can carry 25 tons or more per flight. Cargo flights, like passenger flights, fall into two categories. These are scheduled and chartered. Both arrangements are found in Costa Rica. For example, Challenge Air Cargo flies daily scheduled cargo flights to the United States of America,72 and Martin Air flies daily chartered flights to Holland.73

Scheduled flights apply to Costa Rica’s Aviación Civil for a permit to operate under the agreement that they will follow a schedule and operate year round. The advantages of this type of arrangement are that it is easier to get slots allocated, scheduled flights have priority in the time schedule, fuel prices are lower for scheduled passenger flights, scheduled flights have priority for fuel should there be a crisis, and finally, operational costs are lower. In addition, the Aviación Civil charges less for scheduled flights than it charges for chartered flights - a difference of about $800 USD.

Chartered flights, on the other hand, must apply to the Aviación Civil for permission for each flight planned. This must be done two to four days in advance, and has potential to meet bureaucratic or political delays. The advantages of chartered flights are that they are not obli-

71. *See* Costa Rican Law No. 6878, Art. 4 §A, for an example of this type of clause.
72. Interview with José Giralt, Challenge Air Cargo, Alajuela, Costa Rica (May 23, 1996).
73. Interview with Santiago Jimenez, Martin Air Office, San José, Costa Rica (June 24, 1996).
gated to operate year-round, and may therefore skip the off-season. In addition, they can change the flight routing, the times of the flights, and can end operation at any time.

The cargo situation in Costa Rica provides a different look at the competitive philosophies currently prevalent in Costa Rica. As seen above, in the case of TACA's scheduled passenger flights, LACSA and the other airlines which TACA controls are in competition with TACA for a small market. This has led to redundancy in the scheduled flight market, and inability of smaller national airlines (including those controlled by TACA) to expand and open new routes. However, this is not the situation in air cargo transport. Martin Air, privately registered in Holland, flies the same route that KLM flies from San José to Holland, but the two do not compete. KLM flies scheduled passenger flights, while Martin Air flies chartered cargo. The point to notice is that, like the TACA/LACSA relationship, KLM owns 50% of Martin Air. This strategy of sharing the available traffic appears much sounder than TACA's competitive approach toward airlines in which it has heavily invested. The goals are obviously much different, but from a view point of efficiency, the KLM/Martin Air relationship seems much healthier.

Another interesting approach which Martin Air has taken involves Costa Rica's definition of chartered cargo flights. There is no clause in the description which says that the chartered flights can not be scheduled, repeating the same daily flights on a weekly basis. While this appears to be an unfair competitive advantage to "scheduled" chartered flights over scheduled flights, it is most likely beneficial to Aviación Civil and unquestionably beneficial to Martin Air. Competing scheduled cargo carriers feel there should be more to protect them, but if the benefits they are receiving from their current scheduled status really are insufficient, there would be little to lose from following the same path. This decision should be made by the company, not by the government.

Bilateral Aviation Treaties between Costa Rica and Foreign Countries

Costa Rica has signed bilateral aviation treaties with other industrialized nations aside from the United States, including Bolivia, Holland, Luxembourg, Mexico, Spain, and Venezuela. In addition, it has negotiated (but not ratified) a bilateral aviation treaty with the Netherlands. There are, however, no bilateral aviation treaties between Costa Rica and other Central American nations.

The bilateral aviation treaties which Costa Rica has signed run the

74. Interview with Louis Brenes, San José, Costa Rica (June 20, 1996).
75. Interview with Tomás Nassar, San José, Costa Rica (June 11, 1996). For a complete analysis of these treaties, see Appendix 1.
gamut between very liberal and very conservative. The most liberal
treaty is with the United States. The most conservative is with Mexico.
There are several issues involved in this analysis. Some points covered in
the bilateral aviation treaties exist in the majority of the treaties, includ-
ing the first and second air freedoms; revocation of authorization when a
substantial portion and the effective control of the airline is not in the
hands of the contracting party or its nationals; and when laws and regula-
tions are not followed; application of national laws and regulations; avia-
tion documents must meet ICAO standards, and documents issued to
nationals of the contracting party by the other contracting party for flight
above the territory of the former may be revoked; commitment to act in
accordance with international safety standards; earnings freely converti-
ble; exemptions from customs and taxes for airline supplies; user fees
equal to fees for nationals, and just and reasonable; and methods for set-
tlement of controversies.

Other elements are more contentious. These include the number of
airlines that may be designated; the commercial opportunities which will
be provided; types of legal competition, including limits on traffic volume,
frequency, and types of aircraft, as well as the elimination of illegal com-
petition, and the disruption of cargo; determination of prices; if statistical
data will be required to be shared; and finally, the route rights which will
be provided. The more liberal treaties include more of these contentious
issues. Yet, to make these treaties even more liberal, one would need
unrestricted access to any point in the countries of the signatories.

Although the United States/Costa Rican treaty is, in general, the
most liberal of the agreements, it is one of the most unequal when it
comes to route rights; while the majority of the other agreements provide
for route rights on a reciprocal basis, such as Luxembourg, the Nether-
lands, Spain, and Venezuela, the United States agreement is the most im-
balanced. The United States has unlimited access to the number of
departure points, intermediate points in Costa Rica, and points beyond,
while Costa Rica is limited to one point of departure, an unlimited
number of intermediate points, seven points in the United States, and
three points beyond. None of Costa Rica's other agreements are this
biased.\textsuperscript{76}

\textbf{Possible Changes to Current Aviation Laws}

With the current status of international politics, there is a great push
to arrive at international aviation agreements which encourage liberaliza-
tion and privatization. The US and Europe have been working toward
such agreements, as has Costa Rica, through bilateral treaties. Central

\textsuperscript{76} See Appendix 1, at 4.
America, on the other hand, has not made the necessary commitments to arrive at an accord which will bind the area together as an international aviation zone.

**UNITED STATES**

When the attempt to create a general worldwide multilateral aviation agreement failed at the Chicago Convention, countries switched to a bilateral approach. There has been, however, a growing call within the United States to return to the multilateral approach. Proponents of the idea include a 1994 presidential commission, and public and private sectors within the United States.77

The 1994 report of the United States National Commission to Ensure a Strong Competitive Airline Industry states that, in their opinion, the current bilateral system is no longer sufficient for the international sphere. The Commission argues that the current system does not work to encourage growth in the global trade environment, and that there are many restrictions under the current system which hamper the efficiency and competition in international markets, damaging the entire United States economy. The Commission further asserts that the current bilateral situation "cannot adequately protect or enhance United States interests" and that by continuing to rely on bilaterals, the United States will see an erosion of those interests.78 It continues to argue that in the end, bilaterals are a zero-sum game, where not only does neither party gain, but both lose. The recommendation of the Commission was for the government to work to create a new, growth-oriented international aviation framework, which would allow the United States to use its competitive advantages to attain full success. The Commission believes that to do this, the United States government will have to move away from the present system of bilaterals, toward one based on multilateral arrangements. These agreements may be regional in the beginning, but eventually should grow to span the globe. The Commission also recommends that such a multilateral operating environment should be free of discrimination and restrictions, and developed in such a way that the multilaterals cover provisions for passenger, cargo, and charter services; cross-boarder investment and ownership; comparable traffic rights; fifth and sixth air freedom traffic rights; fair market access and business opportunities; government subsidies; and customs and immigration facilities.79

Following up on the report of the Commission, Washington D.C. lawyer Michael Goldman presented five strategies which the United

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77. Goldman and Murphy, supra note 36, at 44-47.
78. Id.
79. Id.
States needs to implement in the short term while it negotiates multilateral agreements:

- Negotiate more liberal open skies bilaterals with those trading partners that want them, regardless of the market size. This is entirely consistent with the National Commission's longer term recommendation on negotiating a multilateral open skies agreement;
- Challenge the European Union to assume greater responsibility for air transport matters with the United States by seeking high-level negotiations on a United States-European Union all-cargo agreement and a United States-European Union air transport reciprocal investment treaty;
- As recommended by the National Commission, ask Congress to amend the Federal Aviation Act to allow, under conditions of the openness and reciprocity, foreign carriers to own as much as 49% voting stock in United States airlines and exercise control commensurate with their real investment stake as real open skies are not possible without an open climate for airline investment;
- Focus the United States' efforts on bilateral negotiations that can expand service in markets which contribute to the United States' economy. By the same token, avoid bilateral disputes, however well founded, that are contentious and promise few direct economic benefits to the United States; and
- Avoid wasting effort in negotiating restrictive agreements that fail to advance the open skies goal. Such negotiations signal that the United States will settle for a continuation of projectionist agreements or a roll back of liberal ones. [The United States] is better off without an agreement than it is with a new restrictive one.80

Goldman continues that if individual governments do not want to negotiate, the United States should push for an aviation trade agreement with the European Union. This, he proposes, should begin with a liberal open skies cargo agreement, and then move on to a treaty governing investments by European Union airlines in United States carriers and vice versa. The United States should also assign its highest priorities to negotiations that seek to open markets, and lowest priority to those that seek to continue bilateral restrictions. Finally, Goldman concludes that the United States should not continue to insist on its version of free-skies on a take-it-or-leave-it basis.81

A multilateral system, if it could be attained, would have many advantages over the current bilateral situation. The benefits of a multilateral agreement system include reducing restrictions imposed by bilaterals, facilitating the creation of global transportation networks as ownership and control limitations are removed, and limiting the ability of individual

80. Id. at 45.
81. Id.
nations to use non-tariff barriers as leverage to obtain more economic rights. Smaller countries would also benefit by receiving the same rights as larger states.

The key issues which would have to be addressed to ensure the success of a multilateral agreement system include ensuring effective market access, the creation of fair competition rules, effective and timely dispute resolution, and accession which is open to all, but through the compliance with certain criteria.

The approaches which may be followed to create a multilateral framework include one large multilateral agreement, several regionally based agreements with crossover by countries who are interested, or an agreement created by linking together liberal bilaterals. In the latter situation, states would append their bilaterals or re-negotiate them to arrive at identical, liberal provisions ensuring fair market access and fair competition rules, which would lead into the eventual integration into a multilateral agreement.  

Europe

As opposed to the United States' stagnated movement toward free skies, the current changes in the European Community will eventually bring about an entirely different structure for aviation. Full cabotage took effect on April 1, 1997, but due to recessions following the Gulf War, as well as infrastructure problems, e.g., ATC congestion, shortage of space in the airports, and competition from high speed trains, radical changes are likely to be a long way off. However, the European Union is at least making an effort to unify and liberalize their workings. While the issues that present problems for the European Union need to be addressed at some point, measures are being taken to change the state of Europe's aviation for the better.

Latin America

Costa Rica

There are four approaches Costa Rica could take to strengthen its aviation position. First, increasing the availability of different air services in Costa Rica could only help both efficiency and commerce. To increase availability, Costa Rica would need to allow a greater number or airlines to fly into and out of San José. Such liberalization could be done in three ways. First, Costa Rica could renegotiate its existing bilateral aviation agreements, such as those with Mexico, the Netherlands, and Venezuela.
to remove the limits on the number of airlines currently allowed to be designated to fly between signatories. Second, Costa Rica could provide incentives to airlines to open up new routes. Third, it could continue to expand the capacity of the San José international airport.

Martin Air has shown that increased availability of air services can have a positive impact upon business. Martin Air believes that it has raised the quantity and quality of exports from Costa Rica; accounting for the increase of the quantity of exports due to its ability to meet excess demand for exportation, and accounting for the increase in quality by its direct service to Holland, without passing through Miami as other airlines do on the way to Europe. By providing direct service, Martin Air cuts the travel time of perishables from 35 hours, with layover and possible hold-up in the United States, to 14 hours. The Martin Air representative in Costa Rica, Santiago Jimenez, says that this decrease in transit time has decreased the claims against the airline for damages goods "to close to zero."^{84}

While most protectionist thinkers in Costa Rica may argue that such moves would destroy LACSA's competitiveness, there are two elements to consider. First, competition increases efficiency, as seen in Europe, and second, LACSA is under the control of TACA, and increased competition may force TACA to rethink its current route redundancy and allow LACSA to branch out to new routes.

The second approach Costa Rica could take to strengthen its aviation position involves the current United States/Costa Rican Treaty. The United States' goal of open skies is reflected in the 1979 United States-Costa Rican bilateral aviation treaty. However, the treaty is restrictive on the most important of the United States' eleven "open-skies" air freedoms.^{85} While the agreement allows for unrestricted capacity, frequency, and types of aircraft operated, competitive pricing, liberal charter and cargo operations, earning conversions and remittance, self handling and provisions which promote commercial opportunities, liberal user fees, and fair competition, the 1979 United States-Costa Rican treaty did not create unrestricted route and traffic rights—that is, the right to operate services between any point in the United States and any point in Costa Rica. Instead, Costa Rica is limited to a set number of hubs in the United States. The United States principle of free skies is in direct contrast with this. Since the United States has signed liberal bilateral aviation treaties which include this last provision, Costa Rican aeronautical authorities should look into the possibility of re-negotiating a more flexible schedule of routes.

^{84} Interview with Santiago Jimenez, Alajuela, Costa Rica (June 24, 1996).
^{85} Outlined supra at page 314.
Third, Costa Rica could strengthen its position in aviation by following KLM’s lead, and requesting immunity for its designated airlines from the United States anti-trust laws. This would allow Costa Rican airlines, specifically LACSA, to have a greater market share.

A Multilateral Aviation Agreement for Central America

A fourth method which Costa Rica could follow to strengthen its global position would be to join forces with the other countries in Central America. A multilateral aviation agreement between Central American countries would have several benefits. First, it would create for all Central American countries greater bargaining possibilities with the rest of the world, notably the United States and Europe. For the purpose of negotiating unrestricted route and traffic rights, or any other aviation liberalization, the possibility of signing such an agreement with all of Central America may easily entice foreign countries into action.

Second, an Intra-Central America multilateral agreement would benefit the Central American countries by creating a standard of operation. Currently there are no bilateral aviation agreements within Central America. Air transportation runs on the principle of precedence; a situation which can be confusing and difficult to deal with legally. A multilateral agreement codifying intra-Central American aviation laws, would unify the airtransport processes, making flights within Central America easier to implement.

There are several options for a multilateral agreement within Central America. It could be a framework, just enough to link the countries together, and allow bilaterals to create the majority of the liberalizations and concessions. Such a multilateral could include the first and second air freedoms, leaving the third, fourth, fifth and others up to the individual countries. In such a treaty, there could be a commitment to legal competition consisting of equal and just opportunities for competition, and the elimination of illegal competition, while limitations on traffic volume, frequency, and types of aircraft are established bilaterally. Statistical data would have to be provided, and route rights established on the condition of equality between nations. Such a multilateral, while restrictive, would bind the countries together. Recalling the weakness of the ICAO Chicago Convention, however, such an accord may not be sufficient to serve all of the needs of all of the countries.

A more favorable alternative would be to create a liberal multilateral aviation treaty between Central American countries. Such an agreement would be comparable to the United States definition of free skies. The agreement would include the first, second, third and fourth air freedoms established for all signatories, without restrictions on routes or traffic rights, thereby creating the ability for any Central American country
to fly to any other Central American country at any time, in any quantity or capacity. While such an agreement would be difficult to achieve, the positive impacts would be tremendous: establishment of new routes; increased competition; increased efficiency; increased air service; and increased exports of goods from Central America, as goods could pass freely through Central America to countries with route rights to the United States and Europe. Best of all, the national airlines would be more likely to retain their nationality, remaining independent of TACA, because TACA would be free to fly where it would like within Central America, and would not need to control other airlines to meet its goals. Thus, the threat that Costa Rica or any other country would lose the rights granted to their national airlines due to questions of ownership or control, would be mitigated.

A final alternative would fall somewhere between these two solutions. A multilateral agreement within Central America which would allow code sharing on a multinational level, such that any airline of any signatory of the agreement could code-share with any other airline without limitation, would have a similar effect. However, such a solution may not remove the threat to LACSA and other national airlines over issues of sovereignty, as such code sharing may only increase the power of the dominant airline.

**Conclusion**

An global aviation alliance is a long way off. In fact, it may even be impossible. However, this does not mean that changes in international aviation law are not, and should not, be underway. There are many measures which countries can take to assist their aviation industries on both national and international levels. This paper has examined the past, present, and future possibilities for change on the international level, comparing Europe, the United States, and Central America, with an emphasis on Costa Rica. Of these three areas, the first two are making valid efforts to improve the standing of aviation. While there are clearly steps which remain to be taken in Europe and the United States, the problems are widely recognized and accepted as issues to be addressed. Within the next decade, there will likely be some change for the better. The area which does not appear to be taking an active lead in aviation liberalization or reform is Central America.

The current state of aviation law in Central America, while functional, has many elements which could be changed for the better. Legally, there is no reason why the governments of Central America should not form an aviation block, allowing the first through fifth air freedoms, and eventually even cabotage and unrestricted code sharing. Whether
these countries' infrastructure and current economic and political structures could handle such a move is a separate issue. However, to refuse to make such a move based on these latter issues is to stifle growth that is needed to increase business and tourism based air transport, which would in turn stimulate the Central American economies. Such hesitance to form an alliance, witnessed over the past twenty-five years, is self-defeating, especially with the recent boom in non-traditional agricultural exports.

Costa Rica has avoided the issue by creating a viable network of international aviation treaties with industrialized countries. They have created avenues for air transport for their produce and tourists, as well as nationals traveling abroad. However, the possibility of increasing their international transport, by serving as a hub for the transport of goods and passengers from Central America to the United States and Europe is unrealized. A move such that would assist in the realization of these goals could only be beneficial for Costa Rica.

In addition, Costa Rica should continue to challenge their aviation partners to create more liberal treaties, with an unlimited number of possible designated airlines and an unlimited number of points of departure and arrival in the other parties' territory. In renegotiating their treaties, Costa Rica should begin with the United States, pointing out that the United States' current definition of free skies is not fully covered in the current bilateral agreement. At this time, the United States may be willing to concede more rights to Costa Rica, in hope of using such a treaty as an example to the more stubborn European nations, as it did in 1979.86

Over the next few years, as Costa Rica tries to decide what steps it should take to increase the status of its aviation, it should bear in mind that by not working to change the status of aviation in Central America and the aviation agreement with the United States, it denies itself benefits that can only come about with such liberalization.

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86. On May 9, 1997, President Clinton signed a series of bilateral accords with the leaders of Nicaragua, Honduras, Guatemala, Belize, El Salvador, and Costa Rica on trade, drugs, immigration, aviation, and the environment. The new aviation agreements include "open skies" accords, which create new air routes and aim to reduce travel costs. The deals will allow passenger and cargo services between any point in either country, as well as to third countries. Additionally, airlines will be able to price their services, and capacity restrictions will be removed. Johanna Tuckman and Agencies, Clinton Signs Series of Deals at Central America Summit, FIN. TIMES, May 9, 1997 (London Ed.), at 3.
## Appendix I
### Comparison of Costa Rica’s International Aviation Agreements

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<th>Treaties</th>
<th>Memorandums</th>
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<tr>
<td>BOLIVIA</td>
<td>LUXEMBOURG</td>
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<td>DEFINITIONS</td>
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<td>RIGHTS GRANTED</td>
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<td>a) first freedom</td>
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<td>b) second freedom</td>
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<td>c) rights granted for routes (third and fourth freedoms)</td>
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<td>d) fifth freedoms</td>
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<td>DESIGNATION &amp; AUTHORIZATION</td>
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<td>a) one airline only</td>
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<td>b) two airlines only</td>
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<td>c) unlimited number</td>
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<td>REVOCATION OF AUTHORIZATION</td>
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<td>a) when a substantial portion &amp; effective control is not in hands of contracting party.</td>
<td>✓</td>
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<td>b) when laws and regulations are not followed.</td>
<td>✓</td>
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<tr>
<td>c) when security standards are not maintained.</td>
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<tr>
<td>d) when the airlines stop flying said route.</td>
<td>✓</td>
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<td><strong>APPLICATION OF LAWS</strong></td>
<td>BOLIVIA</td>
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<tr>
<td>a) national laws and regulations apply</td>
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<td>b) prohibit flying above certain zones</td>
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<tr>
<td><strong>SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>a) documents must meet ICAO standards.</td>
<td>✔</td>
</tr>
<tr>
<td>b) documents issued by other party to nationals may be rejected.</td>
<td>✔</td>
</tr>
<tr>
<td>c) Consultations for security</td>
<td></td>
</tr>
<tr>
<td><strong>AIR SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>a) commitment to act in accord w/ int'l. conventions</td>
<td>✔</td>
</tr>
<tr>
<td>b) requires airlines to meet security reqs.</td>
<td>✔</td>
</tr>
<tr>
<td>c) will assist other in time of threat or incident</td>
<td>✔</td>
</tr>
<tr>
<td><strong>COMMERCIAL OPPORTUNITIES</strong></td>
<td></td>
</tr>
<tr>
<td>a) offices</td>
<td></td>
</tr>
<tr>
<td>b) personnel</td>
<td>✔</td>
</tr>
<tr>
<td>c) own ground crew</td>
<td>✔</td>
</tr>
<tr>
<td>d) hired ground crew</td>
<td></td>
</tr>
<tr>
<td>e) money freely convertible</td>
<td>✔</td>
</tr>
<tr>
<td><strong>RIGHTS FOR CUSTOMS AND TAXES exemptions for:</strong></td>
<td></td>
</tr>
<tr>
<td>a) goods left on board</td>
<td>✔</td>
</tr>
<tr>
<td>b) supplies brought and used on board in the other's territory</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>BOLIVIA</td>
</tr>
<tr>
<td>--------------------------</td>
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</tr>
<tr>
<td>c) unload goods under supervision</td>
<td>✓</td>
</tr>
<tr>
<td>d) exemption or MFN treatment to supplies brought in on board</td>
<td></td>
</tr>
<tr>
<td>User fees:</td>
<td></td>
</tr>
<tr>
<td>a) must be just and reasonable</td>
<td>✓</td>
</tr>
<tr>
<td>b) may not exceed fees charged to nationals.</td>
<td>✓</td>
</tr>
<tr>
<td>Legal competition</td>
<td></td>
</tr>
<tr>
<td>a) equal and just opportunity for competition</td>
<td>✓</td>
</tr>
<tr>
<td>b) elimination of illegal competition</td>
<td></td>
</tr>
<tr>
<td>c) no limits on:</td>
<td></td>
</tr>
<tr>
<td>Frequency</td>
<td></td>
</tr>
<tr>
<td>Traffic volume</td>
<td></td>
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<tr>
<td>Types of aircraft</td>
<td></td>
</tr>
<tr>
<td>d) limitations on:</td>
<td></td>
</tr>
<tr>
<td>Frequency</td>
<td>✓</td>
</tr>
<tr>
<td>Traffic volume</td>
<td>✓</td>
</tr>
<tr>
<td>Types of aircraft</td>
<td>-</td>
</tr>
<tr>
<td>e) disruption of cargo</td>
<td>✓</td>
</tr>
<tr>
<td>Prices</td>
<td></td>
</tr>
<tr>
<td>a) determined by market</td>
<td></td>
</tr>
<tr>
<td>Consultations</td>
<td></td>
</tr>
<tr>
<td>a) in relation to this accord</td>
<td>✓</td>
</tr>
<tr>
<td>b) provision of statistical data</td>
<td>✓</td>
</tr>
<tr>
<td>SETTLEMENT OF CONTROVERSIES</td>
<td>BOLIVIA</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>a) 1st by diplomacy</td>
<td>✓</td>
</tr>
<tr>
<td>b) arbitration</td>
<td></td>
</tr>
<tr>
<td>c) council consisting of 3 arbitrators</td>
<td></td>
</tr>
<tr>
<td>TERMINATION</td>
<td></td>
</tr>
<tr>
<td>a) 6 Months</td>
<td>✓</td>
</tr>
<tr>
<td>b) 9 Months</td>
<td></td>
</tr>
<tr>
<td>c) 12 Months</td>
<td>✓</td>
</tr>
<tr>
<td>DURATION</td>
<td></td>
</tr>
<tr>
<td>a) until terminated</td>
<td>✓</td>
</tr>
<tr>
<td>b) three years</td>
<td>✓</td>
</tr>
<tr>
<td>MULTILATERAL ACCORD</td>
<td></td>
</tr>
<tr>
<td>a) the accord will incorporate changes</td>
<td>✓</td>
</tr>
<tr>
<td>AMENDMENTS</td>
<td></td>
</tr>
<tr>
<td>a) by mutual consent</td>
<td>✓</td>
</tr>
<tr>
<td>REGISTRATION WITH OACI</td>
<td>✓</td>
</tr>
<tr>
<td>ENTRANCE INTO FORCE</td>
<td>✓</td>
</tr>
<tr>
<td>when ratified</td>
<td>✓</td>
</tr>
<tr>
<td>b) entrance into force</td>
<td>✓</td>
</tr>
<tr>
<td>immediately</td>
<td></td>
</tr>
<tr>
<td>c) provisional until ratified</td>
<td></td>
</tr>
<tr>
<td>ROUTE RIGHTS:</td>
<td></td>
</tr>
<tr>
<td>Number of points</td>
<td></td>
</tr>
<tr>
<td>a) of departure of the signatory</td>
<td>*</td>
</tr>
<tr>
<td>b) intermediate</td>
<td></td>
</tr>
<tr>
<td>c) in Costa Rica</td>
<td></td>
</tr>
<tr>
<td>d) further</td>
<td></td>
</tr>
<tr>
<td>Number of points</td>
<td>BOLIVIA</td>
</tr>
<tr>
<td>------------------</td>
<td>---------</td>
</tr>
<tr>
<td>a) of departure for Costa Rica</td>
<td>*</td>
</tr>
<tr>
<td>b) intermediate</td>
<td>&gt;</td>
</tr>
<tr>
<td>c) in country of signatory</td>
<td>*</td>
</tr>
<tr>
<td>d) further</td>
<td>&gt;</td>
</tr>
</tbody>
</table>

**TARIFFS**

<table>
<thead>
<tr>
<th>a) scheduled</th>
<th>✔</th>
</tr>
</thead>
</table>

| b) “reasonable” | ✔   |

| c) means for dispute resolution | ✔   |

- **D** = denied
- **L** = limited
- **>** = greater than one, unspecified
- ***** = unspecified
**Appendix II**

**International Aviation Agreements Held By Costa Rica**

<table>
<thead>
<tr>
<th>Definitions</th>
<th>BOLIVIA, 3 March 1995</th>
<th>LUXEMBOURG, Signed 8 June 1961; ratified 19 Dec. 1966 Law # 3839</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights Granted</td>
<td>(Article 1) Definitions</td>
<td>(Article 1) Definitions</td>
</tr>
<tr>
<td>1. Each contracting party concedes to the other contracting party the rights specified in the present accord, with the purpose to establish regular international air services, in the routes established in the annex attached to the present accord.</td>
<td>a) The contracting parties concede to each other the rights specified in the attached annex for the international airlines established in the annex, receive or render services within their respective territories.</td>
<td></td>
</tr>
<tr>
<td>2. Conforming with the stipulations of the present accord, the airline or airlines designated by each contracting party, will have, during the operation of the agreed air services, the following rights:</td>
<td>b) Each contracting party will designate one or more international air transport business for the exploitation of the different routes that can be established, and will decide the date of opening for such lines.</td>
<td></td>
</tr>
<tr>
<td>a) To fly above the territory of the other contracting party without landing in said territory.</td>
<td>(Annex)</td>
<td></td>
</tr>
<tr>
<td>b) To make stopovers for non-commercial purposes in the territory of the other contracting party, and</td>
<td>The designated Costa Rican and Luxembourg airlines will have these rights in the territory of the other contracting party: the right to transit and the right to land for non-commercial purposes; the right to use the airports and facilities inherently complimentary to international traffic. They will have also, within the territory of the other contracting party the right to embark or disembark passengers, postal remittances, and merchandise sent with relation to international traffic under the conditions in the present accord.</td>
<td></td>
</tr>
<tr>
<td>c) To embark and disembark international traffic (of passengers, equipment, cargo, and mail) in said territory, in the points specified in the annex.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. The right of cabotage will be reserved to the airlines of each contracting party.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. The rights to fifth freedom traffic of all of the sectors of the annex of the present convention that will be exercised, must have previous consultations between the aeronautical authorities.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Designations and Authorization</td>
<td>(Article 2)</td>
<td>(Article 2)</td>
</tr>
<tr>
<td>1. Each contracting party has the right to designate, in writing, to the other contracting party one or more airlines, that can operate the air services in accordance with the routes specified in the Annex, and also the right to withdraw or modify such designation.</td>
<td>a) Each contracting party will grant the authorization necessary for the exploitation of the airline or airlines designated by the other contracting party, under the conditions of Article 7 mentioned later.</td>
<td></td>
</tr>
<tr>
<td>2. Upon the receipt of designation or modification, the aeronautical authority of the other contracting party will concede, without delay, and in accordance with their laws and regulations, the authorization necessary to operate the agreed air services.</td>
<td>b) Without exception, before authorization is given for the airlines defined in the annex, these businesses must be called to confirm the legality of their qualifications, that they conform with the laws and regulations that normally apply to the party of the aeronautical authorities that are entrusted with the ability to grant authority of exploitation.</td>
<td></td>
</tr>
<tr>
<td>3. The aeronautical authority of one of the contracting parties can demand</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*These treaties and memorandums are unofficial translations from Spanish. They should be used for comparative purposes only.*
<table>
<thead>
<tr>
<th>Revocation of the Authorization</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 4)</td>
</tr>
<tr>
<td>1. Each contracting party has the right to revoke the operation authorization, or to suspend the rights specified in Article 2 of this Accord, to the designated airlines of the other contracting party, or to impose the conditions they consider necessary, in the case that the airline does not comply with the laws and regulations of the contracting party that conceded those rights, or in the case that the airline, in any manner, does not operate in conformity with the conditions prescribed under this accord.</td>
</tr>
<tr>
<td>2. Unless the immediate revocation, suspension, or imposition of the conditions mentioned in paragraph 1 of this Article are essential to avoid major infractions of the laws or regulations, such rights will be exercised only after consultation with the other contracting party.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Application of the Laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 5)</td>
</tr>
<tr>
<td>The laws and regulations in force in the territory of each contracting party concerning the entrance, stay, and exit from the country by airlines dedicated to international air navigation, of passengers, crew, equipment, cargo, and mail, as well as those concerning immigration, customs, and sanitary measures, will apply also in said territory, to the operations of the designated airlines of the other contracting party.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Safety</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 6)</td>
</tr>
<tr>
<td>1. The certificates of air-navigability, the certificates or titles of aptitude,</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Application of the Laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 5)</td>
</tr>
<tr>
<td>a) The laws and regulations of each contracting party that regulate the entrance and exit from their territory with respect to airplanes that are dedicated to international navigation, or that regulate the exploitation and navigation of said airplanes will apply to the airplanes of the airline(s) of the other contracting party during the time when they are within the limits of the other contracting party's territory.</td>
</tr>
<tr>
<td>b) The passengers, equipment, and crew will be under the obligation to abide by, personally or in the name of a third party, the laws and regulations of the territory of the contracting party concerning the entrance, stay, and exit by the passengers, equipment, merchandise, and also to those regulations that apply to the entrance, formalities of exit, to immigration, passports, customs, and quarantine.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Safety</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 5)</td>
</tr>
<tr>
<td>The certificates of navigation, certificates of competence, and the licenses</td>
</tr>
</tbody>
</table>
and the licenses issued or validated by one of the contracting parties and
which are not expired, will be recognized as valid by the other
contracting party for purposes of operating the routes designated in the
Annex, during the period when it is in force, in conformity with the
agreements established in the Accord.
2. Each contracting party reserves the right not to recognize as valid, for
flights over their own territory, the certificates or titles of aptitude and
the licenses issued to their own nationals by the other contracting party
or by a third state.

<table>
<thead>
<tr>
<th>Air Safety</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 15)</td>
</tr>
</tbody>
</table>
| 1. The contracting parties reaffirm their agreement to act in conformity
with the arrangements of the AGREEMENT ABOUT THE INFRACTIONS AND
CERTAIN OTHER ACTS COMMITTED ON BOARD AIRPLANES, signed in Tokyo
on the 14 of September of 1963, THE CONVENTION FOR THE PREVENTION
OF ILLEGAL POSSESSION OF AIRPLANES, signed in the Hague on the 16 of
December of 1970, and the CONVENTION FOR THE PREVENTION OF
ILLEGAL ACTS AGAINST THE SECURITY OF CIVIL AVIATION, signed in
Montreal on the 23 of September, 1971, and equally, will apply any
other convention that concerns this material that is ratified by both
contracting parties. In addition, they declare that their obligation to
protect the security of civil aviation against illegal acts of interference,
constitutes an integral part of their mutual relations in the goals of the
present accord.
2. a) The contracting parties, in their mutual relations, must act in
conformity with the arrangements over security of the airplane
established by the IACO, in the means that are arranged that are
applicable concerning security; They will require that the operators that
have their principle office or permanent residence in their territories, to
act in conformity with said arrangements over the security of aviation.
b) Each contracting party can adapt, without prejudice, to those
measures stipulated in the previous paragraph, all of the supplementary
measures that are considered necessary to assure the inspection of the
passengers, crew, their effective personnel, as well as the cargo and
provisions on board, during loading or their stay in the country.
3. When there is an incident or threat of illegal possession of an aircraft, or
other illicit act against the security of the passengers, crew, airplanes,
<table>
<thead>
<tr>
<th>Commercial Opportunities</th>
<th>(Article 13)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. At any time, any designated airline has the right to convert and transfer the local earnings obtained by services provided, in conformity with the present accord, minus what has been paid in taxes in the territory of either of the contracting parties.</td>
<td></td>
</tr>
<tr>
<td>2. The conversion which will be permitted is the type of exchange that exists in the market at the moment of exchange, and will not be subject to any change with the exception of payment for bank services of such operation.</td>
<td></td>
</tr>
<tr>
<td>3. The transference of earnings will take place with conformity with the legislation enacted by each contracting party, and legislative arrangements and regulations will not be less favorable than those applied to other expatriate airlines that operate international air service to and from the territory of each of the contracting parties.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(Article 14)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The airlines designated by one contracting party will have the right, on the basis of reciprocity, to maintain in the territory of the other contracting party, the commercial, operational, and technical representatives and personnel that are necessary for the fulfillment of the agreed air services.</td>
</tr>
<tr>
<td>2. The necessities of the previous paragraph can be filled by their own dependents of the airline(s), or by contract of services with national personnel, or by any other airline established in the territory of the other contracting party.</td>
</tr>
<tr>
<td>3. The representatives and personnel of each contracting party will be subject to the laws and regulations in force in the territory of the other contracting party.</td>
</tr>
<tr>
<td>Rights for Customs and Taxes</td>
</tr>
<tr>
<td>-----------------------------</td>
</tr>
<tr>
<td>1. The airplanes used in the international air services of the designated airlines(s) of each of the contracting parties, as well as their ordinary equipment, fuel, lubricants, and other provisions (including food, beverages, and tobacco), on board such airplanes, will be exempt from all customs duties, inspection fees or other fees or taxes, upon the arrival in the territory of the other contracting party, only when such equipment and provisions stay on board the airplane until the time of their re-exportation.</td>
</tr>
<tr>
<td>2. Equally exempt will be, on the condition of reciprocity, from the same duties, taxes, and fees, with the exception of fees for services provided, lubricant oils, consumable technical materials, spare parts, tools, and special equipment for maintenance work, as well as provisions (including food, beverages, and tobacco), airline documents such as tickets, pamphlets, itineraries, and other printed materials needed by the company for their service, as well as published material that is considered to be necessary and is exclusively for the development of the same activities sent for or by the airline of the contracting party, to the territory of the other contracting party, as well as those that are put on board the airplanes of one of the contracting parties in the territory of the other contracting party and used in international services.</td>
</tr>
<tr>
<td>3. The normal equipment brought on board of the airplanes, as well as the other materials and provisions that stay on board of the airplanes of either of the contracting parties, can be unloaded in the territory of the other contracting party, only with the previous authorization of the customs authorities of the territory to where the goods were brought. In such cases, they must remain under the supervision of said authorities until they leave the country or they proceed with the legal arrangements of their subject.</td>
</tr>
<tr>
<td>4. The passengers in transit over the territory of either of the contracting parties will only be subject to simple control. The equipment and cargo in direct transit will be exempt from customs fees or other similar fees.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Rights for Taxation on the User (User)</th>
<th>(Article 8)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each contracting party can impose or permit that it is imposed, just and</td>
<td>(Article 4a)</td>
</tr>
<tr>
<td></td>
<td>a) The contracting parties agree that the fees imposed for the use of the</td>
</tr>
<tr>
<td><strong>Fees</strong></td>
<td>Reasonable fees for the use of the airports and other installations. Without exception, each contracting party agrees that said fees will not be higher than those paid for the use of the same airports and installations by the national airlines dedicated to similar international air services.</td>
</tr>
<tr>
<td>---</td>
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</tr>
<tr>
<td><strong>Legal Competition</strong></td>
<td>(Article 10) 1. There will be a just, equal, and egalitarian opportunity for the designated airlines of both contracting parties that operate the agreed services on the specified routes between their respective territories. 2. The agreed services that are provided to the designated airlines by the contracting parties will be designated in strict relation to the necessity for transport of passengers and cargo, including mail, that come from or are destined to the territory of the contracting party that has designated the airlines. 3. The contracting parties agree that the things relative to the specified routes and their terms of operation of the same, will be defined by the aeronautical authorities of both contracting parties, through corresponding channels.</td>
</tr>
<tr>
<td><strong>Prices</strong></td>
<td>(Article 7) The aeronautical authority of one contracting party will supply to the other aeronautical authority of the other contracting party, when it is requested, all statistical data that is considered necessary to operate the aeronautical agreements. Such information can be requested directly by the aeronautical authorities of each contracting party, to the designated airlines of the other party.</td>
</tr>
<tr>
<td><strong>Consultations</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Settlement of Controverses</strong></td>
<td>(Article 12) 1. The aeronautical authorities of the contracting parties, at such time as they find convenient, can put into effect an exchange of opinions with the purpose to achieve strict cooperation and understanding in all that related to the interpretation and/or the application of the present accord and its annex.</td>
</tr>
<tr>
<td><strong>Termination</strong></td>
<td>(Article 20)</td>
</tr>
<tr>
<td><strong>Multilateral Accord</strong></td>
<td><strong>Amendments</strong></td>
</tr>
<tr>
<td>------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td><strong>(Article 18)</strong></td>
<td><strong>(Article 12)</strong></td>
</tr>
<tr>
<td>1. When a multilateral convention enters into force, relative to this accord, the latter will be modified to conform to the terms of such multilateral convention, of which both states are party.</td>
<td>2. At any time the contracting parties can amend and or modify the present accord and its annex, or add clauses to the same, through direct consultations between aeronautical authorities. Such consultations will take place within a period of 60 days, from the date of the request given by the interested contracting party to the other contracting party, by means of correspondence.</td>
</tr>
<tr>
<td><strong>(Article 19)</strong></td>
<td><strong>(Article 13)</strong></td>
</tr>
<tr>
<td>3. The request for consultation, which is referred to in the previous paragraph, will not leave the execution of the administrative measures dictated for one or both of the contracting parties without power as a consequence of the interpretation and or application of the present accord and its annex.</td>
<td>4. All of the modifications of the present accord, will enter into force when they have been confirmed in accordance with the constitutional arrangements of each contracting party.</td>
</tr>
<tr>
<td><strong>Registration with OACI</strong></td>
<td><strong>(Article 9)</strong></td>
</tr>
<tr>
<td><strong>(Article 17)</strong></td>
<td>This treaty and all treaties related to it will be registered with the council of the IACO, established by the ICA Agreement, signed in Chicago on the 7th of December, 1944.</td>
</tr>
<tr>
<td>The accord and all of its modifications will be registered with the ICAO.</td>
<td></td>
</tr>
<tr>
<td><strong>Entrance into Force</strong></td>
<td><strong>(Article 10)</strong></td>
</tr>
<tr>
<td><strong>(Article 21)</strong></td>
<td>a) The present accord will be ratified and the instruments of ratification will be exchanged in San José, Costa Rica in as short a period of time as possible.</td>
</tr>
<tr>
<td>The present accord will enter into force at the time when both contracting parties communicate by means of writing that they have complied with the internal requisites of each contracting party.</td>
<td><strong>(Additional Protocol)</strong></td>
</tr>
<tr>
<td></td>
<td>Route Rights:</td>
</tr>
</tbody>
</table>
### Tariffs

1. Each contracting party will permit each designated airline to fix tariffs for air transport, based on commercial market considerations. The tariffs may not discriminate on the grounds of geographical location of the point of origin or destination of the service, or the point of origin or destination of the payload. The tariffs must be applied uniformly to all traffic originating from and destined to points within each contracting party.

2. The contracting parties will not apply, and will not authorize the direct or indirect application of any measure of a discriminatory nature to injure the interests of the air services established in their territories or of their airlines.

3. The contracting parties will, in good faith, and without prejudice to their rights and obligations under other agreements, including bilateral agreements, cooperate to develop an understanding with respect to the establishment of tariffs.

4. If, at any time, one of the parties finds that a tariff fixed by the other party is not in conformity with the conditions laid down in paragraphs 1 to 3 of this article, it will promptly request that such tariff be modified or abolished.

### Tariff Rate

The tariff rates will be based on the following considerations:

- **Non-discrimination**: Tariffs must not discriminate on the basis of geographical location.
- **Uniformity**: Tariffs must be applied uniformly to all traffic originating from and destined to points within each contracting party.
- **Commercial Market Considerations**: Tariffs must be based on commercial market considerations.

#### Additional Considerations

- **Discriminatory Measures**: Neither party will apply or authorize discriminatory measures to injure the interests of the air services established in their territories or of their airlines.
- **Cooperation**: The contracting parties will cooperate to develop an understanding with respect to the establishment of tariffs.
<table>
<thead>
<tr>
<th>Definitions</th>
<th>(Article 1) Definitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights Granted</td>
<td>(Article 1) Rights Granted</td>
</tr>
<tr>
<td>1. Each of the Contracting parties grants to the other party the rights specified in the present agreement with the end to establish air services in the routes specified in the annex.</td>
<td></td>
</tr>
<tr>
<td>2. Except for what is stipulated in the present agreement, the designated airlines for each party contract to gain from international services, the following rights: a) fly over the territory of the other party without landing b) make scales for non-commercial purposes in the aforementioned territories, c) embark and disembark international traffic in the said territories, in the routes specified in the Route Chart in the annex, [in the form of] passengers, cargo, and mail.</td>
<td></td>
</tr>
<tr>
<td>3. The making of such rights will not be exercised immediately nor impede the airlines of the contracting party from rights they may have conceded to begin prior to the air services in the routes specified in the Route Chart.</td>
<td></td>
</tr>
<tr>
<td>4. These rights by no means imply the ability to combine specified routes. (Art. 2)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Designations and Authorization</th>
<th>(Article 2) Designations and Authorization</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. To start the entrance into force of this present convention, the aeronautical authorities of the contracting parties must communicate as briefly as possible the information concerning the authorizations given to operate the routes mentioned in the Route Chart.</td>
<td></td>
</tr>
<tr>
<td>2. The air service of a specified route can be inaugurated by an airline which already is in existence or which may exist in the future, at the option of the contracting party that has conceded the rights, after one of the Parties has designated to one of the airlines to give service to this route, and has granted to the other contracting party the corresponding permission, each other contracting party is obliged to give it, demanding to the designated airline that it fulfill the requirements of the competent air authorities of said party and that it conforms with the general laws and regulations applied by both authorities. (Art. 3)</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>(Article 2)</th>
<th>(Article 3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Each contracting party will concede to the other contracting party the rights specified in the present convention with the purpose to establish regular international air services in the routes specified in the annex attached to the present convention.</td>
<td></td>
</tr>
<tr>
<td>2. Saving the stipulation in the present convention, the designated airlines of each contracting party will have during the operation of the agreed specified routes, the following routes: a) To fly above the territory of the other contracting party without landing. b) To make stopovers for non-commercial purposes in the territory of the other contracting party. c) To make stops in the points of the other contracting party that are specified in the annex with the proposition to embark and disembark passengers, cargo, equipment, mail, in international air services, proceeding from or destined to the territory of the other contracting party, or proceeding from or destined to another State, in accord with what is established in the annex.</td>
<td></td>
</tr>
<tr>
<td>3. Nothing in paragraph 2 of this article can be considered to grant the right to an airline of a contracting party to participate in air transport between points in the territory of the other contracting party.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(Article 3)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Each contracting party will have the right to designate in writing through diplomatic channels to the other contracting party, an airline to operate the agreed services in the routes specified in the annex, and the right to withdraw or change such designation.</td>
<td></td>
</tr>
<tr>
<td>2. Upon receipt of said designation, the other contracting party must, in agreement with the arrangements in paragraph 3 of the present article, concede without delay, to the designated airline of the other present convention the corresponding authorization of operation.</td>
<td></td>
</tr>
<tr>
<td>3. The aeronautical authorities of one of the contracting parties can require of the designated airline of the other contracting party to demonstrate that it is in the condition to comply with the obligations prescribed in the normal laws and regulations applied by said authorities for the operation of the international air services, in conformity with the arrangements of the Chicago Convention.</td>
<td></td>
</tr>
<tr>
<td>4. When an airline has been designated and authorized in this fashion, it can begin, at any time, to operate the agreed services, provided that there is in force for these services, a tariff established in conformity with the arrangements of the present convention.</td>
<td></td>
</tr>
</tbody>
</table>
### Revocation of the Authorization

| 1. Each contracting party reserves the right to not concede, or to revoke the designated airline of the other party, the permission to present an air service, in the case that they are not satisfactorily convinced that an important portion of the property and effective control of the said airline is in the hands of nationals of the other contracting party, or in the case that the said airline does not comply with the laws and regulations mentioned in this present convention, or in the case that the airline or the government it is designated under, fails to fulfill the conditions under which the rights were granted, in conformity with this agreement or in case that the designated airline does not comply with the conditions contained in the known permission. |
| 2. When one of the parties exercises any of the rights that are contained in the above paragraph, either of them can take refuge in the transactions of consultations and arbitration established in articles 12 and 13 of this agreement. (Art. 4) |

| 5. Each contracting party has the right to refuse granting of the authorization to operate that has been referred to in paragraph 2 of the present article, or to grant this authorization under conditions that it considers necessary to exercise by part of the designated airline of the rights specified in Article 2 of this agreement, if it is not convinced that the substantial property and the effective control of the designated airline is in the hands of the contracting party which designated it, or its nationals, or both. |

### Application of the Laws

| 1. The laws and regulations of one contracting party relative to the admission into their territory, or the exit from their territory, of airplanes used in international air transport, or related to the operation or navigation of such airplanes which they are in their territory, will be applied to the airplanes of the designated airlines of the other contracting party and will be complied with by said airplanes in the entrance or exit of the territory of the first contracting party and while they are within it. |
| 2. The laws and regulations of one contracting party relative to the admission, stay, and exit of the passengers, crew, cargo, and mail, such as regulated by entrance, exit, dispatch, migration, customs, and health, will be applied to the passengers, crew, cargo, and mail |

| 1. The laws, regulations, and procedures of each contracting party that are in force in their territory concerning the entrance and exit of airplanes dedicated to providing international air services, or related to the operation and navigation of said airplanes during their stay within the limits of the territory, will apply to the airplanes of the designated airline of the other contracting party. |
| 2. The laws, regulations, and procedures that are in force in the territory each contracting party concerning the entrance, stay, and exit of passengers, crew, equipment, cargo, and mail, as well as those relating to the formalities of entrance and exit from the country, immigration, customs, and sanitary measures, will apply also in the said territory to the
<table>
<thead>
<tr>
<th>Safety</th>
<th>Air Safety</th>
</tr>
</thead>
<tbody>
<tr>
<td>The certificates of air navigability, the certificates of capacity and licenses, issued or recognized by one contracting party, when they are in force, will be recognized as valid by the other party, for the purpose of operation in the routes and services stipulated in this agreement, under the condition that the prerequisites that exist to issue or recognize such certificates or licenses, will be equal or higher than the minimal norms established in conformity with the Chicago convention of the IACO. Each contracting party will reserve the right to refuse to accept, for the purpose of flight over their territory, certificates of capacity and licenses conceded to their own nationals by the other state.</td>
<td>(Article 6) 1. The certificates of air navigability, the certificates or titles of aptitude and the licenses issued or validated by one of the contracting parties and in force, will be recognized as valid by the other contracting party for the operation of the routes defined in the annex, as long as the certificates or licenses were issued in accordance with the norms established by the Chicago Convention. 2. Each contracting party reserves, notwithstanding the right not to recognize as valid, for flights above their territory, the titles or certificates of aptitude and the licenses issued to their own nationals by the other contracting party.</td>
</tr>
<tr>
<td>(Article 7) 1. The contracting parties agree to help one another when this is necessary to prevent the illegal possession of aircraft, or other illegal acts against the security of aircraft, airports and the air navigation installations, or any other threat to the security of the airplane. 2. Each of the contracting parties agrees to observe the non-discriminatory security arrangements generally applicable and required by the other contracting party, and to take adequate measures to inspect the passengers and their hand baggage. Each one of the contracting parties must also lend benevolent consideration to any request of the other party concerning special security measures for an airplane or passengers owing to a specific threat. 3. The contracting parties must act consistently with the arrangements for air security established by the IACO. If one of the contracting parties deviates from such arrangements, the other contracting party can request consultations with this contracting party. Unless it is otherwise arranged, such consultations will begin within a period of 60 days from operations of the designated airline of the other contracting party. 3. The passengers, equipment, and cargo in direct transit over the territory of either of the contracting parties and that do not stop in the area of the airport reserved for that effect, except in the measures that refer to security against violence and air piracy, will not be subject to more than simple control. The equipment and cargo in direct transit will be exempt from customs duties and other similar taxes. 4. Neither of the contracting parties must give preference to any other airline other than the designated airline of the other contracting party in the application of regulations of customs, immigration, quarantine, and other similar regulations; or the use of airports, air routes, and services of air traffic and connected installations under their control.</td>
<td></td>
</tr>
</tbody>
</table>
the date of receipt of such request.


5. When there is a case of illegal possession of an aircraft, or other illegal acts against the security of airplanes, airports, and the installations for air navigation, or a threat of these acts, the contracting parties must help one another facilitate the communications that are intended to end in a rapid and safe fashion, such incident or threat.

<table>
<thead>
<tr>
<th>Commercial Opportunities</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 13)</td>
</tr>
<tr>
<td>1. The designated airline of each contracting party has the right to convert and transfer, the quantity of income in excess of the taxes paid in the territory of the other contracting party, earned in relation to the activity of air transport. The sums which may be transferred include all earnings, at any time, made by sales of services of air transport supplementary services, and commercial interests accrued on such earnings while they are deposited before transference.</td>
</tr>
<tr>
<td>2. Such transference will be carried out in conformity with the internal legislation in force in each country.</td>
</tr>
</tbody>
</table>

<p>| (Article 14) |
| 1. The designated airlines of both contracting parties will be allowed: |
| a. to establish in the territory of the other contracting party offices for the promotion of air transport and sale of air tickets, as well as the installations necessary to provide the air transport. |
| b. sell services of air transport in the territory of the other contracting party, directly or through an agent. |
| 2. The airline designated by one of the contracting parties must permitted bring and maintain in the territory of the other contracting party the general, commercial, operational, and technical personnel that they require in relation to their air transport. |
| 3. These requirements of personnel, at the option of the designated airline can be fulfilled by their own personnel, or through the services of any other organization, company or airline that is operating in the territory of the other contracting party and which is authorized to provide such |</p>
<table>
<thead>
<tr>
<th>Rights for Customs and Taxes</th>
<th>Rights for Taxation on the User, (User Fees)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(Article 7)</strong></td>
<td><strong>(Article 9)</strong></td>
</tr>
<tr>
<td>2. The lubricant oils, technical consumable materials, spare parts, tools, and special equipment for maintenance work, as well as provisions, introduced into the territory of one of the contracting parties by the other contracting party, for the use exclusively of the airlines of said party, will be exempt, on the basis of reciprocity, from customs taxes, inspection fees, and other taxes or government taxes, state or local.</td>
<td><strong>(Article 9)</strong></td>
</tr>
<tr>
<td>3. Fuel, lubricant oils, other consumable technical materials, spare parts, and other normal equipment and provisions that are retained on board the airplanes of the designated airlines will be exonerated, on the basis of reciprocity, upon the arrival or departure of the territory of the other contracting party, of customs duties, inspection fees, and other taxes or government taxes, state and municipal, even when said articles are used or consumed by said airlines in flights within the referred territory.</td>
<td>1. Each one of the contracting parties can impose or permit to be imposed upon the airlines of the other contracting party, just and reasonable fees for the use of the airports and other services. Without exception, each one of the contracting parties agrees that such fees will not be higher than those applied for use of said airports and services charged to any other airline dedicated to similar international air services.</td>
</tr>
<tr>
<td>4. The fuel, lubricants, and other technical consumable materials, spare parts, normal equipment and provisions that are put on board the airplanes of one of the contracting parties in the territory of the other contracting party and used in international services will be exempt, on the basis of reciprocity, from customs duties, decisions, inspections fees, and other taxes or fees, federal, state, and municipal.</td>
<td>4. The authorized activities and permissions must be completed in conformity with the laws and regulations of the other contracting party.</td>
</tr>
<tr>
<td>5. All of the personnel will be subject to the laws, regulations, and administrative procedures applicable in the territory of the other contracting party.</td>
<td>5. All of the personnel will be subject to the laws, regulations, and administrative procedures applicable in the territory of the other contracting party.</td>
</tr>
</tbody>
</table>

1. The airplanes used in international air services by the designated airline of each contracting party, and its normal equipment, fuel, parts, lubricants, provisions (including food, tobacco, and beverages), materials for promotion on board such airplanes, will be exempt from all customs duties, inspection fees, and other charges or national fees, when they enter into the territory of the other contracting party, as long as this equipment and provisions stay on board the airplane until its time of re-exportation, as well as when said articles are used or consumed by said aircraft in flights above said territory.

2. Equally exempt from the same fees and payments will be:
   a. The lubricant oils, technical consumable materials, spare parts, tools and special equipment for maintenance work, as well as provisions (including food, tobacco and beverages), any for the exclusive use of the development of the activities of said airline, brought by the designated airline of one contracting party to the territory of the other contracting party.
   b. The fuel, lubricant oils, other technical consumable materials, spare parts, necessary equipment, and provisions that are brought on board the airplane of one of the contracting parties in the territory of the other contracting party and used in international services.

3. The equipment normally brought on board airplanes, as well as other materials and provisions that stay on board the airplanes of either of the contracting parties, can be unloaded in the territory of the other contracting party only with the previous authorization of the customs authorities of the local territory. In such cases, the goods will remain under the supervision of said authorities until the time when they are exported or are used in accord with customs regulations.
Legal Competition

(Article 8)
The contracting parties agree that the designated airlines will enjoy just and equal treatment so that they can exploit with equal possibilities the air services agreed between the territories of the contracting parties.

(Article 9)
In the fulfillment of the exploitation of the air services instructed in this agreement for the designated airlines of each of the contracting parties, each party will take into consideration the interests of the airlines of the other contracting party, with the purpose to not individually affect the services which in the end are provided.

(Article 10)
1. to remain understanding that the services provided to a designated airline conform to the present convention, the primary objective will be the proportioning air transport with adequate capacity to the traffic necessary between countries.
2. The services provided to the airlines that function in accord with this agreement must be limited to the strict relation of the public necessity of such services.
3. The right to embark or disembark, in the provision of these services, international traffic destined for a third country or originating from a third country, in any point or points of the specified routes in the Schedule of Routes [appended], they will work to conform to the general principles of rational and ethical evolution, that both parties contract to accept and that will be subject to the general principle of capacity of air transport that must be limited to the proportion:
   a) with the necessity of traffic between the country of origin and the countries of final destination,
   b) with the necessities of the service of directors of the airlines,
   c) with the necessity of the traffic of the region which the airlines passes through, after it takes into consideration local and regional services.
4. Both contracting parties agree to recognize that the traffic of the fifth freedom is complementary to the requirements of the traffic of the routes between the territories of the contracting parties and as the same time is a subsidiary to the requirements of traffic to the third and fourth freedoms between the territory of the other party and a third country on the route.
5. In relation to this, both contracting parties recognize that the development of local and regional services is a legitimate right of their respective countries. They agree therefore to consult periodically over the manner in which the norms of this article will

(Article 8)
1. The designated airlines of each contracting party must present to the authorities of the other contracting party for their approval within 30 days before the time of such intended services, the timetable of their intended services, specifying the frequency, type of airplane, the configuration, and number of seats which will be available to the public.
2. Requests for permission to operate additional flights can be presented by the designated airline for its direct approval to the aeronautical authorities of the other contracting party.

(Article 11)
1. Both contracting parties will agree that the designated airlines of each will have equal and just treatment in the operation of the agreed services in the routes specified between their respective territories on the basis of equal opportunities.
2. Each party will take the pertinent actions within their jurisdiction, to eliminate all forms of discrimination or practices of illegal competition that adversely affect the competitive position of the designated airline of the other party.
3. It will remain understood that the services that are provided by the designated airlines will conform to the present Convention, and will have, among others, the objective to proportion air transport based on the necessities of traffic.
4. The contracting parties agree that in relation to the specified routes, and the termination of operation of the same, will be defined by the aeronautical authorities of both contracting parties by mutual accord.
be completed for their respective designated airlines, with the purpose to ensure that their interests in the local and regional services, and also in the continental services, do not suffer damages.

6. All "rupture of cargo" (the change of a specified route, or substitution of an airplane with a different capacity) for justifiable reasons of economic exploitation will be admitted in any stopover of designated routes. Notwithstanding, no "rupture of cargo" will be done in the territory of the other contracting party when this would modify the characteristics of the exploitation of a service of long-standing or which is incompatible with the principles established in this agreement.

7. Before any increase in the offered capacity of one of the specified routes, or in the frequency of service of the same, advice will be given of not less than 15 days before, by the aviation authorities of the interested contracting party to the airline authorities of the other contracting party. In the case that the latter considers the said increase not justified in sight of the volume of traffic on the route, or that it results in harm to the interests of the airline that has been designated, they can request, within the same period of 15 days, a consultation with the other party. Said consultation must begin within a period of 90 days following the request, and the designated airlines have an obligation to present such information as may be asked for to resolve the necessity or justification of the proposed increase. In the case that they do not reach agreement within 90 days following the day of the request for the consultation, the question will be submitted under the terms of Article 13. During this process, the increase will not enter into force.

<table>
<thead>
<tr>
<th>Prices</th>
<th>Consultations</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 12 Section 1) Either of the contracting parties can at any time, request a consultation between the competent authorities of the two contracting parties with the proposition to discuss the interpretation, application, or modification of this agreement. Said consultations will begin within a period of 60 days following the date of receipt of the petition made to the Secretary of Exterior Relations of Mexico, or to the Ministry of Exterior Relations and Culture of the Republic of Costa Rica, as the case may be.</td>
<td></td>
</tr>
</tbody>
</table>
| (Article 15) 1. The aeronautical authorities of the contracting parties will meet with the frequency which they consider necessary, in the spirit of strict collaboration, with the purpose to assure the satisfactory application of the agreements of the present accord. 2. Either of the contracting parties can, at any time, request a consultation, if it is convenient for the aeronautical authorities of both contracting parties, with the proposition to analyze the interpretation, application, or modification, of this agreement. Said consultations will begin within a period of time of 60 days, starting on the date of receipt of request by the Minister of Business of the Kingdom of the Netherlands, or by the Minister of Exterior Relations of the Republic of Costa Rica, as the case may be. They arrive at a modification to the convention, said accord
### Settlement of Controversies

**Article 13**

1. Except in the cases where this convention has arranged other means, any discrepancy between contracting parties relative to the interpretation or application of this agreement that cannot be resolved by the means of consultations will be submitted to a tribunal of arbitration composed of three members, two of which will be named by each of the contracting parties, and the third by the mutual agreement of the first two members of the tribunal, under the condition that the third member will not be a national of either of the contracting parties.

2. Each one of the contracting parties will designate an arbitrator within the period of 60 days after the date on which either of the contracting parties have delivered to the other contracting party a diplomatic note in which they request a settlement of a dispute through the means of arbitration; the third arbitrator will be named within a term of 30 days, begun after the end of the period of 60 days referred to above.

3. If in the end they find that they cannot reach an accord with respect to the third arbitrator, the job will be filled by a person appointed by the President of the IACO in agreement with his practice.

4. The contracting parties agree to obey any resolution that is dictated in conformity with this article. The Tribunal of Arbitration will decide about the distribution of fees that result from this procedure.

### Termination

**Article 16**

If either of the contracting parties wants, at any time, to give notice to the other contracting party of their intention to rescind the present convention, they are obliged to simultaneously notify the IACO. The agreement will end six months after the date of receipt of the notice of termination. In the case that the other party claims not to have received notice, it will be assumed that the notice was received by them 14 days after the date of receipt of notice by the IACO.

**Article 20**

Either of the contracting parties can at any time, notify the other contracting party of their intention to rescind the present convention. This notification will be communicated simultaneously to the IACO. If such notification is made, the agreement will terminate 9 months after the date of receipt of notification by the other contracting party, unless the notice is not withdrawn by mutual accord before the expiration of the said time period. In the other contracting party does not acknowledge receipt of said notification, notice will be considered received 14 days after the ICAO has received notice.
<table>
<thead>
<tr>
<th><strong>Multilateral Accord</strong></th>
<th>(Article 15)</th>
</tr>
</thead>
<tbody>
<tr>
<td>If a multilateral convention on International Air Transport comes into effect, this present agreement will be modified, following the procedure established in Article 12, to adjust the agreement to the arrangements in said convention.</td>
<td></td>
</tr>
</tbody>
</table>

(Article 17)

1. If a multilateral agreement is accepted by both contracting parties concerning any material covered in this multilateral agreement enters into force and has complied with the constitutional requirements, the relevant agreements of this multilateral will give rule the relevant agreements of this accord. In this case the present agreement will be modified with the purpose to adapt the agreements of the said multilateral agreement.

2. Before the entrance into force of a multilateral agreement, if there exists any conflict between the agreements of the present accord and those of the multilateral, the arrangements of the present agreement will prevail.

<table>
<thead>
<tr>
<th><strong>Amendments</strong></th>
<th>(Article 12 Section 2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The amendments which are agreed to will be signed by both parties in an additional protocol, and will enter into force at the time when both contracting parties have completed their respective constitutional arrangements and have confirmed them through an exchange of diplomatic notes.</td>
<td></td>
</tr>
</tbody>
</table>

(Article 18)

This convention and all of its arrangements will be registered in the IACO.

<table>
<thead>
<tr>
<th><strong>Registration with OACI</strong></th>
<th>(Article 14)</th>
</tr>
</thead>
<tbody>
<tr>
<td>This agreement and all of its amendments will be registered with the IACO.</td>
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</tbody>
</table>

(Article 19)

When reference is made to the Kingdom of the Netherlands, in this agreement this will refer to the Kingdom in Europe only.

(Article 21)

The present convention will enter into force on the date on which there is an exchange of diplomatic notes by the contracting parties that notifies the completion of their constitutional formalities.

<table>
<thead>
<tr>
<th><strong>Entrance into Force</strong></th>
<th>(Article 17)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) The present agreement is subject to ratification. The exchange of instruments of ratification will be as brief as possible, in San José, Costa Rica.</td>
<td></td>
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<tr>
<td>2) The present agreement will enter into force 30 days after the exchange of instruments of ratification.</td>
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</table>

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<tr>
<th><strong>Route Rights</strong></th>
<th>(Annex)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The airlines designated by the Government of Mexico have the right to operate air services in both directions in the routes specified, and to make regular schedules in the intermediate points as qualified below:</td>
<td></td>
</tr>
</tbody>
</table>

For Mexico:
Mexico City → points intermediate → San José → points further.
Mérida, Yuc. → points intermediate → San José → points further.

Notes: |

A. Schedule of Routes:

1. As the proposition manifest in the present accord is to aid, on the basis of equality and reciprocity, the regular air services between the Republic of Costa Rica and the Kingdom the Netherlands, both countries agree to the full reciprocal rights of the designated airlines for the transport of passengers, equipment, cargo, and mail, between any points between their respective countries.
1. The airlines designated by the Government of Mexico to operate route 1, only have the right to fifth freedom flights between points in Central America and San José and vice versa, or between points in South America and vice versa.

2. The airlines designated by the Government of Mexico to operate route 2, do not have the right of fifth freedom to make points in the territory of Costa Rica of between points in Costa Rican territory.

3. The airlines designated by the Government of Mexico can omit any or all of the flights to points intermediate and points further in the specified routes.

4. The airlines designated by the Government of Mexico to operate routes 1 and 2 of this section do not have rights to stop, stay, or exit from points not specified in this section.

For Costa Rica:
Mexico City → points intermediate → San José → points further.
San José → points intermediate → Mérida, Yuc. → points further.

Notes:
1. The airlines designated by the Government of the Republic of Costa Rica to operate route 1, only have the right of fifth freedom between San Salvador and Mexico, and vice versa.

2. The airlines designated by the Government of the Republic of Costa Rica to operate route 2, do not have fifth freedom rights to make points of Mexican territory or between points of Mexican territory.

3. The airlines designated by the Government of the Republic of Costa Rica can omit any or all of the flights to points intermediate and points further in the specified routes.

4. The airlines designated by the Government of the Republic of Costa Rica to operate routes 1 and 2 of this section do not have rights to stop, stay, or exit from points not specified in this section.

**Tariffs**

(Article 7)

1. Each of the contracting parties can impose or permit the imposition on airlines of the other party, reasonable and just tariffs for the use of public airports and other facilities under its authority. Without exception, each of the contracting parties agrees that the said tariffs will not be higher than those charged for the use of the airport and facilities to their national airlines dedicated to similar international services.

(Article 11)

1. The tariffs applicable to the designated airlines of the contracting parties for transport destined to the territory of the other contracting party or originating from them, will be established at reasonable levels, taking into account all elements of value, especially the cost of operation, a reasonable profit, and the tariffs applied to other airlines on any part of the specified route.

2. The tariffs mentioned in paragraph one of this article will be in accord, if possible, for the designated airlines of both contracting parties.

3. The tariffs thus accorded will be submitted for the approval of the
1. When an airline of one of the contracting parties submits for consideration the tariffs on a flight from a point in the territory of one contracting party to another point in the territory of the other contracting party, taking into consideration the continuing service of the air plane, they will fix the tariff at reasonable levels, giving consideration to all of the pertinent factors, such as costs of operation, reasonable utilities and tariffs collected by other airlines as well as the characteristics of each service. These tariffs are subject to the approval of the air line authorities of each contracting party, those who will act in accordance with their obligations in conformity with this treaty, and within the limitations of their legal factors.

2. Any tariff that is proposed to be collected from any designated airline of either party for transport to points in the territory of the other party or to points in the territory of the same, will take into consideration the continuing service of the airplane, and must be presented for said airline, if this is required, to the authorities of the airlines of the other contracting party, leaving at least 45 days to the date of initiation, unless the contracting party has submitted a permit to submit it in a lesser amount of time. The aviation authorities of each of the contracting authorities must do all that is possible to assure that the tariffs that they charge and collect are adjusted to the tariffs presented to either of the contracting parties, and that no airline will be reimbursed a portion of any of these tariffs, in any manner, directly or indirectly, including through excessive commissions paid to agents or the use of imaginative fiscal exchange rates.

3. The two contracting parties agree that during any period when one of the parties has agreed to the proceedings of the Conference of Traffic of the IACO, or other international associations of airlines all settlements of tariffs set by any of these agreements will be subject to the approval of the other contracting party.

4. If either contracting party, at the receipt of notification as referred to in paragraph 2 above, is not satisfied with the tariff that is proposed, they will inform the other party in less than 30 days before the date it is proposed to enter into force, and the contracting parties will work to arrive at a acceptable agreement for a suitable tariff.

5. If a contracting party, upon examining a tariff in force that they collect for transport to their territory, or leaving from their territory, from an airline of the other party, is not satisfied with the said tariff, they will notify the other party and the contracting parties will work to arrive at a convenient arrangement with respect to the tariff.

6. In case, to arrive at an accord in conformity with the arrangements aeronautical authorities of both contracting parties, at least 15 days before the provisional date for their entrance into force. In special cases this time period may be reduced by the consent of the said authorities.

4. When agreement over a tariff cannot be reached in accord with the arrangements in paragraph 2 of the present article, or when the aeronautical authorities in the time period mentioned in paragraph 3 of this article, show to the other aeronautical authorities their disagreement with respect to any tariff acceded in conformity with the arrangements in paragraph 2, the aeronautical authorities of both contracting parties will try to establish a tariff of mutual accord.

5. A tariff which is established to conform to the arrangements of the present article, will continue in force until the establishment of a new tariff.

6. For the establishment of the tariffs, they will use, if possible, the process established by the International Association of Air Transport for fixing tariffs.

7. The designated airlines of each of the contracting parties in no manner can modify the prices or regulations of application of the tariffs in force.
in paragraphs 4 and 5, each contracting party will do what they can to put this tariff into effect.
7. a) If to conform with the circumstances laid out in paragraph 4, it is not possible to arrive at an agreement before the date in which it must enter into force, or
b) If to conform with the circumstance laid out in paragraph 5, it is not possible to arrive at an agreement before the date of expiration of a period of 60 days following after the date of notification:
In each case the contracting party that has submitted the objection to the tariff can adopt the necessary measures to prevent the initiation or continuation of the service in question with the tariff which they object to, when ever the contracting party that submitted the objection does to require that they collect a tariff higher than the minimal tariff obliged from their airlines for similar services between the same points.
8. They understand that the procedure of paragraphs 4, 5, and 7, is applicable only in the case of extreme conflict between the designated airlines of the contracting parties, and the corresponding aeronautical authorities. In normal cases of non-approval of tariffs, for lack of completion of prerequisites determined by part of the designated airline that requests the approval, or for modifications determined to regulate internal applications, there will always be direct settlement between the designated airline and the corresponding aviation authorities. When in any case the conformity with paragraphs 4 and 5 of this article, the aviation authorities of the two contracting parties can not reach an accord within a period of six months, with respect to a convenient tariff, and after consultation initiated by the complaint of a contracting party in relation to the proposed tariff or an existing tariff on the airline or airlines of the to the other contracting party, upon the request of the former, the measures of article 13 will be applied. To produce their report, the tribunal of arbitration will follow the principles established in this article.
9. Unless the contracting parties agree to a different method, each contracting party will compromise to enforce the most possible method to assure that any tariff specified in the national currency of one of the contracting parties will be fixed at a quantity that represents an effective exchange rate (including all of the rights of exchange or other fees) so that any of the airlines of both contracting parties can convert and remit the income of their transport operations into the national currency of the other contracting party.
<table>
<thead>
<tr>
<th>Definitions</th>
<th>Rights Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 2 as amended)</td>
<td>1. Each contracting party will concede to the other contracting party the rights specified in the present accord with the purpose to establish and operate the agreed services, in the routes specified in the annex of the present convention. The airlines designated by each contracting party will enjoy the exploitation of the services brought to a specified route, with the following rights:</td>
</tr>
<tr>
<td></td>
<td>a) to fly above the territory of the other party without landing</td>
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<tr>
<td></td>
<td>b) to make stopovers for non-commercial purposes, in the territory of the other contracting party,</td>
</tr>
<tr>
<td></td>
<td>c) to make stopovers in the points of the territory of the other contracting party that have been specified in the Schedule of Routes in the Annex of the present convention, with the purpose of embarking and disembarking passengers, mail and cargo, in conjunction or separately, in the international air traffic coming from or heading to the territory of the other contracting party or coming from or heading to another state, in accord with what is established in the annex to the present convention.</td>
</tr>
<tr>
<td></td>
<td>2. No stipulation in this agreement can be interpreted to mean that the rights of cabotage within the territory of a contracting party is granted to any airline designated by a contracting party.</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Designations and Authorization</th>
<th>(Article 3 as amended)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Each contracting party will have the right to designate two airlines of air transport to exploit the services agreed to in the specified routes, established by a written note to the other contracting party.</td>
<td></td>
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<tr>
<td>2. Upon receipt of said notification, the other contracting party must concede without delay, to the designated airlines the corresponding authorizations of exploitation, with agreement to the stipulations of paragraphs 3 and 4 of the present article and paragraph 1 of Article 4.</td>
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</tr>
<tr>
<td>3. The aeronautical authorities of one of the contracting parties can require from the designated airlines of the other contracting party that they demonstrate that they have complied with the obligations written in the normal laws and regulations applied by said authorities, for the exploitation of the international air services, in conformity with the requirements of the Chicago Agreement.</td>
<td></td>
</tr>
<tr>
<td>4. Each contracting party has the right to refuse the authorization of exploitation mentioned in paragraph 2 of this article, or to impose the conditions seen as necessary for exercising, as part of an (Article 3)</td>
<td></td>
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</table>

USA, Signed 16 August 1979; ratified 22 July 1983 Law # 6878

<table>
<thead>
<tr>
<th>Rights Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Article 2)</td>
</tr>
<tr>
<td>a) the right to fly over the territory of the other party without landing</td>
</tr>
<tr>
<td>b) the right to make stops in the territory of the other party for non-commercial reasons.</td>
</tr>
<tr>
<td>c) other rights specified in the accord.</td>
</tr>
</tbody>
</table>

Nothing in this section confers a right to any party when they are flying within points of the territory of the other party.
### Revocation of the Authorization

<table>
<thead>
<tr>
<th>Article 4</th>
</tr>
</thead>
</table>
| 1. Each contracting party reserves the right to revoke the authorization of exploitation conceded to a designated airline of the other contracting party, to suspend the ability to exercise this exploitation of the rights specified in Article 2 of the present convention, or to impose the conditions that they find necessary to exercise those said rights:  
   a) When they can not prove that the property and effective control of the airline is in the hands of the contracting airline, or their nationals,  
   b) When this airline does not comply with the laws and regulations of the contracting party that conceded those rights, or  
   c) When the designates airlines abandon the exploitation of the agreed services agreed to in the conditions of the present convention.  
2) Unless the revocation, suspension, or immediate imposition of the provisions in paragraph 1 of this article are essential to prevent new infractions of the laws and regulations, such right will be exercised only after consultation with the other party. |

### Application of the Laws

<table>
<thead>
<tr>
<th>Article 7</th>
</tr>
</thead>
</table>
| 1. The laws and regulations of each contracting party that regulate the entrance and exit of airplanes dedicated to international air transport or as related to the operations of such airplanes, during an airplane's stay within the limits of said territory, will apply to the airplanes of the designated airline of the other contracting party.  
2. The laws and regulations that regulate, for each contracting party, the entrance, stay, or exit from their territory of passengers, crew, equipment, mail, and cargo, as well as the relative transactions of formalities of entrance and exit from the country, immigration, customs, and sanitary measures will apply also in said territory to the operations of the airlines designated by the other contracting party. |

### Article 5

<table>
<thead>
<tr>
<th>Article 6 (Security)</th>
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</table>
| 1. Either of the Parties may revoke, suspend, or limit the authorization to operate, or technical permission of one of the designated airlines of the other party, when:  
   a) A substantial portion and effective control of the airline is not in the hands of the other Party or in the hands of nationals of the other Party;  
   b) The airline has not complied with the laws and regulations that are referred to in Article 5 of this agreement; or  
   c) The other party is not maintaining or administrating the norms stipulated in Article 6 (Security)  
2. If less than immediate action is needed to avoid a major non-compliance with the stipulations in 1) a, b, or c of this article, the rights established by this article will be exercised only after consultations with the other Party. |
3. For military reasons or public security, each contracting party can restrict or prohibit the flight of airplanes of the designated airlines, in areas designated to the other contracting party, over certain zones of their territory, when said restrictions or prohibitions apply equally to the airplanes of the airlines designated by the first contracting party, or to the airlines of air transport of third states that carry out regular international air services.

| Safety | (Article 6) Each party will recognize as valid, for the proposal of the operation of air transport foreseen in this accord, the certifications of airworthiness, certificates of competence, and licenses issued or valid for the other party, and will always have validity, always and when the prerequisites for obtaining of such certificates or licenses are no less than equal to the minimum norms which were established in the Convention. Without exception, each of the parties can refuse the recognition of requests for flight above their territory, consider invalid such certificates of competence and licenses issued or validated for their own nationals for the other party.

2) Each party can solicit consultations referring to the norms of security maintained by the other party in any of the aeronautical installations, air crew, airplanes, and operations of designated airlines. If after such consultations, either of the parties finds that the other party is not maintaining and effectively administrating the norms and prerequisites of security in these areas, to the end that there are less than equal to the minimum norms that were established in accord with the Convention, the other party must receive notification of such determinations and of the measures that are considered necessary to comply with the minimum norms. The other party must then take pertinent corrective action. Each one of the parties reserves the right to withhold, revoke, or limit the authorization to operate or the technical permission of one or more of the airlines designated by the other party in the case that the other party does not take appropriate action within a reasonable time period.

| Air Safety | (Article 7) Each Party, recognizing their responsibilities under the Convention, of developing Civil International Aviation in a safe and orderly fashion, reconfirms their profound concern over acts or threats against the security of airplanes that may endanger the security of the persons and goods, adversely affect the operation of air transport, and adversely affect the public's confidence in the security of Civil Aviation. To this end, each party:

1) Reaffirms their obligation to act consistently within the terms of the Convention concerning infractions and certain other acts committed aboard aircraft, signed in Tokyo on the 14 of December 1963, the
| Commercial Opportunities | Convention for the prevention of illegal acts against the security of Civil Aviation, signed in Montreal on the 23 of September, 1971.  
2) Require that the operators of airplanes flying under their flag will act consistently with the pertinent security measures applicable to air security, established by the ICAO; and  
3) give the greatest amount of help possible the other party to ensure the avoidance of illegal control over airplanes, the sabotage of airplanes, airports and installations of air navigation and threats against the security of air navigation, consider with sympathy the requests made by the other party over special measures for the security of their airplanes and passengers to resolve a particular threat; and when incidents occur or threats to the air security or sabotage against the air planes, airports, or installations of air navigation, they will help the other party to facilitate communications, of which the end will be to terminate such incidents in a rapid and safe manner.  

| Each contracting party agrees to guarantee to the other party the freedom to transfer, at the official exchange rate, all earnings in excess of taxes, obtained in their territory as a result of transport of passengers, equipment, mail, or merchandise carried out by the designated airlines of the other contracting party. When these transfers between contracting parties are regulated by a special treaty, they will implement the accord with said agreements.  

(Article 13)  
The designated airlines of both contracting parties can keep in the territory of the other contracting party, the technical and commercial personnel necessary for the normal development of their commercial activities. Said personnel must be nationals of either of the contracting parties.  

| (Article 8)  
1) the airlines of each of the parties can establish offices in the territory of the other party for the promotion and sale of air transportation.  
2) The airlines designated by one of the parties can, in accordance with the laws and regulations of the other party pertinent to the entrance, residence, and internal employment, introduce and maintain in the territory of the other party a personnel of a general level, for sales, repairs, operations, and of other specialties that require oversight for air transport.  
3) Each of the designated airlines can bring to fulfillment their own maintenance or ground crew in the territory of the other party ("self-handling") or if they prefer, they can select between different agents which compete for such services. These rights are only subject to the physical restrictions which arise from the airport security considerations. When such considerations do not permit such self maintenance or crew, such services must be available on an equal basis for all of the airlines, the charges for such services will be based on the costs of the services provided, and such services must be equal in class and quality to the maintenance and ground crew of their own, if it would be possible to have such.  
4) Each one of the airlines of each of the parties can dedicate themselves to the sale of air transport in the territory of the other party directly and at the discretion of the same airline, through their own agents, except as can be arranged in an annex to the present accord or in conformity with the same. Each airline can sell this type of transport, and all people will be at liberty to buy such transport with the money of their own territory, or in moneys freely convertible.
5) The airlines of both of the parties can convert and remit to their country, to their presentation, sums they earn in excess of the taxes paid locally. The conversions and remittance of such sums will be permitted promptly, without restrictions or related taxes, and the same to the type of exchange rate applicable to the transactions and current remittances.

Rights for Customs and Taxes

1. The airplanes used in the international air services by the designated airlines of either of the contracting parties, and their equipment, fuel, lubricants, and provisions (including food, tobacco, and beverages), on board such airplanes will be exempt from all customs duties, inspection fees, or other fees or taxes, to enter into the territory of the other contracting party, when these equipment and provisions stay on board the airplane until the time of their re-exportation.

2. These will be equally exempt from the same fees and taxes, with the exception of fees for services provided:
   a) The provisions brought on board in the territory of one of the contracting parties, within the limits set by the authorities of said contracting party, for the consumption on board the airplane used for international air transport of the other contracting party.
   b) The spare parts introduced to the territory of one of the contracting parties for the maintenance or repair of their aircraft used in international air transport by the designated airlines of the other contracting party.
   c) The fuel and lubricants destined for the supply of the airplanes used by the designated airlines of the other party and used for the international air services including when these provisions are consumed during the flight above the territory of the contracting party from which such materials were brought on board.

It can be required that these articles mentioned in paragraphs a, b, and c, remain under vigilance or control.

3. The essential equipment of the airplanes, as well as the materials and provisions mentioned above, cannot be removed from the airplane in to the territory of the other contracting party without the approval of the aeronautical authorities of the said territory. In such case, they must be maintained under the vigilance of said authorities until they are re-exported or have received another destination that must be authorized.

4. The passengers in transit across the territory of one of the contracting parties are subject to simple control. The equipment (Article 9)

1) to bring to the territory of one of the parties, the aircraft that the airlines designate for the other party to operate for the international air transport, their regular equipment, their ground equipment, fuel, lubricants, consumable technical articles, spare parts including motors, food for the airplanes (including but not limited to food, drink, liquor, tobacco, and other products designated for the sale or use of passengers in a limited quantity during the flight) and other articles which are used or which must be used only in connection with the operation or service of the airplane dedicated to international air transport will be exempt, on a reciprocal basis, from all restrictions on importation, property taxes, capital taxes, or of consumption, customs duties, duties or fees similar to taxes for the national authorities, and not based on the costs of loaned services, only and when such equipment and articles stay on board the airplane.

2) These things will also be exempt, on the basis of reciprocity, of taxes, fees and duties, that were referred to in paragraph 1) of this article, with the with the exception of fees that are based on the costs of the provided services:

A. The food brought in to the territory of one of the Parties, or obtained in it, and brought aboard, within reasonable quantities, for the use on the designated airline of the other party designated for the use of international air transport in departure flights, and when these foods are going to be used in a portion of the flight over the territory where they were taken aboard.

B. The ground equipment and spare parts, including motors, brought into the territory of the parties for the service, maintenance, or repair of an airplane of a designated airline of the other party that is used in international air transport; and

C. The fuel, lubricants, and consumable technical articles introduced to, or supplied within the territory of one of the parties for the use by an airplane of a designated airline of the other party dedicated to use in international air transport, even when these articles will be used in a
and cargo in direct transit will be exempt of the customs duties and other similar fees.

portion of the flight over the territory where they were brought aboard.

3) It can be required that the equipment and articles that were referred to in paragraphs 1) and 2) of this article are maintained under the supervision or control of the pertinent authorities.

4) The exemptions foreseen in this article also will be applicable when the airlines designated by one party contract with other airlines which have exemptions similar to the other party, for the loan or transferece in the territory of the other party of the articles specified in paragraphs 1) and 2) of this article.

5) Each party will make their greatest effort to search, for airlines designated by the other party, on a reciprocal basis, the exemption of taxes, customs, fees or duties established by the state, or by regional or local authorities concerning articles specified in paragraphs 1) and 2) of this article, as well as the exception of increase in the price of fuel which are transmitted directly to the consumer ("Fuel put through charges") in the circumstances described in this article, except in the case where the charges cover the real cost of such services.

<table>
<thead>
<tr>
<th>Rights for Taxation on the User, (User Fees)</th>
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<tbody>
<tr>
<td>(Article 10) Each of the contracting parties can impose or permit the imposition on the airplanes of the other party, reasonable and just prices for the use of the airports and other services. Without exception, each one of the contracting parties agrees that the said prices may not be greater than those applicable for the use of said airports and services to the dedicated airlines of similar international air services.</td>
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<thead>
<tr>
<th>Legal Competition</th>
</tr>
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<tbody>
<tr>
<td>(Article 11) 1. The services agreed to for any of the routes specified in the annex of the present agreement will have as their essential objective, to offer adequate capacity to and from the country which the designated airline belongs to.</td>
</tr>
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<table>
<thead>
<tr>
<th>(Article 11)</th>
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<tbody>
<tr>
<td>1) Each of the Parties will permit an equal and just opportunity for the designated airlines of both parties to compete in the international air transport covered in this accord.</td>
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<tr>
<th>(Article 11)</th>
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<tr>
<td>2) Each party will take all pertinent action, within their jurisdiction, to eliminate all forms of discrimination or practices of illegal competition</td>
</tr>
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</table>
2. The airlines designated will take into consideration in their common routes, their mutual interests with the purpose of not affecting their respective services.

3. Both contracting parties agree that the Fifth Freedom traffic is complementary to, or subsidiary of, the principle traffic of third and fourth freedoms, whose development constitutes the first objective of the present agreement.

4. In the right to embark and disembark in the respective territories of the contracting parties, of international traffic whose origin or destination is a third country, in accord with what is established in Article 2 c) and in the annex in the present agreement, can be exercised to conform to the general principles of methodological development of international air traffic and in such conditions that the capacity will be adopted between other factors:
   a) the demand of traffic between the country of origin and the country of origin and the country of destination,
   b) the demand for economic exploitation on the route,
   c) the demand of traffic in the sector that the airline transfers.

5. The frequency of the services of the designated airline, the capacity offered for such services, as well as modifications to the type of airplanes, that signify substantial changes in the agreed services, will be determined by agreement between aeronautical authorities of both contracting parties, officially or by proposal of the designated airlines.

which adversely affects the competitive position of the airlines of the other party.

3) Neither of the parties will unilaterally limit the volume of traffic, the frequency or regularity of service, or the type or types of airplanes operated by the airlines designated by the other party, except when it may be required for reasons of customs, technical reasons, operative or environmental reasons, under the uniform conditions established under article 15 of the Convention.

4) Neither party will impose on the designated airlines of the other party, a requisite of first refusal, a percentage of the total traffic (up-lift ratio), a compensation for not presenting an objection (no-objection fee), or any other requisite with respect to the capacity, frequency or traffic that can not be in agreement with the propositions in this accord.

5) Neither of the parties will require the presentation of itineraries, schedules for fleet flights, or plans of operation for airlines of the other party for their approval, except as required on the basis of non-discrimination, to comply with the uniform conditions such as those established in paragraph 3 of this article, or as may be specifically authorized in an annex to this accord. If for the purposes of information either party needs such presentations, there must be a minimum of administrative charges for the requirements of these presentations and for the procedures for the intermediaries of the air transport and the airlines designated by the other party.

### Prices

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<tr>
<td><strong>Prices</strong></td>
<td><strong>(Article 12)</strong></td>
</tr>
<tr>
<td>1) Each party will permit that the prices for air transport will be established for each of the designated airlines on the basis of commercial considerations of the market. The intervention of the parties will be limited to:</td>
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<tr>
<td>a) to evade practices or prices which are discriminatory or of a predatory character; the other party [should present] their reasons for dissatisfaction, as quickly as possible. These consultations must be begun within 30 days of receipt of notice, and the parties will cooperate in the search for information for a reasonable solution to the problem. If the parties arrive at an agreement with respect to a price to resolve that which was presented in the notice of dissatisfaction, each of the parties will make their greatest effort to put this agreement into force.</td>
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<tr>
<td>4) Not in spite of paragraph 3) of this article, each of the parties will permit: a) that any airline of either of the parties or any airline of a third country may equal to the lowest price or most competitive price charged or collected by any other airline or fleet for the international air transport between the territories of the parties; and b) that any airline of one of the</td>
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<tr>
<td>Consultations</td>
<td>(Article 14) The aeronautical authorities of both of the contracting parties will consult periodically with the strict spirit of collaboration, with the purpose to assure the satisfactory application of the arrangements of the present convention and its annex. The aeronautical authorities of each of the contracting parties must assist the aeronautical authorities of the other contracting party, if they make requests for the statistical information that reasonably could be considered necessary to review the capacity required by the established services by the designated airline of the other contracting party. Said information will include all information that is needed to determine the volume of traffic transported by the mentioned airlines in the agreed services. Equal procedure will be followed when the aeronautical authorities of one of the contracting parties request statistical information of the designated airlines if each of the contracting parties.</td>
</tr>
<tr>
<td>Settlement of Controversies</td>
<td>(Article 13) At any time, either of the parties can solicit a consultation in relation to this accord. Such consultations must be begun as soon as possible, but no after, than 60 days after the date on which the other party receives the solicitation, unless they specifically request another form. Each one of the parties will prepare and present, during such consultations, the pertinent evidence to support their position with the end to facilitate rational, economic, and well formed decisions.</td>
</tr>
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### Article 18

1. In the case that a controversy arises over the interpretation or application of the present accord between contracting parties, these will be resolved, primarily, by a solution which will follow direct negotiations.

2. If the contracting parties do not arrive at a solution following negotiations, the controversy can be submitted at the request of either of the contracting parties to the decision of a tribunal composed of 3 parties, one named by each contracting party, and the third designated by the first two. Each of the contracting parties will name an arbitrator within a time period of 60 days following the date when the request for arbitration of the controversy is received by either of the contracting parties by the other contracting party, by diplomatic routes, and the third arbitrator will be named within a new time period of 60 days. If either of the contracting parties does not designate an arbitrator within a fixed time period, either of the contracting parties can ask the President of the IACO to name an arbitrator or arbitrators, as may be the case. In such case, parties may equal the lowest price or most competitive price charged or collected for any other airline or fleet for the international air transport between the territory of another party and a third country. Such as it is here used, the term "equal" means the right to opportunely establish, using the expeditious procedures that are necessary, a price similar or identical with direct basis, in inter or intra-lines, weighing the differences in conditions with relations to routes, requirements of flights of arrival and departure, connections, and the type of service or type of airplane.

### Article 14

1) Any controversy whose motive for origin lies in this accord and that is not resolved in a first round of official consultations, except those that originate along the lines of paragraph 3 of article 12 (prices), with the agreement of the parties, can be referred to another person or group for a decision. If the parties are not in agreement to proceed in this manner, a request by anyone involved in the controversy should be presented for arbitration following the procedures established further on.

2) The arbitration will be carried out by a tribunal of three arbitrators, constituted as follows:

   a) By the end of 30 days after the receipt of a request for arbitration, each of the parties will appoint an arbitrator. By the end of 60 days after these arbitrators have been nominated, the appointment between those nominated, a third arbitrator will be named who will serve as the President of the tribunal of arbitration;

   b) If either of the parties do not name an arbitrator, or if the third
<table>
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<tr>
<th>Termination</th>
<th>(Article 17)</th>
<th>(Article 15)</th>
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<tr>
<td></td>
<td>Either of the contracting parties can, at any time, notify the other party</td>
<td>At any time, either party can give advice in writing of their decision to</td>
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<td>of their intention to terminate the present agreement. This notification</td>
<td>terminate this accord. Such notice must be given simultaneously to the</td>
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<td>will be communicated simultaneously to the IACO. If such notification</td>
<td>IACO. This accord will terminate at midnight (in the place of receipt of the</td>
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<td>is made, the agreement will end 12 months after the date when the other</td>
<td>advise of the other party), immediately following the first anniversary of</td>
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<td>contracting party receives notice, unless the date of notification is</td>
<td>the date of receipt of the advice of the other party, unless the notice is</td>
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<td>withdrawn by mutual accord, before the expiration of said time period.</td>
<td>withdrawn by agreement, before the end of this period.</td>
</tr>
<tr>
<td><strong>Registration with OACI</strong></td>
<td>(Article 19)</td>
<td>The present agreement and all modifications to the same, in addition to any exchange of notes, will be registered with the IACO.</td>
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<tr>
<td><strong>Entrance into Force</strong></td>
<td>(Article 20)</td>
<td>This present accord will be applied provisionally after the date of signing and will enter into force at the time when both contracting parties have notified each other, through the exchange of diplomatic notes, of the completion of their respective constitutional formalities. Unless one of the contracting parties gives notice of their intention to end it, in conformity with arrangements in Article 17, the present convention will have a duration of 3 years, from the date of its provisional application, and will be renewed by tacit agreement, for additional periods of 3 years, unless either of the contracting parties oppose it 12 months before the date set for its expiration.</td>
</tr>
<tr>
<td><strong>Amendments</strong></td>
<td>(Article 15)</td>
<td>1. If either of the contracting parties wants to modify any of the agreements of the present accord, they can request a consultation with the other contracting party. Such consultation, that can be made between the aeronautical authorities verbally or by correspondence, shall begin within a time period of 60 days following the date of the request. If they arrive at an agreement over the modification of the convention, said agreement will be formalized following an exchange of diplomatic notes. 2. The approved amendments will be applied provisionally after the date of the exchange of notes, and will enter into force on the date which both parties agree to, at a time when they have both obtained the approval required in accord with their respective constitutional proceedings, in an additional exchange of notes. 3. Modifications to the annex of the present convention can be made following a direct agreement between the competent aeronautical authorities of the contracting parties, confirmed by an exchange of notes through diplomatic routes.</td>
</tr>
<tr>
<td><strong>Multilateral Accord</strong></td>
<td>(Article 18)</td>
<td>The present convention and its annex will be amended to exist in harmony with any multilateral agreement that is signed by both contracting parties in conformity with the arrangements in Article 15 of the present convention.</td>
</tr>
<tr>
<td><strong>If the contracting party does not acknowledge the date of receipt of said notification, the date of receipt will be considered to be 14 days after the IACO receives notice.</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Route Rights

(Annex)

To the convention over air transport between the Government of the Kingdom of Spain and the Government of the Republic of Costa Rica, for the regular air transport between their respective territories.

1. Schedule of Routes: the agreed services in the specified routes that are referred to in the present convention will be determined as follows:
   a) Spanish Route: Points in Spain → through intermediate points → San José → points further; in both directions.
   b) Costa Rican Routes: Points in Costa Rica → through intermediate points → Madrid → points further; in both directions.

Notes: The intermediate points and the points further not specified in the routes A and B will be determined subject to the agreement between the aeronautical authorities of both contracting parties.

2. The designated airlines can omit one or various points or landings in the same order of the routes indicated in part 1 of this annex, in all or in part of their services, although only when the point of departure has been situated in the territory of the contracting party that has designated said airline.

3. The hours of operation of the agreed air services will be submitted by the designated airlines for the approval of the aeronautical authorities of both contracting parties 60 days in advance or their entrance into force. The aeronautical authorities must, within a period of 30 days, approve or disapprove the proposed hours.

4. The rights to Fifth Freedom traffic exercised by the designated airlines of each contracting party will be established by accord between the aeronautical authorities of both parties and always over a base of analogous economic values.

(Regular Air Service; Annex 1)

Section 1:
A party who is designated in this annex, in conformity with the terms of the designation, will have the right to operate international air transport 1) between points in the following routes and 2) between points in such routes and points in third countries following the points in the territory of the Party which has designated the airline.

a) Routes for the airline or airlines designated by the US:
From the United States of North America → points intermediate → to Costa Rica → points further.

b) Routes for the airline or airlines designated by Costa Rica:
From Costa Rica → points intermediate → to San Juan, Miami, and [five] additional points within the United States → to three points further in Canada.

Section 2:
Each one of the designated airlines can, in any or all of their flights, if they consider it convenient to operate flights in either or both directions without directional or geographic limitations, serve points in the routes in any order and omit stopovers in any point or points that are in the territory of the other Party that designated said airline without losing any right to operate in the traffic permitted in other forms in this accord.

Section 3:
In any of the international segment or segments of the routes described in Section 2 above, a designated airline can operate the international air transport without any limitations to the amount of change, in any point of the route, in the type or number of airplanes they can operate, when the transport in the direction of exit to any point that is further in line that will be a continuation of the transport of the party that has designated the airline; and in the direction of entrance, the transport to the territory of the party that has designated the airline will be a continuation of the transport further to this point.

(Charter Service; Annex 2)

Section 1:
The airlines of one of the parties which is designated in this annex, in accord with the terms of such designation, will have the right to operate international air transport to, from, and through any point or points in territory of the other Party, directly or with stopovers in route, for one way flights or round trip, in the following traffic:

a) any traffic from or to a point or points in the territory of the party that has designated the airline.
b) any traffic from or to any point or points further on from the territory of...
<table>
<thead>
<tr>
<th>Tariffs</th>
<th>(Article 6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The applicable tariffs for the designated airlines of the contracting parties for the transport destined for the territory of the other party or foreseeable to go there, will be established at reasonable levels, bearing in mind all of the elements of valuation, especially the costs of exploitation, the reasonable benefit, and the applicable tariffs of other airlines of air transport.</td>
<td></td>
</tr>
<tr>
<td>2. The tariffs mentioned in paragraph one of this article will be in accord, as is possible, for the designated airlines, subject to consultations with the other airlines that operate in the whole route or in part of it. The airlines will arrive at this recurring agreement, to the extent that is possible, by the recommendation of the international organizations whose regulations are usually used.</td>
<td></td>
</tr>
</tbody>
</table>
3. The tariffs that are assigned will be submitted for approval to the aeronautical authorities of both contracting parties, at least 90 days before the date foreseen for their entrance into force. In special cases this time period may be reduced with the agreement of said authorities. For the entrance into force of a tariff, it is necessary for the preliminary approval of the aeronautical authorities of both parties.

4. When parties have not been able to agree on a tariff that conforms with the arrangements in paragraph 2 of this article, or when an aeronautical authority in the time period mentioned in paragraph 3 of this article, shows to the other aeronautical authority their disagreement in respect to such tariff in accord with the agreements in paragraph 2, the aeronautical authorities of both contracting parties will work to arrive at a tariff of mutual accord.

5. If the aeronautical authorities can not reach an accord over a tariff which conforms to paragraphs 2, 3, and 4 of the present article. The controversy will be resolved by the means arranged in Article 18 of the present convention.

6. A tariff established that conforms with the arrangements of the present article will continue to be in force until a new tariff is established. Without exception, the validity if a tariff can not be prolonged by virtue of this paragraph, for a period of longer than 12 months counting to the date when it must expire.

7. The designated airlines of the contracting parties can not modify in any manner, the price, nor the rules of applications of the tariffs in force.
Appendix II—Venezuela

<table>
<thead>
<tr>
<th>Definitions</th>
<th>VENEZUELA: 1st of December, 1991</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights Granted</td>
<td>(Article 2)</td>
</tr>
<tr>
<td>1. Each contracting party grants to the other contracting party the rights specified in the present convention with the purpose to establish regular international air services in the routes specified in the Schedule of Routes attached to the present convention.</td>
<td></td>
</tr>
<tr>
<td>2. Saving what is stipulated in the present convention, the designated airline of each contracting party will have, during the operation of the air services agreed to in the specified routes, the following rights:</td>
<td></td>
</tr>
<tr>
<td>a) to fly above the territory of the other contracting party without landing in said territory,</td>
<td></td>
</tr>
<tr>
<td>b) to make stopovers for non-commercial purposes in the territory of the other contracting party,</td>
<td></td>
</tr>
<tr>
<td>c) to make stopovers in the points of the other contracting party that are specified in the schedule of routes with the proposition to disembark and embark passengers, cargo, equipment, and mail in the service of international air transport originating from or destined to the other contracting party, and when coming from or with destination to another State, in accord with those established in the Schedule of Routes.</td>
<td></td>
</tr>
</tbody>
</table>

| Designations and Authorization | (Article 3) |
| 1. Each contracting party will have the right to designate in writing through diplomatic channels to the other contracting party, an airline to operate the agreed services in the routes specified, and the right to withdraw or change such designation. |
| 2. To receive such designation, the other contracting party must, in agreement with the arrangements on paragraph 3 of the present Article, concede without delay, to the designated airline of the other contracting party, corresponding authorization of operation. |
| 3. The aeronautical authorities of one of the contracting parties can demand that the designated airline of the other contracting party demonstrate that it is in condition to comply with the obligations proscribed in the normal and reasonable laws and regulations applied by said authorities to the operation of international air transport, in conformity with the arrangements of the Chicago Convention. |
| 4. When an airline has been authorized and designated in this fashion, it can begin, at any time, to operate the agreed services. Whenever it is operating said services, a tariff will be established in conformity with |
### APPENDIX II—VENEZUELA

<table>
<thead>
<tr>
<th>Revocation of the Authorization</th>
<th>(Article 4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Each contracting party reserves the right to deny or revoke the authorization of operation conceded to an airline designated by the other contracting party, or to suspend the ability of said airline to exercise the rights specified in Article 2 of the present convention, or impose the conditions that are necessary to exercise the said rights:</td>
<td></td>
</tr>
<tr>
<td>a) when they are not convinced that the property and effective control of the airline is in the hands of the party that designated the airline, or its nationals.</td>
<td></td>
</tr>
<tr>
<td>b) when the airline does not comply with the laws and regulations of the contracting party that granted those privileges, or</td>
<td></td>
</tr>
<tr>
<td>c) when the airline stops operating the agreed services with arrangement to the prescribed conditions of the present convention.</td>
<td></td>
</tr>
<tr>
<td>2. Unless the immediate revocation, suspension, or imposition of the conditions foreseen in paragraph 1 of the present Article are essential to prevent new infractions of the laws and regulations, such right will be exercised only after consultation with the other contracting party.</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Application of the Laws</th>
<th>(Article 6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The laws and regulations of each contracting party that regulate in their territories, the entrance and exit of airplanes dedicated to international air transport or related operations, and navigation of said airplanes, during their stay within the limits of their territory, will apply to the airplanes of the designated airline of the other contracting party.</td>
<td></td>
</tr>
<tr>
<td>2. The laws and regulations that rule, in the territory of each contracting party, the entrance, stay, and exit of passengers, crew, equipment, and cargo and mail, as well as the transactions relative to the formalities pertaining to the entrance and exit from the country, to immigration, to customs, and to sanitary measures, apply also in the said territory to the operation of said designated airline of the other contracting party.</td>
<td></td>
</tr>
<tr>
<td>3. The passengers in transit over the territory of either of the contracting parties, only will be subject to simple control. The equipment and cargo in direct transit will be exempt from customs duties and other similar fees.</td>
<td></td>
</tr>
</tbody>
</table>

| Safety | 1. The certificates of air navigability, the certificates or titles of aptitude, and the licenses issued or recognized as valid for either of the contracting parties, and in force, will be recognized as valid for the other contracting party for the operation of the routes defines in the Schedule of Routes, as long as the requisites under which such certificates or licenses were issued or recognized are equal or greater to those that were established by the Chicago Convention. |
### Appendix II—Venezuela

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<tbody>
<tr>
<td><strong>2.</strong></td>
<td>Each contracting party reserves, not withstanding, the right not to recognize the validity, for flights above their own territory, the titles or certificates of aptitude and licenses issued to their own nationals by the other contracting party.</td>
</tr>
<tr>
<td><strong>Air Safety</strong></td>
<td></td>
</tr>
<tr>
<td><strong>1.</strong></td>
<td>In conformity with the rights and obligations that are imposed by International Law, the contracting parties acknowledge their mutual obligation to protect the security of Civil Aviation against acts of illicit interference, which constitutes an integral part of the present convention. Without limit, the validity of their rights and obligations by virtue of International Law, the contracting parties, will act in particular, in conformity with the arrangements of the <strong>AGREEMENT ABOUT THE INFRINGEMENTS AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRPLANES</strong>, signed in Tokyo on the 14 of September of 1963, the <strong>CONVENTION FOR THE PREVENTION OF ILLEGAL POSSESSION OF AIRPLANES</strong>, signed in the Hague on the 16 of December of 1970, and the <strong>CONVENTION FOR THE PREVENTION OF ILLEGAL ACTS AGAINST THE SECURITY OF CIVIL AVIATION</strong>, signed in Montreal on the 23 of September, 1971.</td>
</tr>
<tr>
<td><strong>2.</strong></td>
<td>The contracting parties will mutually give all necessary help that is requested to prevent acts of illegal possession of civil airplanes and other illicit acts against the security of said airplanes, their passengers and crew, airports and installations of air navigation and all other threats against the security of civil aviation.</td>
</tr>
<tr>
<td><strong>3.</strong></td>
<td>The contracting parties will act, in their mutual relations, in conformity with the arrangements concerning the security of aviation established by the ICAO and in the annexes to the convention of the ICAO, in the measures in which these arrangements concerning security, will be applied to the parties; they will demand that the designated airlines act in conformity with said arrangements concerning aviation security.</td>
</tr>
<tr>
<td><strong>4.</strong></td>
<td>Each contracting party will agree to require of said designated airlines that they observe the arrangements concerning aviation security that is mentioned in the previous paragraph, in order for the other contracting party to enter, stay, or exit from the territory of the other contracting party. Each contracting party will make sure that they apply adequate effective measures to protect the airplane and to inspect the passengers, crew, effective personnel, equipment, cargo, and the supplies of the airplane before and during the boarding or the stay. Each of the contracting parties will also be favorably predisposed to attend to all requests from the other contracting party to adopt reasonable special measures of security with the purpose to prevent a determined threat.</td>
</tr>
<tr>
<td><strong>5.</strong></td>
<td>When an incident or threat of incident to carry out an illicit possession of</td>
</tr>
</tbody>
</table>
### Appendix II—Venezuela

<table>
<thead>
<tr>
<th>Commercial Opportunities</th>
<th>(Article 14)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The designated airline of one contracting party can maintain and employ their own personnel for their services in the airports and the cities in the territory of the other contracting party, where the same airline has proposed to maintain their own representation.</td>
<td></td>
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<tr>
<td>2. All of the personnel will be subject to the laws, regulations and administrative procedures applicable in the territory of the other contracting party.</td>
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</tbody>
</table>

(Article 13)
The designated airlines for each of the contracting parties will have the right to convert and transfer, the quantity earned in the territory of the other party, greater than the taxes of the same, in relation to their activities in air transport. Such transference will be subject to the internal legislation in effect in each country.

<table>
<thead>
<tr>
<th>Rights for Customs and Taxes</th>
<th>(Article 10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The airplanes used in international air services by the designated airlines for either of the contracting parties and their normal equipment, fuel, lubricants, provisions, (including food and beverages), on board such airplanes, will be exempt from all duties from customs, inspections, or other fees, taxes, and national taxes, upon the entrance to the territory of the other contracting party, when these equipment and provisions stay on board the airplane until the time of their re-exportation, or when these articles are used or consumed by said airplanes in flight over the referred territory.</td>
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<tr>
<td>2. Also exempt under a condition of reciprocity, from the same fees, taxes, and other charges, with the exception of the right of services provided are:</td>
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</tr>
<tr>
<td>a) Lubricant oils, consumable technical materials, spare parts, tools and special equipment for maintenance work, as well as provisions, (including food and beverages) and exclusively for the development of activities of airlines, remitted by the airline of one contracting party to the territory of the other contracting party.</td>
<td></td>
</tr>
</tbody>
</table>
| b) The fuel, lubricant oils, other technical consumable materials, spare parts, equipment for the running the airplane, and provisions that are put on board the airplanes of one of the
## Appendix II—Venezuela

<table>
<thead>
<tr>
<th>Rights for Taxation on the User. (User Fees)</th>
</tr>
</thead>
</table>
| **(Article 9)**  
Each of the contracting parties can impose or permit to be imposed on the airplanes of the other party, reasonable and just fees for the use of the airport and other services. Without exception, each one of the contracting parties agree that said fees will not be higher than those applied for the use of said airports and services to their national aircraft dedicated to similar international services. |

<table>
<thead>
<tr>
<th>Legal Competition</th>
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</thead>
</table>
| **(Article 5)**  
The designated airline of each contracting party can create cooperation agreements. Those that enter into force must be approved by the aeronautical authorities of both parties, in accord with their respective legislation.  

**(Article 11)**  
1. Both contracting parties agree that the designated airlines will enjoy equal and just treatment in the operation of the agreed services in the specified routes between their respective territories on the basis of the principle of equality of opportunities.  
2. Each contracting party will take all pertinent appropriate action, within their jurisdiction, to eliminate all forms of discrimination, or practices of illegal competition that adversely affect the competitive position of the airline of the other contracting party.  
3. In the operation of the agreed services by the designated airline of either of the contracting parties, they will give consideration to the interests of the designated airline of the other contracting party, with the purpose of not to individually affect the services of the latter party.  
4. It will remain understood that the services provided to the designated airline conform to the present convention, and will have the primary objective to proportion air transport with the adequate capacity for the necessities of traffic between the two countries.  
5. The contracting parties, in accordance with the specified routes, and their terms of operations, that the same will be defined by the aeronautical authorities of both contracting parties. |

<table>
<thead>
<tr>
<th>Prices</th>
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<tbody>
<tr>
<td>Consultations</td>
</tr>
<tr>
<td>---------------</td>
</tr>
<tr>
<td>1. The aeronautical authorities of the contracting parties with the frequency they consider necessary and with the spirit of strict collaboration, with the purpose to assure the satisfactory application of the agreements in the present convention.</td>
</tr>
<tr>
<td>2. Either of the contracting parties can, at any time, request a meeting for consultations between aeronautical authorities of the two contracting parties with the proposition to analyze the interpretation, application, or modification of this convention. Said consultations will begin within a period of 60 days, beginning on the date of receipt of petition made to the Minister of Exterior Relations of Venezuela, or to the Minister of Exterior Relations of the Republic of Costa Rica, which ever is the case. If they arrive at an accord to modify the convention, said accord will be formalized following an exchange of diplomatic notes.</td>
</tr>
<tr>
<td>3. The amendments such that are approved, will enter into force on the date on which both contracting parties agree, at such time when they have obtained the approval of everyone required, in accord with their respective constitutional procedures, in an additional exchange of notes.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Settlement of Controversies</th>
<th>(Article 17)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any controversy that originates from this agreement, will be subject, before all, to direct consultations between aeronautical authorities in agreement with the interval established in paragraph 2 of article 16 of this convention and if it is not resolved, it will be addressed through diplomatic channels.</td>
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</tbody>
</table>

<table>
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<tr>
<th>Termination</th>
<th>(Article 20)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Either contracting party can at any time, notify the other contracting party of their decision to renounce the present convention. This notification will be communicated simultaneously to the IACO. If there is such notification, the convention will end 6 months after the date of receipt of notification by the other contracting party, unless said notification is withdrawn by mutual agreement before the end of the said time period. If the other contracting party does not reveal the date of receipt of said notification, it will be considered received 14 days after the IACO has received notification.</td>
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</table>

<table>
<thead>
<tr>
<th>Multilateral Accord</th>
<th>(Article 18)</th>
</tr>
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<tbody>
<tr>
<td>1. In the case that a multilateral convention concerning the rights of traffic for regular international air services enters into force with respect to both contracting parties, the present accord will be modified with the</td>
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</tbody>
</table>
### Appendix II — Venezuela

<table>
<thead>
<tr>
<th>Amendments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration with OACI</td>
</tr>
<tr>
<td>Entrance into Force</td>
</tr>
</tbody>
</table>
| Route Rights | (Annex A) The airline designated by the Republic of Costa Rica will have the rights to operate the air services in the following route:  
  a) San José → points intermediate → two points ending in Venezuela → One point further.  
  NOTES:  
  1) The designated airline for the Government of Costa Rica will exercise rights of traffic of third and forth freedoms, and fifth freedoms to points intermediate and further.  
  2) The designated airline for the Government of Costa Rica will not be limited in the type of equipment for flight.  
  3) The designated airline for the Government of Costa Rica can omit their points intermediate and points further in the route, in one or all of their flights, given previous notification to the corresponding aeronautical authorities.  
  4) The frequency of the service for the points intermediate and further, will be determined by agreement between the aeronautical authorities.  
| Route Rights | (Annex B) The airline designated by the Government of the Republic of Venezuela will have the rights to operate the air services in the following route:  
  a) Venezuela → a point intermediate → San José, Costa Rica, → two points further.  
  NOTES:  
  1) The airline designated by the Government of the Republic of Venezuela will exercise rights of traffic of third and forth freedoms, and fifth freedoms to points intermediate and further.  
  2) The airline designated by the Government of the Republic of Venezuela will not be limited in the type of equipment for flight. |
### Tariffs (Article 12)

1. The tariffs applicable for the designated airlines of the contracting parties for transport destined for the territory of the other contracting party or their provinces, will be established at reasonable levels, owing to the count of all elements of value, especially operating costs, a reasonable benefit, and applicable tariffs for other airlines.

2. The tariffs mentioned in paragraph 1 of this Article will be in accord, if possible, for the designated airlines of both contracting parties.

3. The tariffs thus accorded will be submitted to the approval of the aeronautical authorities of both contracting parties, at least 15 days before the date when they will enter into force. In special cases this time period may be reduced with the consent of said authorities. In order for a tariff to enter into force, the previous authorization of the aeronautical authorities of both parties is needed.

4. When a tariff can not be established in agreement with the arrangements of paragraph 2 of the present Article, or when an aeronautical authority in the time period mentioned in paragraph 3 of this Article, shows to the other aeronautical authority his disagreement with respect to any tariff created in conformity with the arrangements in paragraph 2, the aeronautical authorities of both contracting parties will try to establish a tariff of mutual agreement.

5. A tariff established in conformity with the arrangements of the present Article, will continue to be in force until the creation of a new tariff. Without exception, the validity of a tariff can not be extended by virtue of this paragraph for a period of longer than 6 months after the date when it must expire.

6. To set these tariffs, it will also be taken into consideration the recommendations of the international organization whose regulations are usual.

7. The designated airlines of the contracting parties in no way may change the prices or regulations that apply to the effective tariffs.
### Appendix III

**Memorandums of Understanding held by Costa Rica**

<table>
<thead>
<tr>
<th>Definitions</th>
<th>ARGENTINA: Acts of meetings of 4 and 5 of November 1993, and 19 and 20 of April, 1994</th>
<th>COLOMBIA: Memorandum from the 25 of October 1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights Granted</td>
<td></td>
<td>1. With the proposition to bring about the services established in the present memorandum, each party can designate two airlines for regular services of passengers, cargo, mail, and or exclusive services of cargo, and communicate them to the other party through normal channels. Each party will reserve the right to withdraw or change such designations. The accord is created with the understanding of double designation. The aeronautical authority of Costa Rica ratify the designation of the airline National Air Services S.A. (SANSA) and designates the airline Aero Costa Rica S.A. (ACORISA) to carry out this agreement. The aeronautical authority of Colombia ratifies the designation of the airline Society Aeronautical of Medellín Consolidated S.A. (SAM) and will designate another airline.</td>
</tr>
<tr>
<td>Designations and Authorization</td>
<td></td>
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<tr>
<td>Revocation of the Authorization</td>
<td></td>
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<tr>
<td>Application of the Laws</td>
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<tr>
<td>Safety</td>
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<tr>
<td>Air Safety</td>
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<tr>
<td>Commercial Opportunities</td>
<td></td>
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</tr>
<tr>
<td>Rights for Customs and Taxes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights for Taxation on the User. (User Fees)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Legal Competition | 2a) Each designated airline will have the right to operate up to seven weekly flights in the established routes, without limitation on capacity or type of aircraft, but observing the technical capacities of the respective airports.  
2b) The designated airlines can operate regular services between San José, Costa Rica and San Andrés, Colombia, without any limit or restriction amount of capacity and frequencies operating rights of third and fourth liberties. |
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<tbody>
<tr>
<td>Prices</td>
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<tr>
<td>Consultations</td>
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<tr>
<td>Settlement of Controversies</td>
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<td>Termination</td>
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<tr>
<td>Multilateral Accord</td>
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<tr>
<td>Amendments</td>
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<tr>
<td>Registration with OACI</td>
<td></td>
</tr>
<tr>
<td>Entrance into Force</td>
<td></td>
</tr>
</tbody>
</table>
| Route Rights | The notes from these meetings discuss the possibility of third, fourth and fifth freedom traffics between countries, but which have not yet been worked out. Currently there is no concrete arrangement. | 2. a. The designated airlines can operate the routes that are described with the rights of traffic of third and fourth liberties.  
For the designated airlines of the Republic of Costa Rica:  
From San José → the Island of San Andrés, Colombia, and back. 
For the designated airlines of the Republic of Colombia:  
From the Island of San Andrés, Columbia → San José, CR and back.  
The right of fifth freedom that in six weekly frequencies is exercised by SAM in the route from San José to Guatemala and back, is maintained. 
The designated airlines of Costa Rica will have the right to operate fifth freedom traffic in reciprocity of the point established above, such rights will be negotiated between the aeronautical authorities of both parties. |
| Tariffs | 3. The tariffs will be submitted for the approval of the respective aeronautical authorities, in conformity with the internal legislation of each country. |
## APPENDIX III—ECUADOR

<table>
<thead>
<tr>
<th>Definitions</th>
<th>(Article 1)</th>
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</table>

<table>
<thead>
<tr>
<th>Rights Granted</th>
<th>(Article 2)</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Each contracting party will concede the other contracting party the rights specified in the present memorandum with the purpose to establish regular international air services in the routes specified in the attached schedule of routes. Saving the stipulations in the present memorandum, the designated airline(s) by each contracting party will have during the operation of the agreed air services the following rights:</td>
</tr>
<tr>
<td></td>
<td>a. to fly above the territory of the other party without landing</td>
</tr>
<tr>
<td></td>
<td>b. to make stopovers for non-commercial reasons in the territory of the other present convention.</td>
</tr>
<tr>
<td></td>
<td>c. to make stops in the territory of the other contracting party that are specified in the schedule of routes with the ability to embark and disembark passengers, cargo, equipment, and mail, in international air services, proceeding from or destined to the other contracting party, or in the case proceeding from or destined to a third State, in accord with what is established in the schedule of routes.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Designations and Authorization</th>
<th>(Article 3)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Each contracting party will have the right to designate in writing through diplomatic channels, to the other contracting party, the designated airline(s) that will operate the agreed services in the specified routes, and the right to withdraw or change such designation in conformity with their respective aeronautical politics. Upon receipt of the designated airline(s), the other contracting party must, in agreement with the arrangements in paragraph 3 of the present article, concede without delay, to the designated airline(s) the corresponding authorizations of operation. The aeronautical authorities of one of the contracting parties can demand that the designated airlines of the other contracting party demonstrate that they are in the condition to comply with the obligations prescribed in the normal and reasonable laws and regulations applied by said authorities, to the operation of international air services, in conformity with the Convention. When an airline has been designated and authorized in this fashion, it can begin, at any time, to operate the agreed services, as long as there is in fore for these said services, a tariff established in conformity with the present memorandum.</td>
</tr>
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**APPENDIX III—ECUADOR**

<table>
<thead>
<tr>
<th>Revocation of the Authorization (Article 4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Each contracting party reserves the right to deny or revoke the authorization of operation conceded to a designated airline of the other contracting party, or to suspend from the said airline the rights specified in Article 2 of the present memorandum, or to impose the conditions that it feels are necessary to exercise the said rights:</td>
</tr>
<tr>
<td>a. when it is not convinced that the property and effective control of the airline are in the hands of the contracting party that designated it, or its nationals,</td>
</tr>
<tr>
<td>b. when the airline does not comply with the laws and regulations of the contracting party that granted those privileges, or</td>
</tr>
<tr>
<td>c. when the airline stops operating the agreed services as proscribed in the present convention.</td>
</tr>
<tr>
<td>2. Unless the immediate revocation, suspension, or imposition of the conditions established in paragraph one above are essential to prevent new infractions of the laws and regulations, such right will only be exercised after consultations with the other contracting party.</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Application of the Laws</th>
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</thead>
<tbody>
<tr>
<td>1. The laws and regulations of each contracting party that govern in their territory the entrance and exit of airplanes dedicated to international air service or related to the operation and navigation of said airplanes during their stay within the limits of their territory will apply to the airplanes of the designated airlines of the other contracting party.</td>
</tr>
<tr>
<td>2. The laws and regulations in effect in each contracting party governing the entrance, stay, or exit of passengers, crew, equipment, cargo, and mail, as well as the related transactions concerning the formalities of entrance and exit to the country, immigration, customs, and sanitary measures, will apply also to the operations of the designated airlines of the other contracting party.</td>
</tr>
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<tr>
<th>Safety (Article 6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The certificates of air navigability, the certificates or titles of aptitude, and the licenses issued or validated by one of the contracting parties and not expired, will be recognized as valid by the other contracting party for the operation for the routes defined in the schedule of routes in the present accord, as long as the requisites under which such certificates or licenses were issued or validated are equal or greater than the minimum that was established in the Convention.</td>
</tr>
<tr>
<td>2. Each contracting party reserves, notwithstanding, the right not to validate, for flights above their territory, the titles or certificates of aptitude and the licenses issued to their own nationals by the other contracting party.</td>
</tr>
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</table>
### Appendix III—Ecuador

<table>
<thead>
<tr>
<th>Air Safety</th>
<th>(Article 7)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. In conformity with the rights and obligations that are imposed by international law, the contracting parties confirm their mutual obligation to protect the security of civil aviation against acts of illicit interference, constitutes an integral part of the present memorandum. Without limit the validity of their rights and obligations by virtue of international law, the contracting parties will act in particular in conformity with the arrangements of the <strong>AGREEMENT ABOUT THE INFRACTIONS AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRPLANES</strong>, signed in Tokyo on the 14 of September of 1963, the <strong>CONVENTION FOR THE PREVENTION OF ILLEGAL POSSESSION OF AIRPLANES</strong>, signed in the Hague on the 16 of December of 1970, and the <strong>CONVENTION FOR THE PREVENTION OF ILLEGAL ACTS AGAINST THE SECURITY OF CIVIL AVIATION</strong>, signed in Montreal on the 23 of September, 1971.</td>
<td></td>
</tr>
<tr>
<td>2. The contracting parties will mutually provide all necessary help that is requested to prevent acts of illegal possession of civil aircraft, and other illegal acts against the security of said airplanes, passengers, crew, airports, and air navigation installations and all other threats against the security of civil aviation.</td>
<td></td>
</tr>
<tr>
<td>3. The contracting parties will act, in their mutual relations, in conformity with the arrangements over the security of aviation established by the ICAO in the measures concerning security that are applicable, will be required that the operators that have their principle or permanent office in their territories, will act in conformity with said arrangements concerning aviation security.</td>
<td></td>
</tr>
<tr>
<td>4. Each contracting party will agree that it can require of the said airlines that they observe the agreements concerning aviation security that are mentioned in the previous paragraph, required by the other contracting party to enter, exit or stay in the territory of the other contracting party. Each contracting party will assure that in their own territory they apply adequate effective measures to protect the airplanes, and will inspect the passengers, crew, effective personnel, equipment, cargo, and the supplies of the airplane before and during the stay or the stay. Each one of the contracting parties will also be favorably predisposed to attend to any request by the other contracting party to adopt reasonable special measures with the purpose to block a determined threat.</td>
<td></td>
</tr>
<tr>
<td>5. When there occurs an incident or threat of incident of illegal possession of civil aircraft or other illegal acts against the security of such airplanes, passengers, and crew, airports, or installations of</td>
<td></td>
</tr>
</tbody>
</table>
| **Commercial Opportunities** | (Article 12)  
(Transfer of Profit)  
1. The contracting party on the basis of reciprocity, will eliminate all taxes on goods or earnings of the designated airlines of the other contracting party derived from the operation of agreed services.  
2. The transfer of profits obtained by the designated airlines of one contracting party in the country of the other contracting party, must be carried out in accord with the official regulations of the type of foreign money exchange in force in the territory of the contracting party, on the condition of freedom of exchange controls.  
3. The contracting party, in following the agreements in paragraph 2 of his article, must facilitate in an expeditious form, the transfer of such funds earned in the other country. |
| **Rights for Customs and Taxes** | (Article 9)  
1. The airplanes used in international air services by the designated airline(s) for either of the contracting parties and their daily equipment, fuel, oil, and provisions (including food and beverages), on board such airplanes, will be exempt from all customs duties, fees for inspection, or other charges, fees, or taxes, federal, state, or municipal, that enter into the territory of the other contracting party, only when such equipment and provisions stays on board the airplane until the time of its re-exportation, or if said articles are used or consumed by said airplanes in flights within the referred territory.  
2. Equally exempt, on the condition of reciprocity, of the same fees, taxes, payments with the exception of fees for services will be:  
   a. lubricant oils, technical consumable materials, spare parts, tools and special equipment for maintenance work, as well as the provisions (including food and beverages), the documents of the airline (like tickets, pamphlets, itineraries and others) and published material that is considered necessary and exclusively for the use of developing the activities of the airline, brought into the territory of one of the contracting parties by the other contracting party.  
   b. the fuel, lubricant oils, other consumable technical
APPENDIX III—ECUADOR

| Rights for Taxation on the User. (User Fees) | Materials, spare parts, normal equipment and provisions that are brought on board the airplanes of the designated airline in the territory of the other contracting party and used in international services. |
| 3. The normal equipment brought on board of airplanes, as well as the other materials and provisions that stay on board of the airplanes of either of the contracting parties, can be unloaded in the territory of the other contracting party only with the previous authorization of the local customs authorities. In such cases, the goods will remain under the supervision of said authorities until it has been exported or is used in accord with the customs regulations. |
| 4. The passengers in transit across the territory of either of the contracting parties will only be subject to a simple control. The equipment and cargo in direct transit will be exempt from customs duties and other similar fees. |

| Legal Competition | (Article 8) Each of the contracting parties can impose or permit to be imposed upon the airplanes of the other contracting party just and reasonable fees for the use of the airports and their services. Without exception, each one of the contracting parties will agree that the said fees will not be higher than those charged for the use of said airports and services to their own national airlines dedicated to similar international air services. |
| 1. Both contracting parties agree that their designated airlines will have just and equal treatment in the operations of the agreed services in the specified routes between their respective territories on the basis of equality of opportunity. |
| 2. Each party will take all appropriate pertinent action within their jurisdiction to eliminate all forms of discrimination or illegal competition that adversely affects the competitive position of the designated airline(s) of the other party. |
| 3. In the operation of the agreed services by the designated airlines of either of the contracting parties, the interests of the designated airlines of the other contracting party will be taken into account, with the purpose not to individually affect services rendered. |
| 4. The understanding will be that the services provided by the designated airline(s) conform to the present convention, will have the primary objective to proportion air transport with adequate capacity for the necessities between the two countries. |
| 5. The contracting parties agree in that the routes specified and the terms of operation of the same will be defined by the aeronautical authorities of both contracting parties. |
### APPENDIX III—ECUADOR

<table>
<thead>
<tr>
<th>Prices Consultations</th>
<th>Articles 14 and 13</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The aeronautical authorities of the contracting parties will consult with the frequency they consider necessary, and in the spirit if strict cooperation with the purpose to assure the satisfactory application of the agreements in the present memorandum.</td>
<td></td>
</tr>
<tr>
<td>2. Either of the contracting parties can at any time solicit consultations between the aeronautical authorities of both contracting parties, for the purpose to analyze the interpretation, application, or modification of this memorandum. Said consultations will begin within a period of 60 days, starting at the date of receipt of the request by diplomatic channels. If they arrive at an agreement over the modification of the memorandum, said agreement will be formalized by an exchange of diplomatic notes.</td>
<td></td>
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<table>
<thead>
<tr>
<th>Settlement of Controversies</th>
<th>Article 15</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Any controversy that originates from this memorandum and which can not be resolved by means of negotiations between aeronautical authorities of both contracting parties will be referred to another person or group for decision. If the contracting parties are not in agreement to proceed in this manner, a request from either of them will bring the controversy to arbitration, in the manner mentioned later.</td>
<td></td>
</tr>
<tr>
<td>2. The arbitration will be carried out by a tribunal of three arbitrators, composed as follows:</td>
<td></td>
</tr>
<tr>
<td>a. By the end of a period of 30 days after the request for arbitration, each of the contracting parties will name an arbitrator. By the end of 60 days after the two arbitrators have been named, by agreement between them, will be named a third arbitrator who will act as president of the tribunal of arbitration, who will not be a national of either of the contracting parties.</td>
<td></td>
</tr>
<tr>
<td>b. If either of the contracting parties does not name an arbitrator, or if the third arbitrator is not named in agreement with subparagraph (a) of this paragraph, either of the contracting parties can request the president of the</td>
<td></td>
</tr>
</tbody>
</table>
### APPENDIX III—ECUADOR

1. ICAO to name the arbitrator(s) necessary within a term of 30 days. If the president is of the same nationality of either of the contracting parties, the highest ranking vice president who is not disqualified will make the nomination.

2. Unless it is agreed to the contrary, the tribunal of arbitration will determine the limits of jurisdiction to conform with the present memorandum and establish their own procedure. Under the direction of the tribunal or the request of either of the contracting parties, they will carry out a conference to determine the precise questions that will be arbitrated, and the specific procedures they will use, in the 15 days following the full constitution of the tribunal.

3. Unless it is agreed to the contrary, each one of the contracting parties will present a memorandum within 45 days following the full constitutions of the tribunal. The responses must be sent within 60 days. The tribunal will have a hearing at the request of either of the contracting parties or its own discretion, within the 15 days following the final date for receipt of the responses.

4. The tribunal will present in writing a decision within 30 days following the end of the hearing, or if there is no hearing, after the date of the presentation of both responses. The decision of the majority of the tribunal will prevail.

5. The contracting parties can present requests for clarification of the decision within the 15 days following its presentation, and any clarification which is given, will be given within 15 days after the request.

6. In agreement with their national legislation, each one of the contracting parties will give full compliance to any decision or ruling of the tribunal of arbitration.

7. The fees of the tribunal of arbitration, including honorariums and fees of arbitration will be divided into equal portions for both contracting parties. Any fee that is incurred by the president of the ICAO in connection with the proceeding described in paragraph 2b) of this article will be considered part of the fees of the tribunal of arbitration.

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<table>
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<tr>
<th>Termination</th>
<th>(Article 17)</th>
</tr>
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<tbody>
<tr>
<td>Either of the contracting parties can at any time, notify the other contracting party of their decision to terminate the present memorandum. This notification will be notified simultaneously to the ICAO. If they make such notification, the memorandum will terminate 6 months after the date of receipt of notification by the other contracting party.</td>
<td></td>
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</table>
### APPENDIX III—ECUADOR

<table>
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<tr>
<th>Multilateral Accord</th>
<th>party, unless said notification is withdrawn by mutual accord before the expiration of said time period. If the other contracting party does not acknowledge receipt of said notification, it will be considered received 14 days after the ICAO has received notification.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amendments</td>
<td>(Article 16) This memorandum and all of its amendments will be registered with the ICAO.</td>
</tr>
<tr>
<td>Registration with OACI</td>
<td>(Article 16) The present memorandum will enter into force on this date.</td>
</tr>
</tbody>
</table>
| Entrance into Force | Route Rights (Annex 1)
Quito and or Guayaquil, Ecuador → San José, Costa Rica and points further as established.*
Route for Costa Rica
San José, Costa Rica → Quito and or Guayaquil, Ecuador and points further as established.*

(* not yet established.)

| Tariffs | The tariffs for the air transport of passengers and cargo, will be established in conformity with the national laws of the country of origin of such passengers or cargo, the evidence of completion of this agreement will be the ticket or the air guide that authorizes the air transport. |
Statutory and Common Law Relief for Overworked Truck Drivers

Andrea Baker*

TABLE OF CONTENTS

I. Introduction .............................................. 394
II. Relevant Statutory Schemes .............................. 395
   A. Surface Transportation Assistance Act ............ 395
   B. Occupational Safety and Health Act .............. 398
   C. Implied Private Rights of Action ................. 399
   D. Workers Compensation .......................... 400
   E. Unemployment Compensation ...................... 401
   F. Statutes Prohibiting Blacklisting ................. 402
   G. Statutes Governing Fraud in Employment .......... 402
III. Non-Statutory Remedies ................................. 403
    A. Employment Torts ............................... 404
       1. Wrongful Discharge .......................... 404
       2. Negligence .................................. 406
       3. Emotional Distress .......................... 406
    B. Breach of Contract .............................. 408
    C. Statutory Change ................................ 410
IV. Conclusion ............................................... 410

* After working as a trucker for two companies, Ms. Baker received her B.A. in psychology from the University in Wisconsin in 1994. She is currently enrolled in the law program at the University of Wisconsin, and expects her J.D. in 1998.
I'm so tired. I just drove twenty hours. This company is killing me. I'm keeping two log books. I'm drinking a gallon of coffee per day. I don't remember how I got here. I'm working ninety hours per week. The refrain is a common one at truck-stops across America. Truck drivers, operating on four to five hours of sleep per day, for weeks on end, seem to believe they have no recourse, other than quitting their jobs. Some carriers routinely report annual driver turnover in excess of 150 percent.¹ Many other firms report replacing more than 100 percent of their drivers annually.² Certainly, drivers who keep meticulously falsified log books are aware that they are prohibited from driving more than a specified number of hours per week. However, drivers continue to falsify their logs and drive in excess of the legally allowed limit. Why?

Both drivers and trucking companies have incentives to break the law. Long-distance drivers are paid by the mile, not by the hour, and employers are not required to pay long-distance drivers overtime pay.³ Thus, the more miles they drive, the more income drivers earn. Additionally, companies give out monthly or quarterly bonuses, generally based on three separate categories—customer service, fuel economy, and safety. “Customer service” not only takes into account commendations and complaints from shippers and purchasers, but also such things as on-time deliveries.

To counter the great incentives to speed and drive recklessly that customer service bonuses create, companies also give bonuses based upon fuel economy and safety. Thus, drivers are encouraged to break the law, but still drive at a speed which will not needlessly waste fuel or create a hazard, and obtain enough sleep to keep the truck on the road. “Safety” also takes into account not only such things as accidents, but also over-hours violations. Consequently, a driver who stands to gain an extra $200.00 per month for a safety bonus has a great incentive to falsify his or her log book. This falsification not only serves the driver’s financial interests, but also the employer’s, as companies are required by statute to preserve log books for six months, and the Department of Transportation levies substantial fines against companies with patterns of over-hours violations.

Companies which encourage drivers to break the law, either explicitly or implicitly, have incentives of their own. Trucks constantly depreciate in value. Consequently, the more hours per day that a truck is

---

utilized shipping freight, the more economic gain for the company. Additionally, the more hours an individual driver can drive, the fewer the drivers the company needs to employ and pay benefits. For example, suppose Company A is a 60-hour-a-week company. If their drivers can actually work 80 hours per week, then for every four drivers the company should have, only three actually are employed. Although the mileage pay would be the same with either three or four drivers, the company would only need to pay health and possibly retirement benefits for three drivers.

Long-distance drivers are rarely home during the week, the time when administrative agencies and law offices are open. Long-distance drivers thus have little access to those agencies and organizations which offer them the best remedy to their situation. This lack of access is demonstrated by the dearth of case law in this area. Drivers have the option of turning themselves in at weigh stations and throwing themselves on the mercy of the various states operating these weigh stations, but the potential penalties are stiff. For every over-hours violation found at a weigh station, a driver personally stands to be fined $500.00. Thus, not only is there an incentive for drivers to impeccably falsify log books, there is an incentive not to turn to the most available assistance, the inspector at any weigh station. This lack of access to legal remedies could possibly be the greatest reason that drivers continually break the law.

In this paper, I will discuss the statutory schemes and remedies designed to limit the type of abuse described above, as well as common-law remedies that may exist for drivers harmed by these practices. Although administrative remedies exist, I contend that these remedies give neither drivers nor companies sufficient incentive to comply with the law. Thus, drivers need a private right of action against their employers in order to ensure humane working conditions and safety for both the driver and the general public.

II. RELEVANT STATUTORY SCHEMES

A. SURFACE TRANSPORTATION ASSISTANCE ACT

In 1935, Congress passed the Motor Carrier Act, which first gave the Interstate Commerce Commission (ICC) the duty to regulate hours of service of truck drivers. In 1966, the Department of Transportation Act was passed, creating the Department of Transportation. At that time

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4. Executing a WESTLAW search, I could find only forty-five reported cases in this country that contained the words "truck driver" and "wrongful discharge" in the same paragraph.
7. 1 WILLIAM E. KENTWORTHY, TRANSPORTATION SAFETY LAW PRACTICE MANUAL 4-3 (1989).
much of the ICC's authority to regulate safety was transferred to the Department of Transportation.\textsuperscript{8} In 1984, the Motor Carrier Safety Act was passed.\textsuperscript{9} All of these statutes were repeatedly rewritten, re-codified, and updated, as has the Surface Transportation Assistance Act.

Congress enacted the Surface Transportation Assistance Act (the "STAA") in 1982, requiring the U.S. Department of Transportation Federal Highway Administration to establish voluminous safety regulations for long-distance drivers and motor carriers concerning everything from the maximum number of hours a driver may drive to the use of retread tires on commercial vehicles.\textsuperscript{10}

The Federal Motor Carrier Safety Regulations forbid motor carriers from permitting or requiring any driver to drive more than ten hours following eight consecutive off-duty hours, or after having been on-duty (but not driving) for fifteen hours.\textsuperscript{11} Furthermore, drivers may not drive after having been on duty (even if not driving) for sixty hours in any seven consecutive days if the carrier does not operate every day of the week, or after having been on duty (even if not driving) for seventy hours in any eight consecutive days if the carrier operates every day of the week.\textsuperscript{12}

The Federal Motor Carrier Safety Regulations and Title 49 of the United States Code § 31105 afford drivers some degree of protection against retaliation against employees who refuse to break the law or drive vehicles they believe to be unsafe.\textsuperscript{13} However, to qualify for protection if the employee simply believes the vehicle to be unsafe, "the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition."\textsuperscript{14}

In order to use the power of the state for his or her protection, the employee must notify the Secretary of Labor of the violation not later than 180 days after the alleged violation occurred.\textsuperscript{15} Furthermore, the

\begin{itemize}
\item \textsuperscript{8} Id.
\item \textsuperscript{9} Id.
\item \textsuperscript{10} 49 U.S.C.S. §§ 31501 et. seq. (1994).
\item \textsuperscript{11} 49 C.F.R. § 395.3(a) (1995).
\item \textsuperscript{12} 49 C.F.R. § 395.3(b) (1995).
\item \textsuperscript{13} Title 49 U.S.C.A. § 31105 (a)(1)(1994) states:
\begin{itemize}
\item (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
\item (B) the employee refuses to operate a vehicle because—
\begin{itemize}
\item (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
\item (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
\end{itemize}
\end{itemize}
\item \textsuperscript{14} 49 U.S.C.A. § 31105(a)(2) (1994).
\item \textsuperscript{15} 49 U.S.C.A. § 31105(b)(1) (1994).
\end{itemize}
action the Secretary of Labor may take is limited and does not include punitive damages.\textsuperscript{16} 

If the employee pursues administrative remedies and is consequently given relief (i.e., the employer ceases requiring employees to violate hours-of-service regulations), chances are that the employee will be given a smaller workload. Since payment for long-distance truck drivers is generally made on a per-mile basis, his or her income will be reduced. Could this be characterized as retaliation? It has never been litigated.

Drivers who wish to enforce their rights to work a safe number of hours can make a complaint either through the Occupational Safety and Health Act ("OSHA") (the procedure involving the Secretary of Labor as outlined above) or through their various state authorities.\textsuperscript{17} In practice, while the Department of Transportation investigates safety violations and enforces safety regulations after receiving an employee complaint, OSHA alone enforces the employee's rights.

Unfortunately, the Federal Regulations offer no assistance to the employee who has first left his or her job and subsequently seeks redress. The Federal Regulations offer a current employee injunctive relief (i.e., an order for the employer to cease requiring the employee to break the law) and offer the terminated employee both injunctive (an order that the employee be reinstated) and legal relief (an order for the employer to pay the employee back wages). A possible way to work around the absence of specific wording dealing with employees who voluntarily quit would be for the employee to assert that he or she was constructively discharged. However, constructive discharge is difficult to prove, and to establish it one must show that working conditions are so intolerable that reasonable persons would feel compelled to resign.\textsuperscript{18} Furthermore, when in an intolerable working environment, the employee must seek redress while remaining on the job unless confronted with an aggravating

\begin{itemize}
\item[16.] 49 U.S.C.A. § 3105(b)(3)(A) (1994) states:
If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary \textit{shall} (emphasis added) order the person to—
(i) take affirmative action to abate the violation;
(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
(iii) pay compensatory damages, including back pay.

\item[17.] 49 U.S.C. §502(c) (1994) states:
In carrying out this chapter as it applies to motor carriers, motor carriers of migrant workers, and motor private carriers, the Secretary may—
(1) confer and hold joint hearings with State authorities;
(2) cooperate with and use the services, records, and facilities of State authorities; and
(3) make cooperative agreements with a State to enforce the safety laws and regulations of a State and the United States related to highway transportation.

\end{itemize}
situation.\footnote{Lottman v. City of River Falls, 1996 WL 496740 (Wis. Ct. App.); Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989).}

Even if it would be possible for the employee to prove constructive discharge, the realistic likelihood that the non-lawyer employees of the administrative agencies charged with enforcing these safety regulations would aggressively and creatively pursue these claims in a manner not specifically articulated by statute or regulation is not good.

\section{Occupational Safety and Health Act}

Congress enacted the Occupational Safety and Health Act in an effort to reduce the number of occupational safety and health hazards at places of employment and to provide "safe and healthful working conditions."\footnote{29 U.S.C.A. § 659 outlines enforcement procedures. Truck drivers who wish enforcement of safety regulations may make their complaint either with state authorities, or with OSHA as provided for by 49 U.S.C.A. § 31105. However, drivers who make a complaint with OSHA and are subsequently fired might find themselves having a difficult time enforcing their rights later in a private suit, as there is a consistent history of case law holding that OSHA gives no implied private right of action.\footnote{Only one reported case analyzes the relationship between OSHA and the STAA in the context of an employee suit.\footnote{In this case, the Supreme Court of Oklahoma held that the preemptive nature of OSHA does not demonstrate that the STAA also preempts state claims; "the relationship between OSHA and the STAA is one of procedural convenience only."\footnote{This case was not decided at the federal level and the opinion holds no authority outside of Oklahoma.}} This case was not decided at the federal level and the opinion holds no authority outside of Oklahoma.}}\footnote{OSHA has pursued some creative claims from drivers who were not fired by their employer for refusing to drive under dangerous conditions. For example, a group of drivers employed by Roadway Express, Inc. refused to finish their trip (against the orders of their dispatcher) because about 115 miles into it, they encountered freezing rain and icy roads. One other driver, on the same trip, chose to complete the delivery and arrived at the destination on time. The drivers were not fired and were for the mileage they were entitled to for the run, under their union contract. However, they contended that they were additionally entitled to hourly "down" time for time spent in their trucks waiting out the storm. The Secretary of Labor, via OSHA, pursued their claim, and ultimately prevailed. The rationale was that the STAA forbids a carrier from dis-
criminating against an employee who refuses to commit an unsafe act, Roadway Express sometimes paid drivers for down time when drivers were unable to drive due to weather, and thus Roadway Express' decision to withhold down time pay for this particular run constituted discrimination.²⁴

Even if, on paper, it appears that drivers have sufficient time to lawfully complete a trip at the time of dispatch, OSHA may take action if there is evidence that the employer knew that appearances did not match reality. "The legal premise is that a dispatch that contemplates a violation of the driving-time rules by the driver is illegal even if the driver had available driving-time at the outset of the run."²⁵

C. IMPLIED PRIVATE RIGHTS OF ACTION

The STAA does not specifically provide for a private right of action. Could it implicitly provide one? In 1975, the United States Supreme Court, in deciding Cort v. Ash, identified four factors to be considered when determining whether a court should imply a private cause of action from a federal statute otherwise silent on the matter. First, the plaintiff should be a member of the class for whose benefit the statute was enacted. Second, the court needs to examine legislative intent, either explicit or implicit, to either imply or deny a private remedy. Third, a private cause of action should be consistent with the underlying purpose of the legislative scheme. Last, to find a private cause of action in the federal law, the cause of action should not be one traditionally relegated to state law, which would make it inappropriate to infer a cause of action based solely on federal law.²⁶

Recent cases, however, have moved away from the four-factor approach identified in Cort "toward an exclusive reliance on legislative intent."²⁷ One could infer that Congress does not oppose an implied cause of action from congressional inaction to prohibit one based on the STAA after some courts began recognizing one.

Even if a court in which an action was commenced based on an employer's violation of the STAA were to recognize an implied private right of action in the STAA, how would one identify the employee's loss? Presumably, the driver was paid for the miles driven. One possible measure

²⁴. Roadway Express, Inc. v. Dole, 929 F.2d 1060 (5th Cir. 1991); Kenworthy, supra note 6, at 8-20.
²⁵. Trans Fleet Enterprises, Inc. v. Boone, 987 F.2d 1000, 1004 (4th Cir. 1992); Kenworthy, supra note 6, at 8-21.
²⁷. Stabile, supra note 26, at 868.
of damages would be the amount of lost customer service bonus money a driver would lose for refusing to drive after running out of hours. Another measure could be the lost safety bonus for a driver who hands in accurate logs showing that he or she drove over-hours, rather than the usual immaculately falsified documents.

D. WORKERS COMPENSATION

Workers Compensation is a national system of overlapping state programs. Workers Compensation is designed to provide financial redress to an employee injured in the course of work-related activities. Generally, it is statutorily the exclusive remedy for work-related injuries. Drivers suffering demonstrable physical injuries (i.e., back injuries) should have little difficulty maintaining a claim, but emotional harm is a different situation. While injury "includes mental harm or emotional stress or strain without physical trauma, if it arises from exposure to conditions or circumstances beyond those common to occupational or nonoccupational life," proving that one suffered emotional harm appears to be an evidentiary issue. The employer could certainly argue that the driver, despite claiming to be exhausted, did manage to drive all that was required without having a breakdown or needing to see a physician. The goal of the attorney representing the driver should be to obtain a ruling that chronic sleep deprivation is per se emotional harm.

For determining whether emotional harm suffered in an employment setting is compensable under the WCA, the Wisconsin Supreme Court has held:

The injury must be an egregious one that is to be tested not by the severity

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28. See Wis. Stat. §102.03 (1996). Wisconsin's statute is typical of those in other states. §102.03. Conditions of liability, states:
(1) Liability under this chapter shall exist against an employer only where the following conditions occur: (a) Where the employee sustains an injury. (b) Where, at the time of the injury, both the employer and employee are subject to the provisions of this chapter. (c) 1. Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment.... (d) Where the injury is not intentionally self-inflicted. (e) Where the accident or disease causing injury arises out of the employee's employment.
of the distress or disabling manifestations but by the severity or traumatizing likelihood of the particular causative circumstances of employment. It is not an injury no matter how disabling unless it arises from unusual occupational stresses. This is more a rule of evidence that is geared to discovering the probability of harm than to discovering the fact of harm. It is in a sense an objective test—would a person of ordinary sensibilities be emotionally injured or mentally distressed in the absence of the unusual circumstances.31

One last Workers Compensation issue an attorney representing a truck driver should note is the effect that violations of safety provisions may have on Workers Compensation awards in their state. For example, the Wisconsin statute reads:

If injury is caused by the failure of the employer to comply with any statute or any lawful order of the department, compensation and death benefits provided in this chapter shall be increased 15% but the total increase may not exceed $15,000. Failure of an employer reasonably to enforce compliance by employees with that statute or order of the department constitutes failure by the employer to comply with that statute or order.32

E. UNEMPLOYMENT COMPENSATION

Unemployment Compensation is another national system of overlapping but different programs designed to pay temporary benefits to workers who are unemployed “through no fault of their own.”33 Grounds for denial of benefits include unavailability to work in the general labor market, physical limitations, unwillingness to accept all forms of work available, failure to return to the employer upon recall, and misconduct.34

A driver who can establish that he or she quit because he or she was required to break the law as a condition of employment should be able to establish good cause. The employer always has the option of recalling the employee, but case law and statute establish good cause grounds for an employee to refuse to return to work upon recall.35

Furthermore, at least one court has held both that truck drivers seeking unemployment benefits are not required to notify their employers of their objections to being required to drive more hours than permitted under the Federal Motor Carrier Safety Regulations before quitting their employment in order to establish that the termination of the employment relationship was with good cause attributable to the employer; and that when the employer violates federal safety laws a driver has good cause

31. Jenson, 468 N.W.2d at 6.
34. Id. at 32-61.
35. Wis. Stat. §108.04; supra note 33, at 44-46.
per se to quit at any time as a result of the violation.36

F. STATUTES PROHIBITING BLACKLISTING

Not all states have enacted statutes that prohibit the blacklisting of employees, but in those states that have, drivers whose employers have terminated them in violation of the STAA may have a remedy if they subsequently have difficulty obtaining employment. Not all statutes prohibiting blacklisting allow a private right of action, however.37

The Federal regulations require all truck drivers applying for driving jobs to disclose all driving positions held for the past ten years.38 Thus, a driver fired for refusing to violate safety regulations will be required to disclose that company as a past employer. Although the employer is allowed to make truthful statements about the driver, it is difficult to imagine how a statement to the effect that a former employee refuses to break the law would be beneficial to a potential employer engaging in only lawful business practices. It should be argued that the logical inference from such a disclosure would be an attempt to blacklist.

While the Wisconsin statute does not specifically provide for a private cause of action, it does not specifically prohibit one. The attorney representing the driver should integrate this type of statute with other recognized causes of action.

G. STATUTES GOVERNING FRAUD IN EMPLOYMENT

Some states give employees a cause of action based in fraud if their terms of employment were misrepresented. Wisconsin prohibits the fraudulent advertising for labor, and specifically provides the employee with a private right of action to recover all actual losses associated with the acceptance of employment based on misrepresentations made by the

37. See e.g., Wis. Stat. § 134.02 (1996):
   (1) Any 2 or more persons, whether members of a partnership or company or stockholders in a corporation, who are employers of labor and who shall combine or agree to combine for any of the following purposes shall be fined not less than $100 nor more than $500, which fine shall be paid into the state treasury for the benefit of the school fund: (a) Preventing any person seeking employment from obtaining employment. (b) Procuring or causing the discharge of any employee by threats, promises, circulating blacklists or causing blacklists to be circulated. (c) After having discharged any employee, preventing or attempting to prevent the employee from obtaining employment with any other person, partnership, company or corporation by the means described in part (a) or (b). . . . (2)(a) Nothing in this section shall prohibit any employer from giving any other employer, to whom a discharged employee has applied for employment, or to any bondsmen or surety, a truthful statement of the reasons for the employee’s discharge. . . . (b) It shall be a violation of this section to give a statement with the intent to blacklist, hinder or prevent the discharged employee from obtaining employment.
employer.39

Minnesota codifies a private right of action as does Wisconsin, but the Minnesota statute is even stricter. The Minnesota statute states that "(a)ny person, firm, association, or corporation violating any provision of section 181.64 and this section shall be guilty of a misdemeanor."40

Although the carrier, when advertising, might generally remain silent as to the conditions of employment, the driver could reasonably argue that implied in the offer was the belief that the employer would, at a minimum, adhere to federal safety regulations. This statute does not expressly limit the type of damages which are recoverable, and in states where similar legislation has been enacted, this might be a foot in the door for establishing a claim for emotional harm.

III. Non-Statutory Remedies

The Surface Transportation Assistance Act imposes nominal public control, but is not entirely effective at preventing drivers from working more than they are legally permitted. Allowing all drivers a private remedy against their employers and thus making noncompliance more expensive than hiring the necessary number of drivers would serve the safety interests of the STAA. Currently, aside from the administrative remedies promulgated by statute or regulation, the wronged employee in many jurisdictions has possible civil tort and breach of contract claims. Although in most states by virtue of statute or common law employers can terminate employees at any time for any reason, "several exceptions have been created and today the presumption of at-will employment is generally recognized as rebuttable."41

39. Wis. Stat. § 103.43 (1996) reads in relevant part:
(1) It shall be unlawful to influence, induce, persuade or attempt to influence, induce persuade or engage workmen to change from one place of employment to another in this state or to accept employment in this state or to bring workmen of any class or calling into this state to work in any department of labor in this state, through or by means of any false or deceptive representations, false advertising or false pretenses concerning the kind and character of the work to be done, or amount and character of the compensation to be paid for such work, or the sanitary or other conditions of the employment. . . . Any of such unlawful acts shall be deemed a false advertisement, or misrepresentation for the purposes of this section. . . .
(3) Any person who shall be influenced, induced or persuaded to engage with any persons mentioned in sub. (1), through or by means of any of the things therein prohibited, shall have a right of action for recovery of all damages that he shall have sustained in consequence of the false or deceptive representation. . . . directly or indirectly. . . . and in addition to all such actual damages such workman may have sustained, shall be entitled to recover such reasonable attorney fees as the court shall see fit, to be taxed as costs in any judgment recovered.
A. Employment Torts

1. Wrongful Discharge

The exception to at-will employment most applicable to the fact pattern at hand is the public policy exception. Public policy claims protect employees from employers who discharge in retaliation for refusing to engage in acts contrary to public policy. The public policy relied upon may come from "constitutional provisions, statutes, and administrative regulations, or may be based on other substantial and fundamental non-statutory beliefs. However, the public policy must involve a subject which affects the public at large rather than a purely personal or proprietary interest of the employee or employer."\(^{42}\) The discharged driver may meet this burden by demonstrating that he or she was discharged for refusing to violate the hours-of-service regulations and because the stated purpose of the Federal Motor Carrier Safety Regulations is the protection of the public upon highways of interstate commerce and the protection of employees engaged in transportation in interstate commerce.\(^{43}\)

There is no uniform standard for evaluating when public policy concerns rise to the level necessary to establish the tort of wrongful discharge. For example, in 1993 a discharged employee sued in the District of Columbia, alleging that he had been wrongfully discharged in violation of public policy after reporting to his superiors that he believed his employer was violating the minimum wage law. The District of Columbia Court of Appeals held that the employee could not invoke the at-will exception, as he could not demonstrate that he had been terminated for an outright refusal to violate a specific law.\(^{44}\) The same year, however, the United States Court of Appeals for the Seventh Circuit, in assessing a wrongful discharge claim in a case where a specific law had been violated, held that an Illinois truck driver who was discharged for refusing to sign a lease which governed his employment because the lease violated specific Interstate Commerce Commission (ICC) regulations did not meet the threshold for the public policy exception to Illinois' employment at will doctrine. Again in 1995, a discharged transportation employee (though not a driver) was found not to have a cause of action under Illinois law, despite his allegations that he was fired after advising his employer that it was not in compliance with Interstate Commerce Commission regulations regarding written contracts when using owner-operator carriers for interstate shipping. The court held that public policy must "strike at the heart of a citizen's social rights, duties, and responsibilities," or "involve the

\(^{42}\) Id. at 652.
protection of each citizen's health and safety." \(^{45}\)

In Illinois, it does not appear that there will be many cases where the public policy exception meets this standard. For example, in one Illinois case, a security guard at a nuclear power plant was fired after notifying the plant owner that the plant was engaging in safety violations. The Appellate Court of Illinois, Third District held that since he had signed an agreement not to reveal information obtained in the course of his employment with anyone other than his employer and since Pinkerton, not the plant owner, was his actual employer, he had violated his employment contract which would give his employer legitimate grounds for termination. \(^{46}\)

However, truck drivers have, in several reported cases, been found to have a cause of action based on wrongful discharge after being terminated for refusing to break various safety regulations and statutes. A District of Columbia court held that a truck driver fired for refusing to drive a truck that did not display a valid inspection sticker was found to have a public policy-based cause of action. \(^{47}\) In another case involving driver safety, the Indiana Court of Appeals, Second District held that a driver who was terminated for refusing to drive an overweight load had a cause of action, and in particular noted that the driver himself would have been personally liable for violating the statutory weight limit. \(^{48}\) This reasoning may support a public policy claim for the facts at hand since drivers who are audited for hours-of-service compliance may also be held personally financially liable for noncompliance.

The Supreme Court of Tennessee has held that drivers discharged for refusing to violate safety provisions of the Tennessee Motor Carriers Act had a retaliatory discharge claim because allowing the discharge of an employee for refusing to violate those provisions "would seriously impair the legislative plan for ensuring highway safety." \(^{49}\)

The Court of Appeals of Indiana, First District, has held both that a driver who is discharged for refusing to violate federal safety regulations (specifically the hours-of-service regulations set forth in 49 C.F.R. § 395.3(a)(1)) for which he would have been personally liable has a cause of action and that the Surface Transportation Assistance Act does not preempt a state wrongful discharge cause of action. \(^{50}\) In reaching their decision, they relied on an Eighth Circuit case which held that the lan-

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guage of the STAA does not indicate that it is to be the exclusive remedy for wrongfully discharged drivers.\textsuperscript{51}

The United States Court of Appeals, Fourth Circuit, has held that a driver's discharge for refusing to drive a truck with defective brakes violates West Virginia public policy, giving rise to a wrongful discharge claim.\textsuperscript{52} In a case turning on a virtually identical fact pattern, the United States District Court, D. Minnesota, Fourth Division held that a driver had a retaliatory discharge claim under Minnesota's whistleblower statute.\textsuperscript{53}

2. **Negligence**

A driver injured by his or her working conditions may have a cause of action based upon the negligence of the employer. Negligence involves a duty to use reasonable care, a breach of the duty to conform to the standard of care, causation of the injury by the defendant's breach of duty, and damage resulting to the interests of another.\textsuperscript{54}

Workers Compensation laws' exclusivity provisions will generally preclude private suits against employers for injuries sustained by employees due to an employer's negligence (by definition, a non-intentional occurrence). A few jurisdictions have recognized a cause of action based upon an employer's negligent hiring. Generally, however, the plaintiffs in the cases giving rise to this recognition have been customers or tenants injured by the employee of the defendant, not a co-worker or underling of the offending employee.\textsuperscript{55} If representing a driver in a jurisdiction where Workers Compensation is not the employee's exclusive remedy, it might be possible to allege that the employer negligently supervised the dispatcher or supervisor. I was unable to locate any cases similar to the fact pattern at hand.

3. **Emotional Distress**

In wrongful discharge suits, claims for emotional distress typically require that: "(1) the employer intended to inflict emotional distress or recklessly disregarded whether its acts would result in the infliction of

\textsuperscript{51} Parten. v. Consol. Freightways Corp. of Del., 923 F.2d 580, 583 (8th Cir. 1991). \textit{But see} Davis v. Customized Transp. Inc., 854 F.Supp. 513 (N.D. Ohio 1994), (holding in a diversity action that a retaliatory discharge claim based on Ohio law was preempted by the STAA which provided an exclusive administrative remedy for drivers terminated for refusing to violate hours-of-service standards).


\textsuperscript{54} K. KELLY ET AL., CASES AND MATERIALS ON Torts 131 (9th ed. 1994).

emotional distress, (2) the acts did in fact cause severe emotional distress, and (3) the acts constituted an extraordinary transgression of the bounds of socially tolerable conduct, i.e., outrageous conduct.\textsuperscript{56}

Although Workers Compensation is generally the exclusive remedy for work-related injuries, courts generally have found an exception for intentional injuries, including the intentional infliction of emotional distress. In 1995, the Court of Appeals of Wisconsin held that Workers' Compensation is not the exclusive remedy for emotional injuries caused by an employer's intentional conduct.\textsuperscript{57} In that case the plaintiff, a waitress, was repeatedly sexually harassed and offensively touched by her male employer. The court, in reaching its decision, looked at the wording of the statute, which defined an "injury" as "mental or physical harm to an employee caused by accident or disease."\textsuperscript{58} The court then looked at a dictionary definition of "accident" as the statute did not define the word. "Accident" was held to mean an injury resulting from an unintentional act.\textsuperscript{59}

In \textit{Lentz}, the court then held that they would not "permit employers to use the WCA to shield themselves from the consequences of their intentional acts by labeling these acts as accidents."\textsuperscript{60} They further noted that "allowing employers to use the WCA to shield themselves from liability for intentional acts would exceed the purpose of the WCA. When an employer intentionally injures an employee, it is not appropriate to allocate the financial burden associated with that injury to the public. Rather, the burden of compensating the employee for the consequences of the intentional act should lie exclusively with the employer."\textsuperscript{61}

The United States Supreme Court has held that the exclusivity provision of a state's Worker's Compensation law does not bar a private right of action for injuries sustained due to the intentional violation of a law designed to protect migrant workers.\textsuperscript{62} This case arose out of an incident in which migrant farm workers sustained physical injuries while riding to work in their employer's van. Although the injuries were sustained in an automobile accident, the workers maintained that the violations of the Migrant and Seasonal Agricultural Worker Protection Act (the "AWPA") (i.e., transporting too many workers in the van, not providing seat belts, etc.) were intentional acts and caused their injuries. The employer con-


\textsuperscript{57} Lentz v. Young, 536 N.W.2d 451 (Wis. 1995), petition for review filed.

\textsuperscript{58} Id. at 456 citing Wis. STAT. §102.01(2)(c) (1995).

\textsuperscript{59} Lentz, at 456.

\textsuperscript{60} Id. at 456.

\textsuperscript{61} Id.

tended that the state's Workers Compensation laws exclusive remedy provisions barred a private right of action, but the Supreme Court disagreed, holding that the AWPA specifically provided a private right of action and thus state law did not bar a private AWPA suit.63

No cases arising from emotional injuries caused by an employer's intentional violation of the STAA have been decided by the United States Supreme Court. The STAA does not specifically provide for a private right of action, but it does not specifically prohibit one. Given the manner in which the majority of recent cases have interpreted the STAA, it appears that there could be a good argument for synthesizing Adams Fruit with state cases to argue that although the STAA does not specifically provide for a private right of action, suits to recover for emotional injuries suffered by intentional violations of the STAA are not precluded by state Workers Compensation laws.

It appears that the greatest stumbling block in jumping the hurdle to prove intent on the part of the employer to avoid the Workers Compensation exclusivity provisions is the supervisory problem. How was the employer to know that the dispatcher or supervisor was requiring employees to break the law? Was there negligent supervision of the supervisor? Negligence is, by definition, unintentional. While it may be possible to show that the driver's dispatcher or supervisor intended to cause an emotional injury, how is one to show that the employer knew of the acts but failed to take action to end them?

Depending on the depth of the pockets of the parties involved, it might be worthwhile for the driver to sue the dispatcher or supervisor, in addition to the employer. In a suit against a company and a co-employee, the court held that Wisconsin's Workers Compensation Act is not the exclusive remedy for an injury caused by an assault intended to cause bodily harm.64 However, the Wisconsin Court of Appeals has held that in order to avoid the exclusivity provision, the employee must show that the assault was committed with the intention of causing bodily harm.65 Furthermore, the court held that verbal criticism is not an assault; the assault intending to cause bodily harm must be physical, not verbal.66

B. Breach of Contract

The general rule in America is that unless a written contract specifies otherwise, employees are "at-will," meaning that they can be terminated at any time, for any reason, or for no reason at all. However, there are

63. Id.
66. Id. at 640.
both federal and state statutes which limit the employment-at-will doctrine.\textsuperscript{67}

Truck drivers not represented by collective bargaining are generally at-will employees. Attempting to find a document relating to the employment relationship expressing otherwise is wishful thinking. Although some courts have found that evidence of a promise of continued employment can create an implied contract by looking at the employer’s personnel policies and practices, industry practice, employee’s length of service, and actions or communications by an employer reflecting assurances of continued employment, disclaimers of contractual liability set forth in employee handbooks will generally prevent a finding that an implied contract of continued employment existed.\textsuperscript{68} Trucking companies, knowing the potential financial loss associated with their activities, generally include disclaimers in their employment applications and employee handbooks.

Despite the at-will doctrine, there is in every contract an implied contract of good faith and fair dealing. However, not all states recognize a claim for breach of the covenant of good faith and fair dealing in the context of a wrongful termination action.\textsuperscript{69} Furthermore, even in those states that do recognize a covenant of good faith and fair dealing in employment contracts, bad faith breaches of those covenants may only give rise to breach of contract claims but not tort claims.\textsuperscript{70}

It could be argued that the employment relationships in the trucking industry are at-will contracts to engage in unlawful activity. Since parties cannot have a contract to break the law, the driver could petition a court for a reformulation of the contract. However, since OSHA, the federal Department of Transportation, and the various states’ departments of transportation seem to do an adequate job of investigation and enforcement when a problem is brought to their attention, this step would be expensive, time-consuming, and unnecessary. An OSHA or DOT investigation would have the same net effect (reformation of an illegal contract and the granting of injunctive relief to the drivers) while not wasting court time or attorney fees. The driver who alleges a breach of contract could attempt to recover compensatory damages for excess hours already driven, but nothing in either Title 29 or Title 49 allows compensation for merely being required to break the law. The driver, in all probability, was paid the standard per-mile rate for all miles driven in the over-hours period of time, and the employer could argue, most persuasively, that he or

\textsuperscript{68} Gillette & Tate, supra note 41, at 649.
\textsuperscript{69} Id. at 659.
\textsuperscript{70} Cathcart, supra note 55, at 847.
she was already compensated. As noted in the introduction, motor carriers are not required to pay their drivers overtime pay.

Additionally, attorney fees are not generally recoverable in a breach of contract suit. Because there is a dearth of case law regarding breach-of-contract actions in relationships between at-will drivers and their employers (other cases have been pursued under tort theories or by OSHA), breach of contract claims do not appear to have a financial incentive making them worthwhile pursuing when attempting to find a cause of action for the given fact pattern, unless they are pursued in addition to wrongful discharge or other tort theories.

C. STATUTORY CHANGE

In Europe, all trucks weighing more than 3.5 British tonnes are equipped with a tachograph, a device that measures hours of service, speed, idling time, and so forth. The material is recorded on a daily card, which must be kept by the employer for one year. Although cheating can and does occur, the computerized system is much more difficult to circumvent than the American system of manual self-reporting.

In America, many motor carriers also equip their trucks with computerized equipment and satellite receivers. This equipment both allows the driver to contact the carrier regarding scheduling and allows the company to monitor the same things that European tachographs monitor.

Although European carriers find the financial resources to maintain this technology and many American carriers also utilize this technology for their own ends, it is questionable whether lobbying efforts of this country's transportation industry would allow regulation to mandate the use of this technology here in the near future. For the plaintiff's attorney in private practice, advocating statutory or regulatory change is not a realistic option.

IV. CONCLUSION

When counseling or representing the driver who has experienced or is experiencing psychological or physical problems associated with a requirement to drive in excess of what the law allows, it appears that the most likely way for the employee to gain redress, if he or she has not

72. Id.
73. Martin Hoyle, Today's Television, Fin. Times, Inc. (London), May 1, 1995 at 15.
74. It is noteworthy that the C.F.R. already allows motor carriers to require their drivers to use automatic on-board devices in lieu of or in conjunction with written logs if the carrier chooses to do so. See 49 C.F.R. § 395.15(a)(2).
already voluntarily terminated his or her employment, is to advise the employee to write a detailed letter (or write it for him or her) to the employer reciting all of the past occasions on which hours-of-service falsification was required, a summary of the applicable Federal Regulations, and a statement to the effect that the employee will no longer violate the law at the employer's behest. The letter-writer should also preemptively inform the employer that any loss of a safety or customer service bonus due to the driver's decision to obey the STAA will be interpreted as an act of retaliation. A tactical decision is whether or not the employee should notify the employer that he or she is also sending this documentation to the Secretary of Labor. If the employee is willing to be fired, it might be worth his or her while to subtly encourage the employer to retaliate, in anticipation of being able to bring a civil tort suit. The employee should be informed, however, that there is no guarantee that his or her particular jurisdiction will recognize a wrongful discharge claim for this particular fact pattern.

When counseling the driver, it is also imperative to counsel the employee that he or she should only turn in accurate logbook pages to the employer, in order to leave a paper trail of continuing safety violations. This is particularly important in light of a North Carolina Court of Appeals decision holding that hours-of-service summaries reconstructed from a driver's memory are not admissible as evidence in a civil action for wrongful discharge.\footnote{Coman v. Thomas Manufacturing Company, Inc., 411 S.E.2d 626 (1992).}

The Federal Regulations do not differentiate between requiring and allowing an employee to break the law. If the employee is dismissed or retaliated against, the Secretary of Labor is under a mandate to represent the wronged employee and a paper trail is necessary to establish the prior working conditions.

If the employee has already voluntarily terminated his or her employment due to adverse working conditions, the attorney should advise him or her to immediately make a claim for Unemployment Compensation, attributing the termination to the misconduct of the employer.

After termination of the relationship, a number of legal theories could be creatively pursued. Attorneys practicing in states which have codified tort suits against employers for misrepresenting terms of employment appear to have the greatest chance of successfully recovering damages for a driver required to break the law as a condition of employment. In states with no codified right of action, it appears that a wrongful discharge suit has the greatest possibility of success, although if the employee terminated the relationship on his or her own it would, in order to pursue a wrongful discharge suit, be necessary to establish that the em-
ployee had been constructively discharged. Additionally, an employee could bring a tort action to recover damages for emotional distress. To cover all bases, it would be in the employee’s interests to both make a claim for Workers Compensation and bring a private suit alleging infliction of emotional distress. In states that have codified a cause of action based on fraudulent misrepresentations of the condition of employment, the driver could pursue such damages either before or after termination of the employment relationship.

In addition to tort remedies, the discharged employee could commence suit on a breach of contract theory. Although employees are generally considered “at-will” and the employment relationship may be terminated for any or no reason, at any time, there are exceptions to the “at-will” doctrine. Again, to ensure that all bases are covered, claims alleging a breach of contract should be made in conjunction with other tort theories.
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Are All Railroad Mergers In the Public Interest?
An Analysis of the Union Pacific Merger with Southern Pacific

Salvatore Massa*

Table of Contents

I. Introduction .................................................. 414
II. The UP-SP Merger Case .................................. 416
   A. Background ........................................ 416
   B. Standard of Review ............................... 417
   C. Arguments of the Parties ....................... 419
   D. STB Analysis and Reasoning ................... 420
III. UP-SP Decision: Tension with Precedent? ........ 425
    A. Tension with the Result of the SF-SP Merger
       Application ....................................... 425
    B. Tension with the Standard of Review ........ 427
    C. SP: Failing Firm or Not? ...................... 428
    D. Trackage Rights: A Weak Substitue? .......... 430
    E. The Vertical Foreclosure Paradox .............. 434
IV. Are All Mergers in the “Public Interest”? ....... 437
V. Conclusion .................................................. 440

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I. Introduction

As a response to poor business performance in the late 1970s, federal regulators endorsed deregulation as a mechanism to preserve the railroad industry.\(^1\) By 1980, a more fundamental government approach attempted to deregulate many aspects of the railroad industry, such as line abandonments, ratemaking and mergers.\(^2\) As a result, the railroad industry has experienced several mergers and efforts to rationalize lines, substantially lowering the number of significant railroad carriers.\(^3\) As the most recent wave of mergers continues in the industry, vast networks of trackage have become controlled by a relatively small number of carriers.\(^4\) For the first time in U.S. history, the existence of transcontinental railroad systems are becoming a possibility.\(^5\)

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5. Some railroad executives envision truly transcontinental systems. For example, Robert Krebs, President and CEO of BN-SF believes that transcontinental railroads are inevitable. See Gus Welty, Redrawing the Western Map, Railway Age, Dec. 1995, at 36, 37 [hereinafter Welty, Redrawing]. Further, the recent merger pact between Norfolk Southern and CSX Transporta-
The Union Pacific (UP) bid to control the Southern Pacific (SP) represents the latest consolidation that has reduced the number of Class I railroad competitors that operate west of the Mississippi River from three to two. At present, two railroad corporations dominate railroad freight traffic west of the Mississippi River. The UP bid to control SP represented a competitive response to the Interstate Commerce Commission’s (ICC) approval of the Burlington Northern (BN) application to control the Santa Fe (SF) in 1995. The new 31,000 mile BN-SF system competed directly with UP and dwarfed UP’s already expansive track network. By bidding for the 11,000 mile SP, UP fortified its competitive position in the western portion of the United States, particularly in the southwest where SP had an influential market presence.

While subject to federal regulation, railroads are immune from traditional antitrust legislation such as the Sherman Act or Clayton Act. Instead, the ICC and its successor, the Surface Transportation Board (STB), have applied a “public interest” standard to review the merits of a merger. The ICC and STB have employed this broad standard of review to approve nearly every merger application. Thus, when the UP application to control SP came before the STB, it concluded that the merger was in the “public interest,” in spite of significant concerns about the anticompetitive effects of such a union voiced by shippers, other railroad carriers, state governments, and the U.S. Department of Justice.

This Article assesses the STB decision granting the UP application and explores the “public interest” standard in other railroad merger cases since 1980. In particular, this Article will focus on the failed SF application reflected a belief that transcontinental mergers would occur. See CSX Corp., 1996 Annual Report 2 (1997).

6. Class I railroads represent the major railroad networks of the United States. A Class I railroad is determined by annual operating revenue. For example, in 1991, a railroad with revenues above $250 million was a Class I carrier. 49 C.F.R. §1201.1-1 (1996).

7. See Dempsey, Canadian, supra note 3, at 145 n.192. Dempsey noted four major railroad systems operating west of the Mississippi River in 1990. Currently only two of the listed systems remain.


Further, courts have allowed a great deal of deference to ICC remedy powers to grant or deny competitive access. See Baltimore Gas & Electric Co. v. United States, 817 F.2d 108 (D.C. Cir. 1987); Midtech Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988); Central States Enterprises, Inc. v. ICC, 780 F.2d 664 (7th Cir. 1985).


tion to acquire SP, the only merger application rejected by the ICC and STB since 1980. First, this Article summarizes the UP-SP proceedings. Second, this Article explores other recent merger applications as well as other evidence which demonstrates a tension with the outcome of UP-SP. Third, this Article examines the broader social implications of the current STB posture toward mergers. This section argues for more research on the efficiency gains from merger. This section also raises a fundamental question about whether courts should decide merger applications in lieu of a regulatory body.

II. THE UP-SP MERGER CASE

This section is divided in four parts and provides a summary of the UP-SP decision. First, this section addresses the general circumstances that engendered the UP-SP merger. Second, this section provides the standard of review that the STB used in assessing the merger application. Third, this section emphasizes the arguments of UP-SP supporting the merger and briefly lists the objections of other parties. Fourth, this section provides the STB’s analysis and reasoning used to justify its decision.

A. BACKGROUND

After a lull in merger activity during the 1990s, a new wave of mergers began. Prior to 1995, four major carriers served the western two-thirds of the United States. In 1995, BN, a major western carrier from Chicago, Illinois, which served the Pacific Northwest, Denver, Colorado, and other points in Texas and Alabama, merged with SF, another major western carrier from Chicago, Illinois, which essentially served areas in California and Texas. The merged entity, BN-SF, maintained an expansive track network of approximately 35,000 miles, dwarfing all other western competitors. UP, itself a product of several mergers during the 1980s and 1990s, initially sought to thwart the merger through counter-proposals to acquire SF.

When this strategy failed, on November 30, 1995, UP unveiled plans to acquire SP. On that same day, it filed a merger application with the STB. Immediately prior to the merger announcement, UP operated a

15. UP-SP, supra note 11, at *5.
22,000 mile track network.\textsuperscript{16} UP operated primarily from Chicago, Illinois, to Salt Lake City, Utah. From that western point, one northern route branched to Portland, Oregon, while another traversed southward to points along California. In addition, UP maintained operations from Chicago, Illinois, to Minneapolis, Minnesota, and various points throughout Arkansas, Texas and Louisiana. In contrast, SP operated approximately 14,000 miles of track. SP operated southwesterly from Chicago, Illinois, to southern points in Texas and California with a southern line that skirted the Mexican border and served New Orleans, Louisiana. Another portion of the SP network operated from Chicago, Illinois, to Denver, Colorado, and Salt Lake City, Utah. From Salt Lake City, Utah, SP reached various points in California. A third portion of the SP network ran along the Pacific coast from southern California to Portland, Oregon.

In contrast to the BN-SF system, a substantial portion of the track network of UP and SP overlapped. In some overlap territories, the UP-SP consolidation would eliminate railroad competition. For example, the track network extending from northern California to Salt Lake City, Utah, and eastward to Denver, Colorado, would be exclusively controlled by UP-SP.\textsuperscript{17} To alleviate these monopoly concerns, the UP-SP merger proposal also included provisions to sell 330 miles of trackage and to provide access on approximately 4,000 miles through trackage rights to its primary western rival, BN-SF.\textsuperscript{18} The scope of assignment for trackage rights was unprecedented in relation to prior merger agreements. In one instance, UP-SP provided trackage rights roughly from Oakland, California, to Denver, Colorado, a distance of over 1,000 miles. In spite of these concessions, several parties objected to the UP-SP merger application before the STB.

B. STANDARD OF REVIEW

In evaluating the merger, the STB applied the statutory “public interest” standard.\textsuperscript{19} In essence, the STB interpreted the “public interest” standard as a balancing test which weighs “the potential benefits to applicants and the public against the potential harm to the public.”\textsuperscript{20} According to the STB, the “public interest” standard consisted of five basic

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at *87.
\item \textit{Id.} Trackage rights allow a railroad to operate on another railroad’s network using its own equipment and crew. In exchange, the railroad that owns the track receives a fee for use.
\item \textit{UP-SP, supra} note 11, at *86; see also 49 C.F.R. 1180.1(c) (1996). This standard, along with the five prong test set out in the text, \textit{infra}, has been noted in virtually all merger decisions. E.g., \textit{SF-SP I, supra} note 12, at 722-26; \textit{UP-CNW, supra} note 14 at 53. Federal courts have also applied such standards in certain cases involving the Rule of Reason in antitrust adjudication.
\end{enumerate}
factors which the agency would weigh in evaluating the merits of an application for merger of two Class I railroads. The five factors in this balancing test are: (1) the impact the merger has on the adequacy of public transportation; (2) the effect of including or excluding other railroads in the region from the transaction on the public interest; (3) the total fixed charges that result from the transaction; (4) the interest of railroad employees affected by the transaction; and (5) the adverse effect on railroad competition in the affected region.\(^{21}\)

Of the five factors, the STB emphasized the first and fifth criteria. The STB interpreted the "adequacy of transportation" prong of the test to include "public benefits" from the merger.\(^{22}\) In the STB decision, public benefits were broadly construed to extend to any efficiency gains a railroad may derive from the merger, including cost savings and service improvements. The STB reasoned that such benefits passed on to shippers in the form of better service or lower rates. However, the STB noted that any benefits a railroad may realize from expanded market power, such as the ability to raise rates, is a private benefit and therefore excluded from this calculus.

In contrast, the STB applied the fifth criterion, which examines adverse effects of the merger on railroad competition more narrowly. Relying on prior federal adjudication, the STB "examine[d] the total transportation market(s)" when evaluating competitive harm.\(^{23}\) The STB also relied on the Staggers Act's stated policy of "reliance on competitive forces, not government regulation, to modernize railroad operations and to promote efficiency."\(^{24}\) The STB reasoned that in cases where railroad competition is eliminated through the combination of the only existing competitors, then competitive alternatives, in the form of trucks, barges or pipelines, act as a constraint to competitive harm. While the STB recognized two basic types of mergers, it concluded that the central question remained the same in each case: "Will the merger result in increased rates

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Such cases seek to assess the ultimate consequences of a particular form of conduct. E.g., United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993).


22. The STB reasoned that "in determining whether a proposed transaction is consistent with the public interest, we must examine its effect on the adequacy of transportation to the public. This necessarily involves an examination of the public benefits that will result from the transaction." Id.


or deteriorated service or both?"\textsuperscript{25}  

Taken to an extreme, the competitive harm analysis applied by the STB ignores the potential demise of another rail carrier adversely affected by a proposed merger if other competitive alternatives exist which will keep the consolidated railroad’s market power in check. In its decision, the STB adopted ICC policy guidelines which noted that the agency’s “concern is the preservation of essential services, not the survival of particular carriers.”\textsuperscript{26} If an adversely affected railroad provides “essential services” which will be impaired from the merger, the STB weighs this impact against the merger. An essential service is defined as “a service for which there is a sufficient public need, but for which adequate alternative transportation is not available.”\textsuperscript{27}

C. ARGUMENTS OF THE PARTIES

In justifying the merger proposal, UP-SP emphasized the economic benefits from consolidation to the new corporation and railroad shippers. The applicants claimed approximately a $750 million benefit. The claimed savings fell into three general categories: (1) cost reductions and operating efficiencies; (2) new traffic; and (3) savings in shipper logistics. Significantly, UP-SP predicated these benefits on significant capital infusions of approximately $1.3 billion in addition to the actual consolidation of the firms.\textsuperscript{28} The most significant quantified component consisted of $583 million from cost reductions and other efficiencies. The applicants claimed that the combination of networks would consolidate parallel lines and also provide “single line” service where cooperation of two railroads was required. By providing “single line” service in a greater geographic area, UP-SP could consolidate freight destined for the same location in larger sections, reduce interchange times and develop shorter routes. The consolidation would also result in labor savings from the elimination of duplicative administrative and operations functions inherent in any merger. Reductions in labor costs represented the most significant component in these savings, amounting to $261 million.\textsuperscript{29} As a result of bet-

\textsuperscript{25} The STB has recognized horizontal mergers which are defined as mergers of two overlapping systems and vertical mergers which are combinations of systems at their end-points thereby extending the geographic reach of the network. Many railroad mergers contain both aspects. \textit{Id.}, at *85. \textit{See also} Milwaukee - Reorganization - Acquisition by GTC, 2 I.C.C. 2d 161, 224-25 (1984).

\textsuperscript{26} \textit{UP-SP, supra} note 11, at *86 (citing 49 C.F.R. 1180.1).

\textsuperscript{27} \textit{Id.} (citing 49 C.F.R 1180.1(c)(2)(ii)).

\textsuperscript{28} Applicant’s Supporting Information for Merger, V.S. Mark J. Draper and Dale W. Saltzman, vol. 1, at 364, \textit{UP-SP}, Fin. Docket No. 32760, 1996 WL 467636 (Surface Transp. Bd., Aug. 6, 1996) (“In a UP/SP merger, however, operating efficiencies and traffic gains will depend in part on substantial capital expenditures.”).

\textsuperscript{29} \textit{Id.}, Appendix A, at 93.
ter service capabilities from "single line" service and a lower cost structure, the applicants projected a $76 million increase in new traffic. In addition, UP-SP estimated that shippers would accrue benefits of $91 million from improved service or lower freight rates.

The applicants also offered other less tangible benefits as a justification for the merger. First, according to the applicants, the UP-SP merger would support the financially troubled SP.\textsuperscript{30} Without a capital infusion from UP, SP risked business failure in competing against the considerably larger and financially healthy UP and BN-SF systems. Integration of SP into a larger system greatly reduced the risk of business failure. Second, because UP contended that SP was a weaker competitor than BN-SF or UP, the creation of trackage rights on the UP-SP system for BN-SF would enhance competition because both railroads were more capable of effective competition than SP would be as an independent entity.\textsuperscript{31}

A diverse group of parties rallied against the merger, including several different shippers, shipper organizations, state governments, various departments of the federal government, and other railroads.\textsuperscript{32} However, a conspicuous opposition party was missing from the STB proceedings—BN-SF, the prime competitor of a merged UP-SP. The opponents to the merger had two basic contentions: (1) that the merger benefits were greatly exaggerated; and (2) the anticompetitive effects of the merger outweighed the benefits.\textsuperscript{33}

\textbf{D. STB Analysis and Reasoning}

In weighing the "competitive harm" criterion against the "public benefits" criterion of the public interest standard, the STB ultimately concluded that "[i]n sum, the merger benefits here outweigh any competitive harms of the transaction, and the public interest requires that we approve it."\textsuperscript{34} Essentially, the STB accepted nearly all of the $750 million in claimed benefits with the exception of $76 million in gains from diverting traffic of other railroads and $47 million in gains from the net proceeds of line sales.\textsuperscript{35} The STB excluded these items because they were "private benefits." After deducting the line sales and traffic diversion figures, the net quantifiable "public benefit" of the merger was $627 million.

Interestingly, the STB rejected all other arguments which favored reducing the claimed level of quantifiable benefits. In particular, the STB

\begin{itemize}
\item \textsuperscript{30} \textit{UP-SP}, supra note 11, at *6.
\item \textsuperscript{31} \textit{Id.} at *6-7.
\item \textsuperscript{32} \textit{Id.} at *3.
\item \textsuperscript{33} \textit{Id.} at *93-95 and *99-102.
\item \textsuperscript{34} \textit{Id.} at *92.
\item \textsuperscript{35} \textit{Id.}
\end{itemize}
emphasized that one economic critic of the application "lacked credibility" because of a prior contention that the BN-SF merger would generate few economic benefits. The STB noted that according to the BN-SF, the estimated benefits of the merger were actually understated.

The STB rejected two types of arguments that sought to decrease the estimated benefits of the merger. First, arguments that voluntary coordination could reduce the amount of the claimed benefit were rejected because the STB hypothesized that if such opportunities existed, the railroads would have done so independently. The STB reasoned that widespread coordination required the "stimulus" of a merger as well as antitrust protection. Second, the STB rejected claims that many asserted benefits of the merger were the product of deregulation and not merger activity. One critic attempted to show that railroad productivity improved during years where no merger activity occurred, i.e., 1989-1994. The STB reasoned that while no formal mergers were approved for the period 1989-1994, implementation of two mergers occurred during that period. Further, the STB contended that other mergers which occurred much earlier were continuing to accrue benefits from consolidation. The STB reasoned that while a railroad merger may have occurred in 1976, efficiency gains were still accumulating to the consolidated system in 1989.

The STB also recognized certain "unquantifiable benefits" to the merger. First, the STB concluded that "[a] combined UP/SP system will provide shippers with shorter, more efficient routes throughout the

36. Id. at *93.
37. Id. n.108. According to counsel for BN-SF present during oral arguments, the benefits of that merger exceeded $1 billion, compared to the projected savings of $560 million in the application. The decision also quotes the following source:

BN-SF president and CEO Robert Krebs told analysts in New York last Tuesday that the company had identified $400 million to $500 million in annual savings...on top of the $560 million in annual savings projected in their 1994 merger application. That disclosure, plus the banner earnings, helped push BN-SF stock up $5.875 for the day to close at $82.75 in heavy trading. That price, a 52-week high, represents a $20 per share gain since July 1. Traffic World, Oct. 30, 1995, at 37. This robust financial position has subsequently weakened. Net earnings for the first quarter of 1997 fell twenty percent below earnings a year earlier. The stock price for BN-SF shares has also leveled off considerably. Moreover, service has become erratic and slow for some shippers. See Daniel Machalaba, Burlington Northern Struggles To Get Merger On Track, WALL ST. J., April 22, 1997, at B4 [hereinafter Machalaba, Burlington Northern Struggles].
38. UP-SP, supra note 11, at *94.
39. Id. While UP acquired the Missouri-Kansas-Texas Railway in 1988, the merger was not implemented until 1989. Similarly, the Denver & Rio Grande Western acquired SP in 1988, but did not effectuate the merger until 1989.
40. Id. at *94. The STB concludes that Conrail's consolidation, which occurred in 1976, still reaped economic gains in the period 1989 - 1994.
Second, "[m]ore than 350,000 cars, trailers, and containers, carrying 26 million tons of freight, will gain single line service each year" from the UP-SP consolidation.\textsuperscript{42} The STB observed that the BN-SF trackage rights agreement would add another 120,000 cars annually to this estimate. Third, the STB noted that the UP-SP merger would reduce switching charges to exchange cars to other railroads.\textsuperscript{43} The original SP charges were criticized by many shippers as reducing competitive options to choose carriers. Fourth, the STB noted the proposed capital improvements from the merger as generally pro-competitive.\textsuperscript{44} Fifth, the STB concluded that SP was a financially troubled entity that could no longer compete as an independent entity. The STB noted the disparity in capital expenditures between BN-SF and UP on one hand and SP on the other.\textsuperscript{45} In this regard, the STB concluded that SP faced difficulty in raising capital to improve its facilities and provided inferior service relative to its western competitors, BN-SF and UP.

While the STB found substantial public benefits to the merger, it also concluded that few anticompetitive costs resulted from the transaction. The STB set the tone of this conclusion by noting:

Rail rates have decreased markedly since 1980, despite the fact that most shippers are served by a single carrier, and few are served by three. Because of the several major mergers since that time, and due to the formation of Conrail as the single Class I carrier in the Northeast, large regions of the country are now served by a single major carrier or by two such carriers. Even with this structure, rail competition has thrived and shippers have continued to enjoy increasingly lowered rates.\textsuperscript{46}

The STB reasoned that the anticompetitive harm from such concentrated railroad control was insignificant. First, the UP-SP proposal coupled with additional STB conditions granted trackage rights to BN-SF and other carriers in areas where the merger eliminated competing railroad firms. This remedy ameliorated the possibility of a monopoly by a single carrier and ensured rivalry.

Second, the STB rejected the notion of a "duopoly" situation where two firms collude to control prices. Relying on the existing market structure of railroads in many regions of the East, the STB observed that two

\textsuperscript{41} \textit{Id.} at *96.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at *97.
\textsuperscript{46} \textit{Id.} at *88. Interestingly, financial analysts believe that Conrail has "monopoly" power. Indeed, some analysts fear that the pact to divide Conrail and create two competing track networks owned by CSX Transportation and Norfolk Southern in the Northeast would wipe out that power and reduce the value of Conrail's franchise. See Daniel Machalaba, \textit{Conrail's Breakup Plan Is Released By Norfolk Southern}, \textit{CSX Corp.}, \textit{Wall St. J.}, April 9, 1997, at B4.
carriers provided ample competitive pressure to avoid collusion. Moreover, a similar market structure existed in the Wyoming Powder River Basin, where two western railroads competed to deliver coal from mines in the region. Significantly, opponents to the merger failed to show any empirical evidence of tacit collusion.

Basic structural considerations in the railroad industry also led the STB to conclude that tacit collusion was difficult, if not impossible, for railroad firms. The market for transportation services is heterogeneous and composed of many variables, including freight schedules, types and numbers of cars to be supplied, terminal services, and car repositioning for customers. Also, the secrecy of contracts with shippers precludes railroads from easily establishing the rates of competitors. Many such contracts contain explicit secrecy clauses which prevent disclosure of the terms of the agreement. Further, the STB reasoned that railroads have significant “economies of density.” Economies of density, according to the STB, act as disincentives for collusion. The economies of density rationale is based on the theory that railroads have high fixed costs because of the need for substantial investment in capital to maintain a track network. Once the network is created, marginal costs are comparatively insignificant and each marginal addition of traffic on the network reduces the total average cost thereby allowing a railroad to either reduce rates to attract more traffic or reap greater profits.

In accepting the use of trackage rights to ameliorate competitive concerns from monopoly, the STB rejected arguments that such agreements were ineffective substitutes for independent ownership of a competing network. Recognizing the potential for abuse by the landlord railroad, the STB imposed a monitoring requirement to ensure that operations by the tenant railroad were commenced. Monitoring the progress of trackage rights implementation with the power to modify those rights offered a less intrusive remedy than demanding divestiture of certain lines and an ultimate transfer to other railroads. Further, the monitoring option permits the STB to examine the progress of competition in markets and prevent any abuse by UP-SP.

Without modification, the STB found that the compensation provision of the trackage rights agreement was adequate. Notably, the STB reviewed the contract to determine whether the provisions were “unrea-

47. UP-SP, supra note 11, at *99.
48. Id.
49. Id. at *217 n.304.
50. Id. at *217.
51. Id. at *218.
52. Id. at *112.
53. Id. at *113.
sonable." The STB continued to uphold its three prong test for trackage rights fees which considers: (1) variable costs to the landlord from tenant use; (2) proportional maintenance and operating costs as a result of tenant use; and (3) a return element on the value of the landlord’s property based on use. The STB evaluated the trackage rights fees against prior decisions and found that the assessed cost was lower than its established ceiling.

Further, the STB rejected arguments that the structure of payment from tenant to landlord was inherently disadvantageous. The assessed fees on the trackage rights agreement were entirely variable, dependent on the level of traffic operating on the track network. The Department of Justice contended that this variable cost structure would advantage a landlord in competitive situations when pricing hovered around variable costs because the landlord’s costs would always be lower than the tenant.

The STB also rejected the possibility of tacit collusion in a duopoly arrangement in the trackage rights context. Unlike other competitive circumstances, under trackage rights, the landlord railroad has at least some basic understanding of the tenant’s cost structure because the fees the tenant pays for use of the track go directly to the landlord. Yet, this

54. Id. at *119.
56. UP-SP, supra note 11, at *119.
57. Id. at *120. The STB dismissed this claimed disadvantage on the tenant railroad for two reasons. First, the STB cited the earlier ICC rationale that “potential tenants may have difficulty in making such capital contributions, and a one hundred percent variable rental charge reduces risks for the tenant railroad, which may not have experience participating in that market.” Id. at *120 (citing Burlington N. Inc. — Control and Merger — Santa Fe Pac. Corp., Fin. Docket No. 32549 at 90-91 (I.C.C., Aug. 16, 1995) [hereinafter BN-SP]). Second, the STB rejected the notion that railroad pricing was reduced to variable costs in competitive situations with other railroads:

The only markets in which railroads tend to price their services down to their total variable costs are those where motor carriage is extremely competitive. Those markets are not of concern in the rail merger context because rail competition is relatively unimportant in such markets in comparison to the overall competitive picture. And because railroads need to return their joint and common costs to replace their road bed and track structure as these items deteriorate, they cannot long continue to provide service in such markets. The issue of how fees are structured is ultimately a red herring because railroads generally must price significantly above their variable costs in order to return their joint and common costs and continue to compete.

58. Id. at *218.
knowledge did not cross the threshold of accurate information to collusively set prices because the STB reasoned that “tenants and landlords do keep secret many aspects of service from each other in bidding for traffic.” The STB held that partial information a landlord acquires about a tenant’s cost structure was insufficient to promote collusive arrangements.

III. THE UP-SP DECISION: TENSION WITH PRECEDENT?

In many respects, a tension exists with the UP-SP decision and other prior ICC decisions. This section explores five aspects of the UP-SP decision with prior merger decisions. First, the section compares the outcome of the SF-SP merger application with the result in the UP-SP application. Second, this section compares the standard of scrutiny applied in prior parallel merger proceedings with the standard applied in the UP-SP application. Third, this section explores the failing firm doctrine as it has been applied to SP since 1986. Fourth, this section investigates the sufficiency of trackage rights as a viable alternative to ensure competition. This section uncovers an apparent paradox in finding trackage rights as a viable competitive tool when merger eliminates all other competing track networks, and at the same time finding that voluntary agreements are inadequate to fully reap the benefits that a merger provides. Fifth, this section compares the ICC and STB treatment of vertical foreclosure with voluntary trackage rights arrangements.

A. TENSION WITH THE RESULT OF THE SF-SP MERGER APPLICATION

In 1983, SF merged with SP. The merged SF-SP stock was placed in a voting trust until the ICC decided the application. Both railroad networks overlapped substantially since each served the southwestern portion of the United States. Particularly in California, SF-SP would essentially control the entire railroad network. The initial application provided no trackage rights access to ameliorate these “two-to-one” situations and was ultimately rejected by the ICC. The applicants characterized any trackage rights agreements to ameliorate anticompetitive effects as “deal breakers.” In an effort to resuscitate the merger, SF-SP changed its position and proposed substantial trackage rights agreements to the other western rivals.

In rejecting the amended SF-SP application, the ICC emphasized the dilatory tactics of the applicants, noted the inadequacy of the trackage

59. Id.
60. SF-SP I, supra note 12, at 709.
61. Id.
62. SF-SP II, supra note 12, at 928.
rights agreements to resolve all anticompetitive concerns and expressed reservations about the use of significant grants of trackage rights to ameliorate anticompetitive effects. With respect to this last factor, the ICC observed:

Even overlooking these gaps between our evaluation of the anticompetitive effects and applicants' present attempts to address them, we are confronted with a complex set of agreements that promise to alter significantly the relationships between major western railroads. In our initial decision, we emphasized our reluctance to engage in major railroad restructuring to rearrange traffic patterns in ways that might have unforeseen consequences. While we encourage cooperative efforts between railroads, we are dealing here with a complicated set of arrangements made by several western railroads now in competition with each other across two rail corridors. We are disinclined to risk the possibility of collusion and market splitting that might result from such an artificial, settlement induced rationalization of the western rail system.

While UP-SP implicated the same concern because of the extent of parallel trackage involved in the merger and the extent of trackage rights, the STB rejected this reasoning.

Instead, the STB noted that railroad markets involving two carriers provided robust competition. The STB relied on sections of the eastern U.S. and on the Powder River Basin in Wyoming, where only two firms compete in many regions, to demonstrate that rail rates have continued to decline. Relying on the notion that trackage rights access is equivalent to competing ownership of two track networks, the STB concluded that "the fact that applicants and BN-SF have granted access to each other's markets is not a splitting of markets, but a pro-competitive action that promotes the public interest." With the benefit of additional "experience," the STB decided to overrule this final factor.

However, the rationale supporting the new STB position seems somewhat misleading. First, the additional "experience" retained from the years following the SF-SP application shows that two firm rivalry exists over competing networks. The two examples which the STB cites do not involve substantial amounts of trackage rights to facilitate competition. Indeed, the only recent instance of substantial trackage rights agreements arose from the BN-SF merger in 1995. Thus, the STB conclusion rests on the assumption that having "access" through trackage

63. Id. at 933-36.
64. Id. at 935.
65. UP-SP, supra note 11, at *99-100.
66. Id. at *99.
67. BN-SF, supra note 57 at 121. Eight railroads were involved in a series of trackage rights agreements designed to ameliorate competitive concerns.
rights is equivalent to the competition generated by two separate networks.

Second, the example of two firm rivalry in the east cited by the STB, involved firms that had been competing for at least five years when the second SF-SP application had been decided. Norfolk Southern, which was created by merger in 1982, competed with CSX Transportation, which was formed by merger in 1980. When the ICC framed its decision in 1987 against the SF-SP merger, it had five years of experience available, but rejected the issue of two firm rivalry in the trackage rights setting.

B. TENSION WITH THE STANDARD OF REVIEW

While the SF-SP merger decision applied the same public interest standard set forth in federal statutes, the ICC utilized a higher standard of scrutiny because of the existence of a railroad monopoly in the southwest section of the United States. The ICC observed that the states affected by this railroad monopoly experienced tremendous population growth. Because of the significance of these states, the ICC concluded that the SF-SP application would be reviewed with "extreme caution." Thus, the STB's approach seems inconsistent with the apparently higher standard of scrutiny the ICC had applied to mergers which involved parallel trackage in the Southwest.

A subsequent merger proceeding also supports the existence of a higher standard of scrutiny for parallel mergers. In the UP bid to control the Missouri-Kansas-Texas Railway (MKT), the ICC stated:

The proposed consolidation is largely a parallel one . . . . Because parallel mergers generally present more serious competitive problems than end-to-end ones, we must examine carefully the competitive options that would remain in these corridors.

In order to assess the merger's effects on competition, the ICC undertook two forms of investigation: (1) an examination of products and market

69. See supra notes 20-21 and accompanying text.
70. SF-SP I, supra note 11, at 760-62.
71. Id. at 761-62.
72. Id. at 762.
73. Compare the language of the UP-SP decision at supra note 25 and accompanying text. A parallel merger represents one of two general aspects of a railroad merger. For a brief discussion of both types see supra note 25.
shares routed over each parallel segment.\textsuperscript{75} and (2) an examination of existing competitors in each affected area.\textsuperscript{76} 

In approving the UP-MKT merger, the ICC found that only crushed stone shipments faced competitive harm. However, trucking provided a substitute to railroad transportation since the commodity had a low profit margin and traffic was largely localized.\textsuperscript{77} More significantly, the ICC noted that:

Post-merger, four railroads will continue to compete with the merged carrier. The particular array of competitors varies to a certain extent, corridor to corridor, but one basic fact remains constant: in each of the corridors in which MKT operates today, there will be effective post-merger rail competition.\textsuperscript{78}

While a reduction in competitors occurred because of the parallel effects of the merger, at least one other competing track network existed in each affected area to mitigate the impact. Also, competing modes of transportation existed to set a ceiling on railroad prices.\textsuperscript{79} In UP-SP, the STB disregarded this higher standard of review and instead emphasized the existence of railroad monopolies in certain regions of the nation. Moreover, while the ICC sought to evaluate the existence of competing networks for traffic moving over long distances,\textsuperscript{80} the STB found that trackage rights provide a remedy to ameliorate competitive harms.

C. SP: Failing Firm or Not?

Analogous to antitrust law, the ICC has recognized that preventing a failing firm from ending business may, in itself, become a justification that a merger falls within the ambit of the public interest.\textsuperscript{81} In SF-SP I, the applicants alleged that SP was a failing firm. The ICC noted that the key test to establish the failing firm doctrine was the existence of a clear

\begin{itemize}
  \item \textsuperscript{75} Id. at 440.
  \item \textsuperscript{76} Id. at 449.
  \item \textsuperscript{77} Id. at 464.
  \item \textsuperscript{78} Id. at 449.
  \item \textsuperscript{79} Id. at 449-50.
  \item \textsuperscript{80} Notably, the UP-MKT decision considered trucking as an alternative mode of transportation. The distinguishing feature of the UP-MKT decision from SF-SP I was the shorter length of haul of much of the MKT network. The ICC further held that for traffic moving distances less than 1,000 miles, trucking was generally considered a substitute. See id. at 434-35. Notably, the UP-SP application generally involved traffic moving beyond 1,000 miles. Thus, trucking failed to appear prominently in the decision.
  \item \textsuperscript{81} See e.g., United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974) (cited in SF-SP I, supra note 12, at 828); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (cited in SF-SP I, supra note 12, at 828). Federal courts have recognized the ICC's ability to consider the health of a firm as a factor in accepting a merger. See Kansas City Southern Industries, Inc. v. I.C.C., 902 F.2d 423 (5th Cir. 1990).
\end{itemize}
probability of business failure. While the ICC recognized that SP was a "marginal railroad," it concluded that the failing firm test was not met. The ICC apparently relied on previous claims from SP officers which indicated that the firm was financially healthy.

In 1988, the Denver & Rio Grande Western (DRGW) sought to gain control of SP. Each track network possessed fairly minor overlap and was characterized as an end-to-end merger. While the applicants did not invoke the failing firm doctrine, the ICC used SP's weak financial condition as a factor favoring merger:

SPT [SP] is a marginal carrier. Its traffic base, not the most desirable to begin with, has declined over the years due to vigorous competition from strong railroads in the Southern and Central corridors, particularly from the latter, and from trucks. In recent years it has been forced to supplement operating revenues with proceeds from the sale of real estate. We are convinced that a SPT/DRGW combination will result in a stronger entity than the two carriers separately, and that SPT will have a better chance for long-term stability under RGI [the new holding company] control than as a stand-alone railroad. The combined system will have a more diverse traffic base than either railroad now has, providing the new carrier with some added insulation from economic fluctuations.

The ICC considered SP's poor financial status as a factor favoring merger. However, by 1994, the trade press heralded an SP financial turnaround. In a subsequent merger application in 1995, the ICC rejected SP's contention that the proposed merger between UP and the Chicago & Northwestern (CNW) weakened it.

Similar to the analysis in DRGW-SP, the STB in UP-SP considered SP a financially weak firm that needed to be integrated into a larger system. The STB cast SP as a weaker firm which would grow relatively weaker compared to UP and BN-SF. The STB summed up SP's competitive state:

Based on our examination of the record, and SP's Annual Reports, we con-

82. SF-SP I, supra note 12, at 829.
83. Id. at 833.
84. Id. at 829-30. Those statements, made over two years earlier, were used in conjunction with reported financial data to compare changes in SP's condition.
86. Id. at 844.
87. Id. at 942.
88. See Gus Welty, SP Battles Back To Respectability, RAILWAY AGE, Nov. 1994, at 22 [hereinafter Welty, SP].
90. UP-SP, supra note 11, at *97.
91. Id. at *98.
clude that SP is, and will continue to be, weaker than its principal competitors in the West (BN-SF and UP). Although SP could remain in operation as an independent carrier for some time absent the merger, its inability to generate adequate cash flow from operations, and limitations on its ability to borrow or sell stock, will preclude it from being a strong competitor to UP or BN-SF. The level of service now offered by SP is below that offered by its competitors, and declining; it is essentially a single-track, low-density, high-cost railroad.  

Interestingly, the STB’s succinct, critical examination of SP would have been equally true in 1986, when the ICC rejected the failing firm doctrine. The STB appears to give greater weight to the argument in 1995.

Further, any competitive exacerbation would have been the result of past ICC mergers of western railroads. The ICC contributed to the SP’s weakened position by granting the BN-SF and UP-CNW merger applications. Notably, when reviewing merger applications, the ICC and STB fail to consider “the survival of particular carriers.”  

This approach probably defeated SP’s weakened competitor argument in UP-CNW.

While the ICC has reasoned that a “weakened competitor” argument against a merger application would invariably lead to the rejection of all such applications, adopting the same argument as a justification for merger would invariably lead to accepting all merger applications. Each merger relatively weakens the other unaffected carriers. Therefore, the weakened carriers are justified in merging with other carriers to become larger systems. A summary of recent western railroad mergers provides an illustration of this phenomenon. UP merged with two western carriers, Western Pacific and Missouri Pacific. As a competitive response, DRGW acquired SP a few years later. UP later acquired other midwestern railroads. Then, BN acquired SF. As another competitive response, UP sought to acquire SP.

D. TRACKAGE RIGHTS: A WEAK SUBSTITUTE?

The departure from SF-SP I and SF-SP II runs contrary to the notion that trackage rights may be a poor substitute to outright ownership of a competing track network, especially when a rival controls the track network. Indeed, anecdotal evidence from the UP-SP merger application suggests the inferiority of trackage rights. In an interview with Forbes, Gerald Grinstein, the former CEO of BN-SF, noted that operating on trackage rights provides “service with some disability.”  

However, Grinstein chose to enter into a trackage rights agreement with UP-SP.

92. **Id.** at *97.

93. **See supra** notes 26-27 and accompanying text.

because of the possibility that the STB would approve the merger. This prediction is highly justified since the only merger application rejected by the ICC and STB since 1980 was the SF-SP proposal. Entering into a "voluntary" trackage rights agreement when induced by a merger proposal more accurately reflects an attempt to minimize competitive losses.

Merging parties themselves have contended that trackage rights were inadequate to reap the benefits of an end-to-end merger. The general position of merger applicants is that such arrangements require a level of coordination between the two railroads that may either be prohibitively costly or result in a de facto merger. In the UP bid to acquire the CNW railroad network, the ICC adopted this approach and concluded:

To achieve the efficiency gains and improve service, applicants need to be able to develop and implement a coordination plan based on common management objectives. The ad hoc coordinating approaches suggested by SP are no substitute for such a plan because they may not permit full realization of the public benefits or, if they do, they would likely involve crossing the control line.

Similarly, several other ICC decisions have emphasized the importance of "single line" service to shippers. Significantly, the ICC conceded this position in the SF-SP application even though it ultimately denied the merger.

95. *Id.* at 64.
96. Since 1980, the ICC and STB have approved the following Class I mergers: (1) BN acquisition of Frisco; (2) formation of CSX Transportation; (3) formation of Norfolk Southern; (4) Soo Line acquisition of the Milwaukee Road; (5) DRGW acquisition of SP; (6) UP acquisition of Missouri Pacific and Western Pacific; (7) UP acquisition of MKT; (8) UP acquisition of CNW; (9) BN acquisition of SF; and (10) UP acquisition of SP. Other smaller Class I acquisitions also occurred with Guilford Transportation and Grand Trunk Western. *See* Velluto, et al, supra note 3, at 342-43. Amidst these mergers, only one application was rejected, the formation of SF-SP.

Clearly, the trend toward expectations of further mergers continues. *See Class I Mergers: Equipment Impact Analysis, Railway Age*, Dec. 1995, at DB15 ("With today's mergers, it has become commonplace to assure quick ICC approval by entering into broad, all encompassing trackage rights agreements with competitors, to blunt competitors objections and to assure competitive service to shippers.").

97. Notably, the issue of trackage rights access appears most prominently in the end-to-end context. In end-to-end mergers, the potential to rationalize use of parallel lines cannot be realized through trackage rights agreements. *See also supra* notes 73 and 25 and accompanying text.
98. *UP-CNW, supra* note 89, at 63.
100. In *SF-SP I*, the ICC concluded that:
Applicants sought to neutralize the assertion that many of the claimed merger benefits could be achieved by SPT [SP] and ATSF [SF] by cooperative efforts short of merger.

In the BN-SF merger application, the merging parties claimed substantial post-merger savings from internal re-routes over the combined network. Theoretically, such savings could be recouped by trackage rights or a joint marketing arrangement between the parties. However, the ICC found such an arrangement implausible even though BN and SF had engaged in voluntary haulage agreements which were not precipitated by a merger. In fact, the BN-SF haulage arrangement continued until the submission of the merger application in 1995. Since the early 1990s, several voluntary arrangements have been implemented in the absence of a merger.

Applicants explored in detail the non-merger mechanisms suggested by DOJ in a manner that convinces us that there are practical, legal and competitive problems which would substantially lessen the effectiveness of such arrangements. It seems clear to us that without the unified management resulting from the merger, few if any of the operating economies projected under the Operating Plan are attainable.

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**SF-SF**, supra note 12, at 872 (also cited in **UP-SP**, supra note 11, at *94).


102. A haulage agreement obligates a railroad to transport freight over its network for another railroad at a specified fee.

103. See **Santa Fe**, **BN Launch Haulage Agreement**, RAILWAY AGE, July 1993, at 18; **Santa Fe**, **J.B. Hunt Start Tulsa Service**, RAILWAY AGE, July 1993, at 20. Both articles describe a joint haulage agreement for intermodal traffic. The traffic flowed from the Southwest (originating in California) to the Southeast. SF was allowed to operate over BN trackage from Avard, Oklahoma to Birmingham, Alabama.

104. See supra note 103; see also e.g., **RGI Scuttles Soo Deal, Looks To BN Trackage Rights**, RAILWAY AGE, Sept. 1990, at 22 (Denver & Rio Grande Western decided to negotiate trackage rights over a line extending from Kansas City, Missouri to Chicago, Illinois rather than buying it outright from Soo Line); **BN Teams Up with South Orient**, RAILWAY AGE, Sept. 1992, at 12 (BN gains access to Mexico by acquiring the South Orient, a shoreline which negotiated a haulage agreement from southern Texas to Fort Worth, Texas to connect with BN); **IC, KCS Agree on Joint-Line Service**, RAILWAY AGE, March 1993, at 13 (Illinois Central and Kansas City Southern agreed to market joint-line service); **First, KCS-Midsouth, Now . . . ?**, RAILWAY AGE, June 1994, at 64 (Kansas City Southern and BN enter into a haulage agreement to move intermodal freight from Texas to the Pacific Northwest); **BN, IC Forge Intermodal Agreement**, RAILWAY AGE, Sept. 1996, at 24 (Illinois Central and BN-SF have established a joint marketing agreement for movement of intermodal traffic between Memphis, Tennessee and Mobile, Alabama); Mark W. Hemphill, **Taconite West, Coal East: How Wisconsin Central and Southern Pacific Snared the Big Geneva Steel Ore Haul**, TRAINS, Mar. 1995, at 36-47 (Wisconsin Central and Southern Pacific through joint marketing agreements obtained a lucrative contract, surpassing “single line” service from UP-CNW); **Conrail and Guilford Launch ‘Press Runner,’** RAILWAY AGE, Mar. 1995, at 22 (joint marketing effort to ship paper from mills in Maine to Chicago within four days); **Conrail, NS Join in New Intermodal Service**, RAILWAY AGE, June 1995, at 23 (Conrail and Norfolk Southern introduced a new intermodal service which connected Atlanta, Georgia with Kearney, New Jersey); **North-South Route Focus of SP/IC Partnership**, RAILWAY AGE, July 1994, at 4 (Illinois Central and SP entered into an agreement to interchange in Memphis over Illinois Central trackage to shorten SP transit times); **NS, Conrail Explore Intermodal Venture, Triple Crown To Market Services**, RAILWAY AGE, Dec. 1992, at 13 (Norfolk Southern and Conrail began exploring a joint venture to market intermodal services); **CN, BN Haulage Agreement Speeds Canada To U.S. Traffic Movement**, RAILWAY AGE, Dec. 1992, at 13 (BN and Canadian National implemented a haulage agreement which “vastly simplified” movement into the U.S. according to Canadian National CEO Paul M. Tellier); Arthur J. McGinnis, **Welcome To the**
In addition, railroads have criticized the inadequacy of trackage rights access. Perhaps the most ironic instance of criticism occurred in the UP-CNW merger proceedings when SP claimed UP violated the terms of previous trackage rights arrangements imposed by the ICC.\textsuperscript{105} Some SP complaints included inadequate capitalization of tracks over which SP operated\textsuperscript{106} and unequal treatment of trains.\textsuperscript{107}

The problems stemming from trackage rights conflicts occur because of the differing interests of parties. In spite of the existence of trackage rights agreements, both parties often have diverging economic interests. The landlord railroad may have a diverging interest in the level of maintenance to provide, the priority of the train, or potential competitive concerns. BN argued that such diverging interests existed in its haulage agreement with SF as a justification for merger.\textsuperscript{108}

Currently, railroads are providing a similar strand of arguments against involuntary competitive access, a concept which essentially mandates trackage rights access for a regulated cost on any track network.\textsuperscript{109} Moreover, some railroads have contended that open access would erode economies of density and discourage capital investment.\textsuperscript{110} Since competitors could access the network, the owner of the network risks losing business to the tenant. The owner would, according to some railroad officials, lose the incentives to develop the franchise. Significantly, these arguments apply equally to all trackage rights arrangements.

Under the ICC and STB rationale, voluntary trackage or haulage arrangements are inadequate to reap the same benefits as unified control provides over the same two track networks. Further, some railroads have conceded that being a tenant on another railroad provides a competitive disadvantage to the owner of the network.\textsuperscript{111} Given these perspectives,

\textit{World of NAFTA, Railway Age}, April 1994, at 1 (UP pre-blocking agreement with the Mexican National Railways to speed traffic movement); \textit{More SP Track Available for Lease, Railway Age}, Feb. 1993, at 16 (SP offers leases to short line and regional carriers over certain segments of track which it believes it cannot adequately service).

\textsuperscript{105} \textit{UP-CNW, supra} note 89, at 19 ("SP is adamant that it has had an unsatisfactory experience with UP's administration of trackage rights . . .").

\textsuperscript{106} \textit{Id.} at 21 ("SP alleges that UP has no incentive to maintain and operate efficiently the line between Pueblo and Herington, because SP provides 95% of the line's traffic.").

\textsuperscript{107} SP sought to have UP dispatchers "informed" by their superiors that SP trains should be given equal treatment as UP trains. Further, SP sought performance monitoring and a restructuring of UP dispatcher incentive. See \textit{id.} at 20.


\textsuperscript{110} \textit{Id.} at 38.

\textsuperscript{111} See \textit{supra} notes 94-95 and 105-07 and accompanying text.
trackage rights to ensure competition in an otherwise monopolistic rail-
road market seems unrealistic. While BN-SF and UP-SP have become
interdependent for trackage rights access, non-cooperation by either
party encourages a reciprocity of non-compliance that amounts to a di-
vision of railroad markets to the extent that other competing modes of
transportation permit.112

E. The Vertical Foreclosure Paradox

While the STB has noted that some voluntary trackage rights are
unobtainable because of barriers such as conflicts of interest, the ICC has
rejected the same arguments regarding vertical foreclosure. Vertical fore-
closure occurs in the railroad context when a consolidation precludes an-
other competitor from providing service.113 In a hypothetical, one
railroad has a monopoly over either the destination or origin. Multiple
railroads connect with the monopoly railroad at an intermediate point
and either provide the destination or origin of the shipment. When one
of those multiple lines merges with the monopoly carrier, it is possible
that the other railroads will be “foreclosed” from providing service for
that particular shipment. Some economists have contended that such ver-
tical foreclosure will occur even if the foreclosed railroad is the more effi-
cient carrier.114

The ICC has soundly rejected any ill effects from this type of vertical
foreclosure, reasoning that whoever owns the monopolist railroad will ex-
tract the highest price both before and after a merger. Thus, if the price is
the same, a shipper would not have any incentives to route over one rail-
road or the other.115 Further, from a rational economic perspective, a
merged railroad which can extract a near perfect price squeeze from the
other bridge carriers would choose a bridge carrier if its own costs were
somewhat higher. In *BN-SF*, various utilities contended that vertical
foreclosure would occur in coal shipments. The ICC rejected this argu-
ment reasoning:

The utilities also depend heavily on the companion argument that they will
be harmed by the merger because a vertically integrated BN/Santa Fe will

112. This non-cooperation issue is further addressed in infra note 118 and accompanying
text.
113. See Curtis M. Grimm & Robert G. Harris, *A Qualitative Choice Analysis of Rail Rout-
49-51 (1987) [hereinafter Grimm & Harris, *Qualitative Choice*]; Henry McFarland, *The Econom-
ics of Vertical Restraints and Relationships Between Connecting Railroads*, 23 Logistics and
114. See Curtis M. Grimm & Robert G. Harris, *Foreclosure of Railroad Markets: A Test of
Chicago Leverage Theory*, 35 J.L. & Econ. 295 (1992); see also Grimm & Harris, *Qualitative
Choice*, supra note 112.
115. E.g., *UP-CN*, supra note 89, at 74.
always act to foreclose unaffiliated origin or bridge carriers from participating in efficient through routes. Again, both experience and logic are to the contrary. Simply put, there is no reason for a carrier to foreclose an efficient connecting carrier just to achieve a long haul. If a connecting carrier can provide service at a lower cost than can BN/Santa Fe, it is in the interest of all the carriers to reach an agreement for a joint service.116

When efficiency gains are plausible, railroads can negotiate voluntarily to assure the most efficient routing.

According to the ICC, other factors mitigate the potential effects of vertical foreclosure. The ICC observed that vertical foreclosure is less likely when the cost structures of the two routes are very different or when one route suffers from lower service quality.117 Shippers will act as a force to choose one routing over another when service quality is at stake. The ICC also has reasoned that the interdependence of railroads, with each in a position as a destination monopolist in certain circumstances, curtails abusive practices.118

In addition, a merged firm may have some incentive to pass routing savings to shippers even if it has a monopoly to avoid substitution away to other commodities or other modes of transportation.119 For example, a utility with different types of electric producing plants may, in the short term, decide to substitute oil for coal at the margin when it decides how much capacity to allocate to each type of plant. In the long run, such a utility may also plan to build a new generating facility elsewhere.120 These factors would act as an incentive for the monopolist railroad to pass on some cost savings to the shipper. If another carrier provides a lower cost route structure, the monopolist has every incentive to use that carrier and pass the savings on to the shipper.

Interestingly, the reasoning of the ICC's conclusion that vertical foreclosure is unlikely should also apply equally to voluntary trackage rights and other similar agreements if they are efficient. Where market forces work to avoid the inefficient routing in the vertical foreclosure context, they should also work to seek out efficient voluntary agreements that reap benefits even if far short of a merger. As the ICC stated succinctly: "[r]ailroads, like other firms, normally have no incentive to foreclose efficient alternatives to in-house production."121 For example, a railroad that could reap gains through a shorter re-routing by diverting the traffic to a competitor would negotiate with that competitor to divert

117. UP-CNW, supra note 89, at 74.
118. BN-SF, supra note 99, at 74-75.
119. Id. at 75.
120. Id. at 74 n.95. The ICC referred to this type of decision as the "make or buy" paradigm.
121. Id.
the inefficient portion of the move off its own network. Further, the pressure from other modes of transportation, particularly trucks, would act as a strong incentive for a railroad to enter such an agreement, even if it loses a portion of the length of haul, because it risks losing the business entirely if rates remain the same or increase.

Numerous examples of voluntary arrangements exist. For example, through its traffic movements from the Southwest, which are routed through Memphis, Tennessee, before reaching their Chicago, Illinois destination, Illinois Central had a more efficient route than SP. As a result of this routing disadvantage, SP negotiated a haulage agreement with Illinois Central to gain access to the less circuitous route. Another joint venture example demonstrates how two railroads can effectively defeat a “single line” service carrier. Wisconsin Central (WC) and SP gained a contract with Geneva Steel to haul 2.6 million tons of taconite pellets per year from Minnesota to Geneva, Utah. The SP-WC route, which was substantially longer and more inefficient, remained competitive with the single-line UP-CNW bid because of a coal backhauling arrangement. Cooperation between the two railroads was the essential ingredient to winning the contract. Moreover, in contrast to the STB’s dismal picture of an SP unable to provide adequate service, this shipper had substantial confidence that SP could meet deadlines.

In UP-SP, the STB dismissed this troubling paradox by suggesting that “if UP and SP have not yet been able to coordinate the core operations of their competing systems outside of the merger context, it is not realistic to suppose they could easily do so.” Of course, coordination of “core operations” are not necessary for many proposed gains from “single line” service. As the examples above illustrate, improved service quality through better routing and joint marketing are possible without merger. In stark contrast to the STB’s interpretation, the record clearly demonstrates that the UP-SP merger proposal was a competitive response to the creation of BN-SF. The timing and general context of the merger provide evidence to support this conclusion. Moreover, the

122. See supra notes 103-04 for a listing of examples.
123. See North-South Route Focus of SP/IC Partnership, supra note 104, at 4.
124. See Hemphill, supra note 104, at 36; see also SP, WC Will Test Two-Way Open-Top Service, RAILWAY AGE, March 1994, at 22.
125. See Hemphill, supra note 104, at 42.
126. See supra notes 90-92 and accompanying text.
127. See Hemphill, supra note 104, at 42 (Geneva Steel President and Chief Operating Officer, Robert J. Grow, was “confident that SP will provide the level of service necessary to live up to the requirements of such a relationship.”).
128. UP-SP, supra note 11, at *94.
129. The trade press seems to compare the BN-SF application with UP-SP. See Welty, Redrawing, supra note 5, at 36; UP Prepares To Move To the Top of the Class I’s, RAILWAY AGE,
record itself does not support the STB's conclusions. UP never considered means short of a merger to achieve at least some efficiency gains.\textsuperscript{130}

IV. ARE ALL MERGERS IN THE "PUBLIC INTEREST"?

As the concentration of railroad firms and the scope of railroad networks grow, the seriousness of anticompetitive impacts also increase. Yet, in the post-Staggers Act era, the STB and ICC have become more accommodating toward mergers. Indeed, the holding of the only failed merger application has been eviscerated by the UP-SP decision. Under the STB rationale, all railroad mergers are in the public interest. Of course, with this rubber stamp of approval, the pace of new consolidations continues.\textsuperscript{131}

The continual approval of railroad mergers may lead to the ills that deregulation sought to avoid—excessive regulatory intervention.\textsuperscript{132} When the Staggers Act was adopted, forty Class I railroads existed; now only nine remain.\textsuperscript{133} As industry concentration increases, the potential for collusive behavior also increases. A growing class of shippers may file petitions seeking regulatory relief. The STB itself has set up this form of monitoring through oversight of UP-SP trackage rights agreements.\textsuperscript{134} Ultimately, such oversight may be less desirable and more costly than simply preventing mergers.

More significantly, some question remains about the real efficiency

\textsuperscript{130} See Dep., John H. Rebensdorf, Jan. 22, 1996, at 55, UP-SP, supra note 11 (UP never considered alternative methods to obtain the competitive gains from coordination; it merely considered acquiring SF or SP); Dep., Dale W. Saltman, Feb. 22, 1996, at 126-27, UP-SP, supra note 11 (UP never considered acquiring use of SP assets that were essential to the Operating Plan by means other than merger); Dep., John T. Gray, Feb. 26, 1996, at 143, UP-SP, supra note 11 (SP never examined the economics of selling SP trackage to UP and retaining trackage rights).

\textsuperscript{131} E.g., the current merger proposal to split Conrail. See supra note 4.


\textsuperscript{133} See Miller, Tougher, supra note 132 at 18; see also supra note 3.

\textsuperscript{134} See supra note 53 and accompanying text. The STB clearly anticipates holding proceedings on the level of competition in areas where trackage rights exist. See UP-SP, supra note 11, at *123.
gains stemming from mergers. A great deal of difficulty exists in establishing the gains from mergers because the Staggers Act deregulated freight pricing, allowed greater flexibility for track abandonments, reduced reporting requirements, and facilitated mergers. Clearly, after the Staggers Act the railroad industry’s general economic condition has improved. However, the link between improved financial performance and mergers remains unclear. Before the Staggers Act, at least one major merger became a well publicized financial disaster, ultimately bankrupting many eastern railroads. More recently, UP encountered severe difficulty in absorbing CNW in 1995. In an open letter to customers dated November 6, 1995, Ronald Burns, former CEO of UP, conceded that “[s]ervice has deteriorated to levels never before seen on UP” and that “many customers are experiencing unprecedented problems with service.” Of course, other mergers have been considered successful.

At least one recent economic study which attempted to separate gains from merger and gains from other regulatory reforms concluded that the efficiency gains from mergers were negligible in contrast to gains from other Staggers Act provisions. This study examined the period 1974-1986. A subsequent study of the same data quantified the industry-wide efficiency gains from mergers and other forms of deregulation, and concluded that deregulation accounted for over ninety percent of cost reductions while merger activity accounted for about nine percent.

Notably, the STB has rejected productivity studies during “quiet” years where no merger activity occurred, reasoning that firms who exper-

135. See Wilner, Marketplace, supra note 2, at 307-08 and 311-16.
137. The merger of the Pennsylvania Railroad and New York Central was perhaps the first large combination of major networks. Effectuated in 1968, the merger proved a failure and led to the bankruptcy of several other eastern carriers. Conrail was ultimately created from the ashes of these failed carriers. See Joseph R. Daughen & Peter Binzen, The Wreck of the Penn Central (1971).
139. For example, BN was initially formed by a union of three major western railroads in 1970. BN has been considered a financial success story. See Great Northern Pacific & Burlington Lines, Inc. - Merger - Great Northern Ry., 331 I.C.C. 228 (1967); United States v. I.C.C., 396 U.S. 491 (1970); also noted in Daughen & Binzen, supra note 137, at 124 n.
140. See Vellturo, et al., supra note 3, at 367-68.
ienced a merger earlier still accrue benefits in later years. Such an analysis would make studying the railroad industry in “quiet years” virtually impossible since every Class I railroad has evolved through merger both before and after the Staggers Act. The STB implicitly argues that mergers constitute a continuing and significant component of productivity gains. However, the STB analysis fails to address studies which attempt to “factor out” the effects of mergers. Adopting the logic of the STB, if productivity gains in the railroad industry are attributable in large part to mergers, the industry should continue to consolidate until only one firm remains.

Other anecdotal evidence supports the notion that efficiency gains in the railroad industry are attributable to factors other than merger. For example, Illinois Central, the first Class I railroad to achieve the goal of “revenue adequacy,” substantially rationalized its route network and sold several thousand miles of trackage. In the absence of mergers, Illinois Central continues to earn the highest return on investment of any of the Class I railroads. The success of Illinois Central at least dispels the argument that mergers are the only vehicle to obtain greater efficiency gains in the railroad industry.

Further, another railroad, Florida East Coast (FEC), has successfully attained productivity gains through flexible labor relations. Over the period 1978-88, FEC gross revenues increased over one hundred percent while other Class I railroads, including firms that merged, experienced growth in gross revenues of only thirty-one percent over the same period. Similarly, traffic growth on FEC outstripped the industry average for the same period. FEC was hailed as a model for other Class I rail-

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142. UP-SP, supra note 11, at *94; see also supra notes 37-38 and accompanying text.
143. UP-SP, supra note 11, at *94. For example, consider the history of mergers within BN-SF. With a history of approximately 147 years, the corporation has acquired 330 separate railroad entities. See Machalaba, Burlington Northern Struggles, supra note 37, at B4.
144. UP-SP, supra note 11, at *94.
147. In 1995, Illinois Central managed nearly a seventeen percent return on investment, surpassing the next best railroad by over three percent. Similarly, in 1994 Illinois Central accrued nearly a fifteen percent return on investment, nearly five percent better than its nearest rival. See Miller, Confidential, supra note 8, at 46. Illinois Central has maintained this high return throughout the 1990s. See Klein, supra note 136, at R29.
148. See Wilner, Productivity Challenge, supra note 136, at 35-38.
149. Id. at 36.
roads to follow.\textsuperscript{150}

Finally, in the age of deregulation, some question exists regarding the uniqueness of the railroad industry from other private enterprises. Perhaps such antitrust issues are best left to the court system. The STB approach to evaluating mergers seems best suited for politically neutral courts. The attitude that the STB and ICC adopted toward embracing mergers and deregulation followed a political agenda.\textsuperscript{151} Further, intense lobbying by railroads occurred during the formation of the STB to assure a more favorable standard of review for merger applications.\textsuperscript{152} Federal courts may maintain a better level of balance in evaluating merger proposals without adopting a specific legislative or executive agenda.\textsuperscript{153} Further, the courts have weighed and balanced broad policies in the antitrust context when "unique" issues are at stake.\textsuperscript{154} Given the level of deregulation, it seems unclear that the STB retains specialized knowledge that federal courts cannot easily acquire. Federal courts have evaluated nearly all other antitrust cases. Further, the early cases interpreting the antitrust laws involved railroads.\textsuperscript{155}

V. Conclusion

Since 1980, the ICC and STB combined have only denied one merger application out of eleven major cases, the SF-SP petition.\textsuperscript{156} However, \textit{UP-SP} further eroded the grounds for denial in \textit{SF-SP I} and \textit{SF-SP II}, opening the door to more mergers. Beyond remaining in conflict with the \textit{SF-SP} decisions, the STB approach to mergers in \textit{UP-SP} lowered the standard of review for mergers involving parallel lines. The STB and ICC propensity toward granting mergers has also fueled an interesting application of the failing firm doctrine. While ignoring the weakened condition of non-merging parties in applications, the STB and ICC have considered a railroad's competitive position as a justification for merger. Thus, each merger spawns competitive winners and losers, offering a justification for the weakened firms to regroup and plan yet another merger.

Within the STB and ICC approaches to merger policy, an uneasy equilibrium exists. While trackage rights and other forms of voluntary

\textsuperscript{150} Id.
\textsuperscript{151} See Stone, supra note 1.
\textsuperscript{155} United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint- Traffic Ass'n, 171 U.S. 505 (1898).
\textsuperscript{156} See supra note 96.
arrangements short of merger provide an inadequate vehicle to reap efficiency gains, trackage rights are acceptable to alleviate competitive concerns. Ironically, the railroads themselves recognize trackage rights as "service with some disability."157 While the STB appears to have confidence in the power of trackage rights to alleviate anticompetitive harms, the effectiveness of expansive trackage rights to alleviate such harms remains speculative. The first series of expansive trackage rights grants to alleviate competitive harm occurred in the 1995 BN-SF decision.158 The UP-SP trackage rights agreement is even more expansive and involves more serious competitive problems. Further, many railroads are critical of analogous open access provisions, arguing that such laws would hobble competitiveness.159

In addition, the ICC and STB position regarding vertical foreclosure suggests that a railroad in a monopoly position will voluntarily cede traffic to more efficient carriers when it can recoup at least a portion of the savings. Yet, the ICC and STB have rejected the same arguments when applied to the possibility of voluntary agreements alleviating the need for merger even though numerous examples of such arrangements exist. For voluntary agreements, the STB has concluded that an artificial "stimulus" is a prerequisite before realizing any gains.160 Significantly, the merging parties of UP-SP failed to consider any such agreements short of mergers. Taken in context, the UP-SP merger proposal represented a competitive response to the BN-SF merger application.

The continual approval of mergers has led to a domino effect of additional merger applications with no end in sight until the industry is left with one or two transcontinental systems. The most recent merger application involving Norfolk Southern, CSX Transportation and Conrail clearly represents this effect. While the UP-SP and BN-SF mergers left only two railroads west of the Mississippi River, three major Class I systems operate east of the Mississippi River. As a result, Norfolk Southern and CSX Transportation, two eastern networks, sought to acquire Conrail, the third railroad in the east. John W. Snow, the CEO of CSX Transportation conceded that: "[n]aturally, each of the Eastern carriers was concerned it might be left without a partner should transcontinental mergers occur."161

As the level of industry concentration increases, the risk of anticompetitive behavior increases. Moreover, while the STB and ICC approach has embraced mergers, it remains uncertain whether mergers have con-

157. See supra note 94 and accompanying text.
158. BN-SF, supra note 99, at 121.
159. See Welty, supra note 109.
160. See UP-SP, supra note 11, and accompanying text to note 38.
161. See CSX Corp., supra note 5, at 2.
tributed a significant portion of the efficiency gains realized by the railroad industry since 1980. Continued increases in industry concentration may pave the way for anticompetitive abuses that invite more regulation, defeating the ultimate goals of the Staggers Act. When the Staggers Act sought to facilitate consolidations, the industry was financially unsound and forty Class I railroads dotted the U.S. railroad map.

In addition to the debate regarding the adjudication of railroad merger applications, the question of which institution may better decide these cases exists. The recent precedent of the ICC and STB in merger proceedings suggest that federal courts may better adjudicate the merits of such claims.\textsuperscript{162} Unfortunately, STB and ICC review seems tainted with a political agenda to support merger applications in virtually all circumstances. The STB and ICC have effectively ignored evidence critical of this agenda. In a more balanced environment, courts may better evaluate the economic merits of mergers as well as other broader social policy goals.\textsuperscript{163} In sum, a fundamental re-examination of railroad merger policy is necessary.

\textsuperscript{162} See Gruley, supra note 152 at A20.

\textsuperscript{163} See Daniel Machalaba & Anna Wilde Mathews, Rail Mergers Take Toll on Small Towns, Wall St. J., Nov. 29, 1996, at A2. BN-SF anticipated few abandonments or line sales after its merger. However, it now plans to eliminate approximately 4,000 miles of track. Such rationalizations have hampered small community access to reliable railroad freight service.
Aircraft accidents raise questions of causation that can be as intricate and untidy as the scene itself. Even where causation can be determined, a Herculean effort remains in cohesively relaying that often analytical determination through a litigator and onto a lay jury. Resources that frame the reference of the expert and educate the litigator go a long way toward streamlining the presentation of causation evidence.

Aircraft Accident Reconstruction and Litigation is a notable effort in providing such a resource. Dr. Barnes McCormick, a renowned aeronautical engineer who has appeared many times as an expert witness, and Myron Papadakis, a litigator and law professor, survey many technical and legal aspects of determining causation. As such, the book may be of great assistance in educating lawyers to better understand the circumstances surrounding aircraft accidents.

The first chapter categorizes types of causation. Human error may result from any of a magnitude of people who are involved neglecting any of a host of individual responsibilities. The aircraft can lose power for several reasons. The instruments that ensure the aircraft's stability are suspect when the accident was preceded by a sudden departure in flight path, for example. Structural stability and design may also be suspect.

Chapter two cursorily introduces aeronautical concepts. Lift and drag are defined and explained through formulae, charts, and graphs. Knowing the drag, one can determine the amount of power needed to move the aircraft through the air; through a process explained in the text. An aircraft's drag and the lift required are indicators of its overall performance which, although provided in the flight manual, is a composite of analyzing the calculations of the plane's rate of climb, time to climb, angle of climb, takeoff distance, and range. These are briefly explained and

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presented in the text, as is a discussion of the determination of an aircraft's range, stability and control.

The stability and capacity of the structure of the aircraft is the focus of chapter three. The components of structural failure are discussed, including load factor, bearing factor, and strain of the tensile, compressive, and shear types that threaten the structure of the aircraft. Chapter four begins a detailed "dissection" of an aircraft's components, beginning with its engines. All aircraft engines have various moving parts. Analyzing the engine may determine what, if any, power that engine was generating at the time of impact. Various types of engines are detailed and various considerations in analyzing engine failure are discussed.

This dissection continues in chapter five, with a bit more insight toward reading the wreckage. Whether light bulbs were illuminated at impact, for example, can be telling of any problems with the aircraft's electrical systems and of whether the emergency or warning lights were on. Assuming a pristine and problem free aircraft just before impact, for each and every component within an aircraft, witness marks and bent metal can tell a story. Chapter five provides a few aircraft systems to investigate and things to look for (e.g., crush damage, impact marks, puncture marks, smearing) in search of that story.

Back away from the body of the aircraft, chapter six strives to provide a general understanding of how an airplane operates "within the air traffic control system." The "air traffic control system" begins with the "flight plan," which is required by the FAA for pilots flying under "Instrument Flight Rules" but merely recommended for pilots flying under "Visual Flight Rules." Pilots may only fly under "Visual Flight Rules" during certain meteorological conditions. A brief lesson in reading aeronautical charts and plates, airport depictions, and approach plates is given. The various types of navigation systems that contact aircraft from the ground are briefly discussed. Finally, the many environmental hazards that threaten a take-off or an approach, including wind-shear, turbulence, and lightning, are discussed, as well as methods of determining their role in an accident.

Farther away from the body of the aircraft, the many agencies that govern flight are introduced in chapter seven. "The FAA licenses aircraft and pilots, and controls the operation of the aircraft by the pilots." Every component is manufactured under its regulation. A plane manufacturer must obtain a "Type Certificate" in order to build a new plane. This certificate will "date" the plane’s construction relative to the applicable regulations. Once the plane is built, it must maintain its "Airworthiness Certificate" through compliance with repair and maintenance regulations. "The FAA publishes Advisory Circulars that provide advice on almost all aspects of the air transportation system ranging from airport
design to markers for powerlines.” The National Transportation Safety Board (“NTSB”) is a civil aeronautics board that conducts all civilian accident investigation in the United States. The NTSB joins forces with the military to investigate military accidents. Their findings can be obtained upon request, pursuant to either the Freedom of Information Act or discovery. The International Civil Aviation Organization (“ICAO”) is a coalition of thirty-three nations that promulgates standards and recommended practices for aircraft operation as well as accident investigation and reporting. ICAO endeavors to gather accident information “considered important from a safety or accident prevention viewpoint.” Various other agencies and organizations that can serve as valuable sources of accident information are noted.

As conclusions are drawn from the findings of the investigation, chapter eight describes some of the major causal factors of aircraft accidents. Obvious failures in the aircraft’s instruments may indicate a negligent pre-flight check on the part of the pilot or the ground crew, who may even make mistakes that would evade the normal pre-flight procedure. Investigating the position of the switches may reveal that instruments that do function correctly may have been used improperly by the pilot, who may have been a novice, simply mistaken, or intoxicated. Studying the tapes of the air traffic controller’s communications with the pilot may reveal error in guidance. In short, the engine system, the fuel system, the external control system, and the structure and design of the aircraft are all potential sources of failure and, ultimately, disaster. An investigator must be mindful of the aspects relevant to “the man-machine interface.”

Drawing the conclusions arrived at into a “probable cause” argument, chapter nine presents the systematic, check-list type approach to accident investigation. The investigative procedures that occur in the field are listed and described, relying upon the purposes for those specific investigations discussed earlier (e.g., light bulbs, etc.). The fruits of the field investigation will be given to an expert engineer, “who will attempt to put it all together.” Investigative checklists will aid in understanding the many components of an accident investigation, as well as help the attorney probe the investigation that was conducted and determine what to request when conducting discovery.

Additional investigative techniques are the focus of chapter ten. Legal investigation, such as that conducted by the NTSB, endeavors to find the “probable cause” or the contributing factors, and gather admissible evidence to that effect. Air traffic controller tapes, cockpit voice recorders, and other sound analysis may also be helpful. Some on-board computer systems may have their memory or information storage analyzed by very specialized experts to probe for system failure. Possible causes and legal theories should be checked in a flight simulator, which
can help evidence or diminish the plausibility of a particular causal theory.

Chapter eleven displays the practical applications of the theories detailed in the earlier chapters. A series of pictures of a helicopter wreck are accompanied by commentary of what can be discerned. The pristine nature of the engine components, for example, and the intact but distorted nature of the blades, suggest that the helicopter crashed because it lost power. A second example demonstrates how distorted engine damage, as opposed to fragmented or shattered engine damage, can indicate that the engine was extremely hot at impact. A third example describes the difference between the damage that would result from a fire (extensive blackening) and the damage that would result from an explosion (much less blackening, more distortion generally). The actuators, or devices that maneuver the flaps and tail, may be read to determine their position at impact. A photo series of propeller reconstruction provides a manner of determining their angle at impact. The leading edge of a tail, if distorted, may indicate sideloading, or flying sideways through an airstream.

Chapter twelve is a "glossary" or sorts, alphabetically listing various "clues" of what to look for when analyzing various parts of aircraft wreckage. When looking at the aircraft doors, for example, the authors offer the following:

Doors should be examined to determine that they were closed and locked at impact. If they are found closed and locked, they were. If they are open or missing, a metallurgist should examine the locks. If they are deformed or broken, the door was closed at impact.

Chapter thirteen forges the conclusions drawn from the accident investigation into the legal theories and concepts under which the evidence will be presented to the jury. Negligence and strict products liability are described, and punitive damages are noted as available under either of those theories if wanton behavior can be shown. The issues are drawn in terms of risk versus utility. Plaintiffs assert the risk of a certain design outweighs its utility, while defendants assert the very opposite. Various other concepts of law, such as the Federal Tort Claims Act, federal pre-emption, international airline liability, and the military contract defense, are briefly summarized. More importantly, the authors provide reported cases and secondary authorities that may be instructional or helpful in understanding and researching the subject concepts.

The legal researcher will find the most helpful start in the last chapter, which provides a brief outline of each state’s law regarding products liability, negligence, wrongful death, aviation, punitive damages, statutes
of limitation, and statutes of repose. The researcher is referred to cases and statutes that are hallmark or instructional on that particular concept.

The text is followed by over two hundred pages of appendices. The appendices provide, among other things, a glossary of aviation terms, sample interrogatories, a civil aviation case “checklist,” other resources on aviation law, and “tips” for litigating aviation cases. Additionally, an eighty-two page “Addendum” accompanies the work and provides a host of names and addresses of persons and organizations who may provide additional information and assistance as needed.

Overall, *Aircraft Accident Reconstruction and Litigation* provides a sound introduction to the considerations that must go into aircraft accident causation analysis and litigation. The foreword, written by an accomplished investigator, praises the book as a post graduate guide for the hardware oriented aircraft accident investigator, that lawyers will “probably” appreciate. However, in viewing the work from a legal perspective, it would seem more helpful to the legal researcher and the attorney who wishes to better understand the nuances of his experts’ opinions. Providing the concepts of law, the state-by-state reference outlines, the investigation checklists to aid in assessing the adequacy of the investigation, the “tips” for litigating aviation cases, and the fact that the earlier chapters merely endeavor to introduce, or “brush-over,” much of the detail and minutia involved in analyzing wreckage that the engineer newly involved in investigation would need; distinctly impresses the reader that the work was emphatically geared for the attorney; and was meant, if at all, only to be a rudimentary reference for the engineer or the investigator. What the work accomplishes most notably is to sort out the complex considerations that comprise the accident in a way that would educate the attorney in understanding the evidence and forging the appropriate theory of the case. In so doing, the work serves as a valuable aid in relaying the results of aircraft accident analysis, as evidence of causation, to a jury.
FLYING BLIND, FLYING SAFE, by Mary Schiavo with Sabra Chartrand, Avon Books, 1997, $25.00

Dylan G. Lewis*

Mere weeks before ValuJet's DC-9 crashed into the Florida Everglades killing the 110 people on board the Department of Transportation recommended that ValuJet be grounded for safety reasons. However, Department of Transportation officials, including Secretary Federico Peña, began appearing on television immediately following the accident, reassuring the public that the airline was safe to fly, and "seemed only concerned with protecting ValuJet." Additionally, in 1995, the Inspector General's Office for the Department of Transportation conducted a study of airport security. During this study, Federal Aviation Administration ("FAA") agents "posed as gun-wielding or bomb-carrying passengers and wandered...through some of the biggest airports in the U.S." These agents boarded planes, getting into cargo areas and other secured portions of airports unchallenged 40 percent of the time. When the Inspector General at the time, Mary Schiavo, reported her findings to the FAA, the FAA officials responded by requesting the report be buried indefinitely. As Schiavo notes, "[t]he 1996 Summer Olympics were approaching, and the Department feared our findings would frighten athletes and tourists flocking to Atlanta for the international games."

In her new best-seller, FLYING BLIND, FLYING SAFE, Schiavo, the recently-resigned Inspector General for the Department of Transportation, states that this is due to the fact that consumer safety is not the primary concern of the FAA. For thirty-eight years, the number one objective of the FAA has been "to promote commercial aviation." This approach has bred a reactive approach to safety — assessing the need for certain modifications by the number of human lives that have been lost, an approach that has resulted in the FAA being deemed the "Tombstone Agency." The onset of deregulation, however, coupled with the exponential increase in demand that is projected for the airline industry, spawns fears that the FAA's previously manifested inability to keep step with the ultracompetitive mutations of the airline industry will result in a posi-

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449
tively frightening frequency in airline disasters, as many as "one a week," according to some experts.

The FAA's inability to manage the deregulated industry is discussed through the examination of a number of circumstances, including the ability of component manufacturers to effectually "grant themselves federal certification of their own aircraft designs." The ever increasing modernization of on-board systems has reduced the role of FAA inspectors who struggle to understand and assess the viability of such improvements. "Fortunately, manufacturer expertise and commitment to safety have covered for the FAA." These manufacturers, according to Schiavo, are not the only ones to blame. Market forces incident to deregulation have resulted in widespread manufacture and sale of artificial or counterfeit airplane components known as "bogus parts." A five year study conducted under the author's administration resulted in widespread seizures of bad parts, described as follows:

In the end, we would seize bad parts from almost every kind of aircraft: helicopter blades, brake components, engines, engine starters, fuel bladders, generators, bearings, speed drives, avionics, cockpit warning lights, landing gears, valves and switches, wheels, combustion liners, parts of helicopter tail rotors, windshields and entire wing and tail assemblies. We would confiscate parts made in basements, garages, and weld shops, or from major U.S. manufacturers and from Germany, France, England, New Zealand, Canada, Japan, China, the Philippines, Taiwan or unknown countries of origin. They even showed up on the President's helicopters and in the oxygen and fire-extinguishing systems of Air Force One and Two.

Schiavo identifies and discusses other areas that demonstrate the FAA's inattention to safety. Aircraft inspectors are often untrained and do an incomplete job inspecting the safety of an aircraft. Many aircraft, airports, and air traffic control systems are aging and becoming unsafe — yet federal grants to improve facilities are often squandered or used for purposes other than improving facilities.

In this regard, Schiavo attempts to "arm" the consumer with information about the age of various airplanes and airport facilities. Schiavo also supplies her recommendations regarding which airlines are safest. Further recommendations are made as to what a customer can do as a passenger and a citizen in making the airlines safer (e.g., "[g]ive the [National Transportation Safety Board] more authority [or s]harpen Congress's oversight of the FAA."). Addresses and telephone numbers of various other resources are also provided.

Schiavo raises awareness that the FAA, by its charter, is not concerned primarily with safety. This focus is lost during intervals of frustration; for example, in chapter seven, Schiavo discusses cult-like management seminars attended by FAA officials. Schiavo recommends
"[c]hang[ing] all top management personnel at FAA. . .[who have] proved they are not up to the task."

Overall, Schiavo does well to express sincere concern and alert consumers that safety is not the number one priority at the FAA, by providing insight of frustrated efforts to innovate the Inspector General's role concerning air safety. Although a number of Schiavo's allegations, and the tone with which she expresses them, drew considerable criticism from transportation officials, it cannot be denied that as demand for airline services increases, the need to address the concerns she raises will continue to be relevant — hopefully not at the expense that is suggested.