ASSOCIATION HIGHLIGHTS

Introduction

With the Positive Train Control crisis behind us given Congress's extension of the compliance deadline, and the anticipated passage in the coming days of a long overdue highway reauthorization measure that provides enough funding to prevent an infrastructure crisis but no long term funding fix, one might think that Congressional gridlock is a thing of the past. Of course, that is not at all true. Fortunately, there are some signs that there could be some major transportation projects that move forward in the future notwithstanding a shortage of federal funds and a Congress that tends to be more reactive than proactive. For example, a $20 billion deal is in the works to build a new rail tunnel under the Hudson River to address the risk of a commuter meltdown if one of the existing, decades-old Hudson tunnels was to fail, as has happened in the past. The tunnel deal combines federal funds, state funds and private funds that will be leveraged through a new entity created by the Port Authority of New Jersey and New York. Such public-private partnerships (P3s) have in recent years become a vitally important way of funding new highways and other transport projects. With active support from the US Department of Transportation, such P3s help fill the gaps left by flat public spending.

Such public-private funding not only is critical to conventional infrastructure projects, but could launch us into unchartered transportation territory as well. Beyond the several new high speed passenger rail projects now in various stages of development in California, Texas and Florida, among other states, there is a serious proposal to build a public and privately funded maglev (magnetic levitation) train capable of transporting persons between Washington DC and Baltimore in about 15 minutes. This is a Japanese-supported project; a maglev test project is already operating there. If maglev wasn't futuristic enough, Elon Musk and others are studying a hyperloop system that could transport persons cross-country in minutes.

Apart from funding challenges, these and other types of projects will require rights-of-way, environmental review and lots of energy on which to operate. They will also require, in addition to creative and well-funded private sector proponents, legislators and regulators who are up to the task of supporting new technologies.

Our authors are up to the task of filling you in on the most important developments in their respective areas. Our commuter rail authors address, among other matters, FTA's new guidance on ADA compliance; proposed FTA rules on transit asset management and an FRA grant program to improve rail-highway crossings along rail routes used to transport crude oil. Our hazmat authors bring us up to speed on the administrative, judicial and legislative developments surrounding PHMSA's crude-on-rail rules, which remain a hot topic of litigation and Congressional activity. And our rail author describes a series of proceedings at the Surface Transportation Board, ranging from Class I railroad data reporting; cost of capital and revenue adequacy; rate reasonableness methodologies; Amtrak on-time performance issues and abuse of process in STB proceedings.

Our motor carrier regulatory editor tells us about NHTSA's proposal to require mandatory collision avoidance systems on commercial motor vehicles; FMCSA's revised schedule for implementation of its unified registration system and various other NHTSA and FMCSA actions. Our motor editor explains how a driver's eligibility for overtime pay under the Fair Labor Standards Act turns on the interstate or intrastate nature of the shipments it is transporting, why a state supreme court held that certain state-based labor and employment claims were found not to be preempted by federal law and discusses other recent cases of interest.

In this edition's maritime column, you can read about a federal court's enforcement of a forum selection clause requiring that a breach of contract matter be heard in Japan, as well as the availability of punitive damages in a wrongful death claim arising under maritime laws. Turning to the air, our aviation editors discuss some cases in which passenger claims against an airline were dismissed, one on the grounds that the passenger's cashing of a check that provided for a full and final settlement precluded any further legal claims.

Our labor editor describes an interesting (and complicated) new California statute on piece rate compensation, the implication of which seems to be to discourage that form of compensation. Finally, our comings and goings editor describes recent musical chairs among Government officials.

Happy reading!

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AVIATION

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In *Coppens v. Aer Lingus Limited*, the U.S. District Court for the Eastern District of New York recently held that a passenger who endorsed an airline's check offered in "full and final settlement" of her lost baggage claim could not later pursue damages in a lawsuit.[1] The decision demonstrates how airlines can protect themselves from liability by clearly communicating with passengers when offering a pre-litigation settlement.

The passenger-plaintiff originally asserted that Aer Lingus had lost items of her checked baggage during a flight from New York to Amsterdam. In response the airline's customer service representative mailed the passenger a letter offering approximately $1,680, in "full and final settlement" of

[1] No. 14-CV-6597 (JFB) (AKT), 2015 WL 3885742 (E.D.N.Y. June 22, 2015).

her claims. That amount is the maximum damages allowable under the Montreal Convention, which governs the scope of recoverable damages for lost baggage during international flight between member countries. Enclosed with Aer Lingus's letter to the passenger-plaintiff was a check for the offered amount.

The passenger emailed Aer Lingus to protest that the amount was unsatisfactory, but subsequently deposited the check in her bank account. Days later, she filed a lawsuit, claiming over $26,000 in compensatory damages and over $1 million for emotional distress and punitive damages.

The Magistrate Judge assigned to the case recommended that the District Court grant Aer Lingus's motion to dismiss on the basis that the plaintiff's claims were barred under the common law doctrine of accord and satisfaction, which applies where there is a dispute as to an amount owed and one party knowingly accepts from the other an amount less than the sum claimed. The Magistrate Judge concluded that, by including the phrase "full and final settlement" in the letter offering payment to the passenger, Aer Lingus had put her on notice that cashing the enclosed check would settle her claim. Despite her dissatisfaction with the amount offered, she knowingly accepted the settlement when she deposited the check, thereby precluding any future recovery.

The plaintiff objected to the Magistrate Judge's recommendation, pointing to a subsequent email protesting the offered amount and arguing that she had cashed the check under protest. The District Court Judge rejected that contention, holding that whether she believed she was settling her claim was irrelevant because she deposited the settlement check without explicitly reserving her rights. Accordingly, the Court dismissed the case.

This case follows a line of recent U.S. federal court decisions dismissing claims that were filed after passengers accepted payment accompanied by correspondence using "full and final settlement" language. Last year the U.S. District Court for the Eastern District of New York dismissed a similar case, in which a passenger claimed $5,795 for lost baggage filed after he had deposited the airline's check enclosed in a letter offering $1,065 as "full and final settlement."[2] The District Court held that the doctrine of accord and satisfaction is recognized under both federal and New York state law in that case as well.

In 2001, a federal appeals court applied the doctrine of accord and satisfaction in upholding the dismissal of a class action brought on behalf of United Airlines passengers.[3] The United passengers asserted baggage loss, damage, or delay claims against the airline, but all had received and deposited checks for $635 bearing the caption "By endorsement of this check payee(s) agree that the amount shown is accepted in full and complete settlement of any and all claims which payee(s) may have against United Air Lines, Inc." The appellate court held that this language, which was printed above the signature line of the checks and accompanied by a letter explaining that the amount offered represented the airline's maximum liability under the Warsaw Convention,[4] effectively notified the passengers that depositing the checks would preclude further recovery.

In *Baez v. JetBlue Airways Corp.*[5] the plaintiff's claims were dismissed because court held that JetBlue was immune from liability under the Aviation and Transportation Security Act ("ATSA").[6]

[2.] *Carrion v. United Airlines, Inc.*, No. 13-CV-4875 (NGG) (RER), 2014 WL 3756385 (E.D.N.Y. July 30, 2014).

[3.] *Curtin v. United Airlines, Inc.*, 275 F.3d 88 (D.C. Cir. 2001).

[4.] The Warsaw Convention is the predecessor to the Montreal Convention and applies to international flights between nations that have not yet adopted the Montreal Convention.

[5.] No. 14-2754-cv (2d Cir. Jul. 16, 2015).

[6.] 49 U.S.C. § 44941.

The plaintiff checked into her JetBlue flight from New York to Austin, Texas nearly two hours prior to departure, but did not arrive at the gate until minutes before departure. The gate was closed and a JetBlue employee informed plaintiff that she would not be permitted to board. Plaintiff's checked luggage already had been loaded onto the aircraft, however, and she was informed that it would not be offloaded prior to departure. Rather, plaintiff would have to retrieve her luggage in Austin, when she arrived on a later flight.

Upset with these events, plaintiff asked the JetBlue gate attendant whether allowing the plaintiff's baggage on board the flight when plaintiff herself would not be traveling on that flight would be a security risk and specifically "what if there was a bomb in the bag?" When the JetBlue gate attended responded that the Transportation Security Administration ("TSA") would know if there was a bomb in plaintiff's luggage, the plaintiff responded "TSA—my ass."

The JetBlue gate attended relayed this conversation to her supervisor who drafted an internal report of the incident, including the bomb-related discussion, and then contacted the FBI. The FBI questioned the plaintiff and filed a criminal complaint against her. The plaintiff admitted she did not have a bomb in her bag, but JetBlue and law enforcement decided to reroute the plane carrying the plaintiff's luggage anyway, removed all passengers and searched the luggage. There indeed was no bomb, but law enforcement found marijuana residue in plaintiff's luggage.

The government ultimately dropped the bomb threat charge against plaintiff who pleaded guilty to misdemeanor marijuana possession charges. The incident generated media attention, and plaintiff ultimately was terminated from her job. She then brought a lawsuit asserting several claims against JetBlue and the JetBlue gate attendant, including negligent supervision, retention, training and hiring; defamation; false arrest; and intentional infliction of emotional distress. The District Court granted defendants' motions to dismiss on the ground that ATSA affords them immunity from suit, and because plaintiff's claims have no merit. Plaintiff appealed.

On appeal, the Second Circuit addressed only the holding that the defendants were immune from suit under the ATSA. The Second Circuit affirmed. Specifically, the Second Circuit held that the purpose of the ATSA was to ensure that airline employees would not hesitate to provide law enforcement with information needed to make security decisions by providing those employees immunity for disclosures made to law enforcement even if such disclosures were false or made with reckless disregard for the truth. Accordingly, JetBlue and its employee were immune from liability for reporting Baez's bomb-related statements to law enforcement even if they knew that those statement was false.

In response, Baez argued that there were differences between the statements she made to JetBlue and the statements that JetBlue alleged to law enforcement she made, and that the materiality of those differences should be determined by a jury. However, the Second Circuit held that those potential differences were "immaterial" for the purposes of ATSA immunity because any reasonable law enforcement officer would wanted to have investigated a statement relating to a hypothetical bomb in checked luggage, regardless of how that statement was phrased.

Baez also argued that the JetBlue employee should be stripped of her ATSA immunity because her initial report was to the wrong person, namely her JetBlue supervisor rather than law enforcement. The Second Circuit paid short shrift to this argument as well, holding that the report to a supervisor was but one link in a chain of events that lead to a report to law enforcement, and that link lead to Baez's ultimate arrest and interrogation, for which the ATSA provides immunity.

Ultimately, the Second Circuit appeared unpersuaded by every argument offered by a plaintiff who made a security threat to an airline employee, even if that threat was in jest.

COMINGS & GOINGS

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FRA Administrator Confirmed

Sarah Feinberg was confirmed as the new Administrator of the Federal Railroad Administration on October 28, 2015. Feinberg has been acting Administrator of the agency since January 2015, and before that was chief of staff to Secretary of Transportation Foxx.

Commissioner of FMC Reconfirmed

Mario Cordero is once again a Commissioner of the Federal Maritime Commission. Cordero began serving as a Commissioner in June 2011, and was designated the Chairman in April 2013. Before joining the FMC, Cordero practiced law in the private sector. He also was a member of the Port of Long Beach's Board of Harbor Commissioners for eight years.

New TSA Security Director - Upstate New York

Bart R. Johnson is now the Federal Security Director, under the Transportation Security Administration, for 15 airports in upstate New York. His predecessor, Brian Johansson, has retired.

Most recently, Johnson served airports in this region in the role of Assistant Federal Security Director, Screening and Security. Some of the positions Johnson held before his work with TSA included: Executive Director, International Association of Chiefs of Police; Principal Deputy Under Secretary for Intelligence and Analysis, Department of Homeland Security; Colonel, New York State Police; and Chair, Global Intelligence Working Group and Criminal Intelligence Coordinating Council.

COMMUTER RAIL

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Introduction

Congressional action on Positive Train Control ("PTC"), as well as confirmation of the Administrator for the Federal Railroad Administration ("FRA"), coincided this fall with several noteworthy policy developments from the FRA and Federal Transit Administration ("FTA"). FRA announced new guidance on requirements under the Americans with Disabilities Act of 1990, as well as a proposed rule regarding transit asset management and an updated emergency relief program manual. Meanwhile, the FRA announced a new competitive grant program for improving highway-rail crossings and track along energy routes, and the Federal Communications Commission ("FCC") issued a new proposed rule allowing railroad police to use public safety interoperability and mutual aid channels.

Congress Extends Deadline for Complying with Federal Positive Train Control Requirements

Rail carriers, both passenger and freight, have been working diligently to comply with the deadline established in 2008 for completion of the installation of PTC on covered lines by December 31, 2015. Availability of equipment, availability of spectrum and the sheer volume of the equipment and work required to complete the task made extension of the deadline, as most industry participants predicted early on, essential. On October 29, 2015, President Obama signed into law the Positive Train Control Enforcement and Implementation Act of 2015, which amends Section 20157 of Title 49 of the United States Code to extend the deadline for freight and commuter rail operators to comply with PTC requirements. Under the amended law, Class I railroads, Amtrak and commuter rail operators have until December 31, 2018, to comply with the PTC mandate, three years later than the original deadline. The law, which was attached to a broader short-term patch for the federal surface transportation program reauthorization, comes as the railroad industry and other stakeholders had been increasing the pressure on Congress to push back the deadline, warning that a failure to do so could seriously disrupt interstate commerce and public transportation nationally. Railroads must submit initial revised PTC implementation plans within 90 days after enactment of the bill.

In addition to the three year extension, the new law also provides the Department of Transportation ("DOT") with the authority to further extend the deadline to December 31, 2020. An individual railroad may request authority for this additional extension if it can demonstrate that it has achieved certain statutorily defined steps towards implementation, including acquisition of required radio spectrum, installation of hardware, and employee training, by December 31, 2018, and can certify to FTA that the carrier will implement its PTC installation in strict compliance with its proposed plan.

FTA Announces Extensive Guidance Covering Compliance with Americans with Disabilities Act

The ADA prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. Public transportation

agencies receiving federal funding are required to comply with the ADA, and, as applicable, with DOT and FTA regulations implementing the ADA.

On October 5, 2015, FTA issued a notice of availability of a new circular detailing its requirements for grantees under the ADA. *Americans With Disabilities Act: Final Circular*, 80 Fed. Reg. 60,224 (Oct. 5, 2015). The circular, Circular 4710.1, which became effective November 4, 2015, is available at http://www.fta.dot.gov/documents/Final_FTA_ADA_Circular_C_4710.1.pdf. This release of the final Circular comes after FTA issued various sections of the draft circular in several phases starting in October 2012. *See* 77 Fed. Reg. 60,170 (Oct. 2, 2012); 79 Fed. Reg. 9,585 (Feb. 19, 2014); 79 Fed. Reg. 67,234 (Nov. 12, 2014). Since Circular 4710.1 is the first of its kind for the FTA, it does not cancel any previous circular, but represents the administration's current guidance on ADA issues.

Circular 4710.1 reflects a number of clarifications and responses to public input on draft chapters of the circular. The changes include more clearly differentiating between existing regulatory requirements and non-mandatory best practices. However, in releasing Circular 4710.1, FTA emphasized that it is merely providing additional guidance regarding compliance with ADA, and is not creating new requirements for grantees.

Portions of Circular 4710.1 that are of particular note include:

- Regulatory Scope and Applicability. Chapter One provides an overview of FTA and DOT regulations concerning the ADA and the scope of FTA's jurisdiction over various modes such as commuter rail and rapid and light rail. Chapter One provides a table indicating which regulations apply to each mode, and also includes discussion of the applicability of grantees' ADA requirements to contractors.

- Generally Applicable ADA Requirements. Chapter Two discusses the general ADA requirements with which each grantee must comply, including the extent to which accommodation must be made, grounds for denying access, permissibility of reasonable modifications, and duties to maintain equipment required for accommodation.

- Guidance on Accessible Facilities. Chapter Three covers ADA requirements governing passenger transportation facilities, including rail stations and platforms. It includes discussion of the regulations and standards that are applicable to both new and modified facilities. This chapter provides extensive guidance on passenger rail platforms, which were recently the subject of DOT regulatory revisions.

- Rail Vehicle Acquisition. Chapter Four, concerning vehicle acquisition, includes guidance on the accessibility requirements for rapid, light, and commuter rail car acquisitions.

- Equivalent Facilitation. Chapter Five discusses DOT's interpretation of the provision under ADA permitting equivalent facilitation using alternative designs or technologies that do not strictly comply with ADA standards but that provide equal or greater accessibility. Grantees must seek FTA permission to provide equivalent facilitation. Chapter Five includes a list of Dos and Don'ts for requesting equivalent facilitation.

- Fixed Route Service Requirements. Chapter Six provides an overview of ADA requirements for fixed-route services, including priority seating, boarding and disembarkment time, stop announcements, and route identification.

- FTA Oversight and Monitoring. Chapter Twelve provides guidance regarding FTA's oversight and enforcement of ADA requirements.

FTA Introduces Proposed Rule Regarding Transit Asset Management

The 2012 Moving Ahead for Progress in the 21st Century Act ("MAP-21") required the FTA to create a National Transit Asset Management ("TAM") System aimed at helping transit agencies better understand the link between the condition of their capital assets and the resulting impact on safety. Pursuant to MAP-21, the TAM System would require recipients of FTA funding, including commuter rail operators, to develop their own TAM plans, including an asset inventory, assessment of condition of those assets, and investment prioritization. Recipients would also be required to set performance targets and report their findings and progress to FTA.

On September 30, 2015, FTA issued a Proposed Rule that would establish the National TAM System and require recipients of the FTA assistance to report TAM efforts in the National Transit Database. *Transit Asset Management; National Transit Database*, 80 Fed. Reg. 58912 (Sept. 30, 2015). The Proposed Rule would add a new part to FTA's regulations, 49 C.F.R. Part 625, which would set out the requirements for TAM Plan, and would amend Part 630, regarding the National Transit Database, to include TAM reporting. The requirements under Part 625 reflect the general shift in federal regulation of transportation safety to a less prescriptive, more performance-based model.

Under the Proposed Rule, a public transit agency would be required to report on, and analyze the effects of, its maintenance efforts on all assets used to provide public transportation. This means, for instance, that commuter rail assets that are regulated by FRA for safety purposes must still be included in an agency's TAM planning and reporting.

Public comments on the Proposed Rule were due by November 30, 2015. In addition, FTA planned to conduct additional outreach, including at least one "listening session" in November to discuss the Proposed Rule with stakeholders and the public.

FTA Issues Emergency Relief Manual and Proposed Program Guidance

In MAP-21 Congress established an FTA-managed Emergency Relief Program (codified at 49 U.S.C. § 5324), under which FTA is authorized to make emergency grants for capital projects to protect, repair, or replace damaged assets caused by, and for operating expenses incurred while responding to, a declared emergency or major disaster. In 2013, FTA issued regulations covering the Emergency Relief Program, as well as guidance on its regulations. *See Emergency Relief Program*, 79 Fed. Reg. 60,349 (Oct. 7, 2014); 49 C.F.R. Part 602.

On October 5, 2015, FTA published its final Emergency Relief Manual, which describes its process and procedures for states and transit agencies to seek response and recovery aid for declared disasters. *Emergency Relief Program Guidance*, 80 Fed. Reg. 60222 (Oct. 5, 2015); FTA, *Emergency Relief Manual* (Sept. 30, 2015). The final Emergency Relief Manual, which revises a draft version published in February, 2015, now includes guidance that has been coordinated with FEMA regarding that agency's disaster relief programs. In addition, the final version responds to selected public comments on the draft version. The final version is available at: http://www.fta.dot.gov/documents/FTA_Emergency_Relief_Manual_and_Guide_-_Sept_2015.pdf.

FRA Announces $10 Million in Competitive Grants to Improve Highway-Rail Crossings, Track Along Energy Routes

On September 2, 2015, the FRA announced $10 million in competitive grants to fund projects to reduce the risks created by highway-rail grade crossings and along routes used to transport crude oil, ethanol, and natural gas. *Railroad Safety Grants for Safe Transportation of Energy Products by Rail Program*, 80 Fed. Reg. 53,616 (Sept. 4, 2015). Eligible applicants for the Railroad Safety Grants for the Safe Transportation for Energy Products by Rail Program ("STEP Program") include states, groups of states, or interstate compacts, preferably requested through one or more state departments of

transportation. Applications proposing new and innovative solutions may be given selection preference.

FRA encourages but does not require applicants to limit funding requests to $3 million per project, and also encourages applicants to receive matching funding from other public or private sources. FRA will not fund more than 80 percent of the total project cost, with applicants assuming at least 20 percent of the total cost.

Other News

- Sarah Feinberg Confirmed as FRA Administrator. On October 28, 2015, the U.S. Senate confirmed Sarah Feinberg as Administrator of the FRA, over nine months after she had been identified as the nominee while serving as Acting Administrator.

- FCC Proposed Rule on Railroad Police Communications. On September 29, 2015, the FCC issued notice of a proposed rule to amend its rules providing railroad police with access to public safety interoperability and mutual aid channels. *Enable Railroad Police Officers to Access Public Safety Interoperability and Mutual Aid Channels*, 80 Fed. Reg. 58,421 (Sept. 29. 2015). Currently, railroad police are not included amongst those persons allowed access to communications frequencies reserved for public safety interoperability. The change would allow railroad police to more easily coordinate with other safety personnel, including state and local police officers, firefighters, and federal investigators in the case of an accident or emergency, such as a train derailment. The FCC has proposed using the definition of railroad police established by the FRA and had sought comment on the proposed rule before issuing a final rule. The comment period closed for initial comments on November 13, 2015, and for reply comments on November 30, 2015.

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Final Rule on Enhanced Tank Car Standards Triggers a Multitude of Challenges, New Regulatory Proposals, and Legislative Efforts

The Final Rule on Enhanced Tank Car Standards and Rail Operational Controls for Flammable Liquid Transport ("Final Rule") was finalized on May 1, 2015, but implementation and policy implications continue to develop six months following its publication. The Final Rule has prompted administrative appeals, which the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") has recently ruled on, and judicial appeals, which are currently pending. PHMSA has proposed new regulatory requirements related to some aspects of the rulemaking, and additional proposed rules are expected. Also, the U.S. Congress is developing new legislation that is expected to address some of the topics covered by the Final Rule. Some issues, such as the requirement to implement Electronically Controlled Pneumatic ("ECP") brakes and the omission of a requirement for thermal blanket protection on the tank cars, are being addressed in more than one of these arenas. Below is an updated summary of these developments, and the expected time frame for their resolution.

Administrative Appeals

On November 9, 2015, PHMSA posted its response to five pending administrative appeals of the Final Rule. PHMSA denied the appeals on all grounds and declined to make any changes to the regulatory regime. The agency also took the opportunity to bolster its support for aspects of the rule, including especially the requirement to implement ECP brakes.

Appellants, the Dangerous Goods Advisory Council ("DGAC"), American Chemistry Council ("ACC"), Association of American Railroads ("AAR"), American Fuel & Petrochemical Manufacturers ("AFPM"), the Umatilla, Yakama, Warm Springs, and Nez Perce tribes and the Quinault Indian Nation, had appealed for agency reconsideration of the Final Rule in seven topic areas: (1) Scope of Rulemaking; (2) Tribal Impacts and Consultation; (3) Information Sharing/Notification; (4) Testing and Sampling Programs; (5) Retrofit Timeline and Tank Car Reporting Requirements; (6) Thermal Protection for Tank Cars; and (7) ECP Braking Systems. PHMSA denied reconsideration on all of these issues, and reinforced its decision making in an 89-page response.

Regarding the first topic area, DAGC, ACC, and AAR had claimed that shippers and railroads do not always control the make-up of a manifest train and therefore the 35-car-per train threshold for requiring new tank cars is impractical. The result, according to these appellants, would require retrofits to an additional 40,000 tank cars that PHMSA had not accounted for to ensure that all Class 3 hazardous materials are properly packaged. PHMSA disagreed with these appellants and observed that railroads have significant fleet management programs in place to ensure that Class 3 materials are placed in trains

appropriate for their packaging (i.e., in trains with fewer than 35 cars of Class 3 materials when packaged in un-retrofitted DOT-111 tank cars). PHMSA found that the claim that an additional 40,000 tank cars would need to be retrofitted "is grossly exacerbated by the railroads advising ACC that they will not manage fleets to avoid their shipments becoming subject to the new regulations. PHMSA does not agree that this is a valid basis for revising the scope of the final rule's requirements." Accordingly, PHMSA denied reconsideration of this issue in the Final Rule.

In similar fashion, PHMSA disagreed with other claims raised in the administrative appeals. PHMSA concluded that the Final Rule did not have a significant or unique effect upon the tribes, and therefore denied the tribes' appeals on the grounds that PHMSA failed to conduct required tribal consultation. PHMSA concluded that the sampling and testing program is "reasonable, justified, necessary, and clear as written" and so declined to provide additional definitions or guidance. PHMSA noted that subsequent agency actions and clarifications sufficiently addressed the appeals on the issues of Information Sharing/Notification and Tank Car Reporting requirements, and so declined to revise the Final Rule on these issues. And PHMSA affirmed its decisions to require ECP brakes but not require thermal protection for tank cars. At this time it does not appear that PHMSA intends to revisit or alter any aspect of the Final Rule.

Judicial Appeals

In addition to the administrative appeals, five separate groups filed judicial appeals of the Final Rule in the U.S. Court of Appeals for the District of Columbia Circuit. These cases have been consolidated. *See American Petroleum Institute v. USA*, Docket No. 15-1131.

Some of the issues raised in the judicial appeal are similar to issues raised in the administrative appeals, and PHMSA's ruling serves as a preview into the agency's arguments in court. For example, the judicial appeal raises previously reconsidered issues, including the scope of the rulemaking, information sharing/notification, retrofit time line, thermal protection for tank cars, and ECP braking requirements. However, the appellants in the judicial appeals have also raised unique issues, including speed restrictions, an inadequate small business impact analysis, improper exemption of certain Class 3 flammable liquids, and insufficiency of the standards for retrofitted cars.

The parties had been directed to file proposals for a briefing schedule in the consolidated case by November 23, 2015.

Regulatory Proposals

On May 28, 2015, PHMSA announced that it would extend indefinitely the Emergency Order of May 7, 2014 which requires railroads transporting over 1,000,000 gallons of Bakken crude oil in a single train to provide certain information to State Emergency Response Commissions ("SERCs") while it considered options for codifying the disclosure requirement permanently. Furthermore, on July 22, 2015, the Federal Railroad Administration ("FRA") issued a public letter instructing railroads transporting crude oil that they must continue to notify SERCs of the expected movement of crude oil trains carrying Bakken crude oil. Thus, railroads remain required to notify states of the transportation of unit trains of Bakken crude oil notwithstanding the Final Rule.

On October 14, 2015, PHMSA issued a notice of a new reporting requirement that would require tank car owners to report their progress in the retrofitting of tank cars in the event they have not completed required retrofits by January 1, 2017. 80 FR 61886. The new reporting requirement would require all owners of non-jacketed DOT-111 tank cars in Packing Group I service who do not meet the January 1, 2017 deadline to submit the following information regarding their retrofitting progress: (1) the total number of tank cars retrofitted to the DOT-117R specification (for retrofitted tank cars); (2) the total number to tank cars built or retrofitted to the DOT-117P specification (the performance standard specification); (3) the total number of DOT-111 tank cars (including those built to the CPC-1232 industry standard) that have not been modified; (4) the total number of tank cars built to the DOT-117

specification; and (5) the total number of tank cars built to a DOT-117, -117R or -117P specification that are ECP brake equipped. This reporting requirement appears to have been crafted partially in response to some of the administrative and judicial appeals, which raise concerns about the retrofit deadlines and implementation of ECP brakes within the deadline.

The comment period for this proposed reporting requirement closed on November 13, 2015.

On another front, PHMSA has not yet published the Proposed Rule for Oil Spill Response Plans for High Hazard Flammable Trains (Docket No. PHMSA-2014-0105). PHMSA published its Advanced Notice of Proposed Rulemaking more than one year ago, concurrently with the proposed rule on Enhanced Tank Car Specifications and Operational Controls for High Hazard Flammable Trains. PHMSA has not updated its internal anticipated deadline for publication of the proposed rule of August 31, 2015, and it is unknown at this time when the proposed rule will be issued.

Legislative Proposals

The United States House of Representatives and Senate have two major transportation bills in conference: H.R. 22, which was passed by the House and amended in the Senate over the summer, and, H.R. 3763, the House's latest version of a 6-year transportation package. A transportation package that reconciles the differences between the two bills is expected to pass in early December. As currently drafted, H.R. 3763 contains several provisions that would codify or alter the Final Rule:

- *Phase-Out of tank cars that do not meet DOT-117 or DOT-117R specifications.* Would codify phase-out dates for un-retrofitted DOT-111 tank cars. These deadlines would codify into law the retrofit timetable in the Final Rule.
- *Thermal blankets for tank cars.* Would require the Secretary of Transportation to issue regulations to require DOT-117 tank cars and those modified to meet DOT-117R specifications to be equipped with an insulating thermal blanket of at least ½ inch think material.
- *Comprehensive Oil Spill Response Plans.* Would require the Secretary to issue regulations to require railroads transporting Class 3 flammable liquids to maintain a Comprehensive Oil Spill Response Plan.
- *Information on high-hazard flammable trains.* Would require railroad carriers to provide information on HHFTs to state emergency response commissions consistent with DOT's May 2014 Emergency Order.
- *Study and Testing of Electronically-Controlled Pneumatic Brakes.* Would require the U.S. Comptroller General to conduct an independent evaluation of ECP brake systems, pilot program data, and DOT's research on the costs, benefits, and effects of ECP brake systems.

Congress is expected to vote on the final bill in early December.

PTC Compliance Timeline Extended by Three Years

On October 28, 2015, the U.S. Senate passed a bill extending the deadline for implementation of Positive Train Control ("PTC") by at least 3 years. The U.S. House of Representatives had previously passed the bill, and the bill is on its way to the President for signature. The extension was included in a short-term transportation funding bill that serves as a stopgap while Congress works out the details of a comprehensive transportation bill. This extension resolves concerns about large scale interruptions in rail service for shippers of hazardous materials.

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Compensations Systems at a Cross Roads –Reflections on Piece Rate

Piece rate compensation systems have long been benchmarked by two critical factors. Whether, on balance, they result in payment to employees of the proper minimum wage and if overtime is properly calculated on the regular rate of pay thus earned. However, as with other areas of wage and hour law, requirements to set out wage rates on pay stubs and to clearly specify the rates of pay for time that is or is not compensated have led to an entire new generation of related ligation across the country.

In this article we will examine a unique statutory effort to create a new model for piece rate compensation in California; an important study to the extent California leads the wage and hour nation.

This article focuses on California's new piece-rate law signed by Governor Brown on October 10, 2015. As noted in the press, after extensive legislative wrangling, at the close of the 2015 legislative session, the California Legislature passed Assembly Bill 1513 ("AB 1513") which significantly alters the piece-rate pay system requirements for California employers. The new law will be codified as Labor Code section 226.2 and will be effective January 1, 2016.

According to proponents of the bill and legislative analysts, the bill does not change existing law—it only codifies the California Court of Appeals decisions in *Gonzalez v. Downtown LA Motors* and *Bluford v. Safeway Stores* and incorporates an interpretative memo issued by Labor Commissioner Julie Su. Thus, while the effective date of AB 1513 is January 1, 2016, it may be applied retroactively on the basis that it did not effectuate a change in the law but merely codified existing law.

What Employers Need Know About the New Piece-Rate Requirements

Compensation for Rest and Recovery Periods. The law requires employers utilizing a piece-rate system to separately compensate the employee for rest and recovery periods. The separate compensation for the rest and recovery periods must be the higher of either: (1) an average hourly rate based on a formula set forth in the statute; or (2) the applicable minimum wage whether local, state or federal.

The "average hourly rate formula" is determined by dividing the total compensation for the workweek excluding compensation for rest periods, recovery periods, or overtime compensation by the total hours worked during the workweek excluding time for rest and recovery periods. The employer must pay the higher of the two amounts. Thus, employers must calculate the average hourly rate for each pay period and compare it to the applicable minimum wage to determine whether the average hourly rate is higher than the minimum wage.

A completely different requirement applies to piece-rate employees paid on a semi-monthly basis. For an employee paid on a semi-monthly basis, the employee must be compensated "at least…the applicable minimum wage rate" for rest and recovery periods along with the other wages due during the

payroll period in which the rest and recovery periods occurred. If, after calculating the average hourly rate based on the average hourly formula, the employee is owed additional amounts because the average hourly rate is higher than the applicable minimum wage, the difference between the two amounts shall be paid in the next regular payroll cycle.

Compensation for Other Non-Productive Time. The new law requires that, in addition to payment for rest and recovery periods, employees must be paid separately for "other non-productive time."

The statute defines "other nonproductive time" as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis."

Depending on the nature of the business, "other non-productive" time may include time spent attending meetings, waiting for work, standby time, and for drivers, time spent conducting pre- and/or post-drive inspections.

Time spent conducting "other non-productive" work must be compensated at an hourly rate that is no less than the applicable minimum wage. Alternatively, if the employer already pays an hourly rate of at least the applicable minimum wage for all hours worked, that will be "deemed in compliance" with the compensation required for other non-productive time.

The amount of time spent on other non-productive work may be determined either through "actual records or the employer's reasonable estimates" on either an employee-by-employee basis or a group basis.

If an employer makes a "good faith error" in determining "the total or estimated amount of non-productive time" it is liable for the wages owed for the nonproductive time, but cannot be held liable for any "statutory civil penalties…including, but not limited to penalties under Section 226.3, or liquidated damages" provided that certain requirements are satisfied.

Additional Wage Statement Requirements. In addition to the nine wage statement requirements set forth in Labor Code section 226(a), the new law requires that wage statements issued to piece-rate employees separately list the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for rest and recovery periods during the pay period. The wage statement must also separately list the total hours of other non-productive time, the rate of compensation, and the gross wages paid for the other non-productive time during the pay period.

Safe Harbor to Correct Improper Compensation to Piece-Rate Employees. The law provides "safe harbor" to any employer who fails to compensate or under-compensates employees for rest and recovery periods or other non-productive time if they timely and properly correct the error.

The safe harbor provision is intended to bar employee claims seeking recovery of unpaid wages, liquidated damages, statutory penalties and civil penalties based on a failure to properly compensate an employee for rest and recovery periods or other non-productive time.

The safe harbor provides that an employer may assert an affirmative defense to any claim for "recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties" based solely on the employer's failure to timely pay the employee for rest and recovery periods and other non-productive time for any time period prior to December 15, 2015. This safe harbor only applies if, by December 15, 2016, the employer does all of the following:

- Makes payment to each of its employees for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time for the time period from July 1, 2012 to December 31, 2015, using either of the following calculations:
  - Pay the actual sums due with accrued interest;
  - Pay employees an amount equal to 4% of their gross earnings for each pay period that the employee conducted work on a piece-rate basis from July 1, 2012 to December 31, 2015, less any amounts already paid to the employee for rest and recovery periods and other non-productive time during the same pay period at issue but the credit taken cannot exceed 1 percent of the employee's gross earnings during the pay period at issue.

- The employer must notify the Department of Industrial Relations ("DIR") by July 1, 2016, that it has elected to make such payments to its current and former employers. The statute specifies exactly what information is to be included and where it is to be sent. The names of employers who have made this election will be posted on the DIR's website until March 31, 2017.

- Payments to employees must be made as soon as "reasonably feasible" but must be completed by December 15, 2016.

- Detailed statements regarding the payments must be provided to employees, including, a statement as to how the amount was determined and which calculation method was used (actual sums versus 4% gross earnings) and providing a list or spreadsheet that lists each pay period that is included in the payment, the total hours of rest and recovery periods and other non-productive time of the employee, the rates of compensation for that time, and the gross wages paid for each pay period.

The safe harbor provision does not apply to claims that employees were not advised of their right to take rest or recovery periods, or that such periods were not made available or were discouraged. The safe harbor also does not apply to claims asserted for non-compensation or under compensation of rest or recovery periods and other non-productive time if those claims were asserted in a lawsuit prior to March 1, 2014, or a lawsuit filed prior to March 1, 2014 in which the employee sought to add a claim related to rest and recovery periods or other nonproductive time prior to July 1, 2015. It also, likewise, does not apply to any claims that accrue after January 1, 2016.

The new law contains a sunset provision such that if it is not re-enacted by January 1, 2021, it will be repealed.

Next Steps for Employers

Though AB 1513 is being touted as a "fix" to California's piece-rate system, the complicated formulas and numerous restrictions that are now codified may ultimately force many employers to re-evaluate their use of a piece-rate system or abandon it altogether.

Employers who paid employees on a piece-rate basis during the period covered by the safe harbor provision (July 1, 2012 to December 21, 2015) should consult with counsel to determine if their piece-rate method was legally compliant.

After review by counsel, employers can make an informed determination as to whether they should take advantage of the safe harbor provision to eliminate their exposure for claims related to non-compensated or undercompensated rest and recovery periods or other nonproductive time. The new piece-rate system and its safe harbor provision are highly technical. Employers would be wise to seek the advice of counsel before attempting to comply with the statute.

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Florida District Court Grants Motion to Dismiss on Forum Non Conveniens Grounds Arising out of Forum Selection Clause

In *North American Auto Sales, LLC v. Nippon Yusen Kaisha*, 2015 WL 5521919 (M.D. Fla. Sept. 16, 2015), the United States Middle District of Florida recently examined a motion to dismiss based on forum non conveniens arising out of a breach of a contract of carriage. In November 2013, Nippon Yusen Kaisha and NYK Line (N.A.), Inc. (referred to as "Nippon Yusen") issued two bills of lading in connection with the delivery of three automobiles from North America Auto Sales, LLC ("North America") to a consignee in Jordan. The vehicles arrived in Jordan after a Jordanian permit allowing the cargo's entry into Jordan had already expired. Jordan denied the entry of the automobiles, which remained in Nippon Yusen's control. North America Auto brought suit alleging conversation and breach of contract under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §1300-1315.

The bill of lading contained the contract terms for the carriage of the vehicles. The bill of lading included a forum-selection clause that required any action to be filed in Tokyo District Court. The clause also contained a choice of law provision that required any dispute about the contract to be governed by Japanese law. Based on this clause, Nippon Yusen sought to dismiss the action for forum non conveniens. The court upheld the forum selection clause and granted the motion to dismiss. The court recognized that the test for whether a foreign forum selection clause is valid under § 3(8) of COGSA is whether "the substantive law to be applied [by the chosen forum] will reduce the carrier's obligations to the cargo owner below what COGSA guarantees." The district court recognized that the U.S. Supreme Court enforced a Tokyo forum-selection clause in a bill of lading in *Kawasaki Kisen Kaisha Ltd. v. Regal–Beloit Corp.*, 561 U.S. 89, 111 (2010). The court found that North American failed to show that Japanese law would lessen the carrier's liability. Therefore, the court held that the forum-selection clause was valid and enforceable.

Minnesota District Court holds that Punitive Damages are not available in Wrongful Death Action under the Jones Act or for Unseaworthiness under the General Maritime Law

In *in Re Complaint of Brennan Marine, Inc., for Exoneration from, or Limitation of Liability*, 2015 WL 4992321 (D. Minn. Aug. 20, 2015), the United States District of Minnesota recently examined whether a decedent's spouse could recover punitive damages in a wrongful death action under the Jones Act and the general maritime law. In July 2013, a tugboat crashed into a dam along the Mississippi River in Minnesota. The vessel capsized and sank and one of the crew members was killed. Brennan Marine, the owner and operator of the tugboat filed a limitation action seeking to limit its liability under 46 U.S.C. § § 30501, *et seq*. The widow of the decreased crew member asserted two claims against Brennan Marine: (1) a wrongful-death action on her own behalf under the Jones Act, 46 U.S.C. § 30104; and (2) a survival action under the general maritime law.

Brennan Marine filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, or in the alternative, a Rule 12(c) motion for partial judgment on the pleadings. Brennan Marine sought to dismiss claimants' request for punitive or other non-pecuniary damages. The district court granted the motion. The court held that the Supreme Court's ruling in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), precluded the recovery of punitive damages under the Jones Act. The claimant argued that punitive damages should be

recoverable as pecuniary damages. The court rejected this argument and held that, under existing precedent, pecuniary damages are compensatory. On the other hand, punitive damages are by definition meant to "punish and deter" and are not recoverable under the Jones Act.

The court also rejected the claimant's attempt to recover punitive damages under the general maritime law. The court reviewed the Fifth Circuit's recent decision in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014)(en banc), which precluded the recovery of punitive damages in a wrongful death action based on unseaworthiness under the general maritime law. The court agreed with the Fifth Circuit's reasoning in *McBride*, and held that the Supreme Court's ruling in *Miles* precluded the claimant from recovering punitive damages. In *Miles*, the Supreme Court held that a party asserting an unseaworthiness claim in a wrongful death action could not recover damages for loss of society because such remedy was not available under the general maritime law at the time that the Jones Act was enacted in 1920. The district court likewise held that no general maritime claim for unseaworthiness in a survival action existed at the time that the Jones Act became law. Thus, applying *Miles*, the court held the claimant could not seek punitive damages under the general maritime law in her survival action.

MOTOR

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The shipper's expectation of a shipment's nature controls whether a driver is exempt from overtime pay.
***Kennedy v. Equity Transportation Co., Inc*., 2015 WL 6392755 (N.D. New York 2015)**

Congress enacted the federal Fair Labor Standards Act of 1938, 29 USC §201, *et seq*. ("FLSA"), to protect classes of employees from being overworked without fair compensation. With numerous qualifications and exceptions, FLSA mandates that employees be paid time and a half for work they perform over 40 hours in a week.

An exempted class of employees which doesn't enjoy that statutory benefit is interstate truck drivers, whose time on the job is governed by FMCSA and its regs. Operative is the word "interstate," because drivers who work solely within a state aren't exempted. Again, with qualifications and exceptions.

Motor carrier Equity Transportation employed driver Kennedy. Equity's services to shipper Pepsi included hauling cargo from a manufacturing facility to a compound, both in New York, where the loads would be transferred to a second trailer and transported to out-of-state destinations. The trips' first legs (to the compound) were accomplished by a "shuttle driver," and the onward transport to destination by an "over-the-road" driver. Mr. Kennedy was engaged and qualified to do both, but apparently only operated as a shuttle driver. In other words, he never left the Empire State.

So was he exempt from FLSA overtime pay as an interstate driver? In response to his lawsuit and the parties' cross motions for summary judgment, the U.S. District Court for Northern District of New York ruled he is. While a question of disputed fact remained regarding his actual contemplated duties with Equity, it was clear the runs he made to the compound were the first legs of interstate hauls. Even if he wasn't aware that was the case (and evidence suggested he should have been based on bills

of lading), the shipper's perspective controls the analysis. Neither Pepsi nor its consignees were buying transportation services to a compound; they hired Equity to make interstate hauls. Mr. Kennedy's claims for overtime pay were dismissed accordingly.

FAAAA doesn't preempt state regulation of employment classification.
***Elijahjuan, et al. v. Mike Campbell & Associates, Ltd*., 2015 WL 6736812 (Cal. Ct. App., Div. 8 2015)**

Mike Campbell & Associates was licensed to operate as a freight broker, and operated by engaging numerous truckers to haul freight under their own bills of lading. Documentation between those drivers and Campbell stated the truckers were "independent contractors," and Campbell treated them as such for California employment law purposes. Consequently, the truckers, some of which were incorporated and had employees of their own, didn't get certain advantages and benefits, such as comp and time off, which employers must provide their employees in the Golden State.

Some 1,000 such drivers sued Campbell. Issues such as how Campbell, a broker, shouldn't be hiring truckers as either independent contractors or employees (they should be working for motor carriers) were never reached. The California trial court addressing the matter dismissed the drivers' claims on the ground of Federal Aviation Administration Authorization Act of 1994 (FAAAA) preemption. Campbell successfully argued that "the rates, routes or services" it offers would be affected by the cost-imposing employee classification. It would have to hire more truckers (given the state's employee work time restrictions) which would raise costs. FAAAA is designed to avoid such state law intrusion on interstate motor carriage.

But subsequently, the California Supreme Court ruled in a similar matter that FAAAA doesn't preempt claims based on state employment laws. At about the same time, the Ninth Circuit Court of Appeals chimed in with a similar ruling. Based on those two decisions, the California Court of Appeals reversed, and reinstated the drivers' claims. The connection between added costs imposed by state law requiring employee breaks is just too tenuous and remote from the concept of "rates, routes or services." The great stakes involved (Campbell estimated additional costs of $90 million if its drivers are deemed employees) aren't a factor, and the ruling doesn't actually preclude Campbell from hiring independent contractors. It just says there may be a claim for treating employees as independent contractors.

Venue analysis leaves motor carrier's indemnity claim in the court where its liability was established.
***Landstar Ranger, Inc. v. Global Experience Specialists*, 2015 WL 5714556 (W.D.N.C. 2015)**

Here's a federal magistrate's very straightforward analysis of factors district courts consider in determining proper venue in the context of a motor carrier's indemnity claim against a service provider who allegedly lost some cargo. A shipper engaged Global Experience Specialists (GES), allegedly both a tradeshow event planner and motor carrier, to facilitate transit of tradeshow cargo from Chicago to Mooresville, Illinois. The shipper allegedly gave GES seven pieces of cargo for holding until Landstar fetched and transported it. The cargo arrived short, and the shipper sued Landstar under Carmack in the U.S. District Court for the Western District of North Carolina. They settled for 120 grand.

Landstar then sued GES in the same court for indemnity. GES moved to change venue to the Northern District of Illinois. In response to the motion, a magistrate went through the laundry list of factors to determine whether North Carolina was "inconvenient and/or inappropriate," such that the plaintiff's choice of forum should be disturbed (that choice being the first consideration).

Most points were innocuous, such as availability of witnesses; necessity of a jury viewing a scene; obstacles to a fair trial; court congestion; enforceability of a judgment; conflicts of law issues; and a locality's interest in resolving its own controversies. They didn't make any difference in the analysis (the conflict of laws issue being neutralized by federal law preemption– the first proceeding

established that GES held itself out as a carrier, thereby implicating Carmack).

But given Landstar's pick of courts; evidence being in North Carolina; and the costs of transporting certain witnesses to Illinois, the court concluded this one should stay in the Tar Heel State. Significant was the fact that the court already was familiar with the facts and circumstances.

Broker loses motion for summary judgment because damages and contract terms raise questions of fact.
***Complete Distribution Services, Inc. v. All States Transport, LLC*, 2015 WL 5764421 (D. Ore. 2015)**

Shipper Pacific Nutritional, Inc. (PNI) retained freight broker Complete Distribution Services (CDS) to arrange transit of two loads of vitamins from Vancouver, Washington to two destinations in Florida. CDS booked the loads with motor carrier All States Transport (AST). AST combined the loads onto one truck, which was involved in an accident damaging the cargo to the tune of some 169 grand.

CDS, not liable as a broker but interested in preserving a business relationship, paid PNI the full claim value, collected about half of it from AST's insurer, and sued AST to recover the balance in the U.S. District Court for the District of Oregon. CDS filed a motion for summary judgment shortly thereafter, alleging causes of action based on Carmack (as PNI's assignee) and breach of a contract between CDS and AST. It lost the motion.

Carmack's elements of tender in good order and condition, and delivery in damaged condition, were all clear. But the damages weren't adequately demonstrated for summary judgment purposes. While destination market value usually governs the damages analysis, PNI offered discounts to its consignees based on payment terms that complicated the math and left questions of fact unresolved. There also were discrepancies in invoice amounts, which apparently included FedEx charges that might constitute unforeseeable, and therefore unrecoverable, consequential damages.

CDS asserted that AST had failed to comply with cargo claim administration provisions imposed by 49 CFR §370, which should result in automatic liability. But those regs don't say that; noncompliance doesn't mean automatic Carmack liability (although some courts have gone the other way).

In 2010, AST signed a contract with CDS. In 2012, CDS issued a new contract to its carriers, but apparently never had AST sign it. However, AST did sign CDS load confirmations which incorporated the 2012 contract. The new contract contained terms for the carrier's automatic liability for cargo claims it doesn't dispose of within 60 days, and other terms that could implicate AST having to pay up. AST argued it assumed there were no new terms in the referenced 2012 contract, and nothing in the load confirmations suggested otherwise. The court refused to recognize the incorporation. The 2012 contract and load conformations weren't contemporaneously issued, such that the term "contract" in the load confirmations was ambiguous, and not proper for summary adjudication.

The 2012 contract also required CDS to submit cargo claims to the Surface Transportation Board before it could pursue litigation (never mind that STB wouldn't involve itself with something like this). Moreover, it contained indemnity provisions, ones which AST argued wouldn't apply in suits between CDS and AST as a matter of Oregon law, further complicating the contract issue.

Lastly, AST urged that CDS, in violation of industry practice, failed to apprise it of the cargo's value so that it could procure adequate insurance. This also raised issues only a trier of fact could resolve.

All this might have been avoided if CDS had gotten AST's signature on its 2012 contract.

Only notice pleading is required …
***Mitsui Sumitomo Insurance Co., Ltd. v. Daily Express, Inc.*, 2015 WL 6506546 (S.D. Ohio 2015)**

Transportation law includes some quirks and peculiarities many lawyers and judges aren't familiar with. Inadequate legal expertise can sometimes lead to compromise of parties' legal rights, or at least delayed justice. Most trucking lawyers can't count the number of times their clients been with served with complaints alleging breach of contract, negligence and other common law theories of liability for interstate cargo damage. As Carmack preemption of such theories is one of the most basic of transportation law precepts, knowledgeable lawyers often end up shedding their robes and wigs, stepping into academic shoes, and teaching all concerned how the law works. When opposing counsel still don't get it, motions to dismiss often follow.

But as the U.S. District Court for the Southern District of Ohio recently concluded, transportation law is still subject to the same general court rules, including the rather low-level "notice pleading" requirements regarding the specificity a complaint must allege. A shipper's cargo consisting of a "VC roll," which is a steel sheet product, transported by motor carrier Daily Express from Ohio to Indiana, allegedly arrived damaged. The shipper's subrogated insurer had paid the shipper 62 grand through a first party cargo insurance policy, and sued Daily Express in an Ohio state court to recoup its payout. The complaint alleged "strict liability" under Carmack, as well as breach of contract and negligence. Daily Express removed the action to federal court, and then moved to dismiss the complaint under FRCP 12(b)(6) based on Carmack preemption and an assertion the complaint inadequately pleaded a claim under Carmack.

The motion was denied. True, Carmack requires demonstration of cargo tendered in good order and condition, non-delivery or delivery in short or damaged condition, and damages. It's also true that Carmack doesn't impose "strict liability" in the tort sense of the word. But alleging it does, and not giving precise detail as to the nature and evidence of the Carmack elements, isn't fatal to a complaint. For example, alleging that "[d]efendant signed the bill of lading, acknowledging receipt of the … VC roll in apparent good order" is adequate, even though the allegation doesn't specifically say the cargo was indeed in good order. Identification of the cargo as "Roll 101," while perhaps not a precise identification that might later be a challenge in the litigation, isn't grounds to dismiss. Nor is failure to allege how the cargo was damaged fatal, and issuance of a bill of lading to the shipper's agent, and not to the shipper itself, doesn't excuse the carrier from Carmack liability.

The point is that adequate notice as pleaded to apprise the motor carrier of the claim's nature. Details can be fleshed out in discovery.

MOTOR-REGULATORY

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NHTSA Proposes Mandatory Collision Avoidance Systems for CMVs

The National Highway Traffic Safety Administration (NHTSA) has ranted a petition for rulemaking that if adopted, would require automatic forward collision avoidance and mitigation systems on commercial motor vehicles weighing over 10,000 lbs. 80 Fed. Reg. 62487 (Oct. 16, 2015). NHTSA has been studying the systems for several years and will continue to conduct research and use the rulemaking proceeding to evaluate whether or not to issue such a rule. *Id.* at 62487. The petition for rulemaking was filed by the Truck Safety Coalition, the Center for Auto Safety, Advocates for Highway and Auto Safety and Road Safe America, and supported by the Commercial Vehicle Safety Alliance. *Id.* A 2012 European Union Commission Regulation made advanced emergency braking systems with forward collision warning mandatory in Europe on most new heavy vehicles. *Id.*

NHTSA Wants Access to Confidential Litigation Documents and Settlements

NHTSA has proposed an Enforcement Guidance Bulletin containing "guiding principles and best practices to be utilized in the context of private litigation." 80 Fed. Reg. 57046 (Sept. 21, 2015). The bulletin states: "To the extent protective orders, settlement agreements, or other confidentiality provisions prohibit information obtained in private litigation from being transmitted to NHTSA, such limitations are contrary to Rule 26 of the Federal Rules of Civil Procedure, its state corollaries, and sound principles of public policy. Although such restrictions are generally prohibited by applicable rules and law, the Agency recommends that litigants include a specific provision in any protective order or settlement agreement that provides for disclosure of relevant motor vehicle safety information to NHTSA, regardless of any other restrictions on the disclosure or dissemination of such information." *Id.* at 57046.

FMCSA Eases Restrictions on Electronic Log Revisions

The Federal Motor Carrier Safety Administration (FMCSA) will now allow additional editing of hours of service entries made in automatic on-board recording devices (AOBRDs). 80 Fed. Reg. 59664 (Oct. 2, 2015). Edits may be made so long as the record shows the original entry and revised entry, as well as who made the revision, when and why. However, driving time still may not be edited "except in the case of unidentified or team drivers, and when driving time was assigned to the wrong driver or no driver." *Id.* at 59665.

FMCSA Revises Implementation Dates for its Unified Registration System

Following its earlier announcement that there would be a delay, the FMCSA has announced the new effective and compliance dates of the Unified Registration System (URS) final rule, issued on August 23, 2013. The table below, listed in 80 Fed. Reg. 63695 (Oct. 21, 2015), provides each of the new dates:

URS Effective Dates		
URS final rule major provision	**(Existing) effective/ compliance date**	**(New) effective/ compliance date**
Registration Application Process using the MCSA-1 online application for New Applicants	10/23/2015	12/12/2015
Use of MCSA-1 online application for all new and existing entities for all reasons to file	10/23/2015	9/30/2016
USDOT Number as sole identifier (discontinuing issuance of docket numbers)	10/23/2015	9/30/2016
New Fees Schedule	10/23/2015	9/30/2016
Evidence of Financial Responsibility (Insurance Filings and Surety Bonds/Trusts) for New Private HM and New Exempt For Hire Carriers	10/23/2015	9/30/2016
Evidence of Financial Responsibility (Insurance Filings and Surety Bonds/Trusts) for Existing Private HM and Exempt For Hire Carriers	10/23/2015	12/31/2016
Process Agent Designation (BOC-3) for All New Motor Carriers (including Private and Exempt For Hire Carriers)	10/23/2015	9/30/2016
Process Agent Designation (BOC-3) for All Existing Motor Carriers (including Private and Exempt For Hire Carriers)	4/25/2016	12/31/2016

FMCSA Proposes Revisions to Inspection and Parts Regulations

The FMCSA issued a notice of proposed rulemaking in order to make several assorted revisions to its regulations regarding "Parts and Accessories Necessary for Safe Operation" and "Inspection, Repair and Maintenance." 80 Fed. Reg. 60592 (Oct. 7, 2015). The revisions would: (1) define "major tread groove"; (2) not require a rear license plate lamp for tractors registered in states that do not require rear license plates; (3) make more explicit that violations or defects noted on a roadside inspection report must be corrected before a driver can operate the vehicle again; (4) delete the introductory text from Appendix G of the FMCSA regulations (Minimum Periodic Inspection Standards) and amend Appendix G to require "the inspection of antilock braking systems (ABS), automatic brake adjusters, and brake adjustment indicators, speed-restricted tires, and motorcoach passenger seat mounting anchorages"; and (5) no longer allow motor carriers to use a roadside inspection report as proof of completing a comprehensive inspection. *Id.* at 60592. The notice of proposed rulemaking comes in response to petitions from the Commercial Vehicle Safety Alliance and the American Trucking Associations, as well as two safety recommendations from the National Transportation Safety Board (NTSB).

FMCSA Continues to Allow Drivers to Count Time Attending Vehicle as Off-Duty Time

In an extension of a policy that the FMCSA announced in August, under which drivers of security-sensitive materials are permitted to count the time spent attending their vehicle (as they are required to do by Pipeline and Hazardous Materials Safety Administration (PHMSA) regulation) toward their mandatory break time, the FMCSA granted an exemption to R&R Transportation Group for drivers engaged in the transportation of materials that by their nature must be attended, such as radioactive materials, pharmaceuticals and ammunition. 80 Fed. Reg. 59848 (Oct. 2, 2015).

RAILROADS

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Overview of the Surface Transportation Board's Ex Parte Proceedings in 2015

This article summarizes events in Ex Parte proceedings at the Surface Transportation Board (STB or Board) over the last year. These proceedings relate to topics including data reporting from Class I railroads, as well as the agency's methodologies concerning revenue adequacy, the cost of capital, and rate reasonableness methodologies. Among its decisions, the Board announced that it would waive the prohibition on ex parte communications in a pending proceeding so that STB staff could speak with interested parties regarding the proposed data reporting rules. The Board also held a two-day hearing relating to the methodologies for determining revenue adequacy and the cost of capital, as well as determining the railroad industry's cost of capital for 2014 and railroad revenue adequacy for Class I railroads for the year 2014. The Board also instituted a rulemaking to define "on-time performance" under Section 213 of Passenger Rail Investment & Improvement Act of 2008 (PRIIA) and discontinued a rulemaking proceeding involving the process for Amtrak to seek alternate routing in an emergency. Finally, the Board denied a petition to institute a rulemaking regarding abuse of process in filings and the process concerning offers of financial assistance.

Data Reporting by Class I Railroads

One ongoing proceeding involves the Board's proposed rules to "require[e] all Class I railroads and the [Chicago Transportation Coordination Office], through its Class I members, to permanently report certain service performance metrics on a weekly and quarterly basis, and following certain service and/or operational triggers." *United States Rail Serv. Issues—Performance Data Reporting*, STB Docket No. EP 724, at 1 (Sub-No. 4) (STB served Nov. 9, 2015). The Board previously proposed rules to be codified at 49 C.F.R. §§ 1250.1-1250.3, and the Board initially collected data from Class I railroads on a temporary basis.

The Board recently announced that it would waive its "prohibition on ex parte communications" so that "the Board's staff [may] obtain more detailed information from interested parties and to ask follow-up questions about existing data collections, how the proposed data collection might be used by entities other than the Board, and other related issues." *Id.* at 2. The Board staff will summarize the meetings with interested parties and will post the summaries, as well as copies of handouts, in the record. The Board will reopen the record for seven days to allow parties "an opportunity to submit written comments in response to the summaries." *Id*. at 3. The Board stated that it "expects to issue a supplemental notice of proposed rulemaking with revised data collection metrics and provide opportunity for additional comments on the proposed rule." *Id*.

Vice Chairman Begeman concurred in part. She stated that the waiver of the prohibition on ex parte communications "should also apply to Board members—the decision makers—so that we could also hear directly from affected stakeholders." *Id*. at 4 (Begeman, concurring in part). Commissioner Miller concurred, stating that "[i]t is my hope that, in the future, the Board waives its prohibition on ex parte communication in other proceedings." *Id*. at 5 (Miller, concurring). She "suggest[ed] that the Board remove the general prohibition in the agency's rules (49 C.F.R. § 1102.2) and replace it with a rule that sets forth a process that allows for greater use of ex parte communications in appropriate proceedings." *Id*. at 5.

The Board also proposed rules in two new proceedings. The Board instituted a rulemaking to amend its Uniform System of Accounts (USOA) and Form R-1 filed by Class I railroads. *Accounting & Reporting of Business Combinations, Security Investments, Comprehensive Income, Derivative Instruments & Hedging Activities*, STB Docket No. EP 720, at 2 (STB served July 8, 2015). The Board proposed "to add new general instructions and accounts to recognize changes in the fair value of certain security investments, items of other comprehensive income, derivative instruments, and hedging activities." *Id*. The Board also proposed to "revise the USOA to reflect current accounting practices for business combinations by removing existing instructions for the pooling-of-interest method of accounting." *Id*.

The Board also initiated a rulemaking to propose rules to accelerate deadlines for eight reports "containing financial and operating statistics, including employment and traffic data" submitted by Class I railroads. *Accelerating Reporting Requirements For Class I Railroads*, STB Docket No. EP 701, at 1-2 (STB served July 8, 2015). The Board proposed to shorten the deadlines by 15 days or 30 days depending upon the report. The impacted reports include "Schedule 250 (required under the Annual Report Form R-1); Quarterly Condensed Balance Sheet Forms (CBS); Quarterly Revenue, Expenses, and Income Reports (RE&I)…." *Id*. at 1.

Cost of Capital and Revenue Adequacy

The Board held a two-day hearing in July 2015 to "further examine issues raised in Docket No. EP 722 related to railroad revenue adequacy, and issues raised in Docket No. EP 664 (Sub-No. 2) on how the Board calculates the railroad industry's cost of equity capital." *R.R. Revenue Adequacy*, STB Docket No. EP 722 *& Petition of the W. Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model In Determining the R.R. Industry's Cost of Equity Capital*, STB Docket No. EP 664 (Sub-No. 2) (STB served May 8, 2015).

The Board determined the railroad industry's cost of capital for 2014, finding that the "2014 composite after-tax cost of capital for the railroad industry … was 10.65%." *R.R. Cost of Capital—2014*, STB Docket No. EP 558 (Sub-No. 18), at 15 (STB served Aug. 7, 2015). The Board stated that "proposed changes to the Board's established cost-of-capital methodology, which also includes a determination of the railroad composite group, have already been raised as part of a petition for rulemaking in EP 664 (Sub-No. 2)." *Id*. at 4. The Board declined to "defer the 2014 cost-of-capital determination or condition it on the outcome of EP 664 (Sub-No. 2)," noting that its "precedent has been not to delay its annual cost-of-capital determinations, even when changes to the methodology are underway." *Id*. at 5.

The Board recently made its "annual determination of railroad revenue adequacy" for Class I railroads for the year 2014. *R.R. Revenue Adequacy—2014 Determination*, STB Docket No. EP 552 (Sub-No. 19) (STB served Sept. 8, 2015). The Board explained that "a railroad is considered revenue adequate … if it achieves a rate of return on net investment (ROI) equal to at least the current cost of capital for the railroad industry …. on a system-wide basis, which includes certain railroad affiliates." *Id*. The Board found "four carriers (BNSF Railway Company, Grand Trunk Corporation, Norfolk Southern Combined Railroad Subsidiaries, and Union Pacific Railroad Company) to be revenue adequate for 2014." *Id*. at 1-2. The STB noted that it is "reviewing the arguments and issues raised by the parties participating" in *Railroad Revenue Adequacy*, STB Docket No. EP 722, "to explore the Board's methodology for determining railroad revenue adequacy and the use of revenue adequacy in rate reasonableness cases." *Id*. at 1 n.2.

Rate Reasonableness Methodologies

The Board decided an issue on remand from the D.C. Circuit in *Rate Regulation Reforms*, STB Docket No. EP 715, at 2 (STB served Mar. 13, 2015). The Court remanded the matter to the Board so that it could address a "double-count argument" raised by CSX and Norfolk Southern. *Id*. After the Court's decision remanding the case, the Board explained that "even correcting for this double count, a relief cap of $4 million for Three Benchmark cases was still appropriate." *Id*. The Board recently

decided to "maintain a relief cap of $4 million for Three-Benchmark rate cases" and discontinued its proceeding. *Id*.

The Board also held a hearing to "further examine issues related to the accessibility of rate complaint procedures for grain shippers." *Rail Transp. of Grain, Rate Regulation Review*, STB Docket No. EP 665 (Sub-No. 1) (STB served May 8, 2015). The Board previously requested comments "on how to ensure that the Board's rate complaint procedures are accessible to grain shippers and provide effective protection against unreasonable freight rail transportation rates." *Id*.

Amtrak

The Board instituted a rulemaking proceeding to "define on-time performance for purposes of PRIIA Section 213." *On-Time Performance Under Section 213 of the Passenger Rail Investment & Improvement Act of 2008*, STB Docket No. EP 726, at 5 (STB served May 15, 2015). The Board noted that Amtrak has asked the agency to initiate investigations regarding the "alleged substandard performance of Amtrak passenger trains" on rail lines owned by CN, CSX, and Norfolk Southern. *Id*. (citing docket numbers NOR 42134 and NOR 42141). The Board "concluded that adjudication of Amtrak's complaints under the present circumstances should include analysis under a definition of on-time performance developed by the Board pursuant to Section 213." *Id*. at 3. The Board stated that it "intends to issue a notice of proposed rulemaking and a procedural schedule in a subsequent decision." *Id*. at 5. The rulemaking, however, has not been initiated as of the date this article is being written.

The Board terminated its rulemaking proceeding involving Amtrak requests for an alternate routing order during an emergency where Amtrak and the "rail carrier that owns the alternate route" cannot reach voluntary agreement. *Amtrak Emergency Routing Orders*, STB Docket No. EP 697 (STB served Sept. 8, 2015). The Board has "rarely had to issue Amtrak emergency routing orders," and it previously has used an informal process by "vesting authority in an agent …. to issue orders requiring railroads to make their facilities immediately available to Amtrak during emergencies." *Id*. at 2.

The Board in 2011 proposed rules to "provide a more formal process for Amtrak to seek emergency routing orders over the lines of other railroads and for the Board to issue such orders." *Id*. at 1. In discontinuing the proceeding, the Board explained that "because these requests occur in emergency situations, they require immediate action and the application process the Board included in the proposed rules would not be feasible or practical." *Id*. The Board stated that "[e]very effort will be made … to involve the host carrier properly when faced with an emergency routing request and we expect Amtrak to work with affected carriers during an emergency requiring rerouting." *Id*. at 4. The Board "will continue the practice of appointing a Board staff member who can order access immediately on behalf of the Board …. to handle these emergency situations." *Id*. at 2-3. The Board noted that "[t]hese emergency routing orders will allow for the continued operation of Amtrak trains and typically will not address compensation and other terms," and that "[i]f Amtrak and the affected carriers cannot agree on terms and compensation, they may subsequently petition the Board to set them. *Id*. at 1, 4. The Board also stated that "[r]erouting requests must comply with Federal statutory and regulatory safety requirements." *Id*. at 5.

On the same date, the Board issued a decision "appointing the Director of OPAGAC, or the Deputy Director(s), to act on behalf of the Board in such circumstances." *Id*. at 4 (citing *Appointment of Agent to Require Emergency Routing of Amtrak Passenger Trains*, STB Docket No. EP 697 (Sub-No. 1) (STB served Sept. 8, 2015).

Petition to Institute Rulemaking Regarding Abuse of Process in Filings and the Process Concerning Offers of Financial Assistance

The Board also denied a petition to institute a rulemaking to address "abuse of Board processes" and to propose changes to the process concerning offers of financial assistance (OFA). *Petition of Norfolk S. Ry. Co. to Institute a Rulemaking Proceeding to Address Abuses of Board Processes*, STB Docket

No. EP 727, at 1 (STB served Sept. 23, 2015). Norfolk Southern petitioned the STB to institute a rulemaking to add "(1) a process for identifying an individual as an abusive filer … and a pre-approval process for filings submitted by such individuals; (2) a rebuttable presumption in the OFA process that individuals previously found not financially responsible or who have been bankrupt are not financially responsible and a pre-approval process for the OFA filings of such individuals; and (3) rules to require additional procedures and certifications concerning financial responsibility by potential offerors in the OFA process." *Id*. at 1-2.

In its decision denying Norfolk Southern's petition, the Board stated that it was "not persuaded that NSR's suggested changes to the Board's regulations are warranted at this time." *Id*. at 1. With respect to Norfolk Southern's proposal regarding abusive filers, the Board stated that it "understands and shares NSR's concerns regarding inappropriate filings and the strain such filings place on the resources of the Board and the parties before us." *Id*. at 4. The Board indicated that it "will be more efficient, in the first instance, if the Board seeks to address the issue through increased enforcement of the Board's existing rule addressing irrelevant and immaterial pleadings at 49 C.F.R. § 1104.8…." *Id*. at 4. The Board stated that "it would be within the scope of the Board's authority to propose and institute rules to address abusive filers, including rules similar to those suggested by NSR, if the Board believes such rules are necessary in the future." *Id*.

With respect to Norfolk Southern's proposed amendment to the OFA process, the Board stated in part that it was "not persuaded that the proposed changes—a presumption of non-responsibility and additional certifications for certain offerors—would be practical to administer, nor that they strike the right balance between protecting the process from possible abuse and ensuring meaningful participation in the process for those with a legitimate interest in preserving rail service." *Petition of Norfolk S. Ry. Co. to Institute a Rulemaking Proceeding to Address Abuses of Board Processes*, STB Docket No. EP 727, at 4. However, the Board stated that "it is an appropriate time to consider possible revisions to improve the efficiency and integrity of that process." *Id*. The Board announced that it "intends to serve an advance notice of proposed rulemaking to give interested parties an opportunity to comment on possible changes to the OFA process that may improve that process and protect it against abuse." *Id*. at 4-5. The Board noted that its "discussion of NSR's OFA proposals here does not mean we would not consider similar proposals, such as a requirement for potential offerors to put up earnest money, in the forthcoming rulemaking if the concerns the Board has expressed here are addressed." *Id*. at 5 n.12.

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