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Aviation Safety in Crisis:
The Option of The International Financial Facility for Aviation Safety (IFFAS)

John Saba*

I. INTRODUCTION

"Security" has become the catchword of the air transport industry since September 11, 2001. The skyrocketed priority attached to pursuing security at virtually all costs is understandable given the dramatic and tragic World Trade Center and Pentagon events as well as the subsequent

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The author has drafted this article primarily on the basis of person-to-person interviews from the Spring of 2002 through early 2003 with a number of ICAO officers from the Secretariat as well as representatives on the Council of ICAO of Algeria, Australia, Canada, China, France, India, Ireland, and the United States and the alternate representatives of France and Greece. He also attended relevant ICAO Council meetings during the 166th session (May/June, 2002; particularly, June 7th and 10th) and the 167th session (December 4th, 2002) as well as refers to Secretariat applicable documentation.

This paper is up-to-date as of mid-January, 2003. Thus, the author acknowledges that developments may occur after this date that affect the validity of some comments and conclusions.

The author has written this article in his personal capacity such that its contents should in no way be attributed to ICAO, its officers or specific state representatives. The purposes of the article are to describe and analyze the nature and scope of the problem as well as the various prominent proposed solutions. The author seeks to provide decision-makers and citizens with the necessary information to make intelligent choices and not to advocate any particular position.

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“War on Terrorism” launched by the United States Government. Accordingly, numerous political, economic, and legal aviation-related issues have come to be ultimately analyzed from the perspective of the security filter.

On the other hand, a lurking monster of a problem remains on how to handle the continuing, growing, and very obvious crisis in aviation “safety.” The devastating statistics of deaths due to different aviation accident causes raise the question whether so much of the world’s limited resources should be diverted from promoting aviation safety to enhancing aviation security. The deficiencies in the area of safety continue to cause disproportionately more aviation-related deaths when compared to deaths caused by security deficiencies. One illustrative study indicates that in the period from 1992-2001, aviation accident-related deaths were about ten times more likely to occur (33.77%) due to controlled safety issues, such as flight into terrain than were due to security breaches (approximately 3.87%).

Indeed, this latter statistic even included the deaths of the passengers and crew of the aircrafts that were flown into the World Trade Center, the Pentagon, a field in Pennsylvania in September 2001, and the inadvertent shooting down of a plane over the Ukraine in that same year.

The International Civil Aviation Organization (ICAO), a United Nations specialized agency headquartered in Montreal, Canada, has the responsibility to regulate and promote civil aviation internationally. Furthermore, the ICAO specifically is concerned, inter alia, with balancing the world’s concern for aviation security and safety issues. The Chicago Convention of 1944 mandates ICAO to insure the safe and orderly growth of international civil aviation throughout the world. Indeed, Dr. Assad Kotaite, President of the Council of the ICAO, has given context to this issue when he states that “[t]he international aviation community cannot afford to relax its vigilance . . . ICAO would continue to take timely action to ensure safety and security standards are in effect, and that deficiencies are properly and efficiently addressed.”

Today, the ICAO must reconcile a schism in perceptions as to whether security or safety should be given priority in attention and resources. Although the Developed countries tend to prioritize aviation “security,” most Developing and Less Developed countries (LDC) attri-

1. Culled from a presentation at an ICAO seminar regarding statistics accumulated by the ICAO, Accident Reporting: Air Navigation Commission Briefing (June 6, 2002).
2. Id.
bute more significance to aviation “safety” issues. The sad state of reality today is that whether either, both, or neither issue receives prioritization appears too often to depend upon the political dynamics of national, regional, and global interests rather than principles and recognized needs.

The manner in which the ICAO has tried to bridge the gap between Developed and Developing states on this issue is a case study in the slow and evolutionary processes of international institutional decision-making. The framework of the ICAO decision-making includes three key elements: (1) the Assembly often establishes by resolution a policy priority; (2) the ICAO Council generally deliberates on and formulates the structures and/or rules on the basis of this resolution; and (3) the Secretariat supports both institutions by providing research and ultimately implementation.5

With the backdrop of “security” as the aviation world’s priority concern today, this paper will focus on the “safety” side of the ICAO’s challenges by examining the policy positions, decisions, and actions taken by the ICAO and its 188 member states respecting the creation of an International Financial Facility for Aviation Safety (IFFAS).

The evaluation of the issue surrounding the creation of the IFFAS will be within the framework of four topics: first, a study of the nature and scope of the aviation safety problem, including the process of identifying specific aviation safety deficiencies, particularly through the ICAO’s Universal Safety Audit Program (USOAP); second, a review of existing technical and financial assistance mechanisms that may help remedy aviation safety deficiencies in the Developing/LDC countries; and third, an examination of proposed mechanisms, including the IFFAS, to help remedy the identified safety deficiencies; fourth, a few concluding remarks and suggestions.

II. THE PROBLEM: AVIATION SAFETY

An important problem today is that aviation safety remains far from being at an acceptable level. While the challenge of aviation safety enhancement persists in Developed states, it is particularly acute in Developing and LDC countries. Indeed, this paper postulates that most countries – Developed, Developing, and LDC – recognize that there is a need to help LDCs remedy aviation safety deficiencies since they generally lack resources, financial and otherwise, to remedy these deficiencies. However, states and their domestic air transport industries disagree as to what approaches and mechanism(s) are the best to address this need.

When addressing the deficiencies of aviation safety in Developing

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and LDC countries, it is heuristic to distinguish and discuss both the nature and scope/extent of the problem.

A. THE NATURE OF THE AVIATION SAFETY PROBLEM

The coinciding interests of Developed and Developing/LDC states provide reasons for improving aviation safety in the Developing/LDC world on three principal levels: (1) the safety of travelers and third parties on the ground; (2) economic development worldwide; and (3) aviation industry growth in Developed countries.

1. Safety of Travelers and Third Parties on the Ground

Civil aviation safety can be argued to be indivisible and global in nature such that any known aviation safety deficiency in one country, wherever it may be located, jeopardizes the safety of the entire global civil aviation system. Thus, passengers and third parties on the ground of different nationalities/citizenship are put at risk of death or injury through aircraft accidents and crashes anywhere in the world.6

On a global level, over one and a half billion passengers have been carried annually on average by the world’s airlines in the last few years, and this number is expected to double by 2010.7 The number of aviation accidents has been gradually increasing while the number of passenger fatalities has only decreased slightly over the last two decades.8 Indeed, it has been suggested that, “[i]f the accident rate were to be held constant at the 1996 level, . . . the projected growth in traffic could result in a serious accident every week by 2015.”9

On a regional level, it is apparent that accident rates vary significantly. A study that includes fatal aviation accident rate data for the period of 1994 to 1998 suggests that the Developed regions of North America, Western Europe, and Australia, have the lowest accident rates.10 On the other hand, Developing countries have much higher accident rates. Accordingly, airlines from the Eastern European states, including the Commonwealth of Independent States, have the highest accident rate, nearly fifty times higher than in Western Europe.11 Fur-

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8. Id.
9. Id.
10. Id. at 13 (reproducing a chart from Airclaims Limited, Special Report for IAPA: Study of Fatal Accident Data, Passenger Flights for and Number of Flights, Five Year Rolling Average, Western-built Jet Aircraft 1989 to 1998, (Feb. 4, 1999)).
11. Id. at 3.
thermore, airlines from Africa, Asia, and Central/South America have accident rates at least twice as high as the world average, with the African rate being four times higher than the world average.\textsuperscript{12}

In view of these statistics, there is no doubt that passengers and third parties on the ground are put at risk by Developing/LDC country's aircraft and aviation infrastructure deficiencies. Aviation is a global industry such that safety deficiencies in any part of the world can have an effect elsewhere. It must be recognized that not only do Developed country aircraft operators and citizens fly internationally but also Developed country airports receive flights from non-Developed country aircraft operators. A study of the Commission of the European Union (EU) concerning the risks to EU passengers and third parties on the ground might be extended to similarly apply to North Americans and others from Developed countries:

"Safety deficiencies world-wide and the failure by a number of countries to meet their international obligations concerning the implementation and enforcement of international safety standards has an unacceptable impact on the European Union. EU airlines operate globally and EU citizens travel widely all over the world and constitute an important percentage of passengers. The airports of the Community are also major destinations or stopovers for foreign carriers and aircraft. The safety of their operations is thus a matter of direct and immediate concern to the European Union, which is committed to ensure the safety of citizens living near airports and travelling to non-EU destinations or travelling on non-EU airlines."\textsuperscript{13}

\textbf{2. Economic Development Worldwide}

A second reason for improving aviation safety in Developing/LDC states is that global economic development/growth is intimately linked to a vibrant transportation industry and particularly the vital air transport industry. Three important factors emphasize this linkage.

First, the travel and tourism industry must be kept healthy and growing since today it accounts for over US $3,500 billion of economic production, or around twelve percent of the world's Gross Domestic Product.\textsuperscript{14} Air transport is probably the pivotal element in this growth. Indeed, it has stimulated the transport of billions of Developed country tourists to Developing/LDC countries and permitted the latter to economically develop at an accelerated rate.\textsuperscript{15}

Second, global markets require fast and efficient transportation of perishable goods from the Developing/LDC countries to the Developed

\textsuperscript{12} Id. at 13.
\textsuperscript{13} Id. at 5.
\textsuperscript{14} Abeyratne, \textit{supra} note 4, at 383.
\textsuperscript{15} \textit{EU Contribution, supra} note 7, at 6.
countries that, in turn, send back high value finished goods.\textsuperscript{16}

Third, it is essential that the level of aviation safety be improved throughout the world to build up the confidence of the traveling public. Most experts agree that the welfare of the air transport industry and, in turn, economic growth is significantly dependent on the traveling public’s confidence that air travel is safe and secure.\textsuperscript{17}

3. \textit{Aviation Industry Growth in Developed Countries}

A final reason for improving aviation safety in Developing/LDC states is that Developed countries find increased safety facilitates the growth of their aerospace manufacturing industry. Aerospace suppliers in North America and Western Europe have found it easier to sell more aviation goods and services to Developing/LDC countries when the latter adopt Developed country standardized and uniform air safety regulations for aircraft, air traffic, and airport services.\textsuperscript{18}

B. \textbf{The Scope of the Aviation Safety Problem}

The recognition of the scope of the aviation safety problem in Developing/LDC countries has gone from anecdotal evidence to a confirmed proof basis. This is largely a result of the Universal Safety Oversight Audit Program (USOAP) of the ICAO that has been in effect since January 1999.\textsuperscript{19} Nevertheless, other national, notably, that of the USA, and regional, for example, European, initiatives have also provided some evidence of the extent of the problem.

The first audits/assessments, providing some evidence of aviation safety deficiencies, were those of the United States’ Federal Aviation Administration International Aviation Assessment (IASA) program. This program was initiated in 1992 and continues to assess whether a non-US civil aviation authority (CAA) complies with international ICAO standards for aviation safety oversight of the air carriers under its authority.\textsuperscript{20} The FAA is concerned with the safety oversight system of each country but not the safety of the country’s individual airlines.\textsuperscript{21} By the end of the 1990s, IASA had determined that over forty percent of the countries assessed had insufficient oversight systems.\textsuperscript{22}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 5.}
\item \textit{Id. at 14.}
\item \textit{Id.}
\item \textit{See id. This determination is part of the basis for FAA recommended courses of action to the Department of Transportation (DOT) on the initiation, continuation, or expansion of air service to the United States by the carriers overseen by that CAA. The IASA program applies to}
\end{enumerate}
\end{footnotesize}
A significant regional mechanism is the European Safety Assessment of Foreign Aircraft (SAFA) Programme. This program was established by the European Civil Aviation Conference (ECAC) and Europe’s Joint Aviation Authority (JAA) with support from the European Commission. This Program provides European States with a surveillance tool so that they are made aware of and can act on proven deficiencies. It is largely based on safety information gathered from all possible sources and on ramp-checks of foreign aircraft. The program is applied to all foreign aircraft using an ECAC country’s airports. Information and results of checks are held in a common database at JAA Headquarters, and all results are confidential. The SAFA is neither an assessment of a State’s oversight capability, nor a substitute for safety oversight assessments. Nevertheless, this program contributes upstream to such assessments by drawing attention to possible deficiencies in a country’s oversight system.

This paper is particularly interested in the international framework for auditing/assessing aviation safety deficiencies that has been by carried out under the ICAO’s Universal Safety Oversight Audit Program (USOAP). On a general level, the USOAP was created as a response to all foreign countries with air carriers proposing or having existing air service to the United States under an economic authority issued by the DOT. The FAA is evaluating the safety oversight system of each country, not the safety of its individual airlines. It assesses only whether the oversight system is adequate to ensure that ICAO minimum standards are met, not the higher standards applicable in the U.S., the European Community and some other countries. Id.

In May 2000, the FAA decided to use only two categories in the future – Category 1: countries in compliance with minimum international (ICAO) standards for aviation safety; and Category 2: countries not in compliance with minimum international standards for aviation safety. Countries with Category 1 status will be permitted normal operations to the U.S.A. Category 2 will consist of two sub-groups of countries. The first sub-group of countries is those that have air carriers with existing operations to the U.S.A. at the time of the assessment – these carriers will be permitted to continue operations at current levels, but they are subject to increased FAA surveillance and are not permitted to expand or change services to the U.S.A. while in category 2. The second sub-group of countries is those that do not have air carriers with existing operations to the U.S.A. at the time of the assessment. Carriers from these countries will not be allowed to initiate service to the U.S.A. while in Category 2 status. Id. at 14.

23. Id. at 15.
24. Id.
25. Id.
26. Id.
27. Id. The High Level Group that met in 1996 concluded that the European Community should use its legal powers to make SAFA mandatory for the EU Member States. The European Commission has therefore drafted a proposal for a directive to be handled by the Community legislative process.
28. ICAO’s present day Universal Safety Oversight Audit Programme (USOAP) has its roots in the ICAO Assembly of October 1995. ICAO Contracting States endorsed the implementation of the ICAO Aviation Safety Oversight Program (SOP). This Program was designed to ensure the effective implementation by States of the Standards and Recommended Practices (SARPs) included in ICAO Annexes one (personnel licensing), six (flight operations), and eight
concerns about worldwide compliance with minimum aviation safety standards with the ultimate objective of promoting global aviation safety consistent with the ICAO’s Global Aviation Safety Plan (GASP). Indeed, the USOAP has been such a successful program that even the United States, and its IASA, increasingly defer to this ICAO audit mechanism. On a more specific level, the USOAP was established to address a dichotomy between the legal responsibility of states to assure aviation safety and the failure and/or inability of many states to properly discharge this responsibility. Since this dichotomy has been a particularly prominent issue for Developing/LDC countries, it is important to examine it in more depth.

On the one hand, individual States have a responsibility to assure aviation safety under the terms of the Chicago Convention and its Annexes. The ICAO, through its Council, has adopted eighteen technical Annexes, to the Chicago Convention, establishing Standards and Recommended Practices (SARPs) that are designed to ensure, inter alia, a minimum level of safety for international civil aviation through technical uniformity. In turn, each State is responsible for assuring adherence to (aircraft airworthiness). This Program’s primary task was the safety oversight audits/assessments of States by ICAO, on a voluntary basis. A related purpose was that ICAO was to offer follow-up advice and technical assistance as necessary to enable such States to implement ICAO SARPs and associated procedures. Id. at 16.

The assessment is the safety audit of the country’s actual level of compliance with international standards. This is carried out by assessing whether regulatory authorities have the legal means, the resources, the workforce and expertise to meet their international safety supervisory responsibilities. Id.

There were a number of disadvantages with this initial ICAO Program. First, it was limited by the need for voluntary contributions from Member States and by ICAO’s own continuing funding problems. Second, since the program was voluntary, it could not always be applied where the need was greatest – audits/assessments were only carried out when requested by the State concerned. Id.

Since November 1998, the Program has been renamed the ICAO Universal Safety Oversight Audit Programme (USOAP). ICAO Member States have decided that this new program should apply to all of them in a systematic and regular way. Moreover, the audit results are to be published if a State has made no significant improvement in remedying its deficiencies after a follow-up audit/assessment. Id.

The USOAP provides that ICAO, with the agreement and participation of the State concerned, can proceed to the establishment of an Approved Action Plan. This plan is supposed to assist States to take the necessary recovery actions to remedy the deficiencies identified by the safety audit so that they may fully comply with the ICAO Annexes. Id.

30. See id. at 20.
31. Id.
these SARPs. For example, certain Annexes provide for aircraft safety in the form of design, continuing airworthiness, safe operations, and safe air traffic flow, including the necessary Air Traffic Management and airport infrastructure within a State. If these obligations are not fully respected by States, air safety deficiencies arise and states have an obligation under Article 38 of the Chicago Convention to notify the ICAO of any differences between their national regulations and practices and the international standards contained in the Annexes.

On the other hand, despite this legal obligation, a growing number of contracting States and signatories to the Chicago Convention have been found not to be applying and/or misinterpreting relevant SARPs. This deficiency became a prominent issue when disclosed by ICAO at a November 1997 conference of Directors General of Civil Aviation.

To reconcile this dichotomy in a constructive and gradualist manner, the ICAO initiated the USOAP. This program attempts not only to give effect to ICAO's Global Aviation Safety Plan (GASP) generally but also to specifically determine the scope of the problem of aviation safety deficiencies worldwide. In the period from 1999 to 2001, the ICAO Assembly mandated initial audits, conducted under the auspices of ICAO's Air Navigation Bureau, that were to verify state compliance with the SARPs in three Annexes concerned largely with the aircraft itself - personnel licensing (Annex One), operation of aircraft (Annex Six), and airworthiness of aircraft, such as design, certification, and maintenance (Annex Eight).

The USOAP has been a dramatic success for the ICAO: 177 states and five territories have been audited, with only nine states remaining to be audited by ICAO teams between January 1, 1999 and December 31, 2001. Moreover, the results of these initial audits have been analyzed and submitted to the audited states. It is not surprising that many cases of aviation safety deficiencies resulting from state non-compliance with the SARPs were discovered. Some of the identified shortcomings include: improper and insufficient inspections by state authorities before the certification of air operators, maintenance organizations, and aviation training schools; licenses and certificates improperly issued, validated, and renewed without due process; procedures and documents improperly ap-

33. Id.
34. Id. at 1-71 - 1-72.
35. Chicago Convention, supra note 3, at art. 38.
36. See Belai, supra note 29, at 19.
37. Id.
38. See id.
39. Id.
40. Id.
proved: failure to identify safety concerns; and failure to follow-up on identified safety deficiencies and take remedial action to resolve such concerns.\textsuperscript{41}

The analysis of the audit findings confirms that not only many states experience serious difficulties in fulfilling their safety oversight obligations, but also that there is a need to address safety oversight implementation issues in certain regions.\textsuperscript{42} Furthermore, preliminary studies indicate that in many regions there often appears to be a direct relationship between two variables: the more there are audit findings indicating a lack of effective implementation of SARPs, the higher the aviation accident and incident rates in that region.\textsuperscript{43}

While the data gathered and analyzed by ICAO is based on information collected at the time of the audit, it should be acknowledged that many states have already acted to remedy identified safety deficiencies. The ICAO Air Navigation Commission (ANC) has a “follow-up” audit program “to validate the implementation of States corrective action plans, to identify any problems encountered by States in such implementation, and to determine the need for external assistance to resolve safety concerns identified in the course of the audits.”\textsuperscript{44} Indeed, the ICAO has conducted an analysis of a sample of thirty-four states that compares their rate of non-compliance with specific critical elements of safety oversight in the initial and follow-up audits.\textsuperscript{45} While in the initial audit there was 21.8\% non-compliance, in the audit follow-up three years later, non-compliance drops to only 7.2\%.\textsuperscript{46} It should be noted that these follow-up statistics reveal two important trends: positively, many cases of aviation safety deficiencies have been remedied; but, negatively, “some of the States visited have not been able to implement their corrective action plan and require assistance to do so.”\textsuperscript{47}

The evidence from both studies suggests a clear dichotomy between Developed and most Developing and LDC countries. Most cases of remedied deficiencies originate with Developed and better off Developing countries that have the means and ability to do the necessary corrections. However, many Developing/LDC States are facing serious difficulties in satisfying their safety obligations. The most common cause for these deficiencies is that certain States have not committed adequate resources to

\begin{thebibliography}{99}
\bibitem{41} Id.
\bibitem{42} Id.
\bibitem{43} Id.
\bibitem{44} Progress of the ICAO Universal Safety Oversight Audit Programme, at 2, ICAO Council Working Paper C-WP/11815 (Apr. 18, 2002).
\bibitem{45} Id. at app. B.
\bibitem{46} Id.
\bibitem{47} Id. at 3.
\end{thebibliography}
the task – in many cases because they lack the necessary means and ability. The major reasons for the aviation safety deficiencies fall into four categories: primary aviation legislation and regulations, institutional structures, human resources, and financial resources.48

- **Primary aviation legislation and regulations:** Many of the States audited have legislative and regulatory problems. These states either have not promulgated basic aviation law and related regulations or their existing aviation legislation and/or regulations are out of date and fail to address essential considerations, such as a failure to provide adequate enforcement powers.49

- **Institutional structures:** Certain States are institutionally challenged because the organizations responsible for regulating and supervising aviation safety do not have the authority and/or independence to fulfill their regulatory tasks effectively.50

- **Human resources:** Many States lack sufficient qualified experts for the effective satisfaction of the safety responsibilities of States. This inadequacy, in turn, may be attributed to three key factors: (a) human and financial resources are often not available for necessary expert training; (b) even where these resources are available for training, trained staff often leave for better-paid jobs in the aviation industry; and, (c) the entities in charge of safety oversight or air traffic services are generally government departments such that salaries are often fixed at low levels and cannot be changed without disrupting the whole governmental pay structure.51

- **Financial resources:** Many states do not allocate the necessary funds that their entities in charge of civil aviation safety require to carry out their responsibilities.52 In the case of many Developing/LDC countries, improving air safety is not a high priority on the political agenda when compared to other subjects such as health care, education, irrigation, and poverty.53 Furthermore, when a charging system has been put in place to recover costs from users, the revenues are often put into the general state coffers rather than earmarked back to the functioning of these entities so that they may work to improve aviation safety.54

ICAO's audits have peaked the world's awareness that there is a serious problem of gaps in aviation safety, particularly among certain De-

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
veloping and LDC countries. The problem is that this group of states has not – and probably will not – remedy their aviation safety deficiencies by properly implementing ICAO SARPs due to a lack of will, means, and/or ability to do so. The challenge is to find some existing and/or new mechanisms to help these needy states not only to upgrade their legislative and/or regulatory regimes, including rules, structures, and procedures, but also to secure adequate and trained personnel and sufficient funding for these purposes.

III. REMEDYING AVIATION SAFETY DEFICIENCIES: EXISTING MECHANISMS

Today, as just explained, there is a crisis of un-remedied aviation safety deficiencies in particular states and regions of the world. The traveling public has increasingly become aware of this problem in a stressful environment of rising expectations for a high standard of aviation safety and security. While ICAO has been performing the safety audits, and maybe soon will be doing the security audits of most countries, a question has arisen as to the purpose of these safety audits.

Some experts, concerned with the reality that so little is being done at a slow pace to remedy the problem, pose the dilemma this way. Do USOAP audits of ICAO states have a destructive purpose? In other words, should the audit results be used as a tool to generate information that ultimately results in blacklisting certain states for safety deficiencies so that their airlines and airports will be closed down? Or, do these audits have a constructive purpose, so that their results may be used as a way to generate information that ultimately results in improving international aviation safety?

As one astute international civil servant pointed out: when the international community sends the policeman/detective (i.e. ICAO and its USOAP) to investigate what is wrong in a country’s aviation system, once the problems are diagnosed, should not a doctor be sent to help that state remedy its problems? A disagreeing international official has replied that the ICAO’s mandate is limited to being a policeman/detective – the ICAO legally may not be a doctor and lacks the money for treatments. Thus, the question becomes: what doctor(s) (i.e., mechanisms) should be provided and what treatment(s) should be applied?

The design and implementation of projects to remedy aviation safety deficiencies is clearly required to improve aviation safety worldwide. However, the process of assuring that all states fully comply with minimum aviation safety standards is a much more expensive and demanding process than audits and/or assessments. There are a number of existing technical and financial mechanisms that have, in the past, assisted, or may
be directed in the future to assist, Developing/LDC countries that need to remedy aviation safety deficiencies.

A. Technical Assistance

The needy Developing/LDC states are often asked to apply to existing and/or evolving technical co-operation and assistance institutions and programs at the international, regional, bilateral, multilateral, and plurilateral levels to assist them in remedying their aviation safety deficiencies. It is worthwhile to briefly examine some of these institutions and programs and their ability to solve problems.

1. International technical assistance

The worldwide growth and development of civil aviation in the last half century has been significantly promoted and enhanced through the formulation and implementation of the SARPs by the ICAO. The gradual decrease in aviation safety deficiencies in Developing/LDC countries is largely attributed to the work of both the ICAO Technical Co-operation Bureau (TCB)\(^{55}\) and the ICAO Technical Co-operation Program (TCP).\(^{56}\) They have worked to assure that at least some civil aviation equipment, facilities, and services of many needy countries conform to the international SARPs.

An important caveat indicates that past achievements are no guarantee of future success. In the past, much of the success of the TCB has been due to the significant financing provided by the United Nations Development Program (UNDP)\(^{57}\) that permitted the moneys to be spent to

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\(^{55}\) See International Civil Aviation Organization, TCB, the Technical Co-Operation Bureau of ICAO, at http://www.icao.int/icao/en/txb/TCB/greeting.html (last visited Dec. 12, 2002). The Technical Cooperation Bureau of ICAO provides advice and technical assistance to Developing and LDC countries for civil aviation. The TCB receives administrative fees to fund itself by carrying out civil aviation projects in Developing/LDC countries on behalf of three principal sources of financing: (a) the United Nations Development Program (UNDP), (b) Developing countries self-financing sources, and (c) other funding institutions. Id.

\(^{56}\) See James Ott, Civil Aviation Directors to Explore Expanded Safety Role for ICAO, Aviation Week & Space Tech., Aug. 18, 1997, at 41. The Technical Cooperation Program (TCP) of ICAO is an important part of ICAO's mission with a continuing emphasis on aeronautical training. As with the TCB itself, there has been a gradual decline in funds provided by the UNDP. However, this decrease has been at least partly compensated by increased funding by governments partly self-financing their civil aviation projects, through cost-sharing, and/or trust funds provided by third parties like other governments. See James Ott, ICAO Faces Daunting Issues, Aviation Week & Space Tech., Oct. 3, 1994, at 55.

\(^{57}\) See James Ott, ICAO Faces Daunting Issues, Aviation Week & Space Tech., Oct. 3, 1994, at 55. The United Nations Development Program (UNDP) is the United Nations' largest provider of grants for "sustainable human development." The UNDP grants assistance only at the request of governments and in response to their priority needs that must be incorporated into national and regional plans. The funds are disbursed primarily for international and national
assist in remedying aviation safety deficiencies of Developing countries.\textsuperscript{58} However, over the last decade, there has been a dramatic decline in UNDP funding of the TCB.\textsuperscript{59} Internationally, as well as nationally, limited funds available for all types of technical co-operation have resulted in a change of funding priorities in favor of the health, education, and agriculture sectors, as well as water purification and poverty reduction. Thus, resources have often been diverted away from a lower priority item like civil aviation. Moreover, the present UNDP approach is to require that Developing/LDC countries execute projects themselves such that these countries are forced to look for necessary funding elsewhere. These developments should be understood in the contemporary global economic philosophy that relies on market forces to resolve so many problems. In line with this view, civil aviation projects are expected to be self-financed through a variety of public and private funding sources, but no longer the UNDP, with an ultimate goal that commercial revenues must provide cost recovery.

Constrained by declining UNDP funding, but wanting to respond to the deficiencies identified by the USOA\textsuperscript{P} in Developing/LDC countries, the ICAO has tried to stimulate the activities of its TCB in the field. Accordingly, the ICAO Council has approved the funding by the TCB to fund project feasibility studies for appropriate aviation infrastructure safety-related projects, for example, traffic forecasts and radar installation, in Developing/LDC countries.\textsuperscript{60} These studies are presently funded two key ways: first, by voluntary contributions of a generous third country that wants to help a particular country and its project; or, second, a few hundred thousand dollars transferred annually to the TCB from a small internal ICAO trust fund, which was established by the ICAO to hold dues paid in arrears and to be spent for ICAO-related purposes, for the purpose of, \textit{inter alia}, the preparation of project documents for remedial action in countries generally.\textsuperscript{61} The TCB has decided to direct part of these funds to country-specific feasibility studies.\textsuperscript{62} There is no question that the ICAO in good faith, through the TCB, is providing technical assistance to needy countries by preparing feasibility studies. However, the problem is that the TCB, restrained by a tight budget, can only prepare limited studies that are less than the complete

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\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002). \textit{See also}, \textit{International Civil Aviation Organization}, \textit{Annual Report} 45 (2001).

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{Id.}
and more detailed (i.e. "bankable") Project Reports that the financing institutions want.  

2. Regional technical cooperation

A variety of regional technical cooperation models are beginning to be explored and established.

One regional self-help concept that is evolving involves certain countries organizing themselves regionally for a common aviation purpose with a view of rationalizing their costs and the regional employment of the needed resources. For example, while six countries may not be able to afford to hire three safety oversight or airworthiness inspectors each, they may pool their resources and maybe hire eight inspectors for their region. This concept has been applied by six Latin American member states in the COCESNA regional association respecting their oversight/monitoring, and upgrading of their aviation infrastructure. The mechanisms to collect whatever charges or taxes are necessary to finance these activities are regionally developed and applied. Many Developed countries are supportive of this self-help concept.

Another idea being explored and particularly supported by certain Developed countries is that groups of richer Developing countries, like North Africa, might help neighboring regions of poorer Developing/LDC countries such as sub-Saharan Africa in financing and implementing aviation infrastructure upgrading necessary to remedy safety oversight deficiencies.

3. Bilateral, Multilateral, and Plurilateral technical assistance

Another existing approach to providing assistance to Developing/LDC countries in civil aviation safety projects is that Developed donor states provide help in a bilateral, multilateral, or plurilateral framework. At this level, as with international cooperation, certain similar constraints must be recognized. Again, since technical co-operation funds are limited, other priorities, like health, education, agriculture, water purification, and poverty reduction often divert resources away from a lower priority item like civil aviation. Furthermore, most donor Developed countries take a view that market forces should underpin civil aviation projects. These projects are expected to be significantly self-financed.
through a variety of public and private funding sources with an ultimate goal that commercial revenues must provide cost recovery.

a. Bilateral technical assistance

A number of donor Developed countries apply, or intend to apply, a bilateral and directed approach to technical assistance helping targeted regions, sub-regions or individual countries. In some cases, these countries prefer spending their limited technical assistance funds in this way rather than using international mechanisms for three key reasons.

First, it is suggested that a bilateral approach helps the donor state insure that the money is spent where the donor state intended that it be spent.68

Second, this approach may often provide a higher degree of transparency, accountability, and effective auditing than international assistance mechanisms. This is particularly true when a country already has its own mechanisms to assure that these objectives will be achieved. For example, the U.S. can rely on its FAA.69

Third, this approach permits Developed countries to focus their assistance efforts to recipient countries and regions not only closer to them but also to where political and economic interests are more evident. In effect, some Developed countries are starting to provide “bottom up” assistance bilaterally and regionally using their own facilities rather than “top down” using international mechanisms. A great model is being provided by both Canada and the United States that are involved in projects with the cooperation of the Inter-American Development Bank which channels technical assistance to their neighbors in the Americas.70 Similarly, the Western European states individually and possibly in the future, through a variety of European Union mechanisms, are already channeling some technical assistance to those countries regionally close to them in Eastern Europe and Africa. Suggestions have been made that more developed countries in East Asia, like Japan and Korea, might do something similar to help their Asian neighbors.

This state-based bilateral approach might be broadened into a “pluralilateral” approach, as explained below.

It is important to emphasize that state-based bilateral assistance is still popular, even when donor states are part of a strong regional grouping. Although European Union states are working to coordinate their ef-

68. Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (July 29, 2002).
69. Interview with Edward W. Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).
70. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002 & Aug. 15, 2002).
forts in helping improve aviation safety in Developing/LDC countries, most actions taken or planned are on a bilateral basis. The following are some examples:

- **France** – The DGAC, France's civil aviation regulatory authority, is helping several countries including Cambodia and Vietnam to develop or upgrade their civil aviation codes to be consistent with the Joint Aviation Requirements (JARs) of Europe's Joint Aviation Authority.\(^{71}\)

- **Netherlands** – The Netherlands tends to invoke the safety clause of their Air Service Agreements as the normal basis for technical assistance actions. They currently have projects in Tanzania, Kenya (responding to increased services to Nairobi), and Surinam (helping establish a civil aviation regulatory authority). They have also expressed interest in projects to improve aviation safety in Eastern and Central Europe as well as southern Africa.\(^{72}\)

- **UK and Germany** – The relatively small funds they allocate toward upgrading aviation safety in Developing/LDC countries tends to be mostly channeled through the European Union's mechanisms. Bilateral projects are limited.\(^{73}\)

b. Multilateral technical assistance

The best example of potentially significant multilateral technical assistance is the European Union. The European Commission is an active entity encouraging European Union initiatives to improve aviation safety through an effective global approach. Accordingly, the European Commission has proposed initiatives including co-operation with Europe's Joint Aviation Authority (JAA) and EUROCONTROL to assist future EU members, from Central and Eastern Europe, and the provision of resources to finance safety recovery programs.\(^{74}\) There has been discussion of the joint and complementary aims and priorities of EU member states as well as the need to establish a co-ordination mechanism for actions taken by EU member states to avoid duplication of governmental spending.\(^{75}\)

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74. See EU Contribution, supra note 7, at 11.
75. Id. at 11-12.
c. Plurilateral technical assistance

Plurilateralism is a relatively new and evolving concept, structure, and process of technical assistance. This approach broadens the primary partners of technical assistance to include not only recipient and donor states on a bilateral, multilateral, or international basis, but also “the efforts, experience and... the resources of... international [e.g. ICAO & IATA] and regional organizations, aviation manufacturers and operators, financial and other funding institutions...” Thus, this group of senior aviation experts is mandated to study the aviation safety issues of their region and recommend the best ways to improve safety and provide assistance regionally.

This approach is more commonly called the “GEASA” (Group of Experts on Aviation Security, Safety and Assistance) approach based on the precedent of the Asia-Pacific Economic Community (APEC). In 1995, APEC Transportation Ministers convened such a group of experts to review and recommend the best ways to improve safety and provide assistance in their region. This approach was first formalized and internationally recognized during ICAO’s 33rd Assembly of September/October, 2001.

Some countries are presently applying this model in their own regions consistent with ICAO’s blessings. Canada and the United States recently participated (Apr. 4 – 5, 2002) at a GEASA consisting of experts of seven South/Central American and Caribbean countries as well as the ICAO, the Inter-American Development Bank (IDB), and the Central American Oversight Agency (ACSA). Canada and the USA are apparently receptive to further participation and potential assistance to needy projects and their countries within a GEASA framework.

This concept of plurilateralism is being examined, and eventually might be applied by the Western European states as well. Suggestions have been made that through a variety of European Union mechanisms, Western Europe could direct its technical assistance to Eastern Europe and Africa. Furthermore, the APEC countries, the originators of the GEASA model, are already directing their assistance to the Asia-Pacific

77. Id.
78. See Transport Canada Civil Aviation, Background, at http://www.tc.gc.ca/CivilAviation-International/APEC/Background.htm [hereinafter Civil Aviation Background].
79. Id.
80. GASP Resolution, supra note 76, at II-19.
81. Interview with Edward W. Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002); Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002).
82. Id.
region.\textsuperscript{83}

\section*{B. Financial Assistance}

Developing/LDC countries with inadequate resources may seek not only technical assistance but also financial assistance to remedy their USOAP audited aviation safety deficiencies. It is worthwhile to briefly review the four main options of bank borrowing to which these countries may apply: (1) commercial banks; (2) regional development banks and funds; (3) international banks and other institutions; and (4) export credit agencies and bilateral development Institutions.

1. Commercial banks

Generally, commercial banks are reluctant to lend money to Developing/LDC countries because of a belief that the aviation industry generally and the type of clients in these circumstances particularly (i.e. LDCs) are too high risk given the traditionally small return on investment in the aviation industry.

2. Regional Development Banks and Funds

The Regional Development Banks and affiliated Funds are a more hopeful source of financing to assist needy countries to remedy their aviation safety deficiencies. However, the nature and scope of the assistance that these banks and funds may provide is limited by two key factors. First, these institutions primarily seek to reduce poverty in the donor countries with either no or minimal priority attributed to financing the improvement of aviation infrastructure and services; and, second, these banks have lending policies and practices that apply such stringent criteria that loans are largely restricted to creditworthy countries, effectively precluding the more credit risky Developing/LDC countries that generally will need financing to remedy aviation safety deficiencies.\textsuperscript{84}

It is heuristic to briefly review the approach of each of the four more important regional development banks when they are asked to finance aviation-related projects:

- Islamic Development Bank (IDB): This Bank does not appear to have any mandate to financially assist countries in remedying their aviation safety deficiencies. The Special Assistance Office of this Bank is primarily concerned with promoting the development of Muslim communities in education and health, as well as alleviating

\textsuperscript{83} Civil Aviation Background, supra note 78.

\textsuperscript{84} Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002).
their suffering due to war or natural disasters.85

- African Development Bank (AFDP): This Bank does have a precedent of financially assisting member countries in aviation projects. For example, in April 2001, this Bank granted a loan to the Moroccan Government for an airport improvement and extension of airport capacity project.86 Nevertheless, the priority of the African Development Bank and Fund is to reduce poverty with no significant mention of airport or air navigation service infrastructure upgrading.87

- Asian Development Bank (ADB): This Bank does have precedents of financially assisting member countries in aviation projects. For example, in 1997 this Bank started a technical assistance project to find resources to aid ten minor airports that lack navigational aids, adequate length runways, and suitable terminal buildings.88 Nonetheless, the ADB has committed its largest fund, the Asian Development Fund (ADF), to promoting the reduction of poverty through sustainable development.89

In line with the priority of fighting poverty, the ADB, like the African Development Bank, follows a procedure that effectively excludes loans to LDCs for remedying aviation safety deficiencies. These Banks stipulate to the applicant LDC that there is a fixed amount available for the country’s development with “soft”/concessional loans; however, these Banks stipulate a number of priorities, such as programs for poverty alleviation, education, water supply purification, health care, and rural road infrastructure that do not include aviation infrastructure improvement.90

- Inter-American Development Bank (IADB or sometimes called the IDB): This Bank has the broadest scope of priorities of the Development Banks that includes not only poverty reduction but also sector reform and modernization.91 The upgrading of the aviation sector might be construed as within the IDB’s priorities as exemplified in late 2001 by the IDB’s Multilateral Investment Fund (MIF) creating a $10 million line of activity to help Latin American and Caribbean countries improve airport security in the

86. Id. at app. B-1.
87. Id.
88. Id. at app. B-3.
89. Id. at app. B-2.
90. Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002).
aftermath of the September 11, 2001 World Trade Center tragedy.\textsuperscript{92} For example, the MIF recently approved almost one-half million dollars as a grant to Nicaragua to support a project to strengthen security at Managua's international airport.\textsuperscript{93}

The critics of this Bank suggest that such loans and grants are only a temporary phenomenon that reflects the Developed world's obsession with security today.

At this point, it should be highlighted that the processing of Developing/LDC country loan and grant applications by the regional development banks would certainly be facilitated if the applicants could professionally prepare project proposals, satisfy project management requirements, and documentation procedures. This means that there is a clear need for some mechanism to be developed to facilitate the potential recipients in getting their financial assistance.\textsuperscript{94}

An interesting development is the emergence of a possible new hybrid model, which through a coincidence of interests, incorporates a tripartite group working together of not only parties in a bilateral relationship, often a donor and recipient state relationship, but also a regional development bank. A recent example of this is in the Netherlands. Its Ministry of Transport, through its Aviation Technical Assistance Program, and the European Investment Bank have jointly financed a number of projects in Tanzania by providing seed money, expertise, and/or equipment.\textsuperscript{95} One project involves around US $10 million to provide air navigation and communications equipment while a second project involves around US $13 million to install a back-up power supply in Tanzanian airports for the emergency cases when power goes down due to such events as inclement weather.\textsuperscript{96}

3. International Banks and other institutions

On the international level, it has already been discussed that the United Nations Development Program (UNDP) has dramatically reduced its financing of aviation infrastructure, training and the like. Furthermore, other existing international financing institutions and programs are sector specific and do not generally extend loans or other assistance

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (Apr. 30, 2002).
\textsuperscript{96} Interview with Bert Kraa, Senior Project Manager, Safety and Security, Department of Civil Aviation of the Netherlands (May 28, 2002).
in the aviation sector. For example, the FAO restricts its efforts to the agricultural sector.

The International Bank for Reconstruction and Development (i.e., the World Bank) is not significantly involved today in the aviation sector. However, under the right conditions, it possibly might become a significant participant in the future.

4. Export Credit Agencies and Bilateral Development Institutions

In Developed countries, the domestic production and provision of aviation infrastructure and equipment often is helped and/or subsidized by export credit agencies. These institutions may be willing to help finance safety-related aviation infrastructure equipment and projects. Nevertheless, these exports must be creditworthy, a criterion that many of the aviation safety improvements in the Developing/LDC countries will probably not satisfy. Examples of export credit agencies include Compagnie Française d’Assurance pour le Commerce Extérieur (COFACE) [France], Export Credits Guarantee Department (ECGD) [United Kingdom], Export Development Corporation (EDC) [Canada], Export-Import Bank (Ex-Im Bank) [USA], and Hermes [Germany].

Developed countries also often have bilateral development agencies. While in theory these agencies might get involved in certain dire cases of remedying aviation safety deficiencies of LDCs, in practice they generally do not. Examples of such agencies include: Agence Française de Développement (AFD) [France], Canadian International Development Agency (CIDA) [Canada], Department for International Development (DFID) [United Kingdom], Foreign Ministry [Netherlands], and the U.S. Agency for International Development (USAID).

IV. Remedyng Aviation Safety Deficiencies: Proposed Mechanisms

There has been an almost worldwide consensus in recognizing the need to identify aviation safety deficiencies. Moreover, the ICAO receives almost universal praise for its success in identifying these deficiencies through its USOAP program.

However, this international consensus breaks down on the issue of whether the ICAO should help Developing/LDC countries remedy their identified aviation safety deficiencies when these states lack the ability and means to do so on their own. Thus, the question is whether ICAO has

98. Id.
a role in helping the remedy of identified aviation safety deficiencies, and if so, how?

The following discussion is divided into three parts:

(A) What is the role of ICAO in assisting the remedy of identified aviation safety deficiencies? – This involves contrasting arguments for and against a broad role of ICAO in this area;

(B) If there is an ICAO role, what is the IFFAS? – This discussion is on the history, functions/objectives, and proposed structure and operations of the IFFAS;

(C) Where does the IFFAS go from here? – This section examines important outstanding questions respecting the IFFAS.

A. WHAT IS THE ROLE OF ICAO IN ASSISTING THE REMEDY OF IDENTIFIED AVIATION SAFETY DEFICIENCIES?

To start, it must be recognized that the ICAO is committed to intensify and broaden its activities to audit the level of implementation of SARPs. The main challenge that the ICAO is confronting, but has not resolved, is to establish an effective framework for ensuring that states really comply with their the ICAO commitments in a uniform way. On the one hand, the ICAO has recently committed itself primarily through the USOAP to conduct mandatory, permanent, and universal auditing/assessment of the way its contracting states apply certain standards of the Chicago Convention Annexes for which they are responsible.99 On the other hand, since the ICAO has no legal power to obligate the states to accept the necessary audits and inspections, it has to form bilateral agreements with each of them on a voluntary basis.100 Thus, the USOAP is in effect a voluntary program.101

The present consensus is to expand the USOAP to cover all safety-related SARPs, with the next stage being those related to air traffic management, airport services and security.102 However, the ICAO must confront a number of limitations in proceeding with its USOAP auditing based on other Annexes to the Chicago Convention. Not only are there budgetary constraints but also a perception that non-remedied safety deficiencies exist in states that represent only one percent of international aviation activities.103 While a significant part of the aviation activities of Developed country operators occur in such Developing/LDC countries, there is reason to question the effectiveness of the current approach of trying to remedy the deficiencies.

99. See Belai, supra note 29, at 19.
100. EU Contribution, supra note 7, at 7.
101. Id.
102. See Abeyratne, supra note 4, at 383.
103. EU Contribution, supra note 7, at 7.
The existing mechanisms of technical and financial assistance, discussed above, are often referred to as possible ways to address the problem. Moreover, other options have also been studied as possible ways of funding aviation safety projects in general – some of which may, or may not, be helpful to Developing/LDC countries.

One option is to establish autonomous entities such as publicly owned corporations that are adequately funded. However, in the Developing/LDC world it is clear that adequate funding is unlikely given limited resources and other pressing priorities like health, education, agricultural and industrial modernization, and poverty fighting.

Our economic world is increasingly moving in the direction of “liberalization” and “commercialization.” Accordingly, the second option is the privatization of air navigation services and airport facilities. Furthermore, a third alternative is financing through an investment banking mechanism. Nevertheless, the second and third options are unrealistic in most Developing/LDC countries cost-recovery and a positive return-on-investment is unlikely given insufficient revenues because of low traffic volume.

The fourth option involves pre-funding the needed resources through a charges and/or fees system levied on airline passengers. This is a worthwhile idea with precedent. However, a key drawback of this mechanism is that individual Developing/LDC countries may be challenged in their ability to collect the money and by the relatively small amounts collected. Furthermore, this mechanism works better if it is applied regionally, a possible approach, or best, internationally, an extremely unlikely approach.

In the context of the limitations of existing and most proposed mechanisms for helping needy Developing/LDC countries remedy their aviation safety deficiencies, there has been much debate as to whether an international institutional solution might not be better. Consequently, the debate has shifted specifically to two opposite visions of an ICAO role. Although there are many different viewpoints in between the extremes, let us briefly review the two main visions for and against a broad role of the ICAO, particularly through an IFFAS mechanism.

1. The vision of Proponents of a strong IFFAS favoring a broad role of the ICAO

The proponents of an expanded ICAO role in assisting the remedy of

104. Abeyratne, supra note 4, at 384.
105. Id.
106. Id.
107. Id.
108. Id.
aviation safety deficiencies identified in needy Developing/LDC countries are primarily found among the Developing and LDC states.

At this point, it should be emphasized that the IFFAS structure sought to discharge the function of assisting in the remedy of aviation safety deficiencies identified in needy Developing/LDC countries and is generally envisaged as a quasi-independent entity.109 The IFFAS is to be a self-financed entity, outside of the ICAO’s regular Program Budget, and made up of voluntary state members and participants.110 The ICAO’s “broadened” role through the proposed IFFAS is limited to three main areas: first, the ICAO supervises the IFFAS in assuring that any deficiencies identified through the ICAO’s auditing process are remedied; second, the ICAO provides administrative and technical service support to IFFAS to minimize IFFAS costs on a cost-recovery basis. For example, the ICAO’s Secretariat processes might be used not only to help procure the client state’s aviation goods and services but also finally certify their delivery at quality assured standards through the Technical Cooperation Bureau, and, third, the ICAO’s audited finance processes authorize payment to the suppliers, not the client states, of the goods and services contracted.111

There are four often-cited main arguments of the proponents of the ICAO’s broadened role through a strong IFFAS.

First, on a general level, the proponents of a strong IFFAS have a broad definition of the ICAO’s role and scope of responsibilities. They argue that the ICAO’s functions are not limited to monitoring, auditing, establishing global standards, and recommending practices, but extend to the regulation and enforcement of minimum universal standards established by it. Accordingly, in their view, the ICAO must not only disclose aviation safety deficiencies through its USOAP program but also assist those Developing/LDC countries that lack the means to remedy these deficiencies.112 Consequently, the 33rd Assembly of ICAO has committed itself to establishing a mechanism, defined as an International Financial Facility for Aviation Safety (IFFAS), with the “objective of financing safety-related projects for which States cannot otherwise provide or obtain the necessary financial resources” to help remedy “safety-related deficiencies identified through the ICAO [USOAP].”113

110. Id.
111. Id.
112. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).
113. IFFAS Resolution, supra note 109 at 2; Interview with Taieb Cherif, Representative
Second, on the legal level, some proponents of a strong IFFAS emphasize that an IFFAS, assisting needy states in remediating aviation safety deficiencies, may be a mechanism that reconciles the ICAO and the States' obligations to regulate and assure safe civil aviation under the Chicago Convention in the following way:\footnote{114}

- The Chicago Convention's spirit, as stated in its Preamble, is that "the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world . . . [and] it is desirable . . . to promote . . . cooperation that between nations and peoples. . . ."\footnote{115}

- There is a pivotal objective in the Chicago Convention that requires the ICAO, as the entity responsible for the international regulation of civil aviation, to "insure the safe and orderly growth of international civil aviation throughout the world."\footnote{116} The word "insure" places upon ICAO the responsibility to assure that international civil aviation grows safely and in an orderly manner. Moreover, the ICAO is obliged to "meet the needs of the peoples of the world for safe, regular, efficient, and economical air transport."\footnote{117} Therefore, the Chicago Convention provides that the Contracting States of the ICAO will hold the ICAO accountable for ensuring safety and efficiency in air transport.\footnote{118}

- The ICAO Council can intervene in cases where the Council believes that "the airports or other air navigation facilities . . . of a contracting State are not reasonably adequate for the safe, regular, efficient, and economical operations of international air services. . . ."\footnote{119} Furthermore, it can be argued that the Council has an obligation to make recommendations for remediating the situation as it is stated that the Council "shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose."\footnote{120} Later, a Contracting State may conclude an arrangement with the Council for giving effect to such recommendations.\footnote{121}

\footnote{of Algeria on the Council of ICAO (May 10, 2002) (emphasizing this provision of the Assembly resolution to give legal context to this position).}

\footnote{114. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).}

\footnote{115. Chicago Convention, supra note 3, at pmbl.}

\footnote{116. Id. at art. 44(a).}

\footnote{117. Id. at art. 44(d).}

\footnote{118. Abeyratne, supra note 4, at 393.}

\footnote{119. Chicago Convention, supra note 3, at art. 69.}

\footnote{120. Id.}

\footnote{121. Id. at art. 70.
In this viewpoint, the ICAO must not limit itself to identifying and informing the audited states of aviation safety deficiencies through its USOAP. Accordingly, the ICAO and its Council have an added responsibility of recommending remedies and assisting needy countries if they are not able to rectify these problems on their own.\textsuperscript{122}

Third, on the practical level, proponents of a strong IFFAS emphasize the shortcomings of existing mechanisms of technical and financial assistance that presently provide Developing/LDC countries minimal help to remedy aviation safety deficiencies. These proponents agree with any proposed improvements to the structures, programs, policies, and procedures of existing entities to facilitate the needy countries securing of assistance. However, they go one significant step further by suggesting that, \textit{inter alia}, an IFFAS should be created.\textsuperscript{123} There is a broad spectrum of ideas on how the IFFAS is to function and to be structured.

Fourth, the proponents of the ICAO's broader role through a strong IFFAS have an interesting legal and hypothetical challenge to those who are against an active role of the ICAO in helping remedy safety deficiencies. Suppose that a state has actual or implied/constructive knowledge,\textsuperscript{124} that a certain country is not respecting its international obligations under the \textit{Chicago Convention} since aviation safety deficiencies have been identified through the ICAO USOAP. Two questions then may be asked, does this state's knowledge confer a responsibility on it to inform its citizens of the deficiency in the nonconforming country such that its citizens might avoid the airspace and/or aircraft of the nonconforming country for safety reasons? If the informed state, despite this knowledge, fails to inform its citizens of these risks and one of its citizens is injured or dies in a plane crash, is the plaintiff's state legally responsible for such effects as wrongful death or damages? Although this paper does not intend to address the complicated sovereign immunity issues that

\textsuperscript{122} Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).

\textsuperscript{123} Interview with A. P. Singh, Representative of India on the Council of ICAO (May 15, 2002).

\textsuperscript{124} \textit{See Establishment of an ICAO Universal Safety Oversight Audit Programme,} Res. A33-11, \textit{compiled in Assembly Resolutions in Force,} at I-50, ICAO Doc. 9790 (Oct. 1998). The process of implying that one state has knowledge of another state's aviation safety deficiencies must be qualified. The USOAP is constrained by a memorandum of understanding, signed with the states, that established the Universal Safety Oversight Audit program in 1999 and provides that the results of the audits of all states are known by ICAO; however, each individual state's audit results are confidential and may only be disclosed to other states and entities if the state agrees to the disclosure. Nevertheless, states do become aware of individual deficiencies through bilateral exchanges and other ways. Furthermore, certain countries, for example, the U.S. through its FAA and International Aviation Safety Assessment (IASA) program, have their own auditing mechanisms that give them actual knowledge.
might arise, it should be recognized that there might be judicable legal principles at stake.

2. *The vision of Opponents of a strong IFFAS favoring a restricted role of the ICAO*

There are a number of arguments that have been made against an expanded role of the ICAO in assisting the remedy of aviation safety deficiencies identified.

First, on a general level, the opponents of a strong IFFAS have a more fundamental definition of the ICAO’s role and scope of responsibilities. They argue that the ICAO’s functions are limited to monitoring, auditing, and establishing global standards and recommended practices. They argue that the ICAO is not, and should not, broaden its responsibilities to include the regulation and enforcement of minimum universal standards established by it. In this view, the *Chicago Convention* imposes the obligation to regulate and enforce the SARPs established by the ICAO on the States, not on the ICAO.

Accordingly, in this view, the ICAO should restrict itself to only identifying aviation safety deficiencies through its USOAP program. Indeed, under the *Chicago Convention* only the States, not the ICAO, are responsible to remedy aviation safety deficiencies within their territory. It is argued that the IFFAS mechanism takes the ICAO beyond its traditional and recognized role by assisting those countries that lack the means to remedy their deficiencies.¹²⁵

Second, the opponents of an increased role of the ICAO in helping Developing/LDC countries remedy deficiencies suggest that an IFFAS is redundant since the ICAO already has existing technical cooperation mechanisms that may be substituted for an IFFAS. However, this argument has been challenged by IFFAS proponents. For example, while the IFFAS would be a financial facility or a mechanism to provide financial support through loans and/or grants to States, the Technical Co-operation Bureau has a different responsibility of providing technical and financial assistance to States in the development and implementation of technical cooperation projects, as well as in the mobilization of funds.¹²⁶

Third, the opponents of an expanded role of the ICAO in this area highlight the varying success, including examples of existing mechanisms of technical and financial assistance that help Developing/LDC countries remedy aviation safety deficiencies. They suggest an assortment of im-

¹²⁵. This position has been stated in various ways by some of the Developed states.
Aviation Safety in Crisis

provements to these existing structures, programs, policies and procedures that might facilitate the needy countries in securing more assistance in the future.

Fourth, the opponents of IFFAS sometimes suggest that an IFFAS-type project would place the ICAO into an unconventional role, according to a "strict constructionist" interpretation of the Chicago Convention, in which it lacks the experience, expertise, and appropriate financing. Thus, they argue that it is at least inappropriate, and possibly illegal under the Chicago Convention, for the ICAO to enter what is effectively the banking business.

Fifth, certain opponents of IFFAS state that the IFFAS is potentially anti-competitive. This argument by certain national carriers of Developed states that an IFFAS may give an unfair advantage to certain Developing world carriers. The logic is that any assistance to Developing states to remedy aviation safety deficiencies constitutes an indirect subsidy of that country's carrier(s).

B. What is the International Financial Facility for Aviation Safety (IFFAS)?

The debate continues over whether the ICAO should have a role in helping needy Developing/LDC countries remedy their aviation safety deficiencies identified in the ICAO's auditing program. Nevertheless, the ICAO Assembly over the last few years has mandated such a role in committing to the establishment of an IFFAS. Accordingly, the ICAO Council, during its 166th and 167th Sessions, has tried to give effect to that role through reconciling the conflicting visions of an IFFAS. Indeed, on December 4, 2002, during its 167th Session, the Council approved and adopted the draft Administrative Charter of IFFAS, thereby establishing the IFFAS.127 Since December 4, 2002 and until June 13, 2003, transitional rules approved and adopted by the Council apply requiring the ICAO Secretary-General to prepare a work program, a timetable, a proposed budget, and other activities to effectively launch the IFFAS until the Governing Body of IFFAS assumes control.128 The process of arriving at this point is worth briefly reviewing.

1. The History of IFFAS

The official birth of the concept of an International Financial Facility

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127. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).
for Aviation Safety (IFFAS) dates back to 1995.129 At that time, the 31st Session of the ICAO Assembly considered a proposal from a group of States, the eight members of the Latin American Civil Aviation Commission (LACAC)130 to study the need, appropriateness and usefulness of establishing an International Aeronautical Monetary Fund (IAMF).131 These countries expressed the difficulties of many governments to finance investments in, inter alia, airport and air navigation services infrastructure.132 They argued that there was a need to find means that would be more flexible and less onerous than those usually available in financial markets.133

Preliminary work on the IAMF proposal was carried out in the 1995-1998 triennium period of the ICAO.134 Subsequently, the IAMF concept was endorsed by two significant bodies, the Directors-General of Civil Aviation Conference on a Global Strategy for Safety Oversight in 1997 and the Worldwide Communications, Navigation, Surveillance/Air Traffic Management Systems (CNS/ATM) Implementation Conference in 1998.135

In 1998, the 32nd Session of the ICAO Assembly endorsed plans for further study on the creation of a fund in ICAO’s next triennium of 1998-2001.136 The Assembly was especially moved by an extensive Secretariat study carried out in 1998. The Study demonstrated that there exists a need to finance aviation safety-related projects in certain countries, such as Developing/LDC countries, and that there was no existing funding mechanisms or collection modalities within the existing aviation system to provide funding for their needs.137

The 1998 Assembly favored a much broader scope to the IAMF’s financial assistance responsibilities than today’s IFFAS. It was to help not only projects related to the ICAO safety oversight program but also the global implementation of components of CNS/ATM systems and improvement and expansion of airport and air navigation services infrastructure, where this is aimed at overcoming identified safety

130. The IAMF proponent countries in LACAC were Argentina, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, El Salvador and Panama. Id. at 1.
131. Id. at 2.
132. Id.
133. Id.
134. International Civil Aviation Organization, ICAO Study of An International Financial Facility For Aviation Safety (IFFAS), Background, at http://www.icao.org/cgi/goto_m.pl?/applications/search [hereinafter IFFAS Study].
135. Id.
136. Id.
137. Id.
deficiencies. Subsequently, an in-depth Secretariat Air Transport Bureau Study was prepared and submitted to the 2001 ICAO Assembly for consideration.

In 2001, the 33rd Session of the Assembly adopted Resolution A33-10, the Establishment of an International Financial Facility for Aviation Safety (IFFAS). This resolution noted the work carried out during the triennium, endorsed the IFFAS concept, and, inter alia, requested that the Council "pursue the establishment of an IFFAS as a matter of priority early in the 2002-2004 triennium, having regard to the applicable laws of Contracting States..." The Assembly also expects the Council to formulate appropriate management, administrative, and legal strategies toward the initial implementation of the IFFAS within the 2002-2004 triennium.

2. The ICAO Council deliberates and acts

In discharging its Assembly-mandated obligation to establish an IFFAS, the ICAO Council has faced many challenges within a context of deeply divided positions.

Initially, the dispute between proponents and opponents of an IFFAS focused on conflicting interpretations of the nature and scope of the obligation imposed on the ICAO Council by its Assembly. Proponents emphasized a mandatory obligation of the Council to create an IFFAS by focusing on the words "the establishment of" an IFFAS. Opponents preferred to stress that that the Resolution includes the words "to pursue" the establishment of an IFFAS that means a feasibility study, maybe even a Business Plan, is required before an IFFAS is created.

Despite the countervailing pressures, the Council has proceeded to examine a number of studies and associated draft proposals over its last few sessions.

In its 165th Session in January and February 2002, the Council considered a Working Paper prepared by the Secretariat on the IFFAS. However, since the Council was unable to make a decision at that time, it asked the President to create a study group of Council members and prepare another paper to be discussed at the 166th Session.

138. IFFAS Study, supra note 134, at 3.
139. See id.
140. IFFAS Resolution, supra note 109, at cl.1.
141. Id. at cl. 3.
142. See IFFAS Website, supra note 126.
144. IFFAS Working Paper, supra note 85, at 1. Consensus is a tool that the President of the ICAO Council, Dr. Assad Kotaite, uses to avoid confrontational votes and to eventually arrive at decisions in Council proceedings. For example, in the 165th session of the Council in January and
Subsequently, in the ICAO Council's 166th session in May and June 2002 deliberations over the paper emanating from the IFFAS Study Group continued to have many questions respecting the functions, structure, and the proposed administrative charter of the IFFAS. The Council concluded that further work was necessary for the completion of the draft Administrative Charter and requested the President, in consultation with member Representatives, establish a small working group of six Council members to revise the charter taking into account the reservations expressed in the 9th and 10th Council meetings. The working group was asked to report back to the Council at its 167th session in November and December 2002.145

On December 4, 2002, during its 167th Session, the ICAO Council examined the new text of the Administrative Charter prepared by the working group. It approved and adopted the draft Administrative Charter of IFFAS, thereby establishing IFFAS.146 At the same time, the Council adopted a Resolution relating to transitional arrangements for IFFAS that, inter alia, requires the Secretary-General of the ICAO to perform certain responsibilities under the Charter, which must be discharged during a transitional period, between December 4, 2002 and June 13, 2003, for the implementation of IFFAS in a timely and effective manner.147 The ICAO Council is to select a Governing Body that will assume control of the IFFAS during this period.148

The lengthy negotiation process has resulted in an IFFAS that today is either accepted, or at least tolerated, by most states since there is a widespread recognition of the need for the IFFAS, or something equivalent, to address the remedying of aviation safety related deficiencies in needy states.

3. The functions/objectives of the IFFAS

The 2001 ICAO Assembly provides, in Resolution 33-10, that the IFFAS mission is a mechanism for “financing safety-related projects for which States cannot otherwise provide or obtain the necessary financial resources. . . ."149 Accordingly, since the IFFAS must identify the greatest needs of participating States requiring IFFAS financial assistance, the USOAP is considered the preferred tool to select projects to be funded

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145. This decision was reached on June 10th, 2002, at the 166th session of the ICAO Council.
146. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).
147. Establishment Working Paper, supra note 128, at 5-6, attachment 3 & app. A.
148. Id.
149. IFFAS Resolution, supra note 109, at cl. 2(a).
on a priority basis.\textsuperscript{150}

The IFFAS objectives are more restricted than those suggested in the 1998 ICAO Assembly. This IFFAS is no longer to be concerned with financially assisting either the components of CNS/ATM systems or the improvement and expansion of airport and air navigation services infrastructure. This IFFAS will only focus on financially facilitating needy projects and countries to help provide resources to remedy aviation safety deficiencies identified through the USOAP.

4. The proposed structure and operation of the IFFAS

The 2001 ICAO Assembly provided in Resolution 33-10 a number of principles to guide the Council in establishing a framework for an IFFAS structure and its operational procedures. The Council is requested to report back to the Assembly at its next session in the fall of 2004 on the progress of the IFFAS.\textsuperscript{151}

It is relevant to review and comment on a few of the main principles emanating from the Assembly underpinning the proposed structure and operation of the IFFAS. The Council has attempted to respect the Assembly’s wishes as reflected in the draft Administrative Charter that established the IFFAS on December 4, 2002.

First, the Assembly made the ICAO Council responsible for the establishment of IFFAS as well as granted the Council an oversight function.\textsuperscript{152} The Assembly specifically provided that the IFFAS would be established on the basis of a transitional Administrative Charter or memorandum for signature by participating parties.\textsuperscript{153} This charter is to spell out principles of operation of the IFFAS and requires a Council resolution approving the charter.\textsuperscript{154} Thus, it appears that the December 4, 2002 approval and adoption of the IFFAS draft Administrative Charter largely satisfies this requirement.

Second, the Assembly asked for four main components to be incorporated in the IFFAS as reflected in the draft Administrative Charter:

\textsuperscript{150} Id. at cl. 3(d)(3). In addition to the principles established in Resolution A33-10, aviation safety is one of the most important factors in civil aviation, and it is recognized by the ICAO Strategic Action Plan as being a major element of consideration within ICAO. Resolution A33-9, in clause two, urges the Secretary General to ensure that ICAO provides, when requested, reasonable assistance within available resources, to help States to obtain the necessary financial resources to fund assistance projects by Contracting States, industry organizations or independent consultants. See Resolving Deficiencies Identified by the Universal Safety Oversight Audit Programme and Encouraging Quality Assurance for Technical Cooperation Projects, Res. A33-9, compiled in Assembly Resolutions in Force, at I-50, ICAO Doc. 9790 (1998).

\textsuperscript{151} IFFAS Resolution, supra note 109, at cl. 7.

\textsuperscript{152} Id. at cl. 1.

\textsuperscript{153} Id. at cl. 3(a).

\textsuperscript{154} See IFFAS Website, supra note 126.
a. *Participation* has two aspects:

(i) *Membership:* The IFFAS membership is to be voluntary.\(^{155}\) A Contracting State becomes a member of IFFAS by making voluntary contributions and accepting the administrative charter of IFFAS.\(^{156}\) Thus, IFFAS might operate within the existing ICAO legal regime. However, IFFAS membership, as well as contributors, will be broad-based to include not only ICAO Contracting States, but also private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, manufacturers of airframes, engines and avionics, other members of the aerospace industry, and civil society.\(^{157}\)

(ii) *Participation* in IFFAS is voluntary.\(^{158}\) However, a State’s eligibility for benefits is dependent upon that State’s “contributions or other participation.”\(^{159}\) While it can be argued that this latter clause unfortunately implies that the States most in need will be least able to significantly contribute, it is expected that the states most in need will only have to demonstrate a willingness to participate. Subsequently, the draft Administrative Charter draws some distinctions among participants, contributors, and possible beneficiaries in Article V.\(^{160}\)

b. *Funding:* The IFFAS will be funded completely independent of the ICAO Program Budget.\(^{161}\) Any services provided by the ICAO are to be “only upon request of participating States and on a cost-recovery basis.”\(^{162}\)

(i) *Voluntary contributions:* Contributions to IFFAS will be voluntary.\(^{163}\) This voluntarily provided finance applies to both funding projects in States and for operating IFFAS itself.\(^{164}\) An example of such voluntary funding at work is that states are encouraged to contribute to the IFFAS by annually crediting their share of any distributable surplus that is held in trust by the ICAO from the ICAO Program Budget to the IFFAS account.\(^{165}\) As of January 1, 2003, forty-seven ICAO member states have contributed US $222,709.\(^{166}\) Furthermore, the European Commission has

\(^{155}\) *IFFAS Resolution, supra* note 109, at cl. 5(b).

\(^{156}\) See *IFFAS Website, supra* note 126.

\(^{157}\) See *IFFAS Resolution, supra* note 109, at cl. 6.

\(^{158}\) Id. at cl. 2(b)(1).

\(^{159}\) Id. at cl. 2(b)(2).

\(^{160}\) *Establishment Working Paper, supra* note 128, at 3.

\(^{161}\) *IFFAS Resolution, supra* note 109, at cl. 2(b)(4).

\(^{162}\) Id. at cl. 2(b)(5).

\(^{163}\) Id. at cl. 5(a).

\(^{164}\) *Establishment Working Paper, supra* note 128, at 3.

\(^{165}\) *IFFAS Resolution, supra* note 109, at cl. 5(a) & 5(c).

\(^{166}\) Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).
pledged €200,000 for the 2002 and 2003 years.\textsuperscript{167} Other interested parties, like private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers, and civil society, are also encouraged to make voluntary contributions in the future.\textsuperscript{168}

c. \textit{Governing Body} – The structure of the IFFAS will include a “governing body, incorporating adequate representation from amongst the States and other contributing parties . . .”\textsuperscript{169} In the draft charter, the ICAO President of the Council and the Secretary General would have a right of participation in the meetings of the Governing Body without a voting right.\textsuperscript{170} This Governing Body will be responsible for running the IFFAS and deciding what projects to fund and on what terms.\textsuperscript{171}

d. \textit{Staff} – There is also to be “staffing to support [IFFAS] and to cover daily executive and administrative functions.”\textsuperscript{172} This requirement is provided for in the draft Administrative Charter.

Third, the Assembly provided that certain principles should govern the creation and operation of IFFAS.

- \textit{Global application of principles on a regional basis}. There will be a global “definition of a framework of common guidelines and operating rules with flexibility for implementation” regionally.\textsuperscript{173}
- \textit{Governance and the relationship with the ICAO} has been subject to

\begin{footnotesize}
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\item Id.
\item IFFAS Resolution, supra note 109, at cl. 6.
\item Id. at cl. 3(b)(1).
\item Id. at cl. 3(b)(1).
\item Establishment Working Paper, supra note 128, at 3.
\item IFFAS Resolution, supra note 109, at cl. 3(b)(2). One opinion on the nature of the staff servicing of the IFFAS argues that Assembly Resolution A33-10 provides for a management structure within the ICAO legal regime. Thus, according to Article 54(h) of the Chicago Convention, any staff benefiting from ICAO status is under the authority of the ICAO’s chief executive officer, appointed by the Council, for example the Secretary General. Moreover, such staff shall be subject to rules established by Council, as per Article 58 of the Convention, Staff Regulations. An example may be taken in this regard from African Civil Aviation Commission (AFCAC), European Civil Aviation Conference (ECAC), and Latin American Civil Aviation Commission (LACAC) where staff are officially ICAO staff and have contracts signed by the Secretary General, under the “service” authority of whom they stand. \textit{See IFFAS Website, supra} note 126.
\item IFFAS Resolution, supra note 109, at cl. 2(b)(3). It has been suggested that the regional applicability of IFFAS will be in cooperation with regional financial institutions and such regional bodies as the African Civil Aviation Commission (AFCAC), European Civil Aviation Conference (ECAC), and Latin American Civil Aviation Commission (LACAC). \textit{See IFFAS Website, supra} note 126.
\end{enumerate}
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conflicting interpretations. On the one hand, some argue that since the Assembly Resolution 33-10 clearly provides that the “management strategy” of the IFFAS should be “developed on the principles of, and in conformity with, the existing ICAO legal regime,”\textsuperscript{174} as well as any independence of the IFFAS from ICAO involvement is expressly restricted to independence from the ICAO’s Program Budget; therefore, the creation of a new legal entity with its own legal personality is not permitted. This view considers that the appropriate legal basis for the IFFAS is enshrined in Chapter XV of the \textit{Chicago Convention}, particularly Articles 69 and 70.\textsuperscript{175} On the other hand, others argue that the Council may approve the creation of a separate entity. This dispute is discussed in greater detail later in this paper.

\begin{itemize}
    \item \textit{Governance and the management principles} are to be based on transparency, sound and simple management,\textsuperscript{176} and accountability with clear administrative and financial guidelines to be stipulated and followed.\textsuperscript{177} There will be “clear criteria and procedures for the granting of loans and conducting any other financial transactions. . .” using ICAO standards, policies, and procedures.\textsuperscript{178} Moreover, there are to be safeguards to ensure the proper, effective, and efficient application of funds from participating States.\textsuperscript{179} This suggests that there will have to be a clear distinction and identification of funds used for the administration of the IFFAS and for financial assistance provided toward safety-related projects.\textsuperscript{180} Indeed, there are also to be “measures to assure quality control and to assess effectiveness and efficiency at all levels”\textsuperscript{181} and adequate “provision for the auditing of accounts.”\textsuperscript{182} Some have argued that the ICAO auditing system in the “existing ICAO legal regime” of external and internal auditors could be made formally and directly applicable to IFFAS on a cost recovery basis.\textsuperscript{183}
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\footnotesize\textsuperscript{174} \textit{IFFAS Resolution}, \textit{supra} note 109, at cl. 3(c).
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\footnotesize\textsuperscript{175} \textit{See} IFFAS Website, \textit{supra} note 126. \textit{See also} \textit{Chicago Convention}, \textit{supra} note 3, at arts. 69 & 70.
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\footnotesize\textsuperscript{176} \textit{IFFAS Resolution}, \textit{supra} note 109, at cl. 3(d).
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\footnotesize\textsuperscript{177} \textit{Id.} at cl. 3(d)(1) & 3(d)(2).
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\footnotesize\textsuperscript{180} \textit{See} IFFAS Website, \textit{supra} note 126.
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\footnotesize\textsuperscript{181} \textit{IFFAS Resolution}, \textit{supra} note 109, at cl. 3(d)(5).
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\footnotesize\textsuperscript{182} \textit{Id.} at cl. 3(d)(6).
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\footnotesize\textsuperscript{183} \textit{See} IFFAS Website, \textit{supra} note 126.
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C. WHERE DOES THE IFFAS GO FROM HERE? – IMPORTANT OUTSTANDING QUESTIONS

The rest of this paper examines three key questions associated with the nature, scope and development of the IFFAS.

(1) Should the scope of the functions and structure of the IFFAS provide for a “Big” or “Small” initial operation? What is the compromise approach?

(2) Where is the money going to come from to start and develop the IFFAS?

(3) Should the IFFAS be part of the ICAO or a distinct and independent entity?

(1) BIG or SMALL IFFAS start-up – and the compromise

The first important issue is the division of state positions into two distinct visions of the IFFAS and its role in remediying the aviation safety deficiencies of Developing/LDC countries identified in the USOAP. The first vision is that the IFFAS should start “Big,” effectively as a bank, with a significant structure and lending powers. The second vision is that the IFFAS should start “Small” with a limited structure and restricted powers as a facilitator and intermediary. In essence, it would help needy countries seek financial and technical assistance through existing mechanisms and regionally implement its projects.

IFFAS starting “Big”

The vision of an IFFAS starting “Big” with a maximum scope of functions and structure is an attractive option for the Developing/LDC countries, especially by those who expect to benefit from the IFFAS financial assistance.184 This vision conceives that the IFFAS might assume certain functions of an international bank that directs money to remedy aviation safety deficiencies identified by the ICAO audits in needy countries. IFFAS would have a significant role with broad powers to lend, a sophisticated structure, and deep-pocket financing.

At this point, it should be restated that the IFFAS structure sought to discharge the function of assisting in the remedy of aviation safety deficiencies identified in needy Developing/LDC countries, and is a quasi-independent and self-financed entity, outside of the ICAO’s budget. The ICAO has three main functions in relationship to the IFFAS including: first, the ICAO supervises the IFFAS in assuring that any deficiencies identified through the ICAO’s auditing process are remedied; second, the ICAO provides administrative and technical service support to IFFAS to

184. Culled from public pronouncements that advocate limits on potential abuses made by ICAO’s Secretary General, Renato Costa Pereira.
minimize IFFAS costs on a cost-recovery basis. For example, ICAO’s Technical Cooperation Bureau would not only help procure the client state’s aviation goods and services but also finally certify their delivery at quality assured standards; and, third, the ICAO’s audited finance processes will authorize payment to the suppliers, not the client states, of the goods and services contracted. In the end, the client states will have to pay back the loans secured through the IFFAS process.

Generally, those that adhere to this view consider that significant conditions should be attached to IFFAS loans. Nevertheless, a few potential recipient countries are lobbying that the IFFAS might impose minimal conditions on the loans such that the LDCs may, in many cases, remedy the deficiencies themselves and spend the money as they wish.

This starting “Big” approach has been subject to a number of criticisms for going too far and too fast without adequate funding. Developed countries, that in effect will be the donors to the IFFAS, often suggest that the IFFAS should not start “Big”. Their main argument is centered on the issue of determining who is going to control the IFFAS assistance money. The Developed countries generally view the IFFAS as an indirect form of “foreign aid” from the Developed to the Developing/LDC countries. However, the donor Developed countries, the largest contributors to the ICAO, resist giving up control of how the assistance will be spent in the recipient Developing/LDC countries, the smallest contributors to the ICAO, on the basis of the following reasons:

- The Developed countries are reluctant to delegate power over foreign aid project priorities and spending to another institution, like the IFFAS, since the IFFAS’ objective decision-making may be compromised by the assistance recipient states controlling the IFFAS. Although ultimately they may concede some control to the IFFAS, it must be recognized that most Developed countries prefer to choose the projects and the regions where the money is spent.  

- The Developed countries are reluctant to permit the recipient states to remedy the deficiencies themselves and spend the money as they wish.

- Some commentators question why ICAO, through the IFFAS, should lend money at concessional rates to countries and for projects that existing banks might not find viable for lending. 

185. Interview with Edward Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).

186. Interview with Jonathan Alcek, Representative of Australia on the Council of ICAO (Apr. 30, 2002). This reflects his summary of other state positions rather than necessarily his own.


**IFFAS starting “Small”**

The vision of an IFFAS starting “Small” with a minimum scope of functions and structure tends to be accepted, with reservations, by many Developed and potential donor countries. Moreover, some Developing countries are increasingly finding certain versions of this vision attractive.

This vision refuses to grant IFFAS a broad function of being the actual lending institution, particularly since it is believed that IFFAS will not, and should not, raise enough money to make significant loans. Many countries argue that some of the traditionally large contributors to such ICAO projects, like IFFAS, will only participate if a proper “Business Plan is drafted that will attract funds.”\(^{187}\) To date, they have not seen a satisfactory Business Plan.

Despite these reservations, IFFAS opponents propose that if an IFFAS is created, it should have restricted functions acting “in-between” existing technical assistance and lending mechanisms, such as international, regional development, or national banks and the recipient LDCs. First, the IFFAS should act as a facilitator to the LDCs by providing information and helping prepare professional, meaning bankable/detailed, project proposals and reports. Recall that the TCB only prepares less sophisticated feasibility studies. Second, the IFFAS should act as an intermediary/broker. Moreover, such an IFFAS would be an umbrella organization with its head office, probably in Montreal, providing financial information, and administrative/quality assurance including oversight services to the needy states and approved projects. However, the work of such an IFFAS would probably be implemented regionally.\(^{188}\)

In this view, IFFAS should start with a restricted role, a smaller structure, voluntary membership, voluntary, limited, and interim financing until the next General Assembly in the autumn of 2004. IFFAS would start with a few pilot projects and develop a track record and credibility so that its progress may be evaluated in the future.\(^{189}\) The guiding management principles, reiterating Assembly Resolution A33-10, would be accountability, efficiency, effectiveness, and transparency.\(^{190}\)

This gradualist and evolutionary approach, in turn, has three apparent main sub-groups of States, going from the fewest reservations to the most reservations on the nature and scope of IFFAS.

- Certain Developing countries, while sympathetic to the idea of

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187. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Aug. 15, 2002).
188. Interview with A. P. Singh, Representative of India on the Council of ICAO (May 15, 2002).
189. Id.
190. Interview with Edward Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).
starting the IFFAS "Big", are willing to accede to the gradualist approach so that at least the urgent need of LDCs are addressed as soon as possible. Some of these countries that attribute a broader scope to IFFAS' intermediary/broker role such that the IFFAS may not only help arrange the bank loan for the LDC but also become a small stakeholder for bigger loans/assistance projects.

- Certain Developed countries substantially agree with the start small approach to an IFFAS. However, they want an IFFAS that is subject to and imposes a very strong battery of legal, administrative, and financial controls.\(^{191}\)

- Certain Developed countries have reluctantly acceded that an IFFAS will be created. Nevertheless, they may be reluctant to contribute funds since they prefer other mechanisms, particularly, bilateral and regional, to address the problem. They argue that the IFFAS should start as a small entity that is subject to the strongest possible legal, administrative, and financial controls. Furthermore, these states have been especially adamant not to approve the IFFAS until the functions and structure of IFFAS are clearly defined and agreed upon.\(^{192}\)

The Compromise

The draft Administrative Charter coming from the ICAO Council on December 4, 2002 is a rather interesting compromise developed by the Working Group that prepared it. The Working Group deliberated on whether the IFFAS should provide grants or loans, and this deliberation crossed over and fortuitously blurred the "Big" versus "Small" IFFAS controversy.

In the Working Group, some argued that the IFFAS should only provide outright grants to remedy needy country safety deficiencies identified by an ICAO audit. It was suggested that this would permit the IFFAS to avoid many banker's loan-making problems, including having to address the credit-worthiness of the beneficiaries, interest rates, appropriate repayment periods, and bad debts. Furthermore, it was argued that an advantage of grants is that they recognize the probability that the benefi-

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191. In my interpretation of public declarations at the 166th ICAO Council meetings, countries like Australia, France, Ireland, and Italy assume this view in various ways. Interview with Bert Kraan, Senior Project Manager, Safety and Security, Department of Civil Aviation of the Netherlands (May 28, 2002) (expressing that the Netherlands appears to also be in this school of thought). See *EU Contribution, supra* note 7, for a report by the European Union and its Commission supporting this view.

192. In the author's interpretation of public declarations at the 166th ICAO Council meetings, countries like Canada, Japan, and the USA (and Germany, Spain, and the United Kingdom to a lesser extent) appear to assume this view in various ways.
ciaries would largely be countries, at least in the early days of IFFAS, which already would be unable to pay their minimum rate contributions to the ICAO, meaning that they would find it difficult to meet any schedule of loan repayments.\(^\text{193}\)

On the other hand, the majority in the Working Group considered that the IFFAS should be designed to be self-financing and that beneficiary countries would feel a greater commitment to a project financed by a loan that had to be repaid. This view is closer to the spirit of Assembly Resolution A33-10.\(^\text{194}\)

The draft Administrative Charter bridged both views. In accordance with the second approach, it ascribes to IFFAS the primary function of disbursing loans at concessional interest rates. However, in recognition of the merit of those favoring grants, the IFFAS has the flexibility of awarding grants and zero interest loans in exceptional circumstances where the Governing Body deems it appropriate and necessary.\(^\text{195}\)

(2) Where is the money going to come from to fund the IFFAS?

A key and often-repeated question is: “where is the money going to come from”\(^\text{196}\) to start and develop the IFFAS? The sources of funding the IFFAS will effect the IFFAS’ ability to assist its potential Developing/LDC client in financing an aviation safety-related project.

This issue is particularly pivotal if the IFFAS should start “Big” as a bank because it would eventually need access to billions of dollars. On the other hand, even if the IFFAS starts “Small” as primarily a facilitator, the amount of start-up funds required are estimated between U.S. $5 million and $60 million dollars, depending upon what state or expert makes the estimate and what assumptions are applied.

On a general level, the IFFAS concept appears to imply that the Developing/LDC countries are to be the IFFAS recipients while the Devel-

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\(^\text{193}\) Establishment Working Paper, supra note 128, at 3. Australia was a particularly strong proponent of this position. It was suggested that an IFFAS should provide outright grants and subsidies – rather than loans as presently envisaged – to countries needing assistance. Such assistance – money and expertise – could be used to facilitate efforts to obtain further necessary assistance from other sources. The principal advantage of this proposal is that in many cases it could target the assistance money directly to the specific aviation projects and needy LDC countries. Moreover, this would be achieved without further burdening countries that already suffer from incredible debt loads and are seriously challenged to pay back the principal and small interest on IFFAS loans. Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (July 25, 2002 & July 29, 2002).

\(^\text{194}\) Id.

\(^\text{195}\) Id.

\(^\text{196}\) Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002 & Aug. 15, 2002); Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (July 25, 2002 & July 29, 2002); Interview with Edward Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).
oped countries will be the contributors. However, the Assembly Resolution of A33-10 in 2001 assured that the IFFAS was not considered another mandatory foreign aid mechanism. 197 Furthermore, this Resolution provided the framework of possible IFFAS funding subject to three principles, already mentioned above: first, the IFFAS financing is constrained such that the IFFAS is to be developed, established, and operated with “complete independence from the ICAO’s Programme Budget;” 198 second, as a short-term step, states are encouraged to make “voluntary contributions to finance the preparatory work in development of the IFFAS;” 199 third, in the short to long run, other interested parties like private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers, and civic society are also encouraged to make voluntary contributions to IFFAS. 200

The main basis of IFFAS funding appears to be “voluntary contributions” in both the short and long run. 201 In the short run, the amount of seed money for the IFFAS actually committed by January 1, 2003 has been rather paltry relative to the expectations created:

- Forty-seven ICAO member states have contributed U.S. $222,709. 202 These funds come largely from within the ICAO as these states have chosen to commit at least part of their share of the ICAO program budgetary surplus to the IFFAS project. The average contribution is around U.S. $4,745 dollars with over one-third of all contributions originating from one country. 203
- The European Commission has pledged €200,000 for each of the years of 2002 and 2003. 204
- At the December 4, 2002 ICAO Council meeting, there was a question of whether over US three million dollars held in arrears under a special account of long-outstanding arrears could be allocated to fund the IFFAS. 205 The Council, seeking guidance on interpreting clause three, which governs the incentives for settling

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197. *IFFAS Resolution, supra* note 109, at cl. 2(b)(1).

198. *Id.* at cl. 2(b)(4).

199. *Id.* at cl. 5(a). Indeed, to facilitate the contribution of initial seed money to get the IFFAS launched, states are encouraged to credit “any amount of their share of any distributable surplus from the ICAO Programme Budget to the IFFAS account which will be held in trust by ICAO.” *Id.* at cl. 5(c).

200. *Id.* at cl. 6.

201. *Id.* at cl. 5(a).

202. The amounts and interpretations are based on this writer’s notes and culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).

203. *Id.* The one country contributing one-third of all contributions is France at U.S. $90,700.

204. *Id.*

205. *Id.*
such arrears, of Assembly Resolution A33-27, has submitted the question to the Extraordinary 34th Session of the ICAO Assembly to be held in Montreal in March 31 to April 1, 2003.206

This relatively small amount of seed money presently committed to the IFFAS mechanism has been interpreted two opposite ways. On the one hand, IFFAS proponents suggest that this is a great start and that once the IFFAS is formally created and actively starts soliciting contributions, the funds will pour in. On the other hand, IFFAS skeptics suggest that the limited amount of the contributions reflects a lack of strong support for the concept such that there is a risk that the money might soon be exhausted and the IFFAS will collapse as a fiasco.207 Furthermore, many of the usual major contributors to such ICAO initiatives have indicated that they will not pledge money to the IFFAS until such time as their reservations are addressed.

The IFFAS clearly requires other sources of funding. As discussed earlier, other interested parties, like private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers, and civil society, are also encouraged to make voluntary contributions in the future.208 To date, no contributions have come from these sources. However, there is some optimism that funds will start coming from these and other contributors once an effective informational and promotional program begins respecting the IFFAS. The Transitional Rules of the IFFAS require that the ICAO Secretary-General “prepare and submit to the Council during the 168th Session (i.e. early 2003), a work program, a timetable and a projected budget”209 for “preparatory work which is necessary to initiate and ensure the effective and efficient operation of IFFAS.”210 More specifically, the Secretary-General is mandated to spend money from the exclusively IFFAS account on such matters as “raising and securing funds and accumulating capital, with a view to providing for the necessary administration and essential operations of IFFAS....”211 Accordingly, the ICAO Secretariat is working on a framework for an informational/promotional program to seek contributions and support from, inter alia, states, organizations, banks, airlines, airports, aerospace manufactures, and civil society in general.212

206. Id.
207. The interpretations are based on this writer’s notes of various positions voiced and culled from discussions at the 166th Session of the ICAO Council (June 6, 2002 & June 10, 2002).
208. IFFAS Resolution, supra note 109, at cl. 6.
210. Id. at app. A, Transitional Rules, cl. 8.
211. Id. at app. A, Transitional Rules, cl. 9(a).
212. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).
At this point, it is important to evaluate the advantages and disadvantages of a variety of possible models of sources of funding for the IFFAS mechanism in the long run: first, there is the "voluntary contribution" funding source that has already been mentioned; second, there are two existing analogous ICAO models; and third, a worldwide charge/levy on airline passengers.

a. **Voluntary Contributions:** To start, the A33-10 Assembly Resolution appears to emphasize that "voluntary contributions" by states and other interested parties in aviation will be the IFFAS' primary source of funding. To date, this has been the primary mechanism relied upon.

There are two main disadvantages to such a source of funding. First, on the legal level, concerns have been expressed by a number of countries whether sub-national entities could legally contribute to a fund, like the IFFAS, that is created by an international treaty mandated organization like the ICAO. Second, pragmatically, an important challenge to such financing is that the IFFAS revenue stream might become very volatile and fluctuate wildly with the vagaries of contributor whims. This might affect the quantity and quality of projects in which the IFFAS can and will assist. Thus, it is worthwhile examining other funding mechanisms that may complement voluntary contributions.

b. **Existing Analogous ICAO Models:** There are two working models presently operating within the ICAO context that may at least partly serve as a template for the IFFAS to generate a steady revenue stream and assure cost-recovery. First, there is the TCB experience discussed earlier. Second, a regional analogy of financing of air navigation services that has been successfully administered by the ICAO over many years already exists in the nature of the joint financing agreements.

Joint financing agreements constitute proof that it is possible to establish and administer a fund that implements the ICAO SARPs on air navigation through the implementation of global safety standards. Many years ago, twenty-three ICAO Contracting States signed the Icelandic and Danish Joint Financing Agreements under the auspices of the ICAO. These signatory states currently assume financial responsibility and recover costs through user charges for the provision and operation of certain air navigation and traffic facilities and services provided for civil aircraft flying north of the 45th latitude across the North Atlantic.

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213. *IFFAS Resolution*, supra note 109, at cl. 5(a).
215. *See Abeyratne*, supra note 4, at 397.
216. *Id.*
217. *See id.* at 397-98, providing the following background information:
   - The Danish and Icelandic Joint Financing Funds were created after World War II to en-
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though these joint financing models are helpful precedents, it must be emphasized that the creation of an IFFAS is distinctive in the nature and scope of its functions as well as structure.218

sure the availability of air navigation services needed for the safety of civil aviation over the North Atlantic;

- Installations in Greenland, Iceland and the Faroe Islands put into place and used during the war were retained to service civil flights after the war;

- Since Denmark and Iceland were only modest users of the services, it would not have been fair to ask them to bear the full costs of the services benefiting all users operating flights over the North Atlantic;

- In the early years of the Joint Financing Agreements there were no user charges; the costs of the services were financed by the States parties to the Joint Financing Agreements on the ratio of the crossings by airlines of their States over crossings by airlines of all the States parties to the Agreements;

- In the 1970's, a user charge mechanism was introduced to provide for the recovery of the costs allocable to international civil aviation;

- The Joint Financing Agreements ensure that funds are available on a timely basis to provide the stipulated services and that the Governments of Denmark and Iceland do not have to bear the costs of services for which they are only modest users;

- The Joint Financing Agreements are administered by the ICAO Secretariat under the direction of the ICAO Council and the Council's Joint Support Committee; and

- The role of the Joint Support Committee includes mainly the approval of cost estimates, actual costs, audit reports, assessments on contracting Governments, user charges, adjustments, and payments to the Provider States. It also considers proposals for new projects and new capital expenditures for the services provided by Denmark and Iceland under the Joint Financing Agreements.

Today there are now twenty-three contracting States to the Icelandic Agreement and they reimburse ninety-five percent of the total costs of air navigation services under the Agreement. In 2000, this amounted to approximately $21 million. User charges levied on airlines account for 90% of the total cost. Id. at 397.

See id. at 395-96, for a good explanation of the legal basis – Chicago Convention and Assembly resolutions, inter alia – of these agreements.

218. Id. at 398-99. In the past, when the prevalent concept discussed was a proposed International Aeronautical Monetary Fund (rather than the more limited IFFAS today), Dr. Abeyratne pointed out a number of fundamental differences between the International Aeronautical Monetary Fund (that may be considered similar to the IFFAS for analogy purposes below) and the Joint Financing mechanism. To facilitate the comparison, IFFAS is put in brackets after each reference to the International Aeronautical Monetary Fund below.

- The Joint Financing Funds and the International Aeronautical Monetary Fund [similarly IFFAS] serve two different purposes. The Joint Financing Funds were created in order to finance services essential to international civil aviation. These services needed to be operated by Denmark and Iceland because of the geographical location of Greenland, Iceland and the Faroe Islands in the North Atlantic. The services had to be financed by the various States which airlines were major users of those service in due fairness to Denmark and Iceland which were and still are only modest users of the services. In the case of the International Aeronautical Monetary Fund [similarly IFFAS], this Fund [similarly IFFAS] is destined to finance services required by specific States in great part for their own purposes in ensuring safety and efficiency in their territories. Therefore, the International Aeronautical Monetary Fund [similarly IFFAS] has a commercial value to the States requesting assistance, being considered as an absolute grant or as a loan with which acts to the benefit of the beneficiary State. The Joint Financing mechanism, on the other hand, effects the reimbursement of expenses;
c. User Charge-Levy: There is a third source of possible IFFAS funding that was proposed and rejected by the ICAO Assembly, largely because of Developed countries concerns, at the time of the defunct for-bearer of the IFFAS, the International Aeronautical Monetary Fund. The defeated concept was to apply a mandatory worldwide charge/levy of an additional one U.S. dollar per every passenger ticket sold. For example, if this formula had been applied to the scheduled traffic volume for the year before the World Trade Center tragedy, the year of 2000, when commercial airlines carried 1,647 million passengers,\(^{219}\) the proposed fund would have generated at least 1.647 billion U.S. dollars.

An important question is whether the user charge/levy concept should be revisited given the broad imposition of such charges recently to fund aviation security programs in many Developed states. Possibly, the political climate today may make user charges/levies more palatable. A heuristic exercise is to use the same year 2000 figures just mentioned and estimate the revenues that might be generated for an IFFAS if the charge is not applied globally and only applied to a hypothetical twenty percent

- The two Joint Financing Funds provide services, which are similar and recurring every year. It is possible to administer these Funds with a minimum staff and a few meetings of the Joint Support Committee every year. There are also proposals for new projects and new capital expenditures but these are linked to the services to be provided under the Joint Financing Agreements. In the case of the International Aeronautical Monetary Fund [similarly IFFAS] there would be as many different projects as there are requests. It may require great effort by the staff concerned in evaluating each of the proposed projects, which may invariably be very different from each other. Furthermore, it may require significant resources to administer the numerous projects retained and to follow-up on each of the approved projects. The administrative workload involved could be very heavy and may require more than a Section staffed at minimum. The same problem could confront the special panel, task force or Board, as the case may be, which may be required to decide upon the validity or necessity of numerous non-recurring projects. As opposed to this scenario, the Joint Support Committee, which is mandated to oversee the Joint Financing mechanism, can follow-up more easily the provision of the services under the Joint Financing Agreements due the recurring aspects of most of the activities provided by Denmark and Iceland;

- The Danish and Icelandic Joint Financing Agreements have no political implications since the services financed are necessary for the international aviation community. The International Aeronautical Monetary Fund [similarly IFFAS], on the other hand, is established to consider the request for assistance by each State on a piecemeal basis;

The Joint Financing Funds are now financed mostly by users through a user charge imposed on flights crossings the area determined in the Agreements. The contracting States still contribute for a small portion of the costs, which cannot be attributed to international civil aviation. There is an adjusting mechanism of the user charges and the assessments to contracting Governments through which they may no more and no less than the audited actual costs of the services. The International Aeronautical Monetary Fund [similarly IFFAS] would have no such mechanism in operation. \textit{Id.} at 398-99.

of the passenger tickets sold in the Developing/LDC states and possibly a few Developed countries. Almost 330 million US dollars would be generated for the year 2000. Is such a one dollar charge/levy per ticket to improve global aviation safety exorbitant when one considers the much larger charges/levies being applied by many Developed countries to fund aviation security?

In the long-run, for IFFAS to be successful, a solution must be developed soon on how to adequately fund both it and its projects. Some commentators have suggested that if a solution is not found, there is a danger of the IFFAS becoming a structure that is an empty shell. The IFFAS may create excessive expectations that are unrealizable as needy LDCs line up for money that never comes. Moreover, there is always the danger that the IFFAS may divert resources from worthwhile programs like the Technical Cooperation Bureau.\footnote{220}{Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002 & Aug. 15, 2002).}

\begin{enumerate}
\item \textbf{Should the IFFAS be part of the ICAO or a distinct and independent entity?}
\end{enumerate}

The third important issue is whether the proposed IFFAS should be under the ICAO's control or operate as a distinct and independent entity. A related question deals with the nature of IFFAS, is it to be a "mechanism", a bank, some other corporate body, or a fund?\footnote{221}{Establishment Working Paper, supra note 128, at 3.}

The ICAO Council decision on December 4, 2002 was to create an IFFAS within the ICAO, without a separate legal status, to simplify and expedite the process.\footnote{222}{Id.} A brief review of the opposing arguments voiced that resulted in this compromise is a heuristic example of Council decision-making.

There have been two main conflicting views of the long-run status of IFFAS in relationship to the ICAO. On the one hand, many Developed countries have argued that from birth, IFFAS must be established as an entity independent and distinct from the ICAO. On the legal side, they emphasize Assembly Resolution A33-10's requirement that IFFAS funding must have "complete independence from ICAO's Programme Budget" and "any administrative or other services" are to be provided "only by request by participating States and on a cost-recovery basis."\footnote{223}{IFFAS Resolution, supra note 109, at cl. 2(b)(4) & 2(b)(5). See Establishment Working Paper, supra note 128, at 4.}

On the other hand, some have argued that in the short-run IFFAS may start under ICAO's control. However, in the long-run it may eventually evolve into an independent and distinct entity. It is suggested that
this approach is legally consistent with the provisions of Assembly Resolution 33-10 that in one reference provides that the “management strategy” of the IFFAS should be “developed on the principles of, and in conformity with, the existing ICAO legal regime.” In this view, an IFFAS under the ICAO’s supervisory control and requiring IFFAS Governing Board approval of IFFAS projects may still be consistent with the Assembly imposed requirement of not putting any burden on the ICAO’s regular program budget if a long run financing approach is determined. For example, if the TCB and/or voluntary and/or joint financing approach(es) is followed.

Pragmatically, the ICAO Council adopted the Working Group’s recommendation of creating the IFFAS within the ICAO to simplify and expedite the process. Since the expectation is that IFFAS is to be operated under the ICAO legal regime, it has been understood that that it would not have a separate legal status at this time. However, since it is to be operated independently of ICAO’s regular budget, the means of distinguishing IFFAS from the rest of the ICAO must clearly be identified.

Some interesting legal issues are unresolved given that the IFFAS is not only to operate under the ICAO umbrella without an independent legal status but also to remain independent of ICAO’s Program Budget. To start, a clear statement of accountability of the IFFAS Governing Body to the ICAO must be articulated. Moreover, while the ICAO Council may devolve various tasks onto the IFFAS Governing Body, the Council, and the ICAO member states cannot avoid assuming responsibility for what is done by or in the name of an IFFAS that is part of the ICAO. For example, what is the ICAO’s potential legal liability for non-performing loans extended by IFFAS to client states? Indeed, will the ICAO, through its Council, cover bad IFFAS loans and other potential legal liabilities associated with IFFAS activities? Is the ICAO financially capable to do so? In recognition that a poorly thought out strategy for IFFAS

224. IFFAS Resolution, supra note 109, at cl. 3(e) (emphasis added).
225. Interview with A. P. Singh, Representative of India on the Council of ICAO (May 15, 2002).
226. Establishment Working Paper, supra note 128, at 4. The Council accepted reconciling both positions reiterating the Working Group view that the Assembly Resolution A33-10 has some ambivalence. On the one hand, an IFFAS is to have “complete independence from ICAO’s Programme Budget” and “any administrative or other services...” are to be provided “only by request by participating States and on a cost recovery basis.” On the other hand, the Assembly Resolution makes only one reference to the “existing ICAO legal regime” in the context of creating a management strategy so that the IFFAS structure conforms to that regime, although it may not necessarily fall within that regime. Id.
227. Id. at 5.
228. Id. at 3.
229. Id. at 4.
could have devastating financial repercussions for the ICAO, various insurance, contingency funds and other options are to be studied by the IFFAS Governing Body and ultimately approved by the ICAO Council to cover these and other risks.\textsuperscript{230} There is no doubt that whatever liability protection is undertaken, it should be proportionate to the risk while recognizing that the risks to IFFAS and ICAO are minimal during the transitional period from December 4, 2002 to June 13, 2003.\textsuperscript{231} However, one commentator sums up the overall concern best when he states, “whatever IFFAS may ultimately do, it is important that steps be taken to insure that it does not become a liability to the ICAO or the ICAO Program Budget.”\textsuperscript{232}

Despite these reservations, ICAO proponents argue that, on a pragmatic level, in the long-run IFFAS will pick up momentum and may eventually be spun out of ICAO. They point out a number of advantages arising from permitting the IFFAS to be under the ICAO supervisory umbrella in the first few years of its existence. These benefits arise at the time that the IFFAS must facilitate a needy state’s securing of a loan from a financial institution and/or provide seed money, a loan or a guarantee to the LDC itself.

- First, as stated earlier, ICAO supervises the IFFAS in assuring that any deficiencies identified through ICAO’s auditing process are remedied.\textsuperscript{233} Thus, IFFAS provides an ICAO solution to an ICAO objective. The IFFAS specifically remedies a state’s aviation safety deficiencies identified in the USOAP, recognizing that in turn the USOAP was created to satisfy the objectives of ICAO’s Global Aviation Safety Plan.\textsuperscript{234}

- Second, as mentioned above, ICAO provides administrative and technical service support to IFFAS on a cost-recovery basis.\textsuperscript{235} For example, the ICAO’s Secretariat processes might be used to help procure the client state’s aviation goods and services and finally certify their delivery at quality assured standards through the Technical Cooperation Bureau. Furthermore, the costs of technical experts, lawyers, and others can be minimized in the LDC’s preparation of its “bankable”/detailed project report by using existing internal ICAO staff rather than paying exorbitant fees to outside

\textsuperscript{230} Id. at 5.
\textsuperscript{231} Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (Jan. 14, 2003).
\textsuperscript{232} Interview with Jonathan Aleck, Representative of Australia on the Council of ICAO (Dec. 18, 2002).
\textsuperscript{233} IFFAS Resolution, supra note 109, at cl. 3(d)(6).
\textsuperscript{234} Interview with A. P. Singh, Representative of India on the Council of ICAO (May 15, 2002).
\textsuperscript{235} Establishment Working Paper, supra note 128, at 4.
experts. Needless to add, if the IFFAS disburses its money through ICAO, the work will probably, but not necessarily, come back to ICAO mechanisms, for example, to the TCB.236

- Third, ICAO’s audited finance processes authorize payment to the suppliers – not to the client states – of the goods and services contracted. This assures transparency, accountability, effectiveness, and integrity in the process.

V. Conclusion

While the concept of an IFFAS may exceed certain state expectations of the ICAO, it appears to be achievable under agreed conditions. On the one hand, the need for improved aviation safety in certain states and regions remains unquestioned, as the ICAO has identified aviation safety deficiencies through the USOAP. On the other hand, the extent of the ICAO’s role in assisting the remedy of these deficiencies is still to be determined. While the Chicago Convention clearly imposes an obligation on the state to correct divergences from the minimum SARP requirements, arguably this does not appear to preclude the ICAO from assisting needy Developing/LDC states to remedy their identified aviation safety deficiencies as the ICAO pursues its broad objective of global aviation safety under the GAS.

Now that the IFFAS is developed, it must be materialized with not only a complete definition of the nature and scope of its functions and structure but also adequate funding. There are two key pre-conditions, imposed by the Assembly and given effect by the Council, to the establishment of the IFFAS that impose financial constraints on the nature and extent of its development: first, the IFFAS is to be constituted of a voluntary membership and participation; second, it is to be funded primarily through voluntary contributions as the Assembly stated that the IFFAS is not to burden the regular program budget of the ICAO. On the one hand, in the short-run, its growth may be stymied since certain states, including significant Developed countries, will probably opt out of membership in and contributions to the IFFAS. On the other hand, in the long run, the IFFAS concept may be able to survive and eventually even flourish, if a reasonable and strong source of funding is ultimately found. Accordingly, it is argued that membership must be broadened to include not only state members but also private and public international organizations, airlines, manufacturers, and other entities as suggested in the Assembly Resolu-

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236. Interview with A. P. Singh, Representative of India on the Council of ICAO (May 15, 2002).
In the medium to long term, it can be expected that by the next complete ICAO Assembly the voluntary members and funding of the IFFAS will channel assistance to a few pilot projects to remedy certain aviation safety deficiencies identified by the ICAO’s USOSAP in particular LDC countries. Certain IFFAS skeptics, most opponents have now become skeptics, pessimistically believe that the initial under-funding will doom the IFFAS mechanism. On the other hand, IFFAS proponents optimistically believe that many member state skeptics may eventually decide to join as members and voluntary contributors as the IFFAS is successful in completing pilot projects.

Insofar as the IFFAS is less than a full-fledged bank, it probably will grow as an umbrella organization. Thus, as a facilitator to the benefit of Developing/LDC countries, it might be complementary to existing and developing mechanisms of technical assistance at the international, regional, bilateral, multilateral, and plurilateral levels and in financial assistance, including regional development and international banks and funds, export credit agencies, and bilateral development institutions. Needless to add, the IFFAS will need to operate under tight management principles that provide transparency, accountability, effectiveness, and quality control.

The IFFAS may not always be strictly international in operation and execution. There may be a regional implementation of the ICAO’s objectives. One idea that has been discussed by the ICAO Council is the possibility of a regional charge/levy that is collected and disbursed by the IFFAS for aviation-related projects in those Developing/LDC countries that have difficulty organizing themselves for this purpose. Furthermore, there may be a role for ICAO regional offices to implement IFFAS objectives.

The purpose of this article is to provide a balanced view of the problem and possible solutions so that decision-makers and their populations may make informed choices. There are many arguments that can be made for and against whether or not an IFFAS, some other mechanism, or no mechanism is needed to address the problem of assisting certain Developing/LDC countries lacking the will, ability, and/or means to remedy their USOAP identified aviation safety deficiencies. Nevertheless, one cannot question that a real need exists that ultimately threatens lives, property, and economic interests worldwide.

237. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002).

238. Interview with Daniel Galibert, President of the Air Navigation Commission of ICAO (May 7, 2002).
In this context, there is a tragic irony, inconsistency, and division between Developed and Developing/LDC country perceptions of the crises in aviation "security" and "safety." For instance, certain Developed countries attribute such primacy to global aviation "security" that they apply an "ability-to-pay" principle permitting the generous transfer of resources from richer states to poorer states with security deficiencies when the poorer countries lack the means to remedy them. Many of these same Developed countries appear to argue that the costs to assist in remediating safety deficiencies, for example, through an IFFAS mechanism, should be paid for by the user country (i.e., the "user pay" principle) even if it lacks the necessary resources. While many Developing/LDC countries argue that global aviation "safety" is so important that the "ability-to-pay" principle applies and permits the generous transfer of resources from the Developed world to those states with safety deficiencies. These same Developing countries argue that security system upgrade costs, including some of those in the Developing countries, should be paid for by the user countries, often the Developed countries, since they have a much higher risk of security breaches.

In the end, the economic reality of limited resources and politically dictated priorities should not interfere with the world's politicians finding a way to balance the priority attached to not only civil aviation "security" but also "safety." Civil aviation security and safety each constitute a global and indivisible system such that if civil aviation security and/or safety are threatened in one country or region, security and/or safety breaks down and is threatened worldwide. The sovereign and international political will must be directed to recognize that state interests and passenger lives depend upon channeling sufficient resources to both objectives at the same time and, at a minimum, with equal priority.

The citizens of the world can hope for no more. Needless to add, they have a right to expect no less.
International Responsibility in Preventing the Spread of Communicable Diseases Through Air Carriage – The SARS Crisis

Ruwantissa Abeyratne*

I. INTRODUCTION

Through the years, civil aviation has been used not only as the speediest means of communication and commercial transport between and beyond national boundaries, but also, as a means of solace, particularly in providing relief to communities in distress, whether from natural disaster, famine and ill health or war. Unfortunately, aviation has also been used as a weapon of mass destruction, particularly in the context of the catastrophic events of September 11, 2001. The latest concern of the international community may well be that, although aviation cannot be matched by other means of transportation in view of the speed inherent in air transport, it nonetheless presents certain threats to human health which may emerge as a result of its very nature, requiring the clustering of a large number of humans in a limited space where ventilation and air pressure have to be provided in a contrived manner.

In this regard, the most recent concern is the possible spread of Severe Acute Respiratory Syndrome (SARS), which has an alarmingly high

* The author, who is a senior official in the International Civil Aviation Organization, has written this article in his personal capacity, and as such, facts and views reflected herein should not necessarily be attributed to his position in the ICAO Secretariat.
and increasing morbidity rate currently approaching six percent. A vaccine against this dreaded disease may be several years away and the prospects of a cure are still far away. Some experts on communicable diseases have gone to the extent of predicting a global pandemic, along the lines of the Influenza, which afflicted the world in 1918-19, killing twenty million worldwide despite its low morbidity rate which approached three percent. The threat posed by SARS is compounded by the fact that already large countries such as China are severely affected, along with countries that have a high rate of trans-border communication such as Hong Kong and Singapore. It could be envisioned that, unless contained, the disease could spread to other large countries such as Australia, Canada (which has already shown susceptibility), the States of Europe, and the United States. Stringent measures have already been taken by the countries afflicted such as enforcement of quarantines on thousands of hospital employees and patients, together with isolation of those not ill but have had some contact with infected individuals.

This article examines aspects of international responsibility involved in the exigency of a possible spread of communicable diseases through air transport, with focus on SARS.

II. Health Implications of SARS

From an aviation perspective, it is important to be aware of the grave risk that may be posed by the SARS virus in an in-flight situation. The nature of the disease and the manner in which it spreads has to be fully understood in order to appreciate the risk to the aviation industry. In general, SARS begins with a fever greater than 100.4°F [>38.0°C]. Other symptoms may include headache, an overall feeling of discomfort, and body aches. Some people also experience mild respiratory symptoms. After two to seven days, SARS patients may develop a dry cough and have trouble breathing.

The primary way through which SARS appears to spread is by close

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3. Lemonick & Park, supra note 1, at 50.
5. Lemonick & Park, supra note 1, at 53.
6. Id.
person-to-person contact. Most cases of SARS have involved people who cared for or lived with someone with SARS or had direct contact with infectious material (for example, respiratory secretions) from a person who has SARS. Potential ways in which SARS can be spread include touching the skin of other people or objects that are contaminated with infectious droplets and then touching your own eyes, nose, or mouth. This can happen when someone who has SARS coughs or sneezes droplets onto themselves, other people, or nearby surfaces. It also is possible that SARS can be spread more broadly through the air or through other ways that are currently unknown. Thus, the aircraft cabin environment is highly conducive to the spread of the SARS virus.

Cases of SARS continue to be reported, mainly among people who have had direct close contact with an infected person, such as those living with a SARS patient and healthcare workers who did not use infection control procedures while taking care of a patient with SARS. Any airborne disease, such as SARS, is impacted by the environment particularly if such were to be an enclosed one as in an aircraft cabin. The ventilation system plays a critical part in this regard. Therefore, it is crucial to an air carrier's conduct to identify how an air carrier decides on ventilation systems in its aircraft. For instance, early jet aircraft until the last decade offered 100 percent fresh air in the cabin. However, in the nineties, ironically with more evolved technology, ventilation systems in aircraft were built in such a way as to recycle stale air, thus increasing the chances of survival of bacteria in the aircraft cabin. Even if such a practice were ineluctable, in that recycling is a universal practice, which is calculated to conserve fuel, a prudent airline would take other measures, such as change of air filters through which ventilation is provided.

Air in the cabin is usually dry and lacking in humidity since the outside air at cruising altitudes has an extremely low water content. The humidity level in the air of an aircraft cabin at cruising level has been recognized as being of ten to twenty percent humidity, which is approximately the same as desert air. The lack of humidity, per se, does not facilitate the transmission of airborne vectors, but makes breathing diffi-

8. Lemonick & Park, supra note 1, at 53.
10. Id.
11. Id.
12. Id.
13. Id.
15. Id.
16. World Health Organization, Tuberculosis & Air Travel: Guidelines for Prevention &
cult, particularly for persons suffering from respiratory diseases such as Asthma.\textsuperscript{17} When dry air becomes stale through recycling, the chance of removing droplets of air, which is usually accomplished by fresh air, becomes remote. A suggested solution for a prudent airline to take in this regard is to reintroduce 100 percent fresh air, which is humidified.\textsuperscript{18}

One of the major preoccupations of the World Health Organization (WHO) is to ensure the international prevention of disease.\textsuperscript{19} Quarantine regulation, which was the first step toward this aim, has a long history since being introduced during the tenth century.\textsuperscript{20} WHO adopted International Health Regulations in 1969,\textsuperscript{21} the philosophy of which was recognized subsequently as:

The purpose of the International Health Regulations is to help prevent the international spread of diseases, and in the context of international travel, to do so with the minimum of inconvenience to the passenger. This requires international collaboration in the detection, reduction or elimination of the sources from which infection spreads rather than attempts to prevent the introduction of disease by legalistic barriers that over the years have proved to be ineffective.\textsuperscript{22}

Of course, the purpose of this philosophy will be defeated if individual States have no willingness or the political will to notify the outbreak of communicable diseases to WHO, particularly in the absence of a monitoring body, incentives for states to notify, or sanctions. Therefore, the preeminent obligation of states is to ensure that the outbreak of any communicable disease is notified in a manner that would benefit the world and help prevent the spread of the disease across national boundaries. Regrettably, there have been instances recorded where WHO reports that no new instances of a communicable disease has been recorded while the news media give contrary information simultaneously.\textsuperscript{23} One of the reasons adduced for the lack of interest on the part of states to report the incidence of communicable diseases to a world body such as WHO has

\begin{thebibliography}{23}
\bibitem{Shchepe} \textsc{Oleg P. Shchepe}, \textbf{International Quarantine} 11 (1989).
\bibitem{ID} \textit{Id.} at 7.
\end{thebibliography}
been identified as the lack of importance attributed to International Health Regulations (IHR) by states that consider the regulations as an obsolete relic.  

The international health dimension of SARS involves human rights issues as well. International human rights law has laid down two critical aspects relating to public health: (1) that protection of public health constitutes legitimate grounds for limiting human rights in certain circumstances (such as detention of persons or house arrest tantamount to quarantine exercises would be justified in order to contain a disease); and (2) individuals have an inherent right to health. In this context, it is not only the State or nation that has an obligation to notify WHO of communicable disease but as well as the human concerned who has an abiding moral and legal obligation. In 1975, WHO issued a policy statement, which subsumed its philosophy on health and human rights that stated:

The individual is obliged to notify the health authorities when he is suffering from a communicable disease (including venereal diseases) or has been exposed to infection, and must undergo examination, treatment, surveillance, isolation or hospitalization. In particular, obligatory isolation or hospitalization in such cases constitutes a limitation on freedom of movement and the right to liberty and security of person.

It is critical for an evaluation of the aeronautical implications of SARS that the term “health” be defined in context. The WHO Constitution identifies as an objective of the organization “attainment by all peoples of the highest possible level of health,” and health is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” In an aeronautical perspective, as will be seen later in this article, this is a tough act to follow, as international responsibility in the carriage of persons extends only as far as the obligation to prevent injury, wounding or death, and not to the physical or mental well-being of a person.

III. AERONAUTICAL IMPLICATIONS OF SARS

A. REACTIONS OF THE AVIATION COMMUNITY

During the period November 1, 2002 to April 22, 2003, the WHO

25. Id. at 385.
had recorded seventy-eight SARS related deaths and 2,223 suspected cases of SARS in eighteen countries. Following these statistics, WHO declared that passengers with symptoms of SARS or those who may have been exposed to the virus should not be allowed to fly. Some countries took immediate action, one of the first being the United States, which advised its citizens to defer non-essential travel to affected regions. Canada declared a health emergency and Taiwan advised against travel to the mainland. It was reported that Airbus Industrie had revealed in early May 2003 that several airlines hit by the SARS crisis requested formal postponement of aircraft deliveries. According to this report, the SARS crisis was persistent and affected traffic figures adversely, compounding problems already caused by the war in Iraq. The enormity of the problem is brought to bear by the response of the International Civil Aviation Organization (ICAO), which issued guidelines on May 2, 2003, urging member states to:

[a.] provide all incoming passengers with a detailed information leaflet on SARS;
[b.] implement medical screening of passengers arriving directly from or via affected areas;
[c.] advise pilots to radio ahead if someone on board exhibits SARS symptoms;
[d.] instruct crew on dealing with suspected SARS-patients in flight; and
[e.] disinfect aircraft on which a suspected SARS-patient has travelled.

The International Air Transport Association (IATA) as part of its response to the crisis, set up a SARS operations Centre in Singapore, one of the worst hit states, in order to help coordinate efforts in the region in containing the disease. IATA’s aim was to assist in the establishment of effective and efficient screening processes that could be the result of combined public health expertise offered by governments along with operational expertise of airports and airlines. Furthermore, IATA and WHO met in Bangkok in April 2003 to coordinate and refine plans to curb the possibility of the disease affecting air transport, where IATA identified

30. Id. at 4.
31. Id.
33. Id. at 5.
35. IATA Sets up Regional SARS Centre, Air Letter, Apr. 30, 2003, at 3.
36. Id.
the disease as a "global problem, requiring a global solution, needing the coordinated support and understanding of governments . . . which meant that the imposition of reactionary and inefficient countermeasures must be avoided." IATA’s official view pertaining to the effects of SARS on the air transport industry was that the virus posed the biggest threat the airlines have ever faced and that SARS related airline losses would overtake the $10 billion loss suffered as a result of the Iraq war. According to IATA, passenger loads on all airlines plunged as a result directly or indirectly of SARS, and Hong Kong carriers such as Cathay Pacific and Dragonair had suffered losses as much as seventy percent.

On the insurance front, the London underwriters were reported to have withdrawn aviation insurance coverage for travel to countries affected by SARS. The Air Transport Association of the United States announced that "the world situation continues to play havoc with the airline market place . . . and that for the week ending 6 April, system-wide traffic for the biggest US carriers had dropped by 17.4% and domestic travel had fallen almost 15% compared to the same period in 2002." Elsewhere, there were at least two airlines that reduced scheduled flights or operations as a result of the crisis: KLM announced its reduction of flights to Asia and its intent to fly smaller aircraft with lesser capacity to Asian destinations, thus reducing its total capacity by three percent; and QANTAS delayed its aircraft orders and downsized its staff by 400. Cathay Pacific announced the most comprehensive and aggressive cabin health program ever launched by a commercial carrier in order to ensure the health of passengers and reassure aircrews of cabin safety despite the SARS threat.

B. International Responsibility

The pre-eminent legal provision, which governs this issue, is contained in the Convention on International Civil Aviation (Chicago Convention); Article 14 of which states:

39. Id.
40. Travel Insurers Take Fright Over SARS, Air Letter, Apr. 28, 2003 at 1.
41. Iraq, SARS send Travel to New Low, Air Letter, Apr. 11, 2003, at 1.
42. KLM Cuts Flights to Asia due to SARS, Air Letter, Apr. 29, 2003, at 3.
Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties. 46

This provision explicitly devolves primary responsibility on States to take effective measures to prevent airborne diseases in aircraft and implicitly requires States to issue guidelines for airlines, by liaising with the international agencies concerned. Non obstante, airlines have to face certain legal issues themselves in terms of their conduct. Primarily, airlines are expected to conform to applicable international health regulations and the laws of the countries in their aircraft land. 47 Furthermore, the airline owes its passengers a duty of care to exercise all caution in protecting their rights, so that a blatant instance of a person who looks sickly and coughs incessantly at the check-in counter cannot be ignored. Common law principles of tort law vigorously distinguish between negligence, recklessness and wilful blindness. Of these elements of liability, wilful blindness is particularly relevant since it brings to bear the need for an airline to be vigilant in observing passenger profiles in potentially dangerous or threatening situations. The Canadian Supreme Court has stated:

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry. 48

Civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation are one of four classes of wrongs. 49 Therefore, the tort of misfeasance 50 and nonfeasance, 51 such as wilful blindness

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46. Id. at art. 14.
49. The other types of wrongs are: wrongs exclusively criminal; civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively; and civil wrongs which are exclusively breaches of contract.
to a possible wrong that may be committed, both of which an imprudent and careless airline may be guilty of in the case of the spread of disease in the aircraft cabin, becomes "a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."52

Therefore, in general terms a tort arises from an act performed by the defendant whereby he/she has without just cause or excuse caused some harm to the plaintiff.53 This rationale is grounded on the classical juridical maxim sic utere tuo ut alienum non laedes, which essentially means that no one can hurt another by word or deed.54 It follows naturally, therefore, that a person aggrieved as a result of a tort of another can claim pecuniary compensation in respect of damage suffered. For example, under this principle a person who contracts SARS while traveling in an aircraft which carried an infected person whose disease was transmitted to that person can expect compensation from the airline concerned if the airline is found to have breached its duty of care by either positively contributing to the damage by knowingly allowing the infected person to travel, by knowingly installing a ventilator system in the aircraft which is not effective in preventing the spread of airborne disease, or by wilfully blinding itself to the potential danger of a sickly person entering the aircraft cabin without making further inquiry.

It is incontrovertible that proof of negligence of the airline, whether through wilful neglect or through wilful blindness, would be extremely difficult to establish in the case of the spread of an airborne disease such as SARS, as against such diseases as cholera. The former cannot be linked to unsanitary conditions in the cabin per se, whereas the latter can readily be determined through an ex post facto examination of the cabin. The only instance imaginable where an airline can be held reprehensible and consequently liable for pecuniary compensation is when an obviously sickly passenger is checked in by the airline without making an inquiry; when the airline knows beforehand that a particular passenger is positively infected with the disease; or when the aircraft cabin is not properly equipped to prevent the spread of disease. Therefore, air carrier liability for this particular tort would invariably be addressed after the fact, i.e. after passengers have been infected with the disease, when action taken by the airline to assist both those infected and the health authorities concerned would become relevant.

51. The failure to act when a duty to act existed. BLACKS LAW DICTIONARY (8th ed. 2004).
52. This definition of a tort was cited with approval in the following case: Philip Morris Ltd. v. Airley (1975) V.R. 345 at 347.
54. See generally, G. EDWARD WHITE, TORT LAW IN AMERICA (1980).
Of course, in the case of SARS, the court will also assess the period during which the incapacity will continue.\textsuperscript{55} Invariably, there will be consideration in this regard whether these will be total incapacity for a particular period, followed by partial incapacity for a further period.\textsuperscript{56} The following four considerations would be critical to a court’s assessment of future income loss:

1. for what period would income be probably lost;
2. what would the average loss of income be through that period;
3. what is the appropriate multiple to give the value an annuity of that loss for the period concerned; and
4. what sum should be deducted from the multiple for contingencies.\textsuperscript{57}

In the case of a young child not yet in employment and who is expected to be adversely affected by the disease contracted, the courts would have to determine whether the child could be permanently or temporarily disabled as a result of ill effects of the disease. In addition, courts would have to hazard a conjecture as to the child’s future progression had he/she not contracted the disease. In the 1975 case of \textit{Taylor v. Bristol Omnibus Co. Ltd.},\textsuperscript{58} the court assumed that the child’s earning capacity would be similar to that of the father’s and assessed the loss at sixteen years’ purchase, and reduced it by fifty percent to give current value.\textsuperscript{59} In a later case, \textit{Conolly v. Camden and Islington Area Health Authority},\textsuperscript{60} where a child of five years was expected to live only up to the age of twenty-seven years owing to a disease contracted, the court awarded a modest sum for that period concerned but refused to recognize that compensation should be awarded for “lost years,” which the court found to be nebulous and therefore valued at nil.\textsuperscript{61} In the 1981 case of \textit{Croke v. Wise-man},\textsuperscript{62} which concerned a child, aged two, with brain damage who would live up to the age of forty, the court assumed that the child would earn the national average wage for twenty-two years and valued this figure at just under nine years’ purchase, reducing the multiple to five years to arrive at the current value.\textsuperscript{63}

Irrespective of the plaintiff’s age, the rationale for determining future income loss was well established in the 1977 case of \textit{Moeliker v. A. Reyrolle & Co. Ltd.}\textsuperscript{64} According to this decision, what has to be quanti-

\textsuperscript{55} See Abeyratne, \textit{supra} note 14, at 185.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} 1 W.L.R. 1054 (C.A. 1975).
\textsuperscript{59} \textit{Id.} at 1057.
\textsuperscript{60} 3 All ER 250 (Q.B. 1981).
\textsuperscript{61} \textit{Id.} at 256.
\textsuperscript{62} 1 W.L.R. 71 (C.A. 1981).
\textsuperscript{63} \textit{Id.} at 83.
\textsuperscript{64} 1 WLR 132 (C.A. 1977).
fied in determining compensation is the present value of the risk of future financial loss.\textsuperscript{65} If there is no actual loss of earnings sooner or later, there should be no award.\textsuperscript{66} If, however, there is a significant risk, its value would depend on the magnitude of the risk and how far in the future.\textsuperscript{67} Based on this premise, another case, \textit{Cook v. Consolidated Fisheries Ltd.},\textsuperscript{68} decided in the same year ended with the award of substantial compensation to a young man with an arm injury on the basis that he was likely to suffer from osteo arthritis later in life although this would be many years ahead.\textsuperscript{69}

Loss of career, which a person injured or infected already is in, is another significant consideration. Of course, some occupations are more attractive than others, not necessarily in monetary terms but rather in the job satisfaction they offer. When a person is already enjoying such a career, for instance as an airline pilot or surgeon, two professions for which there are stringent health requirements, infection by a disease such as SARS could be critical. In such instances courts would be compelled to take into account the damage caused by total loss of career.\textsuperscript{70}

As for loss of earning capacity, which the plaintiff avers he/she would have had if not for the injury and which the plaintiff did not have at the time of injury, the obiter dictum of Lord Justice Diplock in \textit{Browning v. War Office}\textsuperscript{71} is relevant: “[a] plaintiff is not entitled to damages for loss of capacity to earn money unless it is established that he would, but for his injuries, have exercised that capacity in order to earn money.”\textsuperscript{72}

In every claim for specific compensation concerning earning capacity, the plaintiff has the burden of showing clearly and convincingly that there was actual loss of future income due to the injury or illness caused.\textsuperscript{73}

C. \textbf{LIABILITY UNDER INTERNATIONAL CONVENTION}

When there is incontrovertible evidence of a person contracting a disease such as SARS as a result of being infected in an aircraft while on board, liability issues pertaining to the airline arising from the incident may involve principles of private air carrier liability. The \textit{Montreal Con-
vention of 1999,\textsuperscript{74} which emerged consequent to the Diplomatic Conference on Private Air Law of the International Civil Aviation Organization ("ICAO") held from May 10 to 28, 1999, provides that the carrier is liable for damage sustained in the event of death or bodily injury of a passenger upon condition only that the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking.\textsuperscript{75} The Warsaw Convention of 1929\textsuperscript{76} provides that the carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.\textsuperscript{77} Both these Conventions have similar wording, admitting only of death or bodily injury or wounding. Of course, on the face of the provision, the words "wounding" and "bodily injury" do not necessarily lend themselves to be associated with infection. A fortiori, according to the Montreal Convention, the bodily injury must be caused as a result of an accident, and, according to the Warsaw Convention, the wounding or injury must be caused by accident. An accident is not typically a synonym for "infection" in both cases. However, the recent decision in \textit{El Al Israel Airlines Ltd. v. Tseng}\textsuperscript{78} introduced a new dimension to the word "accident" under the Warsaw Convention by giving it pervasive scope to include such acts as security body searches performed by the airlines.\textsuperscript{79} In this context, the word "accident" loses its fortuity and it becomes applicable to an expected or calculated act. Thus, if an airline knows or ought to have known that an infected passenger was on board its flight, causing others on board to be infected, it may well mean that the act of the airline would be construed by the courts as an accident within the purview of the Warsaw Convention. Later in this article, liability issues under the Montreal/Warsaw regime will be addressed with a view to determining whether, in general terms, the infection of a passenger with SARS could be considered an "accident" if the negligence of the carrier can be shown.

Generally, in law, an accusation has to be proved by the person who alleges it. Therefore, a presumption of innocence applies to an accused person until he is proven guilty. However, in the instance of carriage by


\textsuperscript{75} Id. at art. 21.


\textsuperscript{77} Id. at art. 17.

\textsuperscript{78} 525 U.S. 155 (1999).

\textsuperscript{79} Id.
air of passengers the airline is presumed liable if a passenger alleges personal injury or if his dependants allege his death as having been caused by the airline.\footnote{\textit{Shawcross and Beaumont: Air Law}, § VII, 152 (J. David McClean et al. eds., 4th ed. 2003) [hereinafter \textit{Shawcross \& Beaumont}].} Of course, the airline can show in its defense that it had taken all necessary measures to avoid the damage\footnote{\textit{Id.} at § VII, 161.} or that there was contributory negligence\footnote{\textit{Id.}} that would obviate or vitiate its liability. This curious anomaly of the law imposing on the airline a presumption of liability is contained in the \textit{Warsaw Convention}, Article 17, which states “[t]he carrier is liable for damage sustained in the event of the death or wounding of a passenger . . . if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”\footnote{\textit{Warsaw Convention, supra} note 76, at art. 17.}

To control the floodgates of litigation and discourage spurious claimants, the Convention admits of certain defenses the airline may invoke and above all limits the liability of the airline to passengers and dependents of deceased passengers in monetary terms. The Warsaw System therefore presents to the lawyer an interesting and different area of the law that is worthy of discussion.

Article 17 of the \textit{Warsaw Convention} needs to be analyzed in some detail so that the circumstances in which a claim may be sustained against an airline for passenger injury or death can be clearly identified. Further, the defenses available to the airline and the monetary limits of liability need also to be discussed.

\textbf{D. DEFENSES AVAILABLE TO THE AIRLINES}

The foregoing discussion involved two key factors that govern the civil liability of airlines: first, the presumption of liability that is imposed upon the airline and second, the liability limits that apply to the protected the airline from unlimited liability and spurious claimants. There are two other factors that operate as adjuncts to the initial concepts. These factors are that the airline may show certain facts in its defense to rebut the presumption and that if the airline is found to be guilty of wilful misconduct it is precluded from invoking the liability limits under the \textit{Warsaw Convention}.\footnote{\textit{Id.} at art. 25.} Viewed at a glance, the above four concepts seem to be grouped into two sets of balancing measures. The end result is that while, on the one hand, the airline is subject to stringent standards of liability, on the other, it is protected by two provisions that limit its liability in
monetary terms and allows a complete or partial defense in rebuttal of the presumption.

Article 20(1) of the Warsaw Convention provides that the airline shall not be liable if it proves that the airline and its agents had taken all necessary measures to avoid the damage or that it was impossible for the airline and its agent to take such measures.85 Shawcross and Beaumont are of the view that the phrase “all necessary measures” is an unhappy one in that the mere occurrence of the passenger injury or death presupposes the fact that the airline or its agents had not in fact taken all necessary measures to prevent the occurrence.86 The airline usually takes such precautions as making regular announcements to passengers on the status of a flight starting with instructions on security and safety measures that are available in the aircraft. These measures are taken by the airline to conform to the requirements of the Warsaw Convention that the airline has to take all necessary measures to prevent an accident in order that the presumption of liability is rebutted. Thus in Chisholm v. British European Airways,87 a case decided in 1963, it was held that a passenger who leaves her seat when the aircraft goes through turbulent atmosphere is barred from claiming under the Warsaw Convention for personal injury.88 Here it was held that an admonition of the airline that the passengers were to remain seated with their seat belts fastened during the time in question was proof of the airline having taken the necessary measures as envisaged in the Warsaw Convention.89 This case also established the fact that “all necessary measures” was too wide in scope and that a proper interpretation of the intention of the Warsaw Convention would be to consider the airline to require taking all “reasonably necessary measures.”90 In a more recent case, Goldman v. Thai Airways International Ltd.,91 Justice Chapman imputed objectivity to the phrase “reasonably necessary measures” by declaring that such measures should be considered necessary by “the reasonable man.”92 The United States follows a similar approach of objectivity. In Manufacturers Hanover Trust Co. v. Alitalia Airlines,93 it was emphasized that the airline must show that all reasonable measures had been taken from an objective standpoint in order that the benefit of the defense is accrued to the airline.94 Some French decisions have also ap-

85. Id. at art. 20.
86. Shawcross & Beaumont, supra note 80, §VII at 161.
88. Id. at 634.
89. Id. at 629.
90. Id. at 628.
92. Id.
94. Id. at 967.
proached this defense on similar lines and required a stringent test of
generality in order that the criteria for allowing the defense be
approved.95

The airline that has the burden of proof cannot seek refuge in showing
that normal precautions were taken. For example, normal precautions
in attending to the safety of the passengers prior to a flight is not suffi-
cient. Therefore, the airline is unlikely to succeed in its defense if it can-
not adduce a reasonable explanation as to why the accident occurred
despite the reasonably necessary precautions being taken.96 Insofar as the
requirement of impossibility to take precautions is concerned, the courts
have required clear evidence of the difficulties faced by the airline in
avoiding the disaster. In one case of a crash landing, the court required
that it was insufficient for the airline to show that the aircraft was in per-
fect condition and that the pilot took all steps to affect a good landing.97
The airline had to show that the weather conditions were so bad that the
aircraft could not land in another airport.98 In Haddad v. Cie Air
France,99 where an airline had to accept suspicious passengers who later
perpetrated a hijacking, the court held that the airline could not deny
boarding to the passengers who later proved to be hijackers.100 In that
instance, the airline had found it impossible to take all necessary precau-
tions and was considered sound in defense under Article 20(1). A similar
approach was taken in the case of Barboni v. Cie Air-France101 where the
court held that when an airline receives a bomb threat whilst in flight and
performs an emergency evacuation, a passenger who is injured by evacu-
ation through the escape chute cannot claim liability of the airline since it
would have been impossible for the airline to take any other measure.102

If the airline proves that the damage was caused by or contributed to
by the negligence of the injured person the court may, in accordance with
the provisions of its own law, exonerate the carrier wholly or partly from
his liability.103 Contributory negligence under the Warsaw Convention
has been treated subjectively as and when cases are adjudicated. The
courts have not set an objective standard as in the earlier defense. For

1980).
98. Id.
100. Id. at 346.
102. Id.
103. Warsaw Convention, supra note 76, at art. 21.
instance in *Goldman v. Thai Airways International Ltd.*

Article 25(1) of the *Warsaw Convention* states that the airline shall not be entitled to avail itself of the provisions of the *Warsaw Convention* which excludes or limits its liability, if the damage is caused by the wilful misconduct or by such default on the part of the airline as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. Article 25(2) extends this liability to acts of the agent of the airline acting within the scope of his employment and attributes such wilful misconduct to the airline. Such action as the failure of the technical crew of the aircraft to monitor weather conditions and the failure to execute a proper approach on adverse weather conditions are examples of wilful misconduct of the airline.

The effect of Article 25 is that the plaintiff becomes entitled to lift the limit of liability of the airline as prescribed in Article 22 of the *Warsaw Convention* if he proves that the airline was guilty of wilful misconduct. Thus, the burden of proof falls on the plaintiff and if he succeeds he may claim an amount over and above the prescribed limits of airline liability.

The limitation of liability of the carrier that the *Warsaw Convention* imposes could be circumvented by the plaintiff proving that the carrier was guilty of wilful misconduct in causing the injury. Wilful misconduct as an exception to the limitation of liability rule appears in all three air law conventions that admit of liability limitations. The original French text of the *Warsaw Convention* states that if the carrier causes the damage intentionally or wrongfully or by such fault as, in accordance with the court seized of the case, is equivalent thereto, he shall not be entitled to claim the limitation of liability.

One author, Drion, maintains that the English translation inaccurately states that the liability limitations of a carrier will be obviated if the damage is caused by his wilful misconduct or by such default. The contentious issue in this question is what kind

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104. 3 All ER 693 (C.A. 1983).
105. Id. at 693.
106. *Warsaw Convention, supra* note 76, at art. 25(1).
107. Id. at art. 25(2).
110. *Warsaw Convention, supra* note 76, at art. 25.
111. HUBERT DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 195 (1954).
of misconduct is required? Drion is of the opinion that by approaching the issue in terms of conflicting concepts, the question whether *faute lourde* as proposed originally in the French text and for which there was an English equivalent of gross negligence was in fact more appropriate than the word *dol* which now occupies the document and for which no accurate English translation exists, has emerged as to what standards may be used in extrapolating the words *dol* or wilful misconduct.\(^{112}\) Miller takes a similar view when she states that the evils of conceptualistic thinking that had pervaded the drafting of Article 25 which rendered it destitute of coherence,\(^ {113}\) has now been rectified by the *Hague Protocol* which has introduced the words "done with intent to cause damage or recklessly and with knowledge that the damage would probably result. . . ."\(^ {114}\)

This confusion was really the precursor to diverse interpretations and approaches to the concept of wilful misconduct under Article 25 of the *Warsaw Convention*. The French Government took steps in its Air Carrier Act of 1957 to rectify ambiguities in this area by interpreting *dol* in the Convention as *faute inexcusable*, or deliberate fault which implies knowledge of the probability of damage and its reckless acceptance without valid reason,\(^ {115}\) making a strong analogy with the *Hague Protocol*’s contents. This interpretation, needless to say, brought out the question whether such reckless acceptance would be viewed subjectively or objectively.

The Belgian decision of *Tondriau v. Air India*\(^ {116}\) considered the issue of Article 25 of the Convention and the Hague interpretation.\(^ {117}\) The facts of the case involved the death of a passenger and a consequent claim under the Convention by his dependants.\(^ {118}\) However, the significance of the case lay in the fact that the Belgian court followed the decision of *Emery v. Sabena*\(^ {119}\) and held that in the consideration of the pilot’s negligence under Article 25 an objective test would apply and the normal behavior of a good pilot would be the applicable criterion.\(^ {120}\) The court held “whereas the plaintiffs need not prove, apart from the wrongful act, that the pilot of the aircraft personally had knowledge that damage would probably result from it; it is sufficient that they prove that a reasonably

\(^{112}\) *Id.* at 200.

\(^{113}\) *Georgette Miller, Liability in International Air Transport* 200 (1977).


\(^{115}\) *Miller, supra* note 113, at 202.


\(^{117}\) *Id.* at 193.

\(^{118}\) *Id.* at 195.

\(^{119}\) (1968) 22 R.F.D.A. 184.

\(^{120}\) Belgium Court Record Transcript at 3.
prudent pilot ought to have had this knowledge.” The court rationalized that a good pilot ought in the circumstances to have known the existence of a risk and no pilot of an aircraft engaged in air transport ought to take any risk needlessly. The Brussels Court of Appeals however, reversed this judgment and applied a subjective test, asserting that the Hague protocol called for “effective knowledge.” Professor Bin Cheng seems to prefer the objective test in the interpretation of “wilful misconduct” in Article 25, on the grounds that a subjective test would defeat the spirit of the Convention and would be “flying in the face of [justice] in search of absolute equity in individual cases.”

Peter Martin, analyzing the Court of Appeals decision in Goldman v. Thai Airways International Ltd., agrees with Bin Cheng and criticizes the lower court decision which awarded Mr. Goldman substantial damages for injuring his hip as a result of being thrown around in his seat in turbulence in an instance where the captain had not switched on the “fasten seat belt” sign. Martin maintains that Mr. Goldman failed to prove that the pilot knew that damage would probably result from his act as envisaged in the Hague Protocol principle. Being an aviation insurance lawyer, Martin is concerned that while the English courts have a proclivity towards deciding Article 25 issues subjectively, insurance underwriters could view the breach of the limits stringently. Both agree on the need for objectivity and of the adverse effects on insurance, it is difficult to disagree with Cheng and Martin.

The question of air carrier liability and the approach taken in its context by the Warsaw Convention has seen the emergence of the scholarly analysis of two issues: should liability of the carrier be based on fault and consequently on the principles of negligence and limited liability or should liability be based on strict liability? Drion, in his 1954 treatise on liability, inquires into the various rationales and scenarios that may come up in an intellectual extrapolation of the subject. He examines the fact that an insurance system for liability, which would inextricably be linked to a strict liability concept, would be desirable as a plaintiff would be able to claim compensation from an impecunious defendant through the lat-

121. Id. at 4.
122. Id.
125. 3 All ER 693 (C.A. 1983).
127. Id. at 148.
128. Id. at 149.
129. Drion, supra note 111, at 7.
ter's insurer on the deep pocket theory, and that insurance underwriters may, in their own interest, be impelled to formulate aviation accident preventive schemes, strengthening the effects of accident prevention. Drion also puts forward nine rationales for the rebuttable limitation of liability presumption that appears in Article 17, quantified by Article 22 of the Convention. These are: maritime principles carry a limitation policy; the protection of the financially weak aviation industry; the risks should not be borne by aviation alone; the existence of back-up insurance; the possibility of the claimants obtaining insurance; limitation of liability being imposed on a quid pro quo basis on both the carrier and operator; the possibility of quick settlement under a liability limitation regime; and the ability to unify the law regarding damages.

These rationales, and whatever else that form considerations of policy in the assessment whether a liability system should be based on negligence or strict liability should be addressed with the conscious awareness that while the Convention imposes a rebuttable presumption of limited liability on the carrier, the contributory negligence of the plaintiff can exculpate the carrier and obviate or apportion compensation. More importantly, wilful misconduct of the carrier transcends liability limits and makes the liability of the carrier unlimited. Strict liability on the other hand, as proposed in the Montreal Protocol, does not admit breaking liability limits, sets a maximum limit of compensation that the carrier has to pay, and makes this limit unbreakable by such extraneous factors as the carrier's wilful misconduct.

E. WILFUL MISCONDUCT OF THE CARRIER

Of the two instances in which the Warsaw Convention provides that the carrier's liability is unlimited, one relates to the absence of documentation (absence of the passenger ticket and baggage check or air waybill) on the grounds that the document of carriage evidences the special regime of limited liability as prescribed in the Warsaw Convention. The other, which has turned out to be contentious, deals with instances where the damage is caused by the carrier's wilful misconduct, or such default on his part as, in accordance with the law of the court which exercises jurisdiction in the case, is considered to be the equivalent of wilful mis-

130. Id. at 8.
131. Id. at 12-13.
132. Id.
133. Warsaw Convention, supra note 76, at art. 17.
134. Id. at art. 21.
135. Id. at art. 25.
137. Warsaw Convention, supra note 76, at art. 3.
conduct.\textsuperscript{138} Article 25 of the \textit{Warsaw Convention} provides:

The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct.\textsuperscript{139}

The provision further stipulates that the carrier shall not be entitled to avail himself of the above provisions "if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment."\textsuperscript{140}

The primary significance of Article 25 is that it addresses both wilful misconduct and the "equivalent" of wilful misconduct. The authentic and original text of the \textit{Warsaw Convention}, which is in the French Language, uses the words "\textit{dol}" and "\textit{faute . . . equivalente au dol}."\textsuperscript{141} There is a palpable inconsistency between English translation of the original text and the original text itself in that the French word "\textit{dol}" personifies the intention to inflict an injury on a person, whereas the English words "wilful misconduct" requires the defendant carrier to be aware of both his conduct and the reasonable and probable consequences of his conduct in the nature of the damage which may ensue from the carriers act.\textsuperscript{142} Wilful misconduct, therefore, may not necessarily involve the intention of the carrier, his servants or agents and remains wider in scope as a ground of liability.

Most civil law jurisdictions have equated "\textit{dol}" with "gross negligence."\textsuperscript{143} Drion dismisses the element of intention by citing examples such as the theft or pilferage of goods or baggage, which are more frequent in occurrence than aircraft accidents, which may not necessarily always occur with the concurrence or knowledge of the carrier and cites a list of possible instances where gross negligence would form more justification for the invocation of Article 25.\textsuperscript{144} Notable examples are assault or indecent behavior by personnel of carrier; accidents caused by conduct of personnel; serving bad food; bumpy rides causing passenger injury; and failure to instruct passengers of rough weather.\textsuperscript{145} Drion also makes the valid point of citing delay in carriage as having many dimensions which

\begin{itemize}
\item \textsuperscript{138} \textit{ld.} at art. 25.
\item \textsuperscript{139} \textit{ld.}
\item \textsuperscript{140} \textit{ld.}
\item \textsuperscript{141} \textit{Drion, supra} note 111, at 165 n.2.
\item \textsuperscript{142} \textit{See id.} at 197-210 (discussing the original text of the Warsaw Convention and its translation from French to English).
\item \textsuperscript{143} \textit{ld.} at 208.
\item \textsuperscript{144} \textit{ld.} at 212-14.
\item \textsuperscript{145} \textit{ld.} at 213.
\end{itemize}
may be accommodated within the purview of Article 25 without warrant-
ing the consideration of intention.146

Common law jurisdictions on the other hand have separated “wilful
misconduct” from “negligence” and insisted that the conduct of the car-
rier has to be “wilful” or intentional for a successful case to be grounded
on Article 25 of the Warsaw Convention.147 This approach is consistent
with the original contention of the British delegate to the Warsaw Con-
ference, who claimed that wilful misconduct should pertain to “deliberate
acts but also [to] careless acts done without regard for the conse-
quences.”148 In the 1952 British case of Horabin v. British Overseas Air-
ways Corporation149 the Court held:

To be guilty of wilful misconduct, the person concerned must appreciate that
he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so
acting or omitting to act regardless of the consequences, or acts or omits to
act with reckless indifference as to what the results may be.150

In the same year, in the United States, the Supreme Court of New
York, Appellate Division, held that wilful misconduct:

depends upon the facts of a particular case, but in order that an act may be
characterized as wilful there must be on the part of the person or persons
sought to be charged, a conscious intent to do or to omit doing the act from
which harm results to another, or an intentional omission of a manifest duty.
There must be a realization of the probability of injury from the conduct and
a disregard of the probable consequences of such conduct.151

The above approach has been followed by subsequent American de-
cisions which have classified wilful misconduct as requiring “conscious in-
tent to do or omit doing an act from which harm results to another. . .”152
and “wilful performance of an act that is likely to result in damage or
wilful action with a reckless disregard of the probable consequences.”153

As to the second limb of Article 25(1), which provides that the equiva-
 lent of wilful misconduct would suffice to impose liability, the Con-
vention leaves the scope of the provision wide open to include an in-
stance of the carrier knowingly providing small seats and not advising the

146. Id.
147. Ruwantissa I.R. Abeyratne, Notion of Wilful Misconduct in the Warsaw System, XXII
148. Robert C. Horner & Didier Legrez, Second International Conference on
150. Id. at 486.
passenger of the inherent dangers related thereto.\textsuperscript{154}

Arguably the watershed decision on the notion of wilful misconduct in recent times was contained in the case In re Korean Airlines Disaster of September 1, 1983\textsuperscript{155}, where the trial court considered wilful misconduct to be “the intentional performance of an act with knowledge that the act will probably result in an injury or damage, or in some manner as to imply reckless disregard for the consequences of its performance.”\textsuperscript{156} The above pronouncement was used by an American court in the 1994 decision of Pasinato v. American Airlines, Inc.,\textsuperscript{157} which concluded that the act in question of a flight attendant did not constitute wilful misconduct within the purview of Article 25(2) of the Warsaw Convention.\textsuperscript{158} In the Pasinato case, a passenger of an American Airlines flight, which was bound for Chicago from Italy, was struck on the head when a heavy tote bag fell from an overhead bin in the cabin.\textsuperscript{159} The incident was the outcome of an initial request by the passenger for a pillow immediately after take off, where the flight attendant, in a bid to open the overhead bin above the passenger to retrieve the pillow, was unable to prevent a tote bag falling from the bin onto the passenger’s head.\textsuperscript{160} The passenger and her husband sued American Airlines under Article 25 on the grounds of wilful misconduct.\textsuperscript{161} The trial court was of the view:

There is no dispute that [the flight attendant] opened the overhead bin to get a pillow for another passenger. [The flight attendant’s] disposition indicates that she opened the bin with one hand, in her customary manner, with the other placed defensively above her head near the bin to prevent an object from falling upon her or a passenger sitting below. Further, [the flight attendant] stated that she tried to catch the tote bag that fell from the bin (and may have touched it as it fell), but that it fell too quickly.\textsuperscript{162}

The court took notice of the contention by American Airlines that the technical and cabin crews give reported warnings to passengers of the dangers of opening overhead bins, both over the public address system of the aircraft and by personal messages.\textsuperscript{163} The evidence of the flight attendant that incidents of objects falling from overhead bins were infrequent and generally harmless, based on her experience, was also

\textsuperscript{154} Warsaw Convention, supra note 76, at art. 25. See generally Ruwantissa Abeyratne, The Economy Class Syndrome & Air Carrier Liability, 28 TRANSP. L.J. 251 (2001).
\textsuperscript{155} 932 F.2d 1475 (D.C. Cir. 1991).
\textsuperscript{156} Id. at 1479.
\textsuperscript{157} No. 93 C 1510, 1994 U.S. Dist. LEXIS 5676 (N.D. Ill. May 2, 1994).
\textsuperscript{158} Id. at *8.
\textsuperscript{159} Id. at *8-*9.
\textsuperscript{160} Id. at *7.
\textsuperscript{161} Id. at *1.
\textsuperscript{162} Id. at *8-9 (citations omitted).
\textsuperscript{163} Id. at *9.
considered relevant.\textsuperscript{164} The court found difficulty in applying the criterion of the \textit{Korean Airlines Disaster} case in that it was difficult for the Court, if not impossible, to envision how the flight attendant’s actions could amount to wilful misconduct.\textsuperscript{165} It was of the view that the pivotal criterion for determining the existence of wilful misconduct — knowledge that the act would probably result in an injury or damage — was absent.\textsuperscript{166} \textit{A fortiori}, the court observed that the other criterion established in the \textit{Korean Airlines} case, that of an act which is performed in a manner indicating reckless disregard for the consequences, was also missing in the \textit{Pasinato} case.\textsuperscript{167}

In the 1994 case of \textit{Saba v. Compagnie Nationale Air France},\textsuperscript{168} involving damage to cargo, a Federal trial court found for the plaintiff and awarded damages against the act of the defendant carrier for improperly packing and storing hand-woven Persian carpets, as a result of which some of the carpets were damaged owing to the seepage of rain water when the carpets were kept outside by the carrier pending their loading onto the aircraft.\textsuperscript{169} The court in this instance followed the decision in \textit{Pasinato} by reiterating the criteria for the proof of wilful misconduct as established by the \textit{Korean Airlines} litigation.\textsuperscript{170} A compelling piece of evidence which enabled the court to arrive at its conclusion in this case was the fact that the air carrier had disregarded its own cargo handling regulations in storing the carpets outdoors, in the rain.\textsuperscript{171} In its findings, the court held “[i]n short, through a series of acts, the performance of which were intentional, Air France has demonstrated a reckless disregard of the consequences of its performance. This disregard is emphasized by the fact that no damage report was ever produced.”\textsuperscript{172} The court, while waiving the liability limits of the \textit{Warsaw Convention}, noted “that a combination of factors can, taken together, amount to wilful misconduct.”\textsuperscript{173} It was sufficient, in the court’s view for an act to be intended and not necessary for “the resulting injury or the wrongfulness of the act” to reflect intention or knowledge.\textsuperscript{174} It was also significant that the Court further observed that “a finding of wilful misconduct [was] appropriate when the act or omission constitute[d] a violation of a rule or regulation of the

\begin{itemize}
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. at *10.
\item \textsuperscript{166} Id. at *10-11.
\item \textsuperscript{167} Id. at *11.
\item \textsuperscript{168} 866 F. Supp. 588 (D.D.C. 1994), rev’d, 78 F.3d 664 (D.C. Cir. 1996).
\item \textsuperscript{169} Id. at 592-94.
\item \textsuperscript{170} Id. at 593.
\item \textsuperscript{171} Id. at 593-94.
\item \textsuperscript{172} Id. at 594.
\item \textsuperscript{173} Id. at 593.
\item \textsuperscript{174} Id.
\end{itemize}
defendant carrier itself."175

Courts in the United States have been cautious to determine the parameters of "scope of employment" as envisaged in Article 25(2) of the Warsaw Convention, which imputes liability to the carrier with regard to acts of its employers acting within the scope of their employment. In the 1995 case of Uzochukwu v. Air Express International Ltd.176 where a New York Federal trial court heard a case about the theft by two airline employees of cargo of the two carriers, it was held that the fact that the employers had used forged documents to perpetrate the offence of theft was sufficient to conclude that the act was outside the scope of employment and that the carrier could not be held liable under Article 25(2).177 It is arguable that the conclusion of the court was based on the fact that generally, in the United States, "wilful misconduct" is regarded as the intentional performance of an act with knowledge that the performance of that act would probably result in injury or damage or that intentional performance of an act in such a manner as to imply reckless disregard of the probably consequences.

In Robinson v. Northwest Airlines Inc.,178 a case decided in March 1996 and involving circumstances similar to the Pasinato case, the United States Court of Appeals dismissed the appeal of the plaintiff who had lost judgment in the trial court against the carrier.179 The trial court had allowed a motion of the carrier that the plaintiff's claim in relation to her being injured by a piece of hand luggage falling from an overhead bin while the plane was taxiing, and additional injuries caused to her by a passenger striking her on the head with the latter's baggage were valid at law.180 The Court of Appeals, in affirming the dismissal of the action of the plaintiff, noted that while "a common carrier [a carrier who opens itself to the world to conduct business in the carriage by air of passengers, baggage and goods] owes a high duty of care to its passengers. . . . [it] is not an insurer of a passenger's safety."181 The court found that the plaintiff failed to raise an issue of fact regarding the carrier's breach of duty towards her.182 The court was of the view:

Short of physical constraint of each passenger until each is individually escorted off the plane, we fail to see what Northwest could have done to pre-

175. Id.
177. Id. at *4.
179. Id. at **3.
180. Id.
181. Id. at **2.
182. Id. at **3.
vent this accident. At best, that is precisely what Robinson has established; the fact that an accident occurred. However, as noted above, common carriers are not absolute insurers of their passengers’ safety.  

A similar approach can be seen in the contemporaneous case of Bell v. Swiss Air Transport Co. Ltd. where the New York Supreme Court refused to allow the plaintiffs’ claim that the loss of his laptop computer during a security check of the airline was due to the airline’s wilful misconduct. In the court’s view, the “plaintiffs failed to prove that [the airline] intentionally mishandled the checked baggage with knowledge or reckless disregard for the probable consequences of its conduct.” The court also noted that it was the local police, and not the airline, who had required the carrying out of the security check.

The case of Singh v. Pan American World Airways, Inc. decided in February 1996, offers a helpful insight into the rationale for determination of wilful misconduct. In wrongful death and personal injury actions arising out of the 1995 hijacking of a Pan Am flight between Bombay and New York, the jury concluded that the carrier had been guilty of wilful misconduct on the reasoning that the management of the carrier knew or ought to have known of serious lapses in its security program. In fact, there had been representations made by the carrier’s staff to the management on several occasions prior to the hijacking. Furthermore, the jury was influenced in its conclusion by the fact that the carrier was aware of terrorist activity at European, Middle Eastern and Asian high-risk airports and that very little had been done by the carrier to provide enhanced security at these airports.

In the case involving the crash of Thai Airways Flight TG-311 near Katmandu, Nepal in July 1992, the question at issue was whether the aircrew had been guilty of wilful misconduct in flying into difficult terrain. The fatal crash occurred during approach to Kathmandu airport — an airport known to be one of the most difficult in the world to land. Evidence had revealed that the captain had given the bearings of

183. Id.
184. 25 Av. Cas. (CCH) ¶ 17,259 (N.Y. Sup. Ct. 1996).
185. Id.
186. Id. at 17,260.
187. Id. at 17,260.
189. Id. at 411.
190. Id. at 412.
191. Id. at 412-13.
193. Id. at *1.
194. Id.
the aircraft to the control tower shortly before the crash, and that such were inconsistent with instruction previously given by the tower to the crew in the cockpit of the aircraft.\textsuperscript{195} The court concluded that the plane had veered towards terrain surrounding the airport due to the crew’s conscious failure to monitor their navigational instruments.\textsuperscript{196} The court held:

\begin{quote}
[B]oth the captain and first officer were well aware that their duty to conscientiously monitor navigational instruments was an act necessary for safety. . . .
\end{quote}

\begin{quote}
[T]heir duty to perform this crucial act was so obvious under the circumstances that failing to perform it was reckless in the extreme.\textsuperscript{197}
\end{quote}

The Thai Airways case, therefore, marks an instance where the elements of wilful misconduct were imputed to the crew on the basis that due to their expertise, they knew or ought to have known the reasonable and probable consequences of their act.\textsuperscript{198}

A further dimension to the notion of wilful misconduct was added in the \textit{Northwest Airlines Air Crash Case}\textsuperscript{199} of August 1996, where the Sixth Circuit Court of Appeals added that a finding of wilful misconduct “may be based upon consideration of a series of actions or inactions. . . .”\textsuperscript{200} The court was of the view that since “[m]any complex safety systems interact during an airplane flight. . . .”, an air disaster would usually require multiple acts of error.\textsuperscript{201} In other words, the court held that it was permissible for a jury to consider an airline’s individual errors or a series of errors and not restrict itself to the only act that seemingly caused an accident.\textsuperscript{202}

If one were to analyze the rationale of wilful misconduct in the light of the cursus curiae so far discussed, one would conclude that wilful misconduct hinges itself on knowledge of the perpetrator that damage would result or reckless disregard for consequences of an act on the part of the perpetrator. The question which then arises is whether an instance of the carrier knowingly providing small seats and not advising the passengers of the dangers of prolonged air travel in confined spaces or as would sub-

\textsuperscript{195} Id. at *2 n.2.
\textsuperscript{196} Id. at *6.
\textsuperscript{197} Id. at *3, *6 (emphasis in original).
\textsuperscript{198} Id. at *3.
\textsuperscript{199} Polec v. N.W. Airlines, Inc., 86 F.3d 498 (6th Cir. 1996).
\textsuperscript{200} Id. at 546.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 545.
scribe to the notion of wilful misconduct as it is perceived at the present time.

IV. Conclusion

Admittedly, it would be extremely difficult for an airline to determine latent illnesses such as SARS of its passengers. Therefore, instances of negligence pertaining to an airline accepting for travel a person infected with the SARS virus may be rare. However, it would not be uncommon to critically evaluate the conduct of an airline after the fact — i.e. by an assessment of the quality of air in the cabin and assistance offered to those infected in flight. Airlines have to carefully follow the guidelines issued by the World Health Organization (WHO), and take initiatives on their own, such as those discussed in the introduction of this article, so that they can convince a court that they acted like prudent, caring business enterprises in the face of a calamity.

It must be emphasized that, in selling an airline ticket for travel by air, an airline offers a composite service, not only to carry a passenger from point A to B, but also to ensure that transportation is accomplished in a safe and sanitary manner. Therefore, the services offered by the airline in the area of clean air in the cabin become extremely relevant and critical to the issue.

As for issues of liability under the Warsaw Convention, although the Tseng case widened the scope of the word “accident,” the case itself addressed a personal security check on a passenger and it remains to be seen whether courts would interpret negligence on the part of the airline to warn the passenger of his liability if he were to conceal the fact of personal infection and advise him of the appropriate precautions as wilful misconduct under the Warsaw Convention. It certainly could be argued, that in the light of the varied interpretations emerging from the cursus curiae that an accident under the Convention, although not explicitly defined in any past instance, could be considered as “any incident unexpected and external to the passenger which is avoidable by the airline and which causes death, wounding or injury to a passenger.” Therefore, although no conclusive medical evidence has been released distinctly and conclusively linking SARS as a critical threat to air travel, since there is some evidence to suggest a risk factor in air travel, the airline could be expected to take or seen to take some precaution against the danger.

As for responsibility of states, effective border control is the preeminent factor in a state’s defense. One way of reacting to the problem may be to crack down on illegal immigration. However, this method, although effective in the war against terrorism, may not be expeditious in a public

health context where a carrier of the virus may not be aware that he is carrying the virus and may have acquired the disease through contact and a chain of happenstance. A counterintuitive approach may well be the best way for a state to handle the problem where legal, and therefore supervised immigration in which health screening is possible and quarantine measures can be effectively applied should be the norm.

There are ongoing and intensive multilateral efforts at containing the SARS crisis. If one were to assume that the epidemic could be contained, the experience gained may be sufficiently persuasive in getting states to adopt more proactive approaches under international law in future situations.
Sponsoring defined benefit pension plans topped the list of the most expensive employment-related mistakes made in the transportation industry during the 2001-2003 survey period. Two other errors, failing to pay overtime in California and hiring commercial drivers with poor safety records, cost several transportation industry employers, or their insurers, millions of dollars, but those numbers were dwarfed by the billion dollar exposures that some transportation industry employers face for underfunded pension plans. This article addresses the ten worst transportation industry employer mistakes to assist the transportation employers in avoiding similar litigation disasters.

**MISTAKE 1:**

**Failing to Pay Overtime as Required by the Fair Labor Standards Act and Applicable State Law**

Class action overtime suits are currently a hot area for employers in all industries, including the transportation industry, which has been hit particularly hard. Often the defendants in these suits are large and legally sophisticated companies that have arguably run afoul of some complexity.

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in the overtime laws. These alleged errors rarely make significant monetary difference on a per-employee basis but add up to a large number when aggregated in a class action lawsuit.

Common employer errors under the Fair Labor Standards Act ("FLSA") include:

- misclassification of workers as supervisors when management is not their primary duty
- failing to pay for on-call time
- docking exempt employees
- joint employer situations in which workers are hired through staffing services
- misclassification of employees as exempt outside sales employees when they do not meet the test for exempt outside sales employees
- treating workers as independent contractors when they are not independent contractors

Employers with workers in California are particularly vulnerable to overtime suits due to a California law known as the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 ("Act"). The Act mandates that nonexempt California employees be paid one and a half times their regular hourly rate for any work performed in excess of eight hours in any given work day, regardless of the total hours the employee works during the week. The Act also mandates that double time be paid for any time worked over eight hours on the seventh day of a work week where the employee works all seven days. Transportation industry employers should consider conducting internal audits of their wage and hour practices in order to discover and address their vulnerabilities in this area.

The application of overtime laws to part-time supervisors has always been a murky area. Archie v. United Parcel Service, Inc. addressed this issue under California wage laws. The plaintiff was a part-time supervi-

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1. See 29 C.F.R. § 541.1(a)-(e) (2003); 29 C.F.R. § 541.102(b) (2003).
6. See 29 U.S.C. § 207(a) (2003) (identifying that coverage extends only to employees). Independent contractors are not covered within the scope of the FLSA. See Carrell v. Sunland Constr., Inc., 998 F.2d 330, 332 (5th Cir. 1993). There are a variety of tests for determining independent contractor status, including economic dependence on the employer. See McLaughlin v. Seafood Inc., 861 F.2d 450, 452 (5th Cir. 1988), modified, 867 F.2d 875 (5th Cir. 1989).
8. Id. at § 510(a).
9. Id.
11. Id.
sor for United Parcel Service ("UPS") for eighteen years.\textsuperscript{12} He alleged an injury of $35 million to $40 million in unpaid compensation on behalf of almost 6,000 current and past part-time supervisors, arguing that UPS violated California's labor law "requiring exempt workers to earn twice the minimum wage."\textsuperscript{13} He contended that the part-time supervisors were more accurately characterized as "lead workers" that the company expected to remain at work without pay to finish the tasks of non-supervisors after their shifts had ended.\textsuperscript{14} Moreover, the plaintiff argued that they had virtually no discretion in performing their jobs and that they were tasked with work identical to that of non-supervisors.\textsuperscript{15}

UPS defended, arguing that it was in compliance with applicable state wage and hour laws.\textsuperscript{16} It noted that part-time supervisors' average annual salaries were $21,000 and that they were part of management, which included additional benefits and management duties.\textsuperscript{17} Further, UPS argued that California law allowed for exempt status for "managers, professionals and administrators who spend more than half their time on managerial, intellectual or creative work."\textsuperscript{18} Nevertheless, UPS agreed to an $18 million settlement.\textsuperscript{19}

In Addvensky v. Corporate Express Delivery Systems, Inc.,\textsuperscript{20} the plaintiff class consisted of nearly 2,000 messengers and delivery drivers paid on commission, where they earned between forty-five and fifty percent of the charges made to their customers.\textsuperscript{21} However, the commission amount was allocated to "wages" and "leasehold reimbursement" (for vehicle use).\textsuperscript{22} The plaintiffs argued that this commission system violated California's minimum wage and overtime statutes, as well as a state labor code requiring reimbursement for "necessarily incurred employment expenses including vehicle expenses."\textsuperscript{23} The company denied any culpability and argued that the damages were not as high as the plaintiffs contended.\textsuperscript{24} Ultimately, the company agreed to a $9.7 million settlement.\textsuperscript{25}

\textsuperscript{12} \textit{id}.
\textsuperscript{13} \textit{id}.
\textsuperscript{14} \textit{id}.
\textsuperscript{15} \textit{id}.
\textsuperscript{16} \textit{id}.
\textsuperscript{17} \textit{id}.
\textsuperscript{18} \textit{id}.
\textsuperscript{19} \textit{id}.
\textsuperscript{21} \textit{id}.
\textsuperscript{22} \textit{id}.
\textsuperscript{23} \textit{id}.
\textsuperscript{24} \textit{id}.
\textsuperscript{25} \textit{id}. The plaintiff's lawyer who handled this case also obtained a $124.5 million judgment
In Confidential No. 101-02-07, the plaintiffs were current and past delivery salespeople, route salespeople, or delivery route salespeople for the defendant’s national corporation. The plaintiffs alleged that the defendant employer violated several California labor codes requiring employee compensation for their overtime hours, unless they were identified as “salaried exempt” or as an “outside salesperson.” Specifically, the plaintiffs alleged that the defendant employer intentionally misidentified them as exempt employees to avoid paying overtime labor; that they were inadequately compensated (not receiving straight time or overtime compensation) for working more than eight hours each day and more than forty hours each work week; that they performed nonexempt work in excess of fifty percent of the time; that the employer falsely told its salaried employees that they were not due overtime compensation; that the employer engaged in “unfair business practices;” and that the employer’s failure to pay the plaintiffs was an act of conversion. The defendant contended that the plaintiffs were accurately identified as exempt employees, and, as a result, it did not violate state labor law. However, the defendants agreed to a $4 million settlement.

MISTAKE 2:
FAILING TO CHECK REFERENCES AND DRIVING RECORDS OF APPLICANTS FOR JOBS INVOLVING PUBLIC SAFETY

When an employee kills or seriously injures someone else, the plaintiff’s lawyer’s first acts likely will be to check the criminal and civil lawsuit history of the wrongdoing employee as well as his employment references. If these checks reveal a history of dangerous, or even criminal behavior, then the lawsuit against the employer will be much more expensive to settle. Most employers know that background checks should be performed on employees before they are hired for safety-sensitive positions. Yet sometimes this background check slips through the crack. The following are some recent examples of suits against transportation industry employers that settled for large sums, partly based on negligent hiring of employees in safety sensitive positions.


27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
In *Meister v. Smithway Motor Xpress, Inc.*, a Smithway Motor Xpress driver lost control of the eighteen-wheeler he was driving and swerved across a highway median, killing two persons and seriously injuring three persons. Depositions in this lawsuit indicated Smithway had hired the driver knowing his history of safety violations. The plaintiffs contended the employer did not enforce its personnel and safety policies. Specifically, the plaintiffs claimed the employer hired and then continued to retain this driver even though he had "habitually violated federal motor carrier regulations regarding driving times for over the road truckers." The plaintiff alleged that the driver was fired by a former employer for false entries in his federally mandated driving log. The driver asserted Fifth Amendment rights when questioned about these false entries.

Also, evidence indicated the employer had ignored reports generated from its satellite-tracking system showing the driver was in violation of the law. The driver contended that he was only traveling forty to fifty mph, but "panic stop" data gathered from an on-board computer showed he was traveling sixty-five mph when the accident occurred. The various plaintiffs eventually settled for a total of $17.4 million.

In *Corley v. L & E Trucking Co.*, a truck driver caused an accident that killed one person. The plaintiffs, the deceased family members, alleged the trucking company "entrusted 30-ton gravel trucks to unqualified drivers with excessive numbers of prior accidents and moving violations." In addition, they claimed the trucking company was negligent in hiring this driver after she noted on her job application that she had more than three moving violations and accidents in the previous three years, which violated the employer's own policies. Ultimately, the trucking company paid a $6 million settlement.

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33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
MISTAKE 3:
FAILING TO INVESTIGATE SERIOUS SEXUAL HARASSMENT AND WORKPLACE VIOLENCE ALLEGATIONS BECAUSE THE COMPLAINANT REQUESTS PRIVACY

From time to time, an employee comes forward to report that they have been victimized by a co-worker who has assaulted, threatened, or harassed them in some serious way. After disclosing this information, the employee then asks for confidentiality, stating that they are embarrassed or fearful for their life if the perpetrator finds out that a report has been made. Sometimes the employee will even point to a provision in the employer's anti-harassment policy promising confidentiality. This is a very sensitive situation involving not just sexual harassment issues but possibly issues of criminal law, workplace violence, and common law privacy. In *Gallagher v. Delaney*, the Second Circuit noted that confidential complaints of this type create a catch-22 situation for employers. This catch-22 situation stems from the need for management to act upon sexual harassment charges, but not violate the confidentiality of the victim.

Moreover, there is authority that the employer need not investigate allegations if the complainant so requests. Nevertheless, the best course for the employer is usually to investigate any type of alleged workplace harassment (whether based on gender, race, religion or any other protected status) promptly and thoroughly. One reason an employer should do this is so that the employer may take advantage of the "prompt remedial action" defense as described in the U. S. Supreme Court decisions in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. Equal Employment Opportunity Commission ("EEOC") authority also indicates that an employer has a duty to investigate reports of sexual harassment.

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47. 139 F.3d 338 (2d Cir. 1998).
48. *Id.* at 348.
49. *Id.*
50. See Torres v. Pisano, 116 F.3d 625, 639 (2d Cir. 1997).
51. 524 U.S. 775, 807 (1998) ("The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities. . . .").
53. U.S. Equal Employment Opportunity Comm'n, *EEOC Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, at www.eeoc.gov/policy/docs/harassment.html (last visited Nov. 9, 2003); see also Malik v. Carrier Corp., 202 F.3d 97, 105 (2d Cir. 2000) ("[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer.").
In *Ferris v. Delta Airlines, Inc.*,\(^{54}\) the plaintiff alleged that, while they were on an airline layover in Italy, a male flight attendant with whom she worked invited her to go wine shopping, and then asked her to visit his room to sample the wine.\(^{55}\) In his room, he drugged the plaintiff's wine and then raped her.\(^{56}\) There was evidence that over a five-year period, two other flight attendants had reported the male flight attendant for similar assaults and a third flight attendant had reported that he threatened to kill her after she refused to go out with him.\(^{57}\) One complainant requested confidentiality but the others did not.\(^{58}\) The airline took no formal action in response to these three complaints.\(^{59}\) A Delta supervisor, to whom one of the rapes was reported, acknowledged to the victim that the male flight attendant was a known rapist but instructed the victim not to discuss the incident with anyone.\(^{60}\) Another supervisor, to whom the assaultive conduct was reported by another victim, refused to take action without a written report.\(^{61}\)

Even though the plaintiff in this case refused for nearly six weeks to reveal to Delta the name of her alleged attacker, she eventually sued Delta for sexual harassment and negligent supervision and retention, among other claims.\(^{62}\) The judge ordered a separate trial on the issue of whether a rape had occurred, and that trial resulted in a hung jury.\(^{63}\) The judge granted Delta summary judgment on the plaintiff's sexual harassment compliant and she appealed.\(^{64}\) The Second Circuit reversed.\(^{65}\) While acknowledging that the question is a close one, the Second Circuit found that a block of hotel rooms booked and paid for by the airline to house flight attendants on foreign assignment could constitute a "work environment."\(^{66}\) The Court noted that Delta "had notice of Young’s proclivity to rape co-workers," and opined that an employer may be liable for co-worker harassment, even where that co-worker did not have supervisory authority over the victim.\(^{67}\)

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54. 277 F.3d 128 (2d Cir. 2001).
55. Id. at 131.
56. Id.
57. Id. at 132-34.
58. Id. at 132.
59. Id. at 133-34.
60. Id. at 133.
61. Id. at 132.
62. Id. at 130-31.
63. Id. at 134.
64. Id.
65. Id. at 138.
66. Id. at 135.
67. Id. at 136.
MISTAKE 4:
STILL NOT “GETTING IT” IN TERMS OF BLATANT SEXUAL HARASSMENT AT WORK

In Faragher and Burlington Industries, the United States Supreme Court opined that employers may escape liability for hostile environment sexual harassment claims where they took common sense measures such as conducting anti-harassment training for employees, implementing an anti-harassment policy with a complaint procedure, and undertaking investigation and prompt remedial action when sexual harassment is reported. 68 Incredibly, many employers have not availed themselves of these rulings and therefore continue to be found liable for significant sums in sexual harassment cases.

For example, in EEOC v. Trans World Airlines, Inc., 69 the EEOC charged that TWA subjected three named plaintiffs and a “class of similarly situated female employees” working at the airline’s John F. Kennedy International Airport facility to a “sexually hostile work environment.” 70 The plaintiffs alleged that their male supervisors subjected them to unwelcome sexually explicit comments, touching and propositions. 71 The plaintiffs contended the supervisors touched their breasts and buttocks and held the plaintiffs’ hands in a way to force them to touch the supervisors’ erect genitals. 72 The plaintiffs also alleged that the supervisors pressed their erect genitals against the plaintiffs’ buttocks and made various vulgar sexually offensive comments. 73 In addition, several of the plaintiffs working in the TWA tower were harassed while they were directing ground movements of aircraft. 74 The EEOC argued TWA did not take remedial action after it had notice of the harassment but instead retaliated against those employees who complained. 75

TWA denied the allegations while settling the lawsuit for $2.6 million without admitting liability. 76 No information was provided regarding the impact of TWA’s Chapter 11 filing on this settlement.

In Vargas v. Celadon Trucking Services, Inc., 77 a trainee truck driver

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68. See Faragher, 524 U.S. at 807; Burlington Indus., Inc., 524 U.S. at 765.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
claimed that a supervisor raped her on a cross-country training run.\textsuperscript{78} She sued the supervisor for sexual assault and intentional infliction of emotional distress, and her employer for sexual harassment based on the supervisor’s conduct.\textsuperscript{79} She also alleged that the trucking company compounded its errors by firing her in retaliation for her complaints.\textsuperscript{80} She contended that she suffered Post-Traumatic Stress Disorder from the alleged assault.\textsuperscript{81} The supervisor and the trucking company responded that there was no rape and that the contact was consensual.\textsuperscript{82}

However, the jury believed the plaintiff, finding the trucking company liable for sexual harassment and the supervisor liable for intentional infliction of emotional distress and sexual assault.\textsuperscript{83} The verdict totaled $2,417,500, with the trucking company liable for $1,259,500 and the supervisor liable for $1,158,000.\textsuperscript{84} The award included $2,212,500 for future pain and suffering and $205,000 for past pain and suffering.\textsuperscript{85} The court directed a verdict on the plaintiff’s punitive damages claim, which prevented the jury from considering these damages.\textsuperscript{86} According to the plaintiff’s attorney, jurors related that they would have awarded at least $10 million in punitive damages if they had been allowed to do so.\textsuperscript{87} Before trial, the plaintiff offered to settle for $200,000, but the trucking company’s best offer was $80,000.\textsuperscript{88}

In \textit{Hamilton v. First Transit Inc.},\textsuperscript{89} a female bus driver for a bus operator in Los Angeles claimed that her supervisor began sexually harassing her after she was promoted to a staff position.\textsuperscript{90} She claimed she was subjected to “obscene and vulgar statements, sexual propositions, offensive touching, and masturbation.”\textsuperscript{91} After she reported the conduct, her employer conducted a two-day investigation but failed to interview any other female bus drivers at that location.\textsuperscript{92} To escape the continued harassment, the plaintiff returned to her previous position and took a de-

\textsuperscript{78.} \textit{Id.}
\textsuperscript{79.} \textit{Id.}
\textsuperscript{80.} \textit{Id.}
\textsuperscript{81.} \textit{Id.}
\textsuperscript{82.} \textit{Id.}
\textsuperscript{83.} \textit{Id.}
\textsuperscript{84.} \textit{Id.} (noting the employer's liability will likely be decreased to $300,000 to comply with Title VII's statutory damages cap).
\textsuperscript{85.} \textit{Id.}
\textsuperscript{86.} \textit{Id.}
\textsuperscript{87.} \textit{Id.}
\textsuperscript{88.} \textit{Id.}
\textsuperscript{90.} \textit{Id.}
\textsuperscript{91.} \textit{Id.}
\textsuperscript{92.} \textit{Id.}
crease in pay.\textsuperscript{93}

Thereafter, the plaintiff made a report of the harassment to her union.\textsuperscript{94} Her union requested that the supervisor be transferred to another job site, but the employer refused to transfer him.\textsuperscript{95} The plaintiff requested her supervisor be moved to another job site because she came into contact with him daily where they were both at the same location.\textsuperscript{96} The plaintiff, as her employer knew, could not relocate to another job site without forfeiting her union seniority status.\textsuperscript{97} The employer argued no sexual harassment took place and that its investigation conducted pursuant to its policy was inconclusive because the lone witness was not reliable.\textsuperscript{98} The jury found for the plaintiff, awarding $1.1 million in damages, including punitive damages.\textsuperscript{99}

Finally, in \textit{Austin v. Conrail Corp.},\textsuperscript{100} a railroad engineer contended that she had been sexually harassed while at work for a period of years.\textsuperscript{101} She alleged that her employer knew of the conduct, failed to respond, and engaged in retaliation by suspending her.\textsuperscript{102} She argued that she was subjected to offensive comments and graffiti that, on occasion, used her name.\textsuperscript{103} In addition, the plaintiff claimed her employer's sexual harassment training was inadequate.\textsuperscript{104} The employer responded that no sexual harassment occurred and that it responded appropriately to her allegation.\textsuperscript{105} But the jury, consisting of six men and two women, returned a verdict for the plaintiff and awarded $450,000 in damages.\textsuperscript{106}

**MISTAKE 5:**

**FAILING TO RECOGNIZE THE SERIOUSNESS OF TITLE VII RETALIATION CLAIMS**

Retaliation claims are clearly a growth industry for civil rights plaintiffs. EEOC data indicates that these claims have almost doubled since

\begin{footnotesize}
\footnotetext{93. Id.}
\footnotetext{94. Id.}
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\footnotetext{97. Id.}
\footnotetext{98. Id.}
\footnotetext{99. Id.}
\footnotetext{101. Id.}
\footnotetext{102. Id.}
\footnotetext{103. Id.}
\footnotetext{104. Id.}
\footnotetext{105. Id.}
\footnotetext{106. Id.}
\end{footnotesize}
Retaliation claims, which do not require proof of discrimination, are based on the language of Title VII itself, which protects persons who complain about conduct "made . . . unlawful" by Title VII. To prevail on a retaliation claim, a plaintiff must establish: 1) "protected activity" engaged in by the plaintiff; 2) subsequent "adverse employment action" by the employer; and 3) a "casual connection" between the plaintiff's "protected activity" and the "adverse employment action."  

Although retaliation claims are often defensible, an employer should use extreme caution in terminating or taking other serious adverse action against an employee who has recently made a discrimination claim. Of course, this does not mean that an employee is bullet proof for years to come merely because he or she has filed a discrimination claim. Although every case must be analyzed on its facts, periods as short as a few months between the protected activity and the adverse action have been found too long, standing alone, to establish causality. Furthermore, favorable treatment of the plaintiff after the employer learned of the protected inactivity, but before the adverse action, may make it much more difficult for the plaintiff to prove retaliation. And, importantly, retaliation claims may be filed not just by persons in protected groups under Title VII, but also by non-minorities who have opposed practices unlawful under Title VII or participated in Title VII proceedings through testimony or otherwise.

In Pineda v. United Postal Service, Inc., the plaintiff claimed his employer, UPS, fired him after he filed a disability discrimination claim, complained of harassment, and testified in a co-worker's suit. The plaintiff had been with the company for twenty-two years when he was terminated. He contended that he was terminated in retaliation for the above protected activities. UPS denied the claim, responding that the

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110. O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001); see, e.g., Richmond v. Oneok, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (three-month period standing alone is insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174 (7th Cir. 1992) (four-month period is insufficient).
112. This is because the anti-retaliation provisions of Pub. L. 88-352, Title VII § 704(a) & 42 U.S.C. § 2000e-3(a) contain both a "participation" and an "opposition" clause.
114. Id.
115. Id.
116. Id.
plaintiff was terminated after he threatened violence towards co-workers.\textsuperscript{117} The defendant employer's attorneys related that six employees corroborated the allegations regarding the threats made by Pineda.\textsuperscript{118}

The jury was unanimous in finding that the plaintiff had been terminated as a result of his protected activities.\textsuperscript{119} Moreover, it found malice, awarding a sum of $1,643,000.\textsuperscript{120} But, the sum included $1 million for punitive damages, which the judge refused to award, and $400,000 in compensatory damages, which was likely reduced due to the $300,000 statutory cap.\textsuperscript{121} Therefore, the net damages were $543,000.\textsuperscript{122} Before trial, the plaintiff had offered to settle for $350,000.\textsuperscript{123} According to the plaintiff's attorney, UPS made a "nominal" settlement offer.\textsuperscript{124}

In \textit{Talbot-Lima v. Federal Express Corp.},\textsuperscript{125} the plaintiff, a twenty year employee of Federal Express ("FedEx"), was a senior manager at one of the company's Philadelphia stations.\textsuperscript{126} Upon being promoted, her managing director began to criticize her performance and that of the station.\textsuperscript{127} She filed a gender discrimination complaint against the managing director, which the company determined to be groundless.\textsuperscript{128} The plaintiff alleged that the director then retaliated against her.\textsuperscript{129}

During the same time period, the plaintiff voiced her displeasure to the CEO of FedEx at having been asked to testify for FedEx in a separate harassment suit.\textsuperscript{130} She was suspended and fired for lack of leadership skills, forgery, and coercing employees.\textsuperscript{131} The plaintiff denied all of the employer's allegations.\textsuperscript{132} At the time of her suspension, the plaintiff, who was pregnant, was earning $100,000 annually despite having never attended college.\textsuperscript{133} Based on these facts an expert determined that the plaintiff would be unable to secure any future employment at that income.\textsuperscript{134} The plaintiff remained unemployed between the time in which

\textsuperscript{117} ld.
\textsuperscript{118} ld.
\textsuperscript{119} ld.
\textsuperscript{120} ld.
\textsuperscript{121} ld.
\textsuperscript{122} ld.
\textsuperscript{123} ld.
\textsuperscript{124} ld.
\textsuperscript{126} ld.
\textsuperscript{127} ld.
\textsuperscript{128} ld.
\textsuperscript{129} ld.
\textsuperscript{130} ld.
\textsuperscript{131} ld.
\textsuperscript{132} ld.
\textsuperscript{133} ld.
\textsuperscript{134} ld.
she was fired and the trial began, and she sought back pay, future lost wages (including her pension package), emotional distress and punitive damages.\textsuperscript{135} She was awarded $309,000 in back pay, $1 each for front pay, past and future emotional distress, and $2 million in punitive damages (subject to the federal cap of $300,000 under Title VII).\textsuperscript{136}

In \textit{Bruso v. United Airlines},\textsuperscript{137} a male supervisor was given a written counseling letter and suspended after he complained about another male supervisor's allegedly abusive treatment of women.\textsuperscript{138} After United investigated his complaint, he was demoted from supervisor to baggage handler.\textsuperscript{139} He sued for retaliation and was awarded $10,000 in damages and $393,418 in attorneys' fees.\textsuperscript{140} On appeal, the Seventh Circuit reversed the District Court's entry of summary judgment on the plaintiff's punitive damage claim and remanded the case for determination of punitive damages and consideration of the plaintiff's right to be reinstated as a supervisor.\textsuperscript{141}

\textbf{MISTAKE 6:}

\textbf{FAILING TO CONTROL RACIAL HARASSMENT IN THE WORKFORCE}

Racial harassment is just as actionable as sexual harassment. However, in some ways racial harassment claims are more dangerous to employers than sexual harassment cases because they can be brought not just under Title VII, but also under 42 U.S.C. § 1981, which has no damage cap.\textsuperscript{142} The elements of a claim for a racially hostile work environment are: "(1) that [plaintiff] belongs to a protected class; (2) that he was subject to unwelcome harassment; (3) that the harassment was based on race; (4) that the harassment affected a term, condition or privilege of employment; and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action."\textsuperscript{143} Additionally, the plaintiff must show that the harassment involved racially discriminatory intimidation, ridicule or insults sufficiently severe or pervasive to alter the conditions of employment and create an objectively abusive working environment.\textsuperscript{144}

\begin{itemize}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} 239 F.3d 848 (7th Cir. 2001).
\item \textsuperscript{138} \textit{Id.} at 852-53.
\item \textsuperscript{139} \textit{Id.} at 854.
\item \textsuperscript{140} \textit{Id.} at 855.
\item \textsuperscript{141} \textit{Id.} at 861-62.
\item \textsuperscript{143} Miller v. Rowan Co., 55 F. Supp. 2d 568, 572-73 (E.D. Miss. 1998), aff'd, 180 F.3d 265 (5th Cir. 1999).
\item \textsuperscript{144} Walker v. Thompson, 214 F.3d 615, 625-26 (5th Cir. 2000).
\end{itemize}
Just as in the area of sexual harassment, an investigation and prompt remedial action may constitute a defense to racial harassment. Moreover, isolated minor incidents of improper racial remarks do not create a hostile environment. Nevertheless, although these claims may be defensible, the best strategy is to avoid them by proper training of the workforce and selection of supervisors and managers who send a strong message that this conduct is unacceptable.

For example, in Antoine v. Yellow Freight Systems, an African-American truck driver/dock worker and two fellow employees sued their employer, Yellow Freight Systems, asserting state claims and federal claims for “hostile environment racial discrimination under Title VII and 42 U.S.C. § 1981.” A motion for separate trials was granted and Plaintiff Antoine’s case was tried alone. The plaintiff alleged that starting at the time of his employment in 1995 and continuing up until his trial, he experienced discriminating and retaliatory terms and conditions at Yellow Freight. He alleged that he was discharged for infractions for which other employees had never been discharged although he was later reinstated through union proceedings. He claimed that he had been given less desirable assignments than whites, that he and other African-American employees were verbally harassed, and that nooses and swastikas were displayed at work.

The defendant employer contended that it responded appropriately.

145. See Miller, 55 F. Supp. 2d at 573 (employer not liable for harassment based on hangman's noose left in plaintiff's locker because it took prompt corrective action); Tutman v. WBBM-TV, Inc., 209 F.3d 1044 (7th Cir. 2000); Hill v. Am. Gen. Fin. Inc., 218 F.3d 639 (7th Cir. 2000).

146. See Eaglin v. Port Arthur Indep. Sch. Dist., No. 1:99-CV-109, 2000 U.S. Dist. LEXIS 6103, at *9-10 (E.D. Tex. Mar. 15, 2000) (citing Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986)); see also Anderson v. Loma Linda Cmty. Hosp., No. 91-56331, 1993 U.S. Dist. LEXIS 15249, at *7 (9th Cir. June 16, 1993) (finding that five racial comments were not sufficiently severe or pervasive to constitute racial harassment); Grant v. UOP, Inc., 972 F. Supp. 1042, 1052-53 (W.D. La. 1996) (finding no actionable harassment where the term “n——” was used in the black plaintiff's presence on three separate occasions by three different co-workers); Vaughn v. Pool Offshore Co., 683 F.2d 922, 924, 926 (5th Cir. 1982) (finding no actionable harassment where names like “n——,” “coon” and “black boy” were “bandied back and forth without apparent hostility or racial animus”); Coleman v. PMC, Inc., No. 96 C 6248, 1998 U.S. Dist. LEXIS 4399, at *23 (N.D. Ill. Mar. 31, 1998) (no actionable harassment found where the African-American plaintiff set forth only a few instances of derogatory comments over the course of a year).


148. Id.

149. Id. The latest information available from Verdict Search indicates that the two other plaintiffs’ cases originally filed with this one were scheduled for trial in the spring of 2003. Id.

150. Id.

151. Id.

152. Id.
to racial harassment events and that any employee that was reprimanded for racially harassing conduct discontinued the conduct.\textsuperscript{153} The company claimed equal employment opportunity policies were in place and that management was trained in that area.\textsuperscript{154} Finally, it stated that legitimate business reasons constituted the actions it took against the plaintiff.\textsuperscript{155}

The plaintiff claimed emotional distress and sought compensatory and punitive damages from the company.\textsuperscript{156} He also sought an injunction against future retaliation, a written apology, and the display of the judgment on the employee bulletin boards in the company’s Colorado facilities.\textsuperscript{157} Economic damages were not claimed because they were addressed in his proceedings with the union.\textsuperscript{158} The plaintiff succeeded on four of the five federal claims and on both of the state claims and was awarded $300,000 in compensatory damages and $3 million in punitive damages.\textsuperscript{159}

In \textit{Hussain v. Long Island Railroad Co.},\textsuperscript{160} plaintiff Sheikh Hussain, a Pakistani-born Muslim and a United States citizen, had worked for the railroad for ten years.\textsuperscript{161} He alleged discrimination “on the basis of race, national origin and religion, in the form of a hostile work environment, in violation of Title VII . . . and § 1981.”\textsuperscript{162}

The plaintiff contended that, beginning in 1995 and continuing until March 1999, his supervisor humiliated him by making statements in front of his co-workers such as:

- When he asked to see the plaintiff’s bag and locker, he said that “maybe you [Hussain] are putting fertilizer or bombs in there.”
- When finding a garden snake on the property, he said “Give this to Sheikh, he probably eats these snakes back home.”
- When asked by the plaintiff why he was being singled out for unfair treatment, he said “Look at your skin and look at mine.”
- When he said to the plaintiff, “Your people live in boxes and huts.”
- When he referred to the plaintiff as “nigger” and “sand nigger.”\textsuperscript{163}

The supervisor also allegedly called the plaintiff “Saddam Hussain,” and said to him, “Saddam is your uncle. What is he? Your father?”\textsuperscript{164}

\begin{flushleft}
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at *2.
\textsuperscript{162} Id. at *2.
\textsuperscript{163} Id. at *4-5.
\textsuperscript{164} Id. at *5.
\end{flushleft}
Plaintiff further contended that he was told by co-workers that the supervisor had made threatening comments "intended to chill [the] Plaintiff from proceeding with any claims of discrimination."\textsuperscript{165}

In addition, the plaintiff claimed that, on occasion, the supervisor assigned him to mechanic's work without properly noting the work and therefore, depriving him of the higher pay rate for the mechanic's work.\textsuperscript{166} The plaintiff also alleged that the supervisor ordered him to bring him coffee in the morning before clocking in.\textsuperscript{167} The evidence indicated that the supervisor's conduct was repeatedly called to the attention of management, resulting in the supervisor's transfer.\textsuperscript{168} The court found the plaintiff's allegations sufficient to withstand summary judgment.\textsuperscript{169} No further information about this case is available.

\textbf{MISTAKE 7:}

\textbf{Terminating Employees Shortly after They File Workers Compensation Claims}

Many state workers compensation laws contain anti-retaliation provisions. Often these statutes do not contain damage caps and it is not unusual to see multimillion-dollar verdicts in this area.

For example, in \textit{Breedlove v. Transwood, Inc.},\textsuperscript{170} Billy Breedlove was a truck driver who worked at a terminal in Oklahoma for Transwood, a national trucking company, and who was injured while on the job.\textsuperscript{171} Breedlove claimed that at the time he was injured, his partner was driving the 18-wheeler while he occupied the sleeper compartment.\textsuperscript{172} His employer contended that Breedlove was an alcoholic with cirrhosis of the liver who was actually driving the truck at the time of the accident, but that he claimed to have been sleeping because he had been drinking.\textsuperscript{173} According to the employer, Breedlove's driving partner admitted to a co-worker at Transwood that Breedlove was the driver when the accident causing Breedlove's injuries occurred.\textsuperscript{174}

Breedlove filed a workers compensation claim after the accident and

\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at *5-6.
\textsuperscript{168} \textit{Id.} at *6-7.
\textsuperscript{169} \textit{Id.} at *31.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}
took some time off.\textsuperscript{175} He later asked his doctor to release him to return to work, and the doctor gave him a release with lifting restrictions.\textsuperscript{176} When Breedlove returned for his first day back at work, he could not walk up the steps leading to the office.\textsuperscript{177} He notified his doctor, who submitted an additional report stating that further testing was required and that Breedlove would remain off work for an additional two weeks.\textsuperscript{178} Upon receiving the two conflicting doctor’s reports the terminal manager ordered Breedlove to return to work within 72 hours.\textsuperscript{179} He then allegedly called Breedlove’s home and left a message firing Breedlove for not returning to work.\textsuperscript{180} Mrs. Breedlove, also a Transwood employee, testified that Transwood knew her husband was undergoing medical procedures during this time because she had informed her supervisor that she would not be at work due to those medial procedures.\textsuperscript{181}

After firing Breedlove, Transwood allegedly sent notices to other trucking companies advising them to contact Transwood before hiring Breedlove, implying that he had a drinking problem.\textsuperscript{182} Breedlove later died of a stroke.\textsuperscript{183} His widow’s suit claimed that her husband was fired as retaliation for filing the workers compensation claim.\textsuperscript{184} She testified that he “had been a professional driver for 10 years, had logged millions of road miles and never had an alcohol-related accident or failed a DOT alcohol screening.”\textsuperscript{185} She claimed that the damage to Breedlove’s reputation forced the couple to take odd jobs in which they earned $3,000 to $4,000 a year.\textsuperscript{186} She further testified that Transwood engaged in activities intended to destroy her husband’s reputation making it impossible for him to work elsewhere as a truck driver.\textsuperscript{187} The plaintiff’s attorney argued that Transwood had a history of terminating employees who had filed workers compensation claims.\textsuperscript{188}

The employer, which continued to insist that Breedlove’s accident was due to his drinking, alleged that it was thwarted in its efforts to have Breedlove’s driving partner testify at trial.\textsuperscript{189} The employer claimed that
the partner was "hiding out" and could not be found.\textsuperscript{190} After less than two hours of deliberations, the jury found for the plaintiff, awarding nearly $2.2 million for wrongful termination.\textsuperscript{191} According to the plaintiff's attorney, the defendant never attempted to make a settlement offer.\textsuperscript{192}

\textbf{MISTAKE 8:}

\textbf{Terminating Any Long-Time Employee Over the Age of Fifty for a Reason that the Jury May Perceive as Flimsy}

In this economy, employment loss is a fact of life and no worker is immune. However, when workers must be terminated, the best approach is often through a severance agreement and a release. Although the Age Discrimination in Employment Act originally protected a worker only until that person reached the age of seventy, the age cap was removed over a decade ago, so that, no matter how old the worker is, age is not a valid reason for terminating him.\textsuperscript{193}

In \textit{Ziegler v. Delta Airlines, Inc.}\textsuperscript{194} plaintiff Joyce Ziegler, a flight attendant, age fifty-six, was fired after years of service with Delta.\textsuperscript{195} Ziegler maintained that her discipline record was clean when she went on disability for a work-related injury.\textsuperscript{196} While she was on disability leave she used pass privileges available to her for travel.\textsuperscript{197} She contended that pursuant to Delta's employee handbook, flight attendants approved for disability benefits were able to continue to travel at no charge or at a reduced rate.\textsuperscript{198} However, Delta claimed she violated another policy.\textsuperscript{199} The plaintiff stated that the other policy was unknown to her and that it contradicted the employee handbook.\textsuperscript{200}

The plaintiff presented evidence of a another Delta employee with a poor disciplinary record and only four years of service who traveled while on disability leave without adverse consequences.\textsuperscript{201} She argued that the other employee was not terminated because she was young and would

\begin{thebibliography}{99}
\bibitem{190} \textit{Id.}
\bibitem{191} \textit{Id.}
\bibitem{192} \textit{Id.}
\bibitem{195} \textit{Id.}
\bibitem{196} \textit{Id.}
\bibitem{197} \textit{Id.}
\bibitem{198} \textit{Id.}
\bibitem{199} \textit{Id.}
\bibitem{200} \textit{Id.}
\bibitem{201} \textit{Id.}
\end{thebibliography}
not soon be eligible for retirement benefits. Further, she presented evidence of Delta's preference for young flight attendants. Further, she maintained that Delta told its investigative service to "pay special attention to age" when reviewing flight attendant applications. She also claimed that, between 1998 and 1999, every flight attendant hired in Cincinnati was younger than she and eighty-five percent of those hired were under forty years of age. Finally, she testified that she could not find other employment in the travel industry, "the only industry she knew," because Delta's termination for cause essentially blackballed her.

Delta claimed the plaintiff was receiving full pay from Delta on "sick and accident" leave and not on disability leave. Delta maintained that because she was on "sick and accident" leave her suspension and ultimate termination was proper because she was not eligible for pass privileges. Delta testified that several employees who were in their early twenties to late fifties were terminated over a period of two years for the same reason as the plaintiff. Delta stated that the particular employee that the plaintiff was relying on for comparison was reinstated on appeal due to compelling circumstances. Finally, Delta argued age discrimination is not proven by favorable treatment towards a single employee.

The plaintiff sought punitive damages and no specific amount of lost pay and benefits. At the conclusion of the trial, Delta was found liable for age and pension discrimination. The jury awarded damages of $770,000 in addition to attorney's fees and reinstatement of the plaintiff to her job.

MISTAKE 9:
FAILURE TO MAINTAIN A CLEAR WRITTEN UNDERSTANDING ABOUT EMPLOYER CONTRIBUTIONS TO UNION PENSION FUNDS

An employer that agrees in a collective bargaining agreement to contribute to a union pension fund may be required to make such contribu-
tions even if the union defrauded it into signing the agreement. ERISA provides:

[c]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.²¹⁵

This provision has been held to insulate multi-employer funds from defenses that might be available to an employer against a union, such as lack of majority status or fraud in the inducement.²¹⁶ In Gerber Truck Service, Inc.,²¹⁷ the Seventh Circuit declared that, under 29 U.S.C. § 1145, multi-employer funds are treated like "a holder in due course in commercial law... or like the receiver of a failed bank—entitled to enforce the [written collective bargaining agreement] without regard to understandings or defenses applicable to the original parties."²¹⁸ Courts continue to decline to give effect to oral understandings concerning contribution obligations that conflict with the terms of the written collective bargaining agreement, and three recent decisions have further defined, and in some respects, expanded the reach of Gerber.²¹⁹ Injunctions may be entered against employers to compel them to make the required contributions,²²⁰ and a successor employer may be liable for the delinquent contributions of its predecessor.²²¹

In New York State Teamsters Conference Pension & Retirement Fund v. United Parcel Service, Inc.,²²² a union-sponsored pension fund sued under 29 U.S.C. § 1145, claiming that UPS owed over $3 million in delinquent contributions.²²³ The issue was whether an eight-hour per day contribution cap from an earlier collective bargaining agreement ("CBA") remained in effect even though a new CBA containing no contribution

²¹⁶ Cent. States, S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv., Inc., 870 F.2d 1148, 1149 (7th Cir. 1989).
²¹⁷ Id.
²¹⁸ Id. (citations omitted).
²²³ Id. at 192.
cap had been signed.224 The union argued that the employer contributions should be in accordance with participation agreements providing for a weekly cap.225 The employer had signed the first participation agreement but added the words "subject to contract."226 Additionally, the employer had not signed a participation agreement since 1993.227 The court found that the participation agreements, even if not signed by the employer, governed because the CBA required the employer to sign the participation agreements.228 The court dismissed UPS' counterclaim against the fund seeking to recover millions of dollars in alleged overpayments.229

**MISTAKE 10:**

**MAINTAINING A DEFINED BENEFITS PENSION PLAN**

In the Trans World Airlines ("TWA") bankruptcy, the company's pension under-funding liability totaled $900 million.230 This liability arose from a defined benefit pension plan, which is a retirement payment arrangement in which the employer agrees to pay retirees a fixed amount per month.231 The employer contributions that fund these plans are frequently invested in the stock market.232 Given the current economic environment, many of these plans are now seriously underfunded.233 Administrators of underfunded plans have a variety of obligations, including notifying the government-owned non-profit corporation, the Pension Benefit Guaranty Corporation ("PBGC"), that the plan has become underfunded.234 Moreover, they must notify the plan's participants and beneficiaries of its underfunded status.235 After an employer becomes delinquent in paying $1 million of contributions to its pension plan, the PBGC may file a lien against the employer as well as its controlled group and affiliated service group members.236 The PBGC, where it shows proper cause, may also move to involuntarily terminate an underfunded

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224. *Id.* at 192-93.
225. *Id.* at 192.
226. *Id.* at 198.
227. *Id.*
228. *Id.* at 199-200.
229. *Id.* at 210-11.
231. *Id.* at 805.
233. *Id.*
235. 29 C.F.R. §§ 4011.3 & 4011.7 (2003).
pension plan.\textsuperscript{237}

In the event that the PBGC moves to terminate an employer's pension plan, the employer is quite likely to see its under-funding liability skyrocket. This is because there are two types of pension plan underfunding: under-funding on an ongoing basis and under-funding on a termination basis.\textsuperscript{238} The amounts shown as underfunded may differ dramatically depending on which type of under-funding is calculated. This may occur because the PBGC generally uses an interest rate assumption of 5% or less in computing termination liability, while employers often use a much higher interest rate assumption.\textsuperscript{239} Another reason why the employer calculation of under-funding often differs dramatically from the PBGC calculation is a result of the concept of “past service credit,” which allows an employer to establish a pension plan, give long-term employees immediate past service credit, and obtain a guaranty of payment from the PBGC.\textsuperscript{240} As long as a pension plan is ongoing, this past service credit may be amortized over a period of years; however, when a plan is terminated, all past service credit must be included in the under-funding calculation.\textsuperscript{241} “A firm may properly fund a plan on an ongoing basis but still severely underfund it on a termination basis. TWA, for example, properly funded its pension plan on an ongoing basis, but nevertheless underfunded the plan on a termination basis by $900 million.”\textsuperscript{242}

Given the potential for disaster in this area, it is not surprising that large corporations have been seeking to eradicate or modify their defined benefit pension plans.\textsuperscript{243} Possible modifications include changing the formula to a cash balance formula, reducing the rate of accrual or freezing their plans. But, for various reasons, including tradition and commitments made in written agreements, some employers are still maintaining defined benefit pension plans.\textsuperscript{244} Airlines seem particularly likely to have defined benefit pension plans. In 2002, seven major carriers were underfunded in the amount of $12 billion in traditional employee plans.\textsuperscript{245} For example, US Airways, which filed for bankruptcy in 2002, had a pen-

\begin{footnotesize}
\begin{enumerate}
\item Keating, supra note 230, at 808.
\item Id. at 812.
\item Keating, supra note 230, at 811.
\item Id. at 812.
\item Id.
\item Kadlec, supra note 239, at A24.
\item Id. (listing airlines as one of the four "worst situated" industries in terms of pension fund shortfalls).
\item James Ott, Pension Plans Suffer from Terrorist Fallout, AVIATION WEEK & SPACE TECH., June 10, 2002, at 36. The analyst group, Fitch Ratings, states that the "airline industry faces an $18 billion pension-funding shortfall." Downey, supra note 232, at E01.
\end{enumerate}
\end{footnotesize}
sion plan that was underfunded by $2 billion. It received permission from the bankruptcy court to terminate the plan for current retirees, leaving them to rely instead on payments provided by the PBGC, which are capped at $44,000 annually for a worker retiring at age 65.

CONCLUSION

Given the often dangerous nature of the work, the inherent public safety issues, the prevalence of unionized workforces, and the large number of hourly employees, it is not difficult to understand why businesses in the transportation industry may have more than their share of employment law problems. Nevertheless, with the benefit of hindsight, it is apparent that many of the unfavorable outcomes revealed in these cases could have been avoided through more workforce training, different human resources practices, or less employer resistance to extending reasonable pretrial settlement offers where warranted. This article was written to assist transportation industry employers in avoiding similar litigation disasters.

246. Downey, supra note 232, at E01.
247. Id.
Toppling the House of Cards That Flowed From
an Unsound Supreme Court Decision:
End Inadmissibility of Railroad Disability
Benefits in FELA Cases

I. INTRODUCTION

A forty-year-old railroad employee is injured on the job and claims
that he is unable to return to work. He and his attorney file a claim under
the Federal Employers’ Liability Act (“FELA”) demanding a large sum
for past and future lost wages. At the same time, the worker has applied
for and is receiving $2,200 each month in disability benefits through a
program established under another federal statute, the Railroad Retire-

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ment Act ("RRA"). His employer has contributed about two-thirds of the resources that fund this benefit. Nevertheless, in deciding the FELA case, the jury will not hear that the plaintiff is already receiving over $26,000 annually in disability payments. Instead, the jury will decide the amount due to the plaintiff in a vacuum and award the full amount of his or her past and future lost wages. The basic principle of tort law, making the injured person whole, is ignored, and the fairness of allowing a defendant to rebut the plaintiff’s case with relevant evidence is undermined. Ultimately, railroad companies are made to pay twice for the same injury in cases based on the slightest amount of negligence on their part.

Despite FELA’s language authorizing a railroad to offset its liability by payments made on a worker’s behalf, this scenario occurs because courts have improperly interpreted a forty-year-old Supreme Court case, Eichel v. New York Central Railroad Co.1 This article also will show that even if courts have correctly interpreted this precedent, the barely three-page opinion is on shaky legal and unsound public policy ground. This article will suggest that trial and appellate courts construe Eichel narrowly, and that the Supreme Court should revisit the issue and either reject the collateral source rule as applied to FELA cases or rule that disability payments are not a collateral source. The Supreme Court should recognize that, in the context of FELA, a payment attributable to the railroad is deductible from a damage award. Courts should allow juries to consider offsetting FELA awards in light of the railroads’ contribution to the funding of disability benefits and allow introduction of such evidence to show malingering and for other relevant purposes.

II. THE COLLATERAL SOURCE RULE

A. PURPOSE AND HISTORY OF THE COLLATERAL SOURCE RULE

The collateral source rule, which has been treated both as a rule of evidence and a substantive rule of law provides that, in computing damages against a tortfeasor, recovery will not be reduced by compensation the plaintiff received from sources other than the defendant, even if the payments mitigated the plaintiff’s actual monetary loss.2 Evidence of payments coming from third parties are barred by the rule and an injured party may recover lost wages or medical expenses from the tortfeasor even if he or she has already recovered full damages from a third party.3 The most typical example of a collateral source may be health benefits, either paid for by an employer or by a plaintiff. The first American application of the collateral source rule would appear to have occurred in the

2. See Restatement (Second) of Torts § 920A (1977).
3. See id., cmt. b.
1854 case of *Propeller Monticello v. Mollison.* The rule continues in many contexts today, but its public policy weakness has caused a number of state legislatures and courts to reduce its reach or eliminate it altogether.5

Courts recognize that the collateral source rule allows plaintiffs to collect twice for the same injury.6 While contrary to the fundamental principle that the purpose of tort law is to make a person whole, not “more than whole,” courts have allowed this exception to persist under the premise “that the wrongdoer ought not to benefit—in having what he owes diminished—by the fact that the victim was prudent enough to have other sources of compensation, which he was probably paying for.”7 As a public policy matter, those who support the collateral source rule view the problem of “windfall” recovery as secondary to relieving a tortfeasor of liability due to a plaintiff’s foresight in obtaining insurance or taking other action to mitigate the costs of the injury. The collateral source rule also is based on the premise that a “wrongdoer” should not benefit from the fact that the plaintiff received compensation from another party.8

The collateral source rule has also been thought to protect against the risk that a jury may find no liability if it knew the plaintiff received compensation from other sources. Such evidence may also be deemed prejudicial or confuse the jury under Rule 403 of the Federal Rules of Evidence, or the state rule equivalent.9

**B. Criticism of the Collateral Source Rule**

The collateral source rule has been called one of “the oddities of

4. 58 U.S. 152 (1854).
6. See, e.g., Estate of Farrell v. Gordon, 770 A.2d 517, 520 (Del. 2001) (“Double recovery by a plaintiff is acceptable so long as the source of such payment is unconnected to the tortfeasor.”).
7. Jeffrey O’Connell & Roger C. Henderson, Tort Law, No-Fault and Beyond 114 (1975); see also Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970) (stating that the rule “embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim’s providence.”).
9. Some scholars have argued that the rule can be justified on the grounds that the plaintiff may otherwise be left compensated before he or she must pay one-third or more of the recovery to a contingency fee lawyer. See Helfend, 465 P.2d at 68. This theory, however, is in derogation of the “American Rule” of each party paying his or her own attorney’s fees and steps on the legislature’s ability to provide for the recovery of attorney’s fees by statute in circumstance it deems appropriate as a matter of public policy.
American accident law.”\textsuperscript{10} As one commentator observed, “[t]he question of mitigation for benefits from a collateral source reflects a potential conflict between guiding objectives of tort law. The first is to compensate the injured party, to make him whole; the second and more dubious one is to burden the tortfeasor with the loss.”\textsuperscript{11}

The rule encourages litigation because it creates incentives to sue, even if a person has already received or is receiving substantial compensation. Such litigation and the attendant transactional costs, such as attorneys and expert witness fees and court expenses, increase insurance premiums and may needlessly use judicial resources. Because awards in such cases serve little or no compensatory purpose, their primary result is punishment of a defendant,\textsuperscript{12} a purpose better suited to awarding punitive damages within the constitutional framework established by the Supreme Court.\textsuperscript{13} Moreover, the vast expansion of the availability of punitive damages between the 1960s and 1980s has further weakened the call to use the collateral source rule as a backdoor means to punish a defendant.\textsuperscript{14}

The bases for the collateral source rule, which came into being prior to the New Deal, are often not applicable in today’s world of public bene-


\textsuperscript{12} See Hubbard Broad., Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980).


\textsuperscript{14} In the past thirty years, the underpinnings of the rule have further unraveled. First, state legislatures and courts drastically expanded the availability of punitive damages. Historically, and at the time of adoption of the collateral source rule, punitive damages were generally limited to cases of “the traditional intentional torts,” designed to punish an individual’s purposeful bad act against another. Victor E. Schwartz & Leah Lorber, Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment,” 54 S.C. L. REV. 47, 49 (2002). These included “assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property.” Id. at 50 (citations omitted). In the late 1960s, however, American courts radically expanded the availability of punitive damages beyond the traditional intentional torts. See Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398 (1967). “Reckless disregard” became a popular standard for punitive damages liability. See, e.g., UTAH CODE ANN. § 78-18-1(1)(a) (2002), and even “gross negligence” became enough to support a punitive damages award in some states. See e.g., Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988). By the late 1970s and early 1980s, unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface and the size of punitive damage awards “increased dramatically.” George L. Priest, Punitive Damages and Enterprise Liability, 56 S. CAL. L. REV. 123, 123 (1982).
fits and trust funds. Payments from these sources are not a result of any foresight on the part of the plaintiff, but the result of government-mandated programs, which are often at least partially, if not predominantly, funded by the same party that is subject to the lawsuit. Some courts, however, continue to strictly apply the collateral source rule to bar the jury from considering such payments to offset a defendant's liability. As times have changed, they have adhered rigorously to precedent and outdated reasoning. This is precisely the case in the FELA context, discussed in greater depth in Section III, where railroad companies pay the greatest share of the money used to finance railroad retirement disability benefits, yet courts do not permit benefits paid to the plaintiff to be deducted from the defendant's liability or even considered by the jury in computing an award. Courts also have applied the rule regardless of the degree of wrongdoing on the part of the defendant. They have applied it even when defendants are strictly liable.

III. RAILROAD RETIREMENT BENEFITS AND FELA

Railroad workers benefit from a pension and disability compensation system that is more generous than what others receive through social security. In addition, rather than be eligible for traditional workers' compensation, which has a wage loss and permanent disability component, railroad workers may sue under FELA and collect these payments in addition to receiving compensation for pain and suffering and other losses.

A. THE RAILROAD RETIREMENT ACT: HISTORY, SOURCES OF FINANCING, AND BENEFITS

1. Purpose, History, and Coverage

The Railroad Retirement Act ("RRA") is a unique federal law that provides a system of benefits for railroad employees and their dependents and survivors. The system, which first awarded annuities in 1936, is administered by the Railroad Retirement Board, with three members appointed by the President of the United States: one labor, one manage-

15. There are also other situations where application of the collateral source rule no longer makes sense, such as in strict product liability cases. See generally Schwartz, supra note 8, at 573-75.

16. Even in cases in which the collateral payment resulted from the plaintiff's purchase of insurance, some have questioned whether the purchaser has already received "the benefit of the bargain." As one commentator noted, "the insured is purchasing security—prompt and sure payments without the necessity of litigation and without regard to the liability and financial resources of prospective defendants." Note, supra note 11, at 751.

17. See generally Schwartz, supra note 8.

18. 45 U.S.C § 231.
ment, and one neutral. The Railroad Retirement Board administers programs that provide sickness benefits, retirement annuities, Medicare, unemployment, and disability benefits.

If an employee is injured and unable to return to work, then he or she may be eligible for either an "occupational disability annuity" or a "total and permanent disability annuity." Occupational disability payments are available to railroad workers who are unable to work in their regular jobs, including as a result of an on-the-job injury. In order to qualify for an occupational disability annuity, a worker must: (1) have a current connection with the railroad industry; (2) have twenty years of railroad service, or be at least age sixty and have ten years of railroad service; and (3) be "permanently disabled" for work in his or her "regular railroad occupation." Railroad workers who are unable to work in any kind of regular job may receive a total and permanent disability annuity. To receive total and permanent disability payments, a worker must (1) stop all work; (2) have ten years of railroad service or have at least five years of railroad service after 1995; and (3) be permanently disabled for any kind of "regular employment." To be eligible for total and permanent disability benefits, workers must meet the same requirements as someone applying for Social Security Disability Benefits. A recipient of RRA disability payments is permitted to earn up to $400 per month. If he or she earns more than this amount, then the RRA award is correspondingly reduced. This creates a disincentive for a recipient to work, as a person qualifying for a disability benefit effectively receives early retirement with full benefits.

2. Sources of Financing

Six sources provide funding for these benefits, with payroll taxes on railroad employers and employees under the Railroad Retirement Tax Act serving as the primary source. Other sources include employee contributions, fund transfers under the financial interchange with the social security system, investment earnings from the trust funds, general revenue appropriations for vested dual benefit payments, income taxes

19. See id. § 231f(a).
20. See id. § 231f(b).
21. See id. § 231a(1)(iv)-(v).
22. See id. § 231a(1)(iv).
23. See id. § 231a(1)(iv)-(v).
24. See id. § 231a(1).
26. Id.
27. Id. at 68.
on benefits, and a work hour tax paid by railroad employers under the Railroad Retirement Tax Act.\textsuperscript{28}

Employers and employees covered by the RRA pay higher retirement taxes than those covered by the Social Security Act, so that railroad retirement benefits remain substantially higher than social security benefits. Railroad retirement benefits consist of two components: Tier I and Tier II. Tier I is essentially the social security benefit that would be paid based on the employee’s lifetime earnings from employment under both the RRA and the Social Security Act.\textsuperscript{29} Railroad employees and employers pay Tier I taxes at the same level as social security taxes, 7.65%, consisting of 6.20% on earnings up to $87,000 in 2003 and 1.45% for Medicare hospital insurance on all earnings.\textsuperscript{30} Permanent and total disability benefits are funded out of Tier I payroll taxes.\textsuperscript{31}

In addition, rail employees and employers both pay tier II taxes which are used to finance railroad retirement benefit payments over and above social security levels, and are based only on an employee’s railroad service.\textsuperscript{32} Occupational disability benefits, which account for the majority of disability benefits paid, are financed by Tier II payroll taxes.\textsuperscript{33} The 2003 tier II tax rate on employees is 4.90%.\textsuperscript{34} Rail employers and rail labor organizations are taxed at a rate of 14.20% on employee earnings.\textsuperscript{35} Beginning with taxes payable for calendar year 2004, tier II taxes on both employers and employees will be based on an average account benefits ratio.\textsuperscript{36} Depending on that ratio, the tier II tax rate for employers will range between 8.20% and 22.1%, while the tier II tax rate for employees will be between 0 and 4.9%.\textsuperscript{37} Thus, railroad companies are responsible for funding approximately two thirds to three quarters of the occupational disability benefits paid to injured workers.\textsuperscript{38}


\textsuperscript{29} RRB HANDBOOK, supra note 25, at 8.

\textsuperscript{30} Id. at 49, 68.

\textsuperscript{31} Id. at 25.

\textsuperscript{32} Id. at 50.

\textsuperscript{33} Id. at 25.

\textsuperscript{34} Id. at 50.

\textsuperscript{35} Id. at 50, 68. Until 2002, rail employers were taxed at a rate of 16.1%. See id. at 68.

\textsuperscript{36} Id. at 68.

\textsuperscript{37} See id.

\textsuperscript{38} One court has recognized that railroad companies contribute approximately two-thirds of the annual total contributions to the RRA disability fund, yet felt constrained to follow the dicta of \textit{Eichel} after finding RRA payments to be a fringe benefit based on the statutory length of service requirement for eligibility. Laird v. Ill. Cent. Gulf R.R., 566 N.E.2d 944, 956 (Ill. App. 1991).
3. Amount of Disability Benefits

Disability benefits under the RRA are more generous than those provided by the Social Security system. For example, disabled railroad workers retiring directly from the railroad industry at the end of fiscal year 2002 were awarded $2,165 a month on the average while awards for disabled workers under social security averaged about $890.39

B. FELA

Injured railroad workers may also be able to recover funds under the Federal Employers' Liability Act ("FELA").40 FELA is a fault-based statute enacted by Congress in 1908 designed to compensate employees suffering work-related injuries and to "shif[t] part of the 'human overhead' of doing business from employees to their employers."41 It provides a claim for injuries resulting "in whole or in part" from the negligence of the railroad, its supervisors, its agents, and employees.42

1. Liability and Compensation Under FELA

In Rogers v. Missouri Pacific Railroad Co.,43 the Supreme Court ruled that, under FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer [sic] negligence played any part, even the slightest, in producing the injury or death for which damages are sought."44 This statement was in the context of whether the plaintiff had submitted sufficient evidence of causation to

41. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994) (quoting Tiller v. Atl. Coast Line R. Co., 318 U.S. 54, 58 (1943)). FELA has been severely criticized as obsolete and contrary to public policy. See generally Thomas E. Baker, Why Congress Should Repeal the Federal Employers' Liability Act, 29 Harv. J. on Legis. 79 (1992); Arnold I. Havens & Anthony A. Anderson, The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform, 34 Fed. B. News & J. 310 (1987). Since the enactment of this fault-based program, no-fault workers' compensation laws have been adopted by every state to cover virtually all other American workers. FELA requires both employer and employee to prove the other is at fault following an accident, thereby creating antagonism between railroads and their workers, and creating a disincentive to cooperate in order to determine the true causes of workplace accidents. FELA is characterized by excessive transaction costs, with a large portion of the monies paid out as compensation to trial lawyers rather than injured employers. Because of its reliance on litigation, FELA can also create a disincentive for employees to seek speedy rehabilitation and return to work.
43. 352 U.S. 500 (1957).
44. Id. at 506. In enacting FELA, Congress also abolished several common law defenses to reduce barriers to railroad worker recovery including "the fellow servant rule" and "the doctrine of contributory negligence in favor of . . . comparative negligence. . . ." and the assumption of risk.
reach a jury. Over the years, however, many lower courts have
interpreted Rogers to establish a lower standard of liability for recovery under
FELA than in ordinary negligence cases, upon which a jury is to be
instructed.

They have looked upon FELA as being based on almost an absolute
liability standard, a substitution for a workers’ compensation law. Some
state courts have gone so far as to characterize a plaintiff’s burden to
show causation as “featherweight.” If a worker meets this standard,
then he or she may recover lost wages and benefits. Also, unlike work-
ners’ compensation, the plaintiff recovers for pain and suffering. Addi-
tionally, unlike workers’ compensation, damages are uncapped. Jury
awards can easily reach into the millions of dollars.

2. FELA and Collateral Sources

FELA expressly incorporates a congressional policy of allowing con-
sideration of collateral source payments in certain conditions. This is
defense, and prohibited employers from exempting themselves from FELA through contract.

45. Rogers, 352 U.S. at 501. The Rogers Court granted certiorari to consider whether the
lower court’s decision to find, as a matter of law, that the plaintiff’s conduct had been the sole
cause of his injury “invaded the jury’s function.” Id.

46. See, e.g., Williams v. Long Island R.R. Co., 196 F.3d 402, 406 (2d Cir. 1999) (construing
FELA as creating a relaxed standard for negligence and causation); Syverson v. Consol. Rail
Corp., 19 F.3d 824, 825 (2d Cir. 1994) (holding that “under FELA and the case law construing it,
the common-law negligence standards of foreseeability and causation normally applied in sum-
mary judgment are substantially diluted . . . ”); Ackley v. Chi. & N. W. Transp. Co., 820 F.2d 263,
267 (8th Cir. 1987) (holding that the “duty to provide a reasonably safe place to work . . . is
broaden under [FELA] than a general duty of due care”); Kelson v. Cent. of Ga., 505 S.E.2d 803,
808 (Ga. App. 1998) (finding that only slight negligence, defined as a failure to exercise great
care, is necessary to support a FELA action).

Offshore Exp., Inc., 845 F.2d 1347, 1352 (5th Cir. 1988); Smith v. Trans-World Drilling Co., 772
F.2d 157, 162 (5th Cir. 1985)).

48. Baker, supra note 41, at 84.

49. Id.

50. Id.

plaintiffs who alleged that the railroad negligently exposed them to asbestos and thereby caused
them to contract the occupational disease asbestosis and suffer from fear of cancer between
$770,000 to $1.2 million each); Trans. Ins. Co., Inc. v. Post Exp. Co., Inc., 138 F.3d 1189, 1190 (7th
Cir. 1998) (considering bad faith claim against insurance company for failing to cover a $2 mil-
illion FELA award to a railway worker for a back injury); DeBiasio v. Ill. Cent. R.R., 52 F.3d 678,
687-89 (7th Cir. 1995) (affirming a $4.2 million FELA award, including $1.5 million for disability,
$1.5 million for past and future pain and suffering, $51,000 for past lost earnings, and $1.2 million
for the value of lost future earnings reduced to present value, as “not monstrously excessive”);
Frazier v. Norfolk & W. Ry. Co., 996 F.2d 922, 925-26 (7th Cir. 1993) (affirming $2,300,000
judgment in FELA lawsuit related to a permanent back injury as not excessive).

52. H.R. 1386, 60th Cong., at 7 (1st Sess. 1908).
contrary to courts' interpretation of FELA as not permitting the jury to consider evidence of railroad retirement benefits in mitigation of damages. At the time of FELA's adoption, Congress had not yet enacted the RRA. Nevertheless, Congress dealt with the issue of collateral sources in the context of "relief departments," which railroad companies had established and administered as a "species of insurance for the employee against the hazards of employment."53 Railroad employees could become members of these departments, which entitled the employee to certain payment should they be injured at work in exchange for discharging the railroad from further liability.54 As one court described the practice, "It was manifestly the intention of the parties, when [the employee] became a member of the relief association, that the pursuit of one remedy should operate as an abandonment of the other. [The employee] had his choice of one of the two methods of relief, but could not resort to both."55

Prior to the 1908 enactment of FELA, courts upheld these practices as valid.56 Congress, however, then enacted Section 55 of FELA, which overturned this legal immunity,57 and voided such agreements.58 45 U.S.C. § 55 provides:

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.59

53. Id. See also Phila., Balt., & Wash. R.R. Co. v. Schubert, 224 U.S. 603, 612-13 (1912) ("The practice of maintaining relief departments, which had been extensively adopted, and of including in the contract of membership provision for release from liability to employees who accepted benefits, was well known to Congress . . . .").

54. See id. Section 55 did not restrict an employer and employee from entering into settlement agreements "after the accident occurred and the liability of the defendant arose." Patton v. Atchison, T. & S.F. Ry. Co., 158 P. 576, 577 (Oka. 1916) (explaining "only contracts which attempt to relieve the railroad company from its liability in anticipation of possible injury come within the purview of this act of Congress." Id. at 578.).

55. Balt. & O. R. Co. v. Miller, 107 N.E. 545, 546 (Ind. 1915) (citing Pittsburgh R. Co. v. Moore, 53 N.E. 290 (Ind. 1899)).

56. Id.


58. See Miller, 107 N.E. at 546.

59. 45 U.S.C. § 55 (1908) (emphasis added). Section 5 of the Employer's Liability Act of April 22, 1908, ch. 149, 35 Stat. 65, was identical to the present Section 55 except for a few minor stylistic changes. This article treats the Section 5 and Section 55 interchangeably, and refers to Section 55 to avoid confusion.
Although Congress believed that it was necessary to stop railroad practices that eliminated a worker's ability to sue, Congress believed that it was fair and reasonable to reduce a railroad's liability for injury in consideration of amounts it had already paid on the workers' behalf. For this reason, Section 55's proviso allowed employers to offset their contribution payments to the relief fund from their liability under FELA "any sum the company had contributed toward any benefit paid to the employee," so long as it did not purport to discharge the employer from liability.\textsuperscript{6} Congress indicated that this setoff "would seem to be entirely fair and all that ought to be required of the employee."\textsuperscript{7}

Courts have recognized that Section 55 ensures that an employee is fully compensated for the extent of his or her loss,\textsuperscript{8} while preventing "the imposition upon an employer of double liability for one loss."\textsuperscript{9} One federal appellate court recognized that "[t]he history also shows that the proviso . . . was included in order to ensure that the employer was given credit for money it had already paid to the employee on account of the injury."\textsuperscript{10} Courts have permitted employers to use this set off in FELA cases when they establish supplemental sickness benefits programs or their own disability plans and pay such benefits to railroad employees.\textsuperscript{11} Courts have also allowed railroads to offset their FELA liability by payments from an employer-funded healthcare insurance policy to an employee, or the premiums paid by the railroad,\textsuperscript{12} provided that the railroad voluntarily established the program, paid at least a portion of the related premiums, and the benefit was not in part compensation for the em-

\textsuperscript{60.} Schubert, 224 U.S. at 612-13.
\textsuperscript{61.} H.R. 1386, 60th Cong., at 7 (1st Sess. 1908).
\textsuperscript{63.} Welsh v. Burlington N., Inc., Employee Benefits Plan, 54 F.3d 1331, 1337 (8th Cir. 1995).
\textsuperscript{64.} Folkestad v. Burlington N., Inc., 813 F.2d 1377, 1380 (9th Cir. 1987).
\textsuperscript{65.} See, e.g., Clark v. Burlington N., Inc., 726 F.2d 448, 451 (8th Cir. 1984) (reducing the FELA award by the full amount of disability payment paid to the worker through the railroad's short and long term disability plan for nonunion workers); Kalanick v. Burlington N. R.R. Co., 788 P.2d 901, 908-09 (Mont. 1990) (ruling that railroad was entitled to setoff with regard to supplemental sickness benefits paid under terms of collective bargaining agreement); W.T. Washington v. Atchison, Topeka & Santa Fe Ry. Co., 834 P.2d 433, 437 (N.M. Ct. App. 1992) (ruling that railroad was entitled to setoff with regard to supplemental sickness benefits paid under terms of collective bargaining agreement).
\textsuperscript{66.} See, e.g., Walton v. Nat'l R.R. Passenger Corp., 673 F. Supp. 744, 746 (D. Md. 1986) (ruling that medical payments provided to the plaintiff under a group medical policy, which was required under the railroad's collective bargaining agreement, were admissible in an employee's lawsuit under FELA); Lucht v. Chesapeake & Ohio Ry. Co., 489 F. Supp. 189, 190 (W.D. Mich. 1980) (holding that employer is entitled to set off health insurance premiums paid on behalf of the employee when he or she brings suit under FELA).
ployee’s work. These cases generally look to a collective bargaining agreement as evidence that the provision of such benefits was not in part consideration for the employee’s labor, and therefore was not subject to the collateral source rule.

While lawyers can argue that Section 55 does not precisely apply to Railroad Retirement Act contributions or payments because they stem from a federal statutory obligation rather than a “contract, rule, regulation, or device” imposed by the railroad, the public policy behind the section is right on point. Workers should receive full compensation for their injury, but resources needed for such injuries should not be wasted on providing workers with double compensation. Section 55 provides public policy guidance to courts when they consider the applicability of the collateral source rule in FELA lawsuits where the plaintiff is already receiving disability benefits that were primarily paid for by his or her employer.

IV. **Eichel v. New York Central Railroad**

A forty-year-old Supreme Court case, *Eichel v. New York Central Railroad Co.*, is responsible for lower courts’ vigorous adherence to the collateral source rule in FELA cases today. The case blocks public policy considerations that strongly suggest that a jury should consider railroad disability benefits in calculating damages and evidence relevant to other issues, such as malingered. Does a three-page, forty-year-old, *per curiam* opinion, in which application of the collateral source rule was never argued, deserve such blind deference? We suggest not; this is why.

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67. See, e.g., *Folkestad*, 813 F.2d at 1383; *Lyons v. S. Pac. Transp. Co.*, 684 F. Supp. 909, 911 (W.D. La. 1988); *Gonzalez v. Ind. Harbor Belt R.R. Co.*, 638 F. Supp. 308, 310 (N.D. Ind. 1986). *But cf.* *Perry v. Metro-North Commuter R.R.*, 716 F. Supp. 61, 63-64 (D. Conn. 1989) (ruling that the employer’s group insurance plan, which did not extend to on-the-job accidents, was “a general benefit, not one restricted to medical costs arising from circumstances that give rise to FELA claims” and was therefore not entitled to setoff); *Brady v. Nat’l R.R. Passenger Corp.*, 714 F. Supp. 601, 603-04 (D. Conn. 1989) (ruling that short term disability benefits paid wholly by employer were subject to setoff, while CIGNA insurance policy proceeds for long term disability did not show an intent to specifically cover liability for FELA claims). At least one appellate court has even allowed a railroad company to bring a separate action to recover the full amount of funds that it provided to the employee through its supplemental sickness benefit program following a judgment against the employer in the employee’s FELA claim. *See Burlington N. R.R. Co. v. Strong*, 907 F.2d 707, 712-14 (7th Cir. 1990) (ruling that such an action was not a compulsory counterclaim and that the employer had a right to set off off the full amount, not just the premiums paid, pursuant to a collective bargaining agreement).

68. See, e.g., *N.Y., New Haven & Hartford R. Co. v. Leary*, 204 F.2d 461, 467-68 (1st Cir. 1953), *cert. denied*, 346 U.S. 856 (1953) (finding that the RRA’s “retirement fund is not an ‘insurance, relief benefit, or indemnity’ . . .” permitting a setoff under Section 55 of FELA).


70. *Id.* at 255.
A. Finding the Holding of Eichel

Eichel involved a claim by a railroad worker for an alleged permanent disabling injury that he incurred during his employment for New York Central Railroad. During the trial, the plaintiff claimed that he was unable to return to work due to the permanency of his injuries. The defense sought to introduce evidence that the plaintiff was receiving $190 per month in disability pension payments to show "a motive for [petitioner] not continuing work, and for his deciding not to continue going back to work after the last accident." The evidence was offered for impeachment purposes, to show that the plaintiff had chosen to live off his pension instead of returning to work, although he was able to do so. This is known as "malingering," where an able claimant, because he or she is receiving disability or other benefits, opts to stay home rather return to his or her job. The trial court excluded the evidence on the plaintiff's objection and the jury returned a $51,000 verdict. The Second Circuit reversed, finding it prejudicial error to not allow the jury to consider such evidence to support the defendant's theory of malingering, and ordered a new trial on damages.

The Supreme Court in Eichel reversed the Second Circuit and upheld the trial court's discretion in excluding the evidence of disability benefits. The core of the Supreme Court's ruling in Eichel is that "[i]nsofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension." Thus, the Court did not hold that evidence that a plaintiff had or was receiving railroad disability payments was inadmissible in any circumstance. Rather, it held that, given the particular facts of the case, and in consideration of other available persuasive evidence, introduction of such evidence would have insufficient probative value in regard to malingering.

71. Id. at 253.
72. Id.
73. Id. at 254-55.
74. Id. at 254.
75. The First Circuit has defined malingering as "feigning physical disability to avoid work and to continue receiving disability benefits." McGrath v. Consol. Rail Corp., 136 F.3d 838, 840 (1st Cir. 1998).
76. Eichel, 375 U.S. at 253-54.
78. Eichel, 375 U.S. at 255-56.
79. Id. at 255.
B. *Dicta, Dicta, and More Dicta*

In law school, one is taught to distinguish between a court's holding, that is, what determination is essential to the issues actually litigated and the outcome of the case, and dicta, which include judicial musings that are not essential to the outcome. The rigid adherence of some lower courts to the principle that railroad disability benefits should not to be considered by the jury for any purpose are based on dicta in the *Eichel* court's ruling.

Lower courts should recognize that the issue of whether evidence of a plaintiff's railroad disability benefits for the purpose of offsetting the plaintiff's total damages was *never* argued in *Eichel*. In fact, the Supreme Court's discussion begins with the acknowledgment that the railroad "does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner." 80 In support of this statement, the Court cited a 1953 First Circuit case, *New York, New Haven & Hartford Railroad Co. v. Leary*, which, in a half-page of analysis, with little legal precedent, decided to follow the "familiar principle that payments received by a plaintiff from a collateral source are not in mitigation of damages." 81 The *Leary* court reasoned that "[w]e think these age and service requirements for disability payments remove these payments from the coverage of § 55 . . ." and noted that benefits resulting of social legislation are "not directly attributable to the contributions of the employer." 82 The flaw in this reasoning is that, as a payment required by law, the employer's contributions to the railroad retirement benefit were not due to the employee's labor, and, thus, not a pension benefit.

In addition to its reliance on *Leary*, the *Eichel* Court also noted that it had "recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury." 83 The Court was referring to *Tipton v. Socony Mobil Oil Co.*, 84 another short *per curiam* decision, involving the suit of a roughneck 85 under the Jones Act, 86 for an injury that occurred during his work on a drilling barge. 87 The employer's liabil-

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80. *Id.* at 254.
81. *Id.* (citing *Leary*, 204 F.2d at 468).
82. *Leary*, 204 F.2d at 468.
ity under the Jones Act turned on whether he was a "seaman," and hence covered under the Act, or an offshore drilling employee that would not be covered by the Act.\textsuperscript{88} The defense introduced evidence that the roughneck was receiving compensation for the same injury through the Longshoreman's and Harbor Workers' Compensation Act to demonstrate his status as an offshore employee, since Longshoreman's benefits are not available to a "member of a crew of any vessel."\textsuperscript{89}

The Supreme Court found that the admission of evidence of the Longshoreman's benefits was prejudicial error because it was "pressed upon the jury."\textsuperscript{90} The Court noted that counsel for the defense repeatedly emphasized throughout the trial that the plaintiff "has a remedy under a federal compensation act, and in fact received benefits in the form of weekly payments under that act . . . ." and the judge had further prejudiced the jury by providing an elaborate discussion of compensation under the Longshoreman's Act in his instructions.\textsuperscript{91} Had this been the end of the Court's ruling, lower courts following \textit{Eichel} might be on firmer ground when interpreting the Supreme Court's binding precedent as not permitting the introduction of railroad retirement benefits under any circumstances. Lower courts need to be aware of the fact that the \textit{Tipton} Court went on to recognize that the judge had failed "to frame a cautionary instruction" that the evidence was only to be used to determine the roughneck's status, demonstrating that collateral benefits might be properly introduced for some purposes, but not others.\textsuperscript{92}

\section*{C. The Aftermath of \textit{Eichel}}

Following \textit{Eichel}, courts have with near unanimity held that a railroad may not introduce evidence of RRA payments received by an employee as an offset or for any other purpose. Many of these courts have read \textit{Eichel} to require the "strict and absolute exclusion" of evidence of railroad disability payments in FELA cases.\textsuperscript{93} Some courts have recog-

\begin{footnotesize}
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  \item \textsuperscript{88} \textit{Id.} at 34.
  \item \textsuperscript{89} \textit{Id.} at 34-35 (citing Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(c)(1) (1953)).
  \item \textsuperscript{90} \textit{Id.} at 35.
  \item \textsuperscript{91} \textit{Id.} at 35-36.
  \item \textsuperscript{92} \textit{Id.} Justice Harlan dissented from the Court's opinion and would not have disturbed the intermediate appellate court's ruling that the admission of the collateral source evidence, for the purpose for which it was offered, to show the plaintiff's status, was "sufficiently relevant" and "not clearly inadmissible," and, if it was improper, such admission was not prejudicial. \textit{Id.} at 37-38.
  \item \textsuperscript{93} Morse v. S. Pac. Trans. Co., 133 Cal. Rptr. 577, 580 (Cal. Ct. App. 1976) (citing several federal appellate level decisions); Finley v. Nat'l R.R. Passenger Corp., 1 F. Supp. 2d 440, 443-45 (E.D. Pa. 1998) (ruling that evidence of plaintiff's receipt of disability benefits is prejudicial as a matter of law and its admission requires a mistrial); Hileman v. Pittsburgh & Lake Erie R.R. Co., 685 A.2d 994, 997 (Pa. 1996) (ruling that \textit{Eichel} involves "a straightforward application of the collateral source rule: a defendant may not introduce evidence that a plaintiff has received
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nized a narrow exception when the plaintiff puts his financial condition at issue, thereby “opening the door” to the railroad’s introduction of his or her receipt of RRA disability payments. These courts’ adherence to <i>Eichel</i> does not comport with the purposes of the collateral source rule. For example, in a 1995 case, the Tenth Circuit began its analysis by correctly recognizing the rationale behind the collateral source rule:

First, public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source. Second, by assuring a plaintiff’s payments from a collateral source will not be reduced by a subsequent judgment, the rule encourages the maintenance of insurance. The collateral source rule generally does not apply when the collateral source is somehow identified with the tortfeasor in a suit against the tortfeasor. Under those circumstances, the additional compensation will be used to offset tortfeasor liability because it is as if the tortfeasor himself paid.

Under these principles, the collateral source rule should not apply in the RRA context because the source of the benefits is primarily employer contributions and the “insurance” is mandated by statute. Nevertheless, the court treated the benefits as “payments from the public treasury” to which the employee also contributed, and, as such, a collateral source. The court purported to follow <i>Eichel</i>, despite the railroads’ argument that the Court’s narrow holding was on the issue of malingering.

V. OVERCOMING EICHEL

Courts can in a fair and just manner address situations where, under current FELA jurisprudence a plaintiff would receive double compensation through a FELA lawsuit. In these situations, his or her employer will
pay both a substantial portion of the contributions to the RRA fund and the entire FELA award. To achieve equitable results, courts should not and need not feel constrained by precedent that blindly follows those rulings. *Eichel*, when properly read, allows admission into evidence of RRA disability benefits for certain purposes, such as to show malingering or to rebut evidence of a plaintiff’s allegedly poor financial situation. In addition, in light of the inapplicability of the historic justifications for the collateral source rule and the public policy expressed by Congress in Section 55, the Supreme Court should clarify that a jury may consider a plaintiff’s receipt of disability benefits in reaching a fair determination of damages.

A. Re-reading *Eichel*: Evidence of RRA Disability Benefits is Admissible for Some Purposes

Courts wisely have begun to break from strict adherence to the absolute exclusionary rule purportedly required by *Eichel* and admitted evidence of the plaintiff’s receipt of RRA disability benefits for certain purposes. For example, in *McGrath v. Consolidated Rail Corp.*, the First Circuit did “not read *Eichel* as requiring the per se exclusion of collateral source evidence in FELA cases” and found that *Eichel* simply involved the trial court’s broad discretion to exclude evidence in a particular factual situation when the potential for prejudice is greater than its probative value. Thus, the First Circuit found that a trial court did not abuse its discretion in admitting evidence of a plaintiff’s RRA disability payments to show his lack of motivation for returning to work. The trial court was able to reduce any prejudice from this admission through issuing cautionary instructions precisely as the Supreme Court had suggested in *Tipton*. The First Circuit concluded, “[i]f there is little likelihood of prejudice and no strong potential for improper use, and a careful qualifying jury instruction is given, then receipt of compensation benefits may be admissible for the limited purpose of proving another matter.”

The United States District Court for the Northern District of Illinois, citing *McGrath*, has also recognized that:

The *Eichel* ruling is . . . based not on the lack of relevance of collateral source income, but rather on the potential for prejudice. As a result, courts generally have considered the exclusion of collateral source income nor to be an absolute rule, but instead a determination that will turn on the particular

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98. 136 F.3d 838 (1st Cir. 1998).
99. Id. at 841.
100. Id.
101. Id.
102. Id. (quoting Simmons v. Hoegh Lines, 784 F.2d 1234, 1236 (5th Cir. 1986)).
facts of each case.\textsuperscript{103}

For this reason, the district court ruled on a plaintiff's motion \textit{in limine} that it would exclude evidence of the plaintiff's RRA benefits, but noted that it retains "broad discretion" to allow the defendant to introduce such testimony to rebut any evidence offered by the plaintiff that suggest "that the costs of his medical bills have caused him to suffer economic hardship."\textsuperscript{104}

Most recently, in May 2003, the Court of Special Appeals of Maryland ruled that, in the case of a locomotive engineer who sustained a disabling shoulder injury, evidence of RRA payments could be introduced for two purposes.\textsuperscript{105} First, the court found that the collective effect of evidence introduced by the plaintiff on his financial status including, among other things, his inability to afford health insurance, pay college tuition for his son, save for retirement, and maintain his home opened the door to the introduction of evidence of his receipt of RRA benefits.\textsuperscript{106} The court distinguished \textit{Eichel} as involving the introduction of collateral source evidence "purely for the purpose of impeaching the plaintiff, not in response to any evidence given by plaintiff that would have put his economic status into question."\textsuperscript{107} Second, the court found, that such evidence was admissible on the issue of malingering, when evidence showed "at least, a suggestion" that the plaintiff chose not to work.\textsuperscript{108}

In May 2004, Maryland's highest court reversed the mid-level appellate court.\textsuperscript{109} Part of its reversal rested on its reading of the facts, rather than the law. The court agreed that receipt of RRA benefits may be admissible to rebut a plaintiff's claim of financial distress, but disagreed with the lower court that the plaintiff's statements, and those of his coun-

\textsuperscript{104} \textit{Id.} at *2-3.
\textsuperscript{105} CSX Transp., Inc. v. Haischer, 824 A.2d 966, 975-77 (Md. Ct. Spec. App. 2003). The court also recognized that a plaintiff's attorney's repeated statements to a jury that FELA provided the "only method" of compensation could place the plaintiff's financial status into question and allow introduction of the receipt of RRA benefits, although it found that counsel had not stepped over this line in the case before it. \textit{Id.} at 974.
\textsuperscript{106} \textit{Id.} at 975-76.
\textsuperscript{107} \textit{Id.} at 976.
\textsuperscript{108} \textit{Id.} at 977 (quoting Kelch v. Mass Transit Admin., 400 A.2d 440 (Md. 1979) (permitting introduction of social security disability benefits on issue of the plaintiff's ability to work)). Still, the Maryland court accepted the premise that the collateral source rule ordinarily excludes evidence of payments "by a source other than a defendant." \textit{Id.} at 972 (citing Am. Paving & Contracting Co. v. Davis, 96 A. 623 (Md. 1916)). The court did not consider the introduction of the railroad company's payments into the RRA fund, nor the policy embodied by 45 U.S.C. § 55 (1908).
sel, reached the level of poverty necessary for admissibility. The court, however, found the statements to accurately show that the plaintiff would face various increased costs, without claiming that he would be unable to afford these expenses. The court also interpreted *Eichel* to adopt a bright-line rule that danger of admitting RRA benefits “outweighs any probative value of the evidence, at least as to malingering.”

The United States Court of Appeals for the First Circuit, United States District Court for the Northern District of Illinois, and the Maryland appellate court recognized that the Supreme Court never intended to exclude the receipt of railroad disability benefits in every case. To the contrary, *Eichel* – particularly when read with *Tipton* – provides courts with ample discretion to allow such evidence for the purpose of rebutting evidence offered by the plaintiff and to show malingering, with a proper cautionary instruction.

B. ALLOWING JURIES TO CONSIDER RAILROAD CONTRIBUTIONS TO THE RRA FUND

Courts should not only admit evidence of RRA disability payments on the issue of malingering or in rebuttal, but also allow the jury to consider an employer’s contribution to the RRA fund. The “assumption” in the dicta in the *Eichel* case was not only unsound public policy, it was simply incorrect.

1. Getting Beyond the Source of Funding

The collateral source rule only comes into play when the source of the payments to be offset against liability come from a source or entity entirely independent from that which is subject to the lawsuit. Courts relying on dicta in *Eichel* to find that the collateral source applies in FELA cases rely substantially on the fact that the employer-defendant is not the only contributor to the railroad disability fund. The employer does, however, provide the greatest source of revenue for the fund. While these courts note correctly that employer, employee, and public contributions also finance the fund, this observation completely misses the public policy mark.

Outside of the RRA disability context, courts have recognized that “[a]pplication of the collateral source rule depends less upon the source of funds than upon the character of the benefits received.” In fact, the

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110. *See id.* at *9-10.*
111. *See id.* at *8.*
112. *Id.* at *8.*
113. *See, e.g., Leary,* 204 F.2d at 468.
Ninth Circuit observed that “courts have been virtually unanimous in their refusal to make the source of the premiums the determinative factor in deciding whether the benefits should be regarded as emanating from the employer or from a ‘collateral source.’”115 In fact, in early Supreme Court cases interpreting Section 55 to permit an offset, the employer and the employee jointly funded the benefits plans at issue. In those cases, the Court ruled that the statute permitted the employer to setoff the sum it had contributed into the fund for that worker.116

What is most relevant from a public policy perspective is whether the payments are “on account of the injury”117 or whether they are considered part of the employee’s income for service rendered, deferred compensation, a pension, or a fringe benefit.118 For this reason, in cases where the employer pays for general healthcare coverage, and that insurance provides payments to the employee for his or her injury, most courts consider these payments to be nondeductible under the collateral source rule; they are not a fringe benefit.119 This is the case even when an employer contributes 100% of the premiums.120 Likewise, retirement pensions, which are voluntarily provided by a company based on an employee’s tenure, are a result of the employee’s labor and are therefore nondeductible.

What these courts recognize is that the proper question is whether the employer’s contribution was the type of benefit that is earned by the employee’s labor or a payment in compensation for an injury or in anticipation of a potential future injury. Disability payments made from the RRA fund are certainly “on account of injury.” Although the RRA incorporates a years-of-service component in determining eligibility for benefits, employer contributions under the RRA program are not a result of the employee’s labor or a benefit achieved through a collective bargaining agreement as part of a compensation package.121 Rather, such payments are mandated by statute. These cases indicate that the correct

Inc., 726 F.2d 448, 450 (8th Cir. 1984) stating that “[t]he important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer” (citing Haughton v. Blackships, Inc., 462 F.2d 788, 790 (5th Cir. 1972); Hall v. Minn. Transfer Ry., 322 F. Supp. 92, 95 (D. Minn. 1971)).

115. Folkesad, 813 F.2d at 1381.
116. See, e.g., Chi. & Alton R.R. Co. v. Wagner, 239 U.S. 452, 458 (1915) (recognizing that the relief department was partially funded by monthly contributions of the employees).
117. This language is employed by Section 55 of FELA, but is useful beyond that context as a general application of the collateral source rule. Federal Employers’ Liability Act 45 U.S.C. § 51 & § 55 (1908).
119. Blake, 484 F.2d at 206 (citing Hall, 322 F. Supp. at 97; Haughton, 462 F.2d at 791).
120. See Russo, 486 F.2d 1018 at 1020-21; Clark, 726 F.2d at 450.
121. RRB Handbook, supra note 25, at 3.
application of the collateral source rule should permit the jury to consider at least an employer’s share of contributions to the RRA fund, if not the total amount of disability payments received by the employee, in determining a damage award in a FELA lawsuit.

2. The Traditional Justifications for the Collateral Source Rule Do Not Apply

As more fully discussed earlier, the collateral source rule tolerates double compensation based on two related principles. The first rationale is that a defendant should not benefit by a reduction in his or her liability when a plaintiff had the foresight to purchase insurance. Deducting amounts paid through insurance from tort liability might discourage people from making such purchases, and thus increase, rather than decrease, an individual’s risk of loss. The second rationale is that a true wrongdoer should not benefit from the happenstance that the plaintiff had been compensated by another “collateral source.”

In the context of FELA, both of these rationales fail. First, a railroad worker’s receipt of disability benefits under the RRA is not a result of any foresight on the part of the worker. He or she did not seek and purchase this “insurance.” Rather, the employee receives the benefits as a result of a mandatory government program. Deducting what would otherwise provide double compensation to the worker will not discourage people from purchasing insurance. Second, railroads are not typical “wrongdoers” in the sense of traditional tort law. Courts are instructing juries that a railroad may be held liable for even the “slightest” degree of negligence, and virtually eliminating the traditional common law requirements of causation and foreseeability. They impose FELA liability in a manner resembling a workers’ compensation statute, providing essentially no-fault recovery for many on-the-job injuries. So long as courts continue to apply Rogers in this way, a railroad should not be considered a “wrongdoer” any more than Wal-mart is a wrongdoer when an employee trips while stocking the aisles. There is therefore little basis for placing the risk of loss under these circumstances squarely and solely upon the railroad.

VI. Conclusion

Courts should critically examine the history and interaction of RRA disability benefits and FELA, the policy considerations behind the collateral source rule, and the Eichel decision. These sources provide a strong basis for both the introduction of such benefits to show malingering as well as the jury’s consideration in assessing damages. When such evi-

122. See supra notes 41-44 and accompanying text.
dence is offered, the court can issue a cautionary instruction to the jury that sets forth the purpose of the proof – an option suggested in the case that formed the basis of the *Eichel* decision.

Courts should also find that the collateral source rule is not applicable to the introduction of the receipt of RRA disability benefits to compensate the worker should he or she suffer a disability. They should permit juries to consider such evidence to award damages that fully and fairly compensate the worker without imposing what are effectively a form of punitive damages against a nominally negligent defendant in routine on-the-job injury cases. The challenge of overcoming the misreading of *Eichel*, however, is substantial. Lower courts may not be persuaded by what they know is sound public policy because they misapprehend that a Supreme Court opinion is “on point.” 123 For this reason, and to set public policy in a sound direction, it is time for the Supreme Court to revisit *Eichel*, to clarify its holding to permit introduction of evidence of RRA benefits on the issue of malingering in appropriate situations, and to permit the jury to be made aware that the employee is receive a disability pension through a government-mandated program primarily funded by the railroad. 124

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123. See, e.g., Snipes v. Chi., Cent. & Pac. R.R. Co., 484 N.W.2d 162, 166-67 (Iowa 1992) (rejecting the defendant’s call for a “critical re-examination” of the applicability of the collateral source rule in FELA cases based on nationwide trends in tort law based on “well settled” federal law).

124. Certiorari has been sought in at least two cases that offer the Court the opportunity to do so. See Green v. Denver & Rio Grande Western R.R. Co., 59 F.3d 1029 (10th Cir.), cert. denied, 516 U.S. 1009 (1995); Kansas City S. Ry. Co. v. Giddens, 29 S.W.3d 813 (Mo. 2000) (en banc), cert. denied, 532 U.S. 990 (2001).
The Teamsters' Union Attempt To Organize Overnite Transportation Company: A Study of a Major Union Failure

Herbert R. Northrup*

On October 24, 2002, three years to the day after it ordered a strike at Overnite Transportation Company, the International Brotherhood of Teamsters ("IBT" or "Teamsters") made an unconditional offer to the company to return employees to work.1 Earlier that day, the company had noticed that picketers at the few company facilities that had maintained the strike had withdrawn.2 The union offer, which the company gladly accepted, was made without any claim for back pay or other considerations, despite the IBT's assertions throughout the strike that it was caused by company unfair labor practices, which, if endorsed by the National Labor Relations Board ("NLRB") and the courts,3 might have en-

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The author thanks Carla E. Beazley, Sue Torelli, John N. Raudabaugh, Marc Chrismer, Daniel B. Pasternak, John D. Schulz, Herv H. Aitken, and the staff of the NLRB Information Division for assistance in obtaining unpublished cases and other materials for this study.


2. Id.

3. This claim has been continuously accepted by the associate editor and principal writer of Traffic World, the major weekly journal in the field, but not endorsed by the courts and certainly denied by Overnite management. Traffic World even went so far as to state in its
titled some strikers to back pay. At the time of the strike’s conclusion, the company put the number of strikers at about 300, the union at more than 500. The company immediately contacted the union and an agreement was reached that strikers requesting reinstatement should notify the company within approximately one month if they wished to be reinstated. Only ninety-five strikers made a reemployment request, and only one was disqualified by the company because the company alleged that he participated in serious violence. All returnees were accorded full seniority once back on the job. The IBT did not appeal the barred striker ruling.

This article describes and analyzes the strike, why the IBT initiated it, and why it was unsuccessful. To lay a foundation, the trucking industry’s structure is first examined, particularly the less-than-truckload (“LTL”) sector in which Overnite is a major participant. Likewise recounted is the history of Overnite under its founder, Harwood Cochrane, whose method of operation set the company apart from its competitors before he sold it to the Union Pacific Corporation in 1986. Both the policies of Cochrane and the sale of the company played a role in the attempts of the IBT to unionize the company and the outcome of the strike.

I. The Structure of the Over-the-Road Trucking Industry

The over-the-road-trucking industry is composed of two types of common carriers: less-than-truckload carriers and truckload (“TL”) carriers. Each type is subject to different economic considerations that affect its growth and structure. This is very well illustrated by the reaction of trucking companies to the Motor Carrier Act of 1980, which deregula-

5. Telephone Interview with the Office of Senior Vice-President and General Counsel, Overnite Transp. Corp. (Oct. 26, 2002).
6. Id.
7. Teamster’s Union Calls End to Strike, supra note 1, at AA-1.
8. OVERNITE TRANSPORTATION, HISTORY 60+ YEARS OF SERVICE (2000). For an account of such mergers and acquisitions during this period, see Herbert R. Northrup, The Failure of the Teamsters’ Union to Win Railroad-Type Protection for Mergers or Deregulation, 22 TRANSPL. L.J. 365 (1995).
lated the industry.

A. THE LTL SEGMENT

The LTL trucking industry segment consolidates shipments from various sources into a truckload and carries them to the same or nearby destinations, or to several destinations where the shipments are unloaded and re-loaded at terminals for their respective destinations. The LTL business requires substantial investment for terminals, local trucking facilities for delivery, computer facilities for scheduling, order taking, billing, telecommunications facilities, and other functions, as well as large trucking equipment. As a result, entry into this branch of trucking operations is limited by the requirement of extensive financial investment.

The number of LTL motor carriers has substantially declined since the passage of the Motor Carrier Act of 1980. A study by an industry magazine found that, between 1980 and 1991, 43 of the 100 largest motor carriers had closed or were otherwise no longer in business. Another fourteen had survived by merging, by being taken over, or by selling out to another carrier, and two remained in business but had ceased LTL operations. All but ten of the carriers that closed, merged, or discontinued were LTL carriers. A similar study issued in 1993 by Trucking Management, Inc., which then represented several of the largest LTL unionized carriers in collective bargaining, is partially summarized in Table 1. This study reported that:

In the 1970s, around 200 carriers a year closed their doors; from 1980-89, over 11,500 failed. There were 2,000 closings in 1991 alone. In 1979, 65 of the top 100 carriers were identified as primarily LTL. Of those 65, more than two-thirds had ceased operations by 1991. In fact . . . only eight LTL carriers of the top 50 trucking companies from 1965 [by then] . . . have survived deregulation . . . All the companies that failed were unionized carriers . . .

The author's updates to Table 1 show that the decline of large carriers has continued to the present. Moreover, not only large LTL carriers disappeared after being unable to cope with a deregulated industry. In

11. Northrup, supra note 8, at 383.
12. Id.
13. Id. For a more detailed picture, see Michael H. Beltzer, Trucking: Collective Bargaining Takes a Rocky Road, in COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 311 (Paul F. Clark, John T. Delaney, & Ann C. Frost, eds., 2002).
15. Id.
16. Id.
17. Id.
18. These summary data were first reproduced in Northrup, supra note 8, at 384 (quoting TRUCKING MANAGEMENT, INC., THE STATE OF THE LTL TRUCKING SECTOR (Washington, D.C. 1993) (on file with author).
November 1991, the economics department of the Teamsters issued a list of 122 LTL carriers that failed between July 1, 1980 and October 31, 1991 and that were parties to the national agreement. This list included carriers with employee counts from 17,593 to 34. In June 1999, the IBT issued a supplemental list of thirty-nine additional carriers that closed since the first list was published.

These trends have continued up to the present time. In 2002, for example, a large regional carrier in the Northeast, A-P-A, failed and shut down, as did many other "decent-sized" carriers. This was followed by the collapse and closing of Consolidated Freightways, headquartered in Vancouver, Washington, one of the five largest LTL national carriers. The A-P-A Transport closing threw 15,500 unionized Teamsters out of work.

B. THE TL SEGMENT

The TL segment of the motor carrier industry is quite different in terms of investment requirements. For the small entrepreneur, there is no need for terminals, local delivery equipment, or elaborate computer and telecommunications facilities. There are a few large operators in the TL business, such as Schneider National, Green Bay, Wisconsin, which is noted for its advanced use of information technology, and J.B. Hunt Transport Services, Lowell, Arkansas, which first grew as a carrier for Wal-Mart Stores, but the great majority of TL operators are relatively small businesses. One can enter the TL business by leasing one or more rigs, taking business to deliver a truckload of goods from destina-


22. John D. Schulz, End of a Long Proud Run, TRAFFIC WORLD, Sept. 9, 2002, at 26-27 ("In the past year [2002], the brutal trucking environment has claimed New Jersey-based A-P-A Transport, which closed in February. In addition, Iowa-based Crouse Cartage and hundreds of other decent-sized truckers have ceased operations. That doesn't count the thousands of smaller, less-than-20 truck operators that close with barely a notice except to themselves.").


25. Northrup, supra note 8, at 384.

26. Id.

27. Schneider National is listed as the fourth largest of all motor carriers and Hunt, the fifth in Traffic World's list of the fifty largest motor carriers. See TRAFFIC WORLD, May 31, 2004.
Table 1
Motor Carriers That Remain in 2003 From the Top 50 in 1965

<table>
<thead>
<tr>
<th>Rank</th>
<th>1965</th>
<th>2003</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>United Parcel Service</td>
<td>United Parcel Service</td>
</tr>
<tr>
<td>2</td>
<td>Consolidated Freightways</td>
<td>Yellow/Roadway</td>
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<tr>
<td>3</td>
<td>Roadway Express</td>
<td></td>
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<td>4</td>
<td>Associated Transport</td>
<td></td>
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<tr>
<td>5</td>
<td>Pacific Intermt. Express</td>
<td></td>
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<tr>
<td>6</td>
<td>McLean Trucking Co.</td>
<td></td>
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<tr>
<td>7</td>
<td>Interstate Motor Freight</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Spector Freight System</td>
<td></td>
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<tr>
<td>9</td>
<td>Denver Chicago Trucking Co.</td>
<td></td>
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<tr>
<td>10</td>
<td>Pacific Motor Trucking</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Harris Freight Lines</td>
<td></td>
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<tr>
<td>12</td>
<td>Transamerican Freight Lines</td>
<td></td>
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<tr>
<td>13</td>
<td>Yellow Transit Freight</td>
<td>Took over Roadway Express in Merger</td>
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<tr>
<td>14</td>
<td>Gateway Transportation</td>
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<tr>
<td>15</td>
<td>T.I.M.E. Freight</td>
<td></td>
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<tr>
<td>16</td>
<td>Transcon Line</td>
<td></td>
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<tr>
<td>17</td>
<td>Eastern Express</td>
<td></td>
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<td>18</td>
<td>Anchor Freight*</td>
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<tr>
<td>19</td>
<td>Ryder Truck Lines</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Garrett Freightlines (ANR)</td>
<td></td>
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<tr>
<td>21</td>
<td>Western Gillette, Inc.</td>
<td></td>
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<tr>
<td>22</td>
<td>Associated Truck Lines</td>
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<td>23</td>
<td>IML</td>
<td></td>
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<tr>
<td>24</td>
<td>Norwalk Truck Lines</td>
<td></td>
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<tr>
<td>25</td>
<td>Red Bull Motor Freight</td>
<td></td>
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<tr>
<td>26</td>
<td>Navajo Freight Lines</td>
<td></td>
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<tr>
<td>27</td>
<td>Jones Motor Co.</td>
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<td>28</td>
<td>Wilson Freight Lines</td>
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<td>29</td>
<td>United Buckingham Freight</td>
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<tr>
<td>30</td>
<td>Brach Motor Express</td>
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<tr>
<td>31</td>
<td>Kramer-Consol. Frt</td>
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<tr>
<td>32</td>
<td>Illinois Calif. Express</td>
<td></td>
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<tr>
<td>34</td>
<td>Hemingway Transport</td>
<td></td>
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<tr>
<td>35</td>
<td>Overnite Transportation</td>
<td>Overnite Corporation</td>
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<td>36</td>
<td>Strickland Transportation</td>
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<td>37</td>
<td>Cooper-Jarrett</td>
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<tr>
<td>38</td>
<td>Carolina Freight Carriers</td>
<td>Taken over by ABF Freight System</td>
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<td>39</td>
<td>Gordon Transport</td>
<td></td>
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<td>40</td>
<td>Midwest Emery Freight Sys.</td>
<td></td>
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<tr>
<td>41</td>
<td>Akers Motor Lines</td>
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<td>42</td>
<td>Terminal Transport</td>
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<td>43</td>
<td>All States Freight</td>
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<tr>
<td>44</td>
<td>Johnson Motor Lines</td>
<td></td>
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<tr>
<td>45</td>
<td>East Texas Motor Lines</td>
<td></td>
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<tr>
<td>46</td>
<td>Mason and Dixon Lines</td>
<td></td>
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<tr>
<td>47</td>
<td>Leeway Motor Freight</td>
<td></td>
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<tr>
<td>48</td>
<td>Ringsby Truck Lines</td>
<td></td>
</tr>
<tr>
<td>49</td>
<td>Arkansas Best Freight Sys.</td>
<td>ABF Freight System – Took over Carolina Freight Carriers</td>
</tr>
<tr>
<td>50</td>
<td>Pilot Freight Carriers</td>
<td></td>
</tr>
</tbody>
</table>

Source: Traffic World
* Auto transport carrier, not an LTL carrier.
Reproduced from the State of the LTL Trucking Sector 11 (1993); also reproduced in Northrup, supra text note 8; updated by the author to reflect development through 2003.
tion A to destination B, and hoping to have a load for the return trip.\textsuperscript{28} This easier entry led to a rapid expansion of the number of TL carriers as a result of deregulation and high turnover, with owner-operator companies becoming quite common and nonunion small companies a dominant factor in the TL industry segment.\textsuperscript{29} As a result of this competition, rates have fallen and profit margins were likely to be small.\textsuperscript{30}

Meanwhile, during the 1990s, industry concentration increased in the TL sector. As the percentage of trucking companies with annual revenues fewer than one million dollars rose, net load factors and profit margins declined, and high rates of turnover for small companies and of bankruptcies occurred.\textsuperscript{31} Such developments made many smaller companies interested in being purchased by larger ones.

Because of the large number of small carriers and the lack of terminals as focal points of operation and unionization, the TL sector, unlike the LTL sector, is difficult for the IBT to unionize and is predominately nonunion.\textsuperscript{32} Deregulation's elimination of barriers to entry, among other changes, had a profound impact on unionization.\textsuperscript{33} "[B]y 1991, union employment in trucking was 40 percent below its 1978 level, while non-union employment grew over 80 percent."\textsuperscript{34} In round numbers, this meant a loss to the Teamsters of as many as 225,000 dues-paying members.\textsuperscript{35}

Just as the number of TL operators greatly expanded during the prosperous 1990s, it fell rapidly when the economy turned downward thereafter. According to one analyst: "[t]he good news for trucking is at least 7,000 carriers and 60,000 owner-operators have left the industry. That lessened capacity is expected to mean better rates for the survivors. We have fewer chickens chasing that same kernel of business . . . ."\textsuperscript{36}

Of course, as margins grow and profits increase in the TL segment, this will undoubtedly attract new entrants and more competition, which in time will likely again lower margins and reduce profitability.

\textsuperscript{28} Northrup, supra note 8, at 384.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id. See, e.g., Nicholas A. Glaskowsky, Jr., Effects of Deregulation on Motor Carriers (2nd ed. 1990), at Chapter 6. It should be noted that the largest and most successful TL carriers also invest heavily in the latest computer, software, and telecommunications equipment in order to provide rapid, reliable service. For an account of how a leading TL carrier handles just-in-time pick-up and delivery for large customers, see Myron Magnet, Meet the New Revolutionaries, Fortune, Feb. 24, 1992, at 12.
\textsuperscript{32} Northrup, supra note 8, at 384.
\textsuperscript{33} Id.
\textsuperscript{34} The State of the LTL Trucking Sector, supra note 18, at 12. This study provides general union figures as well as those pertaining to LTL carriers.
\textsuperscript{35} Author's estimate from Teamster membership figures.
C. Deregulation Impact on Overnite

Overnite was founded by Harwood Cochrane and his brother, Calvin, in 1935 and became profitable two years later. World War II and the post-war boom saw Overnite expand rapidly in the South, where non-union operations were relatively common. Harwood Cochrane and his brother incorporated separate companies in Virginia, the brother left the business shortly, and Overnite made its first acquisitions, as it added terminals in Atlanta and other locations. Under regulation, the right to operate had to be approved by the Interstate Commerce Commission ("ICC"), so that buying companies and their certificated rights to operate routes was the best way to acquire new operation authority. Over the years Overnite acquired more than twenty companies to aid expansion and to acquire terminals and equipment.

By 1963, Overnite had expanded to the more western states of the Old Confederacy, and had become one of only four trucking companies whose stock was traded on the New York Stock Exchange. By 1971, it had crossed the Mississippi River, and by 1980, the year that deregulation began, it had reached California and the markets of the Southwest. Its growth was summarized by a company brochure in 1999 as follows:

From a single used truck in 1935, Overnite’s fleet has grown to more than 4,000 tractors and 18,000 trailers and become one of the nation’s largest less-than-truckload carriers. 13,000 employees in 166 Service centers serve 45,000 cities and towns in the continental U.S., Hawaii, Alaska, Canada, Mexico, Guam, the U.S. Virgin Islands and Puerto Rico.

Thus by 2003, Overnite’s transformation from a local and regional TL carrier saw ninety-two percent of its business included in the LTL segment of the industry.

II. The Impact of the Union Pacific Takeover

In 1986, Cochrane sold the company to the Union Pacific Corpora-

37. **Overnite Transportation**, *supra* note 8.
38. *Id.*
39. *Id.*
40. **Estelle Sharpe Jackson, Mr. Cochrane’s Overnite** 50 (1989). Although this little book is largely a *Festschrift* for Mr. Cochrane, it does contain much useful information concerning his beliefs, wishes, methods, and policies. In addition, the author talked to many Overnite Transp. Co. personnel about Cochrane’s management and used the information given on a confidential basis.
41. *Id.* at 40.
42. **Overnite Transportation**, *supra* note 8.
43. *Id.*
44. *Id.*
tion, which has become the nation's largest railroad. All mergers and takeovers involve positive and negative outcomes both for the company being taken over and for the acquiring company. This one was no exception.

A. THE POSITIVE TAKEOVER IMPACT FOR OVERTNITE

The purchase by Union Pacific had many benefits for Overtnite, especially in operational systems and methods. As stated in its brochure:

The national presence and financial clout of that corporate parent quickly helped Overtnite to achieve quantum leaps in the growth of both its physical network and the technology that supports it. Interlocked mainframe computers combined with the latest in desktop voice and data systems made possible a centralized Customer Service Center that is the envy of the industry. Electronically imaged customer bills and shipping documents move freely through a digital network. At the press of a key in Richmond, an exact image of such a document can be sent to a customer's fax in Monterey, Miami or Montreal.

There is no doubt that these technical advances materially aided Overtnite's business and expansion, as did Union Pacific's contacts and relationships in new Overtnite territory. Moreover, since Overtnite had inaugurated an employee stock purchase plan and Union Pacific paid a hefty premium over the listed stock price for the acquisition, a sizable percentage of Overtnite employees acquired considerable wealth.

B. PROBLEMS CREATED BY THE MERGER

Mergers and company takeovers also create problems. These occurred heavily, as is often the case, for Overtnite in the human resources area. To understand the situation, the employee relations policies and methods of management by Harwood Cochrane are next reviewed.

1. The Cochrane Labor Relations Policies

Cochrane was a one-man manager. He made all the important decisions, and made them very well. He had a keen mind and an excellent memory, and he kept track almost on a daily basis of how each segment of the business was performing, including each terminal, each product carried, where to locate terminals, and how to allocate funds. He wanted no committee management, and he used the Board of Directors

46. *Id.*
47. *Id.*
48. *Overtnite Corp. Prospectus,* supra note 45, at 84.
49. Author's analysis. See also *Jackson,* supra note 40, at 76.
50. *Id.*
51. *Id.* at 26.
mainly to report what decisions were being made or planned. Since his judgment was very good and he did not encourage dissent, he ruled.

Cochrane clearly believed, undoubtedly correctly, that nonunion operating provided Overnite with a clear advantage over unionized competitors. It appears to the author that Cochrane understood that unions are more than economic organizations striving to increase the wages and benefits of their memberships and political organizations in which individuals compete for union positions and leadership. He discerned that unions are also management-regulating devices that demand either a strong voice in, or the right to question, management decision-making. Unions cannot gain power unless they have a major voice in such things as worker employment or layoffs. This would involve ceding power and authority over critical manpower decisions, which Cochrane's record demonstrates that he did not desire to do for anyone, especially an outside organization. He fought hard to maintain Overnite's nonunion status and was highly successful.

Cochrane was also a generous employer in his personnel relations. His door was always open, he talked freely to employees, and he had their respect because he was successful, he had packed trucks, driven them in bad weather at undesirable hours, and as will be recounted below, in the face of Teamster violence. He was sympathetic to the problems of hourly employees and endeavored to provide financial plans and fair and safe conditions of work. Drivers were especially treated well. Their pay was kept just below the union rate, they received special bonuses for safe driving, and they were otherwise treated with respect and understanding. Terminal workers' wages were not as close to union rates, but were comparable to similar rates in southern communities. They also were eligible for open driving jobs.

52. Id. at 76.
53. Id. at 44.
54. This line of thinking was stressed by Professor Sumner H. Slichter, the late, great labor economist at Harvard under whom the author studied. See Sumner H. Slichter, James J. Healy, & E. Robert Liveness, The Impact of Collective Bargaining on Management (1960). See also Gordon F. Bloom & Herbert R. Northrup, Economics of Labor Relations (9th ed. 1981), at Ch. 6.
55. Sumner, supra note 54, at 4.
56. Id.
57. Jackson, supra note 40, at 24, 44, 70.
58. Id. at 74-76.
59. Id. at 19.
60. Id. at 46. This information is also based on discussions with Overnite Transp. Co. personnel who had worked with Mr. Cochrane.
61. Id. at 46.
62. Id. This information is likewise based on confidential interviews with Overnite Transp. Co. management personnel.
This combination of determined opposition to unionization, treatment of people with fairness and consideration, and credibility of a hardworking entrepreneur who had started at the bottom was obviously a difficult act to follow when the company was sold. An experienced and able successor as chief executive was clearly required to succeed Cochrane.

2. Early Attempts at Unionization

The IBT did not take Overnite’s nonunion policies lightly. There were many attempts to organize the company while Cochrane still ran it. In 1942, Cochrane actually signed a union contract for one year rather than lose a large customer.53 When the IBT blacklisted Overnite with the Atlantic & Pacific Tea Company (“A&P”), then the largest supermarket operator, and other companies, and attempted to shut down Overnite’s newly acquired terminal in Atlanta, Cochrane refused to renew the agreement.64 Cochrane personally drove a truck in a convoy to the Carolinas where they met a convey from Atlanta, changed drivers with the Atlanta drivers, and drove the Atlanta trucks back to Richmond while the Richmond ones were driven to Atlanta, despite violence by IBT-driven truck drivers in both directions.65 After seven weeks, an agreement was reached whereby Overnite dropped charges against the IBT and agreed to pay the union $5,000, and the IBT agreed not to picket for at least one year.66

In 1959, James Hoffa, father of the current IBT president, targeted Overnite as the only major LTL carrier in the Carolinas not signatory to a union contract.67 Hoffa did not petition the National Labor Relations Board (“NLRB”) for a representation election; he just demanded that Overnite sign a union contract.68 When Cochrane refused, a strike was called for which there was little employee response.69 Hoffa then organized a boycott in which unionized carriers refused to handle interchanges with Overnite.70 This was costly to the company, which countered with additional employees, new routes, and thousands of dollars spent for guard services, extra telephone and communication expenses, and the extra costs of operating twenty-three additional trailers and nine additional tractors.71 Profits were lower for Overnite and growth slower.72

63. Id. at 44.
64. Id.
65. Id. at 45.
66. Id.
67. Id. at 32-33.
68. Id. at 33.
69. Id.
70. Id.
71. Id.
The union boycott lasted for about five months before it was called off. Overnite then sued the union for $1 million to recover actual and punitive damages caused by unfair labor practices in calling and maintaining a strike and secondary boycotts. The North Carolina state courts denied the punitive damages but allowed the actual ones, which came to approximately $600,000. It took some time to force payment of these funds, but they were eventually collected. Thereupon Cochrane ordered a special dividend and distributed the money to Overnite's shareholders.

Union attempts to organize Overnite continued throughout the 1970s and 1980s on a terminal by terminal basis under the leadership of R.V. Durham, then head of the Asheville, North Carolina, IBT local union and later an international union trustee and safety director. This approach was approved by the national union leadership. From 1971 to 1988, NLRB representation elections were held in twenty-two terminal locations. The Teamsters won six elections, withdrew one petition for an election, and lost the remainder. In the late 1970s, the IBT attempted to organize the whole company; the union lost the NLRB election, protested to the NLRB that Overnite had committed unfair labor practices, was awarded a rerun, and lost the second election. There were no strikes during this period as negotiations failed to reach any agreements. Then IBT President, Ron Carey, was criticized because he allegedly "never devoted the resources to make . . . [the organizing drive] work."

72. Id.
73. Id.
74. Id.
76. Jackson, supra note 40, at 44. One union official received a jail sentence for criminal contempt.
77. In the early 1980s, this author was retained by the Richmond Waterfront Commission to make a study as to whether port business could be increased by having the city build a truck terminal that all truck companies could use. For this purpose, the author began by interviewing Cochrane as head of the largest trucking concern headquartered in Richmond. He was very cordial and forthcoming and advised that Overnite and other nonunion companies would not use such a terminal because they did not want their employees associating with employees of unionized companies. In talking, he told the author how he had used the $600,000 received from the IBT. The author reported to the Waterfront Commission that there was no use proceeding with the study. Interview with Mr. Cochrane, Overnite Transp. Co., Richmond, Va., 1983.
78. Personal investigation by author. See also, Jackson, supra note 40, at 45.
79. Personal investigation by author.
80. Jackson, supra note 40, at 46.
81. Id. Also, information from NLRB.
82. Id.
83. Personal Investigation of Overnite strike record.
3. Problems During the First Several Years of Merger

After the 1986 sale of Overnite to the Union Pacific Corporation, Cochrane remained as chief executive for five years before retiring. He was replaced by Thomas Boswell, a financial executive at Union Pacific, who was a key person in Union Pacific’s due diligence investigation and negotiations to acquire Overnite. He had no experience in operations or in the trucking business, and he came from a company that notes that its employees are eighty-seven percent unionized.

Boswell’s administration ran into difficulties when, in 1994, the IBT struck the other LTL unionized carriers over the failure to reach agreement for a new contract. Many companies at this stage sought to transfer business to Overnite, which accepted more than it could handle. This put considerable pressure on terminal personnel and resulted in delays for long-term customers who felt that Overnite was ignoring their interests in an attempt to gain new business. Thus Overnite, in sharp contrast to the Cochrane approach, was alienating two of its most important relationships - employees and customers. Some of the former turned to unionization, and some of the latter took business elsewhere.

Not surprisingly, newly elected President James Hoffa, son of the former president, endorsed the drive to unionize Overnite, which initially had some success. Again, it was on a terminal by terminal basis; the IBT won bargaining rights in two Overnite terminals in 1994, six in 1995, four in 1996, seven in 1997, two in 1998, and two in 1999. Moreover, the IBT won included some of the largest terminal facilities: Kansas City, St. Louis, Memphis, and Atlanta. Including the terminals won earlier, this meant that the IBT represented employees in thirty facilities. Four of these facilities were shut down, along with about nine nonunion ones,

86. Confidential Interview with Overnite Transp. Co. Personnel (July 2002).
87. UNION PACIFIC CORP., ANNUAL REPORT (1999), at 29 (stating “Approximately 87% of the Railroad’s 52,000 employees are represented by rail unions.”) Similar statements are found regularly in annual reports for other years. Also interview with Overnite Transp. Co. executive who supplied Mr. Boswell’s background.
88. Schulz, supra note 84, at 12.
89. Id.
90. Id. This is the author’s analysis of what occurred and why after researching developments of the period. This research commenced in the period when Overnite began being targeted for NLRB elections as the author wondered what occurred, and whether Overnite would become a unionized operation. At that time, the author had not considered writing an article because it was not clear that anything significant would result from the early research.
91. Id.
92. See infra Table 3 for dates.
after a study by a large consulting firm, A.T. Kearney, recommended that consolidation into large facilities would be economically wise. The company was also appealing union NLRB representation victories in four other locations on question of bargaining unit eligibility and size. This left the IBT with twenty-two unionized terminals representing approximately fourteen percent of the work force in the company’s 166 service centers.

C. THE STRIKE AND ITS FAILURE

By the fall of 1999, several years of unfavorable developments for the IBT had occurred that had fairly well dissipated the union organizing drive.

1. NEW OVERNITE SUGGS ADMINISTRATION AND IBT STRIKE

In April 1996, after a short tenure by James Douglas, who succeeded Boswell as Overnite president, Leo H. Suggs took over as chief executive. Suggs was former president of a large regional motor carrier with long experience in the industry and a person with a good human resources approach. He immediately set about to repair the damages to employee morale and customer relations and to build a management team with both objectives in the forefront.

Meanwhile, although negotiations continued, the IBT had been unable to win a contract, and negotiations had staggered. Moreover, its organizing program was failing. Since 1997, the IBT had lost seven of nine NLRB elections and avoided losses by withdrawing from seven others. In addition, at several of the unionized terminals, employees were attempting to decertify the IBT, but votes were not held because unionists filed unfair labor practice charges, which permitted the NLRB general counsel to block a vote.

The IBT officials decided on a drastic step: they called a strike although, as already noted, the IBT was recognized by Overnite as representing only twenty-two terminals and fourteen percent of the total

96. Confidential Telephone Interview with Overnite Transp. Co. Personnel (Sept. 10, 2002). See also infra Table 3.
98. Id.
99. Confidential Interview with Company Executive, who is part of the Suggs Administration, Overnite Transp. Corp. (Oct. 31, 2002).
100. Personal investigation of situation by author.
101. Data from Overnite Transp. Co. and NLRB information services.
company work force. The strike began on October 24, 1999. The company claimed that many picket lines were peopled by Teamsters from other companies. Violence and mass picketing were common in many locations. The IBT claimed that 2,000 employees answered the strike call; Overnite stated that only 900 quit work. Even if the union data were accurate, which is doubtful, the number of employees answering the strike call seem far too little to effectuate a successful strike. Actually, it is believed that not one represented facility saw the entire work force strike, and few from nonrepresented facilities apparently joined the strike. Overnite did not permanently replace anyone, and took back strikers who returned to work unless they had engaged in serious violence. To completely man facilities at the strike’s inception, Overnite used volunteers from non-struck facilities and “temporary workers placed on standby by contracted third party providers.” The drift back of strikers seems to have begun early so that employment of strike replacements was not large nor lasted for long periods.

President Hoffa was reluctant, at first, to approve the strike. He was persuaded to do so by John Murphy, whom he had appointed as director of organization, and Philip Young, IBT freight director. Murphy assured Hoffa that the strike would last only three weeks, and that by then Overnite would be willing to sign any contract rather than go out of business.

This was a fantastic miscalculation in every respect. Murphy apparently thought that the strike would shut down the company’s key terminals and that employees from many nonunion terminals would join the strike. No such shutdown occurred. In addition, the strike was rejected by a significant minority of the employees who were already represented by the IBT. Equally important, the company fought back vigorously; it

104. Schulz, supra note 84, at 10.
106. Id.
109. Telephone Interview with the Office of Senior Vice-President and General Counsel, Overnite Transp. Corp. (Oct. 26, 2002).
111. Schulz, supra note 84, at 10.
112. Id.
113. Id. Hoffa had agreed to permit the taping and later to have these comments and meetings shown on television. This was done by HBO, and shown on the Public Television network. The tape itself is available.
retained the Chicago firm of Matkov, Salzman, Madoff, & Gunn as coordinating labor counsel along with regional labor counsel at all affected locations, obtained injunctions against violence and mass picketing, and filed charges for illegal secondary boycott violations.115 Most important, it kept all facilities open. The strike utterly failed to prevent the company from operating, and the longer that it continued, the more employees returned to work. By May 24, 2000, Overnite reported:

The protest [strike] continues today but with more than 94 percent of Overnite employees coming to work and ignoring the [picket] lines the company continues to service all geographical areas. With day-to-day service virtually unaffected by the walkout, Overnite has raised its on-time percentage to an all-time high of 98 percent. Internally, the union continues to struggle with its own members. In 1999, Teamsters at 11, or half of those locations represented by the union, filed petitions with the federal government [the N.L.R.B.] seeking to decertify the Teamsters as their bargaining agent.116

D. Why No Agreement Was Possible

There have been many reasons advanced as to why no agreement was reached between the Teamsters and Overnite and why the Teamster strike failed so utterly in attempting to shut down the company.

1. The “Easy Answer” at Traffic World on Terminology and Nature

John D. Schulz, who covered the negotiations and the strike for Traffic World, and generally did it very well,117 had a facile answer as to the nature of the strike and the reason for Overnite’s success. He wrote:

A key factor in Overnite’s success in warding off the high-profile organizing effort largely was its ability to utilize the deep pockets of parent Union Pacific Corp. The strike cost Overnite millions of dollars, especially in the early days of the walkout in October 1999. But Overnite Chairman, President and CEO Leo H. Suggs got the go-ahead from UP to spend “whatever it takes” to keep Overnite union-free.118

Schulz later noted that, as a result of Union Pacific spinning off Overnite by an initial public offer ("IPO"), Overnite would pay Union Pacific $170 million “in what is described as an intercorporate loan.”119 Schulz then commented that this payment is “[m]ost likely repayment for UP support during a three-year unfair labor practice strike called by the

115. See infra section III-B: The IBT’s Use of Illegal Secondary Boycotts.
116. OVERNITE TRANSPORTATION, supra note 8.
117. The author subscribes to TRAFFIC WORLD and found it indispensable in his research.
118. Schulz, supra note 84, at 10.
Teamsters that ended with the company being virtually union free.”

2. *The True Nature of the Strike*

The strike was, first of all, an organizing one, not an unfair labor practice strike. It ended with Overnite being union free in its main operations and with the Teamsters being left as bargaining agent only at two terminals of Motor Cargo, a Utah-based regional LTL carrier acquired by Overnite in November 2001. The rationale for the IBT to term the strike as unfair labor practice seems clear.

Section 8(b)(7) of the Labor Management Relations Act of 1947 amendments to the National Labor Relations Act ("NLRA") make it an unfair labor practice for a union
to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, ... of such employees ... .

Subsection (C) of Section 8(b)(7) defines the unfair labor practice of a recognition strike further: “where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. . . .”

This section of the Act then permits informational picketing “or other publicity” but also limits such picketing
for the purpose of truthfully advising the public, including consumers, [that] an employer [does not employ members of, or have a contract with a labor organization] as long as such publicity does not have an effect of such picketing is to induce any individual employed by any person other than the primary employer in the course of his employment [not] to pick up, deliver, or transport any goods, or not to perform any services. . . .

By terming the strike an unfair labor practice, it seems likely that the IBT hoped to subvert its true nature as an organizing effort, as set forth by Director of Organization Murphy, from the strike’s inception. Moreover, throughout the entire controversy, the IBT’s posture was to demand a contract covering unorganized units as well as already unionized ones.

Additionally, the claim of Union Pacific’s purpose in “lending”

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120. *Id.*
121. *Overnite Corp. Prospectus,* supra note 45, at 17.
Overnite’s $170 million has no support elsewhere except in Schulz’s guess. Union Pacific did indeed support the actions of Suggs and his management team, and presumably financial resources were available in case of need. Also, Overnite’s profits were definitely hurt by the expenditure of large amounts for security, legal assistance, and a host of other costs related to the strike. As a result, Overnite’s profit picture dimmed considerably in the strike’s first year. As time went on, however, these costs declined considerably. In its 1999 annual report, Union Pacific reported:

Teamster activities have increased the [Overnite] company’s costs due largely to increased security measures to ensure the safety of Overnite employees and to maintain customer service. As a result, while Overnite’s net income declined 28% year-over-year to $29 million, it generated strong cash flow of $43 million to the [Union Pacific] Corporation.\(^{125}\)

Overnite sources questioned on a confidential basis a report that its cash flow to Union Pacific was positive throughout the strike.\(^{126}\) Thus, although Union Pacific had deep pockets, there is no proof that it used the contents of these pockets to pay the strike costs. Moreover, the $170 million “payment” was the total of Overnite dividends paid to Union Pacific that were kept in a separate account and added interest.\(^{127}\) When the division of assets for the IPO occurred, Union Pacific decided to keep these funds, as it had the right to do.\(^{128}\)

Actually, the basic reasons why no agreement was ever reached between Overnite and the Teamsters before or during the strike were more fundamental and relate to the conflicting requirements for settlement on the part of Overnite and the Teamsters, which precluded any genuine compromise.

3. Overnite’s Three Intractable Issues

In the negotiations, Overnite offered to the IBT local unions compulsory union membership in states where legal, the checkoff of dues, wage increases, holidays, and improved vacations, the same benefits that were given to its nonrepresented employees.\(^{129}\) Overnite declined to agree to the Teamster demands on three significant issues: (a) that Overnite participate in the Central States Pension Fund, the multi-company pension plan that covered the unionized companies; (b) that Overnite agree to bargain on a multiplant bargaining basis, although it offered the same contract to all unionized units; and (c) that Overnite

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125. UNION PACIFIC ANNUAL REPORT (1999), supra note 89, at 3.
127. Id.
128. Id.
129. Negotiating Summary, infra note 163, at No. 3.
agree to numerous contract and work rule provisions which limited management rights in the assignment and scheduling of work and the deployment of personnel.\textsuperscript{130}

a. Central States Pension Fund

Overnite's decision not to participate in the Central States Pension Fund is easily understandable. Whereas Overnite's plan was initially over-funded and remains in excellent shape,\textsuperscript{131} the Teamsters' Central States Pension Fund, the largest of its pension funds, has been seriously under-funded and is growing more so as investment income has declined, the number of retirees has increased, and the number of active Teamster employees has declined.\textsuperscript{132} Other IBT funds are in similar trouble as set forth in Table 2. Long-run trends project a continued downward spiral as the average age of Teamsters paying into the fund is increasing from fifty-five years old to fifty-seven years old, with many eligible for retirement soon.\textsuperscript{133}

Additionally, Table 2 shows that huge numbers were vested in 2002 under the Central States and other Teamster plans, but were neither working under the jurisdiction of any major Teamster plan, nor receiving benefits. These persons may currently have been working for companies like Overnite who were not covered by major Teamster plans. Such former employees could one day file for their pension payments, a serious problem for the plans in which they are vested. This problem has arisen because of the decline of unionized trucking in the industry since deregulation became effective.

By the fall of 2002, the last date for which Central States Fund data are available, the Central Fund had an unfunded pension benefit liability of $4.9 billion.\textsuperscript{134} Pension funds were then being paid into the Fund only for 187,229 working Teamster employees as compared with 197,011 retirees who were receiving benefits, and investments of the Fund lost 4.5 percent of its value over that year although the fund was profitable in 2003.\textsuperscript{135} Herve H. Aitken, a trucking attorney who has specialized in pension analysis, has predicted a "tidal wave" of unfunded liability over the next two or three years.\textsuperscript{136}

As demographics change and declining union membership continue, Hoffa has recognized that something must be done. He has replaced

\textsuperscript{130} Id.
\textsuperscript{131} Overnite Corp. Prospectus, supra note 45, at 15, 40, 42, and 49.
\textsuperscript{132} John D. Schulz, Big Black Cloud Looming, TRAFFIC WORLD, Dec. 10, 2001, at 27.
\textsuperscript{133} Id.
\textsuperscript{134} Clayton Boyce, Gathering Clouds, TRAFFIC WORLD, Oct. 28, 2002, at 5.
\textsuperscript{135} Id.
\textsuperscript{136} Id.


### Table 2

**Participants in Large Teamster Pension Plans (2002)**

<table>
<thead>
<tr>
<th>Plan Name</th>
<th>Active Participants (Current Employees)</th>
<th>Current Beneficiaries</th>
<th>Vested but Not Working or Receiving Benefits</th>
<th>Total of Current Beneficiaries and Vested but Not Working</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western Conference of Teamsters Pension Plan</td>
<td>234,845</td>
<td>90,437</td>
<td>155,333</td>
<td>245,770</td>
</tr>
<tr>
<td>Central States, Southeast, and Southwest Pension Plan</td>
<td>177,076</td>
<td>204,669</td>
<td>78,202</td>
<td>282,871</td>
</tr>
<tr>
<td>New York State Teamsters Conference Pension &amp; Retirement Fund</td>
<td>16,531</td>
<td>14,891</td>
<td>4,246</td>
<td>19,137</td>
</tr>
<tr>
<td>Central Pennsylvania Teamster Defined Benefit Plan</td>
<td>9,975</td>
<td>16,033</td>
<td>6,720</td>
<td>22,753</td>
</tr>
<tr>
<td>Teamster Pension Trust Fund of Philadelphia &amp; Vicinity</td>
<td>10,330</td>
<td>12,771</td>
<td>4,202</td>
<td>16,973</td>
</tr>
<tr>
<td>Western Pennsylvania Teamsters and Employees Pension Plan</td>
<td>7,324</td>
<td>12,365</td>
<td>5,095</td>
<td>17,460</td>
</tr>
<tr>
<td>Local 705 Int. Brotherhood of Teamsters Pension Trust Fund</td>
<td>6,843</td>
<td>7,904</td>
<td>2,367</td>
<td>10,271</td>
</tr>
</tbody>
</table>


union board members on the fund, retained two outside audit firms to study and report on the situation, and sponsored an article in the union journal which explains why pension plans are often in difficulty currently.137

Management and union representatives on the Central States, Southeast, and Southwest Pension Funds have not been able to agree on a solution for solving the condition of the Funds, with the union representatives proposing enhanced employer contributions, and the employers wanting a decrease in benefits.138 Pursuant to a 1982 consent decree, the situation was referred to the U.S. District Court, Northern District of Illinois, for a binding decision. On November 17, 2003, the Court ruled that benefits could be reduced, but postponed any decision on increased employer contributions.139 The Court, however, retained jurisdiction in the case,

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139. Id. at *8-*9.
and put heavy pressure on the employer group to meet its obligations to maintain viability in the Fund.\textsuperscript{140}

A reduction of benefits has occurred in the form of requiring employees to work several additional years to receive the same benefit.\textsuperscript{141} Thus, an employee who was formerly eligible for a benefit at age fifty-seven with thirty years work experience must now work several more years to receive the same benefit.\textsuperscript{142}

The IBT representatives on the Fund have joined company representatives in tightening up the restrictions against employees receiving pensions and working in jurisdictions covered by Fund pensions.\textsuperscript{143} Some of these restrictions are being challenged in court with varying results. In one case, a participant had his pension payments suspended because, according to Fund representatives, he not only owned trucks, but was in the trucking business because he employed drivers for that purpose.\textsuperscript{144} The Seventh Circuit Court of Appeals agreed that the suspension was proper because the claimant was in “prohibited reemployment” which is defined in Fund rules as “[e]mployment in any position . . . including self-employment . . . in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund.”\textsuperscript{145}

On the other hand, there is apparently some unrest within the IBT concerning the reduction agreed to by Teamster officials. Represented by Public Citizen, a Nader advocacy group, and supported by an anti-Hoffa employee group, Teamsters for a Democratic Union, three union members filed a suit in the U.S. District Court, Northern District of Illinois demanding more public access to the rationale for the reductions agreed upon.\textsuperscript{146} No additional contributions have been agreed to by employers. Led by United Parcel Service (“UPS”), the largest contributor to the Central States Fund, which pays almost forty percent of the total contri-

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\textsuperscript{140} Id. at *3. See also Proposal to Cut Central States Benefits OK'd, But Push to Increase Contributions Reserved, 49 CONST. LABOR REP. (BNA) (Nov. 26, 2003).

\textsuperscript{141} Chao, 2003 U.S. Dist. LEXIS 20800, at *10.

\textsuperscript{142} Telephone Interview with Herve Aitken, Esq., Thiemann, Aitken, Vohra, & Rutledge, Alexandria, Va. (Mar. 2, 2004); see also John D. Schulz, Teamsters Make the Cut, TRAFFIC WORLD, Dec. 1, 2003, at 24. This article states, “[t]he realistic effect of the new rules is that they will severely penalize early retirees, who used to enjoy a ‘30-and-out’ provision that provided a $3,000 monthly pension, Teamsters familiar with the plan say.”

\textsuperscript{143} John D. Schulz, Pensions in Peril, TRAFFIC WORLD, (Oct. 7, 2002), at 23. (see discussion about 'kick-outs').

\textsuperscript{144} Miliello v. Central States, S.E., and S.W. Areas Pension Fund, 360 F.3d 681, 684 (7th Cir. 2004). See also Participant’s Benefits Properly Suspended Because of Self-Employment, Court Rules, DAILY LAB. REP. (BNA) No. 43 (Mar. 5, 2004) at A-3.

\textsuperscript{145} Participant’s Benefits Properly Suspended Because of Self-Employment, Court Rules, supra note 144, at A-3.

\textsuperscript{146} IBT Members Seek Access to Special Counsel Reports About Central States Pension Funds, DAILY LAB. REP. (BNA) No. 137 (July 19, 2004), at A-10.
butions, employers are attempting to gain federal legislation which would alter contributions to attach them to each contributing employer while allowing them to be invested jointly.\textsuperscript{147} This aims to alter the Central States Fund so that the contributors can subsequently withdraw.\textsuperscript{148} Action on such legislation is not likely in the immediate future, and the District Court has the authority to force employers to increase contributions if it desires to do so.\textsuperscript{149} Certainly, the need for more action in bringing costs and benefits in line is clear. The costs, however, will be large if real reform is made.

On April 10, 2004, President Bush signed the Pension Funding Equity Act (H.R. 3108) which provided some temporary help to a few multiemployer pension funds including the Central States Fund.\textsuperscript{150} Basically, it provided, among other provisions, that a multicompny-union fund which suffered a financial loss in 2002 and 2003 and thereby experienced a funding deficit could postpone taking eighty percent of that loss, and would not be required to register its loss when the loss actually occurred.\textsuperscript{151}

Essentially what this law has done for the Teamster funds set forth in Table 2 is to postpone the need for immediate remedial action but to require it nonetheless. UPS supported the 2004 Act after some hesitation.\textsuperscript{152} The company, as noted above, remains committed to paying only for its own pensioners rather than supporting, as it does at the Central States Fund, a substantial part of the total funding of that Plan.\textsuperscript{153} On the other hand, UPS does already have an advantage because its part-time employees, which have been estimated as high as 10,000, have pensions but are covered by a company plan not connected with the Teamster-affiliated fund.\textsuperscript{154} In contrast, part-time employees of LTL carriers are included in the Teamster funds.\textsuperscript{155} If UPS part-time employees were included in the Central States Fund, those employees for whom pension payments are made would narrow the differential between those receiving pensions and those paying into the fund.\textsuperscript{156} Given the large payments

\begin{itemize}
  \item 148. \textit{Id.}
  \item 149. \textit{Id.}
  \item 151. \textit{Id.} at §104(a)(1)(F)(i).
  \item 153. It is estimated that UPS accounts for about 40 percent of the contributions, according to Mr. Aitken (Telephone Interview, May 6, 2004).
  \item 155. \textit{Id.}
  \item 156. Data are author’s estimate.
\end{itemize}
UPS is already making to the Fund, it clearly has no interest in altering the situation in this manner.

UPS received a jolt in its pension cost when in August 2004, the Federal Court of Appeals, Second Circuit, affirmed a lower court decision that UPS was required to contribute to a pension fund for hours employees worked in excess of an eight-hour work day. This pension fund originally contained a provision governed by a cap on contributions after eight hours work per day, but the cap was omitted from contracts negotiated after 1990. UPS claimed that there was an unwritten understanding between UPS and the Teamsters to excuse payments for hours worked from contributions in excess of eight hours per day, but the court ruled that unwritten understandings could not be used to supersede the fund’s rules regarding contributions, stating: “valid collection regulations promulgated by a multiemployer plan to effectuate contributions cannot be defeated by implied or unwritten agreements between employers and unions.”

Overnite’s posture in negotiation was that the substitution of this Fund for its own much superior funded one would endanger the pensions of its employees and that Overnite’s contributions would be used to bolster the pensions of rival companies. The Prospectus for the IPO, which is discussed below, states:

While we [Overnite] follow FAS 87 rules to record the expense and liability associated with our pension plans, actual cash funding is governed by employee benefit and tax laws and the JCWAA, which included temporary rules allowing companies to use discount rates for 2002 and 2003 equal to 120% of the weighted average 30-year U.S. Treasury bond yield. During 2002, we contributed $126.5 million to our defined benefit pension plans, of which $125.0 million was voluntary. With this contribution, our defined benefit pension plans were approximately 94% funded on an IRS funding basis as of December 31, 2002. Through September 30, 2003, we contributed $45.7 million to our defined pension plans, of which $45.0 million was voluntary.

Given this situation, Overnite declined to agree to any relationship with the Central States Fund.

b. Multiplant Bargaining

Overnite insisted on bargaining on an individual terminal basis.

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159. Overnite Corp. Prospectus, supra note 45, at 49.
whereas the Teamster negotiators pushed for a multi-terminal approach.\textsuperscript{160} Since the NLRB certifications were on a single facility basis, the company could successfully insist on its approach in each location. On the other hand, the same contract was offered to the IBT at each terminal, and the same negotiators were involved from each national organization along with local personnel from each facility. Actually, by offering the same contract, the company prevented one facility’s proposal from being played off against another’s, but it also sought to avoid having all facilities on strike at one time, which was obviously a union strike objective. If the contracts had common termination dates, then the union would presumably have been in position to effectuate multi-terminal strikes.

Moreover, even without common termination dates, the IBT could stretch out negotiations at several terminals so that it could strike these facilities at the same time.\textsuperscript{161} Thus, even though Overnite’s proposals provided that a contract would be effective when accepted by the union, it does not appear that this posture was a strong one for the company, or that the IBT was in any position to take advantage of this possible opening.\textsuperscript{162}

It appears also from the record that the company never internally resolved the issues of contract termination or even the dates. It concentrated on what it regarded as key strategic values. First, with eleven of the twenty-two unionized terminals having already filed decertification petitions, it insisted on local bargaining to preserve in practice employees’ rights to file for decertification and to avoid the difficulties that might result if employees were required to seek support for decertification on a multi-terminal basis.\textsuperscript{163} And second, the company strongly desired contracts that terminated as far as possible from the termination date of the National Master Freight Agreement ("NMFA"), which it always believed was necessary if it would ever be able to gain an agreement that was not a virtual duplicate of the NMFA contract.\textsuperscript{164}

c. Restrictions on Management’s Right to Manage

Critical in the negotiations was Overnite’s insistence that it could not agree to provisions of the NMFA contract that affected operations and

\textsuperscript{160} Confidential Interview with Overnite Corp. Negotiating Person (Feb. 11, 2003).

\textsuperscript{161} This method of obtaining multi-facility bargaining is followed by unions seeking to enhance their bargaining power. It has been defined as “coalition bargaining” by scholars where several unions dealing with one employer jointly act in this manner. For the seminal study of coalition bargaining, See generally WILLIAM N. CHERNISH, COALITION BARGAINING (1969).

\textsuperscript{162} Interview with Overnite Corp. Negotiating Person (Feb. 11, 2003).

\textsuperscript{163} Id.

\textsuperscript{164} Id.
placed limits on Overnite’s management rights to manage, nor would Overnite agree to a wage and benefit schedule literally taken from the current NMFA agreement.\footnote{165} Overnite has officially stated:

We believe that our predominately non-union workforce provides us with a significant advantage over union LTL carriers, including less restrictive work rules and lower labor costs, particularly with respect to employee benefit costs. The advantages of a less restrictive workforce include flexible work hours and the ability of our employee to perform multiple tasks, which we believe result in greater productivity, customer service and efficiency. This flexibility is typically not permitted or is significantly limited under the contracts that govern our union competitors.\footnote{166}

It was thus clear that with the IBT bargaining objective quite clearly attempting to bring Overnite within the orbit of NMFA contract provisions, agreement could be difficult. IBT presented provisions copied from, or vary similar to, the NMFA agreement as part of the proposal. In most cases, Overnite offered counter-proposals which greatly watered down or effectively cancelled the union proposals. These were rejected by the IBT, and the negotiations failed on many of these issues to the bitter end although there was agreement on several issues. Since there were about fifty such items on the negotiating table, what are regarded as the foremost issues in dispute, or what was settled, are dealt with herein.

Negotiations between Overnite and the IBT resulted in agreement on many issues. These included the checkoff and compulsory membership issues, and a clear statement that where a state had enacted “right-to-work” laws pursuant to Section 14(b) of the NLRA outlawing compulsory unionism there would be no attempt to circumvent them.\footnote{167} Since a majority of the twenty-one states which have enacted right-to-work laws are in Southeast and Southwest states in which a heavy concentration of Overnite’s business is found,\footnote{168} the company’s concession on the compul-

\footnote{165} This section is based upon a summary of positions on each contractual issue by each of the parties and a copy of the agreement thereon where it was reached in 2000. These contractual issues are found in a large three ring binder which the author was able to acquire. Each issues contains the “Teamster Proposal,” the “Overnite Proposal,” “agreed” verbiage if any, and “Date,” and “Comments,” if any. There are more than 50 sections in the binder, some of which cover several issues. The author has determined what, in his view, are believed to be key issues and discusses them in this part of the article. Since each issue is separately numbered in the three ring binder, or designated as “Appendix” or “Economics,” the citations thereto reference the numbers or the designation in the “Negotiating Summary.”Summary of Contractual Issues (2000) (unpublished summary on file with author) [hereinafter Negotiating Summary].

\footnote{166}Overnite Corp. Prospectus, supra note 45, at 3.

\footnote{167}Negotiating Summary, supra note 165, at Nos. 2 & 3.

\footnote{168}States which have enacted right-to-work laws are Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. See U.S. Dept. of Labor, Employment Standards Administration Wage & Hour Division,
sory union issue would not have insured an automatically large increase in IBT membership, but it certainly would have added some gains. It also gave the company an advantage to contradict any union claims that it was not bargaining in good faith.

Another issue that was largely solved was seniority. Historically, Overnite has recognized length of service as a key criterion in layoffs and promotions, and operates separate seniority districts for terminal workers, local drivers, and over-the-road drivers. Company-wide seniority was also recognized where divisional seniority was not helpful. The record shows considerable give-and-take on seniority issues and a large portion of agreement.

The union presented Overnite with demands for NMFA-based wages and benefits on which there never was agreement. Pensions, as discussed above, were based on the Central States Fund in the Teamster demand, and were rejected out-of-hand by Overnite with no compromise in sight. Health insurance and benefits were in the same category. Even less controversial items such as vacations, holidays, and jury duty remained without complete agreement.

Wages were also still on the table. The union wanted those agreed to in the NMFA negotiation; Overnite desired those given to its nonunion employees. Although there was no movement on this issue, one wonders that if the benefits issues could have been solved - and that is a big “if” - whether wages could have been negotiated, but negotiations were not impelling either side at this juncture, late in the negotiation time cycle.

Penalty overtime regulations were a strong deterrent issue to agreement. The Fair Labor Standards Act of 1938, as amended over the years, has always exempted the trucking industry from penalty overtime regulations. Thus, paying time and one-half for work over 40 hours per week is not required by Federal law. Nothing in the law, however, precludes unions and companies from regulating overtime compensation. The Teamsters won penalty overtime after 40 hours work per week in its agreements, including NMFA. Overnite was paying overtime after 45

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169. Negotiating Summary, supra note 165, at No. 5.
170. Id.
171. Id. at app. A-C & subheading marked “Economics”.
174. Id.
175. Id.
176. Id.
hours, not after 40 hours as required by the NMFA agreement.\textsuperscript{178} No compromise was achieved.\textsuperscript{179}

Allied with the wage issue were union demands to guarantee certain hours of work per day when a worker was called into work.\textsuperscript{180} The result could be eight hours pay for considerably less work time through no fault of management. Overnight paid various amounts depending upon conditions, but rejected automatic grants of eight hours regardless of cause or actual length of work time.\textsuperscript{181}

As significant as these wage and benefits issues were, except for pensions and health insurance, they might have had a better chance of being resolved if they alone stood in the way of general agreement than did the issues directly affecting management’s right to direct its workforce. For example, when conditions warranted, Overnite contracted out work and used casual and temporary employees. The IBT wanted strict limitation on these policies which Overnite would have accepted only if well watered down.\textsuperscript{182}

Various proposals by the IBT concerning arbitration, power of arbitrators, and what could be arbitrated were rejected by Overnite.\textsuperscript{183} The company did, however, agree to expedited arbitration for discharges and suspensions, and offered the right to strike when no arbitration was agreed to.\textsuperscript{184} This provision was cited by the NLRB and its General Counsel in rejecting the IBT’s final attempt to win a general unfair labor practice charge against the company, as discussed below.

Overnite also rejected IBT’s attempts to exempt sympathy strikes and refusals to cross picket lines from a non-agreed no-strike clause or any other contractual intervention in its ability to provide uninterrupted service.\textsuperscript{185} On the other hand, a clause holding an employee liable “for negligent, reckless, and/or intentional acts resulting in loss, damage, or theft of property when the company so concludes by a preponderance of the evidence” was agreed to.\textsuperscript{186}

Agreement was reached on equipment and related matters in the interest of safety in detail and covering many items.\textsuperscript{187} There seemed little opposition on either side of these matters. Generally, the IBT made a proposal, and the company either accepted it or revised and expanded it.

\textsuperscript{178} Confidential Interview with Overnite Transp. Co. personnel.
\textsuperscript{179} *Negotiating Summary, supra* note 165, at app. A-C & subheading marked “Economics”.
\textsuperscript{180} *Id.*
\textsuperscript{181} *Id.*
\textsuperscript{182} *Id. at No. 3.*
\textsuperscript{183} *Id. at No. 7.*
\textsuperscript{184} *Id. at No. 8.*
\textsuperscript{185} *Id.*
\textsuperscript{186} *Id. at No. 9.*
\textsuperscript{187} *Id. at No. 15.*
The union then accepted the revised version.  

Management rights clauses were much discussed, but wording was apparently never agreed to. It has not been possible to determine from the material in the three-ring binder exactly what held up agreement, but it does not appear that the parties were far apart.

The parties also did not reach agreement on the union’s desire to confine employees to their regular jobs. According to Overnite officials, about five times as much truck traffic is carted into Florida than comes out. Rather than use over-the-road drivers to return empty trailers to a terminal where traffic could use them, Overnite used terminal employees who had the proper licenses or casual or contract truckers to do the job. Under union rules, this would be limited or the carrier would have to put the trailers on a train. No agreement was reached in this situation.

Essentially, Overnite has utilized workers where they are needed and are qualified. Working out of classification is elastic under the Overnite practice, and management desired that it be continued this way which IBT rules would strongly resist. Compromise on such matters can be costly for a company, and difficult for a long time nonunion operator like Overnite. At the same time, dropping its long held restrictions on management regulation is difficult for a union and can be politically dangerous for union incumbents.

It is no surprise that agreement on such issues did not occur in the Overnite-IBT negotiations. As already noted, freedom to shift workers around as they are needed gives nonunion operators a large advantage and in such matters each side declined any substantive move toward agreement. Studying the situation as has been done for this article has convinced the author that the matters of management freedom were among the most contentious in the negotiation, and ones upon which neither side was disposed for serious compromise.

4. Why the IBT Believed It Could Only Accept the NMFA Agreement

Overnite’s strong position against what it regarded as significant restrictions on management’s right to manage was mirrored by the IBT’s strong position in favor of such restrictions. From the study of negotia-

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188. Id.
189. Id. at No. 41.
191. Id.
192. Id.
193. Id.
194. Id.
195. Id.
tions, it seems clear that the IBT leadership believed that it could not accept provisions which would provide Overnite with working conditions that were less restrictive than those provided in the NMFA agreement, and for a very obvious reason. It apparently seemed very clear to the IBT leadership that, if it yielded on these issues as Overnite proposed, the companies that were parties to the NMFA would be likely to demand the same or similar provisions. The NMFA was open for renewal negotiations with a March 2003 deadline during much of the Overnite strike period negotiations. If the IBT weakened its contracts at this juncture, the political ramifications for Hoffa and his administration could have been severe.

To preserve its posture, the IBT, therefore, continued to discuss these and other issues, but was never willing to reach agreement. It was careful not to allow a legal impasse to be reached because that would have permitted Overnite to implement its proposals unilaterally without legal penalty. Of course, with decertification elections on the horizon, it is doubtful that Overnite would have taken such advantage of an impasse. Negotiations had actually broken down, but the pretense of ongoing negotiations was maintained by the union to the end. It is significant that Hoffa called off the Overnite strike after an expensive agreement was reached with the largest unionized LTL carriers. He could then quietly admit defeat at Overnite by ending the strike while concentrating communications on the NMFA settlement as a great success.

a. Analysis

In retrospect, one may wonder why the IBT leadership did not adopt a different policy. Perhaps it could have accepted the deal offered by Overnite and possibly maintained at least some of its position in Overnite. To its unionized companies, it could then explain that this was the first step, and that in all future negotiations with Overnite, it would strive to move Overnite closer to the NMFA model until it achieved this goal. This would not have been the first time that the IBT varied from the NMFA contract. Overnite's subsidiary, the regional carrier, Motor Cargo, has agreements with IBT that do not replicate the NMFA.

197. Overnite Corp. Prospectus, supra note 45, at 66 where it is stated:

Employees at two Motor Cargo service centers located in North Salt Lake, Utah, and Reno, Nevada, representing approximately 11% at our Motor Cargo work force at 37 service centers, are covered by two separate collective bargaining agreements with unions affiliated with the Teamsters. Although these agreements cover most of the employees at these two service centers, less than half of these covered employees are actual union members. Those contracts are significantly less onerous than the Team-
of course, far larger, and this may have been a factor.

If the IBT had accepted a contract from Overnite that was, in its view, below the NMFA model, the burden would have been on Overnite to accept it or face NLRB charges of bargaining in bad faith. The IBT really missed its opportunity at this juncture. The IBT opted for an all or nothing goal, and depended on the NLRB to rescue it.\textsuperscript{198} As set forth in Table 3 below, it ended up with nothing.

III. UNION VIOLENCE, SECONDARY BOYCOTTS, "GISSEL" ATTEMPTS, AND FINAL NLRB CASE

To attempt to force Overnite to accept its posture without being able to organize more than fourteen percent of its employees, the IBT utilized three principal tactics: violence, secondary boycotts, and attempts to gain bargaining rights by persuading the NLRB to order Overnite to bargain with the IBT in locations where the IBT actually lost elections, but where a majority of the bargaining unit had signed union supporting authorization cards. Such bargaining orders are termed "Gissel" orders after the lead case in the matter.\textsuperscript{199} Finally, the IBT sought a nationwide "bargaining in bad faith" order undoubtedly in part to restrain Overnite's employees from decertifying actions.\textsuperscript{200} These four tactics are examined in this section.

A. VIOLENCE AS A UNION TACTIC

Union tactical violence has five purposes. First, such violence is an obvious endeavor to frighten bargaining unit employees, salaried employees who might be substituting for strikers by working in the plant, and striker replacements from crossing the picket lines.\textsuperscript{201} Second, violence is meant to scare officials of the struck company, who might be horrified and frightened by the violence levels or fear for their personal and col-

\textsuperscript{198} A reader asked whether there was a "most favored nations" clause or other clause obligating the Teamsters to give the company recipients the benefits of any future signed contract that had terms less than the NMFA agreement, or other arrangements between IBT and the major unionized carriers that prevented IBT from varying from the NMFA model. We have found none. Any provision in one contract or understanding that the Teamsters could not sign contracts or make arrangements that all future contracts follow the NMFA model could undoubtedly be a violation of antitrust laws. See generally United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).


\textsuperscript{200} See Letter from Kenneth T. Lopatka, Overnite counsel to Joseph H. Bornong, Field Attorney, NLRB Region 18 (October 24, 2001) (on file with author).

\textsuperscript{201} Armand J. Thiblot et al., Union Violence: The record and the Response by courts, legislatures, and the N.L.R.B. 32 (2nd ed. 1999).
leagues' safety, into agreeing to a settlement favorable to the union.\textsuperscript{202} Third, violence requires a host of extra company costs, including extra guards, repair of damaged vehicles and other equipment, court litigation, and maintaining employees overnight who fear crossing violent picket lines.\textsuperscript{203} Fourth, violence is designed to scare away suppliers and customers, especially those who use their own equipment to supply materials for or buy products from the struck company, or who have a union themselves that might attempt to support the struck company by various actions.\textsuperscript{204} And fifth, violence is meant to provide a warning to other companies in the same industry or area that it is costly, unpleasant, and generally unwise to oppose the union demands.\textsuperscript{205}

The IBT is clearly very cognizant of the impact of violence. Moreover, truck drivers, the key employees of Overnite, are very susceptible to violence because they work alone unlike factory workers who often work in groups. Hence, the IBT has not been reluctant to utilize violence.

The only nationwide study of union violence found that the Teamsters were recorded by newspapers and a few other organs of news, from 1975 through mid-1996, as involved in 1,543 violent actions in labor disputes.\textsuperscript{206} The second largest involvement was by the United Mine Workers of America ("UMWA") with 946 reports.\textsuperscript{207} On a per capita basis, the now shrunken UMWB was by far the leader with incidents per 1,000 members at 12.61 while the IBT ranked only sixth, with incidents per thousand members at 1.20.\textsuperscript{208} The authors of the study report that "the total number of incidents of violence is understated by considerable margins, not from bias, but from input inadequacy."\textsuperscript{209}

Violence is usually at its peak at the inception of a strike, especially if the union is relatively weakly supported by employees at the struck facility and the company attempts to continue to operate. This was, of course, the situation at Overnite. According to Overnite, the IBT used employees of other trucking companies and temporarily hired personnel to picket.\textsuperscript{210} After one year of the strike, Overnite pointed out the following:

There have been 21 injunctions in 14 states [against IBT violent or illegal actions] and the courts have made findings of serious violence by Teamsters.
The NLRB has issued nine complaints against Teamster violence and threats of violence. A Teamster agent in Philadelphia was found in contempt of court and fined $1,000 personally, while the union was fined $20,000. Teamster agents were found guilty of criminal activity in Minnesota at the local headed by IBT General Secretary - Treasurer, Tom Keegel. Before the picketing began there were no recorded violent incidents involving Overnite trucks. Since the strike began on October 24, 1999, there have been more than 54 shootings at occupied Overnite vehicles.211

Beside seeking injunctions from the courts, Overnite filed more than sixty charges with the NLRB, which with the courts, has adopted a definition of restraint and coercion that is certainly broad enough to encompass most ordinary kinds of violent criminal or tortious conduct. "In applying section 8(b)(1)(A) [of the NLRA, the Board and the courts] . . . have construed the phrase, ‘in the exercise of rights guaranteed in section 7,’ to include almost anything an employee might do in connection with his work or in his relationships with the union. [The Board and the courts] . . . have also taken a broad but realistic view of union responsibility for the violence that occurs incident to unionization activities."212

There are, however, two basic shortcomings with NLRB handling of violence matters. First, the NLRB can only charge unions with orders to cease and desist improper activity, and then seek enforcement by the federal courts, which can be a long process while violence may continue.213 Second, the record of the NLRB in violence matters frequently reveals a reluctance to deal vigorously with union violence.214 This was quite noticeable in the Overnite case in which finally, in the fall of 2002, the sixty odd cases were consolidated and assigned to Region 9, Cincinnati, for action, and a complaint including all of them covering 67 pages issued on October 31, 2002.215 Some of these charges date back to 1999, 2000, and 2001, as well as 2002.216

A hearing date was set, but later postponed, as the parties negotiated a Settlement Stipulation which was approved by the Director of NLRB Region 9, Cincinnati.217 The Stipulation was four single spaced pages long and was remarkably complete. It contained promises that the IBT would not engage in any of the violent activities which it utilized during the strike, and included in its requirements virtually every type and aspect of

212. Thielsot et al., supra note 201, at 440-41.
213. Id. at 281.
214. Id. at 443.
216. Id.
violence that the IBT brandished during the strike.\textsuperscript{218} It also required
that it be posted on the union’s “Internet Home Page . . . and that a copy
of this \textit{Notice to Employees and Union Members} be posted in plants for a
period of 60 consecutive days.”\textsuperscript{219} The \textit{Stipulation} was given wide public-
ity by the \textit{Wall Street Journal} which reprinted four paragraphs from it as
part of an editorial questioning whether the IBT should be freed from
federal control.\textsuperscript{220} This is discussed below.

To illustrate how violence was utilized by the Teamsters and vigi-
lously fought by Overnite in the courts and at the NLRB, what occurred
in Minneapolis, Georgia, and other regions is examined.

\textbf{1. Violence in the Minneapolis Area}\textsuperscript{221}

Teamster Local 120, St. Paul, Minneapolis’ twin city, struck the
Overnite facility, which is actually in the suburb of Blaine, as part of
the national strike that began on October 24, 1999.\textsuperscript{222} This local had been
certified as bargaining agent in the mid-1990s, but employees had filed
for a decertification vote two weeks before the strike, which the NLRB
had dismissed.\textsuperscript{223} Given this background, it is not surprising that the IBT
local leadership resorted to considerable violence to attempt to gain sup-
port for the strike, and that Overnite management strenuously moved to
uphold the rights of free access for employees.

The union charged that Overnite had bargained in bad faith and that
the strike was caused by the company’s unfair labor tactics.\textsuperscript{224} As a part
of this strike, Local 120 established a picket line at the entrance to the
Overnite terminal.\textsuperscript{225}

On November 12, 1999, Overnite filed a lawsuit alleging, among
other things, that Local 120 was violating the Minnesota Labor Relations

\begin{itemize}
\item \textsuperscript{218} \textit{Id.} at 3-5.
\item \textsuperscript{219} \textit{Notice to Employees and Members, posted pursuant to a Settlement Stipulation} (Sept. 9, 2003) (on file with author).
\item \textsuperscript{220} Editorial, \textit{The Teamster Promise}, \textit{Wall St. J.}, Sept. 9, 2003, at A20.
\item \textsuperscript{221} This section profitied for a draft by Mark Chrimer, Esq., Seaton, Beck, Peters, Bowen & Feuss, Enid, MN. The descriptions of the violence were prepared and submitted to the local
court proceedings in which the union was found in contempt, as described, \textit{infra}. The text of the
case described herein is developed from the court case and Mr. Chrimer’s report. It is difficult
to quote in a paragraph because the various paragraphs are derived from several written sources
by the author, Chrimer’s report is the most complete source used. Marc Chrimer, \textit{Summary of
Testimony for Finding Union in Contempt of Temporary Restraining Order and Permanent
Injunction} (on file with author) [hereinafter \textit{Chrimer Report}].
\item \textsuperscript{222} Overnite Transp. Co. v. N.L.R.B, 333 N.L.R.B. No. 1392, 1392 (May 15, 2001) (affirmed
dismissal of request for review).
\item \textsuperscript{223} \textit{Id.} at 1397.
\item \textsuperscript{224} \textit{Id.} at 1393.
\item \textsuperscript{225} \textit{Chrimer Report, supra} note 221, at 1.
\end{itemize}
Act, also known as Minnesota’s “Little Wagner Act,” and applied to the Anoka County District Court for a Temporary Restraining Order (“TRO”) restraining Local 120’s conduct. The Minnesota Labor Relations Act makes it an unfair labor practice for picketers, among other things, to engage in violent conduct. The TRO was issued the same day, and a permanent injunction was issued on December 1, 1999.

The TRO and the permanent injunction enjoined Local 120 from committing acts of violence, coercion, intimidation, verbal harassment, threats, or any other actions which would attempt to compel a person to join a labor organization or strike against his or her will or would affect access to, and operation of, Overnite’s terminal or the free and uninterrupted use of public roads. There were numerous violations of this provision. For example, one nonstriking Overnite driver was subjected to a person from the picket line yelling loudly at her, “Bitch, I’m going to kick your ass.” Another nonstriking Overnite driver was threatened four or five times by two picketers. A third nonstriking driver was told by a picket, as he crossed the picket line, “We’ll beat the shit out of you, cocksucker. We’ll see you somewhere else.” Finally, another nonstriking driver was called a “fucking bitch” while at the Minneapolis facility. All of these drivers apparently felt threatened by the actions of the picketers.

The permanent injunction enjoined Local 120 from “standing or remaining within five (5) feet of a vehicle approaching, ingressing or egressing [Overnite’s] terminal or attempting to do so.” Local 120 picketers were found to have been in violation of the five-foot rule on numerous occasions. Local 120 engaged in a strategy of forcing the Overnite trucks to stop two or three times before entering or leaving the terminal. It was able to do this by having its pickets step in front of the trucks or walk to one end of the truck and turn back and walk to the other end of the

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226. **Minn. Stat.** § 179.01 (2003).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Chrismer Report, supra* note 221, at 3. Herein begins a summary of the failure of the Temporary Injunction to restrain violence, and the Overnite’s move to seek contempt proceedings.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Chrismer Report, supra* note 221, at 5.
truck.\textsuperscript{237}

The TRO and the permanent injunction enjoined the union from damaging or threatening to damage the vehicles or property of Overnite or its employees and other invitees.\textsuperscript{238} The union was found to have committed considerable property damage to Overnite property. Nonstriking truck drivers had raw eggs, coffee, and human waste thrown on their trucks.\textsuperscript{239} Other nonstriking drivers had their trucks spit on and hit with picket signs.\textsuperscript{240} The property damage was not limited to Overnite trucks. Nonstriking Overnite drivers also suffered damage to their personal vehicles.\textsuperscript{241} For example, a number of drivers found screws and jackrocks in the tires of their personal vehicles after crossing the picket line.\textsuperscript{242} One non-striking driver heard a thump as she crossed the picket line in her personal vehicle and, after pulling over, discovered a jackrock in her tire.\textsuperscript{243} Another driver, while crossing the picket line, ran over a jackrock that punctured the front right tire of his vehicle.\textsuperscript{244} The terminal manager found nails and screws on the picket line.\textsuperscript{245} Finally, the Overnite mechanic shop supervisor had to replace air lines on an Overnite truck that had been cut by a sharp blade and had to remove graffiti from two Overnite trailers that had the word “scab” painted on them.\textsuperscript{246}

The permanent injunction enjoined the union from mass picketing, from placing more than four pickets at any entrance to the terminal, and from remaining within 200 feet of Overnite’s entrance except that no more than twenty persons could remain at a location not less than fifty feet from the entrance.\textsuperscript{247}

The union held a rally in support of its strike on December 2, 1999.\textsuperscript{248} Local 120 provided a sound system equipped flat bed trailer upon which the speakers at the rally were to stand. During the rally, local politicians, along with Local 120 officials and members, addressed a crowd of approximately 200 to 250 Local 120 supporters.\textsuperscript{249} At the end of the rally, the police had difficulty getting union supporters to leave the

\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Chrismer Report, supra note 221, at 5.
\textsuperscript{242} Id. A jackrock is a welded, four-pronged metal “jack”, sharpened at each tip, and designed by strikers to inflict damage on automobile tires.
\textsuperscript{243} Id.
\textsuperscript{244} Id. at 5-6.
\textsuperscript{245} Id. at 6.
\textsuperscript{246} Chrismer Report, supra note 221, at 6.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
area. At this same time, Overnite vehicles were returning to the terminal and the police witnessed individuals who had been at the rally stopping the trucks and challenging their entrance to the facility. According to the police, the union supporters and pickets continued in this activity for about twenty minutes before the police were able to get them to disperse. The union admitted that they had violated the order.

On January 3, 2000, a Local 120 picket line captain jumped on the side of an Overnite truck. The picket line captain admitted jumping on the truck and stated that he became angry as the driver involved had several times charged up to the picket line, stopped quickly and accelerated again quickly, making what he called a "jackrabbit stop." The picket line captain also admitted that his behavior during this incident was a major infraction of the TRO and the permanent injunction. Interestingly, this picket line member later became a business agent for Local 120.

Not only did Local 120 members jump on trucks, they also tried to pull Overnite drivers out of their trucks. On January 10, 2000, an Overnite driver was returning to the Overnite terminal. The driver had to stop before he reached the picket line area because a picket carrying a picket sign was in front of his truck. The picket then walked around to the side of the vehicle, opened the truck door, and tried to pull the driver out of the truck. The picket also used threatening language towards the driver and made hand gestures indicating that he was going topple the driver from the truck. The driver was forced to propel the truck so that the picket would fall off. The picket admitted afterwards that he had attempted to pull the driver from the truck. Thus, Local 120 not only committed violence against Overnite property, but they used violence against Overnite employees who were attempting to do their job. Furthermore, the violence was not limited to the Overnite facility only, but was attempted against employees elsewhere.

The TRO and the permanent injunction prohibited the IBT local union from driving alongside Overnite vehicles, other than momentarily,
from following Overnite employees, other than to conduct lawful ambulatory picketing, and from swerving or stopping in front of Overnite vehicles.\textsuperscript{262} The union violated all of these provisions.

For example, one Overnite driver experienced a station wagon with a union decal and a blue truck pull in front of her truck and slow down, making it necessary for her to slow down and pull over abruptly, risking a collision.\textsuperscript{263} Another Overnite driver was followed as he left the Overnite facility. After exiting and reentering the roadway to confirm that he was being followed, the driver let the other car pass him.\textsuperscript{264} After doing so, the other driver pulled in front of his vehicle and slammed on the brakes.\textsuperscript{265} The Overnite driver then pulled his truck over to confront the other driver.\textsuperscript{266} The other driver verbally threatened the Overnite driver by saying, “You are hurting your people in line by working; I might have to hit you” and “I don’t care if I hurt your vehicle or anybody else’s vehicle or my own.”\textsuperscript{267} The driver also said, “If I have to, I will kill you.”\textsuperscript{268} The Overnite driver was later able to identify this driver as a union picketer.\textsuperscript{269}

Yet another Overnite driver was driving his truck when a station wagon pulled in front of him and braked, slowing from 50-55 m.p.h. down to about 20 m.p.h. When the Overnite driver changed lanes, the station wagon also changed lanes, pulling in front of him and slamming on the brakes again.\textsuperscript{270} When the Overnite driver changed lanes yet again, the station wagon quickly changed lanes and nearly hit a third party’s car.\textsuperscript{271} A few minutes later, a projectile hit the Overnite driver’s truck.\textsuperscript{272} The Overnite driver was able to get the license number of the station wagon involved in this incident.\textsuperscript{273} Records from the Department of Motor Vehicles indicated that the car was owned by an individual who was a member of the union.\textsuperscript{274}

The TRO and permanent injunction prohibited the union from damaging Overnite property or Overnite vehicles or vehicles of Overnite employees. Again, the union was guilty of all of the above. When one

\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} \textit{Chrismer Report, supra} note 221, at 8-9.
\textsuperscript{265} \textit{Id.} at 9.
\textsuperscript{266} \textit{Id.}
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} \textit{Id.}
\textsuperscript{269} \textit{Chrismer Report, supra} note 221, at 9.
\textsuperscript{270} \textit{Id.}
\textsuperscript{271} \textit{Id.}
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} \textit{Chrismer Report, supra} note 221, at 9.
\textsuperscript{274} \textit{Id.}
Overnite driver arrived at a customer’s location to make a delivery, a man wearing a union hat was sitting in a nearby car.\footnote{Id. at 10.} When she came out of the customer’s location, the man was gone and three screws were in her tire.\footnote{Id.} Other Overnite drivers found screws in their personal vehicles.\footnote{Id.} On another occasion, an Overnite driver who had stopped for a soda came back to her truck and found that both of her passenger side tires had puncture holes and her driver’s side window was shattered.\footnote{Id.} Another Overnite driver stopped to see if she was okay and while he was seated in her passenger seat, the passenger side window was shattered.\footnote{Id.}

The violence was not limited to stationary Overnite vehicles. One Overnite driver’s windshield was shot out with ball bearings and marbles fired by slingshots.\footnote{Id.} On one occasion, an Overnite mechanic was called to repair an Overnite trailer that had eight flat tires.\footnote{Id.}

Prior to November 12, 1999, the Overnite mechanics fixed approximately one windshield a month.\footnote{Id.} For a two-month period following November 12, 1999, Overnite mechanics replaced eight windshields.\footnote{Id.} Also, for an eleven-year period prior to November 12, 1999, Overnite had to replace only one side window in its trucks.\footnote{Id.} During the two-month period following November 12, 1999, Overnite had to replace twelve side windows.\footnote{Id.}

Another Overnite driver returned to his truck and found that his trailer was disconnected from the fifth wheel.\footnote{Id.} The fifth wheel had been attached prior to making the deliver because otherwise the trailer would not have stayed connected to the truck. Further, it is not possible for the fifth wheel to come unattached on its own because the handle has special indentations that have to be lifted up and unlatched by hand. If one drives with the fifth wheel disconnected, there is a good chance that the trailer will turn over and cause both the trailer and the items inside the truck to be damaged. On another occasion this same Overnite driver returned to his truck after making a delivery and witnessed a man shooting a hole in his tire.\footnote{Id.} The Overnite driver later picked the man out of a
photo lineup. He was a member of Local 120.

Overnite drivers were subjected to other violent incidents including the following: cable locks being placed on a trailer that had to be cut off in order to complete a delivery, pins missing from the locks for a set of dual trailer wheels, and windows being shattered.

When the strike began on October 24, 1999, Overnite contracted with a private security company to establish security at its Minneapolis terminal and at other Overnite terminals across the nation. Security began at the Minneapolis terminal on October 26, 1999. Pursuant to Overnite’s nationwide corporate plan, it was supposed to reduce security at all facilities by fifty percent on December 20, 1999. On the latter date, Overnite instituted this plan nationwide, but was unable to implement the plan at its Minneapolis terminal because of the violence. Security in Minneapolis was not reduced to the fifty percent level until January 24, 2000. Prior to January 24, 2000, Overnite spent approximately $15,500 in weekly security expenses. After January 24, 2000, Overnite spent approximately $7,800 in weekly security costs. From December 20, 1999 through January 24, 2000, Overnite incurred total security costs of $72,183.12. The Anoka County District Court granted Overnite’s motion for an Order finding the union in contempt of the Court’s TRO and permanent injunction.

In order to indemnify Overnite for the actual loses, injuries, and other costs incurred because of the violations of the court orders by the union, the union was ordered to pay Overnite $5,812 for property damage and $24,061.04 for additional security costs incurred by Overnite after the Company sued and was granted an order finding the union in contempt. The trial court decision was affirmed by the court of appeals of Minnesota and the Minnesota supreme court denied further review.

The Teamsters Local 120 strike against Overnite’s Minneapolis Ter-

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288. Id.
289. Chrismer Report, supra note 221, at 11.
290. Id. at 11-12.
291. Id. at 12.
292. Id.
293. Chrismer Report, supra note 221, at 12.
294. Id. at 12-13.
295. Id. at 13.
296. Id.
298. Id.
300. Id.
minal and its aftermath was a microcosm of the Teamsters strike against Overnite generally. The union’s seeming belief that it held a strong position at the outset of the strike, based on its certification as representative of the Minneapolis bargaining unit, the assumed strength of the national Teamsters union behind the local, and the apparent momentum of the union’s national strike, ultimately founded on the fundamental, albeit less apparent, weaknesses in the union’s position as described above. The reliance on violence undoubtedly increased employees’ distaste for union representation. In a secret ballot election held on October 19, 2002, the employees at the Minneapolis facility voted to decertify IBT Local 120 as their bargaining agent by a vote of thirty-six to three.\textsuperscript{303} No objections were filed and the NLRB certified the decertification results on November 5, 2002.\textsuperscript{304} Table 3 shows a similar result at the various struck locations.

2. *Violence in the Georgia Locations and Elsewhere*

As noted above, Overnite has a major terminal in Atlanta, there are smaller facilities in Lawrenceville (North Atlanta) and Kennesaw in the Atlanta area, and one in Macon.\textsuperscript{305} These facilities were beset with the same types of violence at facility gates and especially on the road as described in the Minneapolis area. Overnite both filed charges with the NLRB and filed for and won TROs and permanent injunctions in state courts prohibiting such violence.\textsuperscript{306} The incidents were especially concentrated on the Overnite trucks and drivers and apparently on women drivers who seemed to have been more heavily utilized in these facilities than in the trucking industry generally.\textsuperscript{307} Overnite, of course, was especially concerned about driver safety, not only because drivers are key employees, but also because its business depends upon being able to deliver freight on time and to avoid incidents at customer locations.

The TRO issued by Fulton County Superior Court on March 8, 2000, was broad.\textsuperscript{308} It applied to the IBT, its Local 728, officers, members,


\textsuperscript{303} See infra Table 3 for Minneapolis results as well as similar results at all Teamster NLRB certified locations.

\textsuperscript{304} Id.

\textsuperscript{305} See infra Table 3 for a list of Overnite facilities.


\textsuperscript{308} Id.
## Table 3
**Overnite Transportation Company Teamsters Union Certification/Decertification History**

<table>
<thead>
<tr>
<th>Location</th>
<th>Local Union</th>
<th>Certified Date</th>
<th>Decertified Date &amp; Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta, GA</td>
<td>728</td>
<td>2/7/97</td>
<td>12/18/02 (92-53)</td>
</tr>
<tr>
<td>Bedford Park (Chicago), IL*</td>
<td>705</td>
<td>1982</td>
<td>3/21/03 (40-11)</td>
</tr>
<tr>
<td>Bowling Green, KY</td>
<td>89</td>
<td>8/2/99</td>
<td>9/18/03 (13-3)</td>
</tr>
<tr>
<td>Buffalo (Tonawanda), NY</td>
<td>375</td>
<td>7/30/99</td>
<td>IBT disclaimed interest</td>
</tr>
<tr>
<td>Cincinnati, OH</td>
<td>100</td>
<td>7/18/97</td>
<td>11/4/02 (67-2)</td>
</tr>
<tr>
<td>Decatur, IL</td>
<td>402</td>
<td>1/27/97</td>
<td>11/5/02 (24-1)</td>
</tr>
<tr>
<td>Detroit (Romulus), MI</td>
<td>290</td>
<td>8/19/99</td>
<td>9/25/03 (68-33)</td>
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<tr>
<td>Farmington (Bay Shore), NY</td>
<td>707</td>
<td>5/17/96</td>
<td>2/10/03 (19-11)</td>
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<td>406</td>
<td>6/7/95</td>
<td>10/31/02 (29-0)</td>
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<td>133</td>
<td>12/28/94</td>
<td>2/28/03 (85-41)</td>
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<td>651</td>
<td>8/11/99</td>
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<td>8/14/95</td>
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<td>11/4/02 (98-2)</td>
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<td>2/4/03 (31-8)</td>
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<tr>
<td>Tupelo, MS</td>
<td>667</td>
<td>5/29/98</td>
<td>2/10/03 (16-4)</td>
</tr>
</tbody>
</table>

Source: NLRB Records
*This was the last holdover from the IBT organizing drive of this early period; other facilities unionized then have been closed as a result of the A.T. Kearney study. Cumulative vote as of September 30, 2003: For decertification: 1,095 plus disclaimers by the IBT in two locations, Against decertification: 474, Challenged ballots: 38 (Not counted because would not have affected results.)*

agents, and employees as well as "defendants presently unknown," and then cited prohibitions against a long list of violent actions supported by a host of affidavits presented by Overnite. Among the prohibitions were any acts preventing, or attempting, to prevent Overnite and others from

309. *Id.*
working, continuing in their employment, engaging in a lawful vocation, engaging in and lawful business activity, or using property in the conduct of its or their business; any acts of violence, intimidation, or any other actions that had the effect of compelling a person to join the IBT or strike against his or her will;\textsuperscript{310} using abusive language to persons entering or leaving Overnite terminals and property or making delivery to Overnite customers; swerving into or in front of, stopping in front of, throwing objects at, blocking access of, damaging, or vandalizing Overnite or personal vehicles of Overnite employees; and following Overnite’s agents, employees or their families, or anyone having a business relationship with Overnite, or knowingly driving alongside them.\textsuperscript{311}

A very similar TRO was issued by the Bibb County Superior Court covering the Macon area.\textsuperscript{312} The affidavits submitted in support of the charges indicated the same type of violent actions as were charged in the affidavits in Atlanta. In both locations, charges were also filed with the NLRB and these were included in the master charge noted above which was settled in confidential discussions.

In addition to Minneapolis, Atlanta, and Macon, Overnite also secured injunctions against Teamsters union violence during October and November 1999, the first six weeks of the strike in six other locations - Bridgeton, Missouri; Grand Rapids, Michigan; Farmingdale, New York; Fort Wayne, Indiana; Memphis, Tennessee; and Miami, Florida.\textsuperscript{313} The violence there followed the same pattern as occurred in Minneapolis, Atlanta, and Macon.\textsuperscript{314} The object was the same - to intimidate employees who were not striking and to intimidate the company and those who were working in order to make up for the fact that the strike had relatively little support from the employees. Overnite’s strong legal reaction to this illegal union conduct clearly did much to thwart the union’s violent tactics, and judging from the results of the decertification elections which followed, as set forth in Table 3, indicate that the violence undoubtedly alienated the employees, as will be discussed below.

In LaVergne, Tennessee, near Nashville and known as the “Nashville facility,” Overnite operates a service facility.\textsuperscript{315} Violence of much the same nature as described above occurred between October 1999 and January 2000. The company sought relief in state court. According to the

\textsuperscript{310} Id. at 2.
\textsuperscript{311} Id. at 2-4.
\textsuperscript{313} Information from the Overnite Transp. Co.
\textsuperscript{314} Id.
Tennessee Court of Appeals at Nashville:316

Between October 1999 and January 2000, the trial court entered five injunctions against the union, each more restrictive than the one before, enjoining the union from engaging in the alleged unlawful violence and intimidation. In August 2000, the trial court issued a show cause order, citing 128 alleged violations of the injunctions, requiring the union to show cause why it should not be held in civil contempt. In March 2002, the trial court determined that the company’s petition for civil contempt was moot because, by that time, the contemptuous conduct had ceased. . . .317

The Tennessee Appellate Court reversed the trial court on this issue, noting that when an injunction is issued, it must be obeyed.318 It reversed and remanded the case to the trial court for further proceedings “not inconsistent with [the appellate court’s] Opinion.”319 Judging from past practice, the parties may negotiate a settlement with Overnite receiving remuneration for damages from the violence and intimidation.

B. THE IBT’S USE OF ILLEGAL SECONDARY BOYCOTTS

The IBT’s growth in the 1930s and early 1940s was heavily featured by the use of secondary boycotts whereby customers were picketed to prevent nonunion truckers from serving them and to induce the customers to change to unionized carriers.320 Pressure of this sort, directed against a third party which had no dispute with the union, was not illegal then and served the union’s purpose, which was of course, the unionization of the nonunion truckers. It resulted in a general unionization of the LTL over-the-road trucking industry, of which Overnite has been the largest exception for many years. As recounted above, the father of the current IBT president led a strike in an attempt to unionize Overnite but failed to succeed by using the traditional secondary tactics largely as a result of amendments to the NLRA in 1947 and 1959, which are known as the Labor Management Relations Act (“LMRA”).321

The LMRA amendments severely limited secondary boycott usage by unions. Thus, Section 158(b)(4)(B) of the NLRA, as amended by the LMRA, makes it an unfair labor practice for a union to engage in, . . . or encourage any individual employer by any person engaged in commerce or in an industry affecting commerce to engage in, a

316. Id.
317. Id. at *2.
318. Id. at *37.
319. Id. at *46.
320. See generally Farrell Dobbs, Teamster Power (1973) for an exposition of this approach. He developed and instituted this approach, which was adopted and perfected by James Hoffa, father of the present Teamster president.
strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .322

The LMRA Amendments to the NLRA also provided in § 187(a) that it was “unlawful for . . . this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4). . . .”323 Section 187(b) then provides:

Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) . . . may sue therefor in any district court of the United States . . . without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.324

Because the IBT made no secret of its use of secondary boycotts, Overnite early sought relief and damages in the courts pursuant to § 187 of the LMRA.325 A major case was filed in U.S. District Court for the Northern Division of Georgia, Atlanta Division, because of the concentration of cases in that district and their impact on Overnite’s business. As examples of these cases, the cases described in the Second Amended Complaint therein are summarized below.326

On August 2, 1999, Phil Young, IBT vice-president and national freight director, sent Overnite customers a letter that advised them that there would be a nationwide strike, and that “ambulatory picketers will be used to picket all customers.”327 This was done as promised, but the poor response by Overnite employees to the strike call led the IBT in the second strike year to alter its boycott plans and to concentrate on areas, such as Atlanta, where it could be certain of obtaining adequate pickets and could recruit such pickets to rove in order to picket in other areas. “Instead of scattered picketing in many cities, the IBT planned to ‘saturate one city at a time with as many members as possible.’”328

327. Id. at 4.
328. Id. at 5.
was also chosen as an initial target for such “saturation.”

On October 23, 26, and 27, 2000, IBT and Local 728 officers, employees, agents, and supporters picketed a Mack Truck facility in the small town of Morrow, south of Atlanta, at a time when no Overnite employee was present. As a result, Mack ceased doing business with Overnite. The union actions as described were clearly in violation of § 158(b)(4)(i) and § 158(ii)(B) of the NLRA.

Similar activities with the same conditions and results - ceasing to do business with Overnite - that took place at Huffman Tires in Atlanta and Tara Materials in Lawrenceville (North Atlanta) by the Teamsters were also described as clearly in violation of NLRA § 158(b)(4)(i) and § 158(ii)(B) of the NLRA.

Memphis, Tennessee, like Atlanta, was a stronghold of the Teamster organization within Overnite and secondary picketing was conducted there. A target was United Warehouse, which provided warehousing and logistics services to Eveready Battery/Energizer, an Overnite customer. Picketing occurred there in violation of the NLRA, and Eveready ceased doing business with Overnite.

Secondary picketing also occurred at the Swanson Intimate Commissary Services in Toledo, Ohio, on or about February 1, 2001, again resulting in a company ceasing doing business with Overnite.

Overnite’s major case for recovery of financial damages for illegal secondary picketing demanded a very substantial, but unknown dollar amount. It was settled as part of the confidential negotiations of the past several years and the case dismissed. It is likely that Overnite received a substantial sum for the settlement, but the amount is unknown.

Also in the courts was a major defamation case in which Overnite, former president James Douglas, and officials Robert Edwards and Gary McGuire sued the IBT and Local 728 in Atlanta, former IBT president Ronald Carey, and three other union officers for claiming that Douglas, Edwards, and McGuire had been “formally indicted by the US Government of massive violation of Federal Labor Laws,” and of circulating this and other defamatory materials widely. The complaint demanded

329. Id. at 6.
330. Id. at 7.
331. Id. at 8.
332. Id.
333. Id. at 9-11.
334. Id. at 11.
335. Id. at 12.
336. Id. at 13.
$500,000 in compensatory and punitive damages and the same amount for the company and for each of the allegedly defamed executives who were claimants.\textsuperscript{339} The case likewise was allegedly settled on a confidential basis.

In Kansas City, the parties sued each other.\textsuperscript{340} This litigation involved the discharge of four individuals for strike violence, Overnite-obtained injunctions against such violence. Also the company brought lawsuits against employees from other companies for strike misconduct at or against Overnite facilities. The IBT brought charges with the NLRB in regard to Overnite's disciplining.\textsuperscript{341} The costs of pursuing this case and the time and expense required to do so induced Overnite and the union to move to negotiation. Overnite ended up paying the employees discharged, but securing an agreement that they not be reinstated and never apply for work at the company in the future.\textsuperscript{342} The NLRB cases were withdrawn by the union which agreed to a one year continuation of the injunction against strike violence.\textsuperscript{343} Overnite also paid certain moneys, but concluded this was cheaper than litigating especially since it received what it most desired, no reinstatement for the charged employees and a one year injunction against future strike violence.\textsuperscript{344}

The IBT gained because it could have pointed to the settlement as "proof" that Overnite had engaged in unfair labor practices although the company denied this charge. The IBT did not, however, use this information in any substantive manner in so far as could be determined.

C. The IBT's Search, Initial Gain, and Then Loss in Gissel Cases

The IBT adopted a number of strategies aimed at convincing the NLRB and the courts that Overnite was a viciously antiworker and anti-union employer as a means of gaining public, NLRB, and judicial support for its bargaining objectives. Thus, union supporters filed more than 1,000 unfair labor practice charges with the NLRB.\textsuperscript{345} The great majority of these cases were either dismissed or withdrawn and most of the others were settled, or otherwise disposed of after the parties met to attempt to reduce litigation.\textsuperscript{346} There was, however, no general agreement for the

\begin{itemize}
\item \textsuperscript{340} Information from Overnite Transp. Co. attorneys.
\item \textsuperscript{341} Id.
\item \textsuperscript{342} Id.
\item \textsuperscript{343} Id.
\item \textsuperscript{344} Talking Points for Kansas City Settlement from Overnite Transp. Co. 2 (2001). (on file with author).
\item \textsuperscript{345} Id.
\end{itemize}
eleven locations\textsuperscript{347} where the union lost elections and then requested \textit{Gissel} bargaining orders rather than a new election, but the parties understood that a consolidated case involving four cases, Louisville, Kentucky; Norfolk, Virginia; Bridgeton, Missouri; and Lawrenceville (North Atlanta), Georgia, could well be a decisive one.

The IBT initially assumed that it had finally won its goal in the major four location case, as did everyone else. The administrative law judge ("ALJ") found that the local unions had lost NLRB elections because of extensive Overnite unfair labor practices, and that there was no hope of fair elections.\textsuperscript{348} Therefore, both the ALJ and the NLRB Board ruled that a \textit{Gissel} bargaining order should be ordered.\textsuperscript{349} The Board also issued a broad cease-and-desist order that directed the company to rescind the overtime and nonwage portions of a productivity package which it had effectuated at the four facilities, and to pay damages to workers at fourteen other unionized facilities where employees did not receive wage and mileage increases in 1995.\textsuperscript{350} Overnite appealed the decision to the Court of Appeals, Fourth Circuit, but a three judge panel voted 2-1 to sustain the NLRB decision.\textsuperscript{351} Overnite then sought a ruling \textit{en banc} from the Fourth Circuit, but in April 2002, it was announced that Overnite's request had been denied.\textsuperscript{352} The IBT headlined in its journal, "Overnite Must Pay Workers $3 Million," and declared that the court decision "will lead to negotiations with all thirty-seven terminals on behalf of 3,500 Teamsters."\textsuperscript{353}

Overnite likewise assumed that the Teamsters had won the case. Following the Court's orders enforcing those of the NLRB, Overnite posted notices directed by the Board in all facilities where it was required to do so.\textsuperscript{354} It also began negotiating with the NLRB as to which employees

\begin{footnotes}

\textsuperscript{347} \textit{Id.} at 993. There was one additional location, Chattanooga, Tennessee, on the list, but the IBT failed to obtain the number of eligible employees in the election there, which it lost. As a result it could not claim that it had a majority of signed cards to support its claim that it had a majority membership which Overnite dissipated by unfair labor practices, and that these unfair labor practices caused its representation vote defeat. Such a showing was essential for the Board to order a \textit{Gissel} order. Hence, Chattanooga was dropped from the union claims for such an order. Personal investigation with Overnite Transp. Co. by author.


\textsuperscript{349} \textit{Id.} at 996.

\textsuperscript{350} \textit{Id.} at 996-97.


\textsuperscript{352} \textit{Id.}

\textsuperscript{353} \textit{Overnite Must Pay Workers $3 Million, Teamster,} June-July 2001, at 7. The 37 terminals in the IBT list included the 22 where it held bargaining rights and 15 where it lost elections.

\textsuperscript{354} Telephone Interview retained attorney who was handling this matter for Overnite (Sept. 2001).
\end{footnotes}
should receive back pay and how much they should receive.\textsuperscript{355} In mid-May, however, the Fourth Circuit directed the NLRB to respond to the company's petition requesting it to set aside the panel's decision affirming the Board's decision, to hold an \textit{en banc} hearing, and to issue a new decision \textit{en banc}.\textsuperscript{356} On July 16, 2001, the Fourth Circuit issued a one sentence order granting Overnite's request vacating the February 16 decision of the panel enforcing the NLRB order and setting the hearing, after which an \textit{en banc} ruling would be issued.\textsuperscript{357} The \textit{en banc} ruling was issued on February 11, 2002.\textsuperscript{358} It supported most of the unfair labor practices findings of the NLRB, but concluded that the Board's decision to issue \textit{Gissel} orders was not supported by evidence sufficient to justify that extraordinary relief. By declining to follow our long-standing precedents for the application of \textit{Gissel} [sic], the Board improperly bypassed the employees' will on the question of representation, frustrating the fundamental policy of employee democracy established by Congress in the labor laws.\textsuperscript{359}

The Fourth Circuit had developed very strict rules for the implementation of \textit{Gissel} orders. Neither the ALJ nor the NLRB provided any supporting information to sustain their rulings that the Overnite unfair labor practices were so serious that fair elections could not be held.\textsuperscript{360} Accordingly, that court found that, although it agreed that Overnite had committed unfair labor practices, the solution was to order new representation elections, not to impose a bargaining order.\textsuperscript{361} The Teamsters never applied for such elections so that the results of the earlier elections in which the union lost became permanent.

Although the \textit{en banc} decision sustained many of the unfair labor practice decisions that supported the NLRB and the court panel decisions, it rejected the claim related to the productivity increase stating that this would require conduct of nonunion companies superior to that required of unionized ones.\textsuperscript{362} This had the effect of nullifying the back pay award that had been ordered not only to employees at the four locations, but also to many at other terminals as well. If the decision vacating the panel ruling had come just a short time later, the checks might well have been sent to employees and been difficult to recover.

\textsuperscript{355} \textit{Id.}
\textsuperscript{357} \textit{Id.}; information also supplied by Daniel B. Pasternak, Esq., who was working on the back pay computations when the Fourth Circuit ordered the setting aside of the panel decision.
\textsuperscript{358} Overnite Transp. Co. v. N.L.R.B., 280 F.3d 417, 417 (4th Cir. 2002).
\textsuperscript{359} \textit{Id.} at 422.
\textsuperscript{360} \textit{Id.} at 436.
\textsuperscript{361} \textit{Id.} at 438.
\textsuperscript{362} \textit{Id.} at 432.
The Fourth Circuit's *en banc* decision had both an immediate and long term impact on the IBT-Overnite relationship. Even before the decision was issued, the NLRB had decided a subsequent case in which the same ALJ has issued virtually the same ruling as he did in the four location case. This case involved seven locations: Dayton and Richfield, Ohio; Parkersburg and Nitro (Charleston), West Virginia; Nashville, Tennessee; Rockford, Illinois; and Bensalem (Philadelphia), Pennsylvania.\(^{363}\) The NLRB affirmed this decision after the Fourth Circuit took control of the four location case, but before the *en banc* decision was reached.\(^{364}\) Chairman Hurtgen, who voted with the majority in the prior case, dissented from this Board decision stating, "there is at least some doubt as to whether the Board's findings and conclusions in [the prior case] are correct."\(^{365}\) The NLRB did, however, order a hearing to determine whether Overnite's demand that union "misconduct" [violence] at four of the plants - Dayton, Nashville, Rockford, and Bensalem - merited revocation of bargaining orders at these locations as Overnite pleaded.\(^{366}\)

Hurtgen's position proved accurate. The seven-facility decision was issued in August 2001, and immediately appealed by Overnite to the Fourth Circuit which had already vacated the court's panel decision.\(^{367}\) On October 2, 2001, the Fourth Circuit placed Overnite's appeal in abeyance pending the Court's *en banc* decision in . . . [the four location case]. On February 11, 2002, the Court issued an *en banc* decision in that case which explicitly rejected the rationale that the Board also relied on in this case. Accordingly, it is hereby

ORDERED AND ADJUDGED that consistent with the Court's *en banc* decision in *Overnite Transportation Co. v. NLRB* . . . 280 F.3d 417 (February 11, 2002), the petition for review in this case is granted, and enforcement of the Board's order is denied.\(^{368}\)

As in the earlier case, the IBT did not request any election. Thereafter, the Board joined with Overnite for a *Joint Motion* to remand the case to the Regional Director, NLRB Region 9, "for further appropriate action," apparently to cancel the Board's order that union violence at several facilities included in the dismissed *Gissel* bargaining order be

\(^{364}\) *Id.* at 1074.
\(^{367}\) *Id.*
investigated for violence. This was done and the case dismissed ending the NLRB order. Thus the IBT attempts to win bargaining rights in situations in which the union lost NLRB elections was terminated. Table 4 lists the locations where the NLRB granted Gissel bargaining orders, but which the Court of Appeals, Fourth Circuit, overturned.

One other case that is significant in discussing Gissel situations concerns four locations: Lexington and Bowling Green, Kentucky; Detroit (Romulus), Michigan; and Buffalo (Tonawanda), New York. In fact, there is no Gissel aspect to these cases because the union won the NLRB representation election vote in each, but Overnite refused to bargain on grounds that the NLRB bargaining units and employee eligibility determinations were flawed. After the Board ordered Overnite to bargain, the company appealed to the Fourth Circuit, claiming that the Board misconstrued unit determinations and worker eligibility in the various cases. The Court rejected Overnite's reasoning and ordered the company to bargain.

The net effect was that decertification elections could not be held at these facilities for one year. Bargaining took place, but no agreements were reached for the same reasons as discussed above. The decertification ban ended on July 28, 2003, and employees at Lexington, Bowling Green, and Detroit soon thereafter decertified the IBT. At Buffalo, the IBT withdrew representation rights. These results mean, as shown in Table 3, that Overnite is now completely union free except at its newly acquired Motor Cargo subsidiary where the employees at Motor Cargo's Reno, Nevada, terminal voted to retain the Teamsters as bargaining agent in a decertification election. In all other Overnite facilities, the end of Teamster bargaining rights is truly an amazing result of the Teamster effort to win bargaining rights by striking, and a union defeat as great as ever occurred.

D. The IBT's Final Attempt to Gain a Nationwide NLRB Unfair Labor Practice Bargaining Order

The IBT made one last attempt to gain NLRB assistance in staving off defeat. It filed a nationwide unfair labor practice charge against

370. Id.
372. Id. at 617-18.
373. Id. at 626.
374. See supra Table 3.
375. Id.
376. Overnite Corp. Prospectus, supra note 45, at 17.
TABLE 4
OVERNITE TRANSPORTATION COMPANY
FACILITIES WHERE NLRB DIRECTED GISSEL BARGAINING ORDERS
BUT NLRB ORDER OVERTURNED BY U.S. COURT OF APPEALS,
FOURTH CIRCUIT

<table>
<thead>
<tr>
<th>Location</th>
<th>Local Union</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bensalem (Philadelphia), PA</td>
<td>107</td>
</tr>
<tr>
<td>Bridgeton, MO</td>
<td>600</td>
</tr>
<tr>
<td>Chattanooga, TN*</td>
<td>515</td>
</tr>
<tr>
<td>Dayton, OH</td>
<td>957</td>
</tr>
<tr>
<td>Louisville, KY</td>
<td>89</td>
</tr>
<tr>
<td>Nashville (LaVergne), TN</td>
<td>480</td>
</tr>
<tr>
<td>Nitro (Charleston), W VA</td>
<td>175</td>
</tr>
<tr>
<td>Norfolk, VA</td>
<td>822</td>
</tr>
<tr>
<td>North Atlanta (Lawrenceville), GA</td>
<td>IBT Interna-</td>
</tr>
<tr>
<td></td>
<td>tional</td>
</tr>
<tr>
<td>Parkersburg, W VA</td>
<td>175</td>
</tr>
<tr>
<td>Richfield, OH</td>
<td>24</td>
</tr>
<tr>
<td>Rockford, IL</td>
<td>325</td>
</tr>
</tbody>
</table>

Source: NLRB and Judicial Litigation
*For the special case of Chattanooga and why it was dropped, see supra text note 347.

Overnite maintaining that the company had violated NLRA § 8(a)(5) by failing to bargain in good faith.377 The matter was referred to NLRB Region 18, Minneapolis.378 Joseph Bornong, a staff attorney, was assigned the case. He wrote Overnite’s chief negotiator on September 5, 2001, that the charges “point to a violation of the Act,” and listed the charges, all but one of which were taken from prior cases.379 According to Bornong:

The Union makes reference to only one alleged statement not already passed upon in a prior case to support its charge, that being a March 28, 2001, statement attributed to you [Raudabaugh] to the effect that Overnite’s bargaining goal was to maintain uniformity in wages, benefits and conditions for both its union and non-union employees.380

Overnite’s replies were very thorough. On December 10, 2001, Overnite’s counsel explained several Overnite actions, such as its refusal to accept the grossly underfunded Central States Pension Fund, the meaning of various trucking terms which Bornong did not understand,

378. Id.
380. Id. at 2.
and included documentary evidence. Prior thereto, Overnite’s counsel sent a detailed, nineteen page, single space letter on October 24, 2001, dealing with each aspect of the charge including its rationale:

Preliminarily, it is worthwhile to put the Union’s bad-faith bargaining in perspective. The charge was filed on the heels of the [NLRB] Office of Appeals’ July 26, 2001, affirmance of Region 9’s dismissal of the Union’s widely publicized Holly charge (Case No. 9-CA-37915). That charge accused Overnite of unlawful, indeed criminal, conduct, ranging from suborning perjury to bribing employees to vandalize Company property while blaming the Teamsters for the damage. After a lengthy and thorough investigation, Region 9 found the charge to be spurious in its entirety. From the Union’s vantage point, however, the charge served a significant purpose - it blocked decertification petitions. When the charge no longer could be milked for that purpose, the union filed this charge.

Overnite’s counsel also pointed out that if the charges were confirmed, it would give IBT President Hoffa an excuse to explain why no agreement had been reached as he was campaigning for reelection as president. Counsel then described how the IBT had avoided bargaining by refusing to meet often, taking long lunch periods and excessive caucuses, having key members of the negotiating committee not show up for meetings “because it wanted to wait for the enforcement of bargaining orders [in vain] in other, separate units,” and in the meantime engaging in violence against employees and company equipment, as well as unlawful secondary boycotts.

The balance of Overnite’s letter replied in depth to each of the union charges, noting why they were out of order, time-barred, or just plain erroneous. The union replied but was unable to explain away the facts of the case, including that, throughout, it had stuck to the NMFA model despite Overnite’s rejection and the fact that the NMFA agreement provided for multi-location bargaining and they were bargaining on a facility-by-facility single terminal basis.

On April 23, 2002, Ronald M. Sharp, Regional Director, Region 18, sent a letter to the IBT announcing that he would not issue a complaint and would dismiss the union charge. He explained:

\textit{Overall bad faith or surface bargaining.} The Employer has met at reasonable times and places, over 200 meetings in six years. The Employer has offered a

\begin{footnotes}
\footnote{Overnite Letter Dec. 10, 2001, supra note 158, at 1.}
\footnote{Letter from Kenneth T. Lopatka, Overnite counsel to Joseph H. Bornong, Field Attorney, NLRB Region 18 (October 24, 2001) (on file with author).}
\footnote{Id. at 1.}
\footnote{Id. at 2-3.}
\footnote{See generally Letter from Kenneth T. Lopatka, supra note 382.}
\footnote{Id.}
\end{footnotes}
contract that included a cause restriction on discharges, a guaranteed annual wage increase, and a grievance procedure permitting arbitration in case of discharges, suspensions and seniority disputes and an exception to the contract’s no strike clause for other disputes. The Employer has not committed any recent unfair labor practices that sufficiently establish a motive to avoid an agreement, and it has undergone sufficient management changes since its unlawful 1994-1995 antimonopoly campaign. Based on the totality of the circumstances, it does not appear that I could sustain the burden of proof necessary to establish surface bargaining.387

On October 11, 2002, following a meeting requested by the union and a subsequent meeting with Overnite’s counsel to defend the charge dismissal, Arthur F. Rosenfeld, NLRB General Counsel, denied the IBT’s appeal from the Regional Director’s letter decision of April 23, 2002, stating that “[c]ontrary to your contentions on appeal, the Employer’s proposals did not eliminate the possibility of the Union playing a significant role in representing employees with respect to important terms and conditions of employment. Accordingly, further proceedings herein were deemed unwarranted.”388 The cancellation of the strike became certain as a flood of affirmative decertification votes, mostly by overwhelming numbers, as set forth in Table 3, began at a rapid rate.

IV. CONCLUSION

The Teamsters attempt to organize Overnite, the largest open shop LTL trucking company, was grounded upon inaccurate assumptions and the use of illegal tactics.

A. THE TEAMSTERS’ FAILURE

Teamster basic assumptions were that a union which had organized only twenty-two of the company’s 166 terminals could attract large employee support and that its illegal tactics would insure the company’s complete defeat in about three weeks. Complete defeat of the company would mean that Overnite would be compelled by a massive shutdown either to go out of business or to sign an agreement that varied very little from the NMFA agreement. In fact, the strike lasted three years, by which time the IBT was ready for complete surrender and Overnite was operating full-time with few, if any, disruptions.

All the IBT’s assumptions about employee behavior were quite quickly shown to be inaccurate. There was little support for the strike from unorganized facilities, and in most of the unionized ones, a majority

387. Letter from Ronald M. Sharp, Regional Director, NLRB Region 18, to James A. McCall, Special Counsel, IBT (Apr. 23, 2002) (on file with author).
of employees crossed union picket lines either immediately or soon thereafter, so that Overnite was operating at a high level within a relatively short time. Union violence and illegal secondary boycott activity were met by aggressive use of legal tactics by Overnite so that the damage to its people, property, and customers declined as the strike continued and the number of strike supporters continued to drop. At the end of six months, it was obvious that, absent massive governmental support of the union’s position, the strike was lost. This failure was, in no small part, also because the IBT top officials felt that anything less than the NMFA agreement was politically impossible for them to accept and Overnite had fundamental reasons for not signing such a document.

The NLRB provided strong union support, but the courts, particularly the Court of Appeals for the Fourth Circuit, refused to accept the NLRB’s unsupported fundamental conclusion that Overnite should be ordered to recognize and to bargain at eleven terminals where the IBT had lost elections. Instead of these Gissel orders, the Court decreed that there should be new representation elections. The IBT was too weak at these locations even to request elections. Instead, the IBT filed a company-wide unfair labor practice charge which the NLRB general counsel took about one year to decide before ruling that it had no basis in fact and dismissing it. That was the end of the line. President Hoffa called off the strike at a politically opportune time for him after reaching agreement with the largest unionized contractors on a new NMFA deal.

By late September 2003, all twenty-six unionized bargaining units had voted, most by large margins, to decertify the IBT, and therefore, Overnite was union free, except for the situation in the Motor Cargo subsidiary. This was a union defeat of immense proportions, as set forth in Table 3.

Meanwhile, during the strike, the company had continued to grow and expand despite the enduring union attempted disruptive tactics. Overnite increased the number of its terminal service centers to 208 from the pre-strike number of 166, and its employee count from 13,000 to 14,400, while increasing its number of tractors to more than 6,000 and its trailers to 21,000.\footnote{Overnite Press Release, Overnite Announces Divestiture Decision by Union Pacific (Aug. 4, 2003) (on file with author) [hereinafter Overnite Press Release, Aug. 2003].} This permitted Overnite to provide full coverage in all fifty states with direct access to over 45,000 cities in the United States, Canada, Puerto Rico, Guam, the U.S. Virgin Islands, and Mexico.\footnote{Id.} As a result, Overnite is moving toward being more of a national carrier rather than a regional one as it seeks more business.

Many questions remain about the future. A reader has raised two
interesting ones: why did the Teamster strike not garner more employee support; and was there a racial factor in the situation.

B. The Lack of Employee Support

There is no question that the Teamster strike failed in large part because it had little employee support. Even the IBT's probably exaggerated initial claim, stating that 2,000 employees went on strike out of a total of 14,000, was hardly a number for the union to win and one that closed no Overnite facilities. Employee relations literature includes many publications as to why employees do not support unions, many of which are not much help in analyzing particular situations that have several idiosyncratic features like this one.\(^\text{391}\) The Overnite environment had a combination of general and particular environmental factors that are not easy to replicate.

Overnite is a company that was founded in the South where it remains very strong.

The southern states and municipalities generally do not welcome unions, have enacted right-to-work laws that forbid compulsory union membership, and result in unionized facilities having a varying percentage of employees who decline to join and to support union bargaining agents financially and emotionally.\(^\text{392}\) Thus, even unionized locations are often not enthusiastic supporters of union action and can regard strikes as unnecessary or even foolish financial misadventures for which community, state, and local government support is weak at best. Overnite, a Richmond, Virginia company, and Harwood Cochrane, its founder, had earned strong respect in the community, and the Teamsters' union certainly lacked any such emotional support and certainly did not gain it with its use of violence.

The tremendous impact of deregulation that resulted in the disappearance of hundreds of unionized companies could not have been missed by Overnite employees who had seen their company grow while unionized ones disappeared. Attempts of the union to promise better jobs if Overnite were unionized must have fallen on deaf ears because of what was happening all around them. Like employees in steel, automobiles,

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\(^{392}\) The Federal Government annually surveys the extent of union membership by various categories. The 2003 report found that "all states in the East South Central and West South Central divisions continued to have [union membership rates below the national average]." North Carolina and South Carolina, as in the past, "report[ed] the lowest union membership rates, 3.1 and 4.2 percent, respectively." See U.S. Dept. of Labor, News, USDA 04-53 (Jan. 21, 2004), at 2, available at http://www.bls.gov/news.release/pdf/union2.pdf.
and other industries, they surely found union promises of security highly questionable at best.

The Teamsters had been unable to win a contract in recent years at Overnite. Employees had begun to react with their unhappiness about Teamster representation by filing decertification positions at about one-half of the Teamster organized locations, and by rejecting representation in nonunion locations. The fact that the IBT fought to avoid decertification elections and was filing for few representation ones indicates the employees had turned against the union prior to the strike call.

Union tactics were designed to force unionization regardless of employee desires. The most crude and self-defeating was the widespread use of violence against those who worked instead of obeying the strike call. There seems to be no question that violence exacerbated employee anti-unionism. Moreover, the fact that the company kept facilities running, clearly tried to protect employees and their property, and fought these union tactics to a standstill undoubtedly increased employee determination to support the company and to eliminate unionism in their daily lives. The idea that employees would rush to join unions given the opportunity, which propelled what now seems as a ridiculous statement by IBT director of organization, Murphy, prior to the strike, was based upon the assumption that employees stayed nonunion because of fear for their jobs. Just the opposite appeared true: there appeared to be much more fear that they would lose their jobs if the union won. Union tactics were certainly a major cause of the union's so thorough defeat, together with employee appreciation of what the company was doing to protect their life and property.393

C. WAS A RACIAL FACTOR INVOLVED?

Race has not been absent from the trucking industry as an employment factor. It was not absent from the situation at Overnite, but did not appear to have been a decisive factor. Although this author has researched and published extensively on the issue,394 race was not made a special part of the research for this article. Yet race did play a part, but a small indecisive one.

393. These statements are based upon what occurred during the strike which was carefully examined well before the strike occurred as well as during the strike itself.

394. See generally Hebert R. Northrup, ORGANIZED LABOR AND THE NEGRO (1944). Later the author directed, and was the leading author, for the Ford Foundation sponsored study of industry racial policies that covered thirty-one industries in the RACIAL POLICIES OF AMERICAN INDUSTRY (1968) and STUDIES OF NEGRO EMPLOYMENT series (1970-79). A study of the trucking industry's racial policies is found in both these series, and is cited below. The author's bibliography of "Equal Employment Opportunity and Civil Rights" includes forty-four articles and books and is available upon request.
Overnite may have had a better record in African-American employment than many other companies. Both the IBT and companies discriminated against African-Americans over-the-road work before the courts began to intervene in the early 1970s. Some groups even “explained” their discrimination by claiming that African-Americans lacked the capacity to handle large motor rigs while large numbers of this minority did so working for the U.S. Post Office.

Knowing about this discrimination, the author was surprised to witness twice African-American drivers handling large Overnite rigs in the Richmond area during the early 1970s. The current management employees whom the author contacted on this issue knew nothing of past action in this regard.

African-Americans were, however, strongly represented in the various terminal facility jobs. Memphis and Atlanta probably have the largest percentage of African-American employment among the larger terminal facilities. In both, the vote was close in favor of decertification, as shown in Table 3. Memphis voted 180 to decertify and 151 to retain the Teamsters as bargaining agent. Thus a change of fifteen voters would have altered the result. The Atlanta score was also narrow, recording ninety-two votes to decertify and fifty-three votes to retain the Teamsters as bargaining agent, requiring twenty shifts of votes to retain the bargaining agent.

This would seem to reflect the national figures as set forth in the above quoted U.S. Department of Labor study of union membership in 2003. It found that “Blacks were more likely to be union members (16.5 percent) than were whites (12.5 percent), Asians (11.4 percent), or Hispanics (10.7 percent).”

D. Uncertainties Ahead

Despite Overnite’s amazing victory in repelling the IBT strike, there remain uncertainties in the future as companies, including Overnite, alter their structure and as public policy changes.

396. Leone, supra note 395, at 43.
397. The author was doing regular consulting in the Richmond area during this period, but none with Overnite.
398. See supra Table 3.
399. Id.
1. The Yellow-Road Merger

One such change has been the takeover of the largest LTL unionized carrier, Roadway, by the second largest, Yellow Corporation.\textsuperscript{401} The resultant merger controls about sixty percent of the LTL national business.\textsuperscript{402} Although both buyer and seller agree that Roadway will continue to operate separately, few take that claim seriously because there will be many opportunities for consolidations and savings of terminals, back office operations, and even drivers.\textsuperscript{403} If this occurs, there will be unemployed drivers and terminal employees who might seek jobs at Overnite, and who are used to working under union conditions since it would violate the NLRA to refuse them jobs because of their union affiliation if jobs are available and the applicants are qualified; this could create a problem for Overnite.

Another factor to consider is that some customers either of Yellow or Roadway may decide that they desire a second carrier so that one carrier will not control all their business. It would be likely that some of these would approach Overnite about such an arrangement. Here Overnite has had ample experience, not only during the Teamster strike of 1994, when it took on more work than could be handled expeditiously, alienating customers and employees, and causing the successful union drives to unionize terminals which followed,\textsuperscript{404} but also when Consolidated Freightways ("CF") collapsed and shut down.\textsuperscript{405} According to Gordon S. MacKenzie, senior vice-president and chief operating officer of Overnite, the company was "very judicious in the deals" which it cut in the latter case.\textsuperscript{406} Overnite had clearly learned from the 1994 experience, and is likely to act accordingly as similar opportunities arise.

2. Freeing the Teamsters from Government Control?

The Teamsters have been pushing hard toward an agreement that would free the union from fourteen years of government oversight which was instituted to fight and eliminate criminal elements within the union. If this occurs, it would give the union more autonomy and free it from the costs of the oversight which have been running about $6 million per year. As the \textit{Wall Street Journal} has pointed out, "it would give the union more autonomy and credibility, though it won’t solve more fundamental issues

\begin{flushright}
\textsuperscript{402} Schulz, supra note 401, at 48.
\textsuperscript{404} Schulz, supra note 84, at 12.
\textsuperscript{405} Pui-Wing Tam, \textit{supra} note 23, at A-3.
\end{flushright}
such as declining membership."\textsuperscript{407} Since the early 1980s, IBT membership has declined from about 1.9 million to 1.4 million.\textsuperscript{408} Even if all the funds gained from the lifting of federal government oversight, the union, to judge by the decertification votes listed in Table 3, is so thoroughly discredited with Overnite employees, that opportunities to regain a position there seems very slight. Additionally, the IBT has given its political capital to the Democratic Party by endorsing John Kerry for President thus desensitizing the current administration in any support for abolition of Federal supervision.

Meanwhile, the \textit{Wall Street Journal} has been cognizant of the negotiations to free the IBT from government supervision. Quoting from paragraphs of the consent settlement on the NLRB’s violence charge which read “WE WILL Not use or threaten to use a weapon of any kind . . . WE WILL Not endanger or impede the progress of or harass any non-striking employee . . . WE WILL NOT batter, assault . . . or attempt to assault any non-striking employee of Overnite or any member of his or her family . . . WE WILL NOT threaten to kill or inflict bodily harm . . . or otherwise threaten unspecified reprisals. . . .” the \textit{Wall Street Journal} wonders why the Federal Government should consider even removing such an organization from government supervision.\textsuperscript{409}

Whatever prospect the IBT had to be eliminated from the strict control of the Federal Government probably ended when the former FBI monitor and his staff that Hoffa had appointed to demonstrate his support of “clean” unionism resigned declaring that Hoffa had not supported, but indeed sabotaged attempts to clean up situations in Houston, Chicago, and New York.\textsuperscript{410} This event and the release of reports by the internal counsel received wide press coverage.\textsuperscript{411} It certainly would seem that it would be a political mistake for the Bush Administration to support any change in government supervision at this stage.

3. \textit{Independent Overnite Corporation}

A major change is that Union Pacific has sold 100 percent of the stock of Overnite in an IPO because Overnite was no longer considered “a core asset.”\textsuperscript{412} The IPO is considered a success. It was priced at $17 per

\begin{footnotesize}
\begin{itemize}
\item 408. Schulz, \textit{supra} note 3, at 7.
\item 409. Editorial, \textit{supra} note 220, at A20.
\item 410. \textit{Head of IBT Anti-Corruption Effort Resigns, Says Hoffa Has Obstructed His Investigation}, \textit{Daily Labor Rep. (BNA)} No. 84 (May 3, 2004), at AA-1.
\item 411. \textit{Id}.
\end{itemize}
\end{footnotesize}
share, went up to $19 during the sale, and was trading on the Nasdaq around $30 per share in the autumn of 2004.\footnote{413} The same management remains in charge, and the same policies are being followed. For example, shares of the new corporation’s stock were distributed to employees. The stock seems to have been purchased by a diversified number of investors including many employees who purchased it in addition to the distribution and who will not be anxious to upset Overnite’s successful operations and policies. John W. Fain, Overnite’s senior vice-president of sales and marketing stated in a letter to customers:

[T]he reasons you have chosen to make Overnite your transportation carrier - service, quality, and value - are unaffected by this week’s announcement. The same drivers, service center managers, and sales representatives you have come to rely on to handle your transportation needs in the past will be there for you today and tomorrow.\footnote{414}

Most important for Overnite’s future is that management seems determined to continue its policies of being fair and thoughtful managers and supervisors, treat people fairly, and do not gloat over the union defeat. Anything else could cause a reaction that would undo what management has gained. Meanwhile, the IBT’s tactics and major failure could make unionization at Overnite difficult to achieve, especially if attempted by the IBT. This case involves a classic study of what unions should not do if they have neither the support nor the strength to command employee support in a collective bargaining struggle.

4. The IBT’s Future in Trucking

As a matter of fact, the future of the IBT in motor transport seems to have been made more bleak by its major failure in the Overnite strike. According to the associate editor of Traffic World,

Trucking employers, emboldened by the defeat of organizing attempts at Overnite Transportation, say they no longer fear the 1.4-million-member [IBT]. In fact, the Teamsters largely have become an afterthought to trucking executives. . . .

. . .

Despite having a popular leader in President James P. Hoffa, the union has not been able to win over workers at thousands of nonunion trucking companies. The Teamsters have not organized a large trucking company since the Motor Carrier Act of 1980 deregulated the trucking industry.\footnote{415}

Unless the IBT learns how to court employees and gives up its utilization of violence and illegal coercion against the very people it attempts

\footnote{413} Nasdaq quotations as published by the Wall St. J.
\footnote{414} Gallagher, supra note 412, at 9 (quoting John W. Fain).
\footnote{415} John D. Schulz, supra note 3, at 7.
to unionize, this is not likely to change unless trucking companies fail utterly to treat employees with decency and fairness. There is some evidence that this may have allegedly have taken place. IBT has targeted a subsidiary of USF a very large, Chicago-based holding company that owns and operates five regional LTL concerns among other trucking facilities. According to John D. Schulz in *Traffic World*:

USF operates five regional LTL concerns. Two are completely unionized, two have “white paper” labor agreements covering a handful of workers at a couple of locations and USF Dugan is completely nonunion. Approximately 48 percent of USF’s total work force of 21,000 is covered by Teamster agreements. More than 90 percent of the unionized workers are at USF Holland in the Midwest and USF Red Star in the Northeast. . . .

USF Dugan workers were allegedly upset about the failure of the company to provide healthcare benefits to the NMFA agreement that USF’s unionized employees were receiving. The Teamsters’ union organizers were contacted and rapidly signed up employees. The company refused to recognize anything but an NLRB representation election. The IBT requested NLRB representation elections at Cincinnati, Memphis, and Mobile, where it won, at Nashville where it was rejected, and at Little Rock where it withdrew its petition after the strike had shut down of Red Star, one of USF’s unionized-owned firms. This strike, as a move, may have tarnished the IBT’s initial success.

On May 23, 2004, USF Red Star shut down, laying off about 2,000 employees after the Teamsters suddenly struck the entire company. USF blamed the sudden layoff on the strike which followed an attempt by the Teamsters to secure representation for fifteen clerical workers at Red Star’s headquarters in Newark, New Jersey. The company chief executive stated:

> The unexpected and unilateral job action initiated [May 21] by the International Brotherhood of Teamsters had triggered a loss of customers and revenue to the point where Red Star would never be able to recover from the business losses caused by the Teamster job action.

Four days later, Hoffa declared that the company statement was a “smokescreen to shift the blame for [its] poor performance and management onto the workers.” The union had demanded immediate recognition; management requested an NLRB election to ascertain employee

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417. Date received by telephone from IBT organizing Department (May 21, 2004).
419. *Id*.
420. *Id*.
choice. The strike followed. According to the above cited Traffic World article, "Red Star has consistently lost money for the last ten quarters."421

Both sides apparently suffered problems after the shut down at Red Star. USF found it difficult to schedule regional operators to take over the work formerly done by Red Star and blamed the shutdown for a second quarter loss of $2 million.422 Moreover, existing regional carriers developed "pricing powers" because of the carrier shortage and began to utilize it.423 Hofa was apparently being criticized by internal opponents for the job loss.

These needs apparently brought the parties to a compromise solution. USF brought its profitable unionized carrier, USF Holland, to the Northeast and agreed to open 500 unionized jobs at eight of the former Red Star twenty-seven terminals – Albany and Syracuse, New York, Allentown, Harrisburg, and Wilkes-Barre, Pennsylvania, Richmond, Virginia, Baltimore and Philadelphia.424 Former Red Star employees were given job preference for these and other opened USF positions but were placed in introductory position with bonuses which would after two years add up to about $20.30 per hour and were reinstated in their pensions and welfare benefits.425 The possibility of expanding USF Holland by opening more terminals was promised, and a deal was made for a quick check if office employees were claimed by the IBT via a count by a neutral person instead of the NLRB.426 A suit filed by some union personnel still laid off claimed that the union and the company were responsible does not seem likely to effectuate any change nor does an unfair labor charge made by such employees to the NLRB.427

The Teamsters are also attempting to unionize drivers in the "fragmented, highly competitive drayage market" of the various large harbors where containers are taking off ocean freighter and transferred to trucks.428 It is a difficult union drive and thus far has not reaped any direct success after several years of effort.429 To spur its organizing, the IBT is attempting to enhance its organizing capabilities by training and development. This endeavor does not concentrate on trucking but rather

425. Id. at A-2.
426. Id.
429. Schulz, supra note 416, at 12.
is intended to enroll members wherever the opportunity lies.\textsuperscript{430} Whether the Teamsters will follow the USF experience with other organizing drives remains to be seen. Clearly, however, if company management does provide what appear to be inequities, Teamster organization has at least the opportunity for success. Assuming that, because of the Overnite experience, IBT organizing is dead can be a mistake especially if the target company's house is not in order in the opinion of the employees involved. On the other hand, there remains no strong promise that Teamster organizing in the trucking industry will achieve a serious expansion.

\textsuperscript{430} Union Building Organizing Capabilities Using Resources From 2002 Dues Hike, \textit{Daily Lab. Rep.} (BNA) No. 102 (May 27, 2004), at C-1.
Synergies and Problems in Outer Space Insurance and Air Transport Insurance

Ruwantissa Abeyratne*

I. Introduction

In recent times, both the air transport and space industries have shown synergies in international legal problems pertaining to the procurement of insurance. This has partially been due to the single most ominous economic throwback from the events of 11 September 2001 concerning the air transport industry and the ensuing insurance crisis. On 17 September 2001, underwriters gave seven days notice of cancellation of the standard war risk and allied perils clause of the aircraft insurance contract, plunging the commercial airline industry into a causal paradox of necessity and inability in the running of their air services.¹ The resulting gloom, largely stemming from the economic impotence of carriers worldwide in not being able to meet the un-affordable new premium level, were somewhat diluted when some states provided financial support to bail out their carriers.² However, it became immediately apparent

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2. Abeyratne, Aviation in Crisis, supra note 1, at 271.
that a certain worldwide and combined effort on the part of nations was necessary if air transport services were to be sustained amidst the crisis.

Now, after a little more than three years, it is common knowledge that the problems of aviation insurance were gravely aggravated by the events of 11 September 2001, calling for urgent crisis management.\(^3\) A relatively obscure corollary was that the events also indirectly affected space insurance, particularly due to many liabilities incurred and claims received by many insurance underwriters for massive amounts of compensation with respect to the events of 11 September 2001.\(^4\) These claims inevitably reduced the capital set aside by the underwriters for other insurances including space insurance. A corollary to this trend is that some insurers are now focusing more on the lucrative aviation insurance policies that have emerged as a result, due to the sharp rise in premiums for commercial air transportation.\(^5\) Consequently, space insurance has been "shelved" by the underwriters in order for them to concentrate on the correspondingly greater business opportunities offered by commercial air transport insurance.\(^6\)

The commercial trend that has veered the attention of insurance underwriters to commercial air transport insurance has had the further impetus of a series of communication satellite problems in recent times that have strained the resources of insurers who underwrite space activities.\(^7\) This in turn has imposed a severe strain on companies that launch new spacecraft.\(^8\) The woes of space insurance are reflected in the figures of the past decade. For instance, in the late 1990s, insurers offered a total coverage to the space industry of $1.3 billion with an exposure of $400 million for a single launch,\(^9\) whereas the total capacity offered by the space insurance industry in 2002, as projected, was as little as $300 million.\(^10\) This figure falls far short of a realistic "cap" on space insurance that could comfort companies hoping to obtain insurance for launches of large geostationary communication satellites. On a basic comparison between the drastic rise in insurance premiums both in the commercial air transport industry and the space industry, the former, after third party war risk insurance policies were cancelled on 24 September 2001, were raised con-


\(^4\) See Abeyratne, *Aviation In Crisis*, supra note 1, at 270.

\(^5\) Id.


\(^7\) Id. at 1.

\(^8\) Id.

\(^9\) Id. at 2.

\(^10\) Id.
siderably higher at drastically reduced liability limits,\textsuperscript{11} while the latter, in some cases, had rates increased on launch insurance by fifty percent and for on-orbit insurance for as much as seventy-five percent.\textsuperscript{12}

The above indicators would seemingly give the perception that space insurance is much worse off than air transport insurance. The reality is that both are in a similar predicament and have the same difficulties in resurfacing to their \textit{status quo ante}. The problems faced by both insurance industries involve critical risk management, which calls for stringent measures to restore the industry to levels that prevailed before 11 September 2001. However, this is not the only factor to be considered. Inasmuch as there are similarities in terms of problems facing both industries, the air transport industry has, unlike the space industry, been given the benefit of a significant boost through the auspices of the International Civil Aviation Organization ("ICAO") toward restoring a viable commercial air transport insurance regime. This article will examine space insurance issues as well as air transport insurance issues with a view to identifying the common ground experienced by both, with a view to examining a possible approach in order for both industries to survive the current crisis.

\section{The Space Insurance Industry}

The space insurance industry became a separate commercial element in the field of insurance in 1965 and the space insurance underwriting community came into being as a result of the rapidly evolving commercial space technologies that called for considerable financial investments.\textsuperscript{13} Over the past three decades, space insurance underwriters have collected approximately \$4.2\ billion in premium revenues.\textsuperscript{14} Correspondingly, they have paid around \$3.4\ billion in settlement of claims.\textsuperscript{15} The space insurance market has now become a dynamic and highly competitive one, covering from twenty to thirty commercial satellite launches annually.\textsuperscript{16}

Similar to most commercial air transport insurance contracts, the space insurance policy is usually underwritten in syndicate where each individual underwriter assumes a percentage of the risk.\textsuperscript{17} The coverage of each risk is undertaken for a fractional share of the policy so that the

\textsuperscript{11} Abeyratne, \textit{supra} note 3, at 600.
\textsuperscript{12} Foust, \textit{supra} note 6, at 3.
\textsuperscript{13} I. H. P. Diederiks-Verschoor, \textit{An Introduction To Space Law} 117 (2d ed. 1999).
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.} at 301.
overall risk can be spread out through the global markets. The spreading of risk is accomplished usually through the participation of ten to fifteen large companies and twenty to thirty smaller companies.

One of the most significant and compelling reasons for the predicament faced by the insured in the space industry is the recent rush of communication satellite problems and spacecraft failures. These events have made the space industry a high-risk area. The underlying problem, however, is one which afflicts both the space insurance industry as well as the commercial air transport industry in that the contract of insurance in both instances is not regulated on an international basis. The insurance contract in both areas has been exclusively within the realm of the private sector, where the insurance market forces have dictated the fixing of premiums and limits. Insurance of space activities and spacecraft aptly reflects the significance of risk management and the space insurance contract primarily plays the role of mollifying investors in a space program that their investments would be safe and covered by insurance in the event of damage or launch failure.

In the space industry, insurance applies mostly to communication satellites, which have shown a spate of problems in recent times, plunging the "risk factor" of the launch and activity of such spacecraft into critical levels. Furthermore, in the present context, risk management becomes critical for both the insured and the investor in relation to all four types of insurance, i.e. pre-launch insurance; launch failure and initial operation insurance; satellite insurance; and third party liability space insurance.

Pre-launch insurance is a critical area that involves the provision of coverage at the preliminary stage of a space project, from the planning stage, through to the carrying out of the launch. Among possible accidents that may occur at the pre-launch stage that may require insurance coverage are those that may occur in production of the satellite and storage followed by transportation of the satellite from the production site to the launch site. Also critical at this stage is the complex and delicate

18. Id.
19. Id.
20. Foust, supra note 6, at 1.
22. Rod D. Margo, Risk Management and Insurance, 17 Annals of Air & Space L. 79, 79 (1992) (Margo generally identifies "risk" as the potential for the occurrence of an uncertain event, and goes on to say that a scientist might define risk as "the continuum or spectrum between uncertainty on the one hand and certainty on the other.").
24. Diederiks-Verschoor, supra note 13, at 117.
process of placing the satellite on the launching vehicle.\textsuperscript{26}  

With regard to launch failure insurance, a critical concern for investors is the possibility of non-availability of launch vehicles that would particularly affect investments made by satellite manufacturers.\textsuperscript{27} Another risk involved in launch insurance is non-placement into orbit as programmed.\textsuperscript{28} While the third category, satellite insurance, involves protection against satellite failure in orbit, third party liability space insurance insures against liability arising from damage to a third party during the launch or in-orbit operations of a satellite program.\textsuperscript{29}  

Critical to the acquisition of space insurance and the accompanying underwriting process is the value placed on technical information, the role played by the brokers and underwriters, fluctuating market conditions and the various parties concerned.\textsuperscript{30} These factors played a crucial role in the Intelsat 708 launch failure, in particular the dissemination of technical information and its role in ensuring insurance claims.\textsuperscript{31} It remains to be seen whether judicial interpretation of the value placed on technical information would override the seminal principle established in the 1987 \textit{Martin Marietta} case that a contractual waiver between the parties to an insurance space contract absolving parties from negligence or gross negligence would remain paramount over considerations of tort liability of parties.\textsuperscript{32} The significance of the \textit{Martin Marietta} case, which involved Intelsat claiming \textit{Martin Marietta}'s tortuous liability \textit{inter alia} for the failure of one of two satellites launched on Titan III rockets of the latter to reach correct position in orbit, lies in the fact that it establishes the principle in most US jurisdictions that negligence is no longer a sound basis for establishing damages if preceding contractual arrangement or agreement were to preclude such liability.\textsuperscript{33} The \textit{Martin Marietta} case followed an earlier case, decided in 1984 and decided partly on contractual liability, where a California Court found that contractual provisions incorporated in an insurance policy or other space insurance contract would absolve a dependant seeking recourse to such contractual waiver against

\begin{footnotesize}
26. \textit{Id.}  
27. \textit{Diekerks-Verschoor, supra} note 13, at 118.  
28. \textit{Id.}  
31. \textit{Id.}  
\end{footnotesize}
liability and allocation of risk.\textsuperscript{34}

The area of space insurance concerning liability insurance for damage caused to third parties attenuates its basic principles of liability from two international treaties, namely the \textit{Outer Space Treaty of 1967}\textsuperscript{35} and the \textit{Liability Convention of 1972}.\textsuperscript{36} Both Conventions impose \textit{prima facie}, an obligation on states under \textit{jus cogens} or generally enforceable and applicable law. If it can be accepted that a principle of \textit{jus cogens} creates obligations \textit{erga omnes}, it becomes an undeniable fact that Article 1(1) of the \textit{Outer Space Treaty} could be considered a peremptory norm, or \textit{jus cogens}, since it generates obligations towards the international community as a whole.\textsuperscript{37} Christol observes:

[Article 1] Paragraph 1 [of the Space Treaty], with its adoption of the common benefits and interests guarantee, can be supported [as an example of peremptory norms] . . . because the provisions conform to moral law in the sense that all humankind is to benefit unconditionally, and because the terms are consistent with the spirit and the purposes identified in Article 1, pars. 1 through 3 and Article 2, pars. 1 through 4 of the UN Charter, as well as with complimentary international agreements of lesser authority. To the extent that the terms are beneficial to individuals, . . . the larger community, and States, and when the provisions are found on the fundamental moral principles contained in the foregoing paragraphs of Articles 1 and 2 of the UN Charter, such basic principles qualify for the status of peremptory norms of general international law.\textsuperscript{38}

The effect of this observation is that the content and nature of Article 1 (1) confirms that it is a \textit{jus cogens}. There is seemingly no reason why the international community should not give such recognition to the “common interest” principle as enshrined in Article 1(1) which is aimed at the protection of the interests of the international community as a whole.\textsuperscript{39} \textit{A fortiori}, on the same basis, Article IX of the \textit{Outer Space Treaty} which requires that states should avoid harmful contamination and adverse change in the environment of the Earth which may result from the exploration of outer space would incontrovertibly be considered \textit{jus cogens}.\textsuperscript{40}

\begin{itemize}
  \item \textsuperscript{36} Convention On International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 1973 WL 151962, 24 U. S. T. 2389 [hereinafter \textit{Liability Convention}].
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Id. at 7.
\end{itemize}
Article VI of the *Outer Space Treaty* provides in part that state parties to the treaty shall bear international responsibility for national activities in outer space, whether such activities are carried out by governmental agencies or non-governmental agencies.41 This provision clearly introduces the notion of strict liability *er g a o m n e s* to the application of the *jus cogens* principle relating to outer space activities of states and could be considered applicable in instances where states hold out to the international community as providers of technology achieved and used by them in outer space, which is used for purposes of air navigation. Article VI further requires that the activities of non-governmental entities in outer space shall require authorization and continuing supervision by the appropriate state party to the Treaty, thus ensuring that the state whose nationality the entity bears would be vicariously answerable for the activities of that organization, thereby imputing liability to the state concerned.42

Article VII makes a state party internationally liable to another state party for damage caused by a space object launched by that state.43 The *Registration Convention of 1974*, in Article II(1), requires a launching state of a space object that is launched into earth orbit, or beyond, to register such space object by means of an entry in an appropriate registry which it shall maintain and inform the Secretary General of the United Nations of the establishment of such a registry.44 This provision ensures that the international community is kept aware of which state is responsible for which space object and enables the United Nations to observe outer space activities of states. Article VI of the Convention makes it an obligation of all state parties, including those that possess space monitoring and tracking facilities, to render assistance in identifying a space object which causes damage to other space objects or persons.45 Justice Manfred Lachs analyzes these provisions of the *Registration Convention* to mean that the state of registry and the location of the space object would govern jurisdictional issues arising out of the legal status of space objects.46 On the issue of joint launching of space objects, Justice Lachs observes:

No difficulties arise whenever a State launches its own object from its own territory; the same applies to objects owned or launched by non-governmen-

41. *Outer Space Treaty*, supra note 35, at art. VI.
43. *Outer Space Treaty*, supra note 35, at art. VII.
45. *Id.* at art. VI.
46. MANFRED LACHS, THE LAW OF OUTER SPACE, AN EXPERIENCE IN CONTEMPORARY LAW-MAKING 70 (1972).
tal agencies registered in that State. However, in cases of joint launching, agreement between the parties is required as to which of them is to be deemed the “State of Registry.” A similar agreement is also necessary when a launching is carried out by an international organization.  

The above provision ensures the identification of parties responsible for specific activities in outer space and thereby makes it easier to impose liability for environmental damage caused.

The Outer Space Treaty, while expostulating the fundamental principle in its Article 1 that the exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, explicitly imposes in Article VII international liability and responsibility on each state party to the treaty, for damage caused to another state party or to its populace (whether national or juridical) by the launch or procurement of launch of an object into outer space. In its subsequent provisions, the treaty imposes international responsibility on states parties for national activities conducted in outer space. The treaty also requires its states parties to be guided by the principle of cooperation and mutual assistance in the conduct of all their activities in outer space. This overall principle is further elucidated in the same provision: “States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter . . .”

Article VIII of the Outer Space Treaty provides: “A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body.”

However, as Bin Cheng validly points out, the interpretation of Article VIII could well result in ambivalence and confusion. The “object” and “personnel” referred to in the treaty provision do not adequately cover persons who are not “personnel” such as passengers in a space-

47. Id.
49. Id. at art. VII.
50. Id. at art. IX.
51. Id.
52. Id. at art. VII. This provision is derived from United Nations documentation and has been reproduced almost verbatim from paragraph 7 of the 1963 General Assembly Declaration appearing in Resolution 1962. The Treaty provision extends the scope of application of the provision to the conduct of astronauts both inside and outside the spacecraft. See Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, U.N. GAOR, 17th Sess., at 15, U.N. Doc. A/1962 (1963).
craft.\textsuperscript{54} Of course, as Cheng maintains, the quasi jurisdiction of the state of registry of the spacecraft can apply both in the instance of conduct in the spacecraft as well as outside the spacecraft on the basis that the astronaut concerned would be deemed to belong to the spacecraft at all times in outer space.\textsuperscript{55} Logically, therefore, such jurisdiction could be imputed to passengers, visitors, and guests by linking them to the spacecraft in which they traveled.\textsuperscript{56} This far reaching generalization would then cover the conduct of an astronaut or other persons while walking on the moon, Mars or other celestial body, as well as such persons who go on space walks outside the spacecraft in which they traveled.\textsuperscript{57}

Another provision that sheds some light on past attempts by the international community to identify liability and jurisdictional issues relating to astronauts is Article 12 of the \textit{Moon Agreement of 1979}, which provides: "States Parties shall retain jurisdiction and control over their personnel, space vehicles, equipment facilities, stations and installations on the moon . . ."\textsuperscript{58}

The \textit{Moon Agreement of 1979} provides that in the exploration and use of the moon, states parties shall take measures, \textit{inter alia}, to avoid harmfully affecting the environment of the earth through the introduction of extra-terrestrial matter or otherwise.\textsuperscript{59}

The \textit{Liability Convention} contains a provision that lays down the legal remedy in instances of damage caused by space objects. Article II provides: "A launching State shall be absolutely liable to pay compensation for damage caused by its space objects on the surface of the earth or to aircraft in flight,"\textsuperscript{60} thereby imposing a regime of absolute liability on the state that launches space objects such as satellites, which provide technology and communication that is used for air navigational purposes. Although admittedly, both the \textit{Outer Space Treaty} and the \textit{Liability Convention} do not explicitly provide for damage caused by technology and communication provided by space objects, culpability arising from the "common interest" principle and liability provisions of the two conventions can be imputed to states under these conventions.\textsuperscript{61}

\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{59} \textit{Id.} at art. 7.
\textsuperscript{60} \textit{Liability Convention}, supra note 36, at art. II. Article I(a) defines damage as including "loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations." \textit{Id.} at art. I.
\textsuperscript{61} \textit{See} Frans G. von der Dunk, \textit{Jus Cogens Sive Lex Ferenda: Jus Cogendum, in AIR AND}
Gorove states that in the field of international space law, two clearly connected terms have been used: liability and responsibility. Although "responsibility" has not been cohesively interpreted in any legal treaty relating to outer space, "liability" occurs in the Liability Convention and is sufficiently clear therein. This, however, does not mean that state responsibility is not relevant to the obligations of states law as, in international relations, the invasion of a right or other legal interest of one subject of the law by another inevitably creates legal responsibility. Professor Brownlie observes:

[T]oday, one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequence of illegal acts, and particularly the payment of compensation for loss caused.

International responsibility relates both to breaches of treaty provisions and other breaches of legal duty. In the Spanish Zone of Morocco Claims case, Justice Huber observed: "[R]esponsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation."

There is also explicit recognition that principles of international law apply to space law. The General Assembly of the United Nations in 1961 adopted the view that international law, including the Charter of the United Nations, applies to outer space and celestial bodies. It is also now recognized as a principle of international law that the breach of a duty involves an obligation to make reparation appropriately and adequately. This reparation is regarded as the indispensable complement of a failure to apply a convention and is applied as an inarticulate premise that need not be stated in the breached convention itself.

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63. Liability Convention, supra note 36, at art. II.


65. Id. at 433.

66. Id. at 434 (quoting Spanish Zone of Morocco Claims, Rapport 111 (1924), 2 UNRlAA, 615, 641).


68. Brownlie, supra note 64, at 434.

69. Id. at 434. (quoting Concerning The Factory at Chorzow, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26)).
Court ("ICJ") affirmed this principle in 1949, in the Corfu Channel Case, by holding that Albania was responsible under international law to pay compensation to the United Kingdom for not warning that Albania had laid mines in Albanian waters that caused explosions, damaging ships belonging to the United Kingdom.\textsuperscript{70} Since the treaty law provisions of liability and the general principles of international law as discussed complement each other in endorsing the liability of states to compensate for damage caused by space objects, there is no contention as to whether in the use of nuclear power sources in outer space, damage caused by the uses of space objects or use thereof would not go uncompensated.\textsuperscript{71} The rationale for the award of compensation is explicitly included in Article XII of the Liability Convention, which requires that the person aggrieved or injured should be restored, by the award of compensation to him, to the condition in which he would have been if the damage had not occurred.\textsuperscript{72} Furthermore, under the principles of international law, moral damages based on pain, suffering and humiliation, as well as on other considerations, are considered recoverable.\textsuperscript{73}

As discussed, both treaty law and general principles of international law on the subject of space law make the two elements of liability and responsibility a means to an end - that of awarding compensation to an aggrieved state or other subject under the law. Therefore, in view of the many legal issues that may arise, the primary purpose of a regulatory body which sets standards on state liability in issues concerning the use of space technology would be to carefully consider the subtleties of responsibility and liability and explore their consequences on states and others involved as they apply to the overall concept of the status of a state as a user of space technology which may cause harm or injury to the latter.

The involvement and responsibility of states in space activities leads to legal accountability of such states for space insurance, and, in this respect, one can discern little difference between the role of states in ensuring that there is provision of insurance coverage for activities in outer space and commercial air transport in an adequate manner.

\textbf{III. The Air Transport Insurance Industry}

Insurance coverage in the air transport industry carries the same objective as space insurance in that risk management in the overarching purpose of the insurance contract. A risk entails four possible responses from the person at risk: acceptance; elimination; reduction; and trans-

\textsuperscript{70} Id. at 435 (referring to Corfu Channel (United Kingdom v. Albania), 1949 I.C.J. 4, at 23).

\textsuperscript{71} Diederiks-Verschoor, supra note 13, at 109.

\textsuperscript{72} Liability Convention, supra note 36, at art. XII.

\textsuperscript{73} Christol, supra note 37, at 231.
The risk management aspect of insurance relates to the last element - transfer - whereby a person at risk would transfer the consequences of that risk to an insurer at a premium. The risks so transferred through insurance, particularly in relation to air transport, apply to the risks of theft, loss, or damage in a physical sense; bankruptcy, economic recession, decline or loss in a commercial sense; war, hijacking or repossession of aviation property in a political sense; natural disasters in an environmental sense; human resource problems in a social sense; business interruption in a financial sense; and legislative changes in a regulatory sense.

The current crisis in risk management, particularly in transferring the risk of possible loss occurring to and through commercial air transport, is a direct corollary of the events of 11 September 2001. The international insurance market gave notice on 17 September 2001 that, effective 24 September 2001, third party war risk liability insurance, covering airline operators and other service providers against losses and damages resulting from war, hijacking and other perils, would be cancelled. The most compelling reason for the cancellations was the emergence of an exposure in terms of third party bodily injury and property damage that was unquantifiable. The International Union of Aviation Underwriters ("IUAU") assessed that the total losses in respect of third party bodily injury and property damage caused by these events could exceed the previous greatest single catastrophic loss of U.S. $20 billion caused by Hurricane Andrew in 1992 by a significant margin.

As an immediate response to this measure, the President of the ICAO Council, Dr. Assad Kotaite, issued a State Letter to all ICAO contracting states, requesting that they take effective measures to preclude aviation and air transport services from coming to a standstill. This letter also appealed to contracting states to support airline operators and other relevant parties, at least until the insurance market stabilized, by committing themselves to cover any risks to which airline operators and

74. Margo, supra note 22, at 80.
75. Id. at 81.
76. Id. at 79-80.
77. Abeyratne, Aviation In Crisis, supra note 1, at 269.
78. Id.
79. Id.
80. Special Group on Aviation War Risk Insurance, Second Meeting, Montreal, 28-30 Jan. 2002, ICAO Doc. SGW1/2 Report at i-1 [hereinafter Aviation War Risk, Second Meeting]. The President of the Council followed this letter with two more letters, dated 25 Oct. 2001 and 14 Dec. 2001 respectively, appealing to all Contracting States to cover the risks left open until the insurance markets stabilized. The last letter also appealed to all Contracting States to extend or provide such coverage, as the case may be, until an international mechanism was put in place, thereby contributing to the stabilization of the markets. Id.
others may become exposed by the cancellation of insurance cover. 81

The 33rd Session of the ICAO Assembly, held in Montreal from 25 September to 5 October 2001, considered as an urgent priority the insurance issue by adopting Resolution A33-20. 82 This Resolution, while recognizing that the tragic events of 11 September 2001 had adversely affected the operations of airline operators globally as a result of war risk insurance cover no longer being available at levels which are practical and accessible to airline operators, prima facie urges contracting states "to work together to develop a more enduring and coordinated approach to the important problem of providing assistance to airline operators and other service providers." 83 The Resolution, basing itself on the fundamental premise enunciated in Article 44 of the Chicago Convention, which refers to the objective of ICAO to ensure safe, regular, efficient, and economical air transport, 84 directed the Council of ICAO to urgently establish a Special Group to consider issues emerging from action taken in the insurance market regarding third party war risk insurance coverage. 85

One must of course appreciate that war and associated risks, including hijacking and acts of terrorism, pose an extremely high-risk exposure to insurers. Aviation hull and liability policies therefore usually contain an express exclusion in respect of such risks. 86 The war risk exclusion used in the London market, known as AVN 48B, 87 excludes the risks of war, invasion, hostilities, civil war, rebellion, revolution, insurrection, martial law, hostile detonation of atomic weapons, strikes, riots, civil commotions or labor disturbances, acts of a political or terrorist nature, sabotage, confiscation, nationalization, seizure, and hijacking. 88

In practical terms, war risk insurance is required to cover three eventualities: to protect an airline operator from potential financial liability

81. Id.
83. Id.
85. A33-20, supra note 82, at 2.
86. Aberyatne, supra note 3, at 600.
87. War, Hi-Jacking, and Other Perils Exclusion Clause (AVN 48B), (1968), available at http://www.aviationinsurance.com/warrisk.html (last visited Apr. 17, 2004). The London insurance market introduced the AVN 48B Clause after the Israeli raid on Beirut Airport on 28 December 1968. This war and hijacking risk exclusion clause is now included in every aviation hull and liability policy. This clause covers a wide range of eventualities including damage caused as a result of any malicious act or act of sabotage. Id.
88. Id.
that could jeopardize its existence; to justify operations into territories of states by appeasing those states that they and their citizens would be financially compensated in the event of damage; and to protect the financial interests of airlines, their owners, financiers, and/or lessors. 89 It is usual for an aircraft, depending on its type, to be covered for any amount up to U.S. $750 million to U.S. $1 billion on aggregate (as against per single occurrence). 90 Against this figure, it is significant that the underwriters permitted coverage for only up to U.S. $50 million aggregate, consequent upon their issuing notice of withdrawal of third party war risk insurance on 17 September 2001. 91

Many contracting states, following the State Letter of the President of the ICAO Council, stepped in to address issues regarding cancellation of insurance. 92 In the light of the dramatic recession of insurance coverage, states began to take measures to provide excess insurance cover to carriers, in most cases up to previous policy limit, for war and terrorism related third party risk. 93 Provision of such coverage meant that at least some air carriers would not be in violation of domestic and international regulations and lease covenants respecting war risk cover. However, there was concern expressed with the fact that a considerable number of countries in Latin America, Asia, and Africa, while having taken steps necessary to ensure continued coverage, have not provided the necessary guarantees and indemnities in the same amount as states in Europe and North America. 94

Action taken by ICAO contracting states in responding to the insurance crisis has legal legitimacy in two international Conventions, the Rome Convention of 1952 95 and the Montreal Convention of 1999. 96 Article 15 of the Rome Convention provides that "[a]ny Contracting State may require that the operator of an aircraft registered in another Contracting State shall be insured in respect of his liability for damage sustained in its territory for which a right to compensation exists . . ." 97 The operative clause, in the context of indemnities offered by the several ICAO contracting states as discussed earlier, is contained in Article 15.4 of the Rome Convention which provides that, instead of insurance, inter

89. Abeyratne, supra note 3, at 601.
90. Id.
91. Id.
92. Id.
93. Id. at 605.
94. Id.
97. Rome Convention, supra note 95, at art. 15.
alia, a guarantee given by the contracting state where the aircraft is registered, shall be deemed satisfactory if that state undertakes that it will not claim immunity from suit in respect of that guarantee.\footnote{Id. at art. 15.4(c).} The Montreal Convention of 1999, which is yet to come into force, provides in Article 50 that “States Parties shall require their carriers to maintain adequate insurance covering their liability under [the] Convention.”\footnote{Montreal Convention, supra note 96, at art. 50.} This provision further stipulates that a carrier may be required by the state party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under the Convention.\footnote{Id.}

It must be noted that coverage provided by airline insurance policies regarding perils other than third party liability for war risks have not been affected by this cancellation. War and allied perils coverage with regard to passengers have been left unchanged, but the uncertainty created by the events have made it essential to circumscribe coverage for third party losses at a maximum of U.S. $50 million.\footnote{Abeyratne, Aviation In Crisis, supra note 1, at 269.} Although premiums were increasing due to a sustained period of unprofitable trading in the insurance market, the events themselves triggered accelerated premium increases both in order to assist markets to revive from the bout of unprofitable trading and to create a reasonably adequate premium base for future exigencies of the nature of the catastrophes of September 2001.\footnote{Id.}

In general terms, the price to be paid to revive or reinstate adequate coverage for third party was risk coverage would cost the airlines an additional premium of U.S. $1.25 per passenger carried.\footnote{Id.} If airlines were to purchase coverage for limits of U.S. $950 million in excess of the already available U.S. $50 million they would have to pay U.S. $1.85 per passenger carried.\footnote{Id.} In view of the fact that the airports, refuellers, ground handlers, and other service providers in the aviation industry contribute to an accumulation of risk, since many of them may serve a particular airline at one location, underwriters were disinclined to offer coverage for these providers.\footnote{Id.} However, many insurers have shown willingness to extend coverage for an additional U.S. $100 million over the U.S. $50 million coverage already provided.\footnote{Id.}

Both the ICAO and the International Air Transport Association (“IATA”) have stringently and correctly maintained that there is an in-
herent role to be played by governments in the event of war risk.\textsuperscript{107} IATA has justifiably claimed, in a well reasoned argument, that a new international regime must provide for governments to agree to act as a multilateral guarantor covering terrorist actions against airlines in any part of the world.\textsuperscript{108} IATA has requested that any solution to the insurance crisis be widely available to international aviation shareholders, be reasonably affordable, provide for long term stability even in the event of terrorist acts, and recognize the inherent role of governments in the event of war risk claims.\textsuperscript{109}

The above remarks were made at the First Meeting of the ICAO Special Group on War Risk Insurance, held in Montreal on 6 to 7 December 2001.\textsuperscript{110} This special group was appointed by the ICAO Council in response to ICAO Assembly Resolution A33-20, adopted at the 33rd Session of the Assembly in September/October 2001.\textsuperscript{111} As earlier stated, this Resolution urges contracting states to cooperate in developing a more enduring "coordinated approach to the important problem of providing assistance to airline operators and to other service providers in the field of aviation war risk insurance."\textsuperscript{112} Toward achieving this objective, the Assembly directed the Council to urgently establish a Special Group to consider the issues referred to above and to report back to the Council with recommendations as soon as possible.\textsuperscript{113} The resolution also broadens ICAO's mandate by inviting the Council and the Secretary General to take any other measures considered necessary or desirable.\textsuperscript{114}

At the second meeting of the Special Group, held in Montreal from 28 to 30 January 2002, the London Market Brokers Committee ("LMBC") presented a medium term scheme to cover airlines from war risk liabilities.\textsuperscript{115} The scheme envisions the formation of a company, the board of directors of which shall include representatives of participating states, ICAO, and participating aviation and insurance industries.\textsuperscript{116} The company would offer third party war risk liability coverage up to U.S. $1.5 billion in excess of U.S. $50 million per insured.\textsuperscript{117} This coverage will

\textsuperscript{107} Id.


\textsuperscript{109} Id.

\textsuperscript{110} Special Group on Aviation War Risk Insurance, First Meeting, Montreal, 6 to 7 Dec. 2001, ICAO Doc. SGWI/1 at 2-1 [hereinafter Aviation War Risk, First Meeting].

\textsuperscript{111} A33-20, supra note 82, at 2.

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Id.

\textsuperscript{115} Aviation War Risk, Second Meeting, supra note 80, at app. A1-1 - A.1-3.

\textsuperscript{116} Id. at i-3 - i-4.

\textsuperscript{117} Id. at app. A1-1.
be non-cancelable and apply per occurrence and per aircraft where multiple aircraft are involved.\textsuperscript{118} The insurance cover to be provided by the company would be available to the entire aviation sector and include domestic and international operations as well as equipment lessors, financiers, and manufacturers of each state that joins the scheme.\textsuperscript{119}

The scheme so outlined offers a continuous cover of aviation war and other perils liability insurance based on clauses AVN 52D and AVN 52F which generally exclude coverage of war risk liability with a write-back possibility.\textsuperscript{120} The scheme also admits of a full review by participating contracting states, to be undertaken at its fifth anniversary, with an option to cancel or suspend the scheme ninety days thereafter.\textsuperscript{121} Participating states would act as guarantors or "reinsurers of last resort" through a legal agreement with the insurance company.\textsuperscript{122} In the event of a claim, the contributions of participating states would be pro-rated based on their ICAO assessments.\textsuperscript{123} Each state's maximum liability under the scheme would be capped.\textsuperscript{124} The total cap, if all ICAO states participate in the scheme, is expected to be U.S. $15 billion (therefore, for example, if only fifty percent of ICAO contracting states participate, the total cap would be U.S. $7.5 billion).\textsuperscript{125} The maximum exposure of each state, in any given instance, would be its ICAO assessment percentage of the total cap as it may apply, depending on the participation of states in the scheme, as outlined above.\textsuperscript{126}

Premiums will be collected from the insured in order to build a reinsurance pool to meet claims under the policies.\textsuperscript{127} This pool will obviate the need for participating states to make cash contributions to the company in the event of a claim.\textsuperscript{128} The total amount of premiums to be collected in the first year is targeted at U.S. $850 million (equivalent to fifty cents per passenger segment based on total passenger segments of 1.7 billion).\textsuperscript{129} The premiums for subsequent years would be kept at approximately the same level, provided there were no losses.\textsuperscript{130}

Although some members argued that the U.S. $0.50 per passenger

\textsuperscript{118} ld. at app. A1-4 - A1-5.
\textsuperscript{119} ld. at app. A1-1.
\textsuperscript{120} ld. at app. A1-4.
\textsuperscript{121} ld. at app. A1-3.
\textsuperscript{122} ld. at i-4.
\textsuperscript{123} ld. at app. A1-2.
\textsuperscript{124} ld.
\textsuperscript{125} ld.
\textsuperscript{126} ld.
\textsuperscript{127} ld. at app. A1-1.
\textsuperscript{128} ld.
\textsuperscript{129} ld. at app. A1-2.
\textsuperscript{130} ld.
charge was not an equitable measurement for the collection of the premium as the numbers carried per flight may differ and smaller aircraft may not necessarily be considered as much a threat as weapons of destruction as the larger aircraft which have larger capacity, the Group decided to work on the basis of U.S. $0.50 per passenger as this was considered to be the only workable means of premium funding.\textsuperscript{131}

The work of the Special Group was considered by a Council Study Group on Aviation War Risk Insurance, established by agreement of the Council on 4 March 2002.\textsuperscript{132} This Study Group had two meetings, on 16 April and 24 April 2002, respectively, wherein the Group considered a draft report to Council containing the outcome of the work of the Special Group.\textsuperscript{133} This report firstly outlines coverage to be provided in respect of third party war risk liability insurance, which is up to U.S. $1.5 billion per aircraft, per occurrence, per insured, over and above the coverage offered by the private market amounting to U.S. $50 million, which is already in place.\textsuperscript{134} Special features, which are tantamount to advantages offered by this coverage are that it would not be cancelable (which is in contrast to the current seven-day cancellation clause) and that coverage would encompass all areas of the aviation industry, including airlines, airports, ground handling agents, screening companies, manufacturers of aircraft and components lessors, air traffic controllers, and other providers of air navigation services.\textsuperscript{135} The scope of coverage would be global.\textsuperscript{136}

In terms of rates, the ICAO scheme would charge fifty cents per passenger for coverage up to U.S. $1.5 billion in excess of the private cover of U.S. $50 million, which, as already mentioned, is available at U.S. $1.25 per passenger.\textsuperscript{137} The rate of fifty cents per passenger compares favorably with the current U.S. $1.50 excess charge currently levied in respect of excess third party insurance that goes only up to a maximum of U.S. $1 billion in two extra layers at U.S. $1.00 for both layers in addition to the primary cover fixed at U.S. $1.25.\textsuperscript{138} The premium advantage, notwithstanding the strongest thrust of the coverage offered by the ICAO scheme, remains in its intrinsic guarantee against cancellation, particularly in view of the existing seven-day cancellation clause.\textsuperscript{139}

With regard to participation, which is of course voluntary, the expo-

\begin{itemize}
\item\textsuperscript{131} \textit{Id.} at 2-1.
\item\textsuperscript{132} \textsc{Abeyratne}, \textit{Aviation In Crisis}, \textit{supra} note 1, at 43.
\item\textsuperscript{133} \textit{Id.}
\item\textsuperscript{134} \textit{Aviation War Risk, Second Meeting, supra} note 80, at app. A1-4 - 1-5.
\item\textsuperscript{135} \textit{Id.} at app. A1-1; 1-4 - 1-5.
\item\textsuperscript{136} \textit{Id.} at i-3.
\item\textsuperscript{137} \textsc{Abeyratne}, \textit{Aviation In Crisis}, \textit{supra} note 1, at 43.
\item\textsuperscript{138} \textit{Id.}
\item\textsuperscript{139} \textit{Id.}
\end{itemize}
sure of a participating state to risk of payment in the instance of a claim under third party war risk liability would amount to its ICAO contribution percentage of U.S. $1.5 billion.\(^{140}\) For example, a state that participates in the ICAO scheme, which contributes three percent of the ICAO budget, has a maximum exposure of U.S. $45 million. Compared to state guarantees given in the aftermath of the September 2001 events, which were often unlimited, this modality should be acceptable to most states. In order to participate, an ICAO contracting state would be required to sign a participation agreement with ICAO that would be generally designed to fit the particular legal structure and legislative requirements of each state concerned.\(^{141}\)

An insurance entity, which is proposed within the parameters of the ICAO scheme, would have to be established by the ICAO Council, and thereafter be formally incorporated, jointly by ICAO and the industry, consequent upon development of appropriate statutes and statutory instruments, in accordance with applicable domestic and regulatory requirements. The participation agreement would be open for signature to all ICAO contracting states.

At the Third Meeting of the Council Study Group on Aviation War Risk Insurance, held at ICAO on 14 January 2003, the Study Group considered the status of developments since its second meeting, noting that forty-five contracting states had indicated their intent to participate in the global war risk insurance scheme whereas ten states had responded negatively, expressing their unwillingness to participate.\(^{142}\) The Group also considered a revised Draft Participation Agreement for the Global Scheme Regarding the Provision of Aviation War Risk Insurance\(^ {143}\) which had been circulated earlier to contracting states.\(^ {144}\) This draft Agreement is designed to establish an Insurance Entity ("IE") for the sole purpose of providing aviation insurance cover on prescribed terms for war and allied perils related liability risks faced by airline operators and other commercial entities providing aviation related services.\(^ {145}\) The purpose of the agreement which is mainly to obtain from participating states a guarantee certain obligations of the IE and to establish the proration, limits, and payment mechanisms related such obligations-in other words to provide complimentary cover through the IE that was with-

\(^{140}\) *Aviation War Risk, Second Meeting, supra* note 80, at A1-2.

\(^{141}\) *Id.*

\(^{142}\) Council Study Group on Aviation War Risk Insurance, Third Meeting, Montreal, 14 Jan. 2003, ICAO Doc. CG WI/3-IP/1 at 2.

\(^{143}\) *See Assistance in the Field of Aviation War Risk Insurance, Mar. 4, 2003, ICAO Doc. C-WP/11946* at 2.

\(^{144}\) *Id.*

drawn or reduced by the commercial insurance market following the events of 11 September 2001.\textsuperscript{146}

With regard to the scope of coverage, the IE will provide aviation war risk cover from the excess point per insured up to U.S. $ 1.5 billion.\textsuperscript{147} The same amount would apply to operators who have coverage under AVN 52D and AVN 52F clauses or any derivatives thereof, on the basis the amount would apply to any one occurrence, any one aircraft and any one insured.\textsuperscript{148} This limit of $1.5 billion will be applicable in addition to the primary passenger and third party limits that were provided by the insurance markets prior to 11 September 2001.\textsuperscript{149} A lower limit is also provided under the IE coverage of $ 500 million for operators who obtain coverage under AVN 52E and AVN 52G or derivatives of such coverage.\textsuperscript{150} The IE's cover shall automatically apply to those who are originally insured and who lose their war risk coverage as dictated by the insurance market when such third party cover is up to the excess point or passenger war risk insurance cover under their primary aviation insurance policies.\textsuperscript{151} In the case of passenger war risk cover, the limits of 1.5 billion will be raised to $ 2 billion and up to $750 million respectively.\textsuperscript{152}

The IE will, under the participation agreement, meet any claims through funds accumulated from premiums, earned investment income, and income from other sources, along with borrowings, while participating states will remain as guarantors of last resort.\textsuperscript{153} Premiums will be collected from original insureds who are air carriers designated for the purpose of the Agreement by state parties; any lessors, financiers and manufacturers incorporated in a participating state (State Party) who purchase their own primary insurance; and any service provider incorporated in a participating state who is in the business of providing services or goods in that state to any person or entity engaged in the aviation industry.\textsuperscript{154} Any other person or entity identified by the above categories of original insureds as additional insureds would be exempt from payment of premiums.\textsuperscript{155} The Agreement makes a provision for the IE to seek borrowings from credit institutions in the event funds accumulated through financial resources identified above are not sufficient to meet

\textsuperscript{146} Id. at app. A1-1 – A1-2.
\textsuperscript{147} Id. at app. A1-5.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at app. A1-5 – A1-6.
\textsuperscript{152} Id. at app. A1-5.
\textsuperscript{153} Id. at 2-2.
\textsuperscript{154} Id. at app. A1-5.
\textsuperscript{155} Id. at 3-2.
claims.\textsuperscript{156} The IE is required to maintain at all times liability insurance covering the interests of directors, officers, and employees of the Entity.\textsuperscript{157}

For the part of participating states, their obligations are to guarantee to the IE that they will meet claims arising from insurance policies issued by the IE to original insureds incorporated in the territory of a signatory state or any other participating state party to the agreement.\textsuperscript{158} The participating states also warrant that the agreement would, for all purposes, be treated as a commercial agreement, \textit{i.e.} a contract.\textsuperscript{159}

The inherent advantages of the proposed ICAO scheme are its uniqueness in terms of its global application, non-cancelability, affordability with regard to premium and exposure to claims, and its design in accordance with regulatory requirements.

\section*{IV. Conclusion}

The commonality between the problems of space insurance and air transport insurance lies in the enormity of exposure to risk faced by both industries. In the context of space insurance, underwriters are primarily concerned with the rapidity with which the frequency of spacecraft failures occur.\textsuperscript{160} One of the reasons for satellite failure may well be the accelerated rate of their manufacture, which has shortened from thirty-six months to twelve months.\textsuperscript{161} The reliance on generic spacecraft specifications could also be a contributory factor.\textsuperscript{162} With regard to commercial air transport insurance, the increased exposure to risk is particularly in the field of security and the threat of unlawful interference.\textsuperscript{163} Additionally, the safety of aviation is also a concern, sometimes conceptually attributed to the proliferation of flights by carriers to attain commercial expediency and provide for an increasing demand for air services.\textsuperscript{164} Whatever may be the reasons for increased exposure to risk, both space and air transportation must, of necessity, address the compelling need to review ways and means of ensuring adequate provision of insurance coverage.

One of the issues that would be relevant, and be politically and socially compelling, is the extent to which states can be called upon to be

\textsuperscript{156} \textit{Id.}
\textsuperscript{157} Council Study Group on Aviation War Risk Insurance, Third Meeting, Montreal, 14 Jan. 2003, ICAO Doc. SGWI-CG/I.
\textsuperscript{158} \textit{Id.} at app. A1-5.
\textsuperscript{159} Review Group of the Special Group on Aviation War Risk Insurance, Third Meeting, Montreal, 30 Apr. 2003 & 1 May 2003, ICAO Doc. SGWI-RG/I at 1-1.
\textsuperscript{160} Foust, \textit{supra} note 6, at 1.
\textsuperscript{161} \textit{Id.} at 3.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Abeyratne, Aviation in Crisis, supra} note 1, at 34.
\textsuperscript{164} \textit{Id.}
responsible for ensuring that both these critical areas are covered for risks so that continuity of the services they render are assured. The reason for this is clear. The space and insurance industries clearly suffered a paradigm shift, largely brought to bear by the impact of the events of 11 September 2001 on the air transport industry. Before these events, war risk insurance coverage for aviation, which was included in most standard insurance policies, was the obscure preoccupation of insurance managers of airlines. The only “red flag” in the war risk coverage was the seven-day cancellation clause that was seldom invoked until the events of September 2001.

The fluctuating and untenable situation in the space and air transport insurance industries demonstrate that both industries are “brittle” and, therefore, susceptible to catalysts of market failure. It is this reason that calls for states to be insurers of first resort rather than last resort. States should play the role of initiator and regulator of insurance to the extent of ensuring that insurance is available rather than actually providing it. The ultimate provision of insurance should be left to the commercial insurance market.

The synergies between air transport and space insurance are seen particularly in war risk insurance, where substantial neglect on the part of a state to take reasonable preventive or preemptive action, and neglect due to lack of attention, official indifference or connivance will impose upon that state responsibility for damage to foreign, private and public property. Such a responsibility could give rise to the legal remedy of restitution in integrum, usually granted to the injured person by a tribunal by way of a declaration, or by restitution in kind or specific restitution. Additionally, the rule of law requires that, if damage is caused by negligence in the course of a lawful activity, the award of compensation may be a legal remedy. This is one more reason for states to be interested in involvement one way or another in the regulatory process or guidance-setting with regard to insurance coverage.

A tangible example and experience has already been provided by the ICAO in its offer to the aviation community of a viable regulatory process with regard to air transport insurance. ICAO’s involvement, until 17 September 2001 when the underwriters gave seven days’ notice of withdrawal of war risk coverage, was non-existent. After the Council

166. *See* the Youmans Case, (1926) RIAA iv 110, 116; 21 AJ (1927) 571, 578.
167. *Brownlie, supra* note 64, at 462.
168. *Id.* at 464.
169. *Abeyratne, Aviation In Crisis, supra* note 1, at 34.
of the ICAO approved, in principle, the establishment of a global aviation war risk insurance scheme, the ICAO’s role is predominant.170

The most fundamental commonality in the paradigm outlining the purpose of both the areas of outer space and air transport activity is essentially that both are for the benefit of the public good and the well-being of nations and therefore, any suspension of activity would be seriously detrimental to the welfare of common humanity. In the outer space regime, the benefits accorded by space exploration to both states and people is explicitly recognized in Article 1 of the Outer Space Treaty which provides that “[t]he exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and interests of all countries, irrespective of their economic or scientific development, and shall be the province of all mankind.”171 In the air transport field, the Convention on International Civil Aviation, in its Preamble, recognizes that “whereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world [thus recognizing, as in the context of outer space activity, that both states and people benefit from air transport], yet its abuse [i.e. abuse of the future development of civil aviation] can become a threat to the general security . . . .”172 One can find no compelling legal pronouncements stronger than these to conclude that states are necessarily and integrally involved in assuring the sustainability of outer space activities and air transportation.

The final issue to be addressed, in terms of state involvement as the first insurer or insurer of first resort, is the manner in which state involvement can be consolidated. It must, as of necessity, be through international treaty where consent of the states’ parties to be bound by such a treaty will be a legal prerequisite. It is only in this manner that insurance at last resort can be ensured through the commercial insurance market at reasonable rates. Preference for one over the other, as is currently occurring in the air transport and space industry, can then be effectively precluded.

172. Civil Aviation Convention, supra note 84, at preamble.
The Lessor of Two Evils: Presumption of Responsibility for Motor Carrier Lessees or Common Law Respondeat Superior

Ethan T. Vessels*

Trucking accidents are common. Because of their size, trucks can cause extensive damage when involved in accidents. Those involved in accidents with trucks typically seek compensation from the truck’s insurance company. However, unknown to the traveling public, many trucks are leased. This is significant because, in many instances, when confronted with the duty to compensate the injured party the owner of the truck and the lessee of the truck (and their corresponding insurers) deny financial responsibility for the accident. Or worse, there is no insurance for the truck. As a result, those injured in trucking accidents with leased vehicles often must wait years to identify the responsible party, or may never identify a financially accountable party at all.

I. Introduction

There is a division of authority among courts regarding the presumption of responsibility for motor carrier lessees. This split has caused confusion and delay for personal injury plaintiffs who have been injured as a result of accidents with motor carrier lessees.

Little known to the public, many commercial motor carriers (commercial motor freight operators, i.e. tractor-trailers or semis) lease their

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vehicles. Leasing has become increasingly favored over outright ownership of the truck in recent years. Traditionally, the primary attraction of leasing was the minimization of liability. Motor carrier companies leased trucks from individuals who owned the vehicles. Subsequently, the companies would structure lease agreements whereby the leased vehicle and the driver would not be under the "control" of the lessee in any circumstance except while delivering freight for the lessee. The lessee motor carrier would take maximum advantage of the shielding aspects the respondeat superior doctrine, avoiding liability under master-servant principles.

Either injured plaintiffs were left with the option of suing the owner of the truck or suing the driver, both of whom were unlikely to be financially able to satisfy a judgment. Often the driver is "leased" along with the truck, compounding the incongruity of assuming control of the vehicle and the driver, yet contractually limiting the liability assumed along with them. As a result of these contractual limitations on liability, motor carriers who leased their vehicles were able to escape liability in "virtually all" accidents.

1. See Cincinnati Ins. Co. v. Haack, 708 N.E.2d 214, 218-19 (Ohio Ct. App. 1997) (declaratory action where insurer for lessee motor carrier sued to avoid primary insurance responsibility in a case where the leased truck was involved in an accident while driving with an empty load on the return trip from a canceled pickup).

2. Id.

3. Id. at 219.

4. Id.

5. Respondeat Superior. Latin for "let the superior make answer." This doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. BLACKS LAW DICTIONARY (8th ed. 2004). See RESTATEMENT (SECOND) OF AGENCY: NEGLIGENCE § 243 (1958) ("A master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of employment."). See, e.g., Osborne v. Lyles, 587 N.E.2d 825 (Ohio 1992); Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988). See generally Christopher Vaeth, Annotation, Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile, 27 A.L.R. 5th 174 (1995) (discussing respondeat superior in cases where an employee is driving his or her own car, but arguably on the employer's business).


7. Of course accidents also occur while leased trucks are hauling freight for the motor carrier lessee—undoubtedly "within the service" of the lessee. The dichotomy of the majority-view and minority-view positions discussed in this article has little significance in such situations. Courts typically hold the lessee and their insurer responsible in that scenario because even common law respondeat superior "scope of employment" tests (see infra Section III) offer no real bases to avoid responsibility.

8. Haack, 708 N.E.2d at 218. A typical lease arrangement will read, "The carrier desires to lease the equipment from the contractor and to engage the contractor to provide certain services..." Technically, the motor carrier is leasing the equipment and concurrently contracting for the service of driving. The practical effect is that the truck and the driver are "leased" together. Id.

9. Id. at 219.
The leases also enabled motor carrier companies to avoid compliance with federal and state motor carrier regulations. Now defunct, the Interstate Commerce Commission ("ICC") regulated the maintenance requirements, driver qualifications, driving time limits, and overall operation of motor carriers in interstate commerce. By structuring lease agreements with favorable terms, the leasing motor carrier company was able to avoid compliance with the regulations by placing the regulatory burden on the owner of the vehicle or the independent driver.

Recognizing this problem, the ICC issued regulations intending to make motor carrier lessees more accountable. Unfortunately, the regulations caused confusion. From 1977 through 1986, the ICC regulated lessees as follows:

*Exclusive Possession and Responsibilities.* [The lease] [s]hall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) *Lessee may be considered as owner.* Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

(ii) *Household goods, carrier; intermittent operations under long term lease.* When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions need only apply during the period the equipment is operated by or for the authorized carrier, lessee.

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*Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing

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10. *Id.* The court stated:

Motor carriers were able to avoid compliance with these regulations by leasing motor vehicles from truck owners who were not regulated by the I.C.C. or P.U.C.O. [state counterpart to the ICC] and by structuring the lease arrangements so that the driver and truck could not be found to be under the "control" of the lessee under the master-servant test. This meant in many cases that lessee motor carriers were able to avoid safety standards imposed by the I.C.C. or the P.U.C.O. and the attendant necessary but inevitably more costly and cumbersome compliance with those regulations. *Id.*


13. *Id.* Before the ICC regulations regarding motor carrier leases, the carefully-structured lease arrangements would make the lessor completely responsible for compliance with ICC regulations, leaving the lessees relatively unburdened by regulation. *Id.*


The ostensible import of the regulation was to create a presumption that the existence of a lease established that the lessee was the exclusive operator of the vehicle, and therefore responsible for its operation.\textsuperscript{17}

However, notwithstanding the "exclusive possession and responsibilities" language, motor carriers would structure leases narrowly defining when the vehicle would be considered "in the service" of the lease.\textsuperscript{18} The result was that motor carrier lessees would divest themselves of all tort liability except when the leased truck was hauling the contracted payload to the point of delivery. Any other use of the truck was deemed outside the service of the lease, and therefore the motor carrier would not be liable. This included "deadheading"\textsuperscript{19} and "bobtailing."\textsuperscript{20}

Inevitably, the driver of a leased vehicle must drive the vehicle while "outside the service" of the lease (i.e., deadheading or bobtailing) after delivering the freight or on the way to pick up the next delivery. This is where the ICC regulations proved difficult. Did the regulations presume that the lessee, while displaying the ICC placards, was the responsible party for the vehicle? Or, did the regulations only create a rebuttable presumption that the leasing motor carrier was responsible, and the doctrine of\textit{respondeat superior} determined whether the vehicle was under the control of the lessee at the time of the accident?

The majority of jurisdictions adopted the view that if the vehicle was operating under a valid lease and displaying the appropriate federal and state placards, the motor carrier would be presumed liable for the vehicle.\textsuperscript{21} However, a minority of courts, notwithstanding the apparent presumption of responsibility within the ICC regulations, nonetheless applied the common law doctrine of\textit{respondeat superior} in order to determine whether the vehicle was under the control of the motor carrier.\textsuperscript{22}

This confusion over who is the responsible party has unfortunately caused further confusion regarding the insuring of motor carriers.\textsuperscript{23} Because there remains a split in authority from state to state, motor carriers (by nature, often an interstate enterprise) continue to draft lease agreements cautiously, attempting to account for both views. Consequently, the lessee motor carrier and the lessor vehicle owner will not only agree

\begin{footnotes}
18. \textit{Id.} at 218-19.
20. "Bobtailing" means driving a tractor rig without an attached trailer. See\textit{ id.} at 1343.
21. See infra Section II.
22. See infra Section III.
23. See infra Section IV.
\end{footnotes}
to establish liability for the lessee only while the vehicle is in its "service," but also will contractually shift the burden of who carries liability insurance—notwithstanding state law to the contrary.24 Or worse, the lease will limit the liability of the motor carrier lessee only in instances where the vehicle is "in the service" of the lease, and, ironically, shift the duty to procure liability insurance onto the same motor carrier lessee—thereby leaving only a portion of potential accidents covered by any insurance.25 As a result, injured parties often face uncertainty (even in cases of admitted liability) regarding which insurer will pay. Frequently, injured plaintiffs must wait while the two insurers sue one another for a declaratory judgment establishing which has the duty to defend.26

The remainder of this Article will explain and analyze both the majority view, that motor carrier lessees are irrebuttably presumed to be responsible for the vehicle, and the minority view, that the respondeat superior "scope of employment" test determines whether the vehicle was under the control of the lessee. Further, this Article will highlight cases where the insurer's duty to defend was at issue. Finally, after discussing these cases, this Article will advocate enacting a federal statute affirmatively fixing the responsibility for leased vehicles onto the lessee motor carrier.

II. MAJORITY VIEW: PRESCRIPTION OF LESSEE RESPONSIBILITY

The majority of jurisdictions have concluded that the ICC regulations established a presumption that when a vehicle is operating under a valid lease, the lessee is presumed to be responsible for any resulting accidents, no matter whether the truck is deadheading, bobtailing, or otherwise "not in the service" of the lessee.

Even before the 1977 regulations, Mellon National Bank & Trust v. Sophie Lines27 established that the lessee in a motor carrier lease is presumed to be responsible at the time of an accident.28 In Mellon, the

24. Haack, 708 N.E.2d at 227. One might wonder why lessors would be willing to accept the increased exposure to liability. The most likely answer is that the motor carrier companies typically have greater bargaining power because of their relative financial strength and size compared to the typical lessor, who often is a single truck owner leasing himself along with his truck. The lease agreements are frequently offered on a "take it or leave it" basis.
27. 289 F.2d 473, 475 (3d Cir. 1961).
28. Id. at 477. See also Wellman v. Liberty Mut. Ins. Co., 496 F.2d 131, 139 (8th Cir. 1974) ("It is true that the cases clearly hold that I.C.C. regulations require that the motor carrier operating leased equipment be held liable to the public for negligent operation of leased vehicles."); Simmons v. King, 478 F.2d 857, 867 (5th Cir. 1973) (driver of leased vehicle was "statutory employee" and therefore lessee was "vicariously liable as a matter of law for the negligence of [the driver]"); Alford v. Major, 470 F.2d 132, 135 (7th Cir. 1972) (leased truck operated under a "trip lease" caused fatal accident; court held the lessee to be responsible); Proctor v. Colonial
lessee, Turner Transfer, Inc., entered into a lease with Sophie Lines, Inc.29 The lease contained a provision that the “leased equipment under this Agreement is in the exclusive possession, control, and use of the . . . Lessee . . . .”30 Notwithstanding the agreement, Sophie Lines, who provided the driver and directed the driver, while under the lease to Turner Transfer and with Turner’s knowledge, picked up a load for Sophie Lines during an empty (deadhead) portion of a delivery circuit in order to maximize the truck’s utility.31 Turner benefited by avoiding a 16-cent per mile assessment (a state use tax) for driving the vehicle with empty loads.32 There was evidence that Turner had knowledge of such trips prior to the accident.33 Sophie Lines was not authorized by the ICC to operate the vehicle; only Turner was the ICC authorized carrier.34 During this delivery for Sophie, the truck collided with a freight train.35 Despite the fact that the truck was undeniably on a trip for the benefit of Sophie (the lessor), the trial court held that Turner (the lessee) was liable for the accident.36 The Third Circuit affirmed.37 Despite the language in the lease agreement, the court concluded that Turner, and not Sophie, was liable for any accident occurring while under its lease.38 The court stated:

[Public policy requires that the holder of a franchise or certificate from the Interstate Commerce Commission for the operation of freight vehicles in interstate commerce . . . be held responsible for the operation of such vehicles. . . . Otherwise, the public might be entirely deprived of the safeguards to the public . . . by means of certificate holders evading their responsibility by the employment of irresponsible persons as independent contractors.39

The court went on to note that the primary purpose of such regulations was for “the protection of the traveling public upon the

30. *Id.*
31. *Id.*
32. *Id.* at 476.
33. *Id.*
34. *Id.*
35. *Id.* at 474.
36. *Id.* at 476.
37. *Id.* at 478.
38. *Id.* at 477.
39. *Id.* (quoting Hodges v. Johnson, 52 F. Supp. 488, 490-91 (D. Va. 1943)).
highways.”

After the 1977 regulations, the Third Circuit continued to recognize the lessee as the responsible party, in keeping with its decision in *Mellon*. In *Carolina Casualty Insurance Company v. The Insurance Company of North America*, the court held that the 1977 ICC regulations definitively placed responsibility on the lessee. “[F]ederal law in effect creates an irrebuttable presumption of an employment relationship between a driver and the lessee whose placards identify the vehicle.”

The majority of federal courts have applied the same reasoning. Likewise, the majority of state courts have also presumed motor carrier lessees to be liable.

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40. Id. (quoting Hodges, 52 F. Supp. at 490).
41. 595 F.2d 128 (3d Cir. 1979).
42. Id. at 137.
43. Id. at 137 n.29.
44. See Rodriguez v. Ager, 705 F.2d 1229, 1230 (10th Cir. 1983) (accident occurred after termination of the lease, but lessee’s insignia had not been removed from vehicle); Empire Indem. Ins. Co. v. Carolina Cas. Ins. Co., 838 F.2d 1428, 1430 (5th Cir. 1988) (leased truck involved in accident, and driver and lessee contracted to shift duty to procure insurance onto driver.) (“[W]hen a leased driver is making a trip during the term of but outside the scope of his employment and continues to display the required ICC insignia and permit number, that driver continues to be a statutory employee of the carrier . . . even though he is not actually operating under that authority at the time of the collision.” Id. at 1433.); Grinnell Mut. Reinsurance. Co. v. Empire Fire & Marine Ins. Co., 722 F.2d 1400, 1402 (8th Cir. 1983) (leased truck involved in fatal accident with passenger car; truck was deadheading after completing a “trip lease”; court held the long term lessee liable to the plaintiff, but also held that the lessee was entitled to indemnity by the driver); Empire Fire & Marine Ins. Co. v. Guaranty Nat’l Ins. Co., 868 F.2d 357 (10th Cir. 1989) (leased truck involved in accident while deadheading to terminal in order to wait for a hauling job; court held lessee to be liable); Johnson v. S.O.S. Transp., Inc., 926 F.2d 516 (6th Cir. 1991) (leased truck caused fatal accident due to brake failure; court held that lessee was responsible for the maintenance of the truck even though under a “trip lease”); Gilstorff v. Top Line Express, Inc., 910 F. Supp. 355 (N.D. Ohio 1995) (accident involving permanently leased truck where the truck was under a “trip lease” by another carrier (creating two lessees) but failed to display ICC placard as was agreed to; court held that original lessee was primarily liable to injured parties because its placard was displayed at the time of the accident notwithstanding the second lessee’s promise to display its placards).

45. See Wyckoff Trucking v. Marsh Bros. Trucking Serv., Inc., 569 N.E.2d 1049 (Ohio 1991) (abandoning Thornberry v. Oyler Bros., 131 N.E.2d 383 (Ohio 1955)) (leased truck involved in accident while deadheading in order to pick up a load of steel; court held lessee to be liable); Nat’l Trailer Convoy, Inc. v. Saul, 375 P.2d 922 (Okla. 1962) (leased truck involved in accident while bobtailling; lessee found liable); Cox v. Bond Transp., Inc., 249 A.2d 579 (N.J. 1969) (leased truck involved in accident while bobtailling in order to drive home from terminal; lessee held to be liable); Weeks v. Kelley, 377 A.2d 444 (Me. 1977) (leased truck involved in accident while in service of lessee; lessee held liable); Schedler v. Rowley Interstate Transp. Co., 368 N.E.2d 1287 (Ill. 1977) (leased truck involved in accident while bobtailling enroute to terminal and to await next load; lessee found liable); Wilkerson v. Allied Van Lines, Inc., 521 A.2d 25 (Pa. 1987) (suit by injured driver of a truck; leased truck had been subsequently re-leased to another motor carrier; court held that driver was entitled to ICC regulatory protection as a member of the “traveling public” and determine the subsequent lessee to be responsible); Williamson v. Steco Sales, Inc., 530 N.W.2d 412 (Wis. Ct. App. 1995) (holding that a lessee is presumed responsible,
III. MINORITY VIEW: RESPONDEAT SUPERIOR

A. COMMON LAW SCOPE OF EMPLOYMENT UNDER RESPONDEAT SUPERIOR

In traditional negligence actions involving employers and their employees or agents, courts do not presume the employer to be responsible. Rather, under common law *respondeat superior*, a plaintiff must satisfy a two-part test in order to hold an employer liable for the negligence of his employee or agent.46 First, the plaintiff must establish that an employment or agency relationship exists.47 Second, the plaintiff must show that the employee was under the "control" of the employer.48

The second part of the test is the most important because it is relatively easy to determine whether an employment or agency relationship exists in the realm of trucking leases. The plaintiff must establish that the negligent employee was acting "within the scope" of his employment at the time of the accident.49 This test is explained in the following section.

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46. See Babbitt v. Say, 165 N.E. 721, 725 (Ohio 1929).
47. *See Restatement (Second) of Agency: Definition of Servant* § 220 (1958).
   (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
   (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
      (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
      (b) whether or not the one employed is engaged in a distinct occupation or business;
      (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
      (d) the skill required in the particular occupation;
      (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
      (f) the length of time for which the person is employed;
      (g) the method of payment, whether by the time or by the job;
      (h) whether or not the work is a part of the regular business of the employer;
      (i) whether or not the parties believe they are creating the relation of master and servant;
      and
      (j) whether the principal is or is not in business. *See also Haack*, 708 N.E.2d at 218 (discussing *respondeat superior*).
48. *See Babbitt*, 165 N.E. at 725 (citing Densby v. Bartlett, 149 N.E. 571, 622 (1925)).

[A]n act is within the course of employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was employed upon the master's business, and be done, although mistakenly or ill advisedly, with a view to further the master's business, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, or personal motive on the part of the servant to do the act upon his own account. *Id.*
B. **Respondeat Superior and Motor Carrier Lessees**

Both before and after the 1977 ICC regulations “clarifying” the status of motor carrier leases, a minority (albeit a small minority) of jurisdictions held that evidence of the tractor-trailer operating under a valid lease at the time of the accident does not, in and of itself, establish liability on the part of the lessee.50 These courts held that aside from the lease, the plaintiff must establish the lessee’s liability under the common law principle of respondeat superior.

In *Pace v. Southern Express Company*,51 the driver of a leased tractor-trailer collided with an automobile, killing the automobile’s passengers.52 Peter Couture, the driver, was the owner of the truck.53 He leased the truck and himself, as the driver, to the Southern Express Company.54 The lease provided, “During the period of this lease, said vehicle and driver shall be solely and exclusively under the direction of the Lessee.”55 The lease continued, “In the event the Lessor [Peter Couture] is employed by the Lessee as driver of equipment owned or leased by the Lessee said Lessor shall be deemed an employee of the Lessee.”56 As part of the lease agreement, Couture was to procure insurance, which he failed to do.57

Couture collided with the plaintiff (killing him) while driving the tractor (bobtailing) from Southern Express’s terminal to his home, after leaving the tractor and its freight at the company’s terminal.58 Despite the

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See also Restatement (Second) of Agency § 228 (1958).

Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master, and
(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

See generally Restatement (Second) of Agency: Negligence § 243, Illustration 1 (1958). ("A, a messenger boy employed by the P telegraph company, on the way to receive a message to be delivered by A to P, carelessly runs into T, whom he knocks down. P is liable to T.").

50. See generally R.D. Hursh, Annotation, Liability Under Respondeat Superior Doctrine for Acts of Operator Furnished With Leased Machine or Motor Vehicle, 17 A.L.R.2d 1388 (1951) (discussing cases where respondeat superior doctrine holds employer’s liable for instances where the employee commits a tort while using leased machines or motor vehicles).

51. 409 F.2d 331 (7th Cir. 1969).
52. Id. at 332.
53. Id.
54. Id.
55. Id. at 332-333.
56. Id. at 333.
57. Id.
58. Id.
language of the lease, the court determined that while driving the tractor to his home, he was not an “employee” of Southern Express, and could only be an employee when hauling loads for the company.59 The court stated,

Under Indiana law, which is controlling, it is well settled that where an employee, with or without the consent of the owner of the vehicle, uses the vehicle for purposes of his own, when not on regular duty, the owner is not liable for injury to another resulting from the driver's negligence (citations omitted). Here the uncontroverted facts show that Couture was off duty and performing no task for defendant at the time of the collision. He was neither engaging in defendant’s business nor acting within the scope of his employment. Therefore, under Indiana law, defendant [Southern Express] was not responsible for Couture’s negligence on this occasion, whether or not the relation of employer and employee existed at the time of the accident.60

Astonishingly, the court noted that the master-servant analysis was warranted notwithstanding an Indiana regulation (very similar to the 1977 ICC regulation) definitively establishing the lessee as responsible for the equipment. The Indiana regulation stated:

Lease of Equipment by and to Carriers. The leasing of equipment to a common and/or contract carrier shall result in the complete control of the equipment by said carrier as lessee. The motor carrier to which the vehicle is leased shall for the term of the lease be deemed the operator thereof and the terms of the lease shall indicate that said lessee motor carrier shall be responsible for the operation of the vehicle, including equipment, physical condition, insurance coverage, registration thereof, markings, driver’s qualifications, and all other related matters, to the same degree and extent as if said lessee motor carrier were the regular owner thereof.61

The court dismissed the regulation stating, “In our view, this rule only applies where the tractor is being operated on the lessee’s business.”62 The court did not attempt to reconcile this with the plain language of the regulation stating that the lessee “shall for the term of the lease be deemed the operator thereof.”63

In fact, the Seventh Circuit is the primary cause for the split of authority, having ruled similarly in Gudgel v. Southern Shippers, Inc.64 In

59. Id. at 334.
60. Id. at 333.
61. Id. at 333-34 (emphasis added) (citing Rule 12(b) of the Public Service Commission of Indiana).
62. Id. at 334.
63. Id. But see St. Paul Fire & Marine Ins. Co. v. Frankart, 358 N.E.2d 720, 722-23 (Ill. 1976) (accepting respondeat superior as the appropriate test yet determining that returning home with an empty load is part of the “original activity on the behalf of the carrier.” (referencing Am. Transit Lines v. Smith, 246 F.2d 86 (6th Cir. 1957))).
64. 387 F.2d 723 (7th Cir. 1967).
*Gudgel*, a leased truck was involved in an accident, and the court held that the doctrine of *respondeat superior* applied.\(^{65}\) It is noteworthy, if not ironic, that in *Gudgel* the Seventh Circuit purported to apply Illinois law.\(^{66}\) Yet Illinois applies the majority view presumption-of-responsibility rule.\(^{67}\) Furthering the discontinuity, the Seventh Circuit applied the presumption of responsibility majority-view rule in *Alford v. Major*.\(^{68}\) However, the court did not reverse, or even refer to *Gudgel*, which applied *respondeat superior* scope-of-employment analysis to a long-term lease—arguably worthy of the same treatment. Although these decisions predate the 1977 regulations, they remain valid.

The minority view continues in several state courts as well. In *Gackstetter v. Dart Transit Co.*\(^{69}\) the court held that the existence of a valid lease only satisfies the first element of the master-servant test, that an employer-employee relationship does exist, but does not establish that the employee was within the scope of employment at the time of the accident.\(^{70}\)

Even after the 1977 regulations addressing lessees, some courts continued to apply *respondeat superior*, or at least would not presume the lessee to be responsible. In *Mensing v. Rochester Cheese Express, Inc.*\(^{71}\) the driver of a leased tractor-trailer unhitched the payload and proceeded to “bobtail” in order to get lunch while the terminal employees prepared to unload the trailer.\(^{72}\) On the way to lunch, the driver collided with a car.\(^{73}\)

The lease agreement excluded the lessee’s liability “in any accident as concerns all Equipment hereunder when used not in performance of a trip under this Agreement . . . ."\(^{74}\) Bobtail, the lessee argued, was not in the performance of a trip according to the lease. The court agreed, stating “Cheese Express [lessee] [was] liable only when the tractor was pulling a loaded trailer. The trial court’s interpretation is consistent with

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\(^{65}\) *Id.* at 725.

\(^{66}\) *Id.*


\(^{68}\) 470 F.2d 132, 135 (7th Cir. 1972).


\(^{70}\) *Gackstetter*, 130 N.W.2d at 328-29.

\(^{71}\) 423 N.W.2d 92 (Minn. Ct. App. 1988).

\(^{72}\) *Id.* at 93.

\(^{73}\) *Id.*

\(^{74}\) *Id.*
federal and state statutes and regulations which require the carrier to maintain insurance coverage for the protection of the public." But, the court continued on and applied the *Gackstetter v. Dart Transit Co.* pre-1977 ICC regulations, *respondeat superior* analysis. In *Cheese Express*, the court determined that the driver was "within the scope of employment." Bobtailing in order to attend lunch did not, by itself, destroy the employer-employee relationship. "[A]n employee does not cease to be acting within the scope of employment because of an incidental personal act if the main purpose is still to carry on the business of the employer." "We find the driver was acting primarily for the benefit of Cheese Express [lessee] while waiting for his trailer to be loaded." While achieving the same result, lessee was liable, the court continued to apply *respondeat superior* analysis in light of the 1977 and the 1986 ICC regulations and numerous cases holding that the lessee was irrebuttably presumed to be liable. Other than stating that the decision was in line with current federal regulations, the *Cheese Express* court did not explain how applying the scope-of-employment test conformed to the regulation's declaration that the authorized carrier, the lessee, shall assume complete responsibility for the duration of the lease. Other courts have applied the same analysis, even after the 1977 and 1986 ICC regulations.

In fact, there continues to be support for applying common law re-

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75. *Id.* at 94.

76. *Cheese Express*, 423 N.W.2d at 94 (referring to *Gackstetter*, 130 N.W.2d at 329).

77. *Id.*

78. *Id.* at 94-95.

79. *Id.* at 95 (citing Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11, 16 (Minn. 1979) (quoting DeMirjian v. Ideal Heating Corp., 129 Cal. App. 2d 758, 765-66 (1955))).

80. *Id.* at 95. ("Such acts as are necessary to the life, comfort, and convenience of the [employee] while at work, though strictly personal ... and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment." *Id.*) (quoting Laurie v. Mueller, 78 N.W.2d 434, 438 (1956) (quoting Adams v. Am. President Lines, 23 Cal. 2d 681, 684 (1944))).

81. In light of the remaining confusion after the 1977 regulations, the ICC issued further clarification in 1986—

(c) Exclusive possession and responsibilities — (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease. Written Lease Requirements, 49 C.F.R. § 1057.12 (c) (1986).

82. See *supra* Section II.

83. *Cheese Express*, 423 N.W.2d at 94.

84. *Id.*

spondeat superior to motor carrier lessees. In his 1999 Note, Patrick Phillips advocates that courts apply the common law test, rather than presume lessee responsibility—

The better rule is to follow the interpretation taken by the minority of courts in this context, especially in light of the 1992 amendments. The policy of full compensation has its limits. When courts assign liability to those not negligent for acts that do not confer any benefit on them, they carry this policy too far. A constant consideration to court construction should be the ultimate effects upon all parties involved.

Put differently, Phillips believes that the minority view is the only method that prevents non-negligent actors from having to pay for the conduct of others.

While distinctly in the minority, the respondeat superior view persists in several jurisdictions. Notwithstanding the apparent presumption built into the ICC regulations, the long-standing principle of only attaching liability to a negligent actor overrides this presumption in the minority jurisdictions. The unfortunate side effect is that the continued adherence to this principle causes confusion for those injured by motor carriers.

IV. INSURERS AND THEIR DUTY TO DEFEND

Insurance companies are inextricable players in motor carrier liability cases. In practice, and as required by law, both lessors and lessees of tractor-trailers carry insurance. Indeed, it is often the insurers, recognizing the split of authority regarding motor carrier leases, which seek declaratory judgments, attempting to shift liability onto the opposing insurer (i.e., a lessee insurer will sue the lessor’s insurer). The court in

87. The 1992 Amendments to the ICC regulations provide:
   (c)(4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 11107 and attendant administrative requirements. Written Lease Requirements, 49 C.F.R. § 1057.12(c) (1992).
   This amendment largely was intended to address “trip leases” where the term of the lease exists only for the brief period where the driver and the truck are delivering the load. See Grinnell Mut. Reinsurance Co., 722 F.2d at 1402 n.1, which defined the “trip lease” as follows:
   A “trip lease” involves the use by someone other than the lessee of a leased vehicle. Under a trip lease, the non-lessee uses the vehicle for a specific haul of its own. It is common for equipment leases to contain trip lease provisions. This prevents the equipment from standing idle and unproductive when it could otherwise be used.
89. See Occidental Fire & Cas. Co. of N.C. v. Int'l Ins. Co., 804 F.2d 983 (7th Cir. 1986); Am. Interinsurance Exch. v. Occidental Fire & Cas. Co. of N.C., 847 F.2d 1300 (7th Cir. 1988);
Carolina Casualty Insurance Company v. The Insurance Company of North America provided perhaps the most colorful and sarcastic description of the recurrent situation—

The pattern of facts in this case is a common one. An ICC-certified motor carrier . . . leases a truck; the lessor of the vehicle . . . also provides the driver . . . . The truck, while carrying goods on the lessee's business and displaying the lessee's ICC placards, is involved in an accident. Members of the public . . . alleging injury in the accident, sue lessee, lessor and driver for damages. The insurers of the defendants in that case, meanwhile, stand anxiously by, each trying to bow the other through the courtroom door first. The result is a separate declaratory judgment action in which the lessor's insurer . . . and the lessee's insurer . . . seeks a determination as to which has the unwanted honor of first entering to defend and pay. . . .

In spite of federal and state regulation and the majority line of decisions, motor carriers will nevertheless contractually shift the duty to carry liability insurance back to the lessor or the driver. Ostensibly, motor carriers continue to do this because of the continuing split of authority, anticipating that the contractual shift will be upheld, at least in minority-view jurisdictions. Nonetheless, this has not dissuaded the


90. Carolina Cas. Ins. Co., 595 F.2d at 129-30 (internal citations omitted).

See also Wellman v. Liberty Mut. Ins. Co., 496 F.2d 131, 138 (8th Cir. 1974) (citing 49 C.F.R. § 1043.1 (1974)), which stated:

No common or contract carrier . . . shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed and accepted by the Commission a surety bond, certificate of insurance, proof of qualifications as a self insurer, or other securities or agreements . . . conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use . . . .

94. See DAVID N. NISSENBERG, THE LAW OF COMMERCIAL TRUCKING: DAMAGE TO PERSONS AND PROPERTY § 14-7(b) (2d ed. 1994) ("The seeds of confusion inherent in this situation are exacerbated by conflicting policy provisions and exclusions among the policies and the natu-
lessee’s insurers from denying responsibility, effectively seeking application of the disfavored *respondeat superior* theory in majority-view jurisdictions.  

In *Haack*, an Ohio Court of Appeals held that not only was the motor carrier lessee irrebuttably presumed to be responsible under *Wyckoff Trucking v. Marsh Brothers Trucking Service*, but also the lessor is not to provide insurance while the lease is effective. Therefore, in effect, it is illegal in Ohio to contractually shift the duty to procure insurance. The court continued—

> [W]e are convinced that extending the statutory presumption of liability to the lessee’s insurer prevents public confusion as to who is responsible for accidents caused by P.U.C.O. (Public Utilities Commission of Ohio)-licensed carriers and saves injured parties from lengthy court battles and in-terminable delays in receiving compensation. In addition, this approach avoids the inconsistent result of finding that the lessee is statutorily presumed to be responsible but not finding that the lessee’s insurance is triggered.  

In spite of *Wyckoff* and *Haack*, and the stated goals of avoiding delays in compensating third parties, insurers continue to file declaratory actions in identical circumstances.

V. **The Merits of Presuming Lessee Liability and Insurer’s Corresponding Duty to Defend**

Having canvassed the majority view and the minority view, the rationale for both, as well as the concurrent problem of insurers, the majority view is the better approach. All courts should establish an irrebuttable presumption of responsibility for motor carrier lessees. This approach has greater public policy advantages than the strict application of *respondeat superior*, which is ill suited for the modern practice of leasing tractor-

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95. See *Haack*, 708 N.E.2d at 228.
96. 569 N.E.2d at 1054.
97. *Haack*, 708 N.E.2d at 224-27 (citing Ohio Admin. Code § 4901:2-3-07: The code prohibits “lessees from entering into lease agreements with lessors until the lessors have obtained insurance, but *expressly prohibits owner-lessees from obtaining insurance* covering periods while the vehicle is being operated under a lease.” Id. at 227.) (emphasis added).
trailers. The remainder of this Article will discuss the reasoning and advantages of uniformly applying the majority view.

More than the disadvantages of uniformly applying respondeat superior, the split of authority is the greatest problem. Regardless of prohibition by state law, the fact that disparate treatment remains prompts motor carriers and their insurers to continue to contractually shift liability and insurance liability. Additionally, motor carriers will litigate the same hoping that a court will deem the accident beyond “the service of the lease.” For this reason, Congress should amend the federal statute (not the regulations, as changes to the regulations seem not to be conclusive) to clearly establish that it is the motor carrier lessee who, while operating under a valid lease, is presumed to be responsible (not necessarily liable) for the accident. Furthermore, the lessee’s insurer should bear the burden of defending and paying for the resulting accident.

A. Trucking as an “inherently dangerous activity”

Modern tort law has recognized certain commercial activities to be “inherently dangerous.” Under the modern view, once an activity is determined to be “inherently” or “unreasonably” dangerous to the general public, the entity engaged in the activity will be held strictly liable for any resulting harm, as opposed to other activities where a showing of negligence is required in order to establish liability.

Several courts have reasoned that trucking is an “inherently dangerous activity.” Hodges v. Johnson was the first to discuss trucking as “inherently dangerous.” The court in Hodges would have applied respondeat superior but for the fact that trucking is “inherently dangerous,” and consequently held the owner of the truck liable:

[T]his activity [trucking] involved an unreasonable risk of harm to others. It is a matter of common knowledge that the transportation of freight upon the

100. See Haack, 708 N.E.2d at 225.


102. See RESTATEMENT (SECOND) OF TORTS: ABNORMALLY DANGEROUS ACTIVITIES § 519 (1977) (“One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”).


104. Id. at 492.
highways, usually by means of huge trucks and trailers, if [sic] fraught with
great danger to the traveling public.

....

Therefore, it is my conclusion that public policy requires that the holder of a
franchise or certificate from the Interstate Commerce Commission for the
operation of freight vehicles in interstate commerce upon the public high-
ways be held responsible for the operation of such vehicles . . . 105

The court continued:

[Where public authority grants to an individual or corporation authority to
engage in certain activities involving danger to the public, which right is de-


105. Id. at 490-91.
106. Id. at 491.
107. Haack, 708 N.E.2d at 219. ("Courts using this exception [to the general rule that em-


108. See, e.g., Rodriguez v. Ager, 705 F.2d 1229, 1236 (10th Cir. 1983) ("To fail to uphold the


ICC Regulations would result in injustice. Trucking equipment such as that here present has a
capability for bringing about terrible injuries and damages to life.").]
establish that they acted reasonably and avoid liability under negligence theory.

B. COMPENSATION TO INJURED PARTIES

The most important reason to uniformly apply the majority approach is that it better ensures compensation and avoids confusion and delay regarding responsibility for those injured in tractor-trailer accidents. This is the most frequently mentioned basis for construing the ICC regulations to presume responsibility on behalf of the carrier lessee. In Wyckoff Trucking v. Marsh Bros., the Ohio Supreme Court succinctly stated the compensatory rationale for fixing responsibility on the lessee—

Above all, the majority view removes factual confusion attendant to determining which party is responsible for damages, thus relieving the innocent victim from the sometimes interminable delays that accompany multiparty litigation, by focusing liability as it does, and forcing the trucking companies to allocate the various indemnification agreements among themselves. Once liability is fixed on the statutory employer, it is the statutory employer who must seek contribution or indemnification from other potentially responsible parties, not the innocent victim.\textsuperscript{109}

The last sentence emphasizes the primary weakness in the minority view that presuming responsibility unjustly foists compensatory duties onto non-negligent actors.\textsuperscript{110} The majority view allows the lessee to seek contribution and indemnification from the negligent party if the lessee was not the negligent party.\textsuperscript{111} Consequently, the burden of paying for tortious conduct is not exclusively and conclusively placed upon the lessee if the lessee was not negligent and the innocent party receives compensation quickly and with less confusion.

Patrick Phillips criticizes the majority view, stating that it attaches liability onto parties "not negligent for acts that do not confer any benefit on them."\textsuperscript{112} The problem with this assertion is that majority-view courts do not necessarily fix liability, only responsibility. As stated previously, side from indemnification the defending carrier, despite its responsibility,

\textsuperscript{109} Wyckoff Trucking, 569 N.E.2d at 1053.

\textsuperscript{110} See Phillips, supra note 86, at 390. In support of the minority view, Phillips stated: The common law theory strikes a balance between the full compensation policy and the competing policy of assigning liability to those not responsible for the injuries. If the negligent actions were committed during the employment relationship, and the negligent actions conferred a benefit upon the motor carrier, then the motor carrier and its insurer will be liable for the actions of the owner/driver. However, if not, the owner/driver alone will face the liability. Id.

\textsuperscript{111} See Johnson v. S.O.S. Transp., Inc., 926 F.2d 516 (6th Cir. 1991) ("In Transamerica Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U.S. 28, 39 (1975), the Court held that the 'control and responsibility' requirement does not prohibit an agreement by the lessor to indemnify the lessee for loss caused by the former's negligence. . . . ").

\textsuperscript{112} See Phillips, supra note 86, at 412.
can establish that it acted reasonably and avoid liability under negligence theory (i.e., defeat the negligence claim). \(^{113}\)

The court in *Rediehs Express, Inc. v. Maple* \(^{114}\) provided perhaps the best response to the criticism that blame is unfairly imposed upon non-negligent carriers:

The carrier must, at his peril, exert care in his leasing arrangements and avoid leasing from "gypsies" or fly-by-night, irresponsible truckers. *The regulations and cases make the carrier police its lessors as it is policed by the I.C.C.*

Argument is made that these cases create an unfair burden upon the carrier who is held responsible for the frolic and detour of its lessor. \ldots If the carrier has been derelict in employing an under-insured, financially irresponsible or incompetent lessor, *it has only itself to blame*. \(^{115}\)

In fact, given this reasoning in *Rediehs*, one could argue that the lessee is negligent when it fails to properly certify its lessor, regardless of negligence for ensuing accidents. The motor carrier has a duty to ascertain the financial condition of the parties from whom it leases, and if the lessor is unable to provide indemnity or contribution for acts of its negligence, the lessee is negligent for failing to discover this before leasing the vehicle. The "inherent dangers" of trucking impose a duty upon those who partake in the business to insure that the risk, including financial risk, to the traveling public is minimized. As a matter of policy, it is pref-

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113. See David N. Nissenberg, *The Law of Commercial Trucking* § 6-1 (2d ed. 1994) which states:

The linchpin of the whole process of sorting out responsibility for injuries and property damage sustained in traffic accidents is to establish negligence on the part of the actors in the drama. Under the standard of exercising reasonable care to prevent injuries to persons and property within the vehicle's path, a truck driver risks liability to himself, his employer, and the truck's owner for the slightest deviation.

For an example where a truck did cause an accident but was not negligent, see *Nichols v. Int'l Paper Co.*, 644 S.W.2d 583, 585 (Ark. 1983). In *Nichols*, a paper company had loaded logs onto a trailer and was subsequently sued by another motorist when the logs fell off the truck, striking the motorist's car. The court stated:

It is true that the plaintiffs were apparently not guilty of any negligence and they did prove that an accident happened. But that is not enough. In William L. Prosser, *Handbook of the Law of Torts*, § 39 (4th ed. 1971), the burden of the plaintiff in such a case is explained.

The mere fact that an accident or injury has occurred, with nothing more, is not evidence of negligence on the part of anyone. \ldots"

The evidence in this case was Nelson's [the driver] testimony that the load was properly loaded and bound, and that he was not negligent in driving. He knew of no cause of the accident. The yard foreman's testimony confirmed Nelson's testimony on loading. The plaintiffs simply did not offer one fact or any proof from which the jury could reasonably conclude International Paper Company was guilty of any negligence that was the cause of the accident.


115. *Id.* at 1012 (emphasis added).
erable that the party most able to ascertain the risks of operation, in this case the motor carrier lessee, be the party to bear the compensatory risks if they neglect to ascertain those risks.

The key in reconciling the competing interests of compensating the injured and avoiding injustice to the motor carrier is the insurance.\textsuperscript{116} Risk is shared in the trucking industry. Motor carriers are insured, the drivers are insured or at least are supposed to be insured, and the lessors are insured.\textsuperscript{117} Assuming the injured plaintiff was not negligent in causing the accident, one of these parties will be defending and paying for the injuries.

Rather than constantly litigating to determine who must defend and pay,\textsuperscript{118} it is better to clearly establish that it is the lessee’s insurer who will defend and pay, if necessary.\textsuperscript{119} Insurers of the lessee will adjust their premiums accordingly for the increased exposure and any increased risk for uninsured or underinsured drivers. In fact, this concept is well established in American tort jurisprudence.\textsuperscript{120}

Theoretically, it is possible that insurers for lessees could avoid increasing the premiums by virtue of the money they would save from not having to continually litigate this scenario. Inevitably, the increased costs, if there are any, are passed on to customers. Given the fortunate rarity of accidents occurring “outside the service” of a motor carrier lessee, it is not likely that these costs will be significant.

C. The Inconsistency of Respondeat Superior

Another main weakness in applying \textit{respondeat superior} is that there can be no certainty in determining when a driver “is in the service” of the


\textsuperscript{117} See supra Section IV.

\textsuperscript{118} See supra Section IV.

\textsuperscript{119} See Haack, 708 N.E.2d at 230. (“Hence, the purpose of the presumption of statutory liability—to prevent public confusion as to who is responsible for accidents and to save injured parties from lengthy court battles and interminable delays in receiving compensation—are in effect defeated by the failure to extend the presumption of liability to the lessee’s insurer.”).

\textsuperscript{120} See Oliver Wendell Holmes, \textit{The Path of the Law After One Hundred Years}, 110 Harv. L. Rev. 991, 999 (1997) (reprinting the address of Justice Oliver Wendell Holmes at the Boston University Law School on Jan. 8, 1897):

Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of whose those work it uses.
lessee. In the minority-view jurisdictions, bobtailing has created disparate results. For instance, in *Mensing v. Rochester Cheese Express*, the court held that a driver bobtailing in order to get lunch was “within the scope of employment.”\(^{121}\) However, in *Pace v. Southern Express*, the court held that a driver bobtailing in order to go to his home was not “within the scope of employment.”\(^{122}\)

There seems to be little difference between driving to get lunch and driving to go home. Perhaps the driver in *Pace* had farther to travel than the driver in *Cheese Express*. How far is too far when determining whether the driver is “within the scope of employment?” What is the difference, as a matter of law, between going to lunch and going home? What if the driver were going home for lunch?

The scope-of-employment test is poorly suited for the trucking scenario—especially for trucks under lease. Trucking is different from other master-servant relationships. The nature of trucking dictates that the driver will eventually drop the cargo and travel while empty. Because of the long hours and long distances, drivers stop for lunch, stop to rest, use the tractor to go home, etc. It does not make sense to hinge liability of the lessee, who has effectively employed the driver, on whether the tractor was attached to the trailer or whether the trailer was hauling a load specifically for the lessee. Certainly, an injured party should not have to stake his recovery on the uncertain proposition of whether the driver was sufficiently “within the scope of employment” of the motor carrier lessee.

**VI. CONCLUSION AND PROPOSAL**

The ICC no longer exists.\(^{123}\) There is little need to revive the large and mostly useless government bureaucracy in order to regulate motor carriers.\(^{124}\) The companies can regulate themselves with federal statutes providing operating rules. However, the continued split in authority perpetuates the litigation regarding liability in motor carrier leases.

A short amendment to federal motor carrier statutes, codifying the majority view, would end the continuing confusion.\(^{125}\) The following pro-

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121. *Cheese Express*, 423 N.W.2d at 95.
122. *Pace*, 409 F.2d at 333.
123. The 3-member Surface Transportation Board has taken over any remaining functions of the ICC. See 49 U.S.C. § 701 (2001).
125. Presumably, federal regulation is constitutional. The interstate nature of trucking indicates its penchant to be regulated via statute. In fact, there is a strong argument to be made that
posed statute would meet these goals:

Proposed Amendment to 49 U.S.C. § 14102(a):

(5) Exclusive possession and responsibilities.

Leases of motor vehicles, intended for the transporting of commercial freight, shall provide for the exclusive possession, control, and use of the equipment while operating under the lease. The lessee shall be irrefutably presumed responsible for the equipment for the duration of the lease.

For the purpose of tort liability, the lessee and their corresponding insurer, insured in accordance with 49 U.S.C. § 13906 (1), shall have the duty to defend against and compensate those injured through the negligent operation or maintenance of the leased equipment.

The continued confusion regarding motor carrier lessee liability should be ended. Those injured through the negligence of leased tractor-trailers should be entitled to certainty in identifying a responsible party and to be compensated from that responsible party. The inherent hazards of trucking and the necessity of identifying solvent sources of compensation, which are market financed, necessitate an unambiguous federal statute establishing responsibility.

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state laws should not be the solution to this problem because of disparities among the states and the burden it may place upon interstate commerce. See generally Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981) (holding that Iowa’s restriction on the length of tractor-trailers using the state’s highways was unconstitutional due to its burdensome effect on interstate commerce). However, to date no one has challenged the constitutionality of states’ regulation of motor carrier insurance.
Transportation: A Legal History†

Paul Stephen Dempsey*

“What do I care about the law? Hain’t I got the power?”

—Cornelius Vanderbilt
Shipping and Railroad Baron

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I. Introduction

As the gateways to an increasingly global market, transportation corridors are the arteries through which everyone, and everything everyone consumes, flow. Transportation networks stimulate trillions of dollars in trade, commerce, and tourism. In a global economy, they enable specialization in the production of goods and services, which, under the law of comparative advantage, stimulates broader economic growth.

By shrinking the planet, transportation also facilitates the intermingling and integration of disparate economies and cultures. Cultural interaction enhances international understanding, thereby promoting global peace, which, in a thermonuclear world is essential for survival of the human species. It offers hope for the creation of a global village of friends and neighbors rather than antagonists and adversaries. Cultural interaction also stimulates intellectual, social, and artistic creativity, making the world a more interesting and richer place in which to live.

As a fundamental component of the infrastructure upon which economic growth is built—the veins and arteries of commerce, communications, and national defense—a healthy transportation system serving the public’s needs for ubiquitous service at reasonable prices is vitally important to the region and the nation it serves. It is for this reason that governments the world over have promoted, encouraged, and facilitated its provision by providing essential infrastructure, research and development, protective regulation, subsidies and, on occasion, outright ownership. Historically, government has facilitated transportation by building the airports, the seaports, the rail and transit lines, subsidized their operations where necessary, and established the basic codes and rules pursuant to which the industry serves the public. If done thoughtfully and well,
government planning can facilitate creation of an efficient and productive transportation infrastructure better able to satisfy the broader needs of the public for safe, secure, seamless, expeditious, and reasonably priced transportation service.

The tourism and travel business is arguably the world’s largest industry. It accounts for 5.5% of the world’s gross national product [GNP], 12.9% of consumer spending, 7.2% of worldwide capital investment, and 127 million jobs, employing one in every fifteen workers.¹ The ripple effects of transportation activity—the indirect and induced economic and employment stimulation—is vastly larger than the prices paid directly by passengers or shippers. Transportation creates and transports wealth far in excess of its own facial value. In other words, the tacit benefits of economic stimulation created by transportation networks far exceed its costs.

In this sense, transportation has profound externalities, both positive and negative. For example, a city with abundant airline, motor carrier and railroad networks radiating from it like the spokes of a wheel enjoys a wide economic catchment area stimulating trade, commerce and wealth for its citizens. Conversely, a community with poor, declining or deteriorating access to the established and prevailing transportation networks will wither like a human limb or organ starved of oxygen by an artery made impassable by a tenacious blood clot.

On a macroeconomic level, these observations are true for all nations and all regions, and arguably, for all time. An expeditious, efficient, and economical transportation network will facilitate the public’s need for mobility and will ordinarily advance economic productivity and growth. Conversely, a deteriorating transportation infrastructure will produce sluggishness in overall economic productivity and retard economic growth.

The progress of civilization is reflected in humankind’s accomplishments in transportation: the invention of the wheel, the voyages of Leif Ericson and Christopher Columbus; Charlemagne’s construction of the canal system of Europe; the driving of the golden spike into the tracks at Promontory Point, Utah, linking the American east and west; the construction of the Suez and Panama Canals; the Wright Brothers’ flight at Kitty Hawk; the assembly lines of Henry Ford; the transatlantic flight of Charles Lindbergh; the construction of the German Autobahn and the American Interstate Highway System; and Neil Armstrong’s “giant leap for mankind” onto the surface of the moon.²

² Paul Stephen Dempsey, Rate Regulation and Antitrust Immunity in Transportation: The
In the United States, the federal government has promoted the industry's growth, initially through grants for rail construction, and later through the building of highways, inland waterways, port facilities, and airports.\(^3\) In addition, the government helped ensure its stability (by shielding the industry from destructive competition), and consumer equity (by protecting the public from the industry's monopolistic tendencies), so as to ensure its fundamental role as a catalyst for national economic growth.\(^4\)

Transportation has been a fundamental element in the growth of civilization.\(^5\) Most of the major cities of the world owe their location and their prosperity to their proximity to the trade routes. For example, Bruges, Belgium, was an important and prosperous member of the Hanseatic League during the Middle Ages, which ceased to thrive and became frozen in time when its canal linking it to the North Sea became clogged with silt and became impassable.\(^6\) Rothenburg-ob-der-Tauber is today the only German City encircled by its original medieval walls.\(^7\) It too was frozen in time when trade routes shifted east to Nürnberg.\(^8\)

Transportation is also a fundamental component of economic growth. It is the infrastructure foundation upon which the rest of the economy is built.\(^9\) Any region, which loses access to the system, and thereby the means to participate in the broader market for the exchange

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*Genesis and Evolution of This Endangered Species*, 32 Am. U. L. Rev. 335, 335 (1983) [hereinafter *Genesis and Evolution*].

3. *Id.* at 337.

4. *See id.* at 336.

5. *Id.* at 335.


7. *Id.*

8. *Genesis and Evolution*, supra note 2, at 375 n.1. The birth of civilization in Mesopotamia has, to some extent, been attributed to the existence of trade routes crossing the Tigris and Euphrates, permitting intellectual exchange between people of different cultures. Many European cities, such as Rotterdam, Copenhagen, Vienna, Hamburg, and American cities, such as New York, Chicago, Atlanta, Denver, and New Orleans, owe much of their existence and economic growth to their geographic proximity to natural trade routes. For example, Atlanta was born when a rail line eventually extending from Chicago to Florida crossed another rail line extending from New York to New Orleans.

Many cities, however, owe their economic decline to the relocation of trade routes. For instance, Bruges, Belgium, Rothenburg ob der Tauber, Germany, and Venice, Italy, were important medieval centers for trade and commerce that since have been "frozen in time" because of changing trade patterns. Similarly, major American ports of the Colonial era, such as Alexandria, Virginia, Charleston, South Carolina, and Savannah, Georgia, experienced economic decline because of either the loss of traffic to other ports or the shift of traffic to non-maritime modes of transportation.

of goods and services, will wither on the vine.\textsuperscript{10} Throughout history, it has been the recognition of the role transportation plays in social and economic development that has inspired a strong governmental presence in its promotion, facilitation, and regulation.

Long ago, people recognized the essential role of transportation and began to treat it differently from other industries, thereby allowing the public interest to prevail over individual economic interests.\textsuperscript{11} Traditionally the transportation industry has been deemed too important to be left to the vicissitudes of the marketplace.

The regulation of American business began with the economic regulation of the transportation industry. Building upon principles of Roman Law, beginning in the Middle Ages, English courts imposed upon "common carriers" special duties to serve all without discrimination, and strict liability for loss and damage to goods in their care.\textsuperscript{12} In 1887, the U.S. Government established the first independent regulatory agency, the Interstate Commerce Commission ["ICC" or "Commission"], and granted it jurisdiction to regulate the rates and practices of the railroads.\textsuperscript{13} Currently several federal agencies, including the Surface Transportation Board, the Federal Maritime Commission, the Federal Energy Regulatory Commission, and the Department of Transportation, regulate rail, motor, air, and water carriage, as well as pipelines and freight forward-

\textsuperscript{10} Id. at 463.


Several of these industries were natural monopolies (e.g., the early railroads, telephone, telegraph, gas, and electric companies, and to some extent, television and radio), which if unregulated would produce in lower quantities and at higher prices than would industries in a competitive market. Regulation seeks to substitute what is lacking in the marketplace by insisting that such natural monopolies produce at a lower price and high volume than they otherwise might.

Recognizing this distinction, virtually every major industrial nation on the planet treats these industries in a manner significantly different from the rest. In most, the industries are owned and operated by the state. In transportation, most of the rail, motor, barge, and air carriers are socialized, even in Western Europe.

In the United States, the services of transportation, communications, and energy have largely been performed by the private sector, with government serving the role of a vigorous regulator of a wide variety of activities, weighing and balancing the public interest against what would otherwise be the economic laws of the marketplace. The government plays a dual and perhaps schizophrenic role—on the one hand, it seeks to stimulate the inherent economics and efficiencies of the regulated industries; on the other, it seeks to protect the public from the abuses which these industries might otherwise perpetrate. For the most part, the United States has been able to avoid nationalizing these industries, for private ownership thereof has, on the whole, proven successful. The major exception is rail passenger service.


\textsuperscript{13} \textit{Genesis and Evolution}, supra note 2, at 336.
ers.\textsuperscript{14} Despite substantive differences between the kind and scope of regulation by the various agencies, each mode of transportation is in the business of moving passengers or commodities from one point to another.\textsuperscript{15}

The policy objectives governing transportation regulation have changed significantly since 1887. Congress initially instituted regulation under the ICC in order to protect the public from the monopolistic abuses of the railroads.\textsuperscript{16} Between 1920 and 1975, however, the goal of the national transportation policy was to protect the transportation industry from the deleterious consequences of unconstrained competition.\textsuperscript{17} While contemporary regulatory policy has sought to stimulate competition in order to enhance the economy and efficiency of operations, federal regulation in the areas of entry and pricing diminished during the deregulatory movement of the last quarter of the 20th Century.\textsuperscript{18} This article traces the rich history of the relationship between government and the market in one of the nation's most important industries.

II. Origins of Common Carrier Regulation

The Wright Brothers did not prove the feasibility of manned flight until December 17, 1903, and commercial aviation was not launched until the 1920s.\textsuperscript{19} The foundations of aviation law and regulation were created by common law, statutes and governmental institutions that regulated the modes of transportation that preceded aviation in time, particularly the railroads. It is for that reason that we examine that history here.

Throughout civilization, transportation has been perceived as an industry imbued with a particular public interest.\textsuperscript{20} The Romans were the

\begin{flushleft}
\textsuperscript{14} Id.
\textsuperscript{15} Id. The differences in regulation reflect the inherent economic differences among the modes of transportation, the legislative history of the regulation, the language of the specific statutory provisions, the philosophical and political composition of the individuals serving on the independent regulatory commissions, and the role of the judiciary in either circumscribing or encouraging regulatory activity.
\textsuperscript{16} Id. at 337.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{20} It is difficult to delineate the precise point at which the regulation of transportation began. Some literature indicates that barge traffic on the Nile was regulated by the Pharaohs. See W.D. Brewer, Regulation—The Balance Point, 1 Pepp. L. Rev. 355, 356 n.2 (1974). The German robber barons regulated commerce on the Rhine and Moselle Rivers by demanding the payment of tolls. Common carriers were regulated in England during the reign of William and Mary. See Charles W. Braden, The Story of the Historical Development of the Economic Regulation of Transportation, 19 I.C.C. Pract. J. 659, 659 (1952); Paul Stephen Dempsey, Congressional Intent
\end{flushleft}
first great road builders, laying military roads across Europe, North Africa, and East Asia.\textsuperscript{21} Upon these early roads, trade and commerce flourished, and the Empire prospered. The Roman Empire codified laws of liability for common carriers around 200 B.C.\textsuperscript{22} Bills of lading from the era are remarkably similar to those that exist today. Roman commercial law was passed on to the legal systems of every Western European nation, and served as the foundation for the rules of liability in the area of bailments and common carrier loss and damage, which exist today.\textsuperscript{23} By 1088, law became the earliest discipline taught in the world's first University—the University of Bologna.\textsuperscript{24}

During the Middle Ages, public callings and business occupations affecting the public interest, including transportation firms, were subjected to special obligations.\textsuperscript{25} In English common law, these special duties stemmed from implied assumpsit—the "holding out" on their part was regarded as a general or universal assumpsit both of serving the general public and doing so carefully.\textsuperscript{26} The common callings were narrowed in the 17th Century until, by the close of the 18th, they embraced only common carriers and innkeepers.\textsuperscript{27} Concerns about the monopolistic tendencies of carriers were one rationale; another was the fact that carriers were an essential part of the economic infrastructure.\textsuperscript{28} As one observer noted, "In economic terms, transportation generated positive external effects of a political, social, and economic nature which extended beyond the individual transport operation and were not sufficiently rewarded by the carrier's charges."\textsuperscript{29} The obligation of common carriers to serve all without discrimination continued as a responsibility enforced by the Anglo-American common law courts until the late 19th Century, when the judicial system was replaced with a regulatory one.\textsuperscript{30}

Yet the licensing and regulating of common carriers was not a new phenomenon. The English Parliament had passed such a law as early as

\textit{and Agency Discretion—Never the Twain Shall Meet: The Motor Carrier Act of 1980, 58 Chi-
Kent L. Rev. 1, 48 n.211 (1981) [hereinafter \textit{Congressional Intent}].

21. \textsc{George Newton Raper, Railway Transportation 2-3 (1912).}

22. \textsc{Paul Stephen Dempsey & William Thoms, Law & Economic Regulation in
Transportation 255 (1986).}

23. \textit{Id.}


26. \textit{Id.}

27. \textit{Id.} at 6.


30. \textsc{Marvin L. Fair & John Guandolo, Transportation Regulation 4 (8th ed. 1979).}
1694. Earlier still, the Westminster Code of 1285 was Britain’s first highway law, which protected transportation rights of way.

III. **Government Promotion of Transportation Infrastructure (The 19th Century)**

A. **Birth of a New Continent**

With the European settlement of North America, towns and villages sprang up first along the Atlantic and Gulf coasts, at bays and rivers deep enough for navigation. Settlers gradually moved inland, and towns began to spring up along rivers. Away from the rivers, most roads were Indian trails, which could be traversed by only packhorses or mules. A few private toll roads were constructed during the 18th Century, some with governmental assistance. At the dawn of the 19th Century, it took a week to travel by stagecoach from New York to Boston, and nearly three weeks to reach Charleston.

The first long major road on the American continent was built for military purposes. In 1758, British General Edward Braddock ordered 200 woodsmen to widen a narrow Indian trace into a twelve-foot wide road across streams and eight major mountains. Some 2,200 British and Colonial troops then marched from Fort Cumberland, at the head of the Potomac River, to drive the French from Fort Duquesne.

With the adoption of the U.S. Constitution on July 2, 1788, Congress was given the responsibility “to establish Post Offices and post roads.” The States jumped into road-building quite early as well. For example, the hard-surfaced sixty-mile Lancaster Pike linking Philadelphia and Lancaster, Pennsylvania, was built between 1792 and 1795.

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32. *Id.* at 5.
33. **Social & Economic Consequences, supra** note 6, at 6.
34. *Id.*
35. **Air Transportation Foundations, supra** note 19, at 5.
36. *See id.* at 5-6.
39. *Id.*
40. **Air Transportation Foundations, supra** note 19, at 5.
southern New England followed Pennsylvania in road building.\textsuperscript{42} Many states, notably Pennsylvania and Kentucky, subsidized private turnpikes.\textsuperscript{43}

It became increasingly apparent that transportation was essential to link the remote and sparsely settled nation together, to facilitate communications, trade, economic growth, and defense. Public sentiment for increased governmental support for infrastructure construction began to grow.

In 1808, Treasury Secretary Gallatin became the first national figure to urge a national system of roads.\textsuperscript{44} His proposal included a road system stretching from Maine to Georgia, roads or canals linking the Atlantic Coast to the Mississippi River, and roads to Detroit, St. Louis, and New Orleans radiating from Washington, D.C.\textsuperscript{45} President Thomas Jefferson championed the first federal highway, the National Road.\textsuperscript{46} It followed the old Cumberland Road to the West, stretching from Cumberland, Maryland, to Vandalia, Illinois.\textsuperscript{47} It was to be no steeper than a 4\% grade, with a thirty-foot roadbed.\textsuperscript{48} Construction began in 1808; nine years later it reached the Ohio border.\textsuperscript{49} After that, high costs slowed down additional construction.\textsuperscript{50} The National Road reached Columbus, Ohio, in 1833, and Vandalia, Illinois, in 1852.\textsuperscript{51}

To assert his objection to the Constitutional principle involved, in 1822 President Monroe vetoed a bill for repairs on the Cumberland Road, though he subsequently reversed course.\textsuperscript{52} But when State's rights-champion Andrew Jackson became President in 1832, national policy shifted against federal support of highways.\textsuperscript{53} Though Jackson approved several bills to push the National Road further west, and was himself a

\begin{thebibliography}{99}
\bibitem{hadley} Hadley, supra note 37, at 26.
\bibitem{pennsylvania} Id. Pennsylvania paid about one thousand dollars a mile, about a third of the total cost.
\bibitem{gallatin} Id. at 26.
\bibitem{jefferson} Id. at 27-28.
\bibitem{bourne} Bourne, supra note 41, at 7.
\bibitem{daniels} By purchasing the Louisiana Territory, Jefferson also may have made it inevitable that the federal government would play a role in building transportation corridors west, beyond the Mississippi River. As Professor Daniels observed, "When to the vast acreage of national land east of the Mississippi, the purchase of Louisiana added a continental principality of almost boundless extent west of the river, the public illusion of wealth 'beyond the dreams of avarice' was created, and the floodgates of legislative profusion were certain eventually to be opened." Winthrop Daniels, American Railroads: Four Phases of Their History 38 (1932).
\bibitem{bourne2} Bourne, supra note 41, at 7.
\bibitem{calhoun} Id. at 7. Senator John C. Calhoun was also a major proponent of national aid to roads as early as 1818. Hadley, supra note 37, at 27.
\bibitem{hadley2} Bourne, supra note 41, at 34.
\bibitem{id} Id. at 10.
\bibitem{hadley3} Hadley, supra note 37, at 27.
\bibitem{daniels2} Daniels, supra note 47, at 65.
\end{thebibliography}
major proponent of rail expansion, he vetoed the Maysville Turnpike from Wheeling, West Virginia, to Maysville, Kentucky. Presidents Tyler, Polk, and Pierce also vetoed federal aid to roads. The National Road became important in settling the Midwest. But the structure Jackson established, of State primacy in road construction, albeit with federal support, became the model upon which America’s roads and highways were developed through the remainder of the 19th Century. It also laid the pattern for airport development in the 20th Century.

B. THE CANAL SYSTEM

George Washington was the first American leader to see the future of canal transportation, pointing to the possibility of running a canal westward from the Hudson River prior to the Revolutionary War. In 1786, he became president of the Potomac Canal Company, an ill-fated venture that sought to run a canal along the Potomac River to Cumberland, Maryland.

Despite road improvements, and the development of the steamboat in 1807, transportation costs remained high. To link the nation’s waterways, canal construction began during the early 19th Century. Underwritten by the State of New York, the first major canal was the Erie Canal, begun in 1817 and completed in 1825, stretching some 360 miles from the Hudson River at Albany to Lake Erie at Buffalo, New York. After it opened, the cost of shipping a ton of farm produce fell dramatically from $100 to $5. It so significantly reduced shipping time and costs between New York City and the west as to make New York the largest city on the East Coast, surpassing Philadelphia and Baltimore.

54. Id. at 65-66.
55. Bourne, supra note 41, at 35.
56. Daniels, supra note 47, at 37.
57. Air Transportation Foundations, supra note 19, at 6. Local jurisdictions also built roads. In 1879, the North Carolina legislature passed the Mecklenburg Road Law, permitting the county to levy a property tax to support road construction. The Act was repealed the following year, but reenacted in 1885. By 1902, Mecklenburg was acknowledged to have the best roads in the State. Other States adopted similar laws. But not until the 20th Century did the Federal government resume its role in building highways. Paul Stephen Dempsey & Laurence E. Gesell, Air Commerce and the Law 81 (2004) [hereinafter Air Commerce].
58. Air Transportation Foundations, supra note 19, at 6.
59. Hadley, supra note 37, at 29.
60. Daniels, supra note 47, at 64.
61. Air Transportation Foundations, supra note 19, at 5.
63. Id.
64. Bourne, supra note 41, at 47.
65. Dempsey & Thoms, supra note 22, at 4. Syracuse, Rochester and Buffalo also flourished as a result of construction of the Erie Canal.
sylvania responded by building a canal linking Philadelphia and Pittsburgh.66 Another canal, earlier urged by George Washington, was built linking the Potomac and Ohio Rivers.67 A canal linking the Mississippi River with the Great Lakes gave rise to the development of the City of Chicago.68 Most canals were financed by the States, hoping to enhance their economic development.

In the 1850s, it was an even contest between the canals and railroads for dominance.69 But soon, the interior canals were operating in the shadow of the railroads. Many canals were eventually abandoned.70

One canal, however, was not totally eclipsed by the railroads—the Panama Canal. The French began building a canal across the Isthmus of Panama in 1879.71 A decade later, the effort collapsed, due to inadequate planning, disease, and bankruptcy.72 In 1902, Congress passed the Spooner Act, which authorized purchase of the French holdings.73 The U.S. Senate ratified the Hay-Herran Treaty allowing the canal to proceed, but the Colombian government balked.74 The U.S. Navy sailed the USS Nashville into Colon, preventing Colombian troops from suppressing an uprising among Panamanians seeking independence.75 The U.S. negotiated the Hay-Bunau-Varilla Treaty of 1903 with the new government in Panama, giving the United States exclusive use, occupation, control, and effective sovereignty of the Canal Zone.76 The Panama Canal opened for traffic in 1914.77

C. Railroads

The first rail line was inaugurated between Wandsworth and Croydon, in the suburbs of London in 1801, when the first chartered horse-car

66. Id.
67. Id.
69. HADLEY, supra note 37, at 30.
70. DEMPSEY & THOMS, supra note 22, at 5. The Baltimore & Ohio Canal functioned until 1924. The Main Line Canal across Pennsylvania was eventually bought out by the Pennsylvania Railroad. BOURNE, supra note 41, at 51, 53.
73. Id.
74. BRAGDON & MCCUTCHEN, supra note 71, at 482.
75. Id.
76. Id.
The line was opened for service. It would effectively lay the foundation upon which steam railroads were subsequently built.

The first common carrier railroad in the United States, the Baltimore and Ohio, was chartered just two years after the Erie Canal was opened. Beginning work in 1828, by 1834, the B&O linked Baltimore with Harpers Ferry, West Virginia, by 1852, the Ohio River at Wheeling, West Virginia, and by 1857, with St. Louis. The New York & Erie Railroad opened in 1851; the Pennsylvania Railroad completed the line from Philadelphia to Pittsburgh in 1852; and the New York Central was born in 1853. The Rock Island Railroad crossed the Mississippi River in 1854. According to Daniel Drew, in the decade preceding the Civil War, railroads were spreading all over the country like measles in a boarding school. Though many rail lines existed, they were poorly connected. There was virtually no through passenger or freight traffic.

Compared to canals, railroad construction was not as seriously challenged by topography. Moreover, many canals were frozen and inoperable during winter months. As a result, railroads were found to be a more economical, reliable, and expeditious means of transport, and many canals soon fell into decline and disuse. In addition, railroads were far faster than roads. In 1832, it took three days for passengers and mail, and fifteen days for freight, to move from Wheeling to Baltimore on the National Road. Two decades later, it took 1.5 and 3 days, respectively, to make the same journey on the B&O Railroad. Passenger fares fell from $18.75 via stagecoach to $5 via rail; freight rates fell from $45 a ton via wagon to $25 a ton for railway express.

Everywhere, railroads were creating towns and cities. Before two railroads crossed tracks in a city now called Atlanta (named after the Atlantic and Western Railroad), there was only a pine forest on the banks of the Chattahoochee River. After the Moffat railroad tunnel was built through the Continental Divide, Denver became the largest city in the

78. Hadley, supra note 37, at 9.
79. Raper, supra note 21, at 7.
80. Id. at 180, 182. In 1825, England's Stockton & Darlington Railway had been the first to use a steam engine to pull a passenger train. Id. at 15.
81. Withuhn, supra note 68, at 8, 19, 22.
82. Id. at 19.
83. Social & Economic Consequences, supra note 6, at 7.
84. Daniels, supra note 47, at 10.
85. Raper, supra note 21, at 9.
86. Dempsey & Thoms, supra note 22, at 4-5.
87. Withuhn, supra note 68, at 19.
88. Id.
89. Id.
90. Social & Economic Consequences, supra note 6, at 7.
Rocky Mountain west.91

Replacing horses and omnibuses (enclosed horse-drawn carriages with multiple passengers), urban railroads also became a major mode of transit.92 The steam-powered subway was introduced to London in 1843, the elevated railway in New York in 1867, the electric streetcar, or trolley, in 1888, and the first American subway in Boston in 1897.93 The Paris subway opened in 1900 and the New York subway opened in 1904.94

Although the States built a few railroads, in the relatively densely populated eastern United States, railroads had little difficulty securing private capital for construction.95 But private investment shied away from the sparsely settled west, particularly west of Chicago.96 It soon became apparent that if America's hinterland were to be settled, developed, and enjoy economic growth, construction would have to be subsidized from public treasuries.

The growth, development, and expansion of the rail system into the Midwest and western United States in the 19th Century were for the most part attributable to governments and individual investors.97 State and local governments provided construction capital through land grants, tax exemptions, stock subscriptions, loans, loan guarantees, and capital donations.98 The first federal land grant for railroad construction was the Act of September 20, 1850, entitled, "An Act granting the Right of Way, and making a Grant of Land to the States of Illinois, Mississippi and Alabama, in Aid of the Construction of a Railroad from Chicago to Mobile."99

Sponsored by Senator Stephen A. Douglas, the Act granted to the railroads a right-of-way 200 feet wide and six sections of land for each mile of road completed.100 These were to be alternate sections of land lying on either side of the tracks.101 These land grants were conferred to

91. Paul Stephen Dempsey, Andrew R. Goetz & Joseph S. Szyliowicz, Denver International Airport: Lessons Learned 152 (1997). Without the efforts of Denver's leaders to build a railroad linking the city with the transcontinental rail line to the north, Cheyenne might well be the economic capitol of the Rocky Mountain West. Id. at 150-53.
92. Air Transportation Foundations, supra note 19, at 10.
93. Id. at 10-11. See also Ross M. Robertson, History of the American Economy 276 (3d ed. 1973).
94. Air Transportation Foundations, supra note 19, at 10-11.
95. Dempsey & Thoms, supra note 22, at 5.
96. Id.
100. Id.
101. Id. See also D. Philip Locklin, Economics of Transportation 133 (7th ed. 1972).
the Illinois Central and Mobile & Ohio to build a line from the Great Lakes to the Gulf Coast.\textsuperscript{102} The alternate-section provision was made in the expectation that, along with the railroad companies, the government would also share in the increased land values resulting from the developed transportation facilities.\textsuperscript{103}

Following the precedent set by grants to the Illinois Central and Mobile & Ohio, between 1850 and 1871, hardly a session of Congress failed to make grants of public land to the railroads, with each succeeding grant being ever more generous than the one before.\textsuperscript{104} During the decade preceding the Civil War, the States also granted thirty-two million acres of land to the rail industry.\textsuperscript{105}

The federal government encouraged rail expansion and provided various incentives including loans, remissions of the duty on imported iron, and land grants.\textsuperscript{106} While the War Between the States was in full swing,\textsuperscript{107} President Lincoln signed the Pacific Railroad Act of 1862 which provided incentives for the creation of a rail line beginning at the 100th meridian, near Fort Kearney, Nebraska, and working westward across the Great

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102. Withuhn, supra note 68, at 31.
103. Robertson, supra note 93, at 276.
104. Daniels, supra note 47, at 4. See also Locklin, supra note 101, at 133.
105. Dempsey & Thoms, supra note 22, at 7.
106. Josephson, supra note 97, at 77. The land grant system did not solely favor the railroads. Although the rail industry enjoyed substantial revenue from the sale of land and the exploitation of mineral and timber resources situated on it, the government also benefited: as the value of public land increased, economic development was encouraged, and the gross national product increased. In addition to land grants, huge sums of money, representing the largest industrial investment in the country before the Civil War, were spent to construct and maintain the railroads. Their development expanded the market for agricultural and manufactured products, increased the value of property, spurred the growth of the iron and steel industry, and supported the entire industrial economy. \textit{Id.} See also Richard N. Current, Alexander De Conde & Harris L. Dante, \textit{United States History: Search for Freedom} 307 (1974). By 1890 English businessmen alone had invested more than $2 billion in U.S. railroad securities. \textit{R. Wiebe, The Search for Order} 309 (1967). Legislative proposals occasionally have proposed requiring land grant railroads to include income derived from such real estate into their branch line balance sheets and forfeit land when they decide to abandon its corresponding line. \textit{H.R.} 5114, 97th Cong. (1981); \textit{H.R.} 5115, 97th Cong. (1981).

Water transportation, which received federal aid before the railroads, obtained $4 billion in federal aid between 1789 and 1945, not including early land grants for canals and river improvements. Between the Second World War and 1975, barge operators received an additional $10.6 billion in federal aid. Since 1975, the barge industry has received subsidies approximating $800 million annually. \textit{Frank Wilner, Competitive Equity: The Freight Railroads' Stake} 53 (1981).

107. During the War Between the States, it was necessary for the Union military to destroy the Confederacy's transportation system in order to bring it to its knees. The U.S. Navy put on a coastal blockade to impede the flow of exported cotton and imported industrial material, and captured the Mississippi River to stop trade and cut the South in half. The U.S. Army aimed for the rail junction at Atlanta to impede commerce, cripple the economy, and cut the Confederacy in half again.
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American Desert to the Pacific Ocean. The Act offered the Pacific railroads ten sections (6,400 acres) on alternating sides of the track and a thirty year loan of government bonds, scaled at $16,000, $32,000, and $48,000 per mile of road built, depending upon the difficulty of the terrain. The railroads would receive every alternate section of land—the odd numbered sections—for ten sections in width on either side of the track. Two years later, Congress amended the Act to make it more generous still, doubling the land grant to 12,800 acres per mile of rail laid. Also in 1864, the Northern Pacific Railroad was granted a 400-foot right-of-way as well as a grant of alternating sections twenty miles on either side thereof through the territories, and ten miles through the States.

In a race for land, the Union Pacific Railroad laid track west from Omaha, and the Central Pacific built east from Sacramento. Building from the east beginning in 1865, the Union Pacific was granted twelve million acres of land, and issued $27 million in bonds; building from the west beginning in 1863, the Central Pacific was given nine million acres of land, and issued $24 million in bonds. On May 10, 1869, the nation was linked from coast to coast by a transcontinental rail system with the driving of the golden spike into the tie at Promontory Point, Utah. The nation celebrated the completion of what was then the greatest railroad in the world, an iron bridge linking its two mighty oceans across a vast continent. Actually, however, this route still required travelers to cross the Missouri River on boat. A seamless transcontinental track did not

108. ROBERT G. ATHEARN, UNION PACIFIC COUNTRY 28 (1976). While Secretary of War, Jefferson Davis (by now the President of the rebel Confederate States of America) directed a 12-volume study and survey that recommended a southern route from Memphis, through Texas, across the Gadsden Purchase, to Los Angeles. In part, the 1962 Act may have been motivated to avoid a southern route linking the U.S. east and west. BOURNE, supra note 41, at 85-86. The North was fearful that any line running west from the slave states might spread slavery westward and upset the balance of power established by the Missouri Compromise. Thus, before the Civil War, the issue of where, or whether, a western rail line would be built, was deadlocked. WITTHUN, supra note 68, at 30.

109. ATHEARN, supra note 108, at 30. The Act also authorized the railroads to issue bonds in an amount equal to the government bonds, relegating the government to the rank of a second mortgage holder. Id.


111. ATHEARN, supra note 108, at 32.

112. DANIELS, supra note 47, at 41.

113. JOSEPHSON, supra note 97, at 78.

114. Id.

115. Id. at 91.

116. Id.

come together until 1870 at a place called Comanche Crossing, Colorado, subsequently re-named Strasburg in honor of John Strasburg of the Kansas Pacific Railway.\footnote{118}{Id.}

Other major grants followed. The Northern Pacific bill of 1870 granted forty-seven million acres of land.\footnote{119}{JOSEPHSON, supra note 97, at 93, 96.} In 1871, Congress passed the last of the major land grant bills, handing the Texas & Pacific Railroad eighteen million acres.\footnote{120}{Id. at 79; DANIELS, supra note 47, at 45.} Between 1862 and 1871, the States granted seventeen million acres of land to the railroads, and the federal government granted 130 million acres.\footnote{121}{Some sources put the figure at 158 million acres. JOSEPHSON, supra note 97, at 79. The federal government also lent $64 million in bonds. DANIELS, supra note 47, at 46.} The railroads used the land grant system to help finance construction, by selling land along the rights of way, in some instances, promoting “chains of cities,” laying out whole towns, and by using the land assets as a means of stimulating private investment in railroad stocks and bonds.\footnote{122}{JOSEPHSON, supra note 97, at 77. For example, by 1880, the Union Pacific had sold nearly two million acres of its original 12 million acre original grant. By 1884, the Union Pacific had sold 5.5 million acres for $18 million, or about $3.31 per acre. ATHEARN, supra note 108, at 187.}

Rail expansion continued robustly. Total trackage doubled to 70,000 miles within eight years after the end of the Civil War.\footnote{123}{JOHN CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 115 (1998).} In the 1880s, some 70,000 miles of track were laid.\footnote{124}{Id.} Much of it was built hastily and carelessly; within fifteen years, for example, a large portion of the Santa Fe track and roadbed had to be completely rebuilt.\footnote{125}{Id. at 77 n.2.} One source conservatively estimated that three-fifths of the cost of building the railroads was borne by the government.\footnote{126}{See GENESIS & EVOLUTION, supra note 2, at 336 n.3.} More than any other single factor, the rail network unified the nation. But the impact of enormous over-expansion was to haunt the rail industry for decades.

IV. THE ROBBER BARONS

A. CONSOLIDATION OF THE RAIL NETWORK

Along Europe’s Rhine River stand a number of medieval castles, testament to the German Robber Barons who built them. The Rhine was the principal highway of commerce for medieval Europe.\footnote{127}{See GENESIS & EVOLUTION, supra note 2, at 336 n.3.} The Barons would exact a toll from all the barge traffic on the Rhine, and sink the
barges that would not pay. The toll would be set at whatever the market would bear. In 19th Century America, a new group of Robber Barons emerged, who would attempt to gain control of the transportation network and exact a toll from all who passed.

Cornelius Vanderbilt began the string of consolidations that led to intensive competition among the railroads. He noted that in 1860, 30,000 miles of rail was carrying 70% of the freight, but that it was segmented among scores of small firms. If a passenger wanted to travel from New York to Chicago, he or she would have to change trains 17 times, from one small line to another. Although steamboats had made Vanderbilt the richest man in the nation (by 1865, he was reportedly worth $11 million), between 1857 and 1862 he sold his steamboat interests and began buying railroads. By 1868, he had done it, consolidating a number of smaller railroads into the New York Central Railroad, allowing a passenger to travel from New York to Chicago without changing trains, and reducing transit time from fifty hours to twenty-four.

But others followed Vanderbilt's lead, and three additional railroads soon competed between New York and Chicago—the Pennsylvania, the Baltimore and Ohio and the Erie. Without sufficient traffic to support multiple lines—a situation created by a combination of excessive expansion and a rash of consolidations—competition became intense, and was intensified further by the Panic of 1873 and the depression that followed. The rate wars ignited by the Panic did not subside until 1877.

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128. Id.
129. Id.
131. Id.
132. Josephson, supra note 97, at 13-14. When Vanderbilt died in 1877, he was reportedly worth $105 million. As the master of sailing vessels, Vanderbilt lamented the introduction of the paddle-wheelers in 1807. When they proved their value in transporting passengers, Vanderbilt insisted they could never be used for freight "because the machinery would take up too much room." When they proved their worth there, Vanderbilt had the best steamboats built for his lines, becoming a dominant factor in the ocean and coastal trade. He even built a land bridge, by ship and stagecoach, across Nicaragua. By the 1850s, he had more than 100 vessels afloat. Id.
133. Platt & Drummond, supra note 130, at 444.
134. Daniels, supra note 47, at 18. These included Harlem and Hudson River, described as "two streaks of rust."
135. Josephson, supra note 97, at 71. Vanderbilt captured the old New York Central, running from Albany to Buffalo, by refusing to connect its passengers or freight with his lines at Albany. The Central capitulated, selling the line to Vanderbilt, who amalgamated his lines into the New York Central trunk line, running from the seaboard to the Great Lakes.
136. Platt & Drummond, supra note 130, at 444.
137. Raper, supra note 21, at 205-06.
139. Raper, supra note 21, at 206.
As one source described it:

It brought ruin to the companies, and little advantage to the shippers as a whole. To some shippers it, to be sure, meant low rates. To others, notably those located at the intermediate non-competitive points, it brought the condition of still higher charges for transportation service; the chief burden of the maintenance and fixed charges rested upon these shippers, in favour of those at the great competitive points. It was, in fact, during these years of intense competition that abusive discriminations were at their worst. These were the “dark days” of the history of the American railways.140

Large shippers served by more than a single railroad enjoyed special low rates, underbilling and, in some instances, rebates, sometimes even on the shipment of competitors’ traffic.141 For example, on shipments of oil from western Pennsylvania to Cleveland, John D. Rockefeller’s Standard Oil received a forty cent rebate on every barrel it shipped, plus another forty cents per barrel shipped by its competitors.142 Standard Oil would also receive comprehensive information about the oil shipped by its competitors, proprietary information that was invaluable in underpricing them.143 Such rebates were, indeed, one of the means by which Rockefeller managed to take over the refineries in Cleveland that competed with Standard Oil, and eventually, establish a national monopoly.144 According to John’s brother, Frank, the message was, “If you don’t sell your property to us it will be valueless, because we have got the advantage with the railroads.”145 At the turn of the Century, Yale President Arthur Hadley observed, “the railroad is not merely an instrument fostering monopoly; it is itself an example of the tendency toward monopoly. Railroad consolidation has put the control of the country’s business into the hands of a few large corporations.”146

One example of the rate wars was that practiced between the New York Central and Erie railroads. After a series of price wars, which brought the price of moving cattle from Chicago to New York down to $1.00 a car, Jim Fisk, President of the Erie, bought all the cattle available and shipped them aboard Vanderbilt’s New York Central.147

Rate wars in competitive markets drove down profits, leading carri-

140. Id. at 206-07.
142. Chernow, supra note 123, at 136.
143. Id. One biographer described these rebates as “an instrument of competitive cruelty unparalleled in industry.” Id.
144. Josephson, supra note 97, at 118.
145. Id. at 119.
146. Hadley, supra note 37, at 21. “The public sees no limit to the growing power of corporations, and it regards this growth with a kind of vague fear.” Id. at 42.
ers to raise prices to shippers without alternative means of transport.\textsuperscript{148} Often, a farmer located along an intermediate point served by only a single railroad would find the price he was charged to get his grain to market was higher than that shipped by another, even though the other farmer’s grain would be moved a longer distance over the same line.\textsuperscript{149} Hence, pricing became highly discriminatory.\textsuperscript{150} Prices were generally low, but unstable, between points served by competing railroads, or having access to navigable waterways, and generally high at points between which shippers had no alternative means of transport.\textsuperscript{151} Pricing began to reflect the level of competition in any market, rather than the cost of providing service.\textsuperscript{152}

All of this occurred in an era prior to the existence of the antitrust laws. Ruinous rate wars, often of a predatory nature, designed to drive competitors out of business, were interspersed with price fixing and pooling agreements, whereby carriers in competitive markets would agree to raise prices and pool revenue and freight, whereupon rates soared.\textsuperscript{153} For example, Jay Gould, owner of the Wabash, engaged in a cutthroat rate war with the Chicago, Burlington & Quincy between Nebraska and Denver. Each company extended parallel lines in a fit of wasteful duplication, finally compromising and combining against the “common enemy”—the traveling and shipping public.\textsuperscript{154} Hence, there was tremendous rate instability, even in larger markets.

\section*{B. Rate Abuses}

The most significant abuse prompting government to regulate the transportation industry was rate irregularities. Preferred shippers enjoyed special rates, under billing, and rebates.\textsuperscript{155} According to one source:

\begin{itemize}
\item \textsuperscript{148} Bragdon & McCutchen, \textit{supra} note 71, at 419.
\item \textsuperscript{149} Solon Justus Buck, \textit{The Granger Movement: A Study of Agricultural Organization and Its Political, Economic and Social Manifestations} 14 (1913).
\item \textsuperscript{150} \textit{Id}.
\item \textsuperscript{151} \textit{U.S. Dep’t of Transp., A Prospectus For Change In The Freight Railroad Industry} 116 (1978) [hereinafter Prospectus for Change].
\item \textsuperscript{152} Bragdon & McCutchen, \textit{supra} note 71, at 419.
\item \textsuperscript{153} Raper, \textit{supra} note 21, at 207.
\item \textsuperscript{154} Josephson, \textit{supra} note 97, at 201-02.
\item \textsuperscript{155} \textit{Id} at 113. For example, Standard Oil had a secret agreement with the railroads running out of Cleveland by which the rates on its products would be 25% to 50% below those charged other companies. Bragdon & McCutchen, \textit{supra} note 71, at 389. John D. Rockefeller admitted:
\begin{quote}
A public rate was made and collected by the railroad companies, but so far as my knowledge extends, was seldom retained in full; a portion of it was repaid to the shipper as a rebate. By this method the real rate of freight which any shipper paid was not known by his competitors, nor by other railroads, the amount being a matter of bargain with the carrying companies.
\end{quote}

\textit{Josephson, supra} note 97, at 113.
\end{itemize}
Today an arcane, forgotten subject, the issue of railroad rebates generated heated debate in post-Civil War America since they directly affected the shape of the economy and the distribution of wealth. Railroads had obtained the power to produce either a concentrated economy, with progressively larger business units, or to perpetuate the small-scale economy of antebellum America. The proliferation of rebates hastened the shift toward an integrated national economy, top-heavy with giant companies enjoying preferential freight rates.156

Transportation rates from location points that a single rail carrier served were significantly higher than those rates charged at points where railroad competition existed.157 This was true although points in the former group were often closer to the ultimate destination.158 Indeed, it was common for transportation costs to be higher on a shorter haul than on a longer haul on the same line in the same direction.159 Price competition among carriers serving common geographical points led to rampant rate wars.160 Carriers handled many shipments at substantial losses in hopes of forcing other carriers out of business, thereby enabling the victorious carrier to service the particular location point on its own terms.161

C. Political Corruption and Financial Piracy

The enormous concentrations of wealth and power stemming from railroading led to political corruption, as railroad entrepreneurs bribed legislators and judges, sold them stock at less than fair market value, and gave them free passes, so as to avoid taxation and regulation.162 Fraud, deceit, and corruption marked the era. The New York Sun in 1872 labeled Thomas Durant of the Credit Mobilier, through which much of the Union Pacific’s public capital flowed, as “The King of Frauds.”163 The newspaper described “How the Credit Mobilier bought its way through Congress,” listing the “Congressmen who have robbed the People and who

156. Chernow, supra note 123, at 115.
158. For example, it cost more to ship goods from Poughkeepsie to New York City on the only line available, the New York Central Railroad, than to ship goods from Chicago to New York City, where both the Pennsylvania and Erie Railroads competed with the New York Central Railroad. Genesis & Evolution, supra note 2, at 375 n.16.
159. Bragdon & McCutchen, supra note 71, at 419.
160. Platt & Drummond, supra note 130, at 445.
161. Oren Harris, Introduction, Symposium on the Interstate Commerce Commission, 31 Geo. Wash. L. Rev. 1, 5 (1962). In the late 1860s, cattle were moved from Buffalo to New York City at a cost of $1.00 per car. During this same period, the first-class rate for shipments from Chicago to New York City ranged from $.25 to $2.15 per hundred pounds. In the late 1870s, cattle were carried free of charge from Chicago to Pittsburgh and for $5.00 per care from Chicago to New York. Id.
162. Social & Economic Consequences, supra note 6, at 9.
163. Bourne, supra note 41, at 94.
now support the National Robber.”¹⁶⁴ The paper alleged that Durant and his co-conspirators had “gobbled” more than $211 million of public money.¹⁶⁵ Ulysses S. Grant’s campaign coffers were stuffed with railroad money.¹⁶⁶

Many carriers also issued watered stock,¹⁶⁷ manipulating its price up or down to make quick profits.¹⁶⁸ One example involved Cornelius Vanderbilt’s attempt to take over the Erie Railroad, which competed with Vanderbilt’s New York Central.¹⁶⁹ The Erie was owned by Jim Fisk, Daniel Drew, and Jay Gould.¹⁷⁰ They got wind of the attempted take-over, and began issuing watered stock.¹⁷¹ Drew, known as the “Great Bear,” had prospered in the cattle trade by inaugurating the concept of “watered stock,” whereby cattle were kept thirsty throughout the journey, then given drink only immediately before they were weighed for sale.¹⁷² It was a concept he introduced to the securities industry as a stockbroker and head of the house of Drew, Robinson & Co.¹⁷³ Drew was described as “sallow, weazed, unfathomable, secretive and unprincipled.”¹⁷⁴

Jay Gould had developed the talent of buying up poor railroads, consolidating them, giving them a new name and prosperous image, then selling them off.¹⁷⁵ Should the new purchasers be unable to run it profitability and the line drop into liquidation, Gould would be around to pick the line up at a reduced price and begin the cycle again.¹⁷⁶

“Jubilee Jim” Fisk was described as “blatant, vulgar, exuberant, rollicking, cynical humor, with the natural endowment of a Barnum coupled with the audacity of a gunman.”¹⁷⁷ Printing Erie stock ferociously to

¹⁶⁴. Id. at 94-95. Professor Daniels observed, “The Credit Mobilier to which the construction of the Union Pacific was sublet at an outrageous profit still smolders as a Sodom and Gomorrah in the desert of financial desolation and Congressional venality.” DANIELS, supra note 47, at 45.

¹⁶⁵. BOURNE, supra note 41, at 95.

¹⁶⁶. Id.

¹⁶⁷. “Watered stock” is issued by a corporation as fully paid-up stock, when in fact the whole amount of the par value thereof has not been paid in. It is stock issued as bonus or otherwise without consideration or issued for a sum of money less than par value, or issued for labor, services, or property which at a fair valuation is less than par value. BLACK’S LAW DICTIONARY (5th ed. 1983).

¹⁶⁸. PLATT & DRUMMOND, supra note 130, at 445.

¹⁶⁹. JOSEPHSON, supra note 97, at 74.

¹⁷⁰. Id. The three have been described as “the sanctimonious and treacherous Drew, the fearless Jim Fisk, the impassive, stealthy Jay Gould.” Id.

¹⁷¹. SOCIAL & ECONOMIC CONSEQUENCES, supra note 6, at 9.

¹⁷². JOSEPHSON, supra note 97, at 18.

¹⁷³. Id.

¹⁷⁴. DANIELS, supra note 47, at 18.

¹⁷⁵. JOSEPHSON, supra note 97, at 64.

¹⁷⁶. Id. at 64-65.

¹⁷⁷. DANIELS, supra note 47, at 18.
feed Vanderbilt’s insatiable thirst, said Fisk, “If this printing press don’t break down, I’ll be damned if I don’t give the old hog all he wants of Erie!” Although Vanderbilt himself had issued watered stock from time to time, he was taken.

In the ensuing battle over the Erie, both sides bribed New York legislators and judges. In 1868, a New York judge, in the Tweed ring, obliging to Vanderbilt enjoined the directors of the Erie from issuing additional securities, ordered them to return issued securities and bonds. Gould had his own judges issue counter-injunctions. Drew and Fisk quickly dumped a mass of Erie stock on the market, causing a riot on Wall Street “as though a mine [had] exploded . . . brokers poured out into the street shouting and gesticulating like madmen; and above their tumult sounded the mad roars of the Cyclopean Vanderbilt who, it appears, had been cheated once more out of an enormous sum of money. . . .” Vanderbilt’s judge ordered the arrest of Drew, Gould, and Fisk for contempt of court. Gathering up all the funds they had accumulated, all the cash in the Erie’s treasury, and all securities, documents and incriminating evidence, they threw themselves in a hack and flew at top speed to the Hudson River, boarded the Jersey City ferry, and in New Jersey set themselves up in the Taylor’s Castle hotel. Drew, Gould, and Fisk renamed the hotel “Fort Taylor,” surrounding it with their armed guards. The Jersey City chief of police supplemented the railroad detectives with a squad of police, adding three twelve-pound cannons to the wharves near Fort Taylor. Vanderbilt offered a reward of $25,000 for kidnapping of the trio. A group of forty New York toughs laid siege to Fort Taylor, retreating only when superior defensive forces appeared.

Gould quietly went to Albany to try to persuade the New York legislature to pass legislation legalizing his Erie stock issuances. He spent

178. JOSEPHSON, supra note 97, at 126.
179. Id. at 72. It was claimed that $50,000 of water had been poured for each mile of Vanderbilt’s New York Central track between New York and Buffalo. Id.
180. PLATT & DRUMMOND, supra note 130, at 445.
181. Id.
182. JOSEPHSON, supra note 97, at 125-26.
183. Id. at 126.
184. Id.
185. Id.
186. JOSEPHSON, supra note 97, at 126-27.
187. Id. at 127.
188. Id. at 128.
189. Id. at 129.
190. JOSEPHSON, supra note 97, at 129.
191. Id. at 129-30.
about $1 million, and stock, bribing legislators.\textsuperscript{192} Vanderbilt soon got wind of what was up and sent his own team to lobby the legislature.\textsuperscript{193} But when it became known that Vanderbilt would pay no more, in a rage the legislature turned against him and passed the bill substantially as Gould had proposed it.\textsuperscript{194} Concluding that the "Erie war has taught me that it never pays to kick a skunk," Vanderbilt called for peace with Drew, who accepted Vanderbilt's proposal of a partial repayment of $4.5 million.\textsuperscript{195} In the end, Fisk had defrauded the public of $64 million by watering Erie's stock.\textsuperscript{196} As a result of such stock manipulation, "[t]he railroad treasure was thus gutted for the benefit of the erstwhile combatants,"\textsuperscript{197} and the Erie was unable to pay dividends for half a century.\textsuperscript{198}

Jay Gould subsequently gained control of the Union Pacific and led it to purchase the inflated stock of other rail carriers he controlled—the Kansas Pacific and Denver Pacific, both land grant railroads emptied of their State subsidies and private capital, but now "streaks of rust" ending in the desert.\textsuperscript{199} Adding the Wabash,\textsuperscript{200} the St. Joseph & Denver, the Missouri Pacific\textsuperscript{201} and the Missouri, Kansas & Texas to his portfolio,\textsuperscript{202} he threatened the Union Pacific that if it did not buy his two parallel railroads he would stretch a competing line all the way to the Pacific Ocean.\textsuperscript{203} Gould was given 200,000 shares of the Union Pacific, then worth about $10 million, for these worthless lines.\textsuperscript{204} Long before, Daniel Drew had said of Gould, "His touch is death."\textsuperscript{205} These actions injured both investors and the shipping public, for the carriers found it necessary to maintain high rates in order to pay dividends on these inflated stock issues.\textsuperscript{206}

The Panic of 1873 gave fuel to the fire of wildly fluctuating rates.\textsuperscript{207}

\textsuperscript{192} \textit{Id.} at 130.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} at 131.
\textsuperscript{195} \textit{Id.} at 133.
\textsuperscript{196} \textit{Bourne, supra note 41, at 95.}
\textsuperscript{197} \textit{Daniels, supra note 47, at 21-22.}
\textsuperscript{198} \textit{Platt & Drummond, supra note 130, at 445.}
\textsuperscript{199} \textit{Josephson, supra note 97, at 197.}
\textsuperscript{200} \textit{Id.} at 203. "[I]ts treasury empty, its stock maintained by secret loans at a high price – the poor Wabash was to crash in a sensational debacle, in which it appeared afterward that Jay Gould was in no way involved. He was simply not there when it happened." \textit{Id.}
\textsuperscript{201} \textit{Id.} at 199. Though $25 million had been lavished on the Missouri Pacific in subsidies, Gould acquired it for only $3.8 million. The railroad was to remain in the Gould family for generations. \textit{Id.} at 202.
\textsuperscript{202} \textit{Id.} at 199.
\textsuperscript{203} \textit{Id.} at 201.
\textsuperscript{204} \textit{Id.} at 198.
\textsuperscript{205} \textit{Id.} at 201.
\textsuperscript{206} \textit{Bragdon & McCutchen, supra note 71, at 419.}
\textsuperscript{207} \textit{Social & Economic Consequences, supra note 6, at 9.}
The Panic was precipitated by the financial failure of James J. Hill, the financier of the Northern Pacific.\textsuperscript{208} By the end of the year, nearly one fifth of the nation’s railroad mileage was in bankruptcy.\textsuperscript{209} A long depression followed.\textsuperscript{210} During the decade of the 1870s, rail revenues fell by approximately one third.\textsuperscript{211}

The environment left nearly everyone dissatisfied. The rate wars, rebates to favored shippers and predatory price wars in competitive markets rendered the railroads’ returns on investment inadequate.\textsuperscript{212} Farmers served by only a single railroad felt their rates were excessively high, and wanted protection against discriminatory rate practices.\textsuperscript{213} Shippers in competitive markets desired greater rate stability and wanted some assurance that they would not be placed at a competitive disadvantage vis-a-vis those shipping like products.\textsuperscript{214} As one source noted, “The generation between 1865 and 1895 was already mortgaged to the railways and no one knew it better than the generation itself.”\textsuperscript{215}

D. Labor Unrest

The monopoly power wielded by Rockefeller’s Standard Oil led to such deep rebates as to result in massive revenue losses by railroads.\textsuperscript{216} In 1877, Rockefeller insisted that the Pennsylvania Railroad cease oil refining or he would divert traffic to other roads.\textsuperscript{217} In the wake of Rockefeller’s onslaught, the Pennsylvania fired hundreds of workers, slashed wages 20%, and doubled the length of trains without expanding crews.\textsuperscript{218}

Also that year, the four major eastern railroads—the Pennsylvania, New York Central, Erie and B&O—set up a rate control pool, and cut wages by 10%.\textsuperscript{219} After the Baltimore & Ohio Railroad announced wage cuts, a general railroad strike ensued.\textsuperscript{220} Wages had been reduced the prior year, yet dividends to stockholders were still being paid.\textsuperscript{221} It was one of the bloodiest battles in American labor history, resulting in dozens

\begin{thebibliography}{99}
\bibitem{Chandler} \textit{Id.}
\bibitem{Chandler} \textit{Id.} at 54.
\bibitem{Chandler} \textit{Id.}
\bibitem{Prospectus} \textit{Prospectus for Change}, supra note 151, at 116.
\bibitem{Chandler} \textit{Id.}
\bibitem{Chandler} \textit{Id.}
\bibitem{Josephson} Josephson, supra note 97, at 75.
\bibitem{Chernow} \textit{See Chernow, supra note 123, at 201.}
\bibitem{Chandler} \textit{Id.}
\bibitem{Chandler} \textit{Id.}
\bibitem{Chernow} \textit{Withuhn, supra note 68, at 49.}
\bibitem{Chernow} \textit{Chernow, supra note 123, at 201.}
\bibitem{Chernow} \textit{Withuhn, supra note 68, at 49.}
\end{thebibliography}
of fatalities.\textsuperscript{222} Trainmen at Martinsburg, West Virginia, refused to handle freight trains; trains stopped at Grafton; fights broke out at Wheeling.\textsuperscript{223} To quell the uprising, State governors ordered out their militias, which President Rutherford B. Hayes supplemented with federal troops.\textsuperscript{224} For a week, nearly the entire railroad system ground to a halt.\textsuperscript{225} Violence broke out in Baltimore, Chicago, St. Louis, St. Paul, Omaha, and San Francisco.\textsuperscript{226} In Pittsburgh, a group of 20,000 strikers and supporters confronted 10,000 militiamen and police; 500 tank cars, 120 locomotives and twenty-seven buildings were torched by trade unionists; twenty-four people died.\textsuperscript{227} After burning more than 2,000 freight cars, the revolt subsided.\textsuperscript{228} Nonetheless, it inaugurated a new era of labor militancy in American industry.\textsuperscript{229} It was the first great American industrial strike.\textsuperscript{230}

Working conditions on the railroads were onerous. Workers complained of long hours, no overtime pay, the lack of job security, and dangerous workplace conditions.\textsuperscript{231} In 1886, a bloody strike erupted on the Chicago, Burlington & Quincy Railroad.\textsuperscript{232} The Brotherhoods began to amalgamate to form unions, as the country became convinced that the railroads needed regulating.\textsuperscript{233}

\section*{V. The Birth of Economic Regulation}

\subsection*{A. The Granger Movement}

After America's young men returned to their farms following the Civil War, the production of cereal crops increased, and prices fell.\textsuperscript{234} Moreover, rate discrimination and financial piracy became widespread.\textsuperscript{235} Founded by Oliver Hudson Kelley, a government clerk, the "National Grange of the Patrons of Husbandry" (a sort of rural freemasons society,

\begin{thebibliography}{99}
\bibitem{222} Chernow, supra note 123, at 201.
\bibitem{223} Withuhn, supra note 68, at 49.
\bibitem{224} Chernow, supra note 123, at 202.
\bibitem{225} Withuhn, supra note 68, at 49.
\bibitem{226} \textit{Id}.
\bibitem{227} \textit{Id}.
\bibitem{228} \textit{Id}.
\bibitem{229} Chernow, supra note 123, at 201-02.
\bibitem{230} Withuhn, supra note 68, at 106.
\bibitem{231} In 1888 alone, 2,070 railway workers were killed, and another 20,148 were injured. In 1894, Eugene V. Debs and the American Railway Union staged a bitter, but unsuccessful, strike against wage reductions. Bourne, supra note 41, at 108-09.
\bibitem{233} Withuhn, supra note 68, at 106.
\bibitem{234} Social & Economic Consequences, supra note 6, at 9.
\bibitem{235} \textit{Id}.
\end{thebibliography}
more commonly known as the Grangers), led the political charge for regulation.\textsuperscript{236} They consisted of a powerful political organization of 1.5 million western farmers banded together in 20,000 lodges.\textsuperscript{237}

As noted above, the desire for economic growth led both the federal and many State and local governments to provide economic incentives to railroads to build westward. The railroad promoters also turned to individuals located along the rights of way for investment capital.\textsuperscript{238} Many farmers mortgaged their farms—starry eyed with the prospect of lucrative dividends and reasonably priced access to eastern markets.\textsuperscript{239} They were disappointed on both counts.\textsuperscript{240} Dividends were poor, or nonexistent.\textsuperscript{241} As Professor Daniels observed, "The hectic overstimulation of premature construction, far in advance of the demand for traffic, submerged them eventually in hopeless, sometimes in repeated bankruptcies."\textsuperscript{242} Many railroads went through bankruptcy and reorganization, and the value of their stock was wiped out.\textsuperscript{243} Some had issued watered stock in order to raise money fraudulently.\textsuperscript{244} Many farmers who would be served by the new roads mortgaged their farms and invested in rail stock in anticipation of lucrative dividends and reasonable transportation costs for shipping their crops to eastern markets.\textsuperscript{245} Governments and farmers alike suffered as many railroads went through bankruptcy and reorganization, effectively wiping out the value of the stock sold to investors.\textsuperscript{246}

State governments attacked the rail industry for its bribery of public officials,\textsuperscript{247} sale of worthless securities,\textsuperscript{248} and rate and service discrimination between places and persons.\textsuperscript{249} In addition, farmers were left with mortgages, worthless stock, exorbitantly priced or nonexistent transportation, and increased taxes needed to cover local government invest-

\footnotesize{
236. Buck, supra note 149, at 40; Daniels, supra note 47, at 47.
238. Dempsey & Thoms, supra note 22, at 7.
239. Id.
240. Id. at 7-8.
241. Id. at 8.
242. Daniels, supra note 47, at 46-47.
243. Dempsey & Thoms, supra note 22, at 8.
244. Social & Economic Consequences, supra note 6, at 9.
245. See Platt & Drummond, supra note 130, at 480-90.
246. Dempsey & Thoms, supra note 22, at 8.
247. See Morison, supra note 77, 730-32. Motivated by private gain and unable to see any public interest, the "feudal chieftains" of the railroads bribed or coerced their way out of taxation and government regulation. Id. at 763-64.
248. See Platt & Drummond, supra note 130, at 445. The sale of watered stock, as in the takeover battle between the New York Central and Erie Railroads, injured both stock investors and the public, because the carriers found it necessary to keep rates high in order to pay dividends on the inflated stock issues. See Braggdon & McCutchen, supra note 71, at 418-19.
}
Midwestern farmers, the primary victims of the rate abuses, assailed the excessively high and discriminatory rates that the railroads charged to carry agricultural products from points of origin, over which carriers had a monopoly, to eastern markets or processing areas. They criticized the railroads' high rates, land grants, and political power. In the meantime, their taxes were increased to cover the parallel investment made by their state and local governments. This led to a blind antagonism toward the railroads. Daniels noted, "they commonly incurred the lasting ill will of the communities they were built to serve, an ill will which the arrogance of supposed boundless power was destined to fan into a prairie fire." Another source noted, "[w]hat made matters worse was that these capitalists were living in the Eastern States or in Europe, and were regarded by the farmer as the absentee landlord is regarded by the Irish tenantry." The result was a political movement calling for regulation. Economics Professor Charles Lee Raper noted the tenor of the times:

Too long the railway manager has seen only one side of the situation; too long has he fancied his business a private one, when it should always be a public or quasi-public one. Too long has the state . . . permitted, by its charters and laws, the railway manager thus to think of himself. A great struggle finally came, as come it must under such circumstances, between two parties who should have from the nature of the relationship always been friends. The sanity of railway management and the wisdom of the people are always shown in the condition of the relationship between the railways and the state.

B. The State Commissions

As early as 1836, the Massachusetts Legislature reserved to itself the authority to regulate rail rates. But soon it became apparent that the legislatures had neither the time, the talent, nor the expertise to regulate so complex an industry as transportation, and they established regulatory commissions to perform the task.

The first Commissions were those having only advisory powers, such

250. Dempsey & Thoms, supra note 22, at 8.
251. Id. at 9.
252. Bryant, supra note 110, at 161.
253. Dempsey & Thoms, supra note 22, at 8.
254. Buck, supra note 149, at 11.
255. Daniels, supra note 47, at 47.
256. Hadley, supra note 37, at 133.
257. Dempsey & Thoms, supra note 22, at 8.
258. Raper, supra note 21, at 12.
259. Social & Economic Consequences, supra note 6, at 9.
260. Harris, supra note 161, at 7.
as those established in eastern states like Rhode Island (1936), New Hampshire (1844), Connecticut (1853), New York and Vermont (1855), Maine (1858), Ohio (1867), and Massachusetts (1869). These early commissions appraised the value of property committed to rail development under eminent domain powers and enforced rail safety standards, but lacked ratemaking power. Under the aegis of the “Patrons of Husbandry,” the Granger movement, which lobbied for the political and commercial interests of farmers, persuaded numerous states to enact legislation restricting the activities of rail carriers. In 1869, Illinois passed the first statute requiring the railroads to offer just, reasonable, and uniform rates. In 1871, Minnesota enacted a law that regulated maximum rates and prohibited unjust discrimination. During the subsequent fifteen years, Iowa, Wisconsin, Missouri, California, Nebraska, Kansas, Oregon, and several southern states passed similar legislation. Because State legislators had other public business consuming their time, several States established independent commissions to develop expertise in order to adjudicate rate disputes, regulate the intricacies of their railroad industry, and protect the public interest in transportation matters. In the west, these State commissions had the power to regulate rail rates, whereas in the east, they usually had only advisory powers. But the railroad’s army of lawyers was so adept at finding loopholes in the States’ Granger Laws that many were repealed.

C. The Movement Toward Federal Regulation

Abuses in the railroad industry were not unique to America. In Great Britain, advisory powers over railroads were given to a newly established Board of Trade in 1840. In 1844, a commission was established to report to Parliament on applications for railroad charters. It was clear that competition was not effectively regulating traffic and

261. Social & Economic Consequences, supra note 6, at 9.
263. Harris, supra note 161, at 6.
264. Id. at 6.
265. Id. at 7.
266. Id.
267. Id.
270. Hadley, supra note 37, at 171.
271. Id.
rates.\textsuperscript{272} Yet another commission was established in 1846.\textsuperscript{273} In 1854, Parliament passed the Railway and Canal Traffic Act to protect local roads in through traffic, secure proper facilities, and prohibit discriminatory treatment of shippers.\textsuperscript{274} But this proved inadequate.\textsuperscript{275} A Royal Commission was established in 1865 to investigate the railroad industry.\textsuperscript{276} Another committee was appointed by the British Parliament for the same purpose.\textsuperscript{277} The result was the Act of 1873, which created the Railway and Canal Commission, by which the industry was regulated.\textsuperscript{278} In contrast, Belgium, Prussia, France, Austria, and Italy responded to these concerns by nationalizing their railroads.\textsuperscript{279}

In America, it took a bit longer, and socialism would be no part of the solution. The political pressure for regulation of the railroads was not just targeted at the states. The Granger movement also had an impact in Washington, D.C.

In 1872, President Grant requested a congressional investigation of the industry.\textsuperscript{280} Two years later, the Windom Committee issued its report.\textsuperscript{281} It found that the principal complaint against the railroads involved allegations of unreasonably high rates by the farmers.\textsuperscript{282} The Committee recommended more competition as a solution to the problem, including construction of new canals and track, and federal or state railways in competition with the private railways.\textsuperscript{283} This was, incidentally, the approach adopted by Canada to deal with the problem of monopoly railroads.\textsuperscript{284}

Pressure mounted for rail regulation, and complaints expanded beyond rate levels to discrimination in pricing and service against persons, places and commodities, the loose financial practices characterizing railroad capitalization and construction, and the monopoly nature of the industry, including both the size of the railroads and their extensive pooling arrangements to suppress rate wars.\textsuperscript{285}

In 1878, Congress created a bureau of railroad accounts to investigate irregularities, and ensure enforcement of the laws applicable to the

\begin{thebibliography}{99}
\bibitem{272} Id.
\bibitem{273} Id.
\bibitem{274} \textit{Raper}, \textit{supra} note 21, at 21.
\bibitem{275} Id.
\bibitem{276} Id. at 22.
\bibitem{277} Id.
\bibitem{278} Id. at 23.
\bibitem{279} \textit{Hadley}, \textit{supra} note 37, at 22.
\bibitem{280} \textit{William K. Jones, Regulated Industries} 44 (2d ed. 1976).
\bibitem{281} Id.
\bibitem{282} Id.
\bibitem{283} Id.
\bibitem{284} \textit{Withuhn}, \textit{supra} note 68, at 108-09.
\bibitem{285} \textit{Jones}, \textit{supra} note 280, at 44.
\end{thebibliography}
indebted railroads.286 In 1886, the Cullom Committee Report was issued, which recommended federal legislation prohibiting unreasonably high rates, discriminatory rates and rebates.287 It also called for the creation of an impartial tribunal to adjudicate complaints against the railroads.288 The Wabash decision was issued that same year.289 In 1887, the U.S. Railway Commission examined the issue of political control, concluding that money and passes had been used to influence legislation.290 The stage was now set for Congress to act.

D. CREATION OF THE INTERSTATE COMMERCE COMMISSION

In 1887, Congress promulgated the Act to Regulate Commerce,291 which established the nation's first independent regulatory agency—the Interstate Commerce Commission.292 The Act succinctly established a comprehensive regulatory regime over the rail industry.293 It granted the ICC authority to regulate the interstate rates charged by railroads, thereby ensuring that the rates would be just and reasonable.294 Under the Act, rail carriers could no longer discriminate in rates or services between persons, localities, or traffic.295 Furthermore, they could no longer charge a higher rate for a shorter distance that was included within a longer haul over the same line in the same direction.296 Nor could the rail carriers pool freight or revenues.297 Most importantly, the statute required the railroads to make their rates public, file them with the newly formed Commission, and adhere to the published tariffs.298

Although all but one of the rail industry witnesses favored regulatory legislation, it was still rather effective consumer legislation.299 While it included provisions the industry favored (i.e., requirements that rates be just and reasonable, and that unjust discrimination, preference and prejudice be abolished), it also included provisions against which the railroads had lobbied (i.e., the prohibition against pooling, and charging more for a short haul than a longer haul over the same line in the same

288. Id. at 44.
289. Id. at 45.
292. Harris, supra note 161, at 1.
293. Genesis & Evolution, supra note 2, at 341.
294. Interstate Commerce Act, §§ 11-12.
295. Id. § 3.
296. Id. § 4.
297. Id. § 5.
298. Id. § 6.
299. Chandler, supra note 208, at 55.
direction). 300

Never before had Congress established an independent regulatory commission to exercise the commerce power conferred under Article I Section 8 of the Constitution. 301 President Grover Cleveland appointed the distinguished jurist, Thomas Cooley, to the Interstate Commerce Commission, and Cooley was elected its first Chairman. 302 Cooley, a former Chief Justice of the Michigan Supreme Court, a law professor, and author of treatises in constitutional law, torts, and tax, was among the most prolific and gifted lawyers in the nation. 303

E. THE BIRTH OF THE MODERN REGULATORY MOVEMENT

The Interstate Commerce Act was the first comprehensive regulation of any industry in the United States. 304 It was the first time in American legal history that an industry was regulated by a structure outside the courts and the common law, which had theretofore inartfully attempted to prohibit discrimination and abuses by common carriers. 305 The Interstate Commerce Act preceded the Sherman Antitrust Act by three years.

Perhaps it was inevitable that government would come to play a role in protecting the public and the industry from the ravages of economic instability and exploitation. As a contemporary observer of the era in which economic regulation emerged remarked,

The genesis of the public policy [in favor of economic regulation] lay in the significance of railroad transportation to the fastest growing nation in world history. The railroad dominated [the U.S.] economy and society in the 19th century. The domination existed from every standpoint, capitalization, employment, community impact or entrepreneurial opportunity. There was no force, industrial or religious which matched the societal impact of the railroad after the first third of the 19th Century. 306

300. Id.
301. See Dempsey & Thoms, supra note 22, at 11.
302. Chandler, supra note 208, at 55.
303. Id. Roscoe Pound, for two decades the Dean of the Harvard Law School, considered Cooley one of the top ten judges of all time. The New York Times referred to him as "the father of the Interstate Commerce Bill." Frank N. Wilner, Comes Now The Interstate Commerce Practitioner 102 (1993). Shortly after his appointment to the Interstate Commerce Commission, Cooley recommended creation of an association for state regulatory utility commissioners. It was he who is the father of National Association of Regulatory Utility Commissions [NARUC], established on March 5, 1889. NARUC held its first convention in Washington, D.C., on that date, the day after the inauguration of Benjamin Harrison as 23rd President of the United States.
Another observed, "[w]e know that with the introduction of the railway there came a new factor in the life of the nation, and of the world, which radically affected all phases of that life. The railway is both quantitatively and qualitatively different from other and earlier means of conveyance and communication."\textsuperscript{307}

The creation of the ICC marked the birth of economic regulation in America. One commentator observed, "The ICC is one of the earliest instances we can point to where the federal government intervened directly in the economy to protect the economically weak from the economically strong."\textsuperscript{308} Still another observed that, "[f]rom our own perspective a century later, the greatest significance of the 1887 Act to Regulate Interstate Commerce lies in its creation of the prototypical federal regulatory agency."\textsuperscript{309} Indeed, during the ensuing decades, the ICC became the model for economic regulation of a host of infrastructure industries, including commercial aviation, and the numerous federal and state agencies that emerged to perform the regulatory function.

F. Judicial Emasculation and Congressional Restoration of ICC Jurisdiction

Though Congress expanded the ICC's jurisdiction in the ensuing years, for example, giving it jurisdiction over rail safety in 1893,\textsuperscript{310} decisions of the U.S. Supreme Court significantly reduced the ability of the nascent Commission to regulate rates effectively.\textsuperscript{311} For example, in two cases involving Cincinnati, New Orleans & Texas Pacific Railway, the Court held that the ICC had no authority to prescribe rates for the future.\textsuperscript{312} Although the Commission could conclude that an existing rate was excessive and unlawful, and therefore award reparations to the complaining party, it could not insist on a reduction in future rates, which would have protected others similarly situated or the general public.\textsuperscript{313} In \textit{Interstate Commerce Commission v. Alabama Midland Railway Co.},\textsuperscript{314}

\textsuperscript{307} Lewis H. Haney, 1 A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES, 241 (Augustus M. Kelley 1968).


\textsuperscript{310} Chandler, \textit{supra} note 208, at 57. Congress passed the first Safety Appliance Act in 1893. \textit{Id.}


\textsuperscript{314} 168 U.S. 144 (1897).
the U.S. Supreme Court effectively deprived the Commission of its ability to enforce the long- and short-haul provisions of the 1887 statute.\textsuperscript{315} Thus, by the turn of the century, an essentially impotent ICC faced increasing rail rates, rail consolidations that were reducing competition, and rail carriers which were continuing jointly to fix rates.\textsuperscript{316}

Given this situation, Congress expanded the Commission's jurisdiction through several Progressive Era reforms passed between 1903 and 1910.\textsuperscript{317} In 1903, Congress enacted the Elkins Act,\textsuperscript{318} which prohibited rail rebates and granted the Commission authority to impose civil and criminal penalties for intentional acts of discrimination and intentional violations of published tariffs.\textsuperscript{319} Three years later Congress passed the Hepburn Act,\textsuperscript{320} giving the Commission jurisdiction over express, sleeping car, and steamship companies, as well as over fuel pipelines.\textsuperscript{321} This Act also conferred on the ICC jurisdiction to determine and prescribe maximum rates.\textsuperscript{322} Additionally, it gave the Commission the power to establish through-routes and joint rates among non-competing carriers and to prescribe their divisions,\textsuperscript{323} and forbade the issuance of free passes except for clergy.\textsuperscript{324}

Though the Elkins and Hepburn Acts were designed to prohibit rebates, in 1907 the ICC reported that Standard Oil was still "secretly accepting rebates, setting up bogus subsidiaries, and engaging in predatory pricing."\textsuperscript{325} President Theodore Roosevelt and his cabinet were eager for a test case proving Standard Oil's collusion with the railroads.\textsuperscript{326} Charged with taking rebates from the Chicago and Alton Railroad after the Elkins

\textsuperscript{315} Id. at 168-69.

\textsuperscript{316} I. L. Shafman, The Interstate Commerce Commission 34-35 (1931).

\textsuperscript{317} Dempsey & Thoms, supra note 22, at 11. In 1903, Congress enacted the Elkins Act, which granted the Commission authority to impose civil and criminal penalties for intentional acts of discrimination and intentional violations of published tariffs. Three years later Congress passed the Hepburn act, which gave the ICC jurisdiction over express, sleeping car, and steamship companies, as well as fuel pipelines. This act also conferred jurisdiction to determine and prescribe maximum rates for the future in those situations in which existing rates were deemed unlawful. Additionally, it gave the ICC the power to establish through routes and joint rates among non-competing carriers and to prescribe their divisions. And in 1910, Congress passed the Mann-Elkins Act, which revitalized the long- and short-haul provisions, and established new rate procedures. Under this Act the Commission could, on its own motion, suspend tariffs pending an investigation of their lawfulness. Genesis & Evolution, supra note 2, at 342.

\textsuperscript{318} Elkins Act, ch. 708, 32 Stat. 847 (1903).

\textsuperscript{319} Id. § 1.

\textsuperscript{320} Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

\textsuperscript{321} Id. § 1.

\textsuperscript{322} Id. § 4.

\textsuperscript{323} Id.

\textsuperscript{324} Withuhn, supra note 68, at 106.

\textsuperscript{325} Chernow, supra note 123, at 539.

\textsuperscript{326} Id.
Act prohibited them, the federal district court issued the largest fine in American corporate history up to that time, nearly $30 million.327 Though reduced on appeal, the era of railroad rebates was coming to an end. Moreover, Standard Oil would fall to the antitrust laws in 1911.328 Teddy Roosevelt was among the strongest presidential proponents of a strong Interstate Commerce Commission.329

In 1910 Congress passed the Mann-Elkins Act,330 which revitalized the long- and short-haul provisions331 and established new rate procedures.332 Under this Act the Commission could, on its own motion, suspend tariffs pending an investigation of their lawfulness.333 The Act also created a Commerce Court to review ICC decisions.334 In 1911, it reviewed thirty ICC decisions and reversed twenty-seven of them, a reversal rate that led Congress to abolish the court in 1913.335 During the period from 1889 until World War I, not only was the power of the Interstate Commerce Commission enhanced, but strong regulatory commissions also were established in a substantial majority of the states.336

Other legislation also reigned in the railroads. The Panama Canal Act of 1912 prohibited the railroads from owning ocean carriers traversing the canal.337 The Clayton Act of 1914 prohibited interlocking railroad directorates.338 The Adamson Act of 1916 gave labor the eight-hour workday.339 According to Professor Daniels, "By this time the railroad Sampson had been rather effectively shorn by the Congressional Delilah."340

G. WATER AND OCEAN CARRIER REGULATION

Maritime transportation was the first industry to be administered by a specialized tribunal.341 In England, for centuries there were special courts to address "a thing done upon the sea."342 At the dawn of the

327. Id. at 539-41.
328. Id. at 554.
329. See DANIELS, supra note 47, at 70-80.
331. Id. § 8.
332. Id. § 9.
333. Id. § 13.
334. Id. § 1.
335. Chandler, supra note 208, at 57.
336. Social & Economic Consequences, supra note 6, at 14.
337. DANIELS, supra note 47, at 55.
338. Id.
339. Id.
340. Id.
341. DEMPSEY & THOMS, supra note 22, at 29 (adapted from JAMES HARDMAN, TRANSPORTATION LAW: AN IntroDUCTORY STUDY (1978)).
342. Id.
American republic, admiralty law was well developed. Article III of the U.S. Constitution extended the judicial power of the United States to "all cases of admiralty and maritime jurisdiction." Thus, admiralty law became federal law, with federal courts deciding admiralty cases.

Beginning in 1789, the U.S. government imposed a discriminatory tax on vessels operating in coastal trade. In 1817, Congress completely banned foreign flag ships from interstate trade, reserving cabotage to U.S.-flag vessels, a requirement that continues to the present in the maritime and airline industries. Though American shipping dominated the Clipper ship era of the early 19th Century, by the advent of the steamship in the mid-19th Century, British shipping and shipbuilding began to dominate, while the American industry declined. By the dawn of the 20th Century, the American merchant marine was nearly insignificant.

Congress began regulating water transport with the Panama Canal Act of 1912. The U.S. merchant fleet had shrunk after the Civil War, and by 1910 carried only 10% of the U.S. trade. When World War I broke out, the European vessels withdrew from the U.S. trade, causing freight charges to soar. For example, the price of moving grain from the U.S. to Britain rose from five cents to fifty cents per bushel. World War I deprived the United States of much of the foreign tonnage upon which it had relied.

In order to restore the health of the U.S.-flag fleet, Congress passed the Shipping Act of 1916. This act created a regulatory agency, the U.S. Shipping Board, to regulate ocean vessel conference ratemaking activities, and a public corporation to build, buy, charter, and operate merchant vessels, the Shipping Board Emergency Fleet Corporation. The Act also granted limited antitrust immunity to the conference's price-fixing activities, but subjected it to a regulatory scheme seeking to eliminate other anticompetitive abuses. Although such price-fixing activities would otherwise have been inconsistent with existing antitrust laws, Congress recognized that shielding conference activity from antitrust attack

343. Id. at 29-30.
344. Id. at 30.
346. Id.
347. Id.
349. Id. at 31.
350. Id.
351. Id.
352. Id.
354. See generally id.
355. Id. § 17.
would enable shippers to enjoy the benefits of more frequent and regular sailing, greater rate stability, and enhanced capital investment in new ships. Thus, carriers would be spared the economic injury inherent in the industry’s “boom-to-bust cycle.”

The Merchant Marine Act of 1926 replaced the Shipping Board with the U.S. Maritime Commission, which was given the responsibility to foster U.S.-flag shipping to satisfy the domestic and international needs of commerce and national defense. The Dennison Act of 1928 for Mississippi River navigation, and the Intercoastal Shipping Act of 1933 for the Panama Canal, imposed additional legislative controls over this industry.

Economic and competition issues surrounding carriers and shippers today are governed by the Federal Maritime Commission, the successor to the U.S. Shipping Board, except for the non-contiguous domestic trade, which is governed by the Surface Transportation Board. The Federal Maritime Administration provides subsidies to U.S. flag vessels. The U.S. Coast Guard ensures navigational safety. The Army Corps of Engineers maintains the intercoastal waterways, interior locks and canals. In cooperation with the government of Canada, the St. Lawrence Seaway Commission maintains the river and canal system linking the Great Lakes with the Atlantic Ocean. Additionally, numerous port authorities maintain the docks and harbors of our nation’s port cities. Internationally, the U.N. International Maritime Organization, headquartered in London, oversees safety and environmental issues on the high seas.

VI. NATIONALIZATION OF THE RAIL SYSTEM

A. A BRIEF BOUT WITH SOCIALISM

American involvement in World War I flooded eastern ports with commodities, as rail lines and ports became clogged in gridlock. The

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358. Dempsey & Thoms, supra note 22, at 31.
360. Air Commerce, supra note 57, at 111-12.
361. Id. at 112.
362. Id.
363. Air Commerce, supra note 57, at 112.
364. Id.
365. Id.
ensuing chaos led Congress to take over the national rail industry and run it as a single system. With the Army Appropriations Act of 1916, Congress created the United States Railway Administration [USRA] to perform this task. With the Possession & Control Act of 1917, the USRA ran the system from December 28, 1917, until March 1, 1920—twenty-one months after termination of the hostilities. During the War, rolling stock was maintained in good condition, but the roadbed was allowed to deteriorate. By the end of the War, it was apparent that the industry would need assistance in regenerating itself.

B. The Transportation Act of 1920 and the Railway Labor Act of 1926

After World War I, the policy of the federal government shifted from one of protecting the public from the market abuses of the transportation industry to one of preserving a healthy economic environment for common carriers. This policy shift reflected a Congressional recognition that the rail industry was over-expanded and had suffered deferred maintenance. This led Congress to promulgate the Transportation Act of 1920, also known as the Esch-Cummins Act.

The new legislation was preoccupied with the financial health of the industry. The ICC was given jurisdiction over minimum rates to supplement its existing authority over maximum rates, power to regulate entry and exit from markets by issuing certificates of public convenience and necessity, authority to regulate inter-corporate relationships and the issuance of securities to ensure a sound financial structure, mergers, and a

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369. Social & Economic Consequences, supra note 6, at 14.
371. Dempsey & Thoms, supra note 22, at 12. Some sources have been quite critical of the period of federal control of the national railroad system:
Knowing that great things were expected of him because of the enormous authority he had received, [Director General of Railroads William G.] McAdoo, in a veritable frenzy of activity, set about regulating, restraining and reorganizing so that chaos and confusion from being regional and sporadic, in brief order became endemic to the entire network of the nation. Passenger schedules were slashed, passenger runs merged, freight facilities pooled and, most drastic of all, stringent controls of the flow of freight over the mainline carriers were introduced on a sweeping scale. Out of all this fever of activity nothing very great resulted and from the almost total dislocation of a vast and important industry, the statistics when they were compiled showed that McAdoo's hysterical administration had resulted in a microscopic increase of two percent in freight traffic between 1917 under private management and 1918 under government control. Beebe & Clegg, supra note 370, at 117. Another described this period so "somewhere between unfortunate and disastrous." Wuthuhn, supra note 68, at 126.
372. See Dempsey & Thoms, supra note 22, at 12.
373. Id. at 12-13.
mandate to draft a plan of consolidating the multiple parallel rail companies into a more efficient and fewer number of larger firms. But the effort to consolidate the rail system died stillborn for lack of support from the industry.

Title III of the Transportation Act of 1920 also created a new agency, the U.S. Railroad Labor Board, which attempted to avoid interruptions to commerce by negotiating disputes. Title III was designed to deal with the, sometimes, violent confrontations between labor and management in the railroad industry, including the major strikes of 1877, 1886, 1888, and 1894, and the 105 railroad strikes that broke out between 1899 and 1904. The railroad industry had pressed for the establishment of Army bases in major cities, whose soldiers could be called out to quell strikes with force.

Prior legislation, including the anemic Arbitration Act of 1888, the Erdman Act of 1898 and the short-lived Newlands Act of 1913, had failed to eliminate the conditions that gave rise to strikes. A national strike in 1922 revealed that the 1920 Act still was not the solution. So, in 1926 Congress promulgated the Railway Labor Act, the first legislation to force management to recognize and bargain with employee representatives. It would later be extended to the airline industry.

VII. GOVERNMENT PROMOTION OF TRANSPORTATION INFRASTRUCTURE

A. HIGHWAYS AND THE MOTOR CARRIER INDUSTRY

The early 20th Century saw the emergence of a new form of competition, the motor carrier. In 1904, there were but 700 trucks operating in the United States, most powered by steam or electrical engines. The following year, the first scheduled bus service began in New York City. But still, growth of this important means of transport was hampered by poor roads and the economic dominance of the railroad industry.

The first federal agency was the Office of Road Inquiry, established in 1893 within the U.S. Department of Agriculture. Congress recog-

374. Id.
375. Mahoney, supra note 232, at 249-50.
376. Id. at 245-47.
377. AIR COMMERCE, supra note 57, at 113.
378. Id. at 113-14.
379. Mahoney, supra note 232, at 250.
381. For an excellent review of this history, see Mahoney, supra note 232, at 245-51.
382. SOCIAL & ECONOMIC CONSEQUENCES, supra note 6, at 14.
383. Id.
384. AIR TRANSPORTATION FOUNDATIONS, supra note 19, at 7.
385. BOURNE, supra note 41, at 112.
nized the potential importance of motor carriage, and began to promote its growth with federal matching grants for highway construction, first with the Federal-Aid Road Act of 1916, which established the Bureau of Public Roads, and then the Federal Highway Act of 1921. Soon dirt horse and wagon trails were extended, straightened and paved. The 1916 Act set the basic pattern of federal/state relationships on road and highways and subsequently, airports. Henceforth, the federal government would subsidize planning and funding of highway projects, while the States would construct, own, and maintain their highways.

World War I demonstrated the potential for motor transport. Thousands of motor vehicles were produced for the Army. On the fields of battle, they quickly proved their superiority over mules in transporting men and materiel to the front. After the Great War, thousands of surplus Army trucks became the vehicles for growth of the commercial motor transport industry.

By 1918, the nation had more than 600,000 trucks. With the development of a national system of highways in the 1920s, motor carriers became an increasingly viable competitor to railroads. The combination of the pneumatic tire, the internal combustion engine, assembly line production, and hard surface roads brought sensational growth to the industry.

Soon, the nation had an extraordinary distribution system, which vigorously stimulated national economic growth. Manufacturers of apparel, of appliances, of hardware, and a thousand other commodities soon found that their markets were no longer limited to large cities. The new distribution system of trucks taking merchandise to the farthest corners of the nation meant that manufacturers could now sell their goods on Main Street of the thousands of small towns and hamlets sprinkled across the continent.

And the complexion of Main Street itself changed. No longer would General Stores, which carried everything from fertilizer to soap, domi-

386. Social & Economic Consequences, supra note 6, at 15.
387. Id.
388. Air Transportation Foundations, supra note 19, at 7.
389. Id.
390. Social & Economic Consequences, supra note 6, at 15.
391. Id.
392. Id.
393. Id.
394. Social & Economic Consequences, supra note 6, at 15.
395. Id.
396. Id.
397. Id.
nate the market.\textsuperscript{398} Specialized shops sprang up.\textsuperscript{399} Consumer choices multiplied.\textsuperscript{400} A lady on the plains of Kansas could now buy the same fashions on Main Street that were available on Park Avenue.\textsuperscript{401} The distribution system of the trucking industry made possible tremendous expansion in production and sales, and thus served as a catalyst for one of the most significant periods of economic growth in the nation’s history.

\textbf{B. Railroads}

During the first half of the 20th Century, railroads were the dominant means of intercity transport for passengers.\textsuperscript{402} In 1915, American railroads carried over a million passengers and more than two million tons of freight.\textsuperscript{403} That year, the industry ran 65,000 locomotives, 55,000 passenger cars, and 2.25 million freight cars, while employing 1,800,000 workers.\textsuperscript{404} By 1929, there were still 20,000 passenger trains, though track mileage had dropped below a quarter of a million miles.\textsuperscript{405} The growth of highways resulted in a corresponding decline of railroads, for though the government built and maintained roads, the railroad industry was in charge of keeping its roadbed in shape.\textsuperscript{406} One source noted that the correlation began early on:

\begin{quote}
Every week, evidence flowed into the offices of the Bureau of Public Roads that railroads were withering like a great and noble but diseased oak tree. The first symptoms had manifested themselves at the tips of the branches, and they were dying back, slowly in some parts, more rapidly in others . . . . Eventually the disease spread to the trunk, and it would fall or be left standing as a withered reminder of what once was great. Each time a railroad abandoned a line, it had to tell the bureau of the grade crossings on federal-aid roads that would be eliminated. Notice after notice flowed into the bureau’s offices. . . .\textsuperscript{407}
\end{quote}

With the advent of the automobile, urban transit also began to decline. In 1917, electric streetcars carried eleven billion passengers.\textsuperscript{408} But by 1923, fixed-guideway systems began to be replaced by buses, with their

\begin{itemize}
\item \textsuperscript{398} \textit{Id}.
\item \textsuperscript{399} \textit{Social & Economic Consequences, supra} note 6, at 15.
\item \textsuperscript{400} \textit{Id}.
\item \textsuperscript{401} \textit{Id}.
\item \textsuperscript{402} \textit{Social & Economic Consequences, supra} note 6, at 19.
\item \textsuperscript{403} \textit{Id. See also Lewis, supra} note 38, at 21.
\item \textsuperscript{404} \textit{Lewis, supra} note 38, at 21.
\item \textsuperscript{405} \textit{Id. at 22; The Dark Side of Deregulation, supra} note 9, at 450.
\item \textsuperscript{406} \textit{See Lewis, supra} note 38, at 22.
\item \textsuperscript{407} \textit{Id}.
\item \textsuperscript{408} \textit{Edward Weiner, Urban Transportation Planning in the United States} 10 (2d ed. 1999).
\end{itemize}
lower capital costs and greater operational flexibility.\textsuperscript{409} All transit—bus and rail—began to experience a loss of ridership beginning in the mid-1930s, as roads improvements and automobile affordability created disbursed suburban housing patterns less conducive to transit.\textsuperscript{410}

Automobile production stopped during World War II, as car factories turned to producing tanks, jeeps, and fighter and transport aircraft; fuel and rubber were rationed. Transit ridership grew by 65\% to an all-time high of twenty-three billion trips annually between 1941 and 1946.\textsuperscript{411} But after World War II, demand for rail service began to decline, as passengers chose alternative means to get them to destination—the bus, the airplane, or the automobile.\textsuperscript{412} By 1953, transit had fallen to fewer than fourteen billion trips annually.\textsuperscript{413}

In 1958, Congress passed legislation that allowed railroads to discontinue passenger trains with ICC approval.\textsuperscript{414} Under the ICC’s auspices, the number of passenger trains fell 60\%, until by 1970, only 360 intercity trains were left.\textsuperscript{415} Congress filled the void by passing the Rail Passenger Services Act of 1970, which established Amtrak.\textsuperscript{416} Today, Amtrak serves more American cities than all the airlines combined.\textsuperscript{417}

\section*{C. Airports & Airlines}

From its inception, the airline industry has been perceived as having tremendous potential as a catalyst for economic growth and an essential means for facilitating communications and national defense.\textsuperscript{418} Early on, the U.S. government recognized its potential to serve the needs of a growing nation. As a consequence, the federal government has been active in promoting and encouraging its growth and development from the outset.\textsuperscript{419}

The government’s responsibility to carry the mail as an essential means of communications was recognized by the framers of the U.S. Constitution, and embraced by that document.\textsuperscript{420} The compelling need for

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{409} Id.
\item\textsuperscript{410} Dempsey & Thoms, supra note 22, at 311.
\item\textsuperscript{411} Weiner, supra note 408, at 15.
\item\textsuperscript{412} The Dark Side of Deregulation, supra note 9, at 451.
\item\textsuperscript{413} U.S. Dept. of Transp., Urban Transportation Planning in the United States: An Historical Overview 17 (3d ed. 1988).
\item\textsuperscript{414} The Dark Side of Deregulation, supra note 9, at 452.
\item\textsuperscript{415} Id.
\item\textsuperscript{416} Id. at 452-53.
\item\textsuperscript{417} Id. at 453.
\item\textsuperscript{418} Dempsey & Thoms, supra note 22, at 26.
\item\textsuperscript{419} Id.
\end{enumerate}
\end{footnotesize}
expeditious mail service led the Post Office Department to develop the Pony Express and to employ advanced technology as it emerged, beginning with the railroads.421

The United States air transport industry owes its initial development to subsidies for the carriage of the mail.422 The route structures of America’s largest airlines—United, American, TWA, and Eastern—were largely the product of airmail contracts awarded by the Post Office Department in the 1920s and 1930s.423 Passengers rode on top, while mail was carried in the belly of aircraft.424

Airmail service was inaugurated by the Army in 1918, on a route from New York to Philadelphia to Washington, D.C.425 By 1920, a transcontinental route from Hazelhurst Field, N.Y., to San Francisco, California, had been established.426 By 1924, the Post Office Department had constructed nearly 2,000 miles of lighted airways, allowing pilots to make regular transcontinental night flights.427 The first pilots were daredevils; sadly, 31 of the first 40 pilots in airmail service died in crashes.428

By the mid-1920s, Congress decided to privatize the carriage of mail. The Kelly Act, Contract Air Mail Act of 1925,429 authorized the Postmaster General to award contracts for the carriage of mail to private carriers.430 This marked the beginning of a viable private airline industry in the United States.431

The first five contracts were awarded to National Air Transport, Varney Lines, and Pacific Air Transport (all of which subsequently joined the United Airlines system), Colonial Airlines (later to become an important part of American Airlines), and Western Air Express (which would be merged into the TWA system).432 The first air mail contracts established the route structure which would dominate air service for decades to

421. Id. at 133-34.
422. Lowenfeld, supra note 19, § 1-1, at I-2.
423. Id.
424. AIR TRANSPORTATION FOUNDATIONS, supra note 19, at 391.
425. Id.
427. Lowenfeld, supra note 19, § 1-1, at I-2.
430. Lowenfeld, supra note 19, § 1-1, at I-2. See generally, SAMUEL B. RICHMOND, Regulation and Competition in Air Transportation 4 (1961); HUGH KNOWLTON, AIR TRANSPORTATION IN THE UNITED STATES ITS GROWTH AS A BUSINESS 4 (1941); CLAUDE E. PUFFER, AIR TRANSPORTATION 2-3 (1941); LUCILE SHEPPARD KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION 65 (1951); DEMPSEY & THOMS, supra note 22, at 26.
431. Boyne, supra note 426, at 126.
432. Lowenfeld, supra note 19, § 1-1, at I-2.
The Air Commerce Act of 1926 vested jurisdiction over safety and maintenance of airways, airports and air navigation facilities in the Secretary of Commerce. In fact, federal regulation of aviation safety owes its genesis to the Air Commerce Act of 1926, which established a special investigation division in the U.S. Department of Commerce and gave the Secretary of Commerce power to investigate and publicize air navigation accidents. Promulgated within six years of the end of World War I, in which the nascent new technology of aviation had demonstrated its military prowess, the 1926 Act also imposed restrictions on foreign ownership of U.S. airlines.

After Col. Lindbergh crossed the Atlantic in the Spirit of St. Louis in 1927, the industry enjoyed explosive growth. Even the stock of Seaboard Airline, a southeastern railroad, experienced an unprecedented increase because of speculators' belief that it was somehow connected to aviation.

The McNary-Waters Act of 1930 established a formula for airmail payments based on the amount of mail transported. Postmaster General Brown wanted to create a few large competing transcontinental airlines. Rather than determining the issuance of routes on the basis of competitive bidding, they were actually determined at secret meetings in May and June of 1929—later called "spoils conferences"—of airline executives with Postmaster General Brown. He also encouraged mergers and consolidations of smaller airlines into larger, consolidated companies.

As a consequence, Northwest Airways served the northern tier states, though it lacked a transcontinental route. United Air Lines, organized in December 1928, obtained control of National Air Transport, Boeing Air Transport, Varney Air Lines, and Pacific Air Transport, giving it a route system extending from New York to Chicago to San Francisco,

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433. *Id.*
437. *Id.* § 2.
438. *Id.* § 3(a)(1).
440. *Id.*
442. *Dempsey & Thoms, supra* note 22, at 27.
444. *Id.* § 1.1, at I-5.
445. *Id.* § 1.1, at I-4.
446. *Id.*
and north and south along the Pacific coast. Transcontinental and Western served the central United States, from New York to California via St. Louis and Kansas City. Eastern, then affiliated with Transcontinental, served the principal north-south routes, although United also had a route from Chicago to Texas.

Congressional discontent with the administration of the McNary-Waters Act led to an investigation of these practices by a special Congressional committee chaired by Senator Hugo Black. The revelations of this investigation convinced President Franklin Roosevelt to terminate all existing air mail contracts on the grounds that there had been collusion between the airlines and the Post Office Department in route and rate establishment. He directed the Army Air Corps to transport the mail. A series of tragic crashes, killing about a dozen Army pilots, proved that the Army was inadequately trained in air navigation, inclement weather and night flying, and that the private carriers were technologically proficient.

Congress responded by passing the Airmail Act of 1934, Black-Mckellar Act, which authorized the new Postmaster General to award mail contracts on the basis of competitive bidding, usually on an exclusive basis for a particular route. The system was to be comprised of four transcontinental routes, and an eastern and western coastal route. The legislation prohibited financial interests by airlines in other aviation companies, holding companies, and interlocking directorates. After the initial contract term, postal rates were set by the Interstate Commerce Commission. Also beginning in 1934, federal funds became a primary source of airport funding. The 1934 Act was remedial in that it was intended to counteract the supposed collusion that had allegedly occurred during Postmaster Brown’s administration. It was at the same time

447. Id. § 1.1, at I-3 – I-4.
448. Id. § 1.1, at I-4.
449. Id.
450. Dempsey & Thoms, supra note 22, at 27. Roosevelt would subsequently appoint the Alabama Senator to fill the first vacancy arising on the U.S. Supreme Court during his presidency. Black served on Supreme Court from 1937 until 1971. Frederick C. Thayer, Jr., AIR TRANSPORT POLICY AND NATIONAL SECURITY 10 (1965).
451. Dempsey & Thoms, supra note 22, at 27.
452. Boyne, supra note 426, at 128.
453. Id. Lowenfeld, supra note 19, § 1.1, at I-5.
455. Lowenfeld, supra note 19, § 1.1, at I-5.
456. Id.
457. Id.
458. Id.
460. AIR TRANSPORTATION FOUNDATIONS, supra note 19, at 209.
proactive, because it also created a Federal Aviation Commission to study U.S. aviation policy and to make recommendations leading to more permanent air transportation legislation.\textsuperscript{461} With promulgation of the Civil Aeronautics Act of 1938,\textsuperscript{462} Congress established the Civil Aeronautics Authority, subsequently renamed the Civil Aeronautics Board, and created therein an Air Safety Board with jurisdiction to investigate accidents, determine probable cause, issue reports, and recommend additional safety measures.\textsuperscript{463} These powers were augmented by the Federal Aviation Act of 1958.\textsuperscript{464}

With the creation of the U.S. Department of Transportation in 1966, Congress established therein an independent National Transportation Safety Board (NTSB), giving it power to conduct investigations and hold hearings to determine "the cause or probable cause of transportation accidents and reporting the facts, conditions, and circumstances relating to such accidents."\textsuperscript{465} The NTSB became truly independent and effectively autonomous from DOT with the Independent Safety Board Act of 1974.\textsuperscript{466}

\section*{VIII. The Great Depression}

The Great Depression was the most painful economic period in the history of the United States. It shook to the very core America's faith in \textit{laissez faire}. The Missouri Pacific Railroad became the first to fall into bankruptcy; by 1939, one third of the nation's rail mileage was in receivership.\textsuperscript{467} Congress believed that stability and growth of the essential industries -- including banking, securities, communications, energy, and transportation -- was essential if we were to have national economic recovery.\textsuperscript{468} A sound economy could be built on top of a solid infrastructure foundation.

Hence, during the 1930s, Congress created a number of new federal agencies to regulate these important industries, including the Federal Power Commission (1930), the Federal Communications Commission (1934), the Securities and Exchange Commission (1934), the National La-

\textsuperscript{461} Dempsy \& Thoms, \textit{supra} note 22, at 27-28.
\textsuperscript{462} Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).
\textsuperscript{464} Id.
\textsuperscript{465} Id. (quoting Department of Transportation Act, Pub. L. 89-670, 80 Stat. 931 (1966)).
\textsuperscript{466} Id. (referring to 49 U.S.C. app. §§ 1901-1907 (1980)).
\textsuperscript{467} Withuhn, \textit{supra} note 68, at 130-31.
bor Relations Board (1935), and the Civil Aeronautics Authority (1938), reorganized as the Civil Aeronautics Board (1940).\textsuperscript{469} Most were modeled on the first independent federal agency—the Interstate Commerce Commission, created in 1887 to regulate the railroads.\textsuperscript{470}

The agencies' independence was of utmost importance—indepen-
dent from the Executive Branch. They were to be shielded from the politi-
cal winds that blow down Pennsylvania Avenue by making them
relatively autonomous from the White House.\textsuperscript{471} The independent regu-
latory commissions were, theoretically, an arm of Congress created under
its powers to regulate interstate and foreign commerce pursuant to Article
1 Section 8 of the U.S. Constitution.\textsuperscript{472}

IX. ECONOMIC REGULATION OF MOTOR CARRIERS

Following World War I, the trucking industry enjoyed tremendous
growth.\textsuperscript{473} But not all was well. The trucking industry itself was plagued
by its own growth.\textsuperscript{474} A down payment on a truck and a driver's license
were all it took to get into the industry.\textsuperscript{475} Many entrepreneurs were
unsophisticated, had little idea what their costs were, and took freight for
non-remunerative prices.\textsuperscript{476} Sometimes they were victimized by shippers
with monopoly power dictating excessively low rates.\textsuperscript{477} Wages were
poor.\textsuperscript{478} Many firms fell into bankruptcy.\textsuperscript{479} But used truck dealers simply
recycled their trucks, and the capacity problems persisted.\textsuperscript{480} Industry
overcapacity drove trucking rates down to a level that made it impossible
for many truckers to maintain their equipment and highway safety
suffered.\textsuperscript{481}

All of this led many states to regulate motor carriers, limiting entry
and requiring that rates be reasonable.\textsuperscript{482} By the mid-1920s, thirty-three
states regulated motor freight transport and forty-three regulated bus
companies.\textsuperscript{483} But, in 1925, the U.S. Supreme Court handed down a deci-
sion that stripped the states of their ability to regulate interstate

\begin{footnotes}
\item[469] Id.
\item[470] Id.
\item[471] Air Transportation Foundations, supra note 19, at 210.
\item[472] Id. at 186.
\item[473] Social & Economic Consequences, supra note 6, at 15.
\item[474] Id.
\item[475] Jones, supra note 280, at 499.
\item[476] Social & Economic Consequences, supra note 6, at 15.
\item[477] Id.
\item[478] Id.
\item[479] Genesis and Evolution, supra note 2, at 344.
\item[480] Jones, supra note 280, at 499.
\item[481] Social & Economic Consequences, supra note 6, at 16.
\item[482] Id.
\item[483] Id.
\end{footnotes}
movement. 484

At issue in *Buck v. Kuykendall* 485 was the denial by the state of Washington of a motor common carrier’s application for operating authority on the ground that the routes were adequately served by four connecting auto stage lines and frequent steam rail service. 486 Although the Supreme Court recognized that a state legitimately may constrain interstate transportation in order to promote safety or conservation of the highways, the Court concluded that states could not obstruct the entry of motor carriers into interstate commerce for purposes of prohibiting competition. 487 Prior to this decision, 40 states had denied the use of their highways to motor carriers operating without certificates of public convenience and necessity. 488 The ruling in *Buck* not only prohibited state controls on entry for motor carriers engaged in interstate commerce, it also invalidated insurance requirements and service standards. 489 Thus, the decision limited state regulation of interstate motor carriers to a state’s remaining police powers—motor vehicle safety and highway construction. 490

After that, uncontrolled rate wars broke out among interstate carriers. 491 Bankruptcies proliferated. 492 Safety problems were again exacerbated. 493 Unscrupulous truckers sometimes stole the freight that had been entrusted to them. 494 Unscrupulous bus companies and brokers sometimes absconded with the ticket revenues of unwary passengers. 495 Fraudulent practices became widespread. 496

Even preceding the Great Depression, as early as 1926, the U.S. Department of Agriculture issued a report concluding that entry and rate stabilization of highway transport would be beneficial to prevent over expansion. 497 Beginning that year, Congress, in each session, considered bills for economic regulation of the motor carrier industry. 498

486. *Id.* at 313.
487. *Id.* at 315-16.
489. *Id.*
490. *Id.*
491. *Social & Economic Consequences*, supra note 6, at 16.
492. *Id.*
493. *Id.*
494. *Social & Economic Consequences*, supra note 6, at 16.
495. *Id.*
496. *Id.*
Several economists of the day also advocated the need for economic regulation. In 1928, at a meeting of the American Economic Association, William M. Duffus declared, "Most students of transportation will agree, I think . . . that there must be some sort of central planning looking toward the coordination of our various transportation agencies on a sound economic and financial basis."\(^{499}\) Henry R. Trumbower argued that rail and motor carriage should be treated as a regulated monopoly.\(^{500}\)

Other economists agreed. Shan Szto condemned excessive competition as of "no benefit to anybody," making the industry "unattractive to responsible business people."\(^{501}\) Harold G. Moulton and his Brookings Institution associates criticized the waste and instability created by excessive competition and urged comprehensive coordination of transportation.\(^{502}\) D. Philip Locklin summarized the inherent characteristics that warranted economic regulation: "[t]he ruinous type of competition does develop; discrimination in rates does appear; the condition of overcapacity does not correct itself automatically; and the struggle for survival in the face of inadequate revenues leads to deterioration of safety standards, evasion of safety regulations, financial irresponsibility, and generally unsatisfactory service."\(^{503}\) Professor Paul Kauper noted that, "[t]he present demoralization of interstate motor transportation, due to unsound competitive practices, and the menace of such unrestricted competition to the integrity of the national transportation system as a whole create problems that call imperatively for federal legislation."\(^{504}\) Even Adam Smith, the 18th Century proponent of laissez-faire economics, had conceded that Government has the obligation "of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it."\(^{505}\)

The Wall Street stock market crash of 1929 exacerbated the problem. It set in motion the most prolonged and severe economic depression in

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500. Id.

501. Id. (quoting Shan Szto, Federal and State Regulation of Motor Carrier Rates and Services 24 (1934) (Ph.D. dissertation, University of Pennsylvania)).

502. Id. at 8 (citing H. MOULTON & ASSOC., THE AMERICAN TRANSPORTATION PROBLEM 889-90 (1933)). Sadly, by the end of the 20th Century, Brookings had become a bastion of laissez faire ideologues who attacked economic regulation at every opportunity and who insisted that deregulation has produced billions of dollars in consumer savings.

503. Id. (quoting LOCKLIN, supra note 101, at 670).


505. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 309 (Encyclopedia Britannica, Inc. 1952) (1776).
modern history.\textsuperscript{506} It had a profound impact upon economic and political policy in the United States. The prevailing view soon became that the market had failed to serve society's needs and failed badly.\textsuperscript{507} Only enhanced government involvement in the national economy could restore the stability required for economic growth.\textsuperscript{508} With 3.5 million trucks on the highway, and with thousands of factories shutting down, there was less freight to fill empty trucks.\textsuperscript{509} The economic condition of the industry spiraled downward.

Congress first attempted to restore stability by promulgating the National Industrial Recovery Act, allowing industries to establish "Codes of Fair Competition" to diminish the heated level of competition between them.\textsuperscript{510} Such codes were adopted by many industries, including motor carriers.\textsuperscript{511} But in 1935, the U.S. Supreme Court struck down the legislation on Constitutional grounds.\textsuperscript{512} Recall that it had earlier prohibited the States from regulating interstate motor carrier operations, so the net result was that such activities were once again unregulated.

In 1933, President Franklin Roosevelt appointed the distinguished ICC Commissioner, Joseph Eastman, to the new position of Federal Coordinator of Transportation, with the responsibility to recommend legislation "improving transportation conditions throughout the country."\textsuperscript{513} The National Association of Railroad and Utility Commissioners had sponsored a bill, the "Rayburn Bill," calling for economic regulation of the trucking industry.\textsuperscript{514} The position was quickly endorsed by Eastman and the Interstate Commerce Commission [ICC].\textsuperscript{515}

During the Great Depression, the motor carrier industry was plagued with an oversupply of transportation facilities.\textsuperscript{516} Intensive competition among truckers depressed freight rates excessively and caused hundreds of bankruptcies.\textsuperscript{517} Entry into the industry was easy. The ranks of the unemployed provided an endless pool of drivers; with a driver's license and a used truck they could haul goods for hire.\textsuperscript{518} Not knowing what their costs were, or victimized by shippers with greater market

\textsuperscript{506} Social & Economic Consequences, supra note 6, at 16.
\textsuperscript{507} Id.
\textsuperscript{508} Id.
\textsuperscript{509} Id.
\textsuperscript{510} Social & Economic Consequences, supra note 6, at 16.
\textsuperscript{511} Id.
\textsuperscript{513} Jones, supra note 280, at 499.
\textsuperscript{514} Id.
\textsuperscript{515} Id.
\textsuperscript{516} Id.
\textsuperscript{517} Genesis and Evolution, supra note 2, at 344.
\textsuperscript{518} Social & Economic Consequences, supra note 6, at 16-17.
power, they frequently took traffic at below-cost rates. They drove for gas money, or to cover their monthly payments on the truck, and kept rolling until needed repairs brought the truck to a halt. Soon they were bankrupt, while their truck was sold to yet another entrant, and the cycle repeated itself. All the while, efficient and productive trucking companies and railroads were also hemorrhaging dollars.

The Great Depression exacerbated the problems that had surfaced in transportation. In 1933, the Interstate Commerce Commission concluded that the ease of entry and the inadequate knowledge by unsophisticated entrepreneurs of their costs "condemned the industry to chronic instability and excessive competition." Specifically, the ICC found that rate instability resulted in "widespread and unjust discrimination between shippers. . . . The loss of much capital invested. . . . [a] tendency to break down wages and conditions of employment . . . [and an] [i]ncrease in the hazard of use of the highways." Two years later, the Federal Coordinator of Transportation, Joseph B. Eastman, expressed even greater concern over the economic chaos plaguing the industry, which was caused by unlimited entry and exacerbated by the Great Depression.

It was feared that a continuation of such unrestrained market forces might lead to a loss of service or higher prices for small shippers and small communities, leaving the surviving carriers to concentrate on high-revenue traffic. Thus, as Joseph Eastman said, "The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it." The destructive potential of excessive competition was everywhere apparent.

In his book, Economic Principles of Transportation, published in

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519. Jones, supra note 280, at 500.
522. Regulation and Deregulation of the Motor Carrier Industry, supra note 499, at 5 (citing Coordination of Motor Transp., 182 I.C.C. 263, 362-63 (1932)).
523. Id.
524. Id. (citing S. Doc. No. 73-152 (1934)).
525. Id. at 5-6.
526. Thom, supra note 520, at 48.
527. The Senate Report, which accompanied the new legislation, has this to say:

Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to such an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers or the carriers themselves.

1935, economist W. T. Jackman summarized the pre-regulatory problem posed by the ease of entry into trucking by unsophisticated entrepreneurs:

In most cases the truck owner has no knowledge of his costs and keeps inadequate, if any, accounts. He takes whatever business he can get at a rate which the shipper will pay, in the hope that in the aggregate the financial returns will be favourable. But the mortality in the motor truck field is very heavy.

... The shipper wants a small shipment taken ... and the motor carrier takes this, even if he has nothing else to make up a load, in the hope that by this service he may ingratiate himself with the shipper so as to get future traffic, and also anticipating that he may get something more along the route. On account of the many carriers, however, he may not get anything more, for there is not enough traffic to provide loads for all the operators. However, "hope springs eternal" and the operator continues to run his vehicle, even though he cannot get enough traffic to be reasonably remunerative.

... Then, too, a man can get a truck, especially a second-hand one, for a small cash payment, and may intend to make it pay the balance of the cost by its use. Consequently, it is better for him to get a small amount of business than none at all; and, if traffic is scarce, he will cut his rates very low rather than see his truck lying idle. When others see such men operating trucks upon the highway, the normal inference is that there must be some profit in it, and they likewise enter the service.

... As a result, the number of trucks in operation greatly exceeds the traffic needs, thus causing continuous, widespread, and discriminatory rate cutting, with other unwholesome competitive conditions, which have created serious problems for producers, the public at large, and the railways.

... Probably the greatest defect, is ... the endless rate-cutting by a mass of carriers, each of which wants as large a share as possible of the business. The truck operators bid against one another for the available traffic and many shippers take advantage of this condition to beat down the rate to the lowest point, thus securing a rate which is wholly unreasonable.528

One can dust off the history books of the 19th Century and find that many of these conditions existed in the railroad industry before it was regulated in 1887. For example, the unregulated railroads were beset with fierce price wars in competitive markets while exacting highly discriminatory monopoly rates in markets in which they enjoyed market power.529 Destructive competition produced economic anemia, which encouraged consolidations and monopolization.530 Federal economic regulation was

528. Jackman, supra note 497, at 842-44.
529. See Josephson, supra note 97, at 201-02.
530. Interstate Trucking, supra note 498, at 194.
able to protect the public against widespread pricing and service discrimination, and alleviate the dire financial straits in which the railroads found themselves.\textsuperscript{531} As stated by Alfred Kahn, "[t]he essence of regulation was that it was protectionist."\textsuperscript{532}

Congress was also motivated by the need to achieve equality in the regulatory scheme (railroads were regulated, while their trucking competitors were not), to protect wages and working conditions (which were severely depressed), to provide stable service and reasonable rates for shippers, and to ensure that carriers operated safely and were financially responsible.\textsuperscript{533}

Bus operations were also of significant concern. "Wildcatters" were cutting rates below compensatory levels and victimizing customers.\textsuperscript{534} Shippers were also subjected to the unscrupulous practices of trucking companies, who sometimes stole the freight entrusted to them.\textsuperscript{535}

The need for legislative relief was manifest. With the support of the ICC, most of the State Public Utility Commissions [PUCs], the truck, bus and rail industries, and many shippers, Congress promulgated the Motor Carrier Act of 1935, adding bus and trucking companies to the jurisdiction of the Interstate Commerce Commission.\textsuperscript{536} It gave the ICC authority over entry and rates of motor carriers of passengers and commodities.\textsuperscript{537} Safety was also a principal concern. The new legislation gave the ICC power to establish requirements for the qualifications of drivers, maximum hours of service, and standards of equipment.\textsuperscript{538}

As Representative Sadowski, a principal sponsor, noted, "the purpose of the bill is to provide for regulation that will foster and develop sound economic conditions in the industry . . . ."\textsuperscript{539} Economic stability and enhanced safety were its major purposes.

Under economic regulation, the industry grew and prospered. Motor carriers became responsible, reliable and safe enterprises.\textsuperscript{540} Competition became healthy with modest government oversight of rate levels and en-

\textsuperscript{531} Id.
\textsuperscript{532} Interview by Ben Wattenberg with Alfred Kahn, Professor Emeritus, Cornell University, New River Media, available at http://www.pbs.org/fmc/interviews/kahn.htm. According to economist George Stigler, according to one view "regulation is instituted primarily for the protection and benefit for the public at large or some large subclass of the public." George Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).
\textsuperscript{533} Genesis and Evolution, supra note 2, at 344.
\textsuperscript{534} Thoms, supra note 520, at 49.
\textsuperscript{535} Id.
\textsuperscript{537} Id. at 174 n.13.
\textsuperscript{538} Id.
\textsuperscript{539} Id. at 178.
\textsuperscript{540} Social & Economic Consequences, supra note 6, at 18.
try. Efficient and well-managed carriers earned a reasonable return on investment. The stability of the motor carrier industry provided a foundation for national economic recovery.

X. THE CIVIL AERONAUTICS BOARD

A. GENESIS OF THE CAB

In 1934, Congress established a Federal Aviation Commission [FAC] to study the entire field of aviation and report to Congress. The FAC submitted 102 recommendations on January 30, 1935. It contended that the orderly development of air transportation required two fundamental ingredients. First, in the interest of safety, certain minimum standards of equipment, operating methods, and personnel qualifications should be maintained. Second, "there should be a check in development of any irresponsible, unfair, or excessive competition such as has sometimes hampered the progress of other forms of transport."

When the Great Depression emerged, airlines were in their infancy. Congress was confronted with a national economic disaster, one that had hit the infrastructure industries particularly hard. Congress held hearings on the state of the airline industry, concluding that the economic condition of the airlines was unstable and that a continuation of its anemic condition could imperil its potential to satisfy national needs for growth and development. The legislative history of the Civil Aeronautics Act of 1938 is replete with concerns over excessive and destructive competition and the adverse effect that the economic crisis was having upon the industry and its ability to attract capital and maintain safe and adequate operations. Demand for air services had softened significantly during the Great Depression, and carriers were spiraling downward into a sea of red ink. Without governmental protection, bankruptcies proliferated.

Colonel Edgar S. Gorrell, president of the Air Transport Association, observed:

541. Id.
542. Id.
543. Paul Stephen Dempsey, The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry, 11 TRANS. L.J. 91, 102 (1979) [hereinafter Rise and Fall].
544. Id.
545. Id.
546. Rise and Fall, supra note 543, at 102.
547. Id.
548. Interstate Trucking, supra note 498, at 251.
549. Rise and Fall, supra note 543, at 96.
550. Id. at 97.
551. Interstate Trucking, supra note 498, at 251.
552. Id.
Since air transport was launched into meteoric growth, approximately $120,000,000 of private capital has been devoted to it, but, of that sum, there remains today scarcely 50 percent. Since the beginning of air transport, a hundred scheduled lines have traversed the airways in a struggle to build this newest avenue of the sky. But today scarcely more than a score of those companies remain. The industry has been reduced to the very rock bottom of its financial resources. . . .

There are only two ways whereby the necessary capital can be provided to this industry. One is the way toward which the governments of foreign lands increasingly tend—the way of mounting governmental subsidies, whereby public funds are poured without stint into a [sic] air transport. The other way is the traditional American way, a way which invites the confidence of the investing public by providing a basic economic charter that promises the hope of stability and security, and orderly and intelligent growth under watchful governmental supervision.553

Not only had private entrepreneurs invested considerable capital in the airline industry, but the federal and local governments had as well.554 That investment needed protection.555 In order to avoid the deleterious impact of competition described with pejorative adjectives such as “intensive,” “extreme,” “destructive,” “cutthroat,” “wasteful,” “excessive,” and “unrestrained,” and to avoid the economic “chaos” that had so plagued the rail and motor carrier industries, Congress established a regulatory structure similar to that which had been devised for an orderly development of those industries which had also been perceived to be “public utility” types of enterprises—the railroads and motor carriers.556

Transportation was also viewed as different from other industries, with necessity characteristics making it in the nature of a “public utility,” essential to the national economy and the national defense, therefore warranting protection of the “public interest” by government.557 ICC Chairman Joseph Eastman noted:

[I]mportant forms of public transportation must be regulated by the government. That has been accepted as a sound principle in this country and . . . in practically every country in the world. . . .

Transportation is of such vital importance to the public welfare and the business is so affected with a public interest that some measure of government regulation is . . . necessary.558

The FAC recommended an independent agency be vested with jurisdiction to regulate airline entry, rates, service, consolidations, and gov-

553. Rise and Fall, supra note 543, at 97 n.14.
554. Interstate Trucking, supra note 498, at 251.
555. Rise and Fall, supra note 543, at 102.
556. Id. at 95-96.
557. Id. at 96 n.11.
558. Id. at 100.
ernment subsidies. President Franklin Roosevelt preferred vesting these powers in the existing transportation regulatory agency, the ICC, which had been established in 1887 to regulate the railroads, and whose jurisdiction had been expanded in 1935 to regulate the motor carriers and busses. But the airline industry feared that the ICC would protect the interests of the railroads, which were the dominant passenger carriers of the day, and sought creation of their own aviation regulatory agency.

Three years after motor carriers were brought under the regulatory umbrella, Congress added airlines to the regulatory scheme, promulgating the Civil Aeronautics Act of 1938. In so doing, Congress created a new regulatory body to regulate this industry, the Civil Aeronautics Authority, folding into it the existing Bureau of Air Commerce and the Bureau of Air Mail. The following year, the Civil Aeronautics Authority was reorganized as the Civil Aeronautics Board. Like so many agencies created to engage in economic regulation, the CAB was modeled after its older sibling, the ICC.

The CAB was a relative small institution by Washington standards, comprised of five members (no more than a simple majority of whom could be members of a single political party) appointed by the President with the advice and consent of the Senate, for staggered terms of office. It was given jurisdiction over three major aspects of airline operations: (1) entry (where a carrier could fly), (2) rates (what it could charge), and (3) antitrust and business practices. Additional powers were conferred to the CAB over such things as subsidies, consumer protection, and, initially, the establishment and maintenance of airports and airway navigational aids. But there were many significant aspects of airline operations over which it had no jurisdiction, including scheduling capacity, frequency, type of aircraft, or level of service. The governing legislation encouraged the CAB to take several goals into account:

560. Id.
561. Id.
562. Social & Economic Consequences, supra note 6, at 18.
563. The agency was initially named the Civil Aeronautics Authority. Robert M. Hardaway, Airport Regulation, Law, and Public Policy 13 (1991) [hereinafter Airport Regulation].
564. See Social & Economic Consequences, supra note 6, at 18.
565. Id.
566. State of the Airline, supra note 420, at 139.
567. Id. Actually, airlines proposed rates in tariffs filed with the CAB, which reviewed them to determine whether they were just, reasonable, and nondiscriminatory.
568. Id.
569. Airport Regulation, supra note 563, at 13.
570. State of the Airline, supra note 420, at 139.
(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
(b) The regulation of air transportation in such manner as to . . . assure the highest degree of safety in, and foster sound economic conditions in, such transportation . . . ;
(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; [and]
(d) Competition to the extent necessary to assure the sound development of [the] air-transportation system . . . .

B. Regulation by the Civil Aeronautics Board

The CAB began by “grandfathering” in the existing airlines, or stated differently, issuing certificates of “public convenience and necessity” authorizing operations commensurate with the incumbents’ existing operations (most of which were coterminous with their outstanding air mail contracts). In its first full year of operation, the CAB issued certificates of public convenience and necessity to 16 carriers:

- American
- Braniff
- Chicago & Southern (subsequently merged with Delta)
- Colonial (subsequently merged with Eastern)
- Continental
- Delta
- Eastern
- Inland (subsequently merged with Eastern)
- Mid-Continental (subsequently merged with Braniff)
- National
- Northeast
- Northwest
- Penn Central (name changed to Capital; merged with United)
- Transcontinental and Western (name changed to Trans World Airlines)
- United
- Western

The federal regulatory regime, coupled with subsidies, brought sta-

571. Id. (citing Federal Aviation Act of 1958, Pub. L. No. 85-726, § 102, 72 Stat. 737 (1958)).
572. AIR TRANSPORTATION FOUNDATIONS, supra note 19, at 105.
573. James Callison, Airline Deregulation—A Hoax?, 41 J. AIR L. & COM. 747, 758 (1975). Many, of course, have since disappeared or merged with surviving airlines because of an inability to sustain profitability. Id.
574. State of the Airline, supra note 420, at 139-40.
bility to this important industry which had been so plagued by economic losses.\textsuperscript{575} But soon the United States entered World War II and much of her civilian fleet was dedicated to military service.\textsuperscript{576}

After the War, the CAB began to authorize new "local service airlines" to provide feeder service to the "trunks" (grandfathered long-haul carriers) at regional gateways.\textsuperscript{577} Eventually, these local service carriers would grow to become regional airlines, with CAB authorization of their entry into denser and longer routes beginning in the 1960s, encouraging their competition with the trunk airlines.\textsuperscript{578} By 1972, there were nine such carriers: Allegheny, Air West, Hughes, Frontier, North Central, Ozark, Piedmont, Texas International, and Southern.\textsuperscript{579}

The CAB also exempted several thousand air taxis (originally termed "small irregular carriers").\textsuperscript{580} Commuter airlines (which flew aircraft seating no more than nineteen passengers, later sixty passengers) were exempted.\textsuperscript{581} This expanded service geographically and added a new group of airlines to the system. Between 1939 and 1975, the Civil Aeronautics Board certificated some eighty-six new airlines to compete with the sixteen original carriers and exempted hundreds more from the certification requirements.\textsuperscript{582} In addition, several intrastate airlines existed exempt from CAB requirements, including Southwest, Pacific Southwest, Air California, and Air Florida.\textsuperscript{583}

\section{XI. Structure of Economic Regulation}

Economic regulation of transportation, whether by the Interstate Commerce Commission of the surface modes, or by the Civil Aeronautics Board of airlines, embraced three principal clusters of activities:

- \textit{Entry and Exit}—The agency prescribed what routes could be served, designating which among the applicants would be allowed to serve proposed city-pairs or territories.\textsuperscript{584} Once a carrier served a market, it ordinarily could not cease service unless it received governmental approval to exit.\textsuperscript{585} In granting either entry or exit,

\begin{itemize}
  \item \textsuperscript{575} \textit{Id.} at 140.
  \item \textsuperscript{576} \textit{Id.}
  \item \textsuperscript{577} \textit{Winds of Change, supra} note 428, at 26.
  \item \textsuperscript{578} \textit{State of the Airline, supra} note 420, at 140.
  \item \textsuperscript{579} \textit{Winds of Change, supra} note 428, at 27; \textit{Lowenfeld, supra} note 19, § 1.4, at I-17.
  \item \textsuperscript{580} \textit{Lowenfeld, supra} note 19, § 1.4, at I-17. By 1971, more than 3,500 air taxis served the United States. \textit{Id.}
  \item \textsuperscript{581} \textit{Winds of Change, supra} note 428, at 27.
  \item \textsuperscript{582} \textit{Callison, supra} note 573, at 758. These eighty-six include U.S. firms given scheduled or supplemental authority to enter domestic, territorial and international markets. \textit{Id.} at 758 n.36.
  \item \textsuperscript{583} \textit{State of the Airline, supra} note 420, at 141.
  \item \textsuperscript{584} \textit{See Rise and Fall, supra} note 543, at 93.
  \item \textsuperscript{585} \textit{See Market Failure, supra} note 468, at 7.
\end{itemize}
the agency would issue a certificate of "public convenience and necessity." Typically, service offerings were also regulated in a manner in which carriers were expected to provide adequate service in the territories described by their operating certificates. Finally, carrier safety, financial and managerial ability, and compliance disposition were regulated in certification proceedings in which the agency was required to find the applicant "fit, willing and able" to perform the proposed service.

- **Rates**—The agency would prescribe the appropriate price for transport services, determining whether rates in carrier filed tariffs were "just and reasonable" and nondiscriminatory. The agency protected the public against the extraction of monopoly rents, and pricing discrimination. Efficient and well-managed carriers were allowed the opportunity to earn a reasonable return on investment.

- **Antitrust**—The agency would review proposed carrier mergers, acquisitions and consolidations, interlocking relationships, and inter-carrier agreements, to determine whether they were in the public interest. Approval generally shielded these arrangements from the Sherman and Clayton antitrust acts.

Throughout the 20th Century, most state Public Utility Commissions regulated the intrastate aspects of these industries in essentially the same areas of oversight.

### XII. World War II

The Transportation Act of 1940 added a national statement of transportation policy to the Interstate Commerce Act. In it, Congress provided for "the impartial regulation of the modes of transportation" and in regulating those modes:

- To recognize and preserve the inherent advantage of each mode of transportation;
- To promote safe, adequate, economical, and efficient transportation;

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586. See *Rise and Fall*, supra note 543, at 93.
588. *Social & Economic Consequences*, supra note 6, at 226.
589. *Id.* at 223.
590. See *State of the Airline*, supra note 420, at 207.
592. See *Genesis & Evolution*, supra note 2, at 356.
593. See *Rise and Fall*, supra note 543, at 93.
• To encourage sound economic conditions in transportation, including sound economic conditions among carriers;
• To encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
• To cooperate with each State and the officials of each State on transportation;
• To encourage fair wages and working conditions in the transportation industry.\footnote{595}

The 1940 Act also extended the jurisdiction of the ICC to water carriers, and relieved the land-grant railroads of giving the federal government a discount on non-military traffic, provided they surrendered their claims to unpatented lands.\footnote{596} Freight forwarders were brought under the ICC's jurisdiction with the Transportation Act of 1942.\footnote{597}

World War II again saw the rail, motor carrier, and airline industries mobilized to supply the logistical needs of the nation. After the War, the nation had some seven million trucks and a healthy transportation industry.\footnote{598}

XIII. Antitrust Immunity for Collective Ratemaking

Rate bureaus, associations of two or more carriers, disseminate information regarding rates charged for transportation between various points and collectively consider the prices to be charged by participating rate bureau members.\footnote{599} Collective ratemaking dates back to early railroad development in the United States. Indeed, rate bureaus were formally established in the mid-19th Century and grew in size and number as the rail network expanded.\footnote{600} By the time of deregulation, there were ten

\footnotesize{595. 49 U.S.C. § 10101(a) (Supp. IV 1980).
596. \textit{Bryant}, supra note 110, at 270-71.
598. \textit{Social & Economic Consequences}, supra note 6, at 18.
599. James W. McFadden, Jr., \textit{Competitive Ratemaking}, 12 Transp. L. Inst. 71 (1979). The rate bureaus essentially have three functions:
1. \textit{To process} proposals for changes in rates and other tariff matters, including specified conditions under which the rates apply;
2. \textit{To publish} the rates and related matter in tariff form in accordance with rules and regulations issued by the ICC;
3. \textit{To justify and defend} the collective actions of the carriers before the ICC and the Federal courts, if necessary; and to serve the carriers by developing management information useful in the decision-making process as well as in defense of actions taken.
major regional motor carrier general commodity bureaus and many specialized bureaus for other sectors of the industry. Additionally, the National Classification Board allowed carriers to agree collectively regarding the specific classifications of particular commodities to which particular rates will apply.

As enacted in 1887, the Interstate Commerce Act was silent on the issue of collective ratemaking, although it specifically prohibited pooling of traffic or revenue. Only three years later, however, Congress passed the Sherman Act. Section 1 of the Sherman Act provides that contracts, combinations, and conspiracies in restraint of trade or commerce are illegal, whereas section 2 proscribes monopolies and attempts to monopolize, combine, or conspire to monopolize trade or commerce. Such violations constitute felonies punishable by a fine of not more than $100,000 for individuals and $1 million for corporations, imprisonment for not more than three years, or both.

Despite early indications from the Supreme Court that collective ratemaking activities by common carriers violated the Sherman Act for almost fifty years there were no significant federal efforts to constrain carrier rate bureaus or their collective ratemaking activities. The Department of Justice did not enforce the antitrust law with respect to rate bu-

601. Id. at 83. Motor carrier rate bureaus have been supported for many reasons. See Jesse J. Friedman, Collective Rainmaking by Motor Common Carrier: Economic and Public Policy Considerations, 10 Transp. L.J. 33, 40-41 (1978).


603. Dempsey & Thoms, supra note 22, at 208.


605. Id. § 1.

606. Id. § 2.

607. Id.

608. In United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897), the Court concluded that the collective ratemaking activities of rail carriers were within the prohibition of the Sherman Act. Id. at 312-13. The Court also noted that the Interstate Commerce Act did not authorize anticompetitive activities to which the Sherman Act was directed, the Court recognized:

[R]ailways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen in invitum is not the least . . . many of them are the donees of large tracts of public lands, and of gifts of money by municipal corporations . . . they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community,—the farmer, the artisan, the manufacturer, and the trader.

Id. at 332-33 (citation omitted). The following year in United States v. Joint-Traffic Ass'n, 171 U.S. 505, 574 (1898), the Court reaffirmed the conclusion that the collective price-fixing activities of common carriers violated the antitrust laws. The Court emphasized its position in United States v. Trenton Potteries Co., 273 U.S. 392 (1927), when it stated that "uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." Id. at 398.
reas primarily because the bureaus afforded their members the right of independent action. Furthermore, the Court adopted a rule of reason in interpreting antitrust violations, concluding that only unreasonable restraints of trade fell within the proscriptions of the Sherman Act.

The Clayton Act, enacted in 1914, contains several sections relevant to common carrier ratemaking, including prohibitions against discrimination in prices, services, or facilities as well as prohibitions against rebates and price fixing. The ICC was given jurisdiction to enforce section 7 of the Clayton Act, a prohibition against mergers that might substantially lessen competition, insofar as it involved rail mergers. Further, although Congress included a provision for private relief in section 16 of the Clayton Act, it denied private parties a remedy with respect to any matter subject to the jurisdiction of the ICC.

By the early 1940's the Department of Justice was no longer reticent in pursuing antitrust remedies against regulated common carriers. In 1942 the Department convened a grand jury, which was interrupted by the war, to investigate the issue. In 1944 the Department resumed its efforts and initiated litigation, contending that rate bureau activity violated the Sherman Act. That same year the State of Georgia brought an action against several northern railroads alleging rate discrimination and antitrust violations in price fixing.

In *Georgia v. Pennsylvania Railroad* the Supreme Court held that

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609. McFadden, supra note 599, at 72. The Sherman Act, however, was enforced against other combinations and conspiracies in restraint of trade. See, e.g., United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87, 102 (1913) (White Pass & Yukon Railroad violated the antitrust laws by refusing to do business with any steamship company except the Wharves Company).


611. McFadden, supra note 599, at 72. See United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).


613. *Id.* § 13.

614. *Id.* § 14.

615. *Id.* § 21(a).

616. *Id.* § 26. As late as 1933 the Court upheld the prohibition in section 16 of the Clayton Act against private suits. Cent. Transfer Co. v. Terminal R.R. Ass'n of St. Louis, 288 U.S. 469, 475 (1933). The Court viewed the purpose of section 16 as protecting interstate carriers from disruptions resulting from injunctions sought by parties other than the government. *Id.*

617. McFadden, supra note 599, at 78.

618. *Id.*


a conspiracy "to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed" stated a cause of action under the antitrust laws. Justice Douglas, writing for the majority, was particularly disturbed by the allegation that the activities of the rate bureau had led to regional price discrimination.

Although a bill intended to shield collective ratemaking activities from such litigation had been introduced in the U.S. Senate before the Court's decision in *Georgia v. Pennsylvania Railroad*, the decision—to a large extent—prompted Congress to promulgate the Reed-Bulwinkle Act over President Truman's veto. The Act shielded ICC-approved rate bureau from the application of the antitrust laws. The ICC thus be-

621. Id. at 462.
622. Id.
623. Id. at 450-51. Justice Douglas specifically addressed the illegality of such activity:

[W]e find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making. . . . The Act was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates.

*Id.* at 458-59. Because the relief sought was an injunction against the rate-fixing combination and conspiracy among the carriers, and not against the continuance of any tariff, the case was not within the jurisdiction of the ICC. *Id.* at 455. The Court suggested that had Georgia sought an injunction against the continuation of the tariff, or to have a tariff provision cancelled, relief would have been barred under section 16 of the Clayton Act. *Id.* Section 16 of the Clayton Act, therefore, did not bar Georgia from bringing the action. *Id.* Nevertheless, the dissenters argued that section 16 barred suits concerning "any matters" within the jurisdiction of the Commission. *Id.* at 484. They believed the purpose of that provision was to prevent the maintenance of individual suits that would lead to the breakdown of the Commission's nationwide rate structure.

*Id.*


625. 49 U.S.C. § 10706. See Marnell *v.* United Parcel Serv. of Am., Inc., 260 F. Supp. 391, 399 (N.D. Cal. 1966). This legislation passed with the unanimous support of the shippers and carriers who testified before Congress, see H.R. Rep. No. 80-1100, at 2-3 (1947). The Senate report described the purposes of the Act as "harmonizing and reconciling the policy of the antitrust laws, as applicable to common carriers, with the national transportation policy in such a manner as to protect the public interest." S. Rep. No. 80-44, at 3 (1947). The Senate reaffirmed these purposes almost three decades later in its report on the Railroad Revitalization Reform Act of 1976 (4R Act). The report noted that "cooperation and collective action by and among common carriers is necessary if the national transportation (policy) is to be effectuated and the public is to receive the kind of transportation service to which it is entitled and if the rates are to be reasonable and nondiscriminatory." Atchison, Topeka & Santa Fe Ry. Co. v. United States, 597 F.2d 593, 594 n.2 (7th Cir. 1979) (citing S. Rep. No. 94-499, at 14 (1975)). See Motor Carriers Traffic Ass'n v. United States, 559 F.2d 1251, 1253 (4th Cir. 1977) (history of collective ratemaking for transportation carriers has been long and controversial); Atchison, Topeka & Santa Fe Ry. Co. v. Aircoach Transp. Ass'n, 253 F.2d 877, 882-83 (D.C. Cir. 1958) (ICC controls rates to avoid inconsistency with congressional policy). Congress recognized that it was not breaking new ground in establishing such antitrust immunity, but rather was extending immunity beyond those areas that
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came the sole arbiter of whether collective ratemaking agreements served the public interest. If such agreements satisfied the Commission, they were free from judicial challenge.

XIV. Constitutionality of Economic Regulation

Economic regulation of an industry such as transportation potentially can be circumscribed by the U.S. Constitution in three ways:

- Federal or state regulation may conceivably violate the 5th or 14th Amendment prohibition, respectively, against deprivation of life, liberty or property without “due process” of law;

- State regulation can sometimes be inconsistent with Article 1 section 8 of the Constitution—the Commerce Clause—which vests in Congress the power to regulate interstate and foreign commerce; or

- Federal or state discrimination limiting the economic activities of non-residents may potentially run afoul of the Privileges and Immunities Clause of Article IV and the 14th Amendment of the Constitution.

A. State Police Powers

Opposite these three potential prohibitions against state action lies the inherent police power of the states. As one state court described it, “[t]he police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union, and is not a grant derived from or under any written Constitution.” Another court said:

The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and, under our system of government, is vested in the legislatures of the several

it had already designated as within the exclusive jurisdiction of the ICC. See S. REP. No. 80-44, at 3 (1947).

626. Dempsey & Thoms, supra note 22, at 209.
627. Id.
628. See Ex Parte Tindall, 229 P. 125, 129 (Okla. 1924).
630. Ex Parte Tindall, 229 P. at 128.
631. Id. at 130.

While the term “police power” has never been specifically defined nor its boundaries definitely fixed, yet it may be correctly said to be an essential attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.

Id.
states of the Union; the only limit to its exercise being that the statute shall not conflict with any provision of the state constitution, or with the federal constitution, or laws made under its delegated powers.\textsuperscript{632}

The U.S. Supreme Court described the police power as, "the power of the state, . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."\textsuperscript{633}

B. THE DUE PROCESS CLAUSE

The question of whether a state may regulate business practices consistent with the due process obligations of the 14th Amendment early on was addressed by the U.S. Supreme Court in \textit{Munn v. Illinois},\textsuperscript{634} in which the court upheld state regulation of grain elevator rates.\textsuperscript{635} \textit{Munn} addressed the fundamental issue of whether private property was under the exclusive control of its owners, or whether certain enterprises were of such character as to become quasi-public institutions in which the public has an interest.\textsuperscript{636} The case involved the question of whether Illinois could properly regulate the rates of grain storage elevators within the state.\textsuperscript{637}

In \textit{Munn}, managers and lessees of grain storage elevators in Chicago were prosecuted for ignoring state licensing and rate setting statutes.\textsuperscript{638} The defendants argued that the state had no right to infringe on their economic freedom through such regulations and that the state law was inconsistent with the commerce clause of the U.S. Constitution.\textsuperscript{639} The Supreme Court stated that private property used in a manner affecting the general community becomes "clothed with a public interest" and subject to control "by the public for the common good."\textsuperscript{640} Hence, a state

\begin{itemize}
  \item\textsuperscript{632} Bagg v. Wilmington, Columbia & Augusta Railroad Co., 14 S.E. 79, 80 (N.C. 1891).
  \item\textsuperscript{633} So long as the state legislation is not in conflict with any law passed by congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce, and to expedite, instead of hindering, the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the constitution . . . .
  \item\textsuperscript{634} Id.
  \item\textsuperscript{635} Barbier v. Connolly, 113 U.S. 27, 31 (1884).
  \item\textsuperscript{636} 94 U.S. 113 (1876).
  \item\textsuperscript{637} Id. at 135.
  \item\textsuperscript{638} Id. at 135-36.
  \item\textsuperscript{639} Id. at 135.
  \item\textsuperscript{640} Id. at 123. Although \textit{Munn} did not directly involve rail carriers, subsequent decisions applied this principle to railroads. See, e.g., Winona & St. P.R.R. v. Blake, 94 U.S. 180 (1876) (railroad rates subject to regulation by Minnesota legislature); Peik v. Chi. & Nw. Ry., 94 U.S. 164 (1876) (railroad rates subject to ceilings prescribed by Wisconsin legislature); Chi., B. & Q.
\end{itemize}
government could regulate private property dedicated to a public use. The Court also noted that the regulation of the grain elevators was of domestic concern, and therefore found that the state was free to exercise its governmental powers over such a concern, "even though in so doing it [might] indirectly operate upon commerce outside its immediate jurisdiction." Thus, the state’s power to regulate would be restricted only when Congress itself enacted legislation dealing with interstate rate regulations. Said the court:

[I]t has . . . been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, [and] of common carriers . . . and, in so doing, fix a maximum charge to be made for services rendered. . . .

. . . .

. . .[W]hen private property is "affected with a public interest, it ceases to be juris privati only." . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.

. . . .

. . .[C]ommon carriers stand] in the very "gateway of commerce," and take a toll from all who pass. Their business most certainly "tends to a common charge, and is becoming a thing of public interest and use."642

Hence, a state government may regulate private property dedicated to a public use. Other courts have noted that, "[i]t is laid down as a fundamental principle that persons . . . engaged in occupations in which the public have an interest or use may be regulated by statute."643

 Lochner v. New York.644 a decision that struck down maximum hours regulations for bakers, inaugurated an aberrational period from 1905 until 1934, during which the Supreme Court invalidated approximately 200 economic regulations, principally under the due process clause of the 14th Amendment.645 Under the doctrine of substantive or economic due process, the Supreme Court reviewed the Constitutionality of state and federal legislation against claims that it arbitrarily, unnecessarily, or unwiseably interfered with the right of the individual to liberty of person and free-

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R.R. v. Iowa, 94 U.S. 155 (1876) (railroads engage in public employment and affect public interest; rates subject to legislative control).

641. Munn, 94 U.S. at 135.

642. Id. at 113, 126, 132. Although Munn dealt with grain elevators, the principle announced therein was subsequently extended to railroads. See Chi., Burlington & Quincy R.R. Co., 94 U.S. 155 (1876); Ruggles v. Illinois, 108 U.S. 526 (1883); Ill. Cent. R. Co. v. Illinois, 108 U.S. 541 (1883).

643. Ex Parte Tindall, 229 P. at 131.

644. 198 U.S. 45 (1905).

dom of contract. Justice Oliver Wendall Holmes dissented, saying

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. . . .

. . . .

. . . But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen of the state or of laissez faire.647

During the Lochner era, the Court upheld regulation if it subjectively believed the regulation truly necessary to protect the health, safety or morals of the public, but struck down the regulation if the Court perceived it designed to readjust the market in favor of one party over another.648 By depriving the state legislatures of the freedom to adopt means suited to local needs, Lochner became “one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse.”649

Ultimately, the Court would conclude that Holmes had it right. The Lochner era came to an abrupt end with the Supreme Court’s decision in Nebbia v. New York.650 In Nebbia, the Court upheld a law, which set minimum prices for milk in order to ensure that producers received a reasonable return for their labor and investment, as a prophylactic against milk contamination.651 Referring to Munn’s insistence that property can be regulated only if “affected with a public interest,” the Court observed that this phrase “mean[s] no more than an industry, for adequate reason, is subject to control for the public good.”652 The Court reasoned:

Under our form of government the use of property and making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.

. . . .

Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government.

. . . .

647.  Id. at 75.
651.  See id. at 517.
652.  Id. at 536.
The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit government regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. . . .

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases.

So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. . . . If the legislative policy be to curb unrestrained and harmful competition . . . it does not lie with the courts to determine that the rule is unwise . . . Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.653

Since the end of the Lochner era, courts have been extremely deferential to legislative decisions in areas of economic regulation. Where neither a fundamental right nor a suspect class is involved, the legislative decision withstands constitutional assault where the “classification is based on rational distinctions and bears a direct and real relation to the legitimate object or purpose of the legislation.”654 Thus, the Supreme Court has held, “if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.”655

Many states began to regulate railroads in the 19th Century and motor carriers in the 1920s. In the early 20th Century, such economic regulation was challenged in many states on due process grounds. But virtually every state appellate court upheld the economic regulation of common carriers as a legitimate exercise of the police powers by the state legislature.656

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653. Id. at 523, 524-25, 527-28, 537-38.


656. The following cases illustrate the overwhelming trend. For example, the California Supreme Court upheld the power of the legislature to enact economic regulation of common carriers broadly:

[Common carriers are subject to regulation by the state because the fact that they are engaged in public service causes their business to be affected with public interests, and thus justifies the regulation thereof by public authority. . . .] It is universally conceded
The U.S. Supreme Court has upheld economic regulation where "any state of facts either known or which could reasonably be assumed affords support for it."\textsuperscript{657} The Court has resorted to wholly hypothetical facts to uphold the legislation, concluding that the "day is gone when this Court uses the Due Process Clause . . . . . to strike down state laws, that the state does have the power and the right to completely prohibit the use of its public highways by a common carrier. . . . [This conclusion] is based upon the power of the state to prohibit the private use of its highways or in its discretion to grant the privilege of such private use upon such conditions as it may see fit to impose. By the statute here in question the state says in effect to the citizen: "I will grant you the special privilege of using my highways for your private business upon condition that you in turn submit yourself and your property to such regulations as I impose. I will not compel you to submit to these regulations, but, if you are not willing to do so, I shall not grant you this special privilege."

Holmes v. R.R. Comm'n of Cal., 242 P. 486, 488 (Cal. 1925). Similarly, the Oklahoma Supreme Court upheld the constitutionality of its state's economic regulation of motor carriers:

It is within the police power of the state to grant a privilege to render any character of public service, which will materially benefit the public, and equally within such power to restrict or deny such privilege, whenever it would result in detriment to the public.

. . . .

[T]he advent of throngs of automobiles and motor vehicles has necessitated the building of paved roads at a burdensome expense to the public. The public, as such, is therefore vested with a property right in such highways, and it is folly to argue that the public has no voice as to who shall appropriate its highways to their own free use and then charge the public a profit for such use.

\textit{Ex Parte Tindall}, 229 P. at 132-33.

The principle applied in the regulation of the use of the highways for private enterprise rests upon public convenience and public necessity, a principle recognized and in a large degree applied by the national government in placing the control and regulation of the railroads of the country in the hands of the Interstate Commerce Commission.

. . . .

[We have repeatedly held that] the state was within the rightful exercise of its police power in the regulation of the use of the highways in sustaining the constitutionality of the law here again challenged, and denied that it in any wise was in contravention of either the Fourteenth Amendment to the federal Constitution as in abridgment of any right or privilege of the citizen, or in deprivation of property without due process of law, or in denial to the citizen of the equal protection of the law. . . . .


The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control. . . .

\textit{Id.} at 555 (citing Barbier v. Connolly, 113 U.S. 27 (1884)).

The Virginia Supreme Court agreed with the notion that states may lawfully prescribe the use of its highways, saying,

notwithstanding the constitutional guarantees . . . no private individual, firm, or corporation, has any right to use the public highways in the prosecution of the business of a common carrier for hire without the consent of the state; that such consent may be altogether withheld, or granted as a privilege upon such terms and conditions as the state may prescribe in the exercise of its police power; and that in such exercise of the police power there may be limitations and conditions, and thereby discriminations made between those to whom the privilege is granted and denied, provided the discriminations are based on some reasonable classification, which is not purely arbitrary, does not disclose personal favoritism or prejudice, and is fair and just.

Gruber v. Commonwealth, 125 S.E. 427, 429 (Va. 1924).

regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”\footnote{Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955). The Nevada Supreme Court has echoed this holding, concluding “[i]t is well-settled under rational basis scrutiny that the reviewing court may hypothesize the legislative purpose behind legislative action.” Boulder City v. Cinnamon Hills Assocs., 871 P.2d 320, 327 (Nev. 1994).} Under the rational basis test, courts have upheld economic regulation where any facts actually exist, or would convincingly justify the classification if they did exist, or have been urged in the classification’s defense by those who either promulgated it or argued for its support.\footnote{See Briscoe v. Prince George’s County Health Dep’t, 593 A.2d 1109, 1113-15 (Md. 1991); Dep’t of Transp., Motor Vehicle Admin. v. Armacost, 474 A.2d 191, 201 (Md. 1984). Similarly, the U.S. Supreme Court has concluded: [I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. 

[The Lochner doctrine] has long since been discarded. . . . .}

Applying the rational basis test, the Supreme Court has held that a statutory classification is to be struck down only if the means chosen by the legislature are “wholly irrelevant to the achievement of the State’s objective.”\footnote{Ferguson v. Skrupa, 372 U.S. 726, 729-31 (1963).} Where a state has decided to regulate a business, the judicial focus is on the application of the regulation—whether the regulation is reasonable and its decision not arbitrary or capricious.\footnote{McGowan v. Maryland, 366 U.S. 420, 425 (1961).} “The exercise by a state of its police powers will not be interfered with by the Courts unless such exercise is of an arbitrary nature having no reasonable relation to the execution of lawful purposes.”\footnote{See Bluefield Tel. Co. v. Pub. Serv. Comm’n, 135 S.E. 833 (W.Va. 1926); Long Motor Lines, Inc. v. S.C. Pub. Serv. Comm’n, 103 S.E.2d 762 (S.C. 1958).} Where a regulation is subject to rational basis review, most states accord it a “strong presumption of constitutionality and a reasonable doubt as to its constitutionality is sufficient to sustain it.”\footnote{Long Motor Lines, 103 S.E.2d at 765 (citing Jones v. City of Portland, 245 U.S. 217, 224 (1917)). See also In re Dakota Transp., Inc. of Sioux Falls, 291 N.W. 589, 593 (S.D. 1940) (“[T]he reviewing court cannot substitute its judgment for that of the Commission and disturb its finding where there is any substantial basis in the evidence for the finding or where the order of the Commission is not unreasonable or arbitrary.”).}

\footnote{Briscoe, 593 A.2d at 1113.}
C. The Equal Protection Clause

Historically, the states have held certain inherent power to regulate activities designed to improve the health, safety, and welfare of their inhabitants. The need to regulate interstate commerce was one of the principal reasons the nation came together to replace the Articles of Confederation with the Constitution. Article I Section 8 of the United States Constitution vests in Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Several 19th Century decisions of the U.S. Supreme Court were instrumental in defining Congress' power over interstate commerce, and gave impetus to federal economic regulation.

*Gibbons v. Ogden* addressed the question of whether the state of New York could grant a monopoly franchise to operators of steamboats in New York waters, and prohibit others from entering the trade. Aaron Ogden, who had been assigned the monopoly franchise (earlier granted to Robert Livingston and Robert Fulton) argued that the Constitutional phrase "commerce" referred only to the purchase and sale of goods, and did not comprehend navigation. The court disagreed, concluding that commerce included "every species of commercial intercourse" between states, or between the United States and foreign nations, including navigation, and that such commerce was subject to the exclusive regulatory province of Congress.

In *Cooley v Board of Port Wardens*, the Supreme Court upheld a Pennsylvania law requiring that all ships entering or leaving the port of Philadelphia use a local pilot or pay a fine to support retired pilots and

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664. See Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829). As the U.S. Supreme Court has noted,

[While a] state may provide for the security of the lives, limbs, health, and comfort of persons and ... property ... yet a subject-matter which has been confided exclusively to congress [sic] ... is not within the ... police power of the state, unless placed there by congressional action. ... The power to regulate commerce among the states is [conferred by the Constitution to Congress] but, if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances, until congress [sic] otherwise directs. ... The power to pass laws in respect to internal commerce ... belongs to the class of powers pertaining to locality ... and [to] the welfare of society, originally ... belonging to, and upon the adoption of the constitution [sic] reserved by, the states, except so far as falling within the scope of a power confined to the general government.

Leisy v. Hardin, 135 U.S. 100, 108 (1890) (citations omitted).


666. U.S. CONST. art. I, § 8, cl. 3.

667. 22 U.S. 1 (1824).

668. Id. at 8.

669. Id. at 9-11.

670. Id. at 3.

671. 53 U.S. 299 (1851).
their dependents.\textsuperscript{672} The Court recognized that some areas require diversity of local regulation, rather than a unified national system, to meet as here, for example, "the local necessities of navigation."\textsuperscript{673}

As noted above, in \textit{Munn v. Illinois}, the U. S. Supreme Court observed that the critical test was whether the "private property is 'affected with a public interest,' . . . When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . . ."\textsuperscript{674} Under \textit{Munn}, once business was determined to be "'clothed with a public interest,' the legislature was free to impose whatever rate regulations seemed to it desirable."\textsuperscript{675}

But the real catalyst for federal legislation establishing economic regulation over common carriers was the case of \textit{Wabash, St. Louis and Pacific Railway v. Illinois}, issued in 1886.\textsuperscript{676} In \textit{Wabash}, the U.S. Supreme Court struck down an Illinois law regulating interstate rail rates as unconstitutional.\textsuperscript{677} Although numerous bills involving rail regulation were introduced into Congress prior and subsequent to \textit{Munn},\textsuperscript{678} Congress did not feel compelled to act until the Court decided \textit{Wabash}.\textsuperscript{679}

In \textit{Wabash} the Court held unconstitutional an Illinois law that prohibited a rail carrier from charging the same or higher rate for transporting the same commodity over a lesser distance than over a greater distance in the same direction.\textsuperscript{680} The Supreme Court of Illinois had conceded that the statute might affect interstate commerce, but ruled that the state legislature was free to act until Congress exercised its power to regulate interstate rail traffic.\textsuperscript{681} In overturning the lower court's ruling, the U.S. Supreme Court recognized that Congress had not enacted legislation in this area, yet focused on the oppressive conditions that would be imposed on carriers if the individual states regulated interstate transportation within their borders.\textsuperscript{682} The Court emphasized that the framers of the Constitution had vested in Congress the sole authority to regulate interstate commerce.\textsuperscript{683}

\textsuperscript{672} Id. at 311-12.
\textsuperscript{673} Id. at 319.
\textsuperscript{674} Munn, 94 U.S. at 126.
\textsuperscript{675} David Boies & Paul R. Verkuil, \textit{Public Control of Business} 103 (1977).
\textsuperscript{676} 118 U.S. 557 (1886).
\textsuperscript{677} Id. at 577.
\textsuperscript{678} Between 1868 and 1886, Congress considered approximately 150 bills and resolutions. Harris, supra note 161, at 11.
\textsuperscript{679} Genesis and Evolution, supra note 2, at 340.
\textsuperscript{680} 118 U.S. at 577.
\textsuperscript{681} Id. at 566.
\textsuperscript{682} Id. at 572.
\textsuperscript{683} Id. at 572-73.
Wabash appeared to express a conclusion contrary to that stated in Munn. The Court was expressly holding that even when Congress had not exercised its jurisdiction under the Commerce Clause of the Constitution, the state could not regulate businesses operating in interstate or foreign commerce.\textsuperscript{684} Under the dormant Commerce Clause, the Court held that even in the absence of federal regulation, the states could not regulate the interstate rates of the railroads: "the right of continuous transportation from one end of the country to the other, is essential, in modern times, to that freedom of commerce, from the restraints which the state might choose to impose upon it. . ."\textsuperscript{685} Because nearly three fourths of the commodities shipped at the time were transported in interstate commerce, and were rendered immune from state control by the Wabash decision,\textsuperscript{686} it became a powerful catalyst for federal legislation, leading to the creation of the Interstate Commerce Commission in 1887.\textsuperscript{687} Initially, Congress conferred upon the ICC the power to ensure that rail rates were "just and reasonable" and in 1920 added a requirement that no new rail lines should be built unless the applicant satisfied the "public convenience and necessity."\textsuperscript{688}

By the mid-1920s, thirty-three states regulated motor freight transport, and forty-three regulated bus companies.\textsuperscript{689} But the U.S. Supreme Court in 1925 handed down a decision that stripped the states of their ability to regulate interstate movements.\textsuperscript{690}

Under the notion that congressional power was plenary and exclusive, the dormant Commerce Clause continued to preempt state regulation of interstate commerce for some time.\textsuperscript{691} At issue in Buck v. Kuykendall was the denial by the state of Washington of a motor common carrier's application for operating authority between Seattle, Washington, and Portland, Oregon, on the ground that the routes were adequately served by four connecting auto stage lines and frequent steam

\textsuperscript{684.} Id. at 577.
\textsuperscript{685.} Id. at 572-73.
\textsuperscript{686.} Harris, supra note 161, at 15.
\textsuperscript{687.} Genesis & Evolution, supra note 2, at 341.
\textsuperscript{688.} Dempsey & Thoms, supra note 22, at 11, 13.
\textsuperscript{689.} Social & Economic Consequences, supra note 6, at 16.
\textsuperscript{690.} See Buck v. Kuykendall, 267 U.S. 307 (1925).
\textsuperscript{691.} The Supreme Court held:

Whenever . . . a particular power of the general government is one which must necessarily be exercised by it, and congress remains silent. . . . [T]he only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as . . . the transportation . . . of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled.

Leisy, 135 U.S. at 109-10.
rail service. Although the Supreme Court recognized that a state legitimately may constrain interstate transportation in order to promote safety or conservation of the highways, the Court concluded that states could not obstruct the entry of motor carriers into interstate commerce for purposes of prohibiting competition. Prior to this decision, forty states had denied the use of their highways to motor carriers operating without certificates of public convenience and necessity. The ruling in Buck prohibited state controls on entry for motor carriers engaged in interstate commerce.

In 1935, Congress subjected motor carriers to economic regulation, including the requirement that rates be "just and reasonable," that entry be consistent with the "public convenience and necessity," and that applicants be "fit, willing, and able" to lawfully and financially perform the proposed operations, though exempting intrastate activities from federal regulation. Other interstate modes of transport (including airlines, water carriers and freight forwarders) were also subjected to the federal "just and reasonable," "public convenience and necessity," and "fitness, willingness, and ability" requirements between 1938 and 1940. The states continued to regulate their intrastate activities.

The purposes of such legislation was, inter alia, to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation . . . to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . and to encourage fair wages and equitable working conditions.

Such economic regulation was challenged on due process grounds. Applying the rational basis test, these statutes were almost universally upheld.

692. Buck, 267 U.S. at 313.
693. Id. at 315.
694. Webb, supra note 488, at 92.
699. The rationale for economic regulation of common carriers was expressed by one court as follows:

The primary consideration for requiring motor carriers to secure . . . certificates [of public convenience and necessity] is 'to promote good service by excluding unnecessary competing carriers.' . . . The practical necessity for regulation of this and similar business affected with a public interest . . . 'is to promote public interest by preventing
waste. . . . The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one's choice should be denied. . . . It is true that certified carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service by the avoidance of useless duplication with its consequent impairment of service and increase of rates charged the public. The public interest is paramount.

In re Dakota Transp., Inc. of Sioux Falls 291 N.W. at 593 (citations omitted).

In South Carolina Highway Dep't v. Barnwell Bros. Inc., 303 U.S. 177, 185 (1938), the Supreme Court addressed state size and length restrictions on trucks. It found that "there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states. . . ." The court held that "[f]ew subjects of state regulation are so peculiarly of local concern as is the use of state highways." Id. at 187. "[T]he Court has been most reluctant to invalidate under the Commerce Clause 'state regulation in the field of safety where the propriety of local regulation has long been recognized.' In no field has this deference to state regulation been greater than that of highway safety regulation." Raymond Motor Transp. v. Rice, 434 U.S. 429, 443 (1978) (citations omitted). In determining whether a state regulation is Constitutional, the test is "whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." Barnwell Bros., 303 U.S. at 190. In resolving the latter inquiry, "courts do not sit as Legislatures [to weigh] all the conflicting interests. . . .[F]airly debatable questions as to [a regulation's] reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body. . . ." Id. at 190-91. The court must assess, "upon the whole record whether it is possible to say that the legislative choice is without rational basis." Id. at 191-92.

The Supreme Court held that state limitations on train lengths were an unreasonable burden on interstate commerce, the Court nevertheless observed:

[T]he states [have] wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

S. Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945)

The Court noted that in Barnwell "The fact that [the regulation of highways] affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuses." Id. at 783.

The Supreme Court struck down truck length regulations on grounds that they failed to advance safety concerns and were therefore an unreasonable burden on interstate commerce, the Court nevertheless acknowledged that a

State's power to regulate commerce is never greater than in matters traditionally of local concern. For example, regulations that touch upon safety—especially highway safety—are those that 'the Court has been most reluctant to invalidate.' Indeed 'if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.' Those who would challenge such bona fide safety regulations must overcome a 'strong presumption of validity.'"


This deference to state action in regulating the highways stems from a recognition that the states shoulder primary responsibility for their construction, maintenance and policing, and that highway conditions can vary from state to state. See Bibb, 359 U.S. at 523-24. "The power of a
The U.S. Supreme Court has also upheld state regulation designed to favor one group of competitors (in this case, independent gasoline retailers over refiner owned retail outlets) over another against commerce clause challenges that the state interfered "with the natural functioning of the interstate market." The Court held, "We cannot . . . accept [the argument] that the Commerce Clause protects the particular structure or methods of operation in a retail market."  

As can be seen, with the gradual recognition of the legitimacy of state police powers, and deferential "rational basis" analysis, the Supreme Court began to retreat from dormant commerce clause preemption. Instead, today the court focused on:

- Whether Congress explicitly preempted the states;
- Whether the scheme of federal regulation is so pervasive as to leave no room for the states to supplement it; or
- Whether the object to be obtained by the federal law and the character of the obligations imposed by it reveal the same purpose as the state regulation.

D. THE PRIVILEGES & IMMUNITIES CLAUSE

Related to the Commerce Clause, and its protection of a national economic system, is the Privileges and Immunities Clause—"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Both Article IV and the 14th Amendment guarantee the citizens protection against state deprivation of their "privi-

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state to regulate the use of motor carriers on its highways has been . . . broadly sustained" by the U.S. Supreme Court. See Kane v. New Jersey, 242 U.S. 160, 167 (1914). State regulation of the highways has long been recognized as "an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens . . . ." Hendrick v. Maryland, 235 U.S. 610, 622 (1915).

In a case challenging the power of a Missouri regulatory agency to revoke a motor carrier's certificate of public convenience and necessity, the U.S. Supreme Court held, "The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question." Eichholz v. Pub. Serv. Comm'n of Mo., 306 U.S. 268, 273 (1939). In a case challenging California's economic regulation of motor carriers, the Supreme Court held that "we no longer limit the states to their 'traditional' police powers in considering a statute's validity under the Fourteenth Amendment. . . . [C]onsistent with the many cases giving the State's interest in its own highways more weight than the national interest against 'burdening' commerce, we have held that the highway regulation involved in this case is allowable State action before Congress has acted." California v. Zook, 336 U.S. 725, 734-35 (1949) (citations omitted).

701. Id.
705. U.S. CONST. art. IV, § 2, cl. 1.
leges and immunities” of national citizenship by either the federal or state government, respectively.\footnote{707}

In an early decision, a court noted that the clause protects interests which are, \ldots fundamental; which belong, of right, to the citizens of all free governments, \ldots [These may be] comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may prescribe for the general good of the whole.\footnote{708}

It is the last phrase— "such restraints as the government may prescribe for the general good of the whole"—which allows states to impose regulation upon its citizens, so long as it not provide preferential treatment to in-state, as opposed to out-of-state, citizens, unless there is a "substantial reason" for the difference in treatment.\footnote{709}

Application of the Privileges and Immunities Clause initially involves an inquiry into whether the discrimination against out-of-state residents is sufficiently “fundamental” to promotion of interstate harmony to fall within its purview.\footnote{710} The Supreme Court has held that “the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.”\footnote{711} For example, under the Privileges and Immunities Clause, the Supreme Court has struck down a state fee of $2,500 for non-resident commercial fisherman when residents were charged only $25.\footnote{712} The Court has also held that limiting bar admission to local residents violated the clause.\footnote{713} But again, there must be discrimination against non-residents to trigger the clause.\footnote{714}

Further, the Supreme Court has noted that the “privileges and immunities clause is not an absolute.”\footnote{715} The Court has held, “[e]very inquiry under the Privileges and Immunities Clause ‘must \ldots be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.”\footnote{716}

\footnote{706} “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV, § 1.
\footnote{707} U.S. Const. art. IV, § 2, cl. 1; amend. XIV, § 1.
\footnote{708} Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).
\footnote{710} Corfield, 6 F. Cas. at 552.
\footnote{712} Toomer v. Witsell, 334 U.S. 385, 389 (1948).
\footnote{713} Piper, 470 U.S. at 288.
\footnote{714} Id. at 284.
\footnote{715} Toomer, 334 U.S. at 396.
\footnote{716} Camden, 465 U.S. at 222-23.
XV. A MATURE TRANSPORTATION NETWORK

A. DEVELOPMENT OF THE MODERN AIRLINE SYSTEM

In the 1950s, new generations of turboprop, then jet, aircraft spurred efficiency, productivity and speed, thereby reducing costs to consumers, while enhancing the margin of safety.\textsuperscript{717} Military research and development was a catalyst for technological development, for the two World Wars had revealed the proficiency of aircraft at delivering bombs and soldiers.\textsuperscript{718} Each generation of aircraft was superior to its predecessor in its abilities and its economics.\textsuperscript{719}

In the mid-1950s, a series of accidents brought to surface an underlying need for significant safety enhancement in aviation. In 1956, a Trans World Airlines Constellation collided with a United Airlines’ DC-7 over the Grand Canyon.\textsuperscript{720} In early 1957, a Douglas Aircraft company-owned DC-7 collided with an Air Force F-89 over Sunland, California.\textsuperscript{721} The DC-7 crashed into a junior high school, killing three and injuring seventy others.\textsuperscript{722} In 1958, a third significant accident involved the collision of a United Airlines’ DC-7 and an Air Force F-100 near Las Vegas, Nevada.\textsuperscript{723} Congress responded by promulgating the Federal Aviation Act of 1958,\textsuperscript{724} and creating of the Federal Aviation Agency, later to become the Federal Aviation Administration [FAA] under the Department of Transportation Act of 1966.\textsuperscript{725}

The Civil Aeronautics Act was recodified and restructured by the Federal Aviation Act of 1958,\textsuperscript{726} which spun off the navigation and safety responsibilities of the CAB into the newly created FAA, originally a subsidiary of the U.S. Department of Commerce, and with the creation of DOT in 1966, a subsidiary of it.\textsuperscript{727} The accident investigation and recommendation responsibilities of the CAB were transferred to the FAA initially, and were re-delegated to the National Transportation Safety Board, made independent in 1974.\textsuperscript{728}

Under economic regulation, America enjoyed the world's finest system of air transport, one envied by every other nation.\textsuperscript{729} The time and

\textsuperscript{717} State of the Airline, supra note 420, at 141.
\textsuperscript{718} Id.
\textsuperscript{719} Id.
\textsuperscript{721} AIR COMMERCE, supra note 57, at 61.
\textsuperscript{722} Id.
\textsuperscript{723} Id.
\textsuperscript{726} Federal Aviation Act of 1958, § 101.
\textsuperscript{727} AIRPORT REGULATION, supra note 563, at 19.
\textsuperscript{728} Id. at 19, 21.
\textsuperscript{729} State of the Airline, supra note 420, at 141.
space continuum, and indeed the planet, was shrinking. Service and safety were improving. When adjusted for inflation, prices were falling.

But by the early 1970s, the industry was in a state of crisis. Excessive investment in wide-bodied aircraft (B-747s, DC-10s and L-1011s) had created excessive fleet capacity. That was coupled with an economic recession that suppressed passenger demand, as well as a fuel crisis stimulated by the Arab Oil Embargo of 1973. These events converged to create severe financial turbulence for the industry. The CAB believed that only a stiff dose of regulatory medicine would save the industry from disintegration.

In the early 1970s, the CAB took a number of steps to shore up the economic health of the airlines and avert catastrophe. First, the CAB tacitly began a “route moratorium,” during which no new route application was granted. Second, the CAB allowed a number of major carriers to enter into capacity limitation agreements whereby the number of aircraft flown in major markets was reduced. Third, the major international carriers, Pan Am and TWA, were allowed to swap routes, with TWA exiting the transpacific market, and Pan Am ceding southern Europe. Finally, the CAB allowed carriers to pass on their increased fuel costs to passengers in their ticket prices.

Thus, the pendulum was pulled sharply toward greater governmental involvement in the airline market. This would be perceived as an anti-consumer movement and opposed by the antitrusters. Sir Isaac Newton noted that for every action, there is an equal and opposite reaction. The pendulum of public policy, having been pulled so sharply toward the regulatory end of the spectrum, would soon come roaring back in the other direction.

B. The Emergence of Interstate Highways

Several major separated highways were built before World War II. Notable among them were the Pennsylvania Turnpike, and Robert

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730. Id.
731. Id.
732. Rise and Fall, supra note 543, at 117.
733. Id.
734. Id.
735. Id. at 118.
736. Id. at 115.
737. Id. at 117-18.
739. See Erosion of the Regulatory Process, supra note 11, at 306 n.11.
740. State of the Airline, supra note 420, at 142.
Moses' network of parkways on Long Island. During the 1950s, it was President Dwight Eisenhower who saw the need to build a national system of interstate highways to link the country for, inter alia, purposes of national defense. In 1919, as a young Army officer, Eisenhower had participated in a transcontinental caravan of cars and trucks from the White House in Washington, D.C., to Union Square in San Francisco. Averaging only five miles an hour, the trip took 62 days. As the leader of Allied Forces in Europe, General Eisenhower became acquainted with Adolf Hitler's great public works project of the Third Reich—the Autobahn—highways that facilitated the expeditious movement of the Wehrmacht to invade nearly every nation that bordered Germany, a transport network relatively impervious to air attack.

As President, Eisenhower began a seventeen year construction period of the U.S. Interstate Highway program. The Federal Highway Act of 1956 launched the largest public works project ever undertaken—the 43,000-mile National System of Interstate and Defense Highways. The companion Highway Revenue Act of 1956 created the Highway Trust Fund comprised of revenue from user charges (sales of gasoline, diesel, tires, and a weight tax for heavy trucks and buses)—the first time Congress had earmarked taxes for specific purposes. As the Interstate Highways grew, the market share of freight transported by trucking companies enjoyed a corresponding growth.

C. THE INTERSTATE COMMERCE COMMISSION AT ITS ZENITH

Until the demise of the northeast railroads in the 1970s, the Interstate Commerce Commission—the nation's first independent agency—was regarded as a model of good government. At the agency's fiftieth anniversary, the Interstate Commerce Commission was praised for its "vigor, spirit, and statesmanlike administration." A Congressman said of the ICC, "Without desire to aggrandize itself, but actuated by what it believed to be in the public interest, free from partisanship or politics and

741. Lewis, supra note 38, at 53.
742. Id. at 88-89.
743. Id. at 89.
744. Id. at 90.
745. Id.
746. Air Commerce, supra note 57, at 164.
747. Id.
748. Id. (citing Mark Solof, History of Metropolitan Planning Organizations – Part II 6 (1998)).
749. Market Failure, supra note 468, at 14.
resisting pressure from whatever source, it does its work."\textsuperscript{751}

At the Commission's seventy-fifth anniversary, Supreme Court Justice Felix Frankfurter eloquently summarized the agency's strengths:

[T]he Commission illustrates, throughout its life, unblemished character. . . .character meaning a fastidious regard for responsibility, a complete divvorce between public and private interest, and all other concomitants of a true and worthy conception of public duty. Alas, that cannot be said of all public bodies, but it can be said that this Commission throughout its seventy-five years has had a career of unblemished character. Secondly, . . . we are here to celebrate as striking a manifestation of competence in government as any I know of in the three branches of government.

. . . .

Thirdly, it is a necessary condition, before a Commission can effectively act, that it be independent.

. . . .

It has maintained not merely formal independence, but actual independence of word and deed, and has been a laboratory demonstration of how economic problems may be worked out by trial and error. Finally, by virtue of all these considerations, the Commission has been a pacemaker, a model, for the subsequent commissions which, in turn, have been created in response to economic and social demands in their fields of activity.\textsuperscript{752}

D. RACIAL DESEGREGATION

Federal efforts to arrest discrimination in the provision of transportation services began in the 19th Century. As early as 1887, the ICC had found that racial discrimination by railroads violated the anti-discrimination provisions of the Interstate Commerce Act.\textsuperscript{753} The ICC attempted to devise a policy requiring all passengers to be treated equally, though served separately. Thus was born the concept of "separate but equal" endorsed by the U.S. Supreme Court in 1896 in \textit{Plessy v. Ferguson}.\textsuperscript{754} When blatant acts of discrimination and inequality arose, the ICC took action to assure substantial equality in treatment of passengers.\textsuperscript{755} As the motorbus industry grew, it followed a similar pattern.\textsuperscript{756} Many states passed "Jim Crow" laws mandating racially separate but equal facilities.\textsuperscript{757} Yet it be


\textsuperscript{752} Felix Frankfurter, \textit{Of Law and Life & Other Things That Matter} 236-37, 239, 244 (Philip B. Kurland ed., 1965). Justice Frankfurter also prophetically foresaw the things which could cause the demise of the ICC. \textit{Id.} at 245.


\textsuperscript{754} 163 U.S. 537, 548 (1896).

\textsuperscript{755} See Mitchell v. United States, 313 U.S. 80, 91 (1941).


\textsuperscript{757} See e.g., Corp. Comm'n v. Transp. Comm. of the N.C. Comm'n on Interracial Cooperation, 151 S.E. 648, 651 (N.C. 1930).
came increasingly apparent that separate transportation accommodations inherently could not be equal.\textsuperscript{758}

Relying on the U.S. Supreme Court decision in \textit{Brown v. Board of Education},\textsuperscript{759} which struck down the "separate but equal" doctrine in public education,\textsuperscript{760} the ICC held that providing separate but equal transportation facilities could be countenanced no longer.\textsuperscript{761} In 1961, the ICC promulgated regulations prohibiting carriers under its jurisdiction from separating their facilities so as to segregate patrons on the basis of race or color.\textsuperscript{762}

The U.S. Supreme Court affirmed and expanded these actions, concluding that it was an "undue or unreasonable prejudice" under the Interstate Commerce Act for a railroad to divide its dining car by curtains, partitions, and signs in order to segregate passengers according to race.\textsuperscript{763} Further, the Court extended the Act's discriminatory prohibition not only

\textsuperscript{758} In 1955, Rosa Parks took a seat in the "colored" section of a Montgomery City Lines bus in Montgomery, Alabama. The bus driver subsequently demanded that Ms. Parks and several other Negro patrons on the row surrender their seats to a recently boarded white patron. Ms. Parks refused, and was arrested. The arrest and trial of Rosa Parks led the African American community of Montgomery to stage a 382-day boycott of the bus company beginning December 5, 1955. The boycott was led by Martin Luther King, Jr. Since 70\% of the bus patrons were black, and most of them honored the boycott, the impact was profound. To deal with the losses, the bus company cut service, then distanced itself from its earlier embrace of segregation. In April 1956, the bus company president declared "We would be tickled if the [Alabama and Montgomery Jim Crow discrimination laws] were changed. We are simply trying to do a transportation job, no matter what the color of the rider." It then directed its drivers to discontinue enforcing segregation, a move met by fierce opposition by the Montgomery city and Alabama state governments. Ultimately, the federal courts invalidated the city ordinance and state statute compelling segregation of intrastate passenger transportation. See Randall Kennedy, \textit{Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott}, 98 \textit{Yale L.J.} 999, 1016-24, 1044 (1989); Catherine A. Barnes, \textit{Journey from Jim Crow: The Desegregation of Southern Transit} 108-13 (1983). See also Michael J. Klarman, \textit{Brown, Racial Change, and the Civil Rights Movement}, 80 \textit{Va. L. Rev.} 7 (1994); Richard A. Epstein, \textit{The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake}, 108 \textit{Harv. L. Rev.} 1085 (1995); Michael J. Klarman, \textit{Brown v. Board of Education: Facts and Political Correctness}, 80 \textit{Va. L. Rev.} 185 (1994).

\textsuperscript{759} 347 U.S. 483 (1954).

\textsuperscript{760} \textit{Id.} at 494.

\textsuperscript{761} NAACP v. St. Louis-S.F. Ry. Co., 297 I.C.C. 335, 347 (1955). Examining this history, the Commission concluded:

[I]n the early days of regulation this Commission went to great lengths in attempting, within the confines of the prevailing social and legal philosophy, to end racial discrimination in services, and facilities in the transportation industry. We are proud of the fact that our policy, once plainly enunciated and firmly established, has resulted in prompt and effective compliance by all phases of the industry. Subsequently, over the years complaints alleging racial discrimination in services and facilities have been virtually nonexistent.


\textsuperscript{762} United States v. City of Shreveport, 210 F. Supp. 708, 709 (D. La. 1962).

\textsuperscript{763} Henderson v. United States, 339 U.S. 816, 818 (1950).
to interstate bus common carriers, but to unaffiliated restaurants at which interstate buses stopped. The "separate but equal" doctrine came crashing down in public and private transportation venues. State and local laws mandating segregation in transportation facilities were struck down, and injunctions were issued prohibiting their enforcement. Transit and municipal and intercity companies were ordered to desegregate on Constitutional equal protection and commerce clause grounds. Both public and private facilities were desegregated under the Civil Rights Act of 1964.

E. INTERMODALISM AND TRANSPORTATION PLANNING

As the Interstate Highway System neared completion in the early 1990s, the focus in transportation priorities shifted away from new highway construction. Congressional attention turned instead to alternatives to the single-occupancy vehicle [SOV] to satiate the public's desire for mobility. Concerns over congestion, sprawl, and pollution, all of which defied political jurisdictional boundaries, emerged as political issues. Congress also recognized that the separate and isolated modal networks were not linked together well. Seamless connectivity between modes might well allow Americans to enjoy the inherent advantages of all modes. With a conclusion that the Interstate Highway System would not be further expanded, transportation development would transition to a more regional or local focus.

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766. See e.g., City of Shreveport, 210 F. Supp. at 710-11.
768. Title VI of the Civil Rights Act of 1964 became the legislative authority for DOT regulations prohibiting discrimination. DOT regulations provide that "No person or group of persons shall be discriminated against with regard to the routing, scheduling or quality of service ... on the basis of race, color, or national origin. Frequency of service, age and quality of vehicles assigned to routes, quality of stations serving different routes, and location of routes may not be determined on the basis of race, color or national origin." Sandra Van De Walle, The Impact of Civil Rights Legislation Under Title VI and Related Laws on Transit Decision Making, TCRP LEGAL RESEARCH DIGEST 17 (1997). Affirmative action, and elimination of disparate impact discrimination are also required by the regulations. Id.
770. Id.
771. Id.
772. Id.
773. Metropolitan Planning, supra note 769, at 89.
government to the States, the regions and the local jurisdictions, would empower institutions closer to the people.\footnote{Id.}

Enactment of the Intermodal Surface Transportation Efficiency Act of 1991 [ISTEA] reflected these concerns.\footnote{Id.} Significantly, it was the first highway bill in the nation's history to have expunged the word "highway" from its title.\footnote{Metropolitan Planning, supra note 769, at 89.} This legislation provided enhanced flexibility for state and local governments to redirect highway funds to accommodate other modes and modal connections.\footnote{Id.} It significantly enhanced the role of Metropolitan Planning Organizations [MPOs] in transportation planning by giving the larger MPOs\footnote{Id.} principal authority to select projects for certain "pots" of federal money in consultation with the State, while requiring the State to cooperate with the MPO on allocating federal money in those "pots" over which the State had primary jurisdiction, and the local transit provider to do the same.\footnote{Id. at 89-90. The MPO has responsibility for allocating STP-metro, and in some states, Congestion Management and Air Quality [CMAQ], and enhancement (e.g., bicycle, pedestrian) funds in "consultation" with the State DOT; the State has jurisdiction over the National Highway System, Bridge, and Interstate Maintenance funds, which it selects in "cooperation" with the MPO. CMAQ fund allocation is the responsibility of the State DOT. Project selection should occur cooperatively between the MPO and the State DOT. Id. at 90.} The MPO was required to engage in formalized planning of two types—a twenty-year long-range plan [LRP], and a short-term Transportation Improvement Program [TIP], covering transportation projects to be implemented over at least a three-year period.\footnote{Id.} The TIP must be updated at least every two years.\footnote{Id.}

Two important structural changes were added by ISTE A. First, it required MPOs to include several new types of stakeholders (including transportation providers and the public) in the planning process.\footnote{Id. at 90.} Second, it required an expansion of the boundaries of the planning area to include space for the next 20 years of expected urban growth, and to en-

\begin{itemize}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Metropolitan Planning, supra note 769, at 89.}
\item \footnote{Id.}
\item \footnote{Id. at 87 n.1.}
\item \footnote{Id. at 89-90. The MPO has responsibility for allocating STP-metro, and in some states, Congestion Management and Air Quality [CMAQ], and enhancement (e.g., bicycle, pedestrian) funds in “consultation” with the State DOT; the State has jurisdiction over the National Highway System, Bridge, and Interstate Maintenance funds, which it selects in “cooperation” with the MPO. CMAQ fund allocation is the responsibility of the State DOT. Project selection should occur cooperatively between the MPO and the State DOT. Id. at 90.}
\item \footnote{Id. The LRP and the TIP must be financially constrained (meaning they should only include projects for which full funding can reasonably be expected). They must also include public participation in their preparation, including participation by citizens and transportation providers. In air quality non-attainment areas, the LRP and TIP must conform with the State’s air quality implementation plan. The TIP incorporates all federally-supported projects in the metropolitan area, including those for which the State has primary responsibility. Once the TIP is approved by the MPO, it must be approved by the state Governor, and incorporated into the State Transportation Improvement Program [STIP]. Paul Stephen Dempsey, The Law of Intermodal Transportation: What It Was, What It Is, What It Should Be, 27 Transp. L.J. 367, 397 n.165 (2000) [hereinafter Intermodal Transportation].}
\item \footnote{Metropolitan Planning, supra note 769, at 90.}
\item \footnote{Intermodal Transportation, supra note 780, at 397 n.163.}
\end{itemize}
compass the area in the air quality region, if the region experiences air quality problems.\textsuperscript{783}

The Transportation Equity Act for the 21st Century of 1998 [TEA-21] further enhanced the importance of the MPOs by increasing the amount of federal money over which they have primary responsibility.\textsuperscript{784} TEA-21 also simplified the criteria to be considered in TIP preparation, reducing ISTEA's 15 factors, to just seven: (1) economic vitality; (2) safety and security; (3) accessibility and mobility; (4) the environment, energy conservation, and quality of life; (5) integration and connectivity between transport modes; (6) efficiency; and (7) preservation of the existing system.\textsuperscript{785} It also strengthened the linkage between land use and transportation planning.\textsuperscript{786}

Thus, beginning in 1991, MPOs were transformed from advisory institutions, into institutions that actually have direct influence over the distribution of money—from voluntary planning organizations, to organizations that have their fingers on some of the purse strings.\textsuperscript{787} In ISTEA, and expanded in TEA-21, MPOs were empowered with the ability to directly designate projects for the federal dollars under their primary jurisdiction.\textsuperscript{788} Though the “pots” of federal money over which the MPOs exercise jurisdiction are small relative to those controlled by the states, it is clear that such empowerment over money caused many local jurisdictions to take the MPO process and their participation therein far more seriously than they had theretofore.\textsuperscript{789}

All this gave transportation planning a new perspective. The interstate and inter-regional “top-down” highway planning process of the federal and state governments, respectively, and the localized “bottom-up” street and road planning process of the cities and counties, would now be coupled with a third regional process which was a bit of both, expanded beyond highways, streets and roads into a comprehensive transportation planning process that took into account all modes, as well as a number of related social, economic, and environmental issues.\textsuperscript{790}

XVI. THE U.S. DEPARTMENT OF TRANSPORTATION

Discussions about creating a federal Department of Transportation

\textsuperscript{783} Id.
\textsuperscript{784} Metropolitan Planning, supra note 769, at 90.
\textsuperscript{785} Intermodal Transportation, supra note 780, at 394.
\textsuperscript{786} See id. at 393.
\textsuperscript{787} Metropolitan Planning, supra note 769, at 90.
\textsuperscript{788} Intermodal Transportation, supra note 780, at 392.
\textsuperscript{789} Metropolitan Planning, supra note 769, at 90.
\textsuperscript{790} Id.
began as early as 1940. In the 1960s, the Landis Report cited the need for an office to coordinate and develop a national transportation policy, which led President Kennedy to ask his aides to offer suggestions concerning transport policy. Legislation passed by Kennedy in 1961 provided the first federal program of urban transit support. With Kennedy's assassination, the task force on transportation advised President Lyndon Johnson that no focal point for transportation existed in the Executive Branch, and that therefore a cabinet-level Department of Transportation should be created. The bill creating the DOT was signed on October 15, 1966, and the agency was established on April 1, 1967, with Alan S. Boyd as the first Secretary of Transportation.

The DOT was essentially created from an amalgamation of several pre-existing governmental agencies. From the Interstate Commerce Commission was transferred the Bureau of Railroad Safety (which formed a part of the Federal Railroad Administration [FRA]), and the Bureau of Vehicle Safety (which formed a part of the Federal Highway Administration [FHA]). The independent Federal Aviation Agency (which had earlier been split off from the Civil Aeronautics Board) became DOT's Federal Aviation Administration. The Commerce Department gave DOT the St. Lawrence Seaway Development Corporation, surrendered to the FHA the National Highway Safety Bureau, and gave the FRA the Office of Groundspeed Transportation. The Treasury Department gave it the Coast Guard. The Department of Interior gave the FRA the Alaska Railroad. A new quasi-independent agency, the National Transportation Safety Board, was also

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792. See generally CHAIRMAN OF SENATE COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (James M. Landis) (Comm. Print 1960).
793. Whitnah, supra note 791, at 10.
796. Id. at 11.
797. Id.
798. Id.
799. Whitnah, supra note 791, at 11.
800. Id.
801. Id.
802. Id.
803. Whitnah, supra note 791, at 11.
804. Id.
housed within DOT.805

At the dawn of the 21st Century, the U.S. Department of Transportation consisted of the following agencies:
- Bureau of Transportation Statistics
- Coast Guard
- Federal Aviation Administration
- Federal Highway Administration
- Federal Railroad Administration
- Federal Transit Administration
- Maritime Administration
- National Highway Traffic Safety Administration
- Office of the Secretary of Transportation
- Research and Special Programs Administration
- Saint Lawrence Seaway Development Corporation
- Transportation Administrative Service Center806

XVII. ENVIRONMENTAL & SAFETY REGULATION

Recognizing that the automobile was choking American cities, Congress first required the promulgation of automobile emission standards with the Motor Vehicle Air Pollution Control Act of 1965.807 The National Environmental Policy Act of 1969808 established comprehensive requirements for the preparation of environmental assessments and environmental impact statements for major federal actions that significantly affect the quality of the human environment, and required federal agencies to use all practicable means to assure Americans healthy and safe surroundings.809 The following year, the Environmental Protection Agency was created.810 It set emission standards for automobiles and banned lead in gasoline.811

In 1970, Congress also enacted the first of what would be several major environmental bills that would require transportation planning focused on arresting the problem of automobile air pollution.812 Environmental issues became a strong focus of transportation planning.813 Today, in non-attainment areas, air quality issues have become among the domi-

805. Id.
806. AIR COMMERCE, supra note 57, at 171.
809. Id.
810. See Mintz, supra note 807, at 165.
811. See id. at 164.
812. See id. at 163-64.
813. See id. at 184.
nient concerns of metropolitan transportation planning. A long-term commitment of federal support to transit was also begun that year and expanded in 1973 with both an increase in the federal share for transit construction as well as opening the Highway Trust Fund for transit, high-occupancy-vehicle [HOV] lanes, bus shelters and parking facilities. The Clean Air Act Amendments of 1977 fortified automobile emission strategies requiring better metropolitan planning to reduce emissions.

XVIII. SECURITY REGULATION

The United States has promulgated comprehensive legislation dealing with aerial terrorism and hijacking. Until 1961, there were no domestic United States laws specifically addressing the 20th Century crime of aircraft hijacking. After defining the crime in that year, the United States discovered that the solution to this new type of terrorism was not to be realized by the imposition of penalties.

The Antihijacking Act of 1974 imposed a penalty of 20 years imprisonment or death if a passenger is killed during a hijacking and authorized the President to suspend the landing rights of any nation that harbors hijackers. The Aircraft Sabotage Act of 1984 imposed penalties of up to $100,000 or twenty years imprisonment, or both, for hijacking, damage, destruction, or disabling an aircraft or air navigation facility. The Security and Development Act of 1985 authorized expenditures for enhancing security at foreign airports. The Act required the DOT Secretary to assess security at foreign airports and notify the

814. See id. at 191-92.
815. AIR COMMERCE, supra note 57, at 172.
816. Mintz, supra note 807, at 175.
817. On September 5, 1961, Congress amended section 902 of the Federal Aviation Act of 1958 to impose criminal penalties upon persons convicted of hijacking. See Pub. L. No. 87-197, § 1, 75 Stat. 466 (1961). Prior to 1961, hijacking an aircraft in the U.S. was usually held to be kidnapping or obstruction of commerce. See Bearden v. United States, 304 F.2d 532, 534-35 (5th Cir. 1962), vacated on other grounds, 372 U.S. 252 (1963), obstructing commerce aff'd, 320 F.2d 99, 104 (5th Cir. 1963), cert. denied, 376 U.S. 922 (1964). However, the Federal Aviation Act of 1958 § 103(a), had authorized the Federal Aviation Administration to issue such rules and regulations as necessary to provide for national security and safety in air transportation. It also prohibited the transportation of explosives or other dangerous articles in violation of FAA rules.
818. Paul Stephen Dempsey, Aviation Security: The Role of Law in the War Against Terrorism, 41 COLUM. J. TRANSNAT'L L. 649, 695-96 (2003) [hereinafter Aviation Security]. During the decade following the 1961 hijacking legislation, over one hundred twenty-five attempts were made to hijack U.S. aircraft. Id. at 696 n.230.
821. Id. § 40106(b).
public if a foreign airport fails to correct a security breach.  

The Aviation Security Improvement Act of 1990 established a Director of Intelligence and Security in the Office of the DOT Secretary, and an Assistant FAA Administrator for Civil Aviation Security, and gave the FAA responsibility to oversee security at major airports. FAA security managers were directed to supervise security arrangements. The FAA carried out periodic threat and vulnerability assessments and published guidelines on such topics as airport design and construction, screening of passengers and property, public notification of threats, security personnel investigation and training, cargo and mail screening, research and development activities, security standards at foreign airports, and international security negotiations.


The tragic events of September 11, 2001, revealed that the airport and airway security umbrella was far more porous than theretofore widely recognized. Within weeks of that catastrophe, Congress passed two pieces of legislation—the Air Transportation Safety and System Stabilization Act and the Aviation and Transportation Security Act [ATSA].

Recognizing that a competitive airline industry is essential to national commerce and that the three-day shut down of the industry had caused it significant economic harm, Congress promulgated the Air Transportation Safety & System Stabilization Act. That legislation provided the U.S. airline industry with $15 billion in relief ($5 billion imme-

827. Id. §§ 44931-32.
829. Id.
830. Id. at 712 (citing Yilu Zhao, A Nervous State Looks to Limit Licenses, N.Y. TIMES, Apr. 6, 2003, at 14C).
831. Id.
832. Id.
833. Id.
It capped the liability of the two airlines involved—United Airlines and American Airlines—at their insurance limits and eliminated punitive damages. To deal with the human tragedy, it established a no-fault September 11th Victims’ Compensation Fund directed by a Special Master who would determine compensation, as reduced by payments from collateral sources. Injured parties or estates that choose to forego the Compensation Fund could bring suit in the federal district court for the southern district of New York. If they decide to litigate they will have to establish traditional common law negligence and proximate cause, both of which may be formidable barriers to recovery.

In order to restore the public’s confidence in flying, three days before Thanksgiving, 2001, Congress passed the Aviation & Transportation Security Act, which included ninety-one new measures, fifty-five of which had designated implementation deadlines. The most significant of ATSA’s mandates included federalizing the airport security function (which had theretofore been performed by the airlines, under FAA regulations), imposing minimum job qualifications upon security employees, imposing background checks on airport employees, requiring impregnable cockpit doors. Having concluded that the FAA had been historically slow to implement its wishes, Congress created a new multimodal Transportation Security Administration [TSA] within the U.S. Department of Transportation.

Fourteen months after the terrorist attacks on the World Trade Center and Pentagon, Congress passed the Homeland Security Act of


838. Air Transportation Safety and System Stabilization Act § 408. Subsequent legislation also capped liability for the aircraft manufacturers, the Port Authority, the airports and the owners of the World Trade Center. Aviation Security, supra note 818, at 713 n.311.


840. See id. §§ 405, 408(3).

841. Aviation Security, supra note 818, at 713.


843. Aviation Security, supra note 818, at 714. TSA may establish a pilot program at up to five airports to have a private company perform the screening function. Id. at 714 n.315.

844. Id. at 714. In order to ensure intragovernmental communication and cooperation, a Security Oversight Board (comprised of the cabinet secretaries or their designees from the National Security Council, the Office of Homeland Security, the Central Intelligence Agency, and the Secretaries of Defense and Treasury, and Chaired by the Secretary of Transportation) was established to oversee TSA. Id. at 714 n.316.

845. Id. at 714.
2002 [HSA],\textsuperscript{846} which established a new cabinet-level executive branch agency, the Department of Homeland Security [DHS],\textsuperscript{847} headed by a Secretary of Homeland Security.\textsuperscript{848} It was the most sweeping overhaul of federal agencies since President Harry Truman asked Congress to create the Central Intelligence Agency and unify the military branches under the Department of Defense in 1947.\textsuperscript{849}

In creating DHS, Congress consolidated twenty-two existing agencies that had combined budgets of approximately $40 billion and employed some 170,000 workers.\textsuperscript{850} Several of the agencies historically have been involved in airport and airline passenger and cargo review, including the Customs Service, Immigration and Naturalization Service, Animal and Plant Inspection Service of the Department of Agriculture, and the nascent Transportation Security Administration.\textsuperscript{851}

XIX. Railroad Regulatory Reform

The growth of interstate highways led to a shift of traffic from rail to the motor carrier industry. That, coupled with the move of industry out of the northeastern "rust belt" into the southeastern and western "sun belt," led to a decline of railroad profitability.\textsuperscript{852} Conrail was formed in 1973 with the merger of the bankrupt Penn Central (formerly the Pennsylvania and New York Central railroads) and five smaller railroads.\textsuperscript{853} The bankruptcy of the Penn Central, the Rock Island, and, later, the Milwaukee, made Congress fearful that it would end up owning and operating the nation's rail system.\textsuperscript{854} As it had earlier bailed out railroad passenger service with the creation of Amtrak (and would later bail out the airline industry after the catastrophic impact of September 11th), Congress stepped in to bail out Conrail with a massive infusion of federal capital.\textsuperscript{855}

By the mid-1970s, the political mood in Washington had shifted


\textsuperscript{848} Several Under Secretaries are created as well, including an Under Secretary for Border and Transportation Security. \textit{Id.} § 103.

\textsuperscript{849} Mimi Hall, \textit{Deal Set on Homeland Department Post- Election Compromise Another Victory for Bush}, \textit{USA Today}, Nov. 13, 2002, at 1.

\textsuperscript{850} \textit{Id.}

\textsuperscript{851} \textit{Aviation Security, supra} note 818, at 718.

\textsuperscript{852} Paul Stephen Dempsey, \textit{Antitrust Law and Policy in Transportation: Monopoly is the Name of the Game}, 21 GA. L. REV. 505, 565 (1987) [hereinafter \textit{Antitrust Law}].

\textsuperscript{853} \textit{Id.} at 547.


against economic regulation. Regulatory failure took much of the blame for the anemic state of the rail industry.\(^{856}\) In order to restore the health of the rail industry, Congress passed the Regional Rail Reorganization [3R] Act of 1973,\(^{857}\) the Rail Road Revitalization and Reform [4R] Act of 1976,\(^{858}\) and the Staggers Rail Act of 1980.\(^{859}\) Collectively, the legislation limited the ICC’s jurisdiction over rail ratemaking, circumscribing its ability to regulate rates unless the traffic in question was “market dominant.”\(^{860}\) Rail exit from unprofitable markets also became easier.\(^{861}\) The legislation also partially preempted State jurisdiction over rail rates and operations.\(^{862}\)

The Staggers Rail Act had reduced the ICC’s jurisdiction over rates significantly by providing that the Commission had jurisdiction over them only if the traffic was “market dominant” and the proposed rates were more than 170% of variable costs.\(^{863}\) Railroads were free to raise or lower rates at will unless, with respect to an increase, the carrier had market dominance over the traffic, or with respect to a decrease, the rates would be lowered below a “reasonable minimum” (if the rate was above the variable costs of providing the service, it was conclusively presumed to contribute to “going concern value” and therefore above a reasonable minimum).\(^{864}\) Staggers also freed railroads to enter into contracts with shippers covering rates and levels of service.\(^{865}\)

With the appointment of pro-deregulation commissioners, the ICC defined “market dominance” in such a way that it was rarely deemed to exist.\(^{866}\) According to the commission’s interpretation, it did not exist if there was intermodal competition, intramodal competition, product competition, or geographic competition.\(^{867}\) Subsequently, the commission took the position that carriers should be generally free to raise rates until either they become “revenue adequate” or “stand alone costs” were


\(^{860}\) Genesis and Evolution, supra note 2, at 351.


\(^{863}\) Intermodal Transportation, supra note 780, at 387-88.

\(^{864}\) Id. at 388.

\(^{865}\) Id.

\(^{866}\) Id.

XX. THE POLITICS OF DEREGULATION

It should be noted that regulatory reform and deregulation are not the same thing, although the political movement for the former probably served as a catalyst for the latter. But regulatory reform, as originally conceived, consisted of a modest political agenda for improvement of the regulatory process. There were valid criticisms of government, which demanded relief.

It was argued that government had become bloated, fat, and lazy. Agencies were headed by political cronies rather than professional managers. Lethargy snuffed out innovation. The agencies had allegedly been “captured” by the industries they regulated. Ralph Nader, a consumer advocate, assembled a team of law students who wrote a scathing 1,200-page critique of the ICC, The Interstate Commerce Omission, which described the agency as an Elephant’s graveyard of political hacks, who enjoyed “deferred bribes” in the form of a “revolving door” of subsequent employment in the industry they regulated.

The time and resources expended in complying with the regulatory labyrinth were perceived as excessive, as were the costs to taxpayers. Following the enactment of the Administrative Procedure Act of 1946, the ICC was the largest employer of administrative law judges.

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868. Potomac Elec. Power Co. v. Interstate Commerce Comm’n, 744 F.2d 185, 189 (D.C. Cir. 1984). Stand-alone costs are essentially what it might cost an electric utility, for example, to lay its own rail line to a coal mine. Producers of coal and electric utilities called for legislative relief from this administrative deregulation. Intermodal Transportation, supra note 780, at 388.
869. State of the Airline, supra note 420, at 142.
870. Id.
871. Id.
872. State of the Airline, supra note 420, at 142.
873. Id.
874. Id.
875. Id. In analyzing the motives and behavior of administrative agencies, some commentators have suggested that after an initial developmental period, an agency inevitably falls captive to the industries it regulates. See Marver H. Bernstein, Regulating Business by Independent Commission 294 (1955) (arguing that commissions tend to become protective representatives for agencies regulated); James O. Freedman, Crisis and Legitimacy in the Administrative Process, 27 Stan. L. Rev. 1041, 1055-56 (1975) (stating that regulated groups exert pressure on administrative agency in proportion to their economic importance); Louis L. Jaffe, The Elective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105, 1109-10 (1954) (finding that Congress’ failure to provide clear statutory standards leads to control of agencies by private groups). Nevertheless, the “captivity theory” has received serious criticism. See Louis L. Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1187 (1973).
878. Wilner, supra note 303, at 98.
fact, the ICC was a tiny federal agency, with only five Commissioners, eight clerks, and two messengers in 1887, growing to eleven Commissioners and 2,700 government servants at its high water mark, in 1946.\textsuperscript{879} Contrast that with the U.S. Department of Transportation, which by 1980 had 115,000 employees.\textsuperscript{880}

The Yak Fat Controversy was an example of what was wrong with the excessive procedural morass into which the ICC had degenerated. Fed up with railroad opposition to every trucking rate filed, Robert Hilt II of Hilt Truck Line of Omaha, Nebraska, filed a tariff seeking to haul 80,000 pound truckload lots of yak fat from Omaha to Chicago at forty-five cents per hundred pounds.\textsuperscript{881} A number of railroads objected on grounds that the rate was non-compensatory; Hilt's tariff was suspended pending investigation.\textsuperscript{882} In truth, there was "not a single yak within 10,000 miles of [Omaha]—not even in zoos."\textsuperscript{883}

The regulatory reform movement, on the whole, seemed to appreciate the important public benefits that government was performing, but advanced a belief that the governmental function could be performed better, more expeditiously, and economically.\textsuperscript{884} The regulatory reform movement focused largely on means.\textsuperscript{885} It called for greater regulatory flexibility to allow the industry to respond to market forces.\textsuperscript{886}

In contrast, the deregulation movement focused largely on ends.\textsuperscript{887} Deregulators wanted the very heart of the regulatory function amputated from the body politic, and free-market economists provided the intellectual cannon fodder, insisting that transportation firms were not public utilities, as they had been commonly perceived.\textsuperscript{888}

The generation of Americans, who grew up during the Great Depression and World War II, saw government as an essential companion—a mechanism for achieving greater social good, protecting the country from threats without and within.\textsuperscript{889} For most Americans, the Depression shattered confidence in the theory of laissez faire.\textsuperscript{890}

\begin{itemize}
\item \textsuperscript{879} See id. at 10.
\item \textsuperscript{880} 1980 U.S. DEP'T OF TRANSP., 14TH ANN. REP. 87.
\item \textsuperscript{881} WILNER, supra note 303, at 151.
\item \textsuperscript{882} Id.
\item \textsuperscript{883} Id. at 152.
\item \textsuperscript{884} State of the Airline, supra note 420, at 142.
\item \textsuperscript{885} Id. (emphasis added).
\item \textsuperscript{886} Id.
\item \textsuperscript{887} Id. (emphasis added).
\item \textsuperscript{889} State of the Airline, supra note 420, at 143.
\item \textsuperscript{890} Id.
\end{itemize}
The free market had produced the worst economic collapse in history, and millions of Americans lost their jobs, their homes, their self-esteem, and their faith in the philosophy of laissez-faire. They turned to government to find a solution. It was during this era that many of the independent regulatory agencies were born. Most were modeled after the first of these, the Interstate Commerce Commission, created in 1887 to reign in the monopoly railroads.

But the generation that grew up in the 1960s and 1970s, grew up cynical, perceiving government to be a malignant sore. Those on the left abhorred Watergate and the war in Vietnam. Those on the right were offended by the Great Society and high taxes. "Both converged on a common path that viewed government with hostility." That provided the foundation for a bipartisan political movement supporting radically less government.

In the 1960s and 1970s, a number of economists also published literature critical of economic regulation. "They criticized the CAB as being captured by the industry it regulated." Wrote George Stigler, "every industry or occupation that has enough political power to utilize the state will seek to control entry." They argued that regulation had made air transport more expensive than it need be and that the level of service, although exemplary, was excessive. Principal among their criticisms was that pricing and entry restrictions gave consumers excessive service and insufficient pricing competition, inflated airline costs, and thereby made the industry's profits unsatisfactory. Arguably, deregulation would give consumers the range of price and service options they pre-

891. Interstate Trucking, supra note 498, at 188.
892. Id.
893. Id.
894. Id.
895. Id. The political movement in favor of a reduced governmental presence found support on both ends of the political spectrum. It was a mass psychology of antagonism toward government that was stimulated on the right by the Great Society, the growth of government and taxation, and on the left by Watergate and the War in Vietnam. For once, both sides viewed government as an enemy, rather than a friend. Social & Economic Consequences, supra note 6, at XV.
896. Id.
897. Id.
898. Id.
899. Id.
900. State of the Airline, supra note 420, at 143.
901. Id.
902. Stigler, supra note 532, at 5.
903. See Transportation Deregulation, supra note 861, at 136; Rise and Fall, supra note 543, at 119.
904. As CAB Chairman John Robson observed, "Only three times in the past 26 years, and never in the past decade, has the industry earned the . . . allowable return on investment."
ferred, casting dollar votes of approval to firms which satiated their wants, as Adam Smith's invisible hand did its work.\textsuperscript{905} The market would define not only the dividing lines between price and service, but also how many and which airlines would serve individual city-pair markets.\textsuperscript{906}

But the industry was hardly devoid of competition.\textsuperscript{907} By the early 1970s, nearly 80\% of the nation's scheduled passenger traffic was already competitively served, and in many markets, multiple carriers had been certificated.\textsuperscript{908} Although the big four airlines, United, American, TWA and Eastern, controlled 82\% of the market in 1938, their share declined to 68\% by 1950, 66\% in 1960, and 62\% in 1970.\textsuperscript{909} By 1978, the market share of the top four had fallen to 59\%.\textsuperscript{910} Although pricing competition was somewhat constrained, airlines were free to compete in terms of schedules, equipment, capacity, and facilities in response to consumer choices.\textsuperscript{911}

During the 1970s and early 1980s, deregulation became a bipartisan movement, one that swept America profoundly and provided a new order of radically less government intervention in the market.\textsuperscript{912} In Congress, liberal Democratic Senator Teddy Kennedy and conservative Republican Senator Bob Packwood locked arms in a war with transportation.\textsuperscript{913} All fronts were determined to kiss regulation goodbye. At the White House, Democratic President Jimmy Carter and his successor, Republican President Ronald Reagan, led the crusade for significant deregulation of major industries—broadcasting, banking, telecommunications, oil and gas, air, rail, bus, and trucking.\textsuperscript{914} That movement was coupled with deregulation in less industry-specific areas such as antitrust enforcement, and environmental, safety and health standards.\textsuperscript{915}

On Capitol Hill, the opening salvo was fired by Teddy Kennedy in hearings he conducted as Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure.\textsuperscript{916} These hearings served

\textit{Transportation Deregulation, supra} note 861, at 137. See also \textit{Airport Regulation, supra} note 563, at 24; \textit{Stephen Breyer, Regulation and Its Reform} 200 (1982).

905. \textit{State of the Airline, supra} note 420, at 143.

906. \textit{Rise and Fall, supra} note 543, at 122.

907. \textit{State of the Airline, supra} note 420, at 144.


909. \textit{Lowenberg, supra} note 19, § 1.4. at I-21.

910. \textit{Transportation Deregulation, supra} note 861, at 143. It would fall to 56\% by 1983. \textit{Id}.

911. \textit{State of the Airline, supra} note 420, at 144.

912. \textit{Interstate Trucking, supra} note 498, at 188-89.

913. \textit{Air Commerce, supra} note 57, at 185.

914. \textit{Interstate Trucking, supra} note 498, at 189.

915. \textit{Id}.

916. \textit{Id}. Jurisdictionally, it was an odd thing for a Judiciary subcommittee to take up airlines
as the political genesis of Congressional reform, jumping the gun on bills pending before the Senate Commerce Committee, the committee that actually had appropriate subject matter jurisdiction.\textsuperscript{917} Coached by law professor, and later Supreme Court Justice, Stephen Breyer,\textsuperscript{918} Kennedy began the hearings by saying, "Regulators all too often encourage or approve unreasonably high prices, inadequate service, and anticompetitive behavior. The cost of this regulation is always passed on to the consumer. And that cost is astronomical."\textsuperscript{919}

Free market economists, who for years had attacked the phenomenon of economic regulation, provided the intellectual justification.\textsuperscript{920} They insisted that government distorted the competitive equilibrium, created a misallocation of resources, and was "in bed with" or "captured by" the industries it regulated.\textsuperscript{921} The neo-classical market economists also argued that the costs of regulation were exorbitant.\textsuperscript{922} Thus, they argued, society would be better off if the "dead hand" of regulation was amputated and replaced with Adam Smith's "invisible hand," clearing the way for marginal cost pricing and near-perfect competition in a healthy competitive environment.\textsuperscript{923} The discipline of economics had not embraced an ideology with such religious passion since the Bolshevik Revolution.\textsuperscript{924}

After extensive hearings in 1974 and 1975, the Kennedy staff released a comprehensive report on the Subcommittee's behalf.\textsuperscript{925} The Kennedy Report concluded that deregulation would allow pricing flexibility which would stimulate new innovative service offerings, increase industry health, allow passengers the range of price and service options dictated by consumer demand, enhance carrier productivity and effi-

\textsuperscript{917} Deregulation Movement, supra note 908, at 963 n.4. Senator Howard Cannon, Chairman of the Senate Commerce Committee, introduced a number of bills considered in committee beginning in 1976. Id.

\textsuperscript{918} See Martha Derthick & Paul J. Quirk, The Politics of Deregulation 40 (1985). Kennedy had been persuaded by subcommittee counsel Stephen Breyer that airline regulation was ripe for attack on behalf of consumers. Breyer had previously been a Harvard Law Professor, and Brookings had published his book calling for natural gas deregulation. See generally Stephen G. Breyer & Paul W. Macavoy, Energy Regulation By The Federal Power Commission (1974). Breyer would go on to become a federal judge; but for the moment, airline deregulation was his crusade, and the Civil Aeronautics Board was his enemy.

\textsuperscript{919} Derthick & Quirk, supra note 918, at 41.

\textsuperscript{920} Interstate Trucking, supra note 498, at 189.

\textsuperscript{921} Id.

\textsuperscript{922} Market Failure, supra note 468, at 26-28.

\textsuperscript{923} Interstate Trucking, supra note 498, at 189.

\textsuperscript{924} Id.

\textsuperscript{925} State of the Airline, supra note 420, at 144.
ciency, and result in a superior allocation of society's resources.\textsuperscript{926} Regulated prices were estimated to be some 40% to 100% higher than they should be.\textsuperscript{927} Deregulation, it was asserted, should drive prices down to costs.\textsuperscript{928} Many carriers and observers argued that the net result of deregulation would be deleterious to the industry in the short term, and in the long run injure the public it serves.\textsuperscript{929} The Kennedy Subcommittee disagreed:\textsuperscript{930}

The major arguments against allowing freer entry and greater price competition rests upon the fear of: 1) predatory pricing; 2) destructive competition; 3) monopolization; 4) reduced service to small communisms [sic]; 5) destruction of the existing air service network; 6) reduced safety standards; and 7) greater financing difficulties. The subcommittee examined each of these claims.

In the subcommittee's view there is no substantial historical, empirical, or logical reason for believing that increased reliance upon competition would lead to predatory pricing, destructive competition, or risk of monopolization.\textsuperscript{931}

With Richard Nixon's resignation in 1974, Gerald Ford became President.\textsuperscript{932} After pardoning Nixon, Ford's immediate domestic problem was inflation.\textsuperscript{933} He believed that government was a major contributor to inflation.\textsuperscript{934} Ford embraced deregulation in his presidential campaign.\textsuperscript{935}

By the spring of 1975, Ford was speaking of regulatory reform as if it were an end in itself, not just one element in an anti-inflation program, and he was rationalizing it on grounds that mixed popular culture, individual psychology and economics . . . .

. . . [W]hereas Senator Kennedy had hewed consistently to a proconsumer theme, Ford's criticisms of regulation were variously addressed to consumer interests, business interests, the traditional American attachment to free en-

\textsuperscript{926} Id. at 144-45.
\textsuperscript{927} Id. at 145 (citing CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES, REPORT OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE JUDICIARY COMM. 94th Cong., 1st Sess. 189 (1975)). Another study asserted that prices were between 45% and 84% higher than they would be without regulation. \textit{State of the Airline}, supra note 420, at 145 n.72 (citing Theodore E. Keeler, AIRLINE REGULATION AND MARKET PERFORMANCE, 3 Bell J. Econ. & Mgt. 399, 421 (1972)).
\textsuperscript{928} \textit{Transportation Deregulation}, supra note 861, at 145.
\textsuperscript{929} \textit{State of the Airline}, supra note 420, at 145.
\textsuperscript{930} Id.
\textsuperscript{931} Id. (quoting CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES, REPORT OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE JUDICIARY COMM. 94th Cong., 1st Sess. 4 (1975)).
\textsuperscript{932} \textit{State of the Airline}, supra note 420, at 145.
\textsuperscript{933} Id.
\textsuperscript{934} DERTHICK & QUIRK, supra note 918, at 46.
\textsuperscript{935} \textit{State of the Airline}, supra note 420, at 145.
terprise, and popular hostility to big government. Mass distrust of government was growing, and so was resentment of the costs of supporting it and bearing its intrusion on private activity. A policy stance that promised to reduce government activity therefore had some potential for mass appeal (and some potential utility for a president who would soon be asking the national electorate to return him to office).936

The politicians saw it as a rallying point against inflation and high taxes, attacking “big government,” “red tape,” and “federal bureaucrats.”937 Deregulation and the free market became as American as motherhood, apple pie, and Chevrolet.938

XXI. AIRLINE Deregulation AND THE SUNSET OF THE CIVIL AERONAUTICS BOARD

With the inauguration of Jimmy Carter as President in 1976, the movement had a firm disciple in the White House.939 Convinced by his staff that he could exploit the deregulation movement and make a “quick hit” politically, Carter embraced the deregulation movement even more strongly than his predecessor.940 Carter appointed former Portland, Oregon mayor, Neil Goldschmidt, Secretary of Transportation.941 The first time they met, Goldschmidt brought with him a list of fourteen goals he sought to accomplish as DOT Secretary.942 Carter read the list, then penciled in at the top: “1) Trucking deregulation; 2) Railroad deregulation.”943

Carter became a true believer in the deregulation of airlines, trucking and railroads.944 It was he who championed and then signed into law the Air Cargo Deregulation Act of 1977, the Airline Deregulation Act of 1978, the Staggers Rail Act of 1980, and the Motor Carrier Act of 1980.945 It was he who appointed individuals strongly wedded to deregulation to the regulatory agencies—Alfred Kahn, Elizabeth Bailey, and Marvin Cohen to the CAB, and Darius Gaskins, Marcus Alexis, and Tad Trantum to the ICC—known affectionately in each agency as the Three Marketeers.946

In 1977, Jimmy Carter tapped economist Alfred Kahn to serve as

936. Derthick & Quirk, supra note 918, at 46-47.
937. Interstate Trucking, supra note 498, at 189.
938. Id.
940. Deregulation Movement, supra note 908, at 963-64 n.4.
941. Winer, supra note 303, at 183.
942. Id.
943. Id.
944. State of the Airline, supra note 420, at 146.
945. Id.
946. Id.
Chairman of the CAB. As Chairman of the New York Public Utilities Commission, Kahn had advocated deregulation before the Kennedy Subcommittee. Kahn criticized traditional CAB regulation as having "(a) caused air fares to be considerably higher than they otherwise would be; (b) resulted in a serious misallocation of resources; (c) encouraged carrier inefficiency; (d) denied consumers the range of price/service options they would prefer, and; (e) created a chronic tendency toward excess capacity in the industry."

Being an economist, he was free of the fidelity to law held by his predecessor at the CAB, John Robson. The legislation would allow modest liberalizations, but no more. As CAB Chairman, Kahn would proceed a great deal farther down the path of laissez faire than could Robson.

As CAB Chairman, Kahn implemented a number of revolutionary deregulatory initiatives that liberalized entry and pricing. Soon carriers were authorized to enter new markets, and offer consumers significant discounts over previous levels. The immediate results appeared overwhelmingly successful, with carriers in the late 1970s stimulating new demand by offering low fares, filling capacity, and enjoying robust profits.

This was the first taste of regulatory reform for the airline industry, and it appeared to be an immediate success. The rigid regulatory structure of the proceeding decade had so shackled carriers that they were unable to tap the elasticities of demand to fill seats that otherwise would

947. Id.
948. Id. Kahn had previously, and would subsequently, serve as a free-market economics professor at Cornell. He would subsequently serve as a member of the board of New York Air, a subsidiary of Frank Lorenzo’s Texas Air. Id. at 146 n.79.
949. Id.
950. Id. Robson was Gerald Ford’s CAB Chairman, and a lawyer. Being a lawyer, Robson felt constricted by his oath of office to roam only within the perimeters of the governing legislation, the Federal Aviation Act of 1958. Id.
951. State of the Airline, supra note 420, at 146.
952. Id. Kahn loved to hold court. He used the opportunities of the Sunshine Act to hold most CAB meetings public, and the media loved his performance. Id. 146 n.81.

Kahn made sessions at the CAB more than the public meetings that by law they now must be; he consciously made them public performances, a form of theater, at which the audience - the general press, the trade press, the industry, the CAB staff - watched him pursue with his pedagogue’s passion for reasoned inquiry the question of why airline regulation was as it was and why it could not be done differently.

Id.
953. Id. (referring to Oakland Service Case, 78 C.A.B. 753 (1978), Improved Authority to Wichita Case, 76 C.A.B. 766 (1978)).
954. State of the Airline, supra note 420, at 147.
955. Id.
956. Id.
fly empty. As a consequence, capacity was not being filled, and airline profitability was weak.

Regulatory reform would change that. By lowering prices, airlines were able to lure discretionary (vacation) travelers to fill seats, which had theretofore flown empty. Consumers enjoyed a bonanza of lower fares. Airlines were able to fill empty capacity, and with an upturn in the economy, enjoyed higher profits. Regulatory reform appeared to be a win-win proposition. Politicians from both parties and from a wide spectrum of ideologies jumped on the deregulation bandwagon. If some regulatory reform was good, it was thought, then more will be better.

Kahn was quick-witted, articulate, and could charm an overcoat off a freezing man. Working with the White House, Kahn put his charismatic personality solidly behind the legislative effort for reform. Kahn found allies in Federal Express and United Airlines, the latter the largest airline in the free world.

Federal Express had been held back for years by the CAB’s desire to protect the passenger carriers, which enjoyed incremental profits on cargo carried in the belly. Operating largely under exemptions for small aircraft, FedEx had been prohibited from flying the larger aircraft that could reduce its unit costs. Congress responded by promulgating the Air Cargo Deregulation Act of 1977, known in Washington as the “Federal Express Act,” both for the speed by which it flew through Capitol Hill and the identity of its principal sponsor, and, in the closing hours

957. State of the Airline, supra note 420, at 147.
958. Id.
959. Id.
960. State of the Airline, supra note 420, at 147.
961. Id.
962. Id.
963. State of the Airline, supra note 420, at 147.
964. Id.
965. Id.
966. Id.
967. State of the Airline, supra note 420, at 147.
968. Id.
969. Id.
970. Id.
of the 95th Congress, the Airline Deregulation of 1978.\textsuperscript{972}

The Air Cargo Deregulation Act included a rather clever provision allowing established air cargo companies a one-year moratorium, from November 1977 to November 1978, during which they were free to enter any domestic markets of their choice; new entrants would be free to enter only after that period.\textsuperscript{973} Thus, established carriers like Federal Express expanded during that year to dominate the industry.\textsuperscript{974} Although “fitness” remains a requirement of entry, tariff-filing requirements were eliminated in 1979.\textsuperscript{975}

United, the largest airline before and during the four decades of regulation, but whose market share had fallen under regulation, from 22.9\% in 1938 to 22.0\% in 1976, felt that the CAB nurtured the health and well being of the smaller airlines to its detriment.\textsuperscript{976} The CAB had effectively stopped granting new routes to the largest trunk airlines by the 1970s.\textsuperscript{977} United perceived itself big enough to grow and prosper in a deregulated regime.\textsuperscript{978}

The Airline Deregulation Act of 1978 called for a gradual transition from regulation to competition, eliminating most entry controls, except “fitness” on December 31, 1981, and domestic rate regulation on December 31, 1982.\textsuperscript{979} The Act also included an unprecedented provision mandating the extermination (a/k/a “sunset”) of the U.S. Civil Aeronautics Board on December 31, 1984—the first major federal agency to be obliterated in the nation’s history.\textsuperscript{980} The ICC would be the second.\textsuperscript{981}

The legislation received overwhelming bipartisan support, which was surprising, in that the bills were advanced from the top down;\textsuperscript{982} they had no widespread grass-roots support among the people.\textsuperscript{983} Indeed, public

\begin{itemize}
\item \textsuperscript{972} Pub. L. 95-504; 92 Stat. 1705 (1978).
\item \textsuperscript{973} State of the Airline, supra note 420, at 148.
\item \textsuperscript{974} Id.
\item \textsuperscript{975} Roy J. Sampson, Martin T. Farris \& David L. Shrock, Domestic Transportation: Practice, Theory, and Policy 294 (1990).
\item \textsuperscript{976} Rise and Fall, supra note 543, at 147.
\item \textsuperscript{977} Winds of Change, supra note 428, at 50 (1991).
\item \textsuperscript{978} State of the Airline, supra note 420, at 148.
\item \textsuperscript{979} Dempsey \& Thoms, supra note 22, at 29.
\item \textsuperscript{980} Deregulation Movement, supra note 908, at 964 n.4. This was the work of Rep. Elliot Levitas of Georgia, described as “the staunchest advocate of real deregulation on either side of the Congress.” Id.
\item \textsuperscript{981} See Intermodal Transportation, supra note 780, at 389.
\item \textsuperscript{982} State of the Airline, supra note 420, at 148. The Ford Foundation plumped $1.8 million on the Brookings Institution between 1967 and 1975 to study economic regulation, and virtually all of the free-market literature which emanated from it advocated deregulation. After the Ford money dried up, the emerging right-wing Washington think tanks picked up the gauntlet, including the American Enterprise Institute. Derthick \& Quirk, supra note 918, at 36-37.
\item \textsuperscript{983} State of the Airline, supra note 420, at 148. “The absence of a significant public role throughout this period is a most interesting facet of the airline deregulation movement. The
opinion polls revealed that in 1978 Americans ranked airlines among the very top of all industries in terms of customer satisfaction and confidence.\textsuperscript{984} One industry executive who supported immediate deregulation conceded that four decades of regulation "did produce the world's foremost air transportation system, with more service in more markets by more carriers with more competition with greater variety at lower rates and fares than existed anywhere else on earth."\textsuperscript{985} The predictions as to what deregulation would bring were quite optimistic, in spite of strong misgivings by most industry executives.\textsuperscript{986} CAB Chairman Alfred Kahn characterized the opposition as follows:

\begin{quote}
[t]he most general fear about [deregulation] is that when the CAB withdraws its protective hand from the doorknob, the door will open to destructive competition - to wasteful entry and cut-throat pricing - that will depress profits, render the industry unable to raise capital, and so cause a deterioration in the service it provides - on the whole, it must be admitted good service.\textsuperscript{987}
\end{quote}

Kahn saw the fear as unrealistic.\textsuperscript{988}

What about the prediction by many industry experts that deregulation would depress industry profits, discourage investment and the introduction of more technologically sophisticated aircraft, and lead to a deterioration of service, causing the industry ultimately to gel into a national oligopoly, or in many markets, a monopoly?\textsuperscript{989} Deregulation's proponents saw destructive competition as limited to circumstances where "capital is long-lived and immobile, and through miscalculation competitors irretrievably commit too much capital to a particular market. . . .," a situation not thought to exist in the airline industry because of the mobility of its resources.\textsuperscript{990} Concentration was also thought unlikely because: (1) barriers to entry were perceived low; (2) economies of scale were relatively insignificant; and (3) markets would be contestable—the three legs of the theoretical stool.\textsuperscript{991}

impetus for change came almost entirely from the academics and politicians; the public never did call for deregulation of the airline industry." \textit{Deregulation Movement, supra} note 908, at 964 n.4.

\begin{quote}
984. \textit{Id.}
985. \textit{Id.} at 968.
986. \textit{State of the Airline, supra} note 420, at 149.
987. \textit{Id.} (quoting Alfred Kahn, Talk to the New York Society of Security Analysts (Feb. 2, 1978)).
988. \textit{State of the Airline, supra} note 420, at 149.
989. \textit{Rise and Fall, supra} note 543, at 130-31.
990. \textit{Id.} (quoting Oakland Service Case, 78 C.A.B. 753 (1978)).
991. \textit{State of the Airline, supra} note 420, at 132. Others disagreed, arguing that given the capital requirements of air transportation and the interrelationship of traffic flows which place a premium on the ability of a carrier to marshal traffic support from as many sources as possible, incumbent airlines could deter new entry by demonstrating they would respond sharply and swiftly to the inauguration of new service. Because potential entry could be deterred by potential
\end{quote}
According to Alfred Kahn,

almost all of this industry's markets can support only a single carrier or a few: their natural structure, therefore, is monopolistic or oligopolistic. This kind of structure could still be conducive to highly effective competition if only the government would get out of the way; the ease of potential entry into those individual markets, and the constant threat of its materializing, could well suffice to prevent monopolistic exploitation.992

Kahn and his free market brethren saw few economies of scale or economic barriers to entry in the airline industry.993 The CAB staff noted, "There are no structural traits inherent in domestic air transportation which indicate superior performance by large-size firms; nor are there traits which would significantly inhibit the entry of new firms into the industry."994 Deputy DOT Secretary John Snow agreed: "The evidence suggests very strongly that the optimal size of firms will be sufficiently small so that there will be room for a considerable number of competitive firms in the industry."995 Hence entry, or the threat of potential entry, would keep monopolists from extracting monopoly profits.996 This was the theory of contestable markets, upon which deregulation was largely premised.997 Essentially, should a monopolist or oligopolist begin to earn supercompetitive profits, new entrants should be attracted like

response, the elimination of competition through the employment of predatory tactics would be economically rational. Rise and Fall, supra note 543, at 132. All three of these assumptions—inconsequential barriers to entry, insignificant economies of scale and contestability—have since been repudiated. See Airline Management, supra note 1, at 69-93.

992. State of the Airline, supra note 420, at 149 (quoting Alfred Kahn, Talk to the New York Society of Security Analysts (Feb. 2, 1978)).
993. Id. See generally Caves, supra note 888; David W. Gilten, Tae Hoon Oum & Michael W. Trettheway, Airline Cost and Performance: Implications For Public and Industry Policies (1985). Predictions that the industry would become more highly concentrated under deregulation

"rest on two false assumptions: 1) barriers to entry are relatively high, and 2) there are significant economies of scale and decreasing costs. Economic barriers to entry are relatively low in the airline industry. The most important barriers have been legal barriers enforced by the CAB. Economic barriers pale by comparison.

Economies of scale are relatively low in the airline industry; in fact, there are significant diseconomies of scale.

Transportation Deregulation, supra note 861, at 141-42.
994. State of the Airline, supra note 420, at 150 (quoting Staff of Civil Aeronautics Board, Regulatory Reform 125 n.1 (1975)).
996. Id. at 648.
sharks to the smell of blood. The absence of barriers to entry would also subdue incentives for larger airlines to engage in predatory pricing to drive their weaker or smaller rivals out. It was believed irrational for a carrier to engage in predatory pricing. Or so the theory went.

Kahn was optimistic that the benefits of deregulation would be universally shared:

I am confident that . . . consumers will benefit; that the communities throughout the nation - large and small - which depend upon air transportation for their economic well being will benefit, and that the people most closely connected with the airlines - their employees, their stockholders, their creditors - will benefit as well.

In the late 1970s, the immediate results of deregulation seemed quite positive, and created a general euphoria in Washington and in the media that Congress had chosen the right path. In the short term, airfares plummeted (a bonanza for consumers) while carrier profits soared as low fares led discretionary travelers to fill seats which otherwise might have flown empty. But in the fourth quarter of 1978, long before the recession of the 1980s, carrier profits began to plummet into a sea of red ink; the airline industry suffered the worst losses in the history of domestic aviation.

As noted above, the Airline Deregulation Act of 1978 was intended to provide a gradual transition to deregulated domestic entry and rates, with entry regulation ending on January 1, 1982, and entry regulation ending January 1, 1983. But the CAB quickly dropped any notion of "gradual" deregulation under Chairman Marvin Cohen. Implementation of the new policy was immediate and comprehensive.

The Airline Deregulation Act also called for the "sunset" of the CAB on January 1, 1985, when its remaining responsibilities were trans-

998. State of the Airline, supra note 420, at 150.
999. Id.
1000. BREYER, supra note 904, at 30; Transportation Deregulation, supra note 861, at 142.
1001. State of the Airline, supra note 420, at 150 (quoting Hearing on H.R. 11145 Before the Aviation Subcomm. of the House Public Works & Transp. Comm., 95th Cong. 8 (1978) (statement of Alfred Kahn). Kahn had left the CAB to become President Carter’s "Inflation Czar," where he presided over the highest levels of inflation in peacetime history. Id. at 151 n.107.
1002. Id. at 150.
1003. Id. at 150-51.
1004. Id. at 151.
1005. Id.
1006. Id.
1007. Id. Authority over antitrust was scheduled to vest in the Justice Department in 1985 under the terms of the Airline Deregulation Act of 1978. However, the CAB Sunset Act of 1984 gave it to the DOT. That lasted until 1989, when Congress took it from DOT and gave it to DOJ. WINDS OF CHANGE, supra note 428, at 30.
ferred to the U.S. Department of Transportation. \footnote{1008}{Antitrust Law, supra note 852, at 515, 524.} Those primarily involved the regulation of international routes and rates, small community subsidies, and mergers. \footnote{1009}{State of the Airline, supra note 420, at 151.} The latter was transferred from DOT to the U.S. Department of Justice in 1989, following serious public criticism of DOT's approval of each of the 21 merger proposals that had been submitted to it during its brief reign over the matter. \footnote{1010}{Id. See generally STEVEN MORRISON & CLIFFORD WINSTON, The Economic Effects of Airline Deregulation (1986).}

XXII. MOTOR CARRIER Deregulation

A. The Motor Carrier Act of 1980


\footnote{1008}{Antitrust Law, supra note 852, at 515, 524.}
\footnote{1009}{State of the Airline, supra note 420, at 151.}
\footnote{1010}{Id. See generally STEVEN MORRISON & CLIFFORD WINSTON, The Economic Effects of Airline Deregulation (1986).}
ers was initiated with the promulgation of the Motor Carrier Act of 1935. Among the purposes of this legislation were the prevention of destructive competition among motor carriers and the protection of mo-


Several members of Congress have made statements highlighting the vital importance of the trucking industry. For example, Senator Howard Cannon declared, "There is virtually nothing worn, eaten, or used by the American public that has not at one time or another been transported in a truck. It is no exaggeration to say that the trucking industry is critical to the growth and prosperity of the Nation's economy." Econ. Regulation of the Trucking Indus.: Hearings Before the Senate Comm. on Commerce, Sci. & Transp., 96th Cong. 1 (1979) (statement of Sen. Howard Cannon). Similarly, Senator Russell Long presented data describing the magnitude of the industry:

In 1978, there were over 28 million vehicles registered as trucks in the United States. Of this number, over 1 million are engaged in for-hire operations and over 16,000 trucking companies are regulated by the Interstate Commerce Commission (ICC). The trucking industry serves over 60,000 communities in the United States, many of which rely on trucking as the sole mode of transportation for freight. In 1978, the trucking industry had revenues in excess of $35 billion and this figure represented over 50 percent of the total revenues from intercity freight carried by the various transport modes. There are over 9 million individuals engaged in the trucking industry accounting for over $100 billion in wages each year. The trucking industry is truly a multibillion-dollar business. Clearly, the trucking industry plays a major role in our economy and our society.

Id. at 3 (statement of Sen. Russell Long). And Senator Edward Kennedy, a major proponent of the deregulation of transportation, provided his own estimates of the industry's importance:

Trucking is one of the largest businesses in this nation. Altogether, it generates more than $100 billion dollars in revenue annually. It is one of the backbones of our national transportation system, accounting for about 78 percent of the total revenues earned by all transportation modes.

Interstate trucking is a $56 billion dollar a year industry. Approximately half of this amount is generated by the more than 14,000 carriers licensed by the Interstate Commerce Commission to haul regulated freight. The rest is earned by more than 100,000 trucking companies—many of them owner/operators—who haul unregulated freight.

Id. at 9 (statement of Sen. Edward Kennedy).

In addition, the following information was provided in the Senate report on the Motor Carrier Act of 1980:

In 1979, revenues of the regulated motor carriers amounted to an estimated $41.2 billion, or 55 percent of the total regulated intercity freight bill. There are 16,874 federally regulated motor carriers operating 840,000 pieces of equipment. In 1979, these carriers handled over 1 billion tons of freight. Industry mileage approaches 21 billion annually with ton-miles transported at 276 billion. General freight carriers alone handle about 1 million shipments each working day, and 95 percent are less-than-truckload . . . .

There are more than 61,000 communities in the United States; and of these, nearly 40,000 or 65 percent, are completely dependent on motor carriers for their freight service.


1012. Congressional Intent, supra note 20, at 4-5. In 1935, the Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, was amended by the Act of Aug. 9, 1935, ch. 498, 49 Stat. 453. This amendment divided the Interstate Commerce Act into two parts. The original Act was designated "Part I." The Motor Carrier Act of 1935 was then added as "Part II." The Motor Carrier Act of 1980 amended the Interstate Commerce Act. Id. at 3 n.3.
tor and rail carriers from each other.\textsuperscript{1013}

In the 1970s, retailer Sears, Roebuck & Co., led a public relations campaign against the onerous paperwork and costly burdens of regulation.\textsuperscript{1014} Somehow, trucking became a focus of the regulatory reform campaign. The American Trucking Associations [ATA] was an ineffective opponent, having long lost the ability to command attention on Capitol Hill.\textsuperscript{1015}

\begin{quote}
1013. Thomas D. Morgan, Cases and Materials on Economic Regulation of Business 66-67 (1976). Another principal impetus for the promulgation of the Motor Carrier Act of 1935 was the decision of the United States Supreme Court in Buck, 267 U.S. at 315, which eliminated state regulation of transportation in interstate commerce. Prior to Buck, “some forty states prohibited motor common carriers of passengers from using their highways without a certificate obtained by a showing that the involved service is required by the present or future public convenience and necessity.” Webb, supra note 488, at 92. This development paralleled the decision of the Supreme Court in Wabash, St. Louis & Pacific Railway, Co. v. Illinois, 118 U.S. 557 (1886), which prompted Congress to regulate rail carriers in 1887. See Harris, supra note 161, at 13-15. It is usually argued that monopolists should be regulated so as to prohibit accumulation of excess profits, and to increase production at a price lower and a quantity higher than that at which marginal costs equal marginal revenues (so as to approach a situation comparable to that of a competitive market) so that maximization of social benefits and minimization of waste can be achieved. The regulation of natural monopolists, such as those who provide service on certain rail lines for market dominant traffic, protects the public against attempts by those monopolists to maximize their profits through restriction of their production by requiring production at a level higher than they would otherwise provide and at a price lower than that which they would otherwise offer. Enlightened regulation also attempts to avoid waste and guarantee a fair rate of return. Congressional Intent, supra note 20, at 5 n.8.

Transportation is an example of an industry in which regulation has expanded at a compound rate. Regulation of rail carriers began in the late 19th Century. Regulation was expanded to embrace other modes of transportation by 1935, largely in order to ensure protection of regulated rail carriers and to maintain the delicate balance of modes competing for essentially the same traffic. The industry is an example of the tendency of regulation to proliferate. Id. Transportation is also an example of the initiation of regulation to prevent the deleterious effects of excessive competition. Thus, an additional reason for the promulgation of the Motor Carrier Act of 1935 was to protect existing motor carriers from the excesses of cutthroat competition which had caused numerous firms to drop out of the market during the economic turmoil of the Great Depression. The fear was expressed that without regulation, the economies of scale inherent in the industry would cause concentration, and inevitably, oligopolistic and monopolistic markets. Id.

1014. Air Commerce, supra note 57, at 200. Specifically, the charge was led by Stan Sender of Sears Roebuck & Co. Id. at 200 n.79.

1015. Id. at 200. The regulatory environment for the motor carrier industry that preceded the 1980 Act was by no means devoid of competition. Indeed, more than 16,000 motor carriers held operating authority from the ICC. Marketplace imperatives of supply and demand largely influenced the establishment of rates, although government intervention existed to restrain carriers from exploiting monopoly or oligopoly market positions or to prohibit larger carriers from employing predatory pricing activities to drive their smaller competitors out of business. The market, therefore, provided the basis for the lion’s share of the decisions regarding pricing and service, and the government participated only occasionally to protect those societal objectives that Congress stated to be within the public interest. Institution Disintegration, supra note 697, at 48.
\end{quote}
After lengthy hearings,\textsuperscript{1016} in 1980, Congress passed both the Motor Carrier Act\textsuperscript{1017} and the Household Goods Transportation Act to liberalize entry and rates of trucking companies.\textsuperscript{1018} Although not intended to create deregulation, the new legislation was so interpreted by a highly politicized and ideological Interstate Commerce Commission.\textsuperscript{1019}

In some respects, the Motor Carrier Act of 1980 affirmed the quasi-judicial relaxation of regulatory standards begun three years before by the majority of recent presidential appointees to the ICC, the nation’s oldest independent regulatory agency.\textsuperscript{1020} This liberalization had already begun to swing the pendulum away from protectionism of established carriers from the deleterious effects of excessive competition (a philosophy which had prompted a previous Congress to promulgate the Motor Carrier Act of 1935, which first established ICC jurisdiction over the motor carrier industry) to an ideology that espoused enhanced competition and free market economics.\textsuperscript{1021} In other respects, the legislation reflected a belief that Congress should specify the parameters within which the ICC exercised its discretion, and that the flexibility of the ICC to become excessively liberal in its regulatory approach should be constricted.\textsuperscript{1022}


The Motor Carrier Act of 1980 is the product of over 18 months of continuous study of one of the most complex issues ever undertaken by this Committee. In the last 1 1/2 years, 16 days of hearings were conducted, with 215 witnesses presenting the views of nearly every entity in our society touched by this industry. On two of those days, the committee’s hearings were held in Chicago jointly with the Senate committee on commerce, science and transportation. In addition, thousands of letters from consumers—from beef processor to independent owner-operators—have been received and considered. Through this process, Congress has reaffirmed its role to control and set policy and guidelines for the conduct of interstate commerce.


\textsuperscript{1019} Social & Economic Consequences, supra note 6, at 22.

\textsuperscript{1020} Congressional Intent, supra note 20, at 3. The Interstate Commerce Act was promulgated in 1887. Genesis and Evolution, supra note 2, at 341.

\textsuperscript{1021} Congressional Intent, supra note 20, at 3.

\textsuperscript{1022} See Senate Comm. on Commerce, Sci. & Transp., Report on the Motor Carrier Reform Act of 1980, S. Rep. No. 641, at 2-3 (2d Sess. 1980). Dissatisfaction with the ICC’s deregulatory initiatives was among the major factors motivating Congress to take into its own hands the reins of regulatory reform and to carve out specific areas for liberalization. The Constitution confers on Congress, not the ICC, the power to regulate interstate and foreign commerce. Congress originally created the ICC to effectuate its legislative will. In drafting the 1980 Act, Congress reassessed its constitutional primacy by delineating the parameters of regulatory reform as clearly as statutorily possible. Congress did not intend the Act to constitute only a liberalization of entry regulation. The Act’s other principal purpose was to put a halt to the actions of an agency that had become obsessed with deregulation and had exceeded the statutory limitations on its discretion. See Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3(a), 94 Stat.
The 1980 Act represented the culmination of a process of legislative compromise. The Senate bill was a more deregulatory effort than its House counterpart. In the waning days of the 96th Congress and the last summer of the Carter Presidency, the White House recognized the strong possibility that Congress would adjourn without having passed any legislation at all. Hoping that Congress would approve the legislation before the presidential election, President Carter persuaded the Senate to capitulate to the more conservative House bill. The House bill became law without any changes. Thus, the revised House Report is the most authoritative source of legislative history of the 1980 Act. Desiring to end the ICC’s monumental strides toward de facto deregulation, the motor carrier industry supported the 1980 Act as a compromise that would halt the erosion of economic regulation.

The Motor Carrier Act of 1980 was not written to authorize wholesale deregulation of the motor carrier industry. Nevertheless, political forces were at play to try to ensure that it would be interpreted as man-

793 (1982) (ICC should not attempt to go beyond powers vested in it by Interstate Commerce Act and other legislation enacted by Congress).


dating comprehensive deregulation of the industry. At the time of the Senate vote on the conservative House bill, Sen. Robert Packwood (R-Ore.) had a fabricated dialogue between himself and Sen. Howard Cannon (D-Nev.) inserted into the Congressional Record that purported to interpret the essential provisions of the bill, section-by-section, as mandating comprehensive deregulation.\textsuperscript{1030} No such dialogue ever occurred on the floor of the Senate, and its insertion, without an identifying "bullet" to reveal its subsequent insertion, was a strategic effort toward a desired political result that had not been legally obtained.\textsuperscript{1031} The deregulation-minded ICC Commissioners appointed by President Carter—Darius Gaskins, Tad Trantum, and Marcus Alexis—were quick to seize upon the Packwood-Cannon colloquy as crucial legal history in interpreting the Motor Carrier Act of 1980.\textsuperscript{1032}

B. THE DISINTEGRATION OF THE ICC

America's first independent regulatory agency, the Interstate Commerce Commission, celebrated its centennial anniversary in 1987.\textsuperscript{1033} Throughout much of its history, the ICC was regarded as among the most competent and highly respected governmental agencies.\textsuperscript{1034} Presidents traditionally selected Commissioners for the ICC almost as carefully as they have chosen Justices of the United States Supreme Court, emphasizing their competence, integrity, and ability to apply the law with skill and reason.\textsuperscript{1035}

As noted above, on the ICC's fiftieth anniversary, one contemporary commentator commended the agency for its vigorous and spirited administration of the law.\textsuperscript{1036} The Commission also received high praise for its fidelity to congressional mandate and for its prudent, nonpartisan protec-

\textsuperscript{1030}. \textit{Air Commerce}, supra note 57, at 202.

\textsuperscript{1031}. \textit{Id.} Packwood was a deregulation ideologue, coached by former-ICC attorney and staffer Matthew Scozzozza (who later became an Assistant DOT Secretary); Cannon was eager to distance himself from the Teamsters, who opposed deregulation, as the newspapers had revealed unsavory financial dealings between them. \textit{Id.} at 202 n.92.

\textsuperscript{1032}. \textit{Congressional Intent}, supra note 20, at 25 n.98. Gaskins had been a lieutenant of Alfred Kahn at the Civil Aeronautics Board when it was deregulating the airline industry. \textit{Air Commerce}, supra note 57, at 202-03 n.93.

\textsuperscript{1033}. \textit{Congressional Intent}, supra note 20, at 2 n.1. President Grover Cleveland established the Interstate Commerce Commission in 1887 when he signed into law the Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887).

\textsuperscript{1034}. \textit{Institution Disintegration}, supra note 697, at 1.

\textsuperscript{1035}. \textit{See} Aitchison, supra note 750, at 401 (concluding that ICC has promoted equal justice and improvement of general welfare); Oren Harris, \textit{The Commissioners}, 31 Geo. Wash. L. Rev. 309, 309 (1962) (lauding excellent work of ICC commissioners over 75-year period).

\textsuperscript{1036}. Aitchison, supra note 750, at 321.
tion of the public interest.\footnote{1037} Supreme Court Justice Felix Frankfurter heralded the seventy-fifth anniversary of the ICC in even more glowing terms. He lauded the ICC as an institution of unblemished character, with "a fastidious regard for responsibility, a complete divorcement between public and private interest, and all other concomitants of a true and worthy conception of public duty."\footnote{1038} But at the Centennial celebration of the ICC's existence, many were critical of the institution. Those favoring regulation were disappointed in the ICC's unwillingness to follow its statutory mandates.\footnote{1039} Those favoring deregulation felt that the ICC had not gone far enough.\footnote{1040}

Although Congress designated the ICC to be an eleven-member body,\footnote{1041} by the mid-1970's Presidents were appointing no more than seven members.\footnote{1042} The large size of the Commission traditionally had contributed to its conservatism; policy change within the Commission rarely had been radical. By appointing individuals dedicated to radical change and by keeping the Commission's membership small, however, the White House quickly and dynamically shifted the Commission's internal policy to one enthusiastically dedicated to deregulation.\footnote{1043}

Congress first empowered the President to designate which Commissioner shall serve as chairperson during the Nixon administration.\footnote{1044} This authority sharply increased Presidential influence over the Commission and its chief officer, and undermined the ICC's traditional autonomy from the executive branch as an arm of Congress.\footnote{1045}

\footnote{1037} See Esch, supra note 751, at 464 (describing the ICC as a faithful creature of Congress responsible to no other entity).

\footnote{1038} Frankfurter, supra note 752, at 236. Justice Frankfurter called the ICC "a laboratory demonstration of how economic problems may be worked out by trial and error," id at 244, and commended the agency for its success at remaining independent from external pressures. Id.

\footnote{1039} Air Commerce, supra note 57, at 203.

\footnote{1040} Id.

\footnote{1041} Institution Disintegration, supra note 697, at 3. Commissioners were appointed by the President with the advice and consent of the Senate. No more than six commissioners could be members of a single political party. Id. at 3 n.8.

\footnote{1042} Id. at 3.

\footnote{1043} Id.


\footnote{1045} Institution Disintegration, supra note 697, at 3. Congress can delegate the power to regulate commerce in a manner that enhances or diminishes presidential influence. There are at least four models for such delegation: delegation directly to the president, see Field v. Clark, 143 U.S. 649, 690-93 (1892); delegation to an executive branch agency, see United States v. Grimaud, 220 U.S. 506, 521 (1911); delegation to an independent regulatory commission subject to presidential review, see Bernard Schwartz, Administrative Law 9-15 (1984); and delegation to an independent regulatory commission without presidential review, see id. By choosing the latter approach in creating the ICC, Congress intended to minimize presidential influence over the agency. See Humphrey's Ex't v. United States, 295 U.S. 602, 624-25 (1935) (Congress' purpose in creating regulatory agencies independent of executive authority was to free agencies to exercise their judgment without hindrance); see also Freedman, supra note 874, at 1060-61 (insulation of
Alleging political patronage in the appointment process, some observers criticized the quality of presidential appointments to the ICC.\textsuperscript{1046} By the late 1970s and early 1980s, there was a deliberate attempt by the executive branch to give this quasi-judicial agency a philosophical mission by means of the appointment process.\textsuperscript{1047} President Carter filled vacant seats on the Commission with individuals fervently dedicated to deregulation.\textsuperscript{1048} Although the Ford appointees\textsuperscript{1049} had moved moderately in the direction of liberalized entry and ratemaking, their deregulatory efforts pale in comparison to the vigorous efforts of the Carter economists.\textsuperscript{1050} Despite campaign promises to appoint only qualified and experienced individuals to the regulatory agencies, President Reagan continued this trend with the appointment of his own deregulation ideologues.\textsuperscript{1051}

By the late 1970’s, the ICC had moved resolutely toward deregulation. By 1979 the ICC was granting ninety-eight percent of the applications filed for motor carrier operating authority.\textsuperscript{1052} The Commission supplemented its efforts to open the floodgates of entry and to deregulate ratemaking with numerous liberal decisions and rulemakings.\textsuperscript{1053}
As dissatisfaction with the size and breadth of the government grew in the mid-1970's, the trend toward deregulation developed. The Proposition 13 tax revolt and the country's disillusionment with the Great Society experiment reflected the sentiment that government generally had become inefficient, costly, and ineffective.\textsuperscript{1054} The populace generally perceived regulation as an unnecessary intrusion that wrapped small businessmen in red tape and marched them through a confusing bureaucratic labyrinth.\textsuperscript{1055} It was this public sentiment that encouraged several consecutive presidents to favor transportation deregulation. Presidents Carter and Reagan accomplished comprehensive deregulation even in the absence of statutory authority.\textsuperscript{1056} Reagan was fond of saying, "If it moves, tax it. If it keeps moving, regulate it. If it stops moving, subsidize it."\textsuperscript{1057} White House influence in the ICC, as reflected in ICC endorsement of presidential policy, reached its highest level in the agency's history.\textsuperscript{1058}

The Commission lost the autonomy that traditionally shielded its decision making from the political winds that blow down Pennsylvania Avenue.\textsuperscript{1059} The White House became the dominant political force influencing ICC policy.\textsuperscript{1060} With the Commission dominated by the deregulatory policy of the executive branch and with Congress split on the wisdom of deregulation, the remaining check on aberrant ICC action was

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\textsuperscript{1054} \textit{Institution Disintegration}, supra note 697, at 49.
\textsuperscript{1055} \textit{Erosion of the Regulatory Process}, supra note 11, at 318-20. (discussing the rationale underlying deregulation); \textit{Rise and Fall}, supra note 543, at 114-18 (1979) (discussing public dissatisfaction with regulation of airline industry). The economic benefits resulting from motor carrier regulation included freedom from destructive competition and predatory pricing, and the assured access of small and remote shippers and communities to motor carrier services.
\textsuperscript{1056} \textit{Institution Disintegration}, supra note 697, at 49.
\textsuperscript{1058} See Richard J. Pierce, Jr. & Ernest Gellhorn, \textit{Regulated Industries in a Nutshell} 343-344, (4th ed. 1999) (arguing that catalyst for transportation deregulation has originated in the executive, and not the legislative, branch).
\textsuperscript{1059} \textit{Institution Disintegration}, supra note 697, at 49.
\textsuperscript{1060} See Verkuil, supra note 1045, at 944-47 (discussing Carter administration's confrontations with agency policymakers). Dean Verkuil has noted that "[h]ighly charged White House intervention poses a danger of frustrating the will of Congress as expressed in legislation establishing an agency and defining its mission." \textit{Id.} at 949-50. See also Don Byrne, \textit{ICC Chairman Taylor Again Displays Depth of Rift Between Commissioners}, \textit{Traffic World}, Apr. 16, 1984, at 47 (questioning whether the ICC no longer heeds Congressional mandate but follows executive policy). No ICC Chairman could retain independence when his designation as Chairman was at the whim of the President.
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the judiciary.\textsuperscript{1061} Litigants frequently and successfully used the judicial forum to challenge the Commission's actions.\textsuperscript{1062} Many federal courts of appeals concluded that the ICC's actions in the area of motor carrier deregulation inconsistent with its statutory obligations.\textsuperscript{1063} One court recognized that the Commission's actions were \textit{de facto} deregulation despite the absence of statutory authority.\textsuperscript{1064} Noting the ICC's tendency to ignore the burden of proof by resolving doubts in favor of an applicant for common carrier status, the United States Court of Appeals for the Sixth Circuit announced its suspicion that the ICC was disregarding congressional intent by making decisions solely for the purpose of increasing competition.\textsuperscript{1065}

The ICC in the late 1970's was abdicating its responsibility to engage in meaningful rate and entry regulation.\textsuperscript{1066} Reviewing the Commission's actions, courts found the ICC's decisions to be without an apparent legal or factual basis.\textsuperscript{1067} They found it necessary to remind the ICC that Congress' decision to enter into comprehensive regulation contravenes the ICC's apparent belief that national policy unqualifiedly favors competition.\textsuperscript{1068}

The rhetoric of deregulation had not, however, caught up with the law. Though pro-deregulation Commissioners urged pricing deregulation, the statute required that all rates be included in tariffs filed with the ICC, and that carriers could not lawfully deviate from their filed rates.\textsuperscript{1069} The result was motor carriers were wildly discounting their rates, not filing the discounts with the ICC, and dropping into bankruptcy.\textsuperscript{1070}

\textsuperscript{1061} \textit{See} \textit{Congressional Intent, supra} note 20, at 55 (discussing judiciary's role in overseeing ICC).

\textsuperscript{1062} \textit{Id.} at 49.

\textsuperscript{1063} \textit{Id.} at 49-50.

\textsuperscript{1064} \textit{Argo-Collier Truck Lines v. United States, 611 F.2d 149, 155 (6th Cir. 1979).}

\textsuperscript{1065} \textit{Id.} (ICC's conclusions are not supported by substantial evidence or legislative intent).


\textsuperscript{1067} \textit{See}, e.g., CADC 79-14 Campbell Sixty-Six Express, Inc. v. Interstate Commerce Comm'n, 603 F.2d 1012, 1014 (D.C. Cir. 1979) (remanding decision to ICC because of lack of rational connection between findings and decision); Pitre Bros. Transfer, Inc. v. United States, 580 F.2d 140, 143-44 (5th Cir. 1978) (remanded because of ICC's failure to address petitioner's arguments); Humboldt Express, Inc. v. Interstate Commerce Comm'n, 567 F.2d 1134, 1137 (D.C. Cir. 1977) (remanding decision to ICC after finding no information in administrative record that indicated basis of decision to transfer operating authority from one carrier to another).

\textsuperscript{1068} \textit{See} Trans-Am. Van Serv. Inc. v. United States, 421 F. Supp. 308, 323 (N.D. Tex. 1976) (congressional mandate that ICC must determine those cases in which grant of operating authority will serve public convenience and necessity) (citing FCC v. RCA Communications, Inc., 346 U.S. 86, 91 (1953)).

\textsuperscript{1069} \textit{See} Dempsey \textit{et al., supra} note 22, at 168-69.

\textsuperscript{1070} \textit{Air Commerce, supra} note 57, at 158.
ees in bankruptcy began to file to recapture the difference between the amount charged and billed, and the amount specified in the ICC-filed tariff, under the “Filed Rate Doctrine.” Billions of dollars were sought from shippers. Congressional dissatisfaction with the anomaly of de facto deregulation and de jure regulation was a catalyst for eliminating the tariff-filing requirement in 1994, and sunsetting the Interstate Commerce Commission in 1995. From its ashes was born the Surface Transportation Board—essentially a small railroad regulatory agency, as had been the original ICC.

C. TRUCKING DEREGULATION

With the appointment of deregulation advocates to head the ICC, it administratively accomplished de facto deregulation, despite the de jure prohibition in the Motor Carrier Act of 1980. The emasculated ICC lost the support of the industry, and the Trucking Industry Regulatory Reform Act of 1994 removed most of the remaining barriers to entry in the trucking industry (except regulation of safety and insurance) and eliminated the requirement of tariff filing.

With strong lobbying by United Parcel Service, Kentucky’s largest employer, and without Committee hearing or vote, Sen. Wendell Ford (D-Ky.) added a rider to the Federal Aviation Administration Authorization Act of 1994 preempting State regulation of intrastate motor carriers. The American Trucking Associations [ATA] did not effectively oppose the legislation. At this moment in history, the ATA was headed by Tom Donohue, who had previously, and would subsequently, hold senior positions in the U.S. Chamber of Commerce, which supported trucking deregulation. The Teamsters were in disarray, having just ousted their principal lobbyist, and having lost the ability to ban Mexican truckers under the North American Free Trade Agreement [NAFTA]. President Clinton was unwilling to veto the FAA reauthorization act, given that it included so many pork construction projects, important to selected Congressmen and their constituents.

1071. Id.
1072. Id.
1073. Id.
1074. Id.
1075. Id. at 207-08.
1076. Id. at 208.
1077. Id. (citing DANIEL W. BAKER, TLA ANNUAL REPORT AND SUMMARY OF MOTOR CARRIER REGULATION OF THE RESPECTIVE STATES (1998)).
1078. Id.
1079. Id.
1080. Id.
1081. Id.
Under the terms of the North American Free Trade Agreement, which became effective in January 1994, most restrictions against Mexican carriers operating in the United States were to have been phased out in the 1990s.\textsuperscript{1082} Foreign ownership restrictions were also to be lifted under NAFTA.\textsuperscript{1083}

The provisions allowing Canadian carriers, vehicles, and drivers were dutifully implemented by the United States.\textsuperscript{1084} Canada has a truck inspection program similar to that of the U.S.\textsuperscript{1085} But on December 17, 1995, only one day before the U.S.-Mexican border was scheduled to open, President Bill Clinton issued a safety proclamation for unilaterally closing the border to Mexican trucks beyond the commercial zones, thereby failing to implement NAFTA.\textsuperscript{1086} The Mexican government responded by placing a similar restriction on U.S. vehicles.\textsuperscript{1087}

President Clinton's suspension of implementation of NAFTA led the Mexican government to file a formal complaint in 1998 requesting arbitration under the treaty's dispute resolution provisions.\textsuperscript{1088}

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1082. Alexandra Walker, No Easy Solutions to Mexican Truck Safety Issues, STATES NEWS SERVICE (Feb. 22, 2001). Under NAFTA, beginning December 18, 1995, Mexican trucking companies were to have been allowed to obtain licenses to perform cross-border operations into the four U.S. border states (i.e., California, Arizona, New Mexico and Texas), and U.S. carriers were to have been allowed entry into the six northern border states of Mexico. As of January 1, 2000, NAFTA provides cross-border access for Mexican carriers, in foreign commerce only, throughout the United States, and for U.S. carriers throughout Mexico. A similar phased-in schedule will eventually allow full access by Mexican passenger carriers to the U.S. market. Robert Collier, Long-Distance Haulers Are Headed Into U.S. Once Bush Opens Borders, S. F. CHRON., Mar. 4, 2001, at A1.

1083. Paul Stephen Dempsey, Free Trade But Not Free Transport? The Mexican Stand-Off, 30 DEN. J. INT’L L. & POL’LY 91, 93 (2001) [hereinafter Free Trade] (citing NAFTA Will Be Slow to Change the Rules for Transportation Operations and Ownership, Info. Access Co., Jan. 1994, at 26). Under it, on December 18, 1995, Mexican investors were to be permitted to invest in 100% of a Mexican carrier providing international service, while U.S. investors were allowed to invest up to 49% in U.S. carriers. On January 1, 2001, the percentage increased to 51%; complete ownership is to be permitted in 2004. Id.

1084. Don Stewart, Mexico's Truckers Detoured by Legal, Safety Barriers, TULSA WORLD (Mar. 4, 2001).

1085. Id.


1087. Collier, supra note 1082, at A1. Ostensibly, President Clinton's moratorium was based on safety considerations. He insisted that Mexican trucks would not be allowed beyond the commercial zone until the U.S. was satisfied with Mexican carrier compliance with U.S. safety laws. Id. But some contend that President Clinton's moratorium was imposed under pressure from the 1.4 million-member International Brotherhood of Teamsters and the insurance industry. Mexican drivers earn only about a third of the salary of U.S. drivers, and typically drive their vehicles up to 20 hours per day. As a consequence, many anticipate that after NAFTA is fully implemented, most of the two nations' trade will be driven by Mexican drivers. Id.

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alleged protectionism. The U.S. counterclaimed, accusing Mexico of improper retaliation by sealing off its borders to U.S. carriers. The process was to take six years to run its course. While the arbitration panel was being formed, Congress passed the Motor Carrier Safety Improvement Act of 1999, which created the Federal Motor Carrier Safety Administration within DOT and increased the penalties for Mexican carriers operating outside the commercial zones.

On February 6, 2001, the five-member arbitration panel unanimously concluded that the U.S. decision to block Mexican trucks from entering the United States violated the NAFTA agreement, as was its refusal to allow Mexican companies to invest in U.S. international cargo companies. It gave the United States thirty days to conclude a plan identifying a timetable and action steps the U.S. must take or face possible sanctions. If negotiations to implement NAFTA are unsuccessful, Mexico has the right to levy compensatory duties equal to the economic damage it incurred as a result of a closed border since 1995, which some estimate to be around $200 billion.

D. Bus Deregulation

In the United States, the rate wars, bankruptcies, a deteriorating margin of safety, and consumer exploitation coalesced in the mid-1930s to prompt federal regulation of the bus industry. In promulgating the Motor Carrier Act of 1935, Congress added trucking and bus companies to the jurisdiction of the Interstate Commerce Commission. Destructive competition abated, and for the half-century that followed, bus service was ubiquitously available throughout the nation at a price, which was "just and reasonable." Service was safe and dependable to large

1089. Id.
1091. Collier, supra note 1082.
1092. See William Buxton, Read: This Act Could Change Your Business, TRANSP. & DISTRIBUTION, Mar. 1, 2000, at 11. Under it, foreign domiciled carriers must carry a copy of their registration, and if a vehicle operates beyond the scope of their registration, it may be placed out-of-service; the carrier is liable for a civil penalty and, depending on whether the violation is intentional, may be suspended from operating anywhere in the United States for a period of time. See Lisa H. Harrington, Trucking Wins A Big One, TRANSP. & DISTRIBUTION, Jan. 1, 2000, at 69.
1093. Walker, supra note 1082.
1094. Id.
1095. Free Trade, supra note 1083, at 94-95. (citing Daniel McCosh, DOT, Mexico Talk Trucks, J. OF COMM. (Mar. 22, 2001)).
1096. Interstate Trucking, supra note 498, at 187.
1098. Interstate Trucking, supra note 498, at 187.
and small communities throughout the nation.\textsuperscript{1099}

As in telephone regulation, there was some measure of "cross subsidization" performed under the regulatory umbrella of the ICC (in interstate transport) and the State Public Utility Commissions [PUCs] (in intrastate transport), with more lucrative, denser traffic lanes paying a premium above marginal costs to subsidize rural and small community service.\textsuperscript{1100} With the disintegration of the passenger railroad system (only partially replaced by Amtrak), buses became the only public means of transport to or from tens of thousands of communities across the nation.\textsuperscript{1101}

With the \textit{laissez faire} crusade sweeping railroads (with promulgation of the 4-R Act of 1976 and the Staggers Rail Act of 1980), airlines (with the enactment of the Air Cargo Deregulation Act of 1977 and the Airline Deregulation Act of 1978), and trucking (following the Motor Carrier Act of 1980), the buses were deregulated as well.\textsuperscript{1102}

The Bus Regulatory Reform Act of 1982 [BRRA] significantly liberalized entry, exit and pricing of the U.S. bus industry, and largely preempted the states.\textsuperscript{1103} The BRRA liberalized entry by removing the requirement that applicants prove "public convenience and necessity," leaving them with the obligation to establish only that they are "fit, willing, and able" to provide the proposed operations.\textsuperscript{1104} A protestant must then prove that issuance of the authority sought will not be in the public interest.\textsuperscript{1105} Abandonments became easier too.\textsuperscript{1106} Moreover, industry-proposed intrastate abandonments and price increases denied by the state PUCs could now be appealed to the Interstate Commerce Commission, where they were almost always reversed.\textsuperscript{1107}

In the first year under the BRRA, the bus industry announced termination or reductions of service at 2,154 communities.\textsuperscript{1108} By late 1986, 4,514 communities had lost bus service, while only 896 had gained it.\textsuperscript{1109}
The U.S. intercity bus network constricted significantly under deregulation.\footnote{1110}{Peaking at 27.7 intercity passenger miles traveled in 1979, it fell steadily each year thereafter to twenty-three billion passenger miles in[199x18]}

and rural populations have a higher percentage of children and elderly who need access to public intercity transport than do urban areas. \textit{Id.} (citing Reconnecting Rural America, \supra\ note 1108, at 8). During 1977, 30\% of all intercity bus passenger miles were traveled by individuals living in rural areas, compared to trains (20\%) and airlines (15\%); families earning less than $10,000 a year accounted for 45\% of intercity bus passenger miles, compared to trains (25\%), automobiles (18\%), and airlines (15\%); people under the age of 18 or over the age of 64 accounted for half of intercity bus passengers, compared to automobiles (33\%), railroads (25\%), and airlines (17\%). A 1988 survey by Greyhound Lines Inc. revealed that 44.8\% of its passengers were from families which earned less than $15,000 a year. Robert K. Nathan Assoc., \textit{Federal Subsidies For Passenger Transportation, 1960-1988: Winners, Losers, and Implications For The Future} 17-20 (1989). The U.S. Department of Agriculture summarized the impact of deregulation upon small towns and rural communities:

Many rural residents no longer have intercity public transportation available to them. It is no longer possible "to get from here to there." The combined effect of rail, air, and bus deregulation has simply removed many rural areas from the intercity transportation network. In those small communities where some form of intercity transportation is still available, the cost of travel has risen, sometimes dramatically. . . .

The net result for many rural residents is increased isolation from society at large, as linking with other communities becomes more and more difficult. An alternative for some elderly people is to move away from their homes in rural areas to an urban area—where they no longer have the support of their local community network and where they may require the support of human services agencies to remain independent. [T]here may be an incremental addition to a larger trend toward increased isolation and rising costs for rural communities. As costs rise, businesses close, thereby reducing the number of services available locally. And as the number of services decline, residents are forced to travel farther to access medical care, shopping, employment opportunities, and social and recreational outlets. As people travel to meet basic needs, the cycle of decline is reinforced as individuals combine their trips to the larger community to include the doctor, the shopping center, and the theater—and bypass the local business as an additional, unnecessary stop. Eventually, population declines as access to basic services becomes too difficult or too costly for rural residents to sustain.

\textit{Interstate Trucking,} \supra\ note 498, at 230 n.170 (citing \textit{Reconnecting Rural America,} at 26-27). See generally \textit{The Dark Side of Deregulation,} \supra\ note 9.

1110. \textit{Interstate Trucking,} \supra\ note 498, at 230 n.170. Prior to its deregulation, industry officials predicted that deregulation would result in drastic service reductions to small communities. Harry Lesko, President of Greyhound of Arizona, said that "Eighty-nine percent of our routes are subsidized by the bread-and-butter primary routes. . . . [I]f we are to keep our lines running and the scheduled miles operating on the primary routes to satisfy the high-density population factors, the rural areas are going to have to suffer because they're straining the main line system." \textit{Id.} (citing \textit{Intercity Bus Service in Small Communities: Senate Comm. on Commerce, Sci. & Transp.,} 95th Cong. 17 (1978)). Similarly Charles Webb, President of the National Association of Motor Bus Owners, insisted that

\[ \text{[t]he one conclusive argument against removal of controls on entry by motor carriers of passengers stems from their obligation to provide service to thousands of small cities and towns and to vast rural areas without profit or at a loss, and from the fact that it would be unconscionable either to permit new entrants to skim the cream of the traffic or to authorize existing carriers to discontinue bus service to thousands of communities having no other form of public transportation.} \]

Webb, \supra\ note 488, at 105. Moreover, the loss of bus service meant the loss of the most fuel efficient and least polluting mode of transport. In 1985, the various modes consumed the following amounts of fuel per passenger mile:
1987.\textsuperscript{1111} Despite the freedom to raise prices and leave unprofitable markets created by deregulation, the bus industry suffered unprecedented losses under deregulation.\textsuperscript{1112} Part of this was due to “cream skimming” by new entrants that focused their operations on the denser, higher revenue traffic lanes.\textsuperscript{1113} Excessive capacity in dense markets deprived carriers of the revenue needed to cross-subsidize weaker markets.\textsuperscript{1114} Another part still was prompted by the impact of the airline rate wars of the early 1980s, after promulgation of the Airline Deregulation Act of 1978.\textsuperscript{1115} Supersaver airfares were luring passengers away from the bus stations and into airports.\textsuperscript{1116}

Between 1981 and 1986, Greyhound in the United States experi-

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
\textbf{Mode} & \textbf{BTUs per passenger mile} \\
\hline
Buses & 1,323 \\
Trains & 2,800 \\
Automobiles & 4,040 \\
Commercial Aviation & 4,376 \\
General Aviation & 11,339 \\
\hline
\end{tabular}
\caption{Fuel Consumption by Mode}
\end{table}

\textsc{Nathan, supra} note 1109, at 20.
\textsc{Id.} at app. C, table C.
\textsc{Interstate Trucking, supra} note 498, at 224 n.140.
\textsc{Id.}
\textsc{Id.}
\textsc{Id.}
\textsc{Id.}

\textsc{Id.} Even charter and tour deregulation had a deleterious effect upon carrier profitability. Jeremy Kahn painted the following portrait of the empirical results of deregulation:

[W]ith the exception of a handful of intercity carriers engaged in regular route transportation (be it true intercity transportation or even long distance commuter service within major metropolitan areas), charter and tour revenues provide a significant—if not the most significant—proportion of most carrier revenues. Deregulation of charter and tour operations on the federal level (and, generally on the state level to varying degrees) has resulted in overcapacity, leading to severe price competition, resulting in a diminution of overall carrier profits. This, coupled with ever increasing costs of operation, including the staggering cost of the newest intercity motorcoaches, increased cost of labor, including benefits, and other operating costs, including fuel and taxes, has resulted in mere economic survival being a major issue for many smaller charter and tour carriers within the industry.

Regardless of the number of efficient management programs which are instituted, regardless of the modernization of maintenance facilities and customer service facilities, and regardless of computerization of record keeping and billing, many carriers are faced with a close-to-being-unbearable squeeze on their profits.

... Many carriers are today operating aging fleets of equipment, with models costing the then significant amount of $155,000 now replaceable only with comparable models which cost twice as much.

In many instances, only new entrants, highly leveraged, and barely able to make lease payments on these expensive coaches, enter the charter market and provide fierce price competition, anxious only in the short run to meet their leasing obligations, thereby further exasperating this problem.

ienced severe losses. In 1986, Greyhound of Arizona sold its domestic operations to an investment group led by Fred Curry, a former officer, for $350 million. The following year, Greyhound acquired its rival Trailways, for $80 million, and the U.S. bus duopoly became a monopoly. Recognizing the Trailways was on its deathbed, the U.S. Department of Justice acquiesced and withheld antitrust opposition under the “failing company” doctrine. By the mid-1980s, that single firm accounted for more than 85% of the operating revenues of the ten largest carriers.

Alfred Kahn, the principal proponent of transportation deregulation, acknowledged that bus deregulation was a threat to small communities, whose lifeline is the intercity operator; therefore, had he been at the helm of government, he likely would not have deregulated the bus industry.

**XXIII. DEREGULATION OF OCEAN CARRIERS**

Steamship conferences first arose in the late 19th Century as vessel owners began to recognize that a purely competitive environment tended toward destructive competition. “Conferences” are agreements between ocean common carriers for the purpose of agreeing on rates and other competitive practices, sometimes including sailing times and pooled earnings. In the Shipping Act of 1916, Congress sought both to grant intercarrier agreements antitrust immunity, but regulate them to moderate anticompetitive abuses.

The Shipping Act of 1984 was the first significant statutory change in the regime of ocean shipping regulation since the Shipping Act of 1916. The 1984 Act reaffirmed the antitrust immunity shield created by the 1916 Shipping Act, which enabled carriers to collectively set prices within

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1120. *Interstate Trucking*, supra note 498, at 224 n.140.

1121. Kahn, supra note 1117, at 268.


1123. Pansius, supra note 356, at 337.

1124. *Id*.

1125. Dempsey & Thoms, supra note 22, at 32-33.
the conference system, and to publish conference tariffs containing those rates. Conference members were given the right of independent action, whereby they could offer a rate other than the collective rate offered by the conference. Shippers were given the right to negotiate contracts with an ocean carrier or group of carriers (conference). Such “service contracts” were required to be filed with the Federal Maritime Commission [FMC], and their essential provisions were published. But under the 1984 Act, the conferences were given the authority to control their members’ use of service contracts and could prohibit their members’ entering into such contracts.

The Ocean Shipping Reform Act of 1998 changed these rules in two basic areas: (1) tariff filing and enforcement; and (2) confidential contracts. The 1998 Act no longer required the filing of tariffs with the FMC. Carriers must instead publish and make these tariffs available to their customers and other shippers electronically. Carriers may take independent action on five days notice (compared with the previous ten day period), while rate increases or new tariffs require thirty days advance notice. Time volume rates are permitted.

Conference agreements are restricted under the 1998 Act. They may neither prohibit a member carrier from negotiating a service contract with (a) shipper(s), require a member carrier to disclose a negotiation of a service contract or the terms and conditions thereof, nor otherwise restrict the rights of a member carrier to negotiate or enter into service contracts. In essence, these provisions ensure freedom of contract be-

1127. Id. § 1707(a)(1).
1128. Id. § 1704(b)(8).
1129. Id. § 1703(a)(7).
1130. Id. § 1702(19).
1131. Id. § 1707(c).
1134. Id. § 1707(a)(1).
1135. Id.
1136. Id. §§ 1704(b)(8) & 1707(d).
1137. Id. § 1707(b). The 1998 Act also amended the definition of a “service contract” to provide that it must be a separate written document; the writing requirement is not satisfied by bill of lading or a receipt. The contract may involve one or more shippers and one or more carriers or a conference of carriers, whereby the shipper or shippers commit to tender a certain volume of or portion of its cargo or freight revenue over a specified period of time, and the carrier or carriers commit to a specified rate or rate schedule and service level (e.g., assured space, transit time, port rotation, or similar service feature). The contract may also specify penalties for nonperformance. Thus, service contracts focus on rates and levels of service. The shippers need not form a shipper’s association to negotiate a service contract Id. § 1702(19).
1138. Id. § 1704(c).
tween shippers and shippers associations in confidence a service contract with the carrier(s) of its choice.

The 1998 Act also repealed the provisions of earlier legislation that required a carrier to offer the same or equivalent service contracts to a similarly situated shipper. But both parties must ensure that their actions do not unjustly discriminate against ports or non-vessel operating common carriers [NVOCCs].

XXIV. Economic Trends Under Deregulation

The first two decades of deregulation were the darkest financial period of the airline, bus and trucking industries. They produced an unprecedented failure rate. More than 150 airlines went bankrupt. More than 1,000 motor carriers ceased operations every year beginning in 1983. More than half the general freight trucking companies disappeared.

Concentration became an epidemic in all modes of transport. The eight largest airlines, which in 1978 accounted for 81% of the domestic passenger market, dominated 94% by 1989. The seven largest railroads, which in 1979 accounted for 65% of revenue ton miles, had swollen to 89% by 1987. The eight largest motor carriers, which in 1978 accounted for 20% of that industry, had grown to 37% by 1987. And the bus duopoly became a monopoly with the merger of Greyhound and Trailways.

Mergers also proliferated in the airline and railroad industries. United Airlines acquired many of the international routes of Pan American World Airways, which was liquidated. American Airlines acquired Air Cal, Reno, and TWA as well as many of the international routes of Eastern Airlines, which was liquidated. Delta Air Lines acquired Western Airlines. Northwest Airlines acquired Republic Airlines.

1139. Id. § 1707(c).
1140. Id. § 1709(c).
1142. Market Failure, supra note 468, at 31.
1143. Running on Empty, supra note 1141, at 272.
1144. Id. at 273.
1145. Id.
1146. Interstate Trucking, supra note 498, at 223.
1147. Id.
1148. Id.
1149. Id.
1151. AIR COMMERCE, supra note 57, at 216. TWA had earlier acquired Ozark Airlines. Id.
itself the product of the merger of North Central, Republic, and Hughes Airwest. 1152 Continental was the product of the merger of Continental, Texas International, New York Air, People Express, and Frontier Airlines, as well as several regional carriers. 1153 US Airways (formerly Allegheny Airlines) acquired Piedmont and PSA. 1154 Southwest Airlines acquired Muse and Morris Air. 1155

Not only were national concentration levels at unprecedented levels, regionally, carriers had established hub-and-spoke systems, in which airlines maintained market power. 1156 Nearly all hubs were virtual monopolies, with megacarriers dominating more than 60% of gates, flights, and passengers. 1157 The General Accounting Office found that rates were 27% higher in monopoly hubs than in nonhubs. 1158 Pricing reflected the level of competition in any market, rather than marginal costs. 1159 The domination by giant airlines of hubs, landing and takeoff slots, computer reservations systems, frequent flyer programs made it exceedingly difficult for new entrants to challenge the established megacarriers. 1160

Much of deregulation had been premised on assumptions that there were not significant economies of scale or scope in transportation (except, perhaps, in the railroad industry), and that should incumbents raise prices to supracompetitive levels, new entrants would be attracted like sharks to the smell of blood. 1161 In theory, actual or potential entry would curtail the extraction of monopoly profits and discipline the market. 1162 This was the theory of contestable markets, which provided the intellectual foundation for deregulation. 1163 But during the 1990s, new entrants accounted for less than 5% of the national market. 1164 With megacarrier domination of hub airport infrastructure, computer reservations systems, code-sharing regional airlines, and frequent flying programs, the prospectus for new entry appeared dim. 1165

For railroads, mergers had also proliferated under a complaisant Interstate Commerce Commission, and its successor agency, the Surface

1152. See Airlines in Turbulence, supra note 1150, at 41.
1153. Id.
1154. AIR COMMERCE, supra note 57, at 216.
1155. See Airlines in Turbulence, supra note 1150, at 44 n.105.
1156. AIR COMMERCE, supra note 57, at 216-17.
1157. Id. at 217.
1158. Id.
1159. Id.
1160. Id.
1161. AIR COMMERCE, supra note 57, at 217.
1162. Id.
1163. Id.
1164. Id.
1165. AIR COMMERCE, supra note 57, at 217.
Transportation Board.\textsuperscript{1166} Intense public criticism of the ICC’s abdication of its antitrust responsibilities prevailed to force the Commission to disapprove the merger of the Santa Fe and Southern Pacific in 1986 and upon Congress to disapprove the sale of Conrail to the Norfolk Southern that same year.\textsuperscript{1167} But by the dawn of the 21st Century, four major railroads dominated the nation—the Union Pacific, the BNSF, the Norfolk Southern, and CSX.\textsuperscript{1168}

Perhaps the most consistent theme expressed by deregulation’s proponents was that deregulation has caused a significant decline in fares.\textsuperscript{1169} For example, Steven Morrison and Clifford Winston of the Brookings Institution maintained that price savings resulted in consumer savings amounting to some $6 billion a year.\textsuperscript{1170} About $4 billion of that was attributed to business traveler time-savings because of more frequencies.\textsuperscript{1171}

This has been a matter of some controversy. Some maintain that the hub-and-spoke phenomenon has caused the air transport system to become decidedly slower because both of circuitous routings, congestion, and delays at hub airports necessitated by passenger transfers.\textsuperscript{1172} Moreover, much of the pro-deregulation literature fails to mention the pre-deregulation trend of declining fares which preceded 1978.\textsuperscript{1173} In fact, except for a period of sharp fare declines from 1976 to 1979, fuel and inflation adjusted fares fell at a 30% faster rate in the decade preceding deregulation than in the decade subsequent to it.\textsuperscript{1174}

The literature shows a decline in the rate of airline productivity growth after 1978.\textsuperscript{1175} Deregulation critics point out that the pre-deregulation trend of flying increasing numbers of passengers nonstop in wide-bodied aircraft (Boeing 747s, McDonnell-Douglas DC-10s, and Lockheed L-1011s) was aborted with the development of hubs-and-spokes, which require smaller planes with higher seat mile costs.\textsuperscript{1176} Hubbing also burns more fuel and consumes more labor and time.\textsuperscript{1177}

Whatever the truth on whether deregulation has benefited consum-

\begin{thebibliography}{99}

\bibitem{1166} \textit{Id}.
\bibitem{1167} \textit{Id}.
\bibitem{1168} \textit{Id}.
\bibitem{1169} \textit{Air Commerce, supra} note 57, at 217.
\bibitem{1170} \textit{Id}.
\bibitem{1171} \textit{Id}.
\bibitem{1172} \textit{Id} at 218.
\bibitem{1175} \textit{Id} at 217-18.
\bibitem{1176} \textit{State of the Airline, supra} note 420, at 152.
\bibitem{1177} \textit{Id}.
\end{thebibliography}
ers, its impact on the industry itself was profound. By 1992, the airline industry had suffered more than 150 bankruptcies and 50 mergers, and had lost all the profit it had made since the Wright Brothers flight at Kitty Hawk, plus $1.5 billion more.1178 Alfred Kahn admitted, "There is no denying that the profit record of the industry since 1978 has been dismal, that deregulation bears substantial responsibility, and that the proponents of deregulation did not anticipate such financial distress—either so intense or so long-continued."1179

1178. ld. at 131. Competition oversight and financial stabilization was performed during the Air Mail contract period, and during the period of economic regulation (1938-1978). Economic growth and technological developments, coupled with benign governmental oversight, kept the industry profitable, and importantly, lowered consumer prices significantly until the recession of 1969-71. Potential economic collapse caused by excessive capacity, recession, and a sharp spike in fuel prices triggered by the Yom Kippur War and the Arab Oil Embargo was avoided in that period by the application of regulatory tools—a route moratorium, capacity limitation agreements, pass through of fuel in the rates, and route swapping. All that was viewed as anticompetitive and anti-consumer, and the industry was deregulated in 1978, the year in which it achieved record profitability. It was not to last long. During the 1981-83 recession, the industry lost $1.4 billion, and one major airline was liquidated. AIR COMMERCE, supra note 57, at 218.

The laissez-faire period which followed led to a roller coaster of industry consolidations in the 1980s, creating modest profitability for a short. Then recession, the Gulf War, and a spike in fuel caused economic collapse from 1990-94, during which the industry lost $13 billion. The President and Congress responded by creating the Bailies Commission, most of whose members had little enthusiasm for any governmental remedy beyond such indirect subsidies as releasing crude from the Strategic Petroleum Reserve and rolling back taxes. Direct subsidies were provided to one Minneapolis-based airline. Five major carriers collapsed into bankruptcy; two were liquidated. ld. 218-19.

With a growing economy in the later 90s, prosperity reappeared. But we are again back to financial collapse of a magnitude we have never seen before (losses of nearly $13 billion last year alone, absent the federal bail-out, and probably around $6-8 billion this year). This time, the government responded with socialism again—having the taxpayers bail out an industry which appears to have the characteristics of destructive competition whenever the economy softens. The U.S. government has not only become the financial fuel injector, but the financial lender insurer and insurer of last resort, holding a growing portfolio of airline stocks. ld.

Who would have imagined that a concept such as deregulation—designed to inject free market capitalism into an industry whose pricing and entry had been regulated for 40 years—would instead produce socialism. Regulation is not the antithesis of competition; socialism is.

1179. Alfred E. Kahn, Airline Deregulation—A Mixed Bag, But A Clear Success Nevertheless, 16 TRANSPL. L.J. 229, 248 (1988) [citations omitted] [hereinafter Deregulation, A Mixed Bag]. Alfred Kahn did not promise that deregulation would produce a world of perfect competition. But his assumptions about economies of scale, barriers to entry and contestability reveal how well versed he was in the theory, and how it drove the economics and politics of deregulation.

Before Congress in 1977, he testified, "the assumption that you are going to get really intense, severe, cut-throat competition just seems to be unrealistic when you are talking about a relatively small number of carriers who meet one another in one market after another." Kahn said, "I just do not see any reason to believe that an industry which is potentially rapidly growing, for which there is an ever-growing market, cannot prosper and attract capital." AVIATION REGULATORY REFORM: HEARINGS BEFORE THE SUBCOMM. ON AVIATION OF THE COMMITTEE ON PUBLIC WORKS & TRANSP., 95th Cong. 178-79 (1978).

Speaking before the New York Security Analysts in 1978, he discounted, "The most general fear about [airline deregulation] is that when the CAB withdraws its protective hand from the
After deregulation, national and regional concentration reached unprecedented levels. One source described five major issues of concern of airline deregulation:

- The competitiveness of the industry (its effects on the fares and level of service provided to consumers today and the prospects of reduced competition from further industry concentration),
- The long-term financial stability of the industry,
- Possible discrimination against consumers of different types or in different parts of the country,
- The safety provided to the public by airlines and the FAA, and
- The ability of the federal government to respond to airport and airway capacity constraints.\footnote{1180}

Because performance of the industry under deregulation deviated significantly from the economic model of near perfect competition predicted, some of deregulation's early proponents reevaluated their hypotheses. Michael Levine, among the most staunch early proponents of deregulation, and whose early literature on the subject found no economies of scale of significance in commercial aviation,\footnote{1181} subsequently developed a theoretical justification for and found the existence of

\footnote{doorknob, the door will open to destructive competition - to wasteful entry and cut-throat pricing - that will depress profits, render the industry unable to raise capital, and so cause a deterioration in the service it provides - on the whole, it must be admitted good service." That was before deregulation. \textit{State of the Airline}, supra note 420, at 149 (quoting Alfred E. Kahn, \textit{Talk to the New York Society of Security Analysts} (Feb. 2, 1978)).

A decade after deregulation, Kahn confessed, "There is no denying that the profit record since 1978 has been dismal, that deregulation bears substantial responsibility, and that the proponents of deregulation did not anticipate such financial distress—either so intense or so long-continued." That was said before the $13 billion losses of airline industry losses of 1990-94, or the $21 billion of losses in 2001-02. \textit{Deregulation, A Mixed Bag}, at 248.

Also in 1988, Kahn put out the second edition of his regulatory economics textbook, wherein he wrote, "The major prerequisites [of destructive competition] are fixed or sunk costs that bulk large as a percentage of total cost; and long-sustained and recurrent periods of excess capacity. These two circumstances describe a condition in which marginal costs may for long periods of time be far below average total costs. If in these circumstances the structure of the industry is unconcentrated—that is, its sellers are too small in relation to the total size of the market to perceive and to act on the basis of their joint interest in avoiding competition that drives price down to marginal cost—the possibility arises that the industry as a whole, or at least the majority of its firms, may find themselves operating at a loss for extended periods of time." \textit{Alfred E. Kahn, The Economics of Regulation: Principles and Institutions}, II-173 (2d ed. 1988).

A few years later, when Kahn was asked whether he anticipated that deregulation would lead to such unsatisfactory financial results, he said, "No, I talked about the possibility that there might be really destructive competition, but I tended to dismiss it. And that certainly has been one of the unpleasant surprises of deregulation." Kahn said, "We thought an airplane was nothing more than marginal costs with wings." \textit{Airlines in Turbulence}, supra note 1150, at 87.

\footnote{1180. \textit{Winds Of Change}, supra note 428, at 43.}
\footnote{1181. \textit{See Note, Is Regulation Necessary? California Air Transportation and National Regulatory Policy, 74 Yale L.J. 1416, 1439 (1965).}
substantial economies of scale and scope in the industry.\textsuperscript{1182}

The early economics literature also emphasized the potential contestability of airline markets. Subsequent evaluation of commercial aviation finds little evidence of contestability.\textsuperscript{1183} As Charles Rule, Assistant Attorney General for Antitrust observed, "[M]ost airline markets do not appear to be contestable, if they ever were. . . . [D]ifficulties of entry, particularly on city-pairs involving hub cities, mean that hit-and-run entry is a theory that does not comport with current reality."\textsuperscript{1184}

XXV. SUMMARY AND CONCLUSIONS

The transportation industry has undergone a rather remarkable metamorphosis—from horses and wagons, to steamships, to railroads, to trucks and automobiles, to aircraft—a transformation that is far from over. The evolution of technology, of America's economy, and indeed, of economic theory and political ideology have all contributed to the relationship between government and this important infrastructure industry, one which today accounts for approximately 16\% of the gross national product.\textsuperscript{1185}

Few industries play as broad or vital a role in the U.S. economy as transportation. Throughout the nation's history, a network of roads, canals, railroads, and airways has spurred growth by making possible the movement of goods from one market to another.\textsuperscript{1186} Transportation has historically been identified as an industry that is "affected with a public interest."\textsuperscript{1187} Indeed, the common carrier obligation—the principle (derived from common law) that common carriage is open to all, upon reasonable request, on fair and nondiscriminatory terms—has been imposed upon transportation companies since the Middle Ages. Accordingly, federal regulatory oversight of the surface transportation industry has long been considered necessary and justified to protect the public's interest in having adequate transportation available on reasonable terms.

Federal, state, and local governments in the United States have a


\textsuperscript{1183} See Elizabeth E. Bailey & Jeffrey R. Williams, \textit{Sources of Economic Rent in the Deregulated Airline Industry}, 31 J. L. & ECON. 173, 199 (1988); Levine, supra note 1182, at 405-08.

\textsuperscript{1184} \textit{Winds of Change}, supra note 428, at 25.

\textsuperscript{1186} See the \textit{Airline Industry}, supra note 420, at 153 (citing Charles Rule, \textit{Antitrust and Airline Mergers: A New Era} 15, 18 (speech before the Int'l Aviation Club, Washington, D.C., Mar. 7, 1989)).

\textsuperscript{1185} \textit{The Eno Transp. Foundation, Transportation in America}, 38-42 (12th ed. 1994).

\textsuperscript{1186} By the mid-1990s, outlays for transportation-related goods and services in the U.S. amounted to more than $1.025 trillion annually (16\% of gross national product), of which nearly $300 billion was attributable to the for-hire freight and passenger sectors. \textit{Id.}

\textsuperscript{1187} \textit{Munn}, 94 U.S. at 130.
long history of building, financing, subsidizing, and promoting transportation. The land grants and government subsidies helped build the railroads; the nationalization of rail passenger service helped restore the health of the freight railroads. Government carries the mail. It builds the roads, highways, transit lines, airports, and seaports. It does all this because it understands the profound positive social and economic externalities transportation potentially offers. Whenever possible, the provision of transportation services in the United States has been left to private firms (a/k/a common carriers). When it has not been economically feasible, such as with airports, air traffic control and the airways, the government has assumed responsibility—state and local governments through ownership and operation of airports, and the federal government through capital funding support for airports and operation of the air traffic control system.

Federal regulation of the transportation sector of the United States' economy has served various purposes: to remedy market deficiencies (such as lack of effective competition, or to remedy destructive competition), to override the market to achieve broader social purposes, and to ensure uniformity in the face of regulatory efforts by the States. These purposes and the manner in which regulation has been implemented to achieve them affect not only the performance of the companies and industries in this sector, but also the ability of the United States to lead the global economy.

In 1887, Congress passed the Interstate Commerce Act to protect the shipping public from the monopoly power of the rail industry, and created the Interstate Commerce Commission to carry out that regulatory charge.1188 In 1935, the Commission's regulatory authority was extended to include the nascent interstate trucking and bus operations.1189 Other sectors of surface transportation—pipelines, domestic water carriers, and freight forwarders—were subjected to economic regulation in 1910, 1940, and 1942, respectively.1190 Airlines were regulated in the same fashion beginning in 1938.1191 Federal economic regulation of transportation developed into a comprehensive web of governmental oversight of entry and exit, rates, consolidations, and service quality. Regulation reached its high water mark in the 1950s and 1960s.

In the late 1970s and early 1980s, Congress began to pare and refine federal transportation regulation to reflect contemporary industry conditions and evolving ideological attitudes. The result was to reduce significantly the federal presence in the interstate transportation industry.

1188. See Genesis & Evolution, supra note 2, at 336.
1189. See id. at 344.
1190. See id. at 343 n.51.
1191. Id.
Legislative regulatory reform began in the railroad industry with the 3-R Act of 1973 and 4-R Act of 1974, followed a few years later by the Staggers Rail Act of 1980. Airlines followed, with the Air Cargo Deregulation Act of 1977, the Airline Deregulation Act of 1978, and the Civil Aeronautics Board Sunset Act of 1984, which terminated the Civil Aeronautics Board, and transferred its remaining responsibilities to the U.S. Department of Transportation.\footnote{1192 The five-year period from 1976 to 1981 will be remembered as perhaps the most active in the almost 100-year history of governmental regulation of transportation. During the decades surrounding 1900, the federal focus was limited to railroads and ocean carriers. Indeed, concern with rail transportation prompted the creation of the nation’s first independent regulatory agency, the Interstate Commerce Commission. During the 1930’s, federal concern again focused on the problems confronting transportation, leading Congress to regulate several new modes of transport: motor, bus, inland water, and air carriers, as well as freight forwarders and brokers. But beginning in the mid-1970s, national concern over the economic health of railroads led Congress to promulgate successive pieces of legislation designed to stimulate the rail industry and avoid future problems of the type experienced by Conrail, the Rock Island, and the Milwaukee Road. Thus, the 4R Act of 1976 and the Staggers Rail Act of 1980 attempted to free the rail industry from excessive governmental intervention, making it possible for the industry to enjoy the economic opportunities available in the marketplace. Congress also freed rail carriers from the obligation of providing passenger service by creating the federally subsidized Amtrak.}\footnote{Air Commerce, supra note 57, at 223.} Similarly, the regulatory scheme established by the Civil Aeronautics Board led Congress to deregulate air transportation under the Air Cargo Deregulation Act of 1977 and the Airline Deregulation Act of 1978. The motor carrier industry also came under legislative and regulatory scrutiny that culminated in the passage of the Motor Carrier Act of 1980, the Household Goods Transportation Act of 1980, and the Bus Regulatory Reform Act of 1982. Id.

Few industries have undergone such a comprehensive reevaluation by Congress in such a short period of time as has transportation. This reevaluation represents a concern that government can become archaic in its ways and fail to keep pace with a modern, rapidly growing, industrialized society. Occasionally, it is desirable for Congress to pull out the old statutes and dust them off, to examine the “dinosaur” agencies and revamp them as necessary and to modernize the regulatory structure and improve its organization and procedures in order to ensure that the public interest is best served. It is clearly in the public interest for Congress to maintain a close working relationship with the agencies under its control. Id.

The Seventh Circuit summarized the vitality of legislative activity in the transportation area when it observed:

“Deregulation” is the current “buzzword” with respect to all forms of transportation. Beginning under the Jimmy Carter administration with the Airline Deregulation Act of October 24,1978, 92 Stat. 1705, 49 U.S.C. s 1301 et seq. whose title describes it as an Act “to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services,” the increased reliance on what President Ronald Reagan has called “the magic of the market place” was extended to motor carriers by the Act of July 1,1980, 94 Stat. 793, 49 U.S.C. s 10101, and to railroads by the Act of October 14,1980, 94 Stat. 1895, 49 U.S.C. s 10101 (known from the name of its House sponsor, as the “Staggers Rail Act of 1980”). Likewise, one day later, the Household Goods Transportation Act of October 15, 1980, 94 Stat. 2011, 49 U.S.C. s 10101 note, . . . was enacted. Historians might philosophize that excessive reliance upon market forces may prove shortsighted and resurrect some of the ancient evils which led to the enactment in 1887 of the Interstate Commerce Act in the first place. Was it not the uninhibited operation of marketplace forces which enabled John D. Rockefeller’s Standard Oil Company to
the Household Goods Act of 1980 significantly reduced federal economic regulation of trucking operations.\textsuperscript{1193} Congress addressed and reshaped regulation of the intercity bus industry in the Bus Regulatory Reform Act of 1982.\textsuperscript{1194} The Surface Freight Forwarder Deregulation Act of 1986 deregulated freight forwarders, other than those handling household goods.\textsuperscript{1195} The Negotiated Rates Act of 1993 addressed problems arising out of filed rate regulatory requirements in the trucking industry.\textsuperscript{1196} The Trucking Industry Regulatory Reform Act of 1994 further reduced federal regulation of the trucking industry.\textsuperscript{1197} The ICC Termination Act of 1995 sunset the Interstate Commerce Commission, deregulated and amended certain functions, and transferred jurisdiction over rail, motor, bus, broker, freight forwarder and pipeline services to the newly created Surface Transportation Board [STB] and the DOT.\textsuperscript{1198} And a rider to an FAA appropriations act preempted the States from continuing intrastate regulation of motor carriers.

At this writing, railroads have consolidated into four major lines; the bus industry has one large survivor; and several hundred airlines and trucking companies have gone bankrupt.

In the 19th Century, market failure gave birth to transport regulation. The public interest in transportation was deemed paramount. Nearly a century after economic regulation was born, an expanding, even inflationary economy, coupled with a perceived failure of the regulatory mechanism, gave birth to deregulation. Undoubtedly, the pendulum of American public policy will swing again. Like transportation itself, public policy in this vital infrastructure industry is in perpetual movement.

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\textsuperscript{1193} \textit{Air Commerce}, \textit{supra} note 57, at 223-24.

\textsuperscript{1194} \textit{Id.} at 224.

\textsuperscript{1195} \textit{Intermodal Transportation}, \textit{supra} note 780, at 388.

\textsuperscript{1196} \textit{Id.}

\textsuperscript{1197} \textit{Id.} at 388-89.

\textsuperscript{1198} \textit{Id.} at 389. The STB is a three-member independent panel within the U.S. Department of Transportation. The MCIA is a part of the DOT's Federal Highway Administration. Jurisdiction over railroads and pipelines is now vested in the STB. Jurisdiction over motor carriers, water carriers, brokers and freight forwarders is now vested in the Office of the Secretary of Transportation. \textit{Id.}