

ERRATA: VOLUME 30: ISSUES 2-3, SPRING/SUMMER 2003

Dear Readers:

The Transportation Law Journal staff would like correct the following editing errors in Paul Stephen Dempsey's article, *Transportation: A Legal History*, which was published in Volume 30: Issues 2-3 of the Transportation Law Journal.

Author Autobiographical Section:

It should be noted that Dr. Dempsey has authored fourteen books, not ten books.

The following sentence should be added:

The author would like to thank several transportation lawyers and scholars for their inspiration on the issues described herein, including Mark Andrews, Dan Baker, Dick Champlain, Jim Hardman, Rick Kissinger, Rod Macdonald, Bob McFarland, and Bill Taylor.

Pages 342-43:

The following paragraph should be added following the sentence marked by footnote 1015.

Criticism of economic regulation of the motor carrier industry was launched by a number of academics. For example, Professor Robert Hardaway condemned motor carrier regulation as providing "a striking example of the economic and social harm which results when classical regulation is imposed on a competitive industry."<sup>1016</sup> He summarized the "harm and inefficiencies caused by trucking regulation" in terms of:

Rates which are too high, irrational and discriminatory.

Social and economic inequities.

Inferior service to small communities.

Waste and inefficiency.<sup>1017</sup>

The corresponding footnotes for the above paragraph should read as follows:

<sup>1016</sup>Robert Hardaway, *Transportation Deregulation: Turning the Tide*, 14 *TRANSP. L.J.*101, 106 (1984).

<sup>1017</sup>*Id.* at 132-33 (citations omitted). According to Hardaway, motor carrier deregulation should follow the path of airline deregulation: "At a time when the deregulation of motor carriers and railroads is far from complete, the experience of airline deregulation nevertheless provides an excellent case study and blueprint for der-

egulation of other transportation modes. Robert Hardaway, *Deregulating the Airlines*, 15 *TRANSP. L.J.*165, 168 (1986).

Page 350:

The words “or vote” were deleted after “Committee hearing,” from the sentence marked by footnote 1077.

Page 358:

The following sentence should be deleted under the heading XXIV. ECONOMIC TRENDS UNDER DEREGULATION

The first two decades of deregulation were the darkest financial period of the airline, bus and trucking industries.

The following sentences should be added under the heading XXIV. ECONOMIC TRENDS UNDER DEREGULATION

In testimony before the U.S. Congress, and in books, articles and newspaper editorials, Professor Robert Hardaway insists that economic regulation was a catastrophic failure, and that deregulation has been a remarkable success, resulting in dramatic price savings, and less industry concentration.<sup>1143</sup> In an attempt to explain the difference in the assessment of the public policy impact of deregulation between the economics journals (which tend to praise deregulation) and the law journals (which are more critical), Hardaway accused the legal community of bias: “lawyers themselves have an interest in regulation because they play a significant role in its administration.”<sup>1144</sup> In an unusually harsh indictment of the legal profession and the transportation bar, particularly by a Professor of Law, Hardaway likened those who had represented carriers before regulatory agencies such as the ICC and CAB to anachronistic Marxists of the former Soviet Union. Wrote he: “Like the followers of collapsing authoritarian regimes around the world, old-time regulators took [transportation deregulation] hard. As a former associate counsel of the CAB commented, ‘It is understandably painful for one involved in economic regulation over a professional lifetime to consider one’s work outdated, or even worse, misdirected.’”<sup>1145</sup> In other words, the professional work and contribution of transportation lawyers that helped build what was once universally acclaimed to be the “world’s finest system of transportation”, was unfortunately “misdirected.” According to Professor Hardaway, “deregulation shows every sign of giving the transportation industry a better opportunity to serve the real needs of the consumer, the industry and its employees.”<sup>1146</sup> More

than three decades into deregulation, we are still waiting for it to accomplish those objectives.

Despite such academic euphoria, the first several decades of deregulation have been the darkest financial period in history for the airline, bus and trucking industries.

The corresponding footnotes for the above paragraph should read as follows:

<sup>1143</sup>Robert Hardaway, *Economics of Airport Regulation*, 20 *TRANSP. L.J.*47, 51 (1991). According to Hardaway, "Yes, the competitive environment of deregulation did indeed result in lower fares, and greater efficiency; . . ." Robert Hardaway, *Deregulating the Airlines*, 15 *TRANSP. L.J.*165, 167 (1986). In his 1991 book, Prof. Hardaway would praise deregulation as lowering fares, improving service, and increasing employment. Robert Hardaway, *Airport Regulation, Law and Public Policy* 24 (1991). These are themes that pervade his literature. See e.g., Robert Hardaway, *Is Airline Deregulation a Myth?* *The Journal of Commerce* (June 30, 1992); Robert Hardaway, *Salvaging Airline Decontrol*, *The Journal of Commerce* (January 26, 1991); Robert Hardaway, *Critics of Airline Industry Deregulation Spouting Venom at the Wrong Target*, *Rocky Mountain News* (September 12, 1990).

Prof. Hardaway also became among the most prominent champions of the contribution that Frank Lorenzo made to the airline industry. See Robert Hardaway, *Lorenzo: The Other Side of the Story*, *Boston Globe* (September 4, 1990); Robert Hardaway, *The Good That Lorenzo Did*, *The Cleveland Plain Dealer* (September 1, 1990). The DOT would disagree. In reviewing Lorenzo's fitness to operate a new airline, a DOT Administrative Law Judge concluded, "Mr. Lorenzo's companies have lived on the edge of the law and have not desisted from improper conduct until lawsuits or governmental action deterred them from further transgressions. Since air safety is of paramount importance, the Department cannot take the risk of certifying an air carrier whose owner exhibits such manifest contempt for the legal process." *ATX, Inc. Fitness Investigation*, 1993 WL 534627, at 63 (1993). On appeal, the DOT concurred with its ALJ, concluding that because of Lorenzo's involvement with ATX, its managerial competence and compliance disposition were lacking. This conclusion was based on DOT's review of safety, service and financial failure at Lorenzo's prior airlines, as well as the widespread lack of personal good faith and trustworthiness in his business dealings and legal and regulatory proceedings. *ATX, Inc., Fitness Investigation*, DOT Order 94-4-8 (1994). In the 1980s, Lorenzo had successfully

assaulted a number of carriers with leveraged buy-outs, including Continental, People Express (that included Frontier, Britt and PBA), and Eastern Airlines. Although for a short while he presided over the free world's largest airline empire, his carriers stumbled into bankruptcy, and Eastern was liquidated.

<sup>1144</sup>Robert Hardaway, *Transportation Deregulation: Turning the Tide*, 14 *TRANSP. L.J.* 101, 106 (1984).

<sup>1145</sup>Robert Hardaway, *Recreating the Airline Cartel*, *Bridge News* (Feb. 8, 2001).

<sup>1146</sup>Robert Hardaway, *Transportation Deregulation: Turning the Tide*, 14 *TRANSP. L.J.* 101, 151 (1984).

Page 359-60:

The following sentence marked by footnote 1165 should be deleted.

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.<sup>1165</sup>

The following sentence should be inserted after the sentence marked by footnote 1164.

But overall, pricing was set at unsustainable levels, causing the industry to lose all the profit it had earned in its history.

The following paragraph that precedes the sentence marked by footnote 1166 should be deleted.

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.<sup>1161</sup> In theory, actual or potential entry would curtail the extraction of monopoly profits and discipline the market.<sup>1162</sup> This was the theory of contestable markets, which provided the intellectual foundation for deregulation.<sup>1163</sup> But during the 1990s, new entrants accounted for less than 5% of the national market.<sup>1164</sup> 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.<sup>1165</sup>

Page 360:

The following sentence should be added following the sentence marked by footnote 1174.

It is remarkable that deregulation advocates attribute lower prices to deregulation, but refuse to attribute financial disintegration to deregulation.

Pages 361-62:

The following sentence should be added following the sentence marked by footnote 1179.

But the \$18 billion of economic losses of the early 1990s were modest in contrast to the \$30 billion the airline industry lost in the early 21<sup>st</sup> Century.

Page 366:

The following sentence should be deleted in footnote 1198.

The MCIA is a part of the DOT's Federal Highway Administration.

