# ASSOCIATION HIGHLIGHTS

## *GATEWAY TO SUMMER*

May is the process of disposing of winter. Cold days keep popping up (like today here in D.C. on May 13), but they don't have the oomph they did in March or April. Yes, I find "oomph" in my old, broken "Webster's Seventh New Collegiate Dictionary", copyright 1970.

So much in this issue! Starting with Iceland's Volcanic Bang, Marshall Turner and Tony Battista, our Aviation Editors, review the rules that govern airline liability when disasters of this magnitude cause such hell. They cover both European and American law. They explain that liability in the EU is based on a Regulation and in America on contract. Keep tuned. As much as we may pray otherwise, there is likely more of this in store.

Chuck Spitulnik and Allison Fultz, in Commuter Rail Update, elucidate what now are the final FRA regulations requiring that by December 31, 2015, commuter and intercity passenger rail lines implement Positive Train Control. Their article is comprehensive yet painstakingly attentive to detail. As a dividend, the authors offer their views on certain facets of this regulatory effort. If you wish, you may extract their treatise from this issue and use it as a handbook of the law on this intricate and unfolding subject.

When does something become something else? Bob Spira and Steve Block our Motor Editors, raise this question in two of the cases they so interestingly discusses. First, an employee stayed home because, if he showed up, he would be at the wheel more hours than allowed. The employer issued a warning letter. Was that an "adverse employment action" under the Surface Transportation Assistance Act? How to decide whether it was? Read the description of the court's holding. The second case: A trucker and his insurer were sued for a fatal accident. The direct action against the insurer was brought under a state statute that excluded motor vehicles used exclusively to transport agricultural products. What does "motor vehicle" mean? Both the tractor and trailer? Or just one? Which one? Does it make a difference that the trailer was owned by the shipper and the tractor belonged to the trucker? What holding? Bob and Steve will tell you.

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



***See the 2010-11 Slate of Officers in the Nominations Report on page 3***

**Monday, May 24th**
*81st Annual Meeting,*
Early Registration Deadline & Hotel Reservations Deadline

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# PRESIDENTS' COLUMN

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## TRANSITION AND CONTINUATION

Dear Members,

How quickly the time passes. Can it really be time for me to be writing my final *Highlights* column as President of the Association? The easy part is recognizing that I can use the same title for my last column as I did for my first.

I expect that I will take advantage of the annual meeting scheduled for June 27-29, 2010, in beautiful St. Michael's (see more information in this issue) to reflect back on the year and how quickly it has gone by, and to give proper thanks to everyone who has made my job easier, but I want to take a few lines here to do so as well.

First, I want to thank my predecessor Melissa Dixon who showed me the ropes of being President, who helped with the transition of leadership, and provided us with the foundation for the initiatives of using our regional vice presidents to strengthen the Association in various ways. And to my successor John Edwards who has been active all year in every event and on every issue we have faced, which will make the transition to his leadership that much smoother.

In addition, I feel compelled to mention all the work that Nick DiMichael has put into the *Journal* this year. Nick formed and led a new Publications Committee beginning last summer, and personally led the effort to drum up articles and sources of articles, and to make sure that they were submitted in a timely fashion. The results of his efforts are apparent – issues are being published on time and as robust (in length and content) as ever. I guarantee that it would not have happened without Nick's efforts. We are all fortunate that Nick has now agreed to serve as Editor-in-Chief of the Journal. I know that he would welcome your thoughts and comments about the *Journal* – articles are certainly welcome as well.

I am disappointed that I have not been better able to get a handle on the erosion of our membership base. Last year was particularly hard as the economy faltered and memberships in organizations such as ours seemed to be an expense that people thought they could live without. I continue to believe that our membership offers a great value for a minimal cost, and I pledge to John to continue to work with the membership committee through the coming year to increase our numbers.

I hope that our upcoming annual meeting and program will spur some of the membership laggards to renew in order to attend the meeting. (Did I mention it is in beautiful St. Michael's, Maryland?) Review the program in this issue of *Highlights*, and you will see the usual timely and interesting program touching all modes and manner of transportation, that the Planning Committee led by Chair Tony Battista and Vice Chair Karyn Booth have put together. We have tried to pick a convenient yet enticing location, with the hope that we can attract an audience that is as strong as the program. This is a wonderful opportunity to interact with your fellow Association members, as well as to earn any CLE credits that you need.

The other important event at the annual meeting, is another aspect of continuation - the holding of our annual elections of officers to lead the Association for the upcoming year. The report of the Nominating Committee led by Melissa Dixon is set forth in this issue of *Highlights.* The nominations will also be presented on Monday morning of the annual meeting, with the vote taking place on Tuesday. You must be present to vote – another good reason to attend.

An annual meeting is only as good as the people who are there to appreciate it. Please try to attend. I guarantee you will find it worth your while.

Thank you all for the opportunity you have provided me to serve as your President. It has been an honor.

I hope to see you all in St. Michael's as I transition the gavel to John Edwards, and we continue to try to push the Association onward and upward.

Eric M. Hocky, President

**NOMINATIONS REPORT 2010-11**

E. Melissa Dixon, *Chair*
*mel@dixoninsurance.com*

**Committee Members:**
Dirk H. Beckwith
Michael F. McBride
Jeffrey O. Moreno

**REPORT OF THE ATLP**
**COMMITTEE ON NOMINATIONS**

**June 27, 2010**

Pursuant to Section 3 of the By-Laws of the Association of Transportation Law Professionals (ATLP), the Committee on Nominations recommends the following slate of candidates for election as officers of the Association at the next annual meeting to be held June 27-29, 2010, in St. Michaels, MD:

| | |
|---|---|
| President-Elect | Myles Tobin |
| Treasurer | Katie Matison |
| Secretary | Cynthia Bergmann |
| Vice President-District 2 | Mick Dragash |
| Vice President-District 4 | Jill Mulligan |
| Vice President-District 5 | Dana Henderson |

The Nominations Committee has thoroughly considered qualified candidates for ATLP's Executive Committee for fiscal year 2010-2011. The committee has decided upon the above named candidates and offers the following information describing their competencies:

**President Elect:** Myles Tobin:
Current Treasurer
Myles Tobin is a partner with the firm Fletcher & Sippel LLC in Chicago. Myles previously held the positions of Vice President – Law, of the Canadian National Railroad and General Counsel of Illinois Central Railroad. Myles practices transportation law, concentrating in railroad and railroad supply chain representation. He has previously served ATLP as District 2 Vice President and is ATLP's current Treasurer. In addition, he served ATLP with distinction as chair of the Program Committee for the 2007 Annual Meeting in Chicago. He has a good understanding of ATLP's organizational needs and demonstrates a strong desire to lead ATLP forward. We have no doubt that Myles would make an excellent President.

**Secretary:** Cynthia Bergmann:
Current District 2 Vice President
Cynthia is a partner with Freeborn & Peters, and before that she was with CN. She has been a member of ATLP for many years, and has contributed considerable time and talent. Cynthia served with distinction as Chair of the Program Committee of the 2009 Annual Meeting, and also as a key member of the 2007 and 2010 Annual Meeting Program Committees. Additionally, she has served on the Membership Committee in 2007, 2008 and 2010. As the current District 2 Vice President, Cynthia has been active on many levels on ATLP's behalf and demonstrates a strong desire to serve. We believe that Cindy is an excellent candidate for the Secretary position.

**Treasurer:** Katie Matison
Current District 5 Vice President
Katie has served as ATLP's District 5 Vice President for two terms. Katie has been instrumental in that capacity and has sponsored several new members from her District. In addition, Katie has been successful in incorporating several members from her District as committee members; these actions have enriched our entire organization. Katie has participated extensively in board activities over the last few years and has demonstrated an understanding of the organizations needs and a commitment to its well being. Her firm, Lane Powell, has taken initiative in supporting ATLP with sponsorships and attendance at ATLP functions, both of which are vital to the success of ATLP. We are confident that ATLP would be well-served by Katie's service as Treasurer.

| | | |
|---|---|---|
| **Vice Presidents**: | District 2: | Mickey Dragash<br>Walmart, Bentonville, Arkansas |
| | District 4: | Jill Mulligan<br>BNSF Railway Co., Fort Worth, Texas |
| | District 5: | Dana Henderson<br>Betts Patterson & Mines PS, Seattle, Washington |

We are pleased to nominate Mickey (Mick) Dragash as District 2 Vice President. Currently, Mick is the Assistant General Counsel, Logistics/Transportation for Walmart. Mick has been a member of ATLP for many years and has contributed as a speaker at several ATLP annual meetings. Mick would bring strong shipper experience to the board and would enrich our ability to better serve the ATLP membership as a whole. We are convinced that Mick would be an asset to ATLP as District 2 Vice President.

We are pleased to nominate Jill Mulligan as District 4 vice president. Jill represented BNSF in private practice before going in-house at BNSF in 2007. Jill has been serving as ATLP's Secretary for the last year and has brought great talent and insight to the board. She has been active on ATLP committees and has attended both the 2008 Annual Meeting in Williamsburg, and the 2009 Annual Meeting in Denver. She is a dynamic individual who is committed to the mission of ATLP. We believe that Jill is an excellent choice for District 4 Vice President.

We are pleased to nominate Dana Henderson as District 5 vice president. Dana is a director at her firm and has more than ten years' experience as a trial attorney. Dana's areas of practice include: commercial litigation, transportation law, employment law, products liability, as well as insurance coverage and bad faith litigation. Her clients include international and national transportation and logistics companies, national product manufacturers and sellers, local business owners, and insurance carriers. Dana brings a wide variety of experience to the table and we believe ATLP would be well-served with Dana in the capacity of District 5 Vice President.

**THE COMMITTEE ON NOMINATIONS**
E. Melissa Dixon, Chair
Michael McBride
Jeff Moreno
Dirk Beckwith

Note: The nominating and voting procedures of the Association can be found on www.atlp.org/About Us/Bylaws

# ANTITRUST

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### *Silence May Not Mean Consent: Antitrust Claims Are Not Subject To Class-Action Arbitration Without Agreement*

Federal law does not compel antitrust defendants to submit to class-action arbitration if they have not agreed to do so, the Supreme Court has ruled, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198 (Apr. 27, 2010). The decision could have far-reaching effects in a number of pending and potential class arbitration proceedings.

The arbitration clause at issue was silent on the question of whether class arbitration was permitted or precluded, and the parties stipulated that there was “no agreement” on the issue. The Supreme Court held, in a 5-3 decision, that the imposition of class arbitration was inconsistent with the Federal Arbitration Act (9 U. S. C. §1 e*t seq.*).

The defendants operate ocean-going parcel tankers, which carry bulk liquids in up to 50 separate compartments, often chartered to separate customers. One defendant, Stolt-Nielsen, previously admitted its role in a price fixing conspiracy with others in the parcel tanker industry, and voluntarily entered the Department of Justice’s Corporate Leniency Program in January 2003. With Stolt-Nielsen’s cooperation, DOJ secured guilty pleas from the other conspirators, who agreed to $62 million in fines and prison terms for several executives.

Stolt-Nielsen’s legal odyssey had only begun, however. Within a few months, DOJ’s Antitrust Division claimed that Stolt-Nielsen had violated the conditions of its amnesty agreement, and sought to revoke its grant of leniency. Stolt-Nielsen initially won a district court ruling enjoining the revocation, but an appellate court reversed that ruling. Stolt-Nielsen eventually won a dismissal of all charges on remand when the district court found "no credible evidence" that the company had violated the terms of its amnesty agreement.

At the same time, private plaintiffs filed a number of antitrust actions against Stolt-Nielsen and other defendants in the parcel tanker industry. These cases were consolidated in Connecticut, and on appeal the Second Circuit eventually held that the claims were subject to arbitration.

The lead plaintiffs demanded class arbitration, seeking to represent all purchasers of parcel tanker services from the defendants globally during the relevant period. The parties agreed to submit the question of class arbitration to a panel of three arbitrators, and stipulated that the arbitration clause made no express reference to class arbitration. Moreover, the parties agreed that not only was the contract “silent” on class arbitration, but that they had reached no agreement on that issue.

The panel of arbitrators concluded that the arbitration clause did allow for class arbitration. The defendants sought judicial review, and the district court vacated the award, finding that it was made in “manifest disregard” of choice-of-law principles and federal maritime law. The Second Circuit reversed, holding that neither federal maritime law nor New York law supported a rule against class arbitration.

Justice Alito’s opinion for the Court noted the “high hurdle” facing the defendants, stating that it “is not enough for petitioners to show that the panel committed an error—or even a serious error.” But under the FAA, he wrote, arbitration decisions may be vacated if the arbitrator exceeded his powers, because “the task of an arbitrator is to interpret and enforce a contract, not to make public policy.”

Because the parties had not agreed on the issue of class arbitration, the Court said, the arbitrators should have inquired whether the FAA, maritime law, or New York law contained a default rule allowing class arbitration in the absence of express consent. But the arbitration panel "proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation," the Court said. "The conclusion is inescapable," the Court added, "that the panel simply imposed its own conception of sound policy."

The parties' stipulation "left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task," the Court said. Under the FAA, arbitration "is a matter of consent, not coercion," the Court said, and its primary purpose is to ensure that "private agreements to arbitrate are enforced according to their terms." Courts and arbitrators must "give effect to the contractual rights and expectations of the parties," the Court's opinion said, and "as with any other contract, the parties' intentions control."

Based on these principles, the Court held, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." An "implicit agreement to authorize class-action arbitration," the Court said, " is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." Class-action arbitration "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."

For these reasons, Justice Alito wrote, "the differences between bilateral and class action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." Because the parties reached no agreement on this question, he concluded, they cannot be compelled to submit their dispute to class arbitration.

In dissent, Justice Ginsburg, joined by Justices Breyer and Stevens, argued that the arbitrators' decision on class arbitration was not ripe for judicial review. The dissent also argued that under the FAA, the question before the Court was not whether the arbitrators' ruling was erroneous, but whether the arbitrators "exceeded their powers." Because the parties had agreed to submit the class-arbitration issue to the arbitration panel, Justice Ginsburg wrote, that referral "undoubtedly empowered the arbitrators to render their clause-construction decision."

The dissent also argued that the arbitrators had not disregarded contractual constraints, because the proposed class arbitration would include only "claims . . . arising out of any [agreement] . . . that provides for arbitration," and would adjudicate only the rights of persons with whom Stolt-Nielsen had agreed to arbitrate. For these reasons, the dissent concluded, the arbitrators' decision should have been confirmed.

The Court's decision in *Stolt-Nielsen* could have important implications in a variety of pending and potential class arbitration proceedings. The Supreme Court has already relied on *Stolt-Nielsen* (just six days after it was handed down) in vacating an opinion by the Second Circuit that would have allowed class arbitration of antitrust claims brought by a group of merchants against American Express. *See American Express Co. v. Italian Colors Restaurant*, No. 08-1473 (May 3, 2010).

# AVIATION

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## *The Volcanic Ash Airspace Shutdown: Questioning the Limits of Air Carriers' Obligations to Passengers in Extraordinary Circumstances*

In April 2010, the airline industry experienced the biggest flight disruption since the 9/11 terrorist attacks in 2001. The eruption and ash emissions of the Eyjafjallajokull glacier in Iceland caused an unprecedented lockdown of northern European air space, lasting for six days and resulting in the grounding of 100,000 flights and leaving 10 million people stranded. To date, "ashmaggedon," as it became known, has cost the airline industry reportedly more than $1.7 billion, with additional losses expected as shutdowns continue in localized areas. No small part of this cost came from an international law, which requires that airlines provide care and assistance to passengers whose flights are cancelled or subject to long delays.

This column addresses an airline's obligations to passengers under European Union law in these exceptional circumstances and, as a point of comparison, analyzes the obligations of airlines subject to U.S. law.

### *An Airline's Obligations to Passengers under European Union Law*

EU-registered air carriers and airlines that operate flights from EU airports are subject to EC Regulation 261/2004, governing passenger rights. EC Regulation 261/2004 requires airlines to pay for passengers' hotel accommodation, meals and refreshments and to either reimburse fares in the case of cancelled flights or re-route passengers to their final destinations using comparable transportation. There is no express limit on the duration over which these obligations persist, and airlines are not exempt from these obligations even in "extraordinary circumstances."

The unprecedented six-day shutdown of airspace clearly tested the limits of these obligations. Many airlines, particularly low-cost carriers, opposed application of the rules to the circumstances, arguing they were not designed to cover the unprecedented situation of having much of Europe turned into a no-fly zone. On the other end of the spectrum, passengers are questioning whether the regulations provide sufficient relief. For instance, the airspace shutdown forced many stranded passengers to take time off work, leading some to question whether they should be able to recover additional compensation to cover lost wages.

While it is yet to be seen whether the event will cause the European Commission to reassess the boundaries of the regulations, airlines affected by the volcanic ash, or a similar exceptional event, have been able to take steps to mitigate damages. For instance, affected airlines that notified passengers in advance not to travel to the airport of departure could be relieved of the obligations regarding assistance and care. Additionally, the European Commission has made clear that, given the "exceptional circumstances" of the volcanic ash situation, passengers are not entitled to the additional compensation that would be available to them if the airlines had been at fault for the flight cancellations.

Nevertheless, as affected airlines look ahead to the numerous claims for hotel and food reimbursements, it seems likely that the European Commission will be pressured to review the impact that the current regulations have on airlines in extraordinary circumstances.

### *Airlines' Obligations to Passengers Under U.S. Law*

The enormous impact the volcanic ash had on the airline industry has led all airlines, including U.S.-based airlines unaffected by the EU regulations, to review their obligations to accommodate passengers and refund fares in the event of extraordinary flight delays and cancellations.

Unlike the EU, U.S. law does not mandate airlines to accommodate or refund money to passengers. Rather, U.S. regulation 14 C.F.R. § 221.2 only requires carriers to abide by the terms of their conditions of carriage with respect to accommodations and fare refunds. Accordingly, an airline's obligations to its passengers is governed by contract law.

### *Airline Liability in U.S. Courts*

Absent a contractual requirement, it is unlikely that a U.S. court would order an airline to compensate stranded passengers whose transportation was affected by the volcanic ash.

For one, under U.S. law, the rights of passengers affected by the volcanic ash would most likely be governed by the Warsaw or Montreal Conventions, both of which limit damages arising from the delay of an international flight and exempt airlines from liability in extraordinary circumstances, including inclement weather. One U.S. court has, in fact, held that an airline is not liable for damages caused by delay of transportation when volcanic activity prompted the government to shut down air traffic. A passenger seeking to enforce the EU regulation in a U.S. court would also find little relief, as U.S. courts are not likely to entertain claims brought under EU law on grounds of international comity and *forum non conveniens*.

### *Conclusion*

The ultimate impact that the volcanic ash situation has on the aviation industry is yet to be seen. Certain airlines still remain grounded after nearly three weeks since the initial airspace shutdown. Moreover, passengers are just beginning to submit claims for travel reimbursements, which, in all likelihood , will prompt further debate, and

## COMMUTER RAIL UPDATE

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### *Positive Train Control: Final Rule and Implementation Plans*

#### *Introduction*

The song possibilities are endless – how about (with apologies to Hoagy Carmichael and Ray Charles) "Just an old sweet law/Keeps PTC on my mind…" Since the passage of the Rail Safety Improvement Act of 2008 ("RSIA"), Positive Train Control ("PTC") has been the focus of enormous energy and work to achieve an understanding of how to make the system work both from a regulatory and a practical perspective. This column addresses the *highest* speed initiative in the rail industry these days: the implementation of PTC systems on commuter and intercity passenger lines and on certain freight corridors.

On January 15, 2010, the Federal Railroad Administration ("FRA") issued its final rule governing the implementation of PTC. 75 Fed. Reg. 2598. The final rule implements the requirements set forth in Section 104 of the Rail Safety Improvement Act of 2008 ("RSIA") (codified at 49 U.S.C. § 20157) that PTC be installed and operating by December 31, 2015, on the "main line" of (a) all commuter and intercity passenger rail lines and (b) all Class I railroads carrying any amount of poisonous-by-inhalation ("PIH") material. The final rule became effective on March 16, 2010, and each railroad required to install PTC before the December 31, 2015, deadline was required to submit its PTC Implementation Plans ("PTCIP") to FRA no later than April 16, 2010, as discussed in greater detail below. The regulations implementing PTC appear at 49 C.F.R. Parts 229, 234, 235 and 236.

PTC is technology designed to prevent collisions and other incidents by automatically detecting and controlling the movement of trains. Section 20157(i)(3) of 49 U.S.C. defines PTC as "a system designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position". Using GPS technology to transmit signals, a PTC system employs equipment in locomotives to detect the position and relation of the train to other objects, including track obstructions, equipment at a control center to broadcast authority for train movements, and wayside interface units to transmit the position of switches and monitor the condition of track.

#### *General Requirements*

The relevant timeframe for implementing PTC has already begun. Each railroad required to have a PTC system in operation by December 31, 2015, was required to submit its PTCIP to FRA no later than April 16, 2010. The PTCIP must describe where and how the railroad will install PTC systems, define the relevant circumstances under which the railroad operates, describe relevant risks, and propose the elements to be included in the system. Where freight and commuter operations share a corridor, the railroads must jointly submit a PTCIP. 49 C.F.R. § 236.1009 (a)(3). FRA will then review and approve the PTCIP and its ancillary components, the PTC Development Plan ("PTCDP"), to describe the system's components in detail, and the PTC Safety Plan ("PTCSP"), covering system procedures. Once FRA has approved the proposed PTC system, the railroad must implement PTC progressively, bringing elements into operation as they are ready, until the full system is complete no later than December 31,

2015. 49 U.S.C § 20157(a)(1); 49 C.F.R. § 236.1005(b)(1).

All Class I freight carriers are required to install PTC on their main lines over which any amount of PIH materials are transported (49 U.S.C. § 20157(a)(1)(B); 49 C.F.R. § 236.1005(b)(i)). Each railroad, whether passenger or freight, providing or hosting regularly scheduled intercity passenger service (i.e., Amtrak) or commuter passenger service is required to install PTC on its main line, subject to limited exceptions, all according to the schedule set out in the preceding paragraph. 49 U.S.C § 20157(a)(1). In addition, the RSIA requires FRA to enact regulations no later than Oct. 16, 2012, requiring a railroad safety risk reduction program, which may include PTC, to be submitted by (a) a Class I freight, intercity passenger provider or commuter passenger operator not required to install PTC under 49 U.S.C § 20157, and (b) railroads that FRA determines have an inadequate safety record. 49 U.S.C § 20156. If a railroad in this second-stage grouping elects to propose PTC as part of its technology package under its risk reduction plan, it must commit to implementing PTC by December 31, 2018. 49 U.S.C. § 10156(e)(4).

The "main line" over which PTC must be installed is defined for freight railroads as "a segment or route of railroad tracks over which 5 million or more gross tons of railroad traffic is transported annually". 49 U.S.C. § 20157(i)(2). FRA establishes 2008 as the base year for determining the volume of traffic over a freight line and, therefore, whether the line qualifies as a main line for the purposes of the requirement to install PTC. This designation was controversial among the freight railroads, who argued that 2008 was a peak traffic year and that economic conditions since then have deteriorated markedly. FRA considered these objections but ultimately concluded that, since 2008 was the year in which Congress enacted RSIA, it best reflects the conditions under which Congress passed the legislation. 75 Fed. Reg. 2623. FRA also observes that the freight main line definition "adequately defines the core of the national freight rail system", but that distortions exist at both ends of the risk spectrum. At the low-risk end, PTC is required on low volume, low speed lines over which PIH materials are carried, despite low objective risk. At the high-risk end, PTC is not currently required to be installed on high-volume lines that carry no PIH or passenger traffic, primarily in urban areas. 75 Fed. Reg. 2646. RSIA grants FRA the discretion to define additional lines as main lines over which it may require PTC installation (49 U.S.C. § 20157(i)(2)(A)), but at this time FRA takes the position that it expects such high-risk gaps will be filled in voluntarily by railroads as part of their risk reduction programs as PTC is refined over time. 75 Fed. Reg. 2646.

For passenger intercity and commuter railroads, a main line is any intercity or commuter passenger line. This definition is not affirmatively set forth in the regulations, but is expressed by implication as the "'rule' that trackage over which scheduled intercity and commuter passenger service is provided is considered main line track requiring installation of a PTC system". 49 C.F.R. § 236.1019(a).

Exceptions to the main line definitions, under which specific segments of track may be designated as "not main line", are available only to passenger intercity or commuter passenger railroads or freight railroads conducting joint passenger and freight operation over the same segment of track. 49 C.F.R. § 1019(a). To be eligible for an exception, a railroad must file a main line track exclusion addendum ("MTEA") to its PTCIP. These exceptions fall into two broad categories:

- Passenger terminal exceptions (49 C.F.R. § 1019(b)): This exception applies to trackage used exclusively as yard or terminal track by or in support of regularly scheduled intercity or commuter passenger service, subject to the following requirements:
    - The MTEA must describe in detail physical boundaries of the trackage in question, its use and characteris tics including track and signal charts;
    - The maximum authorized speed must not exceed 20 mph and must be enforced by any available on board PTC equipment;
    - Interlocking rules must be in effect prohibiting reverse movements other than on signal indications with out dispatcher permission; and
    - Either: (a) no freight operations are permitted or (b) freight operations are permitted but no passengers will be on board within the specified area.
- Limited operations exceptions, which may include areas of mixed passenger-freight operation (49 C.F.R. § 1019(c)): This exception applies to trackage used for limited operations by at least one passenger railroad where one of three sets of conditions obtains:

- (a) (i) all trains are limited to restricted speed; (ii) temporal separation of passenger and other trains is maintained; or (iii) passenger service is conducted under a risk mitigation plan submitted by all railroads involved in the joint operation and approved by FRA; or
- (b) passenger service is operated on a segment of track of a freight railroad that is *not* a Class I railroad on which less than 15 million gross tons of freight traffic is transported annually and on which either (i) the segment is unsignaled and no more than four regularly scheduled passenger trains are operated during a calendar day or (ii) if the segment is signaled, no more than 12 passenger trains operated during a calendar day; or
- (c) not more than 4 passenger trains per day are operated on a segment of track of a Class I freight on which less than 15 million gross tons of freight traffic is transported annually.

***Technical Requirements***

One essential characteristic of PTC systems is interoperability. While the term generally implies that all PTC systems will be able to work everywhere on the nation's rail network, 49 U.S.C. § 20157(i)(1) defines interoperability specifically as "the ability to control locomotives of the host railroad and tenant railroad to communicate with and respond to the PTC system, including uninterrupted movements over property boundaries." The host railroad is a railroad that has "effective operating control over a segment of track". 49 C.F.R. § 236.1003(b). The host railroad is the party responsible for PTC planning and filing requirements (e.g., 49 C.F.R. § 236.1009), installing PTC (49 C.F.R. § 236.1005(b)), and with respect to attributes of PTC systems for high-speed rail operations (49 C.F.R. § 236.1007). "Effective operating control" includes the right to determine who operates over the lines and under what conditions, even if another railroad has day-to-day responsibility for dispatching. 75 Fed. Reg. 2610.

In devising its PTC system, each railroad is required to address areas of greater risk prior to areas of lesser risk. 49 U.S.C. § 20157(a)(2). Pursuant to 49 C.F.R. § 236.1005, each PTC system must reliably and functionally prevent:

- Train-to-train collisions, which include collisions at rail-to-rail at-grade crossings, for which an interlocking signal arrangement is required;
- Overspeed derailments;
- Incursions into established work zones; and
- Movement of a train through a main line switch in the improper position.

The system must also:

- Include safety-critical integration of all authorities and indications of a wayside or cab signal system;
- Provide an appropriate warning or enforcement in response to authority or hazard detection;
- Limit the speed of passenger trains to 59 mph and freight trains to 49 mph in areas without broken rail detection or equivalent safeguards; and
- Ensure that, in controlling the movement of trains in response to an incident, the system brings the train to a safe state (or fail-safe condition), a system state that, when the system fails, cannot cause death, injury, occupational illness, or damage to or loss of equipment or property, or damage to the environment (49 C.F.R. § 236.1003(b)).

No later than December 31, 2015, 49 C.F.R. § 236.1006 requires that every locomotive operating on any track segment equipped with a PTC system meet the following requirements: a train operated by a Class II or Class III railroad, including tourist or excursion railroad, and controlled by locomotive NOT equipped with PTC may operate on a PTC-operated track segment that (a) has no regularly scheduled intercity or commuter passenger rail traffic OR (b) has regularly scheduled passenger traffic and the PTCIP permits the operation of a train operated by a Class II or Class III railroad and controlled by a locomotive not equipped with PTC apparatus; operations are limited to four or fewer such unequipped trains per day; where each movement is either (a) less than 20 miles in length or (b) where movement is more than 20 miles in length, locomotives must be equipped with PTC prior to Dec. 31, 2020.

The final rule adds a new Subpart I to the regulations at 49 C.F.R. Part 236, which contain the requirements for installing, inspecting, maintaining and repairing signal and train control systems, devices and appliances. Subparts

A through G of 49 C.F.R. Part 236, which govern elements aside from PTC, continue to apply. Where an issue is not specifically addressed in the new PTC provisions, the requirements set forth elsewhere in Part 236 will apply.

***Technical Requirements***

A railroad's complete PTC proposal will consist of three components respectively describing the general disposition, components and operating procedures for the system. FRA will establish a public docket for each PTC application. 49 C.F.R. § 236.1011(e). Although the first two components, the PTC Implementation Plan and PTC Development Plan, were due to FRA no later than April 16, 2010, the PTC Safety Plan may be submitted later. 49 C.F.R. § 236.1009(b). Upon receiving a railroad's PTCIP, FRA must approve or disapprove the PTCIP within 90 days, provide an explanation of any disapproval in writing, and permit the railroad to refine and resubmit its PTCIP within 30 days. 49 C.F.R. § 236.1011(c). For PTC proposals submitted after April 16, 2010, the PTCDP must precede or accompany the PTCIP, with the PTCSP permitted to follow. 49 C.F.R. §§ 236.1009(b), (c).

***PTC Implementation Plan***. The PTCIP (49 C.F.R. § 236.1011) sets out the general strategy for the proposed PTC system and must describe the following aspects of the system:

- The functional requirements of the proposed system
- How the railroad will comply with FRA's procedural requirements for plan submission
- How the proposed system will provide interoperability
- How the system will address areas of greater risk before areas of lesser risk
- Rolling stock description and schedule for PTC installation
- Number of wayside devices
- Identification of each track segment under the railroad's control as main line or non-mainline
- Whether risk-based prioritization is not practical, and why
- Dates on which the railroad will submit PTCDP and PTCSP

***PTC Development Plan***. In order to establish the system's components, the railroad must submit a PTCDP or specify a Type Approval based on a previously-approved PTCDP. 49 C.F.R. § 236.1013. The PTCDP is the core document through which railroads provide FRA with sufficient information to determine whether a proposed PTC system's operational characteristics could meet statutory requirements. The PTCDP must provide a complete description of the proposed system, including a list of all system components and their interrelationships. The Type Approval, identified by number, is a means of standardizing an assembly of PTC system components described in a PTCDP. Once FRA has reviewed and approved a PTCDP, it will, upon the request of the applicant railroad, issue a Type Approval number, which will remain valid for five years. Another railroad may specify an existing Type Approval in lieu of an individually-devised PTCDP to describe its PTC system components. FRA emphasizes that it will issue Type Approvals for whole PTC systems, but not for individual components or assemblies of components that do not comprise a complete system. 75 Fed. Reg. 2610-2611; 49 C.F.R. § 236.1013(b). A railroad may propose a previously-issued Type Approval in support of its planned PTC installation only if it makes no modifications to the Type Approval. If the applicant railroad submits a PTCDP, FRA must approve, approve with conditions, or deny the PTCDP within 60 days of filing. 49 C.F.R. § 236.1009(j)(2)(i). If FRA fails to timely review a PTCDP, the proposed plan will *not* be deemed approved. Rather, FRA will provide a written explanation for any delay and propose a projected date for action. The PTCDP must include the following:

- A description of the railroad operations or categories of operations on which the PTC system is designed to be used, such as –
    - Train movement density
    - Operating speeds
    - Track characteristics
    - Railroad operating rules
- A list of PTC functions to enhance or preserve safety
- A human factors analysis
- A description of how the system will enforce authorities and signal indications

***PTC Safety Plan***. Finally, the PTCSP describes the procedures governing operation of the proposed PTC system and how the components described in the PTCDP will be deployed. 49 C.F.R. § 236.1015. The PTCSP is the document that FRA relies on to determine whether the proposed system fulfills the statutorily-mandated PTC functions. Approval of the PTCSP is the final prerequisite for FRA to issue a PTC System Certification, which FRA must issue before a railroad can place its PTC system in service. FRA will approve, approve with conditions, or deny a PTCSP within 180 days of filing. 49 C.F.R. 236.1009(j)(2)(ii). The PTCSP must contain the following elements:

- A hazard log, a comprehensive description of all safety-relevant hazards to be addressed during the life cycle of the PTC system
- A risk assessment and hazard mitigation analysis
- A description of the railroad's training plan for employees and contractors
- Complete descriptions of specific procedures and test equipment to be used
- A safety analysis to determine whether, when the system is in operation, any risk remains of an unintended incursion into a roadway work zone due to human error – if any risk remains, a description of the railroad must submit a mitigation strategy
- Elimination of any potential for single-point human failure

In response to its review of the PTCDP and PTCSP, FRA may require independent third-party verification and validation of the proposed PTCSP. 49 C.F.R. § 236.1017; 49 C.F.R. § 236.913.

### *PTC and Passenger Operations*

The statutory requirements governing intercity or passenger rail service and PTC are clear and stringent. First, no *new* intercity or passenger rail service may commence after Dec. 31, 2015, until a PTC system has been certified, installed, and made operative. 49 C.F.R. § 236.1005(b)(6). However, in recognizing that introducing PTC on an operating passenger line will involve different coordination and implementation issues than planning and implementing PTC on a line that has not commenced operation, FRA has indicated some willingness to be flexible in considering circumstances affecting existing operators. "FRA agrees that the remedy associated with any delays in completing PTC system installation should be determined based upon circumstances at the time and without disfavoring passenger service in relation to freight service." 75 Fed Reg 2623.

FRA's statement also signals the agency's recognition that the statutory requirement to provide PTC is broader for intercity and commuter rail operators than it is for freight railroads. Whereas all intercity and passenger lines (and freight lines that carry any intercity or commuter passenger traffic) are deemed to be "main lines" requiring the installation of PTC, freight lines without any passenger traffic must satisfy two criteria before they trigger the PTC installation requirement: (a) a line must carry at least 5 million gross tons of freight traffic annually (measured as of 2008) and (b) must carry any amount of PIH materials. In response to comments from Amtrak and commuter rail operators during the rulemaking comment period, FRA noted that, for intercity and passenger rail operations already in service, "FRA agrees that the remedy associated with any delays in completing PTC system installation should be determined based upon circumstances at the time and without disfavoring passenger service in relation to freight service". *Id*.

Where an intercity or commuter passenger operation shares track with a freight railroad that would be required to independently install PTC, 49 C.F.R. § 236.1009(a)(3) requires all railroads sharing the corridor to submit a joint PTCIP. The regulations set out this requirement in terms of "host" and "tenant" railroads, which may also apply to circumstances involving multiple freight operators, to specify the conditions triggering joint submission of a PTCIP: (a) if the host railroad is required to install and operate a PTC system on a segment of its track; and (b) if the tenant railroad that shares the same track segment would have been required to install a PTC system if the host railroad had not otherwise been required to do so. If the railroads fail to agree on a PTCIP to be jointly filed, each must file its own PTCIP, notify FRA that they were unable to agree, and provide FRA with a comprehensive list of issues not in agreement between the railroads that would prevent the subject railroads from jointly filing the PTCIP. 49 C.F.R. § 236.1009(a)(3). Civil penalties, currently set at up to $5,000 (or $7,500 for a willful violation), may apply if freight and passenger operators fail to reach agreement on joint filing. 49 C.F.R. Part 236, Appendix A.

### *Federal Preemption*

FRA has been updating the preemption provisions of its regulations (i.e., 49 C.F.R. § 236.0(i)) to conform to 49 U.S.C. § 20106, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53. This preemption statement clarifies the role of the federal government, not the states, as the regulator of railroad safety in order to promote national uniformity. The final rule adds the following provisions to Part 236:

- 49 C.F.R. § 236.0(i)(1) – This statement provides that the final rule preempts any state law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is –
    - necessary to eliminate or reduce an essentially local safety or security hazard;
    - is not incompatible with a law, regulation, or order of the United States Government; and
    - that does not impose an unreasonable burden on interstate commerce.

- 49 C.F.R. § 236.0(i)(2) – A statement providing that the final rule establishes a federal standard of care for railroad signal and train control systems. This provision is intended to ratify the preemptive reach of federal safety standards by imposing a federal standard of care, but by permitting tort actions for damages to proceed under state law using that federal standard of care.
    - This section provides that the final rule does not preempt an action under state law seeking damages for personal injury, death or property damage alleging that a party has failed to comply with the federal standard of care established by Part 236, including a plan or program required by that part.
    - This section also specifies that provisions of a plan or program exceeding the requirements of Part 236 are not included in the federal standard of care.
- FRA emphasizes that the preemption provisions do not seek to preempt a plan, rule, or standard adopted by a regulated entity that voluntarily exceeds the federal standard of care. "Federal law does not require that the law be surpassed and, past the point at which the requirements are satisfied, says nothing about its adequacy." 75 Fed. Reg. 2608.

### *High-Speed Rail and PTC*

The final rule anticipates the implementation of PTC systems as the nation's high-speed rail ("HSR") corridors develop. The regulations at 49 C.F.R. § 236.1007 address the requirements for PTC systems on track in increasing speed increments. As a blanket requirement, as of December 31, 2015, the method of protecting HSR operations will be through the use of PTC. 49 C.F.R. § 236.0(d)(2).

- For a railroad required to install PTC that conducts freight operation at or above 50 mph or passenger operation at or above 60 mph, the PTC system must include or work with technology that includes "all of the safety-critical functional attributes of a block signal system, including appropriate fouling circuits and broken rail detection" or equivalent safeguards (49 C.F.R. § 236.1007(a));
- A host railroad that conducts freight or passenger operation above 90 mph must install PTC according to the criteria for 50 mph freight/60 mph passenger operations, and must additionally satisfy specifically-required fail-safe criteria (49 C.F.R. § 236.1007(b)); prevent unauthorized or unintended entry onto the main line from any track not equipped with PTC; and provide specific justification for any deviation from the operating limitations generally required for en-route failures;
- A host railroad that conducts freight or passenger operation above 125 mph must meet the requirements for operations over 90 mph and must also obtain a "HSR-125" approval from FRA. The HSR-125 approval will establish that (a) the system will operate at a level of safety comparable to that achieved over the preceding 5 years by then-existing PTC systems with similar technical and operational characteristics either in the United States or in a foreign country and (b) the system is designed to detect incursions into the right-of-way, "including incidents involving motor vehicles diverting from adjacent roads and bridges" (49 C.F.R. § 236.1007(c));
- A host railroad conducting freight or passenger operation above 150 mph must install a PTC system satisfying all of the criteria applicable to the foregoing high-speed categories and will be governed by a specifically-promulgated Rule of Particular Applicability.

The regulations provide Amtrak some relief from the application of the HSR-related PTC provisions. Under 49 C.F.R. § 236.1007(d), "[a] railroad providing existing high-speed passenger service" may, in its PTCSP, request that the FRA excuse compliance with one or more requirements of Section 237.1007 on a showing that the existing service "has been conducted with a high level of safety." The regulations do not provide a definition of "existing high-speed passenger service" or set forth the time period or criteria for demonstrating the required "high level of safety."

### *Implementation Costs*

Nobody disputes that installing and maintaining PTC technology will be an expensive proposition. FRA has estimated the cost to freight railroads alone of implementing PTC at $2.3 – 5 billion. FRA's own estimates of PTC's cost:benefit ratio are on the order of 15:1. FRA Regulatory Impact Analysis of Positive Train Control, at 51 (Dec. 8, 2009). Nevertheless, FRA characterizes RSIA's imposition of PTC requirements as a "public policy decision that, despite implementation costs, railroad employee and general public safety warranted mandatory and accelerated installation and operation of PTC systems". 75 Fed. Reg. 2602.

Freight railroads, Amtrak, and commuter operators alike have expressed concern about the cost of PTC technology and where the money might come from to pay for it. No funding for PTC is currently proposed in either the House or Senate version of pending transportation reauthorization legislation, and Congress provided no money for PTC implementation in the stimulus package. Without elaborating, FRA has concluded that the final rule "would not impose any direct compliance costs on state and local governments". 75 Fed. Reg. 2696. This may come as some surprise to state and regional passenger rail agencies who undoubtedly face very high costs to implement PTC.

In the absence of any Congressional proposals for funding PTC, FRA has pointed railroads to such potential funding sources as FRA's Railroad Rehabilitation and Improvement Financing loan program, private financing, public bond authority, state and federal appropriations, FTA formula grants, and funds made available in the American Recovery and Reinvestment Act of 2009, with the admonition that "it is the responsibility of each public and private railroad to determine appropriate funding sources to meet its needs". 75 Fed. Reg. 2609.

### *PTCIP Submissions*

As of the publication of this article, FRA had opened dockets for the PTCIPs and related submissions of two-thirds of the nation's 21 commuter rail operators. A detailed discussion of the PTCIPs released so far is beyond the scope of this article. However, a few general points are in order:

- Most commuter operators have applied for Mainline Track Exclusion Addenda for yards, passenger terminal, and limited operations areas. However, the territory covered by such potential exceptions to the PTC installation requirements appears quite limited.
- Although 49 C.F.R. § 236.1009(a)(3) requires the commuter operator and any host or tenant freight railroad to jointly submit a PTCIP, all of the commuter properties to which the joint-submission requirement would apply have submitted evidence of ongoing negotiation with their hosts and/or tenants to address interoperability, but no fully joint PTCIPs.
- A number of commuter systems share track with both Class I freight railroads and Amtrak, who have, over time, developed independent frameworks as the precursors to the currently-required PTC regimes. The PTCIPs available so far reflect that commuter operators, in their efforts to achieve interoperability with their host and tenant railroads, must address sometimes divergent design criteria. In at least one instance where a commuter operator, Amtrak and freight railroads all share a track, a tenant freight railroad has indicated to the host passenger operator that "Amtrak's ACSES II [Advanced Civil Speed Enforcement System] [is] not compatible with the Interoperable Train Control System being developed by the Class I freights." Letter of Gerhard A. Thelen, Norfolk Southern Railway, to Wayne Staley, Metro-North Railroad, March 23, 2010, MetroNorth Positive Train Control Implementation Plan, Vol. 1, Sec. 14.2, Appendix D, FRA-2010-0032-0002, April 16, 2010.

From the initial submissions of PTCIPs, it is clear that PTC proposals are works in progress, requiring railroads to address a shifting matrix of technical and coordination demands in order to craft PTC systems that are internally coherent and interoperable with other systems.

### *Observations*

In the final rule, FRA acknowledges that the highly compressed rulemaking and evaluation schedule mandated by RSIA and limitations on FRA's technical staffing resulted in choices that FRA might not have made if it had had more time or internal resources. During the comment period, a number of manufacturers and suppliers requested that FRA review and approve individual system components or assemblies that railroads could then specify as part of their proposed PTC systems. FRA declined to do so, citing the "inherent difficulty associated with addressing the safety of technology below the system level, and the critical need to provide rapid responses to the necessary filings." 75 Fed Reg 2605. However, the statute governing PTC implementation appears to authorize FRA to evaluate and approve PTC technology at the component level. The statute provides:

> The Secretary shall not permit the installation of any positive train control system *or component* in revenue service unless the Secretary has certified that any such system *or component* has been approved through the approval process set forth in part 236 of title 49, Code of Federal Regulations, and complies with the requirements of that part.

49 U.S.C. § 20157(h) (emphasis added).

Accordingly, FRA's decision to issue Type Approvals only for whole systems rather than system components appears to have resulted from time constraints rather than from any limitation on its authority under RSIA.

In order to issue the final rule as quickly as possible but not to foreclose consideration of relevant issues, FRA is soliciting further comments limited to "increasing the clarity, certainty, and transparency of the criteria" governing relief from PTC requirements for freight carriers. *Id*. FRA has not yet announced a timetable for receiving and responding to additional comments, "[s]ince these issues should not affect the PTCIP required to be filed by April 16, 2010." *Id*. at 2606.

The final rule does not address the bandwidth over which PTC signals will be transmitted, or propose any revisions to the existing radio communications requirements at 49 C.F.R. Part 220. As a result, how PTC bandwidth will be allocated and the mechanics and costs of gaining access to the radio space required for a particular railroad's PTC system are not yet determinable. The Southern California Regional Rail Authority ("SCRRA") filed a request with the Federal Communications Commission to use part of the spectrum reserved for maritime uses for SCRRA's PTC transmissions. *See* FAA Public Notice in WT Docket No. 10-83 (March 29, 2010). This proceeding was pending as of the publication of this article, but provides an example of how railroads are attempting to address the need for bandwidth in the absence of general regulatory actions.

RSIA vests FRA with considerable discretion in connection with the promulgation of rules governing PTC systems, and the review and approval of those systems. RSIA directs FRA simply to "prescribe regulations or issue orders necessary to implement this section" (49 U.S.C. § 20157(g)), and prohibits FRA from permitting any PTC system to be used in revenue service unless FRA has certified "that any such system or component has been approved through the approval process set forth in part 236 of title 49, Code of Federal Regulations" (49 U.S.C. § 20157(h)). For example, in approving any component of a railroad's PTCIP, FRA may, "as necessary for safety, attach special conditions to approving any a PTCIP or issuing a Type Approval or PTC System Certification." 49 C.F.R. § 236.1009(g). Several areas of considerable uncertainty characterize the enterprise on which FRA and much of the railroad industry is about to embark:

- PTC is essentially a new regulatory regime. Railroads have very little agency precedent to guide them in evaluating how FRA is likely to respond to a given proposal.
- PTC technology is emerging. In fact, the current generation of system strategies is so new that FRA revised the sequence of submittals for the April 16, 2010, round of PTCIPs in response to numerous comments that railroads would not have enough information about potential system components in order to submit PTCSPs simultaneously.
- Very little exists in the way of objective standards. This observation goes hand-in-hand with the discretion granted to FRA in RSIA. For example, FRA intentionally structured requirements to be performance-based in order to foster innovation, but criteria for determining the goal of a "safe system" are

nebulous, and, as a practical matter, the technical requirements appear to favor those manufacturers who have been involved in developing today's existing train control systems.

- It is not clear how long it will take for FRA to review and approve a PTCIP. The regulations contain timelines for FRA review, but at this point there is no way to gauge how many passes will be required for a railroad to fine-tune its PTC proposal to FRA's satisfaction.

### *Practical Considerations for Commuter Operators*

Finally, there are some very general, very practical items for commuter operators to consider as they implement PTC.

Coordinate early and often with FRA. The PTC requirements mandated by RSIA constitute a great deal of new territory for the agency. Although PTCIPs and PTCDPs for existing passenger operators were due on April 16, 2010, FRA permits the PTCSP to be filed later. Establishing a dialogue with FRA as it reviews these key documents will likely benefit the individual applicant agency and the review process as a whole.

In negotiating shared use arrangements with freight railroads, it is worth remembering that the presence of passenger service on a joint use corridor will not absolutely trigger the installation of PTC for the freight railroad. This determination requires careful analysis of operating conditions and whether the exemptions available to passenger operators apply. FRA does not stipulate who should pay for what, leaving the allocation of PTC costs among railroads sharing a line to be negotiated on a case-by-case basis. 75 Fed. Reg. 2612. Accordingly, commuter operators should evaluate their existing obligations for signal upgrades and the potential impact of the final rule on future contract revisions or renewals.

Given the high cost and technical complexity of PTC technology, there is bound to be some dispute over cost allocations. The final rule provides no dispute resolution mechanism, again leaving the parties to work out their differences as private actors. FRA explicitly notes that it is "not obligated to act as either a mediator or arbitrator . . . and expects that the disputing parties will submit such issues to a mutually acceptable mediator or arbitrator." 75 Fed. Reg. 2638. However, the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), RSIA's companion legislation, may provide a forum for such mediation. Section 401 of PRIIA, codified at 49 U.S.C. §§ 28501-28505, contains provisions governing non-binding mediation by the STB of "trackage use requests" or an effort by a commuter rail operator to "acquire an interest in a railroad right-of-way for the construction and operation of a segregated fixed guideway facility to provide commuter rail passenger transportation." It appears reasonable that railroads in dispute over the provision of PTC could engage in non-binding mediation under the auspices of the STB, the results of which could be presented to FRA.

Almost everything remains to be seen when it comes to PTC. However, as FRA embarks on the review and approval of PTC systems for both freight and passenger railroads, the public docket for each system should allow interested parties to follow the process and gain some insight into FRA's approach to PTC.

## Federal Energy Regulation Commission

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### *FERC Proposes to Permanently Lift Price Caps on Reassignment of Transmission Capacity*

In its Order No. 888, issued in 1996, the Federal Energy Regulatory Commission ("FERC") required that transmission providers allow their customers the ability to reassign transmission capacity. To address concerns regarding the competitiveness of the market for transmission capacity reassignment, FERC capped the price transmission customers could charge for reassignments. In a subsequent 2007 order, FERC temporarily lifted the price caps until October 1, 2010, and directed FERC staff to study the impact of market-based rate sales for transmission capacity reassignments.

FERC staff reviewed 30 months of data regarding the uncapped sales of transmission capacity reassignments. In an April 15, 2010 report, FERC staff concluded that more than 99% of transmission capacity reassignment sales occurred at levels below the suspended price caps. In the less than 1% of cases in which prices exceeded the suspended price caps, the prices were consistent with the energy pricing differentials between markets. In addition, FERC staff found that there was no evidence of market power abuse by resellers.

Based on the data presented in FERC staff's report, FERC is now proposing to permanently remove price caps and allow the market to set prices for reassignments of transmission capacity by wholesale transmission customers. On April 29, 2010, FERC issued a Notice of Proposed Rulemaking ("NOPR") to permanently lift the price caps. *Promoting a Competitive Market for Capacity Reassignments*, 75 Fed. Reg. 24828 (May 6, 2010). In the NOPR, FERC stated that it would continue to monitor the secondary market for capacity reassignment by requiring the following:

1. Sales of capacity be conducted through, or otherwise posted on, a transmission provider's OASIS on or before the date of service;
2. Assignees of transmission capacity execute a service agreement prior to the date on which the reassigned service commences; and
3. Transmission providers aggregate and summarize, in their electric quarterly reports, the data contained in the service agreements.

FERC also is seeking comments on further reforms that would create a more efficient and vibrant secondary market for transmission capacity, including whether non-price limitations or regional factors limit reassignment and whether the system of secondary point priorities adopted in the natural gas industry would provide greater flexibility.

Comments are due on July 6, 2010.

## COMINGS & GOINGS

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### *Three New Airport Federal Security Directors*

Thomas Connors is the new FSD for Minneapolis-St. Paul International Airport. He has been the Acting FSD there for almost a year. Prior to working for the Transportation Security Administration, Connors retired as a Colonel in the US Army.

Ann M. Testa is the new FSD for George Bush Intercontinental Airport. Before working for TSA, she worked in a variety of positions for US Customs and Border Protection. Testa also retired as a Colonel in the US Air Force.

James P. Schear is the new FSD for Colorado Springs Municipal Airport. He previously was the FSD for Baltimore-Washington Thurgood Marshall International Airport and, before that, had a long career as a US Airways pilot. Schear retired from the US Navy as a Rear Admiral.

### *New Assistant VP for Amtrak*

Patrick Merrill is the Amtrak's new Assistant Vice President for Policy and Development - West. The Western region covers California, Washington, Oregon, Idaho, Utah, Arizona, Nevada and Colorado. Previously, Merrill managed the intercity passenger rail program of the California Department of Transportation.

## GUEST COLUMN

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### *DOLLARS TRUMP PREEMPTION*

For the past approximately fifteen years, since the enactment of the ICC Termination Act of 1995, P. L. 104-88, 109 Stat. 803, December 29, 1995, preemption has been the password for the railroads' construction of classification yards, intermodal transfer facilities, and other exempted track.

Rail line additions or extensions require the advance authorization of the Surface Transportation Board, pursuant to 49 U.S.C. 10901 or an exemption from its provisions, pursuant to 49 U.S.C. 10502, and the Board, as any other Federal agency which grants a license, must assess the consequences of the rail line's construction under the National Environmental Policy Act, 42 U.S.C. 4332, and related laws. The Board's approval, however, is not required for the railroads' installation of spur, industrial, team, switching or side tracks; such undertakings having been exempted by 49 U.S.C. 10906. The exemption is reinforced by the preemption provision of 49 U.S.C. 10501 (b), added by ICCTA, which, in part, provides:

> The jurisdiction of the Board over . . . the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this

> part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

As was contended by the railroads, the Board has concluded that, since the construction of exempt track does not require its approval, it need not undertake an environmental assessment of the proposed project. "Where no license is required, there is no environmental review conducted by the Board." Friends of Aquifer, et al—Petition for Declaratory Order, 5 S.T.B. 880, 885 (2001). See, STB Finance Docket No. 34429, The New York City Economic Development Corporation—Petition for Declaratory Order, served July 14, 2004.

Moreover, as urged by the railroads, the Board will not permit a state or locality to undertake an environmental review of the proposed installation of exempt track. In Pet. for Declaratory Order—Boston & Maine Corp. and Town of Ayer, MA, 5 S.T.B. 500, 507 (2001), aff'd,, Boston & Me. Corp. v. Town of Ayer, 191 F. Supp.2d 257 (D. Mass. 2002), involving the proposed construction of an intermodal transfer facility, the Board held, "[s]tate and local permitting or preclearance requirements (including environmental requirements) are preempted [by section 10501(b)] because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations." See, also, Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005); City of Auburn v. United States, 154 F.3d 1025, 1028-31 (9th cir. 1998).

The classification yards, intermodal transfer facilities, and other exempted track which were the subject of the foregoing Board and court decisions were constructed with the railroads' own funds. The railroads, however, have come around and increasingly are seeking financial assistance from the federal or state governments for their capital expenditures, euphemistically called public/private partnerships. Illustrative is Norfolk Southern Railway Company's highly publicized $2.5 billion Crescent Corridor project, a public/private partnership involving federal and state dollars. Chief Executive Officer Wick Moorman was quoted in the February 2010 issue of Railway Age:

> When public policy leaders talk about changing transportation policy in this country, the Crescent Corridor is an example they point to, as do we. It's gotten enormous support. We have a five-state coalition requesting federal TIGER grant funds, and everything is looking positive. Over the long term, Pennsylvania and Virginia have committed funds, and we have already completed projects in Virginia, Tennessee, Mississippi and Alabama are on board.

The U.S. Department of Transportation awarded Norfolk Southern $105 million of TIGER grant money to be used for the construction of intermodal transfer facilities at Memphis, Tennessee, and Birmingham, Alabama. Before the money can be spent, however, there will need to be environmental reviews of the two projects, probably with the Federal Railroad Administration serving as the lead agency. FRA's updated environmental assessment procedures, published at 64 Fed. Reg. 28545, May 26, 1999, specifically listed grants of federal funds as FRA actions requiring compliance with the provisions of the NEPA and related laws. FRA to a large extent has delegated to the Federal Highway Administration the preparation of environmental impact statements as the FHWA has had far more experience doing so than has the FRA.

CSX Transportation, Inc., wasn't left out in the distribution of TIGER grant money. The North Carolina Department of Transportation received nearly $1 million to be spent on the relocation of the CSX yard at Greenville, North Carolina. North Carolina has a State Environmental Policy Act, similar to the NEPA, the provisions of which will need to be observed before the work is begun.

The State of Washington is contributing about $114 million for improvements to BNSF's Vancouver classification yard, and additional funding is being provided by FRA to improve Amtrak's Cascades service by allowing the trains to traverse the yard more speedily. Washington has a State Environmental Policy Act, and an environmental impact statement has been prepared, with the Washington Department of Transportation and the FHWA serving as the lead agencies.

BNSF Railway Company expects to receive a $50 million grant of federal funds to build a 1,200-acre intermodal transfer facility near Gardner, Kansas. In the meantime, since the plans call for the diversion of a stream that runs through the property, an environmental analysis has been submitted by the U.S. Army Corps of Engineers, deemed inadequate by vocal opponents of the facility's construction, who have gone to court to require that an environmental impact statement be prepared.

Michigan will assist in funding the proposed Detroit Intermodal Freight Terminal to be used jointly by NS, CSX, Canadian Pacific and Canadian National Railroad, and a final environmental impact statement has been completed, with the Michigan Department of Transportation and the FHWA serving as the lead agencies.

The Virginia Department of Rail and Public proposes to pay seventy percent of the $35 million freight yard which NS expects to build near Roanoke as part of its Heartland Corridor. The environmental impact of the project will be considered by the Office of Environmental Review of the Virginia Department of Environmental Quality.

A 14.5-mile spur to be operated by the UP is proposed to be constructed to serve the new Red Cliff coal mine near Fruita, Colorado, and an environmental impact statement for the project is being prepared with the Bureau of Land Management serving as the lead agency.

A 4.5 mile spur to be operated by the UP is proposed to be built in connection with the development of the Mesquite Regional Landfill, a 100-acre solid waste disposal facility near Glamis, California, being funded by the Sanitation Districts of Los Angeles County. Environmental review of the proposed project will be required under the provisions of the California Environmental Quality Act.

As is evident, the railroads are prepared to avoid raising the preemption provisions of 49 U.S.C. 10501(b) so long as they are the recipients of federal or state funds to aid in the construction of their classification yards, intermodal transfer facilities and other exempted track. There's nothing like money to weaken the industry's opposition to restraints upon their ability to build them at will.

# LABOR

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## Planning For Change: An Examination of the Inherent Powers of the National Labor Relations Board and the Presidency With Regard to "Employee Choice" and Their Influence on the Transportation Industries

*By Robert Fried, Atkinson, Andelson, Loya, Ruud & Romo of Pleasanton, California, and Thomas Lenz and Jonathan Judge of Atkinson, Andelson, Loya, Ruud & Romo, Cerritos, California.*

### *Introduction*

Protection of employee choice is critical to successful enforcement of labor law. Employee choices that favor a union seeking to establish itself in a workplace are critical to successful organizing. These two policy goals are not always in balance.

Recent years have seen significant discussion but little real action. Congressional initiatives in such areas as card check, expedited elections, expanded NLRA rights for supervisors and enhanced penalties and injunctive relief have not gained the necessary traction to be enacted into law. This article will focus, from the perspective of the election process, on the history of how the NLRB itself, through its decisional process, has affected employee choice through its unique quasi-legislative authority. We will also examine the role of rulemaking at the Board and a related agency, the National Mediation Board, whose authority extends to transportation under the Railway Labor Act. With new Board majorities, the ability to shape the balance of rights may prove as critical as Congress' in understanding how changes in labor law that originate from administrative decisions and rulemaking can affect this critical balance.

The Presidency, through its authority to issue Executive Orders, also retains the ability to affect the balance of power in organizing. Three recent Presidents, Clinton, Bush and now President Obama, have shown their understanding of how their role as "Contractor in Chief" can enable restrictions on federal contracts and contracting that have a labor related effect. With the expansion of the reach of federal dollars through the American Recovery and Re-Investment Act far beyond the traditional government contract, the potential for this vehicle to become a far reaching tool for "change" has been substantially increased.

This article will focus on how such tools have been used in the past, with, naturally, an eye to the future.

## *"Employee Choice" Under the National Labor Relations Act*

The Board has relied upon its founding statute, the National Labor Relations Act (the Act), and adaptability in its interpretation over 75 years, to protect fundamental employee rights at the heart of the Act in a wide variety of workplaces and circumstances. Employee rights in Section 7 serve as the cornerstone for all else that the Act, and the Board enforcing the Act, call upon employers and unions to do.

Essential to employee Section 7 rights are:

[T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and [employees] shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment[.]

The Act envisions protection of those rights from interference by employers or unions. Unfair labor practice provisions of Section 8 of the Act explain very broadly the types of prohibited employer and union conduct.

### *Favoring Elections to Determine Questions Concerning Union Representation*

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board addresses fundamental questions of employee disaffection with an incumbent union. This includes an employer's ability to withdraw recognition from a union when the employer knows the union has lost employee support.

The Board ruled in *Levitz* that there should not be a single standard for an employer's withdrawal of recognition from an incumbent union, filing an "RM" (employer) election petition, or employee polling. Instead, the Board adopted a more strict approach for withdrawals of recognition, and a less stringent standard for employer petitions. *Levitz* only permits withdrawals where an employer can establish the incumbent union has actually lost majority support, while allowing employer petitions where the employer demonstrates good faith reasonable uncertainty about a union's continuing majority support. The Board reasoned that a lower bar for employer petitions would encourage use of Board election procedures and discourage heated unfair labor practice battles over withdrawals of recognition, expressing that the election process provides "the most reliable measure of union support-rather than the more disruptive process of unilateral withdrawal of recognition." *Id*.

*Levitz* remains a fundamental statement on the legal priority and reliability of Board elections.

### *Prohibiting Supervisory Coercion and Control of Labor Organizations*

Questions arose before and after *Levitz* where management activity and organizations tread upon Section 7 rights. For example, workplace committees established by employers to interact with employees on issues of wages, hours, and working conditions can run afoul of Section 8(a)(2) of the Act and be disbanded by the Board.

In *Electromation, Inc.*, 309 NLRB 990 (1992), the Board ruled that an employer violated Section 8(a)(2) by encouraging the formation of action committees comprised of employees and managers, in effect employer-created "labor organizations." Although cooperation to improve quality or efficiency was arguably the lawful purpose for their formation, the Board held the action committees create an impression that disagreements were resolved bilaterally. By creating the committees, Electromation imposed on its employees a unilateral form of bargaining or dealing. In the Board's view, this robbed employees of the right to choose their own representative and, in effect, pre-empted the efforts of the union to establish a foothold in a non union workforce.

The degree to which an employer's ability to communicate to and with employees is critical to labor union power. *Electromation* committees evoked the fear that employers would flood workplaces with groups dominated by management to govern discussion of wages, hours, and working conditions. To an extent, the Board's ruling addressed that concern by shaping its decision in terms of reaffirming that employers cannot lawfully play a role in creating or dominating a labor organization.

That has not ended the dialogue. Following *Electromation*, the Board decided *E.I. DuPont & Co.*, 311 NLRB 893 (1993), which evaluated an *Electromation* committee in a unionized workforce. The Board again found that employer domination of employee-management committees violated Section 8(a)(2). However, the Board reached a markedly different substantive result, concluding that Dupont's "brainstorming conferences" did not violate the Act.

The rules on how and when employees meet to discuss organizing are viewed by labor as determinants of the success of organizing drives, and they touch on the primary policy issue motivating EFCA - the employer's access to a captive audience supplemented by the access resources for an effective campaign. While card check is one method for limiting employer power, a labor friendly board could examine more closely employee rights to expand access to the workplace as well as to import rights to meet and discuss that would shield organizing from employer knowledge. Providing protection for concerted bargaining activity by small groups of employees by bringing back to life the concept of "minority bargaining" would change the balance of power by enabling organizers to establish a foothold with less than the level of support necessary to force the election process to start.

### *Prohibiting Supervisory Generation and Control of Majority Support for a Union*

*Levitz* certainly focused on the situation where management gives assistance to organizing efforts by a union. Not surprisingly, unions receiving the benefit of such campaign support rarely file Section 8(a)(2) charges to challenge management's assistance or support. Coupled with Section 8(a)(2) risks is the duty of loyalty, which the United States Supreme Court confirmed that an employer may demand from its supervisors. *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980).

However, supervisors have long been regarded as the employer's "weakest link" in union campaigns. They are respected by the employees as they are day-to-day bosses. Yet, they often work side by side with employees and share common concerns.

*Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), involved a saga of litigation concerning a healthcare employer and mid-level supervisory solicitation of authorization cards for a union's organizing campaign. The Board confirmed its standard for whether pro-union supervisory conduct upset conditions required for a fair election as whether the supervisor's pro-union conduct reasonably tended to coerce or interfere with employees' exercise of choice in the election, and whether the conduct interfered with the freedom of choice to the extent that it materially affected the outcome of the election. Answering each of these queries in the affirmative, the Board invalidated the Board election.

In *Chinese Daily News*, 344 NLRB 1071 (2005), the Board set aside election results where supervisors campaigned and solicited authorization cards in an organizing campaign at a Chinese-language newspaper. The Board focused on one of the supervisors who solicited cards from employees he supervised. The Board found that conditions for a fair election were tainted by supervisory conduct. Significantly, the number of employees the supervisor in question supervised stood to impact the margin of votes in the election. Therefore, the Board invalidated the election victory by the union and ordered a second election.

The Act allows considerable leeway in defining who is a supervisor. A Board inclined to view a representative of employee rights as an employee with common grievances might rethink the test for supervisory status substantially to alter the balance of power in "employee choice."

***How the Board "Re-writes" the Act - An Informative Case Study***

The Board's unique structure allows for fluid examination of case law precedent to adapt to changing circumstances. The construction industry has proven to be a critical laboratory for developing and defining the fundamental need for, and protection of, employee choice.

The Board rulings above illustrate the balance of protecting the uncoerced majority of employees on questions of union representation along with preventing employer domination of labor organizations. Bargaining relationships in construction typically arise without the consideration of employees' majority support otherwise required under Section 9 of the Act or, indeed, the that role an employer plays in establishing a bargaining relationship. Construction bargaining relationships typically require no proof of employee support. Section 8(f) allows unions and construction employers to enter into agreements without a Board election or other majority showing.

Section 8(f) is based on a fact of life in the construction business - that a construction employer may not have a single business location or steady complement of employees. The erratic workloads and staffing in construction encourage disputes over whether a union has the support of a majority of employees. Indeed, it was the need of construction employers decades ago for a source of skilled employees that led construction employers to seek out union relationships without the hurdles of majority support or elections. While elections and majority-based relationships are possible in construction, most relationships are voluntary between employer and union, without regard for employee support, pursuant to Section 8(f).

The Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), fundamentally changed Board law on 8(f) relationships. Key principles emerged that all construction bargaining relationships are presumed to arise under Section 8(f) and to exist coextensively with the parties' labor agreement. The *Deklewa* rules affirm that 8(f) agreements are enforceable but, unlike agreements in other industries, they will not bar a rival union's election petition during the contract term. Additionally, upon expiration of an 8(f) agreement, either party may repudiate the agreement and end the bargaining relationship.

*Deklewa* marked a critical tipping point in defining the limits (or lack thereof) of Board power in "re-writing" the Act. One year later, in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124 (1988), the Ninth Circuit Court of Appeals affirmed that the Board did indeed have the broad quasi-legislative powers it exercised in *Deklewa*, ruling that *Deklewa* was a "reasonable and tenable" construction of Section 8(f).

The Board demonstrated how a lawful 8(f) relationship is distinguished from an impermissible majority-based 9(a) relationship in *Raymond Interior Systems*, 354 NLRB No. 85 (2009). In *Raymond*, charges brought by the Painters Union led the Board to find that Raymond violated Section 8(a)(2) by assisting the rival Carpenters Union to secure employees' signatures on Carpenters Union authorization cards and then granting 9(a) recognition to the Carpenters. The Board determined that Raymond violated the Act by granting majority-support-based recognition at a time when the Carpenters did not represent an uncoerced majority of employees. *Raymond* illustrates that once a construction employer departs from the voluntary and presumed 8(f) relationship under *Deklewa* to exert control over questions of its employees' majority support for a union, Section 8(f) gives way to protections for employee choice from coercion.

Over the years, construction unions have sought to convert Section 8(f) relationships to more traditional 9(a) relationships to enjoy the stability and protections afforded by Section 9(a). Case law on conversion of 8(f) to 9(a) relationships shows the tensions in regulating uncoerced employee choice.

In *Oklahoma Installation*, 325 NLRB 741 (1998), the Board found a Section 8(f) agreement converted to a Section 9(a) relationship with no supporting evidence of majority support except boilerplate agreement language that "the Union has submitted, and the Employer is satisfied that the Union represents a majority of its employees in a unit that is appropriate for collective bargaining."

Then, in *Staunton Fuel & Material*, 335 NLRB 717 (2001), the Board modified its rule on 8(f) to 9(a) conversion to place greater scrutiny over what contract language, by itself, would suffice. The new rule required that contract language must unequivocally show that the union requested recognition as majority representative of the unit employees, that the employer granted such recognition, and that the employer's recognition was based on the union's showing, or offer to show, substantiation of its majority support. Importantly, *Staunton* clarified that since a Section 8(f) relationship does not rely upon majority support, a Section 8(f) relationship itself does not give rise to coerced majority issues under Section 8(a)(2), such as in *Raymond Interior Systems.*

However, in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), the District of Columbia Circuit rejected a Board ruling finding an 8(f) to 9(a) conversion. The court ruled that contract language alone did not convert an 8(f) agreement into a 9(a) relationship where evidence showed the union lacked majority support. This court ruling prompted the Board to issue a memorandum reiterating the *Deklewa* presumption that construction bargaining relationships come under Section 8(f) and that evidence, including, but not limited to, contract language, must be considered before a determination is made that an 8(f) relationship transformed into a 9(a) relationship. NLRB OM Memo 04-83 (September 2, 2004).

*Rule-Making: A Case Study in the Transportation Industries*

While Congressional action is required to change a statute, both the Board and its sister agencies, such as the National Mediation Board, also enjoy statutory rule making authority that some feel extends to implementation issues such as the election process.

Just as the Board law in *Deklewa* defined the election balance of power in construction, since 1934, the *Railway Labor Act* has been interpreted as adapting to the uniquely fluctuating employee workforce in the railway and airline industries by requiring unions to show majority support of all eligible voters including those who did not vote. Indeed, defining the pool of "voters" is the most basic of tipping points in an organizing campaign.

While many commentators have focused on the NLRB's potential for rulemaking, either with or without EFCA, it is ironic that the first significant test of this power will occur in the transportation industries with the announcement, in early May, that the NMB has adopted new rules in conformity with the Board's, whereby a union will win recognition if it secures a majority of those who vote - an easier bar for an organizing union to meet.

***Balancing Elections with Alternative Organizing Strategies***

Unions outside the construction industry increasingly organize without invoking Board election processes. As a result, the number of Board elections has declined. To balance a trend away from elections with rights of choice under the Act, the Board determined it appropriate to rule on questions of neutrality and card check arrangements in *Dana Corporation*, 351 NLRB 434 (2007).

In *Dana*, employees sought an election which challenged their employer's agreement to maintain neutrality over unionizing efforts and to recognize a union as a Section 9(a) majority-supported representative. The Board considered arguments over whether to allow employees to vote or, instead, whether to disallow a vote and permit the agreement between the union and the employer to determine the employees' representation.

The Board created a new recognition bar rule in *Dana*. Specifically, where a union is recognized by an employer as a majority representative under Section 9(a), the employees are entitled to 45 days notice to file a decertification petition or to support the filing of a petition by a rival union. If the 45 days pass without an election petition, the recognition agreement between employer and union will then bar an election for a reasonable period of time. The Board expressed that this rule would "provide greater protection for employees' statutory right of free choice and to give proper effect to the court-and Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election." *Id.* at 437.

While procedures under *Dana* are new and not time-tested, it is expected that, like many other decision-based Board rules, experience will refine the process.

### *The Executive Order and the Act*

While the Executive Branch does not have the power to re-write an Act of Congress, it does have the authority to decide how the money appropriated by Congress is spent consistent with the authorizing statutes. In this regard, almost every recent President has chosen to use that power to influence labor policy. Such executive orders have addressed *Beck* rights on union shop rights, federal policy on pro-union project labor agreements and retaining displaced workers. With the notable exception of a Clinton-era executive order on the latter subject, all have survived legal scrutiny. Indeed, the power of the President in this regard is generally regarded as sufficient if it is exercised in support of the "economy and efficiency" of federal spending.

The current administration is no exception. It has reversed the executive order on project labor agreements, has withdrawn the *Beck* executive order, and will replace it with its polar opposite. However, its most complex labor friendly effort will likely be the executive order addressing so called "neutrality" rights in the workplace.

Executive Order 13494 proclaims "the costs of the activities of preparing and distributing materials; hiring or consulting legal counsel or consultants; holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and planning or conducting activities by managers, supervisors, or union representatives during work hours, when they are undertaken to persuade employees to exercise or not to exercise, or concern the manner of exercising, rights to organize and bargain collectively" to be "unallowable costs."

In *Chamber of Commerce vs. Brown* (2008), the United States Supreme Court struck down a California statute that sought indirectly to regulate the labor relations policy of employers who received state funds by either prohibiting their use of those monies in their response to union organizing drives or, in the alternative, require proof that they were not so used, holding that such regulation violated free speech in the workplace rights protected by Congress in the National Labor Relations Act.

In so doing, the Executive Order will arguably affect the balance of power in the exercise of "employee choice" if it is viewed as indirectly pressuring employers to remain "neutral" in organizing campaigns or, in the alternative, to attempt at their risk to segregate their expenses on organizing responses such that they can prove, under audit conditions, that they were not used to cover such costs.

### *Conclusion*

The Board's vitality and success derive from its ongoing ability to adapt the Act's protections of choice to the world and workplaces around it and the confidence of employees, unions, and employers to invoke its processes. The takeaway from this article is that this "vitality" derives from the unique powers provided by the Congress in writing the Act and how, coupled with the power of the Executive and the potential for aggressive "rulemaking", the roadmap for a new labor relations landscape could be drawn.

# MARITIME

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## *RECENT MARITIME DECISIONS*

Northern District of California Holds that State Statute Requiring Shipowners to Hold Pilots Harmless or Buy Insurance Passes Muster Under Federal Law.
*Continental Ins. Co. v. Cota*, 2010 AMC 313 (N.D. Cal. 2010)

On November 7, 2007, the cargo ship M/V *Cosco Busan* allided with the San Francisco-Oakland Bay Bridge. John Joseph Cota, the pilot of the vessel, was sued following the allision. Plaintiff Continental Insurance Company ("Continental"), which subscribed a policy of insurance to the San Francisco Bar Pilots, appointed defense counsel for Cota. Ultimately, Regal Stone Limited and Fleet Management, Ltd., the owner-operators of the vessel, assumed Cota's defense.

The instant action arises from Continental's suit against Regal Stone and Fleet for reimbursement of the costs and fees arising from its defense of Cota in the underlying litigation. To date, Continental has incurred at least $315,000 in legal fees and costs. In support of its reimbursement claim, Continental cites Section 1198 of the California Harbors and Navigation Code. Under Section 1198, a vessel (either its owner or operator) shall either purchase trip insurance from the pilot, or defend, indemnify and hold harmless the pilot if an accident occurs due to the pilot's negligence. *See* Cal. Harbors & Navigation Code §1198(c). In their Answer to Continental's Complaint, Regal Stone and Fleet contend that Section 1198(c) is invalid because it is preempted by federal maritime law. Both Continental and Cota moved for partial summary judgment on whether the statute is preempted.

In evaluating the enforceability of Section 1198, the district court first set forth the various circumstances for when state law is preempted by federal law. Preemption occurs when: (1) Congress expresses a clear intent to preempt state law; (2) there is an actual conflict between federal and state law; (3) compliance with both state and federal law is physically impossible; (4) there is implicit in federal law a barrier to state regulation; (5) Congress occupies the "entire field of regulation"; and (6) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. However in this case, the court summarily decided that none of these circumstances were present with respect to California's statute. In fact, the court identified various instances in which Congress specifically authorized and envisioned state regulation of pilotage. *See, e.g.*, Lighthouse Act of 1789 ("all pilots in bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states[.]"); 46 U.S.C. §8501(a) ("pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States."). Moreover, in *Soriano v. U.S.*, 494 F.2d 681, 684 (9th Cir. 1974), the Ninth Circuit recognized that for more than 185 years Congress specifically reserved pilotage for regulation by the states. Accordingly, the district court concluded that the state of California, in enacting Section 1198, properly exercised the authority Congress had reserved for it.

Although Section 1198 was not directly preempted by federal statutory law, the district court also assessed whether federal maritime law preempted the California statute. Federal maritime law provides that the owner of a vessel is not personally liable for the negligence of a compulsory pilot. *See Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406, 416-17 (1901). The owner is not personally liable because "the element of compulsion eliminates the respondeat superior nexus which would normally serve as a basis for imputing a pilot's negligence to the shipowner." *Cota*, 2010 AMC at 320. On its face, this maritime law principle is in direct conflict with Section 1198. However, the district court, referring to U.S. Supreme Court precedent, opined that general maritime law does not apply in an admiralty case when there is a relevant statute. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986). Here, federal maritime law could not preempt Section

1198 because federal statutory law had reserved the regulation of pilotage to the states. *See, e.g.*, 46 U.S.C. §8501 (a). Although Section 1198 conflicted with this maritime law principle, the district court ultimately reasoned that the tension between the statute and maritime law was permissible because shipowners were given an option—i.e., purchase trip insurance. In summary, the district court concluded that Section 1198 is valid and not preempted by federal maritime law.

***TAKE-AWAY:***

It is worth noting that this decision has implications for vessel owners and operators outside of California. A significant number of states currently have laws requiring shipowners to purchase trip insurance or hold pilots harmless. *See*, *e.g.*, Or. Rev. Stat. §§776.510-776.540 (This statute requires vessel owners to purchase trip insurance or to defend, indemnify and hold pilots harmless). Statutes in Washington, Maine, and Texas go further and limit a pilot's liability for negligence even if trip insurance is not offered to the vessel owner. *See* Wash. Rev. Code §88.16.118(1)(a) (pilot's liability is limited to $5,000 per incident); 38 Me. Rev. Stat. Ann. §99-A (pilot's liability is limited to $5,000 per incident); Tex. Transp. Code Ann. §66.083(a) (pilot's liability limited to $1,000 per incident). This author is unaware of any decision in which a court has held that federal maritime law preempts this type of statute.

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Second Circuit Adopts "Range of Reason" Standard as a Guide for Evaluating a Carrier's Efforts to Mitigate Demurrage Damages and Dispose of Abandoned Cargo.

*APL Co. PTE LTD. v. Blue Water Shipping U.S. Inc.*, 592 F.3d 108 (2d Cir. 2010)

Plaintiff APL was hired to ship 29 refrigerated containers of imported garlic to the Los Angeles port. Upon arrival, the garlic was to be picked up by Defendant Blue Water Shipping and delivered to the purchaser, Akata Food Trading Company. Between March 31 and April 22, 2003, APL unloaded shipments of the garlic onto its dock. It is undisputed that neither Blue Water nor Akata picked up the shipments.

U.S. Customs and Border Protection levied anti-dumping tariffs on the cargo, and the cargo ultimately passed into the "constructive General Order" custody of Customs.[1] Under the bill of lading, the parties agreed that once the cargo passed into Custom's custody, APL's obligations terminated. Via an e-mail communication on May 7, 2003, APL informed Blue Water that current demurrage charges totaled $75,000 and inquired whether Blue Water and/or Akata would pick up the garlic even though the demurrage charges made the shipment unprofitable. In response, Blue Water sought additional time to carry out the pick-up and delivery to Akata. APL informed Blue Water that it would auction the cargo if it was not removed by May 9, 2003. Blue Water did not respond to this demand. APL, however, did not immediately place the cargo up for auction. Following repeated conversations with Customs officials, APL was under the mistaken impression that a six-month hold was required before the goods could be sold at auction. Finally, on June 5, 2003, APL learned a hold was not necessary and commenced the process for putting the cargo up for auction. The garlic was ultimately not sold because it failed a series of inspections and testings by the FDA. The cargo was destroyed in its entirety by August 25, 2003.

APL sued Blue Water for breach of contract and claimed approximately $403,000 in demurrage damages. Although the district court concluded that Blue Water had breached its contract, the court held that APL failed to mitigate its damages. APL appealed this decision to the Second Circuit.

On appeal, the Second Circuit noted that this case involves well-settled principles of contract law. "It is elementary that a party injured by a breach is entitled to recover damages that are the <u>natural and probable consequence of the breach</u>." *See APL*, 592 F.3d at 111. Nevertheless, the injured party has a duty to make reasonable efforts in mitigating its damages. If the injured party fails to satisfy this obligation, the court may reduce the prevailing party's recovery. The Second Circuit explained that this "duty to mitigate" does not require the party actually to mitigate its damages. Instead, the injured party need only take such action "within the range of reason." If reasonable attempts at mitigation fail, the breaching party remains liable for the full amount of damages.

[1]The garlic passed into a constructive custody "because the cargo physically remained in APL's terminal occupying 29 of its refeers [i.e., refrigerated containers]." *See* 592 F.3d at 109.

In evaluating whether the injured party's mitigation efforts were "within the range of reason," the Second Circuit opined that such an inquiry must start with the parties' expectations under the contract. In the instant case, APL's obligations under the contract had ceased by the time the cargo passed into Custom's custody. Yet the district court failed to evaluate APL's mitigation efforts in light of the fact APL had fully performed. "The trial court's obligation was to determine whether the mitigation efforts actually chosen in those unaccustomed shoes were reasonable, not whether hindsight suggests that an objectively better choice was available." *Id.* at 112. The Second Circuit also took issue with the district court's failure to address Blue Water's mitigation efforts, if any. In summary, the Second Circuit concluded that the district court erred in failing to assess Blue Water's post-breach conduct. As a sophisticated player and as the party having the greater financial interest, Blue Water's inaction in failing to mitigate its own damages should have entered into the district court's analysis. The Second Circuit remanded the matter to the district court to re-evaluate the damages award in light of its decision.

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### CASE LAW

**Supplemental jurisdiction: Carmack brings third-party action against cargo-loader into federal court.**
***Travelers Indemnity Co. of Connecticut v. Colma Drayage, Inc., et al.*, 2010 WL 934076 (N.D. Cal. 2010)**

The Northern District of California recently took an interesting look at the impact of multiple services and parties involved in the intermodal transportation process on federal jurisdiction. Shipper Marinpak imported a cargo of industrial equipment into the Port of Oakland, destined for ultimate delivery in Sonoma. Carrix apparently loaded and secured the load to a flat rack at the port. Marinpak hired trucker Colma to run the surface leg; Colma subbed out to carrier Devincenzi; and Devincenzi handed it off to carrier Shumate, which actually made the haul. En route to Sonoma, the flat rack collided with an overpass, damaging the cargo to the tune of some 764 grand.

When Marinpak's subrogated insurer sued the three carriers in the U.S. District court for the Northern District of California, Devincenzi impleaded Carrix as a third-party defendant. The court found jurisdiction over the primary action based on Carmack (as the continuation of a through ocean move). Carrix moved for dismissal claiming the court lacked federal jurisdiction over it, and urging that its participation in the process was distant – in time and location – from any basis of federal jurisdiction asserted in the primary action.

The court disagreed, exercising its "supplemental jurisdiction" over a matter that "derives from a common nucleus of operative fact." Other transportation precedents have refused to extend supplemental jurisdiction, but the allegations in those matters' primary actions had nothing to do with a chain of events eventually reaching third-party defendants. Here, Devincenzi was merely alleging an additional link in a causal chain that would include (if accurate) Carrix. In other words, "[t]his is a claim that a third-party's negligence contributed to an injury that clearly occurred during carriage, rather than a claim that a third-party's acts independently caused injury after the carriage." That might be a line difficult to draw in some circumstances, but it's one worth keeping in mind.

### A warning letter doesn't constitute "adverse employment action" under the Surface Transportation Assistance Act.
***Melton v. U.S. Dep't of Labor*, 2010 WL 1565494 (6th Cir. 2010)**

The Surface Transportation Assistance Act, 49 USC §31105(a), contains provisions prohibiting motor carrier employers from retaliating against their employees who take safety actions such as refusing to drive while fatigued. No one should be more aware of, or more concerned about, safety issues than drivers. As we all know, some motor carriers can be less than scrupulous when it comes to the profits-versus-safety analysis. Thus, if a trucking line imposes any adverse employment action in response to a driver asserting safety issues or regs as a basis not to perform, the feds can slap the line pretty hard on the wrist.

But what about a warning letter? Yellow Transportation driver Melton had just finished a ten-day vacation and had gotten up to await dispatch on his regular run from Nashville to Jackson, Mississippi. When the haul was delayed several hours (not an unusual occurrence), Melton reported in that he would not be able to drive, because doing so would have him out of the bed more than 19 hours since he crashed the preceding night. He claimed he would be too fatigued to make the run.

Yellow issued to Melton its standard warning letter, stating that he was just using fatigue as a "subterfuge to avoid work (absenteeism)," and that future occurrences would subject him to disciplinary action. By Yellow's policy, the letter would remain in Melton's personnel file six months. Melton apparently learned from a co-worker that these warning letters might officially be dropped from his file half a year later, but that they physically remain there, and could influence his status within the company.

So Melton took Yellow to the mat. In fact, he made a federal case of his beef. Having been rebuffed by a U.S. Department of Labor administrative law judge and Administrative Review Board, he took the matter all the way to the Sixth Circuit Court of Appeals. But every tribunal that reviewed his case reached the same conclusion (although for slightly different reasons). A warning letter simply doesn't rise to the level of adverse employment action. Yellow's issuance of the letter was based on its reasonable belief that Melton wasn't basing his action on protected activity, and was just trying to prolong his vacation. The goals of the Surface Transportation Assistance Act wouldn't be furthered by penalizing Yellow for issuing a warning under these circumstances.

### Agricultural product exemption status doesn't arise simply by trucker hitching a log trailer.
***Occidental Fire and Casualty Company of North Carolina, Inc. v. Johnson*, 2010 WL 761093 (Ga.App. 2010)**

Trucker Thomas was hauling an intrastate load of logs for a local timber harvester within Georgia. Thomas owned his rig, but the trailer belonged to the harvester. He was involved in a fatal collision, which prompted a lawsuit against him and, per a direct action statute within Georgia's Motor Carrier Act ("the Act"), his insurer Occidental. Such direct action statutes enable bodily injury and property damage plaintiffs to sue truckers' insurers as part of their primary actions, instead of having to await (and worry about) a determination of coverage.

But for the insurer to be the subject of a direct action claim, the haul involved would have to be subject to the Act, which contains definitions and exclusions. Excluded from the Act are "motor vehicles" that are "engaged exclusively in the transportation of agricultural products" which include "timber or logs." Occidental argued that the trailer was used exclusively for the transportation of logs, and that Thomas's tractor shouldn't be considered separately when defining the term "motor vehicle," because it was the combo as a unit that was involved in the accident.

Affirming a trial court, the Georgia Court of Appeals disagreed, ruling that the term "motor vehicle" couldn't be defined in isolation and in a manner that would frustrate the Act's intent and goals. By Occidental's approach, Thomas's status as exempt or non-exempt might change every time he hitched a new trailer, which would be contrary to what the statute envisioned by "exclusive" agricultural hauls. Occidental stays in the case.

**Undercharge litigation revisited (sorta): NRA small business exemption requires payment of freight charges.**
***Estes Express Lines v. SMI Creations, Ltd.*, 2010 WL 1719291 (D. Colo. 2010)**

Here's a little blast from the past for those of you who remember the undercharge litigation of the 1980s and 1990s. Shipper SMI booked various interstate transit with motor carrier Estes. Terms included negotiated rates discounted from Estes's tariff as allowed by the Negotiated Rates Act, 49 USC §13709 (the "NRA"). But in the event of nonpayment and collection activity, the reduced rates were subject to reversion to the tariff rates plus attorneys' fees. On a few occasions, SMI had fallen behind in paying its freight charges, and Estes hadn't enforced the higher tariff rates.

This time, Estes sued SMI in the District of Colorado, and quickly moved for summary judgment. SMI tried to escape liability for the higher rates by pointing to the NRA's exemption for small businesses in undercharge claims. The court paid some lip service to whether the NRA applied at all, and whether the undercharge precedents SMI cited were at all relevant. This wasn't the typical Filed Rate Doctrine scenario wherein trustees of bankrupt carriers went after shippers who'd been charged rates lower than the carriers' tariff-mandated freight charges.

But the court really didn't have to go that far into it. To enjoy a small business exception from undercharge liability, the small business has to actually pay the freight charges. SMI hadn't. The shipper also argued that Estes's previous non-enforcement of the higher tariff rates should constitute a general waiver, but that's just not the way the law works either (at most Estes might have waived its entitlement to collect the tariff rates in those earlier shipments). Pay up, SMI.

**Broker found liable for freight damage based on contract terms.**
***Dominion Resource Services, Inc. v. 5K Logistics, Inc.*, 2010 WL 917492 (E.D. Va. 2010)**

Here's one of those decisions that just doesn't smell right, and produces a result that could be a bad precedent for freight brokers. Shipper Dominion Resource Services had a master service contract with freight broker 5K Logistics that contained all the usual stuff requiring that services be performed in a "workmanlike manner" and other warranty terms enforceable under contract law. 5K also had motor carrier operations, and owned its own trucks.

In the haul at issue, Dominion asked 5K, pursuant to the master contract, to transport two industrial heat exchangers from Virginia to Maryland. 5K engaged motor carrier Daily Express to make the run. Apparently, the load wasn't secured properly, fell off the truck, and suffered 192 grand in damages. Dominion sued 5K for breach of contract, and the Eastern District of Virginia properly analyzed this in the contract context (in other words, Carmack wasn't the governing law). Federal jurisdiction was based on diversity.

The amount of damages not being in dispute, Dominion's motion for summary judgment was granted. How could a broker be liable in this context? The court does drop a few words about 5K's operating trucks and holding itself out as a "one stop shop," and that the master contract encompassed "any such [w]ork performed by [5K] in the scope of its usual business." But if the ruling were premised on 5K's stepping into motor carrier shoes, the claim would have to be that Carmack governed.

The court's ruling doesn't address how Daily Express's bill of lading (if any) was written, which could be critical. Who was its shipper of record? The court does state that "5K's hiring of contractors unknown to Dominion and billing of Dominion directly for services rendered, strongly suggests that 5K was acting as a general contractor and not merely as a broker of services." While this sentence reveals improper application of surface transportation law principles, the court might be observing that 5K didn't facilitate a direct relationship between Daily Express and Dominion, and instead operated as a *de facto* carrier or forwarder. But then again, this conclusion would fly in the face of the court's determinations that 5K wasn't a carrier or forwarder, and that Carmack didn't apply.

All told, the court construed the master service contract, with its inclusion of standard contract warranties, to document something more than a mere brokerage relationship. It saw those terms as a guarantee of safe delivery even though it pointed to no such words in the agreement or law that would impose that obligation on a broker. But from the opinion, there's also no reason to believe 5K clearly specified its limited role (and liability) as a broker, which is its biggest mistake.

**More broker woes: if you walk and talk like a broker, you're a broker (even if you're not licensed as one)**
***Christenberry Trucking & Farm, Inc. v. F&M Marketing Services, Inc*****., 2010 WL 1254374 (Tenn. Ct.App. 2010)**

UPS, a licensed freight broker, handles shipments for Dell Computers. F&M Marketing Services, which had no FMCSA authority, worked in coordination with UPS to hire truckers to haul Dell's cargo. It engaged motor carrier Christenberry Trucking & Farm to run a series of loads for Dell pursuant to a "Commission Sales Agreement" which referred to F&M as an "agent," and through an addendum provided that Christenberry pay F&M a 6% sales commission. Christenberry never signed the addendum, but did business with F&M under it. A dispute about rates unfolded, and Christenberry refused to pay F&M's commissions.

The parties took their row to a Tennessee state court on cross motions for summary judgment. Christenberry argued that it had no contract with F&M, at least not a valid one. The trial court found that F&M is a broker, even if an illegal one. However, it concluded that any contract would be illegal and therefore unenforceable, as F&M's brokerage activities were unlicensed. F&M appealed.

Going through a nice review of transportation player definitions and roles, the Volunteer State appellate court agreed that F&M was a broker based on its activities. Put simply, it arranged and facilitated interstate surface transportation of freight. While the concept of an "agent" is recognized, simply calling yourself one doesn't take you out of the realm of freight brokerage-dom (per federal statutory definitions). Besides, F&M worked for a series of motor carriers and shippers such that it wasn't subject to the directives of any particular carrier (including Christenberry).

F&M resisted this, recognizing that its contract was premised on its work as an "agent" and probably realizing the feds would be breathing down its neck for unauthorized activity if it were held to be an unlicensed broker. It claimed that UPS was the licensed broker here, and that F&M just represented motor carriers in setting up deals. But setting up transportation arrangements is precisely what brokers do. Only the legislature could draw the line F&M wanted.

But what about the contract law notion that an illegal contract is unenforceable? The court struggled with this one, quipping that "[t]his general rule … is almost as much honored in the breach as in the observance." Recognizing the sophistication of the parties, the benefit Christenberry enjoyed by the contract, and the fact F&M wasn't incompetent in its services and still will have to deal with the feds, the court found the contract enforceable. Christenberry will have to pay up.

## AGENCIES

Federal Motor Carrier Safety Administration
"No Text Today"

Notice of Proposed Rulemaking; Request for Comments; Docket No. FMCSA-2009-0370. *Limiting the Use of Wireless Communication Devices*, 73 *Fed. Reg*. 16391 (April 1, 2010)

Every once in a while, an issue making its way through the FMCSA regulatory process captures the attention of the general public. The issue of "texting" is clearly such an issue.

As defined by FMCSA, (see proposed rule 49 CFR 390.5), texting includes manually entering text into or reading text from an electronic device. Texting also includes short messages, e-mail messages, or a request to access the World Wide Web. Texting does not include retrieving phone numbers, using an in-cab fleet management system, or using a citizens band radio.

According to FMCSA, there is overwhelming public support for a ban on texting and other distractive behaviors that can occur while a driver is behind the wheel. To illustrate the seriousness of the problem, research sponsored by FMCSA has determined that the accident odds ratio applicable to a truck driver while texting is 23.2. By comparison, the odds ratio for dialing a cell phone is 5.9 and the odds ratio for talking or listening to a hands free phone is .4.

FMCSA is proposing to prohibit texting by drivers of commercial motor vehicles while operating in interstate commerce. FMCSA also intends to impose sanctions, including loss of CDL , for drivers with multiple violations.

The NPRM is a follow-up to the regulatory guidance published by FMCSA on January 27, 2010. The guidance stated that, while there was no direct prohibition against texting, there is a general restriction against the use of equipment or accessories that decreases the safety and operation of a commercial motor vehicle.

Comments were due by May 3. We will see how quickly the Agency can move these regulations through the process.

*"EOBRs"*
Final Rule; *Electric On-Board Recorders for Hours of Service Compliance*; Docket No. FMCSA-2004-18940; 75 *Fed. Reg.* 17208 (April 5, 2010)

FMCSA is moving forward with its plan to require use of electronic on-board recorders ("EOBRs") by motor carriers that have demonstrated serious problems complying with the hours of service rules. EOBRs can be required if FMCSA determines, based on a compliance review, that the motor carrier has a 10% or greater violation rate for any designated hours of service rule.

If ordered by FMCSA, the carrier will be required to install EOBRs in all of its commercial motor vehicles for a period of two years. A motor carrier who does not comply with a remedial order will have its registration revoked.

In addition to the new rules requiring use of the EOBR, FMCSA is encouraging their usage by revising its compliance review procedures. Under certain circumstances, FMCSA will permit random samples of drivers' records of duty status after the initial sampling. In addition, under certain circumstances, it will provide partial relief from hours of service document requirements. FMCSA is also considering rules mandating use of EOBRs by hazardous materials carriers, passenger carriers, and new motor carriers seeking authority to operate in the United States.

FMCSA has been considering EOBR requirements for many years. In earlier NPRM's, FMCSA rejected the EOBRs because of lack of adequate cost and benefit data. With prodding from Congress in the recent highway bills, the Agency is getting behind the EOBR program.

The Final Rule will be effective on June 4.

## RAILROADS

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### STB RULEMAKING AND OTHER PROCEEDINGS

***The Board Proposes A Rule Permitting Parties to Use Four Years of Data Released from the Waybill Sample to Construct Comparison Groups in Three Benchmark Cases***

On April 2, 2010, the Board proposed a rule to permit parties in Three Benchmark cases to construct comparison groups using Waybill Sample data for the preceding four years. Waybill Data Released in Three-Benchmark Rail Rate Proceedings, STB Ex Parte No. 646 (Sub-No. 3), at 1 (STB served Apr. 2, 2010). The Three-Benchmark method "compares a challenged rate to the rates of a comparison group drawn from the Waybill Sample data." Id. at 2. The Board previously proposed a final rule that allowed parties to use four years of Waybill Sample data to form comparison groups, but the D.C. Circuit vacated that portion of the Board's rule on rehearing after the Court concluded that the Board failed to provide adequate notice of this rule. Id. at 1-2 (citing Simplified Standards for Rail Rate Cases, STB Docket No. 646 (Sub-No.1) (STB served Sept. 5, 2007), aff'd sub nom., CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), vacated in pertinent part on reh'g, CSX Transp., Inc. v. STB, 584 F.3d 1076 (D.C. Cir. 2009)). In its April 2010 proposed rule, the Board emphasized that its proposed rule "would be permissive, not mandatory, i.e., it would provide a rate complainant and the defendant railroad . . . the option of using more data, but the proposed rule would not force them to use all of that data." Id. at 3. The Board requested comments "concerning the amount of data that would be available under the proposed rule and the proposal that the parties could draw from all 4 years of waybill data to form their comparison groups." Id. at 1. Comments were due on May 3, 2010, and replies are due on June 1, 2010.

### *The Board Grants Entergy's Motion to File A Second Amended Complaint Naming BNSF as a Defendant and Seeking an Interchange with BNSF at Aurora or Lamar, Missouri*

On April 19, 2010, the Board granted Entergy Arkansas Inc.'s and Entergy Services, Inc.'s (collectively "Entergy") motion to file a second amended complaint against Union Pacific Railroad Company ("UP") and Missouri & Northern Arkansas Railroad Company ("MNA"). Entergy Ark., Inc. & Entergy Servs., Inc. v. Union Pac. R.R. Co. & Missouri & N. Ark. R.R. Co., STB Docket No. 42104, at 2 (STB served Apr. 19, 2010). Entergy's motion to file a second amended complaint named BNSF Railway Company ("BNSF") as a defendant and sought interchange with BNSF at Aurora or Lamar, Missouri. The Board granted Entergy's motion, noting that the Board "can order BNSF's participation in such a through route only if it is a party to the proceeding in which the through route is ordered." Id. at 2. BNSF filed its answer on May 10, 2010.

### *The Board Orders Canadian National Railway Company to Provide Additional Information Regarding Grade Crossing Blockages on Former EJ&E Line Exceeding Ten Minutes*

On April 20, 2010, the Board ordered Canadian National Railway Company ("CN") to "explain [at a hearing] why CN's submissions to the Board on crossing blockages of 10 minutes or more differ from data automatically reported by its own crossing gates, and why CN did not disclose that it had such information." Canadian Nat'l Ry. Co. & Grand Trunk Corp.—Control—EJ&E West Co., STB Finance Docket No. 35087, at 1 (STB served Apr. 21, 2010). This order stems from the Board's 2008 approval of CN's acquisition of control of a subsidiary of the Elgin, Joliet and Eastern Railway Company ("EJ&E"). Under the transaction, the Board imposed a five-year monitoring period that included consideration of "increased delay and blockages at the numerous highway/rail at-grade crossings . . . on the former EJ&E line." Id. The Board required CN to file monthly reports, and CN has filed monthly and quarterly reports since April 2009. After some citizens questioned CN's reports, the Board retained a third-party contractor, HDR, Inc., ("HDR") to audit CN's November and December 2009 reports. HDR used the radio transmission units ("RTUs") to calculate the number of instances when the grade crossings were blocked for more than ten minutes. Id. at 2-3. The Board observed that the RTU-generated data presented a "material difference" when compared to the information presented in CN's reports, and the Board stated that it "expected CN to have brought the data to [the Board's] attention . . . without the necessity of an independent audit by the Board." Id. at 3. The Board asked CN to explain at a hearing "why it did not report the existence of this data to the Board earlier as part of its ongoing monitoring responsibilities" and instructed CN to include "all known occurrences of street crossing blockages of 10 minutes or more in its future monthly and quarterly reports." Id. at 3, 5. The Board also required CN to submit historical RTU data. Id. at 4. Per the Board's instructions, CN filed raw RTU data for the entire EJ&E line from July 2007 through April 2010, as well as restated blocked crossing reports from February 2009 to March 2010 to include RTU data. Statement of Gordon T. Trafton, II, Canadian Nat'l Ry. Co. & Grand Trunk Corp.—Control—EJ&E West Co., STB Finance Docket No. 35087, at 8 (filed Apr. 29, 2010). The Board held a hearing on April 28, 2010. At the hearing, CN explained that it "believed [it was] meeting the Board's reporting requirements" without including the RTU data. Id. at 2. CN believed the Board wanted it to include "blockages caused by stopped trains" in its reports, and not all blockages exceeding ten minutes. Id. at 2. CN agreed to comply with the Board's instructions to report "all known occurrences of street crossing blockages of 10 minutes or more, as reflected in RTU-data or any other source of information available to CN, as well as all historical data regarding such occurrences." Id.

### *The Board Reaffirms Its Jurisdiction Over the Planned Construction and Operation of a High-Speed Passenger Rail Line Between Southern California and Las Vegas, Nevada*

On May 7, 2010, the Board reaffirmed its 2007 decision finding that DesertXpress Enterprises, LLC's ("DesertXpress") proposed construction and operation of a 200-mile high-speed passenger rail line required the Board's approval under the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10901, and would be subject to federal preemption under 49 U.S.C. § 10501(b). DesertXpress Enters., LLC—Petition for Declaratory Order, STB Finance Docket No. 34914, at 1 (STB served May 7, 2010). Petitioners "who are developing a competing proposal to build and operate a magnetic levitation transportation system largely along the same corridor" had asked the Board to reopen its 2007 decision concerning DesertXpress under 49 U.S.C. § 722, citing changed circumstances, new evidence, and material error. Id. at 1, 6-7. Petitioners asserted that the recent congressional funding for studies relating to their planned system is a changed circumstance that justifies reopening. Id. at 6. The Board disagreed. The Board explained that the availability of funding for a different interstate passenger service "does not materially affect the analysis or outcome reached in that decision and therefore does not justify its reopening." Id. at 7. The Board also concluded that there was no new evidence that would warrant reopening the 2007 decision because the Board was aware that DesertXpress's "proposed line would not initially physically connect to existing rail lines." Id. at 7. Finally, the Board concluded that it did not commit material error in failing to consider the meaning of the phrase "as part of the interstate rail network" under 49 U.S.C. § 10501(a)(2)(A). The Board concluded that its "assertion of jurisdiction in the 2007 Decision comports with the definitions in the ICA, the [ICC Termination Act's] legislative history, case precedent, and sound public policy." Id. at 17. The Board reasoned that "[t]he phrase 'as part of the interstate rail network' does not apply here" and alternatively, that "DesertXpress's project would be part of the 'interstate rail network' in any event." Id. at 9-11.

## RATE CASES

### *The Board Dismisses Two Complaints Filed by US Magnesium, LLC Against Union Pacific Railroad Company*

On April 2, 2010, the Board dismissed two complaints filed by US Magnesium, LLC ("USM") against UP after the parties voluntarily settled their dispute. US Magnesium, LLC v. Union Pacific R.R. Co., STB Docket No. 42115, at 1 (STB served Apr. 2, 2010) (dismissing complaint filed June 25, 2009); US Magnesium, LLC v. Union Pacific R.R. Co., STB Docket No. 42116, at 1 (STB served Apr. 2, 2010) (dismissing complaint filed October 9, 2009). USM's complaints concerned the movement of chlorine from Rowley Utah to destinations in California, Nevada, and Utah, including Los Angeles, Mojave, Ontario, Santa Fe Springs, Saugus, Elk Grove, Stockton, and Torrance, California; Salt Lake City, Utah; and Sparks and Henderson, Nevada.

## JUDICIAL PROCEEDINGS

### *The Fifth Circuit Rejects a Challenge Under the Endangered Species Act to the Board's Decision to Grant an Exemption to Construct and Operate a Seven-Mile Rail Line in Medina County, Texas*

On April 6, 2010, the Fifth Circuit denied a petition for review filed by the Medina County Environmental Action Association ("MCEAA") under the Endangered Species Act ("ESA"). MCEAA had challenged the Board's decision to grant an exemption under 49 U.S.C. § 10901 to the Southwest Gulf Railroad Company ("SGR") to construct and operate a seven-mile rail line between a proposed limestone quarry in Medina County, Texas, and Union Pacific's main line. Medina County Envtl. Action Ass'n v. STB, --- F.3d ----, No. 09-60108, 2010 WL 1290383 (5th Cir. Apr. 6, 2010). Section 7 of the ESA requires a federal agency to ensure that its "'actions'" are "'not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.'" Id. at *3 (quoting 16 U.S.C. § 1536(a)(2)). The Fifth Circuit concluded that the Board's decision to grant SGR's exemption to construct and operate the proposed rail line was not arbitrary and capricious. It emphasized that the quarry could be developed "regardless of whether the rail line were built" and that the Board's only two choices were to (1) grant the exemption, which was the "environmentally preferable alternative;" or (2) deny the exemption, and "quarry development would progress, served by a more environmentally disruptive fleet of trucks." Id. at *12.

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### *STB Reauthorization Bill Emerges from Senate Committee*

On December 17, 2009, the Senate Committee on Commerce, Science, and Transportation favorably reported out S. 2889, the Surface Transportation Board Reauthorization Act of 2009 (the "Act"). On the House side, U.S. Rep. James Oberstar (D-MN), Chairman of the House Committee on Transportation and Infrastructure is readying his own version of STB Reauthorization, but appears to be waiting for the Senate to act before pushing forward in the House.

S. 2889 contains a panoply of provisions that are intended to address shipper concerns regarding competition. Key provisions are summarized below:

*STB Reorganization*
Board membership would expand from 3 members to 5 members. At least 2 members must have "professional or business experience (including agriculture or other rail customers) in the private sector," *i.e.*, at least 2 members must have a shipper background.

The STB, which currently is "administratively affiliated" with the Department of Transportation ("DOT") but "decisionally independent," would become an independent federal agency.

*Enhanced Investigative Authority*
The Act grants the STB authority to begin investigations, other than rate reasonableness proceedings, on its own initiative. Under current law, the Board can begin an investigation into carrier rates, classifications, rules or practices only on complaint.

*Rail Transportation Policy*
The Act "updates" the statement of the nation's rail transportation policy. *Inter alia,* it establishes that it is U.S. Government policy

> "To protect rail shippers …"; and
> "To provide fair and expeditious regulatory decisions *and ensure that the regulatory process is accessible and cost effective for all affected parties*" (emphasis added to denote new language)

The Act deletes the following current policies:

> "To minimize the need for federal regulatory control;"
> "To reduce regulatory barriers to entry into and exit from the industry;" and
> "To ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information."

Further, the Act expands on the current policy of encouraging and promoting energy conservation by making it U.S. Government policy "to advance the environmental and energy efficiency advantages of rail transportation and encourages energy conservation and environmentally-responsible practices among rail carriers."

*Interchange Commitments*

The Act gives the Board authority over existing and future "interchange commitments."

An "interchange commitment" is defined as "a contractual agreement between two or more rail carriers subject to the jurisdiction of the Board reached as part of a sale or lease of a rail line for which the approval of the Board is required … which limits the incentive or the ability of the purchaser or tenant rail carrier to interchange traffic with a rail carrier other than the seller or lessor rail carrier."

For future transactions that include an interchange commitment and are subject to Board authorization, the Act makes authorization contingent on the Board's determination that the interchange commitment is "reasonable and in the public interest."

The Act allows "persons" to challenge before the Board interchange commitments in existing agreements. If the Board determines that an existing interchange commitment is not "reasonable and in the public interest" the Board must "take appropriate action to address any conflict between an interchange commitment and the provisions of this part."

If the carriers fail to bring the interchange commitment into compliance, the Board may set a purchase price for the Class II or III rail carrier that is subject to the interchange commitment to buy out the commitment from the Class I carrier. To pay for the buy-out, the purchasing carrier may impose preconditions on shippers seeking service on the line, such as payment of a subsidy. Additionally, the Act makes federal grant money available for interchange commitment buy-outs.

*Bottleneck and Terminal Switch Rates*

The Act requires that "a Class I carrier, or other rail carrier as deemed appropriate by the Board" that is market dominant over a movement from origin to destination, establish upon "reasonable request" rates for a bottleneck segment of the movement. Further, it requires the STB to establish standards for determining whether a bottleneck rate is reasonable.

In developing standards for determining reasonableness of a bottleneck rate, the Board must take into consideration the carrier's revenue adequacy needs and must include as part of a reasonable rate, operating, maintenance, and required capital investment costs for providing the service, as well as a reasonable return on embedded capital for the bottleneck segment and a reasonable return on contribution to the carrier's "network infrastructure costs of the non-bottleneck segment of the route offered by the incumbent rail carrier that is sufficient, along with other traffic on the segment, to maintain the non-bottleneck segment, " and any other contributing factors appropriate to meet the revenue adequacy consideration.

In a rate challenge, the burden is on the carrier to establish rate reasonableness.

*Terminal Access*

The Act amends the standards under which the Board can order terminal access and the process for setting compensation and conditions, requires the Board to establish standards for considering challenges to the reasonableness of compensation and conditions, and sets out standards that must be used by the Board in developing standards to assess reasonableness.

Under current law, the Board can order a rail carrier to make its terminal facilities "including main-line tracks for a reasonable distance outside of a terminal" available for use by another carrier if it "finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business." 49 U.S.C. § 11102(a).

Under the Act, the Board can order access only if it finds, *inter alia*, that it "would be practicable and would not *significantly adversely affect* the operation of the terminal or facility owned by such rail carrier or rail carriers otherwise entitled to use the terminal or facilities," or the network efficiency or other customers of those rail carriers. (emphasis added) Additionally, access must be "necessary to promote the efficient operation of the railroad system and improve rail service" and "in the public interest."

Under current law, the carriers are responsible for agreeing on compensation and conditions for use of the terminal facilities and if the carriers cannot agree, the Board can establish them "under the principle controlling compensation in condemnation proceedings." 49 U.S.C. § 11102(a).

The Act gives rate-making power to the incumbent carrier in the first instance. The compensation and conditions would then be subject to a reasonableness challenge under standards to be established by the Board.

In developing the standards for determining reasonableness, the Board must consider "rail carriers' need to earn adequate revenues." It must also include "as part of reasonable compensation," operating and maintenance costs required to provide the requested usage, additional capital investment costs required to perform the requested usage, reasonable return on embedded capital employed for the requested usage, a reasonable contribution to network infrastructure costs, and any other contributing factors appropriate to meet the revenue adequacy consideration.

The burden of proof is on the rail carrier whose terminal facilities are at issue to show that the compensation is reasonable.

### *Exempt Traffic*

The Act eliminates the requirement that the Board exempt traffic "to the maximum extent consistent with this part." Further, the Board must conduct a study to determine whether any of the existing class exemptions should be revoked, and "establish a process for the periodic review, and revision as necessary, of class exemptions."

### *Antitrust*

Language that changes the antitrust regime governing rail carriers has not yet been unveiled.

### *Arbitration*

The Act requires the STB "to establish a binding arbitration process to resolve rail rate, practice, and common carrier service expectation complaints subject to the jurisdiction of the Board." Relief would be subject to a cap of $250,000 per year up to 2 years.

### *Rate Cases*

The Act increases the maximum relief for small rate cases, i.e., "three benchmark" cases, from $1 million to $1.5 million and for medium rate cases, i.e., "simplified stand alone-cost" cases, from $5 million to $10 million. Further, it allows the STB to "consider" a rate reasonableness challenge "up to 1 year before the date on which the rate is to take effect."

### *Studies*

In addition to the study on exempt traffic (see above), the Act requires STB studies on the Uniform Rail Costing System (Sec. 207), rail replacement costs (Section 208), rail practices (Section 209), rail car interchange (Section 210), how the STB will apply the revenue adequacy constraint in rate cases (Section 309), and the development of pipelines for the "capture, transportation, and sequestration of carbon dioxide."

Additionally, the Comptroller General is required to undertake a review of the impact of the regulatory changes made by the STB Reauthorization Act on, *inter alia*, rail operations, rates, competition, service, revenues, maintenance, and investment.

### *Short Line Tax Credits*

The good news: Both the House and Senate passed bills extending the expired short line maintenance tax credit. The measure passed in each chamber is part of a larger package of tax credits. On December 9, 2009, the House, passed HR 4213, The Tax Extenders Act of 2009. On March 10, 2010, the Senate passed an amended version of HR 4213, titled American Workers, State and Business Relief Act of 2010.

The bad news: Because the Senate passed an amended version of HR 4213, the bills must be reconciled before the tax credit can become law. Congress, however, appears in no hurry to pass a reconciled bill.

The tax credit is set forth in 26 I.R.C. Section 45G, which, *inter alia*, provides short line railroads a tax credit of $0.50 for every dollar expended on qualified track maintenance, subject to a mileage based limit. That credit, however, expired on January 1, 2010.

The legislation as passed by the House and Senate makes three changes to Section 45G. First, it extends the credit through 2012. Second, it expands eligibility to short lines created prior to January 1, 2009. Under current law, to avoid providing an incentive to Class I railroads to sell off lines, only short line railroads created prior to January 1, 2005 were eligible for the credit. Lastly, the legislation raises the limits on the amount of available credits.

### *Senate Hearing Focuses on Rail Security*

On April 21, 2010, the Senate Committee on Commerce, Science and Transportation held a hearing focused on rail security. Several Senators and witnesses called for additional measures and efforts to secure the nation's rail and transit systems.

Witnesses included officials from the Department of Homeland Security, Government Accountability Office, Amtrak, CSXT and New Jersey Transit. The general gist of the hearing was that more needs to be done to secure our nation's rail networks.

Senator Hutchison (R-TX) bemoaned the imbalance in resources that the Transportation Security Administration ("TSA") dedicates to aviation security as compared to surface transportation security. She "noted that the fiscal year 2010 budget for the nation's surface transportation security is just $110 million, which represents just over two percent of TSA's total budget [and] that this level of funding is not equal to the level of risk facing the country."

Senator Rockefeller (D-WV) stated that "[i]t's not clear that we are meeting our obligations to keep our passenger rail systems, or freight networks and other surface transportation networks protected."

Skip Elliot, CSXT's Vice President for Public Safety and the Environment, called on Congress to ensure that future rail security grant money go to freight rail security projects. Additionally, CSXT recommended that DHS establish rail security advisory committees similar to the Federal Railroad Administration's rail safety advisory committees.

The hearing followed the December 3, 2009 passage of H.Res. 28, which expresses the sense of the House of Representatives that TSA should, *inter alia*, "continue to enhance security against terrorist attack and other security threats to our Nation's rail and mass transit systems and other modes of surface transportation."

### *Bills Focus on Public Transit Safety*

On February 10, 2010, Senators Dodd (D-CT), Menendez (D-NJ), Mikulski (D-MD) and Cardin (D-MD) introduced S. 3015, "The Public Transportation Safety Program Act of 2010." The bill requires the Department of Transportation ("DOT") to establish a safety program for "rail fixed guideway public transportation systems." It excepts certain systems already subject to FRA regulation, and it authorizes, but does not require, the DOT to establish a similar program for public bus systems. It authorizes the DOT to impose civil and criminal penalties, and to seek injunctive relief for violation of a public transportation safety regulation or order. On February 22, 2010, US. Reps. Oberstar (D-MN), DeFazio (D-OR) and Edwards (D-MD) introduced a companion bill in the House (H.R. 4643).

### *High Speed Rail Bills and Letters*

On March 12, 2010, eleven U.S. Representatives from the Northeast introduced HR 4838 which designates the Northeast corridor as eligible for high-speed rail grants. The bill notes that although the Northeast corridor already has the Acela, investment in infrastructure is needed in order to allow Amtrak's high-speed service, the Acela to operate closer to its top speed of 150 mph. According to the bill, the Acela's current average speeds are 82 mph between Washington, DC and New York and 66 mph between New York and Boston. The Northeast corridor was not designated by the Obama Administration as one of the eleven corridors eligible for federal high-speed rail funds.

On April 13, 2010 U.S. Rep. Gwenn Moore (D-WI) introduced H.R. 5010, which requires that at least 10% of federal high-speed rail funds go to small businesses that are "owned and controlled by socially and economically disadvantaged individuals."

On April 14, 2010, one hundred and six U.S. Representatives sent President Obama a letter asking him to help in identifying a dedicated revenue source for high-speed rail. The letter follows Transportation Secretary Ray LaHood's March 22, 2010 reported announcement that the Administration will "soon unveil a set of policy principles for a new multi-year surface transportation authorization bill."

*Air-Rail Codeshare Study*

The Federal Aviation Administration reauthorization bill (H.R. 1586) that passed the Senate on March 22, 2010, requires the Government Accountability Office to conduct a study of "current airline and intercity passenger rail codeshare arrangements" and "the feasibility and costs to taxpayers and passengers of increasing [connectivity between the two modes]."

The House version of FAA Reauthorization that passed on March 25, 2010, did not include a similar provision. House and Senate conferees are attempting to resolve the differences between the House and Senate bills.

## TRANSPORTATION SAFETY

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### FMCSA Adopts New Rules Concerning Electronic On-Board Recorders

FMCSA has issued a final rule requiring the use of Electronic On-Board Recorders (EOBRs) to record hours of service compliance for motor carriers that have a ten percent or greater violation rate for specified hours of service violations. *Electronic On-Board Recorders for Hours of Service Compliance*, 75 Fed. Reg. 17208 (Apr. 5, 2010). The final EOBR rules are compliance-based, consistent with the agency's view to date that EOBRs not be mandated for all carriers. About 5,700 carriers will be required to use EOBRs under the adopted rule during each year of its implementation, However, perhaps in response to criticism that FMCSA should impose a more broad-based requirement for EOBRs, the agency has announced intention to initiate a new rulemaking proposal in the near future that would explore whether EOBR requirements should be imposed more broadly for passenger carriers, hazardous materials carriers, and new entrants.

The new EOBR rules become effective June 4, 2010, but compliance is delayed for two years to June 4, 2012. Under the new rule, any carrier meeting the violation rate threshold set forth in the rule will be issued an EOBR remedial directive requiring the installation of EOBRs that meet specified performance standards in all of the carrier's vehicles for a period of two years. Should such a carrier already have an older-generation EOBR known as an automatic on-board recording device and be able to demonstrate that iss drivers know how to use these devices, then it could continue to use such devices even if issued a remedial directive.

The final rule also addresses two other matters. First, it specifies technical performance standards for EOBRs. EOBRs, for example, will be required to record the date, time and location of the driver's duty status. Second, the final rule provides incentives to motivate other carriers to voluntarily install EOBRs. Notably, carriers using EOBRs will not need to maintain documentation supporting hours of duty compliance.

### FMCSA Initiates Rulemaking to Prohibit Texting By Commercial Motor Vehicle Drivers

Following up on its January 26, 2010 policy announcement banning drivers of commercial motor vehicles from texting while driving, FMCSA has initiated a formal rulemaking process. *Limiting the Use of Wireless Communication Devices*, 75 Fed. Reg. 16391 (Apr. 1, 2010). The proposed rule, which FMCSA can be expected to adopt expeditiously, will remove any question about the enforceability of the nationwide prohibition that the rule will adopt. The Department of Transportation has been on a crusade against distracted driving, and for good reason given the demonstrated heightened accident risk that accompanies use of personal communication devices while driving.

The proposed rule would prohibit texting, which is defined to include e-mails, instant messages, and accessing webpages. However, it would not prohibit using a cell phone to place or receive a phone call, using an in-cab fleet management system or CB radio, using a GPS system or using a device that can perform multiple, non-prohibited functions. Drivers who violate the proposed rule are disqualified from driving for increasing periods based on the number of violations. A sixty day disqualification period is specified for drivers convicted of two violations in any 3 year period, while a 120 day disqualification period is specified for a third or subsequent violation during any 3 year period.

FMCSA has advised that it is going to propose rules regarding cell-phone use by CMV drivers. Stay tuned.

### PHMSA Revises Security Plan Rules

Currently, carriers of all major modes transporting highly hazardous materials are required under PHMSA rules to maintain a security plan that addresses risks associated with transportation, personnel security, access issues and route security. See 49 CFR Part 172. In a final rule revising its security plan rules, PHMSA has narrowed the list of hazardous materials subject to these rules and made certain other changes designed to ease the burden of the security plan rules. It made these changes in coordination with TSA. *Hazardous Materials: Risk-Based Adjustment of Transportation Security Plan Requirements*, 75 Fed. Reg. 10974 (Mar. 9, 2010).

The final rules reduce the list of hazardous materials for which security plans must be developed. Generally, under the new rules security plans will be required only when the specified hazmat is transported in large bulk quantities, i.e., a quantity greater than 3,000 kg (6,614 pounds) for solids or 3,000 liters (792 gallons) for liquids and gases in a single packaging. The list of hazmats covered by the PHMSA rules was also modified to coordinate with TSA's list of Highway Security Sensitive Hazardous Materials. The new rules also include requirements that required security plans address site-specific risks, that individuals and their explicit responsibilities be listed in the plan, and that security risk assessments be in writing. Further, plans must be reviewed at least annually and modified as needed, employees with specific security-related responsibilities must have access to the plan, and employee training must be scheduled at least every 3 years and within 90 days of implementation of a revised plan.

Interestingly, PHMSA's final rule decision notes that TSA is working on proposed new rules for railroads and other surface modes governing vulnerability assessments and requiring the submission of security plans to TSA for review and approval. PHMSA indicates that its rules may need to be modified once again to comport with the new TSA rules, once the latter are issued.

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**Sunday, June 27, 2010**
**General Session: 4:00pm – 6:00 pm**

**4:00 pm – 5:00 pm** **Ethics**

**5:00 pm – 6:00 pm** **Climate Change**

*Global climate change is upon us. Europe has already enacted a carbon cap and trade system and Congress is considering its own climate change legislation. This panel of government, industry, and financial representatives examines how the European experience has impacted the transportation industry, trans-national issues raised by the European system, and lessons learned for the U.S. The panel will also examine current efforts within the transportation sector to reduce emissions and opportunities that might exist to benefit under a new green regime.*

**Monday, June 28, 2010**
8:00 am – 8:15 am **General Business Session - Part I**

8:15 am – 9:45 am **Hot Topics in Maritime Law / Co-Sponsored by the Maritime Administrative Bar Association**

*Should the Carmack Amendment apply to international ocean transportation shipments involving inland transportation by rail or truck---How will the Supreme Court decide this question in the pending Union Pacific vs. Regal Beloit case)? Will the Rotterdam Rules be ratified by the United States and other major trading nations? Should port authorities efforts to regulate port drayage movements to address national security, environmental issues and congestion be subject to federal preemption? Come hear the views of leading maritime experts on these current and controversial issues which involve potential collisions between maritime and domestic transportation policies, among other hot maritime topics.*

10:00 am – 11:30 am **Antitrust**

*Federal antitrust authorities have made clear statements regarding enhanced enforcement during the Obama Administration, which may have effects throughout the transportation industry. This panel will address the antitrust framework that govern actions for each of the various modes, and try to draw forth the lessons applicable to all.*

***Air:*** Each of the transportation modes faces unique antitrust concerns and challenges. Spurred on by sharp increases in transportation costs in the aviation industry, and by a Department of Justice investigation resulting in some fifteen guilty pleas and the collection of over $1.2 billion in fines, class action litigation has now been filed against some thirty airlines, alleging a decade old conspiracy.

***Maritime:*** The statutory antitrust exemption for international ocean carriers has come under Congressional scrutiny and may be the subject of shipper lobbying for repeal even as the domestic maritime industry has experienced antitrust prosecution.

***Rail:*** The rail industry is confronting the possibility of new legislation that threatens to change the regulatory landscape in which it acts.

***Motor:*** And while the motor carrier industry faces a continuous challenge in learning to live without antitrust immunity for rate making, there has been a rebirth of interest in the STB's ability to approve pooling agreements among carriers which provides participants in the agreement a degree of antitrust immunity.

**11:30 am – 12:30 pm Railroad Reform Legislation: To Be or Not to Be?**

*It has been 30 years since Congress passed the Staggers Rail Act and now Senator Rockefeller has introduced legislation seeking to address competition concerns plaguing shippers in more recent times. The railroads claim there is no plague to cure, and even if there were, the cure is worse than the disease. Does S.2889 strike the right balance? Will the House of Representatives develop its own curative? What are the side effects to the railroads and Staggers? Don't miss this two part panel which will provide you with the latest information from Congressional staff who are directly involved in the development of the rail reform legislation, as well as the views of shippers, Class I railroads, and the shortline industry who will debate whether there are realistic prospects for passage of this legislation in 2010, and if so, what form it will take?*

**12:30 pm – 2:00 pm Luncheon with Keynote Address**

**2:00 pm – 3:00 pm Part II: Railroad Reform Legislation: To Be or Not to Be?**

**3:15 pm – 4:45 pm NIMBY**

*Each of the modes faces their own problems regarding NIMBY issues. While the modes may have statutory help in responding to these issues, overuse (and misuse) of these various preemption statutes can result in a loss of that protection. The Clean Railroad Act of 2008 is a stark lesson. Instead, the modes need to be more proactive, than reactive. What are the NIMBY issues facing each of the modes? How does NIMBY (Not In My Back Yard) differ from NIAMBY (Not In Anybody's Back Yard) and BANANA (Build Absolutely Nothing Anywhere Near Anything)? What are the tools and methods to be used to respond to these issues?*

**6:00 pm** ***Cocktail Reception***
**7:00 pm – 10:00 pm** ***Awards Dinner***

**<u>Tuesday, June 29, 2010</u>**
**8:00 am – 8:05 am** **General Business Session – Part II**

**8:05 am – 9:05 am** **Security**
*The nation continues to face substantial security challenges as DHS attempts to meet the statutory requirement of 100% air and marine cargo screening. Recently, TSA has increased its focus on the other modes including, in particular, rail cargo. Among other things, TSA is increasing inspections and enforcement actions related to rail hazmat transportation. Panelists from DHS and industry will discuss these new rail security initiatives, as well as developments in air, motor carrier and port security.*

**9:05 am – 10:05 am** **In-House Counsel Roundtable**
*Every sector of the transportation industry is feeling the effects of the economic downturn. Through this prism, our distinguished panel of corporate counsel will share their insights on the challenges they face in managing the legal needs of their organizations, what they look for and value in their outside counsel relationships, and the top issues they face in 2010.*

**10:20 am – 11:35** **Changes at the STB**:
*The STB has continued in the role of the former Interstate Commerce Commission in the resolution of shipper and carrier disputes. Currently, there are some important cases pending before the STB that could significantly change the way railroads compete with each other. In late 2009 the White House appointed a new chairman of the STB and he did not come from the traditional sources within the industry. How does other recent changes in the make-up of the Board affect its views and priorities? Also, the DuPont/CSXT decision in 2008 was an indication that shippers have rights to be enforced. Will this trend continue? This panel will explore these and other issues expected to arise with the STB in 2010.*

**11:35 am – 12:50 pm** **Modal Updates**
*Association Highlights* Editors to discuss the current issues, rulemakings, etc. of different modes of transportation (Air, Rail, Maritime, Motor, FERC, Rail & Motor Legislative updates, etc.).

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