

JOURNAL OF TRANSPORTATION LAW, LOGISTICS AND POLICY

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Journal of Transportation Law, Logistics & Policy

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Motor Carriers, Federal Preemption, and the Supreme Court: Back to Basics

*Mark J. Andrews and Linna T. Loangkote*¹

I. THE CONGRESSIONAL ROAD MAP FOR PREEMPTION UNDER ADA, FAAAA, AND ICCTA

A. The Federal Preemption Framework

The doctrine of preemption holds that federal laws supersede all inconsistent state laws. The doctrine stems from the Supremacy Clause in Article VI of the U.S. Constitution, which provides that “the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”² Because federal laws are supreme in relation to state laws, any state law that conflicts with a federal law will be nullified.

This article explores two categories of preemption as they relate to certain California laws affecting motor carriers: (1) express preemption, and (2) conflict preemption. Express preemption occurs when a specific enactment by Congress preempts state law. In express preemption, Congress’s “command is explicitly stated in

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² U.S. Const. Art. VI.

the statute's language."³ Conflict preemption exists when the federal and the state rules impose contradictory requirements on a regulated party, especially when it is impossible to comply with both requirements.⁴ Not explored in this article are other aspects of the preemption doctrine, such as field preemption⁵ and the dormant commerce clause.⁶

B. The Federal Aviation Administration Authorization Act (FAAAA) and Successor Statutes Expressly Preempt State Law as to Motor Carrier Rates (or Prices), Routes, and Services

As part of a decades-long effort to reduce federal economic regulation of air and surface transportation, Congress enacted a series of statutory provisions intended to prevent state regulators from nullifying federal deregulation through rules of their own choosing. The first of these preemptive provisions was included in the Airline Deregulation Act of 1978, Pub. L. No. 95-504 ("ADA"). As

³ *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 98 (1992).

⁴ *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

⁵ Field preemption arises when Congress is found to have occupied an entire field of law in such a comprehensive manner as to preempt state law. Unlike express preemption based on statutory text, field preemption involves a more subjective determination that the intended scope of the federal rule is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 232 (2013).

⁶ The dormant commerce clause reflects that the Constitution reserved the regulation of interstate commerce primarily to Congress rather than the States. Consequently, the States may not discriminate against interstate commerce even as to subjects not yet affirmatively regulated by Congress. *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

now codified at 49 U.S.C. § 41713(b)(1), this provision precludes state and local governments from “enact[ing] or enforc[ing]” laws or regulations “related to a price, route, or service of an air carrier”⁷

Identical wording was used to extend ADA-style preemption to motor carriers of property in Title VI of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305 (“FAAAA”). This provision is codified at 49 U.S.C. § 41713(b)(4)(A) for certain motor carriers affiliated with air carriers, and at 49 U.S.C. § 14501(c) for all other motor carriers of property. By enacting these provisions, Congress intended both to eliminate non-uniform state regulations of motor carriers which caused inefficiencies⁸ and to “level the playing field” between previously deregulated air cargo carriers, already the beneficiaries of ADA preemption, and state-regulated motor freight carriers.⁹

The third of the three federal preemption statutes precluding state regulation of transportation prices, routes, or service was the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88 (“ICCTA”). In pertinent part, ICCTA extended the full scope of FAAAA preemption to truck transportation intermediaries (such as freight brokers and surface freight forwarders) and to private motor carriers.

As currently enacted, 49 U.S.C. § 14501(c) states:

⁷ 49 U.S.C. § 41713(b)(1).

⁸ *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 441 (2002).

⁹ H.R. Conf. Rep. No. 103-677, 103 Cong. 2nd Sess. at 88 (1994) (legislative history for FAAAA).

Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law **related to a price, route, or service of any motor carrier** (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.¹⁰

In the remainder of this article, the price, route, and service preemption resulting from ADA, FAAAA and ICCTA will sometimes be referred to for simplicity as “14501(c) preemption.” It also should be noted that “rate” preemption and “price” preemption have been treated as synonymous as these statutes have been successively enacted and re-codified.¹¹

C. **Express Preemption Under the Motor Carrier Safety Act of 1984 Pertaining to Commercial Motor Vehicle Safety**

Another express preemption provision relating to motor carriers is contained in the Motor Carrier Safety Act of 1984 (“MCSA-84”), enacted as Title II of the Tandem Truck Safety Act, Pub. L. No. 98-554. As codified in 49 U.S.C. § 31192, MCSA-84 empowers the Secretary of Transportation to preclude enforcement of a state law or

¹⁰ 49 U.S.C. § 14501(c)(1) (emphasis added).

¹¹ H.R. Conf. Rep. No. 103-677, *supra* note 9, at 83.

regulation on commercial motor vehicle safety if certain criteria are met. This provision has received increasing attention in recent months. As discussed in Part VI of this article, federal motor carrier regulators (under their delegated authority from the Secretary) have determined under section 31192 that California’s regulations concerning meal and rest breaks for truck drivers are preempted not by FAAAA, but by federal hours-of-service regulations at 49 CFR Part 395.

III. THE SUPREME COURT’S MULTI-LANE CONSTRUCTION OF PRICE, ROUTES, AND SERVICES PREEMPTION: FROM *MORALES* TO *ROWE* VIA *WOLENS*

A. The Breadth of *Morales* and *Rowe*, Properly Understood

A broad construction consistently has been applied by the Supreme Court to the preemption provisions of ADA, FAAAA, and ICCTA. With regard to the expansive scope of ADA preemption, nothing could have been clearer than the Court’s pronouncements in the formative case of *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The following three holdings in *Morales* are particularly instructive here:

(i) Preemption extends not only to state actions “actually prescribing rates, routes, or services” but also to state requirements having only an “indirect effect” on such matters;¹²

¹² *Morales*, 504 U.S. at 385-86.

(ii) State requirements affecting such matters in more than a “tenuous, remote, or peripheral . . . manner” are preempted (as applied to carriers) regardless of whether they are addressed specifically to transportation providers or are actions of “general applicability;”¹³ and

(iii) Economic analysis is appropriate to assess whether a particular state action is “related to” rates or prices in a degree sufficient to trigger preemption.¹⁴

When the preemption language of ADA later was extended to motor carriers by FAAAA, the framers of that statute specifically stated their intent to ratify “the broad preemption interpretation” of ADA “adopted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.*”¹⁵

The Supreme Court later reaffirmed the mandate of *Morales* in an FAAAA case, *Rowe v. New Hampshire Motor Transport Ass’n et al.*, 552 U.S. 364 (2008) (*affirming* 448 F.3d 66 (1st Cir. 2006)). In striking down two portions of a Maine statute restricting tobacco deliveries by motor carriers, the Court reiterated that a state law having a “significant impact related to Congress’[s] deregulatory and pre-emption-related objectives” for the motor carrier industry is preempted under FAAAA even if the impact was “indirect.”¹⁶ According to the Court, “[t]he Maine law produces the very effect that the federal law sought to avoid, namely, a State’s direct substitution of its own governmental commands for competitive market

¹³ *Id.* at 386, 90.

¹⁴ *Id.* at 388-90.

¹⁵ H.R. Conf. Rep. No. 103-677, *supra* note 9, at 83.

¹⁶ *Rowe*, 552 U.S. at 371 (internal quotations omitted).

forces in determining (to a significant degree) the services that motor carriers will provide.”¹⁷

Interestingly, the *Rowe* Court did not rest its holdings solely on the cost or administrative burden of compliance with the Maine law – and certainly did not rely on any finding that the Maine law would raise carriers’ rates. Notwithstanding the disputed evidentiary record on that score, the Court invoked preemption because the delivery restrictions at issue would “freeze in place and immunize from competition a service-related system that carriers do not (or in the future might not) wish to provide.”¹⁸ As further reasons for invoking preemption, the Court noted the following:

(i) “[T]o permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations;”¹⁹

(ii) Such a patchwork of delivery rules for particular types of freight would impermissibly affect “essential details of the carriage itself;”²⁰

(iii) The scope of FAAAA could not somehow be confined to state “economic” regulation of carriers as suggested by Maine, especially since “Congress declined to insert the term ‘economic’” into the statutory text describing the forbidden types of enactments, “despite having at one time considered doing so;”²¹ and

¹⁷ *Id.* at 372 (internal quotations omitted).

¹⁸ *Id.* at 373.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 374.

(iv) The delivery-related requirements of the Maine law exerted an impermissibly “‘*significant*’ impact on carrier rates, routes or services,”²² and did so simply because the State [sought] to enlist the motor carrier operators as allies in its enforcement efforts” relating to tobacco.²³

Six years later, the principles established in *Morales* and *Rowe* were succinctly summarized by a unanimous Supreme Court in another ADA case, *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014). The *Ginsberg* Court held that the scope of price, route, and service preemption depends on the “effect of a state law, regulation or provision, not its form,” and that preemption applies where “real-world consequences” amount to “a clear intrusion into a federally-regulated industry.”²⁴

B. Voluntary vs. Externally Imposed Obligations under *Wolens*

Also considered in *Ginsberg*²⁵ was another line of Supreme Court cases under ADA, FAAAA, and ICCTA that stemmed from *American Airlines v. Wolens*, 513 U.S. 219 (1995). These cases apply if the state mandate does not directly govern tangible acts or omissions of a regulated party, but rather forces alteration of that party’s contractual commitments. *Wolens* stands for the proposition that ADA preemption (and, by extension, FAAAA and ICCTA preemption) precludes States from using their regulatory

²² *Id.* at 375 (emphasis in original).

²³ *Id.* at 376.

²⁴ 572 U.S. at 283 (quoting from *Brown v. United Airlines, Inc.*, 720 F.3d 60, 66-67 (1st Cir. 2013) (internal quotations omitted)).

²⁵ 572 U.S. at 276.

powers to alter a carrier's contractual terms relating to transportation prices, routes, and services. While state courts may entertain state-law breach-of-contract actions to enforce the "privately ordered obligations" voluntarily assumed by a transportation provider,²⁶ such actions may not serve as a vehicle for "enlargement or enhancement" of the "parties' bargain" on the basis of state laws or policies external to the agreement."²⁷

IV. CALIFORNIA CASES NARROWING PREEMPTION: OFF-RAMP TO A BALKANIZED FUTURE?

A line of Ninth Circuit and California Supreme Court cases has considered whether California law is preempted by federal law applicable to motor carriers. Most of these cases have narrowly interpreted the phrase "related to prices, routes, and services" for purposes of 14501(c) preemption. Based on this narrow interpretation, section 14501(c) has been held not to preempt California law on meal and rest breaks for truck drivers, and on classification of those drivers as independent contractors or employees.

A. *Mendonca* and *Charas* Set the Stage for California Courts' Narrow Interpretations

In *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (1998), the Ninth Circuit seized on the Supreme Court's language defining the scope of federal preemption under the

²⁶ *American Airlines v. Wolens*, 513 U.S. at 228 (1995).

²⁷ *Id.* at 233.

Employee Retirement Income Security Act (“ERISA”) in *California Division of Labor Standards Enforcement v. Dillingham Independent Contractor Construction, N.A., Inc.*, 519 U.S. 316 (1997).²⁸ There, the Supreme Court had confronted an ERISA preemption challenge to apprenticeship provisions of the California Prevailing Wage Law (“CPWL”). This challenge had been based on the contention that CPWL “related to” and had a “connection with” ERISA plans because CPWL increased costs of providing certain benefits, thereby affecting the choices made by ERISA plans.²⁹ The Supreme Court unanimously had rejected the contention, holding that the CPWL was “in an area of traditional state regulation” that had only a “tenuous . . . relation” to ERISA.³⁰

While the appellant in *Mendonca* argued that the higher wage levels required for its truck driver employees under CPWL would require a 25 percent increase in its trucking prices, causing “it to utilize independent owner-operators,” and compelling “it to re-direct and re-route equipment to compensate for lost revenue,” the Ninth Circuit cited *Dillingham* in holding that such effects were “no more than indirect, remote, and tenuous” and therefore were not “related to” prices, routes, and services.³¹ But the direct and obvious linkage between truck drivers’ wages and the CPWL in *Mendonca* is not comparable to the multiple degrees of separation in *Dillingham* between ERISA plans and California’s apprenticeship programs. The Supreme Court had understood this distinction in *Dillingham*, pointing out that there was no connection with

²⁸ 152 F.3d at 1188-89.

²⁹ 519 U.S. 316 at 316.

³⁰ *Id.* at 318.

³¹ *Id.* at 1189.

ERISA because California law did “not bind ERISA plans – legally or as a practical matter – to anything.”³² The law only provided a “measure of economic incentive to apprenticeship programs” by “authorizing lower wage payments to workers enrolled in approved apprenticeship programs.”³³ By contrast, the math in *Mendonca* should have compelled a conclusion that the stipulated 25 percent increase in wages for truck drivers would exert more than just an “indirect, remote, and tenuous” effect on the trucker’s prices under the industry-specific preemption provisions of FAAAA.

In another case decided only a few months after *Mendonca*, the Ninth Circuit was confronted with the task of assigning a tangible definition to the “rates, routes, and services” encompassed by ADA preemption. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (1998), arose from a slew of state tort actions brought against various passenger air carriers.³⁴ As in *Mendonca*, the Ninth Circuit purported to follow Supreme Court holdings in *Wolens* (*i.e.*, that ADA would not preempt most state tort laws) and *Morales* (*i.e.*, that state deceptive advertising laws were preempted by the ADA because they were related to price).

The *Charas* court held, however, that the term “services,” as distinct from “rates” (meaning prices) and “routes” (meaning courses of travel), referred only to “frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided.”³⁵ The Court asserted that nowhere in the ADA’s

³² *Dillingham*, 519 U.S. at 317.

³³ *Id.*

³⁴ 160 F.3d at 1265-66.

³⁵ *Id.*

legislative history did Congress ever imply that “service” should include the dispensing of food, drinks, flight attendance assistance, or the like as asserted in some of the underlying actions.³⁶ Therefore, the Court declined to interpret “service” more broadly, by claiming that the result of a broad interpretation would be to preempt “virtually everything an airline does.”³⁷

This claim, of course, sets up a classic straw man. In all likelihood, most observers would agree that the ADA would not preempt services rendered to airlines by third parties (such as grass cutters, window washers and even outside counsel), but should preempt all types of interfaces between an airline and its customers.

As will be shown next, the false dichotomy between wages and prices in *Mendonca* and the cramped definition of “service” in *Charas* have had dramatic consequences for California and Ninth Circuit jurisprudence on 14501(c) preemption.

B. California Rulings That Meal and Rest Break Requirements Are Not Preempted by the FAAAA

For all employees, California Labor Code sections 226.7 and 512 require that employers provide a meal break of thirty minutes for any employee who works more than five hours a day, and another meal break of thirty minutes for any employee who works more than ten hours a day.³⁸

³⁶ *Id.*

³⁷ *Id.*

³⁸ Cal. Lab. Code § 512(a).

But for transportation employees, an employee may not work more than ten hours per day without a second meal period for not less than 30 minutes, except if the total number of hours worked does not exceed twelve hours, then the second meal period may be waived by mutual consent between the employer and the employee if the first meal period was not waived.³⁹ As to rest breaks, per every four hours, an employer shall authorize and permit transportation employees to take ten minutes of “net rest.”⁴⁰

In *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (2014), the Ninth Circuit was confronted with the issue whether California meal and break laws were preempted by the FAAAA.⁴¹ The Court held that they were not preempted,⁴² but instead were “normal background rules for almost all employers doing business in the state of California” – this, despite the fact that some of the “background rules” were specific to the transportation industry as shown above.⁴³ Further, the Court asserted with scant support that the application of California’s meal and rest break laws to motor carriers would not contribute to an impermissible “patchwork” of state-specific laws, defeating Congress’s deregulatory objectives.⁴⁴ The Court analogized from the meal and rest breaks to *Mendonca* and other CPWL cases, ultimately holding that the break rules were not preempted by the FAAAA because they were not related to prices, routes, and services.⁴⁵

³⁹ 8 CCR § 11090(11).

⁴⁰ 8 CCR § 11090(12).

⁴¹ 769 F.3d at 640.

⁴² *Id.*

⁴³ *Id.* at 647.

⁴⁴ *Id.* at 644.

⁴⁵ *Id.*

Along the way, the Court answered six hypotheticals to illustrate its reasoning: (1) a break requirement does not mean that a carrier must “suspend” its services; (2) the break requirement may result in a modest increased cost of doing business, but carriers are free to offer as many services as they choose; (3) carriers are free to schedule as frequently or infrequently as they want; (4) the break requirements do not bind motor carriers to specific services and all intrastate carriers are subject to the same regulations; (5) the requirements do not change carriers’ starting points, destinations, or routes; and (6) there is no evidence to suggest that the break requirements will bind drivers to only a certain set of routes.⁴⁶ In knocking down this set of straw men, the Court again ignored Supreme Court holdings that economic analysis is appropriate to ascertain whether state requirements impact the “services” and “routes” that carriers “choose” to operate.⁴⁷

C. California Rulings That FAAAA Does Not Preempt State Classification of Drivers as Employees or Independent Contractors

Thirty years ago, the California Supreme Court adopted a multi-factor test to determine whether a person was an employee or independent contractor in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P. 2d 399 (1989).⁴⁸ *Borello* looked to a series of factors drawn from the Restatement Second of Agency:

⁴⁶ *Id.* at 645.

⁴⁷ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388-90 (1992).

⁴⁸ 769 P.2d at 404.

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.⁴⁹

The classification test set forth in *Borello* and its applicability to drivers of motor carriers was examined in *California Trucking Association v. Su*, 903 F.3d 953 (9th Cir. 2018). *Su* held that the FAAAA did not preempt the *Borello* test to determine whether a driver was an employee or an independent contractor.⁵⁰ Reaching that conclusion, the Ninth Circuit even inquired as to whether in so holding, contracts would effectively be altered, and looked to the Supreme Court decisions in *Wolens* and *Ginsberg* for guidance.⁵¹ According to the Ninth Circuit, however, “[e]ven if *Wolens* and *Ginsberg* draw a line between the

⁴⁹ *Id.*

⁵⁰ *Su*, 903 F.3d at 961.

⁵¹ *Id.*

permissible enforcement of contractual terms and the preempted enforcement of normative policies, that line does not control when the contractual relationship is between a carrier and its workforce, and the impact is on the protections afforded to that workforce.”⁵² Further, looking into the FAAAA’s legislative history, the Ninth Circuit did not find anything to indicate “that Congress intended to preempt the traditional power to protect employees or the necessary precursor to that power, *i.e.*, identifying who is protected.”⁵³ On the other hand, the *Su* court could not and did not cite any statutory carve-out of such employee-protection powers from 14501(c) preemption.

The California Supreme Court likewise would revisit the *Borello* test in 2018. In *Dynamex Operations W. v. Superior Court*, 416 P.3d 1 (2018), drivers for “a nationwide package and document delivery company” sued on the ground that they were misclassified as independent contractors when they were really employees.⁵⁴ *Dynamex* was on-trend with many other trucking and non-trucking cases being brought before California courts on similar grounds.⁵⁵ Especially in California, home to the Silicon Valley and its numerous technology applications that utilize human capital to perform on-demand services, impacts of reclassification would change the way the plaintiffs could

⁵² *Id.* at 962.

⁵³ *Id.* at 967.

⁵⁴ *Id.* at 6.

⁵⁵ See, e.g., *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1021 (9th Cir. 2018) (alleging misclassification of Uber drivers); *Romano v. SCI Direct, Inc.*, 2018 WL 1441147 (C.D. Cal. Mar. 21, 2018) (alleging misclassification of sales representatives); *Alfred v. Pepperidge Farm, Inc.*, 322 F.R.D. 519 (C.D. Cal. 2017) (alleging misclassification of sales associates); *Flores v. Velocity Express*, 250 F. Supp. 3rd 468 (N.D. Cal. 2017) (alleging misclassification of delivery drivers).

pay taxes, claim benefits and exercise other rights (*e.g.*, overtime pay and medical insurance).

In *Dynamex*, the Court adopted what has become known as the “ABC test” to govern classification of employees and independent contractors. The ABC test examines three prongs:

“(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.”⁵⁶

In California, classification under the ABC test is and will be far-reaching. Wage and benefit structures for employees differ sharply from compensation structures for independent contractors, who receive a percentage of freight revenue but also bear many operating expenses. Conversely, employers will face a whole host of taxes and legal compliance considerations, unique to hiring employees. But as mentioned in some of California’s non-trucking cases above, the line between classification of employee and independent contractor blurs in the new Silicon Valley age of on-demand services.

⁵⁶ *Dynamex*, 416 P.3d at 7.

The question of whether FAAAA preemption could apply to California's ABC test was not adjudicated in a federal court until seven months following *Dynamex*. And here at last is a bright spot (for the trucking industry) in California's jurisprudence on 14501(c) preemption. In *Alvarez v. XPO Logistics Cartage, LLC*, 2018 WL 6271965 (Nov. 15, 2018), the U.S. District Court for the Central District of California held that the FAAAA did preempt the application of the ABC test to motor carriers, noting that "the ABC test may effectively compel a motor carrier to use employees for certain services because, under the ABC test, a worker providing a service within an employer's usual course of business will never be considered an independent contractor."⁵⁷ Although not yet reviewed by the Ninth Circuit, this decision recognized that a full embrace of the ABC test as applicable to motor carriers would effectively terminate all independent contractor agreements in that industry and convert them into employment agreements.

D. Except for *Alvarez*, California Cases on Break Periods and Worker Classification Take Unduly Narrow View of *Morales*, *Rowe*, and *Wolens*

Under the ADA, FAAAA, and ICCTA, it is not required that state laws specifically target the motor carrier industry in order for there to be a finding of preemption.⁵⁸

⁵⁷ 2018 WL 6271965, at *5. However, *Alvarez* did not go so far as to state that the underlying California Labor Code protections were preempted by the FAAAA. *Id.* The authors are indebted to Hillary A. Booth of the California Bar for her recent analysis of this decision. See "Case Note: Preemption as Viewed by *Alvarez v. XPO Logistics Cartage, LLC* and What May Lie Ahead," in *The Transp. Lawyer*, Vol. 20, No. 5, p. 52 (April 2019) (hereafter, "Booth Note").

⁵⁸ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389, 390 (1992).

Moreover, while particular state regulations may only have a minute impact on labor cost and carrier prices when considered piecemeal, the aggregate increases in resulting costs and prices can be dramatic, and even go so far as to retroactively rewrite independent contractor agreements as employment agreements. When examined in the aggregate, therefore, the results of a cramped construction of 14501(c) preemption impose far-reaching effects on motor carrier prices, routes, and services.

The Supreme Court opinions in *Morales*, *Rowe*, and *Wolens* (*supra* Part III) have delineated far more expansive boundaries of what relates to prices, routes, and services than the Ninth Circuit has been willing to recognize. But while *Morales* seems all-encompassing, the *Wolens* Court held that preemption does not stop States “from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated.”⁵⁹ A further demarcation line appears to be drawn in *Rowe*, which points out that if piecemeal state efforts to regulate routes, rates, and services were to be allowed as long as they did not amount to “a total ban on shipments,” the resulting narrowed scope of FAAAA preemption “would severely undermine the effectiveness of Congress’[s] pre-emptive provision.”⁶⁰

Given the Supreme Court’s roadmap, California and the Ninth Circuit have struggled to attain internal consistency in applying FAAAA to motor carriers. First and foremost, the Ninth Circuit has not yet affirmed any application of the ABC test to motor carriers. This is likely

⁵⁹ *American Airlines v. Wolens*, 513 U.S. at 228, 233 (1995).

⁶⁰ *Rowe v. New Hampshire Motor Transport Ass’n et al.*, 552 U.S. 364, 376 (2008).

because, when *Su* was initially litigated in the District Court, the California Supreme Court had not yet adopted the ABC test, even though *Su* was decided after *Dynamex*.

On the other hand, the ABC test has been held to have retroactive application to industries other than trucking in *Vasquez v. Jan-Pro Franchising International, Inc.*, 2019 WL 1945001 (9th Cir. May 2, 2019). Moreover, *Alvarez* remains the lone California opinion holding that the FAAAA preempts the ABC test.⁶¹ That case is still ongoing, and no notice of appeal regarding the preemption issue has been filed. Since *Alvarez*, which was decided in November 2018, the Ninth Circuit's only pronouncement concerning the recently adopted ABC test has been in *Vasquez*, where it not only held that the ABC test may be retroactively applied in a non-trucking context, but also asserted that *Dynamex* was "a clarification," not as "a departure" from the *Borello* standard.⁶²

As matters now stand, *Su* is the Ninth Circuit's last word on the issue of 14501(c) preemption as it relates to classification of drivers of motor carriers. And because *Vasquez* interpreted *Dynamex* as a clarification to the *Borello* test, and not as a departure, the Ninth Circuit, if provided another opportunity to rule on an issue of 14501(c) preemption in the context of classification, might well follow *Su* and hold that the FAAAA does not preempt the ABC test.

⁶¹ See *Western States Trucking Ass'n v. Schoorl*, 2019 WL 1426304, at *10-11 (E.D. Cal. Mar. 29, 2019) (holding that the FAAAA does not preempt the ABC test); *Valadez v. CSX Intermodal Terminals, Inc.* 2019 WL 1975460, at *8 (N.D. Cal. Mar. 15, 2019) (holding that FAAAA preempts only prong B of the ABC test); *Moreno v. JCT Logistics, Inc.*, 2019 WL 960188, at *6 (E.D. Cal. Jan. 8, 2019) (withholding decision of FAAAA preemption to ABC test because of incomplete briefing).

⁶² 2019 WL 1945001 at *10.

V. OF CIRCUIT SPLITS, A REGIONAL PATCHWORK, AND *CENTRAL TRANSPORT (1997!)* AS ON-RAMPS BACK TO UNIFORMITY

A much more expansive view of 14501(c) preemption has been taken by States other than California and by federal appeals courts other than the Ninth Circuit. The First Circuit has specifically rejected any idea of a “labor exception” to price, route, and service preemption under section 14501(c). Instead it has recognized that state laws effectively precluding a motor carrier from using the independent contractor business model to staff its truck fleet are preempted because they exert far more than a “tenuous, remote or peripheral” effect on transportation “services.”⁶³ In addition, the Second, Fifth, and Seventh Circuits (or the federal District Courts they supervise) have upheld claims of ADA preemption based on indirect economic effects arising under state laws.⁶⁴

Any remaining notion that expansive interpretations of 14501(c) preemption are on life support because of *Dynamex* should be dispelled by one other FAAAA/ICCTA case on worker classification issues that was decided a generation ago. An FAAAA analysis remarkably similar to that in *Alvarez* was adopted in a little-noticed state court decision during the formative period of jurisprudence on ICCTA preemption. In *Central Transport, Inc.. v. Public*

⁶³ *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 440 (2016); *Massachusetts Delivery Ass’n. v. Healey*, 821 F.3d 187, 190 (2016).

⁶⁴ *See, e.g., Lehman v. USAIR Grp.*, 930 F. Supp. 912 (S.D.N.Y. 1996) (airline excise tax refund claims); *Statland v. American Airlines*, 998 F.2d 539, 542 (7th Cir.), cert. den. 510 U.S. 1012 (1993) (same)); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004) (tort claims for deep vein thrombosis, a medical condition allegedly resulting from overcrowding on Delta’s passenger aircraft).

Service Commission, 223 Mich. App. 288 (1997), the Court had no trouble holding – like the *Alvarez* Court twenty-one years later – that a provision of Michigan law effectively requiring intrastate motor carriers to use employee drivers was preempted by FAAAA because it exerted a significant effect on a carrier’s prices, routes and service. In the Court’s words:

For example, carriers operating in interstate commerce and using independent contractors as drivers have to make special arrangements to operate intrastate traffic in Michigan. A carrier handling traffic from a point outside Michigan to a point inside Michigan could not use the same vehicle (or at least not the same independent contractor as a driver) to transport property wholly within Michigan as part of a return trip. Thus it is clear that [the state statute] affects routes and services and most probably affects prices.⁶⁵

Accordingly, the Sixth Circuit (which includes Michigan) should be added to the Second, Fifth, and Seventh as being at odds with the Ninth Circuit on whether indirect economic impacts of a state law should be considered for purposes of 14501(c) preemption. The resulting Circuit split on the scope of preemption when state laws exert such indirect effects serves to strengthen the need for (and likelihood of) another look at this issue by the Supreme Court. It is submitted that now is not the time for the affected industries to stop pushing for such a ruling!

⁶⁵ *Id.* at 309.

VI. CONCLUSION: ICCTA PREEMPTION AS THE BROADEST BYPASS AROUND FRAGMENTARY REGULATION OF MOTOR CARRIERS

Despite the ongoing controversies described above, the Supreme Court has not yet agreed to review the issue of whether state laws affecting wages, hours and classification of truck drivers exert a sufficient impact on prices, routes and service to be subjected to 14501(c) preemption. In the absence of a definitive ruling on express preemption under section 14501(c), regulators and courts have re-focused on the preemptive effect of narrower statutes and regulations involving drivers' hours of service (HOS) and the terms of leases between owner-operators and motor carriers.

For example, the Federal Motor Carrier Safety Administration ("FMCSA") has determined that MCSA-84 results in express preemption of California's meal and rest break regulations for motor freight carriers subject to federal HOS regulations at 49 CFR Part 395.⁶⁶ The Agency determined that the MCSA-84 preemption criteria at 49 U.S.C. § 31192 were met because the state rules (1) were "regulations on commercial motor vehicle safety," (2) were "additional to or more stringent than" the federal HOS rules, (3) had "no safety benefit," (4) were "incompatible" with the federal HOS rules, and (5) would impose "an unreasonable burden on interstate commerce" if enforced against FMCSA-regulated freight carriers.⁶⁷ FMCSA thus invoked express preemption (*supra* Part I.C), but under a narrower statute relating to truck safety rather than under

⁶⁶ 83 Fed. Reg. 67470 (Dec. 28, 2018) (hereafter, "*Break Rules*").

⁶⁷ *Id.* at 67480.

the price, route, and service provisions of section 14501(c).⁶⁸

As an alternative to express preemption, the Court in *Alvarez, supra* advanced a conflict-preemption theory (*supra* Part I.A) based on the FMCSA's truth-in-leasing ("TIL") regulations at 49 CFR Part 376 as additional grounds for determining that California's ABC test was preempted. As pointed out in the Booth Note cited previously,⁶⁹ there is a conflict between the TIL rules at 49 CFR § 376.12 and the California Labor Code as to whether motor carriers could allocate certain expenses to owner-operators rather than bearing them itself.

While preemption arguments based on MCSA-84 and the TIL rules are well-taken as far as they go, they do not provide a comprehensive solution for the federal-state conflicts discussed in this article. FMCSA's *Break Rules* determination does not address bus drivers, intrastate truck drivers, nor truck drivers subject to proliferating HOS exemptions for such things as oilfield and agricultural

⁶⁸ The subsequent history of *Break Rules* has provided good news and bad news for proponents of federal preemption. On one hand, the office of FMCSA's chief counsel issued a legal opinion on March 22, 2019, asserting that Break Rules should be applied retroactively. The opinion is available at <https://www.fmcsa.dot.gov/safety/fmcsa-legal-opinion-applicability-preemption-determinations-pending-lawsuits> (last visited May 24, 2019). Also, the Central District of California has held that it is bound by Break Rules until such time as that determination is reviewed by the Ninth Circuit. *Ayala v. U.S. Xpress Enterprises, Inc.*, No. 5:16-cv-00137-GW-(KKx) (May 2, 2019). On the other hand, at least three petitions for review challenging Break Rules remain pending before the Ninth Circuit on behalf of the International Brotherhood of Teamsters, California's Attorney General, and the state's Labor Commissioner. Moreover, the FMCSA's action is vulnerable to legislative pushback, as illustrated by proposed section 133 of the transportation appropriations bill currently under consideration by the U.S. House of Representatives for fiscal year 2020. See Draft Transportation-Housing and Urban Development Bill found at <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/FY2020%20THUD%20Sub%20Markup%20Draft.pdf> (last visited May 23, 2019) at 54 (116th Cong. 1st Sess.).

⁶⁹ *Supra* note 57, at 52-53.

operations under Part 395.⁷⁰ Likewise, the federal-state conflict recognized in *Alvarez* on payments to owner-operators falls far short of resolving the full range of classification issues faced by carriers in California today.

Interestingly, even FMCSA's preemption determination in *Break Rules*, although ostensibly based on MCSA-84, provided a comprehensive *Rowe*-style analysis of the costly "patchwork" effects resulting from disparate state laws on driver breaks.⁷¹ *Rowe* and section 14501(c) thus offer compelling alternative grounds for upholding *Break Rules* and affirming *Alvarez*.

⁷⁰ See "Interpretations Browser" at <https://fmcsa.dot.gov/regulations/title49/section/395.1> (last visited May 22, 2019).

⁷¹ *Break Rules*, *supra* note 66, at 67479-80.

WHO OWNS THE RIGHTS TO RAILROAD RIGHTS-OF-WAY?

*Kristine Little*¹

I. INTRODUCTION

In the 19th century, interest in populating the West grew but there was not a sufficient transportation structure to do so. To facilitate the settlement and development of the West, Congress granted railroads various rights of way under the “pre-1871 Acts” and the General Railroad Right-of-Way Act of 1875. The Acts were intended to provide the railroads with the necessary land to construct rail lines and additional land to be sold to finance construction.²

However, the language in both the pre-1871 Acts and the 1875 Act did not articulate the nature of the railroads’ right of way. There was also little recorded discussion of the exact nature of the legal interest being conveyed to the railroads. Subsequently, disputes arose between the railroads and the adjacent landowners regarding the nature of the railroads’ interests. That has led to a Circuit split after a recent decision by the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit recently reversed a United States District Court’s grant of summary judgment against Union Pacific Railroad (“UP”). The Ninth Circuit’s holding

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² See generally Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights of Way and the Myth of Congress’s “1871 Shift,”* 82 U COLO. L. REV. 85 (2011) (Hereinafter “Roberts”).

conflicts with holdings in the Eighth and Tenth Circuits. UP has been leasing land under 1,800 miles of its right of way to the Santa Fe Pacific Pipeline (“SFPP”) and was challenged by adjacent landowners on UP’s ability to lease under its right of way. The District Court held that both the pre-1871 Acts and the 1875 Act granting rights of way to railroads required a “railroad purpose” and that UP’s lease to SFPP served no such purpose. The Ninth Circuit reversed the order granting a motion to dismiss UP’s Counterclaims and held that UP has the right to lease the subsurface because the Court found that the use of any oil in the pipeline for the operation of the railroad deemed the pipeline a railroad use. This article discusses the Ninth Circuit decision, prior case history, the legislative history of the pre-1871 Acts and the General Railroad Right of Way Act of 1875 and some possible implications of the decision, if it remains unchallenged or unchanged.

II. FACTUAL BACKGROUND

UP operates over approximately 32,000 miles of track. Most of the track was issued to UP by Congress under the pre-1871 Acts and the 1875 Act. But the track that is the subject of the Ninth Circuit’s decision is track UP acquired from Southern Pacific Railroad (“SP”) in 1996.

SP first leased the land under its rights of way to an affiliate in the 1950s. The affiliate built the 1,800 miles of pipeline to transport petroleum products. When UP acquired SP’s track, SFPP, a subsidiary of Kinder Morgan, acquired the pipeline. As a result, UP and SFPP entered into a series of agreements that granted SFPP a perpetual easement in exchange for fair market rent. In the event that the parties could not agree on fair market rent, the

agreement stipulated for proceedings in California state court.

In a proceeding to determine the fair market rent for 2004 to 2014, SFPP questioned UP's title to the right of way, arguing that fair market rent for the easement should be reduced. However, SFPP did not question UP's right to grant the easement. In 2012, the state trial court held that UP had a sufficient property interest in the land beneath its right of way and was entitled to collect rent from SFPP. However, during oral argument before the California Court of Appeals, the Court raised, *sua sponte*, the issue of whether, based on prior judicial precedent, a railroad in such circumstances had the lawful right to grant a pipeline easements under its rights of way.³ Upon supplemental briefing, the Court determined that the pre-1871 Acts and the 1875 Act did not grant UP the right to lease the land under its rights of way.

Due to the California Court of Appeal's decision, owners of property that was formerly public land adjacent to the rights-of-way filed class action lawsuits in Nevada, Arizona, New Mexico and California. The proceedings sought damages for trespass and similar theories. In response, UP asserted counterclaims for declaratory relief and to quiet title. In the California case, the District Court dismissed those counterclaims and held that, based on prior judicial precedent, both the pre-1871 Acts and the 1875 Act required a "railroad purpose" and that the pipeline did not serve such a purpose under the Acts.

Pursuant to 28 U.S.C. § 1292(b), the District Court certified two issues for interlocutory review:

³ *UP v. SFPP*, 231 Cal. App. 4th 134, 155 (2014).

1. Can Union Pacific authorize a use of the subsurface underneath the railroad right of way if the use does not serve a “railroad purpose”?
2. Can Union Pacific demonstrate a “railroad purpose” in granting a subsurface easement to a third party to operate a commercial petroleum pipeline through the subsurface of the rights of way?

The Ninth Circuit held that (1) land issued to UP through the pre-1871 Acts do not require a “railroad purpose” and (2) that, although the 1875 Act requires a “railroad purpose,” UP plausibly asserted a benefit from leasing the land under its right of way for the use of a pipeline sufficient to meet that purpose. (UP argued that it used the pipeline to transport fuel it purchased from third-parties, which it then used to power its locomotives.⁴) Accordingly, the Ninth Circuit reversed the District Court’s order granting a motion to dismiss UP’s counterclaims.

III. LEGISLATIVE HISTORY

In the 19th century, the United States government owned larges expanses of land but not the necessary transportation infrastructure to encourage development.⁵ At the time, some members of Congress wanted to fund roads and other transportation improvements. However, some questioned the authority of Congress to subsidize the construction of roads and other transportation improvements because some member in Congress felt that such subsidies exceeded Congress’s constitutional powers.

⁴ *Wells v. UP*, No. 16-56562 (9th Cir. 2018).

⁵ *Brandt v. US*, 134 S. Ct. 1257 (2014).

Notwithstanding, both Parties agreed that the Constitution gave Congress the authority to dispose of public lands as it saw fit.⁶ Therefore, to alleviate the concerns of Congress' constitutional authority to directly subsidize internal improvements, Congress based these Acts [pre-1871 Acts] granting rights of way to the railroads on its "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."⁷

Thus, Congress began a policy of subsidizing railroad construction by offering lavish grants from the public domain. Congress would grant the railroad right of way through public land. This policy included grants of property larger than would be needed for the rail right of way. Generally, the land was granted in checkerboard blocks and railroads had the option to either develop their lots or sell the lands to finance construction of rail lines. To encourage settlement and the development of the West, Congress would grant those same public lands to homesteaders and other settlers with the condition that the lands would continue to be subject to the railroad's right of way. In the 1860s, the Civil War aided the development of the transcontinental railroad. The States that had seceded were, of course, no longer sending representatives to Congress. Accordingly, the remaining Congress was free to act and facilitate the development of the transcontinental railroad without dissent from those southern opponents.⁸

⁶ U.S. Const. art. IV, § 3.

⁷ *Id.*

⁸ Withdrawal of Solicitor's Opinion M-37025 issued on November 4, 2011, and Partial Withdrawal of Solicitor's Opinion M-36964 issued on January 5, 1989, Acting Solicitor and Principal Deputy Solicitor, Sept. 1, 2017 <https://www.doi.gov/sites/doi.gov/files/uploads/m-37048.pdf>.

Congressional policy on railroad grants began to shift, however, after 1871.⁹ Despite the checkerboard land grants reaching their peak in the 1860s, public sentiment towards granting the railroads large land grants began to sour. The public's opposition was not targeted to the rights of way granted to the railroads but rather was directed to the practice of granting the railroads large stretches of land. Western settlers, initially the biggest supporters of the transcontinental railroad, began to complain that the railroads were too slow in selling unused land to farmers and settlers, hindering settlers' ability to "homestead" or purchase government lands. Thus, Congress changed its policy in favor of homesteaders.¹⁰

Subsequently, after 1871, grants of public land to railroads were discontinued. Congress, however, still wanted to continue to encourage development to the West and the development of a nationwide railroad system. Therefore, Congress still needed a means to provide the railroads the ability to lay track across public domain. As a result, Congress passed a number of special Acts granting the designated railroads the "right of way" through the public lands of the US without the accompanying land subsidy. Those grants were not intended to convey any land to the railroad.¹¹

In 1875, to avoid passing legislation for each new railroad right of way, Congress passed the General Right of Way Act. The Act ended the checkerboard grants to the

⁹ *Supra* note 2, *Roberts* at 98.

¹⁰ Cong. Globe, 42nd Cong., 2d Sess., 585 (1871) ("Resolved, that in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporation ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands be held for the purpose of securing homesteads to actual settlers, and for education purposes, as may be provided by law.")

¹¹ *See* 2 Cong. Rec. 2898 (1874).

railroads, placed a one-year limit on the railroads to file profiles of the planned rights of way, and imposed a five-year limit on construction of the rail lines. Under the General Right of Way Act, Congress makes clear that the intent with the 1875 Act was to simply grant the railroads the rights of way. When presenting the bill, Senator William Morris Stewart remarked “the bill grants the right of way simply. There is no grant of lands except for stations and depots and the right of way over the public lands.”¹² The General Railroad Right of Way Act remained in effect until 1976, when it was superseded by the Federal Land Policy and Management Act.¹³

Both Acts represent a period in US history where the primary concern was to facilitate the expansion and development of the West. Thus, the vague nature of the interest conveyed in the grants marked a period where the primary focus was on development and not the nature of the right of way being conveyed. This lack of specificity has resulted in the Courts interpreting the interests conveyed inconsistently. As discussed more fully below, courts have distinguished between the nature of the right of way granted under both Acts. Indeed, the courts have generally agreed that the 1875 Act represented a shift in Congressional policy from the pre-1871 Acts. The courts have defined this shift in policy by classifying the interest conveyed to the railroads pre-1871 as a limited fee, and grants conveyed under the 1875 Act as an easement. However, there is still a significant disagreement among the courts on what the scope of the limited fee and easement entitles the railroads.

¹² *Id.*

¹³ Pub. L. No. 94-579, § 706 (1976).

IV. JUDICIAL HISTORY

Under the pre-1871 Acts, the courts began defining the property interest conveyed in the railroads right of way to be one of a limited fee.¹⁴ However, case law has produced varying interpretations of the interest in the right of way conveyed to the railroads. In *St. Joseph and Denver City Railroad v. Baldwin*,¹⁵ the Supreme Court determined that the land conveyed by an Act of Congress on July 23, 1866 was a present and absolute grant. The Court reasoned that the intent of public grants was to facilitate the development of a transcontinental railroad. In contrast, in *New Mexico v. U.S. Trust Co.*,¹⁶ the Supreme Court held that the right of way granted to a railroad was more than just the right to cross lands. Rather, the Court asserted that a railroad's right of way was more than an ordinary easement, "But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession."¹⁷

A. EARLY LIMITED FEE AND EASEMENT CASES

One of the main cases defining this limited fee interest is the 1903 case of *Northern Pacific Railway v. Townsend*.¹⁸ In *Townsend*, the owner of land adjacent to the Railroad's right of way claimed that he was entitled to adverse possession of a portion of the right of way under

¹⁴ *Missouri, Kansas, Texas Railway Co. v. Roberts*, 152 US 114 (1894) (the Supreme Court determined that the lands granted to the railroad were granted in fee).

¹⁵ 103 US 426 (1880).

¹⁶ 172 US 171 (1898).

¹⁷ *Id.* at 183.

¹⁸ 190 US 267 (1903).

Minnesota law. The land had been granted through the pre-1871 Acts. The Court rejected the owner's claims and held that he could not adversely possess federally granted land and that he did not acquire any rights to the land. Here, the Court held that the land was passed by grant but was of a limited fee with an exclusive right of possession in the railroad and an implied condition of reverter. The Court reasoned that the grants conferred under the pre-1871 Acts were intended for the "perpetual use of the land for the legitimate purposes of the railroad."¹⁹

In contrast, in the 1942 case of *Great Northern v. United States*,²⁰ the central issue was to determine whether the railroad had any right to the oil and minerals underlying its right of way. Citing the shift in Congressional Policy after 1871, the Court distinguished the right of way conveyed under the 1875 Act from land grants issued under the pre-1871 Acts. In this instance, the right of way had been conveyed to UP under the 1875 Act. Here, the Supreme Court held that the right of way granted was clearly an easement and not a fee interest. The Court reasoned that the language under the statute was one of use and occupancy, rather than a grant of the land itself. The Court explained that the land grants after 1871 were merely an easement, whereas the "outright grants to a railroad of alternate sections of public lands" conveyed under the pre-1871 Acts were not intended to "give only an easement in the right of way" and were a limited fee.²¹

¹⁹ *Townsend*, 190 US at 271.

²⁰ 315 US 262 (1942).

²¹ *Id.* at 278.

However, in the 1957 case of *United States v. Union Pacific Railroad Co.*,²² the court further clouded the issue. Here, the United States brought an action to prohibit UP from drilling oil and gas in their right of way. The right of way was granted under Section 2 of the Act of July 1, 1862. The United States argued that the grant did not include mineral rights and was excepted under Section 3 of the Act. Contrary to prior holdings, the Court rejected UP's reliance on case law establishing that the railroads have a limited fee in the land. Per the Court, those limited fee cases merely established that the railroads "receive all surface rights to the right of way and all rights incident to a use for railroad purposes."²³ Further, the case law cited by UP did not pertain to subsurface oil and mineral rights and the word "right of way" in the Act "describes a lesser interest in the grant of public land." The Court held that "whatever may be the nature of Union Pacific's interest in the right of way, drilling for oil on or under it is not a railroad purpose within the meaning of § 2 of the Act."²⁴

In both the Eighth²⁵ and Tenth²⁶ Circuits, the Courts further narrowed the railroads' right of way after *United States v. Union Pacific Railroad Co.*, supra. In both these cases, Energy Transportation Systems, Inc. was planning the construction of a pipeline under UP's right of way. UP objected to construction of the pipeline under its right of way. However, the Courts held UP's interest in the right of way is limited to the surface rights and other rights used in

²² 353 US 112 (1957).

²³ *Id.* at 119.

²⁴ *Id.* at 114

²⁵ *Energy Transp. Sys., Inc. v. UP*, 619 F.2d 696 (8th Cir. 1980).

²⁶ *Energy Transp. Sys. Inc. v. UP*, 606 F.2d 934 (10th Cir. 1979).

the construction and operation of the railroad. Therefore, UP has no rights to the subsurface.

B. RECENT COURT DECISIONS

In *Brandt Revocable Trust v. United States*,²⁷ UP sold a rail line and the right of way between Laramie to Coalmont, Colorado to the Wyoming and Colorado Railroad (“W&CR”). The right of way was granted pursuant to the 1875 Act. W&CR planned to use the rail line as a tourist attraction, but the rail line failed to be profitable. W&CR notified the Surface Transportation Board of its intent to abandon its right of way. W&CR completed abandonment of the line in 2004. In 2006, the U.S. Government initiated a judicial proceeding seeking a declaration of abandonment and an order to quiet title in the United States to the right of way. The Government named the owners of 31 parcels of land crossed by the abandoned right of way as defendants. The Government either settled or obtained a default judgment against all but one of the defendants, a Marvin Brandt. Brandt argued that the right of way that stretched across his property was a mere easement, which was extinguished when W&CR abandoned the railroad. The Government countered that it had always retained a reversionary interest in the right of way. Citing the similarity in the language in the 1875 Act and the pre-1871 Acts, the Government asserted that the 1875 Act granted the railroad something more than an ordinary easement.

The Court noted that although the interest Congress granted to railroads in their rights of way was not explicitly defined in the statutes, it had been answered in prior case

²⁷ 134 S. Ct. 1257 (2014).

law. The Court rejected the Government's assertion that *Great Northern* only referred to the oil and mineral rights and that the Court should limit its characterization of the right of way under the 1875 Act to that context. According to the Court, the case turned on what type of interest was granted to the railroads and that interest had already been defined in *Great Northern*. Therefore, the right of way was simply an easement.

In contrast, in *Wedemeyer v. CSX Transportation, Inc.*,²⁸ the Seventh Circuit expanded the easement rights of the railroads. Landowners living adjacent to CSX track filed a complaint seeking "immediate and sole possession" of the property underlying the rail line. The plaintiff's predecessor-in-interest had opted into the class action and had filed an affidavit of ownership stating that he held superior title to the property in the underlying rail line. The landowners asserted that CSX had abandoned the track at issue in December 2003 because of a settlement agreement and declaratory judgment filed in an Indiana state court class action—*Clark v. CSX Transp., Inc.*²⁹ In *Clark*, the Court held that CSX's right of way was less than fee title and was an easement. The Court held that the Settlement Class Member's title to the portion of the track at issue adjacent to their property was superior to any claims of title by CSX.

Prior to *Clark*, CSX had filed a petition for exemption in 1989 with the Interstate Commerce Commission ("ICC") to end CSX's common carrier obligation on a 26.73-mile segment of track, near Milepost 132.45 in Mitchellville, Indiana to Milepost 159.18 near

²⁸ 850 F.3d 889 (7th Cir. 2017).

²⁹ *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404 (Hamilton Cty. Super. Ct.).

Roachdale, Indiana. The ICC granted CSX's petition and, in 1990, CSX notified the ICC that the segment of track had been abandoned. Beginning in 1992, CSX leased a portion of the track to a grain shipper while still retaining the right to use the abandoned track as needed.

Plaintiffs argued that CSX had abandoned the track at issue, which extinguished CSX's easements. The plaintiffs claimed that the original purpose of the tracks at issue was for mainline rail service between Indianapolis and Decatur and that the shift in use of the track extinguished CSX's easement. The Court held that the 1876 deed conveying the land to the railroad states that its purpose is "for the right of way and the use and purpose of the construction of the Railway of said Company, and the use and purpose of the track and roadway of said Company."³⁰ The court reasoned that the broad language of the statute did not limit CSX's use of the rail right of way to mainline or common carrier service. The Court held that the current use of the line by CSX and the grain shipper fell within the broad scope of the statute. Therefore, CSX's easement had not been extinguished.

V. SUMMARY OF THE NINTH CIRCUIT DECISION IN WELLS V. UNION PACIFIC RAILROAD CO.

As indicated above, the Ninth circuit was asked to review two issues: (1) whether UP can authorize the use of the subsurface underneath the railroad right of way if the use does not serve a "railroad purpose"; and (2) whether UP can demonstrate a "railroad purpose" in granting a

³⁰ *Wedemeyer*, 850 F.3d at 897.

subsurface easement to a third-party to operate a commercial petroleum pipeline through the subsurface.

In terms of “railroad purpose,” the Court noted that the term was not present in the statutory language of the pre-1871 Acts or the 1875 Act. Rather, the term was established in *United States v. Union Pacific Railroad Co.* With respect to the right of way granted under the pre-1871 Acts, the Court held that the “limited fee” described under *Townsend* did not restrict the use of the right of way to a railroad purpose. Moreover, *Townsend* only established that the railroad obtained, at a minimum, the rights to carry out a railroad purpose. It did not establish whether a railroad purpose was required under the pre-1871 Acts. Therefore, the railroad did not need to establish a sufficient railroad purpose to operate pipeline under rights of way conferred through the pre-1871 Acts. Although *United States v. Union Pacific Railroad Co.* narrowed the holding in *Townsend*, the Ninth Circuit found the District Court’s reliance on *Union Pacific* to be misplaced with respect to the use of subsurface rights. Because *Union Pacific*’s holding was focused on whether the interest granted to the railroad extended to the oil and mineral rights under its right of way, it did not apply to subsurface rights. The Court reasoned that the leasing of subsurface rights was not the same as extracting oil rights, arguing that Section 3 of the Act only prohibits the grantee from extracting mineral rights and does not prevent the grantee from using the subsurface for any other purpose. Thus, *Union Pacific* did not limit the use of the subsurface rights by the railroads.

Finally, in support of its conclusion that a railroad purpose was not required for grants conveyed under the pre-1871 Acts, the Court turned to *Brandt*. Under *Brandt*,

the Court held that the 1875 Act conveyed an interest different from that conveyed by the pre-1871 Acts and that the right of way conveyed under the pre-1871 Acts was a fee simple defeasible in everything except mineral rights. Therefore, as long as UP continued to operate a railroad through the right of way, UP is free to lease the subsurface rights to SFPP regardless of whether it conforms to a railroad purpose.

With respect to the 1875 Act, UP had conceded that the lands granted under this statute were conveyed through a broad easement “for railroad purposes.” Thus, the main issue that the Courts had to address was whether UP has provided sufficient evidence of whether the pipeline was serving a sufficient railroad purpose. Although the Court concluded that the pre-1871 Acts did not require a railroad purpose for its right of way granted under the pre-1871 Acts, UP had to show that the pipeline provided a “railroad purpose” for lands granted under the 1875 Act. UP asserted that the pipeline served a railroad purpose because UP uses capacity on the pipelines to transport fuel it purchases from third-party refineries. UP claimed that it used this fuel to power its locomotives and that transporting the fuel from the pipeline reduced its operating cost by millions of dollars a year. The Court reasoned that it had long been established that a railroad right of way conferred more than a right to run trains over the land.³¹ Therefore, railroads could conduct a variety of activities incidental to railroad operations that would meet the “railroad purpose” standard.

³¹ See *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898) (“The phrase “right of way,” besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes and another thing in a grant to a railroad for public purposes — as different as the purposes and uses and necessities respectively are.”).

The Court determined that UP had established a sufficient railroad purpose under the incidental use doctrine. It reasoned that the Supreme Court has embraced the “incidental use doctrine” even if not in direct connection to the pre-1871 Acts or the 1875 Act. The Court rejected the District Court’s finding that the pipeline was not within the scope of the incidental use doctrine. The Court based its decision on the Supreme Court’s holding that a railroad may erect structures if, in its judgment, they were convenient for the receipt and delivery of freight on its road. In addition, the Court rejected the District Court’s argument that the incidental use doctrine did not apply because the pipeline was operated by a third-party. The Court held that it established that a railroad may “license third parties to do what it could do itself, even if the third-party benefits in addition to the railroad.”³² Thus, the Court held that “the pre-1871 Acts do not require a “railroad purpose” and that UP plausibly alleged that the pipeline serves such a purpose under the 1875 Act.

VI. CONCLUSION

Unlike the Eighth and Tenth Circuits, where those Courts construed the railroads’ interest in the rights of way even further than the holding in *Union Pacific*, the Ninth Circuit decision has construed the applicable Congressional Acts to enlarge the railroads’ rights. Based on the decision establishing (1) that use of rights of way conveyed under the pre-1871 Acts was not restricted to a railroad purpose; and (2) that a railroad has rights to use both the surface and subsurface as long as the railroad could establish a sufficient railroad purpose, the Ninth Circuit has construed

³² *Wells*, No. 16-56562 at 27 (9th Cir. 2018).

a railroad's interests in a manner consistent with the broad definition under *Townsend*. The Ninth Circuit is correct that land conveyed under pre-1871 Acts were intended to be outright grants to the railroad, but its interpretation of the 1875 Act expands the scope of a railroad easement in ways arguably not warranted by the term "railroad purpose."

As indicated above, the pre-1871 Acts and the 1875 Act represent a period in US history where the primary concern was to facilitate the expansion and development of the West. This was apparent in *Townsend*, where the Court held that the railroad's interest in constructing and operating a transcontinental railroad was held to be superior to an individual's claim by adverse possession. Thus, the vague nature of the interest conveyed in the grants marked a period where the primary focus was on development and not the nature of the right of way being conveyed.

However, the legislative history of the 1875 Act does not indicate an intention by Congress to grant something more than the right to operate in the rights of way. Moreover, Congress was responding to public opposition to what it saw as lavish grants and revised the law to still allow the transcontinental railroad to develop without granting large tracts of land. As indicated in *Great Northern*, the Court held that the Act of 1875 only granted an easement stating, "section 1 indicates that the right is one of passage since it grants 'the' not a, 'right of way through the public lands of the United States.'"³³

Although the broad nature of what the Ninth Circuit considers to be a railroad purpose is in line with Surface

³³ *Great Northern*, 315 US at 271.

Transportation Board decisions regarding preemption, the overbroad nature of what the Court defines as a “railroad purpose” provides little guidance to interested parties disputing the railroad’s use of its right of way. Moreover, it fails to limit what can be considered a “railroad purpose.” Based on this decision, adjacent property owners or interested parties would be hard-pressed to establish that any activities of the railroad were not for a “railroad purpose” simply because the railroad is a railroad.

The Ninth Circuit decision is at odds with other Circuit decisions that narrowly construed the interest granted to the railroads through the pre-1871 Acts and 1875 Act.³⁴ As indicated above, the Eighth and Tenth Circuits held that the railroad was granted only the surface rights in its right of way and not the sub-surface rights. Until and unless the Supreme Court grants review in the Ninth Circuit case or in another one of the cases raising these issues, there will remain a Circuit split as to how to define a railroad’s property interest in its rights of way. As the law now stands, the Ninth Circuit’s holding is to the detriment of landowners whose properties are adjacent to rail lines within the Ninth Circuit’s jurisdiction.

³⁴ See *Energy Transp. Sys., Inc. v. UP*, 619 F.2d 696 (8th Cir. 1980); *Energy Transp. Sys. Inc. v. UP*, 606 F.2d 934 (10th Cir. 1979); *Union Pacific*, 353 US 112 (1957).

HUMAN TRAFFICKING AND TRANSPORTATION

Rebecca Mares¹

INTRODUCTION

This article is not intended to be an exhaustive survey of the human trafficking crisis that is pervasive in the United States and throughout the world. Rather, this paper presents an overarching view of the crime of human trafficking, along with information on international and domestic resources. The purpose of this article is to (1) explain what human trafficking is and what it is not; (2) discuss what is being done about human trafficking on an international level and domestic transportation level; and (3) present potential solutions to help curtail the crime of human trafficking.²

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² Most people become very uncomfortable when the subject of human trafficking comes up in conversation. It is horrifying that any human being and in particular—young girls or boys during their most innocent years, even as young as 6 years old or younger—are being used against their wills as labor or sex slaves. It is so horrifying that most people would prefer to believe that it does not exist. As my awareness of human trafficking has increased, I have become passionate about the subject and about what we can do to curtail it. Because it is an underworld activity, there are many who do not realize the scope of the problem. In fact, this horrifying tragedy is prevalent in the United States. Human trafficking is a real and growing tragedy here in the United States and other countries. My goal in writing this article is to make people aware of the problem that exists. Furthermore, I hope to make people passionate about helping to curtail human trafficking.

HUMAN TRAFFICKING ACROSS NORTH AMERICA

A. Statistics from the Justice Department.

In 2017, the Department of Justice of the United States “secured conviction against 499 traffickers . . . Of these, 471 involved predominantly sex trafficking and 28 involved predominantly labor trafficking, although several involved both.”³ Each of these traffickers potentially represents an untold number of victims and an untold number of uncaught and unconvicted traffickers. Some of the traffickers charged were even United States government employees ranging from a corrections officer and a law enforcement officer to a U.S. Navy Seaman.⁴ Additionally, Belize, which is a worldwide destination for child sex tourism, draws child sex tourists primarily from the United States.⁵ Further, in the words of the 2018 Report on Human Trafficking:

“The United States is a source, transit, and destination country for men, women, transgender individuals, and children—both U.S. citizens and foreign nationals—subjected to sex trafficking and forced labor. Trafficking occurs in both legal and illicit industries, including in commercial sex, hospitality, traveling sales crews, agriculture, janitorial services, construction, restaurants, care for persons with disabilities, salon services, massage parlors, fairs and carnivals, peddling and begging,

³ *Trafficking in Persons Report*, U.S. Department of State, at p. 433, June 2018, <https://www.state.gov/documents/organization/282798.pdf> (last visited January 11, 2019).

⁴ *Id.*, at p. 444.

⁵ *Id.* at p. 98.

drug smuggling and distribution, and child care and domestic work. Individuals who entered the United States with and without legal status have been identified as trafficking victims. Government officials, companies, and NGOs have continued to express concern about the risk of human trafficking in global supply chains, including in federal contracts. Victims originate from almost every region of the world; the top three countries of origin of federally identified victims in FY 2017 were the United States, Mexico, and Honduras.”⁶

Human trafficking networks continue to operate across the U.S./Mexico border with victims coming from as far as Central & South America. In 2012, a twelve-year old girl could be bought in Central America for only \$150 U.S. dollars,⁷ that is bought, not just borrowed or purchased for the hour or the day, but *bought* - as in - take her home and do what you will with her, for the rest of her life, however, short or long you determine that life should be. A 12-year old could first bring a return on your investment as a prostitute or a laborer and then, when she is used up, her organs can be removed and sold.

U.S./Mexico government cooperation has worked to bring United States Department of Justice prosecution to “eight members of a transnational organized criminal sex trafficking enterprise.”⁸ However, because this is only the

⁶ *Id.* at pp. 448-449.

⁷ *Volviendo*, Brittany Lefebvre, Diego Traverso, Phillip Abraham, Kyle Malkin, In Dependence Studios, 2012, <https://www.bing.com/videos/search?q=volviendo+movie+free&view=detail&mid=044FEDE71551BF5FF3D7044FEDE71551BF5FF3D7&FORM=VIRE> (last visited January 11, 2019).

⁸ *Trafficking in Persons Report*, U.S. Department of State, at p. 443 June 2018, <https://www.state.gov/documents/organization/282798.pdf> (last visited January 11, 2019).

tip of the iceberg, Executive Order 13773 signed on February 9, 2017 requires the Department of Homeland Security (“DHS”) to scale up border security and immigration enforcement activities in order to:

“thwart transnational criminal organizations and subsidiary organizations, including criminal gangs, cartels, racketeering organizations, and other groups engaged in illicit activities that present a threat to public safety and national security and that are related to, for example ... the illegal smuggling and trafficking of humans”⁹

Additionally, there were 14,117 calls made to the National Human Trafficking Hotline and 5,147 Human Trafficking Cases reported in 2018 alone, with the vast majority of these cases reported from California, Texas and Florida¹⁰ with these calls and reports only representing a fraction of humans actually trafficked.

B. A True Story of the Impact of Human Trafficking—The Tragedy of CC

John and Jane Doe got married in the 1980’s in California. They were blessed with a son and three daughters. John and Jane Doe loved each other and their children. They both worked hard, and raised their four children with great love and with great hopes and expectations. Then, life happened, not just the normal bumps and bruises of typical teenage angst but traumatic

⁹ *Executive Order 13773*, Executive Office of the President of the United States, February 9, 2017, <https://www.federalregister.gov/documents/2017/02/14/2017-03113/enforcing-federal-law-with-respect-to-transnational-criminal-organizations-and-preventing> (last visited January 11, 2019).

¹⁰ *National Human Trafficking Hotline*, Polaris, <https://humantraffickinghotline.org/states> (last visited January 11, 2019).

events, which would forever affect the trajectory of their family.

Now, these things are not things that we like to discuss. These things involve coercion and abuse. Sadly, the youngest girl, adorable little CC was traumatized, coerced and abused, and sadly the beginnings of the trauma happened when John and Jane Doe were unaware of the abuse and trauma. Thus, they were powerless to prevent it. As CC grew, she started to act out in ways that John and Jane Doe could not predict and could not curtail. John and Jane Doe tried to get help from caring family members, teachers, counselors, and church leaders, all to no avail. Little CC grew into a beautiful, troubled young woman, hurting herself while looking for love in all the wrong places. The degradation that she endured as a result of her trauma resulted in her devaluation.¹¹ This devaluation made her easy prey for men skilled in coercion and manipulation.

Through a long series of unfortunate events, she was recruited, by a pimp disguised as a loving, caring male, into the sex trade at the age of 16. She was not recruited in a third-world country. She was recruited in Bellevue, Washington, an exclusive enclave of King County, Washington, adjacent to Seattle and the home of some of the wealthiest companies in the world. She was not rescued by the pimp from a life of poverty or violence. On the contrary, she had her own car, her own room, her own bathroom, a closet full of clothes, a fridge full of food, more beauty products and jewelry than she could keep track of and parents and extended family who loved her

¹¹ This concept is taught by Steve and Celestia Tracy through *Mending the Soul Ministries*, <https://mendingthesoul.org/> (last visited January 11, 2019).

deeply. However, she saw her parents love as coercive, manipulative and limiting and longed to “escape” into the “freedom” of doing whatever came naturally and what came naturally, because of her history of trauma and abuse, was to rush headlong into more trauma and abuse.

Because CC’s sense of value and worth had been so eroded by the trauma and abuse she endured, her normal childhood development was stunted, even good memories were twisted and she leaned into pain. CC is now a young woman, struggling to grow past the pain, as she relives the horror of being coerced into trafficking, while waiting to testify against the pimp at his felony trial in Seattle’s backyard.

Sadly, the pimp himself comes from a history of trauma and abuse, and he is perpetrating a cycle of violence he has seen acted out from family members in the United States and in Mexico. Of course, he does not see himself as a pimp. He claims to love all these girls, wants to buy them things and “care” for them. His twisted logic seems perfectly plausible, reasonable and logical from his perspective. That is why he is so good at coercing girls, he actually believes he is caring for them.

What would have happened to CC if she had not had John and Jane Doe to fight for her, get her back and pluck her from harm? Well, what would have happened next could have involved using transportation systems to move her and other girls to where they could be most valuable to the pimp.

CC is a beautiful blue-eyed, blonde, young, Caucasian girl and as such, she may have commanded a higher price in a country where she is a rarity or novelty. However, she was also located in a city that is a melting pot of cultures, representing countries from all over the globe, with highly educated, highly paid workers with expendable cash moving from all over the world to work here in the technology industry. Highly paid, lonely men provide a ready demand for the supply of young girls of all colors and nationalities. Even with this fact, CC could have been moved to another country.

A detective working on this case told John and Jane Doe that it was only their persistence in alerting and working with local law enforcement that kept CC from being moved to Mexico. If she had been moved to Mexico via air, rail or truck, she may have then been moved on to Belize, or possibly on to Amsterdam, where she could have been trafficked beyond, even as far as Asia.

ANALYSIS OF THE HUMAN TRAFFICKING CRISIS IN TRANSPORTATION MODES

A. Exactly What Is Human Trafficking and How Profitable Is It?

It is estimated that there are over 24.9 million victims currently being trafficked, which means that there are more slaves in the world right now than at any prior point in history.¹² Human trafficking largely involves

¹² *7 Things Everyone Should Know About Human Trafficking*, TraffickingInstitute.Org, <https://www.traffickinginstitute.org/wp-content/uploads/2018/03/7-Things.pdf> (last visited January 11, 2019).

victims of labor and sex enslavement and it is defined by the United Nations Office on Drugs and Crime (“UNODC”) as the:

“recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹³

It is important to note that the crime of human trafficking, as defined above and the specific crime of sex trafficking as defined by the Trafficking Victims Protection Act of 2000, as amended (“TVPA”) does not require movement across borders.¹⁴ The crime of human trafficking is a crime of coercion, practiced by men and women skilled in manipulating victims. Also, the sex trafficking (the most common form of human trafficking) of anyone under the

¹³ *What is Human Trafficking?* United Nations Office on Drugs and Crime, http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html#What_is_Human_Trafficking (last visited January 11, 2019).

¹⁴ *Trafficking Victims Protection Act of 2000*, Section 102 (9), <https://www.state.gov/j/tip/laws/61124.htm> (last visited January 11, 2019).

age of 18, is a federal crime in the United States punishable by 10 years to life.¹⁵

The profits of human trafficking exceed One Hundred Fifty Billion Dollars (\$150,000,000,000). This staggering number is “more than the annual profits of Exxon, Microsoft, BP, Samsung and Apple combined.”¹⁶ Because of the sheer numbers and the huge financial incentives, not only may you know someone who is a perpetrator or participant in this crime, you also likely know of or know someone who is a victim of this crime. It is not always easy to identify victims as it is not uncommon for a trafficker to traffic their own “children, spouses, intimate partners, siblings or other family members,” easily disguising the use of coercion or force under the guise of a close relationship.¹⁷

Aviation is one of “primary modes of transportation utilized by traffickers.”¹⁸ While this may not seem

¹⁵ *Sex Trafficking of Children or by Force, Fraud, or Coercion*, 18 U.S.C. § 1591, <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section1591&num=0&edition=prelim> (last visited January 11, 2019).

¹⁶ *7 Things Everyone Should Know About Human Trafficking*, Trafficking Institute, www.traffickinginstitute.org/wp-content/uploads/2018/03/7-Things.pdf (last visited January 11, 2019). Because of the sheer numbers and the huge financial incentives, not only may you know someone who is a perpetrator or participant in this crime, you also likely know of or know someone who is a victim of this crime.

Do you know who is traveling with you on an airplane, train, bus, or ship or who is in the cargo hold? Would you know if you were sitting next to someone who is a victim of human trafficking?

¹⁷ *2017 Federal Human Trafficking Report*, Kyleigh E. Feehs & John Cotton Richmond, at p. 40, www.traffickingmatters.com/2017-federal-human-trafficking-report (last visited January 11, 2019). Because of the sheer numbers and the huge financial incentives, not only may you know someone who is a perpetrator or participant in this crime, you also likely know of or know someone who is a victim of this crime. Do you know who is traveling with you on an airplane, train, bus, or ship or who is in the cargo hold? Would you know if you were sitting next to someone who is a victim of human trafficking?

¹⁸ *Combating Human Trafficking in Aviation: What Can Cabin Crew Do About It?* Martin Maurino at p. 9, <https://www.wats-event.com/wp-content/uploads/2018/05/Maurino-Trafficking.pdf> (last visited January 11, 2019).

plausible, consider that in the United States alone there are 19,346 U.S. airports with 2,600,000 + passengers flying every day in and out of those airports¹⁹ and those statistics increase exponentially when international airports and air traffic are considered.²⁰ To mention just one example, in 2017, a fast-thinking flight attendant acted swiftly and intelligently to help rescue a girl from human trafficking.²¹

B. What Does Not Constitute Human Trafficking?

Frequently, the smuggling of migrants is confused with human trafficking. The smuggling of migrants is not human trafficking. The smuggling of migrants involves “the procurement for financial or other material benefit of illegal entry of a person into a State of which that person is not a national or resident.”²²

The smuggling of migrants is a crime and it can relate to human trafficking, as migrants who hire smugglers or coyotes to help migrants cross borders can be kidnapped, held for ransom, and also become human-trafficking victims. Although this behavior is despicable, this article is not focused on the atrocities of migrant caravans.

¹⁹ Federal Aviation Administration, https://www.faa.gov/air_traffic/by_the_numbers/ (last visited January 11, 2019).

²⁰ International Air Traffic Statistics can be purchased from IATA in the “WATS 2018” report, available at the following link for US\$650, <https://www.iata.org/publications/store/Pages/world-air-transport-statistics.aspx> (last visited January 11, 2019).

²¹ *Flight attendant uses secret message to rescue teen girl from human trafficking on Calif. Flight*, Nancy Dillon, February 6, 2017, <http://www.nydailynews.com/news/national/flight-attendant-rescues-teen-girl-human-trafficking-article-1.2965478> (last visited January 11, 2019).

²² *UNODC on trafficking in persons and smuggling of migrants*, United Nations Office on Drugs and Crime, <http://www.unodc.org/unodc/en/human-trafficking/index.html?ref=menuaside> (last visited January 11, 2019).

C. What Is Being Done About Human Trafficking on an International Level?

1. The United Nations

The United Nations is working with member countries to curtail human trafficking through two (2) main works of legislation:

- 1) The *United Nations Convention against Transnational Organized Crime* was adopted by the General Assembly on November 15, 2000 and entered into force on September 29, 2003 (the “Convention”). The Convention:

“represents a major step forward in the fight against transnational organized crime and signifies the recognition by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for

building or upgrading the necessary capacity of national authorities.”²³

- 2) *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the Convention*, was entered into force on December 25, 2003 (the “Protocol”). The Protocol is intended to:

“facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases. An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights.”²⁴

In addition, The United Nations has also set up the “United Nations Trust Fund for Victims of Human Trafficking” (“Fund”) which has \$4.2 million in contributions, as of April 2018.²⁵ This Fund supports individuals through over 3,000 NGO partners who receive grants from the Fund, and also provides access to justice, legal advice and representation.²⁶

Finally, the United Nations Office on Drugs and Crime (“UNODC”) created a “Human Trafficking

²³ UNODC, <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (last visited January 12, 2019).

²⁴ *Id.*

²⁵ UNODC, <http://www.unodc.org/unodc/human-trafficking-fund.html> (last visited January 12, 2019).

²⁶ *Id.*

Knowledge Portal” which includes a “Case Law Database;” “Bibliographic Database;” and “Database of Legislation.”²⁷ While reviewing the information on these sites, I found and ordered a book called, “Human Trafficking around the World—Hidden in Plain Sight”²⁸ which can be purchased through Columbia University Press. This resource provides an in depth international survey of human trafficking.

2. Other International Efforts to Curb Human Trafficking.

Human beings are illegally trafficked both domestically and internationally via multi-modal transportation systems, including truck; rail, ship; and air.²⁹ The International Transport Forum (“ITF”) which is “an intergovernmental organisation with 59 member countries, acts as a think tank for transport policy and organizes the Annual Summit of transport ministers. The ITF is the only global body that covers all transport modes.”³⁰ While the International Transport Forum has committed to “cooperate globally with public and private sectors to combat human trafficking, terrorism and other crimes involving transport

²⁷ UNODC, <https://sherloc.unodc.org/cld/en/v3/htms/index.html> (last visited January 12, 2019).

²⁸ *Human Trafficking around the World—Hidden in Plain Sight*, Stephanie Hepburn, Rita J. Simon, <https://cup.columbia.edu/book/human-trafficking-around-the-world/9780231161459> (last visited January 12, 2019).

²⁹ While there are reports of human trafficking by truck, rail and ship, there does not appear to be an international organization specifically dedicated to educating multi modal transportation stakeholders about the crime of human trafficking.

³⁰ *Women’s Safety and Security: a Public Transport Priority* Magdalena Olczak-Rancitelli, Mary Crass et al, at p. 3, https://www.itf-oecd.org/sites/default/files/docs/womens-safety-security_0.pdf (last visited January 12, 2019).

networks, and raise awareness of security issues among the travelling public and transport service providers,”³¹

ITF has published a report, “Women’s Safety and Security: a Public Transport Priority,” which presents reports from leading transportation experts. A contributor to the report is K. Jane Williams, the Acting Administrator for the Federal Transit Administration (“FTA”), United States Department of Transportation (“U.S. Department of State”). She rightly states that “the freedom of travel provided by transit has been abused by those who are engaged in human trafficking. These threats exist in small towns and large cities, and in wealthy nations as well as developing ones; and universal problems require global action.”³² The author outlines the excellent work being done in the United States by U.S. Department of State and other federal agencies and NGO’s to raise awareness, and develop training materials to recognize and report human trafficking. These materials could be adopted for multi-modal use internationally in order to help combat this universal problem with global action.

Currently, there are no multi-modal international education materials. Yet, there are two (2) international organizations that work to provide education to one transportation mode, aviation. These organizations suggest specific education and best practices for reporting and rescuing victims of human trafficking. The information

³¹ *Transport Safety & Security, 2018 Summit* report (May 23-25) at p. 39, https://www.itf-oecd.org/sites/default/files/docs/2018-summit-highlights_0.pdf (last visited January 11, 2019).

³² *Women’s Safety and Security: a Public Transport Priority* Magdalena Olczak-Rancitelli, Mary Crass et al, at p. 8, https://www.itf-oecd.org/sites/default/files/docs/womens-safety-security_0.pdf (last visited January 12, 2019).

provided by these organizations could also be adopted for multi modal use internationally:

- 1) *The International Civil Aviation Organization* (“ICAO”) recommends that each air carrier consider three (3) main areas of focus: (1) developing a set of dedicated policies, procedures and reporting protocols for when an encounter with human trafficking occurs; (2) creating specialized training for cabin crew with customized content, including reporting requirements; and (3) offering both initial and recurrent training to keep abreast of legislative changes and new developments. Further, the ICAO, in conjunction with the Office of the United Nations High Commissioner for Human Rights (“OHCHR”), identifies additional stakeholders beyond the flight crew that should also be involved, including airport personnel and airport transportation providers.³³

- 2) *The International Air Transport Aviation* (“IATA”) passed a resolution denouncing human trafficking at its June 2018 meeting.³⁴ The resolution recommends that airlines implement best practices, provide training to operational staff to identify potential trafficking situations and take appropriate action that does not compromise the safety of the

³³ *Combating Human Trafficking in Aviation: What Can Cabin Crew Do About It?* Martin Marino at pp. 9 & 17, <https://www.wats-event.com/wp-content/uploads/2018/05/Maurino-Trafficking.pdf> at pgs. 9 & 17 (last visited January 13, 2019).

³⁴ *Resolution against Trafficking in Persons*, IATA, <https://www.iata.org/pressroom/pr/Documents/resolution-trafficking-persons-agm2018.pdf> (last visited January 13, 2019).

victim while also calling government authorities and operators to work together as a team.³⁵

Additionally, IATA provides free resources for airline staff training to increase staff and passenger awareness, such as: a free online tutorial for airlines; guidance on human trafficking and two-day classroom training on human trafficking.³⁶

Finally, Airline Ambassadors International, a United States-based nonprofit organization, works to educate airline employees on child protection via volunteer training on human trafficking.³⁷

WHAT IS BEING DONE ABOUT HUMAN TRAFFICKING IN THE UNITED STATES?

The enormity of the problem has caused United States federal authorities to take notice and author legislation and best practices requiring and encouraging transportation entities to comply with and implement training programs to identify and report potential human trafficking.

A. U.S. Department of State

The U.S. Department of State functions as an umbrella organization to provide a broad overview of both

³⁵ *Id.*

³⁶ *Human Trafficking (HT)*, IATA, <https://www.iata.org/policy/consumer-pax-rights/Pages/human-trafficking.aspx> (last visited January 13, 2019).

³⁷ Airline Ambassadors International, <https://airlineamb.org/about-us/> (last visited January 12, 2019).

U.S. and international action on human trafficking. The June 2018 Trafficking in Persons (“TIP”) report is 478 pages long and covers a plethora of topics, including country narratives, which are a worldwide survey and ranking of compliance with the minimum TVPA standards. Countries are ranked from Tier 1 to Tier 3, with Tier 1 showing the highest level of compliance with TVPA minimum standards and Tier 3 showing the lowest level of compliance with TVPA minimum standards.³⁸ Countries that are not even parties to the International Convention are also included in the TIP, such as; Bangladesh, Republic of Congo, and Yemen. The TIP also includes victim stories, stressing the importance of including survivors of human trafficking as “key stakeholders” to help craft effective government and nongovernment responses.³⁹

The TIP report discusses effective task forces with an outline of the well-developed Houston Area Council on Human Trafficking which includes the “3Ps”- “prosecution, protection, and prevention and a fourth “P” for partnerships ... with a 91-point strategic plan to combat human trafficking.”⁴⁰ It also details how this crime is often “hidden in plain sight”⁴¹ as victims are often scared to report because of fear of harm to themselves or their families or fear of legal repercussions.

Economic indicators of criminals and criminal organizations are also discussed, along with highlighting

³⁸ *Trafficking in Persons Report*, U.S. Department of State, at pp. 44-45, June 2018, <https://www.state.gov/documents/organization/282798.pdf> (last visited January 13, 2019).

³⁹ *Id.* at p. 4.

⁴⁰ *Id.*

⁴¹ *Id.* at p. 9.

the importance of conducting “Know Your Customer-KYC” and “Politically Exposed Persons”⁴² due diligence in order to screen potential business partners and clients and to confirm that your organization is not unwittingly collaborating with blacklisted individuals or companies.

B. The United States Department of Transportation

U.S. Department of State, in conjunction with DHS, has developed counter trafficking initiatives and they are currently working to develop even more robust initiatives. U.S. Department of State recommends that transportation leaders across all modes of transportation join the fight against human trafficking by implementing a four pronged approach: (1) joining the effort of Transportation Leaders against Human Trafficking initiative and signing the pledge; (2) issuing a leader statement; (3) training employees; and (4) raising awareness.⁴³

*The Combatting Human Trafficking in Commercial Vehicles Act*⁴⁴ was passed into law on January 3, 2018 and it required the U.S. Department of State to establish the Advisory Committee on Human Trafficking (“ACHT”). The ACHT was established on October 3, 2018 and it consists of stakeholders from trafficking advocacy organizations; law enforcement; and trucking, bus, rail, aviation, maritime, and port sectors, including industry and

⁴² *Id.* at p. 29.

⁴³ U.S. Department of Transportation, <https://www.transportation.gov/stophumantrafficking> (last visited January 13, 2019).

⁴⁴ *The Combatting Human Trafficking in Commercial Vehicles Act, Public Law 115-99*, January 3, 2018, <https://www.govinfo.gov/content/pkg/PLAW-115publ99/pdf/PLAW-115publ99.pdf> (last visited January 13, 2019).

labor.⁴⁵ The ACHT submitted recommendations this last summer to Secretary Chao to help combat human trafficking. The Public Meeting Agenda from the first ACHT meeting of December 6, 2018⁴⁶ outlines an ambitious scope of work for the remaining seven (7) months, to include a three (3)-point scope across the transportation industry:

- 1) Strategies for identifying and reporting instances of human trafficking;
- 2) Recommendations for administrative or legislative changes to use programs, properties, or other resources owned, operated, or funded by the Department to combat human trafficking; and
- 3) Best practices for state and local transportation stakeholders based on multi-disciplinary research and promising evidence-based models and programs, including sample training materials and strategies to identify victims.⁴⁷

The U.S. Department of State partners specifically with the aviation industry through the Blue Lightning Initiative

⁴⁵ *U.S. Secretary of Transportation Elaine L. Chao Announces Appointees to Advisory Committee on Human Trafficking*, U.S. Department of Transportation Briefing Room, Thursday, October 11, 2018, <https://www.transportation.gov/briefing-room/us-secretary-transportation-elaine-l-chao-announces-appointees-advisory-committee> (last visited January 13, 2019).

⁴⁶ Department of Transportation Advisory Committee on Human Trafficking Public Meeting Agenda, December 6, 2018, <https://cms.dot.gov/sites/dot.gov/files/docs/mission/international-policy-and-trade/against-human-trafficking/327296/dot-acht-public-meeting-1-agenda-12-6-18.pdf> (last visited January 13, 2019).

⁴⁷ *U.S. Secretary of Transportation Elaine L. Chao Announces Appointees to Advisory Committee on Human Trafficking*, U.S. Department of Transportation Briefing Room, Thursday, October 11, 2018, <https://www.transportation.gov/briefing-room/us-secretary-transportation-elaine-l-chao-announces-appointees-advisory-committee> (last visited January 13, 2019).

(“BLI”),⁴⁸ led by U.S. Department of State, DHS, and U.S. Customs and Border Protection. BLI trains aviation industry personnel to identify potential traffickers and human trafficking victims, and to report their suspicions to federal law enforcement. While more than 100,000 personnel in the aviation industry have been trained through BLI, many more aviation industry professionals are in need of initial and recurrent training.⁴⁹

C. U.S. Federal Aviation Administration

The “*FAA Extension, Safety, and Security Act of 2016*,” signed by the President on July 15, 2016, requires air carriers to provide initial and annual flight attendant training regarding recognizing and responding to potential human trafficking victims.⁵⁰ The “Blue Lightning Initiative,” led by DHS, U.S. Customs and Border Protection, and U.S. Department of State, offers virtual training which provides a streamlined mechanism for meeting the requirement and participation is currently open to any U.S. airline, with consideration by U.S. government agencies on expanding the training to foreign-flagged airlines.⁵¹

H.R. 3669, the “*Securing General Aviation and Commercial Charter Air Carrier Service Act of 2017*,”

⁴⁸ *Blue Lightning Initiative*, U.S. Department of Transportation, <https://www.transportation.gov/administrations/office-policy/blue-lightning-initiative> (last visited January 13, 2019).

⁴⁹ *Id.*

⁵⁰ *Enhanced Training for Flight Attendants*, CONGRESS.GOV, H.R.636 – FAA Extension, Safety, and Security Act of 2016, at Title II, Subtitle A, Section 2113, July 15, 2016, <https://www.congress.gov/bill/114th-congress/house-bill/636/text> (last visited January 13, 2019).

⁵¹ *Blue Lightning*, U.S. Customs and Border Protection, <https://www.cbp.gov/border-security/human-trafficking/blue-lightning> (last visited January 13, 2019).

authorizes the Transportation Security Administration (“TSA”) to provide screening services for general aviation. The bill passed the house, has been received in the Senate and is currently with the Committee on Commerce, Science, and Transportation.⁵² Currently, U.S. Customs and Border Protection requires aircraft arriving from international destinations to notify U.S. customs officials prior to arriving in the U.S. Also, all charter aircraft over 12,500 lbs (turbo-prop and larger) must comply with passenger manifest and ID review requirements and certain security measures and requirements known as the Twelve-Five Standard Security Program (“TFSSP”).⁵³ However, there are currently no standard screening mechanisms for passengers boarding these aircraft at general aviation airports. H.R. 3669 would help solve this gap that allows illegal trafficking activity to proliferate among nefarious general aviation operators outside of the purview of TSA.

All aircraft passengers and the general public are encouraged to watch the general awareness video at the following link, to help recognize and report human trafficking: U.S. Department of Homeland Security, *Blue Campaign*, <https://www.dhs.gov/blue-campaign/videos/general-awareness> (last visited January 13, 2019).

⁵² CONGRESS.GOV, *H.R.3669 – Securing General Aviation and Commercial Charter Air Carrier Service Act of 2017*, <https://congress.gov/bill/115th-congress/house-bill/3669> (last visited January 13, 2019).

⁵³ *Twelve-Five Standard Security Program (TFSSP)*, National Business Aviation Association (NBAA), NBAA.ORG, <https://nbaa.org/aircraft-operations/security/programs/twelve-five-standard-security-program-tfssp/> (last visited January 13, 2019).

WHAT IS BEING DONE ABOUT HUMAN TRAFFICKING ON A STATE-BY-STATE LEVEL IN THE UNITED STATES?

There is much and varied work being done on a state-by-state level by both governmental and non-governmental actors. It is beyond the scope of this paper to provide a state by state survey. However, U.S. Department of State provides a state-by-state compendium of human trafficking awareness poster laws.⁵⁴ While most states are committed to implementing local laws to help stop the scourge of human trafficking, not every state has robust posting laws. Each state should implement robust posting laws that require posting at all transportation hubs and areas frequented by traffickers. Posting can help create awareness in the general population, as well as provide information for victims to escape captivity.

The State of Washington has developed an excellent Clearinghouse on Human Trafficking, its posting laws are limited to mandatory posting only at highway rest stops. Other states take their posting laws much further, requiring posting at all transportation related venues, such as bus stops, train stations, airports and venues that could be frequented by perpetrators such as truck stop diner bathrooms and adult entertainment venues. California⁵⁵

⁵⁴ *Compendium of Human Trafficking Awareness Poster State Laws*, U.S. Department of Transportation, February 10, 2014, https://www.transportation.gov/sites/dot.gov/files/pictures/HT_Awareness_Poster_Laws.pdf (last visited January 13, 2019).

⁵⁵ California Civil Code Section at Section 52.6 https://california.public.law/codes/ca_civ_code_section_52.6 (last visited January 16, 2019).

provides an excellent example of a well-crafted posting law.

OTHER SOLUTIONS FOR HUMAN TRAFFICKING

Traffickers are motivated by the enormous financial incentives that support multiple criminal activities, including terrorism. Is your organization prepared to help stop this scourge? Transportation operations should be abreast of the current regulations and should be implementing the requirements and best practices to help identify human trafficking and alert authorities.

There are multiple training options for the transportation industry. The building blocks for developing a training program are primarily available for multi-modal transportation stakeholders through U.S. Department of State's collaboration with DHS. To date, Amtrak has trained 20,000 employees, Greyhound has trained all of its drivers, and 23 aviation industry partners have trained over 100,000 employees under the Blue Lightning Initiative (BLI) for aviation personnel.⁵⁶

While the ACHT will outline best practices for state and local transportation stakeholders and suggested sample training materials and strategies to identify victims, and recommendations have been submitted to Secretary Chao, the sample training materials are still under development.

Meanwhile, transportation stakeholders, should *at a minimum* include the plan listed below. Air carriers are

⁵⁶ U.S. Department of Transportation, <https://www.transportation.gov/stophumantrafficking> (last visited January 13, 2019).

required to *provide* initial and annual flight attendant training regarding recognizing and responding to potential human trafficking victims.⁵⁷

- 1) Join the Transportation Leaders against Human Trafficking initiative by signing the pledge.⁵⁸
- 2) Issue a Leader Statement.⁵⁹
- 3) Educate Employees:
 - a) Develop a set of dedicated policies, procedures and reporting protocols for when an encounter with human trafficking occurs – include:
 - i. The 4 “P’s” -- prevention, protection, partnerships and prosecution;
 - ii. Learn-and-know customer training to insure that due diligence is exercised to screen potential business partners and clients and confirm that your organization is not unwittingly collaborating with blacklisted individuals or companies; and

⁵⁷ *Enhanced Training for Flight Attendants*, CONGRESS.GOV, H.R.636 – FAA Extension, Safety, and Security Act of 2016, at Title II, Subtitle A, Section 2113, July 15, 2016, <https://www.congress.gov/bill/114th-congress/house-bill/636/text> (last visited January 13, 2019).

⁵⁸ *Transportation Leaders against Human Trafficking*, U.S. Department of Transportation, <https://www.transportation.gov/TLAHT> (last visited January 13, 2019).

⁵⁹ *Id.*

- iii. Include survivors of human trafficking as stakeholders in your training, you could show a short video to help your team identify with the reality of this crime as it is difficult for most folks to believe this actually happens in our backyards.
 - b) Create initial and recurrent training for employees with the foregoing customized content.
- 4) Educate customers and clients by developing a campaign to raise awareness, to include posting, showing videos and requiring your suppliers to follow protocol that aligns with your established practices.

CONCLUSION

The human-trafficking crisis is a problem that impacts all modes of the transportation industry. Transportation companies now have the ability to support organizations that are working to combat the crime of human trafficking. Transportation stakeholders have a significant opportunity to help educate employees, and the public, and support local groups. Awareness and training to recognize and deal with the problem can help engender good will among customers and client base in the industry and provide with an excellent public relations opportunity, along with an opportunity to do great good.

EFFICIENCY IN CONTAINER ALLOCATION IN THE US AND EU: AN INSTITUTIONAL PERSPECTIVE

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Abstract

Demurrage and Detention charges are facing considerable scrutiny across the world. Even so, in the United States (“US”), where the Federal Maritime Commission (“FMC”) finished a year-long study and determined to allow market solutions rather than governmental dictates, the problem persists. On the contrary, the situation in the European Union (“EU”) is the opposite; in the EU, there is much more efficiency in

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container allocations and thereby lower demurrage and detention charges in general. In this paper, we use the concept of institutional distance and suggest that, perhaps, a market-based solution is not necessarily optimal. There might be a case for regulation to reduce the demurrage and detention issues which are currently prevalent in the US market.

Introduction

A global focus on demurrage and detention policies in the world's major trade lanes has highlighted a quintessential competitive issue, namely the efficiency of the ports and their ability to effectively minimize waste in the supply chain for the shippers and to maximize the ROA for the carriers.³ This has led to a call by the FMC to focus more on market-based solutions as compared to regulatory solutions to the problem. In this paper, we examine this idea from the perspective of Institutional Distance, a concept which has been widely applied in the Sociology and International Business ("IB") domains to study multi-national enterprises. Our discussion suggests that, going by the principles of institutional distance, perhaps there is a case for further regulation.

The paper is laid out as follows: we first establish the carriers' perspective on their efficiency pursuits. Next, we discuss the shippers' perspective and the disruption in their supply chains. We follow this with a discussion on the concept of distance and more specifically on geographic and institutional distance. Finally we make

³ The issue bringing this into focus lately is demurrage and detention. Conflict regarding demurrage and detention has been written about for over a century (*see* Wilds 1917).

recommendations to address these issues, along with recommendations for future research into this arena.

Carriers' perspective

The past two decades has seen tumultuous times for the world's containerized fleet carriers (*e.g.*, deregulation, mergers of the world's top ocean carriers in response to overcapacity, bankruptcies, lockouts, strikes, etc.) (Stapleton, Nandialath and Bose 2018: 169). Carriers have long pursued strategies to remain competitive (*e.g.*, invention of the stack train network; consolidation; mergers, etc.). Carrier response to today's trade environment is no different. Global carriers must contend with uncertainties brought about by tariffs, trade wars, shipper charges of profiteering on detention and demurrage practices, and the like. One key to maximizing carriers' operations is keeping their assets (*e.g.*, containers) in motion. Carriers' response have oftentimes focused on Return-On-Assets (ROA). For instance, the invention of the stack train – where trains loaded 100 cars two-containers high. Stack trains were dedicated, meaning both that they did not stop at hump yards, and that they were not coupled together like traditional piggy back trains. The invention led to both marketing and engineering advantages, and ultimately to a greater ROA for those carriers utilizing the network. One key to maximizing ROA is to keep the containers in motion, and reducing time spent in the hinterland awaiting pick-up from the marine terminal or awaiting drop-off from the shipper. Thus carriers and terminal operators apply demurrage and detention fees to penalize those shippers who do not heed the free time allocation and hang on to the container longer than is

allowed.⁴ Many shippers charge the carriers and terminal operators with using these fees more as a revenue-generator instead of as a punishment (Stapleton, Nandialath and Bose 2018). According to Bouchery, *et al.* (2016), the rationale for the shipping line to charge such fees are not only related to generating local revenue, as they also include the following aspects: Control (*i.e.*, the shipping line needs to carefully plan the flow of containers and the shorter the time the container is in the hinterland, the more control the company has over the container); Utilization (*i.e.*, the containers owned by the shipping line are an important asset and these must be utilized as good as possible) the promoting of the carrier's own transportation services (*i.e.*, by charging demurrage and detention, the shipping line can stimulate its clients to also use the hinterland transportation services of the shipping line company (*i.e.* to move from merchant haulage to carrier haulage)); and, Avoidance of storage (*i.e.*, some clients might be tempted to use containers as a means to store inventory. The carrier wants to discourage its clients from doing so.).

Shippers' perspective

The major strategic thrust for the shippers, the beneficial owners of the freight, is that firms are pursuing operational excellence in both their production and in their

⁴ When the shipping line that performs the sea transport is also responsible for delivering the container to the final destination (carrier haulage setting), it will attempt to make sure that the containers used for transport are recovered from the destination as fast as possible, and the client pays a fixed fee which is independent from the time the container spends in the hinterland. However, when the shipping line is only responsible for the ocean transport (merchant haulage setting), the client pays a variable *demurrage* and *detention* fee, in function of the time the container spends in the hinterland. Demurrage represents the charge for the time the container overstays at the deep-sea terminal, and detention applies to the time the container stays outside the sea terminal, in the hinterland. (Bouchery, *et al.* 2016)

transportation and logistics. Any disruption in the supply chain prevents the achievement of this desired efficiency. There may be many reasons that inefficiencies exist at some ports, including congestion, ineffective allocation of chassis, and inefficient reallocation of empty containers, amongst others. One major consequence that impact the shippers, their supply chains, and the carriers is containers not being picked up in a timely manner, or containers not being returned in a timely manner. In this paper, we look at the efficient through the lens of demurrage and detention policies and practices between the US and the EU.

Demurrage pertains to the time an import container sits in a container terminal, with carriers generally responsible for collecting penalties on behalf of container terminals.

Detention relates to shippers keeping hold of containers for too long outside of a container terminal.⁵ Demurrage fees are charged when import containers are still full and under the control of the shipping line. Detention occurs when the consignee holds onto the carrier's container outside of the port, terminal, or depot beyond the free time that is allotted.⁶ In the US there are other forces in play, such as

⁵ For comprehensive coverage of the contemporary maritime vernacular see Veenstra and Zuidwijk (2016) and Schofield (2015).

⁶ How it works for Imports: A) Container demurrage at terminal: The port authorities charge the consignee directly on a pay-per-day basis. B) Import container detention: In an attempt to improve the turn-around time of containers shipping lines will apply detention charges for import containers returned after the expiry of the free time. Free days typically commence from midnight on the day of discharge from vessel. How it works for Exports: In the case of exports, normally shipping lines give 10 free days within which the shipper has to pick up the empty container, pack it and return it full to the port. In case of delays of more than 10 days, the shipping line charges Detention (generally same tariff as import detention) for the days that the container is kept with the client as empty or full. Demurrage will be charged from date it is delivered at port until the start of the free period which normally comprises of 7 days prior to the expected date of arrival (ETA) of the vessel. Furthermore, if the container is delivered to the port but the shipper is unable to export it due to any reason, then the Demurrage will be charged at the rate fixed by the port until the full container is shipped out. (See Stapleton, Nandialath and Bose 2018: 172)

congestion on West coast ports and continuing effects of weather disruptions, labor disruptions, trade policies (*e.g.*, tariffs) and trade imbalances leading to the storage and shipment of empty containers.

What drives inefficiency in the US Market?

Role of Institutional Distance

In this paper, we draw on the role of institutions in general and its implications for inefficiency of US ports. A widely used concept in the IB literature focuses on the role of institutions and its implications for businesses in general. Broadly, North (1990) defines institutions as “the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.” The IB literature, which focuses on organizations in general, discusses the implications and impact of the existing institutional structures within each market that they are operating in and the constraints and opportunities these structures offer. For instance, DiMaggio and Powell (1977), note that in environments characterized by high degree of institutionalization, firms are influenced by *coercive isomorphism*. Coercive isomorphism fundamentally discusses how firm actions are pressured by other firms. In the context of our application, an interesting explanation for observing efficiency in the EU markets could simply be that ports are competing with each other and the institutional environment in place is such that each port is pressured into improving the overall efficiency of the containers which leads to lower demurrage and detention charges. On the contrary, in the United States, it is possible that the institutional structure may not necessarily reflect pressure from other ports in improving overall efficiency. DiMaggio and Powell (1977) also discuss two other

avenues through which firms may engage in observed behavior. One is *mimetic isomorphism*, where firms simply react to other firms pressures in the same environment.

Finally, *normative isomorphism* implies that firms and ports are reacting to normative standards set by external institutions. Thus, *mimetic isomorphism* implies that, within the context of ports in the USA, because all ports are engaging in activities which may not necessarily be influencing allocation efficiency, the trend just continues. Thus, firms do not actively seek to improve efficiency since their peers are not necessarily doing the same. Finally normative isomorphism implies that the external environment is probably influencing the lack of efficiency in these markets. Cumulatively, we believe that much of what we observe in US ports can be attributed to either *mimetic* or *coercive isomorphism*.

Thus, a simple comparison across the EU and US might suggest that within the EU isomorphism generates a positive externality in the sense that actions that firms generally take are focused towards improvement of efficiency which in turn leads all other firms to take similar actions. Cumulatively, it has a positive effect of the efficiency of the industry as a whole. On the contrary, within the US it can be argued that the general lack of interest in improving efficiency (which may be attributed to structural problems) perpetuates through all ports which in turn leads to overall average efficiency in the industry. Thus a potential solution could be to consider means to reduce such distance such as through regulation.

From the perspective of institutional distance, one aspect that may warrant further investigation is the role of regulation of the ports. Primarily within the literature on regulation and institutional distance, regulation has been seen as laws and rules which are readily observable and defines which actions are acceptable and which actions are not (., Kostova 1997). Regulation is typically easier to observe from the perspective of DiMaggio and Powell (1971), because it creates coercive isomorphism of adoption (especially given that it can have reputational effects when firms do not adhere to regulation). Thus an interesting but yet to be explored idea would focus on differences in regulations of ports between the EU and the US and its potential contribution to the efficiency problems encountered in the US.

Discussion and Conclusion

After a year-long investigation, the FMC opted to allow market-based solutions rather than governmental dictates with respect to demurrage and detention and free time policies and practices. However, European ports are far more effective at proactively reallocating empty containers. Thus a pertinent question to ask is: Can the US learn from the European experience? If it can indeed replicate the success of EU ports, it appears that this mitigates the demurrage and detention issues seen in the US, a pressing issue (Berman 2018; Gillis 2018). In this paper, we use the concept of “distance” as defined in the I B literature to speculate on some reasons why there is heterogeneity in the performance of the EU and US ports. Specifically, we focus on the role of institutions within the US and how it can improve port performance.

One strategy in managing empty container allocation is known as “street-turns.” Legros, *et al.* (2016) concluded that the proactive management of empty containers by the consignees enables reaching a high level of street-turns in many cases. Street-turns are beneficial not only for the consignees (as a way to decrease their costs) but also for the shipping lines (by increasing the utilization rate of the containers and reducing the cost of sending back empty containers to shippers). Street-turns additionally enable reduced congestion, accidents and pollution. Moreover, in case of a strong imbalance in favor of import between import and export flows and short detention free periods, the consignees have little incentive to manage empty containers at their location as the difference in cost as compared to the immediate return policy is small.

Jula, *et al.* (2006) and Song and Dong (2012) focus on the street-turn strategy, because it is often considered as one of the most efficient strategies for empty container management in the hinterland. The idea behind a street-turn is very basic and consists of shipping the empty container directly from the consignee to the shipper without passing by a terminal. The advantages of the street-turn strategy are numerous. The empty movements are reduced and accordingly repositioning costs decrease. Similarly, the reduction of empty movements may imply a decrease in the number of road accidents. Each street-turn also avoids two movements to and from the terminal, reducing congestion. Finally, empty container demand from the shippers can be met sooner, increasing the container utilization rate which positively impacts container fleet sizing (Jula, *et al.* 2006; Song and Dong 2012).

From the perspective of institutional distance, the adoption and success of the street-turn strategy is potentially dependent on the institutional framework under which ports are operating. For example, we argue that firms may engage in mimetic or coercive isomorphism where they are pressured to undertake actions based on how competitors behave. This may lead to situations where sub-optimal strategies may be propagated at the expense of efficiency enhancing ideas such as street turns. Thus, a fundamental question presents itself: Is more regulation actually be a better option? Although the FMC determined that market-based solutions may indeed be preferable, we suggest that we may need to look more closely at the institutional framework under which ports are currently operating. This might call for a different solution. The situation in the EU appears to be due, at least in part, to much more efficiency in container allocations and thereby lower demurrage and detention charges in general. The concept of institutional distance suggests that a market-based solution may not necessarily be optimal. Therefore, there might be a persuasive case for regulation to reduce the D&D issues which are currently prevalent in the US market.

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