



# ASSOCIATION HIGHLIGHTS

## A VISIT UP NORTH

Where we go to Maine in the summertime is about twenty minutes from the State Capitol in Augusta. It's a lovely building pretty much vacant in August. In the Rotunda you may, if you wish, and I always do, pay respects to the battle flag of the 20<sup>th</sup> Maine. The Law Library is on the Second Floor. I went there this year with my wife Judy, and that meant I couldn't stay too long. On leaving, I noticed an issue of a law review that the Library had put on display. It was the McGeorge Law Review, Vol. 41, No. 2 (2009-2010). First on the cover was an article entitled "The Insurance Policy as a Statute", by J. W. Semple. I was startled by this as I was rooted in the old world view that an insurance policy was just a contract. Professor Semple says it's more than that. He has written several articles explaining that a policy is other things besides a contract. He has coined the term "quadrangulation" for his multivalent interpretive approach. Check this out when you have more time than I did. I hurried to the Rotunda to find my wife. She'd discovered, down a corridor, a portrait of "Cyril Curtis, Publisher" who, we sensed the portrait told us, was from Maine. A fact we didn't know.

This issue offers just what you need for a fresh start after these summer months: A cornucopia of Maritime, Labor, Import/Export Regulation, Comings & Goings, Motor, Railroads, Railroad Legislative, FERC, and Transportation Safety and Security. Some are of wide-ranging scope of subjects (e.g., Railroads, Motor, Transportation Safety and Security); others attend in depth upon a particular subject (e.g., Maritime, FERC, Import/Export, and Labor). A couple at random: Jennifer Smith tells of a case holding that a bill of lading prevails over a service contract in the matter of limitation of liability (the case is heading for the Second Circuit); and Steve Block describes, in his inimitable fashion, a decision of the Southern District of New York ruling that the maritime concept of deviation doesn't budge limitation of liability under Carmack. In our Rail Legislative article in this issue, David Rifkind tells us of the Staff Report and hearing by Senator Rockefeller's Committee in support of his STB Reauthorization bill, S. 2889. It's as if you heard it live. I hope this whets your appetite!

*- James F. Bromley  
Editor-in-Chief  
Association Highlights*

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**7th Transportation Forum 2010**  
**Surface Transportation Board**  
**Washington, DC**

**Monday, November 1, 2010**

(Please note change of date from prior issue)

## COMINGS & GOINGS

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### ***NEW ADMINSTRATOR FOR TSA***

John Pistole is now the Administrator of the Transportation Security Administration. He previously worked for the Federal Bureau of Investigation for 26 years. Before becoming the Administrator of TSA, Pistole was the Deputy Director of the FBI.

### ***STB HAS NEW GENERAL COUNSEL AND CHIEF OF STAFF***

Raymond A. Atkins is now the General Counsel of the Surface Transportation Board. Atkins previously worked for the STB as an attorney in its General Counsel's Office for many years, and most recently was STB Chairman Elliott's chief of staff. Prior to serving at the STB, Atkins was an associate at the law firm Covington & Burling. He replaces Ellen Hanson, who has retired.

Timothy J. Strafford has been named the new chief of staff for Chairman Elliott. In 1999, he began working as a STB attorney in the Office of Proceedings and then as assistant to the director of this Office.

### ***ALJ APPOINTED TO NTSB***

Alfonso J. Montano has been named an Administrative Law Judge for the National Transportation Safety Board. Montano previously served as an ALJ for the Department of Health and Human Services and the Social Security Administration.

### ***NMB SELECTS MEDIATOR***

Michael Kelliher has been selected as a mediator for the National Mediation Board. He previously worked for the Brennan School of Business, Dominican University, as an adjunct professor of management. Kelliher's prior experience includes serving as the President of the Association of Professional Flight Attendants at American Airlines.

## FEDERAL ENERGY REGULATORY COMMISSION

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### ***Compatibility of State Feed-in Tariffs with Applicable Federal Energy Law***

On July 15, 2010, the Federal Energy Regulatory Commission ("FERC") issued its first major ruling on state feed-in tariffs for renewable resources.<sup>1</sup> The ruling partially rejected the State of California's proposal to require investor-owned utilities ("IOUs") to purchase renewable energy from small renewable generators at state-prescribed prices. FERC found that:

<sup>1</sup> California Public Utilities Commission, 132 FERC ¶ 61,047 (July 15, 2010).

- (1) the Federal Power Act (“FPA”) does not preempt the States from requiring IOUs to purchase wholesale electricity from combined heat and power generators (“CHPs”) that are not Qualifying Facilities (“QFs”) under Section 210 of the Public Utility Regulatory Policy Act (“PURPA”);
- (2) the FPA preempts the States from specifying the wholesale price for such purchases;
- (3) PURPA does not preempt the States from specifying the wholesale rates for purchases from CHPs that are QFs, provided such prices do not exceed the purchasing utilities’ avoided cost rates; and
- (4) States are not preempted by the FPA from specifying wholesale prices for purchases from CHPs that are not QFs by publicly-owned utilities exempted from regulation under the FPA.

These rulings stemmed from a California statute, AB 1613, which requires each IOU in California to file with the California Public Utilities Commission (“CPUC”) a standard-form ten-year power purchase contract, known as a “feed-in tariff.” The mandated tariff is an offer by the IOU to buy, at a CPUC-set price, electricity generated by CHPs whose capacity does not exceed 20 MW. The California Legislature had enacted the feed-in tariff requirement as part of comprehensive legislation aimed at reducing greenhouse gases. The CPUC contended that the mandated feed-in tariffs were compatible with FERC’s jurisdiction under Part II of the FPA and Section 210 of PURPA because the states alone have jurisdiction over their utilities’ resource portfolios, and the FPA does not preempt California because it required only that such utilities make an offer to buy power. The IOUs’ petition contended that the two federal statutes preempt AB 1613’s feed-in tariff program.

In its order, FERC conceded that states may require non-QF utilities to purchase capacity and energy from specified resources. It held, however, that beyond such resource specification, the CPUC decisions constituted “impermissible wholesale rate-setting” preempted by the FPA because they set “rates for wholesale sales in interstate commerce by public utilities.” FERC also held under existing precedent that the AB 1613 feed-in tariff program was not preempted to the extent it constitutes an implementation of PURPA, provided that: (1) CHP generators eligible for contracts with the purchaser utilities obtain qualifying facility (QF) status under PURPA section 210 and the FERC’s implementing regulations; and (2) the CPUC-set rates the purchaser utilities are required to offer do not exceed their avoided cost. Because no petitioner had requested FERC to determine whether the specific prices approved by the CPUC exceeded the California IOUs’ avoided cost rates, FERC declined to address that question.

With respect to arguments raised regarding environmental considerations, FERC explicitly rejected the arguments of the CPUC and many supporting intervenors that environmental considerations gave California jurisdiction. FERC held that such factors have no bearing on its exclusive jurisdiction over wholesale rates. The Commission also was not swayed by assertions that state estimates of environmental costs and benefits, e.g., reduction of carbon emissions, could be included in state avoided cost determinations for purchases from QFs.

FERC did clarify that government-owned utilities exempted from its jurisdiction by FPA section 201(f) that are neither QFs nor public utilities are not affected by its decision. However, the Commission rejected the assertion that it lacked jurisdiction over distribution-level facilities and feed-in tariffs. As explained in the order, the FPA grants FERC jurisdiction over all sales for resale in interstate commerce by public utilities without regard to the kind of facilities used to effectuate them.

This decision is likely to be viewed as setting strict limits on the power of States to prescribe wholesale prices for environmentally favorable forms of electric energy. States, however, may continue to mandate that IOUs purchase power and energy from environmentally-friendly sources, so long as such mandates do not set wholesale rates. The clarification granted by FERC may provide some flexibility for those governmental, municipal, and cooperative utilities exempted from FERC’s FPA jurisdiction under Section 201(f).

## IMPORT/EXPORT REGULATION

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### *National Export Initiative*

In April 2010 the Obama Administration rolled out its proposal, known as the National Export Initiative (“NEI”), to reform the United States’ export control systems.

We currently have a myriad of agencies involved in export control. The US Department of Commerce controls exports through its Bureau of Industry and Security, issuing licenses for certain dual use items and administering the Export Administration Regulations. Commerce’s Census Bureau administers the Foreign Trade Regulations and provides the international trade statistics against which we measure the balance of trade for this country. The State Department’s Directorate of Defense Trade Controls administers the International Traffic in Arms Regulations, which contain the Munitions List, and regulates items that have or are designed to have, a military use as opposed to a civilian use. The Treasury Department’s Office of Foreign Assets Control (“OFAC”) administers the OFAC regulations by imposing economic sanctions against foreign parties and countries that the United States considers unfriendly. So, anyone who has a sensitive export must check with all these agencies to be sure their export is in compliance with their rules and regulations. Additionally, there are several lists the potential exporter must check to confirm that their shipment will not wind up in the hands of a prohibited party or be put to a prohibited use.

All of these regulations make for a complicated regime that delays and inhibits exports. So, the Obama administration concluded that there is a need to limit more effectively the transfer of sensitive hardware, software and technology to countries and entities hostile to the United States and our foreign policy and to improve the global competitiveness of United States companies. The goal is significantly to increase exports in order to boost the domestic economy by reaching out to small and medium sized United States companies to help them increase their exports.

There are four key principles of the National Export Initiative. The first is a **Single Export Control List**. The NEI emphasizes excluding items and technologies that no longer require stringent controls. The single export control list will be a positive list, stating which items are included, rather than a general list leaving to the exporter the interpretation whether an item is included. The single export control list will be divided into three tiers: the highest tier will include the most stringent controls and the lowest tier the least amount of control.

The second key principle is a **Single Licensing Agency**. One of the goals of the NEI is to create a single licensing agency with which United States exporters will interact to determine licensing requirements and obtain licenses. The hope is that a single agency will help to streamline the licensing review process as well.

The third initiative is to have a **Single Enforcement Coordination Agency**. The NEI will combine the various offices that are currently involved in enforcement into a single, integrated agency for export enforcement to enforce export controls.

The fourth component of the reforms is to establish a **Single Enforcement Coordination Agency**. And there will be a single information technology system to receive, process, and screen license applications and end users.

All of this sounds great and is useful. We will, of course, see how it plays out.

## GUEST COLUMN

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*A continuation of the presentation from the 81st Annual Meeting, St. Michaels, MD June 28, 2010:*

### ***NIMBYs & ICCTA Preemption***

It doesn't matter how good a project is, NIMBYs oppose everything. Without countering this opposition, developers face an uphill battle and, as a result, we see good projects die every day. If the developer happens to be a railroad, however, there is an additional tool in its arsenal that is not normally available — preemption under the Interstate Commerce Commission Termination Act (ICCTA), found at *49 U.S.C. Section 10501(b)*. But as is the case for any tool, it should only be used when appropriate and overuse will wear it out.

Railroads are interstate by nature — if local interests were allowed to have their way with them, a decision in one jurisdiction would have profound effects far beyond the confines of that jurisdiction. For that reason, Congress made sure local zoning laws and regulations generally cannot get in the way of most types of railroad development projects. The statute, often referred to as “ICCTA Preemption,” places under the exclusive jurisdiction of the Surface Transportation Board (STB) virtually every aspect of a railroad's operation and facilities, other than safety aspects (governed by the Federal Railroad Administration). At the same time, the STB does not have authority to approve or condition the construction, acquisition, operation, abandonment or discontinued use of trackage other than main line track (*49 U.S.C. Section 10906*). Railroads do have to comply with certain federal laws — primarily environmental — such as the Clean Water Act and the Clean Air Act, whether those federal laws are administered on the federal or local levels. Much of the law in this area is well summarized in STB Finance Docket No. 35157, *The City of Alexandria, VA – Petition for Declaratory Order*, serviced February 17, 2009. The bottom line is that railroads have a pretty powerful tool when it comes to rail facility development.

Although this tool exists, it should only be used as a last resort. Denying the public a role in the decision-making process can have many adverse consequences. It can result in costly litigation, delay a project for years, and negatively affect the brand reputations of the companies involved.

As an alternative, a railroad should conduct political due diligence before considering a project. This process entails gauging the attitudes of local residents about the impacts of the proposed rail development and assessing the political landscape in order to understand whether a project is politically viable. That is, a railroad must determine beforehand whether a sufficient amount of community support can be garnered and leveraged for the purpose of influencing public officials or providing them with political cover to support the project. Every project is unique and has its own distinct set of key stakeholders and influencers who must be identified and motivated. Primary among these key stakeholders is the local citizenry — even though they are not the elected officials, they have the most influence over those elected officials. In the absence of visible community support for a project, elected officials will take the expedient path and accede to the demands of vocal opponents.

Public officials and regulators can actively engage the local citizenry as well. Ensuring that they are well informed is a necessary prerequisite to ensure that they can be responsive to their constituents on all aspects of a rail facility project. Although keeping local officials informed is not a sure way to win them over, keeping them from being informed is a sure way to lose their support. Further, local officials can have valuable insight that can contribute to the overall success of the rail facility development process.

Working with public officials, building support in the community, and neutralizing opposition can have both short-term and long-term benefits. In the short term, rail facility projects can be expedited and costly

litigation can be avoided. In the long term, the railroad can protect its brand reputation and build strong partnerships with the communities in which it operates.

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### ***Pro Union Labor Relations Changes on a Roll***

With legislative prospects for passage of the Employee Free Choice Act ("EFCA") on the wane, the focus in Washington has dramatically shifted to use of administrative and decisional processes to bring pro-labor changes. This article will be part of our continuing update on this evolving subject. Feel free to contact any of us directly for questions on specific cases - some of which we are actively involved in litigating. ([www.aalrr.com](http://www.aalrr.com))

### ***Rule Making and Rule Making Light***

The shift in membership at the National Mediation Board has prompted change in a long standing election practice under the Railway Labor Act ("RLA"). The old rule, in place for 75 years, required "aye" votes from a majority of those eligible to vote, and any employee who did not vote was counted as a "no." The new rule provides for determining majority based on the number of votes actually cast rather than the number of eligible employees. In the initial steps of a judicial challenge, a federal district court held that the NMB's actions were a valid interpretation of the RLA. (*Air Transport Ass'n. of America, Inc. v. National Mediation Bd.*, 2010 WL 2572685 D.D.C. 2010)

While the ATA litigation is proceeding, the National Labor Relations Board ("NLRB") is taking a more cautious but still substantively aggressive approach to labor law changes.

Card check is a critical component of EFCA. However, labor unions are not waiting for EFCA to be passed. Instead, they are aggressively seeking to implement various kinds of card-check tools in existing labor relations.

For example, in a case currently in the appellate process, NLRB decided to allow the recognition demands by card check to preempt and prevail over pending election petitions and the NLRB's election process. (*J & R Flooring, Inc.*, 355 NLRB No. 123)

The NLRB has also loosened its briefing processes to include requests for briefing by non-parties on substantive issues raised. For example, the Bush NLRB, in *Dana Corp.*, 351 NLRB 434 (2007), held that when an employer agrees voluntarily to recognize a union based on signed authorization cards, the employer must post a notice advising employees of the right, within 45 days of the notice, to file a petition for an election to decertify the union or in support of a rival union, if the employees so desire. Now, in a pending case, the NLRB announced it is

accepting briefs on whether to modify the rule for employers' voluntary recognition of unions which may impact employees' rights to vote on or challenge such recognition. (*Rite Aid Store 6473-Lamons Gasket Co.*, 355 NLRB No. 157)

The same approach is being used in other areas, such as electronic dissemination of remedial notices to employees aimed at achieving better access to employees through the most prevalent workplace media. For example, in a trio of cases to be decided, the NLRB is accepting briefs on the question of whether NLRB-ordered remedial notices should be posted electronically, such as via a company-wide email system, and if so, what legal standard should apply. (*Arkema, Inc.*, 16-CA-26371; *Stevens Creek Chrysler Jeep Dodge, Inc.*, 20-CA-33367, and *Custom Floors, Inc.*, 28-CA-21226)

#### *Other Recent Decisions of Note*

#### *Bannering*

Bannering in lieu of more traditional picketing has been a growing tool of choice because of its far more powerful ability to communicate. However, decisions of the Bush NLRB and civil litigation have trended toward placing on bannering the more restrictive rules of conduct that exist for traditional picketing.

The Obama NLRB has taken a substantial step to reversing the trend. In a recent case in Arizona, the Carpenters Union publicized its disputes with construction contractors by stationing 3 and 4 feet high and 15 to 20 feet long banners, which bore the words "SHAME ON" followed by the name of hospitals, and "Labor Dispute," outside of hospitals on which they had performed work. The NLRB declared that such union bannering was lawful and protected as First Amendment free speech. (*Carpenters Local 1506 and Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159)

## MARITIME

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### **Southern District of New York Holds Bill of Lading Applies Instead of Service Contract.**

*St. Paul Travelers Ins. Co. v. M/V Madame Butterfly*, 2010 AMC 1299 (S.D.N.Y. March 31, 2010)

St. Paul Travelers Insurance Co. ("St. Paul") is the subrogee insurer of a 2006 Sunseeker Predator 72 foot yacht. While the yacht was being offloaded from the M/V Madame Butterfly at Port Hueneme, California, a crane collapsed onto the yacht. St. Paul subsequently brought suit against the ocean carrier<sup>1</sup>, the crane lessor<sup>2</sup>, and the stevedores<sup>3</sup> responsible for offloading the yacht. St. Paul sought to recover \$4,179,938 (payout of the insurance claim) and brought claims for damage to goods in transit, negligence, unworkmanlike performance, conversion, negligent entrustment, and breach of contract.

<sup>1</sup> The ocean carrier defendants include: Wallenius Wilhelmsen Logistics A/S, Wallenius Wilhelmsen Logistics, Inc., and Wallenius Wilhelmsen Logistics Americas LLC (collectively, "WWL").

<sup>2</sup> OST Trucks and Trains Inc. ("OST") was the crane lessor.

<sup>3</sup> Pacific Ro Ro Stevedoring LLC ("PacRoRo") is the stevedore responsible for offloading the yacht.

St. Paul argued that the defendants were liable under the service contract entered into by the ocean carrier for the shipment of various yachts with Peters & May, a freight forwarder, as agent for Sunseeker. The defendants responded that the service contract did not apply and that the governing contract was actually the bill of lading, which would not permit suits against any party other than the ocean carrier and would limit the ocean carrier's liability to the \$500 package limitation under the Carriage of Goods by Sea Act ("COGSA"). The ocean carrier moved for partial summary judgment seeking, in part, to limit its liability to St. Paul to \$500. St. Paul likewise cross moved for summary judgment seeking a ruling that the defendants are liable for the full amount of the damage to the yacht.

In analyzing the parties' respective summary judgment motions, the district court began with a review of the relevant language in the service contract between the ocean carrier and the freight forwarder. The service contract provided that shipments under the service contract "shall be subject to the terms and conditions of the . . . Bill of Lading or Sea Waybill, whichever is applicable. In the event of a conflict between the . . . Bill of Lading/Sea Waybill and the terms of this Contract, the terms of this Contract shall prevail." The service contract also stated that the ocean carrier

shall be liable for all losses and/or damages to the goods while in its care, custody and control in accordance with the International Convention on the Unification of Rules on Bills of Lading in the version of the Amendment Protocol dated 23 February 1968 (Hague-Visby rules). . . . The maximum liability for WWL for loss of or damage to cargo should always be calculated in accordance with the International Convention on the Unification of Rules on Bills of Lading in the version of the Amendment Protocol dated 23 February 1968 (Hague-Visby rules).

Lastly, the service contract required the ocean carrier to affix the service contract number to the relevant bill of lading for contract shipments. The ocean carrier retained the exclusive discretion to waive this requirement. It is undisputed that the service contract number was not affixed to the bill of lading for the shipment in this case. Further, there was no evidence that the ocean carrier waived this requirement.

The district court then reviewed the language of the bill of lading at issue. The applicable bill of lading contained a forum selection clause providing that suits should be filed in this Court and that the governing law is COGSA and the "general law of the United States." The bill of lading further stated in clause 10:

If U.S. COGSA applies to the contract evidenced by this bill of lading, the Carrier's liability is limited to U.S. **\$500 per package**, or for goods not shipped in packages, per customary freight unit, unless a higher value is declared in the Declared Value box on the face of the bill of lading and a higher freight is paid. Each unpackaged vehicle or other piece of unpackaged cargo on which freight is calculated, constitutes one customary freight unit.

The bill of lading also contained a Himalaya Clause at Clause 15 permitting the ocean carrier to subcontract part of a contract of carriage and extending the carrier's defenses and limitations of liability to subcontractors including, but not limited to ". . . stevedores, terminal operators . . . direct and indirect subcontractors, independent contractors, and every servant or agent of the Carrier or of a subcontractor." Lastly, the bill of lading contained a provision called an "agreement to claim against no one other than the carrier."

In evaluating which document should govern the dispute, the district court noted that generally "where the parties' relationship is governed by a separate contract, that contract acts as the contract of carriage and bills of lading are mere receipts." However, in this case, the bill of lading is the proper governing contract because the applicable terms of the service contract were not satisfied. The plain language of the service contract required the service contract number to appear on the bill of lading. Here, the bill of lading did not contain the service contract number. Further, there was no evidence that the ocean carrier intended to waive this requirement. In applying the plain terms of these documents, the court concluded that the bill of lading is the governing contract.

The district court then held that the COGSA limitation on liability applies to St. Paul's claims.<sup>4</sup> COGSA

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<sup>4</sup> The court engaged in a thorough discussion of whether the COGSA limitation was inapplicable due to a false bill of lading. The court, however, dismissed this argument on the ground that an incorrect departure date on the bill of lading is not a "material error."

is inapplicable under the fair opportunity doctrine if the shipper is not provided with a fair opportunity to declare that the goods have a higher value and an opportunity to pay an additional charge for increased protection. In this case, however, the shipper had an opportunity to declare a higher value for the goods and pay for increased protection, but no such higher value was declared. Thus, the COGSA liability limitations apply, including the \$500 limit. The court explained that a yacht in a cradle is a single package for COGSA purposes, and the \$500 liability limitation is applicable when the yacht is damaged during unloading. *See SNC S.L.B. v. M/V Newark Bay*, 111 F.3d 243, 244 (2d Cir. 1997) (liability limited to \$500 in dropped yacht case); *Royal Ins. Co. v. Sea-Land Serv. Inc.*, 50 F.3d 723, 727 (9th Cir. 1995) (citing *Inst. of London Underwriters v. Sea-Land Serv., Inc.*, 881 F.2d 761 (9th Cir. 1989)) (yacht found to be one COGSA package).

Lastly, the court held that because there was an agreement not to sue any party other than the ocean carrier in the bill of lading (i.e., the “agreement to claim against no one other than the carrier” provision), St. Paul’s claims against the stevedore and the crane operator must be dismissed.

**TAKE-AWAY:** This case highlights the importance of abiding by all terms of a service contract to ensure that the service contract is indeed the governing document—and not the less favorable bill of lading, which applies COGSA limits on liability. This is a significant concern, in particular, with annual service contracts applicable to more than one vessel.

**UPDATE:** St. Paul appealed the district court’s decision to the Second Circuit on July 21, 2010.

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## AGENCIES

### *Federal Motor Carrier Safety Administration*

Final Rule; Minimum Levels of Financial Responsibility for Motor Carriers; Docket No. FMCSA – 2006-26262; 49 CFR 387; 75 *Fed. Reg.* 38423 (July 2, 2010).

Federal Motor Carrier Safety Administration (FMCSA) is responsible for regulating the financial responsibility requirements applicable to motor carriers. Regulations include limits of insurance coverage and limits of the MCS-90 endorsement extending liability for insurance coverage. The policies and endorsements are required to be maintained at the principal office of the carrier.

In response to a petition from the Government of Canada, FMCSA has amended the financial responsibility rules as they are applicable to Canadian- based carriers and freight forwarders operating in the United States.

Under the applicable regulations, (49 CFR 387.11), the insurer or surety must be legally authorized to issue the policies and endorsements in each State in which the motor carrier operates, in the State in which the

motor carrier has its principal place of business, and in each State in which it issues excess lines of insurance and otherwise complies with the regulations.

In order to comply with the applicable regulations, Canadian-based carriers had to deal with Canadian insurance companies operating under a fronting agreement with a U.S. carrier. The extra step caused additional expense and inconvenience for the Canadian-based carriers, without any benefit to highway safety. The Government of Canada asked FMCSA to amend the regulations permitting insurance companies in Canada to write insurance policies and issue the MCS-90 endorsement for carriers domiciled in Canada who are operating in the United States.

In general, the proposal did not generate much controversy. Comments were filed by U.S. and Canadian insurance associations and trucking associations. These comments were generally supportive of the Proposed Rule FMCSA adopted the Final Rule on July 2, 2010. It became effective August 2.

## ***COURTS***

### **Carrier successfully limits its liability per Carmack notwithstanding a COGSA “deviation.” *Personal Communications Devices v. Platinum Cargo Logistics, Inc.*, 2010 WL 3489165 (C.D. Cal. 2010)**

This case knocks out a thought some practitioners whose work includes both surface and maritime cargo claims have entertained when truckers disregard agreed shipping arrangements. Shipper Personal Communications Devices (“PCD”) booked a very expensive load (worth some \$7.6 million) with motor carrier Platinum Cargo Logistics (“PCL”) for transport from Carson, California to Louisville, Kentucky. PCD listed the declared value on bills of lading it prepared itself as \$245,000, and issued instructions to PCL that the cargo not be consolidated with other stuff. PCL handed off the load to another carrier, which consolidated and lost it to theft.

PCD sued PCL in the Central District of California. Some of the typical preemption issues were resolved in favor of Carmack dominion, and then the parties got down to PCL’s alleged limitation of liability. After rejecting a few more typical Carmack-litigation contentions (“we didn’t know ultimate liability would be limited to \$245,000,” and “that number’s just not fair”), the court properly found PCL’s liability was limited to the declared amount.

PCD tried to raise the maritime concept of deviation, which provides that if a vessel owner “deviates” from an agreed route or stowage plan, it loses the right to limit its liability under the U.S. Carriage of Goods by Sea Act. The shipper’s theory was that the consolidation of its freight deviated from the agreed transportation agreement in ways similar to an ocean carrier’s stowing freight on deck (instead of safely below) despite agreement not to do so. PCD even pointed to a 9<sup>th</sup> Circuit precedent, mistakenly so, which it believed extended the concept of deviation to Carmack claims. The court rejected the notion, pointing out that the 9<sup>th</sup> Circuit has never actually applied deviation to Carmack, and refused to do so here. Notwithstanding the extension of several admiralty concepts to surface transportation, deviation does not come ashore.

### **Theories of liability against freight broker are preempted on grounds beyond Carmack. *Chatelaine, Inc. v. Twin Modal, Inc., et al.*, 2010 WL 3294242 (N.D. Tex. 2010)**

Shipper Chataleine engaged broker Twin Modal to arrange shipment of a time sensitive load of wine from California to Texas (Chataleine needed the wine delivered in time for a promotional event). Twin Modal booked the load with carrier R&A. Because the shipment was booked for rapid delivery, Twin Modal didn’t bother with a reefer unit, but R&A delayed delivery a couple days, and the wine spoiled. The shipper filed suit against Twin Modal alleging Carmack liability and four state and common law causes of action.

On the broker’s dispositive motion, the Northern District of Texas properly dismissed the Carmack claims, that statute being applicable only to motor carriers. Then the court got down to business considering whether claims based in tort and a state’s consumer protection statute are allowed under the Interstate Commerce Act (“ICA”). 49 USC §14501(c) precludes any state or common law, reg or other provision that would have an effect on a broker with respect to interstate transportation of property. Analogizing relevant ICA provisions to the

Airline Deregulation Act of 1978 (“ADA”), and citing other precedents, the court concluded that breach of contract actions are not preempted so long as there’s “no enlargement or enhancement [of the contract] based on state laws or policies external to the agreement.” Both ICA and ADA are designed to facilitate market driven competition, which is based on contracting. Contract actions are permissible against brokers.

That analysis doesn’t apply to tort and CPA claims, however, so the latter were dismissed. By this analysis, which certainly isn’t followed uniformly, surface freight brokers may be sued in contract only.

**An example of why through bills of lading are a good idea, or  
The trouble with daisy chains.**

*Cal Insurance Company, Ltd. V. M/V Williamsburg Bridge In Rem, et al., 2010 WL 2802257 (D. N.J. 2010)*

This case shows one benefit shippers receive when booking through transit per a single bill of lading. Japanese shipper Mori Seiki sold an expensive lathe to a buyer in Illinois. It hired intermediary NewLog, Ltd. to facilitate transportation. NewLog made arrangements with ocean carrier Uti K.K. to haul the lathe across the Pacific, and separately engaged Tober Group to take care of the inland transportation. Tober Group initiated a long daisy chain of other intermediaries and carriers, beginning with National Cargo, Inc. (“NCI”) and ending with SLT Express Way. No through bill of lading was issued, and the cargo arrived with severe water damage allegedly resulting from improper placement of a tarp.

One of the intermediate entities, PSR Logistics, Ltd., had issued an invoice for the carriage from Long Beach to Illinois. NCI apparently did the leg work in making logistics arrangements. SLT didn’t like the tarp placement, and received some sort of release from NCI and a written agreement that NCI would take responsibility for cargo damage. What the other players did (or didn’t so) isn’t clear. The only thing that was clear was the big bucks Mori Seiki’s subrogated insurer wanted to recover from one or more of the involved providers in its action before the District of New Jersey.

The insurer’s action sounded in both Carmack and negligence, again, because it just wasn’t clear who was a carrier and who was something else (Carmack being applicable only to motor carriers and railroads). But a threshold element of Carmack is proof that the cargo was tendered to a carrier in good order and condition. The plaintiff couldn’t do that, as the cargo was completely out of its hands after it left Uti K.K.’s possession (a problem, particularly under new case law, the shipper would have avoided under a through bill of lading). The Carmack claim was accordingly dismissed on summary judgment.

It’s possible, however, that some non-carrier entity – likely NCI – negligently failed to provide appropriate tarp covering. Obstacles remain in that the evidence didn’t demonstrate whether the water that entered the lathe was sea or fresh (rainwater), but the court wouldn’t deal with the tort claim on summary judgment. Litigation continues on the tort theories.

**One to furrow your brow: an intermediary’s limitation of liability clause extends to its motor carrier subsidiary. Hmm.**

*Royal & Sun Alliance Ins. PLC v. UPS Supply Chain Solutions, Inc., et al., 2010 WL 3000052 (S.D.N.Y. 2010)*

Unless there are things – many things – not explained in the court’s opinion, this one might cause a degree of gastronomical upset in the midsections of some transportation law practitioners. Pharmaceutical shipper Ethicon entered into a long-term logistics contract with intermediary UPS Supply Chain Solutions (“UPS”). UPS and Ethicon entered into a Logistics Services Agreement (“LSA”) which specified that UPS’s wholly owned subsidiary, WDS, would provide dedicated transportation services. In other words, an intermediary-owned motor carrier would do the actual hauling. Nothing suggests Ethicon and WDS entered into any separate documentation or other agreements. The LSA contained a \$250,000 limitation of liability clause.

WDS had a Staffing Services Agreement with IMSCo whereby the latter outfit provided the former with employees, i.e., drivers to run WDS’s trucks. Again, nothing suggests IMSCo and Ethicon had any separate agreements. A WDS truck, operated by an IMSCo driver, was involved in an accident in which some 769 grand worth of pharmaceuticals was destroyed. Ethicon’s subrogated insurer took UPS, WDS and IMSCo to the mat. At issue

was whether the LSA's limitation of liability applied to WDS and IMSCo.

As to WDS, the Southern District of New York answered, "yes." The LSA specified that WDS was a "designated affiliate," which contractual working encompassed as subject to the limited liability clause. But what about the hoops a motor carrier must traverse before limiting liability? Did WDS offer Ethicon separate liability levels on a bill of lading? What would this mean as a precedent? That motor carriers can easily piggy back their way into limited liability without satisfying well recognized prerequisites just by having their names added to a broker's contract? Again, hmmm.

IMSCo didn't fare so well. Rejecting as analogous earlier decisions addressing aviation subcontractors (an analysis that raises more questions than it answers), the court concluded that Carmack's provisions extending liability to a trucker's agents and contractors puts IMSCo on the hook. IMSCo isn't mentioned in the LSA as a UPS affiliate, so it's potentially liable without limitation.

**Accommodation of *pro se* plaintiffs: a federal court gives an owner operator the benefit of the doubt. *Nelson v. Signor Trucking, Inc., et al.*, 2010 WL 3307288 (D. Neb. 2010)**

Here's one to key trucking companies into how federal courts view owner-operator drivers who sue without counsel seeking to recover relative peanuts.

Driver Nelson had two agreements with motor carrier Signor, one being an owner operator lease, and the other a commercial arrangement whereby Signore financed through lease payments her eventual purchase of a rig. She described the latter as a "tacit arrangement," which probably means it not only wasn't documented, it may not even have been specified verbally. When things went south, Ms. Nelson came to believe that Signor had made improper deductions from her checks, and failed to provide substantiating documents, all in violation of the Motor Carrier Act's Truth-in-Leasing regs provided in 49 CFR §276.1 *et seq.* Ms. Nelson also alleged that Signor had stated false information about her to potential subsequent employers. She brought suit in the District of Nebraska *pro se*.

While the court recognized that it must dismiss any portion of a complaint "that states a frivolous or malicious claim" or is otherwise improper, it also reaffirmed federal law designed to protect *in forma pauperis* litigants (literally, "in the manner of a pauper," or someone who doesn't have resources to litigate). Court fees are reduced or eliminated for such parties and, most importantly for claims management purposes, procedural standards for considering allegations are eased.

Citing other precedents, the court ruled that "[p]ro se plaintiffs must set forth enough factual allegations to 'nudge their claims across the line from conceivable to plausible' or their complaint will be dismissed for failing to state a claim upon which relief can be granted." To meet that standard, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Notwithstanding apparently bare accusations, the court found the complaint sufficient to survive its initial *sua sponte* review of the claim to determine its viability.

**Uninformed household goods shipper misses out by not stating a specific dollar amount in the claim form. *Noble v. Wheaton Van Lines, et al.*, 2010 WL 3245421 (D. Mass. 2010)**

Here's yet another example of how unknowledgeable shippers can get lost in transportation law's vagaries. The Nobles moved from Ohio to Massachusetts, and had most of their stuff transported by carrier Walkerly Moving & Storage. A few things arrived broken; they filled out a claim form Walkerly gave them without stating a specific dollar value of their damaged goods; and Walkerly paid the claim.

The Nobles had a second load of stuff to transport from Ohio, but by that time, Walkerly had signed on as an exclusive agent for Wheaton Van Lines. Walkerly issued the Nobles a Wheaton bill of lading and made the second haul, but this time the load suffered extensive damage. Walkerly gave the Nobles a Wheaton claim form, which the shipper filled out, again omitting any statement of the damaged cargo's dollar value. When no one

would pay the claim, the Nobles sued Walkerly, Wheaton, and Walkerly's insurer, Vanliner Insurance Company, in the District of Massachusetts.

All defendants moved to dismiss – successfully. Nine months, the minimum time Carmack sanctions, had passed since the delivery, and the Nobles had never submitted a written claim containing requisite info (i.e., the claim's dollar value) as mandated by 49 CFR §370.3(b). The shippers argued that they did provide a spreadsheet containing the property's approximate purchase price, and by law a level of depreciation should be applied. The court wouldn't accept an approximate purchase price and, anyway, the spreadsheet was submitted more than nine months after the fact. The court delivered a similar rebuff with respect to the Noble's discovery response which provided more specific info.

The Nobles argued they had been misled into believing the contents of their claim form submission were adequate. After all, they provided information identical to what Walkerly had accepted in the first haul. While a carrier's departure from standard practice can be grounds to excuse an incomplete filing, the court rejected this argument on rather dubious procedural grounds. Ms. Noble submitted an affidavit stating she didn't state dollar value in the first claim form, but didn't say what she had provided in that form. The court ruled it was unclear from the affidavit whether Walkerly could deduce the claim's dollar value from what the Nobles had stated.

The Nobles tried to point a finger at Walkerly for several other alleged noncompliances with claims regulations, but those never came into play, as an effective claim had never been submitted. They tried to escape Carmack altogether on the ground that packaging prior to transportation allegedly caused the damage, but the fact remained that damage occurred during transit. Vanliner got out because Massachusetts doesn't recognize direct actions against insurers prior to judgment.

## RAIL LEGISLATIVE

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### *Rail Tax Credit Bill Introduced*

On August 4, 2010, Senators Conrad and Ensign (R-NV) introduced S. 7749 to provide a tax credit for freight rail investments. The proposed tax credit equals 25% of the cost of new qualified rail infrastructure investment and new qualified locomotive purchases.

The bill broadly defines qualified rail infrastructure investments to include, *inter alia*, track grading, tunnel bore, track (ties, rails, ballast and other track materials), terminals, yards, roadway buildings, wharves, docks, signals and communication systems, and intermodal facilities.

New locomotives that are either purchased or purchased and leased back would also qualify for the credit if they meet EPA emission standards and expand the capacity of the rail carrier's fleet.

The "original use" of the property must be by the taxpayer claiming the credit. The property must be acquired after the effective date of the proposed legislation and placed into service during the relevant tax year and prior to December 31, 2015.

Importantly, property that simply replaces existing property would not qualify for the tax credit. Similarly, investments in rolling stock, other than new locomotives, would not qualify for the tax credit under this bill.

Credits claimed for a qualified locomotive investment would be recaptured if the locomotive is sold within 5 years of being placed into service.

In order to qualify for the credit, the investment must be treated as chargeable to capital account. However, taxpayers who wish to take a deduction rather than a tax credit could elect to treat the investment as not chargeable to capital account.

### *Senate Holds Hearing on National Rail Plan ... Issues Report on Financial Health of Class I Carriers*

With no chance of passage of his STB Reauthorization bill, S. 2889, before Congress leaves town for the mid-term elections, Chairman Rockefeller began laying the groundwork for future Congressional action on the bill. On September 15, 2010, his Committee on Commerce, Science, and Transportation issued a majority staff report titled *The Current Financial State of the Class I Freight Rail Industry* ("Staff Report") and then held a hearing on the Federal Role in National Rail Policy.

Both the Staff Report and the hearing appear intended to turn up the heat on Class I rail carriers to get behind S. 2889. The bill, which contains far-reaching competition reforms and institutional changes to the STB, was first unveiled on December 17, 2009 and reported favorably out of Committee that same day. Since then both carriers and shippers have sought changes. Reportedly, Committee staff and stakeholders, including representatives of the rail carriers, have been working together in an effort to refine the bill so that it is satisfactory to the shippers and will not be opposed by the rail carriers. A revised draft of the bill has not emerged, however, and Chairman Rockefeller made clear that he is intent on placing the blame for the lack of progress on the rail industry.

#### *Senate Staff Report on Class I Carriers*

The Report, which focuses on BNSF, CSXT, NS, and UP only, proclaims that "the Staggers Act's goal of restoring financial stability to the U.S. rail system has been achieved." According to the Report, the "four largest U.S. rail carriers have nearly doubled their collective profit margin in the last ten years to 13%", resulting in a ranking of fifth of 53 on *Fortune's* list of most profitable industries." Staff Report at 4-5. It concludes with a call for Congress and the federal government to "evaluate whether our country's current rail policy needs to be changed to reflect this new reality." *Id.* at 15.

#### *Hearing on Federal Role in National Rail Policy*

Using the Staff Report as backdrop, Rockefeller opened what he claimed will be the "first in a series of hearings" on the federal role in national rail policy. Senator Herb Kohl, STB Chair Daniel R. Elliott, and Deputy Secretary of Transportation John Porcari each testified.

Chairman Rockefeller opened the hearing with caustic words for the rail industry and Chairman Elliott's predecessors. He described the railroads as having exercised "ownership up until recently of the ICC and the STB, and their respective Chairman." Citing the just released Staff Report, he accused the railroads of being "disingenuous" by telling the STB that "they're barely making enough money to keep the lights on," while touting high profit margins to Wall Street. Further, he accused the railroads of not dealing with him "honorably" on the reauthorization bill by attempting to "delay this process." He concluded his remarks with a warning to the railroads that rail reform is going to happen: "Either Congress will do it, or we will do it through regulations."

The Chairman's tone, however, did not sit well with Senator Lautenberg, who told the Committee that "the freight rail industry ought not to be presented as pariahs." He noted that the "rail industry since 1980 has invested its own funds, almost \$480 billion in expansion and improvement in rail service." He stressed the need for insuring greater investment in rail in light of rail's contribution to relieving congestion on the nation's highways and in its airspace; reducing U.S. dependence on oil; protecting the environment; and to the economy and U.S. national security. Lastly, Senator Lautenberg called for approaching the captive shippers issue "in a balanced way."

Senators Kerry, Thune, and Johan each noted the "critical" role of freight rail. Senators Thune and Johan recalled the financial straits the railroads were in prior to passage of the Staggers Act. Senator Thune credited the Staggers Act as largely responsible for enabling the "very capital-intensive" rail industry "to fund capital improvements for freight operations without government subsidies." In calling for modifications to STB policies "to strike a better balance between the railroads and their shippers" he called for a "cautious approach" to "insure ... that

reform does not cause unintended economic harm to our freight railroad system.”

Senator Hutchinson, while noting her support for S. 2899, used the opportunity to call for the FRA to revise its Positive Train Control (“PTC”) regulations. Specifically, she called for changes in the FRA’s decision to use 2008 traffic data as a benchmark to determine lines on which PTC must be installed by 2015. She noted that using 2008 data rather than current data will result in installation of PTC by Class I carriers “on one third more miles of track than they would be using in 2015, and that’s not what Congress intended.”

Senator Kohl testified that the so-called railroad “antitrust exemption” should be revoked. While noting a May 2009 agreement between him and Chairman Rockefeller to incorporate the “repeal [of] the railroad industry’s undeserved antitrust exemption” in the reauthorization bill, Sen. Kohl warned that “all should know that if comprehensive rail reform is not possible, then I will seek to advance repeal of the antitrust exemption by any other means possible.”

Deputy Secretary Procari’s testimony highlighted the “need to assure a balanced system under which rail earns financial returns sufficient to keep and expand access to private capital markets, but not at the sole expense of limited option shippers.”

He reaffirmed the Administration’s commitment to high speed rail. While noting the “difficulty in achieving timely stakeholder agreements between the states and freight railroads,” Deputy Secretary Procari pointed to a sign of progress: namely, the recent agreement between BNSF and Washington State to improve passenger service between Seattle and Portland, Oregon.

Chairman Elliott’s testimony set out his agenda for the STB. It includes “looking at the competitive access rules, revisiting the need for broad exemptions to regulation, and looking at how much we charge to file a case with the Board.”

Additionally, Chairman Elliott praised the pending reauthorization bill generally and specifically praised the bill for giving the STB the “ability to start investigations on our own,” “the ability to send small disputes to a quick and inexpensive arbitration process,” and “a budget that would allow us to be more proactive.”

### [FRA, Amtrak and STB Appropriations Bills Progress](#)

On July 29, 2010, the House passed the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2011 (H.R. 5850). A companion bill, S. 3644, is pending in the Senate. These bills appropriate funds for the Federal Rail Administration and the Surface Transportation Board, among other agencies.

## ***Federal Railroad Administration***

### **Safety and Operations**

For safety and operations, the House and Senate bills appropriate approximately \$203.5 million and \$205 million respectively, \$50 million more than the Administration requested. According to the accompanying House Committee on Appropriations Report 111-564 (“House Report”), the additional funds are in recognition of the fact “that the responsibilities of the FRA have grown exponentially in recent years.” The House Report states that the Committee “views this increase as an investment in FRA and consequently will expect FRA to perform at an even higher level of proficiency” and admonishes the FRA that as the economy rebounds, “it expects FRA to remain vigilant in keeping the railway safe.” *Id.* at 82.

To facilitate FRA’s achievement of these expectations, the House Report approves FRA’s request to hire 62 additional positions and 31 full time equivalents. *Id.*

The Senate Committee on Appropriations Report 111-230 (“Senate Report”) specifies that the funds are to be used “to cover travel costs related to safety inspections, as well as the cost of the close call system,... Automated Track Inspection program, Railroad Safety Information System, Southeastern Transportation study,

research and development activities, contract support, and Alaska Railroad liabilities.” Additionally, the Senate Report specifies that:

- \$250,000 is for hiring three additional acquisition positions;
- \$1.5 million is for the Next Generation Corridor Equipment Pool Committee, which provides a mechanism by which “[intercity and high speed rail] projects and corridors being developed across the country can coordinate on rail equipment standards and orders so that a domestic industry will be able to respond;” and
- \$2 million is to fund grants to Operation Lifesaver to carry out public information and education programs to prevent grade crossing accidents.

### **Railroad Research and Development**

The House and Senate bills each appropriate \$40 million for railroad research and development. The House Report recommends that the funds be allocated as follows:

- Northern Lights Express Intercity Passenger Rail Study, MN.....\$500,000
- Railroad system issues.....\$3,835,000
- Human factors.....\$3,495,000
- Rolling stock and components.....\$3,000,000
- Track and structures.....\$5,450,000
- Track and train interaction.....\$3,800,000
- Train control .....\$8,270,000
- Grade crossings .....\$2,200,000
- Hazmat transportation .....\$1,550,000
- Train occupant protection .....\$4,700,000
- R&D Facilities.....\$2,700,000
- Rail cooperative research program.....\$500,000
- Empire Corridor West High Speed Rail Improvement  
Cayuga County, NY.....\$360,000
- Improvement to Safety Devices at Highway/Railway Grade Crossings  
Wisconsin.....\$750,000
- Traffic Separation Studies in Durham and Wake County  
North Carolina.....\$500,000
- Empire corridor West High Speed Rail Improvements  
Oneida County, NY.....\$625,000

House Report at 82-83.

The Senate Report “directs FRA to test and evaluate the use of fuel cell technology to support off-grid and backup power production units for implementation of positive train control and other technology initiatives to improve the safety and performance of freight and passenger rail movements.” Report 111-230 at 83.

The Senate Report designates funding for projects as follows:

- San Diego Positive Train Control, CA .....\$1,000,000
- Metrolink Positive Train Control, CA .....\$1,000,000
- PEERS Rail-Grade Crossing Safety, IL.....\$500,000
- RR Whistle Free Zone Project, Goodview and Minnesota City  
MN.....\$400,000

### **Railroad Safety Technology Program**

Although the Administration requested no funding for the railroad safety technology program, the House bill provides \$75 million and the Senate bill twice that amount to fund the program. The funds are to assist in

meeting the Rail Safety Improvement Act's ("RSIA") mandate for deployment by the end of 2015 of Positive Train Control on lines that transport hazardous (Toxic by Inhalation Hazard) traffic or jointly operate passenger and freight traffic.

The program, authorized under the RSIA, provides "grants to passenger, commuter and freight rail carriers, railroad suppliers, and State and local governments for projects that have a public benefit of improved railroad safety and efficiency."

The House and Senate Reports direct the FRA to give "[p]riority to projects that make technologies interoperable between railroad systems; accelerate the deployment of train control technology on high-risk corridors, such as those that have high volumes of hazardous materials shipments, or over which commuter or passenger trains operate; or benefit both passenger and freight safety and efficiency." The House further directs that the funds be provided "to grantees struggling with [PTC] costs." House Report at 83.

Significantly, the Senate Report faults FRA for issuing regulations that use 2008 as the base year for determining which lines require PTC. Senate Report at 85. The Committee "directs FRA to reconsider its use of 2008 as a base year and provide the House and Senate Committees on Appropriations a full justification for its use by March 30, 2011."

### **Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service**

The House and Senate bills appropriate respectively \$1.4 billion and \$1 billion for investment in passenger rail infrastructure including for high speed rail corridors and intercity passenger service. S. 3644 at 46; H.R. 5850 at 53. The grants may also be used "to reduce congestion or facilitate ridership growth along passenger rail corridors." House Report at 84.

Under the Senate bill, 85% of these funds "shall be for cooperative agreements that lead to the development of entire segments or phases of intercity or high-speed rail corridors." S. 3644 at 47-48. The Senate bill requires FRA to notify Congress at least 30 days before issuing a letter of intent or entering into such agreements. *Id.*

The Senate bill requires that the national rail plan specifically include "an estimate of the cost to complete the system of high speed rail envisioned in the plan, and a complete map of that system." S. 3644 at 47. The plan must be resubmitted by June 1, 2011. Senate Report at 85. Further, the Senate Report states the "expectation" that the final national rail plan will address safety standards for high speed rail, particularly in light of the fact that high speed rail will often share tracks with freight rail. For good measure, the Senate Report directs the Inspector General to report by December 31, 2011 on "FRA's progress in developing [such] safety standards." Senate Report at 86.

The Senate Report criticizes FRA for introducing "a sense of uncertainty in its administration of the \$8 billion high speed rail grant program funded by the American Recovery and Reinvestment Act ("Recovery Act"). Specifically, the Committee criticizes the FRA for issuing a new set of guidance for grant agreements between the FRA and States one year after issuing interim guidance. The new guidance "included specific expectations for freight railroads working with a State on an intercity or high speed rail project funded under the program." Senate Report at 86. The House bill authorizes FRA to use the interim guidance for the program, while directing FRA to finalize the pending passenger rail regulations by the end of fiscal year 2011. *Id.*

The Senate Report deems "appropriate" the FRA's commitment to respect the terms of the applications that were awarded with grant funding notwithstanding the change in guidance. Further, the Senate Report urges FRA to move expeditiously to finalize grant agreements for projects announced under the Recovery Act and to "continue to give States and freight railroads the appropriate flexibility for negotiating performance standards and expectations." *Id.* at 87

The House Report, in strong language, calls for comprehensive oversight of, and management focus on, the passenger rail grant program and sets aside \$50 million for these purposes. The Committee states that it "considers investments made by this program to be critical to the nation's infrastructure and essential to providing

a transportation alternative for the congested highways and air space between city pairs around the country.” Accordingly, the House Report designates the grant program as “a critical area of management focus at DOT” and states that the Committee “is adamant about the immense need for comprehensive oversight of this program.” FRA must submit a report by March 29, 2011 on the “oversight and grants management process of the high speed rail program.” House Report at 85.

The bills provide up to \$30 million “for the purposes of conducting research and demonstrating technologies supporting the development of high-speed rail in the United States, including the demonstration of next-generation rolling stock fleet technology and implementation of the Rail Cooperative Research Program.” S. 3644 at 47; H.R. 5850 at 50.

The bills provide up to \$50 million for planning activities, including multi-state planning efforts that result in development of rail corridor investment plans. Some of these funds may also be used “to facilitate the preparation of a service development plan and related environmental impact statement for high-speed corridors located in multiple States.” *Id.*

Lastly, taking note of the impact that the building of the nation’s highways had on poor or minority communities, the House Report expresses the expectation that the DOT’s environmental reviews of new transportation projects, including high speed rail, will “consider the effects of using existing or new transportation corridors, as appropriate, and to identify appropriate mitigation measures and comply with Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.” *Id.* at 86.

### ***Amtrak***

Initially, the House Report is almost effusive in its praise of Amtrak, stating its appreciation of the level of detail in its budget justifications and its pleasure in receiving Amtrak’s five-year plan and with Amtrak’s “recent increase in on time performance.” It describes Amtrak’s capital fleet plan as “a bold initiative that adds long-term structure to Amtrak’s fleet acquisition process.” House Report at 86.

All this praise, however, turns out to be a set up as the House Report then slams Amtrak for its “abysmal” performance in bringing its stations into compliance with the Americans with Disabilities Act (“ADA”). House Report at 87-88. The Senate’s criticism is less strident, describing news of Amtrak’s progress on this front as “discouraging.” Senate Report at 88.

### **Operating Grants**

Both bills appropriate the \$563 million requested in the Administration’s budget for Amtrak operating grants.

The Senate bill requires Amtrak to submit to Congress “a plan to achieve savings through operating efficiencies including, but not limited to modifications to food and beverage service and first class service.” Amtrak’s inspector general must submit semi-annual reports on the estimated savings. S. 3644 at 50.

While the House bill eliminates prior restrictions on Amtrak’s ability to offer deeply discounted fares, Amtrak must report to Congress quarterly on its discount fare offerings. House Report at 87.

### **Capital and Debt Service Grants**

The House and Senate bills appropriate respectively \$1.2 billion and \$1.4 billion for capital and debt service grants for Amtrak. Both bills place a \$305 million limit on use of the funds for debt service. H.R. 5850 at 53; S. 3644 at 52.

The House Report recommends that no less than \$165 million be used for ADA compliance and directs Amtrak to provide quarterly updates on its progress in meeting ADA requirements. House Report at 88. The Senate Report recommends \$230 million for ADA compliance and expresses its expectation that Amtrak will “continue giving ADA compliance priority for the use of these funds.” Senate Report at 88.

The House Report recommends up to \$28 million for payment of costs associated with early buyout options as authorized in the Passenger Rail Investment and Improvement Act of 2008. House Report at 88.

The House Report recommends \$127.5 million for Amtrak's "bold" capital fleet plan. Both the House and Senate encourage Amtrak and FRA "to explore alternative financing options, such as the RRIF program, to meet the immense capital need for the fleet plan." House at 88; Senate at 88-89. Further, the Senate discourages the FRA from pursuing private market financing, except as a last resort, in light of the higher interest rates and Amtrak's obligation as a recipient of federal subsidies to use its funds responsibly. Also, the Senate directs Amtrak to notify the Appropriations Committees when it decides to pursue a formal application for either a RIFF loan or private sector loan. Senate Report at 89.

The Senate bill requires the FRA to report to Congress on FRA's efforts to improve the on-time performance of Amtrak intercity rail service operating on non-Amtrak owned property. S. 3644 at 55.

### ***STB***

The House bill and Senate bill respectively provide approximately \$31.25 million and nearly \$30 million for STB salaries and expenses. Although these amounts assume that \$1.25 million of the appropriated funds will come from user fees, the bills cap the filing fees for rate and practice complaints at a level not to exceed federal district court civil suit filing fees. S. 3644 at 77; H.R. 5850 at 73.

For updating the Uniform Railroad Costing System ("URCS"), the House Report recommends \$1 million and the Senate \$625,000. In doing so, the Senate notes that a "complete overhaul of URCS ... may not provide enough benefits to justify its price tag." Senate Report at 119.

### ***DOT***

#### **National Infrastructure Investment Grants**

H.R. 5850 includes \$400 million for the "national infrastructure investment program" created by the American Recovery and Reinvestment Act. H.R. 5850 at 4. The House Report "urges the Secretary [of Transportation] to give consideration to innovative projects that support investment in freight rail and inland ports." Also, it urges "traditional rail line relocation applicants" to apply for grants "if their projects correlate to the national investment infrastructure program." House Report at 14.

Program grants must be between \$5 million and \$75 million except that grants for projects in rural areas must be a minimum of \$1 million. Further, grants to projects in a single state cannot exceed 12.5% of the total funds authorized by H.R. 5850 for the program. H.R. 5854 at 5-6.

S.3644 contains \$800 million for "capital investments in surface transportation infrastructure." The funds may be awarded "to a State, local government, transit agency or collaboration among such entities ... for projects that will have a significant impact on the Nation, a metropolitan area, or a region." Eligible projects include passenger and freight rail transportation projects. S. 3644 at 3-4.

Program grants must be between \$10 million and \$200 million except that grants for projects in rural areas must be a minimum of \$1 million. Further, grants to projects in a single state cannot exceed 25% of the total funds authorized by S. 3644 for the program. *Id.*

## RAILROADS

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### ***STB RULEMAKING AND OTHER PROCEEDINGS***

#### ***The Board Announced the Formation of the Toxic By Inhalation Hazard Common Carrier Transportation Advisory Committee***

On August 3, 2010, the Board announced that it will form the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (TIHCCTAC). The TIHCCTAC will advise the Board “on issues related to the common carrier obligation with respect to the rail transportation of toxic by inhalation hazards (TIH).” Establishment of the Toxic By Inhalation Hazard Common Carrier Transportation Advisory Committee, STB Ex Parte No. 698, at 1 (STB served Aug. 5, 2010).

The Board also placed in abeyance the pending proceeding Common Carrier Obligation of Railroads—Transportation of Hazardous Materials, STB Ex Parte No. 677 (Sub-No.1) (STB served June 4, 2008), which concerns what constitutes a reasonable request for transportation of TIH. In that proceeding, the Board had held a hearing in June 2008 to discuss possible policy solutions posed by the potentially catastrophic liability associated with transporting TIH.

The Board proposed that the TIHCCTAC convene for a two-year period with the goal of “producing a report and recommendations on how the Board should balance the common carrier obligation to transport [TIH] with the risk of catastrophic liability in setting appropriate rail transportation liability terms for TIH cargo.” Establishment of the Toxic By Inhalation Hazard Common Carrier Transportation Advisory Committee, STB Ex Parte No. 698, at 4. The Board requested comments on several issues, including “the appropriate scope of such a committee’s mandate,” “the optimum size of such a committee,” and the allocation of the committee’s membership “among various stakeholder groups.” Id. at 1. The Board requested comments regarding the TIHCCTAC’s “structure and scope” by September 24, 2010, and nominations for members by October 25, 2010.

#### ***The Board Requested Comments Regarding Mediation and Arbitration Procedures***

On August 20, 2010, the Board requested comments regarding how the Board can “encourage greater use of mediation and arbitration procedures.” Assessment of Mediation and Arbitration Procedures, STB Ex Parte No. 699, at 2 (STB served Aug. 20, 2010). The Board also requested comments regarding “us[ing] Board-facilitated mediation procedures without the filing of a formal complaint.” Id. Comments are due by October 25, 2010, and the Board will decide whether to issue a notice of proposed rulemaking at a later date.

#### ***The Board Will Include A Plain Language Digest in Entire Board Decisions***

On September 2, 2010, the Board issued a policy statement that it will include a digest at the beginning of entire board decisions. Policy Statement on Plain Language Digests in Decisions, STB Ex Parte No. 696, at 1 (STB served Sept. 2, 2010). The digests are intended to “increase transparency in government and to foster public understanding of Board decisions” in response to a presidential memorandum. Id. at 2 (citing Memorandum on Transparency and Open Government, 74 Fed. Reg. 4,685-86 (Jan. 26, 2009)). The digests may not be cited as precedent, and they will include the following disclaimer: “The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent.” Id. at 2.

## ***UNREASONABLE RULES OR PRACTICES CASES***

### ***The Board Stayed Proceedings Regarding Tank Cars for Joint Mediation***

These proceedings concern mileage equalization requirements for tank cars of private ownership (Freight Tariff RIC 6007-Series, Item 187) and for empty tank cars (Item 190). On June 8, 2010, the Board granted Complainants' petition for mediation, and it held the proceedings in abeyance. Cargill, Inc., et al. v. Aberdeen & Rockfish R.R. Co., et al., STB Docket No. 42117, at 3 (STB served June 8, 2010). The joint mediation session was scheduled for September 7, 2010. Cargill, Inc., et al. v. Aberdeen & Rockfish R.R. Co., et al., STB Docket No. 42117, at 2 (STB served Aug. 30, 2010).

### ***The Board Stayed Proceedings Concerning UP's Tariff Regarding Contamination of Railcars***

North American Freight Car Association (NAFCA) alleges that UP's tariff regarding contamination of railcars constitutes an unreasonable practice. UP's tariff requires a party releasing a railcar to ensure that the car is clean and permits UP to assess a surcharge if the railcar is contaminated. On June 8, 2010, the Board granted the parties' motion to stay the proceedings to enable the parties to conduct informal discovery and discuss mediation. N. Am. Freight Car Ass'n v. Union Pac. R.R. Co., STB Docket No. 42119, at 1 (STB served June 8, 2010).

The Board subsequently extended the deadline for the parties to request mediation or propose a procedural schedule until September 10, 2010. N. Am. Freight Car Ass'n v. Union Pac. R.R. Co., STB Docket No. 42119, at 1 (STB served Aug. 13, 2010).

### ***The Board Held a Public Hearing Concerning the Reasonableness of BNSF's Rules Regarding the Reduction of Coal Dust Emissions***

On July 29, 2010, the Board held a public hearing in a declaratory order proceeding concerning the reasonableness of BNSF's rules regarding limits on coal dust emissions. Arkansas Elec. Coop. Corp.—Petition for a Declaratory Order, STB Finance Docket No. 35305, at 1 (STB served June 10, 2010). This proceeding concerns the reasonableness of two tariffs issued by BNSF Railway Company (BNSF) that require shippers of coal from the Powder River Basin (PRB) over the Joint Line and Black Hills Subdivision to limit the emission of coal dust to specified standards. The Board noted that the "issues before the Board include whether provisions of a BNSF tariff constitute an unreasonable practice, whether BNSF may establish rules regarding coal dust dispersion from coal trains operating over its lines, and whether refusal to provide service to shippers not in compliance with the provisions would violate BNSF's common carrier obligation." Id. The Department of Transportation and several shippers and railroads spoke at the hearing. Arkansas Elec. Coop. Corp.—Petition for Declaratory Order, STB Finance Docket No. 35305, at 3-4 (STB served July 21, 2010).

## ***RATE CASES***

### ***The D.C. Circuit Remanded to the STB a Decision on the Reasonableness of AEP Texas Rates to Reassess the 2005 Calculation of the Cost of Equity Capital***

On June 18, 2010, the United States Court of Appeals for the District of Columbia held that the Board had "failed adequately to explain its decision" regarding the 2005 calculation of the cost of equity capital in a case involving the reasonableness of certain coal transportation rates. The Court remanded the decision to the Board for further consideration of the 2005 cost of capital. AEP Texas N. Co. v. STB, 609 F.3d 432, 434 (D.C. Cir. 2010). This case arose from AEP Texas's complaint concerning BNSF's rates for transportation of coal from the PRB to the Oklaunion Generating Station near Vernon, Texas. In September 2007, the Board concluded that AEP failed to demonstrate that BNSF's rates were unreasonable. AEP Texas N. Co. v. BNSF Ry. Co., STB Docket No. 41191 (Sub-No. 1), at 23 (STB served Sept. 10, 2007). After the Board denied AEP's motion for reconsideration, AEP petitioned for review. AEP Texas N. Co. v. BNSF Ry. Co., STB Docket No. 41191 (Sub-No. 1), at 4 (STB served May 15, 2009).

AEP Texas had challenged the Board's calculations of the cost of equity capital for several relevant years. For years prior to 2005, the D.C. Circuit upheld the Board's conclusion that it was appropriate to use the Board's

previously published cost of capital determinations based on reliance by railroads and investors on those determinations. AEP Texas N. Co., 609 F.3d at 440. However, the Court found that the Board had “failed to address the unique circumstances” relating to the 2005 cost of capital determination, including the fact that it had been challenged by shippers. Id. at 441. The Court also concluded that the Board had not adequately explained its conclusion that the “2005 calculation ‘does not vary significantly more than other models.’” Id. at 442 (quoting AEP Texas N. Co. v. BNSF Ry. Co., STB Docket No. 41191 (Sub-No. 1), at 10 (STB served May 15, 2009)). The Court remanded to the Board “to reassess its decisionmaking for the 2005 cost of equity estimate.” Id. at 444.

### ***The Board Dismissed the Complaint Filed by M&G Against CN Based on Voluntary Settlement and Established a Procedural Schedule for M&G’s Complaint Against CSX***

M&G Polymers USA, LLC (M&G) filed a complaint against CSX and Canadian National Railway Company (CN), challenging rates for transportation of polyethylene terephthalate. On July 22, 2010, the Board granted M&G’s motion to dismiss the complaint against CN after the parties voluntarily resolved their dispute. M&G Polymers USA, LLC v. CSX Transp., Inc. & Canadian Nat’l Ry. Co., STB Docket No. 42123, at 1 (STB served July 22, 2010).

The dispute between M&G and CSX remains pending, and the Board established a procedural schedule with discovery closing on December 15, 2010. M&G Polymers USA, LLC v. CSX Transp., Inc., STB Docket No. 42123, at 1 (STB served Aug. 4, 2010). The parties’ joint submission of operating characteristics is due on March 1, 2011. M&G’s opening evidence, CSX’s reply evidence, and M&G’s rebuttal evidence are due between April and December 2011. The parties’ final briefs are due on January 31, 2012.

### ***The Board Dismissed NRG’s Complaint Against CSX Based on Voluntary Settlement***

On July 8, 2010, the Board granted NRG Power Marketing LLC’s (NRG) motion to dismiss the complaint against CSX. NRG Power Marketing LLC v. CSX Transp., Inc., STB Docket No. 42122, at 1 (STB served July 8, 2010). NRG’s complaint challenged the reasonableness of CSX’s rates for the transportation of coal from Chicago, Illinois to western New York State. The parties negotiated a settlement agreement after they participated in mandatory non-binding mediation pursuant to 49 C.F.R. § 1109.4.

### ***The Board Stayed Seminole Electric’s Rate Case Against CSX for Settlement Negotiations***

Seminole Electric Cooperative, Inc.’s (SECI) complaint challenged the reasonableness of CSX’s rates for coal transportation to the Seminole Generating Station near Palatka, Florida. The parties submitted evidence and filed final briefs. The Board held oral argument concerning whether CSX possesses market dominance for the movement of coal. Oral Argument, STB Ex Parte No. 693, at 1 (STB served May 19, 2010).

On August 11, 2010, the Board granted SECI’s motion to stay the proceeding so that the parties could attempt to settle their dispute. Seminole Elec. Coop., Inc. v. CSX Transp., Inc., STB Docket No. 42110, at 1 (STB served Aug. 11, 2010). SECI requested the Board to hold the proceeding in abeyance until September 15, 2010. SECI explained that the parties “reached an agreement-in-principle with CSXT to resolve this rate litigation,” and the parties intend to “enter into a new rail transportation contract.” Seminole Elec. Coop., Inc., STB Docket No. 42110, at 1 (STB served Aug. 11, 2010). On September 14, 2010, SECI filed a motion to dismiss the complaint with prejudice and discontinue the proceedings.

## ***RECENT JUDICIAL DEVELOPMENTS***

### ***THE 4-R ACT***

#### ***The United States Supreme Court Granted CSX’s Petition for Certiorari Regarding Whether Alabama’s Sales and Use Tax on Diesel Fuel is Subject to Challenge under Section 306 of the 4-R Act***

On June 14, 2010, the United States Supreme Court granted CSX’s petition for *certiorari* on the question “[w]hether a State’s exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. § 11501(b)(4) as ‘another tax that discriminates

against a rail carrier.” CSX Transportation, Inc. v. Alabama Dep’t of Revenue, No. 09-520 (U.S. certiorari granted June 14, 2010).

Section 306 of the Railroad Revitalization Act and Regulatory Reform Act of 1976 (the 4-R Act) prohibits states from “[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” 49 U.S.C. § 11501(b)(4). In Alabama, railroads are subject to state sales and use tax on their purchase of diesel fuel in Alabama, as well as sales and use taxes imposed by counties and municipalities. Motor carriers are subject to a fixed fuel excise tax, but they are exempt from the state and local sales and use tax. Water carriers engaged in interstate commerce are not subject to either the excise tax or the sales and use tax.

The Eleventh Circuit and the district court dismissed CSX’s challenge to the Alabama tax structure, concluding that they were bound by the Eleventh Circuit’s 2008 decision concerning a challenge to Alabama’s sales and use tax under the 4-R Act. CSX Transp., Inc. v. Ala. Dep’t of Revenue, No. 09-10772 (11th Cir. Sept. 1, 2009) (per curiam) (unpublished). The Eleventh Circuit’s previous decision held that the Alabama statute “does not offend the 4-R Act so long as the tax is generally applicable and does not target railroads within Alabama.” Norfolk Southern Railway v. Alabama Department of Revenue, 550 F.3d 1306, 1316 (11th Cir. 2008).

The United States Supreme Court scheduled oral argument for November 10, 2010, and Alabama’s merits brief is due on September 27, 2010. The United States, AAR, and the Council on State Taxation filed *amicus curiae* briefs in support of CSX.

## **PREEMPTION**

### ***The Eighth Circuit Held that the Railway Labor Act Preempts Employee’s Suit Under Nebraska Statute***

On June 14, 2010, the Eighth Circuit held that the Railway Labor Act preempted a conductor’s claim that Nebraska Revised Statutes § 25-1640 requires BNSF to reimburse him for “‘productivity shares’ lost because of his service on a federal grand jury.” Evermann v. BNSF Ry. Co., 608 F.3d 364, 365 (8th Cir. 2010). BNSF paid plaintiff wages while he was serving on the grand jury, but it refused to reimburse him for Productivity Fund shares for missed trips due to jury duty because previous arbitration rulings held that employees must actually “perform” qualifying trips to be eligible for productivity shares under the Crew Consist Agreement between BNSF and United Transportation Union.

The Eighth Circuit concluded that plaintiff’s state law claim was preempted by the Railway Labor Act because the productivity shares are “an employee benefit created by . . . the Crew Consist Agreement.” Id. at 367 (internal quotation marks omitted). Because plaintiff’s “specific *claim* for reimbursement asserted in his complaint depends on an interpretation of the CBA, [it] is therefore preempted.” Id. at 368 (emphasis in original and internal quotation marks omitted).

### ***The Fourth Circuit Held that the ICC Termination Act Preempts a City’s Haul Ordinance as Applied to Norfolk Southern’s Ethanol Transloading Facility***

On June 16, 2010, the Fourth Circuit concluded that the City of Alexandria’s haul ordinance, as applied through haul permits, was preempted by the ICC Termination Act, 49 U.S.C. § 10501(b). Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 159-60 (4th Cir. 2010). This dispute concerns Norfolk Southern’s operation of an ethanol transloading facility in Alexandria, Virginia. Pursuant to the City’s ordinance prohibiting the hauling of certain materials on its streets, the City issued a thirty-day haul permit to Norfolk Southern, which was reissued every thirty days. Norfolk Southern filed a declaratory judgment action in the Eastern District of Virginia, and the district court held that the Ordinance and Permits were preempted.

On appeal, the Fourth Circuit concluded that the Ordinance and Permits are preempted under the ICC Termination Act because they “regulated ‘transportation by a rail carrier.’” Id. at 159 (quoting 49 U.S.C. § 10501(b)(1)). The Court reasoned that the “Ordinance and Permit[s] regulate ethanol transloading at the Facility” because they “directly impact Norfolk Southern’s ability to move goods shipped by rail.” Id. at 158-59. The Court did not decide whether two other federal statutes—the Hazardous Materials Transportation Act and the Federal

Rail Safety Act—preempted the City’s Ordinance and Permits. *Id.* at 157.

***The Eleventh Circuit Held that the ICC Termination Act Preempts State Law Nuisance Claim***

On August 5, 2010, the Eleventh Circuit concluded that the ICC Termination Act, 49 U.S.C. § 10501(b), preempted a state law nuisance action concerning an increase in noise and smoke due to traffic on CSX’s side track adjacent to plaintiffs’ land. *Pace v. CSX Transp., Inc.*, --- F.3d ----, 2010 WL 3034664, at \*2 (11th Cir. Aug. 5, 2010). The Court held that the plaintiffs’ nuisance claim was preempted because the suit “pertain[s] to the operation or construction of a side track.” *Id.* The Court emphasized that the ICC Termination Act “expressly preempts state remedies involving the operation of the side track,” and the Court refused to “permit landowners to circumvent that Congressional decision through state law nuisance claims.” *Id.* at \*3; 49 U.S.C. § 10501(b)(2).

***The Ohio Court of Appeals Held that the FRSA’s Exception to Preemption Does Not Apply to a Railroad’s Operating Rules Filed with the Federal Railroad Administration***

On June 11, 2010, the Ohio Court of Appeals affirmed the partial grant of summary judgment to Norfolk Southern on grounds of preemption under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20106. *Gilbert v. Norfolk Southern Ry. Co.*, No. L-09-1062, 2010 WL 2333773, at \*8 (Ohio Ct. App. June 11, 2010) (unpublished). This case arose from a grade crossing collision involving a semi-tractor/trailer. The trial court granted Norfolk Southern’s partial motion for summary judgment that plaintiffs’ claims were preempted under the FRSA because the crossing’s warning devices were federally funded. After the jury returned a defense verdict on the remaining claims, plaintiffs appealed.

The Ohio Court of Appeals affirmed. The Court rejected plaintiffs’ argument that preemption under the FRSA does not apply because Norfolk Southern “violated its own operating rules by not using flares.” *Id.* at \*7. The FRSA provides that “Section 20106 permits State tort actions arising from events or activities . . . for the following . . . a party’s violation of, or failure to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries.” *Id.* at \*7 (quoting 49 C.F.R. § 218.4). The Court concluded that this exception to preemption does not apply to a railroad’s operating rules, even though the operating rules are filed with the Federal Railroad Administration. The Court reasoned that the “fact that federal law requires that a railroad file copies of its operating rules with the Federal Railroad Administration does not equate that the rules themselves were *created* pursuant to an order of the Secretary of Transportation.” *Id.* at \*8 (emphasis in original).

## TRANSPORTATION SAFETY

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### *FRA Issues New Bridge Safety Rules*

Implementing a provision of the Rail Safety Act of 2008, the Federal Railroad Administration has issued bridge safety rules. *Bridge Safety Standards*, 75 Fed. Reg. 41282 (July 15, 2010). The rules were issued notwithstanding that in the last fifty years, not one fatality has resulted from the structural failure of a railroad bridge. Nonetheless, FRA recognizes that the rail infrastructure is aging and the new rules are a precaution against potentially catastrophic failure.

The rules make the owner of the track over the bridge the party responsible for compliance or for assigning responsibility to another party pursuant to a written notification to be supplied to FRA. Each responsible track owner must establish a bridge management program; Class I carriers must do so by March 14, 2011. The rules specify the contents of the management program and the qualifications of bridge inspectors and engineers. The rules also require a determination of the bridge load capacity and require certain measures to protect the bridge from overweight loads. Bridge inspections must be scheduled, and records kept, pursuant to the detailed requirements of the rules. The rules also provide for audits. The detailed provisions of the new rules are set forth at 49 C.F.R. Part 237.

### *PHMSA Proposes New Hazmat Special Permit Rules*

In order to tighten its existing program of issuing special permits (formerly known as exemptions) allowing deviations from its hazardous materials transportation rules, PHMSA has proposed new rules concerning the permitting process. The rules are designed to provide PHMSA with more information about applicants for special permits and information on operational controls that would apply to the mode of transportation at issue. In addition, the new rules would require (among other information) a specification of the number of shipments expected to be subject to the special permit and the preparation of a failure mode and effect analysis by the applicant. New procedural requirements for applying for new special permits and renewals are also proposed. *See Hazardous Materials Transportation: Revisions of Special Permit Procedures*, 75 Fed. Reg. 43898 (July 27, 2010). The existing requirement that a special permit not result in a diminution of the level of safety ensured by the application of the rules remains in place.

### *FMCSA Issues Final Rules Barring Texting While Driving; PHMSA Issues an NPRM on the Same Issue*

In connection with DOT Secretary LaHood's focus on distracted driving, on September 27, 2010, FMCSA issued a final rule prohibiting texting by drivers of interstate commercial motor vehicles, effective October 27, 2010. *Limiting the Use of Wireless Communications Devices*, 75 Fed. Reg. 59118 (Sept. 27, 2010). The rule applies to drivers operating motor vehicles (including while stopped in traffic) other than those who have pulled the vehicle off to the side of the road in order to text. The prohibited texting does not include dialing a phone number or using a navigation system or a dispatching system. Further, the prohibition extends to drivers of vans designed to transport between 9 and 15 persons not for direct compensation, even if such vans do not meet the definition of a commercial motor vehicle. Drivers convicted of two texting offenses during a three-year period are disqualified for 60 days; while those convicted of three or more violations are disqualified for 120 days.

On the same day, PHMSA issued a notice of proposed rulemaking that proposes to adopt a similar rule applying the texting prohibition to intrastate drivers of hazardous materials of a quantity requiring placarding or

meeting certain highly hazardous criteria. *Hazardous Materials: Limiting the Use of Electronic Devices*, 75 Fed. Reg. 59197 (Sept. 27, 2010). Such drivers are not covered by the FMCSA rule, which only applies to interstate drivers.

#### ***FRA Finalizes Rules on Use of Cellphones and Other Electronic Devices***

In yet another regulatory decision addressing electronic device distraction, FRA has issued a rule governing use of cellphones and other electronic devices by rail workers. Responding to a series of rail accidents caused by railroad employees who were distracted from doing their jobs by speaking on cellphones, in May 2010 FRA had proposed a sweeping prohibition on the use of such phones and other potentially distracting electronic devices.

FRA has now finalized those rules. *Restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices*, 75 Fed. Reg. 59580 (Sept. 27, 2010). FRA's final rule mirrors an Emergency Order that the agency put into place on October 1, 2008, following a September 12, 2008 head-on collision between a passenger and freight train in California that resulted in 25 fatalities. The final rules prohibit a rail operating employee from using an electronic device (a defined term) if the use would interfere with the employee's safety-related functions. Such devices may not be used when the employee is on a moving train, engaged in switching operations, or preparing a train for movement. Special rules are prescribed for railroad-supplied electronic devices and for deadheading employees. Also, exceptions are allowed for emergency situations and certain special situations, such as using a camera to document a safety hazard or violation. Railroads are required to maintain written instruction programs on the rules that each railroad must adopt to implement the FRA rules. Further, written records documenting such instruction must also be maintained.

#### ***NHTSA Proposes Motorcoach Seatbelt Rules***

On August 18, 2010, NHTSA initiated a long-anticipated rulemaking proceeding that would require the installation on new motorcoaches of passenger seat belts within three years after a final rule becomes effective. *Federal Motor Vehicle Safety Standards; Motorcoach Definition; Occupant Crash Protection*, 75 Fed. Reg. 50958 (Aug. 18, 2010). The proposal was prompted by a series of accidents in which fatalities were experienced as a result of passengers being ejected from motorcoaches. This is the first in a series of occupant protection rulemakings that NHTSA is expected to pursue relative to motorcoaches. It also tracks pending Congressional efforts to require seatbelts and other protective measures. The industry is generally not opposed to these measures.

The proposed rules address such key questions as what constitutes a motorcoach subject to the rules (transit buses would be excluded, while intercity and tour buses would be covered); what standard of strength should apply to the seatbelts required to be installed (the rule proposes essentially the same standard that applies to passenger vehicles, while seeking comment on the possible application of the standard adopted by the EU for European motorcoaches); and whether the proposed three-year implementation period is too long or too short.

Another key question in the proceeding is whether to require retrofitting of the existing motorcoach fleet with seatbelts. NHTSA is probably not likely to impose this requirement due to the difficulty and cost of installing seatbelts on older buses, but this remains to be seen.

#### ***FRA Clarifies/Modifies Positive Train Control Rules***

In its January 15, 2010 decision adopting final positive train control ("PTC") rules, FRA sought additional comment on a few issues. It has now issued a decision in response to those comments. *Positive Train Control Systems*, 75 Fed. Reg. 59108 (Sept. 27, 2010). Perhaps the most significant element of the latest decision is the addition of a provision allowing the exclusion of track segments due to the cessation of the transportation of poisonous by inhalation (PIH) materials on the segment or rerouting of those materials to other track. The new rules adopt procedures and hazardous criteria for removing this track from the PTC Implementation Plan for the railroad.

#### ***Proposed Hours of Service Rules for Drivers Remain Pending at OMB***

FMCSA sent its new hours of service rule proposals for interstate drivers to the Office of Management and Budget for review on July 26, 2010. The proposals remain pending, but could be issued as a notice of proposed rulemaking during October 2010.

## HEADQUARTER NOTES

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### Association UPDATES:

#### Membership:

**Dues 2011:** We are currently putting together the dues invoices for 2011. Please look for them in the mail.

- **EMAIL addresses** are very important. It's how we communicate with you.

**Volunteer!** There are currently 4 different committees on which you can serve your time and talents! Programs, Membership, Publications, Practice & Procedure. *Get involved and get more out of your membership!*

#### *Help us to grow!*

- **Refer an industry associate to ATLP!** It's that easy! All membership information is available on [www.atlp.org](http://www.atlp.org) or contact ATLP Headquarters: (410) 268-1311 or [info@atlp.org](mailto:info@atlp.org) *Your choice: refer a new member and receive a reduction in your 2011 dues or event registration fee.*

If you are interested in serving on the Membership Committee, please contact Rose Michele Nardi, *Chair*, Weiner Brodsky Sidman Kider, [Nardi@wbsk.com](mailto:Nardi@wbsk.com), or contact ATLP headquarters: [info@atlp.org](mailto:info@atlp.org)

#### Publications:

We are always seeking for members and associates who are interested in submitting articles for our *Journal of Transportation Law, Logistics & Policy*. If you have a topic, or paper that you would like to be considered for publication, please contact our Editor-in-Chief, Nick DiMichael: [nick.dimichael@thompsonhine.com](mailto:nick.dimichael@thompsonhine.com).

#### Programs:

##### **7th Transportation Forum:**

Michael F. McBride, *Van Ness Feldman*, is developing the program for the 7th Transportation Forum along with committee members Nick DiMichael, *Thompson Hine LLP*, Robert M. Jenkins III, *Mayer Brown LLP*, David F. Rifkind, *Leonard, Street & Deinard* and John V. Edwards, *Norfolk Southern Corporation*.  
**Look for Registration on-line at [www.atlp.org](http://www.atlp.org) NOW!**

##### **82nd Annual Meeting:**

Our 82nd Annual Meeting will be held at the Peabody Hotel in Memphis, TN June 26-28, 2011. The Planning is underway. Karyn Booth, *Chair*, Thompson Hine LLP and Michael Barron, *Co-Chair*, Fletcher Sippel, have put together an exciting committee with many newcomers! If there is a topic of interest that will serve our members next June, please send an email to [info@atlp.org](mailto:info@atlp.org). We appreciate your input!

***For More Information go to: [www.atlp.org](http://www.atlp.org).***

**7th ATLP Transportation Forum**  
Surface Transportation Board  
Washington, DC  
**Monday, November 1, 2010**

Preliminary Program

9:00 a.m.                   **Registration**

9:30 a.m.—10:00 a.m.   **Welcoming Remarks**

Michael F. McBride, ATLP Past President and Van Ness Feldman  
The Honorable Daniel R. Elliott III, Chairman, Surface Transportation Board  
The Honorable Frank Mulvey, Vice Chairman, Surface Transportation Board  
The Honorable Charles “Chip” Nottingham, Member, Surface Transportation Board

10:00 a.m.– 10:45 a.m.   **Developments in Passenger Rail: State of the Passenger Rail System  
in the US**

Moderator/ Presenter: John V. Edwards, ATLP President and Norfolk Southern Corporation  
Presenters:  
Kevin M. Sheys, K&L Gates  
Kevin B. Page, Chief of Rail Transportation, VA Dept. of Rail and Public Transportation

10:50 a.m.—11:50 a.m.   **Will Congress Enact Transportation Legislation?**

Moderator: Linda J. Morgan, Covington & Burling LLP  
Presenters:  
Robert G. Szabo, Van Ness Feldman  
Hubert K. “Obie” O’Bannon, Senior Vice President, Government Affairs, Association of  
American Railroads  
Congressional Staff Members of the Senate Commerce Committee, House Transportation &  
Infrastructure Committee, Senate & House Judiciary Committees (invited)

12:00 p.m.— 1:30 p.m.   **Lunch – On Your Own**

1:30 p.m. – 3:00 p.m.   **Developments in Alternative Dispute Resolution**

Moderator: Robert M. Jenkins III, Mayer Brown LLP

•   **STB Mediation: Customer Outreach, Ad Hoc and Mandatory**

Presenters:  
Lucille Marvin, Deputy Director, Section of External Affairs, Office of Public Assistance,  
Governmental Affairs and Compliance, Surface Transportation Board  
Thomas J. Brugman, Section Chief, Section of External Affairs, Office of Public Assistance,  
Governmental Affairs and Compliance, Surface Transportation Board  
Thomas J. Stilling, Chief of Mediation Services, Office of Public Assistance, Governmental  
Affairs and Compliance, Surface Transportation Board  
Brian O’Boyle, Attorney Adviser, Office of Public Assistance, Governmental Affairs, and  
Compliance Surface Transportation Board

•   **Commercial Arbitration & Mediation**

Presenters:  
William A. McCurdy Jr., Transportation Dispute Resolution LLC  
Samuel M. Sipe, Steptoe & Johnson LLP

- **Mediation and Arbitration of Grain-Related Issues**

Presenters:

Jill K. Mulligan, Senior General Attorney, BNSF Railway Company

Charles M. Delacruz, Corporate Counsel & Secretary, National Grain and Feed Association

- **STB Advisory Committee on TIH Matters**

Presenters:

Paul R. Hitchcock, Associate General Counsel, CSX Transportation, Inc.

Pamela D. Guffain, Vice President of Member Services, The Fertilizer Institute

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m.- 4:30 p.m. **STB Reports to Congress**

Moderator: Nicholas J. DiMichael, ATLP Past President and Thompson Hine LLP

- **Report on Rail Competition:**

Presenter:

Dr. B. Kelly Eakin, Senior Vice President, Christensen Associates

- **Report on Uniform Rail Costing System:**

Presenters:

Dr. William Huneke, Director & Chief Economist, Office of Economics, Surface Transportation Board

Michael Baranowski, Senior Managing Director—Economic Consulting, FTI Consulting

Thomas O'Connor, Vice President, Snively, King, Majoros, O'Connor & Lee

- **Report on Liability Issues Between Freight Railroads & Passenger Service Providers:**

Presenter:

Jamie P. Rennert, Chief, Section of Passenger Rail Operations, Surface Transportation Board

4:30 p.m. – 5:30 p.m. **STB Rate Proceedings—Are there New Issues Arising?**

Moderator: David F. Rifkind, ATLP Past President and Leonard Street and Deinard, PA

Presenters:

Lou Anne Rinn, Associate General Counsel, Union Pacific Railroad Company

Jeffrey O. Moreno, ATLP Past President, Thompson Hine LLP

5:30 p.m. **Adjourn**

## ***Our sincere gratitude to our Host: The Surface Transportation Board***



**ATLP TRANSPORTATION FORUM LOCATION:** The Surface Transportation Board is located at 395 E Street, SW, Washington, DC 20423 Phone: (202) 245-0245.

**PARKING INFORMATION:** Parking is available in many locations surrounding 395 E Street SW in Washington, DC. Please visit [www.ecolonial.com](http://www.ecolonial.com) for parking garage locations nearest the Forum. Some garages may be Govt permit parking only.

**METRO INFORMATION:** Federal Center SW located on the Blue and Orange lines.

**AIRPORT INFORMATION:** The most convenient airport is Ronald Reagan National Airport. Other options are Dulles International Airport and Thurgood Marshall Baltimore Washington International Airport.

**HOTEL SUGGESTIONS:** Please visit [www.atlp.org/events](http://www.atlp.org/events) for a list of hotels.

**REGISTRATION POLICY:** Registration forms can be downloaded from our website: [www.atlp.org](http://www.atlp.org). ATLP will not process any registration form that is not accompanied by payment. Registrations may be faxed to ATLP Headquarters at (410) 268-1322 or E-mailed to [info@atlp.org](mailto:info@atlp.org).

**REGISTRATION DEADLINE: Monday, October 18, 2010.** While ATLP expects to accommodate all meeting registrants, registrations must be received by the deadline in order to, *inter alia*, receive the reduced registration fee and ensure inclusion in the List of Attendees. After the deadline, registrations will be accepted on a space available basis.

**CANCELLATIONS:** If ATLP Headquarters receives your cancellation in writing by **October 25, 2010**, ATLP will refund your registration fee less a \$25 processing charge. No refunds will be issued for cancellations received after October 25, 2010. Registrations are transferrable. Please notify ATLP Headquarters of substitutions by Email at [info@atlp.org](mailto:info@atlp.org).

**GENERAL INFORMATION:** ATLP Headquarters, P.O. Box 5407, Annapolis, MD 21403 Phone: (410) 268-1311; Fax (410) 268-1322, Email: [info@atlp.org](mailto:info@atlp.org); Website: [www.atlp.org](http://www.atlp.org). If you have any questions, please do not hesitate to contact us!

**ATLP Transportation Forum VII  
Monday, November 1, 2010  
REGISTRATION FORM**

Contact Name: \_\_\_\_\_

Organization: \_\_\_\_\_

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<b>REGISTRATION FEES:</b>	<b>Before Oct 18th</b>	<b>After Oct 18th</b>
ATLP & Government	\$150	\$175
Non-Member	\$350*	\$350*

Payment must accompany registration. See page 4 for registration, cancellation and refund policies.

\* Non-member registration fee includes one-year membership to the Association of Transportation Law Professionals

Please register the person(s) listed below for the ATLP Transportation Forum VII 2010:

#1 \_\_\_\_\_ \$ \_\_\_\_\_

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**YES**, my organization would like to **SPONSOR** the Forum for \$500 (includes 2 complimentary registration). Please submit your electronic logo in jpeg or tiff format.

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**This Form serves as your Invoice**  
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Please return the completed registration form by **October 18, 2010**, with your payment to ATLP for the total registration fees: Mail: ATLP, PO Box 5407, Annapolis, MD 21403, Fax: (410) 268-1322, email: [info@atlp.org](mailto:info@atlp.org). If you have any questions, you may contact ATLP Headquarters: (410) 268-1311.

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Mark your calendars  
For these ATLP events:

**7th Transportation Forum**  
Surface Transportation Board  
Washington, DC  
Friday, October 15, 2010

**82nd Annual Meeting**  
The Peabody Hotel  
Memphis, TN  
June 26—28, 2011

**ASSOCIATION OF TRANSPORTATION LAW PROFESSIONALS**  
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**Name** \_\_\_\_\_  
hereby makes application for membership in the Association of Transportation Law Professionals, Inc.

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The information provided in this application is true and correct to the best of my knowledge.

**Signature** \_\_\_\_\_ **Date** \_\_\_\_\_

**To qualify for membership in the Association of Transportation Law Professionals you must satisfy one of the following categories (check appropriate box) and provide appropriate information below:**

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- A – Category 1A – Attorney
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Membership benefits include subscriptions to the *Journal of Transportation Law, Logistics and Policy* and *Association Highlights* newsletter, [www.atlp.org](http://www.atlp.org), and opportunities to participate in all educational programs. *Organizational Memberships* are also available. Please contact ATLP for further information: [info@atlp.org](mailto:info@atlp.org)

<b>Annual Dues (1A &amp; 1B)</b>	<b>\$225</b>
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*Fiscal year runs from January 1 to December 31. Dues are billed annually on October 1. Please submit application with your full first-year's dues; check must be drawn on a U.S. bank. If you join at some point in the middle of the fiscal year, a prorated amount will be credited with the first dues bill after receipt of your application.*

ATLP offers a web-link opportunity to it's members: from the ATLP website membership roster, we can provide a link to your Firm/Organization's website home page or directly to your Bio page on your website. There is a \$25 set-up fee.

**Please add the following link to my web page:** (please add \$25 to your membership fee)

**Contributions or gifts to ATLP are not deductible as charitable contributions for federal income tax purposes; however, dues, publications, advertising, and registration fees are generally deductible as ordinary and necessary business expenses. Check with your accountant.**

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***The Journal of Transportation Law Logistics & Policy***

Published quarterly

Available to Federal, State, University and Law Libraries

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Surface Transportation Board

Washington, DC

**Monday, November 1, 2010**

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The Peabody Hotel

Memphis, TN

**June 26—28, 2011**

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