Published by the Federal Bar Association Transportation and Transportation Security Law Section

Summer 2013

TransLaw

VIP Profile: Hon. Ronnie A. Yoder, Chief Administrative Law Judge, Office of Hearings, Department of Transportation

Hon. Ronnie A. Yoder, Chief Administrative Law Judge, Office of Hearings, Department of Transportation

Hon. Ronnie A. Yoder has been a federal administrative law judge (ALJ) for more than 38 years and has been with DOT for more than 27 years. In an interview with judicial intern Emily Singer Hurvitz, Judge Yoder illustrates the role of the ALJ and highlights additional activities that have enhanced his career.

What path did you take to become an administrative law judge (ALJ) and how did you come to be the chief ALJ at DOT?

I was in private practice for 14 years in both New York and Washington, D.C. First, I worked in the litigation department of what became the Nixon law firm and then as counsel and partner at Zuckert, Scoutt & Rasenberger, where I was introduced to transportation law and administrative law at the Civil Aeronautics Board. I also learned that it was possible to become a federal ALJ on the basis of merit, through an examination administered by the Office of Personnel Management. Applicants are required to have been attorneys for seven years, and, at that time, were required to demonstrate two years of hearing practice and to pass written and oral exams. Successful applicants are placed on a register in order of their exam grade. The register may include over 1,000 names and only the top three people on the list can be hired by an agency seeking an ALJ. In 1975, I took the exam and was selected by the Department of Labor in January 1976. In April 1976, I transferred to the Civil Aeronautics Board (CAB). In 1986, the CAB was closed as part of deregulation and I transferred to DOT with three other judges. I became chief ALJ at DOT in July 2001, after serving as acting chief since January 1999.

What is the role of an ALJ at DOT?

The role of the ALJ is established by the Administrative Procedure Act (APA) of 1946, which assures hearings by an independent decision maker where an organic statute requires a hearing "on the record." ALJs at DOT hold hearings for any of the DOT operating administrations that need to hold hearings on the record—principally the Federal Aviation Administration, Federal Motor Carrier Safety Administration, and the Office of the Secretary.

What is the best aspect of your job?

The best part of the ALJ position is the ability to gain and retain a judgeship solely on the basis of merit—without the need for political connections or contributions or the gauntlet of Senate confirmation hearings. ALJs are guaranteed decisional independence by the APA, which prohibits an agency from evaluating ALJs, affecting their pay, or subjecting them to supervision by persons involved in investigation or enforcement. ALJs are generally subject to discipline only after good cause is shown in a hearing before an ALJ at the Merit Systems Protection Board. ALJs sit for the agency and apply its policy, but they have an opportunity to significantly impact the agency decisional process and help to assure fairness to all parties who appear before them.

PROFILE continued on page 6

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TransLaw is published by the Federal Bar Association Transportation and Transportation Security Law Section, ISSN No. 1069-157X.

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Chair's Corner

Monica R. Hargrove, Chair

FBA Transportation & Transportation Security Law Section Members:

One of the great things about the summer months is the influx of summer tourists and interns in the Washington, D.C., metropolitan area! As members of the Transportation & Transportation Security Law Section, some of us had an opportunity to share our experiences with summer interns and young lawyers on the evening of June 13, 2013, during a "Careers in Transportation" networking event held at the Park Tavern in Washington, D.C.

A number of very talented law students from law schools throughout the country attended this event. The interns were working in a number of different capacities both in the private and public sector. We met interns working for the Department of Justice in the section handling aviation litigation, several interns who were serving as law clerks for Administrative Law Judges at the Department of Transportation, a couple of young attorneys who had recently begun new employment opportunities with Congressional committees on the Hill, and some folk interested in locating new employment opportunities. It was a great opportunity to share perspectives on experiences that many of the "seasoned" attorneys could provide about their careers in transportation law. Despite the threat of a rainstorm that afternoon, we had at least 25 persons in attendance. Many new friendships and mentoring relationships were established! We even met an intern, Emily Singer Hurvitz, who was able to interview DOT Chief Administrative Law Judge Ronnie A. Yoder and provide a V.I.P. Profile for this issue of TransLaw! And since Washington is a networking city, it was a good place for the interns to share an opportunity to expand their legal and professional networks!

The section held its first Maritime and Ports Shipping Forum on July 16, 2013. The forum was designed to provide information on how the expansion of the Panama Canal will impact the transportation modes. Also, the T&TSL Section has planned two excellent programs in August and September: The first program will focus on the challenges of funding infrastructure projects for intercity rail transportation projects involving multiple states, and the second of which will provide some insights on what is being done to identify and control human trafficking from a transportation provider's standpoint. See the marketing flyers which provide information on the dates and registration requirements for these programs.

Again, thanks for your participation in the programs offered by the Transportation & Transportation Security Law Section. As always, we welcome your ideas and suggestions of activities and topics that would be of interest to you!

Monica R. Hargrove is the chair of the Transportation and Transportation Security Law Section and general counsel of Airports Council International–North America. You can reach her at mhargrove@aci-na.org.

Letter From the Editor

Lisa A. Harig

I'm pleased to present the Summer 2013 issue of TransLaw. We've got a fascinating collection of articles, case notes, and personal interviews on a variety of transportation-related subjects.

In this issue, we profile DOT's Chief Administrative Law Judge Ronnie A. Yoder. Section Chair Monica Hargrove and airline industry lawyer Roy Goldberg present companion pieces on the end of the LAX III rates and charges case. Kathryn Gainey provides case notes on two recent cases involving the Federal Railroad Administration: *Ass'n of American Railroads v. U.S. Dep't of Transp.* and *Chlorine Institute v. FRA*. Scott Mitchell reviews *Decker v. Northwest Environmental Defense Center* in a case note of interest to all administrative law practitioners. Thomas Lehrich and Matthew Drener discuss the Maritime and Ports Shipping Forum and provide a brief history of the Panama Canal. Thank you to all of our excellent authors and contributors.

Please contact me at lharig@mklawdc.com or Sherwin Valerio at svalerio@fedbar.org with ideas for future issues of TransLaw or to submit an article.

The Airport Industry Perspective: LAWA Reaches Final Resolution of Rates and Charges Disputes with Air Carriers

Monica R. Hargrove

In an order issued by the Department of Transportation (DOT) on the eve of our Independence Day holiday, July 3, 2013, the DOT finalized all outstanding issues in the terminal fee disputes at Los Angeles International Airport (LAX) between the Los Angeles World Airports (LAWA) and certain airlines. The case also challenged the reasonableness of fee methodologies imposed at LAX and involved complaints filed by Southwest Airlines and US Airways at Terminal 1 and Air Tran Airways, ATA Airlines, Frontier Airlines, and Midwest Express at Terminal 3, together referred to as the T1/T3 Airlines. The order dismissed the claims of the four airlines that remained in the case and terminated the proceeding in its entirety. The DOT's dismissal of the case ended disputes that had been languishing before the DOT and in the courts for over a decade. The parties successfully put these issues behind them and resolved their different opinions on these rate-methodology issues through rational business negotiations alleviating the necessity of further legal proceedings and reliance on regulators or courts to determine a workable business solution.

BACKGROUND: In an order issued on June 15, 2007, the DOT issued its final decision about the reasonableness of new terminal fees and fee methodologies at LAX that were challenged by certain air carriers following the imposition of those charges on carriers serving that airport.[1] Petitions for review of the DOT's final decision were filed by several airlines and their trade association, the Air Transport Association (now called Airlines for America or A4A), in the U.S. Court of Appeals for the District of Columbia Circuit. Airports Council International-North America (ACI-NA), a trade association representing many commercial and general aviation airports, including LAX, filed a joint brief with the City of Los Angeles in the U.S. Court of Appeals for the District of Columbia in this matter. Oral arguments in the case were held in December 2008.

DECISION OF THE U.S. COURT OF APPEALS: On Aug. 7, 2009, the court issued its decision regarding the methods used by LAX to calculate the rental rates airlines pay for terminal space at the airport. The court upheld several important determinations made by the DOT and found that the airport's increased maintenance and operation fees were non-discriminatory. The court further upheld the requirement that fair market value (FMV) be established by an independent appraisal, and ruled that the DOT unlawfully placed the burden of persuasion upon the City of Los Angeles to justify its use of different methods for determining rentable space for the Terminal 1 Airlines and Terminal 3 Airlines, as well as the long-term tenants.

However, the U.S. Court of Appeals directed the DOT to further review the following, among other, issues, in remand proceedings that the department was directed to convene:

1. to explain why DOT believed that an airport may use FMV to set non-airfield rates but not airfield rates;

2. to consider whether LAX had monopoly power and, if so, how that affected the City's methods used to calculate rent to be paid by the air carriers involved; and

3. to either explain or abandon its position that, in establishing the FMV for non-airfield space, the airport may consider only "other aeronautical uses."

Several findings of the court are significant from an airport standpoint. First, the decision validated the fee methodology adopted by LAWA which allows the airport proprietor to recover operations and maintenance costs at Terminals 1 and 3 from the airline tenants. The decision also supported the airport's position in finding that DOT was incorrect in placing the burden of persuasion on the airport to justify the use of different methods for determining rentable space for the airlines. Further, the court also recognized that the airlines, not the airport, are responsible for supporting their position that the airport proprietor cannot use different rate methods for determining rentable space for the airlines with month-to-month agreements versus those with long-term lease agreements.

POST-DOT REMAND OBSERVATIONS AND ACTIONS OF THE PARTIES: The parties involved in this litigation had been exploring settlement negotiations to resolve issues remanded to the DOT for review by the U.S. Court of Appeals since 2010. On Feb. 6, 2013, Air Tran and the airport respondents in the case, namely LAWA and LAX, filed a joint stipulation for dismissal without any right of resubmitting the claims. On March 18, Southwest and the airport respondents filed a similar stipulation. In both

AIRPORT PERSPECTIVE continued on page 6

1 The proceedings actually began much earlier when the affected air carriers petitioned DOT for review of the proposed terminal rents and charges as issued by LAX. The matter was assigned to a DOT administrative law judge, who recommended that the department essentially rule in favor of the T1/T3 Airlines. *Recommended Decision of U.S. Administrative Law Judge Richard C. Goodwin*, Docket No. OST-2007-27331 at 77-78 (Dep't of Transp. May 15, 2007).

The Airline Industry Perspective: Observations on the Conclusion of the LAX III Rates and Charges Litigation

Roy Goldberg

The recent order of the U.S. Department of Transportation terminating the long-pending airport rates and charges cases involving terminal fees at Los Angeles International Airport (LAX) marks the welcome end of a 6.5 year proceeding, in the case known as LAX III (because of two prior landing fee cases involving LAX in the 1990's). LAX III started off extremely expedited and intense, but was dormant for several years, until the operator of LAX, Los Angeles World Airports (LAWA), reached agreements with the primary airlines behind the legal challenge: Southwest Airlines Co., Alaska Airlines, and US Airways (who I had the privilege to represent, along with four additional airlines: AirTran, ATA Airlines, Frontier, and Midwest Express). The airlines accomplished several important objectives both during the litigation and after, and can be very thankful for the department's hard work in this matter.

Because of the expedited nature of rates and charges proceedings under 49 U.S.C. 47129, the month-long trial before the administrative law judge assigned by the department to hear the case started less than six weeks after the complaint and all supporting evidence (totaling nearly 3,000 pages) were filed by the Terminal 1 and 3 (T1/T3) airlines on Feb. 16, 2007. The department issued its final decision four months after the complaint was filed, on June 15, 2007. Both LAWA and the airlines immediately filed cross-appeals to the D.C. Circuit, which were decided in August 2009. Although the court remanded several key issues to the department, the parties spent the next several years negotiating and finally agreeing to settlements which mooted the remanded case.

For the T1/T3 airlines the outcome of the LAX III was highly successful. As a result of the department's decision in June 2007, LAWA rescinded millions of dollars in planned terminal fee increases which the airlines contended were unjustly discriminatory. LAWA also credited the airlines with millions of dollars of higher fees paid in 2007 that the department found to be unreasonable.

The settlements that resolved LAX III reflected efforts by both the airlines and the LAWA administrators who joined LAWA after LAX III was first filed (and therefore had nothing to do with the challenged fees) to resolve long-standing issues and provide for strategic repositioning at LAX (e.g., Alaska Airlines moving from Terminal 3 to Terminal 6). The settlement goal was also helped by the fact that the new LAWA administrators deliberately sought to retain lower cost service at LAX, a motivation which not present in their predecessors.

The recent settlements of the LAX III issues also resulted in LAWA agreeing to a terminal fee methodology that includes "revenue sharing" with the airlines. This was a significant gain for the airlines given that prior to LAX III, LAWA refused to agree to any revenue-sharing with the airlines.

Finally, an important part of the legacy of the LAX III case is the role that an airport operator's monopoly power may play in future cases. The T1/T3 airlines argued that the new fee increases at LAX constituted an abuse of LAWA's monopoly power. The administrative law judge assigned to the case agreed, but the department refused to adopt that finding, stating that the monopoly issue was not properly before the agency. The D.C. Circuit reversed, stating:

> We now turn to the elephant in the room: Whether LAX had monopoly power over the provision of commercial airport services in a relevant geographic market. LAX's monopoly power *vel non* is relevant both to whether the City could lawfully consider evidence of fair market value to set rental rates for terminal space and to whether the rentable space methodology unjustly discriminated against the T1/T3 Airlines. The extent to which market value may be considered "fair" is surely affected by whether the market is competitive rather than dominated by a government with monopoly power. Whether it was unjust for the City to charge the T1/T3 Airlines, but not the other airlines, rent for a portion of terminal common areas might also be affected by the City's alleged monopoly position; a more competitive market might have led to rent based only upon area used exclusively by an airline. *See Ill. Tool Works Inc. v. Indep. Ink Inc.*, 547 U.S. 28, 44 (2006) (observing price discrimination "is strong evidence of market power"). ...
>
> The [Department's Rates and Charges Policy] Statement clearly stated the DOT would consider whether an airport impermissibly exercised monopoly power if an airline sought its review using the procedure the T1/T3 Airlines followed. The T1/T3 Airlines raised the issue in their complaint, but the DOT failed to include the issue in the Instituting Order. ... It was arbitrary and capricious for the DOT, having invited airlines to raise the monopoly power issue, when it was raised to ignore it without good and sufficient reason. On remand the DOT must explain why this case does not present the "extraordinary situation" in which alleged monop-

AIRLINE PERSPECTIVE continued on page 6

AIRPORT PERSPECTIVE continued from page 4

filings, the parties advised DOT that they had settled all disputes related to their claims brought concerning airport rates, charges and methodologies. On May 9, the airport respondents filed for dismissal of the claims brought by US Airways and Frontier Airlines, and advised the DOT that the LAWA Board of Commissioners adopted resolutions on airport-wide rates and charges on Sept. 17, 2012, and the new rate methodologies were incorporated in new agreements with those air carriers on Dec. 26, 2012, and Dec. 17, 2012, respectively. Those agreements also included provisions which acknowledged that those carriers considered their claims pending before the DOT as moot and therefore they consented to the dismissal of their complaints without any right to refile them.

As a result of the order, all remand proceedings that were pending before the department have been dismissed. The DOT noted that the other airlines that were complainants in the original proceeding, namely Midwest Express and ATA Airlines, no longer operate and have surrendered their operating certificates. The order also referenced an earlier order issued in February 2012, in which claims brought by Alaska Airlines against the airport respondents were dismissed without any right to refile them. Accordingly, all claims raised in the LAX III proceedings between LAX and Alaska Airlines, and the T1 /T3 Airlines are resolved and new rates and rate methodologies are in place to determine future charges for use of airport terminal space.

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AIRLINE PERSPECTIVE continued from page 5

> oly power is relevant to a fee dispute or, if it cannot, then go on to consider whether LAX had monopoly power in a relevant geographic market.
>
> *Alaska Airlines, Inc. v. DOT*, 575 F.3d 750, 760-61 (2009).

The termination of the LAX III case leaves in place the D.C. Circuit's admonition not to ignore evidence that an airport operator's new rates and charges constitutes an abuse of that airport operator's monopoly power. This can be an important protection for airlines doing business at airports with monopoly power.

Roy Goldberg is a partner in the Washington, D.C., office of Sheppard Mullin Richter & Hampton LLP.

PROFILE continued from page 1

What are the most significant changes in the legal field (or in government work) that you have observed throughout your career?

Going back to 1976, the most significant changes include the IT revolution, with the introduction of and subservience to computers and computerization; deregulation and the disinclination to regulate even where required by law; privatization of federal employment with a loss in continuity, expertise, and efficiency in the name of reducing full-time employees while increasing both the cost and number of actual government workers; and an exponential increase in administrative load to meet security needs and other statutory mandates.

Aside from being Chief ALJ at DOT, with what other activities are you involved?

I have been active in professional associations in administrative adjudication, including the ABA National Conference of Administrative Law Judges (Chair 1994-95), Federal Administrative Law Judges Conference (Executive Committee), National Association of Administrative Law Judges (Journal Advisory Board), American Judicature Society (National Advisory Council), and the Federal Bar Association Judiciary Division (President 2003-05). Following law school, I spent a year as a Rockefeller fellow at Yale Divinity School and have continued to pursue various religious activities, including starting a scholarship at Virginia Theological Seminary and singing in various church choirs throughout the Washington, D.C., area. I spent 10 years in the Washington Opera chorus and other area opera companies and have sung at the DOT Annual Awards ceremony for the last 10 years. I recently joined the Board of the Interfaith Conference of Metropolitan Washington. I have four children and 11 grandchildren including one Chinese, three Chinese-American, one Japanese-American, two English-American, one Austrian-American, and three American-American.

What is the most important thing for young lawyers to know as they start out?

Lawyering is a 24-7 job; but after seven years you have an opportunity to become one of the only merit-selected federal judges—a federal administrative law judge.

Transportation Case Updates

Kathryn Gainey

DC Circuit Declares Section 207 of Passenger Railroad Investment and Improvement Act Unconstitutional

The D.C. Circuit recently considered whether Congress has the power under the Constitution to delegate "joint regulatory authority" to a federal agency and to Amtrak. *Ass'n of American Railroads v. U.S. Dep't of Transp.*, No. 12-5204, ___ F.3d ___, 2013 WL 3305715, at *1 (D.C. Cir. July 2, 2013). Congress delegated joint regulatory authority to Federal Railroad Administration (FRA) and Amtrak in Section 207 of Passenger Rail Investment and Improvement Act of 2008 (PRIIA). The court concluded that Section 207 is an "unlawful delegation of regulatory power to a private entity," and it held that the provision is unconstitutional. *Id.*

Section 207 required FRA and Amtrak to "jointly … develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay …." *Id.* at *2 (internal quotation marks omitted). The statute contains a separate enforcement mechanism that provides for investigation by the Surface Transportation Board (STB). After the statute was enacted, FRA and Amtrak drafted proposed metrics and standards.

AAR challenged Section 207 as unconstitutional and asked the district court to set aside the metrics promulgated jointly by FRA and Amtrak. Specifically, AAR argued that Section 207 is unconstitutional because it delegates to Amtrak, a private entity, "the authority to regulate other private entities." *Id*. at *3. In addition, AAR argued that Section 207 violates the due process clause because it "empower[s] Amtrak to regulate its competitors." *Id*. The district court granted summary judgment in favor of the federal government, and AAR appealed.

This case concerns "how much involvement may a private entity have in the administrative process before its advisory role trespasses into an unconstitutional delegation." *Id*. at *3. Congress "cannot delegate regulatory authority to a private entity," but a private entity may "help a government agency make its regulatory decisions." *Id*. After reviewing the statutory provisions, the court concluded that the statutes did not ensure that "Amtrak would function subordinately to the FRA." *Id*. at *6. Under Section 207, FRA and Amtrak must "jointly … develop" metrics for measuring performance. *Id*. at *2 (internal quotation marks omitted). If Amtrak and the FRA do not agree on the metrics, an arbitrator appointed by the STB would decide the dispute through binding arbitration. The court concluded that this "backdrop stacked the deck in favor of compromise" between FRA and Amtrak because "FRA's failure to reach an agreement with Amtrak would have meant forfeiting regulatory power to an arbitrator the agency would have had no hand in picking." *Id*. at *6. The court also observed that no previous cases have held that a "private entity may jointly exercise regulatory power on equal footing with an administrative agency." *Id*. at *5. Such a holding would undermine the "principle that private parties must be limited to an advisory or subordinate role in the regulatory process." *Id*.

Because "Amtrak enjoys authority equal to the FRA" under Section 207, the statute is unconstitutional if Amtrak is a private entity. *Id*. at *4. The court thus considered whether Amtrak is a private corporation and concluded that it is "with respect to Congress's power to delegate regulatory authority." *Id*. at *9. The court recognized that the federal government is involved in Amtrak's operations. For example, the Secretary of Transportation, along with seven presidential appointees, serves on Amtrak's Board of Directors. The federal government owns Amtrak's preferred stock shares. Although the federal government is involved in Amtrak's operations, Congress chartered Amtrak as a private corporation. The federal statutes provided that Amtrak "shall be operated and managed as a for-profit corporation and is not a department, agency, or instrumentality of the United States Government," and Amtrak has stated that it is a "private corporation operated for profit." *Id*. at *7 (internal quotation marks omitted). Congress even "instructed that [Amtrak] be managed so as to maximize profit." *Id*. at *9. The court finally considered two "functional purposes [of] the public-private distinction" with respect to congressional delegation of regulatory power. *Id*. Those purposes—ensuring "democratic accountability [and] … that disinterested government agencies ostensibly look to the public good, not the private gain"—are inconsistent with the delegation of joint regulatory authority to Amtrak and FRA. *Id*. at *7. For example, the federal government could disclaim responsibility for the metrics since Amtrak is a private corporation. The federal government cannot prevent Amtrak "from devising metrics and standards that inure to its own financial benefit rather than the common good." *Id*. at *8. The Court thus concluded that Amtrak is a private entity, which means that it "cannot be granted the regulatory power prescribed in § 207," and the statute "impermissibly delegates regulatory authority to Amtrak." *Id*. at *9. The court did not consider AAR's due process argument.

DC Circuit Dismisses a Challenge to FRA's Final Rule Regarding Positive Train Control Systems

The D.C. Circuit recently dismissed a challenge by the Chlorine Institute to

UPDATES continued on page 8

UPDATES continued from page 7

the Federal Railroad Administration's (FRA) final rule governing implementation plans to install a positive train control (PTC) system in *Chlorine Institute v. FRA*, No. 12-1298, ___ F.3d ___, 2013 WL 2477012 (D.C. Cir. June 11, 2013). Among other things, a PTC system is "designed to prevent train-to-train collisions [and] over-speed derailments." *Id*. at *1 n.2. The Chlorine Institute challenged the final rule in *Positive Train Control Systems*, 77 Fed. Reg. 28,285 (May 14, 2012), because the agency removed a two-part test for a railroad to exclude segments from its PTC implementation plan. The court concluded that the Chlorine Institute's challenge is not ripe and that the court lacked jurisdiction to consider the petition.

By way of background, the FRA has promulgated rules regarding PTC systems under the Rail Safety Improvement Act of 2008. The statute requires railroads providing intercity or commuter rail passenger transportation and Class I railroads to complete implementation plans to install PTC systems. Those systems are required to be installed on main line tracks used for passenger service or tracks used for transporting poisonous-by-inhalation (PIH) or toxic-by-inhalation (TIH) commodities, such as chlorine, where the segment has 5 million or more gross tons annually. 49 U.S.C. § 20157(a)(1).

In 2010, FRA promulgated two final rules regarding PTC systems. The agency selected 2008 "as the baseline year for determining whether a main line carries either passenger or PIH traffic so as to require PTC." *Decision*, at *2. Because "routing could change between the 2008 baseline and the Act's Dec. 31, 2015, PTC implementation deadline," FRA's final rule in January 2010 permitted a railroad to request exclusion of track segments "based upon changes in rail traffic such as reductions in total traffic volume or cessation of passenger PIH service." *Id*. (internal quotation marks omitted) (citing *Positive Train Control Systems*, 75 Fed. Reg. 2598, 2700 (Jan. 15, 2010)). FRA would approve the request to exclude a line segment when "there is no remaining local PIH traffic expected on the track segment," and when exclusion "satisfied a two-part test, which included (1) an alternative route analysis requiring that alternative route(s) to the excluded tracks be shown to be substantially as safe and secure as the excluded tracks; and (2) a residual risk analysis, requiring that, after cessation of PIH traffic, the remaining risk associated with PTC-preventable accidents not exceed the average comparable risks of other tracks required to be PTC-equipped." *Id.* at *2 (internal quotation marks omitted). FRA moved the two-part test to a different section in the final rule issued in September 2010. *Positive Train Control Systems*, 75 Fed. Reg. 59,108, 59,117 (Sept. 27, 2010).

The Association of American Railroads (AAR) challenged FRA's final rules that were issued in January and September 2010. AAR and FRA later settled the appeal, and the case was held in abeyance pending FRA's rulemaking.

FRA's rulemaking culminated in the May 2012 final rule where FRA eliminated the two-part test for excluding a line segment from the 2008 baseline. FRA will approve a request to exclude a line segment "upon a showing that, as of Dec. 31, 2015, there will be no passenger service or PIH traffic on the tracks." *Decision*, at *3. FRA explained that "retaining the two-part test could potentially require PTC system implementation at a great cost to the railroads on lines that will not carry PIH materials traffic as of Dec. 31, 2015." *Id*.

The Chlorine Institute challenged the FRA's final rules issued in May 2012, and the AAR intervened as *amicus curiae* in support of FRA. The D.C. Circuit dismissed the Chlorine Institute's petition "for lack of jurisdiction" because the "challenge is not ripe." *Id.* at **1, 5. More specifically, the court concluded that the Institute "has not established that its members now face a present or imminent injury" from FRA's decision to remove the two-part test. *Id*. at *1. The court reasoned that the Institute's alleged impact of the final rule "is—at most—speculative." *Id*. at *4. For example, it is unknown "which track segments will be fitted with PTC under the plans that are submitted by carriers and ultimately approved by FRA" and "whether any Institute member's ability to ship PIH will be significantly affected" by the May 2012 final rule. *Id*. The court recognized that removing the two-part test "will result in a smaller map of PTC-equipped line segments, causing more rerouting of PIH traffic than under the 2010 rules," but it explained that rerouting "simply requires a different shipping route be used" and is a "necessary consequence of Congress's decision to restrict PIH traffic to PTC-equipped tracks." *Id*. (internal quotation marks omitted). Ultimately, the court concluded that the Institute's challenge is not ripe, although the court observed that "the Institute's challenge may thereby ripen … [a]s the PTC Implementation Plan process advances and its impact becomes clearer." *Id*.

Kathryn Gainey is of counsel at Steptoe & Johnson LLP in the Washington, D.C., office. She is the chair of the Surface Transportation Committee of the Transportation & Transportation Security Law Section. You can reach her at kgainey@steptoe.com.

Deference to Agencies or "Enough is Enough?"

Scott E. Mitchell

Perhaps the most familiar doctrine in all of administrative law is the well-known formula of *Chevron*: if a statute administered by an agency is ambiguous, then a court will defer to the agency's reasonable interpretation.[1] But, in a highly regulated area such as transportation, just as important as the interpretation of statutes is the interpretation of regulations. What standard should apply when an agency interprets its own regulation? Starting in 1945 with the case of *Seminole Rock* and seemingly canonized in the case of *Auer v. Robbins*, the Supreme Court has held that, in the same vein as *Chevron*, the standard of review is deference.[2] In the March 20, 2013, case of *Decker v. Northwest Environmental Defense Center*, the Supreme Court took the opportunity to affirm the principle of deference and note a circumstance where it is particularly appropriate.[3] Despite the majority's customary reliance on *Auer*, however, Justices Roberts and Alito indicated that in proper circumstances the court should reconsider it.[4] And Justice Scalia, proclaiming "enough is enough," found no reason to wait.[5]

This case note discusses the facts and holding of *Decker*. Then, it outlines the common arguments for and against the *Auer* doctrine. Finally, it briefly discusses possible outcomes if the court was to reconsider *Auer*. It is important to note that *Auer* is the law of the land; it is recently cited and applied Supreme Court case law that the court considers "well established."[6] Many feel that is unlikely to change. Nevertheless, it is an area of ongoing debate, and transportation practitioners are well served to understand the basic arguments for and against the doctrine.

In *Decker*, the Supreme Court deferred to the Environmental Protection Agency's (EPA) interpretation of its Industrial Stormwater Rule, holding that a Clean Water Act permit is not required for stormwater discharges from logging roads.[7] The case involved stormwater runoff from two logging roads in Oregon's Tillamook State Forest.[8] When it rains, water runs off the graded roads into a system of ditches, culverts and channels that discharge the water into two rivers—the South Fork Trask River and the Little South Fork Kilchis River.[9] The Northwest Environmental Defense Center (NEDC), invoking the Clean Water Act's citizen suit provision, brought suit against certain firms involved in logging and paper-products operations, as well as state and local officials, for discharging stormwater without an NPDES permit.[10]

Under the Clean Water Act, most discharges composed entirely of stormwater are exempt from the NPDES permitting scheme.[11] One notable exception to this rule is that stormwater discharges associated with industrial activities do require permits.[12] EPA has defined industrial activities, in a rule known as the Industrial Stormwater Rule, as follows:

> the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility. ...[13]

Noting that the rule covers access roads used or traveled by carriers of raw materials, and that the "categories of industries identified in this section" include "logging," NEDC argued that the discharges arose from an industrial activity and a permit was required.[14]

EPA argued[15] that the Standard Industrial Classifications referenced in the rule defined logging in terms of "establishments." According to EPA, that coupled with the rule's use of the term "facilities," meant that the rule only covered "industrial sites more fixed and permanent than outdoor timber-harvesting operations."[16] The court, in support of EPA's approach, further noted that the rule describes industrial discharges as those "directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[17] The court ultimately held that these arguments supported EPA's view that the regulation does not cover "temporary outdoor logging installations" or the "harvesting of raw materials."[18]

The text of the rule notwithstanding, the court's fundamental rationale in upholding EPA's interpretation of the rule was the application of deference. The court held:

> It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[19]

Additionally, the court held that *Auer* deference was particularly appropriate in this case because EPA was advancing a long-held position.

There is no indication that [EPA's] current view is a

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> change from prior practice or a *post hoc* justification in response to litigation. The opposite is the case. The agency has been consistent it its view that the types of discharges at issue here do not require NPDES permits.[20]

The principle of *Auer* deference, as applied in the case, has been subject to significant legal critique. There are at least four strong arguments in favor of *Auer* deference. First is the notion that Courts should defer to an agency's interpretation of its rule, because the agency has expertise. As argued in the briefs:

> Agencies are more competent than courts to resolve questions that implicate technical or scientific policy concerns; agencies are more politically accountable for the impacts of their determination; and agencies alone can offer advance guidance, applicable on a national level, about the meaning of a statute or regulation, fostering the values of clarity, predictability, and fairness. [21]

Thus we should defer to an "expert agency to decide a question that falls squarely within its core competence (and well outside the judicial bailiwick)."[22]

Second is that where there is a gap in the rule, the agency is in the best position to fill it. This is because the agency has the most insight into its intent when enacting the rule and thus a superior ability to understand it.[23]

Third is that *Auer* is consistent with *Chevron*, as explained (but ultimately rejected) by Justice Scalia:

> If it is reasonable to defer to agencies regarding the meaning of statutes that *Congress* enacted, as we do per *Chevron*, it is *a fortiori* reasonable to defer to them regarding the meaning of regulations *that they themselves crafted*.[24]

Finally is that allowing agencies to interpret their own rules creates certainty and consistency that would be impossible to achieve if courts felt free to question "reasonable and authoritative agency interpretation of ambiguous provisions."[25]

In contrast, opponents of *Auer* have at least three criticisms that weigh against the rule. First is that *Auer* places too much power in the hands of the agency and thereby violates principles of separation of powers, i.e., "the power to write a law and the power to interpret it cannot rest in the same hands."[26] Second is that *Auer* creates an incentive for agencies to promulgate regulations that "speak vaguely and broadly" knowing that they can fill in the blanks at a later date, thus giving them the future power to do as they please. [27] Finally is the concern that *Auer* deference allows agencies to interpret or effectively create rules without the observance of notice and comment procedures that normally apply to rulemaking.[28]

If the Court was to reexamine its decision in *Auer*, there are a number of approaches it might take. Justices Robert and Alito have indicated that there are "serious questions" with *Auer*. Justice Scalia, his mind made up, indicates that instead of *Auer*, the court should apply the "familiar tools of textual interpretation."[29] But, to the extent that only three of the Justices share these concerns, an obvious possibility is that the court, if and upon a future reconsideration, would merely affirm it.

Other approaches, short of reversal, could be to limit the doctrine to particular circumstances. In *Decker*, the court indicated that *Auer* deference was particularly appropriate where the agency was proffering a long held interpretation.[30] Conversely, the Supreme Court has indicated that *Auer* deference is inappropriate when the agency's interpretation is plainly erroneous or inconsistent with the regulation ... [or] when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question. This might occur when the agency's interpretation conflicts with a prior interpretation or when it appears that the interpretation is nothing more than a convenient litigating position, or a *post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack.[31]

Justice Kagan has indicated in academic writing that greater deference should apply when interpretations reflect the policy position of the president or high level leadership.[32] Finally, courts have refused to apply *Auer* deference when the agency has merely parroted the statute[33] or when the regulation is so vague and broad as to constitute "mush."[34] Thus, to the extent that *Auer* is reexamined—and that is not at all certain—incremental clarifications of its scope are probably more likely than an across-the-board reversal.

Conclusion

In the *Decker* case, the Supreme Court ruled upon a case with a complicated legislative, regulatory and judicial past. However, the court managed to sidestep an in-depth inquiry into the history of the proceedings and a substantive analysis of both the statute and congressional intent by according deference to the agency. The court applied this precedent with minimal analysis, noting that the principle was "well established" and particularly appropriate where the agency's position has been long held and consistently applied. Three of the justices suggested, however, that the court may need to reconsider *Auer* deference. For transportation practitioners and other practitioners of federal administrative law, an agency's interpretation of its rules and how that is reviewed by courts, is a basic question that goes to the "heart of administrative law."[35] For these reasons, practitioners should be aware of the *Auer* doctrine, its judicial treatment and the arguments that may be invoked

therein.

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Endnotes

[1]*Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984).

[2]*See Bowles v. Seminole Rock & Sand. Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997).

[3]*Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337 (2013).

[4]*Id.* at 1339 (Roberts, J., concurring). Justice Breyer did not take part in the case.

[5]*Id.* (Scalia, J., dissenting).

[6]*Decker.* 133 S. Ct. at 1337

[7]*Id*. at 1331.

[8]*Id. at* 1337.

[9]*Id. at* 1333.

[10]*Id.* NPDES refers to the National Pollutant Discharge Elimination System.

[11]33 U.S.C. § 1342(q).

[12]33 U.S.C. § 1342(p)(2)(B).

[13]40 C.F.R. § 122.26(b)(14) (2006). Three days before the case was argued EPA amended this rule to clarify its position that runoff from logging roads was not considered an industrial source. Nevertheless, the court found that the matter was not moot and considered the case in light of the pre-amendment rule. 133 S. Ct. at 1335.

[14]133 S. Ct. at 1336.

[15]In this case EPA supported Respondents as amicus curiae.

[16]133 S. Ct. at 1337.

[17]*Id.*

[18]*Id.*

[19]*Id*. citing *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (quoting *Auer*, 519 U.S. at 461).

[20]*Id.*

[21]*Brief of Amici Curiae Law Professors in Support of Petitioners*, 2012 WL 3864276, *19 (Sept. 4, 2012)

[22]*Id.*

[23]*Decker*, 133 S. Ct. at 1340 (Scalia, J., dissenting) (arguing, however, that agency intent is irrelevant).

[24]*Id.*

[25]*Brief of Amici Curiae Law Professors in Support of Petitioners*, 2012 WL 3864276, *20-21 (Sept. 4, 2012) (quoting *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring in part and in judgment); *Decker*, 133 S. Ct. at 1341 (Scalia, J. , dissenting).

[26]*Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting).

[27]*Brief of Law Professors as Amici Curiae on the Propriety of Administrative Deference in Support of Respondent*, 2012 WL 5361523, *11 (Oct. 23, 2012).

[28]*Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting); *Brief of Law Professors as Amici Curiae on the Propriety of Administrative Deference in Support of Respondent*, 2012 WL 5361523, *9-10 (Oct. 23, 2012).

[29]*Decker*, 133 S. Ct. at 1342.

[30]*Id.* at 1337-38.

[31]*Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (internal cites and quotation marks omitted).

[32]David J. Barron & Elena Kagan, 2001 Sup. Ct. Rev. 201, 204 (2001) ("the deference question should turn on . . . the position in the agency hierarchy of the person assuming responsibility for the administrative decision").

[33]*Gonzales v. Oregon*, 546 U.S. 243, 256-257 (2006).

[34]*Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

[35]*Decker*, 133 S. Ct. at 1341.

Shipping Forum on the Impact of the Panama Canal Expansion: A Summary of What the Experts Discussed With a Short History of the Canal

Thomas Lehrich and Matthew Drenan

History and Background of the Panama Canal

On July 16, 2013, the section hosted a panel of industry experts to discuss the multi-modal impacts of the Panama Canal expansion slated for completion in 2015. The Panama Canal has a deep history as one of the most important transportation innovations of the past century. Recognizing the impact of the canal in a time of American imperialism, President Theodore Roosevelt stated when addressing Congress on Dec. 3, 1901, "no single great material work which remains to be undertaken on this continent is as of such consequence to the American people."

With the foresight and persistence of President Roosevelt, the canal opened in 1914, connecting the Pacific Ocean with the Atlantic via the Caribbean Sea. When the marvel was built, the canal consisted of three pairs of locks including the Gatun, Miraflores, and Pedro Miguel. Each lock chamber was 1,050 feet long, 110 feet wide, and allowed for a 40-foot draft. Less than twenty years after the canal had opened, plans for expansion were already underway. In 1939, construction began on two new locks in anticipation of the new *Montana* class of battleships. The blueprints included plans for longer and wider locks than the original chambers, measuring 1200 by 140 feet. Unfortunately, the onset of World War II forced work to come to a halt in 1942.

Almost a century after the completion of the canal, Panamanians are determined to finish what was started more than 70 years ago. The current expansion will double the canal capacity and involve two new, even larger locks 1400 feet by 180 feet, accompanied by new entrance channels on both coasts and a deepening of the waterway. As the locks exist today, vessels carrying up to 4800 TEU can successfully transit the canal. Larger vessels are 30 percent more cost efficient, giving rise to the recent boom in increased vessel size. The expansion is consistent with the trend of shipbuilding, and the two new locks will be capable of accommodating up to 13,000 TEU vessels.

The Forum

If a mid-morning visit to DOT headquarters did not fit into your day, the following provides a summary of what you would have learned. Representing diverse transportation perspectives, our panelists included Randolph Resor, a policy advisor at the Department of Transportation; Robert Ledoux, general counsel and vice president at Florida East Coast Railway (FEC); and Shawn Kiernan, a strategic planner at the Maryland Port Administration. Kathryn Gainey, a transportation lawyer with Steptoe & Johnson LLP, moderated the discussion.

After reviewing charts, maps and data on the canal, the panelists agreed the Panama Canal expansion will not increase cargo volumes for the East Coast but merely shift current cargo volumes to those ports capable of accommodating the larger post-panamax vessels. Notably, participants learned that only three East Coast ports currently possess the much-coveted 50 feet of water to accommodate the 13,000 TEU vessels that will be passing through the canal by 2015. The Port of Miami is being readied; it should have a 50-foot berth by the time the first vessel passes through the two new locks. The Port of Everglades will round out the contenders for the East Coast container traffic transiting the expanded canal, projecting the completion of channel and berth widening and deepening by 2017.

It was East versus West. The experts explained the Panama Canal expansion is described by West Coast ports as being overly negative, fearing the loss of considerable cargo volume, while East Coast ports have been overly positive, forecasting a large shift in container traffic that does not, in all likelihood, seem poised to occur. We learned that the considerable cargo shift that could occur would be between the East Coast ports themselves, based on which ports update infrastructure to accommodate the larger vessels that will soon be transiting the canal.

The answer to why a cargo shift that conventional wisdom deems likely to occur will not, lies in the land bridge created by intermodal transportation. Fifty-five percent of Asian imports move through West Coast ports, yet some 80 percent of the U.S. population lives east of the Rockies. Locks are slow, and even the new locks will only accommodate about 14 vessel transits per day, which will add almost ten days to transit times in some instances, compared to intermodal transportation from a West Coast port (*e.g.*, cargo from Asia will take 23-24 days to reach Chicago via a West Coast port, compared to 32 days via the canal).

So what is the contestable market? Low-value goods have already shifted to East Coast ports based on transit times, because time to market is less of a consideration to shippers when importing less expensive cargo. Conversely, high-value container traffic will continue to move via West Coast ports, resulting from the penalty "all-water" transit times impose. The contestable market for some kind of cargo shift based on the Canal expansion will be in the Midwest, specifically Ohio. In coming years, the Midwest could see imports arrive via the West, East, and Gulf. Ultimately, fuel prices and trucking costs will have a direct impact on near-term shifts in routing.

The canal expansion is not likely to increase the volume of cargo to the East via an "all-water" path through Panama, just the size of the vessels transiting the locks. However, there could be a cargo shift between East Coast ports based solely on which ports have readied themselves to accommodate the

larger post-panamax vessels. If East Coast ports wish to maintain or increase their cargo volumes, they will need to update infrastructure, including a channel and berths with 50 feet of water and the equipment to unload up to 13,000 TEU vessels.

So the question of who will get the cargo from Panama in 2015 has in some ways been reduced to a race to 50 feet for East Coast ports. How local, state, and federal government choose to invest in updating infrastructure at particular ports in the East will directly affect other transportation modes. Florida East Coast Railway is looking optimistically on South Florida ports readying themselves to capture American imports from Asia after vessels take a left hand turn from Panama.

FEC has done a tremendous amount of work to get ready for the Panama Canal expansion. FEC operates 351 miles of track on the East Coast of Florida from Miami to Jacksonville where they connect to the national freight network via CSX and Norfolk Southern. FEC is in a unique position, poised to benefit as a provider of intermediary intermodal transportation for cargo, acting as a vital first step in getting goods to market. FEC's optimistic fate is directly tied to the Port of Miami being ready in 2015 and the Port of Everglades staying on track with its plans for a 2017 rebirth for new Panamanian cargo. Southern Florida offers a strategic location to "all-water" cargo as it offers the closest U.S. ports of call to the Canal. With improvements to the Port of Miami and the Port of Everglades, cargo will be able to reach 70 percent of the population via a South Florida port in one to four days.

Over the last three years, the Port of Miami has received funding for over one billion dollars in infrastructure improvements, making it a likely recipient of the larger vessel calls the expansion will create. Specifically, the port is planning to add four "super" post-panamax cranes by 2013, while Miami should get its game-changing 50 feet by 2015. While Miami has been working to make sure the vessels will come, FEC has been working just as hard to ensure it will be able to quickly get the goods to market. That means on-dock rail access to the FEC intermodal yard, making FEC the only railroad with direct access to the Port, linking Miami with the rest of the country. All told, the FEC on-dock rail connection will be a 45 to 50 million-dollar project with money contributed by Tiger II, Florida DOT, Miami Dade County, and FEC.

Port Everglades is the other South Florida port which should soon be a contender for "all-water" Asian imports. FEC is making considerable efforts here as well, having broken ground on July 17, 2013, on a 73 million-dollar, 42-acre intermodal transfer facility to service container traffic from the port. Money has been contributed by a number of entities in addition to FEC, including Broward County and grants from the State of Florida. Meanwhile, the port's slated 2017 completion of a joint deepening and widening project with the U.S. Army Corps of Engineers (USACE) will deepen the outer entrance channel to 57 feet and add additional berthing space, all at least 50 feet in depth. The addition of five new cranes capable of servicing the larger post-panamax vessels will round out the infrastructure improvements in store for the Port of Everglades.

The Port of Baltimore recently obtained 50 feet of water and is ready and waiting for the larger ships that should come calling when the expansion is completed. But depth is not everything; Shawn Kiernan of the MPA noted the importance of purchasing cranes large enough to service larger vessels. The vessels that will be making their way from the Pacific to the Caribbean via the canal will not only draw more water but will be wider as well. Larger cranes are necessary to accommodate new vessels, and Baltimore is a step ahead of Miami and Everglades having already purchased three new cranes capable of doing so. It is important for Baltimore to be ahead of the game, as the two-day turnaround the Chesapeake Bay adds to transit times has always put it at slight competitive disadvantage.

The Port of New York/New Jersey and Norfolk should not be forgotten, as they already possess 50 feet of water. Unfortunately for New York, the Bayonne Bridge presents an air draft impediment and must be raised before the port can accommodate the larger post-panamax vessels. The existing roadway should be gone by the time the canal expansion is completed and an elevated, single lane road in each direction will be followed by two lanes and a center divider in 2017.

Overall, the panelists felt that a national cargo shift is not likely to occur, but individual ports will see increases or decreases in volume based on their ability to accommodate larger post-panamax vessels. If the canal were finished today, Baltimore and Norfolk would be able to accommodate the larger vessels for which the expansion is designed. The USACE will continue to be a vital part of ports getting to 50. The House Energy and Water Subcommittee recently approved a one billion dollar draw from the Harbor Maintenance Trust Fund (HMTF). However, Congress has been slow in recent years to appropriate money from the HMTF, which currently has a near seven billion dollar surplus. When the Canal is finished, if all ports' plans stay on schedule, Baltimore, Norfolk, New York/New Jersey, and Miami, will share in imports from larger vessels traveling from Asia via the Panama Canal, and by 2017, Port Everglades could make a fifth as the United States continues to benefit from an investment it made more than one hundred years ago.

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NTSB General Counsel Speaks during the Transportation and Transportation Security Law Section's May 2013 Lawyers' Luncheon Program

Monica Hargrove, chair of the Transportation and Transportation Security Law Section, welcomed David Tochen, general counsel of the National Transportation Safety Board (NTSB), as the featured speaker during the section's May 28, 2013 lawyers' luncheon program. During her introduction, Hargrove told attendees that Tochen had a distinguished career at the Department of Transportation prior to assuming his position as general counsel of the NTSB and that Tochen was not a stranger to the T&TSL Section since he has been a long-standing member since May 1984!

Speaking to a standing room only crowd of approximately 50 attendees, NTSB General Counsel Tochen began his presentation with photos of historical and recent accident investigations covering all the transportation modes. Among the incidents to which he referred were: the TWA Flight 800 incident in July 1996; the Minneapolis bridge collapse in October 2007; the Chatworth, Calif., rail incident caused by texting while driving in September 2008; the "Miracle on the Hudson" in January 2009; the Fort Totten Metro Rail crash in June 2010; the pipeline explosion in San Bernardino, Calif., in September 2010; and the Boeing Dreamliner battery fires in Boston in January 2013.

Tochen then provided a brief history of the agency, pointing out that it was statutorily created as part of the Department of Transportation Act of 1966, and was then an independent entity within the Department of Transportation. In 1974 the board was established as an independent investigative agency.

He explained the composition of the board of the NTSB, which includes a chair who serves for two years, and five board members, each of whom serve five year staggered terms. He advised that the NTSB employs approximately 410 persons. The board received appropriations totaling approximately $103 million in 2013 (after sequestration). Tochen also provided an overview of the statutory responsibilities of the board, which include primary responsibility for investigations of all civil aviation accidents involving public aircraft, helicopter emergency health service (HEMS) accidents, major marine casualties, (which is a shared responsibility with the Coast Guard), and interstate highway, rail and pipeline accidents. He pointed out that the NTSB does not have primary jurisdiction over any state and local transportation investigations, but coordinates with state, local and international authorities in information-sharing.

Although the NTSB issues reports and special safety studies, it does not have any enforcement authority. Tochen discussed the role that the Office of the General Counsel assumes in the Board's investigations and in preparing decisions. He also explained the manner in which the NTSB interacts with U.S. Department of Transportation agencies in accident investigations.

T&TSL Section Chair Hargrove led a question and answer session following Tochen's prepared presentation, and the attendees also asked a number of questions. During that session, Tochen addressed issues including, among others: the role of the NTSB's Office of General Counsel in the administration of the board's ethics program; how his prior experience as an attorney at the U. S. Department of Transportation prepared him for his assumption of the role of General Counsel of the NTSB; and some of the biggest challenged faced by the Office of General Counsel in assisting the NTSB in fulfilling its safety mission. The program was very informative and General Counsel Tochen's presentation to the attendees was greatly appreciated.