ASSOCIATION HIGHLIGHTS

Introduction

When we think of the heavy snow and unusual cold that has characterized this winter for parts of the country, we often do so in terms of how it affected our own lives. We've all experienced some really bad commutes and other forms of discomfort. However, the kind of extreme weather that many of us have experienced this winter also has broader economic implications, as we learned last year when first quarter economic numbers fell short of expectations due to the 2014 polar vortex event. By one recent estimate in the Boston Business Journal (and the folks in Boston should know a little something about this), a one-day snow-related shutdown in 2015 might cost the economy of that state as much as $265 million, while the entire impact of his winter's weather on Massachusetts surely can be measured in the billions.

A chunk of these losses is no doubt the result of transportation-related cancellations or delays – trucks and railroads that could not make deliveries, transit vehicles stuck in yards, and airplane flight cancellations and associated lost revenues. A cost we have not yet fully seen is more road deterioration caused by heavy salt use. Hopefully, spring will bring not only better weather, but also a new highway reauthorization bill that will provide new funding for road maintenance and improvement. May brings with it the funding deadline that Congress needs to address (current funding runs out on May 31), as well as the promise of warmer temperatures and (maybe) the return of bare ground to our friends in Boston.

You don't have to wait until May, however, to enjoy this special, double edition of *Highlights*. While technical issues held up publication of our year-end edition, the articles here are all timely and worthy of your attention. Among other cases he describes, our motor carrier editor discusses cases that explore when a broker might be liable for loss and damage (in this case for transportation of a 1972 Camaro), when a broker might not be liable for an accident involving a carrier it hired and when a broker might be protected from liability by federal preemption. On commuter rail, our authors describe the latest pronouncements coming out of FTA, FRA and other agencies on diverse matters such as expanded categorical exclusions from NEPA review; ADA compliance for transit operators; and the dispute now at the Supreme Court over standards for on-time passenger train performance. Our railroad article is heavy on STB cases addressing preemption of state and local law in a variety of different circumstances, ranging from local air quality rules sought to be incorporated into a State Implementation Plan; to permitting and pre-clearance requirements in connection with planned new rail facilities; to trespass, negligence and inverse condemnation claims arising from the flooding of property allegedly caused by rail track design and maintenance.

Our maritime editor explores, among others, a case that holds that punitive damages are not available under the Jones Act or general maritime law of unseaworthiness and another case that holds (contrary to the majority rule) that a cruise line can be held liable for the negligence of medical personnel. Speaking of getting sick, our aviation editors discuss some recent case law in which passengers or their estates try (unsuccessfully as it turns out) to sue airlines for inadequate medical care or failure to divert when illness strikes during a flight. And in the strangest case discussed in this edition, they also discuss a case in which a party that wrongly received a package containing marijuana, followed by a visit from some unsavory characters, sued Federal Express, only to have the suit dismissed on preemption grounds.

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Our labor editor describes two new laws that have emerged from the left coast, one of which is San Francisco's version of the Affordable Care Act and the other of which addresses paid sick days in California. As he notes, "what happens in California never stays in California." Our new Hazmat, Safety and Security editors, Athena Kennedy and Robin Rotman from Van Ness Feldman (welcome!) address the long-pending and long-awaited

PHMSA rulemaking on crude oil transportation by rail, as well as new North Dakota regulations on Bakken crude, while Comings and Goings addresses recent coming and goings, including the "going" of former Chairman Elliott of the STB, who may be "coming" back to the STB in the near future.

Happy reading!

David H. Coburn
Editor-in-Chief

AVIATION

John Maggio
Condon & Forsyth LLP
New York, NY 10036
(212) 894-6792
jmaggio@condonlaw.com

Evan Kwarta
Condon & Forsyth LLP
New York, NY 10036
(212) 894-6814
ekwarta@condonlaw.com

Two U.S. District Courts Grant Judgment to Defendant Airlines in Failure to Divert Cases Arising Under the Montreal Convention

As most readers know, liability issues for injuries sustained by a passenger on a roundtrip international flight from the United States are governed by an international treaty known as the Montreal Convention. In two recent cases decided by U.S. District Courts, passenger-plaintiffs sought damages under the Montreal Convention for injuries stemming from medical emergencies that arose on board international flights. Both passenger-plaintiffs alleged that the airlines' inadequate responses to their medical conditions constituted an "accident" under Article 17 of the Montreal Convention. In both cases, the courts found that each crew's response to the on board medical incident was in accordance with the airline's respective policies and procedures and therefore did not constitute an "accident" as that term is used in the Montreal Convention. Accordingly, both courts granted judgment to the defendant airlines.

In *Singh v. Caribbean Airlines Limited*,[1] the plaintiff-passenger and his sister were passengers on board a Caribbean Airlines flight from Trinidad to Miami. Approximately one-and-one-half hours into the flight, the sister noticed that the plaintiff was not feeling well and called a flight attendant. One of the flight attendants evaluated the plaintiff-passenger, and agreed with the sister that the passenger was having a stroke, although the head flight attendant disagreed. Nonetheless, consistent with the airline's procedures, the lead flight attendant notified the cockpit that there was an ill passenger who was being monitored.

A short time later, the plaintiff vomited and his left side appeared paralyzed. Oxygen was administered and the cockpit was informed that the situation was serious. The cockpit crew then contacted an on-call doctor via radio frequency and relayed information relating to the passenger's background

1. --- F. Supp. 3d ---, 2014 WL 4953246 (S.D. Fla. Sept. 18, 2014).

and condition. The flight crew also used the on board intercom system to page for any doctors who might be on board. A second-year medical student responded, examined the plaintiff-passenger and told the flight attendants that he likely was having a stroke.

During his conversation with the on-call doctor, the Captain advised that he could divert the aircraft to a closer airport identifying Nassau, Bahamas or San Juan, Puerto Rico. As the discussion with the on-call doctor continued, the Captain advised that the window to turn around and land in Puerto Rico had closed and the aircraft could either land in the Bahamas, or land 30 minutes later in Miami, its intended destination. The on-call doctor recommended diverting to the Bahamas, the Captain began to divert the flight and, following protocol, contacted Systems Operations Control. Operations Control advised the Captain that ground support could not be reached in the Bahamas but medical arrangements could be made if the flight continued to Miami. While discussing the situation with Operations Control, the Captain was advised that the passenger was now moving his arm. Considering all circumstances, as well as his unfamiliarity with the Bahamas (the Captain had not landed there in 25 years), the Captain determined that it would be best to continue to Miami. The plaintiff-passenger was treated upon landing in Miami, but now is fully incapacitated.

The court held a three week bench trial covering three primary issues: (1) whether the flight crew's response to the passenger's stroke constituted an "accident" under the Montreal Convention; (2) assuming that an "accident" had occurred, whether the accident caused the plaintiff-passenger's injuries; and (3) if the plaintiff prevailed on the first two issues, what damages should be awarded. Because the court held that the incident did not qualify as an "accident" under the Montreal Convention, it never reached the second and third issues, and granted judgment to the defendant after the trial.

The district court concluded that because the Captain had followed Caribbean Airlines' policies and procedures in deciding not to divert the aircraft, the flight crew's conduct did not constitute an "accident," even though the Captain disregarded the recommendation of the on-call doctor. Additionally, the flight crew had implemented Caribbean Airlines' on board medical emergency procedures in all but one respect: they mistakenly administered the plaintiff a tablet of nitroglycerin. However, the court held that this error did not constitute an "accident" because the nitroglycerin had no material effect on the plaintiff's condition. Finally, the court held that the flight crew did not disregard any health-based request made by the plaintiff; to the contrary, the court found that the passenger's sister requested that the flight continue to Miami.

Safa v. Deutsche Lufthansa Aktiengesellschaft, Inc.,[2] involved a passenger who had a heart attack on board a Lufthansa flight from Philadelphia to Beirut, with a layover in Frankfurt. Approximately three hours before the scheduled landing in Frankfurt, the plaintiff fell down in the aircraft aisle and another passenger alerted the flight crew to the incident. Pursuant to Lufthansa procedure, the lead flight attendant moved the plaintiff to the rear of the aircraft, the flight attendants gathered the on board emergency medical equipment, and the lead flight attendant used the on board public address system to seek medical assistance from doctors. The lead flight attendant also alerted the Captain to the situation and described the plaintiff's condition to the Captain.

On the basis of the on board doctors' recommendation that the plaintiff's condition was not serious, the Captain elected not to divert the flight. However, the Captain testified at his deposition that he was not aware that the plaintiff was experiencing chest pain, and that had he been aware that the plaintiff was having a heart attack, he would have asked to speak with the on board doctors personally and would have diverted the flight. The Captain also had attempted to contact an on-call doctor via satellite phone, but the phone did not work.

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[2] No. 12-cv-2950 (ADS)(SIL), 2014 WL 4274071 (E.D.N.Y. Aug. 28, 2014).

The district court began its analysis first by noting that the U.S. Supreme Court has defined an "accident" under the Montreal Convention as "an unexpected or unusual event or happening that is external to the passenger," but also held that the definition "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." The district court then held that complications arising from a passenger's medical conditions are not external to the passenger, and therefore typically are not "accidents" under the Montreal Convention. However, the court also held that a flight crew's unexpected or unusual response to a passenger's medical condition is external to the passenger and therefore can be a Montreal Convention "accident."

Turning to the parties' arguments, the court rejected the plaintiff's argument relating to the Captain's deposition testimony. It held that Lufthansa's policies and procedures do not mandate that the Captain divert the flight in the event of a passenger's heart attack, and thus the failure to do so cannot be an "accident," even if the Captain would have made a different decision had he known that plaintiff's condition could have been life-threatening. It also rejected the plaintiff's argument with respect to the satellite phone because contacting the on-call doctor also was not a Lufthansa requirement, and thus the failure of the phone was not an "accident." In sum, the court held that Lufthansa had followed its policies and procedures and, therefore, the plaintiff could not establish that his injuries resulted from an "accident" as that term is used in the Montreal Convention. Accordingly, Lufthansa's motion for summary judgment was granted.

On board medical emergencies are becoming more frequent occurrences with more elderly, and sicklier travelers. These decisions reached the appropriate conclusions after analyzing whether an airline crew followed its procedures, albeit not perfect responses, in responding to medical emergencies to find no liability for the carriers.

Emotional Distress Claims Arising from Receipt of Illicit Drugs in Wrongly Labeled FedEx Package Preempted by Airline Deregulation Act

In an extraordinarily unusual case, the U.S. Court of Appeals for the First Circuit held in *Tobin v. Fed. Express Corp.* that a plaintiff's emotional distress claims arising from having received a mislabeled package that contained marijuana from FedEx, and a subsequent visit to her home from suspicious individuals looking for the package, are preempted by the Airline Deregulation Act ("ADA").
An unknown individual shipped a package containing two vacuum-sealed packages of marijuana from a FedEx location in California to an individual in Massachusetts with the same last name as the plaintiff. A FedEx employee inputted the sender's handwritten recipient information into a FedEx computer, which produced a printed address label with an incorrect address, which just so happened to be plaintiff's. The package was delivered to plaintiff's residence in Massachusetts, and plaintiff and her minor daughter opened the package even though she was neither the listed sender or recipient. Worried that she had received illicit drugs and that the sender or intended recipient may come looking for the drugs, plaintiff notified the police. The police then contacted FedEx, and asked that FedEx flag the shipment and refrain from disclosing any information regarding the actual delivery address to anyone who inquired about the package.

Thereafter, an individual with the same last name as the package sender called FedEx, stated that the package had not been received, supplied the package tracking number to a FedEx employee, and asked for the address to which the package had been delivered. FedEx placed a "trace" on this call, but claimed, at the instruction of police, not to have revealed the plaintiff's address. In the interim, a man arrived at plaintiff's door asking whether she had received a package. The Man's car was parked

[3] *Air France v. Saks*, 470 U.S. 392, 405 (1985).

[4] No. 14-1567, --- F.3d --- (1st Cir. Dec. 30, 2014)

[5] 49 U.S.C. § 41713(b)(1).

in plaintiff's driveway with two men seated inside. The plaintiff slammed her door shut on the visiting man and again contacted the police. As a result of these events, she brought Massachusetts state common law claims for emotional distress on behalf of herself and her minor children. She further alleged that FedEx was not only responsible for mislabeling and wrongfully delivering the package, but also for disclosing her address to the sender or intended recipient. As a result of this disclosure, plaintiff also asserted a Massachusetts statutory claim for invasion of privacy.

Following discovery, the District Court granted FedEx's motion for summary judgment, holding that the plaintiff's claims were preempted by the ADA, which preempts state laws relating to an air carrier's prices, routes or services. Plaintiff appealed.

The First Circuit began its analysis of plaintiff's claims first by noting that she makes three primary factual contentions, that: (1) FedEx mislabeled the package; (2) FedEx misdelivered the package; and (3) FedEx disclosed plaintiff's address to third parties. FedEx did not dispute the first two contentions, but argued there was no proof of the third. In fact, FedEx's records contained no indication that FedEx had not followed the police's instructions not to disclose plaintiff's address. The First Circuit agreed and dismissed plaintiff's statutory invasion of privacy claims for having failed to raise a triable issue of fact. But plaintiff's common law emotional distress claims remained and the First Circuit then analyzed whether those are preempted by the ADA.

The ADA contains an express preemption provision: "a State may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route or service of an air carrier." The preemption analysis thus has two parts: (1) the "mechanism" question, which asks whether the plaintiff's claim is predicated on a "law, regulation or other provision having the force and effect of law;" and (2) the "linkage" question, which asks whether the plaintiff's claim is sufficiently "related to" a service provided by the carrier.

The First Circuit held that the mechanism question easily was answered, as the Supreme Court recently held that common law causes of action are provisions with the force and effect of law for the purposes of ADA preemption. As to the linkage question, however, plaintiff argued that FedEx's conduct was not related to a service FedEx provided because the plaintiff did not bargain for the delivery of an unwanted package. But the First Circuit held that the "linkage" element does not require that the plaintiff be the customer for whom the service was provided. Citing *Bower v. EgyptAir Airlines, Co.* and *DiFiore v. Am. Airlines., Inc.* the First Circuit held that the fact that a plaintiff was a stranger to the relevant contract of carriage, and was not a contracting party does not insulate her claims from ADA preemption. Additionally, the First Circuit rejected plaintiff's argument that the alleged tortious conduct was not a "service" within the meaning of the ADA because no one would bargain for the wrongful delivery of a package. To the contrary, the First Circuit held that although a customer would not willingly bargain for the wrongful delivery of a package, the relevant inquiry is whether the enforcement of plaintiff's claims would impose an obligation on a carrier with respect to conduct, that when properly performed, amounts to a service.

Having found that plaintiff's claims implicate FedEx's services, the First Circuit then addressed the question of whether they are sufficiently "related to" those services so as to warrant preemption under the ADA. The "related to" language in the ADA typically is broadly construed so as to give effect to Congressional intent to avoid a "patchwork of state service-determining laws, rules and regulations."[11]

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[6] There was no dispute that FedEx is an air carrier for the purposes of the ADA.
[7] *Id.*
[8] *See Northwest, Inc. v. Ginsburg*, 134 S.Ct. 1422, 1429, 572 U.S. --- (2014).
[9] 731 F.3d 85 (1st Cir. 2013). *Bower* was covered in the Aviation section of the November 2013 edition of ATLP Highlights.
[10] 646 F.3d 81 (1st Cir. 2011). *DiFiore* was covered in the Aviation sections of the July 2013 and July 2011 editions of ATLP Highlights.
[11] *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368-373 (2008)

The First Circuit concluded that for plaintiff to prove her common law claims, she would have to prove either that: (1) FedEx's procedures were inadequate; or (2) FedEx's procedures, though adequate, were carried out carelessly by FedEx employees. It held that both outcomes would be sufficiently "related to" FedEx's services. In the former case, a finding that FedEx's procedures were inadequate would have the effect of requiring new procedures, which is significantly related to FedEx's services. In the latter circumstance, a finding that FedEx's employees operated carelessly would have the effect of supplanting the market forces the ADA was designed to promote with Massachusetts common law definitions of reasonableness relating to employee conduct.

In response, plaintiff argued that her claims seek to enforce nothing more than a "garden variety" of a duty of care that exists throughout society. To that the First Circuit responded that a damages award could result in fundamental changes to FedEx's services that are not required by the ADA. Plaintiff alternatively argued that her claims escape preemption because they do not impose duties different than those imposed by regular market demands because FedEx already has market-based incentives to label and deliver packages correctly. The First Circuit disagreed, holding that although accuracy in labeling and shipping is a service goal currently dictated by the market, and one that FedEx has chosen to pursue through its internal policies and procedures, the demands of the market could change at any time, and FedEx's services must be free of state regulations to respond to changing demands.

Having found that plaintiff's claims were preempted by the ADA, the First Circuit, while not unsympathetic to the facts of the case, affirmed the dismissal of her case.

COMINGS & GOINGS

Rose Michele Nardi
Transport Counsel, P.C.
Washington, DC
(202) 349-3660
RNardi@Transport Counsel.com

TSA Administrator Retires; Acting Administrator's Tenure Begins

On December 31, 2014, John S. Pistole retired from his position as the Administrator of the Transportation Security Administration. He held that position for more than 4 years. In addition to his service with TSA, Pistole was employed by the FBI for 26 years.

Melvin Carraway is now TSA's Acting Administrator. Carraway joined TSA in 2004, and served most recently as the Deputy Administrator. Prior to serving the TSA, Carraway worked for the Indiana State Police, and became its superintendent in 1997.

New Acting Chairman of STB

Vice Chairman Deb Miller was voted by the Surface Transportation Board to serve as its Acting Chairman. The Vice Chairman will be Ann Begeman. Chairman Elliott's last day as Chairman was December 31, 2014. Chairman Miller will fill the position of Acting Chairman until a Chairman is appointed by President Obama.

COMMUTER RAIL

Charles A. Spitulnik
Allison I. Fultz
Christian L. Alexander
Kaplan, Kirsch & Rockwell LLP
Washington, D.C.
(202) 956-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com
calexander@kaplankirsch.com

Introduction

A slew of final rules and guidance from the Department of Transportation ("USDOT") and its modal agencies have hit the streets in recent weeks on issues including project funding, development, and environmental review, emergency response, and civil rights. FTA and FHWA jointly issued their final rule for new categorical exclusions ("CEs") used to streamline the environmental review process of certain types of projects. In addition, FTA issued a final rule regarding its Emergency Relief Program, final guidance on early acquisition of right-of-way for transit purposes, and a final circular on joint development projects for FTA grantees. DOT also published implementation modifications to its Disadvantaged Business Enterprise ("DBE") Program. Additionally, the National Transportation Safety Board ("NTSB") published an investigative report regarding railroad and rail transit roadway worker protection.

Further, the holiday season offered up a smorgasbord of rulings and rulemakings affecting passenger rail operators:

- A California U.S. district court reversed a Department of Labor ("DOL") determination that a state labor law impeded Section 13(c) certification.

- The Federal Transit Administration ("FTA") issued the final draft chapters of its proposed circular regarding public transportation agencies' compliance with the Americans with Disabilities Act.

- The National Transportation Safety Board ("NTSB") issued a special investigative report into several recent accidents at the Metro-North Railroad ("Metro-North") (This report pre-dated the incident that occurred on February 3 on Metro North in Valhalla, NY).

- The Federal Railroad Administration ("FRA") issued notices regarding roadway worker safety rules and implementation measures, and railroad worker alcohol and drug testing. In addition, FRA issued a qualified Buy America waiver for prototype high-speed rail trainsets to Amtrak and the California High Speed Rail Authority.

- The Surface Transportation Board ("STB" or "Board") weighed in on a range of matters, including preemption of state and federal environmental laws and applicability of railroad labor laws to railroad subcontractors.

- The U.S. Supreme Court heard oral argument on the constitutionality of congressionally delegated power to Amtrak in setting metrics for determining on-time performance of Amtrak's trains on freight railroad-owned lines.

FTA, FHWA Finalize New Categorical Exclusions

Categorical exclusions ("CEs") are regulatory designations assigned to particular types of projects which a federal agency with environmental review responsibilities has determined do not normally have the potential for significant environmental impacts and therefore do not require the preparation of an environmental assessment or environmental impact statement. CEs thus allow for a streamlined environmental review process for projects meeting certain criteria. FHWA's CEs are listed at 23 C.F.R. § 771.117; FTA's CE's are listed at 23 C.F.R. § 771.118. Section 1318 of the Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141 ("MAP-21"), specifically required USDOT to review and add additional CEs.

On October 6, 2014, FTA and FHWA jointly issued a final rule ("CE Final Rule") promulgating new CEs for certain types of projects for which each agency has environmental review authority. *See Environmental Impact and Related Procedures—Programmatic Agreements and Additional Categorical Exclusions*, 79 Fed. Reg. 60,100 (Oct. 6, 2014). The CE Final Rule follows a notice of proposed rulemaking ("NPRM") published on September 19, 2013 (78 Fed. Reg. 57,587) that proposed five new CEs for FTA. The NPRM was covered in the November-December 2013 issue of the ATLP Association Highlights. The new CEs published under this rulemaking are separate from additional CEs mandated under other sections of MAP-21.

FTA's proposed CEs fall into two categories: "(c)-list" CEs, located at 23 C.F.R. § 771.118(c), and "(d)-list" CEs, located at 23 C.F.R. § 771.118(d). FTA excludes activities covered under (c)-list CEs from detailed review because they almost never involve significant environmental impacts, while activities under CEs on the (d)-list may qualify for exclusion from agency review upon submission of documentation demonstrating that certain criteria are met and that the action will not result in significant environmental effects. The new CEs, which are nearly identical to those proposed in the NPRM are:

- (c)-list CEs:
  - Bridge removal and related activities when the removal is completed consistent with and in full compliance with other applicable federal regulations (now at § 771.118(c)(14));
  - Preventative maintenance (now at § 771.118(c)(15)); and
  - Localized geotechnical and other informational investigations for preliminary design, environmental analysis, and permitting purposes (now at § 771.118(c)(16)).
- (d)-list CEs
  - Minor transportation facility realignment for rail safety reasons (now at § 771.118(d)(7)); and
  - Modernization or minor expansions of transit structures and facilities outside existing right-of-way (now at § 771.118(d)(8)).

FHWA also finalized several CEs, including moving a former (d)-list CE permitting construction of grade separations to replace at-grade railroad crossings or to permit bridge rehabilitation, reconstruction, or replacement to its (c)-list (now at 23 C.F.R. § 771.117(c)(28)). The new FHWA and FTA CEs became effective on November 5, 2014.

FTA Issues Final Rule for Public Transportation Emergency Relief Program

In July 2012, MAP-21 authorized FTA to establish a Transportation Emergency Relief Program ("Program") allowing FTA to provide capital and operating grants to public agencies in the event of a natural disaster or other catastrophic event. *See* 49 U.S.C. § 5324. In January 2013, following Hurricane Sandy, Congress passed legislation requiring FTA to establish an interim final rule in order to fully issue all of the funding allocated to the Program. Disaster Relief Appropriations Act, 2013, Pub. L. 113-2, 127 Stat. 4, 14, 36 (2013). In March 2013, FTA issued an interim final rule ("Interim Rule"), and sought additional comments to be considered in drafting a permanent final rule. *See Emergency Relief Program*, 78 Fed. Reg. 19,136 (Mar. 29, 2013). On October 7,

2014, FTA published its final rule ("ERP Rule") establishing the Program *Emergency Relief Program*, 79 Fed. Reg. 60,349 (Oct. 7, 2014), codified at 49 C.F.R. Part 602. The ERP Rule incorporates public input resulting from FTA's March 29, 2013 Interim Rule.

The ERP Rule largely tracks the previously published Interim Rule. The standards and requirements covered include:

- Defining emergencies and major disasters for which relief may be sought, mirroring the statutory definition found in 49 U.S.C. § 5324. FTA makes clear that both natural and human-created catastrophes are covered under the Program.
- Setting forth the policy for the Program, including that Program funds are not intended to supplant funds for correcting non-disaster related deficiencies, and shall not duplicate assistance under other federal programs or compensation from insurance or other sources.
- Enumerating activities eligible for funding as well as some activities that are not eligible. Eligible activities include emergency operations, emergency protective measures, emergency repairs, permanent repairs, actual engineering and construction costs, repair or replacement of spare parts, and resilience projects. Ineligible projects include heavy maintenance, costs covered under other federal grants, insurance reimbursements, projects for which funds were obligated prior to the emergency, reimbursement for lost revenue, and project costs associated with replacement of damaged material not on the property of the recipient and not incorporated into the public transportation system.
- Application procedures and pre-award authority, which allows formula grant recipients to use formula grant funds to cover certain emergency costs in advance of expected weather events.

The effective date of the ERP Rule was Nov. 6, 2014. FTA also intends to issue an Emergency Relief Manual or Circular by the end of the year. The additional guidance will provide more detail than is provided in the regulations, and will address some of the issues that came up during public comment for the ERP Rule.

FTA Issues Final Circular on Joint Development

In an effort to clarify its policies on joint development projects, which involve partnership with third parties to jointly create transportation infrastructure and revenue producing non-transportation development, FTA issued a final circular regarding guidance to grantees on joint development projects ("JD Circular") on August 25, 2014. *See Notice of Issuance of Final Circular: Guidance on Joint Development*, 79 Fed. Reg. 50,728 (Aug. 25, 2014) (copies of the actual JD Circular are available on FTA's website and on regulations.gov under docket number FTA-2013-0013). The JD Circular finalizes the proposed circular, which was made available for public comment and review on March 6, 2013, and was covered in the May-June 2013 issue of the ATLP Association Highlights. FTA's impetus for issuing the JD Circular was to consolidate guidance previously located in a number of broader guidance documents into a single circular.

The JD Circular provides guidance to FTA grantees on how to use FTA funding or property acquired with FTA assistance for joint development. The topics covered in the JD Circular include: (1) definition of the term "joint development"; (2) explanation of how a joint development project can qualify for FTA assistance; (3) the legal requirements applicable to acquisition, use, and disposition of real property acquired with FTA assistance; (4) common crosscutting requirements applicable to FTA-assisted joint developments; and (5) FTA's process for reviewing a joint development project proposal.

One of the primary requirements for FTA approval of joint development projects is that grantees receive a "fair share of revenue" from any third parties involved in the joint development. FTA declines to define "fair share of revenue" in the JD Circular, instead providing that, as a baseline minimum standard, the grantee must receive at least as much revenue over the life of the joint development project as it received through federal investment. A number of comments from public agencies expressed concern with the ambiguity of the term "fair share of revenue" and FTA's insistence that fare box revenue

cannot be counted towards the joint development revenue. However, FTA notes in the notice for the JD Circular that joint development projects are not "one-size-fits-all", and that it is therefore appropriate not to provide one definition for "fair share of revenue." FTA also notes that it does consider fare box revenue and other transit benefits of a proposed project as transportation benefits of the project, rather than as part of the "fair share of revenue" component. Newly added section VI of the JD Circular, regarding the review process for FTA-assisted joint development projects, includes additional guidance regarding the FTA's review criteria.

The effective date of the JD Circular was October 1, 2014. Projects for which sponsors executed joint development agreements with third parties before the effective date are covered by the previous guidance.

FTA Issues Final Guidance on Funding Transit Right-of-Way Acquisition

On November 12, 2014, FTA published a notice of its final guidance interpreting the applicability of a statutory provision allowing for federal assistance for early acquisition of right-of-way for transit purposes. *See Notice of Availability of Final Guidance on the Application of United States Code on Corridor Preservation*, 79 Fed. Reg. 67,238 (Nov. 12, 2014) ("ROW Notice"); *FTA Final Guidance on the Application of 49 U.S.C. § 5323(q) to Corridor Preservation for a Transit Project*, *available at http://www.fta.dot.gov/documents/Final_Corr_Pres_Guidance_FINAL_10-27-2014.pdf* ("ROW Guidance"). The ROW Guidance explains FTA's interpretation of Section 20016 of MAP-21, codified at 49 U.S.C. § 5324(q), which allows agencies receiving federal funding to acquire right-of-way for corridor preservation in anticipation of future projects, even if environmental review of those projects is not yet complete. The ROW Guidance finalizes proposed guidance that FTA initially issued last December (78 Fed. Reg. 75,446 (Dec. 11, 2013)), which was covered in the January-February 2014 issue of the Association Highlights.

FTA made a number of generally minor changes to the ROW Guidance, some in response to public comment. Significantly however, FTA withdrew its position that it would not assist agencies in corridor acquisition once environmental review of a project was initiated. Previously, FTA had stated that the corridor preservation provisions of § 5323 would apply only if environmental review had not yet begun. Instead, FTA will now allow assistance for right-of-way acquisition at any time before environmental review is complete, provided that the project sponsor certifies that the acquisition will not limit the choice or selection of reasonable alternatives for the project or otherwise influence the decision on approval for the project. The ROW Guidance became effective on November 12, 2014.

USDOT Issues Final Rule Modifying Its Disadvantaged Business Enterprise Program

USDOT's DBE program, the regulations for which are found at 49 C.F.R. Part 26, seeks to ensure nondiscrimination and create a level playing field for contractors selected under USDOT-assisted contracts. The DBE program requires recipients of federal assistance awarding USDOT-assisted contracts to set DBE participation goals, certify DBEs, and review and monitor compliance with DBE regulations. On October 2, 2014, USDOT published a final rule ("DBE Rule") that finalizes a number of largely technical and clarifying changes to USDOT's DBE program. *Disadvantaged Business Enterprise: Program Implementation Modifications*, 79 Fed. Reg. 59,566 (Oct. 2, 2014). The DBE Rule finalizes the proposed rule included in the NPRM published on September 6, 2012 (77 Fed. Reg. 54,952), which itself modified the USDOT DBE final rule issued in January 2011 containing substantial policy modifications (76 Fed. Reg. 5,083 (Jan. 28, 2011)). The NPRM was covered in the November-December 2012 issue of the ATLP Association Highlights. The DBE Rule revises certain DBE program forms, strengthens enforcement mechanisms, and modifies several provisions concerning various subjects, including overall goal setting and good faith efforts. The DBE Rule became effective November 3, 2014.

NTSB Issues Railroad and Rail Transit Roadway Worker Safety Report

In September, the NTSB issued a Special Investigation Report reviewing accidents occurring in 2013 that resulted in 15 railroad and transit roadway worker deaths, a recent record annual high. NTSB, *Special Investigation Report on Railroad and Rail Transit Roadway Worker Protection*, NTSB/SIR-14/03 (Sept. 24, 2014) ("Report"). The Report identifies a number of overarching safety issues distilled from the incidents reviewed, and provides safety recommendations to the FRA, FTA, the Occupational Safety and Health Administration ("OSHA"), and the Fatality Analysis of Maintenance-of-Way Employees and Signalmen ("FAMES") Committee. Among the incidents reviewed were train strikes involving five of the Class I railroads, the Northeastern Illinois Regional Commuter Rail Corporation ("Metra"), the Metro-North Railroad ("Metro-North"), and several rail transit systems including WMATA, BART, and New York City Transit.

The primary safety issues identified from analysis of the accidents included:

- Job briefings – The NTSB found that in many instances, job briefings before the accidents omitted essential and job-specific elements related to hazard recognition and mitigation. Instead of highlighting specific hazards, many of the briefings were cursory or included only partial or generalized assessment of risks.
- Regulation and Safety Oversight – The NTSB found that in some cases inadequate FRA oversight and lack of clarity regarding applicable FRA or OSHA oversight may have contributed to the accidents.
- Safety Culture and Safety Management Systems – The NTSB emphasizes the importance of developing, implementing, and sustaining comprehensive safety practices. The FRA should consider Safety Management Systems ("SMS") that include predictive, proactive, and reactive hazard identification elements. With respect to scope, the Report states that "[a]n all-hazards approach to roadway worker protection that expands the federal regulation at 49 C.F.R Part 214 that currently establishes roadway worker safety to include both on-track hazards and occupational safety, health, and environmental hazards incorporating best practices in job briefings . . . would likely result in improved safety among roadway workers."0

Drawing from its analysis, NTSB made a number of conclusions. Most importantly for railroads under FRA jurisdiction, the NTSB concluded that there were gaps or discrepancies between FRA workplace safety regulations and OSHA standards, and that FRA and OSHA should work to resolve such discrepancies. With respect to workplace job briefings, NTSB also found that more comprehensive standards, including specific briefing criteria, should be adopted. FRA pointed to OSHA standards at 29 C.F.R. Parts 1910 and 1926 as model examples for workplace job briefings. The NTSB also found that rail transit, regulated by FTA, should follow similar workplace safety protocols followed by entities subject to FRA and OSHA regulations.

As a result of these conclusions, the Report recommended that the FRA revise portions of its regulations governing job briefings (Part 214) to include the best practices included under OSHA's regulations at 29 C.F.R. parts 1019 and 1926, and to revise FRA's national inspection program to focus on roadway worker activities. NTSB also recommended that FRA require initial and recurring training for roadway workers in hazard recognition and mitigation, and to include union participation in accident investigations. Finally, the Report recommended that FRA work with OSHA to clarify guidelines in order to specify when and where OSHA standards are to be applied, as well as with FTA to help that agency implement roadway safety standards for rail transit systems.

California Passenger Rail Operators Succeed in Reversing Adverse Department of Labor Section 13(c) Determination

Section 13(c) of the Urban Mass Transit Act ("UMTA"), codified at 49 U.S.C. § 5333 (b), requires that all public transportation agencies applying for federal funding obtain certification from DOL that the "interests of employees affected by the assistance" are protected by

"fair and equitable" arrangements. Without DOL certification, the Federal Transit Administration ("FTA") cannot approve a grant.

In September, 2013, the California Department of Transportation ("CalTrans") and the Sacramento Regional Transit District ("SacRT") filed suit in United States District Court for the Eastern District of California against DOL in response to DOL's decision not to certify that federal funding to be allocated to CalTrans and SacRT included fair and equitable employee protective conditions. Specifically, DOL had determined that the California Public Employees' Pension Reform Act of 2013 ("PEPRA"), which provides less favorable pension rights to public employees hired after January 1, 2013, prevented CalTrans and SacRT from complying with Section 13(c). CalTrans and SacRT asserted in their complaint that DOL's determination disregarded the congressional intent behind UMTA, as well as prior DOL precedent, and thus was arbitrary and capricious in violation of the Administrative Procedures Act ("APA").

On December 30, 2014, the district court granted summary judgment in favor of CalTrans and SacRT. *Cal. Dep't of Transp. v. U.S. Dep't of Labor*, Civ. No. 2:13-cv-2069 KJM DAD (E.D. Cal. Dec. 30, 2014). Reviewing DOL's interpretation of Section 13(c) *de novo*, the court held that DOL failed to properly interpret the applicable case law and prior DOL decisions, which established that in passing UMTA Congress did not intend to replace the substance of state labor law with federal law, but rather protected the process of collective bargaining. Under Section 13(c), the court explained, state law may permissibly change the parameters within which collective bargaining proceeds so long as it does not give state and local employers unilateral authority over labor terms. The court found that PEPRA did not give state governmental entities such unilateral authority, and as a result DOL erred in determining that the law was inconsistent with Section 13(c).

FTA Issues Additional Draft ADA Guidance Circular Chapters

In 2010, FTA initiated a comprehensive review of its guidance to public transportation agencies regarding their compliance with the Americans with Disabilities Act ("ADA"). This process led FTA to propose creating a new circular, Circular FTA C 4710.1, encompassing guidance for the most common and important topics. FTA has decided to issue various draft chapters of Circular 4710.1 in phases. The first chapters were issued in 2012 and early 2014, as discussed in previous Association Highlights. *See* 77 Fed. Reg. 60170 (Oct. 2, 2012); 79 Fed. Reg. 9585 (Feb. 19, 2014). On November 12, 2014, FTA issued the final seven chapters for public review and comment. *See Americans with Disabilities Act: Proposed Circular Amendment 2*, 79 Fed. Reg. 67234 (Nov. 12, 2014). The final chapters cover: transportation facilities (Chapter 3), fixed route service (Chapter 6), demand responsive service (Chapter 7), ADA paratransit eligibility (Chapter 9), passenger vessels (Chapter 10), other modes (Chapter 11), and oversight, complaints, and monitoring (Chapter 12). In addition, the final chapters include addenda to two previously issued chapters, General Requirements (Chapter2), and Complementary Paratransit Service (Chapter 8). Among the highlights are:

- Chapter 3: Transportation Facilities – As its name indicates, Proposed Chapter 3 focuses on the ADA requirements for transportation facilities, with particular emphasis on new construction and alterations to facilities. Proposed Chapter 3 also discusses path of travel alterations and the issue of cost disproportionality, which is the standard for determining the extent to which certain accessibility modifications are required to be made.
- Chapter 6: Fixed Route Service – This chapter includes discussion of commuter rail accessibility requirements, including priority seating, information announcements, and boarding requirements.
- Chapter 12: Oversight, Complaints and Monitoring Methods – This chapter explains how FTA oversees and enforces DOT's ADA regulations, as well as transit agencies' own responsibilities for compliance, including responding to complaints.

- General Revisions to Formatting – Taking into consideration comments on previous proposed chapters, FTA is altering the format of Circular 4710.1 to more clearly distinguish between regulatory requirements and guidance.

FTA states in its notice that nothing in Circular 4710.1 alters, amends, supersedes or otherwise affects the DOT ADA regulations themselves; rather, the Circular provides guidance on existing regulations. The proposed Circular 4710.1 is available on FTA's website, www.fta.dot.gov. In contrast to the phased issuance of draft chapters, FTA will issue the final draft of Circular 4710.1 as a single document after taking into consideration the public comments received from the separate phases of the draft period.

NTSB Issues Report on Metro-North Railroad Accidents

On November 19, 2014, NTSB released a special investigation report looking into the factors involved in several recent Metro-North accidents, including the December 1, 2013 derailment near the Spuyten-Duyvil station in the Bronx, New York. *Organizational Factors in Metro-North Railroad Accidents*, NTSB Special Investigation Report NTSB/SIR-14/04, PB2015-101211 (Nov. 19, 2014). The NTSB Report details the common factors involved in the accidents, corrective steps taken or planned by Metro-North, New York Metropolitan Transit Authority, FRA, and others to resolve these issues, and lessons learned from the accidents. Metro-North and the FRA have already taken a number of steps to remedy many of the issues raised in the report. As discussed previously in the Association Highlights, FRA has pursued its own investigations of Metro-North accidents, and continues to monitor the railroad's progress in addressing the safety issues identified.

FRA Issues Rules on Safety and Drug Testing, Buy America Waiver for High-Speed Rail Trainsets

FRA has issued the following notices relating to worker safety and Buy America waivers:

- Final Rule on Safety-Related Railroad Employees. On November 7, 2014, the FRA issued a final rule requiring railroads and their contractors to establish safety-related railroad employee training programs and to designate minimum training qualifications for each occupational category of employee, as required under Section 401(a) of the Rail Safety Improvement Act of 2008 ("RSIA"), Public Law 110-432 (Oct. 16, 2008) (codified at 49 U.S.C. § 20162). *Training, Qualification, and Oversight for Safety-Related Railroad Employees*, 79 Fed. Reg. 66460 (Nov. 7, 2014). FRA published its proposed rule in early 2012 (discussed in this column in a past issue of the Association Highlights). *See* 77 Fed. Reg. 6412 (Feb. 7, 2012). Under the final rule, railroads must submit training programs to FRA for approval and conduct periodic oversight and reporting of their own employees' conduct. The objective of the final rule is to create a more holistic safety process utilizing more engaging, "hands on" training programs. As previously proposed, the final rule covers any employer of a safety-related railroad employee, including railroads, contractors, and subcontractors. The final rule went into effect on January 6, 2015. In response to comments, the FRA has extended the deadline to file a training program to January 1, 2018, for larger railroad employers, i.e., those with at least 400,000 total employee work hours annually. In addition, FRA intends to issue a compliance guide to assist railroad employers, particularly smaller employers, in complying with the new requirements. Smaller railroad employers will have until the later of January 1, 2019, or four years after the date of issuance of FRA's interim final compliance guide to submit their plans. Plans will be considered approved upon submission, and must be implemented by the applicable submission deadline. Model training programs must be submitted by May 1, 2017, in order to be able to be used by individual employers by the first submission deadline.

- Safety Advisory Regarding Roadway Workers. In response to several recent roadway worker incidents, on November 25, 2014, FRA issued Safety Advisory 2014-02 ("Advisory"), which emphasizes clear communication and compliance with applicable rules and procedures regarding roadway

worker authority limits on controlled track. *Roadway Worker Authority Limits—Importance of Clear Communication, Compliance With Applicable Rules and Procedures, and Ensuring That Appropriate Safety Redundancies Are in Place in the Event of Miscommunication or Error*, 79 Fed. Reg. 70268 (Nov. 25, 2014). Specifically, the Advisory recommends that railroads monitor their employees for compliance with existing requirements, examine train dispatching operations, and introduce electronic systems to create safety redundancies where none currently exist. Examples of electronic systems suggested by FRA include providing roadway workers with unique, exclusive password codes for removing blocking devices, GPS-based systems mounted on roadway worker vehicles, and electronic alerter devices used at interlockings to detect and warn workers of approaching trains.

- Determination of 2015 Minimum Random Testing Rates for Railroad Employee Alcohol and Drug Testing. Pursuant to federal statute, the FRA is responsible for requiring railroads to conduct drug and alcohol testing, including random testing, on all of its railroad employees responsible for safety-sensitive functions. *See* 49 U.S.C. § 20140(b)(1)(A). FRA regulations provide that railroads are required to randomly test a certain percentage of employees responsible for safety-sensitive functions. 49 C.F.R. 219.602, 219.608. The percentage is dictated in part by the industry-wide reported positive test rate for the two previous years. On December 19, 2014, FRA issued a notice of determination stating that, because the rail industry's random drug testing positive rate remained below 1.0 percent for the last two years, the testing rate for 2015 will remain at 25% of covered railroad employees. Likewise, because the industry-wide random alcohol testing violation rate remained below 0.5 percent for the last two years, the minimum random alcohol testing rate for 2015 will remain at 10% of covered railroad employees.

- Notice of Intent to Grant Buy America Waivers to Amtrak and California High Speed Rail Authority. On December 2, 2014, FRA published a notice in the Federal Register of its intent to grant Buy America waivers sought jointly by Amtrak and CHSRA for non-domestic final assembly of four "prototype" Tier III high-speed rail trainsets. *See Notice of Intent to Grant Buy America Waivers to National Railroad Passenger Corporation and California High-Speed Rail Authority for the Non-Domestic Final Assembly of Four "Prototype" Tier III High-Speed Rail Trainsets*, 79 Fed. Reg. 71504 (Dec. 2, 2014). Given the potential amount of time between its notice and actual production, FRA has required as a condition of approval that, prior to issuing a final notice to proceed to the manufacturer, Amtrak and CHSRA must each certify and provide support documenting to FRA that the selected supplier has not established domestic manufacturing facilities capable of assembling the prototypes and delivering them within a reasonable time. FRA also stipulated that all components used in the prototypes must still be domestically manufactured, unless separate waivers are sought and granted. In support of its decision, FRA noted that currently there are no domestically-produced high-speed rail trainsets that meet Amtrak's and CHSRA's specifications, and no domestic assembly or testing facilities to develop prototypes. Although design and production capabilities may be developed in the future, FRA stated that the delay this would cause to Amtrak's and CHSRA's schedules necessitated the waiver.

STB Issues Decisions on California High-Speed Rail Project, Rail-Term, EPA

STB Holds California High Speed Rail Project to be Exempt from State Environmental Permitting Regulations

The California High Speed Rail Authority ("CHRSA"), the government body tasked with planning and constructing the state's high speed train system ("HST System"), recently scored another victory at the STB. This time the STB issued a declaratory order stating that state court issued injunctions against CHRSA based on non-compliance with the California Environmental Quality Act ("CEQA") are preempted by federal law. CHSRA began the CEQA process for the HST System before the STB ruled in 2013 that it had jurisdiction over the project. After that decision, CHSRA pledged to continue the CEQA process, but reserved its right to assert federal preemption as a defense to CEQA claims. Last

October, in response to suits filed against it in state court for non-compliance with CEQA, CHSRA petitioned the STB for a declaratory order that any injunctions issued against the phase of the HST System currently underway would be preempted. On December 30, 2014, the STB granted the petition and ruled in favor of CHSRA. *California High-Speed Rail Authority – Petition for Declaratory Order*, STB Docket No. FD 35861 (Service Date Dec. 12, 2014).

Noting that it was "uniquely qualified" to address the preemption issue, the STB held that federal law did preempt private suits seeking injunction based on the broad preemption provision in the statute. 49 U.S.C. § 10501(b). The STB also cited previous Board and federal circuit court precedent applying the preemption doctrine in the context of railroads subject to STB jurisdiction. A number of parties raised objections to CHSRA's petition on procedural and substantive grounds. These objections included, among others, that CHSRA had waived its right to raise preemption by voluntarily undergoing CEQA review, that another California appellate court had already held that CHSRA could not raise preemption, and that CHSRA was compelled to comply with CEQA based on Proposition 1A, the ballot initiative authorizing bond-financed funding for the HST System. The STB rejected all of these arguments.

First, the STB held that CHSRA had not waived its right to assert preemption when it continued with the CEQA process even after learning in 2013 that the STB had jurisdiction over the project. The STB noted that CHSRA had made clear several times throughout the CEQA process that it reserved its right to assert preemption. The STB also rejected any finding of implied agreement on the part of CHSRA to waive preemption, stating that such an agreement would unreasonably interfere with interstate commerce by conflicting with the STB's exclusive jurisdiction.

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Second, the STB rejected the holding of a state appellate court finding that federal law did not preempt CEQA with respect to CHRSA's programmatic environmental documentation for project routing. The state appellate court had found federal preemption inapplicable because the "market participant" doctrine, which shields state action from federal preemption where the state's action is proprietary in nature, applied to CHSRA's actions. However, the STB disagreed, citing another state court decision finding that CHSRA was not acting as a market participant for the purposes of a challenge to its compliance with CEQA. The STB cited the California Supreme Court's pending review of the conflicting cases as rationale for weighing in on the issue.

Third, the opponents argued that because Proposition 1A required CHSRA to comply with CEQA as a condition of funding the project, to find federal preemption would infringe upon state sovereignty over how to proceed with the state project. However, the STB distinguished between state requirements that CHSRA comply with CEQA, which the Board was not addressing, and private suits to seek an injunction of the project. The STB also noted that it did not have authority to interpret the requirements of Proposition 1A, as that was a question of state law.

The official groundbreaking of construction of the HST System occurred on January 6, 2015.

STB Declines to Grant EPA Request for Declaratory Order Regarding Preemption of Air Quality Standard Rules, But Notes That Rules "May" Be Preempted

The Clean Air Act makes state and local governments responsible for meeting National Ambient Air Quality Standards by developing a state integration plan. Once the states assess and approve their rules, they submit those proposals as part of the state integration plan to the Environmental Protection Agency ("EPA") for final approval, giving the rules the force and effect of federal law.

In 2006, the South Coast Air Quality Management District (the "District"), one of 35 California air quality management districts, proposed two rules covering locomotives left idling 30 minutes or more. Although the District originally intended the rules to be enforced as local rules, several railroads successfully argued in federal district court that the rules were preempted by federal law granting STB exclusive jurisdiction over the national rail network. The district court decision was affirmed by the

Ninth Circuit. *See Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010). However, the Ninth Circuit noted without holding that if the EPA were to approve the rules into the California state implementation program, they would have the effect of federal law and, according to previous STB precedent, might not be preempted because they could be harmonized with the STB's authority. When the District subsequently submitted the rules to the EPA, the EPA petitioned the STB to clarify whether the rules would in fact be preempted notwithstanding their inclusion in the state implementation program under CEQA.

On December 30, 2014, the STB issued a decision regarding the EPA's request. *U.S. Env. Protection Agency – Petition for Declaratory Order*, STB Docket No. FD 35803 (Service Date Dec. 30, 2014). The STB declined to issue a declaratory order on the basis that such a decision would be premature since the EPA had not yet approved the rules. However, it did state that, based on the information available, the rules may be preempted once approved. Although the Board noted that its exclusive jurisdiction does not preempt the general application of federal environmental statutes, a specific action taken under federal statute could nevertheless be preempted where that action unavoidably conflicted with the purpose and regulatory scheme under the Subtitle IV of Title 49, United States Code. Based on the facts presented, the STB found it possible that the air quality attainment rules would be preempted because their approval could lead to a patchwork of locomotive idling laws across the country, conflicting with the STB's statutory mandate. The STB also noted that the rules could potentially conflict with other federal laws, including FRA laws regarding safety critical tests and inspections.

STB Reaffirms that Railroad Dispatching Independent Subcontractor Is a Rail Carrier Subject to STB Jurisdiction

On December 30, 2014, the STB issued a decision reaffirming that Rail-Term Corporation ("Rail-Term"), an independent subcontractor providing short-line railroads with dispatching services, was considered a "carrier by railroad" subject to the STB's jurisdiction. *Rail-Term Corp. – Petition for Declaratory Order*, STB Docket No. FD 35582 (Service Date Dec. 30, 2014). The holding indicates that Rail-Term dispatchers are also covered under the Railroad Retirement Act ("RRA") and the Railroad Unemployment Insurance Act ("RUIA").

Rail-Term had petitioned the United States Court of Appeals for the D.C. Circuit to review two decisions of the Railroad Retirement Board ("RRB") finding Rail-Term to be a "carrier by railroad" subject to the STB's jurisdiction, and thus a covered "employer" under RRA and RUIA. After the D.C. Circuit held that the issue of STB jurisdiction must be determined by the STB, Rail-Term petitioned the Board for a determination regarding jurisdiction. On November 19, 2013, the STB held that Rail-Term was a "rail carrier" as defined under the Interstate Commerce Act, as amended by the ICC Termination Act, and as a result was subject to the Board's jurisdiction. *Rail-Term Corp. – Petition for Declaratory Order*, STB Docket No. FD 35582 (Service Date Nov. 19, 2014). Rail-Term sought reconsideration, prompting the STB to issue the December 30th decision reaffirming its 2013 decision.

In the December 30th decision, the STB restated its previous analysis noting that while Rail-Term did not have its own any track, trains, conductors, signalmen, engineers, or maintenance-of-way employees, its central business function was nevertheless an indispensable link in implementing transportation by rail. The Board declined to follow any of Rail-Term's new arguments, including that it misapplied existing STB precedent in making its initial decision. Among its other points in reaffirming its earlier decision, the STB distinguished its determination of Rail-Term's status with its exemption of public entities from common carrier obligations through the Board's *State of Maine* procedures, in which the public entities are allowed to acquire a line but not the legal right or obligation to provide common carrier service. Although Rail-Term argued that in some cases these public entities similarly retain dispatching responsibilities for the line, the STB noted that "[w]hen these sorts of entities dispatch, they are principally dispatching their own commuter trains, and are only involved incidentally with the limited number of freight trains that continue to use the line." In contrast, Rail-Term's principal job as subcontractor to railroads was to dispatch freight trains.

This decision confirms commuter railroads' ability to retain certain railroad operational obligations, including dispatching, without assuming rail carrier status, but only if such functions primarily serve commuter railroad functions rather than relieving a rail carrier of its duties. More broadly, it impacts the use of contractors in the railroad industry, a common means of reducing costs.

U.S. Supreme Court Hears Argument Regarding Constitutionality of Amtrak's Role in Establishing On-Time Performance Measures

On December 8, 2014, the U.S. Supreme Court heard argument in *U.S. Department of Transportation v. Association of American Railroads*, Docket No. 13-180, in which the freight railroad industry challenged the constitutionality of Section 207 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"). Section 207 requires FRA and Amtrak to jointly develop metrics for determining on-time performance, which will ultimately determine whether the STB investigates freight railroads for failing to provide Amtrak's trains with preference on the lines they share with Amtrak. The railroads argued that this provision unconstitutionally delegated legislative power to a private entity. The D.C. Circuit agreed with the railroads, holding that the provision violated the non-delegation doctrine, a doctrine last invoked by the Supreme Court nearly 80 years ago in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

Depending on the scope of the Court's decision, this case could bring significant changes. Amtrak's on-time performance has been slipping across the country as a result of an increasingly congested rail network, exemplified in part by an exponential expansion of crude-by-rail shipments. *See* Curtis Tate, *Freight Trains Force Repeated Delays on Popular Amtrak Route*, The Seattle Times (Dec. 23, 2013), http://seattletimes.com/html/localnews/2022516636_freightamtrakxml.html. A favorable decision on Section 207 could provide Amtrak with more leverage to enforce the priority obligations in its statute, 49 U.S.C. § 24308(c), and comply with on-time performance measures contemplated in PRIIA. The Court's decision could also once again allow it to consider Amtrak's status in a different context—is it a governmental entity or a private corporation?

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Athena Kennedy
Van Ness Feldman LLP
1150 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372
amk@vnf.com

Robin Rotman
Van Ness Feldman LLP
1050 Thomas Jefferson Street NW
Seventh Floor
Washington, DC 20007
(202) 298-1800
rmr@vnf.com

On August 1, 2014, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") of the U.S. Department of Transportation ("DOT"), in coordination with the Federal Railroad Administration, issued a Notice of Proposed Rulemaking on Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains ("NPRM"). The deadline for public comments was September 30, 2014. In the NPRM, PHMSA proposes stricter standards for new and retrofitted rail tank cars and certain operational controls for "high-hazard flammable trains" ("HHFT"), defined in the NPRM as trains carrying 20 or more tank carloads of "Class 3" flammable liquids, such as crude oil and ethanol.

PHMSA's NPRM responds to numerous petitions for rulemaking and is intended to improve rail transportation safety in the wake of several recent accidents in the United States and Canada involving trains carrying crude oil or ethanol. To further that objective, the NPRM proposes three alternative specifications for a new DOT-117 tank car standard. The NPRM prescribes a retrofit or phase-out schedule pursuant to which new DOT-117 tank cars or existing DOT-111 cars retrofitted to the DOT-117 standard would replace legacy DOT-111 cars in HHFT service by 2020 (in a phased timeline based on packing group). The NPRM also proposes speed restrictions, braking requirements, rail routing requirements, and emergency response notifications for certain trains.

DOT has received approximately 3,500 comments on the NPRM from various entities and individuals, including: railroads; tank car manufacturers; petroleum and ethanol producers; chemical manufacturers and other shippers; state, local, and tribal governments; public officials; and public interest organizations.

he commenters offer a wide range of positions on the various options presented by DOT in the NPRM. State, local, and tribal agencies, public officials, and environmental organizations generally advocate adoption of the most stringent tank car standards proposed. By contrast, shippers of petroleum, ethanol, and other Class 3 materials tend to support the least stringent tank car standards proposed in the NPRM, arguing that the stricter options would cost more, without a corresponding safety benefit, and would lead to a reduction in tank car lading capacity (because some safety features would increase tank car weight). The railroad industry appears to support an intermediate tank car option. Commenters have diverse views as to the appropriate retrofit or phase-out schedule, with some environmental groups calling for an immediate ban on DOT-111 tank cars, while some trade associations assert that the proposed timeline is too aggressive in light of limited tank car manufacturing and retrofit shop capacity. Commenters also vary in their treatment of the proposed operational controls, with some arguing that they would compound existing rail traffic delays, while others assert that the controls do not go far enough to promote safe transport of hazardous goods by rail.

A number of commenters from diverse sectors identify potential flaws or gaps in the NPRM, stating that failure to resolve these issues in a final rule could result in litigation. These alleged deficiencies include procedural problems with the NPRM, such as alleged failures to comply with applicable procedural statutes, regulations, or Executive Orders (e.g., failure to prepare an Environmental Impact Statement). Many commenters challenge key assumptions in PHMSA's Draft Regulatory Impact Analysis, including retrofit cost estimates, projections regarding the likelihood and potential consequence of a major incident, and the assumption that legacy DOT-111 tank cars would be shifted to Canadian oil sands service with little or no modification. Additionally, many commenters request that DOT address railroad track inspection and maintenance and railroad operator training and oversight, arguing that these are root causes of derailments. Commenters on both sides of the U.S. – Canada border emphasize the need for harmonization between DOT's final rule and rules that are currently being promulgated by Transport Canada, given the substantial number of cross-border shipments.

Although DOT has not established a clear deadline for issuing the final rule, the Draft Regulatory Impact Analysis assumes that production of DOT-117 tank cars would begin in early 2015. In light of the large number of comments received and the risk of litigation, it was speculated that DOT could issue the final rules in stages, beginning with rules covering the new tank car specifications and later addressing operational controls. A final rule was sent to OMB for review on February 5, 2015. OMB review typically takes 90 days, but can be shorter or longer depending on internal factors. PHMSA recently pushed back its estimate for publication of the final rule to May 12, 2015, assuming a January 30, 2015 submittal to OMB. This delay comes on the heels of aggressive timeframes set out in the fiscal year 2015 omnibus appropriations bill, passed on December 13, 2014, which required PHMSA to release the final Tank Car Rule by January 15, 2015.

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North Dakota Finalizes Bakken Crude Conditioning Rule

On December 9, 2014, notwithstanding industry objections, the North Dakota Industrial Commission published new rules for "conditioning" of Bakken crude oil prior to transport. The rule sets operating standards for conditioning equipment to separate crude oil into gas and liquids at the wellheads. As of April 1, 2015, all Bakken wells subject to the rule must be produced through equipment that conditions the oil to "improve marketability and safe transportation" of the crude oil. This equipment can be a gas-liquid separator or emulsion heater that heats the liquids to not less than 110 degrees F (with other operating conditions specified).

Production facilities can operate the required stabilizing equipment at temperatures and pressures other than those prescribed in the regulations, but only if the operator can demonstrate through testing that the crude oil produced has a vapor pressure of 13.7 psi or less, or 1 psi less than the vapor pressure of stabilized crude as defined in the latest version of ANSI/API RP3000, whichever is lower. The majority of Bakken Crude has vapor pressure measurements averaging 11.8 psi.

Under the final rule, Operators of rail transloading facilities must notify the state "upon discovery" if any Bakken crude oil received violates "federal crude oil safety standards." However, there is no affirmative obligation to test the product at the transloading facility. The final rule also prohibits the blending of Bakken crude oil with natural gas liquids.

On February 6, 2015, the North Dakota House of Representatives passed a bill that, if enacted, would effectively stay the conditioning rule pending full review by the legislature.

LABOR

Robert Fried
Atkinson, Andelson, Loya, Ruud & Romo
Pleasanton, CA
(925) 227-9200
rfried@aalrr.com
Twitter @rfaalrr

Mandatory Benefits and the Multi-State Employer

One of the most dynamic of national trends is the mandating of employee benefits and other labor relations rules at the local level. San Francisco is well known for its landmark Healthy San Francisco Ordinance implemented a tax or coverage scheme which was the precursor to the Affordable Care Act. http://healthysanfrancisco.org/

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San Francisco even tailors its provisions to specific industries. For example, operations at its regional airport, San Francisco International, mandate health insurance coverage provisions that include whole family coverage, a requirement not yet in effect under the Affordable Care Act.

San Francisco was also the model for paid sick leave. http://sfgsa.org/index.aspx?page=391 . Cities across the country have followed and with the fall elections, Connecticut and California. This article outlines the California law as a likely model for further national expansion.

On September 10, 2014, Governor Brown signed into law the Healthy Workplaces, Healthy Families Act of 2014, which will require California employers to provide to nearly all employees — exempt and non-exempt — paid sick days effective July 1, 2015.

The Basics: With limited exceptions, beginning July 1, 2015, every employee, whether exempt or non-exempt, who is employed in California for 30 days or more will be entitled to accrue paid sick leave at the employee's regular rate of pay of not less than one hour per every 30 hours worked commencing on the first day of employment or the effective date of the new law (July 1, 2015), whichever is later. Exempt employees are deemed to work 40 hours per week, unless the employee normally works a workweek of less than 40 hours. An employee shall be entitled to use accrued paid sick days beginning on the 90th day of employment, after which the employee may use paid sick days as they are accrued. However, an employer may limit an employee's use of accrued paid sick days to three days or 24 hours per year of employment. These are the basics. As with most things, the devil is in the details, and there are numerous details employers should be aware of and should prepare to comply with.

Are There Exceptions For Small Employers? No. The Act applies to all "employers" regardless of the number of employees and defines the term "employer," as "any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities."

Are There Exceptions For Certain Employees? Yes and no. The Act applies equally to exempt and non-exempt employees, but there are some exceptions, primarily for unionized employees subject to a collective bargaining agreement. The four exceptions are: (1) employees covered by a valid collective bargaining agreement that expressly provides for the wages, hours, and working conditions that also expressly provides for paid sick days and other requirements; (2) persons employed in the construction industry covered by a valid collective bargaining agreement that satisfies certain requirements; (3) a provider of in-home support services under specified parts of the Welfare and Institutions Code; and (4) persons employed by an airline as a flight deck or cabin crew member subject to certain provisions of the federal Railway Labor Act.

Are There Exceptions For Employers With Existing Paid Leave Policies? Yes and no. "An employer is not required to provide additional paid sick days pursuant to [the Act] if the employer has a paid leave policy or paid time off policy, the employer makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in [the Act], and the policy does either of the following: (1) Satisfies the accrual, carry over, and use requirements of [the Act]," or "(2) Provides no less than 24 hours or three days of paid sick leave, or equivalent paid leave or paid time off, for employee use for each year of employment or calendar year or 12-month basis." However, an employer with an existing paid leave policy or paid time off policy, or that adopts after July 1, 2015, a compliant policy, will still be required to comply with the notice, posting, reporting, and recordkeeping requirements of the Act discussed below.

For What Purposes Will Employees Be Entitled To Use Paid Sick Days? An employer will be required to permit an employee to use paid sick days for:

(1) "Diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or an employee's family member." The term "family member" is defined as:

- "A child, which . . . means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis" and that definition applies "regardless of age or dependency status."
- "A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child."
- "A Spouse."
- "A registered domestic partner."
- "A grandparent."
- "A grandchild."
- "A sibling."

(2) "For an employee who is a victim of domestic violence, sexual assault, or stalking" [to take "time off from work to obtain or attempt to obtain any relief, including, but not limited to, , a temporary restraining order, restraining order, or other injunctive relief" or to obtain as specified in Labor Code section 230.1 various services available to victims of domestic violence or sexual assault.]"

How Much Notice Will Employees Be Required To Give When Paid Sick Days Are To Be Used? An employer is required to provide paid sick days as required by the Act "upon the oral or written request of an employee." "If the need for paid sick leave is foreseeable, the employee shall provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for the leave as soon as practicable."

In What Increments Can Paid Sick Days Be Used? "An employee may determine how much paid sick leave he or she needs to use" in a given instance, "provided that an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave." Thus, the Act expressly contemplates the use of partial sick days when, for example, an employee wishes to leave work early on a given workday for a permitted purpose.

Can Employees Be Required To Find Someone To Cover For Them When Paid Sick Days Are Used? No. "An employer shall not require as a condition of using paid sick days that the employee search for or find a replacement worker to cover the days during which the employee uses paid sick days."

When Must Paid Sick Days Be Paid? "An employer must provide payment for sick leave taken by an employee no later than the payday for the next regular payroll period after the sick leave was taken."

Are There Notice Requirements For New Hires? Yes. The law amends the requirements for the *Labor Code* Section 2810.5 notice to be provided to newly hired non-exempt employees at the time of hiring. Employers must add the following additional information to the statement: "[t]hat the employee: may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates."

Are There Posting Requirements? Yes. An employer will be required to display in each workplace of the employer a poster stating all of the following:

(1) An employee is entitled to accrue, request, and use paid sick days;

(2) The amount of sick days provided for by [the Act];

(3) The terms of use of paid sick days.

(4) That retaliation or discrimination against an employee who requests paid sick days or uses paid sick days, or both, is prohibited and that an employee has the right under [the Act] to file a complaint with the Labor Commissioner against an employer who retaliates or discriminates against the employee."

The Act directs the Labor Commissioner to create a poster containing the required information and to make it available to employers, which should simplify employer compliance once the Labor Commissioner makes the required poster available.

Are There Reporting Requirements? Yes. Employers will be required to provide to each employee "with written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee's itemized wage statement [i.e., check stub] or in a separate writing provided on the designated pay date with the employee's payment of wages." Thus, employers will be required to continuously track and report the amount of paid sick leave available to each employee based on the amount of paid sick leave an employee has accrued and on the amount of paid sick leave an employee has used.

Are Accrued Paid Sick Days Carried Over From Year To year? Yes. "Accrued paid sick days shall carry over to the following year of employment. However, an employer may limit an employee's use of paid sick days to 24 hours or three days in each year of employment." Further, "[a]n employer has no obligation to allow an employee's total accrual of paid sick leave to exceed 48 hours or 6 days, provided that an employee's rights to accrue and use paid sick leave . . . are not otherwise limited."

Are Employers Required To Pay Employees For Accrued Paid Sick Days When Employment Terminates? No. The Act does not require employers to pay employees for paid sick days accrued under the Act. The Act expressly states, "an employer is not required to provide compensation to an employee for accrued, unused paid sick days upon termination, resignation, retirement, or other separation from employment." However, if an employee is rehired within one year from the date of termination, "previously accrued an unused paid sick days shall be reinstated," and "[t]he employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehiring."

Are There Record Keeping Requirements? Yes. As with time and payroll records, employers will be required to keep for at least three years paid sick leave records as follows: "An employer shall keep for at least three years records documenting the hours worked and paid sick days accrued and used by an employee." Furthermore, an employer will be required to make such records available for inspection by the Labor Commissioner and will be required to make such records available for inspection and copying by employees as employers are required to do as to other employment records of an employee. Notably, "[i]f an employer does not maintain adequate records pursuant to [the Act], it shall be presumed that the employee is entitled to the maximum number of hours accruable under [the Act], unless the employer can show otherwise by clear and convincing evidence."

Does The Act Contain Anti-Discrimination And Anti-Retaliation Provisions? Yes. The Act states, "[a]n employer shall not deny an employee the right to use accrued sick days, discharge, threaten to

discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with the department or alleging a violation of this [Act], cooperating in an investigation or prosecution of an alleged violation of this [Act], or opposing any policy or practice or act that is prohibited by this [Act]. The Act carries a rebuttable presumption of retaliation "if an employer denies an employee the right to use accrued sick days, discharges, threatens to discharge, demotes, suspends, or in any manner discriminates against an employee within 30 days" of an employee doing any of following: "(A) The filing of a complaint by the employee with the Labor Commissioner or alleging a violation of [the Act]. (B) The cooperation of an employee with an investigation or prosecution of an alleged violation of [the Act.] (C) Opposition by the employee to a policy, practice, or act that is prohibited by [the Act]. Thus, under such circumstances, retaliation will be presumed as a matter of law unless the employer can meet its burden of proving retaliation in fact did not occur.

Does The Act Provide For Civil Or Administrative Penalties For Violations? Yes. The Act provides for a variety of monetary and non-monetary remedies for violations of its various provisions.

Is There A Private Right Of Action For Violations Of The Act? As introduced on January 15, 2014, Assembly Bill 1522 would have expressly provided for an "aggrieved employee" or "an entity a member of which is aggrieved," such as a labor union, to bring an action in court to enforce its provisions. AB 1522 then stated, in pertinent part, "The Labor Commissioner, the Attorney General, a person aggrieved by a violation, or an entity a member of which is aggrieved by a violation of this article may bring a civil action in a court of competent jurisdiction against the employer. . . ." As enacted, the Act states, "the Labor Commissioner or the Attorney General may bring" such an action, thus eliminating the references to an "aggrieved employee" and to "an entity a member of which is aggrieved," which suggests the Act currently does not permit a current or former employee to enforce its provisions, at least not directly. However, it remains unclear and remains to be seen whether a current or former employee could seek to enforce the Act indirectly via the California Private Attorney General Act of 2004 ("PAGA"), which provides a procedural mechanism of an "aggrieved employee" to bring an action in his or her own behalf and on behalf of other allegedly "aggrieved employees" to obtain penalties for violation of nearly any provision of the Labor Code and/or of any Industrial Welfare Commission Wage Order, even those that do not otherwise provide for a private right of action.

What about local sick leave ordinances? The Act provides that it does not preempt local ordinances that provide for greater accrual or use of sick leave by employees. This means employers in San Francisco and San Diego will be required to provide sick leave that complies with both state and local laws.

San Francisco instituted similar requirements for sick leave in 2007.

What Do Employers Need To Do Now? The Act does not become effective until July 1, 2015, but employers should prepare in advance to meet the various requirements of the Act. For many employers, the notice, posting, reporting, and recordkeeping requirements of the Act will likely prove to be more onerous and more costly than providing employees three paid sick days each year.

What Happens in California Never Stays in California- Paid Sick Days To Be Required To Be Provided To Nearly All California Employees Effective July 1, 2015

Paid sick leave is the leading edge of the growth in mandated benefits. In practice, its implications stretch far beyond the benefit, but also include its potential role as a disincentive to continuation of existing employee benefits, ranging from paid time off, vacation or comp pay. In complex work situations, such as federal contracting, air transport or interstate trucking , there is likely to be a direct clash between mandates, like California's that do not expressly provide exemptions for federal work.

With that said, the starting point is a thorough understanding of a leading example of such a statute., as follows:

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"A Spouse."

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by the employee to a policy, practice, or act that is prohibited by [the Act]. Thus, under such circumstances, retaliation will be presumed as a matter of law unless the employer can meet its burden of proving retaliation in fact did not occur.

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What about local sick leave ordinances? The Act provides that it does not preempt local ordinances that provide for greater accrual or use of sick leave by employees. This means employers in will be required to provide sick leave that complies with both state and local laws. If paid sick leave is adopted nationally, it is unlikely that preemption of local benefits will be included.

What Do Employers Need To Do Now? Counsel for multi state or industries with their own regulatory structure should initiate efforts to explore those conflicts sooner rather than later. A second step to do now is developing an intergraded plan in benefits that reflects the effect of such mandates on what an employer continues to provide..

MARITIME

Travis Kennedy
Lane Powell PC
Seattle, WA 98101
206.223.7242
KennedyT@LanePowell.com

Fifth Circuit Holds that Punitive Damages Are Not Recoverable Under the Jones Act or the General Maritime Law of Unseaworthiness

In *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382 (5th Cir. 2014), an *en banc* panel of the Fifth Circuit recently examined whether injured seaman can obtain punitive damages under the Jones Act, 46 U.S.C. § 30104, or for an unseaworthiness claim brought pursuant to general maritime law. The Court held that punitive damages in such actions were not cognizable based on the Supreme Court's ruling in *Miles v. Apex Marine Corp*. 498 U.S. 19 (1990).

In *McBride*, an accident occurred on a barge that supported a truck-mounted drilling rig in a navigable waterway in the State of Louisiana. One crew member was killed and three others were injured. The Estate of the deceased and the three injured seaman filed suit against their employer – the owner and operator of the rig. Plaintiffs brought a claim for unseaworthiness under general maritime law and negligence under the Jones Act. Plaintiffs sought compensatory and punitive damages. The Defendant moved to dismiss the punitive damages claims on the basis that such damages are not an available remedy when purported liability is based on unseaworthiness or Jones Act negligence. The court granted the Defendant's motion and the Plaintiffs appealed. The Fifth Circuit reversed and held that the Plaintiffs could seek punitive damages. The Fifth Circuit granted rehearing *en banc* and reversed the appellate panel's decision.

The *en banc* panel held that punitive damages were not available as a remedy under both the Jones Act and for unseaworthiness claims brought pursuant to the general maritime law. The court recognized that Congress has "paramount power" to determine maritime law. Congress enacted the Jones Act to ensure that an injured seaman and their survivors could sue their employers for negligence for personal injury and wrongful death. Congress provided injured seaman the same remedies that Congress had previously provided railroad workers under the Federal Employers' Liability Act ("FELA").

The *en banc* panel examined two Supreme Court opinions – the Supreme Court's ruling in *Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990) and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). In *Miles*, the Estate of a deceased seaman sued his employer for wrongful death under the Jones Act and general maritime law. The Supreme Court held that the scope of the survivors' recovery for unseaworthiness claims brought pursuant to the general maritime law was limited to their "pecuniary losses." While neither the Jones Act, nor FELA explicitly limit damages to pecuniary loss, the Court held that, based on existing law, Congress must have intended to incorporate this limitation into the Jones Act. The Court further held that there is no recovery for the loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

In *Townsend*, the Supreme Court held that injured seaman could recover punitive damages against a vessel owner who denied maintenance and cure benefits and whose conduct was willful and wonton. The *en banc* panel held that the unseaworthiness claims were distinguishable from the willful failure to pay maintenance and cure. The Fifth Circuit noted that maintenance and cure are distinct claims from negligence and unseaworthiness. Accordingly, the panel held that *Townsend* did not provide a punitive damages remedy for unseaworthiness claims.

Relying on *Miles*, the Fifth Circuit held that the Plaintiffs injured by the drilling rig could only seek to recover pecuniary losses. Plaintiffs argued that punitive damages should be considered pecuniary losses. The panel rejected this argument because the recovery of pecuniary losses is designed to compensate a plaintiff for the actual loss they suffered, while punitive damages are intended to punish the wrongdoer for their misconduct.

Highlighting the sharp disagreement within the *en banc* panel, judges issued two concurring opinions and dissenting opinions. In a dissent joined by five other judges, Judge Higginson argued that punitive damages could be awarded to a plaintiff alleging injury based on the unseaworthiness of their employer's vessel. Relying on *Townsend*, Judge Higginson argued that (1) unseaworthiness was a general maritime claim prior to the passage of the Jones Act; and (2) that punitive damages were available under the general maritime law prior to the passage of the Jones Act. He argued that the Jones Act did not address unseaworthiness or limit its remedies. Thus, because Congress did not limit a party's ability to seek punitive damages for a claim of unseaworthiness, he would have allowed the punitive damages remedy to the injured parties in *McBride.*

This decision severely limits the scope of *Townsend* and the availability of punitive damages for a seaman asserting unseaworthiness claims. Courts outside of the Fifth Circuit will weigh in on the availability of punitive damages for unseaworthiness claims. The Supreme Court may also address this issue given the sharp divide in the Fifth Circuit over the application of *Miles* and *Townsend* to the injured seaman and the Estate of the deceased in *McBride*.

Eleventh Circuit Rejects Attempt to Bring Jones Act Claim against Dual-Listed Corporation on the Grounds of Personal Jurisdiction

In *Sabo v. Carnival Corp*., 762 F.3d 1330 (11th Cir. 2014), the Eleventh Circuit recently affirmed the dismissal of a class action suit under the general maritime law and the Jones Act, 46 U.S.C. § 30104, against Carnival Corporation & PLC in the Southern District of Florida. The Plaintiffs were three workers who were employed aboard Cunard Line Cruise Ships. Each of these workers suffered back injuries and was unable to work while they recovered. Under their employment contract, each worker received three months of wages and two months of medical expenses.

All three of these employees had entered into an employment contract with Cunard Celtic Hotel Services, Ltd. ("Cunard"). Cunard operates under the corporate umbrella of Carnival Corporation & PLC. Carnival Corporation & PLC is a dual-listed company ("DLC") comprised of Carnival Corporation (a Panamanian corporation headquarter in Miami) and Carnival PLC (a British Company headquartered in Southhampton, England). A DLC allows two separate corporations to be unified into a single enterprise through an agreement between the two corporations. These arrangements are employed between companies of different national origin because they offer benefits to both companies, including tax and regulatory advantages. The Court noted that Carnival Corporation and Carnival PLC chose to become a DLC because it allowed them to gain access to multiple financial markets and to avoid divestment from British institutional investors, who may be restricted from holding shares in foreign-owned companies.

Unsatisfied with their contractual benefits, the Plaintiffs filed a class action suit against Carnival Corporation and Carnival PLC for failure to provide maintenance and cure in accordance with the general maritime law and the Jones Act. After the Defendants filed a motion to dismiss, the Plaintiffs stated that they only intended to sue Carnival Corporation & PLC – the DLC. The district court dismissed the complaint because it held that it lacked jurisdiction over the DLC. The court noted that in order to reach the DLC, the Plaintiff would need to explain how it could "overcome the individual corporate identity of Carnival Corporation and Carnival PLC" to give the court jurisdiction over the DLC. The Plaintiffs filed an amended complaint that named Carnival Corporation & PLC as the sole defendant. The Plaintiffs attempted to describe how the corporate structure of the DLC subjected it to personal jurisdiction in the Southern District of Florida. However, the court rejected this argument and again held that the Court did not have personal jurisdiction over the PLC.

On appeal, the Eleventh Circuit affirmed. The court held that the Plaintiffs chose to sue the DLC in federal court in Florida because it offered greater potential rewards by (1) invoking U.S. Maritime law and the Jones Act; and (2) allowing the plaintiffs to tap into a larger pool of potential class members from the entire fleet of the DLC. The court analyzed the three potential bases for personal jurisdiction advanced by Plaintiffs: (1) that the DLC is really one company; (2) the DLC is subject to

doctrine of incorporation by estoppel; and (3) that the DLC is essentially a joint venture between two corporations that would make it amenable to suit pursuant to Florida's joint venture law.

The Eleventh Circuit rejected each of these arguments. First, the Court rejected that the claim that the DLC was one company because it was not incorporated as a single legal entity in Florida or any other state. Second, there were no facts that supported the Plaintiffs' incorporation by estoppel theory. In particular, the Plaintiffs entered into employment contracts with Cunard. They provided no explanation for how the DLC had any involvement with their employment agreements or why they believed that the DLC was a single legal entity. Third, the Court rejected the joint venture theory because: (1) a DLC is not a joint venture, which requires the creation of a single business enterprise; and (2) even if the DLC was a joint venture, Florida law only provides for personal jurisdiction over the entities compromising the joint venture – not the joint venture itself. Thus, the Court lacked personal jurisdiction over the DLC in Florida.

This case highlights the advantages of the DLC structure in limiting potential exposure to litigation in the United States. Moreover, it serves as a strong reminder that parties in Jones Act litigation must carefully analyze the corporate form of the defendants to determine whether personal jurisdiction exists over each party.

The Eleventh Circuit Holds that Cruise Lines May Be Held Liable for the Negligence of Medical Personnel

In *Franza v. Royal Caribbean*, 772 F.3d 1225 (11th Cir. 2014), the Eleventh Circuit examined whether a passenger can assert a claim for medical malpractice against a cruise line based on the conduct of medical personnel operating aboard the vessel. This case analyzed the well-established *Barbetta* rule. This rule, that was set forth in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), immunizes a vessel owner from liability when its employees render negligent care to its passengers. The *Barbetta* rule has been adopted by several circuits, including the Second, Fifth, and Ninth Circuits. However, the Eleventh Circuit rejected this approach and held that the plaintiff had stated a cognizable claim against the cruise liner.

In *Franza*, an elderly cruise ship passenger injured his head while the vessel was docked at Port in Bermuda. The passenger was transported back to the ship and received medical treatment in the ship's medical center. The complaint alleged that a nurse aboard the ship failed to properly diagnose the patient's head trauma and provided no treatment. The ship's doctor failed to meet with the patient for nearly four hours. The doctor began a Mannitol drip and transferred the patient to a hospital in Bermuda for further care. By the time the patient received treatment at the hospital, his life was beyond saving. He fell into a coma and died a week later.

The Estate of the deceased brought suit under 28 U.S.C. § 1333 and the general maritime law and sought to hold the cruise liner vicariously liable for the purported negligence of the ship's doctor and nurse. The Estate alleged that the defendant was liable for the negligence of its employees and agents because the medical personnel were the defendant's (1) actual agents and (2) apparent agents. The Estate alleged that that the passenger would have survived if he had received the proper medical care at the defendant's medical center. The district court dismissed the plaintiff's complaint because such claims were barred by the "*Barbetta*" rule.

On appeal, the Eleventh Circuit reversed, rejecting the *Barbetta* rule and held that plaintiff had stated a cognizable claim. While a shipowner traditionally owes no duty to provide medical care, the court held that a shipowner may be liable for medical negligence if its conduct breaches the shipowner's general duty to exercise reasonable care. The court recognized that maritime cases have routinely held vessel owners vicariously liable for the negligence of their agents. The Eleventh Circuit could not align this well-established body of case law with the *Barbetta* rule.

While acknowledging that other circuits have embraced the *Barbetta* rule, the Eleventh Circuit held that "absent any statutory mandate to the contrary, the existence of an agency relationship is a question of fact under the general maritime law." The allegations in the complaint supported a finding that the nurse and doctor in question were agents of Royal Caribbean. The Estate met this standard by alleging sufficient facts to show that the: (1) cruise liner acknowledged that the medical professionals would act on its behalf; (2) personnel had accepted this undertaking; and (3) that cruise liner had control over the actions of the medical professionals. The Estate alleged that the defendant hired the medical personnel, considered them to be members of the crew, required them to wear uniforms, and placed them under the command of the ship's superior officers. The Estate also alleged that the defendant paid the medical personnel a salary. In terms of payment, passengers were billed for medical treatment through the passenger's onboard payment card. The defendant thus controlled the funds that would have been paid directly to the medical personnel if they were independent contractors. Further, the defendant allegedly supplied the medical centers with supplies and equipment. These facts were sufficient to allege a principal-agent relationship. The Eleventh Circuit also held that, based on these facts, the Estate had alleged a valid claim under a theory of apparent agency because the cruise line made a representation to the deceased that the medical professionals were agents of the cruise line and that the deceased had detrimentally relied upon this representation.

The court further rejected several assumptions underlying the *Barbetta* rule. The court recognized that when the *Barbetta* rule was adopted, vessel owners exercised less control over medical personnel operating on the vessel. However, this is no longer the case given that cruise liners operate medical centers that are responsible for providing care to thousands of passengers. The court was also dubious of *Barbetta's* assumption that the nature of a cruise line's expertise makes it unable to supervise medical personnel. The Eleventh Circuit recognized that courts have held other entities, including universities, liable for the negligence of the medical professionals that they employ. The court held that the determination of whether a cruise liner has exercised sufficient control over the medical personnel to warrant vicarious liability must be determined after analyzing the specific facts of each case.

The court thus strongly rejected the assumptions underlying *Barbetta.* This decision has created a split amongst the Circuits and could open the door to a new series of lawsuits arising out of medical care rendered on cruise ships and other vessels. This case is especially important because many cruise liners have included forum selection clauses in their contracts with passengers that require any suit to be filed in the Southern District of Florida.

The Fifth Circuit Holds that Vessel-Based Tankermen are not Subject to Overtime Pay Under the Fair Labor Standards Act

In *Coffin v. Blessey Marine Services, Inc*., 771 F.3d 276 (5th Cir. 2014), the Fifth Circuit examined whether nine former vessel-based tankermen that were employed on barges were entitled to overtime pay under the Fair Labor Standards Act ("FLSA"). The district court held that the tankermen were not seamen for purposes of the FLSA and denied the defendants' motion for summary judgment. The Fifth Circuit analyzed the applicable facts and held that the tankermen were exempt from overtime under the FLSA.

Under the FLSA, an employee that works more than forty hours a week must be paid overtime unless the employee is exempt from the statute. The FLSA exempts from overtime "any employee employed as a seaman." 29 U.S.C. § 213 (b)(6). In analyzing whether the plaintiffs were seamen, the Fifth Circuit relied upon the applicable Department of Labor regulations. 29 CFR §831.31, 32. Section 783.31 states:

> [A]n employee will ordinarily be regarded as 'employed as a seaman' if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character.

29 CFR §831.31. The regulations further state that work other than seaman work becomes substantial "if it occupies more than 20 percent of the time worked by the employee during the workweek." *Id.* at § 783.37.

The Fifth Circuit emphasized that a district court must examine the factual context of the work that is performed when determining whether a certain employee is exempt under the FLSA. The defendants transported liquid cargo via inland waterways and the ocean. The plaintiffs were members of a unit tow crew that were assigned to particular vessels for voyage and performed work on barges that were towed by the defendants' boats. The tankermen "ate, slept, lived and worked aboard" the defendants' vessels and worked at the direction of the captain. The crew worked aboard the defendants' vessels approximately 84 hours during a seven-day period.

The tankermen argued that they were not seamen because they loaded and unloaded the vessels. They argued that such work did not constitute the work of seamen under existing case law. The Fifth Circuit declined to adopt such a rule given the plaintiffs' responsibilities aboard the vessels. Unlike harbor-based personnel that have no involvement in the barge's navigation, the plaintiffs' work aboard the vessels impacted the loading and unloading duties. The court emphasized that the context of the work that is performed "can affect whether it is seaman or nonseaman work." It determined that the tankermen were seamen for purposes of the FLSA because the loading and unloading of the vessel was integrated with their many other duties aboard the defendants' vessels.

Finally, the court noted that the purpose of the FLSA supported the defendants' position. The tankermen devoted "varying amounts of time to loading and unloading on each hitch" and it was common for employees in this environment to work more than forty hours a week. Thus, given the circumstances of the plaintiffs' employment, the court held that the purpose behind the FLSA was best served by determining that the workers were exempt from the statute.

MOTOR

Steven W. Block
Foster Pepper PLLC
Seattle, WA
(206) 447-7273
sblock@foster.com

Absent defined subrogation rights or an assignment from shipper of record, a broker cannot sue a carrier under Carmack (and federal jurisdiction fails as a consequence). *Haulmark Services, Inc. v. Solid Group Trucking, Inc*., 2014 WL 5768685 (S.D. Tex. 2014)

Shipper Del Monte engaged freight broker Haulmark Services to arrange transit of freight from Texas to Nebraska. Haulmark booked the load with carrier Solid Group Trucking (SGT) pursuant to a bill of lading SGT issued to Del Monte, as well as a contract between Haulmark and SGT that contained an indemnity clause.

Yes, an indemnity clause, of the variety many states, including Texas, have outlawed when they purport to hold a carrier liable for losses beyond what existing law would. Haulmark paid Del Monte the post-salvage value of its cargo loss, and sued SGT in Texas state court to recover. Its claim was based on the indemnity agreement only.

SGT removed the matter to the U.S. District Court for the Southern District of Texas, asserting that Haulmark's claims are preemptively governed by Carmack, which provides for federal jurisdiction. SGT moved to remand, asserting that, hey, this wasn't a Carmack claim.

The federal court agreed and sent the matter back to state court. Not only was this not a Carmack claim based on the complaint's four corners, it couldn't be based on facts before the court. Only a shipper of record, a subrogated broker or an assignee of the shipper's rights can sue under Carmack, and nothing in the record suggested any of those circumstances here. Despite a Texas statute, the indemnity agreement could be a basis for SGT's liability because, on the face of it at least, it didn't create an indemnity obligation for anything beyond the carrier's negligence or other wrongdoing.

SGT's motion to remand was granted, but because there were reasonably good grounds for the removal, the court denied SGT's request for a fee award (which it is empowered to grant when removal is unreasonable).

Allegation that carrier's failure to honor shipper's full liability election constitutes fraud and violation of consumer protection laws doesn't upend Carmack preemption.
Irene J. Kendrick Revocable Living Trust, et al. *v. South Hills Movers, Inc*., 2014 WL 5685680 (W.D. Pa. 2014)

There are some exceptions to Carmack's exclusive dominion over interstate cargo claims. These generally must be based on "peripheral claims" resulting from the carrier's conduct or harm that are separable from the actual loss. They usually apply only when there's been particularly egregious wrongdoing, such as intentional infliction of emotional distress, or an issue completely separate from the cargo loss.

But a carrier's failure to pay full cargo value despite its shipper's election of full liability on a bill of lading doesn't rise to that level. Just ask the beneficiaries of a trust who filed suit against carrier South Hills Movers. They recently lost that argument before the U.S. District Court for the Western District of Pennsylvania after some of their stuff was damaged in a household goods move. They believed their carrier's refusal to pay up constituted a post-loss breach of warranty or, worse yet, fraud, that shouldn't be preempted by Carmack.

The court actually liked the argument, calling it "superficially appealing," The problem was that the shipper's only loss was damage to their cargo, which is "at the heart of Carmack preemption."

but …

A broker's alleged failure to process a cargo claim on shipper's behalf falls outside Carmack preemption.
Anderson v. Pour, et al., 2014 WL 5699646 (N.D. Cal. 2014)

Shipper Anderson hired freight broker Reindeer Logistics to arrange transit of his 1972 Camaro from New York to California. Reindeer booked the transit with carriers Bristol Global Mobility and Mandana Pour, d/b/a Quality Auto Transport (the opinion doesn't get into the roles each carrier played). The car arrived late and damaged.

Anderson's agreement with Reindeer provided that Reindeer would process any cargo claims. While the broker made some lowball offers to Logan to settle his $25,000 repair claim, it apparently didn't do anything else to collect from the carriers. Anderson sued all concerned in the Northern District of California, claiming tortious breach of the implied duty of good faith and fair dealing, as well as emotional distress and other state law causes of action. He asserted the carriers were also liable on these theories because they were acting with Reindeer as part of a "joint venture." Reindeer moved to dismiss the shipper's state law claims based on Carmack preemption.

The court denied the motion. All of Reindeer's alleged wrongdoing occurred after the transit, and related to its brokerage agreement with Anderson that's not subject to Carmack. The court relied

heavily on the U.S. Supreme Court's 2013 decision in *Dan's Used Cars, Inc. v. Pelkey*, in which the Supremes ruled that preemption applies only to a claim that "relates to … service of any motor carrier … with respect to the transportation of property." Anderson's claim, as pleaded in his complaint, was outside that scope.

Unfortunately, the court didn't get into the confusing business about the carriers and Reindeer being in a joint venture that renders the carriers proper defendants under Anderson's state law theories …

A shipper "pleads itself out of court" by alleging in its complaint that a transportation service provider is a carrier.
The Mason and Dixon Lines, Inc. v. Walters Metal Fabrication, Inc., 2014 WL 4627715 (S.D. Ill. 2014)

Shipper Walters Metal Fabrication (Walters) engaged Mason and Dixon Lines (MADL) to deliver an oversize load of pipe spools from Illinois to Texas. MADL obtained the oversize permit from the Illinois Department of Transportation, and apparently brokered the load to carrier AmCan. The load was damaged en route when it hit a bridge.

Walters made a claim against MADL, and ultimately set off some 138 grand in freight charges against the value of the allegedly damaged cargo. This prompted MADL to sue Walters in the U.S. District Court for the Southern District of Illinois, and Walters to counterclaim on the ground MADL negligently damaged its pipes. MADL moved to dismiss the counterclaim based on Carmack preemption, which it urged rendered the offset improper.

Walters responded that it wasn't clear whether MADL had operated as a broker or a carrier, and only if MADL was a carrier would Carmack apply. It's complaint actually alleged MADL was either one or the other, without saying which.

The court granted MADL's motion. True, whether or not an entity is a broker a carrier is a fact question, typically not properly resolved in a motion for summary judgment. But in addressing such a motion, a court must accept the claimant's pleaded facts as true. Walters itself alleged it had "contracted with MADL to haul cargo from [Walters'] facility to its customer's facility." This is a something only a carrier, and not a broker, would do. Moreover, the complaint alleged that MADL had procured the oversize permit which, again, only carriers undertake as a matter of statute. Thus, Walters had "pleaded itself out of court," a rather harsh result given the role pleadings are intended to serve. Presumably, Walters can refile.

A court dismisses accident injury plaintiff's claims against broker C.H. Robinson.
Hayward v. C.H. Robinson Co., Inc., et al, 2014 WL 5487748 (Ill. App. 3 Dist 2014)

Finally, here's some good news for freight brokers in general and C.H. Robinson in particular regarding broker liability for carrier accidents. C.H. Robinson was the broker of a load transported by carrier Pella Carrier Services (Pella). The court refers to Pella as an "independent contractor" of C.H. Robinson, which isn't quite right, but doesn't alter the analysis. After a Pella driver hit a motorist while undertaking an illegal maneuver, the motorist's estate sued C.H. Robinson and various other entities in an Illinois state court, alleging that Pella was an agent of C.H. Robinson, which should be liable under various negligence and master servant theories.

Both the trial and appellate courts disagreed. Unlike many other scenarios we've seen in which brokers and forwarders have been held liable for accidents (frequently for huge bucks), here, C.H. Robinson had effectively distanced itself from Pella contractually and operationally. C.H. Robinson had verified that everything was in order with the performance history, safety rating, insurance and licensing of Pella and its driver before booking the load. The companies' contract specified that no employment or

agency relationship was created; C.H. Robinson didn't hire, fire, dispatch, pay, incentivize, disincentivize, equip, or otherwise monitor Pella's drivers, and nothing in the opinion suggests C.H. Robinson's relationship with Pella had anything to do with the accident.

The plaintiff submitted an expert report that showed how another company owned by Pella's owner, which shared common employees, had been cited for safety issues, but evidence linking that with Pella's current operations was inadequate. The court wouldn't go so far as to impose on a broker a duty to research other companies. The plaintiff had tried to obtain additional discovery before the summary judgment hearing, but the court found procedural errors and refused to hold up dismissal on that basis.

Federal court dismisses shipper's cargo claim against broker based on FAAAA preemption and failure to state a plausible claim.
Marx Companies, LLC v. Western Trans Logistics, Inc., 2015 WL 260914 (D.N.J. 2015)

A number of cases in recent years have rejected shipper claims against freight brokers by concluding that the Federal Aviation Administration Authorization Act (FAAAA), which prohibits states (and therefore state law claims) from interfering with the business of interstate transportation, preempts them. The U.S. District Court for the District of New Jersey recently went that way, for the most part, in tossing out a shipper's claim based on tort and contract theories.

Shipper Marx Companies engaged broker Western Trans Logistics to arrange transit of a cargo of frozen beef from California to Missouri. Western issued to Marx its credit application, which served as a contract, and which proclaimed Western had "an extensive network of reliable carriers." Allegedly, Western booked the load with a carrier it knew nothing about, and with which it had no experience. The load disappeared, and Marx sued Western.

The court was a bit confused by Marx's complaint, having trouble determining whether the theories were in tort or contract. It broke down Marx's claims into negligence and breach of contract categories, and reviewed each separately. Negligence claims, the court ruled, don't get past FAAAA. Such allegations relate to the service of the broker, and as such are specifically preempted.

However, while not delving deeply into the distinction, the court concluded contract claims might be allowed. But the contract at issue didn't specify any promise that Marx claimed had been broken. Marx asserted that there are promises implied in law regarding a broker's obligations to select appropriate carriers. The court rejected this argument, first because implied promises weren't alleged in the complaint, and second because they'd be outside the parties' express contractual agreement, which would be needed to avoid preemption. The court therefore claimed Marx's complaint didn't state a plausible claim, and granted Western's motion for summary judgment.

Carmack doesn't preempt or provide federal jurisdiction for a broker's indemnity claim against carrier.
Keystone Logistics, Inc. v. Struble Trucking, LLC, 2014 WL 6750052 (N.D. Ind. 2015)

Broker Keystone Logistics booked interstate transit of a load of ice cream with carrier Struble Trucking. Struble allegedly failed to deliver it properly; Keystone paid off its shipper; and the broker sued the carrier in Indiana state court seeking indemnity. Struble removed the claim to the U.S. District Court for the Northern District of Indiana, and Keystone moved to remand.

The removal was based on Carmack's conferral of federal jurisdiction on claims based on carrier-issued bills of lading. Agreeing with Keystone, the court observed that Struble hadn't issued any bill of lading to Keystone. The carrier urged that the broker essentially was standing in its shipper's shoes in making the claim, and precedents hold that Carmack still governs indemnity claims in

such situations. But Keystone wasn't suing as its shipper's assignee or subrogee, as an insurer might in seeking recovery after a payment. Here, Keystone was suing directly under its contract with Struble. The carrier-shipper relationship was not implicated. The court remanded the action to state court accordingly. Be careful with matters like this; the removal statute provides for attorney fee awards for improper federal jurisdiction claims, and the court awarded Keystone its fees in getting the claim remanded.

Consignee's costs to uninstall construction panels are non-recoverable consequential damages, and nine-month period to give notice of claim must be stated to consignee.
Architectural Contractors, Inc. v. Schilli Transportation Services, Inc., 2014 WL 7014337 (W.D. Ark. 2015)

Here's a case that shows how complex a damages analysis can be in the construction context. These kinds of issues come up frequently when contractors, their subs, and sub-subs go at it, but transportation service providers aren't immune. Architectural Contractors, Inc. (ACI) ordered from BlueScope Buildings North America supplies, including wall panels, needed for a construction project that was subject to contractual deadlines. BlueScope booked transit of the panels with motor carrier Schilli Transportation Services which issued a bill of lading naming ACI as consignee.

The panels arrived damaged, but to meet its deadlines, ACI went ahead and used them as a necessary step before concrete could be poured (with the intention of later replacing the panels with undamaged ones). ACI brought suit against Schilli in the U.S. District Court for the Western District of Arkansas seeking recovery not only of the value of the damaged panels, but the costs to redo the damaged ones used for the concrete pour.

Schilli first pointed to a nine-month deadline to give written notice of claim established by a transportation agreement between Blue Scope and the carrier. But the bill of lading didn't contain such a term, and Schilli couldn't show that ACI had ever received the agreement or other notice. Carmack countenances such time-to-give-notice restrictions, but they must be made known to any and all parties subject to it. That defense failed.

But ACI wasn't allowed to recover its consequential damages resulting from the concrete pour. The carrier simply didn't have advance notice that such monetary losses would ensue from damage to the panels, which is the test established eons ago, and now is known as the *Hadley v. Baxendale* standard. True, Schilli was in the business of moving building materials, but that didn't make it an expert on every aspect of construction, and neither shipper nor consignee specified the potential consequential damages in shipping documentation. There also was a suggestion that ACI could have gotten replacement panels in advance of the pour.

Commercial relationships rule, and you can't sue someone just for not doing business with you.
Daniluk v. Norfolk Southern Railway Company, 2015 WL 148560 (D. Colo. 2015)

It goes without saying that making and keeping good relationships that provide ongoing streams of business is the most reliable model for success in any service industry. The transportation industry is more than just a good example of why this is true. Just ask Joe Daniluk, owner of bankrupt Superloads, Inc., who claims his company failed as a result of a major railroad putting it on a "do-not-use" list.

The whole mess started when the tail end of a daisy chain of intermediaries, Superloads, Inc., fell out of favor with Hyundai Heavy Industries (HHI), the shipper of a huge transformer, and the Norfolk Southern Railroad. Superloads arranged for portions of the domestic surface transport of the transformer from Korea to Pennsylvania. The Norfolk Southern was responsible for ensuring that HHI had necessary permits and rail clearances, and apparently Superloads and the railroad got into a row about permits in a way that delayed delivery. HHI dispatched a rep to find out what was going on, and when

the smoke cleared, both a ticked-off HHI and one of the freight forwarders higher up the daisy chain put Superloads on a "do-not-use" list.

Mr. Daniluk sued the Norfolk Southern in the U.S. District Court for the District of Colorado, alleging various tortious business interference claims. The problem was that he didn't have any evidence supporting his claims. He alleged that HHI had replaced Superloads as shipper of record in the bills of lading, but no document showed it was ever named as a shipper in the first place. Superloads remained solvent throughout the transport, and was paid according to its contract. It had no future deals in place it could show were cancelled. In other words, Mr. Daniluk had nothing more than a conclusory, self-serving affidavit supporting his hunch that the railroad had done anything wrong. That's not enough, and his claims were dismissed.

Personal jurisdiction concepts in the trucking context.
Rhodes Enterprises, LLC v. Financial Carrier Services, Inc. and Rickie Williams, 2014 WL 7010952 (M.D. Tenn. 2014)

Given the trucking industry's inherently transient nature, personal jurisdiction issues are commonplace. You can't get just any state's courts to take jurisdiction over anyone, anywhere; natural persons and other legal entities must have some connection with a state before it would be fair for their rights to be adjudicated there. Stationary entities located within the same state don't face the same issues getting a court to grant jurisdiction as ones which have business all over – like trucking companies.

The U.S. District Court for the Middle District of Tennessee recently took an interesting look at the circumstances of players in our industry when a Tennessee-based motor carrier, Rhodes Enterprises, wanted to collect allegedly unpaid freight charges from another carrier, Alabama-based Rickie Williams Trucking (RW Trucking), after RW Trucking had interlined a load to Rhodes, and/or from RW Trucking's factoring agent, Florida-based Financial Carrier Services (FCS). The defendants moved to dismiss the claim for lack of personal jurisdiction.

The personal jurisdiction analysis centers on fundamental concepts of "minimum contacts" a defendant must have with a state before a plaintiff can properly subject that defendant to the court jurisdiction of that state. Doing business in a state usually is enough if that business is the subject of a dispute, but the issue isn't always so clear. A number of tests have been drawn up over the centuries U.S. judges have grappled with the issue, with a party's "purposeful availment" being the "constitutional touchstone" of when it's proper for a court to claim power to adjudicate. If you intentionally and knowingly try to earn a buck in a state, you're subjecting yourself to that state's judicial oversight.

In response to the defendants' motion, RW Trucking pointed out that it didn't have anything to do with Tennessee, especially with respect to the hauls it engaged Rhodes for. The plaintiff's complaint didn't suggest where any of its transportation activities were intended to occur, or any other specifics about the RW Trucking-Rhodes relationship related to the Volunteer State. The agreement between them was consummated in a Yellowhammer State truck stop, and nothing suggested any RW Trucking employee had ever even been to Tennessee. Similarly, other than an earlier payment to Rhodes, FCS had nothing to do with Tennessee.

The mere fact Rhodes is located in Tennessee is insufficient to connote minimum contacts with that state by entities which do business with it. Going through a nice and possibly handy little review of personal jurisdiction law, the court dismissed the case without prejudice for filing elsewhere.

RAILROADS

Kathryn J. Gainey
Steptoe & Johnson LLP
Washington, D.C.
(202) 429-6253
kgainey@steptoe.com

Recent STB Decisions Relating to Preemption

This article profiles several recent decisions of the Surface Transportation Board relating to preemption under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b).

The Board Considered Whether Two Rules Relating to Locomotive Idling Would Be Preempted

On December 30, 2014, the Board considered a petition for a declaratory order filed by the United States Environmental Protection Agency, Region IX asking the Board to declare whether two rules relating to locomotive idling would be preempted if they were incorporated into the California State Implementation Plan (SIP) under the Clean Air Act (CAA). U.S. Envtl. Protection Agency—Petition for Declaratory Order, STB Docket No. FD 35803, at 1 (STB served Dec. 30, 2014).

This proceeding arose after the South Coast Air Quality Management District (District) developed two rules relating to locomotive idling and attempted to implement the rules "at the local level." Id. at 3. In 2007, a federal district court "held that the Rules were preempted § 10501(b)" and enjoined "implementation or enforcement of the Rules." Id. at 3 (quoting Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., No. CV 06-01416-JFQ (PLAx) (C.D. Cal. Apr. 23, 2007)). The federal district court also determined that the "District did not have authority under California law to 'regulate air contaminants from locomotives, and therefore was not acting under the CAA when it adopted the Rules.'" Id. In 2010, the Ninth Circuit affirmed "on the basis that § 10501(b) preempted the Rules." Id. at 4 (citing Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094 (9th Cir. 2010)).

In 2011, the District submitted the rules to the California Air Resources Board (CARB) "for consideration of inclusion in the state's SIP." Id. at 4. CARB submitted the Rules to EPA, and EPA petitioned the Board for a declaratory order.

The Board denied EPA's petition, explaining "that issuing such an order would be premature." Id. at 1. "If EPA subsequently does approve the Rules as part of the California SIP, the preemption issue will then be ripe for review and any party may petition the Board for a formal preemption determination." Id. at 6. The Board also stated that the "parties have raised many issues outside the Board's purview that control whether or not EPA can even incorporate the Rules into California's SIP" and that "it appears that these issues would indeed need to be addressed before EPA could approve inclusion of these Rules into California's SIP." Id.

The Board further stated, "based on the current record, we find that the Rules likely would be preempted by § 10501(b)." Id. at 10. The Board found that "based on the current record, it appears that allowing states and localities to create a variety of complex regulations governing how an instrument of interstate commerce is operated, equipped, or kept track of (even if federalized under the CAA) would directly conflict with the goal of uniform national regulation of rail transportation." Id. The Board also found that the "record here also suggest that adoption of the Rules into the California SIP could conflict

with obligations imposed under other federal laws," citing "EPA's own regulations on locomotive emissions enacted pursuant to the CAA" and "concerns [raised] in the USDOT/FRA comments that there are inconsistencies between the Rules and FRA regulations." Id. at 11.

State and Local Permitting and Preclearance Requirements Are Preempted Relating to a Track Extension Project In a Rail Yard

On December 23, 2014, the Board granted a petition for declaratory order filed by Soo Line Railroad Company's "seeking … clarif[ication] that environmental and other permitting requirements … for a track extension project to upgrade Soo's St. Paul yard [ ] are preempted under 49 U.S.C. § 10501 (b)." Soo Line R.R. Co.—Petition for Declaratory Order, STB Docket No. FD 35850, at 1 (STB served Dec. 23, 2014).

The Board stated, "(as the parties agree) that the environmental and wetlands review and permitting requirements of the State and the City are categorically preempted by § 10501(b) in connection with the project to upgrade the Yard." Id. at 5. The Board noted that the "parties have not resolved the limits of federal preemption as it pertains to the types of state and local regulation that might be applied to the Yard." Id. at 3. The Board stated that the "City may exercise its police powers over the project to the extent its regulations project public health and safety and do not unreasonably interfere with or discriminate against rail operations, and provided that its regulations entail no extended or open-ended delays." Id. at 5. The Board further stated that the "State and the City cannot use their police powers to indirectly regulate matters reserved to the Board, such as Soo's rates, services, and facilities" and that "state and local action must not have the effect of foreclosing or unduly restricting Soo's ability to upgrade the Yard and conduct operations in St. Paul, or otherwise unreasonably burden interstate commerce." Id.

CEQA Is Preempted In Connection With The California High-Speed Rail Line Segment Between Fresno and Bakersfield

On December 12, 2014, a majority of the Board concluded that the "[California Environmental Quality Act (CEQA)] is categorically preempted by § 10501(b)" in connection with the proposed California high-speed rail line segment between Fresno and Bakersfield. California High-Speed Rail Auth. —Petition for Declaratory Order, STB Docket No. FD 35861, at 10 (STB served Dec. 12, 2014). The California High-Speed Rail Authority petitioned the Board for a declaratory order after seven lawsuits were filed challenging the Authority's compliance with CEQA and seeking "injunctive remedies under CEQA that would prevent or delay the Authority's ability to proceed with construction of the Line." Id. at 2.

The majority concluded that CEQA is preempted, stating in part that "Section 10501(b) expressly preempts any state law attempts to regulate rail construction projects , as they are under the Board's exclusive jurisdiction." Id. at 10. Commissioner Begeman dissented, stating that the Board should not issue a declaratory order. Id. at 15-17 (Begeman, dissenting).

Two petitions for reconsideration, as well as a petition to stay the Board's decision, have been filed.

A Town's Local Zoning Laws and Other Regulations Concerning Operations At a Bulk Transloading Facility Are Preempted

On December 5, 2014, the Board found that "federal preemption applies to … activities [] performed at a bulk transloading facility" on behalf of the Grafton & Upton Railroad Company (G&U) and that the local zoning laws and other regulations of the Town of Upton, Massachusetts are preempted. Diana Del Grosso, et al.—Petition for Declaratory Order, STB Docket No. FD 35652, at 1 (STB served Dec. 5, 2014). Seven local residents asked the Board to declare that the "Town's local zoning laws and other regulations are not preempted," claiming, among other things, that certain operations at the facility

are not part of "rail transportation." Id. at 1, 2.

In this proceeding, the Board considered, among other questions, whether the "vacuuming, screening, bagging, and palletizing of wood pellets at the Upton Facility" is "integrally related to rail transportation." Id. at 6. The Board explained that "the activities at the Upton Facility constitute services related to the movement of property by rail and thus fall within the statutory definition of transportation." Id. at 7. The Board thus found that "these activities qualify for federal preemption under § 10501(b)." Id. at 5.

A petition for review has been filed in the United States Court of Appeals for the First Circuit. Diana Del Grosso, et al.—Petition for Declaratory Order, STB Docket No. FD 35652, at 1 (STB served Jan. 22, 2015) (citing Del Grosso, et al. v. STB, No. 15-1069).

State Law Claims Alleging Improper Design, Construction, and Maintenance of a Rail Line Are Preempted

On October 31, 2014, the Board found that state tort claims "for flooding and property damage allegedly caused by the improper design, construction, and maintenance of BNSF's rail line are federally preempted by 49 U.S.C. § 10501(b)." Thomas Tubbs, et al.—Petition for Declaratory Order, STB Docket No. FD 35792, at 1 (STB served Oct. 31, 2014). Petitioners Thomas Tubbs and Dana Lynn Tubbs own a farm adjacent to BNSF's rail line in Missouri. They alleged "trespass, nuisance, negligence, inverse condemnation, and statutory trespass" and sought "compensation for property damage allegedly caused by BNSF in connection with a flood…." Id. The state court stayed its proceeding to permit Petitioners to seek a declaration "that their state court claims against BNSF are not federally preempted." Id.

The Board found that "Petitioners' claims of trespass, nuisance, negligence, inverse condemnation, and statutory trespass under Missouri state law to be preempted by 49 U.S.C. § 10501(b)." Id. at 7. "[T]his case involves tort claims that challenge a railroad's design, construction, and maintenance of its track." Id. at 5. The Board stated that "[i]f these claims were allowed to proceed, they would have the effect of managing or governing rail transportation." Id. at 4. "Whether BNSF took its actions before and during an emergency resulting from a massive flood, as here, or during normal circumstances, state and local regulation of actions based on the railroad's design, construction, and maintenance standards for railroad track are preempted under § 10501(b)." Id. The Board explained that such claims "would unduly burden interstate commerce and amount to impermissible state regulation of BNSF's operations by interfering with the railroad's ability to uniformly design, construct, maintain, and repair its railroad line." Id. at 5.

A petition for review has been filed in the United States Court of Appeals for the Eighth Circuit. Thomas Tubbs, et al.—Petition for Declaratory Order, STB Docket No. FD 35792 (STB served Jan. 12, 2015).

State and Local Preclearance Requirements Are Preempted In Connection With a Proposed Liquefied Petroleum Gas Transload Facility

On September 19, 2014, the Board concluded that state and local preclearance requirements are preempted in connection with G&U's proposed construction and operation of a liquefied petroleum gas transload facility in Grafton, Massachusetts. Grafton & Upton R.R. Co.—Petition for Declaratory Order, STB Docket No. FD 35752, at 2 (STB served Sept. 19, 2014). A state court enjoined delivery of propane storage tanks to G&U's "rail yard to be used in connection with the construction of the transload facility," and the court stayed the proceedings so the Board could address whether the "Town's application of its permitting and preclearance requirements to the facility" is preempted. Id. at 2-3.

The Board concluded that "operation of the facility will constitute 'transportation by rail carrier' within the meaning of the statute, and as such it comes within the Board's jurisdiction and qualifies for

federal preemption under § 10501(b)." Id. at 8. The Board found that "G&U's current plans call for the transloading facility to be an integral part of its operations as a rail carrier." Id. The Board thus found that "Massachusetts' aboveground storage tank construction permit requirement is categorically preempted by § 10501(b) with respect to the facility at issue here, as it constitutes a permitting or pre-clearance requirement." Id. at 8. The Board stated that "unless applied in a discriminatory manner, provisions of the Massachusetts fire safety code and the aboveground storage tank construction codes that fit within the local police power exception to federal preemption … would be applicable to this project, notwithstanding [the Board's] finding that the facility will constitute transportation by rail carrier entitled to federal preemption under § 10501(b)." Id. at 9 (internal citation omitted).

On October 7, 2014, the Town filed a petition for review in the United States Court of Appeals for the First Circuit. Grafton & Upton R.R. Co.—Petition for Declaratory Order, STB Docket No. FD 35752, at 1 (STB served Oct. 14, 2014) (citing Padgett v. STB, No. 14-2067).

Certain Activities of the Denver & Rio Grande Railway Historical Foundation Do Not Constitute Transportation Within the Board's Jurisdiction

On August 18, 2014, the Board considered "whether a local zoning ordinance is preempted under 49 U.S.C. § 10501(b) with respect to a 1.84-acre parcel of land" leased bythe Denver & Rio Grande Railway Historical Foundation (DRGHF) in the City of Monte Vista, Colorado. Denver & Rio Grande Railway Historical Foundation—Petition for Declaratory Order, STB Docket No. FD 35496, at 1 (STB served Aug. 18, 2014). This proceeding arose after a municipal court ruled that the President of DRGHF violated a local ordinance that prohibited storing railcars "in any … commercial zone of the City when not connected to a rail line." Id. (quoting Monte Vista Municipal Code § 12-17-110(3)). The President appealed to county district court, which held the proceeding in abeyance while DRGHF sought a declaratory order from the Board.

The Board found that "enforcement of Municipal Code § 12-17-110(3) is not preempted under § 10501(b)." Id. at 11. The Board stated that "(1) DRGHF's use of the Parcel is not part of transportation subject to the Board's jurisdiction; and (2) DRGHF does not appear to be in a position to institute such transportation in the reasonably foreseeable future." Id. at 2. The Board explained that the "very limited, wholly intrastate excursion passenger and related raft operations that DRGHF has conducted over the Line to date are not transportation that is conducted under the Board's jurisdiction 'as part of the interstate rail network.'" Id. at 10. The Board stated that "DRGHF has not demonstrated that it provides interstate passenger service or that it has or plans to seek agreements with any other carriers that would make its passenger movements part of the interstate rail network." Id. at 11. These "wholly intrastate operations … are outside the Board's jurisdiction." Id. The Board stated that "as long as that remains the case, the City's rail car storage ordinance is not preempted." Id. at 9.

The Board subsequently denied DRGHF's request for a stay of its order. Denver & Rio Grande Railway Historical Foundation—Petition for Declaratory Order, STB Docket No. FD 35496 (STB served Sept. 16, 2014).

DRGHF filed a petition for reconsideration on September 8, 2014.

HEADQUARTER NOTES

Lauren Michalski
Executive Director
Association of Transportation Law Professionals
P.O. Box 5407
Annapolis, MD 21403
(410) 268-1311
Michalski@atlp.org

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Your continued support through membership is important to the vitality of the ATLP. We thank the members that continue to find value in ATLP and support the Association through your annual dues!

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9995 Gate Parkway, Suite 40
Jacksonville, FL 3224
P: 904.996.1100
E*: brock@rumrelllaw.com*

TROY D. CAHILL (1A)
General Counsel
LaserShip, Inc.
1912 Woodford Road
Vienna, VA 22182
P: (703)761-9030
E: *tcahill@lasership.com*

ATHENA KENNEDY (1A)
Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
P: (206)-623-9372
E: *amk@vnf.com*

JOHN R. DEW (1B)
Director, Global Ocean Services
Expeditors International
1015 Third Avenue
Seattle, WA 98104
P: 206.674.3400
E: john.dew@expeditors.com

MIMI GESWEIN (1A)
Ice Miller LLP
250 West Street, Suite 700
Columbus, OH 43215-7509
P: 614.222.3436
E: *mimi.geswein@icemiller.com*

Look left, look right...Membership Promotion

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

Publications

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

We welcome our new editors: **Travis Kennedy** (Maritime), *Lane Powell PC,* and **Jim Curry, Robin Rotman** and **Athena Kennedy** (HazMat, Safety & Security), *Van Ness Feldman LLP. Thank you!*

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CALL FOR PAPERS

Journal of Transportation Law, Logistics & Policy invites persons interested in transportation policy, law or logistics to submit articles for publication. The *Journal,* which has been published quarterly since 1935 and is listed in Cabell's Directory (Management/Marketing), contains academic-quality articles on timely subjects of interest to transportation academics, attorneys, government officials and a wide variety of policy leaders in the field. Articles in the *Journal* cover all modes and all aspects of transportation policy and law, including both freight and passenger issues, and matters of interest both nationally and internationally. Subscribers to the *Journal* include academic and legal experts, practicing attorneys, government officials, and many others.

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

Please consider submitting your article to the Journal.

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

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Sheraton—Boston
Monday, June 29, 2015

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who will be participating in the Meeting:

Richard F. Griffin, Jr.
General Counsel, NLRB

William P. Doyle
FMC Commissioner

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PRELIMINARY CLE PROGRAM

Supreme Court & Regulatory Issues

It has been an active year for transportation issues at the Supreme Court and major initiatives by federal regulators. A panel of experts will provide a review of transportation-related Supreme Court decisions and key pending federal regulatory initiatives.

Modal Updates

Contributing Editors of the Association Highlights newsletter, provide updates to each of the represented modes in transportation: Antitrust, Aviation, Commuter Rail, FERC, Labor, Maritime, Motor, and Railroads.

FDA: Sanitary Transportation of Food

For the first time, the FDA will issue rules to ensure the safety of food transported by rail and motor carriers. The proposed rules seek to impose new obligations on virtually anyone who ships, receives, or carries food in rail car or motor vehicles. A panel of experts will discuss the impact, and unintended consequences, the rules will have on a variety of stakeholders.

Current and Future Issues Affecting the Transportation Work Force

This panel will include presenters from regulatory agencies such as the FRA, FMCSA or FAA and in□house and outside counsel to discuss a broad range of labor and employment issues relative to the transportation industry. Topics will include hours of service, employee / independent contractor classification, compliance with the most recent federal safety regulations and programs designed to deal with an aging workforce / the employability of our nations' veterans.

Class Action Lawsuits in Aviation

This panel will address class actions in aviation cases and address how other modes of transportation may similarly face such lawsuits. The panel will present plaintiff and defendant perspectives on class actions with an overview on how such cases are litigated.

Port Congestion: Causes, Effects and Legal Implications

A discussion of recent instances of port congestion, its causes and effects, and legal issues of interest to those advising affected persons.

Rail Service Issues : Is the Nightmare of 2014 Over?

2014 was marked by nationwide rail service deficiencies and capacity and equipment shortages which were rooted in economic events and railroad planning decisions dating back to late 2013. Service failures in 2014 eventually led to active participation by the Surface Transportation Board, and a year-long effort by railroads, shippers, and elected officials to try and solve the service and capacity issues and to minimize the harm to rail customers and the economy. The panel will discuss several aspects of the rail service topic, including (1) the increasing interplay between AMTRAK and freight railroads concerning their respective usage of track capacity, and the role of the STB; (2) the pros and cons of the STB's decision to address freight rail service deficiencies by requiring the Class I railroads to make more commercial data available to the STB and the public; and (3) whether and how periodic widespread rail service failures can be prevented in the future.

Passenger Rail: The Expanding View

This panel will look at various developing legal, policy and transactional strategies current in the non-freight rail context. We will address the use of inward-facing cameras in locomotive cabs, the development of intercity passenger rail service under Sections 209 and 212 of the Passenger Rail Investment and Improvement Act of 2008, and the variety of interests and opportunities that arise when freight corridors are railbanked – it's not just about recreational trails.

From Truck Drivers to Middlemen, What's New Regarding Motor Carrier Law?"

This year saw significant developments in law and regulations governing the motor carrier industry. Those in the highway transportation business have kept on trucking through implementation of MAP-21; disputes between states and motor carriers over classification of owner-operators as employees, rather than independent contractors; changes in cargo liability principles; the ongoing debate over hours of service; intermodal issues in an increasingly comprehensive transportation infrastructure, including intermediary liability; and other points of interest. This panel of nationally prominent motor carrier law practitioners will get you up to speed on how the largest component of cargo movement has been cruising.

Canadian Panel

This panel will present on recent developments in Canadian trucking law, with focus on cabotage law issues; Canadian aviation law, with focus on law pertaining to drones; Canadian railroad law, focusing on legal aftermath of Lac Megantic disaster.

Ethics Presentation

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BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 76131
Official Representative: Jill Mulligan
Phone: (817) 352-2353
Jill.Mullligan@bnsf.com

Daley Mohan Groble
55 W. Monroe, Suite 1600
Chicago, IL 60603
Official Representative:
Raymond Groble III
Phone: (312) 422-9999
groble@daleymohan.com

Fletcher & Sippel LLC
29 N. Wacker Drive, Suite 920
Chicago, IL 60606
Official Representative: Myles L Tobin
Phone: (312) 252-1502
mtobin@fletcher-sippel.com

Freeborn & Peters LLP
311 South Wacker Drive
Suite 3000
Chicago, IL 60606
Official Representative: Cynthia Bergmann
Phone: (312) 360-6652
Cbergmann@freeborn.com

Harkins Cunningham LLP
1700 K Street, Suite 400
Washington, DC 20006
Official Representative: Paul Cunningham
Phone: (202) 973-7600
pac@harkinscunningham.com

Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
Official Representative: John V Edwards
Phone: (757) 629-2838
john.edwards@nscorp.com

Scopelitis, Garvin, Light, Hanson & Feary PC
10 West Market Street, Suite 1500
Indianapolis, IN 46204
Official Representative: Allison O. Smith
Phone: (317) 637-1777
asmith@scopelitis.com

Sidley Austin LLP
1501 K Street NW
Washington, DC 20005
Official Representative: G Paul Moates
Phone: (202) 736-8175
pmoates@sidley.com

Slover & Loftus
1224 17th Street, NW
Washington, DC 10036
Official Representative: C. Michael Loftus
Phone: (202) 347-7170
cml@sloverandloftus.com

Steptoe & Johnson LLP
1330 Connecticut Avenue NW
Washington, DC 20036
Official Representative: David Coburn
Phone: (202) 429-3000
DCobrun@steptoe.com

Thompson Hine LLP
1920 N Street NW #800
Washington, DC 20036
Official Representative: Aimee DePew
Phone: (202) 263-4130
Aimee.depew@thompsonhine.com

Union Pacific Railroad Company
1400 Douglas Street, MS 1580
Omaha. NE 68179
Official Representative: Lou Ann Rinn
Phone: (402) 501-0129
larinn@up.com

ASSOCIATION OF TRANSPORTATION LAW PROFESSIONALS

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Karyn.Booth@thompsonhine.com

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Phone: (904) 900-6256
Kenneth.charron@gwrr.com

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Washington, DC 20036
Phone: (202) 347-7170
PAP@sloverandloftus.com

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29 N. Wacker Drive
Suite 920
Chicago, IL 60606
Phone: (312) 252-1311
MBarron@fletcher-sippel.com

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Phone: (212) 894-6792
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ATLP
P.O. Box 5407
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Vice President
ROBERT M. BARATTA, JR.
Freeborn & Peters LLP
311 South Wacker Drive
Suite 3000
Chicago, IL 60606
Phone: 312.360.6622
Email: Bbaratta@Freeborn.com

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Steptoe & Johnson LLP
1330 Connecticut Ave
Washington, DC 20036
Phone : (202) 429-6253
KGainey@Steptoe.com

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1400 Douglas Street, MS1580
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Phone: (402) 544-1658
elisadavies@UP.com

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1420 Fifth Avenue
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Phone: (206) 223-7000
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Immediate Past President
CYNTHIA A. BERGMANN
Freeborn & Peters LLP
311 South Wacker Drive
Suite 3000
Chicago, IL 60606
Phone: (312) 360-6652
cbergmann@freeborn.com

Phone: (410) 268-1311
Michalski@atlp.org

Past President
KATIE MATISON
Lane Powell PC
1420 Fifth Avenue
Suite 4100
Seattle, WA 98101
Phone: (206) 223-7000
matisonk@lanepowell.com

Ex-Officio
E. MELISSA DIXON
Dixon Insurance & ITL, Inc.
P.O. Box 10307
Fargo, ND 58106
Phone: (701) 281-8200
melissad@dixoninsurance.com

Ex-Officio
ERIC M. HOCKY
Clark Hill l Thorp Reed LLP
One Commerce Square
2005 Market St, Suite 1000
Philadelphia, PA 19103
Phone: (215) 640-8500
ehocky@clarkhill.com

Ex-Officio
MYLES L. TOBIN
All Aboard Florida
2855 Le Jeune Road
4th Floor
Coral Gables, FL 33134
Phone: (305) 520-2300
Myles.Tobin@AllaboardFlorida.com

Editor in Chief
MICHAEL F. MCBRIDE
Van Ness Feldman LLP
1050 Thos. Jefferson St, NW, 7th Floor
Washington, DC 20007
Phone: (202) 298-1989
MFM@vnf.com

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