ASSOCIATION HIGHLIGHTS

Introduction

The federal government collected $2.7 trillion in tax and fee revenues in 2013, and is on track to collect an astounding almost $3.0 trillion in 2014. Income tax revenue represents over $1.6 trillion of these revenues, an amount worth pondering as you file your 1040 form this year. Social security taxes represent the next largest revenue source, about $900 million. How to divide this very large money pie is one of those never-ending battles in Washington, but there is a tool provided by the White house that you can use at https://www.whitehouse.gov/2013-taxreceipt to enter the amount you have paid in various types of federal tax to get some sense of how your money is put to use. National defense and health care are by far the largest expenditure categories, each at about 25% of total spending. Transportation, by contrast, doesn't even rate its own spending category on this White House calculator, but rather is lumped in with a catchall "additional government programs," which together amount to less than 5% of the government spending.

But taxes and transportation are in the news these days, as Congress continues to struggle to find ways of addressing growing Highway Trust Fund shortfalls and providing funds for essential infrastructure spending. There are lots of ideas being put forward, including taxing repatriated overseas corporate profits, raising revenues through corporate tax reform measures, indexing taxes on fuel and increasing highway user taxes and fees. To date, no single idea has attracted the necessary political support, and each idea seems to have more detractors than supporters. Thus, facing a May 31 deadline when MAP-21 funding runs out, and then having to tackle FAA reauthorization, the most likely outcome (again) is that Congress will adopt some short-term band aid fix and keep debating. We can always hope for more.

We don't have to hope for more from our contributors to this edition of *Highlights* – they have come through as usual. Our railroad editor reviews recent Supreme Court and federal appellate decisions of interest – notably a Supreme Court case holding that Amtrak is a Government-entity capable of constitutionally engaging in standards-making under the Passenger Rail Improvement and Investment Act and another Supreme Court case addressing (and not fully resolving) whether Alabama's sales tax on diesel fuel used by railroads is unlawfully discriminatory when motor carriers are exempted from a diesel sales tax, but made subject to other fuel taxes. Our commuter rail editors update us on a final FTA rule on ADA compliance for public transport and a proposed rule on local hiring preferences. Railroads are also the subject of our antitrust editor's article; he discusses a court decision allowing an amended complaint alleging a fuel surcharge price fixing and monopolization conspiracy between two railroads to withstand a motion to dismiss on standing and failure to state a claim grounds.

Our labor article offers a wide-ranging review of how the NLRB is enforcing the National Labor Relations Act in the modern workplace setting, including in connection with employer-provided email systems. Our motor editor addresses broker liability issues in a variety of different contexts, ranging from cargo liability to fraud claims to accident-related liability. We also learn about the appointment of new head to

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the National Transportation Safety Board in our Comings and Goings article.

We have not overlooked the skies, the seas or safety. Our aviation editors enlighten us about some recent cases involving "accidents" that allegedly occurred during flight but that did not pass muster in courts in light of the strict standards of the Montreal Convention. Our maritime editor discusses new reporting and disclosure obligations imposed on cruise lines with respect to reports of criminal activities during cruises, as well as a case exploring the implications of a seaman claiming certain benefits while not being truthful about his past medical history. And finally our Hazmat, safety and security editors discuss recent crude oil train derailments and summarize an FRA risk-reduction proposal and some pending hazardous materials transportation rulemakings.

Happy reading!

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If At First You Don't Succeed, Replead: Oxbow Carbon's Amended Antitrust Claims Survive Motion To Dismiss

A federal district court has declined to dismiss amended antitrust claims alleging that two western railroads conspired to fix prices and monopolize markets by adopting uniform rail fuel surcharges and allocating markets in the western United States.

The amended claims, brought by Oxbow Carbon LLC and four affiliates against Union Pacific Railroad and BNSF Railway, allege that the plaintiffs collectively have paid more than $50 million in excess fuel surcharges.

Oxbow Carbon and its affiliates engage in the production, marketing, and shipment of sulphur, coal and petroleum coke. The privately-held companies, founded by William Koch, are among the world's largest marketers of sulphur and petroleum coke, including fuel grade and calcined coke (used in manufacturing aluminum), with annual sales of more than $4 billion.

Initial Dismissal

In a previous ruling, the district court held that the plaintiffs' initial complaint failed to allege sufficient facts to state claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, and dismissed the claims without prejudice. *Oxbow Carbon & Minerals LLC v. Union Pacific R. Co.*, 926 F. Supp. 2d 36 (D.D.C. 2013).

In dismissing Oxbow's original claim under Section 1 of the Sherman Act, U.S. District Judge Paul Friedman held that it failed to allege how any individual plaintiff was harmed by the alleged conspiracy. "Standing is not dispensed in gross," the court said, and "each

plaintiff must demonstrate that it has suffered injury in order to establish standing."

The court also dismissed the plaintiffs' claims under Section 2, holding that attempts to create a "shared monopoly" cannot give rise to a Section 2 claim. Congress intended Section 2 to address "the complete domination of a market by a single economic entity," the court said, and did not include shared monopolies or oligopolies within its scope. The court also held that even if the complaint were construed as alleging a conspiracy to allocate an entire market to Union Pacific, the plaintiffs did not allege enough details to support a claim of conspiracy.

Finally, the court rejected the plaintiffs' claim that Union Pacific had monopolized or attempted to monopolize rail traffic by restricting the flow of rail traffic in the western United States and by failing to take procompetitive actions to increase capacity. The court noted that claims of insufficient assistance to rivals are generally not cognizable under Section 2.

Amended Complaint - Standing

The plaintiffs filed a substantially revised amended complaint, including additional allegations regarding the injuries they allegedly suffered. The defendants again moved to dismiss for lack of standing and for failure to state a claim.

The court first addressed the threshold issue of standing. This time, the court held that the plaintiffs had standing to raise their antitrust claims. The court found that the amended complaint alleged that each plaintiff paid fuel surcharges that they would not have paid without the alleged conspiracy. Although the plaintiffs did not identify which defendant was paid some of the fuel surcharges, the court held that this omission was not fatal. Each defendant, the court said, would be jointly and severally liable under Section 1 of the Sherman Act for any injury suffered. Therefore, the court said, the plaintiffs "need only allege … that they suffered damages as a result of the conspiracy in which defendants participated."

On the second count, alleging a conspiracy not to compete, the railroads argued that the plaintiffs bringing this claim lacked standing as to any allegations concerning the Powder River Basin, because they reside solely in the Uinta Basin. Thus, they argued, Oxbow "does not have standing to maintain an action for an alleged antitrust violation affecting a relevant market in which it does not participate."

The court rejected this argument. Because the alleged conspiracy encompasses two relevant markets (the Uinta and Powder River Basins), the court said, the alleged conspiracy "does affect the relevant market in which Oxbow participates." The fact that it also affected another market in which the plaintiffs do not participate, the court said, "does not deprive plaintiffs of standing; nor does it bar them from making allegations concerning that market." The court also applied the same reasoning to find standing to bring the third count, alleging a conspiracy to monopolize under Section 2 of the Sherman Act.

The plaintiffs' fourth amended claim alleged a breach of contract, and was allegedly brought "[b]y all Plaintiffs against UP." As the court noted, however, two of the plaintiffs were not parties to the contract. Because they were neither parties nor intended beneficiaries of the contract, the court said, they lacked standing to assert a breach of contract. Therefore, the court dismissed the breach of contract claim by these two plaintiffs, while allowing the claim to stand for the remaining plaintiffs.

Amended Complaint – Stating A Claim

In their motion to dismiss, the defendants argued that Oxbow had pled no facts in Count I that plausibly suggested the existence of a separate conspiracy to impose higher fuel surcharges for the shipment of coal. In response, Oxbow argued that the amended complaint alleged only one solitary conspiracy for both coal and petroleum coke.

The court agreed with Oxbow, finding that it had alleged "no separate conspiracy regarding coal surcharges." Instead, the court said, the plaintiffs had alleged "a conspiracy to increase revenue by… imposing across-the-board, non-negotiable fuel surcharges on all customers and for all products." The court added that Oxbow's amended complaint clearly alleged that "coal fuel surcharges were part and parcel of the overall fuel surcharge conspiracy."

The railroads also argued that Oxbow's allegations regarding a conspiracy not-to-compete were contradictory, conclusory, and could be explained by natural market factors, rather than by conspiracy. The court also rejected these arguments.

First, the court said, Oxbow's decision to focus on the alleged allocation of customers in the Uinta Basin and the Powder River Basin, rather than on the broad western coal market, was a permissible narrowing of their allegations from a larger market to a "cognizable submarket," and was not contradictory.

Second, while the court recognized that the amended complaint "rests on circumstantial evidence of agreement," the court held that its allegations "plausibly suggest conspiracy." After reviewing these allegations, the court said, "[i]t is difficult for the Court to surmise what more Oxbow could offer before discovery has commenced." The court said that "conspiracies are rarely evidenced by explicit agreements, but nearly always must be proven through inferences that may be fairly drawn from the behavior of the alleged conspirators."

Third, the court stated that the Supreme Court's decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) "did not create a heightened specificity requirement" for antitrust conspiracies. In fact, the court said, "*Twombly* expressly rejected the kind of particularity requirement that defendants seek to impose."

In sum, the court said, "[t]he amended complaint alleges when (late 2003-2004) and what (an agreement not to compete with each other's customers)." In combination with allegations of parallel conduct and other circumstantial evidence, the court said, those allegations "raise a right to relief above the speculative level," *quoting Twombly*, 550 U.S. at 555. The court added, "[t]hat is all the specificity *Twombly* and Rule 8 of the Federal Rules of Civil Procedure require."

The railroads also argued that Oxbow's allegations of parallel conduct were "entirely consistent with" and "fully explained by" natural market forces. But the court held that Oxbow was not required to "rule out the possibility of independent action" at the motion to dismiss stage. Because Oxbow's allegations were plausible, the court said, "Oxbow need not eliminate the possibility of independent action to survive defendants' motions to dismiss, even if defendants' allegations are also plausible."

The court also declined to dismiss Oxbow's remaining claims. While Oxbow no longer alleged a "shared monopoly," the court said that the amended complaint sufficiently alleged that "UP and BNSF intentionally conspired to afford UP a monopoly" in violation of Section 2. The court also held that the plaintiffs adequately alleged exclusionary conduct and attempted monopolization by UP in violation of Section 2, and declined to dismiss these claims.

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Defendant Airlines Granted Summary Judgment in Two Montreal Convention "Accident" Cases Where Plaintiffs Failed to Set Forth Sufficient Evidence

As most readers know, liability issues for injuries sustained by a passenger on a roundtrip international flight from the United States are governed by an international treaty known as the Montreal Convention. To establish liability under Article 17(1) of the Convention, a passenger needs to establish that an "accident," i.e., "an unexpected or unusual happening that is external to the passenger,"[1] on board the aircraft caused a bodily injury. In two recent cases, plaintiffs sought damages for injuries that allegedly occurred on board international flights. But in neither case could the plaintiff set forth sufficient evidence to avoid a finding that the alleged injuries were not caused by "accidents" within the meaning of the Montreal Convention and, accordingly, both cases were dismissed on summary judgment.

In *Vanderwall v. United Airlines, Inc.*,[2] the plaintiff sought damages when she allegedly slipped and fell in the aisle of a United aircraft en route from Houston to London. She claimed that she walked from her seat in coach to the lavatory at the back of the plane and noticed no debris in the aisle during that walk. However, upon exiting from the lavatory, she slipped on a piece of thin plastic, twisted her knee and tore her ACL.

The *Vanderwall* Court noted that a determination of what qualifies as "unexpected" is not necessarily based on whether the cabin crew was negligent, but on what procedures are ordinary and customary for the operation of that particular flight, and in the industry generally. In this case it was undisputed that although the flight crew generally is responsible for ensuring that there is no trash in the aircraft aisle that could pose a safety hazard to passengers, there was no specific United Airlines or industry standard policy directed at trash removal during flight operation except for the standard practice of tidying up the aircraft approximately thirty minutes prior to landing. However, the plaintiff alleged that she slipped and fell at least an hour before that.

Moreover, Plaintiff described the piece of plastic she allegedly slipped on as similar to "Saran wrap." That description proved fatal to her claim because, as the court noted, passengers bring on board and consume a great number of items wrapped in plastic during the course of an international flight, and such plastic easily could have found its way to the aircraft aisle floor. Thus, the falling of plastic wrap onto the aircraft aisle floor can hardly be "unusual or unexpected."

Additionally, the plaintiff conceded that the cabin crew was not responsible for removing every item of trash from the aircraft aisle no matter its size or visibility. Thus, the court concluded, it could not be "unusual or unexpected" for there to be a small piece of trash in the aircraft aisle while the aircraft was in flight. Because

1. *See El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 165 (1999).
2. No. 14-60256-Civ (S.D. Fla. Jan. 26, 2015).

plaintiff could not show that something more unusual or unexpected than a small piece of plastic falling on an aircraft aisle floor took place, the court granted United's motion for summary judgment dismissing plaintiff's claims.

In *Mumtaz v. Etihad Airways*,[3] the plaintiff's evidence supporting an alleged injury that occurred on board a flight from Abu Dhabi to New York City was so scant, the court did not even reach the question of whether the happening of the injury was "unusual or unexpected"; instead, the court took the unusual step of frankly stating that a reasonable person could not believe plaintiff's claims and, accordingly, granted summary judgment to defendant.
Upon disembarking from his flight without assistance, the *Mumtaz* plaintiff contacted a police officer in the airport stating that he felt "dizzy and cold." The police officer's report of the incident contained no reference to an injury sustained while on board the aircraft from which plaintiff had just departed, nor was there any mention of any signs of injuries, such as a wound or blood. Eight hours later, the plaintiff admitted himself to a local hospital, where doctors noted that he had a cyst on his head that appeared to predate his Etihad flight. But plaintiff claimed that the actual reason he contacted the police officer and admitted himself to a local emergency room was that he has been hit by falling baggage during his flight, suffered a significant laceration, and as a result, was bleeding profusely.

In rejecting plaintiff's claim, the court noted that plaintiff's account of how his injury was sustained shifted several times and there was no evidence that any injury occurred on board the aircraft apart from the plaintiff's say-so. Specifically, the court noted that not only did plaintiff wait eight hours after landing to seek medical treatment, but neither his medical records nor the police officer's report contained any reference to an injury. Moreover, defendant's cabin crew testified that the airline has stringent passenger injury and illness reporting requirements, but no report was filed with respect to the plaintiff although at least one other passenger illness report was filed for plaintiff's flight.

The court noted that to defeat a motion for summary judgment, the non-moving party must show not simply that there are facts in dispute, but that there are *genuine* facts in dispute. That is, the non-moving party must show that a reasonable fact-finder could believe plaintiff's version of the events. However, the court concluded that no reasonable juror could do so because of plaintiff's ever-changing allegations, first that he was struck by a falling bag halfway through the flight, then later claiming that he was actually struck when the aircraft was on approach or while he was attempting to exit the plane. Thus, defendant's summary judgment motion was granted. The court noted that it did not come to this holding lightly, citing several cases also holding that there are rare, but possible instances, such as this, where if a claim required the suspension of disbelief, it could not withstand summary judgment.

[3] No. 12-cv-2051 (D.N.J. Dec. 30, 2014).

COMINGS & GOINGS

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Christopher A. Hart is the new chairman of the National Transportation Safety Board. Prior to being confirmed as chairman, Hart was the acting chairman of the NTSB. He has been a Board member since 2009, and was also a Board member in the early 1990s.

In addition to his service at the NTSB, Hart previously worked for the National Highway Traffic Safety Administration and for the Federal Aviation Administration. He was the NHTSA deputy administrator, the FAA assistant administrator (System Safety) and the FAA deputy director (Air Traffic Safety Oversight). Hart is educated as an aerospace engineer (Princeton) and attorney (Harvard), and is a licensed pilot.

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Introduction

Late winter 2015 brought several federal rulemakings of note to commuter railroads, including:

- The U.S. Department of Transportation ("DOT") issued a final rule regarding required accommodation of public transportation system practices and policies in compliance with Americans with Disabilities Act ("ADA") requirements.

- DOT also issued a notice of proposed rulemaking allowing for local hiring preferences in federally awarded contracts, so long as such preferences are not otherwise prohibited by federal law.

- The Federal Railroad Administration ("FRA") issued a notice of proposed rulemaking for freight railroad risk reduction programs that included some provisions mirroring a related proposed rule for passenger railroad safety system programs.

A Long Time Comin':
DOT Issues Final Rule Regarding Reasonable Modifications to Agencies' ADA Policies and Practices

On March 13, 2015, DOT issued a revision to its regulations implementing ADA and Rehabilitation Act requirements to accommodate disabled public transportation users. *Transportation for Individuals With Disabilities; Reasonable Modification of Policies and Practices*, 80 Fed. Reg. 13253 (Mar. 13, 2015) ("Final Rule"). This rule has experienced an unusually long gestation period—DOT has been developing this rule since it issued a notice of proposed rulemaking on February 27, 2006 (71 Fed Reg. 9761), which received extensive comments and was the subject of an extended comment period. DOT had already issued a final rule regarding requirements for level boarding, a topic also included in the same NPRM, in 2011. *See, Transportation for Individuals With Disabilities at Intercity, Commuter, and High Speed Passenger Railroad Station Platforms; Miscellaneous Amendments,* 76 Fed. Reg. 57924 (Sept. 19, 2011). This Final Rule now completes the process begun in 2006 by explicitly delineating public transportation providers' obligations to modify their services to accommodate persons with disabilities, an obligation that DOT notes is a "fundamental tenet" of disability nondiscrimination law. DOT states that the revisions, which affect Parts 27 and 37 of Title 49 of the Code of Federal Regulations, do not constitute new obligations, but instead correct an "unintended" gap in DOT's ADA regulations exposed by previous litigation. *See*, *e.g.*, *Melton v. Dallas Area Rapid Transit (DART)*, 391 F.3d 669 (5th Cir. 2005) (reference in DOT regulations to applicability of Department of Justice ("DOJ") regulations, which require accommodation, was not sufficient to require a transit agency to accommodate a paratransit request because DOT regulations, not DOJ regulations, applied).

The Final Rule specifically provides that transportation entities "shall make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability." Proposed 49 C.F.R. § 27.7(e). This language mirrors DOJ regulations applying generally to public services. *See* 28 C.F.R. § 35.130(b)(7). The requirements of the Final Rule apply to both public and private entities providing public transportation. The three sole exceptions to this requirement are where: (1) granting the request would fundamentally alter the nature of the entity's services, programs, or activities; (2) granting the request would create a direct threat to the health or safety of others; or (3) without the request modification, the individual with a disability would still be able to fully use the entity's services, programs, or activities for their intended purpose. For example, a bus driver on a fixed route does not need to accommodate requests to stop at any location without limitation, since granting such requests would fundamentally alter the nature of the entity's service.

Appendix E of the Final Rule provides specific examples where a transit agency typically would not be required to modify its policies or procedures to accommodate a request from a disabled user. While many of the specific examples listed apply to paratransit or fixed route bus service, some also apply to passenger rail transportation. For example, public transportation services should allow persons to take required medicines or foods (e.g., for a diabetic condition) even if eating and drinking are normally not permitted on the service. Although the Final Rule leaves it up to public transportation agencies to determine what modifications might be required, and does not require DOT approval for any practices or policies, it notes that DOT reserves the right to review agencies' processes.

Despite significant concerns about cost expressed by public transportation providers during the comment period, DOT does not foresee any significant increased costs to transportation agencies because it maintains the Final Rule only clarifies what agencies are already required to do in order to qualify for federal grants. The Final Rule goes into effect July 13, 2015.

…And a Long Time Gone: DOT Issues NPRM Removing Restrictions on Local Hiring Preferences in Federally Funded Programs

On March 5, 2015, DOT issued a notice of proposed rulemaking ("NPRM") proposing to permit grant recipients and subrecipients to include geographic hiring preference provisions in contracts for federally-funded projects. *Geographic Based Hiring Preferences in Administering Federal Awards*, 80 Fed. Reg. 12092 (Mar. 6, 2015) (proposing amendment of regulations found at 2 C.F.R. Part 1201). The NPRM constitutes a deviation from general government-wide grant award regulations issued by the Office of Management and Budget (2 C.F.R. Part 200), which prohibit geographical hiring preferences in federally-funded projects (*see* 2 C.F.R. § 200.319(b)). In justifying the change, the NPRM notes that many local governments employ local hiring preferences for non-federally funded projects in an effort to ensure that the communities in which the projects are located benefit from the economic impact of construction of these projects. In addition, the NPRM notes that in Section 418 of the Fiscal Year 2015 Appropriations Act, Public Law 113-235, Congress prohibited DOT from enforcing statutory prohibitions against geographically based preferences for projects awarded in 2015. Congress's action, the NRPM states, indicates the diminished legal effectiveness of such prohibitions.

The proposed change would apply only where federal law does not otherwise prohibit geographical hiring preferences. For example, 23 U.S.C. § 112 requires full and open competition for contracts under the Federal-aid highway program. Historically, the Federal Highway Administration ("FHWA") and the Federal Transit Administration ("FTA") have interpreted Section 112 as prohibiting local hiring preferences. However, a 2013 DOT Office of Legal Counsel opinion concluded that restrictions not directly related to the performance of work, such as local hiring preferences, are permitted under Section 112 so long as they do not unduly limit competition. In order to ensure that local hiring preferences will not unduly limit competition, FHWA and FTA are implementing a pilot program in order to better determine whether local preference policies will comply with Section 112. DOT issued a separate notice explaining the pilot program, which will be effective for one year starting on the date of its publication in the Federal Register. Department of Transportation, *Contracting Initiative* (Issued Feb. 24, 2015). For federal highway-aid program projects, DOT is requiring FHWA and FTA recipients and subrecipients to participate in a pilot program if they desire to include geographical hiring preferences.

FRA Issues Freight Version of Proposed Safety Reduction Program Regulations

On February 27, 2015, the FRA issued a proposed rule requiring freight railroads to establish Risk Reduction Programs ("RRPs"). *Risk Reduction Program*, 80 Fed. Reg. 10950 (Feb. 27, 2015) (to be codified at 49 C.F.R. Part 269) ("RRP NPRM"). The RRP NPRM proposes to require each Class I railroad and each railroad with inadequate safety performance to develop and implement an RPP to proactively identify hazards and eliminate or mitigate the risks associated with those hazards. FRA issued the RRP NPRM in compliance with the requirements of Sections 103 and 109 of the Rail Safety Improvement Act of 2008, Public Law 110-432, Division A ("RSIA"). In Section 103 Congress required the Secretary of Transportation to issue regulations requiring passenger and freight railroads to develop, submit, and implement railroad safety risk reduction programs. Section 109 exempted certain information gathered by the FRA under the safety risk reduction programs from the public disclosure requirements for the Freedom of Information Act ("FOIA").

Although only applicable to freight railroads, the RRP NPRM provides parallel regulations to FRA's System Safety Program ("SSP") proposed rule for passenger railroads, which FRA issued in September 2012. *See System Safety Program*, 77 Fed. Reg. 55372 (Sept. 7, 2012) (to be codified at 49 C.F.R. Part 270). The statutory authority for the SSP proposed rule also comes from Sections 103 and 109 of RSIA. The RRP NPRM explains that FRA decided to pursue separate rulemakings in order to account for significant differences between passenger and freight operations. As an example, freight operations, but not passenger rail operations, may involve the transportation of hazardous waste materials.

However, although the two rules address different sectors of the rail industry, many of the provisions are similar or identical. For example, FRA has made a point of including identical provisions implementing statutory requirements to consult railroad employees in developing RRPs and SSPs, as well as provisions protecting sensitive SSP and RRP information from FOIA requests. In order to maintain consistency between the rules, FRA will consider comments submitted to the SSP proposed rule regarding the employee consultation and information protection provisions before publishing the RRP final rule. FRA implies that, similarly, any comments submitted for the RRP NPRM regarding these provisions will be considered before issuing an SSP final rule, which FRA anticipates will occur before issuance of an RRP final rule. FRA has stated that it will, to the extent possible, work to minimize any overlapping or duplicative requirements.

The RRP NPRM requires covered freight railroads that host passenger railroads on their lines to coordinate relevant aspects of their RRPs with those passenger railroads. This requirement mirrors a similar one contained in the proposed rule for SSPs obligating passenger railroads to coordinate with freight railroads. The RRP NPRM preamble explains that FRA believes requiring freight and passenger railroads that share a corridor with one another to each prepare both an RRP and an SSP would be unnecessary and duplicative. However, each must prepare an RRP or SSP, whichever is applicable, and must coordinate their programs. Railroads that conduct both freight and passenger operations must account for their freight operations in their SSPs. However, FRA specifically requests public comment on whether railroads providing both freight and passenger services should instead be required to implement both an RRP and an SSP, or, alternatively, an RRP accounting for passenger operations. Public comments are due no later than April 28, 2015.

HAZ MAT

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Recent Derailments Cast Spotlight on Upcoming Crude by Rail Rule Revisions

In February and March 2015, four unit trains carrying crude oil derailed in the U.S. and Canada, triggering releases and large fires. These derailments come at a time when both the U.S. and Canada are poised to finalize new tank car standards for the shipment of crude oil, and have attracted attention from lawmakers on both sides of the border. It remains to be seen whether the recent derailments will affect the timing or content of the U.S. or Canadian rulemakings, which have already entered the final stages and are expected to be published this spring.

On February 14, a 100-car train carrying 68 cars of crude oil and 32 cars of petroleum distillates derailed in a wooded area about 50 miles south of Timmins in northern Ontario, Canada. The train had originated in Alberta. The Transportation Safety Board of Canada reported that 29 cars derailed and 21

cars were breached, igniting a fire that burned for several days. The train was traveling at 38 mph at the time of the derailment.

Just two days later, on February 16, a 109-car crude oil unit train derailed near Mt. Carbon, West Virginia. The train had originated in the Bakken fields of North Dakota. Initial reports indicated that 27 cars derailed and 19 cars were breached, releasing crude oil, which ignited and may have entered nearby waterways. Downstream water treatment intakes were closed as a precaution, and hundreds of residents were evacuated. The train was traveling approximately 33 mph at the time of the derailment.

On March 6, another unit train carrying crude Bakken oil derailed in a rural area south of Galena, Illinois. In that accident, 21 of the 105 train cars derailed, and five cars caught fire. The train was traveling at approximately 23 mph. On the following day, March 7, another unit train derailed in northern Ontario, near the town of Gogama. This accident occurred approximately 23 miles from the previous month's derailment near Timmins. According to initial reports, the train was carrying 94 cars of crude oil from Alberta and was traveling at 43 mph. Thirty-nine cars derailed, of which at least five landed in a waterway, and 15 cars were breached.

The cause of each of these derailments is under review. Preliminary indications suggest that track infrastructure failures may have played a role in both of the Canadian accidents. All four of the trains were traveling below applicable speed limits, and three were travelling slower than the speed limit likely to be established in the forthcoming U.S. rule to be promulgated by the Pipeline and Hazardous Materials Administration (PHMSA). All of the cars involved in these four derailments were DOT-111 tank cars that had been built to the stricter CPC-1232 industry standard. Both the U.S. and Canadian proposed rules would impose design standards for new tank cars that are stricter than the CPC-1232 industry standard; the U.S. rule would also impose operational controls on crude oil trains. As this article went to press, the U.S. rule was under review by the Office of Management and Budget and was expected to be published by PHMSA in May 2015. A similar Canadian rule addressing only tank car standards is expected to be finalized this spring.

Open HazMat-Related Rulemakings

The following summary includes rulemakings that are pending or recently-completed and which have the potential to affect HazMat transportation.

Risk Reduction Program (Docket No. FRA-2009-0038)

The Federal Railroad Administration (FRA) published a Notice of Proposed Rulemaking (NPRM) on February 27, 2015 to implement a provision of the Rail Safety Improvement Act of 2008 (49 U.S.C. 20156). In this rulemaking, the FRA proposes to require all Class I railroads and all other railroads deemed to have inadequate safety performance records to develop and implement an FRA-approved Risk Reduction Program in order to improve operational safety. Each Risk Reduction Program would be required to include a risk-based hazard analysis and a technology implementation plan. The NPRM sets out a proposed method by which FRA would annually identify railroads with inadequate safety performance, and states that each railroad's assessment of its safety risks and mitigation measures would be protected from public disclosure. FRA expects the rule to improve safety on Class I freight railroads by decreasing railroad incidents and workplace injuries. The public comment period closes on **April 28, 2015**.

Hazardous Materials: Adoption of Special Permits (Docket No. PHMSA-2013-0042)

PHMSA published a NPRM on January 30, 2015 to amend the Hazardous Materials Regulations (HMR) to adopt certain provisions that are commonly incorporated in Special Permits. The HMR authorizes PHMSA to grant Special Permits, which allow variances from HMR standards. The alternative requirement prescribed in the Special Permit must achieve at least the same level of safety as do the HMR standards, or when the regulations do not establish a safety level, a safety level consistent with the public

interest. (*See* 49 C.F.R. Part 107). PHMSA has reviewed the more than 3,000 active Special Permits for provisions that could be codified in the HMR, thus reducing the need for Special Permits. The NPRM proposes the adoption of 98 Special Permit provisions into the HMR, in the following categories: cylinders; cargo tanks/rail cars/portable tanks; operational air/vessel; operational highway/rail/shipper/other; and non-bulk packaging specifications. The public comment period closed on **March 31, 2015**.

Hazardous Materials: Miscellaneous Amendments (Docket No. PHMSA-2013-0225)

PHMSA published a NPRM on January 23, 2015 to revise and clarify certain requirements in the HMR, including: eliminating the packing group (PG) II designation for certain organic peroxides, self-reactive substances, and explosives; incorporating requirements for trailers of manifolded acetylene cylinders; providing requirements to allow for shipments of damaged wet electric batteries; revising the requirements for the packaging of nitric acid; revising procedures for testing pressure relief devises on cargo tanks; and revising the requirements for shipments of black or smokeless powder for small arms. These proposed amendments are designed to promote safer transportation practices, address petitions for rulemaking, respond to National Transportation Safety Board Safety Recommendations, facilitate international commerce, and simplify the regulatory regime. The public comment period closed on **March 24, 2015**.

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The Reinvigorated Role of the National Labor Relations Act in Human Resources and a Look Back at the Year in Review

A New Approach Explained

The NLRB has issued new rules expediting the union representation election process, voided arbitration agreements containing class action waivers, voided handbook policies that restricted employees' rights to use their employers' email systems to engage in union-related activity, ruled insubordinate employee conduct was protected, and struck down numerous handbook policies that allegedly infringed upon employees' rights.

To their credit, the Board and its General Counsel have reached out to explain their interpretations of the relevance of the Act to employers and their human resource teams who had, in the past, largely viewed the Act as an artifact of union organizing.

The key takeaway is understanding the impact of labor law rights that define the worker employer relationship under Section 7 of the Act, which depends upon "concerted protected activity."

Section 7 rights do not require a union to be enforced. Moreover, applied to modern workplace technology such as email and intranet systems, ways in which employees communicate are just as connected to discipline and termination as to traditional organizing. Refocusing on the protection of these

communications under federal labor law in enforcement analysis is the key theme going forward.

This article will examine this new approach as well as summarizing other key developments.

I. NLRB ISSUES NEW ELECTION RULES

In December 2014, the NLRB issued its long-awaited "final rule" which will drastically change union election procedures effective April 14, 2015. The final rule will shorten the election period and will likely facilitate union victories. Significant changes include: (1) The NLRB may electronically deliver notices and documents to parties (will result in expedited action on election petitions, election notices, and voter lists); (2) The NLRB will provide the parties with additional information about election procedures and voting process for mandatory dissemination once a petition is filed; (3) The Regional Director will schedule the pre-election hearing eight days after the hearing notice, rather than within 14 days of the petition filing; (4) Non-petitioning parties must submit a Statement of Position outlining all issues at least one business day before the pre-election hearing; (5) Employers must provide the NLRB and union with a list of prospective voters and information regarding prospective voters' job classifications, shifts, and work locations prior to the pre-election hearing; and (6) The voter list that employers must provide will include personal phone numbers and email addresses of prospective voters, and must be provided within two business days of the Regional Director's approval of an election agreement or direction of election.

II. NLRB RECESS APPOINTMENTS ARE RULED UNCONSTITUTIONAL

During a Senate recess, taken in the midst of *pro forma* sessions of Congress in January 2012, President Obama appointed three members to the five-member NLRB panel. In February 2012, the NLRB panel – with its three newly appointed members – issued an adverse decision to Noel Canning Corp. Noel Canning Corp. appealed to the Court of Appeals for the District of Columbia ("D.C.") Circuit, arguing that the NLRB lacked the authority to issue the ruling because it was not comprised of a quorum of constitutionally appointed members. The D.C. Circuit sided with Noel Canning Corp., holding that the three recess appointments made by President Obama were "invalid from their inception" because President Obama exceeded his authority under the Constitution. *Noel Canning v. NLRB* (D.C. Cir. 2013) 705 F.3d 490. The NLRB then appealed the decision of the D.C. Circuit to the United States Supreme Court.

A. The Supreme Court Upholds the D.C. Circuit and Invalidates the Recess Appointments

On June 26, 2014, the United States Supreme Court issued its decision in *Noel Canning*, affirming the D.C. Circuit's ruling by holding that President Obama's January 2012 recess appointments to the NLRB were unconstitutional because the Congressional recess during which the appointments were made was of insufficient length, three days. *NLRB v. Noel Canning* (2014) 573 U.S. ____.

B. The NLRB's Response to the *Noel Canning* Decision

The NLRB must spend a significant amount of time revisiting the decisions issued by the quorum-less NLRB. Although the NLRB is likely to reaffirm many of its prior decisions, some of the decisions may be modified or revoked. Moreover, the amount of time that must be devoted to revisiting those prior decisions could hinder the NLRB in advancing its agenda during 2015.

III. EMPLOYEES HAVE A PRESUMPTIVE RIGHT TO USE EMPLOYER-PROVIDED EMAIL SYSTEMS FOR UNION ACTIVITIES

A. Prior NLRB Authority Broadly Allowed Employers to Prohibit or Restrict Employees' Use of Employer-Provided Email

Prior to December 2014, the NLRB permitted an employer to maintain policies prohibiting or restricting its employees' use of email for non-working purposes, so long as the prohibitions or restrictions did not discriminate against Section 7 activity. *Register Guard* (2007) 351 NLRB No. 70. For example, an employer could lawfully maintain a policy permitting use of its email system to make personal solicitations (e.g., for the sale of a personal vehicle), while simultaneously prohibiting commercial solicitations (e.g., for the sale of Avon products), or permitting charitable solicitations (e.g., for the Red Cross or Salvation Army), while simultaneously prohibiting non-charitable solicitations (e.g., for a union). Such prohibitions or restrictions were permissible if they did not discriminate against activities or communications "because of" their union or other Section 7 protected status.

B. New NLRB Authority Provides that Employees Must "Presumptively Be Permitted" to Use Employer-Provided Email for Section 7 Communications During Non-Working Time

In December 2014, the NLRB overruled *Register-Guard* and broadly expanded the rights of employees to use their employers' email systems during non-working time. *Purple Communications* (2014) 361 NLRB No. 126. In *Purple Communications*, the employer maintained a handbook policy prohibiting the use of its computer and email systems for "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the [employer]." After the union lost NLRB-held elections to represent the employer's employees at seven of the employer's call centers, the union objected to the election results and filed an unfair labor practice charge on the ground that the employer's computer and email use policy interfered with the employees' freedom of choice in the elections. A trial judge relied upon NLRB precedent in *Register-Guard* to uphold the employer's policy and dismissed union objections to the election results. The union then filed exceptions to the trial judge's order with the NLRB.

The NLRB overruled the trial judge and sided with the union, holding that the employer's email policy violated the National Labor Relations Act (the "NLRA"): "[W]e decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." The NLRB emphasized the necessity of communication among employees to exercise their Section 7 rights and the rapidly expanding use of email as a means of workplace communication. The NLRB stated that an employer's property interest in its email system must yield to its employees' Section 7 communication rights. The NLRB suggested its ruling has a minimal effect on employers.

C. Effect on Employers

The NLRB cautioned that its decision was a "limited one," applying only to policies pertaining to email systems and no other electronic communications systems. However, the NLRB left open the possibility that its holding eventually could expand to other forms of communication through employer-provided equipment. The NLRB also cautioned that its decision applies only to employees who already have access to their employer's email system for work purposes. Employers are not required to grant email access to employees working without such access.

Significantly, the NLRB's decision applies only to email use during non-working time. Employers need not permit their employees to engage in Section 7 activity through the employers' email systems during working time. Employers may also still maintain uniform and consistently enforced restrictions (such as prohibiting large attachments or audio/video segments) if the employer can demonstrate that to allow otherwise would interfere with the email system's efficient functioning. Finally, employers may still monitor their computers and email systems for legitimate management reasons (such as ensuring productivity), provided they do "nothing out of the ordinary, such as increasing monitoring during an organizational campaign or focusing monitoring efforts on protected conduct or union activists."

Employers should understand that *Purple Communications* concerned the handbook policies of a non-union employer. The employer's handbook policies were the subject of dispute because, it was alleged, the policies infringed upon the employees' Section 7 communication rights. Thus, regardless of union or non-union status, employers should take action to ensure their handbooks and other computer and email use policies comply with the NLRB's decision.

IV. HANDBOOK POLICIES RESTRICTING NEGATIVE COMMENTS VIOLATE THE NLRA

In April 2014, the NLRB held unlawful under the NLRA an employer's handbook policy that required its employees to refrain from "making negative comments about…fellow team members" and from "engag[ing] in or listen[ing] to negativity or gossip," and which required its employees to "represent [the employer] in a positive and professional manner in every opportunity." *Hills and Dales General Hospital* (2014) 360 NLRB No. 70.

A. Factual Background

In response to low morale among employees and a poor working environment, Hills and Dales General Hospital (the "Hospital") implemented a "Values and Standards of Behavior" policy covering a wide range of topics, including customer service, respect, teamwork, and attitude. The three handbook policies at issue contained the following language: (1) "We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other", (2) "We will represent Hills & Dales in the community in a positive and professional manner in every opportunity", (3) "We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating."

The Hospital asked its employees to sign copies of the new policy and used the policy as a basis for employee discipline. In one instance, the Hospital disciplined an employee for a comment the employee posted on Facebook in violation of the policy. After implementation of the new policy, the Hospital noted improvements in employee and patient satisfaction and improved ability to attract and retain personnel.

B. The NLRB's Decision

The NLRB determined that the Hospital's policy violated Section 8(a)(1) of the NLRA by interfering with employee rights. The NLRB found that the Hospital's policy would cause the Hospital's employees to "reasonably view…the language as proscribing them from engaging in any public activity or making any public statements (i.e., 'in the community') that are not perceived as 'positive' towards the [Hospital] on work-related matter." As a result, the NLRB held the policy would discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting the terms and conditions of their employment. The NLRB therefore ordered the Hospital to revise or rescind its policy.

C. Effect on Employers

Hills and Dales General Hospital demonstrates that what may seem like a well-intentioned standards of conduct policy may be unlawfully broad under the NLRA. Employers should pay special attention to handbook policies that prohibit negative comments about fellow employees, that prohibit employees from engaging in or listening to negativity, and that require employees to represent the employer in the community in a positive and professional manner, as they may be unlawful under the NLRA.

V. HANDBOOK POLICIES REGARDING THEFT, EMPLOYEE PERFORMANCE, AND PERSONAL CONDUCT

In April 2014, the NLRB examined and provided guidance as to employer handbook policies regarding stealing/theft, work rules and employee performance, and personal conduct. *First Transit, Inc.* (2014) 360 NLRB No. 72.

A. Stealing/Theft Policies

A policy prohibiting employees from "using Company property for activities not related to work anytime" was part of a broader policy which prohibited stealing from the employer, other employees, or customers. The trial judge ruled that the provision was unlawful because employees could construe it as prohibiting their physical presence in nonworking areas where they could lawfully engage in union and protected activities during nonworking time. The NLRB reversed the trial judge because the provision was encompassed by a broader, lawful, anti-theft policy, and because the handbook distinguished between personal property and the employer's operating location. The NLRB found that employees would recognize the language banned theft or misappropriation of property, not participation in protected activities.

B. Work Rules and Employee Performance

The second policy the NLRB examined prohibited "[p]oor work habits including loafing, wasting time, loitering, or excessive visiting." The trial judge ruled that the policy was unlawful because it could be interpreted as prohibiting protected activities during non-work time in non-work areas. The NLRB, however, overruled the trial judge, distinguishing the policy from other policies which have been found unlawful for prohibiting loitering outside of the employees' working hours.

C. Personal Conduct

The third policy the NLRB examined prohibited "[d]iscourteous or inappropriate behavior to passengers, other employees, or members of the public." The NLRB found the policy unlawfully overbroad because it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, and could be construed by employees as limiting their communications concerning employment.

D. Effect on Employers

First Transit, like *Hills and Dales General Hospital*, demonstrates that no employer handbook policy is immune from NLRB scrutiny as the agency works to expand employees' Section 7 rights. Although the NLRB ultimately found that the first two policies it examined – a policy pertaining to stealing/theft and a policy pertaining to work rules and employee performance – were lawful, it did so only after the employer defended itself all the way through a trial and then appealed an adverse ruling by the trial judge. The employer ultimately benefited by clearly articulating its first two policies, which served a legitimate business purpose and did not interfere with the employees' Section 7 rights.

Regarding the third policy, and consistent with the NLRB's decision in *Hills and Dales General Hospital* (issued just one day prior to its decision in *First Transit*), the NLRB again found that policies which broadly prohibit "discourteous" or "inappropriate" behavior interfere with employees' Section 7 rights.

Employers – even those in non-unionized workplaces – must carefully examine their handbooks and other written policies to ensure their policies are clearly articulated and not overly broad with respect to employee performance and conduct. Policies which seek to control employee conduct in a manner that potentially infringes upon employees' rights to engage in protected union activities may be subject to NLRB scrutiny.

VI. THE NLRB and EMPLOYEE INSUBORDINATION

These noteworthy 2014 decisions demonstrate that even conduct which is generally deemed offensive and inappropriate may find protection under the NLRA.

A. The *Starbucks Corporation* Decision

In June 2014, the NLRB ordered reinstatement and full back-pay for an employee who was terminated for insubordination and threatening his store manager. *Starbucks Corporation* (2014) 360 NLRB No. 134. The employee was terminated after two different incidents within six months. In the first incident, after the employee asked his supervisor for assistance and the supervisor came to his aid, the employee told the supervisor it was "about damn time." The employee then noisily shoved a blender into the sink, told his supervisor "this is bullshit," and told his supervisor to "do everything your damn self." Starbucks responded by suspending the employee for several days and issuing him a written warning.

In the second incident, the employee visited his assigned store during non-working hours, wearing a pro-union pin. Shortly after the employee arrived at the store, an off-duty assistant manager from a different store who was also visiting asked the employee about the union pin. The conversation became a heated confrontation, in which the employee made highly profane remarks to the off-duty assistant manager. Starbucks terminated the employee for disrupting business operations.

The NLRB ruled that Starbucks's termination of the employee violated the NLRA because it was motivated, at least in part, by Starbucks's anti-union animus. The NLRB relied upon a statement contained within a memorandum documenting the discharge that "[Employee] strongly support [sic] the IWW union." The NLRB reasoned that the employee was provoked in the second incident by the assistant manager, and that Starbucks had given more lenient treatment to other employees under similar circumstances. Accordingly, the NLRB ruled that Starbucks failed to prove that it would have terminated the employee regardless of his participation in activities protected under the NLRA.

B. The *Plaza Auto* Decision

In May 2014, the NLRB ordered reinstatement and full back-pay for an employee who was terminated for making profane comments and engaging in threatening behavior toward the company owner. *Plaza Auto Center* (2014) 360 NLRB No. 117. The employee was terminated after calling the company owner a "f___ing crook," an "asshole," and "stupid," remarking that nobody liked the owner, and engaging in threatening behavior.

The NLRB ruled that the termination violated the NLRA. The NLRB overruled the trial judge's finding that the employee engaged in physically aggressive behavior toward the company owner. Although the NLRB conceded that the employee's statements to the company owner were "obscene and denigrating," the NLRB nonetheless found that the employee's conduct was protected because the subject matter of the communications related to the terms and conditions of employment; the statements were made in a private meeting, away from other employees; and the company owner had provoked the employee by telling the employee that he could quit if he did not like the employer's policies and by refusing to deal with the substance of the employee's complaints about working conditions. Thus, the NLRB concluded, the employer "invited a strong response" from the employee.

C. Effect on Employers

Employers should not be dissuaded from issuing discipline to employees for insubordinate or disruptive conduct. However, employers should take action to ensure their handbooks include standards of conduct policies which clearly articulate proscribed disruptive, offensive, or insubordinate conduct. Employers should consistently enforce their standards of conduct policies in order to defend against allegations of unfair or discriminatory conduct, and should consider implementing policies which provide

employees with a mechanism for voicing concerns about the workplace. In no instance should discipline be intended or administered in such a way as to provoke an employee outburst.

VII. WORKPLACE INVESTIGATIONS AND CONFIDENTIALITY REQUIREMENTS

In August 2014, the NLRB ruled that an employee who requested assistance from her coworkers in preserving evidence for a sex harassment complaint she intended to make was engaged in "concerted activities" for "mutual aid and protection" under Section 7 of the NLRA, and that an employer's handbook policy "prohibit[ing] solicitation of team members during working time for any purpose" violated Section 8(a)(1) of the NLRA. *Fresh & Easy Neighborhood Market, Inc.* (2014) 361 NLRB No. 12.

A. Factual Background

A female cashier wrote a note to her supervisor on the whiteboard in the employee break room. She requested the supervisor sign up the cashier for training required to sell alcohol at the Fresh & Easy store. Another employee defaced the whiteboard message by adding sexual content. The cashier then drew a copy of the whiteboard message on a piece of paper and asked several other employees to sign the paper. After those employees signed the cashier's paper, the cashier altered the paper by adding language implying that other employees interpreted the defaced whiteboard to constitute sexual harassment.

Fresh & Easy's employee relations manager interviewed the cashier and two of the employees the cashier had asked to sign the depiction of the defaced message. The employee relations manager questioned why the cashier obtained her co-workers' signatures on the depiction, and instructed the cashier to obtain no further statements. Fresh & Easy's employee handbook prohibited solicitations, providing: "We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation of team members during working time for any purpose… And keep in mind that violations of this policy could lead to disciplinary action." After the investigation, Fresh & Easy disciplined the employee who defaced the whiteboard message. No disciplinary action was taken against the cashier, despite her violation of the non-solicitation policy.

B. The NLRB's Decision

The NLRB assessed whether Fresh & Easy violated Section 8(a)(1) of the NLRA by (1) questioning the cashier about her reasons for obtaining her co-workers' signatures on her depiction of the defaced message, or (2) by instructing her not to solicit additional written statements from her coworkers. For the cashier's activities to have protection under the NLRA, they must have been both "concerted" and engaged in for "mutual aid or protection."

The NLRB determined that the cashier's solicitation of support from her coworkers constituted "concerted" activity. Although "concerted" activity normally requires action by two or more employees, the NLRB found the cashier's actions in seeking the assistance of coworkers was "concerted" whether those coworkers disagreed with the cashier's position or agreed to assist the cashier in making a complaint of harassment.

The NLRB next found that the cashier's actions pursued "mutual aid or protection," although the cashier acted in response to misconduct directed at her alone. The NLRB noted that by requesting assistance from coworkers, an employee requests that his coworkers exercise vigilance against the employer's perceived unjust practices, and that the solicited employees have an interest in helping the aggrieved individual because "next time it could be one of them that is the victim."

The NLRB assessed whether Fresh & Easy violated the NLRA by instructing the cashier not to obtain additional statements from her coworkers on the sexual harassment complaint. The NLRB reiterated stated employees have a Section 7 right to discuss with one another ongoing employer investiga-

tions into alleged employee misconduct. The NLRB nonetheless found that Fresh & Easy had a legitimate business justification for instructing the cashier not to obtain any additional statements from coworkers while Fresh & Easy investigated the cashier's complaint. The NLRB also found that Fresh & Easy did not prohibit the cashier from discussing the investigation with her coworkers, asking those coworkers to be witnesses for her, or obtaining statements from coworkers with respect to any future complaints. According, the NLRB found that Fresh & Easy did not violate Section 8(a)(1) of the NLRA.

C. Effect on Employers

The *Fresh & Easy* decision stands for the proposition that Section 7 protections apply to potentially every case where an employee seeks assistance from coworkers on an individual complaint of harassment (or other statutory right benefiting multiple employees). As a result, the ruling may be used to attack employer handbook policies that prohibit employee solicitation of other employees to exercise a broad spectrum of Section 7 rights. Employers conducting investigations into harassment complaints should narrowly tailor their questions to avoid inquiries about employees' Section 7 activities.

VIII. NARROWLY TAILORED EMPLOYEE INTERROGATION PERMISSIBLE

In January 2015, a trial judge ruled that an employer investigating a facially valid harassment complaint does not violate the NLRA by asking an employee about protected activity, provided the questions are narrowly tailored and do not involve employees' union views, motives, and sentiments. *DTE Energy Co.*, NLRB (1/7/15) ALJ No. 7-CA-129514.

A. Background

On April 21, 2014, several employees of DTE Energy Company ("DTE"), including Kurt Danowski and Juanita Jackson, engaged in a workplace conversation in which they discussed their belief that another employee, Jeffrey Burss, was not performing the same work that other employees were required to perform. That same day, Danowski provided a statement to Jackson, who had previously filed a grievance against Burss for the same issue, detailing the work that employees who previously held Burss's position had performed. Danowski then informed Burss about the statement, and Burss filed a harassment complaint against Jackson.

DTE investigated Burss's harassment complaint per its anti-harassment and investigation policies. In the investigation, DTE questioned Jackson about the specific allegations, asked whether Jackson solicited signatures on written complaints about Burss, and asked Jackson to produce a copy of the statement Danowski gave. DTE ultimately concluded that Jackson had not violated DTE's policies. Jackson was not disciplined.

B. The Trial Court's Decision

The NLRB charged DTE with unlawful investigation of Jackson regarding protected concerted activities. After the trial, the trial court ruled that Jackson's communications with other DTE employees about Burss' job performance, as well as Jackson's efforts to obtain a signed statement in support of her complaints about Burss, constituted protected concerted activity. However, the court found the questioning was not unlawful interrogation because it was narrowly tailored to the specific allegations contained within Burss' complaint, did not ask about Jackson's union views, motives, or sentiments beyond the harassment complaint, and followed DTE's anti-harassment and investigation policies. NOTE: This ruling is not final and will be reviewed by the NLRB panel in Washington, D.C.

C. Effect on Employers

Questions asked during workplace investigations can form the basis of an unfair labor practices charge under the NLRA. Employers should narrowly tailor questions to avoid inquiring about their employees' union views, motives, and sentiments, and must avoid questioning in a manner that will be deemed coercive or which interferes with employees' Section 7 rights. Employers should also maintain anti-harassment and investigation policies in their handbooks, and should conduct their investigations in a manner consistent with those policies.

IX. ARBITRATION AGREEMENTS: CONFLICT BETWEEN COURTS AND NLRB

A. Background: The Federal Arbitration Act and *AT&T Mobility*

Congress passed the Federal Arbitration Act (the "FAA") in 1925. The FAA codifies the federal policy of enforcing arbitration agreements and requires that where the parties have agreed to arbitrate, they do so in lieu of going to court. The FAA applies in both state courts and federal courts, notwithstanding any state substantive or procedural policies to the contrary.

In 2011, the United States Supreme Court ruled that the FAA preempts state laws that prohibit contracts from disallowing class-wide arbitration. *AT&T Mobility, LLC v. Concepcion* (2011) 131 S.Ct. 1740. As a result, businesses that have arbitration agreements with class action waivers can generally require consumers to bring claims only in individual arbitrations, rather than in court as part of a class action. A number of courts, including the California Supreme Court, relied upon the *AT&T Mobility* decision to uphold the enforceability of arbitration agreements, even when such agreements are contained in employment contracts and apply to prohibit class action litigation of employment claims. *See, e.g., Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348.

B. The *D.R. Horton* Decision

In 2012, the NLRB ruled that an arbitration agreement which required employees to waive their right to bring class or collective actions violated the NLRA. *D.R. Horton, Inc.* (2012) 357 NLRB No. 184. Specifically, the NLRB held that D.R. Horton's mandatory arbitration agreement violated Section 8(a)(1) of the NLRA. According to the NLRB, the agreement's failure to identify unfair labor practice claims as an exception to the arbitration requirement could lead employees to believe they were prohibited from filing unfair labor practice charges with the NLRB. Further, the NLRB held that the arbitration agreement interfered with employees' substantive rights under Section 7 of the NLRA to engage in "concerted" action for "mutual aid or protection" because the arbitration agreement required employees to waive their right to pursue class or collective actions in violation of Section 8(a)(1) of the Act.

D.R. Horton appealed the NLRB's decision to the Fifth Circuit Court of Appeals, which upheld the NLRB's decision in part and rejected and reversed the decision in other part. The Fifth Circuit agreed with the NLRB's finding that the arbitration agreement constituted a violation of Section 8(a)(1) of the NLRA because it was worded in such a way that could lead employees to believe they were prohibited from filing unfair labor practice charges with the NLRB.

The Fifth Circuit rejected the NLRB's view on the arbitration agreement's class action waiver. The Fifth Circuit evaluated the NLRB's position by analyzing two exceptions to the FAA's general rule that arbitration agreements must be enforced according to their terms: (1) the FAA's "savings" clause, which invalidates arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract;" and (2) a "congressional command" to override the FAA. The Fifth Circuit held that the "savings" clause was inapplicable because its application to class action waivers would be inconsistent with the public policy considerations discussed by the United States Supreme

Court in *AT&T Mobility*. The Fifth Circuit further held that the FAA has equal importance to the NLRA, and that the NLRB cannot effectuate the policies of the NLRA by ignoring other equally important congressional mandates, such as the FAA. Finally, the Fifth Circuit held that neither the text of the NLRA nor its legislative history indicated a "congressional demand" to override the FAA.

D. The *Murphy Oil USA* Decision

In October 2014, the NLRB again ruled that mandatory arbitration agreements barring employees from bringing class or collective workplace claims restrict the exercise of a substantive right under Section 7 of the NLRA to act concertedly for mutual aid and protection. *Murphy Oil USA*, 361 NLRB No. 72 (2014). The NLRB further held that finding an arbitration agreement unlawful under the NLRA because it precludes class or collective claims does not result in a conflict between the NLRA and the FAA.

E. he *Babcock* Decision

In December 2014, the NLRB issued a ruling establishing a new standard for deferral to labor arbitration in the unionized workplace which sets a higher bar for deferral and is likely to promote duplicative litigation in arbitrations and NLRB proceedings. *Babcock & Wilcox* (2014) 361 NLRB No. 132. The NLRB's ruling in *Babcock* tightens the prior legal standard for deferral, which the NLRB stated did not adequately balance protection of employee rights with the national policy encouraging arbitration. Citing a risk that the NLRB would defer when an arbitrator had not adequately considered the accompanying unfair labor practice issue, or when it was impossible to tell whether he or she had done so, the NLRB ordered that deferral in the unionized setting requires: (1) Arbitral proceedings to be fair and regular with all parties agreeing to be bound; (2) The arbitrator is explicitly authorized to decide the unfair labor practice issue either by the collective bargaining agreement or the parties themselves; (3) The arbitrator is presented with the statutory (NLRA) issue or was prevented from doing so by the party opposing deferral; and (4) NLRB law reasonably supports the arbitral award.

The new standard set forth in *Babcock* stands to promote duplicative litigation in arbitrations and NLRB proceedings, as there is a higher bar for deferral. Parties to collective bargaining relationships and arbitrations under those agreements should remember that to raise deferral it may be necessary to explicitly reference the NLRA's provisions and relevant case authority.

F. Effect on Employer

These decisions demonstrate that the NLRB will not be dissuaded from striking down arbitration provisions containing class or collective action waivers even though the validity of such provisions has been upheld in many state and federal courts. Employers may therefore find themselves stuck in an irreconcilable dilemma: arbitration provisions that may otherwise be deemed lawful under various state or federal laws may be deemed unlawful under the NLRA. It seems likely the United States Supreme Court will have to decide this issue before the NLRB changes its position. Employers should ensure their arbitration agreements adequately protect their interests while simultaneously complying with NLRB authority.

X. NEW "JOINT EMPLOYER" STANDARD

In December 2014, the NLRB announced it would prosecute McDonald's corporation as well as individual franchisees on alleged unfair labor practices. To do so, the NLRB's General Counsel is pursuing a new interpretation of joint employer analysis to challenge what have historically been arms-length business relationships. The NLRB is also expected to soon rule in the *Browning-Ferris Industries* matter, which could also have significant implications for franchisors.

A. Effect on Employer

It remains to be seen how the NLRB will prosecute employers using a "joint employer" theory of liability. Going forward, one should expect the NLRB to attempt to find commonly owned, commonly branded, and commonly operated businesses jointly liable for unlawful conduct and legally bound for matters regulated by the NLRB, such as union representation and elections. Employers should ensure their handbooks do not contain language which could be used to argue joint-employer status.

XI. CONCLUSION

The NLRB demonstrated in 2014 that it will use handbooks and other written policies against employers where charges of unfair labor practices have been made and in 2015 the General Counsel released his comprehensive guidance memo on these issues Even policies that have not previously been the subject of legal challenge, or which do not seem objectionable on their face, may be scrutinized and deemed unlawful. Employers and their general counsel will benefit from a solid grounding on why rights arising under the Act have awoken from relative dormancy.

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Congress Passes Legislation Requiring Additional Reporting of Crime Statistics Aboard Cruise Liners

In December 2014, Congress passed and President Obama signed H.R. 5769, the Howard Coble Coast Guard and Maritime Transportation Act of 2014. Section 323 of this legislation amended the Cruise Vessel Security and Safety Act (enacted into law in 2010). 46 U.S.C. §3507(g)(3)(A). Under the 2010 statute, cruise liners operating out of U.S. Ports were required to report quarterly crime statistics and statistics regarding missing persons to the federal government. However, the 2010 law only required cruise liners to report statistics regarding crimes that were "no longer under investigation by the Federal Bureau of Investigation."

Under the new legislation, cruise liners must now provide these statistics "without regard to the investigative status of the incident." This legislation requires cruise liners to report these statistics on a quarterly basis and requires the U.S. Secretary of Transportation to post these statistics on the Internet. The legislation requires the Secretary of Transportation to provide the name of each cruise liner for each crime and whether it was committed by a crew member or passenger. While certain cruise liners have voluntarily disclosed statistics beyond what was required in the 2010 statute, such disclosure is now required industry-wide and may draw increased attention to safety aboard cruise ships.

Fifth Circuit Reverses Verdict for Maintenance and Cure When Seaman Misrepresented Previous Medical History

In *Meche v. Doucet*, 777 F.3d 237 (5th Cir. 2015), the Fifth Circuit examined whether an injured seaman can obtain maintenance and cure when he misrepresented his medical history to a former employer that was later acquired by the Defendant corporation. The Fifth Circuit reversed the Western District of Louisiana and held that such remedy was not available.

Willie Meche was the captain of a vessel that served a drilling rig off the Louisiana coast. He alleged that he injured his back when lifting a hatch cover on the vessel. He claimed that stormy conditions caused a wave that hit the vessel and threw him over a railing. He sued his employer, Key Marine Services, LLC, who owned the vessel he worked on, and his supervisor, Alex Doucet, who worked on the rig at the time of the injury. Meche asserted claims under the Jones Act and the general maritime law against both Defendants.

The court held a bench trial and found that the evidence did not support Meche's claim that he was thrown over the railing by a wave. The court found that Meche had merely injured his back while lifting the hatch cover. The court ultimately found that the Defendants were not negligent and the vessel was seaworthy. However, the court also found that Meche strained a preexisting back injury when lifting the hatch cover and held that he could recover maintenance and cure, punitive damages, attorneys' fees, and pre and post-judgment interest from both defendants.

The parties filed cross-appeals before the Fifth Circuit. The Fifth Circuit affirmed the dismissal of Meches' Jones Act claims. However, the court reversed the district court's verdict for Meche and held that Meche could not recover maintenance and cure. First, the court dismissed the claim against Meches' supervisor because a party can only obtain maintenance and cure against an employer and Meches' supervisor was not his employer.

Second, the court examined whether Meche could recover maintenance and cure against Key Marine even though Meche had failed to disclose certain information regarding his previous medical history. Meche's employer argued that Meche could not recover because of the *McCorpen* rule. The *McCorpen* rule precludes a plaintiff from recovering maintenance and cure if an employer can show that: (1) the claimant intentionally misrepresented or concealed medical facts; (2) the non-disclosed facts were material to the employer's decision to hire the claimant; and (3) a connection exists between the withheld information and the injury complained of in the lawsuit." *McCorpen v. Cent. Gulf S.S. Corp*., 396 F.2d 547, 548 (5th Cir. 1968). The *McCorpen* rule recognizes a distinction between non-disclosure and concealment in cases involving a pre-existing disability. *McCorpen*, 396 F.2d at 548-49. If an employer does not require a pre-employment medical examination, a seaman must only disclose a past injury when, in his opinion, the vessel owner would consider it be an important condition. Courts describe this standard as subjective. However, if the employer requires a pre-employment medical examination, a seaman who intentionally misrepresents or conceals material medical facts during the examination cannot recover maintenance and cure. Courts refer to this inquiry as an objective standard.

The parties disputed whether Meche misrepresented his pre-existing spinal injury to Key Marine. The district court found that Key Marine did not require a pre-employment examination and applied the subjective standard. On appeal, Key Marine argued that this finding was incorrect. Key argued that while it did not require a pre-employment examination, its predecessor company, Moncla, did require such an examination. Key Marine purchased Moncla's marine division and believed that Moncla's previous examination protocols were sufficient. When applying to Moncla, Meche did not disclose his previous medical condition. Thus, Key Marine argued that Meche's misrepresentation to Moncla was a de facto misrepresentation to Key. The Fifth Circuit agreed and precluded Meche's recovery under the *McCorpen* rule. This application of *McCorpen* allows a successor corporation to rely on the pre-employment examination of a predecessor entity.

In reviewing the record presented at the district court, the Fifth Circuit noted that Meche suffered three prior back injuries between 1984 and 1994. He received disability payments and multiple settlements related to these injures. Thus, Meche misrepresented his medical history in his pre-employment medical history questionnaire when he stated that he never settled lower back injuries.

Meche also argued that he did not misrepresent his condition because he did not complete the questionnaire itself. He claimed that a family member filled out the application because he had difficulty reading and writing. However, both the district court and Fifth Circuit rejected this argument because the record did not establish that Meche lacked the literacy skills to understand his responses. The court applied *McCorpen* and reversed the district court's verdict on Meche's maintenance and cure claims.

MOTOR

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A federal court dismisses a shipper's claim against a freight broker based on FAAAA preemption and the absence of contract terms.
Marx Companies, LLC v. Western Trans Logistics, Inc., 2015 WL 260914 (D.NJ 2015)

Here's the latest federal court decision in a trend in holding freight brokers immune from tort-based liability in cargo claims based on Federal Aviation Administration Authorization Act, 49 USC §14501 (FAAAA), preemption. The U.S. District Court for the District of New Jersey addressed a FRCP 12(b)(6) motion to dismiss shipper Marx Companies' cargo liability claims against broker Western Trans Logistics, and through Marx out of court.

Marx had engaged Western Trans to arrange transit of a cargo of beef from California to Missouri, and Western Trans booked the load with motor carrier Dew-Right Transportation (DRT). The load disappeared; Marx claimed DRT stole it; and Marx sued Western Trans alleging negligence and contract theories. Regarding negligence, Marx claimed its broker breached implied duties "to act in accordance with standards of a professional freight brokers [sic]"; and a duty to "retain only competent, honest and reliable motor carriers to transport plaintiff's goods." Yes, those sound more like contract theories, but as the shipper briefed them as negligence claims, the court treated them as such.

Following the lead of several other recent federal court decisions addressing broker liability, the court applied the FAAAA, which prohibits states from enforcing laws, regs or provisions "having the force and effect of law related to price, route or service of any … broker … with respect to the transportation of property." Because selection of DRT was within Western Trans' service as a broker, the "negligence" claims were dismissed, as were Marx's unpleaded but argued fraudulent inducement and misrepresentation claims, which are other species of tort.

The court entertained the contract claim, but Marx couldn't show any contract term between it and Western Trans that had been breached. The shipper tried to put an "implied" contractual promise spin on its allegations, as well as a good faith and fair dealing warranty claim. As those were not written contract terms, they, too, would be preempted, as case law also holds.

It's not how you label yourself or how you're licensed; it's what you say and what you do.
Prussin v. Bekins Van Lines, Triple Crown Maffucci Storage Corporation, et al., 2015 WL 457470 (N.D. Cal. 2015)

Here's a great example of an intrastate transportation and logistics service provider talking and writing itself into potential Carmack liability for a household goods claim. Shippers the Prussins engaged Bekins Van Lines to pack up, store and transport their stuff from New York to California. At the appointed hour, Triple Crown Maffucci Storage Corporation (TCM) arrived at their New York home, and took the cargo to a local storage facility pending further instructions. Bekins actually made the haul west, and the Prussins claimed some of their belongings arrived damaged or were missing.

The Prussins sued both Bekins and TCM in the U.S. District Court for the Northern District of California, alleging negligence claims against TCM. When TCM moved for summary judgment, the

shippers asserted that Carmack preempted their negligence claims. You read that right. It's not well explained in the opinion, but somehow the plaintiff argued and potentially prevailed in an argument that they pleaded their claim improperly.

TCM's point was that it can't be liable under Carmack because it was just an intrastate carrier and broker for Bekins. But despite the facts it held only intrastate and broker licenses, and considered itself to be only a broker for Bekins in the interstate haul, the court found an issue of fact as to whether it had lead the Prussins to believe it was "blended" with Bekins. Specifically, TCM had its fax line on a Bekins contract; sent the Prussins a bill that said "Thank you for choosing Bekins"; the cost estimate said "Maffucci Bekins"; and the TCM invoice charged for interstate transportation. TCM had an explanation for each of these points (which the court noted), but concluded a jury could agree with the shippers. This one goes to trial.

On second thought, ICCTA preempts a shipper's claim that a broker fraudulently failed to procure insurance.
***Midwest Trading Group, Inc. v. GlobalTranz Enterprises, Inc*., et al., 2015 WL 1043553 (N.D. Ill. 2015)**

Shipper Midwest Trading Group hired broker GlobalTranz Enterprises to arrange interstate transit of two cargoes of Android tablet computers. Apparently, part of GlobalTranz's rate quote included cargo insurance, and a broker employee confirmed that insurance had been procured. It hadn't been. Of course, the computers were stolen en route, and a miffed Midwest sued GlobalTranz and the carriers for big bucks in the U.S. District Court for the Northern District of Illinois. Against the broker, Midwest alleged various fraud and negligence theories.

GlobalTranz moved for summary judgment, asserting that the Interstate Commerce Commission Termination Act (ICCTA), per 49 USC §14501(c)(1), preempts the fraud claim, and that in any event, GlobalTranz's limitation of liability provisions, found in its incorporated terms and conditions, puts a low ceiling on the broker's potential exposure. The court originally denied the motion as to the fraud claims (granting it as to negligence), but on GlobalTranz's motion for reconsideration, took another look, and partly changed its mind.

At issue is whether a broker's broken promise to get cargo coverage, or as Midwest put it, fraudulent inducement of the shipper to enter into a contract based on such a promise, and/or fraudulent misrepresentation of a contract's terms, constitutes an ICCTA-covered transportation service. The court originally denied this aspect of GlobalTranz's motion, reasoning that an agreement to procure coverage is "pre-transportation conduct," which is outside ICCTA's scope. But looking at several precedents, the court agreed that pretty much anything a broker does takes place before cargo moves, and insurance agreements are "… within the scope of 'transportation.'" Moreover, Illinois law doesn't recognize a tort of promissory fraud unless it's "embedded in a larger pattern of deceptions …," which wasn't the case here, and in any event would be preempted by federal law unless ordinary contract damages are inadequate, which wasn't alleged.

However, the court didn't disturb its earlier ruling regarding GlobalTranz's terms and conditions because the broker didn't argue anything new. There remains a question of fact as to whether they ever were agreed to and incorporated. Where this all leaves the case against GlobalTranz is unclear and a subject for an ordered status conference.

No broker liability for a motor carrier's accident absent demonstrable control over trucking activities; a broker-trucker joint venture; or negligence in hiring the carrier.
***Dragna v. A&Z Transportation, Inc*., et al., 2015 WL 729844 (M.D. La. 2015)**

The U.S. District Court for the Middle District of Louisiana got it right when, departing from an alarming trend of courts finding brokers liable for motor carrier accidents, ruled that a broker can't be liable when it did everything it was supposed to. Shipper BASF Chemical engaged motor carrier KLLM Transport to haul a chemical cargo. KLLM Transport determined it couldn't handle the load, and so handed it off to its sister company, freight broker KLLM Logistics. KLLM Logistics booked the shipment with A&Z Transportation, whose driver was involved in an accident en route. Injured motorist Dragna sued all concerned, including KLLM Logistics, asserting against it theories based on vicarious liability; joint venture liability; and negligent hiring.

On its motions for summary judgment, the court found no basis for KLLM Logistics to be liable under any of these theories by distinguishing cases that have found otherwise. KLLM Logistics wasn't vicariously liable for A&Z's alleged negligence because A&Z was documented as an independent contractor. With that relationship, vicarious liability could only apply if the principal's actions constitute "operational control" over the independent contractor. All KLLM Transport did was require check-in calls. Cases in which brokers have been shown to exercise operational control over truckers resulting in vicarious liability for their accidents involve far more, such as dispatching, route selection, provision of trucking services, etc. KLLM Transport's nose was clean on this.

Nor could Dragna show a joint venture between the collective KLLM entities and A&Z. BASF's contract was with KLLM Transport; and A&Z's was with KLLM Logistics. Both contracts pertained only to the parties to them, and again, the brokerage agreement specified that A&Z was an independent contractor. Moreover, it said nothing about risk or profit sharing, both essential elements of a joint venture, instead providing that A&Z must indemnify the broker for accident-related claims.

Lastly, no evidence suggested KLLM Transport negligently hired A&Z, if it could be said that it "hired" the trucker at all. The broker had run a Carrier411 check, which provides thorough carrier information. True, KLLM Logistics learned through that check that A&Z was "unrated" by FMCSA, but a carrier isn't disqualified, or presumed to be unreliable, just because it isn't rated. Dragna will have to pursue his claim against the parties that might bear responsibility, and therefore liability, for his losses.

Because a shipper has no duty to truck driver to properly load and secure freight, it can't be liable for accident.
***Patton v. Nissan North America, Inc*., 2015 WL 859056 (S.D. Miss. 2015)**

Shipper Nissan North America booked a load with motor carrier Specialized Transportation Services (STS), and loaded its cargo into the STS trailer. En route within Mississippi, the trailer overturned, injuring driver Patton. Patton sued Nissan in the U.S. District Court for the Southern District of Mississippi, alleging negligence theories.

Nissan moved for summary judgment, arguing that it had no duty to the driver regarding cargo securement and, in any event, no evidence proved that cargo loading caused the accident. The court agreed on both counts and dismissed the lawsuit.

Generally, per federal and Mississippi trucking regs, cargo loading and securement is solely the carrier's responsibility. Shippers that load their own freight can be potentially liable only if they do so in an unsafe manner that is latent, i.e., that the carrier couldn't have found anything wrong with a reasonable look-see. That wasn't the case here.

Duties can arise if a shipper undertakes loading tasks, or gratuitously promises to do so, and then improperly secures the load. But that wasn't the case here either, and the Nissan-STS contract didn't get into any such duties or promises. True, the STS Drivers Manual specifies that company drivers shouldn't load cargo, but Nissan wasn't a party to that document or bound by it. Nor did the STS bill of lading's language about a shipper submitting cargo in proper condition change the equation, as it didn't address cargo loading. The cargo's "condition" was fine.

Add to that the absence of any evidence that a load shift actually caused the accident, and Patton's claim against Nissan was tossed out of court. This case demonstrates the rationale behind the strong judicial inclination to hold carriers responsible for cargo loading.

RAILROADS

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Hot Topics Impacting the Railroad Industry In the Federal Courts

In recent months, federal courts have issued several decisions involving rail transportation. Among other cases, the United States Supreme Court considered two cases involving the rail industry. The Court concluded that Amtrak is a federal actor for constitutional purposes in a case involving a constitutional challenge to Section 207 of the Passenger Rail Investment and Improvement Act, which required Amtrak and the Federal Railroad Administration ("FRA") to jointly promulgate metrics and standards for on-time performance for Amtrak trains. The Court also considered the provision of the 4-R Act that prohibits a state from imposing a tax that discriminates against railroads in a case involving Alabama's sales and use tax of diesel fuel purchases.

This article also highlights four other federal appellate decisions. The Fifth Circuit considered what constitutes "compensation" under the Railroad Retirement Act. The Third Circuit considered whether a railroad's indemnification, contribution, and breach of contract claims are preempted under the Locomotive Inspection Act. The D.C. Circuit dismissed a railroad's challenge to the Board's market dominance determination in a bifurcated rate reasonableness case. Finally, the Ninth Circuit dismissed a claim under the Resource Conservation and Recovery Act involving the emission of the locomotive diesel particulates in rail yards.

The U.S. Supreme Court Considered Whether Amtrak is a Federal Actor For Constitutional Purposes

On March 9, 2015, the Supreme Court considered whether Amtrak is a federal actor for constitutional purposes in a case involving a constitutional challenge to Section 207 of the Passenger Rail Investment and Improvement Act ("PRIIA"). Dep' of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1232-33 (2015). Section 207(a) of PRIIA provides, "[T]he Federal Railroad Administration and Amtrak shall 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, ridership, on-board services, stations, facilities, equipment, and other services." Id. at 1229 (quoting 122 Stat. 4907, 4916).

After Amtrak and FRA jointly issued metrics and standards, the Association of American Railroads ("AAR") filed suit against the U.S. Department of Transportation ("DOT") and FRA in the United States District Court for the District of Columbia, alleging that "Amtrak is a private entity and it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance." Id. The district court granted summary judgment for DOT and FRA. The D.C. Circuit reversed, holding that "for purposes of this dispute, Amtrak is a private entity and that Congress violated nondelegation principles in its grant of joint authority to Amtrak and the FRA." Id. at 1228. It relied upon two statutes—that Amtrak "is not a department, agency, or instrumentality of the United States

Government," 49 U.S.C. § 24301(a)(3), and that Amtrak "shall be operated and managed as a for profit corporation." 49 U.S.C. § 24301(a)(2). The D.C. Circuit did not resolve AAR's claim under the Due Process Clause.

The Supreme Court reversed. It concluded that "for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity." Dept' of Transp., 135 S. Ct. at 1228. The Court stated, "Congressional pronouncements, though instructive as to matters within Congress' authority to address, are not dispositive of Amtrak's status as a governmental entity for purposes of separation of power analysis under the Constitution." Id. at 1231 (internal citation omitted). The Court analyzed "Amtrak's ownership and corporate structure," and it concluded that the "political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations." Id. at 1232. The Court held that "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit." Id. Therefore, "in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions." Id. at 1232-33.

The Court vacated the opinion and remanded so the lower court could address remaining issues in the case. The Court stated, "[a]lthough Amtrak's actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U.S. Const., Art. II, § 2, cl. 2—[that] may still remain in the case." Dep't of Transp., 135 S. Ct. at 1228.

Justice Alito concurred. He agreed that while "Amtrak must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution." Id. at 1240 (Alito, J., concurring). He stated that a "[r]ecognition that Amtrak is part of the Federal Government raises a host of constitutional questions," including questions involving the Oath and Commission Clauses, the constitutionality of the arbitration provision in PRIIA, and the Appointments Clause. Id. at 1239-40.

Justice Thomas also concurred. He wrote "separately to describe the framework that I believe should guide our resolution of delegation challenges and to highlight serious constitutional defects in [PRIIA] that are properly presented for the lower courts' review on remand." Id. at 1240 (Thomas, J., concurring). "A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so." Id. at 1253.

The U.S. Supreme Court Considered Alabama's Tax on the Purchase of Diesel Fuel Under Section 11501(b)(4) the 4-R Act

On March 4, 2015, the U.S. Supreme Court considered whether the State of Alabama violates the Railroad Revitalization and Regulation Reform Act of 1976 ("4-R Act") "by taxing diesel fuel purchases made by a rail carrier while exempting similar purchases made by its competitors; and if so, whether the violation is eliminated when other tax provisions offset the challenged treatment of railroads." Ala. Dep't of Revenue v. CSX Transp., Inc., 135 S. Ct 1136, 1139-40 (2015). Section 11501(b)(4) of the 4-R Act prohibits a state from imposing "'another tax that discriminates against a rail carrier providing transportation.'" Id. at 1140 (quoting 49 U.S.C. 11501(b)(4)).

This is the second time that the Supreme Court has considered this dispute between CSX Transportation, Inc. and Alabama regarding the Alabama's sales and use tax of diesel fuel purchases. In 2011, Supreme Court "rejected the State's argument that sales-and-use tax exemptions cannot 'discriminate' within the meaning of subsection (b)(4), and remanded the case for further proceedings." Id. at 1139 (citing CSX Transp., Inc. v. Ala. Dep't of Revenue, 562 U.S. 277, 296-97 (2011) ("CSX I")).

On remand from the Supreme Court's decision in CSX I, the district court held a trial and denied CSX's claim. On appeal, the Eleventh Circuit reversed, stating that "CSX could establish discrimination by showing the State taxed rail carriers differently than their competitors—which, by stipulation, included motor carriers and water carriers." Id. at 1140. The Eleventh Circuit "rejected Alabama's argument that the fuel-excise taxes offset the sales tax—in other words, that because it imposed its fuel-excise tax on motor carriers, but not rail carriers, it was justified in imposing the sales tax on rail carriers, but not motor carriers." Id.

The Supreme Court reversed. The Supreme Court first considered "who is the 'comparison class' for purposes" of evaluating a claim under Section 11501(b)(4) of the 4-R Act. Id. at 1141. The Court explained that the comparison class under Section 11051(b)(4) "depends on the theory of discrimination alleged in the claim" and that when "a railroad alleges that a tax disadvantages it compared to its competitors in the transportation industry, the railroad's competitors in that jurisdiction are the comparison class." Id. In this case, the Court concluded that "in light of CSX Transportation's complaint and the parties' stipulation, a comparison class of competitors consisting of motor carriers and water carriers was appropriate, and differential treatment vis-à-vis that class would constitute discrimination." Id. at 1143.

The Supreme Court next considered whether, "when resolving a claim of unlawful tax discrimination, a court should consider aspects of a State's tax scheme apart from the challenged provision." Id. at 1140. It concluded that "Alabama can justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel excise tax." Id. at 1143. The Court remanded the question whether "Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption." Id. at 1144. The Court also indicated that the Eleventh Circuit on remand should consider the issue of Alabama's justifications for the exemption of water carriers from both taxes is justified.

Justice Thomas, joined by Justice Ginsburg, dissented. He stated that he would reverse and remand for the entry of judgment in favor of Alabama. Id. at 1144 (Thomas, J., dissenting).

The Fifth Circuit Considered Whether Non-Qualified Stock Options and Certain Moving Expenses Constitute "Compensation" Under the Railroad Retirement Tax Act

On January 15, 2015, the United States Court of Appeals for the Fifth Circuit considered whether BNSF Railway Company ("BNSF") or its predecessors were entitled to a refund of certain taxes paid pursuant to the Railroad Retirement Tax Act ("RRTA") for the tax years from 1993 to 1998. BNSF Ry. Co. v. U.S., 775 F.3d. 743, 746 (5th Cir. 2015). "BNSF claims that it overpaid when it included (i) Non-Qualified Stock Options [], and (ii) certain moving expenses as taxable compensation." Id. The federal district court granted summary judgment in favor of BNSF, and the United States appealed. Id.

The Fifth Circuit reversed and remanded. With respect to non-qualified stock options, the Court stated that the definition of "compensation" in the Internal Revenue Service's regulation "is a reasonable definition," meaning that the non-qualified stock options "are properly taxed as compensation under RRTA." Id. at 757. With respect to moving expenses, the Court dismissed claims for two tax years, finding that "BNSF failed to perfect those claims prior to filing the present suit." Id. For the remaining tax years, the Court stated that a "determination will need to be made on an expense by expense basis as to whether the benefit qualifies as 'compensation' under the RRTA." Id. at 760. The Court remanded and directed the district court to "parse the disputed moving expenses to determine (i) whether each disputed moving expense qualifies as 'compensation' as explicated in Part III of this opinion, and (ii) whether each disputed moving expense may be properly excluded as a traveling expense, or a bona fide and reasonable expense related to travel." Id.

The Third Circuit Considered Whether a Railroad's Indemnification, Contribution, and Breach of Contract Claims Are Preempted Under the Locomotive Inspection Act

On January 9, 2015, the United States Court of Appeals for the Third Circuit considered whether a railroad's claims against defendants that manufactured and repaired seats in locomotives are preempted under the Locomotive Inspection Act (LIA). Delaware & Hudson Ry. Co. v. Knoedler Mfrs., Inc., No. 13-3678, ---F.3d----, 2015 WL 127374 (3d Cir. Jan. 9, 2015). The Delaware & Hudson Railway Company, which is doing business as Canadian Pacific Railway, and its subsidiaries ("Canadian Pacific") "brought indemnification, contribution, and breach-of-contract claims [against the locomotive manufacturer, Knoedler Mfgrs.,] …. [after Canadian Pacific] settled lawsuits brought by its employees who have suffered injuries as a result of defective train seats." Id. at *1. The federal district court dismissed Canadian Pacific's claims, concluding that "they were preempted by the LIA." Id.

In a split decision, a majority of the Third Circuit vacated the district court's decision dismissing the claims and remanded to the district court. The majority stated that "Canadian Pacific's state law claims of indemnification and contribution based on the LIA are not preempted, nor are its breach-of-contract claims." Id. at *9. With respect to Canadian Pacific's indemnification and contribution claims, which "are premised on a violation of federal standards set by the LIA and accompanying regulations," the majority concluded that the LIA does not preempt "a state claim based on a federal standard of care." Id. at *3, 4. With respect to Canadian Pacific's breach-of-contract claim, the majority stated that the LIA does not preempt such claims and noted that "breach-of-contract claims involve voluntarily assumed duties as opposed to duties imposed by state law" and that "Canadian Pacific seeks to enforce contractual provisions that call for compliance with federal law." Id. at *7-8.

Judge Hardiman dissented, stating that the "LIA preempts all state law causes of action, even those based on federal standards of care." Id. at *9 (Hardiman, J., dissenting).

The D.C. Circuit Dismissed CSX's Challenge to the Board's Market Dominance Determination in the Total Rate Case

On December 16, 2014, the United States Court of Appeals for the D.C. Circuit dismissed a petition for review challenging the Board's market dominance determination in a rate reasonableness case filed by Total Petrochemicals & Refining USA, Inc. (TPI) against CSX. CSX Transp. Inc. v. Surface Transp. Bd., 774 F.3d 25, 27 (D.C. Cir. 2014). TPI alleged that CSX's rates were unreasonable under the Board's Stand-Alone Cost Test, and the STB previously bifurcated the case to consider the question of market dominance before considering the rate reasonableness. After the Board's market dominance decision, CSX filed a petition for review with the D.C. Circuit seeking interlocutory review. On appeal, the parties disagreed whether the Board's interlocutory decision should be considered final agency action.

The Court dismissed CSX's petition for review, stating that it "has no jurisdiction at this stage of the administrative adjudication to interfere with the Board's process." Id. at 28. The Court explained that the Board's "interlocutory ruling on market dominance was a nonfinal interlocutory order," noting in part that "[t]here is no legislation authorizing judicial review of intermediate market dominance decisions that issue before the adjudication of a rate complaint is done." Id. at 30. The Court also concluded that CSX's argument that the Board failed to "follow notice-and-comment procedures required by the [Administrative Procedure Act] … is not a final order subject to judicial review." Id. at 32.

The Ninth Circuit Considered a Claim Under the Resource Conservation and Recovery Act Challenging the Emission of Diesel Particulates Into the Air In Rail Yards

On August 20, 2014, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of a suit filed by three environmental organizations against BNSF and Union Pacific Railroad Company under the Resource Conservation and Recovery Act ("RCRA"). Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. Co., 764 F.3d 1019, 1022 (9th Cir. 2014). Under RCRA's amendment to the

Solid Waste Disposal Act, "'any person' [may] sue the owner or operator of a solid waste treatment, storage, or disposal facility if the owner or operator 'has contributed or … is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.'" Id. at 1020 (quoting 42 U.S.C. § 6972(a)(1)(B)).

In this case, Plaintiffs alleged that "Defendants 'dispose' of solid waste—specifically, diesel particulate matter—by allowing the waste to be 'transported by wind and air currents onto the land and water near the rail yards' …. [when] the particulates are then 'inhaled by people both directly and after the particles have fallen to the earth and then have been re-entrained into the air by wind, air currents, and passing vehicles.'" Id. at 1023. Plaintiffs asked the district court to "declare Defendants' activities in violation of RCRA and order Defendants to take certain control measures to reduce diesel particulate emissions from their rail yards." Id. at 1022.

The Ninth Circuit concluded that Plaintiffs failed to state a claim under RCRA. The Court stated that "by emitting diesel particulate matter from their rail yards and intermodal facilities, Defendants do not 'dispose' of solid waste in violation of RCRA." Id. at 1021, 1030. The Court determined that "RCRA's definition of 'disposal' does not include the act of 'emitting.'" Id. at 1024. The Court stated that the "conclusion, in our view, follows relatively clearly from RCRA's text." Id. at 1030. The Court further stated that "to the extent that its text is ambiguous, RCRA's statutory and legislative histories resolve that ambiguity." Id.

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*Look left, look right…*Membership Promotion

If you have an associate that is not a member of the ATLP, share the details of our Transportation Forum next month, or our 86th Annual Meeting in Boston, June 2015. Contact ATLP headquarters and will send a letter of invitation and samples of our programs and publications for them to consider the many benefits of being a member of ATLP! With your name as the referral on the membership application, **you will received $50 off your next annual dues or your next ATLP Event registration.**

Publications

Please let us know if we can send the Journal of Transportation Law, Logistics & Policy to you via email (PDF). We are striving to be a paper-lite, environmentally conscious organization. Contact ATLP Headquarters: Info@ATLP.org and put ***JTLLP PDF*** in the subject line.

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The policy of the *Journal* is to publish thoughtful articles related to transportation and supply chain management, including law, administrative practice, legislation, regulation, history, theory, logistics and economics.

One electronic copy for review should be sent to Michael F. McBride, the editor-in-chief : *mfm@vnf.com* and Lauren Michalski, Executive Director: *michalski@atlp.org,* for consideration following the Journal's Standard Format (for standard formatting guidelines visit: *www.atlp.org*).

Please consider submitting your article to the Journal.

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Acting Chairman

Deb Miller

to present the ***Keynote Address*** at the

86th ATLP Annual Meeting
Sheraton—Boston
Monday, June 29, 2015

Additional Industry Leaders
who will be participating in the Meeting:

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