

Foreword: Transportation Law in the Post 9/11 World

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During the last twenty-five years dramatic changes have taken place in the transportation industry. Together the various components of the industry, which involve the movement of goods, people and information, have represented 16% of the gross domestic product, a substantial portion of the national economy.¹ Deregulation of the airline and trucking industries, however, has led to profound consequences for both industries.² In trucking, a highly unionized industry has become substantially less so.³ Contract negotiations between the Teamsters Union, represent-

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1. Letter from Professor Paul Stephen Dempsey to Prospective Law Students, (undated), 27 *TRANSP. L. J.* 1 (2000).

2. See generally Steven Kropp, *Collective Bargaining in Bankruptcy: Toward An Analytical Framework for Section 1113*, 66 *TEMPLE L. REV.* 697, 697-701 (1993) (describing the inherent conflict between bankruptcy and labor law and proposing a model for analyzing sec. 1113 of the Bankruptcy Code).

3. See Michael H. Belzer, *Collective Bargaining After Deregulation: Do the Teamsters Still Count?*, 48 *INDUS. & LAB. REL. REV.* 636, 636-37 (1995) (“[e]conomic deregulation has accelerated the deunionization of the trucking industry”).

ing drivers, and most of a largely fragmented, competitive trucking industry over the National Master Freight Agreement (NMFA) once dominated the newspaper and television headlines.⁴ Membership in the Teamsters Union has fallen, however, from approximately two million members in 1979 to one million four hundred thousand members in 2002.⁵ Consequently, the Teamsters Union has become a less powerful force in the national economy.⁶

The effects of deregulation on the airline industry have been just as significant. Ease of entrance, fare wars, and the increase in passenger traffic, have transformed an industry dedicated to a business and upper-class luxury clientele into a low-cost, mass consumer driven industry today.⁷ The consequences for the major U.S. carriers, however, have not been particularly positive: companies such as American, Braniff, Continental, Delta, Eastern, Northwest, Pan American, TWA, United, and U.S. Air have proved unable to compete successfully.⁸ These companies have operated on the traditional hub and spoke model. That model has proved economically ineffective under deregulation.⁹ Many of these ma-

4. See Arthur A. Sloane, *Collective Bargaining in Trucking: Prelude to National Contract*, 19 INDUS. & LAB. REL. REV. 21 (1965) (providing a description of the late Teamsters President James Hoffa's pivotal role in the genesis of the NMFA).

5. Bureau of Labor Statistics, U.S. Dept. of Labor, Bull. No. 2079, *Directory of National Unions and Employee Associations* 46 (1980); Court Gifford, ed., *Directory of U.S. Labor Organizations*, 2002 Edition 62; see also George Feldman, *The New Teamsters and the Labor Movement*, 38 WAYNE L. REV. 527, 579 n.141 (1992) (observing that membership had "dropped from 2.2 million to 1.5 million in a decade.") (citing the Daily Lab. Rep. (BNA) Feb. 4, 1992 at A-5).

6. Belzer, *supra* note 3, at 643-45, 653-54. UPS workers remain staunchly Teamster, Belzer, *supra* note 3, at 640, 651, and, with over 200,000 of them as members, are currently the largest single component of the Union. Teamsters Online: About the Teamsters: Teamster Facts and Demographics at 1 available at <http://www.teamster.org/about/demogrph.htm>. [hereinafter Teamsters Online] [last accessed on 4/6/2004]. Only 120,00 members are covered by the National Master Freight Agreement, Id., because long and short haul trucking companies increasingly are operated as double breasted companies or simply non-union. See George Feldman, *supra* note 5 at 540-41.

7. See Michael A. Katz, *The American Experience Under the Airline Deregulation Act of 1978—An Airline Perspective*, 6 HOFSTRA LAB. L. J. 87, 93-94 (1988)

8. See Gregory P. Ripple, Note, *Special Protection in the Air[line Industry]: The Historical Development of Section 1110 of the Bankruptcy Code*, 78 NOTRE DAME L. REV. 281, 284-286 (2002) (noting that Braniff, Eastern, Pan American, and TWA have ceased doing business); Mark C. Mathiesen, Comment, *Bankruptcy of Airlines: Causes, Complaints, and Changes*, 61 J. AIR L. & COM. 1017, 1018 n.6 & n. 7 (1996). These major carriers, plus Continental (twice), United, and U.S. Air have each filed for Chapter 11 bankruptcy in the years following deregulation. Ripple, *supra* note 8, at 285-86. Continental's initial filing was allegedly motivated less by financial problems than by its desire to terminate its labor agreements. See Ripple, *supra* note 8 at 284, n.17; Katz, *supra* note 7 at 97; but see In re Continental Airlines, 38 B.R. 67 (S.D. Tex. 1984) (holding Continental's collective bargaining agreements with its unions a leading contributor to its financial difficulties and denying the unions' motion to dismiss the bankruptcy proceedings).

9. See Paul Stephen Dempsey, *Airlines in Turbulence: Strategies for Survival*, 23 TRANSP.

major carriers have filed for Chapter 11 or seriously flirted with the idea. By contrast, Southwest Airlines has emerged as the successful alternative; it is a low cost, low fare carrier, flying from point to point, cherry picking routes popular with the traveling public.¹⁰ Of the major carriers, Southwest also has the fastest turn-around time, the fewest number of aircraft, the aircraft with the youngest average age, and flies only one type of aircraft, the Boeing 737.¹¹

Three factors chiefly make-up the cost structure in the airline industry: labor, the price of jet fuel, and the capital costs of buying or leasing planes.¹² Because labor costs are a primary factor in the financial success of an airline, some commentators have blamed unionization, with its frequently high labor costs, as the principal cause for the major carriers economic problems.¹³ That seems a doubtful explanation, however. Southwest Airlines, for example, is the most heavily unionized carrier in the industry, yet it has remained a consistently profitable company.¹⁴ Thus, unionization is an unlikely explanation for the financial difficulties so many major carriers have faced. Nevertheless, several major carriers have entered Chapter 11 Bankruptcy in order to shed supposedly onerous labor contracts.¹⁵

Not surprisingly, Jet Blue, Frontier, Air Tran, and others have emulated Southwest, with varying degrees of success. Indeed, even the major carriers have begun to adopt a two-tier model in which a low cost airline operates in tandem with a full-service carrier.¹⁶

During the 1980's and 90's technological developments revolutionized the methods of transacting business locally and globally. These developments included widespread use of personal computers, the internet, the ability of companies to track sales and inventory enabling just in time

L. J. 15, 33-38 (1995); Richard D. Gritta et. al., *Measuring the Degrees of Operating, Financial and Combined Leverage for the Major U.S. Air Carriers: 1979-1995*, 26 *TRANSP. L. J.* 51, 63 & n.23 (1998).

10. Gritta, *supra* note 9, at 63-64.

11. Dempsey, *supra* note 9, at 37-41.

12. *Id.* at 18, 23-25.

13. See, e.g., Robert M. Hardaway, *Transportation Deregulation (1976-1984): Turning the Tide*, 14 *TRANSP. L. J.* 101, 139-140 (1985); Michael A. Katz, *The American Experience Under the Airline Deregulation Act of 1978—An Airline Perspective*, 6 *HOFSTRA LAB. L.J.* 87, 94-100 (1988).

14. JODY HOFFER GITTELL, *THE SOUTHWEST AIRLINES WAY: USING THE POWER OF RELATIONSHIPS TO ACHIEVE HIGH PERFORMANCE*, 165-66 (McGraw-Hill Books 2003).

15. See generally cases and articles cite in note 8, *supra*. There has been a lively debate over whether deregulation constitutes the principal reason that the airline industry has failed to prosper. Compare PAUL STEPHEN DEMPSEY, *FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION* (1990) (arguing that deregulation has failed to achieve the benefits its proponents predicted) with Robert M. Hardaway, *The FAA "Buy-Sell" Slot Rule: Airline Deregulation at the Crossroads*, 52 *J. AIR LAW & COMM.*, 9-14 (1986) (favoring deregulation as efficient and beneficial to consumers and urging that further competition be introduced into the industry).

16. Dempsey, *supra* note 10, at 44, 51-52; Grittell, *supra* note 13, at 208-211.

supply chain management, the creation and thriving of web sites that allow the purchase of discount airline tickets and hotel reservations, and so forth.¹⁷

Against this backdrop of deregulation and technological change, which accelerated trends developing over two decades, occurred the horrific events that unfolded on September 11, 2001.

The terrorist attacks on the Twin Towers of the World Trade Center and the Pentagon on September 11, 2001 focused the nation and the world community on the global threat posed by militant Islamic terrorism. Those terrorists used passenger airplanes as weapons of war to deliberately kill as many innocent victims as possible. The challenges this terrorism posed to the transportation industries initially seemed to threaten the very survival of the airline and tourism and travel industries. A host of controversial and difficult legal and public policy issues arose in the wake of September 11th. These issues included security at our nation's airports, our Canadian and Mexican borders, and our maritime ports; who should bear the financial costs of combating terrorism; and the proper scope of congressionally mandated funds used both to compensate victims of the terrorist attacks and to fund a partial bail out of the airline industry.

In this 30th anniversary issue of the *Transportation Law Journal* [Journal], the student editors of the Journal wrestle with these and related topics.¹⁸ Mr. Anthony Ryan in his Note, "How Airline Security Fees in a Post September 11, 2001 Environment Are Spiraling Out of Control" examines airline security fees and taxes that are assessed upon passengers to reduce the risk of terrorist attacks, and he recommends that the nation rather than the flying public subsidize aviation security. Mr. Berry White focuses on international aviation in "Beginning of a Redefined Industry: How the European Court of Justice's Decision in the Open Skies Case Could Change the Global Aviation Industry ." He concludes that this

17. See generally, David R. Kolzow and Ed Pinero, *EDRI White Paper: The Internet economy and its impact on local economic development*, 17 *ECON. DEV. REV.* 82 (2001).

18. The Patriot Act, which has been exhaustively debated in the press, see, e.g., Ethan Bronner, *Collateral Damage*, *New York Times Book Review Section*, A 10, Feb. 22, 2004 (reviewing DAVID DADGE, *CASUALTY OF WAR: THE BUSH ADMINISTRATION'S ASSAULT ON A FREE PRESS* (2004); JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* (2004); CHRISTIAN PARENTI, *THE SOFT CAGE: SURVEILLANCE IN AMERICA: FROM SLAVERY TO THE WAR ON TERROR* (2003); CYNTHIA BROWN, *LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* (2003); NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS: AND THE GATHERING RESISTANCE* (2003); DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003); RICHARD C. LEONE AND GREG ANRIG JR., *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2003); PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* (2003)), and in law reviews. This is not a topic addressed in this issue. See, e.g., *Law and the War on Terrorism*, 25 *HARV. J. LAW & PUBLIC POL'Y* 399 (2002).

decision fosters the EU's goals of creating a unified negotiating front and a common air traffic market in competition with the United States. Ms. Jessica Ramirez in her Note, "The Victims Compensation Fund", analyzes the perceived inequities in the Congressionally mandated Victims Compensation Fund, and she contends that the fund is not an approach well suited for mass tort situations generally.

The emphasis in the next set of articles shifts from aviation to the trucking and maritime industries and border security. In "Border Crisis: Time for a New Collective Review of Tri-Nation Border Security," Mr. Daniel Stiles confronts deficiencies in border security between the United States and its two largest trading partners, Canada and Mexico. He advocates a cooperative approach and the creation of a tri-nation border security agency to facilitate the transportation of goods across joint borders. Mr. Owen Bishop, in "A 'Secure' Package? Maritime Cargo Container Security After 9/11," grapples with maritime security. In particular, he examines cargo container security at our nation's major ports and at the largest foreign ports that handle a significant volume of the goods destined for the United States. A final student article by Ms. Chessa Bieri, "The Time Has Come for the Government to Develop and Implement a Transportation Plan for Yucca Mountain" rounds out the picture by looking at the debate over the transportation of hazardous, nuclear waste. She explores the controversial proposed nuclear waste receptacle in Nevada and the ramifications of transporting thousands of tons of radioactive material across the highways and railways of the United States. Altogether the Journal authors present a rich and varied look at the challenges faced by our society. We anticipate that these student articles will spark further dialogue and debate both in the pages of our Journal, as well as in the pages of other law reviews. On a personal note, I end my service as advisor to the Transportation Law Journal at the end of the 2003-2004 academic year. It has been a rewarding experience. I leave the Journal, however, in significantly better shape than when I first arrived as its advisor. We began Spring 2003, with no issues published in a year and a half. We finished 2003 five issues behind, with one issue published that Spring. This academic year we will have published four issues, due in large part to an outstanding editorial board and staff. The editorial board appointed for 2004-2005 is equally talented, and I am confident that they will continue to publish a mix of high quality academic and practical articles, produced on a prompt and responsible schedule.

