ASSOCIATION HIGHLIGHTS

Introduction

With ATLP's Annual Meeting soon to convene in Boston (June 27-30), a few reflections on that city are in order. One of Boston's nicknames is "The Hub," a name that many of you with a transportation focus might assume derives from the fact that highways and railroads emanate from Boston to connect it with the rest of New England. It's a nice theory, but wrong – the nickname "Hub" derives from 1858, when Oliver Wendell Holmes used the phrase "Hub of the Solar System" to describe the gold-domed Massachusetts State House, which stood out on the skyline atop Beacon Hill more prominently than it does today. The Hub nickname became associated with Boston's commercial and cultural dominance over other U.S. cities at the time.

While Boston might no longer be the economic or cultural Hub it once was, it has not slid too far down in the rankings of important cities. With Harvard, MIT, Boston University, Boston College and many other major schools (including my own alma mater, Brandeis University) in or near the City, Boston remains an intellectual and academic powerhouse, which in turn fuels economic growth, particularly in the ideas-dependent area of technology. The Boston area is one of those dynamic areas in the US which attracts the best and the brightest, and excels at job growth. It does so while also preserving the historic places that were central to the founding of the Nation.

Boston also has a distinguished place in the Nation's rail history. One of the earliest railroads in the U.S. was the Granite Railroad, a three mile line between Quincy, Mass and Neponset built in 1826 and used in haul granite from mines in Quincy, just south of Boston. The Boston and Lowell Railroad followed a few years later, providing both freight and passenger service and using the first moveable rail bridge built in North America, spanning the Charles River. The Boston and Maine Railroad and many other New England based railroads followed soon thereafter. There are a large number of books about the history of New England railroads that any of you that are interested can find at http://www.bedforddepot.org/store/page7.html

You don't have to go elsewhere to learn about current day transportation developments because our editors have you covered. In this edition, you can read about the new and long-awaited PHMSA rules governing crude-by-rail transportation from both our Hazmat and (from a somewhat different perspective) Commuter Rail editors. These rules are already, and predictably, generating a great deal of controversy and of course litigation. Our Commuter Rail editors also inform us about some recent STB decisions on passenger rail transportation, including a new rulemaking on Amtrak on-time performance, that the Board is launching.

Our Railroad editor reviews a variety of STB decisions on key issues, including rail revenue adequacy matters and rate case developments. Our Labor editor writes about the broadening concepts of "control" and "joint employer" in the course of reviewing recent legislative and other developments. The Motor Carrier article reviews the latest twists in federal preemption of tort claims, forum selection and Carmack issues, while our Aviation editor explores a recent failed effort by passengers to seek redress in US Courts under provisions of EU law providing for

compensation for flight delays. In our Maritime article you will find a discussion of a case adjudicating the rights of certain Mexican states to recover indirect damages suffered as a result of the BP spill in the Gulf, while our FERC editor describes a new agency policy addressing the procedure for pipeline companies to recover gas pipeline modernization costs.

Happy Reading!

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Seventh Circuit Affirms Dismissal of EU 261 Class Action

European Union Regulation 261/2004, 2004 O.J. (L 46) 1 (EC) ("EU 261") is a European Union regulation that requires that air carriers reimburse passengers for flights departing from EU member states[1] that were cancelled on short notice, or delayed for more than three hours. Compensation rates are standardized based on flight distance, whether the air carrier rerouted passengers, and several other factors. Mandated compensation ranges from €250 to €600.[2]

Beginning in 2011, eight plaintiffs filed class action lawsuits in U.S. federal district courts seeking enforcement of EU 261 for delayed or cancelled flights departing to or from EU member states.[3] The judges in the district court handling these cases has unanimously agreed that EU 261 does not create a private right of action that can be enforced in U.S. courts. *Volodarskiy v. Delta* was the first case that reached a U.S. Court of Appeals. On April 10, 2015, a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal of the *Volodarskiy* class action.[4]

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[1] EU 261 also applies to flights to EU member states, but only if the air carrier is based in an EU member state. EU 261 applies to all flights departing from member states.

[2] Compensation is not owed for flights that are cancelled due to "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken." *Id.*

[3] The seven other cases, all of which also were brought in the U.S. District Court for the Northern District of Illinois are: *Polinovsky v. British Airways, Plc*, No. 11 C 779, 2012 WL 1506052 (N.D.Ill. Mar. 30, 2012) (dismissed on ADA grounds, *see* Fn. 6, *supra*); *Lozano v. Continental Airlines, Inc.*, No. 11 C 8258, 2013 WL 5408652 (N.D. Ill. Sept. 26, 2013); *Giannopoulos v. Iberia, Líneas Aéreas de España, S.A.*, No. 11 C 775, 2014 WL 551603 (N.D. Ill. Feb. 12, 2014); *Polinovsky v. Deutsche Lufthansa, AG*, No. 11 C 780, 2014 WL 958666 (N.D. Ill. Mar. 12, 2014); *Gurevich v. Compagnia Aereas Italiana*, No. 11 C 1890 (N.D. Ill. Mar. 18, 2014); *Bergman v. United Airlines, Inc.*, No. 12 C 7040 (N.D. Ill. June 18, 2014); *Harris v. British Airways, Plc*, (N.D. Ill.) (pending).

[4] No. 13-3521 (7th Cir. Apr. 10, 2015).

The *Volodarskiy* class action was based on the Volodarskiy family's Delta flight from London's Heathrow Airport bound for Chicago's O'Hare. The flight was delayed for more than eight hours, and the plaintiffs alleged that Delta neither informed the Volodarskiys of the delay prior to departure nor compensated them for it after the fact. The Volodarskiys and another class representative, whose Delta flight from Paris bound for Philadelphia was canceled after the plane had boarded, brought a class action in the U.S. District Court for the Northern District of Illinois seeking compensation under EU 261. Initially the plaintiffs brought a breach of contract claim, arguing that EU 261 was incorporated into Delta's contract of carriage. After the District Court dismissed that claim, the plaintiffs amended their complaint to bring only a "direct" claim under EU 261. The District Court dismissed that claim as well, holding that EU 261 could only be enforced in EU member states. Plaintiffs appealed.

On appeal, the plaintiffs did not challenge the dismissal of their breach of contract claim, but rather focused on EU 261's text to support their argument that a claim for a violation of EU 261 can be brought in U.S. courts. EU 261 provides, in relevant part, that:

> Member States should ensure and supervise general compliance by their air carriers with this Regulation and designate an appropriate body to carry out such enforcement tasks. The supervision should not affect the rights of passengers and air carriers to seek legal redress from courts under procedures of national law.
>
> ***
>
> Each member state shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from third country to such airports. . . .
>
> ***
>
> . . . each passenger may complain to any designated body under [this section], or to any other competent body designated by Member states, about an alleged infringement of this Regulation at any airport situated on the territory of a Member state or concerning any flight from a third country to an airport situated on that territory.

The Seventh Circuit thus based its decision on the text of EU 261, as this was the focus of both the plaintiffs' and Delta's arguments.[5] Plaintiffs, emphasizing the absence of an explicit forum-limitation clause and broadly interpreting phrases such as "procedures of national law" and "competent courts or bodies," contended that EU 261 can be enforced in any nation pursuant to that nation's procedural laws. The Court of Appeals also noted that the plaintiffs undoubtedly brought their claims in the U.S. rather than an EU member state to take advantage of U.S. class action procedures, which few other nations have adopted. Delta's arguments focused on the Regulation's references to "EU Member States" and drew upon the EU legal principles of "subsidiarity" and "legal certainty" to argue that enforcement of EU 261 is limited to courts in the EU Member States.

The Court of Appeals agreed with Delta's interpretation. Although acknowledging that the text of EU 261 did not expressly limit its enforcement to judicial bodies in EU member states, the Seventh Circuit found that "it also doesn't clearly empower tribunals in nonmember countries to enforce the

[5] The Seventh Circuit also noted that enforcement of EU 261 in U.S. courts could implicate jurisdiction, venue, and choice of law issues. However, because neither plaintiffs nor Delta raised such issues, the court specifically noted that it was not deciding those issues.

compensation system. And the text and structure of the regulation indicate that passenger claims for compensation due from air carriers are limited to administrative bodies and courts in EU Member States."

Moreover, the Court of Appeals found that its conclusion was reinforced by the principle of "subsidiarity," pursuant to which EU member states have authority to determine how EU regulations should be enforced. The court also recognized that the principle of "legal certainty," which emphasizes the uniform enforcement of EU regulations by the EU member states, with the European Court of Justice acting as the ultimate authority to resolve conflicts, also supported the narrower interpretation of EU 261. In this context, the Court noted that the judiciary of EU member states can certify legal questions to the European Court of Justice for that reason, whereas U.S. courts have no such authority. The Seventh Circuit was careful to note, however, that there are limits to how far the legal certainty principle should be extended, and that there could be situations to which it would not apply. Nevertheless, it found that where, as here, the EU law is "fraught with uncertainty," the application of an EU law by a U.S. court "risks offending principles of international comity."

Finding that the text of EU 261 was sufficient to dismiss the plaintiffs' direct claim for violation of EU 261, the court declined to address Delta's Airline Deregulation Act ("ADA") preemption[6] arguments. The Seventh Circuit did, however, discuss the doctrine of *forum non conveniens*, which had not been raised by either party.[7] In a passing comment, the court suggested that the doctrine of *forum non conveniens* also potentially could have supported a motion to dismiss the plaintiffs' complaint, but it did not thoroughly analyze the issue. For now, the Seventh Circuit's decision affirming the dismissal of direct EU 261 claims is enough to confirm the airlines' consistent position that EU 261 does not provide the basis for a private right of action enforceable in U.S. courts.

The *Volodarskiy* Plaintiffs petitioned the Seventh Circuit for a rehearing *en banc*, i.e., by all judges of the Seventh Circuit, not limited to the three-judge panel that dismissed their complaint. On May 20, 2015, the Seventh Circuit denied that petition without comment. The *Volodarskiy* Plaintiffs' remaining right of appeal lies with the U.S. Supreme Court.

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[6] The Airline Deregulation Act preempts state laws "having the force and effect of law related to a price, route or service of an air carrier." 49 U.S.C. § 41713(b). Several other carriers submitted an amicus or "friend of the court" brief also pressing Montreal Convention arguments. The Montreal Convention is a multilateral treaty that governs international air transportation. The Seventh Circuit declined to address those arguments as well because it affirmed on other grounds and because that argument was was "underdeveloped."

[7] The doctrine of *forum non conveniens* allows a U.S. court to dismiss a case if the court determines that there are strong reasons to have that case litigated in another country's courts.

COMMUTER RAIL

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Introduction

Amtrak's tragic May 12, 2015, passenger train accident on the Northeast Corridor has suddenly thrust several industry issues to the forefront of public attention. FRA responded to the accident by issuing an order for Amtrak to implement additional mandatory speed restrictions on the Northeast Corridor. Other commuter railroads and transit operators are already moving to implement additional speed restrictions voluntarily. The accident has elicited discussion about the sufficiency of the statutorily set $200 million damages cap for passenger railroad accidents, a cap that some experts predict will be inadequate to address actual damages given the high number of casualties involved in the May 13th accident. The accident has also served to highlight the impending deadline for Positive Train Control ("PTC") implementation, which is set for the end of the year, but which many freight and commuter railroads may well miss. The accident has served both to rally some public transportation advocates in Congress to push for additional federal funding for public transportation, as well as renew consideration of additional safety mandates. Finally, Amtrak's President Joseph Boardman announced on Tuesday, May 26, that Amtrak is proceeding with the installation of inward facing cameras even as the FRA sponsored Railway Safety Advisory Committee ("RSAC") effort to develop a negotiated rule regarding such cameras proceeds.

In separate safety-related news, and continuing its response to public scrutiny over crude-by-rail safety, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") and FRA issued a final rule regarding oil tank cars. The decision follows a rapid increase in the past several years of crude-by-rail deliveries, as well as deadly accidents.

Finally, this edition covers two recent STB decisions, one involving on-time performance metrics mandated under the Passenger Rail Investment and Improvement Act ("PRIIA"), and the other covering acquisition of passenger rail rights through a *State of Maine* transaction. The PRIIA decision, while directly concerning Amtrak, could impact commuter railroads which share lines with Amtrak.

Amtrak Derailment Spurs New Talk and Action on Passenger Rail Safety and Liability

The Accident

On the evening of May 12, 2015, a regional Amtrak train heading northbound from Washington to New York derailed while taking a curve just north of the Philadelphia station. According to published reports, at the time of the derailment, the train was traveling at speeds well in excess of the published speed limit for the curve. Although the southbound portion of the track at the curve was equipped with a mechanized system for automatically slowing a train's speed, a system known as Automatic Train Control, which has many of the same but not all of the attributes as the PTC system now being put in place across the country, the northbound track had no such restrictions and relied solely on advisory signals

and the expertise of the train engineer. The derailment resulted in more than 200 injuries and eight deaths. The accident has renewed public focus on, and regulatory scrutiny over, passenger railroad safety and liability issues, many of which impact commuter railroads.

FRA Emergency Order No. 31

On May 21, FRA issued Emergency Order No. 31, Notice No. 1 ("EO 31"), which required Amtrak to take immediate steps to prevent similar accidents in the future. In particular, EO 31 required Amtrak to (1) implement its version of PTC for northbound trains at the May 13th derailment site in order to enforce speed restrictions; (2) survey its main line track on the Northeast Corridor and identify for FRA curves where there is a reduction of more than 20 miles per hour in the approach speed; (3) within 20 days develop and submit for FRA's approval an action plan identifying appropriate modifications to Amtrak's PTC system, as well as milestones and target dates for implementation of those modifications; (4) upon approval by FRA, implement the action plan; and (5) within 30 days, install additional wayside signage alerting engineers and conductors of the maximum authorized passenger train speeds throughout the Northeast Corridor system.

Although the FRA's notice only covered Amtrak operations, several commuter railroads had already indicated they plan on voluntarily modifying their procedures to enhance speed restriction protections. *See* Ted Mann and Andrew Tangel, *Commuter Railroads Consider More Speed Curbs in Wake of Amtrak Crash*, Wall Street Journal, http://www.wsj.com/articles/fbi-finds-no-evidence-that-derailed-amtrak-train-was-hit-by-firearm-1431984123 (May 18, 2015) (mentioning Massachusetts Bay Transportation Authority, Southeastern Pennsylvania Transportation Authority, and New Jersey Transit). As this article goes to press, the passenger rail industry also awaits further directives that FRA has announced it will issue to address potential over-speed issues on all passenger rail corridors.

$200 Million Cap on Passenger Railroad Accident Liability Questioned

The accident also brought new focus on the federal statutory $200 million liability cap placed on passenger injuries in rail accidents. Section 161 of the Amtrak Reform and Accountability Act of 1997, Pub. L. 105-134, codified at 49 U.S.C. 28103, limits the damages that passengers may recover. Specifically, the statute provides that the "aggregate allowable awards to all rail passengers, against all defendants, for claims, including claims for punitive damages, arising from a single accident or incident, shall not exceed $200,000,000." 49 U.S.C. § 28103(a)(2). Some Democratic members of Congress have suggested increasing or removing the cap, although the chances of such legislation passing is low given general opposition from Republican members and even some Democrats. *See* Rachael Bade and Heather Caygle, *Congress Unlikely to Raise Cap on Amtrak Victims' Claims*, Politico.com, http://www.politico.com/story/2015/05/congress-amtrak-victims-claim-limit-118008.html (May 15, 2015).

Implications for Implementation of Positive Train Control

The Amtrak accident has also forced federal lawmakers to address the schedule for implementing PTC. PTC generally refers to integrated systems that continuously monitor train operations and automatically adjust speed to slow or stop a train to avoid accidents. Congress passed the Rail Safety Improvement Act of 2008 ("RSIA") immediately following the collision of a freight train and a commuter train in California that resulted in 25 fatalities. The RSIA mandates PTC on most freight rail lines that carry passenger or toxic-by-inhalation-hazard freight traffic. Under RSIA, the changes must be fully implemented by the end of 2015, but many freight and commuter railroads have clearly expressed their expectation that this deadline will not be met. Both Congress and the President have been considering the industry's calls to extend the deadline. However, in the wake of the Amtrak accident, Congressional appetite for loosening the PTC requirements has waned, at least momentarily. Some Democratic Congress members have also suggested seeking additional federal funding to support PTC implementation. *See* Maria Gallucci, *Amtrak Crash Philadelphia: House Democrats Seek $750 M In Funding For*

'Positive Train Control' In Wake of Deadly Amtrak Derailment, International Business Times, http://www.ibtimes.com/amtrak-crash-philadelphia-house-democrats-seek-750m-funding-positive-train-control-1930126 (May 19, 2015). PTC costs have been estimated at more than $13 billion over 20 years. In attempting to implement PTC, the railroad industry has encountered a number of difficulties, including technological standardization, infrastructure placement, and limitations in the digital bandwidth spectrum available for use.

Springboard for Discussion of Federal Surface Transportation Funding

Although early indications suggest that infrastructure defects were likely not the cause of the May 13th derailment, transportation funding advocates, including those in Congress, have used the heightened attention to try to focus public awareness on the crisis facing the Highway Trust Fund, which funds surface transportation, including public transportation projects. Congress has once again passed a short-term extension for authorization of the federal surface transportation until July 31, 2015, with further extension to the end of the year possible if no consensus is found on how to fund the Highway Trust Fund, which includes the Mass Transit Account. The continuing practice of Congress to provide only short-term extensions of existing funding programs has made it increasingly difficult for transportation agencies to plan and construct system improvements.

Amtrak President Announces Decision to Install Inward-Facing Cameras

Finally, Amtrak's President Joseph Boardman announced on Tuesday, May 26, that Amtrak is proceeding with the installation of inward facing cameras on trains in the Northeast Corridor and eventually throughout Amtrak's entire system. Although Amtrak has already been working with the FRA sponsored RSAC to implement this change, which the National Transportation Safety Board ("NTSB") has long called for, Mr. Boardman told reporters that he had decided it was time to move forward with this change.

PHMSA and FRA Issue Hazardous Materials Rail Tank Car Rule

On May 8, 2015, PHMSA and FRA published a Final Rule regarding enhanced tank car standards for "high-hazard flammable trains" ("HHFT"). *Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, 80 Fed. Reg. 26644 (May 8, 2015) (modifying 49 C.F.R. Parts 171, 172, 173). Under the rule, HHFTs are freight trains transporting at least 20 continuous tank cars, or trains with at least 35 total tank cars, loaded with a Class 3 flammable liquid, such as crude oil and ethanol. The Final Rule provides for more stringent safety features and manufacturing requirements for new rail tank cars, as well as new regulatory oversight, reporting, and restrictions on the transportation of highly flammable materials by rail. PHMSA and FRA's rulemaking responds to the tremendous increase in crude-by-rail shipments in past several years, and the consequential rise in railroad accidents involving flammable rail cargo, including domestically produced crude oil. PHMSA and FRA state that the rulemaking is intended to reduce the likelihood of these accidents, and to mitigate the consequences of such accidents should they occur. The Final Rule follows the notice of proposed rulemaking that PHMSA published on August 1, 2014 (79 Fed. Reg. 45015). The Final Rule goes into effect on July 7, 2015.

With respect to content, the Final Rule:

- Phases out existing (DOT-111 and CPC-1232) tank cars by May 1, 2025, for use in HHFTs, requiring them to be replaced or retrofitted according to a risk-based schedule or used in other configurations, including the continued shipment of crude oil and ethanol in trains that do not reach the HHFT threshold;

- Requires all new tank cars manufactured after October 1, 2015, to adhere to new tank car manufacturing requirements;

- Requires more robust testing and packaging of highly flammable materials;

- Reduces operating speeds for HHFTs in urban areas and when not equipped with a two-way end of train device or distributed power system;
  Phases in use of electronic braking; and

- Requires railroads to notify state or regional "fusion centers" (i.e. emergency information sharing centers, see http://www.dhs.gov/state-and-major-urban-area-fusion-centers) and respond appropriately to requests for information from State, local, and tribal officials regarding the routing of hazardous materials through their jurisdictions.

Many of the Final Rule's provisions codify a number of recent emergency orders regarding rail tank car safety. The Administration has been under pressure from Congress and local communities to address crude-by-rail safety issues. While the Final Rule requires more robust safety measures for trains meeting the definition of an HHFT, there is no requirement for improvements to tank cars use in trains comprised of a number of tank cars below the HHFT thresholds (i.e. 20 tank cars in a single block or 35 total tank cars per train).

While the Final Rule itself does not directly implicate commuter rail operators, its provisions do impact passenger operations sharing lines with freight traffic. The speed restrictions placed on trains within urban areas will likely impact the speed and efficiency of passenger operations in those areas, as the commuter rail industry indicated to PHMSA and FRA during the rulemaking process. Separately, the information sharing requirements should help commuter rail operators and local governments better coordinate responses to oil tank car accidents, but these public entities must be diligent and proactive in establishing lines of communication with the railroads and with state and local fusion centers.

STB Grants Petition Seeking Initiation of Rulemaking to Determine Definition of "On-Time Performance" Under PRIIA

Section 213 of PRIIA, codified at 49 U.S.C. § 24308(f), provides that the STB may, or must if petitioned by Amtrak, investigate the on-time performance of any intercity passenger trains where average performance is less than 80 percent, or where certain quality of service metrics are not met, for two months in a row. If its investigation concludes that the host railroad was the cause of the sub-par performance, the STB may award damages against the railroad payable to Amtrak.

On May 13, 2015, the STB granted a request from the AAR to initiate a rulemaking proceeding to define "on-time performance" for the purposes of Section 213." *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, STB Docket No. EP 726 (Service Date May 15, 2015). The AAR's petition and the STB's decision come while several Section 213 petitions filed by Amtrak against AAR members are pending before the STB (*see Nat'l Railroad Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Railway Co.*, STB Docket No. NOR 42134 (Service Date Jan. 16, 2015); *Nat'l Railroad Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, STB Docket No. NOR 42141 (Service Date Apr. 7, 2015)), and while the parties are fighting over a related PRIIA measure regarding service quality (Section 207) in the federal courts. *See U.S. Dep't of Transp. v. Ass'n of American Railroads*, 135 S.Ct. 1225, 1234 (2015) (remanding case to the D.C. Circuit for consideration of certain constitutional issues).

In its petition, the AAR argued that resolving the meaning of the term "on-time performance" would be a more efficient means of settling ongoing disputes with Amtrak, rather than the STB deciding piecemeal through the various Section 213 cases now pending. Amtrak opposed AAR's petition for rulemaking, arguing that the STB could provide a more precise response to issues regarding on-time

performance within the context of specific cases.

The STB's decision granting the AAR's rulemaking request found AAR's arguments persuasive, and instituted proceedings under 49 C.F.R. § 1110.2(e). The STB stated that it would issue a notice of proposed rulemaking and a procedural schedule in a subsequent decision.

The rulemaking is just one area of dispute between the freight railroads and Amtrak. Although the Supreme Court recently upheld the constitutionality of a separate PRIIA provision, Section 207, which provides for the establishment of metrics to judge quality of service for Amtrak that may be assessed under Section 213, its decision was narrowly tailored, and it remanded review of further issues regarding Section 213's constitutionality to the D.C. Circuit. *See U.S. Department of Transportation v. Ass'n of American Railroads*, 135 S.Ct. 1225 (2015).

While the STB's decision to institute a rulemaking on on-time performance does not impact commuter railroads directly, commuter rail authorities that share lines with Amtrak should nevertheless pay attention to these developments, as they will necessarily have an impact on all railroad operations using the same lines. While forcing freight railroads to prioritize passenger trains could possibly benefit commuter railroads, it may also put commuter trains in a worse position by prioritizing both Amtrak and freight over commuter rail schedules.

STB Holds MassDOT Is a Common Carrier Pursuant to Acquisition of Passenger Rights for Western Massachusetts Rail Line

A May 21 decision from the STB that examines the Board's jurisdiction over passenger rail operations in the context of a *State of Maine* transaction provides some further guidance to public agencies seeking to acquire passenger service rights in conjunction with other rail assets. Under the STB's *State of Maine* doctrine, public agencies may acquire a line's physical assets and underlying property interest from a rail carrier without becoming subject to the STB's jurisdiction if the rail carrier retains the exclusive, perpetual right to conduct common carrier operations on the line, as well as sufficient control to fulfill its common carrier obligation. In order to initiate a *State of Maine* proceeding to seek STB confirmation that no common carrier obligation has been transferred, the agency must file a notice of exemption from the acquisition, along with a motion to dismiss the notice of exemption for lack of jurisdiction.

In October, 2014, the Massachusetts Department of Transportation ("MassDOT") filed a notice of exemption and motion to dismiss relating to its acquisition of the physical assets and underlying property of a 36-mile railroad line extending from the Massachusetts-Connecticut border at Sheffield to Pittsfield in western Massachusetts (the "Line"). The underlying transaction involved an operating agreement with the rail carrier serving the Line and a property transfer from a non-carrier holding company affiliated with the operating railroad. MassDOT explained in its filings that it was acquiring the Line in connection with indefinite long-term plans to restore regional passenger service linking western Massachusetts to the New York City metropolitan area and the Northeast Corridor.

On December 24, 2014, the STB granted MassDOT's motion to dismiss its exemption regarding common carrier responsibilities for freight service over the Line. However, the STB requested additional information regarding the acquisition of passenger rail rights. Specifically, the STB asked why, given that the ultimate intended use of the Line would apparently be passenger rail service between New York City and western Massachusetts, MassDOT would not be engaging in interstate passenger service subject to STB jurisdiction. The STB also asked for clarification regarding whether the rail holding company was a necessary party to the proceeding. MassDOT subsequently filed a response indicating that it purposely sought to exclude its acquisition of passenger rights from the *State of Maine* transaction, and would seek any required STB authority for interstate passenger service at a later time when it chose to exercise its passenger rights on the Line. MassDOT further clarified that it also intended to use the Line in the foreseeable future to occasionally transport passengers in connection with civic and sporting

events, and argued that this use of the Line was excepted from the STB's jurisdiction under 49 U.S.C. § 10501(c)(2)(A) because it constituted "mass transportation."

On May 22, 2015, the STB issued a decision denying MassDOT's motion to dismiss its earlier filed notice of exemption for acquisition of passenger rights over the Line. *Massachusetts Dep't of Transp. – Acquisition Exemption – Certain Assets of Housatonic Railroad Co.*, STB Docket No. FD 35866 (Service Date May 22, 2015). With respect to jurisdiction over the transaction, the STB held that it was immaterial when MassDOT *exercised* its passenger rights; rather, the STB's authority was triggered when a non-carrier *acquired* a railroad line. Thus, MassDOT's acquisition of passenger rights for the Line was subject to the STB's jurisdiction and required Board approval or an exemption. As a result, the STB held that if MassDOT proceeded with the transaction, it would become a common carrier subject to the STB's jurisdiction. In order to avoid STB jurisdiction, MassDOT would need to restructure the transaction and seek additional relief from the STB. Furthermore, the STB also stated that MassDOT's use of the Line for "occasional" passenger service did not fall under the exception for mass transportation because that exception only covered *regularly scheduled* transportation services open to the public. However, the STB held that this occasional service would not be subject to the STB's authority because it would not, based on the information provided, constitute interstate service. Finally, the STB agreed with MassDOT that the holding company was not a necessary party because, based on MassDOT's supplemental filings, it had not obtained any common carrier interest when it originally acquired the property interest and assets associated with the Line from the operating carrier before re-selling them to MassDOT.

This decision indicates that public agencies acquiring rail lines pursuant to *State of Maine* transactions should carefully consider what its agreements state regarding rights with respect to passenger rail operations. If the line crosses state borders or even links significantly somehow with interstate passenger transportation, the STB may determine that it has jurisdiction over the transaction. Separately, the decision also clarifies that *occasional* passenger service is not covered by the mass transportation exception to the STB's jurisdiction.

FERC

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Pipeline Modernization Policy Statement

The Federal Energy Regulatory Commission ("FERC") adopted a policy statement on Cost Recovery Mechanisms for Modernization of Natural Gas Facilities ("Policy Statement").[1] The Policy Statement allows interstate natural gas pipelines to establish a surcharge or tracker mechanism to recover certain safety, environmental, or reliability capital expenditures made to modernize pipeline system infrastructure outside of a Natural Gas Act ("NGA") Section 4 rate case. Rather than instituting a specific set of rules, FERC established a framework for how it would evaluate pipeline proposals for the recovery of infrastructure modernization costs.

[1.] *Cost Recovery Mechanisms for Modernization of Natural Gas Facilities*, 151 FERC ¶ 61,047 (Apr. 16, 2015).

In order to establish such a surcharge or tracker mechanism, five guiding principles must be met. First, the pipeline's base rates must have been reviewed recently in either an NGA general section 4 rate proceeding or through a collaborative effort with customers. Second, the eligible costs must be limited to one-time capital costs incurred to modify the pipeline's existing system to comply with safety or environmental regulations issued by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration, the U.S. Environmental Protection Agency, or other federal or state government agencies, and other capital costs shown to be necessary for the safe or efficient operation of the pipeline. Third, the pipeline must design the proposed surcharge in a manner that will protect the pipeline's captive customers from cost shifts if the pipeline loses shippers or must offer increased discounts to retain business. Fourth, the pipeline must include some method to allow a periodic review of whether the surcharge and the pipeline's base rates remain just and reasonable. Finally, the pipeline must work collaboratively with shippers to seek shipper support for any surcharge proposal.

Pipelines and their shippers are able to negotiate which recovery method is appropriate for their specific systems. The Policy Statement also makes available, on a case-by-case basis, the recovery of reservation charge credits paid for disruption of primary firm service due to voluntary or mandatory system improvements. FERC noted that pipelines should have some relief from the payment of reservation charge credits if a modernization project unavoidably causes an outage of primary firm service.

The Policy Statement will take effect on October 1, 2015.

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PHMSA Issues Final Rule on Enhanced Tank Car Standards and Rail Operational Controls for Flammable Liquid Transport; Petitions for Review Filed by Industry, Environmental Groups, and Local Governments

On May 1, 2015, the U.S. Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a final rule imposing new specifications for rail tank cars used in high-volume flammable liquid service, new classification requirements for unrefined petroleum-based products, and operational restrictions for certain trains (Final Rule).

The primary purposes of the rule are to reduce the probability and consequences of accidents of trains moving large quantities of flammable liquid. PHMSA received comments from over 3,200 stakeholders during the last stage of the rulemaking process and published the Final Rule nine months

after issuing a Notice of Proposed Rulemaking (NPRM) in August 2014. PHMSA's rulemaking has occurred against the backdrop of a number of accidents involving crude oil unit trains in the U.S. and Canada, as well as pressure from Congress, the National Transportation Safety Board, and numerous industry stakeholders seeking regulatory clarity. PHMSA developed the new rules in coordination with the Federal Railroad Administration (FRA) and Transport Canada, which recently issued new safety rules for rail transport of flammable liquids in Canada.

The Final Rule was published in the Federal Register on May 8, 2015 and will become effective on **July 7, 2015**, with a series of phased implementation deadlines occurring over the next decade. The Final Rule supersedes some, but not all, of the emergency orders issued by DOT, PHMSA, and FRA since August 2013. As this article went to press, four Petitions for Review of the Final Rule had been filed – one by industry, one by local governments, and two by environmental groups. These are discussed in detail below.

Summary of Rule

High Hazard Flammable Trains

The Final Rule applies largely to High-Hazard Flammable Trains (HHFTs), defined as trains transporting 20 or more loaded tank cars of Class 3 flammable liquid in a continuous block, or 35 or more such cars in any configuration. The Final Rule provides a degree of flexibility beyond the NPRM, which had proposed a more sweeping threshold of 20-plus flammable liquid cars in any configuration. The Final Rule has been changed to capture higher-risk bulk quantities transported in unit trains, while excluding some lower-risk manifest trains.

Enhanced Braking

One of the most controversial aspects of the Final Rule appears to be the portion of the enhanced braking requirements related to Electronically Controlled Pneumatic (ECP) brakes. The Final Rule establishes two-tiered braking requirements based on risk. First, all HHFTs operating at speeds above 30 mph must be equipped with a two-way end-of-train device (EOT) or a distributed power (DP) braking system. These systems allow for faster brake applications across a train in the event of an emergency, and many railroads already use them for crude oil unit trains. This requirement is effective **July 7, 2015**.

Second, the Final Rule imposes an additional requirement on High-Hazard Flammable Unit Trains (HHFUT) (a new definition not proposed in the NPRM), defined as a train transporting 70 or more loaded cars of Class 3 flammable liquid. HHFUTs containing any Packing Group I material and operating at speeds above 30 mph must have Electronically Controlled Pneumatic (ECP) brakes **by January 1, 2021**. All HHFUTs operating above 30 mph, regardless of the Packing Group of the material, must be equipped with ECP brakes by **May 1, 2023**. Some railroads believe that ECP brakes provide little to no safety benefit compared to EOT or DP systems, and are expensive to implement. The government and many environmental groups disagree. The ECP brakes requirement has already been challenged in the Petition for Review filed by the American Petroleum Institute.

Speed Restrictions

HHFTs are limited to 50 mph, consistent with the speed restrictions issued by the Association of American Railroads (AAR) in its August 5, 2013 Circular No. OT-55-N. In High Threat Urban Areas (HTUAs), a designation established by the U.S. Department of Homeland Security (DHS) for certain large cities or groups of cities and surrounding areas including a 10-mile buffer zone. In such areas, the Final Rule limits HHFTs to 40 mph if any of the cars containing a Class 3 flammable liquid does not meet the new tank car design specification. DHS regulations include a table listing HTUAs. In the Final Rule, PHMSA elected the HTUA threshold, rather than the more aggressive options of a 100,000

population threshold or a uniform speed limit regardless of population. PHMSA estimates that the HTUA restriction affects approximately 2% of track miles. Speed restrictions are also a significant issue for the railroads, which assert that speed limits can have far-reaching effects on the rail network.

New Tank Car Specifications

New tank cars built for use in HHFT service after **October 1, 2015,** must meet the new DOT-117 specification, which includes the following requirements:

- Shell thickness: 9/16" minimum
- Tank material: TC-128, Grade B normalized steel with protective exterior coating
- Gross rail load: maximum 286,000 lbs.
- Head shield: full height; 1/2" thick
- Thermal protection: required to meet the performance standards specified in 49 C.F.R. § 179.18 (likely means thermal insulation is required)
- Pressure relief valve: reclosing pressure relief device required
- Jacket: 11 gauge A1011 steel (equivalent to 1/8"), with weather flashing and protective coatings
- Bottom outlet valve: handles removed or designed with protection systems
- Top-fittings protection: according to modern AAR standards (AAR's specification for Tank Cars, M-1002, appendix E, paragraph 10.2.1); Toxic by Inhalation Hazard-style rollover protection not required
- Brakes: EOT or DP (HHFTs); ECP brakes (HHFUTs) – see above.

The DOT-117 specification most closely resembles tank car Option #2 from the NPRM, except for the ECP brakes requirement. Tank cars in HHFT service may alternatively be built to the more flexible DOT-117P performance standard, which does not require specific shell thickness, head shield or jacket types. Instead, tank cars built to the DOT-117P specification must meet a series of impact tests designed to simulate the forces in a derailment.

Retrofit Specification

Existing DOT-111 (including CPC-1232) tank cars must be phased out or retrofitted according to the new DOT-117R specification for continued use in HHFT service, according to the timeline set forth below. The DOT-117R specification is the same as the DOT-117 new car specification discussed above, except for the following important differences:

- Shell thickness: 7/16" minimum
- Shell material: built with steel authorized under the regulations when constructed
- Top-fittings protection: existing protections acceptable; retrofit not required

Thus operators may continue to use many tank cars with shells less than 9/16", provided they are otherwise retrofitted in accordance with DOT-117R.

Retrofit Timeframes

Existing DOT-111 (including CPC-1232) cars used in HHFT service must be removed from this service or retrofitted by the following dates:

Packing Group I:	DOT-111 (non-CPC-1232; non-jacketed)*	**January 1, 2018**
	DOT-111 (non-CPC-1232; jacketed)	**March 1, 2018**
	DOT-111 (CPC-1232; non-jacketed)	**April 1, 2020**
	DOT-111 (CPC-1232; jacketed)	**May 1, 2025**

Packing Group II:	DOT-111 (all non-CPC-1232)	**May 1, 2023**
	DOT-111 (CPC-1232; non-jacketed)	**July 1, 2023**
	DOT-111 (CPC-1232; jacketed)	**May 1, 2025**
Packing Group III:	DOT-111 (all)	**May 1, 2025**

*By **January 1, 2017,** owners of non-jacketed DOT-111 cars in HHFT service must report the number of tank cars that they own or lease that have not yet been retrofitted.

This reporting requirement was not in the NPRM. In general, these retrofit timeframes allow more time, in some cases significantly so, to complete retrofits than the deadlines proposed in the NPRM.

Rail Routing and Notification

The Final Rule requires carriers transporting HHFTs to comply with the route analysis, routing, and notification requirements that currently apply to railroads transporting explosive, poisonous by inhalation, and radioactive materials. Carriers of HHFTs must perform a routing analysis that considers, at a minimum, 27 safety and security factors, and then select a route in according to the findings. Railroads must also notify state and local governments along HHFT routes regarding these rail movements. Carriers of HHFTs must complete initial route planning by **March 31, 2016**.

Classification: Sampling and Testing Requirements

The Final Rule imposes new sampling and testing requirements for the classification of "unrefined petroleum-based products." These requirements are not limited to HHFTs; they apply to any shipment (by rail, truck, etc.) that is governed by the DOT's Hazardous Materials Regulations (HMR). PHMSA developed these requirements in light of concerns that products extracted from the earth and not yet refined may exhibit variability (though they may have undergone initial processing). Examples of products covered by the rule are crude oil, raw-mix NGLs, lease condensate, and petroleum-based liquid and gas wastes and byproducts. PHMSA jettisoned the "mined gasses and liquids" definition from the NPRM, which commenters found confusing.

Offerors must develop a sampling and testing plan to ensure accurate classification. The plan must provide for sampling throughout the transportation chain, empirically-based sampling and testing frequencies, program quality control, annual program review, and certification and documentation. The Final Rule does not adopt the newly-issued API RP 3000 crude oil testing standard, but notes that API RP 3000 is largely consistent with the new regulations and may be used to satisfy the sampling provisions of the rule.

Harmonization with Canadian Regulations

Trains carrying flammable liquids operate on an integrated rail network and regularly cross the U.S. – Canada border, making harmonization of tank car specifications and certain operational rules critical. In the Final Rule, PHMSA observes that the HMR amendments have been harmonized as much as possible with Canadian requirements. The two main areas where the rules differ are braking requirements (ECP brakes not required in Canada) and a shorter Canadian retrofit timeline for non-jacketed, non-CPC-1232, DOT-111 tank cars in Packing Group I service (U.S. retrofit deadline: January 1, 2018; Canada retrofit deadline: May 1, 2017).

Analysis and Pending Litigation

If it withstands legal challenge, the Final Rule will likely require the expenditure of billions of dollars for retrofitting or replacement of thousands of rail tank cars and the installation of new braking technologies, and will likely result in reductions in train speeds. Some stakeholders have argued that the

cost-benefit analysis does not support the new requirements, particularly the ECP brake mandate. Others have argued that PHMSA's assumptions regarding retrofit shop capacity, new-build capacity, and the shift of cars into other service types are incorrect. Still others argue that the rules do not go far enough to reduce risks. HHFT speed limits may further congest the rail network and drive industry to put more trains on the tracks to compensate for lower speeds.

On May 11, the American Petroleum Institute filed a Petition for Review in the U.S. Court of Appeals for the D.C. Circuit, asking the Court to set aside and remand the provisions of the Final Rule that establish: the timetable for retrofitting tank cars used in HHFTs; the requirement and timetable for installing certain braking systems in HHFTs; and operational requirements for trains not meeting the retrofit or braking system requirements.

Environmental groups and local governments have also challenged the Final Rule. On May 13, the Village of Barrington, IL and the City of Aurora, IL filed a joint Petition for Review in the U.S. Court of Appeals for the Seventh Circuit. It asks the Court to set aside and remand the provisions of the Final Rule that: apply the enhanced tank car standards only to HHFTs; allow an "unreasonably long phaseout schedule" for DOT-111 tank cars; and for not going far enough in requiring railroads to provide information to emergency response personnel. On May 14, seven environmental groups filed a joint Petition for Review in the U.S. Court of Appeals for the Ninth Circuit. The environmental groups take issue in particular with the terms in the Final Rule that: allow tank cars retrofitted to the DOT-117R specification certain exceptions from the standard that applies to new tank cars (DOT-117); allow an "unduly long phase-out period" for DOT-111 tank cars; and apply the 40 mph speed limit only in HTUAs. The environmental groups also ask the Court to vacate and remand the notification provisions in the Final Rule for further notice-and-comment rulemaking. On May 15, Riverkeeper, Inc., filed a Petition for Review in the Second Circuit, making highly similar arguments as the Petition for Review jointly filed by the environmental groups on May 14.

The Final Rule does not resolve the continuing debate over the effects of product volatility on accident outcomes. There are ongoing "upstream" efforts at the state and federal level that seek to address unrefined product volatility. It is uncertain whether volatility findings collected in the future will confirm the approach taken in the Final Rule or result in more regulation.

It also remains to be seen how rail track maintenance and operational factors (cracked rails, wheel issues, operator error, etc.), which have played a role in a number of recent HazMat and passenger train accidents, will be addressed going forward. The costs associated with the Final Rule will likely affect the economics of crude by rail, particularly in the current low commodity price environment.

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Labor Relations Going Forward – Ways in Which Doctrinal Changes Are Changing Labor Relations Decision Making For the Union and Non Union Employer

Introduction

This article will review the key elements of what is shaping up to be a sea change in workforce management. These include the broadening concepts of "control" and "joint employer," the ways in which legislatures are embracing these concepts, the merging of remedies for discrimination and wage and hour claims and the potential for the labor contract grievance process to adapt.

Understanding the New Approach at the NLRB

The General Counsel of the National Labor Relations Board has, with innovation and intelligence, pursued aggressive expansion of the National Labor Relations Act to everyday human resources decisions. Recent actions apply joint employer concepts under the Act to rewrite the rule of franchise and subsidiary relationships in the retail food industry. Before that, the current NLRB was leading the way in applying long dormant concepts of employee rights to communications in the workplace to electronic communications. Most recently, the General Counsel has issued a memorandum applying these concepts to the day to day drafting of employee handbooks. See General Counsel Memorandum GC-15-4) (March 18, 2015) providing guidance under the NLRA in crafting an employee handbook. (www.apps.nlrb.gov/link/document.aspx/09031d4581b37135)

The new topic for many practitioners is how traditional but arguably dormant labor law rights define the worker employer relationship under Section 7 of the Act. Section 7 rights depend upon "concerted protected activity" and 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 unpredictable. Individuals can quickly sidestep the traditional business agent or human resources relationship. Neither union nor employer has the authority to silence a disgruntled employee who chooses to directly communicate to the workforce on his or her own. Indeed, a current case before the Supreme Court concerns whether a sexual harassment investigation can be kept confidential within a bargaining unit when employees object to that confidentiality being enforced.

The labor world is now looking with renewed interest at so-called minority bargaining units. In practice, this means that more than one union can compete for portions of the same workforce, allowing for subtrade disputes even where a basic trade contract is present, or give rise to unfair labor practices charges even on organized jobsites where individual stress points arise. The NLRB's new election rules will approve a unit of two, if that is what is requested, a dramatic change from the past made even more important under expedited hearing processes.

In the transportation industry, one international airport now requires successor employers to engage in a card check process with all unions wishing to negotiate an agreement. To accomplish this, an

individual union with a bargaining interest must pre-register with the airport and, if it does, they each are eligible to receive a list of employees to contact for representation purposes. Some have called this the first ever merger of card check with a "bridal registry." In trucking, class action lawsuits are close partners to Teamster organizing in the port shipping industry, long home turf for the 'independent contractor."

Direct involvement in setting labor standards by state or local government is not new either. What is less well known is that mandatory living wage standards were first introduced for airport vendors, such as shuttle services, who had contracts for servicing passengers at major airports.

Of course, the growth of other mandated benefits also is part of the picture. California has been a leading implementer of paid sick leave. The law exempts employees covered by a valid CBA, but only if the CBA expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees as well as final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.

The Union Contract and Grievance Process

Similar tensions are mirrored in many issues related to the scope of the grievance process in labor contracts as to which employees are covered when and to what degree.

One of the most well-known dichotomies entails the failure to grandfather union plans into the network of the ACA insurance exchange. This places great pressure on new hire/probationary employees who are often excluded from health plan eligibility while, at the same time, being nominally excluded from the grievance process.

There is substantial synergy between the ability of a probationary grievant to have a viable claim when they allege discrimination that may encourage the filing of unfair labor practices (by the employee or their union) to supplement their claim. While there is no absolute definitive answer as to whether a probationary employee has the right to grieve his/her termination on the basis on alleged discrimination—that determination will depend on the unique language of the Master Labor Agreement involved Though a vintage decision, consider Aerojet General Corp. and International Association of Machinists and Aerospace Workers, Lodge 946, 88 LA 786 (Herbert Oestreich, 1987) as a possible benchmark: Here the Arbitrator held that the sex-discrimination issue in a grievance protesting the discharge of a probationary employee was arbitral, because even though the contract exempted probationary employees from the normal "just cause" protections for discharge, the contract's non-discrimination clause nevertheless applied to both regular and probationary employees.

Changes in Enforcement Philosophy on "Control" of Third Party Workers and Contractors at the United States Department of Labor: Are You a "Fissured" Industry?

At the same time as the Board has advanced the concept of "joint employer" status based on control or work practices, wages and other conditions of employment, the United States Department of Labor, under the guidance of the new Administrator of the Wage and Hour Division, has introduced the enforcement concept of the "fissured employer" to how the DOL will look at who is a joint employer. As to contractors, subcontractors, independent contractors and staffing agencies, the changing workforce affects who is liable for whom, and why without respect to the separateness of individual companies and providers of personnel. The difference between the approach at the NLRB and the Department of Labor is that the DOL focuses on how the workforce itself has changed, including the growth of staffing agencies and professional employer associations (PEOs) as well as the routine use of independent

contractors. This model is what the DOL calls the "fissured" industry.

Legislatures at Work – Key Areas of Developing Interest with a Non Exclusive Focus on California

In the last legislative session, Sacramento enacted AB 1897 which imposes joint liability on labor contractors and client employers. AB 1897 defines "labor contractors" as any individual or entity that supplies a client employer with workers to perform the regular and customary work of a business, such as a staffing agency.

Heat Stress and Managing the Jobsite

Under the new California Heat Stress Rules, establishment, implementation and enforcement responsibilities are shared between general contractors and subcontractors. Cal-OSHA will cite for any provisions of a published plan that is found not to have been implemented on a jobsite so every heat illness plan needs to be vetted for not just compliance but how it is enforced as to the workers engaged side by side on the jobsite without regard to their individual employers.

Financial Responsibility

California is following the lead of the United States Department of Labor under the Fair Labor Standards Act in imposing oversight responsibilities on contractors arising out of the financial ability to perform of tiered employers or franchise operations.

Notwithstanding, the emerging growth of "know or should have known standards" on the financial capabilities of corporate relationships is a tricky concept because the standards for due diligence are open ended. (e.g., that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided.) This is even more important because combined with established FLSA enforcement process, the obligation to inquire can lead to personal liability under federal law for company ownership.

Industry Specific Innovation Regulations

California has seen the introduction and passage of legislation purporting to regulate wages and working on conditions in the refinery industry premised on authority asserted to reside in the Clean Air Act. Known nationally and colloquially as "SB 54", this legislation would have emergency responders checking payrolls against state established wage minimums if a regulated emission occurs. Illinois has seen similar legislative proposals introduced. In the midst of the growth of oil by rail transport, expansion of such concepts to rail transport is probably a "short line" trip in the future.

Conclusion

There is a real synergy between how different sources of law change the focus of legal decision making at the general counsel level. Good policies are a must and regular legal review a given. What is different, going forward, is the need to conduct those updates in the context of independent and novel rights arising in the modern and newly relevant traditional labor relations world.

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The Fifth Circuit Affirms Dismissal of Mexican States' Claims in Deepwater Horizon Litigation

The Fifth Circuit recently examined a district court's dismissal of claims asserted by three Mexican States arising out of the 2010 Deepwater Horizon oil spill. Veracruz, Tamalupas, and Quintana Roo (referred to as the "Mexican States") brought claims against the Deepwater Horizon Defendants ("defendants")–BP, Transocean, Haliburton, and Cameron—in the Western District of Texas seeking damages arising from the oil spill. These claims alleged negligence, gross negligence, negligence per se, violations of the Oil Pollution Act, private nuisance, and public nuisance. The Mexican States allege that they were damaged because, *inter alia*, they had to incur costs to monitor the spill, experienced diminished tourism, and suffered natural resources losses. These cases were consolidated. The summary judgment briefing submitted by the parties analyzed whether the long-standing rule articulated in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307-09 (1927), which precludes recovery for economic loss absent a proprietary interest in physically damaged property, barred the Mexican States' claims. After analyzing the Mexican States' interest in the property in question, the district court held that they lacked a sufficient proprietary interest and granted the defendants' motion for summary judgment.

The Fifth Circuit affirmed the district court's judgment. First, the court held that the *Robins Dry Dock* rule applied to the dispute. The court noted that the purpose of the rule is to limit the consequences of negligence to exclude "indirect economic repercussions" which can be "widespread and open-ended." The Mexican States argued that *Robins Dry Dock* should not apply because the rule traditionally applies to civil negligence. The Mexican States pointed out that BP and Transocean had pled guilty to federal criminal conduct in the U.S. The court rejected this argument because the only guilty plea dealing with intentional conduct related to obstructing a congressional investigation, which was not causally related to the oil spill itself. The criminal conduct at issue in the oil spill involved criminal negligence. After analyzing analogous case law in the First Circuit, the Fifth Circuit held that the *Robins Dry Dock* rule applied in cases of criminal negligence.

The court held that the Mexican States did not have a sufficient proprietary interest in the damaged property because they failed to establish that they owned the property. The court examined the Mexican Constitution, the Mexican federal statutory law, and state constitutions and determined that Mexico law identifies the Mexican federal government as the owner of the property that was allegedly damaged in the oil spill. The court recognized that, while the Mexican States have some authority to use or exploit the resources in question, they lacked the requisite control over the property in question to satisfy the *Robins Dry Dock* rule. The court further noted that the Mexican federal government filed a similar lawsuit arising out of the Deepwater Horizon oil spill in 2013 and that no substantive orders had yet to be issued in that litigation.

The Second Circuit holds that Recovery of Punitive Damage in Maintenance and Cure Actions is not Limited to Reasonable Attorney's Fees

In *Hicks v. Tug Patriot, Inc.*, 783 F.3d 939 (2d Cir. 2015), the Second Circuit Court of Appeals examined the scope of punitive damages in maintenance and cure actions. In that action, Ciro Charles Hicks ("plaintiff) alleged that he tore his rotator cuff aboard a tug while employed by Van Line

Bunkering, Inc. ("defendant"). The defendant agreed to provide maintenance and cure until plaintiff recovered or his condition was declared permanent. The defendant provided the plaintiff with a $15 per day per diem, despite the fact that his costs for food and lodging were approximately $70 a day. The plaintiff underwent surgery on his rotator cuff and was unable to return to work.

The defendant hired a private investigator to videotape the plaintiff and captured the plaintiff engaged in a limited range of motion. The defendant provided the videotape to plaintiff's doctor and told the doctor that plaintiff's work required only light lifting. Based on this information, the doctor determined that plaintiff could return to work and the defendant terminated the maintenance and cure payments. The plaintiff met with a different doctor, who advised that the plaintiff undergo further surgery and physical rehabilitation. After the maintenance and cure payments were cut-off, the plaintiff returned to work while still injured. The plaintiff experienced severe financial difficulties and ultimately brought suit against the defendant. He asserted claims against defendant alleging negligence under the Jones Act and the maritime doctrines of unseaworthiness and maintenance and cure. At trial, the jury found for the defendant on the negligence and unseaworthiness claims, but determined that defendant had failed in its duty to provide maintenance and cure because it paid the plaintiff an insufficient per diem and ultimately ended the required payments. The court awarded plaintiff compensatory damages, including pain and suffering damages. After finding that defendant's conduct was unreasonable and willful, the court awarded punitive damages and attorneys' fees.

On appeal, the Second Circuit examined two issues. First, the court found there was sufficient evidence for the jury to award pain and suffering damages based on the defendant's failure to provide maintenance and cure. Second, the court examined whether punitive damages in maintenance and cure actions are limited to an award of attorneys' fees. The court recognized that previous authority within the Second Circuit and Eastern District of New York had limited punitive damages for maintenance and cure to "the amount of reasonable attorneys' fees." The *Hicks* court rejected this approach. It recognized that the Supreme Court held in *Atlantic Sounding Co. v. Townsend,* 557 U.S. 404 (2009), that punitive damages were available when an employer willfully fails to pay maintenance and cure. In that case, the Supreme Court did not limit punitive damages to attorneys' fees. Further, the Second Circuit recognized that trial courts now routinely award punitive damages and reasonable attorney fees in a diverse array of litigation, including federal civil rights litigation and intellectual property litigation. The court held that there was no longer a basis to limit such damages in maintenance and cure actions, and affirmed the jury's verdict.

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ICCTA preemption of negligence claims against brokers doesn't extend to personal injury lawsuits.
Montes de Oca v. El Paso-Los Angeles Limousine Express, 2015 WL 1250139 (C.D. Cal. 2015)

Ms. Montes de Oca sued freight broker El Paso Los Angeles Limousine Express to recover for personal injuries (how and why, we don't know) in a California state court. The broker removed to the U.S. District Court for the Central District of California, claiming that ICCTA, per 49 USC §14501(c)(1), provides federal question jurisdiction and preempts the plaintiff's tort claims. In other words, El Paso-Los Angeles Limousine Express asserted that freight brokers can't be liable for personal injury claims based on state tort law theories.

Sound frivolous? Well, that's close to what a recent line of cases addressing cargo liability claims against brokers has held, a point the broker made in response to Ms. De Oca's motion to remand her case back to state court. Interpreting ICCTA's 49 USC §14501(c)(1) as preempting tort claims against brokers, cargo claimants have been forced to proceed based on contract theories.

While not finding the broker's position frivolous, the court cited precedents for the notion that federal courts are loath to find federal preemption when a plaintiff "invokes traditional elements of tort law." Personal injury matters are within that tradition. Also, ICCTA tracks the Airline Deregulation Act (ADA) in its preemption terms, and the Ninth Circuit has cautioned that "broad interpretation" of the statute outside its context would "effectively result in the preemption of virtually everything a transporter does." ICCTA, like the ADA, is intended to insulate the trucking industry from state regulation, specifically rates routes and services, but not immunize it from liability for personal injury. Cargo litigation could impact those goals; personal injury claims cannot. This matter goes back to state court where it belongs, subject to law that properly governs it.0

Regarding a forum selection clause, a Texas federal court isn't a "Texas court."
Blackwell v. Across U.S.A., Inc., 2015 WL 1879754 (N.D. Tex. 2015)

Shipping documentation apparently needs to provide very clear specification as to its intended court to be effective, at least in the Longhorn State. Just ask household goods carrier Across U.S.A., which issued a bill of lading to shipper Blackwell to haul his stuff from Texas to North Carolina. Blackwell filed suit against Across U.S.A. in a county court within Dallas, alleging the carrier engaged in some sort of "bait and switch" fraud that violated the Texas Deceptive Trade Practices Act. Across U.S.A. removed the action to the U.S. District Court for the Northern District of Texas, asserting Carmack governs and connotes federal jurisdiction.

Blackwell moved to remand, pointing to the bill of lading's forum selection clause, that provided that "suit shall and must be brought in circuit or county court in and for Dallas County"; that "the parties agree to submit themselves to the jurisdiction of the Texas Courts"; and that the "Shipper consents to jurisdiction in Dallas County, Texas …" The court agreed and remanded. First, there are no circuit courts in Dallas County, such that a county court is all that fits the first provision. Second, a Fifth Circuit decision holds that "[f]ederal district courts may be in Texas, but they are not *of* Texas," as they have their origin in Article III of the U.S. Constitution and federal statutes. Thus, the federal

court isn't encompassed by the clause "jurisdiction of the Texas Courts." Third, forum selection clauses generally are enforceable as written unless they're the result of fraud or overreaching; enforcement would deprive a party of a day in court; unfairness of law would deprive a party of a remedy; or enforcement would be against public policy. None of those were the case here

Across U.S.A. must abide by its own provision, and it gets to pay Blackwell's attorneys for the remand motion, the court ruling that these rules well enough established that the case wasn't the subject of a reasonable removal.

More than one motor carrier may be liable under Carmack for the same loss. *Walters Metal Corporation v. Universal Am-Can, Ltd.*, et al., 2015 WL 1880186 (S.D. Ill. 2015)

Six service providers were involved in the transport from Illinois to Texas of an oversize load of pipe spools belonging to shipper Walters Metal Corporation. While en route, the cargo was damaged in a bridge collision. We don't know which of the several truckers involved was running the truck at the time, but it doesn't much matter for purposes of the case.

One of the involved providers was Mason and Dixon Lines (MADL), which had issued a bill of lading to Walters. MADL filed a declaratory judgment action against Walters in the U.S. District Court for the Southern District of Illinois (the nature of the requested judgment isn't clear). Walters counterclaimed, in that action, alleging that MADL was a motor carrier, and was liable under Carmack and common law negligence principles. Walters subsequently settled out with MADL.

Why MADL was named in a second action involving several other defendant truckers we also don't know. In any event, the others moved to dismiss Walters' claims, asserting it had been established by Walters' own counterclaim in the earlier action that, hey, MADL was a motor carrier. Thus, the other providers urged, we can't be. In other words, because only carriers may be liable under Carmack, whatever the other defendants were, they're ostensibly immune from liability.

The problem with that argument is that it assumes only one entity may be a carrier of record subject to Carmack at a time. That's not the case, ruled the court. Per Carmack, anyone issuing a bill of lading is a potentially liable record, and Walters had alleged that four of the defendants had done so for this haul. The motion to dismiss was denied.

Demurrer affirmed based on Carmack's public authority defense. *Gibson v. United Parcel Service, Inc.*, 2015 WL 1850278 (Cal. App. 1 Dist. 2015)

Robert Gibson, under disputed circumstances, was said to be the shipper of a UPS parcel containing some 658 grand in cash. Police dogs barked their conclusion that the package smelled like dope. UPS had discovered the parcel's dubious contents through an audit in Sacramento before shipping it to destination in North Carolina. UPS turned it over to the California State Bureau of Narcotic Enforcement, which handed it off to the U.S. Attorney's Office.

Gibson sued UPS in a California state court, alleging a number of state and common law causes of action. In response, UPS filed a demurrer (in law-speak, a defendant's way basically of saying "so what" to a complaint, asserting that, at least as currently crafted, it must be dismissed because the allegations couldn't possibly lead to liability or an award of damages). The court agreed, and dismissed the complaint with leave to amend. Gibson took another stab at it with an amended complaint that alleged there was a mix-up of some sort within the Gibson household, leading to a family member shipping the wrong cargo. Uh-huh.

UPS demurred again, and this time the court agreed by dismissing the complaint without leave to amend. The California Court of Appeals agreed as well. If Carmack governs this matter, Gibson's

common law claims are preempted, and because the government had seized the cargo, he no longer held any possessory interest in the cargo for which he could assert a claim against UPS in the first place. And even if he did, Carmack's public authority defense would so clearly shield UPS from liability that the claim clearly would surely fail. There was some suggestion this shipment was intended to be by air freight, but even if that were the case, the preemptory effect of the Airline Deregulation Act, 49 USC §41713, would have similar effect.

Analysis of complex interaction between two entities leads to conclusion that insurer must pony up full MCS-90 value.
Park Insurance Company v. Lugo, et al., 2015 WL 1535791 (SDNY 2015)

Get out your pencil – you'll need it to diagram this one out. A rig, operated by driver Solano and owned by Sav-On Waste Services, was involved in a multivehicle collision in Pennsylvania that injured the Lugos and Youngs. Eco America Trucking Corp. was in the process of buying the rig from Sav-On at the time of the accident, and its registration had already been transferred to Eco. Eco also paid for the truck's fuel, maintenance and repairs.

The relationship between Sav-On and Eco was ambiguous. Sav-On hired owner operators and operated as a freight broker, and isn't registered with FMCSA as a motor carrier. Eco is an FMCSA-licensed motor carrier, and employed Solano. But Sav-On gave Solano credit cards to pay for fuel and repairs, and it collected payment of freight charges from shippers. Record keeping by all concerned was shoddy, as were memories about who actually paid the driver his wages.

Park Insurance Company insured Sav-On in a policy that covered the rig involved in the accident. Park's policy had a coverage ceiling of $500,000, but included an MCS-90 Endorsement certifying coverage up to $750,000 that would be applicable to motor carrier liability resulting from bodily injury or property damage (FMCSA regs require motor carrier coverage to that extent).

When the Lugos and Youngs made claims for their extensive damages, Park brought an interpleader action in the U.S. District Court for the Southern District of New York, seeking to deposit with the court, and have its liability limited to, about 455 grand ($500,000 less expended costs). Interpleader is a legal mechanism whereby a party that concedes it's liable for a certain amount, but doesn't know to whom, can deposit the amount of its conceded liability with a court, naming those potentially entitled to the proceeds as defendants. If the court agrees the amount deposited is all the "plaintiff" depositor should owe, then the "defendant" claimants are left to fight out who gets how much of the deposit, and the depositor is done with it with no further exposure.

At issue here was whether or not Sav-On was a motor carrier. If it was, then the MCS-90 Endorsement kicks in, and Park can't get off the hook for less than $750,000. Park thought Eco should be the motor carrier, arguing Sav-On was just the lessor of a truck to Eco. The court didn't see it that way, and granted interpleader subject to a $750,000 deposit. Sav-On's activities in controlling the truck's activities and collecting freight charges, along with the ambiguities as to which entity paid Solano, suggested motor carrier activities. And if Sav-On didn't think it was motor carrier, why did it procure the MCS-90 Endorsement?

An unsustainable cargo claim poster child.
Northrich Company v. Group Transportation Services, Inc. and FedEx Freight, Inc., 2015 WL 1291447 (N.D. Ohio 2015)

Here's a shipper that just didn't get things right, in a claim that shouldn't have been brought. Northrich was a representative of manufacturers of HVAC products. It engaged broker Group Transportation Services (GTS) to arrange interstate transit of a load of three heat exchangers, which it claimed carrier FedEx delivered damaged. The shipper sued GTS and FedEx in the U.S. District Court for the Northern District of Ohio, and after discovery closed, was met with a barrage of the defendants' motions for summary judgment.

GTS made the brokers-aren't-liable-for-cargo-they-didn't-touch argument, and Northrich responded with a claim that GTS was FedEx's agent, and therefore was within Carmack's purview of potentially liable entities. That sounds like a reasonable position if you have evidence to back it up. Northrich didn't. Coming into court with empty hands and claiming you think somewhere there's a contract between the two defendants just doesn't cut it. GTS was dismissed out.

In its motion, FedEx first argued lack of standing based on the absence in any bill of lading of Northrich as a shipper of record. In fact, the shipper itself said it never saw a bill of lading, "which, in itself, militates against Plaintiff's right to recover under the Carmack Amendment." The bill of lading attached to the shipper's briefing didn't identify Northrich anywhere. The court put it best: "After consideration of the relevant authority, the Court is unable to find any decision which explains how a party that is not the shipper; that is not listed on, or a party to, the bill of lading; that did not possess the bill of lading; that did not negotiate with the carrier; and that was not the receiving party of the shipment, has standing to sue for damage to the cargo under the Carmack Amendment."

But even if Northrich had standing, it never got off home base for a Carmack claim. There was no evidence of good order and condition at time of tender. The shipper pointed to bill of lading language confirming the cargo was "properly classified, described, packaged, marked and labeled," but that's a far cry from an indication of its condition. In any event, a bill of lading "is not necessarily prima facie evidence of that condition." Northrich goes home empty handed.

RAILROADS

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Decisions of the Surface Transportation Board From 2014 and 2015

This article profiles proceedings at the Surface Transportation Board (STB or Board) from Summer 2014 and through Spring 2015 in three areas: Ex Parte proceedings, passenger rail transportation, and rate cases. STB proceedings involving preemption under the ICC Termination Act (ICCTA) were discussed in the *Railroads* article in the November 2014-February 2015 issue of *Association Highlights*. The *Railroads* article in the March-April 2015 issue of *Association Highlights* focused on judicial decisions impacting the railroad industry.

EX PARTE PROCEEDINGS

The STB Has Scheduled Two Hearings This Summer In Ex Parte Proceedings

The Board scheduled a hearing for June 10, 2015, to "further examine issues related to the accessibility of rate complaint procedures for grain shippers. *Rail Transp. of Grain, Rate Regulation Review*, STB Docket No. EP 665 (Sub-No. 1) (STB served May 8, 2015). The Board also scheduled a two-day hearing for July 22 and 23, 2015, to "further examine issues raised in Docket No. EP 722 related to railroad revenue adequacy, and issues raised in Docket No. EP 664 (Sub-No. 2) on how the Board calculates the railroad industry's cost of equity capital." *R.R. Revenue Adequacy*, STB Docket No. EP 722 & *Petition of the W. Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the*

Multi-Stage Discounted Cash Flow Model in Determining the R.R. Industry's Cost of Equity Capital, STB Docket No. EP 664 (Sub-No. 2) (STB served May 8, 2015).

The Board Instituted a Rulemaking to Define "On-Time Performance" Under Section 213 of PRIIA

The Board instituted a rulemaking "to define on-time performance for purposes of PRIIA Section 213." *On-Time Performance Under Section 213 of the Passenger Rail Investment & Improvement Act of 2008*, STB Docket No. EP 726, at 5 (STB served May 15, 2015). The Board noted that "there is no longer a judicial decision in effect holding Section 207 unconstitutional" because the Supreme Court vacated the D.C. Circuit's decision in *DOT v. AAR*, 135 S. Ct. 1225 (2015). The Board further stated that the "Supreme Court's remand for consideration of other constitutional challenges to Section 207 means that the provision remains subject to an uncertainty that we must consider in addressing the proceedings before us." EP 726, at 3. The Board "conclud[ed] that adjudication of Amtrak's complaints under the present circumstances should include analysis under a definition of on-time performance developed by the Board pursuant to Section 213." *Id*. The Board stated that it "intends to issue a notice of proposed rulemaking and a procedural schedule in a subsequent decision." *Id*. at 5.

The Board Adopted a Cap for Relief of $4 Million in Three-Benchmark Cases

The Board resolved an issue involving the Board's decision to increase the cap for relief in Three-Benchmark rate reasonableness cases from $1 million to $4 million. *Rate Regulation Reforms*, STB Docket No. EP 715, at 2 (STB served Mar. 13, 2015). This proceeding was on remand from the D.C. Circuit. The Court "found that the Board had not adequately addressed the double-count argument" advanced by CSX Transportation, Inc. (CSX) and Norfolk Southern Railway Company (NS). *Id*. at 2. The Court "remand[ed] the matter back to the agency because 'the Board may be able readily to cure a defect in its explanation.'" *Id.* (quoting *CSX Transp., Inc. v. STB*, 754 F.3d 1056, 1066 (D.C. Cir. 2014)).

On remand, in December 2014, the Board "acknowledged the double count … [but] explained that even correcting for this double count, a relief cap of $4 million for Three-Benchmark cases was still appropriate…." *Id*. The Board requested comments on its "intended resolution of the double-count issue." *Id*. In its March 2015 decision, the Board decided to "maintain a relief cap of $4 million for Three-Benchmark cases." *Rate Regulation Reforms*, STB Docket No. EP 715, at 2 (STB served Mar. 13, 2015).

The Board Proposed Rules Requiring Class I Railroads to Report Data

The Board initially collected data from Class I railroads on a temporary basis. On October 8, 2014, the Board announced that it would collect from Class I railroads "weekly reports on an interim basis, containing specific performance data …. [including] weekly average train speeds, weekly average terminal dwell times, weekly average cars online, number of trains held short of destination or scheduled interchange, and loading metrics for grain and coal service, among other items." *U.S. Rail Serv. Issues—Data Collection (Interim Data Order)*, STB Docket No. EP 724 (Sub-No. 3), 2014 WL 5092926, at *4 n.6 (STB served Oct. 8, 2014). The Board noted that it was collecting data "on a temporary basis" and that it would "initiate a rulemaking proceeding in the near future to determine whether to institute permanent data reporting requirements…." *Id.*

On December 30, 2014, the Board proposed rules to be codified at 49 C.F.R. §§ 1250.1-1250.3 that would require Class I railroads and the Chicago Transportation Coordination Office (CTCO) "to report certain service performance metrics on a weekly basis." *U.S. Rail Serv. Issues—Performance Data Reporting*, STB Docket No. EP 724 (Sub-No. 4), 2014 WL 7405860 (STB served Dec. 30, 2014). The Board stated that its "proposed reporting requirements are based on and include those contained in the *Interim Data Order*" with some modifications. *Id.* at *3. The Board "invite[d] public comments to

determine whether to establish new regulations for permanent reporting and to receive constructive input to revise, as necessary, and improve the existing data reporting structure." *Id.* at *2. The Board stated that "proposals for new reporting items should take into account whether they may be obtained from data likely maintained by railroads in the ordinary course of business." *Id.* at *6.

The Board Denied WCTL's Request for a Coal-Specific Service Recovery Plan

The Board denied Western Coal Traffic League's (WCTL) request to order BNSF Railway Company (BNSF) to prepare a "coal-specific service recovery plan." *U.S. Rail Serv. Issues*, STB Docket No. EP 724 (STB served Dec. 30, 2014). The Board stated that since it "is not requiring the service recovery plan enforcement requested by WCTL, we need not reach a conclusion on BNSF's legal objections to that remedy." *Id*. at 7. Although the Board denied WCTL's request, the Board did "direct BNSF to provide specific information with regard to its coal service contingency planning." *Id.* at 6. Specifically, the Board directed BNSF "to provide to the Board its contingency plans for addressing any such shortfalls, including a detailed description of the steps it takes to identify coal-fired plants at critical levels and to remedy acute shortages in a timely fashion. BNSF's response should address equipment, infrastructure, and personnel resources used to respond to such situations." *Id*. BNSF submitted its description of contingency plans on January 29, 2015.

The Board Denied a Petition to Institute a Rulemaking Involving Summaries of Agricultural Contracts

The Board denied a petition to "institute a rulemaking proceeding to exempt railroads as a class from the requirement at 49 U.S.C. § 10709(d)(1) to file agricultural transportation contract summaries." *Petition of Norfolk S. Ry. Co. & CSX Transp., Inc. To Institute A Rulemaking Proceeding To Exempt Railroads From Filing Agricultural Transportation Contract Summaries*, STB Docket No. EP 725, 2014 WL 3929890, at *1 (STB served Aug. 11, 2014). The Board denied the request to institute a rulemaking, explaining in part that "Petitioners [NS and CSX] claim that the contract summary filing requirements is unduly burdensome, but their submission does not demonstrate that the statutory requirement is particularly burdensome to them, much less the railroad industry." *Id.* at *4.

Vice Chairman Miller concurred. She stated that while the "proper course of action here is to continue to require rail carriers to submit the agricultural contract summaries," she "understand[s] why CSX and NS may feel that the summaries are of limited use." *Id.* at *5 (Miller, concurring). She stated that she will "work with the Board staff to make sure that these summaries are provided to our stakeholders in a more useful format and that the requirements are adhered to." *Id.*

PASSENGER RAIL TRANSPORTATION

The Board Granted an Exemption to Rocky Mountaineer for Its Rail Passenger Tourist Operations From Canada to Seattle Using Amtrak Train and Engine Crews

The Board granted a petition for exemption filed by Great Canadian Railtour Company Limited d/b/a Rocky Mountaineer to "exempt Rocky Mountaineer from Subtitle IV, except for those provisions specifically excluded from exemption by statute." *Great Canadian Railtour Co. Ltd d/b/a Rocky Mountaineer – Petition for Exemption From 49 U.S.C. Subtitle IV*, STB Docket No. FD 35851, at 1 (STB served June 3, 2015). The Board found that Rocky Mountaineer's luxury passenger service between Canada and Seattle is "transportation" by a "rail carrier" subject to STB jurisdiction. The Board found that "regulation by the Board is not necessary to carry out the [rail transportation policy of 49 U.S.C. § 10101]." *Id*. at 4. The Board limited its exemption to the operations described in the petition, which the Board described as giving Rocky Mountaineer the "right to operate its excursion trains, using Amtrak train and engine crews, on any rail line where the host carrier will allow it to operate." *Id*. at 5.

The Board envisioned that an exemption would allow Rocky Mountaineer to "enter and exit passenger routes without the need for regulatory approval." *Id*. The Board emphasized that the exemption "does not extend to any new activities, or new types of operations or services, that Rocky Mountaineer may offer in the future or to any service offered in conjunction with any carrier other than Amtrak," meaning that "Rocky Mountaineer would need to seek prior Board approval in such situations." *Id*.

The Board Granted an Exemption to Pullman Sleeping Company for its Luxury Rail Passenger Cars Attached to Amtrak Trains Pulled by Amtrak Locomotives

The Board granted a petition for exemption filed by the Pullman Sleeping Car Company, LLC for "Pullman's operations, as described in the petition, from Subtitle IV, except for those provisions specifically precluded from exemption by statute." *The Pullman Sleeping Car Company, LLC—Petition for Exemption From 49 U.S.C. Subtitle IV*, STB Docket No. FD 35738 (STB served Feb. 5, 2015). The Board found it has jurisdiction over Pullman's operations between New Orleans and Chicago because those operations constitute "transportation" by "rail carrier." *Id*. at 2-3. The Board found that "regulation by the Board is not necessary to carry out the [rail transportation policy of 49 U.S.C. § 10101." *Id*. at 4. The Board explained that "[r]equiring Pullman to come to the Board for authority each time it proposes a new route would be an unnecessary burden." *Id*. The Board stated that the exemption "applies only to Pullman's operations as described in the petition (i.e., passenger railcars attached to Amtrak trains providing passenger rail service) and does not extend to any new activities, or new types of operations or services, that Pullman may offer in the future or to any service offered in conjunction with any carrier other than Amtrak." *Id*.

Amtrak Has Filed Two Cases Under Section 213 of PRIIA Involving On-Time Performance of Amtrak Trains

One proceeding involves the on-time performance of Amtrak trains operating on rail lines of Canadian National Railway Company (CN). Amtrak filed a petition in January 2012 asking the Board to "initiate an investigation pursuant to Section 213 of PRIIA,49 U.S.C. § 24308(f), regarding the alleged 'substandard performance of Amtrak passenger trains' on [eight] rail lines owned by CN." *Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry. Co.*, STB Docket No. NOR 42134, at 2, 2014 WL 7236883 (STB served Dec. 19, 2014). Section 213 states, "'If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters … the Surface Transportation Board … may initiate an investigation, or upon the filing of a complaint by Amtrak …, the Board shall initiate such an investigation ….'" *Id.* at *3 (quoting 49 U.S.C. § 24308(f)(1)).

In a 2-1 decision, the Board granted Amtrak's motion to amend its complaint against CN to challenge service on the Illini/Saluki route between Chicago and Carbondale, Illinois. *Id.* at *1. The majority considered "whether the Board may investigate the Illini/Saluki service's potential failure to achieve 80-percent 'on-time performance' under Section 213 of PRIIA in the absence of an operative definition of 'on-time performance' under Section 207 of PRIIA [] due to the D.C. Circuit's decision …. holding Section 207 of PRIIA unconstitutional." *Id.* at 1-2 (citing *Ass'n of Am. R.R. v. DOT*, 721 F.3d 666 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2865 (June 23, 2014) (No. 13-1080)). Section 207 provides that the "'[FRA] 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.* (quoting PRIIA, Pub. L. No. 110-432, 122 Stat. 4916 (codified at 49 U.S.C. § 24101 note)). The majority concluded that "the invalidity of Section 207 does not preclude the Board from construing the term 'on-time performance' and initiating an investigation under Section 213 if [the Board] determine[s] that the on-time performance with respect to Amtrak's Illini/Saluki service has fallen below 80 percent for two or more consecutive calendar quarters." *Id.* at *8.

Commissioner Begeman dissented. She stated, "I believe the Board would best fulfill its obligations under the law by initiating a rulemaking to establish clear standards by which on-time performance cases could fairly be processed … *[a]ssuming* Section 213 of [PRIIA] is severable from the Section 207 provisions currently under review by the U.S. Supreme Court." *Id.* (Begeman, dissenting) (emphasis in original).

As discussed in the *Railroads* article in the March-April 2015 issue of *Association Highlights*, the Supreme Court issued its decision in *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1232-33 (2015), and remanded to the D.C. Circuit. CN filed a petition for reconsideration of the Board's December 2014 decision, which Amtrak has opposed.

Another proceeding involves Amtrak's request that the "Board initiate an investigation of alleged substandard performance of Amtrak's Capitol Limited service between Chicago, Ill., and Washington, D.C." *Nat'l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd.*, STB Docket No. NOR 42141, at 1 (STB served Apr. 7, 2015) (*April 7, 2015 Decision*). The Board directed the parties to participate in mediation under 49 C.F.R. § 1109.3. *April 7, 2015 Decision*, at 2. CSX and NS asked the Board to "refer the parties to mediation," and Amtrak opposed the requests. *Id.* at 1. The Board explained that under the regulation, if a party "to the mediation does not voluntarily consent to mediation, the Board will not hold the underlying proceeding in abeyance and statutory deadlines will not be tolled." *Id.* at 2. The Board stated that "the proceeding will not be held in abeyance at this time … [b]ecause Amtrak has not voluntarily consented to mediation here." *Id.*

The Board Authorized Construction of the High-Speed Rail Segment From Fresno to Bakersfield

In a split decision, a majority of the Board granted an exemption authorizing the California High-Speed Rail Authority (CHSRA) to construct a segment of the proposed high-speed rail line from Fresno to Bakersfield. *Cal. High-Speed Rail Auth.—Constr. Exemption—In Fresno, Kings, Tulare, & Kern Counties, Cal.*, STB Docket No. FD 35724 (Sub-No. 1), 2014 WL 3973120, at *1 (STB served Aug. 12, 2014). The majority granted CHSRA's petition for exemption "subject to various environmental mitigation conditions, including: (1) construction of the route designated by FRA as environmentally preferable, (2) compliance with the mitigation imposed by FRA …, and (3) compliance with three additional environmental conditions recommended by the [Office of Environmental Analysis (OEA)]." *Id.* at *2.

Commissioner Begeman dissented. She stated that "[e]ach segment of this project, including its financing, merits the Board's thorough examination, which has not and cannot occur under the exemption process." *Id.* at 23 (Begeman, dissenting).

RATE CASES

The Board Decided the Approach for Reinstituting the Rate Prescription in AEPCO's Rate Case

On May 14, 2015, the Board issued a decision involving the approach for reinstituting the rate prescription in *Arizona Elec. Power Coop., Inc. v. BNSF Ry. Co. & Union Pac. R.R. Co.*, STB Docket No. NOR 42113 (STB served May 14, 2015). This proceeding concerns the reasonableness of rates established by BNSF and UP for the transportation of coal to AEPCO's generating station near Cochise, Arizona. The Board found in November 2011 that the rates were unreasonable and "prescribed the maximum lawful rate that the carriers could charge…." *Id.* at 2. The Board found in January 2012 that "changed circumstances relating to the 2010 purchase of [BNSF] by Berkshire Hathaway, Inc. [ ] justified reopening this proceeding …. [and] temporarily lifting the prescriptive effect of the rate prescriptions in this case." *Id.* at 1, 2. In its May 2015 decision, the Board addressed disputes between the parties involving the approach to reinstitute the rate prescription. The Board found that the "prescriptive effect of the rate prescription in this proceeding is reinstituted through 2013." *Id.* at 10. The Board stat

ed that it "will require the use of the corrected URCS [without the acquisition premium] for each year the data are available. For 2010, 2011, and 2012, the parties are directed to use the corrected BNSF URCS for each year; for 2013, the parties are directed to use the current BNSF URCS, which is for 2013." *Id*. at 5, 7, 10. The Board further stated that the parties should "use the corrected Western Region URCS, which incorporates the corrected BNSF URCS, for each year to calculate the rate prescription for 2010-2012…." *Id*. at 10. For years 2014 through 2018, the Board stated that the "prescriptive effect of the prior rate order remains temporarily lifted," and it "instructed [each party] to continue to keep account of amounts paid during the pendency of the reopening—in accordance with the parties' agreement to make the party/ies whole at the conclusion of this reopening, with respect to the amounts paid during the interim." *Id*. The Board found that "[f]rom 2014-2016, when each year's URCS, including the asset markup becomes available, the Board will prescribe the rate for that year" and that "[o]nce the asset markup is fully incorporated, and the 2016 BNSF URCS is available, the Board will reinstitute the rate prescription for 2017-2018." *Id*. at 9.

Consumers Energy Challenged The Reasonableness of Rates for Transportation of Coal

In January 2015, Consumers Energy Company challenged the reasonableness of CSX's rates for the transportation of coal in unit trains to Consumers' generating station near West Olive, Michigan. *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. NOR 42142, at 1 (STB served Apr. 27, 2015). Consumers alleged that CSX "possesses market dominance over the traffic and that CSXT's rates are unreasonable under both the Stand-Alone Cost constraint and the Revenue Adequacy constraint." *Id*. CSX moved to dismiss Consumers' Revenue Adequacy claim and filed an answer. This motion is pending before the Board. In its April 2015 decision, the Board granted the parties motions to withdraw their respective motions to compel responses to discovery requests.

The Office of Proceedings Granted a Petition to Hold the Western Fuels/Basin Rate Case In Abeyance

On January 30, 2015, the Office of Proceedings granted a joint petition to hold the proceeding in abeyance. *W. Fuel Ass'n, Inc. & Basin Elec. Power Coop., Inc. v. BNSF Ry. Co.*, STB Docket No. NOR 42088, at 1 (STB served Jan. 30, 2015). In this proceeding, Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. challenged the reasonableness of BNSF's rates for transportation of coal from the Powder River Basin to Laramie River Station at Moba Junction, Wyoming. In the joint petition to hold the case in abeyance, the parties stated that they have "reached a preliminary settlement agreement that calls for dismissal of the case and vacation of the rate prescription that is the subject of the remand" and that the "agreement is contingent upon the Parties' development and execution of a rail transportation contract." *Id*.

Surface Transportation Board,
Acting Chairman

Deb Miller

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