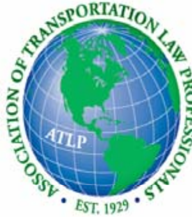

ASSOCIATION HIGHLIGHTS

Introduction

With the first Monday in October recently passed, it seems appropriate to make note of the fact that the first argument heard by the US Supreme Court in this new term was a railroad case, although not one involving a North American railroad. The case is *OBB Personenverkehr AG v. Sachs* – OBB being the Austrian national railroad and Sachs being a US citizen who bought a ticket through an online travel agency in Massachusetts to travel on the railroad. Unfortunately, Sachs was seriously injured while traveling on the railroad and now seeks to hold the railroad responsible for her injuries in a US court, relying on the sale of the ticket here as a hook for US jurisdiction. However, OBB not only conducts no railroad activity in this country (other than ticket sales through agents), but is owned by the Austrian Government, arguably making it immune from suit under the Foreign Sovereign Immunities Act. Sachs is thus forced to argue that the FSIA's "commercial activity" exception should apply to her case, which is the primary issue on which the Supreme Court appears focused. By all accounts, the argument did not go well for Sachs; both liberal and conservative Justices seemed united in their skepticism that buying a ticket in the US is enough to expose a foreign railroad to tort liability for actions occurring outside the US.

While we might hope that the Court's apparent unity in this railroad case will carry through to more controversial cases on its docket this term, I wouldn't bet on that. Perhaps more worrisome for railroads and shippers alike, however, is the prospect that political divisions across the street from the Supreme Court, in the US Capitol, will result in an inability by Congress to timely adopt an extension of the approaching December 31, 2015 Positive Train Control implementation deadline. Unfortunately, the ramifications of a failure to avert a PTC deadline-spawned crisis are only the most recent, albeit one of the most acute, examples of how broader Congressional dysfunction has begun to impact transportation policy, traditionally an oasis of bipartisan cooperation.

Fortunately, there is nothing dysfunctional about the articles in this edition of Highlights. Our airline editors describe several recent preemption cases invoking various different sources of federal preemption, the Airline Deregulation Act, the Federal Aviation Act and the Air Carrier Access Act. Preemption also continues to be a source for rail disputes and so it is fitting that our railroad article provides a review of recent STB preemption cases on matters as diverse as allegedly rail-induced flooding and the taking of rail property for crossings. Our commuter rail authors discuss a failed request to the STB by Caltrain (also noted in the railroad article) to preempt state court challenges to an electrification project under the California Environmental Quality Act, as well as new FTA guidance on that agency's Capital Investment Grant Program. They also update us on PTC implementation with a focus on commuter rail implications of the current, and as noted largely unattainable, December 31, 2015 implementation deadline. Our hazmat editors also address the PTC issue from the perspective of impacts to hazmat shipments (an issue that was addressed as they note during the recent confirmation hearing for a new FRA Administrator), while also bringing us up to speed on various PHMSA developments.

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Our motor carrier editor covers the latest in the world of Carmack loss and damage cases, including a case that involved stolen cargo and another stolen identity, as well as an interesting limitation of liability case. This edition's motor carrier regulatory column identifies a series of delayed rulemaking proceedings pending at FMCSA, while also addressing a variety of other matters, including a notable FHWA report on the controversial issue of truck size and weight and a NHTSA ANPRM on underride guards and reflective materials for certain trucks. Our maritime editor describes a First Circuit case addressing the lawfulness of certain port fees under the Commerce Clause, and another case on the question of an employer's vicarious liability under maritime law. Our labor editors discuss important NLRB developments on the hot question of joint employment, while our FERC editor discusses recent FERC guidelines on public outreach when new pipelines are proposed. In the comings and goings column, our editor identifies recent agency personnel changes of interest.

Happy reading!

David H. Coburn
Editor-in-Chief

Transportation Forum XII

Surface Transportation Board
Washington, DC

Monday, October 19th

Topics will include:

What Are the Issues Before the STB?

Board Authority

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The Future of Railroad Economic Regulation

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Recent Cases Address the Scope of Preemption Under the Airline Deregulation Act and Air Carrier Access Act

Three recent cases addressed the scope of preemption, reaching different results. The first, *Gleason v. United Airlines*[1], involved a passenger who allegedly had a severe allergic reaction to peanuts during a flight, forcing United Airlines to divert the aircraft and make an emergency landing in St. Louis, Missouri.

According to the plaintiff, before she boarded a Chicago-bound flight from Orlando, Florida, she notified United employees that she has severe peanut allergies. The plaintiff asserted that those employees assured her that the flight crew would make an announcement on board the aircraft asking that passengers refrain from eating peanuts. However, once the plaintiff notified her actual flight crew of her allergy, they refused to make such an announcement.

Approximately one hour into the flight, the plaintiff began to experience the symptoms of a severe peanut allergy attack. She noticed a passenger four rows behind her eating peanuts. The plaintiff took medication, but her condition worsened. Flight attendants and medical personnel attended to the plaintiff, and informed the pilot that the plaintiff may not survive if the flight continued to Chicago. Accordingly, the pilot made an emergency landing in St. Louis, where the plaintiff was taken off the plane and hospitalized for two days.

In her complaint, she alleged that she suffered permanent physical and psychological injuries, and brought seven state common law causes of action against United, including causes of action for negligence, breach of contract, and breach of the implied covenant of good faith and fair dealing. United moved for summary judgment and argued that the plaintiff's claims were preempted by the Airline Deregulation Act ("ADA").[2] The ADA is a federal law that preempts state laws that relate to a "price, route or service" provided by an air carrier.

After finding that United was an air carrier within the meaning of the ADA, the court held that the plaintiff's claims related to a United service, or at least the lack of a service, namely the failure to make an announcement to passengers asking that they refrain from consuming peanuts.

1. No. 2:13-cv-01064, 2015 WL 2448682 (E.D. Cal. May 19, 2015).
2. 49 U.S.C. § 41713(b).

Accordingly, the court held that the plaintiff's claims were preempted. United had also argued that plaintiff's claims were preempted by the Federal Aviation Act, but having dismissed the claims based on ADA preemption, the court did not reach that issue.

In *Ahmadi v. United Continental Holdings, Inc.*,[3] the plaintiff alleged that she was hit by an overhead bag that another passenger was attempting to place in an overhead bin prior to takeoff. The plaintiff claimed that the impact of the bag rendered her unconscious and caused injury. She further alleged that the flight attendant near her at the time the bag fell failed to assist her. The plaintiff's complaint alleged generally that United: (1) failed to provide safe storage for carry-ons; (2) failed to assist passengers in loading luggage into overhead bins; (3) failed to warn passengers about dangerous conditions; and (4) failed to properly train its employees. The plaintiff also brought *res ipsa loquitar* and state code violation claims. The case was brought in state court, but United removed to federal court. United then moved for summary judgment on the basis that the plaintiff's claims are preempted by the Federal Aviation Act.

The court began its analysis by noting that in the field of law involving aviation safety and commerce, there are pervasive federal laws which preempt state laws on those topics under the doctrine of field preemption. Field preemption precludes any state from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance.

The court then addressed United's motion for summary judgment with respect to each of the plaintiff's categories of claims. First, with respect to plaintiff's claim that United failed to provide safe storage for carry-ons, the court noted that federal law governs the design of overhead bins, thereby preempting any state law standard of care. Because the plaintiff failed to set forth any evidence showing that United's overhead bin had a defect or did not conform to federal regulations, the court granted United's motion for summary judgment on that claim.

The court next addressed the plaintiff's flight attendant assistance claim. Here too the court found that flight attendant duties are the subject of pervasive federal regulations. Those regulations require only that a flight attendant assist a passenger when the attendant is aware of the need for intervention. Because the flight attendant did not know that the passenger whose bag fell on plaintiff required assistance, the flight attendant had no duty to assist that passenger. Thus, there was no duty to intervene under federal law, and United was entitled to summary judgment on that claim.

Third, the court addressed the failure to warn claim. The court held that under federal law, airlines cannot be held liable for a failure to warn unless those warnings are mandated by federal law. Summary judgment was therefore granted on that claim.

Fourth, the court analyzed the plaintiff's claim that United failed to properly train its employees. Here too the court explained that there are pervasive federal regulations governing flight attendant training. However, the plaintiff failed to allege any facts demonstrating that United failed to train its flight attendance in accordance with federal regulations. Thus, summary judgment was granted on that claim as well.

Finally, the court addressed the plaintiff's *res ipsa loquitar* and state code violation claims. With respect to the *res ipsa loquitar* claim, the court granted United summary judgment on the ground that the plaintiff failed to demonstrate that United was in exclusive control of the baggage that fell on the plaintiff. The court granted summary judgment on the state code violation claim because that claim was preempted by the Federal Aviation Act. Having granted United's summary judgment motion in full, the court dismissed the case.

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3. No. 1:14-cv-00264 (E.D. Cal. August 10, 2015)

Baugh v. Delta Air Lines, Inc.[4] involved a claim on behalf of a blind plaintiff, who allegedly was denied assistance boarding a Delta flight, then tripped and fell on the jet bridge, injuring herself. The plaintiff sued in state court. Delta removed to federal court claiming that the plaintiff's negligence claims were preempted by the Air Carrier Access Act of 1986 ("ACAA"),[5] which prohibits air carriers from discriminating against disabled individuals. Plaintiff sought remand to state court, and Delta cross-moved to dismiss on the ground that the ACAA does not provide a private right of action.

The court began its analysis by noting that neither the U.S. District Court for the Northern District of Georgia, nor the Eleventh Circuit had yet addressed whether the ACAA preempts state law negligence claims. Thus, the court undertook a full analysis as to whether the plaintiff's claims were preempted, in whole or in part, by the ACAA.

Delta argued that because the plaintiff is disabled, and her claim arose while attempting to board an aircraft, the ACAA is the exclusive source of her rights and remedies. Delta also argued that because the ACAA contains no private right of action, then plaintiff's complaint must be dismissed for failure to state a claim. In response, the plaintiff argued that she was not asserting a discrimination claim, but only state-law tort claims.

The court held that the ACAA does not expressly preempt state law negligence claims and, thus, the relevant inquiry was whether field preemption applied to plaintiff's claim. The field preemption inquiry asks: (1) whether Congress intended to preempt state law claims; and (2) whether Congress has legislated in a field typically occupied by the states. The factors that courts typically consider when analyzing field preemption include: (1) whether the state claim is displaced by federal law under an ordinary preemption analysis; (2) whether the federal statute provides a private right of action; (3) what kind of jurisdictional language exists in the federal statute; and (4) whether there is language in the statute's legislative history evincing Congressional intent regarding preemption.

The court found that the most significant factor in the case was that the ACAA does not create a private right of action. Indeed, the court noted that the Eleventh Circuit has only found field preemption in the context of three federal statutes, and each of those statutes sets forth the available causes of actions and remedies. Thus, the court held that the ACAA does not completely preempt state law negligence claims, joining the Ninth Circuit in that conclusion.[6]

However, the court also held that the ACAA did preempt state law standards of care that should apply in negligence cases. On the basis of those conclusions, the court held that no federal question existed, and remanded the case back to state court for further proceedings.

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[4] No. 1:14-cv-2551, 2015 WL 761932 (N.D. Ga. Feb. 23, 2015).

[5] 49 U.S.C. § 41705 *et seq.*

[6] *See Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013)..

COMINGS & GOINGS

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New TSA Administrator

Peter Neffenger is the new administrator for TSA (Transportation Security Administration). Neffenger served the U.S. Coast Guard for 34 years, including as its Vice Commandant.

New NMB Chairman

Nicholas Geale is the new Chairman for the NMB (National Mediation Board). Geale's prior positions include, among others, serving on US Senate Committees, working for the U.S. Department of Labor as the Deputy Secretary's Counselor, and working at the Washington Metropolitan Area Transit Authority as its Assistant General Counsel. He has a law degree from Georgetown.

New NMB Mediators

Jane Allen, Eva Durham and Catherine McCann are new mediators at the National Mediation Board. Allen has more than 20 years of airline industry experience. Her prior experience includes working as Senior Vice President, Onboard Service and Senior Vice President, Human Resources for one big, legacy airline carrier, as well as Vice President, Employee Relations and Chief Labor Negotiator for a second big, legacy airline carrier. She has a law degree from Vanderbilt and was a practicing attorney for five years.

Durham has had a 40-year labor relations career in the airline industry. She started as an Ozark Airlines flight attendant and served on the AFA MEC. In her career, she has worked for regional carriers (*e.g.,* leader of Inflight department for Compass Airline), ULLC carriers (Senior Director Inflight for Frontier and Spirit), and a legacy carrier (*e.g.,* manager for TWA, human resource - labor relations). Durham has an MBA from Clayton State University, mediation training from Harvard Law and was a mediator in Georgia (civil and domestic relations).

McCann has 18 years of experience in human resources/labor relations for commercial aviation. Her prior experience includes her work as Vice President, Employee Relations and Vice President, People for American Eagle Airlines. Her experience in labor relations extends outside the U.S. to the Bahamas and Canada.

New STB Chairman

Daniel R. Elliott III is the new Chairman of the Surface Transportation Board. His first term as Chairman extended from mid-August 2009 through December 2014. Prior to his work at the STB, Elliott was the United Transportation Union's associate general counsel. He has a law degree from Ohio State College of Law.

New SES Appointment

Mary Thien Hoang is now a member of the SES (Senior Executive Service). Hoang will continue to be the Chief of Staff for the Chairman of FMC (Federal Maritime Commission), a position she

has held since Spring, 2013. She has served FMC since 2005 in positions such as Attorney-Advisor, General Counsel's Office and Attorney-Advisor, Bureau of Enforcement. Hoang holds a law degree from Widener University School of Law.

New RRB Director

Kimberly Price-Butler is the new Policy and Systems Director at the RRB (Railroad Retirement Board). Her predecessor, Ronald Russo, retired at the end of last year. Most recently, Price-Butler worked in Policy and Systems as the Railroad Unemployment Insurance Act, Internet and Support Chief.

COMMUTER RAIL

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Introduction

A late-summer regulatory lull has still produced a few updates for the commuter rail industry. First, the Surface Transportation Board (STB) issued a decision determining that a corridor electrification project on the Peninsula Corridor Joint Powers Board's (Peninsula Corridor JPB) San Francisco Peninsula Corridor is subject to California environmental regulatory laws and that such requirements are not preempted by federal law. Second, the Federal Railroad Administration (FRA) issued a Status Report to Congress detailing the state of implementation of Positive Train Control (PTC) and FRA's expectation that most commuter railroads will not meet the December 31, 2015 statutory deadline for implementation. Finally, the Federal Transit Administration (FTA) has issued its updated final guidance regarding its Capital Improvement Grant Program.

STB Denies Caltrain Petition Seeking Federal Preemption of Peninsula Corridor Electrification Project

The Peninsula Corridor JPB is the owner and operator of Caltrain, a public agency providing passenger commuter rail service along the San Francisco Peninsula Corridor, a line that the Peninsula Corridor JPB acquired over two decades ago. The Peninsula Corridor JPB has continued to allow freight railroads to operate on the line. The Peninsula Corridor JPB is currently implementing the Peninsula Corridor Electrification Project ('the "Project), which will electrify the corridor, one of several steps required in order for high-speed rail to eventually use the line.

Opponents of the Project sued the Peninsula Corridor JPB in state court alleging noncompliance with the California Environmental Quality Act (CEQA). In response, the Peninsula Corridor JPB filed a petition for declaratory order with the STB seeking a declaration that the state environmental challenges are preempted by federal law.

On July 2, 2015, the STB issued a decision holding that federal law does not preempt CEQA as applied to the Project, and denying the Peninsula Corridor JPB's petition. *Peninsula Corridor Joint Powers Board – Petition for Declaratory Order*, STB Docket No. FD 35929 (Service Date July 2, 2015). In arriving at its decision, the STB explained that although Caltrain is a rail carrier subject to STB jurisdiction, the Project constituted "mass transportation provided by a local government authority," which is expressly excluded from STB jurisdiction under federal statute. First, because Caltrain is a public agency created under California law, it falls within the definition of "local government authority" as defined under 49 U.S.C. § 5302. Second, because Caltrain's passenger commuter service constitutes "regular, continuing shared-ride surface transportation services that are open to the general public," it fits the definition of "public transportation" and "mass transportation" as defined under the statute.

Although Caltrain argued that the project came under STB jurisdiction due to co-location of freight service on the corridor, the STB found no indication in the record that the Project would impact freight service. The Board noted that a freight railroad could file a petition any time if it believed that the Project would threaten freight rail service, but that so far the co-located railroads were not protesting. In addition, Caltrain argued that the Project was being conducted in order to make the corridor compatible with future high-speed rail service, which the STB had already held to be subject to STB jurisdiction. However, the STB found that: the Project would only benefit Caltrain's commuter rail operations; that several other improvements and upgrades would be required to support high-speed service; and that Project's planning made it clear that it was distinct from construction of a high-speed rail line. Accordingly, the STB held that the Project was exempted from the STB's jurisdiction, and that federal law did not preempt the application of CEQA.

FRA Reports Most Railroads Will Miss Positive Train Control Deadline

Positive Train Control, or PTC, generally refers to integrated systems that continuously monitor train operations and automatically adjust speed to slow or stop a train to avoid accidents. Congress passed the Rail Safety Improvement Act of 2008 (RSIA), which mandated PTC implementation, immediately following the collision of a freight train and a commuter train in California 2008 that resulted in 25 fatalities. RSIA requires certain freight rail lines and all commuter and intercity passenger rail lines to install and use PTC. Under RSIA, the changes must be fully implemented by December 31, 2015.

With the statutory deadline for PTC implementation looming, FRA has issued a Status Report to Congress detailing the progress of all subject railroads in meeting the implementation date. *See* Federal Railroad Administration, *Status Report to House and Senate Committees on Appropriations – Status of Positive Train Control Implementation* (August 2015). The Status Report explains the history of PTC, challenges to implementation, and FRA's actions and financial support to assist railroads in meeting the deadline. Challenges to implementation that the Status Report identifies include:

- Railroads' difficulty in acquiring wireless spectrum from owners in the secondary market.
- Limited number of suppliers of PTC technology with proven capability of delivering systems with the required capabilities.
- Potential radio interference due to lack of a coherent, industry-wide standard for relevant technologies and communication protocols.
- Railroads' failure in timely submitting safety plans as required under FRA's final rule for PTC implementation.

FRA also reiterates its longstanding concern that lack of public funding for PTC implementation could result in implementation delays, and notes Congress's lack of any reliable revenue source dedicated to implementation.

FRA reports that, according to the American Public Transportation Association, an industry trade group, 29% of commuter railroads will complete installation of PTC equipment by the end of 2015, and full implementation of PTC for all commuter lines will be completed by 2020. Out of all of the railroads listed in the report as subject to PTC requirements, only five commuter railroads expect to make the implementation date. Those railroads are: Peninsula Corridor Joint Powers Board, Sounder Commuter Rail, Southern California Regional Rail Authority, Southeast Pennsylvania Transportation Authority, and Tri Met Commuter Rail.

While it states that it will fully enforce the PTC requirements, FRA also requests that Congress provide it with the flexibility to address the "safety gap" that it says will inevitably occur after the December 31 implementation deadline. In particular, FRA proposes that it be allowed to oversee a phased rollout of PTC, and to be allowed to authorize temporary safety alternatives in lieu of PTC implementation. As this Update went to press, both the House and Senate had agreed in principle to extend the PTC implementation deadline to December 31, 2018, but had not agreed on a number of specific issues relating to an extended deadline.

FTA Issues Final Interim Policy Guidance for Capital Investment Grant Program

The Capital Investment Grant Program (the "Grants Program) is FTA's primary grant program for funding major transit capital investments, including those for commuter rail. Before 2012 the Grants Program consisted of two categories of funded projects, known as New Starts focusing on new major capital projects, and Small Starts focusing on smaller capital projects. In 2012 the Moving Ahead for Progress in the 21st Century Act (MAP-21) reworked aspects of the Grants Program, including adding a silo for funding of "Core Capacity Improvements."

Funding under the Grants Program is discretionary. The Grants Program process is based on a multi-phase evaluation process based on established criteria. Where possible, FTA rates projects according to quantitative measurements, assigning different ratings according to established "breakpoints."

Pursuant to federal statute (49 U.S.C. 5309(g)(5)), FTA is required to publish policy guidance for the Grants Program the earlier of every two years or each time the agency makes a significant change to the process or evaluation criteria. In April 2015, FTA published proposed interim policy guidance for the Grants Program. *See* 80 Fed. Reg. 18,796. In August, FTA issued its Final Interim Policy Guidance for its Capital Investment Grant Program. Federal Transit Administration, *Final Interim Policy Guidance – Federal Transit Administration Capital Investment Grant Program* (August 2015) (Final Guidance). *See also Notice of Availability of Final Interim Policy Guidance for the Capital Investment Grant Program*, 80 Fed. Reg. 46,514 (Aug. 5, 2015). FTA also published separately a summary of comments received on the proposed interim policy guidance. The Final Guidance replaces the previous final guidance issued August 2013.

The Final Guidance is arranged into three major sections, addressing New Starts, Small Starts, and Core Capacity program requirements separately. Although similar, the individual programs differ in some details from one another. The Final Guidance also addresses several subjects not previously addressed in previous versions. These include:

- Identifying the measures and breakpoints for congestion relief criterion applicable to New Starts and Small Starts projects. Congestion relief is a new criterion introduced in MAP-21 and is based on the number of new weekday linked transit trips resulting from implementation of the proposed project. In the Final Guidance FTA slightly relaxed the breakpoints for its congestion relief criterion ratings after reviewing its previous breakpoints.

- An evaluation and rating process for Core Capacity Improvement projects, including measures and breakpoints for all project justification and local financial commitment criteria applicable to

those projects. FTA sought to make the Core Capacity evaluation and rating process as similar to the New Starts and Small Starts processes as possible, taking into account the inherent differences between new projects and capacity improvements.

- Prerequisites for entry into each phase of the Grants Program process, and the requirements for completing each phase. FTA has sought to clarify and streamline entry into and exit out of each phase of the Grants Program.

- Explanation of "warrants" entitling certain New Starts, Small starts, and Core Capacity Improvement projects to qualify for automatic ratings on certain evaluation criteria. Prior to MAP-21 there were limited opportunities for automatic ratings qualification. Under MAP-21, the concept of warrants was expressly embraced as a measure to further streamline project development. The purpose of warrants is to greatly simplify the evaluation process for projects that can meet certain cost and ridership thresholds.

FTA has labeled the Final Guidance "interim" because it soon intends to engage in a new rulemaking to amend the governing regulations at 49 C.F.R. Part 611 and codify the principles set forth in MAP-21.

FERC

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Best Practices for Natural Gas Industry Outreach to Stakeholders

There are a growing number of parties objecting to the construction and development of infrastructure projects throughout the country. Under this paradigm, more attention is being paid to the stakeholder outreach efforts being pursued by companies proposing to build such infrastructure projects. On July 28, 2015, the Federal Energy Regulatory Commission's ("FERC") Office of Energy Projects ("OEP") published its *Suggested Best Practices for Industry Outreach Programs to Stakeholders*. Although OEP's publication does not include any regulations, OEP identified public outreach tools that it believes project sponsors can use to effectively engage stakeholders during the process of siting, constructing, and operating interstate natural gas and LNG facilities to help facilitate an efficient process.

OEP suggests that companies develop formal stakeholder outreach programs that foster a continual two-way dialogue between the companies and interested stakeholders. Such stakeholders may include landowners, residents, elected officials, non-governmental organizations, Native American tribes, community leaders, and the media. According to OEP, successful stakeholder outreach programs are company-wide efforts that are supported by all levels of company management. Company employees should be trained to effectively communicate with interested stakeholders at every stage of the project. Also, companies should develop a project website and educational materials, and establish a toll-free hotline number and email address, to be disseminated as part of all public outreach efforts.

Outreach should begin early in the project development process, especially for larger projects. Companies should consider creating teams of individuals dedicated to outreach efforts, and should consider working with public relations specialists who are familiar with local issues and elected officials. OEP recommends that early communications focus on stakeholders such as elected officials, permitting

agencies, and community leaders. As the project moves forward, outreach efforts should include materials providing basic project information, community meetings prior to the beginning of survey work, and meetings with permitting agencies.

OEP recommends that companies utilize FERC's pre-filing process. This process is designed to help companies engage interested stakeholders to resolve issues at the early stages of the project development process and to streamline the review process once an application is filed with FERC. The pre-filing process' public outreach efforts include open houses, stakeholder lists, communications with FERC staff, scoping meetings, and site visits.

Even after an application is filed, companies should continue their outreach efforts. Once the project receives approval to begin construction, OEP recommends that companies provide stakeholders with a construction and restoration schedule, and environmental and permitting information. Public outreach should continue even after the project is built and in operation, as there will be ongoing maintenance and construction activities throughout the life of the project.

Given the growing attention to stakeholder outreach efforts, FERC likely will encourage pipeline companies to proactively reach out to the public, particularly in those regions where new infrastructure projects have been met by well-organized opposition by local groups. While many companies currently implement the recommended practices outlined by OEP, not all companies take those steps. OEP seems to suggest that pipelines can help facilitate timely and efficient project approval and construction if they regularly adhere to the best practices in all of their outreach efforts.

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GAO Report Says Railroads Will Not Meet Positive Train Control Deadline; HazMat Transportation Likely To Be Affected

A new report released by the Government Accountability Office (GAO) (Positive Train Control: Additional Oversight Needed As Most Railroads Do Not Expect to Meet 2015 Implementation Deadline, GAO-15-739, issued September 16, 2015) warns that most railroads will not be able to meet the fast-approaching December 31, 2015 deadline for installing positive train control (PTC). If Congress does not extend the deadline, railroads may suspend or curtail transportation HazMat transportation, resulting in serious service problems.

PTC is a communications-based system for monitoring and controlling train movements. PTC can automatically slow or stop a train if it is being operated at excessive speeds. The Rail Safety Improvement Act of 2008 mandated the installation of PTC systems by December 31, 2015, for "mainline" railroads (*i.e.*, lines carrying 5 million or more gross tons of freight annually) that are used for

transportation of any amount of toxic-by-inhalation HazMat or for passenger service.

The GAO report found that both freight and passenger railroads continue to face significant difficulties in implementing PTC – such as cost concerns, delays in vendor shipments of components and software, problems obtaining Federal Communications Commission permits necessary for constructing and testing PTC systems, and issues with host railroad/tenant railroad coordination. Most railroads told the GAO that they would require one to five additional years to comply with the mandate. In 2013, the GAO reported that most railroads were not on track to meet the December 31, 2015 deadline (Positive Train Control: Additional Authorities Could Benefit Implementation, GAO-13-720).

The Federal Railroad Administration (FRA) is responsible for overseeing and enforcing implementation of the PTC mandate. The FRA recognizes that many railroads will not be able to fully install PTC by December 31, but maintains that the agency does not have authority to extend the deadline. Accordingly, the FRA plans to enforce the requirement starting on January 1, 2016. (See article below regarding discussion of PTC at September 17 Confirmation Hearing for FRA Administrator Nominee Sarah Feinberg). The GAO report recommended that FRA develop a plan for holding railroads accountable for making continued progress towards PTC implementation.

If Congress does not extend the PTC deadline, widespread rail service problems are expected to affect the national network; service disruptions could be particularly severe for HazMat shippers. Railroads assert that, without an extension, they will be forced to stop most freight and passenger operations on January 1. In addition to FRA civil penalty exposure, non-compliant railroads could face problems regarding insurance coverage, tort or other commercial liability, and labor-relations issues. Because railroads can apply to have segments of mainline track excepted from the PTC requirement if they no longer carry any toxic-by-inhalation material, it is possible that railroads will begin to refuse to carry this class of HazMat.

Railroads that suspend or curtail service because they have not met the PTC deadline, however, may violate their common carrier obligations (pursuant to 49 U.S.C. § 11101), including the obligation to carry HazMat. On September 3, Chairman Elliott of the Surface Transportation Board stated, in a letter to Sen. John Thune (Chairman of the Committee on Commerce, Science, and Transportation), that a carrier-initiated curtailment due to that carrier's noncompliance with the PTC requirement would be a matter of first impression before the Board. Sen. Thune has predicted that service impacts could be felt as early as November, when the railroads could start winding down their operations in anticipation of the deadline.

Confirmation Hearing Held on September 17 for FRA Administrator Nominee Sarah Feinberg

On September 17, the Senate Committee on Commerce, Science, and Transportation held a confirmation hearing for Ms. Sarah Feinberg, President Obama's nominee to be the next administrator of the FRA. Ms. Feinberg has been serving as the Acting Administrator of the FRA since January 2015, and was nominated for the Administrator post on May 29. During her tenure at FRA, Ms. Feinberg has focused on rail accident prevention and transparency in rail investigations.

A native of West Virginia, Ms. Feinberg served for eighteen months as Chief of Staff to Mr. Anthony Foxx, Secretary of the Department of Transportation, before taking up the Acting Administrator post at FRA. While criticized by some for having fairly limited experience in transportation matters, Ms. Feinberg is no stranger to getting things done in Washington. She previously worked for former Congressman Rahm Emanuel as the Communications Director of the House Democratic Caucus, and later as a senior adviser at the White House. She has also worked in communications in the private sector. The Association of American Railroads supports her nomination. Petroleum trade associations criticized Ms. Feinberg after she told the press that industry needs to take greater responsibility for safe shipment of energy products.

During the confirmation hearing, Ms. Feinberg faced questions about the year-end deadline for implementation of PTC. (See article above for further information on PTC and the upcoming deadline.) After noting that several serious train accidents have occurred during her tenure as Acting Administrator, including the May 2015 derailment of an Amtrak passenger train in Philadelphia, Pennsylvania, which killed eight people and injured 200, Ms. Feinberg asserted that FRA will enforce the December 31 deadline if she is confirmed. She reiterated the position that FRA does not have authority to extend the deadline, and said that FRA will work with railroads to address technical and financial challenges related to PTC installation. During the hearing, Senators from both sides of the aisle expressed frustration that FRA does not appear to have a contingency plan in the event that Congress does not pass an extension.

Committee Chairman Sen. John Thune voiced his support for Ms. Feinberg's confirmation following the hearing. He noted that five out of nine of the Department of Transportation agencies, including FRA, are currently overseen by acting leaders who have not been through the Senate confirmation process. Ms. Feinberg is likely to be confirmed in the coming weeks.

A webcast recording of the hearing and copies of statements are available at: http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=10a0e71e-108d-45b4-bd76-40cf434a6108&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a

PHMSA Awards Grants to First Responders for HazMat Transportation Incidents

On September 2, 2015, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) announced the release of $19.9 million in grants to first responders to address HazMat transportation incidents. All 50 states, as well as five U.S. territories and ten American Indian tribes, will receive grants. The grants are funded by annual user registration fees paid by shippers and carriers of certain HazMat.

The grants will be issued by PHMSA's Hazardous Materials Emergency Preparedness Program. This program supports planning, training, and preparedness for HazMat response teams. This year's grant cycle focused on the following activities:

1. emergency planning and training related to bulk transportation of energy products by rail and motor vehicle;
2. coordinating federal, state, and local emergency planning; and
3. providing HazMat training to volunteer organizations.

PHMSA Final Rule Streamlines Special Permits Process

On September 10, PHMSA issued a final rule to make the special permits application review process more efficient and transparent. *Hazardous Materials: Special Permit and Approvals Standard Operating Procedures and Evaluation Process*, 80 Fed. Reg. 54418 (Sept. 10, 2015). The final rule establishes standard operating procedures (SOPs) for PHMSA to follow when processing special permit applications. The SOPs will be codified in a new Appendix A to 49 C.F.R. Part 107. Special permits allow variations from PHMSA's Hazardous Materials Regulations (HMR) while achieving a level of safety at least equal to that required under the HMR. Special permits promote HazMat transportation efficiency and innovation, while fostering international commerce.

The SOPs set forth a process for PHMSA to follow when reviewing special permit applications:

1. Determine whether the application is complete;
2. Publish a summary of the application in the *Federal Register*;

3. Perform a technical evaluation (*i.e.*, whether the proposed permit will achieve a level of safety at least equal to that required under the HMR, or if no safety level is prescribed, whether the proposal is in the public interest and protects against risks to life and property) and a safety profile evaluation (*i.e.*, whether the applicant is fit to conduct the activity authorized in the special permit); and
4. approve or deny the permit.

PHMSA also announced that, in an effort to improve transparency in the application review process, it is developing an online portal for use by the public in submitting and checking the status of special permit applications. The system is designed to notify applicants when an application does not meet the required criteria.

The final rule takes effect on November 9.

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Who Do You Employ? It May Be More Than You Think: National Labor Relations Board Expands the Definition of "Joint Employer"

In this article, former NLRB counsel Thomas Lenz joins me in updating the discussion we began in Boston with NLRB General Counsel Dick Grffin, on the expanding role of the National Labor Relations Board as a thought leader in business structure liability.

In a case having potentially far reaching application to businesses nationwide, including staffing companies, the National Labor Relations Board (the "Board") issued its decision in Browning-Ferris Industries of California, Inc., 326 NLRB No. 186 (2015), expanding the definition of employer. Using a "joint employer" theory, the NLRB's ruling creates new opportunities for unions and employees to claim shared liability between multiple businesses, to seek organizing of multiple employers at once, and to interfere with companies' business relationships. The broad potential impact of this ruling on day-to-day business operations warrants attention from employers in all industries.

Previously, a party asserting joint-employer status had to demonstrate that the putative joint-employer both possessed and exercised authority to control employees' terms and conditions of employment. Under the new standard articulated by the Board in Browning-Ferris, a party can now establish joint-employer status by demonstrating that the putative joint employer reserved authority to control, or exercised indirect control over, the terms and conditions of employment. The effect will be to increase the number of employers who will now be obligated to collectively bargain with their workforces.

Background

Browning-Ferris Industries of California, Inc. ("BFI") owned and operated a recycling facility in Milpitas, California. BFI directly employed approximately 60 employees, including loader operators, equipment operators, forklift operators, and spotters, most of whom worked outside BFI's facility. BFI contracted with Leadpoint Business Services ("Leadpoint") to provide another 240 workers whose jobs included sorting recyclables within BFI's facility.

BFI and Leadpoint were parties to a temporary labor services agreement which provided that Leadpoint was the sole employer of the personnel it supplied. BFI and Leadpoint employed separate supervisors and lead workers at BFI's facility. Leadpoint was responsible for recruiting, interviewing, testing, selecting, and hiring personnel to perform work for BFI, subject to certain requirements contained within the labor agreement between BFI and Leadpoint. Leadpoint was solely responsible for disciplining, reviewing, evaluating, and terminating personnel assigned to BFI, subject to BFI's right to reject or discontinue the use of any personnel. Although Leadpoint was responsible for determining the rates paid to personnel supplied to BFI, BFI was responsible for paying the labor (plus a markup for Leadpoint). BFI set the hours of facility operation, and Leadpoint was responsible for supplying the workers required to cover the scheduled shifts.

The International Brotherhood of Teamsters (the "Union") petitioned to represent the workers supplied by Leadpoint. The NLRB's Regional Director, applying the prior standard for joint employer status, found that BFI was not a joint employer of the Leadpoint workers because BFI did not "share or codetermine those matters governing the essential terms and conditions of employment." The Union filed a request for review of the Regional Director's decision, contending the Board should reconsider its standard for evaluating joint-employer relationships. The Board granted the Union's request for review.

The Board Articulates a New Standard

The Board began its analysis by providing a history of the joint-employer standard. The Board explained that prior to 1982, the determination of whether joint-employer status existed included examination of factors such as the putative joint-employer's right to control the work of the workers; the putative joint-employer's "indirect" exercise of control over the workers' terms and conditions of employment; and whether the putative joint-employer held day-to-day responsibility for the overall operations of the worksite, such as whether it determined the scope and nature of the workers' work assignments.

The Board then explained that following the Third Circuit's 1982 decision in NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3rd Cir. 1982), the Board adopted a more restrictive approach that effectively narrowed the joint-employer standard. For example, the Board foreclosed consideration of the putative joint-employer's contractual right to control workers and instead began focusing exclusively on the actual exercise of such control. To that end, the Board "refused to assign any significance to contractual language expressly giving a putative employer the power to dictate workers' terms and conditions of employment." The Board also disregarded a putative joint-employer's exercise of indirect control over workers even where, for example, the employer dictated the number of workers to be employed, communicated specific work assignments and directives to the workers' manager, and exercised oversight as to whether job tasks were performed properly.

Citing to an increase in the number of workers now employed through temporary services companies and a "responsibility to adapt the Act to the changing patterns of industrial life," the Board held that the existing joint-employer standard did not best serve the policies of the National Labor Relations Act. Thus, the Board held, a return to the Board's broader, pre-1982 test for determining joint-employer status was required: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."

The Board held that it would utilize an inclusive approach in defining "essential terms and conditions of employment." Thus, not only will control over traditional terms of employment such as hiring, firing, discipline, and supervision constitute control over the "essential terms and conditions of employment," so too will control over seemingly less significant terms of employment such as scheduling, dictating the number of workers to be supplied, authorization of overtime, assigning of work, and determining the manner and method of work performance. The Board's intent is to minimize the degree of control required to establish joint-employment.

Further, the Board will no longer require that a joint-employer both possess the authority to control the terms and conditions of employment and exercise that authority "directly, immediately, and not in a 'limited and routine' manner." Rather, the Board will examine the putative joint-employer's right to control, whether or not actually exercised and whether direct or indirect. The existence, extent, and object of the putative joint-employer's control will be material to the determination of its status as a joint-employer. In other words, the Board will critically examine all aspects of the employment relationship and will give weight to previously insignificant factors.

Anticipated Effect on Employers

It goes without saying the Board's decision is significant. In a staffing-company context, user-employers which may have previously maintained a degree of independence from supplier-employers sufficient to withstand a finding of joint-employment may now find themselves in a joint-employer relationship. Unions may be encouraged to attempt organizing multiple employers at once, particularly employers utilizing staffing companies, employers who are parties to a contractor/subcontractor relationship, and employers who are parties to business relationships with other entities where both have some degree of control over employees' working conditions.

Further, the NLRB may be encouraged to pursue shared liabilities against both user-employers and supplier-employers for unfair labor practices and joint bargaining obligations. Indeed, the Board's two dissenting members caution that the change in the joint-employer test will "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity."

Employers concerned with being parties to a joint-employment relationship should critically evaluate their employment practices and business relationships. Staffing companies, in particular, should take caution to protect against the risk they may be held liable for the employment practices of the companies to which they supply employees, while user-companies should beware they may acquire previously non-existent collective bargaining obligations.

Apart from shared bargaining obligations and shared liabilities for unfair labor practices, the ruling stands to expand unions' abilities to create headaches for employers which could threaten business relationships. Picketing or pressure on third parties deemed to have control over another employer may prosper with the new analysis. Employers entering into business relationships may wish as a matter of due diligence to spend more time on contract language and investigating the day-to-day policies and practices of a new business partner in order to gauge potential risks and benefits. Management training will no doubt warrant consideration to avoid inadvertent pitfalls.

The nuances of this new ruling will play out as the current NLRB members rule in other cases. Court review should be expected given the importance of the ruling. Whether the analysis survives may depend not only on federal appellate court review, but also the next presidential election, as it is the President who appoints the NLRB's five Board members.

MARITIME

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Fifth Circuit Analyzes the Employer-Employee Relationship Under the General Maritime Law

The Fifth Circuit recently examined the claim that a corporate defendant should be held vicariously liable under the general maritime law for the negligence of its purported employees. In *Johnson v. Global Santa Fe Offshore Services, Inc.*, --- F.3d ---, 2015 WL 4878556 (5th Cir. Aug. 13, 2015), the plaintiff was a superintendent aboard a drilling rig off the coast of Nigeria. The plaintiff was injured when he was shot by a gunman that was able to scale the rig. Before the incident, rig hands working on the drilling rig had moved a ball valve, attached to the blow-out preventer, in front of the stairs leading from the rig to the platform in order to conduct work on the blow-out preventer. When the gunman's vessel approached the rig, the rig hands were unable to raise the stairs because the stairs were blocked by the ball valve, which allowed the gunmen to invade the platform. The plaintiff asserted: (1) claims under the Jones Act; and (2) for unseaworthiness, maintenance and cure, and negligence under the general maritime law, against a number of entities that are affiliated with Transocean Ltd. One of these affiliates was GSF. GSF is an indirect subsidiary of Transocean Ltd. The court dismissed the plaintiffs' claims against Transocean and a number of its affiliates, including GSF. The district court granted GSF's motion for summary judgment on Johnson's claims for negligence under the Jones Act and negligence and unseaworthiness under the general maritime law. The plaintiff only appealed the dismissal of his claims for negligence under the general maritime law.

The Fifth Circuit affirmed. The court held that it is "appropriate to rely on common law principles of agency to determine the employer's identity in the maritime analysis" for purpose of vicarious liability. Under the common law approach, the court must examine two inquires: (1) whether the defendant is the employer of the tortfeasor; and (2) whether the tortfeasor committed the tort in the course of his employment. The first question was the only inquiry that needed to be examined in *Johnson*. After review of previous maritime jurisprudence analyzing the employer-employee relationship, the Court analyzed the evidentiary record pertaining to the relationship between GSF and the rig hands that purportedly caused the plaintiff's injuries. The evidence indicated that GSF is an entity that had no function other than to provide payroll for Transocean Offshore Deep Water Drilling, Inc., and to assist with immigration issues as they arose. GSF also provided certain training of the chief mechanic and was listed as the rig hands' employer on their W-2 forms. However, GSF did not manage the rigs or provide day to day supervision of the rig hands. Moreover, none of the employees actually identified GSF as their employer.

The court held that the plaintiff had failed to establish that GSF employed the rig hands. The court recognized that "control" is the most important factor in determining an employment relationship under the general maritime law. GSF's lack of day to day management of the rig hands was evidence that GSF did not control the rig hands. The court thus held there was no employment relationship under the general maritime law and that GSF could not be held vicariously liable for the purported negligence of the rig hands. The court also rejected the plaintiffs' argument that GSF was liable because it was the payroll employer of the rig hands and that it was GSF's burden to show that it has divested itself from all control over the rig hands. The court held that it was not GSF's burden to demonstrate a "lack of control." While the payment of wages is relevant, it is not a dispositive factor in determining control. Because the plaintiff failed to establish that GSF had control over the rig hands, the court affirmed the dismissal of plaintiff's claims.

First Circuit Rejects Challenge to Puerto Rico Port Authority's Cargo Fees

The First Circuit recently rejected a constitutional challenge brought by three shipping operators against certain cargo fees assessed by the Puerto Rico Port Authority ("PRPA"). In *Industria y Distribuction de Alimentos v. Trailer Bridge*, 797 F.3d 141 (1st Cir. 2015), the shipping operators challenged a program where Puerto Rico supplied: (1) each company with cargo-scanning technology; (2) required them to scan all inbound cargo; and (3) then charged an additional fee to each company. The operators argued that the dormant Commerce Clause barred Puerto Rico from charging the additional fee to offset the scanning costs.

To increase Port security after the September 11, 2011 terrorist attacks, the PRPA promulgated a regulation to require all inbound cargo to be scanned at the Port of San Juan. Puerto Rico installed scanning technology at the facilities of the three shipping operators at the Port of San Juan. Except at particularly busy times these operators were required to scan all containerized cargo (but not bulk cargo) and then have a third-party contractor and Puerto Rico Treasury agent review those scans. To pay for the scanning, the PRPA charged all vessels carrying cargo into the Port an enhanced security fee (including those operators who did not have scanning technology at their facilities).

A number of parties brought challenges to these regulations. First, thirty-two businesses and originations involved in importing cargo at the Port sued the PRPA and Puerto Rico's Treasury Department to challenge the regulation and the fee. These parties did not have scanning technology at their facilities. The magistrate judge held that the scanning procedure was constitutional, but applying the fees to these parties violated the dormant commerce clause.

The second group of plaintiffs was three operators who had scanning technology at their facilities. The court rejected their challenge and held that the fees were constitutional as applied to those parties. On appeal, the First Circuit affirmed. The court recognized that the dormant Commerce Clause precludes states from discriminating between transactions on the basis of an interstate element and prohibits economic protectionism between the states. The court recognized that the dormant Commerce Clause can be employed to challenge users' fees for government facilities or services. A user fee is constitutional if it: "(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred and (3) does not discriminate against interstate commerce." *Evansville –Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc*., 405 U.S. 707, 716–17 (1972). First, the court held that the plaintiffs failed to establish that the user fees were not a fair approximation of the operator's use of the scanning service. Second, the plaintiffs failed to establish the fees were excessive when compared to the benefits in question, especially when the fees roughly approximated the cost to implement the scanning procedure. Third, the plaintiffs failed to establish that the fee discriminated against interstate commerce. While only out-of-Commonwealth companies utilize the Port of San Juan, the court was not persuaded that the purported "interference" with commerce that could be attributed to the fee was sufficient to meet the third factor.

The court noted that the plaintiffs' central argument was that the user fees had no benefit and that the scanning procedure was "wholly ineffective." However, the Court refused to engage in an analysis of whether the required scanning was sound public policy. The court recognized that the PRPA implemented user fees to fund a legitimate service that was relevant to the operation of the Port. The court thus rejected the plainitffs' constitutional challenge.

MOTOR

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In case it wasn't clear enough, yes, Carmack applies to stolen cargo.
***Annette Holding, Inc. v. A1 Trucking Service, LLC*, 2015 WL 5037214 (D. S.C. 2015)**

We've seen all kinds of spins put on transportation statutes like the Carmack Amendment in opposition to their application. Oftentimes, counsel take stabs at derailing judges and adverse parties inexperienced in this esoteric legal field, and sometimes well-meaning lawyers just don't get it. This case out of the U.S. District Court for the District of South Carolina cleared up any confusion about whether Carmack's use of the clause "actual loss" of cargo encompasses theft in governing shipper claims to evoke Carmack's exclusive and preemptive dominion over instate cargo claims. Yes, it does.

Shipper Okonite Company hired TMC Logistics to arrange transit from South Carolina to North Carolina of a load of cable reels, and TMC booked the shipment with motor carrier A1 Trucking Service. A1's driver left the cargo in an unsecured yard while his rig was being repaired. It was stolen; TMC paid Okonite the cargo's value (110 grand); and as the shipper's assignee, TMC sued A1 alleging various causes of action including Carmack liability.

A1 defended the Carmack claim by urging the statute doesn't say anything about stolen freight, such that it didn't apply here. Carmack has been interpreted that way for many decades; the term "actual loss" including all forms of, well, loss. Any other interpretation would defeat the statute's clear purpose. A1 also argued it wasn't negligent in causing the loss, a factual contention, but one that's only at issue if the carrier asserts a Carmack defense. A1 hadn't. A1 is liable under Carmack, and TMC's other causes of action are preempted.

Case of alleged load board identity theft leaves factual questions unanswered.
***LIG Insurance Co. v. ZP Transport, Inc.*, et al., 2015 WL 4725004 (N.D. Ill. 2015)**

A complex, intermodal shipment from Korea to Argentina through the U.S., replete with a daisy chain of intermediaries and carriers, never made it from Chicago to Miami. Korean intermediary, ZP Transport, through its Chicago branch went to the web-based Interstate TruckStop load board to find a motor carrier to transport a cargo of cell phone parts from O'Hare Airport to Miami for onward carriage. Through Internet TruckStop, ZP got in contact with someone purporting to be with J&T Trucking of Tampa Bay, although the communications and differing phone numbers might have raised a red flag as to J&T's legitimacy.

Of course, the load disappeared, LIG Insurance Company paid its insured shipper 796 grand, and the insurer sued all concerned in subrogation in the U.S. District Court for the Northern District of Illinois. In its motion for summary judgment seeking to dismiss LIG's claim, J&T claimed it knew nothing about the shipment whatsoever. It argued its trucks were a different color than the one a photograph showed picking up the cargo, and that it only employed one driver, who was in Kentucky at the time the subject shipment was fetched.

But the truck which hauled off the ill-fated cargo did bear a J&T placard, and documentation did identify J&T as the carrier of record. Thus, the court ruled, sufficient evidence demonstrated a triable issue of fact as to J&T's "identity theft" defense that summary judgment would be improper. Not the first glitch we've seen with internet load boards that allow any nogoodnik with industry familiarity to rip off shippers and leave innocent motor carriers stuck with legal headaches. True, they're convenient. However, in the current MAP-21 era of increased intermediary responsibility, and especially in light of high-dollar jury verdicts against brokers connected with truckers who get into accidents, they should be used with great care and scrutiny.

Nor did ZP escape full liability on summary judgment. The intermediary argued its liability should be limited to 98 grand based on a through air waybill governing transit from Korea to Argentina. ZP argued that, while it wasn't a party to the air waybill, it was an agent of the air carrier. LIG responded that ZP had issued its own bill of lading – sans limitation of liability clause – for the surface leg, such that Carmack governed its potential liability, and not the terms of an international air waybill. The court agreed that the ZP bill of lading separates the surface leg out of the air waybill's coverage, and evokes Carmack.

Part II of a broker's owner's attempts to avoid personal liability: questions of fact still abound. *CSX Transportation, Inc. v. Taylor*, et al., 2015 WL 4730280 (N.D. Ohio 2015)

Last issue we reported on Glenn Taylor's attempts to avoid personal liability for freight charges his corporation, Intermodal USA, collected from shipper Macy's and failed to remit to carrier CSX. Taking advantage of Ohio law, he argued in response to CSX's motion for summary judgment that he didn't know Ohio had revoked the corporate charter, which can be a defense to otherwise personal liability for the debts of the non-existent corporation. Recently, Taylor went on the offensive, and sought to have CSX's $117,263 freight charge claim dismissed based on justifiable reliance and statute of limitations grounds.

As CSX's claim against him is based on fraud, CSX would have to show it justifiably relied on Intermodal USA being a corporation in good standing to get to Taylor personally. Taylor argued it would be an easy matter for CSX to check the Ohio Secretary of State's webpage to see that Intermodal USA had been dissolved and, in fact, CSX should be held constructively aware of that given that the dissolution was a matter of public record. CSX also would have seen that Taylor was conducting business through a new entity. The Northern District of Ohio found this to be a question of fact not properly decided on summary judgment, as Taylor had submitted to CSX an application containing a Dunn & Bradstreet credit report which specifically required him to advise CSX of any business ownership issues.

The court also refused to consider Taylor's time bar defense on summary judgment. While 49 USC §14705 provides an 18-month statute of limitations for carriers to bring freight charge claims against shippers, CSX argued issuance of invoices, and not completion of shipments, starts the clock ticking. As the invoice dates were within 18 months of CSX's filing suit, the claim shouldn't be time barred. The court saw a number of different dates on those invoices, and kicked the statute of limitations can down the road for consideration at trial.

A court applies the material deviation doctrine to a trucking contract to void limitation of liability. *Royal & Sun Alliance Insurance, PLC v. ECM Transport, Inc*., 2015 WL 5098119 (S.D.N.Y. 2015)

Shipper Ingram Micro and carrier ECM Transport executed a service agreement in 2007 that set forth general shipping terms and contemplated new rate agreements being issued and incorporated into the service agreement on a periodic basis as addenda. It limited ECM's liability to $250,000, but provided that "[b]reach of security, willful misconduct, and/or employee theft [would] be subject to the full replacement of the product." Each addendum contained a merger agreement providing that the new

package supersedes previous agreements. The last issued addendum contained a "Released Value" clause stating that ECM's liability would be limited to $100,000.

When Ingram Micro's load of computer parts, worth some 561 grand, disappeared en route from Pennsylvania to Illinois, cargo insurer Royal & Sun Alliance paid its shipper and sued ECM in subrogation in the U.S. District Court for the Southern District of New York. A gate to ECM's yard had been left open, and the unattended trailer was stolen.

On cross motions for summary judgment, the parties focused on limitation of liability. ECM argued that the last addendum encompassed more than just revised pricing terms, i.e., the merger clause rendered it an entirely new agreement with a lower limitation of liability amount. Because the service agreement referred to it as "an attachment," the court rejected that argument, but nonetheless found that newer terms addressing the same subject matter as older ones generally supersede them. That might activate the lower limitation of liability amount.

None of that ultimately made any difference, as the court applied the material deviation doctrine to nix ECM's limitation of liability altogether. Material deviation as a defense to limitation of liability is a maritime law concept, one that courts applying Carmack have largely rejected. It holds that when a carrier deviates from a pre-agreed route, service provision or other term, it may lose its right to limited liability. While the court doesn't get into why it went the other way here, it's pretty apparent that the specific security terms Ingram Micro bargained and paid for were on its mind. The "breach of security" clause wasn't superseded by any addendum, and as ECM apparently failed to follow its own security protocols by leaving the gate open, a breach was readily apparent. The addendum's released value clause doesn't apply, and the insurer gets its full money back.

MOTOR-REGULATORY

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New Agency Administrators

President Obama nominated Acting Administrator of the Federal Motor Carrier Safety Administration (FMCSA) Scott Darling to become the FMCSA Administrator, but there has not yet been a confirmation hearing. Darling was elevated to Acting Administrator from his role as FMCSA Chief Counsel.

Greg Nadeau was confirmed as Administrator of the Federal Highway Administration (FHWA). Nadeau had previously been the FHWA's Acting Administrator and the Deputy Administrator. The Administrator position opened when Victor Mendez became Deputy Secretary of Transportation for the Department of Transportation (DOT).

Marie Dominguez was confirmed as Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA). Most recently, Dominguez was Principal Deputy Assistant Secretary of the Army for Civil Works. Timothy Butters had served as the acting administrator at PHMSA. Butters took a senior adviser position at the Federal Aviation Administration following Dominguez's nomination.

FHWA Seeking Comment on Truck Size and Weight Report

The FHWA is receiving comments for an upcoming report to Congress on truck sizes and weights. 80 Fed. Reg. 54653 (Sept. 10, 2015). The report will be based upon a study required by the Moving Ahead for Progress in the 21st Century Act (MAP-21) to assess the safety, infrastructure and enforcement impacts of trucks that exceed the current federal size and weight limits, and to evaluate the impact of allowing bigger and heavier trucks, including the impact on freight diversion.

The DOT has already released certain technical reports based upon the study. But in a June 5, 2015 letter to House Committee on Transportation and Infrastructure Chairman Bill Shuster, DOT Undersecretary Peter Rogoff reported that the study contains significant data limitations and recommended that, until better data can be collected, the laws and regulations regarding truck sizes and weights should not be changed.

Comments must be received by October 13, 2015 in order to be included in the report to Congress; however, the comment period will remain open beyond that date.

NHTSA issues ANPRM on Underride Guards and Reflective Material for Single Unit Trucks

In what the National Highway Traffic Safety Administration (NHTSA) states is the "first step of a larger agency initiative to upgrade the standards," NHTSA is seeking comments on the costs and benefits of improving rear impact protection for single unit trucks (SUTs) by requiring that they be equipped with underride guards and reflective tape, like larger tractor-trailers. 80 Fed. Reg. 43664 (July 23, 2015).

SUTs are the most commonly used truck according to the Advanced Notice of Proposed Rulemaking (ANPRM) and include delivery trucks, tank trucks and dump trucks, among others. Underride occurs when a passenger vehicle slides under the comparatively higher rear end of a truck during an accident, causing the truck to directly strike the passenger compartment of the passenger vehicle.

"NHTSA estimates that a requirement for rear impact guards on . . . SUTs . . . could save five lives and prevent 30 injuries each year, and would cost approximately $669 million . . . . A requirement for reflective tape on SUTs could save up to 14 lives per year with a cost of approximately $30 million annually . . . ." according to a NHTSA press release issued on July 17, 2015, available at http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/nhtsa-truck-underride-anprm-july2015.

Hours of Service Exemption Granted to Some HazMat Drivers

Drivers of security-sensitive hazardous materials (such as explosives, weapons, or radioactive materials) may count their time attending to such hazmat toward their mandatory break time, under a recent FMCSA exemption. 80 Fed. Reg. 50912. Drivers of such material are normally required by Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations to attend to the load while their vehicle is stopped, which is considered on-duty time under the FMCSA's hours-of-service rules. FMCSA regulations prohibit driving longer than eight consecutive hours without an off-duty break of 30 minutes or more, but without an exemption, security-sensitive hazmat drivers cannot go off duty. Exempt drivers may now count their on-duty attendance of hazmat cargo toward the required 30-minute rest break, so long as they do not perform any other on-duty task.

Implementation of Unified Registration System Delayed

Implementation of the FMCSA's Unified Registration System (URS), has been delayed. The URS was established in an August 2013 FMCSA rule and will make the USDOT number the sole identifier for motor carriers, brokers and freight forwarders, displacing MC, MX and FF Numbers. Implementation had been slated for October 23, 2015, but the new date has not yet been announced.

When implementation goes into effect, nearly all carriers, brokers and freight forwards will be required to demonstrate evidence of financial responsibility, followed by designating an agent for service of process, neither of which were previously required for entities not subject to FMCSA commercial oversight. Further details are available at https://www.fmcsa.dot.gov/registration/unified-registration-system.

Electronic Logging Device Final Rule Delayed

A final rule requiring the use of electronic logging devices to record hours of service has been further delayed. Eric Miller, *ELD Final Delayed Another Month, FMCSA Says*, Transport Topics, Sept. 16, 2015, available at http://www.ttnews.com/articles/basetemplate.aspx?storyid=39455. The rule is now expected to be published by the end of November. Congress mandated electronic logging devices as part of MAP-21.

Issuance of Proposed Truck Speed-Limiter Rule Delayed

NHTSA and the FMCSA sent a proposed rule to the White House Office of Management and Budget (OMB) in May that would require that heavy trucks implement speed-limiting devices. The proposed rule had been expected to be issued in September; however, the proposed rule will receive extended review by OMB and no new date of issuance has been set. The agencies have not said what the maximum speed might be, but the American Trucking Associations requested a top speed of 65 mph. Eric Miller, *Truck Speed-Limiter Rule Delayed for 'Extended' Review by White House*, Sept. 4, 2015, available at http://www.ttnews.com/articles/basetemplate.aspx?storyid=39357.

Driver Wellness Initiative

The FMCSA's Motor Carrier Safety Advisory Committee and Medical Review Board held a joint public meeting on September 21 and 22, 2015 regarding the establishment of a non-regulatory public-private partnership to improve drivers' health. Details are available from the FMCSA at http://mcsac.fmcsa.dot.gov/meeting.htm.

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Recent STB Decisions Involving Preemption Under the ICC Termination Act

One of the topics on the schedule for the ATLP Transportation Forum on Monday, October 19 is preemption under the ICC Termination Act (ICCTA). That statute provides that the "remedies provided under [49 U.S.C. § 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). This article discusses some recent cases at the Surface Transportation Board involving preemption under ICCTA.

The Board Provided Guidance on Preemption of State Law Claims Alleging Flooding and Property Damage from CSX's Maintenance of Tracks

On July 31, 2015, the Board denied a petition for declaratory order because "there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance, and the status of the state court proceedings here is unclear." *CSX Transp., Inc.—Petition for Declaratory Order*, STB Docket No. FD 35832, at 3 (STB July 31, 2015). In this proceeding, CSX filed a petition asking the Board to declare that "state court claims filed by HAMP, Inc. (HAMP), against CSXT, alleging negligence, nuisance, trespass, inverse condemnation, and violation of various sections of the Virginia Code, are preempted" under 49 U.S.C. § 10501(b). *Id.* at 1. HAMP filed a complaint in state court "seeking compensation for property damage allegedly caused by CSXT in connection with a flood…." *Id.* HAMP alleged that "as a result of CSXT's failure to maintain the berm and culvert, runoff accumulated in the Creek…." and flooded HAMP's mobile home park that is adjacent to CSX's line. *Id.* CSX argued that HAMP's state law claims are preempted because HAMP "asks the state court to regulate directly CSXT's railroad activities, including the design and operation of its culverts and bridges." *Id.* at 3. HAMP argued that its "state law claims can proceed … because § 10501(b) does not strip state and local governments of certain police powers to protect public health and safety." *Id.*

The Board stated that ICCTA "preempts other regulation that would unreasonably interfere with railroad operations that come within the Board's jurisdiction, without regard to whether or not the Board actively regulates the particular activity involved." *Id.* at 4. The Board further stated that "§10501(b) preemption does not apply to state or local actions taken under their retained police powers, as long as they do not unreasonably interfere with railroad operations or the Board's regulatory programs." *Id.* The Board noted that the "Board and the courts have decided in a number of cases that § 10501(b) preempts state and local attempts to regulate the design, construction, maintenance, and repair of rail lines and their associated structures." *Id.*

The Board "provide[d] … guidance on preemption" because the "record does not indicate whether the state court stayed its proceedings in response to CSXT's request or whether discovery or other proceedings are ongoing in the state court." *Id.* at 3. The Board stated, "Whether § 10501(b) preempts HAMP's claims of negligence, trespass, nuisance, and inverse condemnation under Virginia state law, as well as its request for a declaratory judgment under Virginia Code …, will likely depend on how the facts and circumstances as determined in the state court action fit within the case law discussed above." *Id.* at 5.

The Board Considered Whether ICCTA Preempts the Application of CEQA to the Electrification of a Commuter Rail Line Between San Jose and San Francisco

On July 2, 2015, the Board concluded that ICCTA does not preempt the California Environmental Quality Act (CEQA) as applied to the Peninsula Corridor Joint Powers Board (Caltrain)'s project to electrify a rail line. *Peninsula Corridor Joint Powers Bd.—Petition for Declaratory Order*, STB Docket No. FD 35929, at 1 (STB served July 2, 2015). Caltrain is a public agency that operates "Caltrain commuter rail service between San Jose and San Francisco" and that "seeks to electrify its line, a project known as the Peninsula Corridor Electrification Project." *Id.* at 2. Caltrain asked the Board to declare that "the requirements of the [CEQA], as applied to Caltrain, are preempted under 49 U.S.C. § 10501(b)." *Id.* at 1.

The Board instituted a declaratory proceeding to consider "whether, and the extent to which, CEQA is preempted with regard to the Project…." *Id.* at 2. The Board found that "based on the record here, the Project is not rail transportation subject to the Board's jurisdiction under § 10501" because the project "will solely enhance Caltrain's commuter rail operations, which constitute mass transportation by a local government agency that is not subject to Board jurisdiction under § 10501(c)(2)(A)." *Id.* at 4. The Board stated that "CEQA is not preempted with respect to [Caltrain's] Project." *Id.* The Board found that "[n]othing in the record indicates that the Project is either for the benefit of, or would

unreasonably interfere with, non-Caltrain rail operations on the line that are subject to the Board's jurisdiction." *Id.* at 3. The Board stated that there is "no indication that the Project would have potential impacts on UP's freight rail operations on the line." *Id.* "Nor is there any evidence that UP's rail operations would be adversely affected by any conditions imposed on the Project pursuant to CEQA." *Id.* at 4. The Board distinguished a prior STB decision in another case "where the Board found that § 10501 (b) preempted state and local permitting requirements applied to a commuter rail's construction of a passing track, because the permitting requirements at issue would affect freight rail operations as well as commuter rail operations." *Id.*

The Board Found that State Court Orders Requiring a Railroad Crossing in Wichita are Preempted by ICCTA

On June 23, 2015, the Board considered preemption under ICCTA of a proposed railroad crossing in Wichita, Kansas. *Wichita Terminal Ass'n, BNSF Ry. Co. & Union Pac. R.R. Co.—Petition for Declaratory Order*, STB Docket No. FD 35765, at 11 (STB served June 23, 2015). F.Y.G. Investments, Inc. and Treatco, Inc. (collectively FYG) argued that Kansas state law required a public railroad crossing of approximately 1,000 feet of Wichita Terminal Association's (WTA) interchange tracks. The STB proceeding "follow[s] 11 years of state court proceedings, which included three appeals." *Id.* at 2. After the Kansas trial court "ordered WTA to construct the Emporia Court crossing," the state appellate court remanded the case "with instructions to direct WTA to file an application with the STB to resolve any issues concerning the STB's jurisdiction." *Id.* at 4 (internal quotation marks omitted).

WTA filed a petition for declaratory order with the Board and asked it to "find that FYG's demand for any permanent public railroad crossing is preempted by federal law." *Id.* The Board noted that "state courts typically can resolve disputes involving preemption of railroad/private road or sewer crossings and that routine non-conflicting uses, such as non-exclusive easements for at-grade road crossings … are not preempted so long as they would not impede rail operations or pose undue safety risks." *Id.* at 6 (internal quotation marks omitted). "The right to proceed under state property law, however, is conditioned upon that action not unreasonably burdening or interfering with rail transportation." *Id.* at 7.

In this case, the Board concluded that "any Kansas court order requiring a crossing at Emporia Court is federally preempted because it would unreasonably burden or interfere with interstate commerce." *Id.* at 9. The Board further stated, "[b]ased on the current record, it does not appear that a court-ordered crossing at the location of the temporary crossing, at the west end of the [interchange tracks], would have the same effect on interstate rail operations. It would be reasonable for a state court, applying state law, to address those issues in light of the preemption standards discussed in this decision." *Id.* at 11.

The Board Found that a State Court is Not Preempted from Finding that a Landowner Unlawfully Interfered with a Permanent Rail Easement by Removing Tracks from Its Property

On May 22, 2015, the Board considered a petition for declaratory order filed by JGB Properties, LLC asking the agency to declare that a judgment in New York state courts that "JGB unlawfully removed railroad tracks from its property in violation of a permanent easement for railroad track, is preempted" under ICCTA. *JGB Properties, LLC—Petition for Declaratory Order*, STB Docket No. 35817, at 1 (STB served May 22, 2015). The Board denied JGB's petition and concluded that the "state court proceeding does not unreasonably interfere with rail transportation and is not preempted." *Id.*

The state court proceeding arose after JGB removed track that "crossed its property, terminating Ironwood's ability to receive CSXT rail service." *Id.* at 2. Ironwood and Steelway Realty Corporation filed suit in New York state court against JGB to "protect their easements from JGB's interference." *Id.* The state court "found that Ironwood and Steelway possess permanent right-of-way easements for railroad tracks, that they have a continuing right to use and maintain the rights-of-way, and that JGB's conduct was unlawful." *Id.* at 3.

JGB also sued Ironwood and Steelway in federal court to try to "void the state court judgments…." *Id*. The federal court dismissed JGB's case. The federal court concluded in part that the state court's order "requiring JGB to provide compensation for its unlawful removal of the track segment would not have the effect of preventing or unreasonably interfering with railroad transportation." *Id*. at 6.

JGB asked the Board to declare that ICCTA "preempts the state court from taking any initiatives that govern, regulate, or impose penalties or damages associated with the construction, acquisition, operation, or use of the tracks across its property." *Id*. at 4. JGB argued that the tracks on its property "are not authorized by statute" and argued in the alternate that the Board should "treat its filing as an application for adverse abandonment." *Id*. Ironwood and Steelway asserted that ICCTA preemption does not apply to the state court proceeding because it "involves issues of New York property law and focuses on the existence and enforceability of easements rather than on matters subject to the Board's jurisdiction." *Id*. CSX also opposed JGB's petition and contended that the "court's finding that valid easements exist does not impose permitting or preclearance requirements on a railroad and does not interfere with rail transportation." *Id*. at 5. CSX stated that it "has an agreement with Ironwood to provide service if the track removed by JGB is replaced." *Id*.

In the STB's decision denying JGB's petition, the Board concluded that "there is no reason for the Board to intervene" because the "dispute is grounded in state property law, and JGB has not demonstrated that the New York courts have taken any action that unreasonably interferes with rail transportation" and "is thus not preempted." *Id*. at 6, 8. The Board reasoned that the "court's ruling in no way interferes with the provision of rail service but helps preserve it." *Id*. at 7. The Board stated that it did not need to decide "whether these tracks are excepted tracks under [49 U.S.C.] § 10906, railroad lines subject to Board licensing under § 10901, or private tracks outside the Board's jurisdiction because a ruling on that issue would have no bearing on the state court's finding that Ironwood and Steelway have valid railroad easements across JGB's property." *Id*. at 7. The Board further stated that "even if the tracks were unauthorized railroad lines, we would not, in any event, consider granting adverse abandonment authority here based on JGB's petition for declaratory order but rather would require the filing of an application for that relief." *Id*. at 7 n.21.

The Board Is Considering Whether ICCTA Preempts Efforts by Two Communities in Washington State to Bisect a Class III Carrier's Tracks With an At-Grade Street Crossing

On May 18, 2015, the Board began a declaratory order proceeding where "a controversy exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under § 10501(b), and the record is incomplete." *Tri-City R.R. Co.—Petition for Declaratory Order*, STB Docket No. FD 35915, at 2 (STB served May 21, 2015). In this case, Tri-City Railroad Company, LLC (TCRY), a Class III rail carrier, operates on track located in the City of Kennewick, WA and City of Richland, WA (the Cities). The Cities obtained approval from the Washington State Utilities and Transportation Commission to construct an at-grade rail crossing that "would bisect TCRY's main and passing tracks." *Id*. at 1. The Cities "served a pre-condemnation notice," as well as a "Notice of Planned Final Action and the proposed condemnation ordinances." *Id*. at 2.

TCRY petitioned the Board for a declaratory order that ICCTA "preempts actions by the Cities to condemn and acquire a right-of-way for a proposed at-grade crossing." *Id*. TCRY argued that the proposed at-grade crossing "would unreasonably interfere with current and planned railroad operations by rendering portions of the tracks unusable for switching and railcar storage operations" and would "create new hazards for both rail crews and members of the public." *Id*.

In instituting the proceeding, the Board set a schedule for replies by interested parties and TCRY's rebuttal. The Board noted that "[a]lthough the Cities were scheduled to consider the condemnation ordinances in April, the record is silent concerning the outcome." *Id*.

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