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NATIONAL COOPERATIVE RAIL RESEARCH PROGRAM

Responsible Senior Program Officer: Lawrence D. Goldstein

Legal Research Digest 2

RAILROAD LEGAL ISSUES AND RESOURCES

This report was prepared under NCRRP Project 12-01, "Legal Aspects of Rail Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, The Thomas Law Firm, Washington, DC.

Background

The nation's freight, intercity passenger, and commuter rail operators need a comprehensive source of information that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to rail transportation. The complex interaction among operators, institutional entities at all levels of government, and private and public sectors creates a multi-level institutional configuration affecting rail system planning and operation.

To meet similar needs in the highway area, the Transportation Research Board of the National Academies inaugurated a legal research project in 1969 under the National Cooperative Highway Research Program. The highway legal project has been funded continuously since that time, eliciting strong support and approval from the constituency it serves. Similarly, a transit legal research project was implemented in 1992 under the Transit Cooperative Research Program and that project has continued since its inception. Finally, an airport legal research project was implemented in 2006 under the Airport Cooperative Research Program and continues today.

Each year, numerous attorneys nationwide are involved in rail-related work, yet there is no centralized repository of legal resources on which they can depend. In response, the National Cooperative Rail Research Program's (NCRRP) *Legal Research Digest* series has been initiated to provide rail-related research on a wide variety of legal topics.

Applications

This legal research digest presents a detailed compilation and review of legal issues of importance that attorneys may encounter when representing both freight and passenger railroad owners and operators (commuter and intercity) and others (including government entities) involved in railroad-related transactions. This product includes 40 separate chapters evaluating individual issues ranging from abandonment and discontinuance to constitutional law, construction, contracts, interaction with regulatory agencies, safety-related issues, retirement, and numerous other subjects.

The digest is presented in two parts:

1. A printed annotated index of the entire range of legal topics encompassed by review.
2. The electronic supporting documentation presenting detailed summaries of statutes, regulations, cases, and relevant articles as a fundamental resource for use in understanding the background and broad ramifications of railroad-related law reflected in each category.

Case law is continuously evolving and any analysis or evaluation building on the material contained in this digest should also examine experiences that occur after publication. Case law also varies by jurisdiction, and possible variations should always be researched and considered when using this resource.

TRB TRANSPORTATION RESEARCH BOARD
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A. INTRODUCTION

The objective of the research for the annexed digest was to develop an index of substantive legal areas and issues of importance that railroad attorneys may encounter in their representation of railroads, including freight and passenger (commuter and intercity) railroads, railroad owners and owners (including government entities), and others. An index to and brief narrative of the legal topics and issues addressed in the digest appears at pages 7 to 162. The summaries of the statutes, cases, and articles that railroad attorneys and others may consult for information on major topics in railroad law and recent developments commence at page 170 of the digest contained in the accompanying CD-ROM.

B. DISCLAIMER

Please be advised that the one using this guide should consult any amendments or later case history for the statutes and cases that are summarized in the digest.

Although the digest summarizes statutes and cases for some states, the materials are examples of issues and resources and are not necessarily representative of all states or even a majority of the states. Thus, it is necessary to verify what the law is in a particular jurisdiction in which the reader is interested.

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C. ABBREVIATIONS AND ACRONYMS

AAPD	American Association of People with Disabilities
ADA	Americans with Disabilities Act
Amtrak	National Railroad Passenger Corporation
Amtrak Act	Rail Passenger Service Act
ARAA	Amtrak Reform and Accountability Act of 1997
ARRA	American Recovery and Reinvestment Act of 2009
CEQ	Council of Environmental Quality
CERCLA	Comprehensive Environmental Response Compensation and Liability Act
COGSA	Carriage of Goods by Sea Act
CRA	Clean Railroads Act
CREATE	Chicago Region Environmental and Transportation Efficiency Program
DOT	Department of Transportation
EEOC	Equal Employment Opportunity Commission
FCA	False Claims Act
EPA	Environmental Protection Agency
FELA	Federal Employers' Liability Act
FHWA	Federal Highway Administration
FLPMA	Federal Land Policy and Management Act
FMSLMRS	Federal Service Labor–Management Relations Statute
FOPA	Firearm Owners' Protection Act
FRA	Federal Railroad Administration
FRSA	Federal Railroad Safety Act of 1970

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FSAA	Federal Safety Appliance Act
FTA	Federal Transit Administration
FSAA	Federal Safety Appliance Act
HMSA	Hazardous Materials Safety Act
HMTA	Hazardous Materials Transportation Act
HSIP	Highway Safety Improvement Program
HSIPR	High-Speed Intercity Passenger Rail
HSR	High-Speed Rail
ICC	Interstate Commerce Commission
ICCTA	Interstate Commerce Commission Termination Act of 1995
LIA	Locomotive Inspection Act
LMRA	Labor Management Relations Act
MAP-21	Moving Ahead for Progress in the 21st Century Act
MERA	Minnesota Environmental Rights Act
MTCA	Model Toxics Control Act (Washington)
MUTCD	Manual on Uniform Traffic Control Devices
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NITU	Notice of Interim Trail Use or Abandonment
NLRA	National Labor Relations Act
NMB	National Mediation Board
NRAB	National Railroad Adjustment Board
NTSB	National Transportation Safety Board

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OSHA	Occupational Safety and Health Administration
PRIAA	Passenger Rail Investment and Improvement Act of 2008
PUC	Public Utility Commission
3R Act	Regional Rail Reorganization Act of 1973
4R Act	Railroad Revitalization and Regulatory Reform Act
RLA	Railway Labor Act
RRA	Railroad Retirement Act of 1974
RRIF	Railroad Rehabilitation and Improvement Financing Act
RSIA	Rail Safety Improvement Act
RRSIA	Railroad Retirement and Survivors' Improvement Act
RUIA	Railroad Unemployment Insurance Act
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
STB	Surface Transportation Board
TEA-21	Transportation Equity Act for the 21st Century
TIFIA	Transportation Infrastructure Finance and Innovation Act
TIGER	Transportation Investment Generating Economy Recovery program
Trails Act	National Trails Systems Act

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INDEX OF LEGAL TOPICS AND ISSUES

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I. ABANDONMENT OF RAIL LINES OR DISCONTINUANCE OF SERVICE — 171

A. Introduction — 171

Part I concerns only abandonment of rail lines and federal regulatory issues, including the abandonment or discontinuance of a rail line or a portion thereof that is subject to 49 U.S.C. § 10903, *et seq.* and the regulations in 49 C.F.R. § 1152, *et seq.,*[1] as well as the interim use of railroad rights-of-way for recreational trails.

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As explained by the Supreme Court of Michigan in *Mich. Dep't of Natural Res. v. Carmody-Lahti Real Estate, Inc.*,[2] an abandonment "involves relinquishing rail lines and underlying property interests," whereas discontinuance "'allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future.'"[3]

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2. Procedures Applicable to an Abandonment or Discontinuance — 173

When a railroad carrier subject to the jurisdiction of the Surface Transportation Board (STB) decides to abandon or discontinue any part of a railroad line, the carrier must file an application with the STB and provide information as required by statute and the regulations thereto.[4]

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[1] *See* Surface Transportation Board, Overview, available at http://www.stb.dot.gov/stb/about/overview.html (last accessed Mar. 31, 2015).

[2] 472 Mich. 359, 699 N.W.2d 272 (Mich. 2005).

[3] *Id.*, 472 Mich. at 365, 699 N.W.2d at 276 (citations omitted).

[4] 49 U.S.C. §§ 10903–10905 (2014); 49 C.F.R. pt. 1152) (2014).

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3. STB's Authority to Exempt a Person, Class of Persons, or a Transaction or Service 177

The STB "shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part…is not necessary to carry out the transportation policy of section 10101 of this title and…either…the transaction or service is of limited scope[] or the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power."[5] Besides being able to commence a proceeding on its own initiative,[6] the board is empowered to specify the effective period of an exemption[7] and may revoke an exemption when "necessary to carry out the transportation policy" described in 49 U.S.C. § 10101.

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In *Avista Corp. v. Wolfe*,[8] the Ninth Circuit held that whether a railroad has abandoned its right-of-way is determined based on the plain language of 43 U.S.C. § 912 and common law principles of abandonment: the present intent to abandon and physical acts demonstrating the clear intent to abandon.

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[5] 49 U.S.C. § 10502(a) (2014).

[6] 49 U.S.C. § 10502(b) (2014).

[7] 49 U.S.C. § 10502(c) (2014).

[8] 549 F.3d 1239, 1248 (9th Cir. 2008).

[9] *CSX Transp. Inc., – Aban. Exemption – In White County, Ind.,* EB 43833, Slip Op. (STB served Sept. 19, 2014), available at http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/15AA5535B36F775E85257D58004CE5AC/$file/43833.pdf (last accessed Mar. 31, 2015).

[10] *Id*. at 1.

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could file an appropriate abandonment application or petition for exemption that cured the "defects" in the current petition.[11]

b. Request to Authorize a Third Party or Adverse Abandonment of a Line 182

In *Paulsboro Refining Company LLC–Adverse Abandonment–in Gloucester County, N.J.*,[12] Paulsboro Refining Company LLC (PRC) requested the board to authorize the third-party abandonment, referred to as an adverse abandonment, of approximately 5.8 mi of PRC's rail line (the Line) that SMS Rail Service, Inc. (SMS), a Class III railroad, operated for PRC. Because there was no present or future need for common carrier service, the board approved the application. The board rejected SMS's claims that the abandonment should be denied because federal railroad safety regulations would no longer apply, noting that other federal safety regulations would continue to apply.[13]

c. Denial of Petition to Reopen Declaratory Order Proceeding in the Absence of Changed Conditions or New Evidence 184

In *BNSF Railway Company–Petition for Declaratory Order*,[14] the board followed up on its 2010 authorization of BNSF to abandon 1.54 mi of a rail line in Oklahoma City, Oklahoma pursuant to 49 U.S.C. § 10903. The board denied J. Kessler's petition filed in June 2009 to reopen the proceedings, finding that the shipper did not currently need rail service, that BNSF would provide rail service when the shipper required it, and that J. Kessler's arguments regarding the absence of future rail service for the shipper was nothing more than speculation.

6. Class Exemption and Relocation 186

In *Kessler v. Surface Transportation Board*,[15] the District of Columbia Circuit held that it is within the STB's discretion to exempt a rail carrier from abandonment procedures under 49 U.S.C. § 10904 "when the right-of-way to be abandoned is needed for a public purpose and there is no overriding public need for continued rail service."[16]

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[11] *Id*. at 6.

[12] AB 1095 (Sub-No.1), Slip Op. at 1 (STB served Dec. 2, 2014), available at http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/7A83E1ACF028CC8385257DA200546855/$file/43977.pdf (last accessed Mar. 31, 2015).

[13] *Id*.

[14] *BNSF Railway Company–Petition for Declaratory Order*, FD 35164, Slip Op. at 1 (STB served May 7, 2010), available at http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/BFDBAEB594ECED188525771B00702699/$file/40399.pdf (last accessed Mar. 31, 2015).

[15] 635 F.3d 1 (D.C. Cir. 2011).

[16] *Id*. at 5.

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7. Judicial Approval of the Abandonment of a Line of a Railroad Company Reorganizing in Bankruptcy **187**

Normally, the STB must authorize the abandonment of a railroad line, but in the case of a railroad company reorganizing in bankruptcy, the court may authorize an abandonment.[17]

8. STB's Authority in Adverse Abandonment Proceeding and in Involuntary Bankruptcy Proceeding **187**

In *Howard v. Surface Transportation Board*,[18] the First Circuit held that "Congress made it clear in enacting 11 U.S.C. § 1170 that it wanted the bankruptcy court, not the STB, to make the final determination of whether a debtor's rail lines could be *abandoned* and the STB to play an advisory role, subject to time constraints"[19] but that the board retains its jurisdiction over "adverse" abandonment or discontinuance proceedings.[20]

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In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co*.,[21] the U.S. Supreme Court held "that the Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated carrier when the [ICC], in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise in state court."[22]

C. Federal Grants of Rights-of-Way to Railroads, Abandonment, and Reversionary Rights **191**

[17] 11 U.S.C. § 1170 (2014).

[18] 389 F.3d 259 (1st Cir. 2004).

[19] *Id*. at 268 (emphasis in original).

[20] *Id*. at 268, 270–71.

[21] 450 U.S. 311, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981).

[22] *Id.,* 450 U.S. at 322–23, 101 S. Ct. at 1132–1133, 67 L. Ed. 2d 258.

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An article published by the Congressional Research Service, analyzing the 1875 General Railroad Right of Way Act (the 1875 Act)[23] and the Act of 1922,[24] states that the Court of Federal Claims has held that because only an easement was granted for a right-of-way "when the right of way was no longer used for railroad purposes, the easement was lifted and no property interest reverted to the United States."[25]

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A law review article, written prior to the decision in *Marvin M. Brandt Revocable Trust v. United States,*[26]discussed in subpart I.C.3 below, discusses the split that had developed in the federal circuit courts of appeals on whether the federal government retains any ownership in railroad rights-of-way that were granted after 1871, the year that Congress discontinued granting land to railroad companies in favor of granting rights-of-way to the companies.[27]

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In *Marvin M. Brandt Revocable Trust v. United States*,[28] the Supreme Court held that the General Railroad Right-of-Way Act of 1875 granted only an easement to the railroad company, not an interest in fee, and thus when the railroad company in 2004 properly abandoned the right-of-way, "Brandt's land became unburdened of the easement, conferring on him the same full rights over the right of way as he enjoyed over the rest of the Fox Park parcel."[29]

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[23] 43 U.S.C. § 934 (repealed).

[24] 43 U.S.C. § 912 (2014) (disposition of abandoned or forfeited railroad grants).

[25] PAMELA BALDWIN & AARON M. FLYNN, FEDERAL RAILROAD RIGHTS OF WAY 16 (Congressional Research Service, CRS Report for Congress, updated May 3, 2006), available at http://congressionalresearch.com/RL32140/document.php (last accessed Mar. 31, 2015).

[26] 134 S. Ct. 1257, 1266, 188 L. Ed. 2d 272, 282 (2014).

[27] Darwin R. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift*," 82 U. COLO. L. REV. 85, 85–86 (2011).

[28] 134 S. Ct. 1257, 188 L. Ed. 2d 272 (2014).

[29] *Id*., 134 S. Ct. at 1266, 188 L. Ed. 2d at 282.

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[30] 16 U.S.C. § 1241, *et seq*. (2014).

[31] Pub. L. No. 94-210, 90 Stat. 33. *See* 45 U.S.C. 801, *et seq*. (2014).

[32] Pub. L. No. 100-470, 102 Stat. 2281, 2281 (1988), *codified at* 16 U.S.C. § 1248(c) (2014).

[33] 16 U.S.C. § 1247(d) (2014).

[34] 49 C.F.R. § 1152.29(a) (2014).

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2. The Tucker Act and Claims Against the United States **200**

Claims by landowners of a taking of their property when an abandoned rail line is to be used as a recreational trail are heard by the Court of Federal Claims under the Tucker Act,[35] with the U.S. District Courts retaining concurrent jurisdiction over claims for $10,000 or less.[36]

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In *Preseault v. Interstate Commerce Commission*,[37] the U.S. Supreme Court held that the petitioners' claim of a reversionary interest in land over which a railroad had a right-of-way had to be brought under the Tucker Act in the Court of Federal Claims.

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In *Toews v. United States*,[38] the Federal Circuit held that the government may impose new uses affecting the fee interests held by adjacent landowners for which the government must pay just compensation and further held that the use of a railroad right-of-way as a recreational trail is an entirely different use that constitutes a taking under the Fifth Amendment.

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In *Thompson v. United States*,[39] the Court of Federal Claims held that because the plaintiffs had a reversionary interest in the easements to their properties, and because Michigan did not authorize the use of railroad easements for public recreational trails, the government's actions constituted a taking when the government converted a right-of-way to a public recreational trail.

[35] 28 U.S.C. § 1491 (2014).

[36] 28 U.S.C. § 1346(a)(2) (2014).

[37] 494 U.S. 1, 11–13, 110 S. Ct. 914, 921–922, 108 L. Ed. 2d 1 (1990).

[38] 376 F.3d 1371, 1376 (Fed. Cir. 2004).

[39] 101 Fed. Cl. 416, 434 (Fed. Cl. 2011).

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In *Ellamae Phillips Co. v. United States*,[40] the Federal Circuit held that whether there is a taking "rest[s] on the scope, not abandonment, of the easement, as the taking of a reversionary interest in a right-of-way is compensable regardless [of] whether the right-of-way has been abandoned."[41]

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An article in the *Ecology Law Quarterly* analyzes the main points of *Preseault*, *supra*, Part I.E.3, discusses the proceedings that followed the Supreme Court's decision, summarizes the regulatory framework and the STB's involvement in the process of railbanking, and identifies issues to consider when litigating takings claims under the Trails Act.[42]

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A. Introduction 209

The Americans with Disabilities Act (ADA) was enacted to "provide a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities"[43] in employment, transportation, public accommodations, communications, and government activities.[44] Section B discusses provisions of the ADA that apply to transportation by rail. Section C discusses what is required for a *prima facie* case of employment discrimination because of a disability. Section D addresses the meaning of a disability under the Act, including before and after the 2008 amendments to the Act. Section E reviews issues concerning the feasibility of alterations to make facilities accessible to rail patrons. Sections F and G summarize articles that discuss the ADA Amendments Act of 2008 and transportation and civil rights.

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[40] 564 F.3d 1367 (Fed. Cir. 2009).

[41] *Id*. at 1372.

[42] Cecilia Fex, *The Elements of Liability in a Trails Act Takings: A Guide to the Analysis*, 38 ECOLOGY L.Q. 673, 682, 685–700 (2011).

[43] Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. *See also* ADA.gov., Americans with Disabilities Act of 1990 (as amended), available at http://www.ada.gov/pubs/adastatute08.htm (last accessed Mar. 31, 2015).

[44] United States Department of Labor, Disability Resources, Americans with Disabilities Act, available at http://www.dol.gov/dol/topic/disability/ada.htm (last accessed Mar. 31, 2015).

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B. Americans with Disabilities Act 209

The ADA includes provisions that apply to transportation by rail; for example, 42 U.S.C. §§ 12142 and 12162, which are discussed in this subpart. Railroad employees are protected under the employment section of the ADA.[45]

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As stated in *Norman v. Union Pacific R.R. Co.,*[46] a *prima facie* case for discrimination under the ADA requires proof of an ADA-qualifying disability, qualifications to perform the essential functions of the employee's position with or without reasonable accommodation, and an adverse employment action because of the disability.

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In *EEOC v. Burlington Northern & Santa Fe Ry. Co.*,[47] the Tenth Circuit held, *inter alia*, that when "an individual cannot perform a specific required task in a particular position or positions but can perform other tasks, he is not considered excluded from a 'class of jobs.'"[48]

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In *Coale v. Metro N. R.R. Co.*,[49] a federal district court in Connecticut held that the plaintiff failed to provide any evidence that any railroad employees regarded his injury as an impairment that substantially limited a major life activity.

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[45] 42 U.S.C. § 12112(a) (2014) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.")

[46] 606 F.3d 455, 459 (8th Cir. 2010).

[47] 211 Fed. Appx. 682 (10th Cir. 2006) (citation omitted).

[48] *Id.* at 686 (*quoting* EEOC v. Burlington N. & Santa Fe Ry. Co., 406 F. Supp. 2d 1228, 1237 (W.D. Okla. 2005)).

[49] 2014 U.S. Dist. LEXIS 31764, at *1, 41 (D. Conn. Mar. 12, 2014).

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3. Definition of Disability Before and After the ADA Amendments 215

In *Gaus v. Norfolk S. Ry. Co.*,[50] a federal district court in Pennsylvania held that with respect to the railroad's actions prior to January 1, 2009, and the ADA amendments, Gaus did not have a disability because Norfolk Southern did not regard Gaus as having an impairment that substantially limited one or more major life activities.[51] However, for the period after January 1, 2009, the court held that a reasonable jury could find that Gaus could have been disabled under the "regarded as" test of the ADA as amended and, thus, denied Norfolk Southern's motion for summary judgment.[52]

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A law review article discusses the ADA Amendments Act of 2008 (ADAAA), which broadened the definition of disability in response to Supreme Court decisions that had narrowed the definition beyond the original intent of Congress but argues that the interpretation of

[50] 2011 U.S. Dist. LEXIS 111089, at *1, 45 (W.D. Penn. Sept. 28, 2011).

[51] *Id.* at *45.

[52] *Id.* at *60–61.

[53] 655 F. Supp. 2d 553, 566, 567 (E.D. Pa. 2009), *aff'd*, 635 F.3d 87, 98 (3d Cir. 2011).

[54] 693 F.3d 345, 354 (3d Cir. 2012).

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impairments may hinder the intent of Congress in expanding the “regarded as” prong in the ADAAA.[55]

G. Transportation and Civil Rights 220

A 2013 article by the American Association of People with Disabilities emphasizes the key roles played by transportation and mobility “in the struggle for civil rights and equal opportunity in the disability community.”[56]

III. AMTRAK 222

A. Introduction 222

The 1970 Rail Passenger Service Act (PRSA or Amtrak Act) created the National Railroad Passenger Corporation (Amtrak), a federally funded, private company.[57] Sections B through D discuss the Amtrak Act and the Passenger Rail Investment and Improvement Act of 2008 (PRIAA), as well as the 1997 repeal of Amtrak’s exclusive franchise. Sections E through H discuss judicial decisions involving Amtrak. Sections I through K summarize articles addressing Amtrak’s exemption from claims under the False Claims Act, Amtrak tax exemptions, and high-speed rail.

Statutes **223**

B. Amtrak Act 223

Under the Amtrak Act, Amtrak is defined as a railroad carrier operated and managed as a for-profit corporation that is not a department, agency, or instrumentality of the United States government.[58]

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[55] Michelle A. Tavis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 971 (2012).

[56] American Association of People with Disabilities, Equity in Transportation for People with Disabilities, available at http://www.aapd.com/resources/publications/transportation-disabilities.pdf (last accessed Mar. 31, 2015).

[57] FRA, Amtrak, available at https://www.fra.dot.gov/Page/P0052 (last accessed Mar. 31, 2015).

[58] 49 U.S.C. § 24301 (2014).

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C. Repeal of Amtrak's Exclusive Franchise in 1997 224

Although the Amtrak Act "provided Amtrak with the exclusive right to provide intercity rail passenger service over the corridors that it operated," Amtrak's "exclusive franchise" was repealed in 1997.[59]

D. The Passenger Rail Investment and Improvement Act of 2008 224

The PRIAA was enacted to improve Amtrak's service, operations, and facilities in respect to its long-distance routes, the Northeast Corridor (NEC), and state-sponsored corridors; encourage the development of high-speed rail corridors; and authorize grants to Amtrak to cover operating costs and certain capital investments.[60]

Cases **227**

E. Private Corporation or Public Entity? 227

The issue of Amtrak's status as defined in 49 U.S.C. § 24301 was litigated most recently in *Department of Transportation v. Association of American Railroads,*[61] decided by the U.S. Supreme Court on March 9, 2015, in which the Court held that Amtrak was a governmental entity for purposes of Section 207 of PRIAA.

1. Decision by the District of Columbia Circuit 228

In *Association of American Railroads v. United States Department of Transportation*,[62] the Association of American Railroads (AARR) argued before the District of Columbia Circuit that Section 207 of PRIIA was unconstitutional. The appeals court held that Amtrak is a private corporation because "Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit."[63] In reversing the district court's grant of a summary

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[59] Federal Railroad Administration, Privatization of Intercity Rail Passenger Service in the United States, at 4 (Mar. 1998), available at www.fra.dot.gov/eLib/Document/2759 (last accessed Mar. 31, 2015).

[60] Federal Railroad Administration Overview, Highlights and Summary of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), at 1, 2 (prepared Mar. 10, 2009), available at https://www.fra.dot.gov/eLib/Details/L02830 (last accessed Mar. 31, 2015).

[61] 135 S. Ct. 1225, 191 L. Ed. 2d 153, 2015 U.S. LEXIS 1763, at *1 (U.S., Mar. 9, 2015).

[62] 721 F.3d 666, 670 (D.C. Cir. 2013), *rehearing denied,* 2013 U.S. App. LEXIS 20746 (D.C. Cir., Oct. 11, 2013), *rehearing, en banc, denied*, 2013 U.S. App. LEXIS 20745 (D.C. Cir., Oct. 11, 2013), *vacated and remanded,* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 191 L. Ed. 2d 153, 2015 U.S. LEXIS 1763 (U.S., Mar. 9, 2015).

[63] *Association of American Railroads*, 721 F.3d at 674, 677.

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judgment for the Department of Transportation (DOT), the court held that Section 207 of PRIIA was unconstitutional.

2. Decision by the United States Supreme Court 229

On March 9, 2015, the Supreme Court reversed the appeals court, held that "for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity,"[64] and further held that on remand the Court of Appeals would have to address "substantial questions respecting the lawfulness of the metrics and standards--including questions implicating the Constitution's structural separation of powers and the Appointments Clause."[65]

F. Exemption of Amtrak from State Public Utility Rules 230

In *City of New York v. Amtrak*,[66] a federal district court in the District of Columbia held that Amtrak was not obligated by reason of a 1906 deed to maintain the bridge in dispute in perpetuity because any such agreement was preempted by federal law.

G. Preemption of a Negligence Claim Relating to Service but Not of a Claim for Negligent Design of a Railcar 232

In *Rubietta v. Amtrak*,[67] the court held that the plaintiff's claim for negligent seating was preempted because the claim related to service, but that a claim based on alleged negligent design was not preempted.

H. Express and Implied Preemption of Condemnation of Amtrak Property 233

In *Amtrak v. McDonald,*[68] when Amtrak sued the Commissioner of the New York State Department of Transportation in connection with its condemnation of Amtrak land, the court granted the Commissioner's motion for summary judgment on several grounds, including the defendant's immunity under the Eleventh Amendment.

***Articles* 234**

I. Amtrak Exemption from Claims Under the False Claims Act 234

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[64] 135 S. Ct. 1225, 191 L. Ed. 2d 153, 156, 2015 U.S. LEXIS 1763, at *1, 6 (U.S., Mar. 9, 2015).

[65] *Id.*, 191 L. Ed. 2d at 156, 2015 U.S. LEXIS 1763, at *6.

[66] 960 F. Supp. 2d 84, 90, 94–95 (D.D.C. 2013).

[67] 2012 U.S. Dist. LEXIS 12047, at *1, 9–11, 12 (N.D. Ill. Jan. 30, 2012).

[68] 2013 U.S. Dist. LEXIS 144107, at *1, 25 (S.D.N.Y. Sept. 26, 2013).

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An article in *Recent False Claims Act & Qui Tam Decisions* that discusses the applicability of the False Claims Act (FCA) to Amtrak argues that the District of Columbia Circuit's decision in *United States ex rel. Totten v. Bombardier Corp.*[69] effectively exempts Amtrak from FCA actions.[70]

J. Amtrak Tax Exemption 236

A law review article discussing the Amtrak tax exemption argues that recent judicial authority is "consistent with the presumed congressional intent to minimize state taxes and fees on Amtrak."[71]

K. High-Speed Rail Projects 236

An article on high-speed rail (HSR) argues that Amtrak is uniquely positioned with respect to HSR projects because of Amtrak's ability to use existing right-of-ways or privately owned freight tracks.[72]

IV. BUY AMERICA ACT 238

A. Introduction 238

A 2015 NCRRP Report, entitled *Buy America Requirements for Federally Funded Rail Projects*,[73] summarized briefly in this part of the digest, is an authoritative, comprehensive study of the Buy America requirements applicable to federal grants for passenger and freight rail development.[74]

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[69] 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 3967 (U.S., May 16, 2005), *superseded by statute as stated in* United States v. Carell, 782 F. Supp. 2d 553, 2011 U.S. Dist. LEXIS 28965 (M.D. Tenn. 2011). *See* Department of Transportation v. Association of American Railroads, 135 S. Ct. 1225, 191 L. Ed. 2d 153, 2015 U.S. LEXIS 1763, at *1, 6 (U.S., Mar. 9, 2015) in which the Supreme Court held for purposes of § 207 of the Passenger Rail Investment and Improvement Act (PRIAA) that Amtrak was a "governmental entity."

[70] Taxpayers against Fraud (TAF) Education Fund, Recent False Claims Act & Qui Tam Decisions, 35 *False Cl. Act and Qui Tam Q. Rev*. 3 (Oct. 2004).

[71] Symposium, *A Case of Irreconcilable Differences with the Federal District Court: An Agency Caught in a Judicial Vise Grip*, 21 WIDENER L.J. 213, 226 (2011).

[72] Darren A. Prum and Sarah L. Catz, *High-Speed Rail in America: An Evaluation of the Regulatory, Real Property, and Environmental Obstacles a Project Will Encounter,* 13 N.C. J.L. & TECH. 247, 268–69 (2012).

[73] TIMOTHY R. WYATT, BUY AMERICA REQUIREMENTS FOR FEDERALLY FUNDED RAIL PROJECTS 1, (NCRRP Legal Research Digest, 2015), available at http://onlinepubs.trb.org/Onlinepubs/ncrrp/ncrrp_lrd_001.pdf (last accessed Mar. 31, 2015).

[74] *Id*. at 3.

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B. General Statutory Issues 238

The digest discusses the statutory issues and differences among the various Buy America provisions, including their coverage and applicability; exceptions, exclusions, and waivers; and bid certification and potential penalties, as well as multiple funding sources with Buy America provisions.[75]

C. Buy America Provisions and the Federal Railroad Administration 238

The digest discusses first, in some detail the Federal Railroad Administration (FRA) High-Speed Intercity Passenger Rail (HSIPR) Buy America provision[76] and, second, the Amtrak Buy America provision.[77]

D. Buy America Provisions and the Federal Transit Administration 240

The digest analyzes the Buy America provision applicable to the Federal Highway Administration (FHWA),[78] followed by an explanation of the Buy America provision that applies to the Federal Transit Administration (FTA).[79]

V. CARMACK AMENDMENT AND LIABILITY FOR LOST OR DAMAGED GOODS 242

A. Introduction 242

Many issues may arise under the Carmack Amendment concerning a railroad's liability when, for example, a train transporting cargo derails. Sections B and C discuss statutes, regulations, and cases affecting the liability of railroads under the Carmack Amendment. Section D discusses the applicability of the Carriage of Goods by Sea Act (COGSA) and the Harter Act. Sections E through G consider whether the Carmack Amendment applies to an international shipment on a through bill of lading when a freight forwarder contracts for the inland rail portion, as well as other issues. Section H discusses articles that address, for instance, whether the Carmack Amendment applies to intermodal exports and whether the Supreme Court has misinterpreted the Carmack Amendment and COGSA.

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[75] *Id*. at 4–9.

[76] *Id*. at 9–14.

[77] *Id*. at 26 (footnote omitted).

[78] *Id*. at 39–52.

[79] *Id*. at 52.

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Statutes and Regulations **242**

B. The Carmack Amendment's Effect on the Liability of Railroad Carriers **242**

The Carmack Amendment, enacted in 1906 to amend the Interstate Commerce Act,[80] imposes strict liability on common carriers for goods that are lost or damaged or not delivered on time, limits the liability of a carrier to the value of the damaged goods, and preempts state and common law claims in these instances.[81]

Cases **245**

C. Applicability of the Carmack Amendment **245**

1. Preemption of All Claims Under State Law **245**

The Carmack Amendment bars all claims that would permit a railroad to be held liable under state law.[82]

2. Intrastate Shipment that Was Part of an Interstate Shipment **246**

In *Chartis Mexico, S.A. v. HLI Rail and Rigging*,[83] a federal district court in New York held that for shipments originating overseas under a single through bill of lading the initial carrier is liable for the inland portion of the transportation and, thus, is exempt from the Carmack Amendment.

3. Claims Brought Against the Originating Rail Carrier in the Judicial District Where the Point of Origin Is Located **247**

The Carmack Amendment allows claims to be brought against originating rail carriers in the judicial district where the point of origin is located, as well as allows one court to exercise control over all claims subject to the Amendment.[84]

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[80] *See* 49 U.S.C. §§ 11706 and 14706 (2014).

[81] Regulations applicable to the Carmack Amendment are set forth in 49 C.F.R. pts. 1005 and 1035.

[82] Gulf Rice Arkansas, LLC v. Union Pacific R.R. Co., 376 F. Supp. 2d 715, 719 (S.D. Tex. 2005).

[83] Chartis Mexico, S.A. v. HLI Rail and Rigging, 2014 U.S. Dist. LEXIS 33745, at *1 (S.D.N.Y. Mar. 13, 2014), *on reconsideration by, modified by, in part, summary judgment granted in part*, 2015 U.S. Dist. LEXIS 15909 (S.D.N.Y., Feb. 9, 2015).

[84] 49 U.S.C. § 11706(d)(2)(A) (2014); Pacer Global Logistics, Inc. v. Amtrak, 272 F. Supp. 2d 784, 788 (E.D. Wis. 2003).

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Statutes and Regulations **248**

D. Applicability of the Carriage of Goods by Sea Act and the Harter Act **248**

The Carmack Amendment may not apply when shipments originate overseas under a single through bill of lading or the shipper and carrier contract to limit the liability of intermediary carriers and freight forwarders. When the initial carrier is an ocean carrier, COGSA will apply,[85] whereas the Harter Act applies to contracts of carriage of goods by sea between U.S. ports and between the United States and foreign ports.[86]

Cases **250**

E. Carmack Amendment Inapplicable When the Parties Contract Otherwise **250**

When parties engaged in maritime commerce enter into a contract and select COGSA to govern any dispute arising under the contract, the Carmack Amendment will not apply to the rail segment of an international shipment because the Carmack Amendment only applies to property for which a receiving rail carrier has issued a bill of lading.[87]

F. International Shipment on a Through Bill of Lading When a Freight Forwarder Contracted for the Inland Portion **252**

The Carmack Amendment's applicability also is limited when a shipment originated overseas under a single through bill of lading that covers the inland segment of the transportation.[88]

G. Effect on a Subcontractor of Covenants Not to Sue in a Through Bill of Lading **253**

In *Federal Insurance Company v. Union Pacific R. Co.*,[89] the Ninth Circuit held that a covenant not to sue in a through bill of lading between the shipper and the ocean carrier

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[85] 49 Stat. 1207, *codified* at 46 U.S.C. § 30701 (note) (2012); GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 85 (1997).

[86] 46 U.S.C. § 30704 (2014) (previously codified at 46 U.S.C. § 193 (2000)).

[87] Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 2445, 177 L. Ed. 2d 440, 444 (2010).

[88] Norfolk Southern Railway Co. v. Sun Chemical Corp., 735 S.E.2d 19, 28–29 (Ga. Ct. App. 2012), *cert. denied*, 2013 Ga. LEXIS 403 (Ga., Apr. 29, 2013).

[89] 651 F.3d 1175, 1180 (9th Cir. 2011).

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precluded liability of the ocean carrier's subcontractor Union Pacific to the property insurer Federal Insurance Company after a Union Pacific train derailed and destroyed the property.

Articles **254**

H. Recent Criticism of Laws Limiting Railroad Liability **254**

Several articles have discussed the overlap of the Carmack Amendment and COGSA and the courts' conflicting interpretations of the Carmack Amendment.

1. Need for a Uniform Law **255**

A law review article published prior to *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, *supra*, Part V.E, argues that the Carmack Amendment should apply to the inland segment of intermodal transportation, because the law on liability will not be uniform or predictable "if the law…change[s] with the geographical location of the cargo or with the mode of transportation."[90]

2. Whether the Carmack Amendment Applies to Intermodal Exports **255**

Another law review article argues that the *Kawasaki* case, *supra*, Part V.E, was wrongly decided and that an exemption under the Carmack Amendment of the inland segment of an overseas shipment eliminates the amendment's application to a substantial amount of trade.[91]

3. Alternative Reasoning for the *Kawasaki* Decision **256**

Another article critical of the *Kawasaki* decision argues that the Supreme Court misinterpreted the plain language of COGSA and the Carmack Amendment, noting that some lower court decisions after *Kawasaki* have stated that the Carmack Amendment applies to export shipments on through bills of lading.[92]

4. Judicial Split on Applicability of Carmack or COGSA to International Shipments **257**

An article in the *Transportation Law Journal* argues that applying the Carmack Amendment to inland segments of international shipments subject to a through bill of lading will increase litigation and create uncertainty through conflict between contractual terms and

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[90] William P. Byrne, *Loss and Damage Freight Claims*, 36 TRANSP. L. J. 145, 174 (2009).

[91] Patrick M. Talbot, *How Swiftly the Carmack Amendment is Washed Away*, 42 J. MAR. L. & COM. 631, 633–34 (2011).

[92] O. Shane Balloun, *The Derailment of a Transport Statute: How Regal-Beloit Shipwrecked the Carmack Amendment on the Shoals of the COGSA*, 37 TUL. MAR. L. J. 379, 380, 394 (2013).

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domestic laws and that the courts should respect the parties' intent to the extent that they contract to extend COGSA to inland transportation.[93]

VI. CHANGE IN DRAINAGE 260

A. Introduction 260

Railroads are required by state statutes and case law to construct culverts and ditches that provide adequate drainage to ensure that water flows in its natural course and is not obstructed. As discussed in Section B, a Missouri statute is representative of state statutes on railroads' obligations to divert water to prevent damage to the railroads' neighbors. Sections C through E discuss whether applicable federal law requires railroads to facilitate water flow from the roadbed, whether the Federal Railroad Safety Act (FRSA) preempts claims under state law for water damage caused by a railroad's negligence, and whether a change in topography resulting in changes in drainage modify a railroad's duty to provide proper drainage. Section F discusses an article addressing surface water rules in Arkansas.

Statutes 260

B. Duty of a Railroad to Construct and Maintain Ditches and Drains 260

Missouri law regulates a railroad's obligation to provide outlets for water so that the water may follow its natural path and not damage adjacent property.[94]

C. Applicable Federal Law Requires Railroads to Facilitate Water Flow from the Roadbed 261

Federal law requires that "[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction[] to accommodate expected water flow for the area concerned."[95]

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[93] Matthew K. Bell, *Forget What You Intended: Surprisingly Strict Liability and COGSA Versus Carmack*, 37 TRANSP. L. J. 57, 71 (2010).

[94] MO. REV. STAT. § 389.660 (2014).

[95] 49 C.F.R. § 213.33 (2014).

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Cases **261**

D. Whether the Federal Railroad Safety Act Preempts Claims Under State Law for Water Damage Caused by Negligence **261**

1. Decision by a Pennsylvania Commonwealth Court **261**

In *Miller v. SEPTA,*[96] in which the plaintiffs sued the Southeastern Pennsylvania Transportation Authority (SEPTA) for negligently causing water damage to a hotel, a Pennsylvania court held that the FRSA preempted a state claim for negligence because the Secretary of Transportation had promulgated a regulation that covered drainage issues.

2. Decision by the Supreme Court of Pennsylvania **263**

On October 30, 2014, in *Miller v. SEPTA*,[97] the Supreme Court of Pennsylvania reversed and remanded the decision of the Commonwealth Court. The court held "that the instant state law riparian rights claim is neither covered by the FRSA's preemption provision, nor § 213.33 of the federal Track Safety Standards regulations."[98]

E. Whether the Interstate Commerce Commission Termination Act of 1995 Preempts State Law Claims for Water Damage **264**

In *Village of Big Lake v. BSNF Ry. Co.*,[99] the village brought an action against BSNF for raising the height of its track in and around the village, which caused water damage to property within the village. A Missouri appellate court had held that the village's claims were preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), which "expressly provides that the [STB] has exclusive jurisdiction over the 'construction' of railroad tracks."[100] However, the Court of Appeals of Missouri reversed the grant of a summary judgment in favor of BNSF and a construction company and remanded "[b]ecause genuine issues of material fact [exist] as to which Respondents bear the burden of proof and persuasion."[101]

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[96] 65 A.3d 1006, 1007–1008 (Pa. Commw. Ct. 2013), *reversed by, remanded*, 2014 Pa. LEXIS 2866 (Pa., Oct. 30, 2014).

[97] 103 A.3d 1225 (Pa. 2014).

[98] *Id*. at *1236.

[99] 382 S.W.3d 125 (Mo. App. 2012), *remanded by* Village of Big Lake v. BNSF Ry. Co., 2014 Mo. App. LEXIS 634 (Mo. Ct. App., June 3, 2014).

[100] *Id.* at 129.

[101] Village of Big Lake v. BNSF Ry. Co., 433 S.W.3d 460, 461 (Mo. Ct. App., June 3, 2014).

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F. Change in Topography Resulting in Changes in Drainage Does Not Modify a Railroad's Duty to Provide Proper Drainage 266

In *City of Atlanta v. Kleber*,[102] the Supreme Court of Georgia held that Norfolk Southern was not liable to homeowners for water damage to their property caused by a drainage pipe and culvert. Changes in the topography of the surrounding neighborhood did not give rise to a railroad duty to change the drainage ditch and pipe that were installed properly in the 1970s.[103]

Article **267**

G. Surface Water Rules in Arkansas 267

A law review article that discusses the issue of diffused surface water in Arkansas argues that Arkansas, as have many other states, should adopt a "reasonable use rule" pursuant to which "liability is determined by the reasonableness of the property owner's actions [that] altered the surface water flow."[104]

VII. CHANGE OF GRADE 269

A. Introduction 269

This part of the digest discusses whether damages are recoverable for grade changes, usually at highway–railway crossings. Sections B and C discuss statutes and cases applicable to changes of grade by municipalities and railroads. Section D discusses liability when a change of grade was for a public use but the railroad contractually agreed with a municipality to be responsible for damages. Section E reviews a law review article that discusses when a landowner is entitled to compensation when the owner's abutting property is taken or damaged because of a change of grade. Section F addresses liability to private land owners when access to their property is altered or obstructed by a change of grade.

Statutes **269**

B. Recovery of Damages Because of a Change of Grade 269

Section B reviews the statutes in several states that address the issue of damages for property taken or damaged because of a change of grade, as well as other matters.

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[102] 285 Ga. 413, 677 S.E.2d 134, 138 (Ga. 2009).

[103] *Id.,* 285 Ga. at 418, 677 S.E.2d at 138.

[104] W. Looney, *Diffused Surface Water in Arkansas: Is it Time for a New Rule?*, 18 U. ARK. LITTLE ROCK L.J. 393, 406–07 (1996).

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Cases **270**

C. Liability of Railroads for a Taking or Damaging of an Owner's Property Caused by a Change of Grade **270**

In a 1915 case, *Bennett v. Winston-Salem South-Bound Ry. Co.,*[105] the North Carolina Supreme Court held that unless the work was performed negligently, a property owner may not recover for damage to his property caused by a change of grade that was authorized by the state or a political subdivision thereof because compensation was paid to the landowner when the property was taken initially.

D. Contracts Between States or their Local Governments and Railroads for Damages Caused by a Change of Grade **272**

In *Rigney v. New York Cent. & H. R. R. Co.*,[106] the New York Court of Appeals held that, if a railroad and a municipality agree that the railroad will be liable for damage to property caused by a change of grade, assuming certain conditions are met, a property owner may sue the railroad rather than the municipality for damages.

Articles **273**

E. History of Liability for a Taking of or Damage to Property **273**

As explained by an article in the *Vanderbilt Law Review* that traces the liability under state constitutions for government takings of property, by 1912 over half of the then 48 states had adopted a constitutional amendment requiring the payment of just compensation when property was taken or damaged rather than just when property was taken.[107]

F. Liability for a Change in a Landowner's Access to Property Caused by a Change of Grade **274**

A recent law review article that discusses government regulation of access to roads and highways argues that only when a property owner's access to his or her land is obstructed does the property owner have a claim for just compensation.[108]

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[105] 170 N.C. 389, 391, 87 S.E. 133, 135 (N.C. 1915).

[106] 217 N.Y. 31, 37, 111 N.E. 226, 228 (1916).

[107] Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 115 (1999).

[108] Michael L. Stokes, *Access Management: Balancing Public and Private Rights in the Modern "Commons" of the Roadway*, 60 CLEV. ST. L. REV. 585, 654 (2012).

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VIII. CHICAGO REGION ENVIRONMENTAL AND TRANSPORTATION EFFICIENCY PROGRAM (CREATE) 276

A. Introduction 276

The Chicago Region Environmental and Transportation Efficiency Program (CREATE) is “a first-of-its-kind public/private partnership” among the State of Illinois, City of Chicago, various railroads, and the Commuter Rail Division of the RTA (Metra) to improve railroad efficiency and reduce congestion, as well as to befit Metra.[109]

Statutes and Regulations **277**

B. National Environmental Policy Act’s Applicability to CREATE 277

The National Environmental Policy Act (NEPA) applies to the CREATE program because it is partially funded with federal funds, and, therefore, must be reviewed by a federal agency.[110]

C. TIGER Program Under the American Recovery and Reinvestment Act 278

The DOT’s TIGER program established by the American Recovery and Reinvestment Act includes funding for passenger and freight rail transportation projects.[111]

Articles **278**

D. Overview of CREATE’s Origin, Purpose, Projects, and Funding 278

A 2013 report by the Infrastructure Council of the Illinois Chamber of Commerce provides an overview of CREATE’s origin, purpose, projects, and funding and describes the Chicago area’s need for the CREATE program.[112]

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[109] Chicago Region Environmental and Transportation Efficiency Program (CREATE), “What is CREATE?,” available at: http://www.aurora-il.org/documents/cnrailway/docs_meeting/Call%20to%20Action%20CREATE%20Exhibit.pdf (last accessed Mar. 31, 2015).

[110] 42 U.S.C. § 4332 (2014); CREATE: Final Feasibility Plan (2005), available at: http://www.createprogram.org/linked_files/final_feasibility_plan_orig.pdf (last accessed Mar. 31, 2015).

[111] Pub. L. No. 111-5, 123 Stat. 115, 516 (Feb. 19, 2009).

[112] Benjamin J. Brockschmidt, Infrastructure Council of the Illinois Chamber of Commerce, CREATE Ten Years: The Past, Present, and Future of the Chicago Region’s Railroads (2013), at 2–3, available at: http://www.cmap.illinois.gov/documents/10180/125910/CREATE-Report-Final.pdf/382726e9-8c31-4b58-ab8b-8ddb65dc72cf (last accessed Mar. 31, 2015).

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E. CREATE's Future as Dependent on Additional Funding 279

A June 2013 article in the *Chicago Tribune* states that the CREATE program still needed $2 billion for the completion of its projects.[113]

IX. COMMON CARRIER OBLIGATION OF RAILROADS 280

A. Introduction 280

By reason of the common carrier obligation of railroads, codified at 49 U.S.C. § 11101, a railroad company is required to provide transportation to all parties upon reasonable request, including for hazardous materials. Sections B and C discuss statutes, regulations, and policies that apply to a rail carrier's common carrier obligation. As discussed in Section D, exceptions to a railroad company's common carrier obligation are not to be implied. Section E illustrates more particularly the statutory obligation of a railroad company as a common carrier to transport hazardous materials. Section F discusses a recent article on the preemption of tort claims under state law with respect to a railroad company's transportation of such materials.

Statutes, Regulations, and Policies **280**

B. Common Carrier Transportation, Service, and Rates 280

Under 49 U.S.C. § 11101, "[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request."

C. Common Carrier Obligation of Railroads to Transport Hazardous Materials 281

This subpart discusses regulations of DOT and FRA to improve the integrity of tank cars to reduce the possibility of spillage or leakage and the DOT Pipeline and Hazardous Materials Safety Administration (PHMSA), which has published rules (49 C.F.R. § 172.80, *et seq.*) regarding the transportation of hazardous materials.

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[113] Richard Wronski, *Chicago Rail Program a Success, but Future Funding in Doubt, Officials Say*, CHICAGO TRIBUNE (June 11, 2013), available at http://articles.chicagotribune.com/2013-06-11/news/ct-met-railroad-bottlenecks-20130611_1_rail-crossings-create-program-englewood-flyover (last accessed Mar. 31, 2015).

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Cases **283**

D. Exceptions to the Common Carrier Obligation Are Not To Be Implied **283**

In 1967, in *Am. Trucking Ass'n v. Atchison, Topeka, & Santa Fe Ry. Co.*,[114] in which the Supreme Court heard challenges to rules promulgated by the Interstate Transportation Commission (ICC) on trailer-on-flatcar service, the Court held that the "obligation as common carriers is comprehensive and exceptions are not to be implied."[115]

E. Statutory Common Carrier Obligation to Transport Hazardous Materials **284**

In *Riffin v. Surface Transportation Board*,[116] the District of Columbia Circuit denied a petition to review a ruling by the Surface Transportation Board (STB). The court stated that "railroads have…a statutory common carrier obligation to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations," and that a railroad's statutory obligation under § 11101 supersedes the common law.[117]

Article **285**

F. The Common Carrier Obligation and the Preemption of State Tort Law on the Transportation of Hazardous Materials **285**

The common carrier obligation that began as a common law doctrine was codified in the 1887 Act to Regulate Commerce and later codified by the Hepburn Act of 1906.[118] The common carrier obligation mandates that railroads transport hazardous materials as long as there is a comprehensive regulatory framework that governs the transportation of such materials. The Federal Railroad Safety Act and the Hazardous Materials Safety Act preempt tort claims under state law.

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[114] 387 U.S. 397, 407, 87 S. Ct. 1608, 1614, 18 L. Ed. 2d 847 (1967).

[115] *Id.*, 387 U.S. at 407, 87 S. Ct. at 1614.

[116] 733 F.3d 340 (D.C. Cir. 2013).

[117] *Id.* at 343.

[118] Aaron Ries, *Railroad Tort Liability After the "Clarifying Amendment:" Are Railroads Still Protected by Preemption,* 77 DEF. COUNS. J. 92, 97 (2010).

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X. COMPETITION AND RAILROADS 287

A. Introduction 287

Railroad competition and mergers are regulated by STB. Section B discusses legislation applicable to railroad consolidations and mergers, laws that exempt railroads from antitrust liability, and related issues. Section C discusses the railroads' express or implied immunity from antitrust liability and the preemption of state antitrust laws by the ICCTA. Section D discusses competitive access for railroads and the use of terminal facilities and reciprocal switching arrangements.

Statutes 288

B. Regulatory Reform, Deregulation, and Mergers and Acquisitions 288

1. Regional Rail Reorganization Act of 1973 288

Because many railroad companies were facing bankruptcy in the early 1970s, Congress enacted the Regional Rail Reorganization Act (3R Act) of 1973 to reorganize regional rail lines and provide them with governmental assistance.[119]

Articles 289

2. The Railroad Revitalization and Regulatory Reform Act of 1976 289

A study of the effect of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act)[120], published in the University of Chicago *Journal of Law & Economics* in 2007, argues that the 4R Act, along with the Staggers Act of 1980, "brought sweeping changes for both rail rates and abandonments of freight service" based on their measure of "average densities on U.S. railroads." [121]

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[119] 45 U.S.C. § 701(a) (2014) (as amended in 1975, 1976, 1978).

[120] *See* 45 U.S.C. § 801*, et seq*. (2014).

[121] John. D. Bitzan & Theodore E. Keeler, *Economies of Density and Regulatory Change in the U.S. Railroad Freight Industry*, 50 J. LAW & ECON. 157, 159 (2007) (footnote omitted).

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3. The Staggers Act of 1980 289

In an article entitled "The Success of the Staggers Rail Act of 1980," the author contends that the Staggers Act[122] resulted in "beneficial effects on shippers and railroads" alike as discussed in the article.[123]

***Statutes* 290**

4. Factors Applicable to Consolidations, Mergers, and Acquisitions of Railroads 290

Under 49 U.S.C. § 11323, railroads may not merge, acquire control of another rail carrier, or acquire trackage rights over another's railroad tracks without STB's approval.[124] Section 11324 sets forth the factors that STB considers when approving a railroad merger.[125]

5. Interstate Commerce Commission Termination Act of 1995 291

As a result of the ICCTA, among other responsibilities, STB has authority to "inquire into and report on the management of the business of carriers providing transportation and services."[126]

***Cases* 292**

6. Authority of the STB to Impose Environmental Conditions on Minor Mergers 292

In *Village of Barrington v. Surface Transportation Board*,[127] the District of Columbia Circuit held that STB has the authority to impose environmental conditions when approving minor mergers.

7. Challenging a Railroad's Rate Caused by a Bottleneck 294

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[122] *See* 49 U.S.C. § 10101, *et seq*. (2014).

[123] Clifford Winston, *The Success of the Staggers Rail Act of 1980*, AEI-Brookings Joint Center for Regulatory Studies 1, 5 (Oct. 2005), available at http://www.brookings.edu/research/papers/2005/10/railact-winston (last accessed Mar. 31, 2015).

[124] 49 U.S.C. § 11323(1) (2014).

[125] 49 U.S.C. § 11324 (2014).

[126] 49 U.S.C. § 721(b) (2014).

[127] 636 F.3d 650, 651 (D.C. Cir. 2011).

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As stated in *Burlington N. R. Co. v. Surface Transportation Board*,[128] a "bottlenecking carrier" is one that "'can usually control the overall rate sufficiently to preclude effective competition.'"[129] The court held that STB was correct in finding that the railroad's rate was unreasonable and in lowering the rate that a shipper was required to pay.[130]

Articles **295**

8. History of the Regulation and Deregulation of Railroads 295

A recent law review article, which examines the regulation and deregulation of the transportation industry, noting the impact of the deregulation of the financial, electric power, and airline industries, argues that the deregulation of the railroad industry could have similar adverse effects on the economy and the public.[131]

9. Anticompetitive Behavior 296

An article in the *Transportation Law Journal* that considers the anticompetitive effects of bottlenecking observes that the railroad industry is regulated by STB, not by the antitrust laws; argues that STB's policy is to approve a merger even if it will result in a bottleneck; and offers four proposals to alleviate bottlenecking.[132]

C. Antitrust Exemptions for Railroads 298

Statutes **298**

1. Sherman Antitrust Act 298

The Sherman Antitrust Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"[133] and provides for the imposition of fines and punishments.[134]

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[128] 114 F.3d 206, 209 (D.C. Cir. 1997).

[129] *Id*. at 210 (*quoting* Consolidated Papers, Inc. v. CNW Transportation Co., 7 ICC 2d 330, 339 (1991) (holding that railroad market dominance existed over eight traffic movements beginning Feb. 27, 1979, and ending on certain dates due to market conditions)).

[130] *Id.* at 212, 214.

[131] Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: the Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1187–88 (2012).

[132] Salvatore Massa, *Injecting Competition in the Railroad Industry Through Access*, 27 TRANSP. L. J. 1, 2, 13 (2000).

[133] 15 U.S.C. § 1 (2014).

[134] 15 U.S.C. §§ 1 and 2 (2014).

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2. Railroads' Exemption from the Antitrust Laws 299

Federal law, however, provides that "[a] rail carrier, corporation, or person participating in" a transaction approved or exempted by STB "is exempted from the antitrust laws...as necessary to let that rail carrier, corporation, or person carry out the transaction."[135]

3. Exemption of Rate Agreements from Antitrust Laws 299

If STB approves an agreement of at least two rail carriers that concerns rates, the agreement is exempt from the Sherman Act, the Clayton Act, the Federal Trade Commission Act, sections 73 and 74 of the Wilson Tariff Act, and the Act of June 19, 1936.[136]

4. Exemption of Conferences on Unification and Coordination of Railroads from Antitrust Laws 300

If the Secretary of Transportation holds conferences on the unification or coordination of railroads, the attendees are not liable under the antitrust laws for their participation or with respect to any agreements that are concluded with the approval of the Secretary of Transportation.[137]

5. Exemption of Acquisitions Approved by DOT from the Clayton Act 300

Transactions approved by the Secretary of Transportation and STB are exempt from Section 7 of the Clayton Act.[138]

Cases **301**

6. Implied Immunity from Antitrust Litigation 301

In *In re Wheat Rail Freight Rate Antitrust Litigation*,[139] the Seventh Circuit held that although a railroad is not expressly exempt from the antitrust laws when it does not adhere to a rate agreement approved by ICC, STB's predecessor, a railroad is impliedly immune from antitrust liability when it fails to adhere to the procedural requirements of an agreement.

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[135] 49 U.S.C. § 11321(a) (2014).

[136] 49 U.S.C. § 10706(a)(2)(A) (2014).

[137] 49 U.S.C. § 333(d) (2014).

[138] 15 U.S.C. § 18 (2014).

[139] 759 F.2d 1305, 1309, 1316 (7th Cir. 1985).

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7. ICCTA's Preemption of Antitrust Claims Under State Law 302

In *Fayus Enterprises v. BNSF Railway Co.*,[140] the District of Columbia Circuit held that antitrust claims invite "judicial supervision of the reasonableness and fairness of rates charged to shippers" and allow "state law antitrust claims of this nature [to] undermine the deregulatory and anti-balkanization policies underlying the ICCTA."[141]

***Articles* 302**

8. Elimination of Transportation Exemptions in Favor of Periodic Review of Transactions that Have Anticompetitive Risks 302

An article in the *Oregon Law Review* argues that the exemption of railroads from the antitrust laws shields anticompetitive agreements that are contrary to the public interest and makes a number of recommendations.[142]

9. Proposal that the Approval of Mergers be Transferred from the STB to the Courts 304

An article in the *Transportation Law Journal* examines the public interest standard used by STB in determining whether to approve a railroad merger, argues that STB has approved almost every proposed merger, and suggests that the courts are more "politically neutral" and thus are "best suited" to review proposed mergers.[143]

10. Proposed Legislation that Would Affect the Antitrust Exemptions of Railroads 305

An article in the *Administrative Law Review* examines the economic consequences of an antitrust act applicable to railroads and argues that Congress should have enacted the Railroad Antitrust Enforcement Act of 2009 because it would have increased the scrutiny of "paper barriers" and "refusals to deal," protected "captive shippers," and increased competition. [144]

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[140] 602 F.3d 444 (D.C. Cir. 2010).

[141] *Id*. at 454.

[142] Peter C. Carstensen, *Replacing Antitrust Exemptions for Transportation Industries: The Potential for a "Robust Business Review Clearance,"* 89 OR. L. REV. 1059, 1061–62 (2011).

[143] Salvatore Massa, *Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific*, 24 TRANSP. L. J. 413, 415–16 (1996).

[144] Russell Pittman, *Recent Development: The Economics of Railroad "Captive Shipper,"* 62 ADMIN L. REV. 919, 934–935 (2010). The Railroad Enforcement Act of 2009 was never enacted but the Railroad Enforcement Act that was introduced in Congress in 2013 proposed the elimination of antitrust exemptions for railroads.

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D. Competitive Access for Railroads 306

***Statutes* 306**

1. Use of Terminal Facilities and Reciprocal Switching Agreements 306

The STB "may require terminal facilities…owned by a rail carrier providing transportation…to be used by another rail carrier if the Board 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."[145]

***Proceeding* 307**

2. Proposal to the STB Requesting a Modification of the Mandatory Competitive Switching Standards 307

In 2011, when the National Industrial Transportation League (NITL) petitioned STB to modify its standards for mandatory competitive switching, the Association of American Railroads, representing Class I railroads, opposed the NITL proposal and argued that no changes were needed.[146]

XI. CONSTITUTIONAL LAW AND RAILROADS 310

A. Introduction 310

Although the primary basis on which a railroad challenges a state law is that federal law preempts the state law, state laws regulating railroads also may be challenged for being unconstitutional under the Fourteenth Amendment to the United States Constitution. Sections B and C discuss federal constitutional provisions, state statutes, and cases in which railroads have challenged certain state statutes on constitutional grounds. Section D discusses a case in which the plaintiffs alleged that a transit authority violated their Fourth Amendment rights.

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[145] 49 U.S.C. § 11102(a) (2014).

[146] *Petition*, Docket No. EP 711, 42264, 2012 STB Lexis 273, at *2.

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B. The United States Constitution 310

Railroad companies have challenged some state laws applicable to railroads on the basis that they violate the Commerce Clause under Article I of the U.S. Constitution,[147] the Constitution's Contracts Clause,[148] or the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution.[149]

Statutes **311**

C. State Statutes Requiring Full Crews 311

An example of a full crew law is a Wisconsin statute requiring a train operator in Wisconsin to have a crew consisting of at least two members, one of whom has to be a certified railroad locomotive engineer.[150]

Cases **312**

1. State Statute Requiring a Full Crew on Trains Does Not Violate the Due Process Clause or the Equal Protection Clause 312

Although in 1968 in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R. I. & P. R. Co.*,[151] the U.S. Supreme Court held that the Arkansas full crew statutes did not violate the Equal Protection Clause, in 1999 the Seventh Circuit ruled that federal law preempted some of the provisions of the aforesaid Wisconsin statutes.[152]

2. State Statutes Requiring Fencing Do Not Violate the Due Process or Equal Protection Clauses 315

In *Berens v. Chicago M. S. P. & P. R. Co.*[153] the Supreme Court of South Dakota held that the statutory obligation of railroads to construct fences to protect livestock was not a denial of equal protection even though motor carriers were not subject to the same requirement.

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[147] U.S. CONST. art. I, § 8, cl. 3.

[148] U.S. CONST. art. I, § 10, cl. 1.

[149] U.S. CONST. amend. 14, § 1.

[150] WIS. STAT. § 192.25(2) (2014).

[151] 393 U.S. 129, 143, 89 S. Ct. 323, 330, 21 L. Ed. 2d 289, 299 (1968).

[152] Burlington N. & Santa Fe Ry. Co. v. Doyle, 186 F.3d 790, 804–05 (7th Cir. 1999).

[153] 80 S.D. 168, 175, 176, 120 N.W.2d 565, 570, 571 (1963).

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3. State Requirement of a Manned Caboose Held Not to Violate the Commerce Clause or the Contracts Clause 316

Although in 1986 the Eighth Circuit held in *Burlington N. R. Co. v. Nebraska*[154] that the requirement that railroads have a manned caboose did not violate the Constitution's Commerce and Contract Clauses, the same circuit held in 1989 that FRA regulations preempted the Minnesota manned-caboose law.[155]

D. Violation of the Fourth Amendment by a Railroad Security Officer Acting Under Color of State Law 318

In *George v. CSX Transp. Inc.,*[156] in which the plaintiffs were stopped by a CSX police officer who detained the plaintiffs for an hour before releasing them, a federal district court in New York held that because the officer was acting under color of state law there was no violation of the Fourth Amendment and dismissed the remaining claims.

XII. CONSTRUCTION CONTRACTS 320

A. Introduction 320

This part of the digest discusses statutes, cases, and an article on construction contracts involving railroads. Sections B through D describe three state statutes pertinent to railroad construction contracts. Sections E through J discuss holdings in recent cases on contractual indemnification of a railroad and other issues. Section K discusses an article on indemnity clauses under Virginia law.

Statutes **320**

B. Lien on Railroad Property by Reason of a Construction Contract 320

A Tennessee statute provides that in certain circumstances a person or company may acquire a lien on railroad property.[157]

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[154] 802 F.2d 994, 996–97 (8th Cir. 1986).

[155] Burlington N. R. Co. v. Minnesota, 882 F.2d 1349 (8th Cir. 1989).

[156] 2014 U.S. Dist. LEXIS 10324, at *1, 4–5 (E.D.N.Y. 2014).

[157] TENN. CODE § 65-10-101 (2014).

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C. Authority of a Railroad Company to Change the Grade of Existing Tracks or to Construct New Tracks 321

A New Jersey statute provides when a municipality may enter a contract with a railroad company to construct tracks, bridges, or facilities and share the cost thereof as agreed between them.[158]

D. Authorization Under State Law to Enter into Contracts with Railroad Companies for the Construction of Grade Crossings or Tracks 321

A South Carolina statute authorizes the South Carolina Department of Transportation to enter into agreements with "railroad companies for the construction, reconstruction, or modifications of railroad-highway grade separation crossings or track or other property rearrangement."[159]

Cases **322**

E. Indemnity of a Railroad Company Under a Construction Contract for an Injury to an Employee During Construction 322

In *Brown v. Baltimore & Ohio Railroad Co.*,[160] the county of Baltimore and the Baltimore and Ohio Railroad Company (B&O) had an agreement permitting the county to construct a sewer pipe under a railroad track. The Fourth Circuit held that a Maryland statute did not void the indemnity clause because "the statute was not intended to apply to licensors or easement grantors such as the B&O who enter into railroad crossing indemnity agreements of this type."[161]

F. Whether a Contract with a Railroad to Paint a Bridge Is a Construction Contract 323

In *Kurtin v. Nat'l Passenger R.R. Corp.*,[162] a federal district court in New York held that the term "construction" should be given its normal meaning; thus, a contract for the painting of a bridge was not a construction contract within the meaning of an insurance policy.

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[158] N.J. STAT. ANN. § 48:12-79 (2014).

[159] S.C. CODE § 57-5-1640 (2014).

[160] 805 F.2d 1133 (4th Cir. 1986).

[161] *Id*. at 1141–42 (footnote omitted).

[162] 887 F. Supp. 676, 680, 681 (S.D.N.Y. 1995).

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G. Whether Indemnity Provisions Are Against Public Policy 324

In *S. Pac. Transp. Co. v. Sandyland Protective Ass'n*,[163] a California appellate court held that responsibility could not be shifted to the Sandyland Protective Association for the railroad's negligence because the intent of the statute in question was that a non-negligent party to a construction contract would not be held liable for the other party's negligence.

H. Conflict Between a Public Policy Against Indemnity Agreements in Construction Contracts and a Public Policy in Favor of a Railroad's Ability to Grant Easements 325

In *Helm v. W. Md. Ry. Co.*,[164] the Fourth Circuit affirmed a district court's decision that an indemnity provision was void under a Maryland statute that voids indemnity agreements in certain construction contracts to prevent the indemnification of a promisee for injury and liability caused by the promisee's negligence.

I. Railroad's Liability for Active Interference with a Contractor 327

In *U.S. Steel Corp. v. Mo. Pac. R.R. Co.*,[165] the Eighth Circuit held that Missouri Pacific actively interfered with the performance of a contract by the American Bridge Division of United States Steel for work on a bridge; thus, the no damage clause in the contract was unenforceable.

J. Interpretation of an Indemnity Provision Determined by the Contract's Choice of Law Provision 328

In *Wallace v. Amtrak*,[166] a federal district court in New York, applying District of Columbia law, held that Weeks Marine, Inc. (Weeks), which had a contract with Amtrak, was responsible for any claim brought by an employee of Weeks because under District of Columbia law a party may be indemnified under a contract regardless of the party's negligence.

***Article* 329**

K. Indemnity Clauses and Public Policy Under Virginia Law 329

A law review article on developments in construction law in Virginia discusses a case that involved a railroad company in which the Supreme Court of Virginia held that an owner

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[163] 224 Cal. App.3d 1494, 1498, 274 Cal. Rptr. 629 (Cal. Ct. App. 1990).

[164] 838 F.2d 729, 730, 731 (4th Cir. 1988) (*citing* MD. CODE ANN., CTS. & JUD. PROC. § 5-305).

[165] 668 F.2d 435, 439 (8th Cir. 1981).

[166] 2014 U.S. Dist. LEXIS 36346, at *1, 61, 71–72 (S.D.N.Y. Mar. 18, 2014).

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may "obtain broad indemnity from a contractor to protect it from future personal injury claims that were not caused by its negligence or the negligence of the indemnifying contractor."[167]

XIII. CONTRACTS AND RAILROADS 331

A. Introduction 331

This part of the digest discusses implied covenants, indemnity provisions, and other agreements. Section B considers implied covenants such as in leases and mortgages affecting railroads. Section C summarizes statutory provisions, cases, and articles regarding railroad contracts other than construction contracts. Section D discusses other contracts and obligations applicable to railroads.

B. Implied Covenants in Railroad Contracts 331

Statutes **331**

1. Necessary Incidents Implied in a Contract 331

An Oklahoma statute mandates that anything considered necessary for the parties to carry out a contract is an implied condition of the contract, a provision that has been applied to contracts granting a right-of-way.[168]

Cases **332**

2. Railroad's Obligation to Maintain and Operate a Railroad While Under Lease 332

In *Southern Railway Co. v. Franklin & Pittsylvania Railroad Co.*,[169] the Supreme Court of Appeals of Virginia held that Southern Railway was obligated to continue operating a line because its continued operation was an implied covenant in a lease.

3. Lessor of Rail Property Does Not Have a Common Law Duty to Repair the Property 332

In *Felton v. Cincinnati*,[170] the Sixth Circuit refused to find that there was an implied covenant in a lease that obligated the lessor to construct or repair a road to make it suitable for its intended use; thus, unless otherwise required by the terms of the lease or required by statute, a

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[167] D. Stan Barnhill, *Construction Law*, 43 U. RICH. L. REV. 107, 117 (2008) (footnote omitted).

[168] OKLA. STAT. tit. 15, § 172 (2014).

[169] 96 Va. 693, 700–11, 32 S.E. 485, 488–91 (1899).

[170] 95 F. 336, 340 (6th Cir. 1899).

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lessor is not obligated to put property in an operable condition when leasing the property to a railroad.

4. Prioritization of Income to Pay Expenses Incurred During Ordinary Operation over a Mortgage 333

In *In re Chicago, R.I. & R. Ry. Co.*,[171] the Seventh Circuit held that "[e]very railroad mortgagee, in accepting its security, impliedly agrees that all current debts, accruing in the ordinary course of the operation of its business, shall be paid from the current income before [the mortgagee] has [a] claim thereto."[172]

5. Implied Obligation in Railroad Contracts of Good Faith and Fair Dealing 334

In *Anderson v. Union Pac. R. Co.*,[173] in which an employee of Union Pacific alleged that the company had committed a breach of an implied covenant of good faith and fair dealing when terminating his employment, the Ninth Circuit held that Union Pacific's actions satisfied the definition of good cause under California law.

C. Indemnity Provisions in Railroad Contracts Other than Construction Contracts 335

***Cases* 335**

1. Obligation to Indemnify a Railroad Is Contractual 335

In *Rice v. Union Pacific R. Co.*,[174] the Eighth Circuit held that the "industry's obligation to indemnify a railroad…is a contractual duty and not a duty arising under the common law."[175]

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[171] 90 F.2d 312 (7th Cir. 1937) (citation omitted), *cert. denied*, 302 U.S. 717, 58 S. Ct. 37, 82 L. Ed. 554 (1937).

[172] *Id.* at 315 (citation omitted).

[173] 359 Fed. Appx. 800, 801–02 (9th Cir. 2009).

[174] 712 F.3d 1214 (8th Cir. 2013).

[175] *Id.* at 1219 (*citing* Burlington N., Inc. v. Bellaire Corp., 921 F.2d 760, 763 (8th Cir. 1990)).

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2. Indemnity Provision Not Negated by Party's Passive or Secondary Negligence 336

In *Booth-Kelly Lumber Co. v. S. Pac. Co.*,[176] the Ninth Circuit held that because Southern Pacific was only passively negligent while the other party to the agreement was actively negligent, Southern Pacific was entitled to full indemnity under the provision.

Articles **337**

3. Freight Rail Has Limited Liability for Passenger Rail Incidents 337

A law review article discussing indemnification of freight rail lines when a passenger rail line is granted a right-of-way on its lines observes in part that "the potential that future courts may weaken indemnity provisions in rail sharing contracts motivated congressional action to reinforce indemnification agreements."[177]

4. Indemnity Provisions and the Role of State Legislatures 339

The Marks' article, *supra,* Part XIII.C.3, explains that, although passenger rail and freight lines negotiate rights-of-way, state legislatures are often involved in setting the terms of indemnity agreements.[178]

5. Whether It Is Against the Public Interest to Release or Indemnify a Railroad Company Acting as a Landlord 340

A law review article notes that when a railroad company is a landlord, the company may include an exculpatory provision in a lease that releases the railroad from any liability for damage to the lessee's property or include a provision for indemnification of the railroad company.[179] The article argues that railroad–lessors should be allowed to contract for indemnification because it is economically efficient and should not be regarded as contrary to public policy.[180]

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[176] 183 F.2d 902, 911 (9th Cir. 1950).

[177] Justin J. Marks, *No Free Ride: Limiting Freight Railroad Liability When Granting Right-of-Way to Passenger Rail Carriers*, 36 TRANSP. L.J. 313, 317 (2009).

[178] *Id*. at 321.

[179] William K. Jones, *Private Revision of Public Standards: Exculpatory Agreements in Leases*, 63 N.Y.U. L. REV. 717 (1988).

[180] *Id*. at 749–50.

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D. Other Contracts and Obligations Applicable to Railroads 341

***Statutes* 341**

1. STB's Authority to Mandate Construction of Switch Connections 341

STB is authorized to mandate the construction of switch connections when an owner of a railroad applies to the board for the connection.[181]

***Cases* 342**

2. No Right to Use a Track after the Expiration of an Easement 342

In *Dakota, Minnesota and Eastern Railroad Corp. v. Wisconsin & Southern Railroad Corp.*,[182] the Seventh Circuit held that the Dakota, Minnesota and Eastern Railroad Corp., after it sold certain property to Wisconsin and Southern Railroad Corp., did not retain any right to use the track when the easement to serve a principal customer no longer applied and further held that the tracks were sold as a fixture with the land.

3. Unlawful Condemnation of Leased Railroad Property to Avoid a Lease 343

In *Union Pac. R. Co. v. Chicago Transit Auth.,*[183] when the Chicago Transit Authority attempted to condemn leased railroad property and retain a permanent easement to avoid paying high rents to the railroad–lessor, the Seventh Circuit held that the condemnation amounted to regulation that interfered with railroad transportation and, thus, was preempted by the ICCTA.

4. STB's Review of Proposed Switching and Joint Use Agreements Limited by a Showing of Public Interest or Encouragement of Competition 344

In *Central States Enterprises, Inc. v. I.C.C.*,[184] Central States Enterprises, Inc., requested the ICC to require two railroad companies to enter into a switching agreement or a joint-use agreement. The Seventh Circuit agreed with the Commission that there had not been a showing of a compelling public need for joint terminal service and that the switching agreement was sought merely as a matter of convenience.[185]

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[181] 49 U.S.C. § 11103 (2014).

[182] 657 F.3d 615, 622 (7th Cir. 2011).

[183] 647 F.3d 675, 682 (7th Cir. 2011).

[184] 780 F.2d 664 (7th Cir. 1985).

[185] *Id.* at 678–80.

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5. Construction of a Spur Track over a Pipeline on an Easement 345

In *Travis County v. Flint Hills Res., L.P.*,[186] the Fifth Circuit held that Texas law on the interpretation of contracts also applies to easements; however, because the easement at issue was silent on who should pay the cost to lower a pipeline for the construction of a spur track, the Texas Health and Safety Code governed responsibility for cost.

Articles **346**

6. Short Line Sales and Employee Protection Provisions 346

An article on the rise in recent years of short line railroads in the United States, published prior to the creation of STB, discusses ICC's more permissive approach to the regulation of railroad obligations to employees and the protection of employees in sales agreements.[187]

7. Shifting Bargaining Power Between Passenger Rail Lines and Freight Rail Lines Through STB Regulation 347

An article in the *Transportation Law Journal* explains that when it is in the public interest, STB may require the use of track facilities of one carrier for another carrier and that when the parties are unable to negotiate the terms, the board may establish the necessary conditions.[188]

XIV. CROSSINGS AT RAILROADS 349

A. Introduction 349

This part of the digest is devoted to several aspects of the important topic of highway-railway grade crossings. Section B discusses federal and state law on improvements to highway-railway grade crossings and the elimination of grade-crossings, as well as the government's right to require changes to grade crossings in the public interest. Section C discusses defective conditions at railroad crossings, such as inadequate warnings, uneven road and rail conditions, and vegetation obstructing a motorist's view of an oncoming train. Section D discusses a motorist's obligation to make a full stop at a railroad crossing in response to warning signals or a stop sign that may indicate an approaching train. Section E discusses the liability of railroads for defective conditions at railroad crossings and FRSA's preemption of some tort claims under state law. Section F covers the rights of utilities to use or cross certain railroad rights-of-way. Section

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[186] 456 Fed. Appx. 410, 413, 415 (5th Cir. 2011) (*citing* TEX. HEALTH & SAFETY CODE ANN. § 756.122 (2005)).

[187] Paul Stephen Dempsey & William G. Mahoney, *The U.S. Short Line Railroad Phenomenon: The Other Side of the Tracks*, 24 U. TOL. L. REV. 425, 428–30 (1993).

[188] Charles A. Spitulnik & Jamie Palter Rennert, *Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property*, 26 TRANSP. L.J. 319, 329 (1999).

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G discusses compensation for damage occasioned by the construction, relocation, or closure of crossings. Section H addresses whether railroads may be held liable for accidents at private crossings.

B. Improvements to or Elimination of Highway–Railway Grade Crossings **350**

Statutes and Regulations **350**

1. Railway–Highway Crossings and Safety **350**

When needed for safer crossings, DOT will pay the cost of "projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings."[189]

Article **351**

2. Railroad Obligations Under State Law on Grade Crossings **351**

Except when federal law preempts state law, "[m]ost aspects of jurisdiction over highway-rail grade crossings reside with the states."[190] For example, a Mississippi statute requires that when a railroad is constructed across a highway such that the highway must be raised or lowered, the railroad company is responsible to make and maintain a "proper and easy" grade for the crossing.[191]

Cases **352**

3. Compensation When a Local Government and a Railroad Company Agree on a Change of Grade **352**

As noted in *Bercel Garages, Inc. v. Macomb County Road Comm'n,*[192] Michigan recognizes the ability of a road authority and a railroad to enter into agreements for a change of grade, including separation of a grade at crossings, and the responsibility to compensate adjacent landowners.[193]

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[189] 23 U.S.C. § 130(a) (2014).

[190] L. STEPHEN JENNINGS, THE COMPILATION OF STATE LAWS AND REGULATIONS AFFECTING HIGHWAY-RAIL GRADE CROSSINGS ii (5th ed. 2009), available at http://www.plsc.net/docs/compilationofstatelawsRR2009.pdf (last accessed Mar. 31, 2015).

[191] MISS. CODE ANN. § 77-9-251 (2014).

[192] 190 Mich. App. 73, 475 N.W.2d 840 (Mich. Ct. App. 1991).

[193] MICH. COMP. LAWS §§ 102.7, 462.321 (2014).

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Articles **353**

4. Elimination or Modification of Railroad Crossings **353**

A law review article discussing the construction or elimination of railroad grade crossings notes that the New York Commissioner of Transportation may approve the installation, elimination, or relocation of grade crossings.[194]

5. Compilation of State Laws and Regulations on Matters Affecting Highway–Rail Crossings **353**

A compilation of state laws and regulations on matters affecting highway–rail crossings summarizes the law in each state on the processes and procedures required and the roles of the state or local government and the railroads when undertaking elimination, relocation, construction, repair, or improvement of grade crossings.[195]

C. Defective Conditions at Railroad Crossings **354**

Statutes and Regulations **354**

1. Safety Standards for Railroad Tracks, Roadbeds, and Nearby Areas **354**

Federal regulations require the railroad track, roadbed, and the areas around the roadbed to be inspected and meet certain safety standards.[196]

2. Duty to Maintain a Crossing Beyond the Crossties and the Crossing **355**

In Georgia a railroad is responsible for that part of the road 4 ft beyond the "traveled way or flush with the edge of the paved shoulder."[197]

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[194] Matthew R. Atkinson, *On the Wrong Side of the Railroad Tracks: Public Access to the Hudson River*, 13 PACE ENVTL. L. REV. 747, 801 (1996).

[195] JENNINGS, *supra* note 190.

[196] 49 C.F.R. § 213.1 (2014); 49 C.F.R. § 213.233 (2014).

[197] GA. CODE ANN. § 32-6-190 (2014).

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3. Applicability of the Manual on Uniform Traffic Control Devices to Railroad Crossings 356

The *Manual on Uniform Traffic Control Devices* (MUTCD) requires that certain devices must be used at highway and rail or light rail transit crossings and identifies the specific types of signs to use.[198]

Cases **357**

4. Requirement of Notice of a Defective Condition at a Crossing to Hold a Railroad Liable for the Condition 357

In *Goebel v. Salt Lake City S. R. Co.*,[199] the Supreme Court of Utah held that because the alleged condition at a railroad crossing was not one that the railroad installed or created, there had to be evidence that the railroad had notice of the alleged defective condition.

5. Whether a Road Condition at a Crossing Is an Unusually Dangerous Condition 358

In *Illinois Cent. Gulf R. Co. v. Travis*,[200] in which an oncoming train struck a motorist's truck at a railroad crossing, the railroad was held not liable for the accident because the grade was not unusually steep and the crossing lacked other defects that would prevent one from seeing or hearing a train.

6. Applicability of a Statute to a Crossing that Was Installed After the Road's Construction 359

In *Bowman v. CSX Transportation, Inc.,*[201] involving a Mississippi statute providing that it was a railroad's duty "to make proper and easy grades in the highway," a Mississippi appellate court interpreted the statute to apply only to railroad crossings installed after the construction of the road.

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[198] FHWA, MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, §§ 8A and 8A.01 (2009), available at http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/part8.pdf (last accessed Mar. 31, 2015).

[199] 104 P.3d 1185, 1193 (Utah 2004), *aff'd,* Utah Transit Auth. v. Salt Lake City S. R.R. Co., Inc., 2006 UT App 46, 2006 Utah App. LEXIS 15 (2006).

[200] 106 So. 3d 320, 340 (Miss. 2012), *rehearing denied*, 2013 Miss. LEXIS 93 (Miss., Feb. 14, 2013).

[201] 931 So. 2d 644, 652, 664–65 (Miss. Ct. App. 2006).

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Article **360**

7. Maintaining a Crossing and Crossing Signs and Warning Devices 360

The use of federal funds to upgrade crossings results in federal preemption of claims under state law that allege that railroad crossing warnings were inadequate.[202]

D. Failure by Motorists to Stop at Railroad Crossings 361

Statutes and Regulations **361**

1. Full Stop Required at a Crossing When a Signal Indicates an Approaching Train 361

A Vermont statute requires motorists to make a complete stop 50 ft from the nearest rail of a railroad crossing when an approaching train is visible, when an approaching train has sounded its horn, when a crossing gate is down, when a signal warns of an approaching train, or when a stop sign is posted.[203]

Cases **362**

2. Passenger's Duty to Watch for Approaching Trains and Warn the Driver to Stop 362

In *Smith v. Union Pac. R. Co.*,[204] the issue on appeal was whether the passenger-plaintiff was contributorily negligent in failing to watch for and warn the driver of an approaching train. The Supreme Court of Kansas held, *inter alia*, that if a passenger sees an approaching train and fails to warn the driver to stop, the passenger may be held to be contributorily negligent.[205]

3. Railroad Conductor's Duty to Watch for Motorists Who May Fail to Stop 363

In *Illinois Cent. Gulf R. Co. v. Travis,*[206] *supra*, Part XIV.C.5, the court held that Mississippi law requires that a crew on a moving train watch for vehicles approaching the tracks, but that the law also allows the crew to assume that motorists will obey the traffic laws.

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[202] Brent M. Timberlake, *Railroad Law*, 43 U. RICH. L. REV. 337, 361 (2008).

[203] 23 V.S.A. § 1071 (2014).

[204] 564 P.2d 514 (Kan. 1977).

[205] *Id*. at 519.

[206] 106 So. 3d 320, 329–330 (2014).

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E. Liability of Railroads for Defective Conditions at Crossings 364

***Statutes and Regulations* 364**

1. Telephone Reporting of Problems at Crossings 364

Federal law requires that each railroad carrier "establish and maintain a toll-free telephone service for rights-of-way over which it dispatches trains[] to directly receive calls reporting" malfunctions and other problems at crossings[207] and to "ensure the placement at each grade crossing on rights-of-way that it owns of appropriately located signs with a "a toll-free telephone number to be used for placing calls" regarding malfunctions and other problems "to the railroad carrier dispatching trains on that right-of-way."[208]

***Cases* 365**

2. Preemption of Claims Under State Law Alleging Defective Warning Devices 365

In *Norfolk S. Ry. Co. v. Shanklin*,[209] the Supreme Court held that when a state has used federal funds to install devices at a crossing, a railroad is not liable for an alleged failure to maintain adequate warning devices at the crossing.

3. Two-Step Approach in Determining Whether Tort Claims Under State Law Are Preempted by the Federal Railroad Safety Act 366

In *Zimmerman v. Norfolk S. Corp.*,[210] the Third Circuit held that if Norfolk Southern violated a federal standard of care created by a federal regulation or by an internal rule, Zimmerman's claim was not preempted.

4. Liability for a Defect in a Crossing that Causes Personal Injury 367

In *Alumbaugh v. Union Pac. R. Co.*,[211] the Eighth Circuit reversed the trial court's grant of a summary judgment for Union Pacific on the plaintiff's negligence claim because the

[207] *See* 49 U.S.C. §§ 20152(a)(1)(A)–(D) (2014).

[208] *See* 49 U.S.C. §§ 20152(a)(5)(A)–(C) (2014). The requirement for toll-free telephone service may be waived for Class II and Class III rail carriers when "the Secretary determines that toll-free service would be cost prohibitive or unnecessary." 49 U.S.C. § 20152(b) (2014).

[209] 529 U.S. 344, 358–359, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000).

[210] 706 F.3d 170, 178 (3d Cir. 2013) (*citing* 49 U.S.C. §§ 20106(b)(1)(A)–(B) (2007)).

[211] 322 F.3d 520, 525–526 (8th Cir. 2003).

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evidence was sufficient for the jury to find that Union Pacific should have known of the alleged defective condition.

5. Liability of a Railroad for Failure to Keep a Crossing Clear of Vegetation 368

Bryant v. Tenn-Ken R.R. Co., Inc.[212] involved a Tennessee statute that required railroad companies to "cut down all trees standing on its lands which are six (6) or more inches in a diameter two feet above the ground of sufficient height to reach the roadbed if they should fall."[213] However, the Sixth Circuit held that the statute was not intended to protect motorists.[214]

6. No Preemption of a State Law When the Federal Law Does Not Subsume the Subject Matter Regulated by State Law 369

In *Strozyk v. Norfolk S. Corp.*,[215] the driver of a truck was killed in a collision with a Norfolk Southern train at a railroad crossing. The Third Circuit held that the federal regulations that address adequate warning devices did not "substantially subsume" the subject area of an obstruction impairing visibility; therefore, the regulations did not preempt the plaintiff's claim based on an obstruction to visibility.[216]

7. Whether State Law that Applied to Crossings Was Preempted by a Federal Statute When Federal Regulations Had Not Been Issued 370

In *Langemo v. Montana Rail Link, Inc.*,[217] the court ruled that 49 U.S.C. § 20153, enacted in 1994, did not preempt state law because federally required "'regulations requiring that a locomotive horn shall be sounded while each train is approaching and entering upon each public highway-rail grade crossing'" were not in effect at the time of the accident, as they were not issued until January 2000.[218]

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[212] 108 Fed. Appx. 256, 262 (6th Cir. 2004).

[213] *Id*. at 259 (*quoting* TENN. CODE ANN. § 65-6-132 (2004)).

[214] *Id.* at 260, 262.

[215] 358 F.3d 268 (3d Cir. 2004).

[216] *Id.* at 273.

[217] 2001 ML 370, 2001 Mont. Dist. LEXIS 2131, at *1 (Mont. First Jud. Ct. 2001).

[218] *Id.* at *15 (*quoting* 49 U.S.C. 20153 (1994)).

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8. Whether the Public Utilities Commission Controlled a Railroad Crossing and Owed a Duty to the Plaintiffs Because the Crossing Was a Dangerous Condition of Public Property **371**

In *Public Utilities Commission v. The Superior Court of Los Angeles County*,[219] the plaintiffs alleged that a railroad crossing constituted a dangerous condition of public property. However, a California appellate court held that the California Public Utilities Commission's (PUC) "regulatory authority over the crossing does not establish control of that property within the meaning of section 830";[220] that "the PUC's right to inspect the crossing for safety violations and to close the crossing to vehicular and pedestrian (but not railroad) traffic does not establish control";[221] and that "*no evidence* was offered that the PUC *ever actively* maintained the railroad crossing through any form of maintenance or repair."[222]

Articles **372**

9. Preemption of State Tort Claims Under the *Easterwood, Shanklin,* and *Henning* Cases **372**

An article discusses the railroad industry's support of the FRSA's preemption of state law claims and the Supreme Court's decisions in *CSX Transp., Inc. v. Easterwood*[223] and *Norfolk Southern R.R. Co. v. Shanklin*[224] that interpreted federal preemption.[225]

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[219] 181 Cal. App. 4th 364, 375, 376, 105 Cal. Rptr. 3d 234, 243 (Cal. App. 2010).

[220] *Id.,* 181 Cal. App. 4th at 375, 105 Cal. Rptr. 3d at 243.

[221] *Id.,* 181 Cal. App. 4th at 376, 105 Cal. Rptr.3d at 243.

[222] *Id.,* 181 Cal. App. 4th at 379, 105 Cal. Rptr. 3d at 246 (emphasis in original).

[223] 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

[224] 529 U.S. 344, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000), *superseded by statute as stated in* Hunter v. Canadian Pac. Ry. Ltd., 2007 U.S. Dist. LEXIS 85110 (D. Minn. Nov. 16, 2007).

[225] Aaron Ries, *Railroad Tort Liability after the 'Clarifying Amendment:' Are Railroads Still Protected by Preemption*?, 77 DEF. COUNS. J. 92, 103 (2000).

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F. State Laws on the Rights of Utilities to Use or Cross Certain Rights-of-Way 374

***Statutes and Regulations* 374**

1. Rights of a Public Utility in California 374

Under California law, when a public utility is authorized to use eminent domain for the construction of a utility line but a railroad already occupies the same space, the utility may request that the section of railroad be removed.[226]

2. Rights of Utilities in Michigan 374

Although not mentioning railroads, a Michigan statute provides in part that "[e]xcept as otherwise provided under subsection (2)…public utility companies…may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, longitudinally within limited access highway rights-of-way."[227]

3. Dispute Process to Petition the DOT for Hearing Before an Administrative Law Judge Regarding a Utility Crossing 375

Michigan's Railroad Code § 62.265 provides for notice to a railroad company and railroad authority for "crossings within the right-of-way of a public street, highway, road, or alley, notification" and for a similar notice "[f]or crossings at any other location not within the right-of-way of a public street, highway, road, or alley."[228] The statute further provides that "[i]n case of a dispute emanating…which the parties cannot resolve within a reasonable time, either party may petition the department for a hearing," which has jurisdiction to settle disputes.[229]

***Cases* 376**

4. Waiver of Immunity of a Commuter Rail Line from an Action by a Utility to Condemn a Right-of-Way 376

In *Oncor Electric Delivery Co. LLC v. Dallas Rapid Transit*,[230] the Supreme Court of Texas held that the subject rail lines did not come within the exception for state-owned land in a

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[226] CAL. PUB. UTIL. CODE § 7557 (2014).

[227] MICH. COMP. LAWS § 247.183(1) (2014).

[228] MICHIGAN RAILROAD CODE §§ 462.265(1)(a) and (b) (2014).

[229] MICHIGAN RAILROAD CODE § 462.265(3) (2014).

[230] 369 S.W.3d 845, 848 (Tex. 2012).

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newly enacted Texas statute that provided that "the rights extended to an electric corporation…include all public land, except land owned by the state."[231]

5. Utility's Expropriation of Land for a Crossing as a Public Use 377

In *Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co.*,[232] ExxonMobil sought to expropriate a permanent right-of-way across Union Pacific's property.[233] The Supreme Court of Louisiana held that the use of the expropriated property would benefit the public because the road would allow the pipeline company to inspect its pipeline, which provides petroleum to the public.[234] Therefore, ExxonMobil was held to have the ability to expropriate a right-of-way across the rail line.[235]

6. Whether an Independent Transmission Company Could Avail Itself of a "Pay-and-Go" Procedure Used by Utilities to Cross a Railroad Right-of-Way 378

Hawkeye Land Company v. Iowa Utilities Board[236] involved an Iowa statute that authorized a "pay-and-go" procedure and payment of a legislatively predetermined $750 standard crossing fee a utility could pay to the owner of a railroad right-of-way. The Supreme Court of Iowa held that an independent transmission company is not a public utility and therefore is not allowed to use the pay-and-go procedure.[237]

Article 379

7. Railroad Abandonment of Property Also Used by a Utility 379

An article in the *Ecology Law Quarterly* discusses ways in which a utility may be able to continue having an easement after a railroad has abandoned a rail line and also notes that some states have statutes that allow utilities to remain on a property even after a railroad company abandons it.[238]

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[231] *Id.* at 848 (*quoting* TEX. UTIL. CODE ANN. § 37.053(d)).

[232] *Id.* at 194.

[233] *Id.* at 195.

[234] *Id.* at 197–99, 202.

[235] *Id.* at 202.

[236] 847 N.W.2d 199, 201 (Iowa 2014).

[237] *Id.* at 219.

[238] Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 440 (2000).

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G. Compensation for Damage Occasioned by the Construction, Relocation, or Closure of Crossings 381

In Pennsylvania, compensation for damages, after proper notice and hearing, is determined by the Pennsylvania Public Utility Commission.[239]

***Cases* 382**

H. Railroad Liability for Injuries at Private Crossings 382

1. Whether a Railroad Has Assumed a Duty of Care at a Private Crossing 382

As stated in *Calhoun v. CSX Transportation, Inc*.,[240] although generally a railroad has no duty at a private crossing, a duty may arise when "a different duty was assumed; if the crossing is, or becomes, ultra-hazardous; or where, by pervasive use, the character of a private crossing has changed to a public one."[241]

2. Whether a Railroad Has a Duty at a Private Crossing Alleged To Be Extra-Hazardous 383

In *Gaw v. CSX Transportation, Inc.,*[242] although a federal district court in Kentucky granted CSX's motion for summary judgment, the court held that "[i]f there is habitual and pervasive public use of an otherwise private crossing, Kentucky common law provides that this may impose a duty to warn, keep lookout, or slacken locomotive speed on the railroad" to protect the public at private crossings that are "extra-hazardous."[243]

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[239] 66 PA. CONS. STAT. § 2704(a) (2014).

[240] 331 S.W.3d 236 (Ky. 2011).

[241] *Id.* at 238.

[242] 2008 U.S. Dist. Lexis 23131, at *1 (W.D. Ky. 2008), *aff'd*, 2009 U.S. App. Lexis 11334 (6th Cir. 2009).

[243] *Id.* at *12.

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3. Railroad's Duty at an Extra-Hazardous Private Crossing 384

In *Illinois Central Railroad Company v. White*,[244] the Supreme Court of Mississippi held that although a railroad generally has no statutory duty at private crossings, the record "support[ed] plaintiffs' assertion that the crossing was 'extra-hazardous.'"[245]

4. Railroad's Right to Submit Evidence that It Was Not Required to Apply Safety Standards and Recommendations at a Private Crossing 385

In *Webb v. Union Pacific Railroad Company,*[246] although an Illinois appellate court held that on remand the trial would have to determine whether control was an issue, the trial court had not "abused its discretion in permitting some evidence on the issue of the Railroad's control over and maintenance of the subject crossing."[247]

5. Whether a Railroad Is Liable After Failing to Maintain Whistle Posts and Crossing Signs at a Railroad Crossing Believed To Be a Private Crossing 386

In *Cook v. CSX Transportation, Inc.*[248] a federal district court in Ohio rejected a claim "that CSXT was negligent because the crossbucks at the railway crossing do not comply with Ohio law" for the reason that the state law "is preempted by the Federal Railroad Safety Act.."[249]

6. Whether the State DOT Has Jurisdiction to Close a Private Crossing 387

In *B&W Lumber Company, Inc. v. Norfolk Southern Corporation,*[250] involving the plaintiff's action to prohibit the closure of the crossing following a fatal accident, a federal district court in South Carolina held that the language in S.C. Code Ann. Section 58-15-1625 was not "so clear as to foreclose the possibility that a court will interpret the statute to allow (or require) SCDOT to assume jurisdiction over a private crossing."[251]

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[244] 610 So. 2d 308 (Miss. 1992).

[245] *Id.* at 317.

[246] 2012 Ill. App. Unpub. LEXIS 494, at *1, 2012 Ill. App. (5th) 100607-U (Ill. App. 2012).

[247] *Id.,* 2012 Ill. App. Unpub. LEXIS 494, at *33, 2012 Ill. App. (5th) 100607-U at P41.

[248] 2014 U.S. Dist. LEXIS 147661, at *1 (N.D. Ohio 2014).

[249] *Id.* at *11.

[250] 2009 U.S. Dist. LEXIS 51732, at *1 (D. S.C. 2009).

[251] *Id.* at *15, N 7.

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7. Calculation of Offset in Settlement with a Railroad in Claim Against a Private Party for Creating a Hazardous Condition Near Railroad Tracks 388

In *RGR, LLC v. Georgia Settle, Personal Representative of the Estate of Charles E. Settle, Sr., Deceased*,[252] the Supreme Court of Virginia ruled that RGR LLC was negligent in creating a hazardous condition when the company stacked lumber near the railroad tracks, which blocked motorists' view of the tracks at the crossing where the accident occurred.

XV. DAMAGE TO OR MAINTENANCE OF PROPERTY 389

A. Introduction 389

This part of the digest discusses damage to property caused by or sustained by a railroad. Section B discusses damage to railroad bridges and other property, as well as state statutes that apply to the construction and maintenance of railroads. Section C deals with damage to property caused by a railroad and whether the ICCTA [253] preempts state tort claims against a railroad for property damage.

B. Liability of a Railroad for Neglect of a Bridge 389

Statutes **389**

1. Damages for Violation of a Statute Applicable to Bridges 389

In Iowa a railroad company is liable for damages to "any person by reason of any neglect or violation" of an Iowa statute that requires railroad companies to build and maintain all bridges necessary for a railroad to cross over or under another railway, highway, or waterway.[254]

2. Liability for the Cost of a Bridge Required for Drainage 390

An Illinois statute provides in part that when a drain apparently owned by a district authority (district) crosses an existing railroad and a bridge is necessary for the crossing the district is liable to the railroad for the cost of constructing and maintaining the bridge.[255]

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[252] 2014 Va. LEXIS 161, at *1, 3 (Va. 2014).

[253] 49 U.S.C. § 10102 (2014).

[254] IOWA CODE § 327F.2 (2014).

[255] 70 ILL. COMP. STAT. § 605/12-4 (2014).

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3. Liability for the Cost of a Crossing Over or Under a Railroad and for Bridge Repair 390

A Maine statute provides in part that when a railroad is constructed over or under another railroad or canal, the "corporation making the crossing is liable for damages, occasioned by making the crossing."[256]

Cases **391**

4. Whether a Railroad's Agreement with a Transit Company to Maintain a Bridge Relieved the Railroad of Its Obligation Under Section 93 of the New York Railroad Law 391

In *City of Middletown v. Wallkill Transit Co.*,[257] the Erie Railroad Company maintained that the transit company's predecessor had agreed to maintain a bridge and keep it in repair. A New York court held that the agreement did not relieve the railroad company of its obligation to the City under Section 93 of the Railroad Law of New York.[258]

5. Whether a Railroad's Duty Under Section 93 of the New York Railroad Law to Maintain and Repair a Bridge Included a Duty to Erect Signage 392

In *Aramini v. CSX Transportation, Inc.*,[259] involving a claim that CSX failed to provide a sign that adequately alerted drivers to the actual height of a bridge, a federal district court in New York held that the "statutory obligation to maintain and repair bridge structures" did not include "a duty to erect signage."[260]

6. Triable Issue of Fact on Whether an Expansion Joint Was Part of a Bridge and Abutments Under Section 93 of the New York Railroad Law 392

In *Oppenheim v. Village of Great Neck Plaza, Inc.*,[261] an appellate court in New York held that under New York Railroad Law Section 93, there were issues of fact regarding whether the expansion joint at issue in the case constituted a defective condition in a bridge.

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[256] ME. REV. STAT., tit. 23 § 7209 (2014).

[257] 18 Misc. 334, 193 N.Y.S. 297 (N.Y. Sup. Ct. 1922).

[258] *Id.*, 18 Misc. at 335, 193 N.Y.S. at 298.

[259] 2014 U.S. Dist. Lexis 74154, at *1 (W.D.N.Y. 2014).

[260] *Id.* at *9–10.

[261] 46 A.D. 3d 527, 846 N.Y.S.2d 628 (N.Y. App. 2d Dep't 2007).

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7. Whether the "Second Comer" Doctrine Imposed a Duty of Complete Reconstruction of a Bridge 393

In *Baltimore & Ohio Railroad Company v. Kuchta*,[262] the Maryland Court of Special Appeals held that the county commissioners' attempt in an agreement to relinquish the county's common law rights as a "first comer" was "beyond the scope of their authority, and therefore *ultra vires,*" and also rejected B&O's "argument that the second comer doctrine did not impose upon it the duty of completely reconstructing Bridge 5A."[263]

8. 28 U.S.C § 130's Preemption of the "Second Comer" Doctrine in a Case Involving Bridge Reconstruction and Maintenance 394

CSX Transportation, Inc. v. Mayor and City Council of Baltimore City, Maryland[264] concerned a dispute over whether an agreement between the B&O, the predecessor of CSXT, and the City of Baltimore (City) was a valid and binding contract. A federal district court in Maryland held that under 23 U.S.C. § 130, "once a state or local government agrees to the federal funding of a railroad crossing construction or reconstruction project, it cannot seek to impose the cost of that project upon the railroad."[265]

9. Liability for Damage to a Bridge Owned by a Railroad When the Bridge Is Struck by a Vessel 397

Union Pac. R. Co. v. Kirby Inland Marine, Inc.[266] involved a vessel's collision with a bridge owned by Union Pacific and whether the bridge was an unreasonable obstruction to navigation pursuant to a federal statute, the Truman–Hobbs Act. The Eighth Circuit held that because the Truman–Hobbs Act has to do with funding, not safety, it was improper to shift responsibility from the vessel-owner back to the bridge-owner, Union Pacific. However, the court remanded the case to determine whether a presumption that the vessel was negligent was rebutted by a Coast Guard finding that the bridge was an unreasonable obstruction to navigation.[267]

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[262] 76 Md. App. 1, 543 A.2d 371 (1988).

[263] *Id.,* 76 Md. App. at 8, 10, 543 A.2d at 375, 376 (citation omitted).

[264] 759 F. Supp. 281 (D. Md. 1991).

[265] *Id.* at 284.

[266] 296 F.3d 671, 675 (8th Cir. 2002), *cert. denied,* Union Pac. R.R. Co. v. Kirby Inland Marine, Inc., 2003 U.S. LEXIS 1124 (U.S. Feb. 24, 2003), *cert. denied,* Kirby Inland Marine, Inc. v. Union Pac. R.R., 2003 U.S. LEXIS 1123 (U.S. Feb. 24, 2003).

[267] 296 F.3d at 676.

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10. Liability for Damage to Bridge Used But Not Owned by a Railroad 399

In *Louisville & Nashville R.R. Co. v. M/V Bayou Lacombe*,[268] the Fifth Circuit held that the Louisville and Nashville Railroad Company (L&N) did not have a property interest in a bridge struck by a tugboat that would permit L&N to recover for damages to the bridge because the agreement between L&N and Southern Railway only granted L&N the right to use Southern Railway's bridge.

11. Liability for Damage to a Railroad Bridge During Hurricane Katrina 400

In *BNSF Ry. Co. v. Parker Drilling Offshore USA LLC*,[269] Browning Oil Company (Browning Oil) secured a rig (owned by Parker Drilling Offshore U.S.A. L.L.C. (Parker)) to a nearby dock, which the rig damaged during Hurricane Katrina. The Fifth Circuit affirmed a summary judgment for Browning Oil on Parker's contractual claim for indemnification.[270]

12. Whether a Railroad's Operating Agreement with Amtrak Was a Valid Prior Cost Allocation Agreement Divesting the Public Utility Commission of Jurisdiction to Allocate Costs 401

In Norfolk Southern Railway Company v. Public Utility Comm'n,[271] a Pennsylvania court ruled that Norfolk's Operating Agreement with Amtrak did not constitute a valid private cost allocation agreement, as contemplated by 66 Pa. C.S. § 2704(a), that would divest the Pennsylvania Public Utility Commission of jurisdiction to allocate any costs for the removal of the bridge to Norfolk Southern.

Article **402**

13. State Public Utility Commission Authority to Allocate the Expense of Bridge Repair to a Railroad 402

A law review article discusses the decision in *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Comm'n*[272] that upheld the PUC's decision on the allocation of the cost of bridge repair to the railroad because the ICCTA did not preempt the state statute.

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[268] 597 F.2d 469, 471, 474 (5th Cir. 1979).

[269] 332 Fed. Appx. 986 (5th Cir. 2009).

[270] *Id*. at 987.

[271] *Norfolk Southern Railway Company,* 2014 Pa. Commw. Unpub. LEXIS 233, at *1, 12, 20 (Pa. Commw. Ct. 2014).

[272] 778 A.2d 785, 196–97 (Pa. Commw. Ct. 2001).

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C. Liability for Damage to Other Property 403

Statute 403

1. Damage to Property Caused by a Railroad 403

A Michigan statute provides that, unless an engine is proved to have been in good order or that all safety precautions were taken, railroad companies are liable for damage to property "by fire originating from engine's passing over the road, fires set by company employees by order of the officers of the road, or otherwise originating in the constructing or operating of the railroad."[273]

Cases 403

2. Liability for Damage to Private Property Caused by a Railroad Trestle 403

In *Irish v. BNSF Ry. Co.,*[274] although a Wisconsin statute prohibited the obstruction of water flow when a railroad company builds a track across a drainage area, the plaintiffs were not entitled to relief because they failed to comply with the required statutory notice.

3. Liability of a Railroad for Nuisance and Contamination of Property 404

In *Redevelopment Agency v. BNSF Railway Company,*[275] involving contamination caused by a petroleum spill from a nearby facility, the Ninth Circuit held, *inter alia*, that the railroads were not liable for nuisance as possessors of the property because there was no evidence "that the Railroads had actual knowledge of the contamination while they were in possession of the Property."[276]

4. Whether the ICCTA Preempts Tort Claims Under State Law for Water Damage Caused by a Railroad 406

In *Emerson v. Kansas City S. Ry. Co.*,[277] property owners alleged that the Kansas City Southern Railroad Co.'s failure to keep a drainage ditch clear of obstructions resulted in the

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[273] MICH. COMP. LAWS § 462.259 (2014).

[274] 674 F.3d 710, 711, 712 (7th Cir. 2012).

[275] 643 F.3d 668 (9th Cir. 2011).

[276] *Id*. at 675.

[277] 503 F.3d 1126 (10th Cir. 2007).

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flooding of their adjacent property. The Tenth Circuit held that the ICCTA did not expressly preempt their state tort claims, but on remand the district court would have to determine whether allowing a remedy for the injury would interfere with railroad transportation.[278]

5. Claim for Gas and Smoke Caused by a Railroad Tunnel 407

In *Richards v. Washington Terminal Company*,[279] arising out of a railroad company's construction of a tunnel and tracks near but not adjoining the plaintiff's home, the Supreme Court held that gas and smoke directed toward and into the plaintiff's house constituted a *private* nuisance for which the landowner could recover damages.

XVI. DEMONSTRATION PROJECTS OR PROGRAMS 409

A. Introduction 409

FRA currently is sponsoring the Confidential Close Call Reporting System (C3RS) Demonstration Project to improve railroad safety by allowing railroad companies to report close calls without being penalized by FRA. The statutes summarized in Sections B and C authorize the Secretary of Transportation to create demonstration projects to improve railroad safety. The articles discussed in Section D focus on the C3RS's benefits and challenges.

Statutes and Regulations **410**

B. Section 163 of the Federal-Aid Highway Act of 1973 410

The Federal-Aid Highway Act of 1973 authorized the Secretary of Transportation to implement demonstration projects to improve safety at railroad–highway grade crossings.[280]

C. Grade Crossings and Railroad Rights-of-Way 410

The Secretary of Transportation is required to establish demonstration projects to determine whether train accidents would be reduced by using reflective markers and stop or yield signs at railroad grade crossings and speed bumps or rumble strips prior to a crossing.[281]

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[278] *Id*. at 1128, 1130.

[279] 233 U.S. 546, 551–52, 34 S. Ct. 654, 58 L. Ed. 1088 (1914).

[280] Federal Aid Highway Act of 1973, Pub. L. No. 93-87, §§ 163 and 230, 87 Stat. 250 (1973). *See* 23 U.S.C. § 130 (2014); § 230 *repealed by* Federal Aid Highway Act of 1976, Pub. L. No. 94-280, § 135(c), 90 Stat. 442.

[281] 49 U.S.C. § 20134(c) (2014).

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Articles **411**

D. Benefits of Using a Confidential Close Call Reporting System 411

A report by FRA addresses the C3RS Demonstration Project and its importance in reducing railroad accidents, notes the benefits of implementing a close call reporting system, and discusses how a similar reporting system is benefiting the railroad industry in the United Kingdom.[282]

E. Challenges to Using a Confidential Close Call Reporting System 412

In "Developing an Effective Corrective Action Process: Lessons Learned from Operating a Confidential Close Call Reporting System," the authors describe the process for the reporting of close calls, discuss challenges associated with the implementation of a C3RS, and offer some solutions.[283]

XVII. EASEMENTS AND INTERPRETATION OF RAILROAD DEEDS 415

A. Introduction 415

Except under the circumstances discussed in part I of the digest, the disposition of a railroad easement or right-of-way is governed by state law. Part B discusses whether a railroad easement reverts to the original owner or to the said owner's successor-in-interest. Part C discusses the law in several states on whether an adjoining landowner has a right to an abandoned railroad right-of-way. Part D summarizes cases holding that a deed conveying a right-of-way conveys an easement rather than an interest in fee simple. Parts E and F discuss what is meant by the term right-of-way, whether a railroad is permitted to lease the subsurface of its right-of-way for nonrailroad purposes, and whether a railroad has the right to exclude others from its right-of-way. Parts G and H discuss the interpretation of railroad deeds and whether landowners may recover compensation when a railroad right-of-way is used by a telecommunication company.

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[282] Jordan Mutler, Improving Railroad Safety through Understanding Close Calls, at 1, available at http://www.closecallsrail.org/pubs/closecalls05a.pdf (last accessed Mar. 31, 2015).

[283] Jordan Multer, Joyce Ranney, Julie Hile, & Thomas Raslear, "Developing an Effective Corrective Action Process: Lessons Learned from Operating a Confidential Close Call Reporting System" (undated), available at http://www.closecallsrail.org/pubs/Lessons_Learned_From_Operating_A_Confidential_Close_Call_Reporting_System.pdf (last accessed Mar. 31, 2015).

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Case **416**

B. Whether an Original Grantor or Successor-in-Interest Has a Right of Reversion to an Abandoned Railroad Right-of-Way **416**

In *Stone v. U.S.D. No. 222,*[284] concerning whether a railroad had obtained only an easement for railroad purposes, the Supreme Court of Kansas held that the determining factor was the language in the original deed, not the use to which the property had been put.

Statutes **418**

C. State Law on Whether an Adjoining Landowner Has a Right to an Abandoned Right-of-Way **418**

1. California **418**

In California the rules that apply to a highway or stream apply to a railroad right-of-way.[285]

2. Iowa **418**

An Iowa statute provides that "property shall pass to the owners of the adjacent property at the time of abandonment. If there are different owners on either side, each owner will take to the center of the right-of-way."[286]

3. Indiana **419**

An Indiana statute provides that when "a railroad abandons its right to a railroad right-of-way, the railroad's interest vests in the owner of the right-of-way fee with a deed that contains a description of the real property that includes the right-of-way."[287]

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[284] 278 Kan. 166, 179, 91 P.3d 1194, 1203 (2004).

[285] Freeman v. Affiliated Property Craftsmen, 266 Cal. App. 2d 723, 730, 72 Cal. Rptr. 357, 364–65 (1968). *See* CAL. CIV. CODE § 1112 (2014), CAL. CIV. CODE § 831 (2014).

[286] IOWA CODE § 327G.77(1) (2014).

[287] IND. CODE ANN. § 32-23-11-10(b) (2014).

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4. Maine 419

Under 23 Maine Revised Statutes Annotated, Section 7105, Maine's Department of Transportation is authorized to lease or purchase certain railroad lines that have been authorized to be abandoned. In Maine, railroads are treated differently than roads.[288]

5. North Carolina 422

A North Carolina statute provides in part that whenever a railroad abandons a railroad easement, the presumption is that the title vests in each adjacent landowner "to the centerline of the abandoned easement."[289]

6. South Dakota 422

A South Dakota statute states that a railroad that abandons service over a rail line "shall settle title claims with adjoining landowners and municipalities within one year."[290]

Cases **422**

D. Whether a Deed Conveying a Right-of-Way Is a Conveyance of an Easement or a Fee Simple Interest 422

1. Presumption that a Deed Conveys Only an Easement 422

In *Baltimore County v. AT&T Corp.*,[291] an Indiana federal district court held that under applicable Maryland law (relevant to AT&T's motions), when a deed granted a right-of-way to a railroad, the deed conveyed only an easement because the deed evinced no intention of conveying a fee simple interest.

2. Significance of Language in a Deed Indicating Conveyance of an Easement 423

In *Dale Henderson Logging, Inc. v. Department of Transportation*,[292] the Supreme Judicial Court of Maine held for different reasons that the property owners did not now own a

[288] 23 ME. REV. STAT. ANN. § 3026(1) (2014).

[289] N.C. GEN. STAT. ANN. § 1-44.2(a) (2014).

[290] S.D. CODIFIED LAWS § 49-16A-115 (2014).

[291] 735 F. Supp. 2d 1063 (S.D. Ind. 2010).

[292] 2012 ME 99, *20, 48 A.3d 233, 238 (2012).

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railroad corridor in fee simple, but that the state transportation department held the easement for future railroad uses.

3. Judicial Factors Used to Differentiate Between the Grant of an Easement or an Interest in Fee Simple 425

In *Beres v. United States*,[293] when the government denied that the plaintiffs held a reversionary interest in a right-of-way on their properties, the Federal Court of Claims held that all grantors of the deeds at issue had conveyed easements, not interests in fee, to the railroad.

E. Meaning of the Term "Right-of-Way" 427

1. A Right-of-Way as a Strip of Land on Which Railroad Companies Construct a Road Bed 427

In 1891 in *Joy v. City of St. Louis*,[294] the U.S. Supreme Court held that in every instance that the term right-of-way was used, the term referred to a strip of land rather than to a right to cross over the land because "[a] right of way is of no practical use to a railroad without a superstructure and rails," and that an alternative definition would have defeated the purpose in granting the right-of-way.[295]

2. Right to Lease the Subsurface for a Nonrailroad Purpose Not Included in a Railroad's Right-of-Way 427

In *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.*,[296] a California appellate court held that Union Pacific did not have the right to collect rent from Santa Fe Pacific Pipelines based on the acquisition of a right-of-way under the General Right-of-Way Act of 1875, because the Act did not make "the subsurface the 'property of the railroad,'" and because the leasing of the subsurface to generate profits is not a railroad purpose.[297]

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[293] 97 Fed. Cl. 757, 774–75 (Fed. Cl. 2011).

[294] 138 U.S. 1, 11 S. Ct. 243, 34 L.E. 843 (1891).

[295] *Id.*, 138 U.S. at 45, 11 S. Ct. at 256, 34 L. Ed. at 858.

[296] 2014 Cal. App. LEXIS 1007, at *1 (Cal. Dist. Ct. App. 2014).

[297] *Id*. at *47–48, 51.

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F. Railroad's Right to Exclude Others from Its Right-of-Way 429

In *Western Union Tel. Co. v. Pennsylvania R. Co.*,[298] the Supreme Court held that the Act of 1866[299] did not permit a telegraph company to enter private property and erect structures without the consent of the owner of the property.

Articles **430**

G. Railroad's Authority to Grant Easements to Utility Companies or Repurpose Land for Another Use 430

An article in the *Ecology Law Quarterly* discusses how an abandonment of railroad property or a rail line affects utility companies that have a license from a railroad company to lay pipes, cables, or wires on railroad property and discusses a number of class actions in which property owners sought damages for a taking because of the utilities' use of an abandoned right-of-way.[300]

H. Compensation for Use of Railroad Rights-of-Way by Telecommunication Companies for Line or Cables 432

An article in the *Drake Journal of Agricultural Law* discusses several class action suits in which landowners received compensation because of telecommunication companies' claims that they had permission from the railroads holding the rights-of-way to enter onto the land to lay cables.[301]

XVIII. EMINENT DOMAIN AND RAILROADS 435

A. Introduction 435

Many states have extended the right to take private lands for public use to certain private companies, including railroads, because the states consider the use of such property to be fundamentally public. Section B discusses condemnation of property by railroads, whereas Section C discusses condemnation of property owned by railroads. Section D addresses the nature of the property interest taken in eminent domain actions. Section E discusses the difference between eminent domain and zoning. Section F summarizes cases and an article on

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[298] 195 U.S. 540, 562, 25 S. Ct. 133, 138, 49 L. Ed. 312, 320 (1904).

[299] The Act of July 24, 1866, 14 Stat. 211. C. 230 (repealed 1947).

[300] Danaya C. Wright & Jeffery M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 352, 360 (2000).

[301] Nels Ackerson, *Right-of-Way Rights, Wrongs and Remedies Status Report, Emerging Issues, and Opportunities*, 8 DRAKE J. AGRIC. L. 177, 184–85 (2003).

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the valuation of property and the determination of just compensation in eminent domain cases.

B. Condemnation of Property by Railroads **435**

Constitutional Provisions and Statutes **435**

1. Requirement of Just Compensation for Property Taken or Taken or Damaged **435**

Most state constitutions and statutes include provisions requiring just compensation for property taken, or taken or damaged, by the state or by local governments for public use.

2. State Limitations on the Use of Eminent Domain **437**

Some states have enacted laws that limit the use of eminent domain in the taking of homes or sacred locations.

Cases **437**

3. Satisfaction of the Public Use Requirement **437**

In *Buck v. District Court for Kiowa County*,[302] the Supreme Court of Colorado held that the construction of dust levees along the side of railroad tracks enhanced the operational efficiency of the railroad and thus was for a public use and benefit.

4. Acquiring Land for Railroad Business **437**

In *Hairston v. Danville & W. R. Co.*,[303] the U.S. Supreme Court held that a railroad could validly exercise the right of eminent domain to obtain property for the purpose of handling railroad business with nearby industrial or similar plants.

[302] 199 Colo. 344, 348, 608 P.2d 350, 351–52 (1908).

[303] 208 U.S. 598, 608–09, 28 S. Ct. 331, 52 L. Ed. 637 (1908). *See also* Kelo v. City of New London, 545 U.S. 469, 482, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005); United States *ex rel.* Tennessee Valley Authority v. Welch, 327 U.S. 546, 552, 66 S. Ct. 715, 90 L. Ed. 843 (1946); Alton R. Co. v. Illinois Commerce Com., 305 U.S. 548, 553, 59 S. Ct. 340, 83 L. Ed. 344 (1939) (all citing *Hairston*).

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5. Takings by Railroad Companies of Property Adjoining a Railroad for Ancillary Uses or Spur Tracks 438

States have permitted railroad companies to take adjoining property through eminent domain for ancillary uses or for spur tracks.[304]

6. Tracks Connecting the Railroad with a Private Business 438

In *Hughes v. Consol-Pennsylvania Coal Co.*,[305] the Third Circuit held that a railroad company had the right to condemn land for the purpose of connecting a private coal mine with its railway but remanded case on the property owners' claims of fraudulent misrepresentation, conspiracy, and racketeering.

7. Spur Tracks for Private Railroads 439

In *McCarthy v. Bloedel Donovan Lumber Mills,*[306] involving a private railroad's taking to add a spur between its existing logging railroad and timberland that the railroad owned, the Ninth Circuit held that the taking was an appropriate exercise of the power of eminent domain.

C. Condemnation of Railroad Property 440

Statutes **440**

1. Interstate Commerce Commission Termination Act 440

The ICCTA[307] did not intend to preempt all state and local takings of railroad property by eminent domain actions; rather, preemption is determined on an "as applied" basis rather than "categorically."[308]

2. State Limitations on Condemnation of Property Owned or Operated by Railroads 442

Many states have statutes that govern the exercise of eminent domain with respect to

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[304] *See, e.g.,* Union Lime Co. v. Chicago & Northwestern R. Co., 233 U.S. 211, 34 S. Ct. 522, 58 L. Ed. 924 (1914); Hairston v. Danville & W. R. Co., 208 U.S. 598, 28 S. Ct. 331, 52 L. Ed. 637 (1908); Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594 (3d Cir. 1991); McCarthy v. Bloedel Donovan Lumber Mills, 39 F.2d 34 (9th Cir. 1930).

[305] 945 F.2d 594, 613 (3d Cir. 1991).

[306] 39 F.2d 34, 36-37 (9th Cir. 1930).

[307] *See* 49 U.S.C. § 10501 (2014).

[308] Union Pac. R.R. v. Chicago Transit Auth., 647 F.3d 675, 680 (7th Cir. 2011).

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railroad property, but the states may permit the state or public utility companies to condemn land owned or operated by railroads for use in establishing telephone lines or other public utilities.[309]

3. Statutory Provisions in Oregon 442

Oregon is an example of a state with statutory provisions pursuant to which the state may "locate, relocate, or construct" a highway on a railroad's right-of-way when necessary.[310]

Case **443**

4. Condemnation Preempted that Would Interfere with Railroad Operations 443

In *Union Pacific Railroad v. Chicago Transit Authority,*[311] when the Chicago Transit Authority attempted to condemn railroad property to acquire a perpetual easement, the Seventh Circuit held that the condemnation was preempted because the condemnation would interfere unreasonably with Union Pacific's operations.

Cases **445**

D. Nature of Property Interest Taken in Eminent Domain 445

1. Narrow Interpretation of a Property Interest Obtained by Eminent Domain 445

State law determines the nature of a property interest that is acquired in eminent domain cases.[312]

2. Whether Government Retained Reversionary Interest in Public Land It Condemned and Granted to a Railroad 445

In *Samuel C. Johnson 1988 Trust v. Bayfield County,*[313] in determining whether Bayfield County retained a reversionary interest, the court held that the land itself, not an easement, was acquired outright by the railroad through eminent domain, leaving no reversionary interest.

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[309] *See, e.g.,* CAL. PUB. UTIL. §§ 7557, *et seq*. (2014) and 90402 (2014).

[310] OR. REV. STAT. § 366.335(1) (2014). *See also* OR. REV. STAT. § 368.116 (2014).

[311] 647 F.3d 675, 676, 682 (7th Cir. 2011).

[312] Howard v. United States, 106 Fed. Cl. 343, 367 (2012).

[313] 649 F.3d 799, 808 (7th Cir. 2011).

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E. Difference Between Eminent Domain and Zoning Regulations **446**

1. Eminent Domain as an Inalienable Right of Sovereignty **446**

In *Forth Worth & D.C. Railway Co. v. Ammons*,[314] the court stated that the power of eminent domain derives from the states' right to appropriate private property, "one of the inalienable rights of sovereignty," while the power to zone property is based on the states' police powers and is subject to more restrictions.[315]

Article **447**

2. Interaction of Local Land Use Regulations and Eminent Domain **447**

A law review article entitled "Eminent Domain and the Sanctity of the Home" argues that in cases involving railroads and local land use regulation and eminent domain, the use of eminent domain is most consistent with promoting the general welfare because utility companies and railroads have obligations that encompass a larger geographic area than local governments, which serve the needs of their communities.[316]

Cases **448**

F. Valuation of Property and Just Compensation for Takings **448**

1. Market Value **448**

In *First English Evangelical Lutheran Church v. Los Angeles County*[317] the Supreme Court held that when a condemnor takes property by eminent domain, just compensation equals the market value of the property determined as of the date of the taking.

2. Special Value Not Compensable **448**

In *Palazzolo v. Rhode Island*,[318] the Supreme Court held that any special value that a property has to the condemnor is not to be considered when determining market value.

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[314] 215 S.W.2d 407 (Tex. Civ. App. 1948). *See* Michael B. Kent, Jr., *Public Utilities, Eminent Domain, and Local Land Use Regulations: Has Texas Found the Proper Balance?*, 16 TEX. WESLEYAN L. REV. 29, 31 (2009) (summarizing the *Ammons* decision).

[315] *Id.* at 409–10.

[316] Kent, Jr., *supra* note 314, at 29.

[317] 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

[318] 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

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3. Severance Damages 449

In *State by State Highway Commissioner v. Williams*,[319] a New Jersey appellate court held that when the government takes only part of a person's property "the measure of damages is the difference in the value of the tract before and after the taking, or the value of the land that is taken and compensation for the diminution in value [of the remainder] that will result from the taking."[320]

4. Comparable Sales or Other Evidence 449

In *United States v. 329.73 Acres of Land*,[321] the Fifth Circuit held that evidence other than comparable sales may be admissible in determining the value of property taken by condemnation.

5. Whether Injunctive Relief Is Available 449

In *Osborne & Co. v. Missouri Pacific Railway Co.*,[322] the Supreme Court held that the courts may deny an injunction when a property owner's injury (i.e., the decrease in market value of the adjoining property) may be compensated fairly in damages.

Article **450**

6. Whether Just Compensation Should Include Nonmarketable Elements 450

A law review article argues that the compensation model for eminent domain should be adjusted to include "nonmarketable elements of home ownership."[323]

XIX. EMPLOYEES AND DRUG AND ALCOHOL TESTING 452

A. Introduction 452

The Secretary of Transportation has issued detailed regulations implementing policies and procedures for testing railroad employees for the use of drugs and alcohol. Sections B through F discuss statutes, regulations, and cases on drug and alcohol testing. Section G

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[319] 65 N.J. Super. 518, 168 A.2d 233 (N.J. App. Div. 1961).

[320] *Id.,* 65 N.J. Super. at 524, 168 A.2d at 236.

[321] 666 F.2d 281, 283 (5th Cir. 1982).

[322] 47 U.S. 248, 260, 13 S. Ct. 299, 303, 37 L. Ed. 155, 161 (1893).

[323] John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783 (2006).

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discusses an article on the expansion of searches without prior suspicion. Section H discusses the use of drug and alcohol testing for other purposes such as unauthorized genetic testing.

B. Policies and Procedures Applicable to Drug and Alcohol Testing 453

***Statutes and Regulations* 453**

1. Secretary of Transportation's Authority to Promulgate Regulations on Drug and Alcohol Testing 453

The DOT Secretary is empowered to issue regulations on the use of controlled substances and alcohol through programs that require "preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions";[324] to "prescribe regulations and issue orders requiring railroad carriers to conduct periodic recurring testing of railroad employees responsible for safety-sensitive functions…for the use of alcohol or a controlled substance in violation of law or a Government regulation";[325] and to issue regulations regarding rehabilitation programs for drug and alcohol use or abuse.[326]

2. Regulations for the Control of Alcohol and Drug Use in Railroad Operations 454

Transportation employers are subject to detailed requirements for drug and alcohol testing in the workplace for safety-sensitive employees.[327] The applicable regulations describe in detail the prohibitions and procedures that apply to railroad employees.[328]

***Case* 455**

C. The Fourth Amendment Applies to Drug and Alcohol Testing of Railroad Employees 455

In *Skinner v. Railway Labor Executives' Association*,[329] the Supreme Court held that although the federally required testing of employees for the use of drugs and alcohol implicated the Fourth Amendment's protection from unreasonable searches and seizures, the testing was reasonable and did not violate the Constitution.

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[324] 49 U.S.C. § 20140(b)(1)(A) (2014).

[325] 49 U.S.C. § 20140(b)(2) (2014).

[326] 49 U.S.C. § 20140(d) (2014).

[327] 49 C.F.R. § 40.1(b) (2014); *see generally* 49 C.F.R. pt. 40 (2014).

[328] 49 C.F.R. §§ 219.101–219.107 (2014).

[329] 489 U.S. 602, 614, 616, 109 S. Ct. 1402, 1411, 1413, 103 L. Ed. 2d 639, 658, 659 (1989).

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Statutes and Regulations **457**

D. 2008 Modifications and More Stringent Requirements for Returning Employees **457**

DOT modified its drug and alcohol testing requirements in 2008 by making them more stringent for employees who return to work after failing a drug test and completing a drug treatment program. The District of Columbia Circuit held in *BNSF Railway Co. v. United States Department of Transportation*[330] that the modified regulations did not violate the Fourth Amendment.

E. 2014 Proposed Regulations to Expand Alcohol and Drug Testing to Employees Performing Maintenance-of-Way Activities **458**

Pursuant to Congress's mandate in the Rail Safety Improvement Act of 2008, FRA "is proposing to expand the scope of its alcohol and drug regulations to cover employees who perform maintenance-of-way (MOW) activities" and to amend and clarify current alcohol and drug regulations, including the addition of regulations applicable to "regulated service," a new term.[331]

Case **461**

F. Civil Rights Claims Under Section 1983 **461**

In *Griffin v. Long Island Railroad*,[332] after the Long Island Railroad (LIRR) terminated Griffin for failing to pass a random drug test, a federal district court in New York held that Griffin could bring an action against LIRR under 42 U.S.C. § 1983 because the statute authorizing FRA to promulgate regulations created a right that was intended to benefit the plaintiff.

Articles **462**

G. Expansion of Suspicionless Searches **462**

A law review article entitled *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State* examines the Supreme Court's expansion of the special needs exception, as seen in *Skinner*, *supra*, Part XIX.C, to the individualized suspicion and

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[330] 566 F.3d 200, 209 (D.C. Cir. 2009).

[331] Control of Alcohol and Drug Use: Coverage of Maintenance of Way Employees, Retrospective Regulatory Review-Based Amendments (RRR), 79 Fed. Reg. 43830, 43832, 43835 (proposed July 28, 2014) (to be codified in 49 C.F.R. pt. 219).

[332] 1998 U.S. Dist. LEXIS 19336, at *1, 36, 38 (E.D.N.Y. 1998).

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warrant requirements of the Fourth Amendment.[333]

H. Genetic Testing 463

An article entitled *Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States* explains how employers may use samples of bodily fluids to obtain medical information on employees without their knowledge.[334]

XX. ENVIRONMENTAL LAW AND RAILROADS 464

A. Introduction 464

This part of the digest discusses various environmental requirements that are applicable to railroads. Section B discusses the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the liability of railroad companies for the release of hazardous substances. Section C discusses environmental requirements for permits for new facilities. Section D addresses issues concerning the Hazardous Materials Transportation Act (HMTA). Section E discusses the requirements of NEPA, as well as regulations of FRA and STB that are applicable to railroads. Section F summarizes an article on federal preemption of local air quality laws and regulations.

B. The Comprehensive Environmental Response Compensation and Liability Act 464

***Statutes and Regulations* 464**

1. Liability Under CERCLA 464

Under CERCLA a railroad company may be held liable, *inter alia*, as the "owner and operator of a vessel or a facility" for a disposal of hazardous substances,[335] unless the release or threatened release of hazardous substances was caused solely by "an act or omission of a third party other than an employee or agent of the defendant."[336]

[333] Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1224 (2004).

[334] Nancy J. King, Sukanya Pillay & Gail A. Lasprogata, *Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States*, 43 AM. BUS. L.J. 79 (2006).

[335] *See* 42 U.S.C. §§ 9607(a)(1)–(4) (2014).

[336] *See* 42 U.S.C. §§ 9607(b)(1)–(3) (2014).

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2. EPA Enforcement and Civil Proceedings Under CERCLA 465

Liability and fines apportioned by the U.S. Environmental Protection Agency (EPA) to an entity that has violated CERCLA may be challenged in a federal district court.[337]

Cases **468**

3. Unilateral Administrative Orders Issued by the EPA Do Not Violate the Fifth Amendment 468

In *General Electric v. Jackson*,[338] the District of Columbia Circuit held that the EPA's issuance of a unilateral administrative order (UAO) under CERCLA does not violate the Due Process Clause of the Fifth Amendment of the U.S. Constitution because the potentially responsible parties (PRPs) are only fined when a federal court finds that a PRP without sufficient cause willfully failed to comply with a proper UAO.

4. Apportionment Under CERCLA of Costs Among Responsible Parties 470

In *Burlington Northern and Santa Fe Railroad Co. v. United States*,[339] the Supreme Court held that "an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance," and that liability may be apportioned when there is a basis for determining the contribution of each cause to the single harm.[340]

Statute **471**

5. Liability Under State Law that Incorporates CERCLA 471

In *Redevelopment Agency of City of Stockton v. BNSF Railroad Co.,*[341] the Ninth Circuit held that a local redevelopment agency could recover its costs for contamination remediation in a redevelopment area from any "responsible party" under California's Polanco Act, which incorporates CERCLA.[342]

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[337] 42 U.S.C. §§ 9609(a)(4) and 9613 (2014).

[338] 610 F.3d 110, 113, 118–119 (D.C. Cir. 2010), *rehearing denied by, rehearing, en banc, denied* , 2010 U.S. App. LEXIS 27485 (D.C. Cir., Sept. 30, 2010), *cert. denied*, 131 S. Ct. 2959, 180 L. Ed. 2d 245, 2011 U.S. LEXIS 4334 (U.S. 2011).

[339] 556 U.S. 599, 129 S. Ct. 1870, 1881, 173 L. Ed. 2d 812 (2009).

[340] *Id*., 556 U.S. at 611, 129 S. Ct. at 1879, 173 L. Ed. 2d at 823.

[341] 643 F.3d 668 (9th Cir. 2011).

[342] *Id*. at 676.

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Case **471**

6. Railroads Not Liable Because They Were Not Owners or Operators nor did They Create or Assist in Creating a Nuisance **471**

In *Redevelopment Agency of City of Stockton, supra,* Part XX.B.5, the Ninth Circuit also held that the railroads could not be held liable if they were not owners or operators within the meaning of the CERCLA definition incorporated in the state statute and if they had not created or assisted in creating the nuisance, unless they acted unreasonably in failing to recognize or stop it.[343]

Statutes **475**

7. Kentucky Statute on Contamination Caused by Hazardous Substances **475**

A Kentucky statute applies, *inter alia*, to reportable quantities and release notification requirements for a release of hazardous substances, pollutants, or contaminants and remedial action to restore the environment.[344]

8. Liability Under an Indiana Statute to the Same Extent as Under CERCLA **475**

An Indiana statute provides that except as otherwise provided in the statute, a person liable under CERCLA is liable to the state of Indiana in the same manner and to the same extent.[345]

9. Liability Under the Pennsylvania Hazardous Sites Cleanup Act **475**

Pennsylvania has its own cleanup statute, the Pennsylvania Hazardous Sites Cleanup Act (HSCA), which provides a remedy for expenses caused by releases of hazardous substances.[346]

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[343] *Redevelopment Agency of City of Stockton*, 643 F.3d at 673.

[344] KY. REV. STAT. ANN. § 224.1-400 (2014).

[345] IND. CODE ANN. § 13-25-4-8 (2014).

[346] 35 PA. CONS. STAT. ANN. § 6020.102(8) (2014).

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Cases **475**

10. Railroads May Bring Claim for Contribution Under CERCLA and HSCA **475**

In *Reading Co. v. City of Philadelphia*,[347] a federal district court held that the Reading Company (Reading) could maintain its claim against the City of Philadelphia and other defendants under CERCLA and Pennsylvania's Hazardous Sites Cleanup Act (HSCA) for the defendants' share of clean-up costs already incurred and for future costs for the removal of polychlorinated biphenyls (PCBs) from a viaduct.

11. Liability Under Washington's Model Toxics Control Act for Environmental Cleanup **476**

A case involving Washington's Model Toxics Control Act (MTCA)[348] is *Harbor Steps Limited Partnership v. Seattle Technical Finishing, Inc.*,[349] in which the previous owner, Burlington Northern, was sued for cleanup expenses for contaminated land, but a Washington appellate court held that Burlington Northern had only a security interest in the property when the property became contaminated.

Articles **477**

12. Survey of States with CERCLA-Type Laws **477**

An article entitled *Natural Resource Damages: Recovery under State Law Compared with Federal Laws* includes a survey of state "environmental statutes for CERCLA-type laws pertaining to the release of a hazardous substance."[350]

13. History of EPA's Enforcement of CERCLA **477**

An article in the *Southwestern Law Review* summarizes the enforcement of CERCLA by the EPA from its inception through the first 3 years of President Barack Obama's presidency.[351]

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[347] 823 F. Supp. 1218, 1221–22 (E.D. Pa. 1993).

[348] WASH. REV. CODE ANN. § 70.105D.040 (2014).

[349] 93 Wash. App. 795, 970 P.2d 797, 789–99 (1999).

[350] Lloyd W. Landreth & Kevin M. Ward, *Natural Resource Damages: Recovery Under State Law Compared with Federal Laws*, 20 ENVIR. L. REP. 10134 (1990), available at http://elr.info/sites/default/files/articles/20.10134.htm (last accessed Mar. 31, 2015).

[351] Joel A. Mintz, *EPA Enforcement of CERCLA: Historical Overview and Recent Trends*, 41 SW. L. REV. 645 (2012).

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14. CERCLA in the Ninth Circuit 479

A 2012 law review article reviews some significant cases in the Ninth Circuit on environmental law and examines the application of CERCLA to railroads and other entities, such as manufacturers and maritime bodies.[352]

15. Remedies Available Under State Statutory and Common Law for Damages and Other Relief for Contaminated Property 479

In a 2012 law review article, Professor Alexandra Klass makes a strong case for the importance of state statutory and common law claims for contaminated property. Professor Klass argues that the "real money" is not "in the cleanup costs one can recover under CERCLA or state superfund laws" but is instead "in the damages that are potentially recoverable, including punitive damages, under state common law claims such as nuisance, negligence, or strict liability."[353]

C. Environmental Requirements for Permits for New Facilities 482

Statutes and Regulations **482**

1. The Clean Railroads Act 482

The Clean Railroads Act provides in part that a solid waste rail transfer facility must comply with all applicable federal and state requirements to prevent and abate pollution and to protect and restore the environment and protect public health and safety, including laws governing solid waste "as required for any similar solid waste management facility…that is not owned or operated by or on behalf of a rail carrier, except as provided for in section 10909 of this chapter."[354]

2. Requirement for Notice of Intent to Apply for a Land-Use-Exemption Permit 483

A solid waste facility or railroad that owns a facility must first submit a notice of intent to the STB to file an application for a land-use-exemption permit.[355]

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[352] *Case Summaries 2011 Ninth Circuit Environmental Review Case Summaries*, 42 ENVTL. L. 793, 820, 831 (2012).

[353] Alexandra B. Klass, *CERCLA, State Law, and Federalism in the 21st Century*, 41 SW. L. REV. 679, 680 (2012).

[354] 49 U.S.C. § 10908(a) (2014).

[355] 49 C.F.R. § 1155.20(a) (2014).

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3. Board Determinations on an Exemption Permit 484

STB "will issue a land-use-exemption permit only if it determines that the facility at the existing or proposed location would not pose an unreasonable risk to public health, safety, or the environment" and meets other requirements.[356]

Case **484**

4. Preemption of State Regulations by the Interstate Commerce Commission Termination Act 484

In *New York Susquehanna and Western Railroad Corp. v. Jackson*,[357] the issue was whether the ICCTA preempted state regulations for the practice of transloading solid waste from a truck to a railroad car and related facilities. The Third Circuit vacated an injunction against New Jersey that had prevented the state from enforcing the regulations and remanded the case for further fact finding.[358]

Articles **486**

5. Railroad Deregulation and Waste Transfer Stations and the Presumption Against Preemption 486

An article in the *Ecology Law Quarterly* argues that the "[p]reemption doctrine is potentially a great obstacle to progressive state policies," because "truck-to-truck and truck-to-barge transfer stations remain highly regulated, but truck-to-rail transfer stations are completely unregulated," a "regulatory gap" for which the author believes STB is responsible.[359]

6. Whether "Little NEPA" Laws and State and Local Permitting Requirements Are Preempted by the ICCTA 488

A report published by the Center for Climate Change at Columbia Law School analyzes the effect of federal environmental laws on permitting requirements affecting new railroad infrastructure for the movement of coal to ports for export and concludes that there is

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[356] 49 U.S.C. § 10901 (2014). *See also* 49 U.S.C. § 10901(2) (2014) and 49 C.F. R. §§ 1155.26(b)(1)-(3) (2014).

[357] 500 F.3d 238 (3d Cir. 2007).

[358] *Id*. at 257.

[359] Carter H. Strickland Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1151, 1172 (2007).

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"significant uncertainty" regarding the relationship of the ICCTA and the Clean Railroads Act on the issue.[360]

D. Transportation of Hazardous Materials 491

Statutes and Regulations 491

1. Hazardous Materials Transportation Act 491

The HMTA authorizes the Secretary of Transportation to issue regulations "for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce."[361]

2. Regulations Implementing the Hazardous Materials Transportation Act 492

FRA's regulations on the safety of the transportation by rail of hazardous materials apply to persons who perform pretransportation or transportation services and establish minimum criteria that must be considered by rail carriers, such as a thorough analysis of the hazardous materials to be shipped, the routes to be used, a description of the threats identified, and vulnerabilities and mitigation measures to address the vulnerabilities.[362]

Cases 492

3. Tension Between Environmental Requirements and the Fourth Amendment 492

In *Wisconsin Central Limited v. Gottlieb*,[363] the Wisconsin Court of Appeals decided whether the Wisconsin Department of Transportation (WisDOT) had to have a search warrant to collect soil samples for a study on changing the path of a railroad track. The court held that there was no illegal search and seizure because the Wisconsin Central Limited had cosponsored and consented to WisDOT's investigation of hazardous materials.

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[360] Columbia Law School, Center for Climate Change Law, Report on "Carbon Offshoring: The Legal and Regulatory Framework for U.S. Coal Exports" (July 2011), available at http://powerpastcoal.org/wp-content/uploads/2011/09/ColumbiaLawSchool_coalexportpolicy11.pdf (last accessed Mar. 31, 2015).

[361] 49 U.S.C. § 5103(b)(1) (2014).

[362] 49 C.F.R. §§ 172.820(a)-(d) (2014).

[363] 832 N.W.2d 359 (Wis. Ct. App. 2013).

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4. Federal Railroad Safety Act and Preemption of Local Law 493

In *CSX Transportation, Inc. v. Williams*,[364] the District of Columbia Circuit held that the FRSA preempted the District of Columbia's Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005.

E. National Environmental Policy Act and Requirements 494

Statutes and Regulations **494**

1. National Environmental Policy Act 494

NEPA, signed into law by President Nixon on January 1, 1970,[365] sets forth when an environmental impact statement (EIS) is required and the information that it must contain; mandates that agencies must cooperate in complying with NEPA;[366] and requires that administrative procedures conform to national environmental policy.[367]

2. Department of Transportation 495

Under 49 U.S.C. § 303, which applies to parks, recreation areas, wildlife or waterfowl refuges, and historic sites, the Secretary may approve a project requiring the use of public land only if there is no alternative to using the land and there are plans in place to minimize harm to the site and wildlife, or find that a project will have a *de minimis* impact on historic sites or parks, recreation areas, wildlife, or waterfowl refuges.[368]

3. Federal Railroad Administration 496

FRA and STB are subject to NEPA because both engage in "major federal actions affecting the human environment" and thus are required to have environmental assessments or EIS's as appropriate.[369]

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[364] 406 F.3d 667, 669 (D.C. Cir. 2005).

[365] 42 U.S.C. § 4321 (2014).

[366] 42 U.S.C. § 4332(C) (2014).

[367] 42 U.S.C. § 4332 (2014).

[368] 49 U.S.C. § 303(d) (2014).

[369] 42 U.S.C. § 4332 (2014).

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5. Surface Transportation Board 498

STB is responsible for ensuring that railroads meet the requirements of NEPA for actions that are subject to NEPA and to the board's jurisdiction.[370]

6. Railroads, Environmental Documents, and Findings 500

a. Environmental Reports 500

An applicant for an action identified in 49 C.F.R. §§ 1105.6(a) and (b) (that is, a proposed action that may require an EIS or an Environmental Assessment (EA), respectively) must submit, except in the situations noted in the regulations, an Environmental Report (ER) on the proposed action containing the information required by §§ 1105.7(e)(1)–(10).[371]

b. Environmental Assessment 501

STB and FRA may require either an EIS or an EA, but an EA must be prepared prior to all major FRA actions.[372]

c. Categorical Exclusions 502

A proposed action may qualify for a categorical exclusion (CE), meaning that an EA or an EIS is not required.[373] CEs are actions that "do not individually or cumulatively have a significant effect on the human environment and [that] have been found to have no such effect in procedures adopted by a Federal agency in [the] implementation of these regulations."[374]

d. A Finding of No Significant Impact 503

Under the FRA's procedures, "[a] FONSI shall be prepared for all major FRA actions for which an environmental impact statement is not required[] as determined in accordance with section 10(e) of these Procedures."[375]

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[370] 42 U.S.C. § 4332 (2014).

[371] 49 C.F.R. § 1105(7)(a) (2014).

[372] 40 C.F.R. § 1508.4 (2014).

[373] *Id.*

[374] *Id.*

[375] United States Department of Transportation, Federal Railroad Administration, Procedures for Considering Environmental Impacts, 64 Fed. Reg. 28545, 28551 (May 26, 1999).

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e. Environmental Impact Statement **504**

NEPA requires that all federal agencies submit a "detailed statement" on the environmental impact of any proposed major federal action.[376]

Cases **505**

6. Judicial Review of Petitions Challenging an STB Decision **505**

In *Alaska Survival v. Surface Transportation Board*,[377] the Ninth Circuit considered whether environmental requirements under NEPA and the provisions of the ICCTA governing railroad expansions allow the court to review a decision of the STB. The court held that the STB considered sufficient alternatives to satisfy the public and private objectives for the project and made an informed decision on whether to grant an exemption.[378]

7. Reasonable Basis for a Finding of No Significant Impact **507**

In *Township of Belleville v. Federal Transit Administration*,[379] the issue was whether the defendants met the required federal statutory provisions for a FONSI. A federal district court in New Jersey held that FTA acted reasonably in requiring an EA to be prepared because "[t]he base facility is to be constructed on a site zoned for industrial purposes" and "[t]hat portion of the project falls squarely within the categorical exception."[380]

8. Requirement that the STB Take a Hard Look When Considering Environmental Impacts **508**

In *Northern Plains Resource Council v. Surface Transportation Board,*[381] in which the issue was whether a railroad company's applications to build a new track were properly approved, the Ninth Circuit held that the board did not satisfy NEPA's requirements in its preparation of the EIS, in part because of the use of outdated aerial survey photographs.

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[376] 42 U.S.C. § 4332(2)(C) (2014).

[377] 705 F.3d 1073 (9th Cir. 2013).

[378] *Id*. at 1089.

[379] 30 F. Supp. 2d 782 (D. N.J. 1998).

[380] *Id*. at 798.

[381] 668 F.3d 1067, 1086–87 (9th Cir. 2011).

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9. The STB's Authority to Impose Environmental Conditions on Minor Mergers 510

In *Village of Barrington v. Surface Transportation Board*,[382] the District of Columbia Circuit held that the Staggers Rail Act did not foreclose STB from imposing environmental conditions on minor mergers.

10. Requirement of Cooperation of Federal and State Agencies 512

Judicial Watch Inc. v. United States Department of Transportation[383] concerned a joint agreement of FRA and the California High Speed Rail Association to work together to create Environmental Impact Reports. A federal district court in the District of Columbia granted the defendant's motion for summary judgment because the agencies were working together as required by NEPA.

11. Requirement that STB Cooperate with Other Agencies 512

In *Medina County Environmental Action Association v. Surface Transportation Board*,[384] the issue was whether STB improperly granted an exception without consulting with other agencies, namely the U.S. Fish and Wildlife Service (FWS). The Fifth Circuit held that STB's informal consultation with the FWS, combined with the EIS, was sufficient to satisfy procedural requirements and denied the plaintiff's petition for review.

12. State Environmental Law and Archaeological Impact Statements 514

In *Kaleikini v. Yoshioka*,[385] the petitioner sought a declaration that the final EIS was "unacceptable," *inter alia*, because it did not include an Archeological Impact Statement (AIS) and was inadequate for failing to consider the impacts that the construction would have on native artifacts.[386] The Supreme Court of Hawaii agreed with the City and held that the EIS only needed to comply "in good faith" with the regulatory requirements, a test that the EIS satisfied.[387]

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[382] 636 F.3d 650, 673 (D.C. Cir. 2011).

[383] 950 F. Supp. 2d 213, 214 (D. D.C. 2013).

[384] 602 F.3d 687, 693 (5th Cir. 2010).

[385] 283 P.3d 60 (Haw. 2012).

[386] *Id*. at 68.

[387] *Id*. at 83, 84.

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13. Environmental Impact Statement Required to Consider Socioeconomic Impacts on the Local Population 516

In *Saint Paul Branch of the National Association for the Advancement of Colored People v. United States Department of Transportation*,[388] the issue was whether the final EIS (FEIS) failed to consider properly the impact of the construction of a light rail project on a primarily African-American residential neighborhood with low-income businesses. A federal district court in Minnesota held that the FEIS was *insufficient* in its consideration of lost business revenue as a consequence of the light rail construction.[389]

14. STB's Adequate Consideration of Alternatives and of Horn Noise 517

In *Mayo Foundation v. Surface Transportation Board*,[390] the issue was whether STB approved the updating and building of new rail lines without considering alternative routes. The Eighth Circuit held that "[t]he Board is required to consider all 'reasonable' alternatives" but is not required "to consider alternatives that would frustrate the very purpose of the project."[391]

***Article* 518**

15. NEPA and the Role of Public Comments 518

A recent law review article discusses how the inclusion of public comments has influenced decisions by the courts on the issue of compliance with NEPA.[392]

***Article* 519**

F. Federal Law Preempts Local District's Air Quality Rules 519

As discussed in a recent article, California has 35 air quality management districts and each is responsible for proposing and creating air quality rules in its district.[393] The South Coast

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[388] 764 F. Supp. 2d 1092 (D. Minn. 2011).

[389] *Id*. at 1112–13.

[390] 472 F.3d 545 (8th Cir. 2006).

[391] *Id*. at 550 (citations omitted).

[392] Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5 (2012).

[393] Mike Cherney, 9th Circuit Finds Calif. Railroad Pollution Laws Preempted, Law360, available at http://www.mayerbrown.com/files/News/1886584c-3771-45fe-a5a6-088affd3492e/Presentation/NewsAttachment/375bc41b-c80d-4c18-a307-c83b80f1c328/9thCirc-Finds_Calif.pdf (last accessed Mar. 31, 2015), herein referred to as "Cherney."

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Air Quality Management District had a rule that required idling trains to limit the amount of emissions they release to reduce air pollution. In *Association of American Railroads v. South Coast Air Quality Management District*,[394] the Ninth Circuit held that federal law preempted the local regulations.[395]

XXI. FEDERAL EMPLOYERS' LIABILITY ACT 521

A. Introduction 521

In 1908, Congress enacted the Federal Employers' Liability Act (FELA) to ensure that railroad employees who were injured in the course of their employment would be able to recover damages for their injuries.[396] Sections B through D discuss some of FELA's provisions, whether other federal statutes preclude claims under FELA, and some of the principles generally applicable in FELA cases. Sections E through F address claims under FELA for intentional emotional distress and for industrial or occupational diseases and poisoning. Section G covers claims under FELA for violations of the Federal Safety Appliance Act (FSAA). Sections H through M summarize articles on FELA and causation, the effect of counterclaims by railroads in FELA cases, recovery under FELA for a fear of developing cancer because of job-related exposure to toxins, and whether FELA should be repealed.

B. Liability of Railroads for Negligent Injuries to Employees 522

Statute 522

Section 51 of FELA provides that a common carrier engaged in interstate commerce is liable for damages to any employee who suffers an injury while engaged in interstate commerce or when the employee dies because of a common carrier's negligence.[397]

Cases 524

1. Determining Who Is an Employee 524

In *Kelley v. Southern Pacific Company*,[398] the Supreme Court held that a nonrailroad employee must demonstrate that a railroad company has a supervisory responsibility over a

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[394] 622 F.3d 1094 (9th Cir. 2010).

[395] Cherney, *supra* note 393.

[396] 45 U.S.C. § 51, *et seq.* (2014).

[397] 45 U.S.C. § 51 (2014) ("for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment").

[398] 419 U.S. 318, 95 S. Ct. 472, 42 L. Ed. 2d 498 (1974).

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nonrailroad employee before the nonrailroad employee may be "deemed *pro hac vice* [an] employee[] of the railroad" for the purpose of liability under FELA.[399]

2. Requirement of Physical Harm as Antecedent to Claim for Emotional Distress 525

In *Consolidated Rail Corporation v. Gottshall*,[400] decided in 1953, the Supreme Court held that FELA requires an employee to have experienced a physical harm as an antecedent to a claim for emotional distress.

3. Inapplicability of FELA to a Claim for Wrongful Discharge 526

In *Lewy v. Southern Pacific Transportation Company*,[401] the Ninth Circuit held that FELA only covers work-related or "on the job" injuries and does not apply to claims of wrongful discharge.

4. Inapplicability of FELA to Purely Intrastate Activities 528

In *Felton v. Southeastern Pennsylvania Transportation Authority*,[402] the Third Circuit held that Congress had no intention of extending FELA coverage to employees of urban transportation systems such as subways.

Cases **529**

C. Whether Other Federal Laws May Preclude a Claim Under FELA 529

1. FELA, the Federal Railroad Safety Act, and Preclusion of Federal Claims 529

In *Cowden v. BNSF Railway Company*,[403] the plaintiff alleged that BNSF failed to provide reasonably safe working conditions. The Eighth Circuit reversed and remanded the case because the district court failed to consider "whether an FRSA regulation 'substantially subsumes' the negligence claim."[404]

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[399] *Id.*, 419 U.S. at 330, 95 S. Ct. at 479, 42 L. Ed. 2d 498.

[400] 512 U.S. 532, 557, 114 S. Ct. 2396, 2411, 129 L. Ed. 2d 427 (1994).

[401] 799 F.2d 1281, 1289 (9th Cir. 1986).

[402] 952 F.2d 59, 66 (3d Cir. 1991).

[403] 690 F.3d 884 (8th Cir. 2012).

[404] *Id*. at 895.

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2. FELA, the Locomotive Inspection Act, and Federal Preclusion 530

A California federal district court in *Glow v. Union Railroad Co.*[405] held that a FELA claim is not precluded when a railroad has complied with the Locomotive Inspection Act.

Cases **531**

D. Principles that Generally Apply in FELA Cases 531

1. Determining Whether Employees Are Engaged in Interstate Commerce Under FELA 531

In *Geraty v. Northeast Illinois Regional Commuter Railroad Corporation*,[406] a patrol officer for the Northeast Illinois Regional Commuter Railroad Corporation (Metra) filed a FELA claim against Metra for a slip-and-fall injury that the plaintiff sustained on railroad property while she was working. A federal district court in Illinois denied Metra's motion for summary judgment because the plaintiff's duties were in furtherance of interstate commerce.[407]

2. Permissibility of Counterclaims by Railroads in FELA Claims 532

In *Cavanaugh v. Western Maryland Railway Co.*,[408] the Fourth Circuit ruled that because Congress failed to preclude the assertion of counterclaims by railroads, counterclaims by railroads are allowable in FELA cases.

3. Whether a Plaintiff Must Prove Proximate Cause in a FELA Action 532

Although in *CSX Transportation v. McBride*[409] CSX argued that McBride had to prove proximate cause, the Supreme Court held that juries should be instructed to find liability whenever a "railroad's negligence played any part in bringing about the injury."[410]

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[405] 652 F. Supp. 2d 1135, 1141 (E.D. Cal. 2009).

[406] 2009 U.S. Dist. LEXIS 20573, at *1 (N.D. Ill. 2009).

[407] *Id*. at *20, 21.

[408] 729 F.2d 289, 291 (4th Cir. 1984).

[409] 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011).

[410] *Id*., 131 S. Ct. at 2634, 180 L. Ed. 2d at 643.

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4. Low Standard for Evidence Required in FELA Cases 533

In *Rivera v. Union Pac. R.R. Co.*,[411] the Fifth Circuit held that there is a very low standard for the evidence that a plaintiff needs to prove a FELA claim.

5. The Use of Comparative Negligence Rather than Contributory Negligence in FELA Cases 534

The doctrines of contributory negligence and assumption of the risk do not apply to cases brought under FELA;[412] rather, as the Supreme Court held in *Norfolk Southern Railway v. Sorrell,*[413] any contributory negligence of the employee is to be used to calculate any reduction in damages that otherwise would be owed to the employee.

6. FELA's Preemption of Actions Under State Law 535

In 1917, in *New York Central Rail Company v. Winfield*,[414] the Supreme Court held that FELA precluded an employee from claiming damages under state law because FELA was too comprehensive to allow additional options for recovery.

7. Whether Transit Authority Employee Assigned to Work on the Long Island Railroad was Employee of an Entity Operating as a Common Carrier in Interstate Commerce 535

Greene v. Long Island Railroad Company[415] involved a FELA claim by a police officer employed by the New York Metropolitan Transit Authority (MTA) for an injury he suffered while patrolling the Long Island Railroad (LIRR). A federal district court in New York held that only "those employees of MTA who are engaged in the interstate common carrier operations of its commuter rails" are covered by FELA.[416]

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[411] 378 F.3d 502 (5th Cir. 2004).

[412] Toledo, St. L. & W. R. Co. v. Slavin, 236 U.S. 454, 35 S. Ct. 306, 59 L. Ed. 671 (1915); Central V. R. Co. v. White, 238 U.S. 507, 35 S. Ct. 865, 59 L. Ed. 1433 (1915).

[413] 549 U.S. 158, 160, 127 S. Ct. 799, 802, 166 L. Ed. 2d 638, 644 (2007).

[414] 244 U.S. 147, 148, 153–154, 37 S. Ct. 546, 548, 549, 61 L. Ed. 1045, 1048–49 (1917).

[415] 99 F. Supp. 2d 268 (E.D.N.Y. 2000), *aff'd,* 280 F.3d 224 (2d Cir. 2002).

[416] *Id*. at 275.

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8. The Effect of Medical Insurance on the Amount of an Employee's Recoverable Damages 537

In *Leighton v. CSX Transportation*,[417] the Kentucky Court of Appeals held that because the payments by the plaintiff's health insurance plan were not a collateral source, the employee's recovery had to be limited to out-of-pocket expenses.

***Cases* 538**

E. Whether a Claim of Infliction of Emotional Distress May Be Made Under FELA 538

1. Whether the Zone of Danger Test Applies to a Claim Under FELA for Intentional Infliction of Emotional Distress 538

In *Goodrich v. Long Island Rail Road Co*.,[418] the Second Circuit held that Goodrich did not have a claim for intentional infliction of emotional distress under FELA because the plaintiff failed to allege that he had sustained a "physical impact" or was placed in "immediate risk of physical harm" because of LIRR's actions.[419]

2. Whether the Zone of Danger Test Applies to a Claim Under FELA for Negligent Infliction of Emotional Distress 540

In *Conrail v. Gottshall*,[420] the Supreme Court held that although a claim for negligent infliction of emotional distress is actionable under FELA, the Court embraced the zone of danger test under the common law that is in harmony with FELA's requirement of a physical injury.

***Cases* 540**

F. Claims Under FELA for Industrial or Occupational Diseases and Poisoning 540

1. Recovery of Damages for a Fear of Developing Cancer 540

In *CSX Transportation v. Hensley*,[421] the Supreme Court held that an employee may be able to recover under FELA for emotional distress for fear of developing cancer without

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[417] 338 S.W.3d 818, 822 (Ky. Ct. App. 2011).

[418] 654 F.3d 190 (2d Cir. 2011).

[419] *Id*. at 192.

[420] 512 U.S. 532, 569–70, 114 S. Ct. 2396, 2417, 129 L. Ed. 2d 427, 456 (1994).

[421] 556 U.S. 838, 129 S. Ct. 2139, 173 L. Ed. 2d 1184 (2009).

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exhibiting physical manifestations as long as the individual is only seeking damages for asbestosis-related pain and suffering and the plaintiff's fear of developing cancer is "genuine and serious."[422]

2. Liability of a Railroad Under FELA for an Employee's Exposure to a Toxic Substance 541

In *Norfolk & Western Ry. v. Ayers*,[423] railroad employees sued Norfolk Southern under FELA because of their exposure to asbestos. The Supreme Court held that the employees could recover for mental anguish when they are able to prove that their fear of developing cancer is a genuine and serious one.[424]

3. Liability of a Railroad for Industrial or Occupational Disease or Poisoning 542

In *Fraynert v. Delaware and Hudson Railway Co.*,[425] a Court of Common Pleas in Pennsylvania denied Delaware and Hudson Railway Co.'s motion for a summary judgment regarding five plaintiffs' claims because it was not clear whether they "possessed sufficient critical facts to objectively discover their pulmonary harm and its cause more than three years before suit was commenced."[426]

***Cases* 543**

G. Violations of the Federal Safety Appliance Act and Claims Under FELA 543

1. Liability for an Employee's Injury Occurring When a Train Was in Use 543

In *Woodard v. CSX Transportation, Inc.,*[427] involving a claim under the FSAA for which a violation constitutes negligence *per se* in a FELA suit, a federal district court in New York held that because the employee was injured while unloading the railcar when it was on a CSX track, the railcar was "in use" at the time of the injury.

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[422] *Id.,* 556 U.S. at 841, 129 S. Ct. at 2141, 173 L. Ed. 2d at 1188.

[423] 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003).

[424] *Id.*, 538 U.S. at 141, 123 S. Ct. at 1215, 155 L. Ed. 2d at 271.

[425] 2013 Pa. Dist. & Cnty. Dec. LEXIS 299, at *1 (Pa. Ct. Com. Pl. 2013).

[426] *Id.* at *1.

[427] 2012 U.S. Dist. LEXIS 16704, at *1, 3, 4 (N.D.N.Y. Feb. 10, 2012).

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2. Liability of a Railroad Under FELA Based on a Violation of the FSAA 544

In *Strickland v. Norfolk Southern Ry. Co.*,[428] the Eleventh Circuit held that a violation of the FSAA may be asserted under FELA.

Articles **545**

H. What a Plaintiff Must Prove Regarding Causation Under FELA 545

A recent law review article analyzes the Supreme Court's decision in 1957 in *Rogers v. Missouri Pacific Railroad Co.*,[429] in which the Court held that FELA requires only "that employer negligence played any part, even the slightest, in producing the injury."[430]

I. The Extent of Causation Required in FELA Claims After *McBride* 547

In *Causation Issues in FELA and Jones Act Cases in the Wake of McBride*, the author argues that the element of proximate cause has not been removed completely from FELA cases because the courts commonly use reasoning that is based on proximate cause, even when declaring there is no proximate cause requirement.[431]

J. The Effect of Counterclaims by Railroads on FELA Claims 548

In *Sidetracking the FELA: The Railroads' Property Damage Claims*, the author argues that FELA's value is compromised by the increased instances in employees' suits under FELA when railroads counterclaim for property damage.[432]

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[428] 692 F.3d 1151, 1151–53 (11th Cir. 2012).

[429] 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

[430] Michael D. Green, *The Federal Employers' Liability Act: Sense and Nonsense about Causation*, 61 DEPAUL L. REV. 503, 504 (2012).

[431] David W. Robertson, *Causation Issues in FELA and Jones Act Cases in the Wake of McBride*, 36 TUL. MAR. L. J. 397, 421 (2012) (*citing* Heath v. Matson Navigation Co., 333 F. Supp. 131, 135–36, 1972 AMC 1063, 1068–70 (D. Haw. 1971)).

[432] William P. Murphy, *Sidetracking the FELA: The Railroads' Property Damage Claims*, 69 MINN. L. REV. 349, 350 (1985).

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K. When an Employee May Recover Under FELA for a Fear of Developing Cancer 548

An article in *Trial*, in which the author analyzes the application of FELA in cases when there are substances in the workplace that cause nonmalignant harm but that may cause cancer in the long term, suggests how to harmonize the awards that include damages for fear of cancer.[433]

L. Whether the Cost of FELA Claims Is Too High 549

In *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, the authors argue that over the last century the Supreme Court has sought to diminish a plaintiff's burden of proof for claims under FELA.[434]

M. Whether FELA Should Be Repealed 550

In *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, the author argues that FELA should be repealed or clarified and replaced by state workers' compensation funds.[435]

XXII. FEDERAL FINANCING FOR RAILROAD PROJECTS 551

A. Introduction 551

Congress has authorized billions of dollars to support the expansion and upgrading of transportation systems across the country.[436] Sections B through D summarize some features of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Transportation Infrastructure Finance and Innovation Act (TIFIA), and the Railroad Rehabilitation and Improvement Financing Act (RRIF). Section E discusses funding for the Railway–Highway Crossings Program. Section F discusses the 2009 American Recovery and Reinvestment Act (ARRA).

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[433] William P. Gavin, *FELA and the Fear of Cancer*, TRIAL (Jan. 2011).

[434] Arnold I. Havens & Anthony A. Anderson, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310 (1987).

[435] Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 87, 92 (1992).

[436] Federal Highway Administration, MAP-21 Moving Ahead for Progress in the 21st Century, available at https://www.fhwa.dot.gov/map21/ (last accessed Mar. 31, 2015).

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Statutes **551**

B. Moving Ahead for Progress in the 21st Century Act **551**

1. Programs Affected by MAP-21 **551**

MAP-21, enacted by Congress in 2012, "creates a streamlined and performance-based surface transportation program and builds on many of the highway, transit, bike, and pedestrian programs and policies established in 1991."[437]

2. Funding for Surface Transportation Programs **552**

MAP-21 expanded numerous projects already in progress within the various highway programs and included funding in connection with TIFIA and for the upgrading of railway–highway grade crossings.[438]

Statutes and Regulations **552**

C. Transportation Infrastructure Finance and Innovation Act **552**

1. Funding **552**

TIFIA, enacted in 1998 and modified by MAP-21, "makes three forms of credit assistance available—secured (direct) loans, loan guarantees and standby lines of credit—for surface transportation projects of national or regional significance," such as highway, railroad, intermodal freight, and transit projects.[439]

2. Project Eligibility **553**

Rail projects that are eligible for a TIFIA line of credit or loan include intercity passenger rail facilities (as well as Amtrak); public and private freight rail projects, although the latter must provide a "public benefit for highway users"; intermodal freight transfer facilities; and projects that improve the service of freight rails.[440]

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[437] *Id*.

[438] MAP-21 § 2002 (2012), 23 U.S.C. §§ 601–609 (2014); MAP-21 § 1519, 23 U.S.C. § 130 (2014).

[439] Federal Highway Administration, Transportation Infrastructure Finance and Innovation Act, available at https://www.fhwa.dot.gov/map21/factsheets/tifia.cfm and https://www.fhwa.dot.gov/map21/factsheets/tifia.cfm (last accessed Mar. 31, 2015) and http://www.fra.dot.gov/Page/P0340 (last accessed Mar. 31, 2015); MAP-21 § 2002; 23 U.S.C. §§ 601–609.

[440] MAP-21 § 2002 (2012), 23 U.S.C. §§ 601–609 (2014); MAP-21 § 1519, 23 U.S.C. § 130 (2014).

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D. Railroad Rehabilitation and Improvement Financing Program 554

***Statutes and Regulations* 554**

1. Direct Loans and Loan Guarantees 554

As a result of the Transportation Equity Act for the 21st Century (TEA-21), the RRIF program authorized up to $35 billion in direct loans and loan guarantees for railroad infrastructure projects.[441]

2. Project Eligibility 557

Under the RRIF program, financial assistance is available to acquire, improve, or rehabilitate intermodal or rail equipment or facilities, including track, components of track, bridges, yards, buildings, and shops; to refinance certain outstanding debt; or to develop or establish new intermodal or railroad facilities.[442]

***Article* 557**

3. Repurposing RRIF to Include Commuter Rail 557

One source argues that "[i]t is now time to transform RRIF into a source of financing for large commuter rail projects."[443]

***Statutes* 559**

E. Railway–Highway Crossings Program 559

1. Funding 559

The purpose of the Railway–Highway Crossings Program is to reduce the number of injuries and fatalities at public grade crossings.[444]

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[441] 45 U.S.C. § 821, *et seq*. (2014) and 49 C.F.R. § 260, *et seq*. (2014).

[442] 45 U.S.C. §§ 822(b)(1)(A)-(C) (2014); 49 C.F.R. §§ 260.5(a)(1)-(3) (2014).

[443] Barney A. Allison, Perspective: Refining RRIF to Include Commuter Rail (Jan. 15, 2014), available at http://www.railwayage.com/index.php/passenger/commuter-regional/perspective-refining-rrif-to-include-commuter-rail.html?channel=56 (last accessed Mar. 31, 2015).

[444] Federal Highway Administration, *Railway–Highway Crossings Program Fact-Sheet*, available at https://www.fhwa.dot.gov/map21/factsheets/rhc.cfm (last accessed Mar. 31, 2015); MAP-21 § 1519, 23 U.S.C. § 130 (2014).

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2. Project Eligibility 559

To receive funding for railway–highway crossings, a state must survey all highways to determine the railroad crossings that require attention; moreover, a railroad must compensate the state transportation department for 10 percent of the net benefit of a railroad project.[445]

***Statutes* 560**

F. The American Recovery and Reinvestment Act 560

1. Stimulus Funds for Passenger Rail Projects 560

ARRA, enacted in 2009, provides short-term funding for sectors across the economy, including $8 billion to develop high-speed intercity passenger rail service in the United States.

2. Project Eligibility 561

ARRA funding may be made available to current recipients of FTA's grant programs,[446] such as the Urbanized Area Formula Program (49 U.S.C. § 5307), Formula Grants for other than the Urbanized Areas Program (49 U.S.C. § 5311), the Fixed Guideway Modernization Formula Program (49 U.S.C. § 5309), and Capital Investment Grants (49 U.S.C. § 5309).

XXIII. FEDERAL RAILROAD SAFETY ACT 562

A. Introduction 562

In 1970, Congress enacted the FRSA. Section B discusses statutory elements. Sections C through E summarize cases applying the FRSA. Section F discusses an article on the 2007 amendment to the FRSA clarifying the statute's preemption of state laws.

***Statute* 562**

B. Federal Railroad Safety Act's Regulation of Every Area of Railroad Safety 562

The FSRA authorizes the Secretary of Transportation to prescribe regulations for every area of railroad safety[447] and for the "investigative and surveillance activities necessary to enforce the safety regulations."[448]

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[445] *Id.*; 23 U.S.C. § 130(d) (2014).

[446] *See* Federal Transit Administration, available at http://www.fta.dot.gov/about/12835_9325.html#Eligibility (last accessed Mar. 31, 2015).

[447] 49 U.S.C. § 20103(a) (2014).

[448] 49 U.S.C. § 20105(a) (2014).

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1. Amendments to 49 U.S.C. §§ 20109(a)(1)–(7) of the FRSA by the 9/11 Commission Act of 2007 563

Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act of 2007) amended 49 U.S.C. §§ 20109(a)(1)–(7) of the FRSA by increasing the type of protected activities in which a railroad employee may engage.[449]

2. Amendments to 49 U.S.C. §§ 20109(b)(1)–(7) of the FRSA by the 9/11 Commission Act of 2007 564

Section 1521 of the 9/11 Commission Act of 2007 amended 49 U.S.C. §§ 20109(b)(1)–(7) on whistleblower protection.[450]

3. Transfer of Enforcement of Whistleblower Protection from the National Railroad Adjustment Board to the Occupational Safety and Health Administration 565

Section 1521 of the 9/11 Commission Act of 2007 amended the FRSA by transferring enforcement of whistleblower complaints from the National Railroad Adjustment Board to the Occupational Safety and Health Administration (OSHA).[451]

4. Amendments to the FRSA by Section 419 of the Railroad Safety Improvement Act of 2008 566

Section 419 of the Railroad Safety Improvement Act of 2008 amended the FRSA by prohibiting a railroad carrier from "disciplin[ing], or threaten[ing] discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician."[452]

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[449] 49 U.S.C. §§ 20109(a)(1)-(7) (2014) (as amended by the 9/11 Commission Act of 2007, §§ 1521(a)(1)–(7)).

[450] 49 U.S.C. §§ 20109(b)(1)(A)-(C) (2014) (as amended by 9/11 Commission Act of 2007, §§ 1521(b)(1)(A)–(C)).

[451] 49 U.S.C. §§ 20109(c) and (d) (2014) (as amended by the 9/11 Commission of 2007 Act, §§ 1521(c) (Enforcement Action) and (c)(1) ("by filing a complaint with the Secretary of Labor") and 1521(d) (Remedies)). OSHA is part of the Department of Labor and is tasked with assuring safety and healthful working conditions.

[452] 49 U.S.C. § 20109(c)(2) (2014).

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5. Increase in OSHA's FRSA Whistleblower Complaints 567

Since 2007 when OSHA acquired jurisdiction of FRSA complaints, OSHA's number of FRSA-based complaints has increased from 1 in fiscal year 2007 to 384 and 353 complaints, respectively, in fiscal years 2012 and 2013.[453]

Cases **567**

C. Whether an Exception Under State Law for a Railroad's Reckless Conduct Survives Preemption 567

In *Boyd v. National R.R. Passenger Corp.,*[454] although the issue was not directly before the Supreme Judicial Court of Massachusetts, the Massachusetts Court of Appeals had held that the FRSA preempted the plaintiff's state law claims because the conditions at the crossing did not qualify as a local hazard under the savings clause; however, the Supreme Judicial Court concluded that there was a triable issue of fact on whether the defendants were reckless.

D. Under the FRSA Only Federal Regulations and Orders of the Secretary of Transportation Establish a Federal Standard of Care that Preempts State Law 570

In *Sanchez v. BNSF Railway Company*,[455] a federal court in New Mexico explained that FRSA preemption does not apply when a railroad violates a federal safety standard of care; however, the court held that the American Railway Engineering and Maintenance of Way Association standards did not establish a federal standard of care because they were not issued by the Secretary and were merely nonbinding recommendations.

E. Exclusive Federal Whistleblower Protection for Railroad Employees 571

In *Rayner v. Smirl*,[456] the Fourth Circuit stated that 45 U.S.C. § 441 "provides a broad federal remedy for railroad 'whistleblowers'" but "refuse[d] to narrow this federal remedial provision to allow appellant to pursue a state action in tort."[457]

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[453] United States Department of Labor, Occupational Safety and Health Administration, Whistleblower Investigation Data FY2005–FY2013, available at http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13.pdf (last accessed Mar. 31, 2015).

[454] 446 Mass. 540, 549, 845 N.E.2d 356, 365 (Sup. J. Ct. Mass. 2006).

[455] 2013 U.S. Dist. LEXIS 147656, at *1, 13, 14 (D. N.M. 2013).

[456] Rayner v. Smirl, 873 F.2d 60 (4th Cir. 1989), *cert. denied*, 493 U.S. 876, 110 S. Ct. 213, 107 L. Ed. 2d 166 (1989), *superseded by statute as stated in* Gonero v. Union Pac. R.R. Co., 2009 U.S. Dist. LEXIS 100962, at *1 (E.D. Cal. 2009).

[457] *Id.* at 64.

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Article 573

F. The FRSA's Continued Preemption of State Laws Since the 2007 Amendment 573

An article published in the *Transportation Law Journal*, examining the state of federal preemption under the FRSA after the 2007 amendment, states that although the 2007 amendment clarified the FRSA by listing exceptions to the general rule of preemption, "the statute will continue to assure that federal regulations regarding particular areas of railroad safety will supersede state laws covering the same subject."[458]

XXIV. FEDERAL SAFETY APPLIANCE ACT 575

A. Introduction 575

This part of the digest discusses the railroad safety appliances that are required by the current Federal Safety Appliance Act (FSAA).[459] Section B discusses the regulation of railroad safety equipment, including civil penalties that may be imposed for violations of the FSAA. Section C discusses cases arising out of a violation of the FSAA resulting in claims for death or injury. Section D calls attention to rules published by the American Association of Railroads.

Statutes and Regulations 576

B. Regulation of Railroad Equipment Safety 576

1. Standards for Safety Devices Under the FSAA 576

As discussed in this subpart, the FSAA provides a detailed description of devices that railroads have to install prior to using a vehicle or railcar.[460]

2. Requirements for Safety Appliances Under the Federal Regulations 576

The requirements for specific safety appliances are described in more detail in the federal regulations.[461]

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[458] Frank J. Mastro, *Preemption is not Dead: The Continued Vitality of Preemption under the Federal Railroad Safety Act Following the 2007 Amendment to 49 U.S.C. § 20106*, 37 TRANSP. L. J. 1, 25 (2010).

[459] Magelky v. BNSF Ry. Co., 579 F. Supp. 2d 1299 (D. N.D. 2008) ("The duty imposed on a railroad carrier by the Federal Safety Appliance Act is an absolute one.") (*citing* Brady v. Terminal R.R. Ass'n of St. Louis, 303 U.S. 10, 15, 58 S. Ct. 426, 82 L. Ed. 614 (1938)).

[460] 49 U.S.C. § 20302 (2014).

[461] 49 C.F.R. § 231.0 (2014).

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3. No Assumption of Risk by Railroad Employees 577

An employee of a railroad carrier does not assume the risk of injury resulting from the use of a train that is in violation of the FSAA.[462]

4. Civil Penalties for Violations of the FSAA 577

Under the regulations, any person, as defined by the FSAA, who violates federal railroad safety laws is subject to civil penalties as further discussed in this subpart.[463]

Cases **578**

C. Claims for Injury or Death of Employees for a Violation of the FSAA 578

1. When a Train Is "In Use" Under the FSAA 578

In *Deans v. CSX Transportation, Inc.*,[464] the Fourth Circuit held that the FSAA "imposes absolute liability on railroad carriers" for violations of the law if a train is "in use" at the time of an accident[465] and that a railroad company shall not use a vehicle on its line if it lacks efficient hand brakes.[466]

2. When a Violation of the FSAA Is Negligence *Per Se* for the Purpose of a FELA Claim 580

In *Marshall v. Grand Trunk W. R.R. Co.*,[467] a federal district court in Michigan held that to prove an FSAA violation the plaintiff Marshall did not have to show that Grand Trunk had prior notice of the defect[468] and that in this case the railroad's violations of the FSAA constituted negligence *per se*.[469]

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[462] 49 U.S.C. § 20304 (2014).

[463] 49 C.F.R. § 229.7(b) (2014).

[464] 152 F.3d 326 (4th Cir. 1998).

[465] *Id.* at 328.

[466] *Id.* (*quoting* 49 U.S.C. § 20302(a)).

[467] 850 F. Supp. 2d 686 (W.D. Mich. 2011).

[468] *Id.* at 698.

[469] *Id.* at 700 and 708.

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3. Requirement that Efficient Handbrakes Work Properly Every Time They Are Used 582

In *Schroeder v. Grand Truck W. R.R. Co.*,[470] a federal district court in Michigan held that a handbrake's performance is adequate only when it works efficiently every time; an inefficient handbrake violates the FSAA.[471]

4. Whether a Device Comes Within the FSAA Is a Question of Law 583

In *Johnson v. Union Pacific R. Co*.,[472] a federal district court in California held that the list of safety appliances should be understood to mean categories of appliances[473] and that the support for an air hose was part of the brake system and, therefore, a safety appliance under the statute.[474]

5. When a Violation of the FSAA Is Negligence for the Purpose of an Indemnity Claim 584

In *Burlington Northern R.R. Co. v. Farmers Union Oil Co. of Rolla*,[475] the Eighth Circuit held that Burlington Northern's lessee of a railcar failed to prove that Burlington Northern could have discovered the defect through an inspection or that the railcar was defective before the lessee received it.[476]

Article 586

6. Specific Safety Devices and Appliances Required Under the FSAA 586

As discussed in an article available online, the FSAA mandates that trains have train brakes that allow the engineer to control the speed of the train; secure running boards, handholds, grab irons, sill steps and ladders; and functional couplers so that employees do not have to pass between cars to uncouple them.[477]

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[470] 2011 U.S. Dist. LEXIS 139233, at *1, 4 (E.D. Mich., Dec. 5 2011).

[471] *Id.* at *10.

[472] 2004 U.S. Dist. LEXIS 22151, at *1, 2 (N.D. Cal. Oct. 27, 2004).

[473] *Id.* at *8 (*citing* Jordan v. S. Ry. Co., 970 F.2d 1350, 1354 (4th Cir. 1992)).

[474] *Id.* at *12.

[475] 207 F.3d 526 (8th Cir. 2000).

[476] *Id.* at 533.

[477] *FELA Federal Safety Appliance Act*, Online Lawyer Source, available at: http://www.onlinelawyersource.com/fela/safety-act/ (last accessed Mar. 31, 2015).

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D. Rules Published by the American Association of Railroads 587

Also relevant to the regulation of railroad equipment safety are rules published by the American Association of Railroads (AAR):[478] the Office Manual of the AAR Interchange Rules[479] and the Field Manual of the AAR Interchange Rules.[480]

XXV. HIGH-SPEED RAIL 588

A. Introduction 588

Federal law authorizes the Secretary of Transportation to "lead and coordinate federal efforts" to "foster the implementation of…high-speed steel wheel on rail transportation systems."[481] Sections B and C discuss, respectively, the development of high-speed rail and funding provided by ARRA. Sections D and E summarize articles that address what is needed for the development of high-speed rail and the current level of reportedly insufficient funding.

Statutes **588**

B. Development of High-Speed Rail 588

The Secretary may award contracts and grants and establish related national programs for demonstrations to determine the contribution of high-speed rail to more efficient ground transportation systems[482] and has a statutory obligation to "submit to Congress a study of the commercial feasibility" of high-speed ground transportation systems.[483]

C. Funding by the American Recovery and Reinvestment Act 589

In 2009, Congress enacted ARRA, which specifically provided $8 billion in funding for passenger rail capital projects with priority given to the development of intercity high-speed rail.[484]

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[478] The AAR's members include most of the large and small freight railroads in the United States, Canada, and Mexico.

[479] Association of American Railroads, Office Manual of the AAR Interchange Rules (2015).

[480] Association of American Railroads, Field Manual of Interchange Rules (2015).

[481] 49 U.S.C. § 309(a) (2014).

[482] 49 U.S.C. §§ 309(b) and (c) (2014).

[483] 49 U.S.C. §§ 309(d) and (e) (2014).

[484] 111 Pub. L. No. 5, 123 Stat. 115 (2009); *see* 26 U.S.C. § 1 note (2014).

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Articles **590**

D. Continued Growth of High-Speed Rail 590

A law review article argues that "high-speed rail transit would serve as a meaningful form of alternative transportation" and that the "political will and growing public–private partnerships" could overcome the "challenges in adopting high-speed trains within existing transportation schemes."[485]

E. Insufficient Funding for High Speed Rail 590

According to one source, studies have shown that "high speed rail operating at an average speed of more than 150 mph can compete favorably with air travel over distances of 500 miles or less," but that the cost would be "anywhere from $400–$800 billion" to establish a successful nationwide high-speed rail system.[486]

XXVI. INSURANCE AND INDEMNITY AGREEMENTS 592

A. Introduction 592

Railroad companies often purchase insurance and have indemnification agreements to protect them in the conduct of their business and operations.[487] Sections B through D discuss Mandatory Insurance for the Feeder Railroad Development Program; Railway–Highway Insurance Protection; and the Amtrak Reform and Accountability Act of 1997. Section E discusses a case involving railway–highway insurance issues. Section F analyzes cases dealing with disputes over insurance coverage, whether a complaint must include facts sufficient to determine insurance coverage, and escape clauses and excess insurance. Section G reports on cases involving indemnification agreements, including whether 49 U.S.C. § 28103 preempts state law on such agreements and whether an indemnity clause in an agreement is a waiver of sovereign immunity. Section H discusses arbitration of disputes arising under indemnification agreements, such as whether a public policy defense precludes enforcement of an indemnity agreement and whether an arbitral panel may enforce an indemnity agreement notwithstanding the other party's gross negligence that resulted in the liability claims sought to be indemnified. Sections I and J discuss a report issued by the U.S. Government Accountability Office regarding

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[485] Kamaal R. Zaidi, *High Speed Rail Transit: Developing the Case for Alternative Transportation Schemes in the Context of Innovative and Sustainable Global Transportation Law and Policy*, 26 TEMP. J. SCI. TECH. & ENVTL. L. 301, 302 (2007).

[486] Joshua Rogers, Note, *The Great Train Robbery: How Statutory Construction May have Derailed an American High Speed Rail System,* 2011 U. ILL. J.L. TECH. & POL'Y 215, 224, 227 (2011).

[487] *See, e.g.,* CSX Transportation, Inc. v. Mass. Bay Transp. Auth*.,* 697 F. Supp. 2d 213 (D. Mass. 2010); Orr v. Indiana Harbor Belt R.R*.,* 976 F. Supp. 1151 (N.D. Ill. 1997).

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insurance arrangements between freight railroads and railroad passenger carriers and alternative insurance arrangements for the transportation of hazardous material.

Statutes 593

B. Mandatory Insurance for the Feeder Railroad Development Program 593

The Feeder Railroad Development Program includes a statutory mandate that private railroads must carry insurance.[488]

C. Railway–Highway Insurance Protection 593

When FHWA provides funding for highway construction projects that affect property owned by railroads, the federal government may pay for public liability insurance for contractors and for insurance for property damage for the contractors and railroads.[489]

D. Amtrak Reform and Accountability Act of 1997 594

The Amtrak Reform and Accountability Act of 1997 (ARAA), which limited the liability to rail passengers to $200 million,[490] was the result of freight railroads requesting increased compensation associated with the risks of sharing a freight railroad's right-of-way.[491] ARAA also provided that "[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for all claims," so that state law would not interfere with the railroads' indemnification agreements.[492]

Cases 595

E. Railway–Highway Liability Insurance 595

In *Orr v. Indiana Harbor Belt Railroad*,[493] a construction company had agreed to obtain liability insurance to cover the railroad for any injuries caused by the construction company's work. A federal district court in Illinois held that because the parties had agreed only to use the

[488] 49 U.S.C. § 10907 (2014); *see* 49 C.F.R. § 1151.3(8) (2014).

[489] 23 C.F.R. §§ 646.101–111 (2014). *See* 23 U.S.C. §§ 109(e), 120(c), 130, 133(d)(1), and 315 (2014).

[490] 49 U.S.C. § 28103(a)(2) (2014).

[491] Amtrak Reform and Accountability Act of 1997, S. REP. NO. 105-85, at 5 (1997), available at: http://www.gpo.gov/fdsys/pkg/CRPT-105srpt85/html/CRPT-105srpt85.htm (last accessed Mar. 31, 2015).

[492] 49 U.S.C. § 28103(b) (2014).

[493] 976 F. Supp. 1151, 1152–1153 (N.D. Ill. 1997).

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insurance in the event of an injury, the Indiana Harbor Belt Railroad could not seek contribution from the construction company.[494]

F. Disputes Over Insurance Coverage 596

1. Use of Declaratory Judgment Action to Determine Insurance Coverage 596

In *All American Insurance Co. v. Steadfast Insurance Co.*,[495] two insurance companies insuring the Chicago Freight Car and Leasing Company (CFCL) sought a declaratory judgment that a policy issued by a third insurance company, Steadfast Insurance, Co. (Steadfast), applied to a wrongful death suit that was pending at the time against CFCL in an Illinois state court. An Indiana federal court held that the absence of an identification of the railcar in the welder's wrongful death complaint was not sufficient evidence that Steadfast's policy did not cover the wrongful death suit, that declaratory judgment actions are appropriate in Indiana to determine insurance coverage, and denied Steadfast's motion to dismiss because of an insufficient record to determine the parties' rights and duties.[496]

2. Escape Clauses and Excess Insurance 597

In *Federal Insurance Co. v. Lexington Insurance Co.*,[497] two insurance companies supplied insurance policies to Trona Railway Co., which was involved in a lawsuit. A federal district court in California held, *inter alia*, that as a matter of public policy Federal should not be able to use a clause "buried in a general liability policy" to escape its obligations to provide primary insurance coverage.[498]

G. Indemnification Agreements 599

1. Whether 49 U.S.C. § 28103 Preempts State Law 599

In *CSX Transportation, Inc. v. Massachusetts Bay Transportation Authority*,[499] a federal district court in Massachusetts ruled that 49 U.S.C. § 28103(b), which allows railroads to enter into indemnification agreements, did not preempt a Massachusetts law that prohibited a party

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[494] *Id.* at 1153.

[495] 2011 U.S. Dist. LEXIS 54435, at *1 (N.D. Ind. 2011).

[496] *Id.* at *10, 11.

[497] 2011 U.S. Dist. LEXIS 91375, at *1 (C.D. Cal. 2011).

[498] *Id.* at *15.

[499] 697 F. Supp. 2d 213 (D. Mass. 2010).

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from indemnifying another party for injuries or damage caused by gross negligence or recklessness.

In *O&G Industries, Inc. v. Amtrak*,[500] the Second Circuit held that 49 U.S.C. § 28103(b) preempted a Connecticut law banning indemnity agreements in a construction contract when the agreement indemnified a party for acts caused by its own negligence.

2. Interpretation of Indemnification Provisions 601

In *Fekete v. Amtrak*,[501] Amtrak argued that a quarry should indemnify Amtrak because the damage arose out of work performed under the contract and because the language of the contract was sufficiently broad to include liabilities caused by Amtrak's negligence. A federal district court in Pennsylvania, however, held that the quarry was liable only for claims resulting from Amtrak's negligence that involve personal injury or wrongful death, not property damage as in this case.[502]

3. Whether Indemnity Clause in a Lease Waives Sovereign Immunity 602

In *Apfelbaum v. National Railroad Passenger Corporation*,[503] a federal district court in Pennsylvania held that under Pennsylvania law an indemnification clause in a lease between the Southeastern Pennsylvania Transportation Authority (SEPTA) and Amtrak did not waive SEPTA's immunity.[504]

H. Arbitration of Disputes Arising Under Indemnification Agreements 604

1. Whether a Public Policy Defense Precludes Enforcement of an Arbitration Agreement 604

In *National Railroad Passenger Corporation v. Consolidated Rail Corporation,*[505] arising out of an accident in Maryland in 1987 involving a Conrail locomotive and an Amtrak train, the District of Columbia Circuit held that the issue of whether an indemnification clause was contrary to public policy and unenforceable did not preclude arbitration of the dispute.[506]

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[500] 537 F.3d 153 (2d Cir. 2008).

[501] 2012 U.S. Dist. LEXIS 109771, at *1, 6 (E.D. Penn. 2012).

[502] *Id.* at *17.

[503] 2002 U.S. Dist. LEXIS 20321, at *1 (E.D. Pa. 2002).

[504] *Id.* at *13 (footnote omitted).

[505] 892 F.2d 1066 (D.C. Cir. 1990).

[506] *Id*. at 1071.

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2. Arbitral Decision Enforcing Indemnity Agreement Notwithstanding Other Party's Gross Negligence that Resulted in Liability Claims 606

In *Maryland Transit Administration v. National Railroad Passenger Corporation*[507] a federal district court in Maryland upheld an arbitral panel's decision that under the Amtrak–MTA indemnification agreement at issue the MTA was bound to procure liability insurance to protect both parties, notwithstanding a previous arbitral panel's decision that the Amtrak locomotive engineer's gross negligence was the cause of the accident giving rise to the claims.

Articles 607

I. Insurance Arrangements Between Freight Railroads and Passenger Carriers 607

A 2009 report issued by the U.S. Government Accountability Office on liability and indemnity provisions in agreements between freight railroads and commuter rail agencies found that regardless of fault, commuter rail agencies usually must take on most of the liability and risk for commuter operations.[508]

J. Alternative Insurance Arrangements for Transportation of Hazardous Material 608

In "Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality," the authors make several policy recommendations on the transportation of toxic inhalation chemicals and discuss risk and liability alternatives for the transportation of such chemicals.[509]

XXVII. LABOR RELATIONS AND EMPLOYMENT 610

A. Introduction 610

Numerous federal laws affect the rights of employees in the railroad industry. Section B discusses the history and purpose of the Railway Labor Act (RLA), arbitration of disputes under the RLA, the National Railroad Adjustment Board's (NRAB) exclusive jurisdiction over minor

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[507] 372 F. Supp. 2d 478, 479 (D. Md. 2005).

[508] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, COMMUTER RAIL: MANY FACTORS INFLUENCE LIABILITY AND INDEMNITY PROVISIONS AND OPTIONS EXIST TO FACILITATE NEGOTIATIONS 5 (2009), available at http://www.stb.dot.gov/stb/docs/Liability%20Report%20letter%206-10.pdf (last accessed Mar. 31, 2015).

[509] Lewis M. Branscomb, Mark Fagan, Philip Auerswald, Ryan N. Ellis & Raphael Barclan, *Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality*, Harvard Kennedy School Belfer Center Discussion Paper No. 010-01 (2010), available at http://belfercenter.ksg.harvard.edu/files/Rail-Transportation-of-Toxic-Inhalation-Hazards-Final.pdf (last accessed Mar. 31, 2015).

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disputes, and other issues arising under the RLA. Section C discusses the Labor Management Relations Act (LMRA),[510] including suits by and against labor organizations and hybrid actions (claims by employees against both the employer and the union).[511] Section D addresses the federal requirement that under certain circumstances transit agencies receiving federal funding must protect employees' collective bargaining and other rights with "protective labor agreements."[512] Section E addresses the rights of employees and the application of the First and Fourth Amendments of the U.S. Constitution to transit authorities.

B. The Railway Labor Act 611

***Statutes and Regulations* 611**

1. History and Purpose of the Railway Labor Act 611

Since the enactment of the RLA in 1926,[513] there have been several important amendments, including one in 1934 that established the NRAB.[514]

2. National Railroad Adjustment Board 613

A labor dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" may be referred to the NRAB, which has four divisions with jurisdiction over different types of disputes.[515]

3. Arbitration of Disputes Under the RLA 614

The RLA structure divides labor disputes into major and minor disputes, each of which has its own mechanism for dispute resolution.[516]

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[510] 29 U.S.C. § 185 (2014).

[511] *See* UPS v. Mitchell, 451 U.S. 56, 66–67, 101 S. Ct. 1559, 1565–66, 67 L. Ed. 2d 732, 742–43 (1981).

[512] 49 U.S.C. § 5333 (2014).

[513] The Railway Labor Act Simplified, available at: http://www.pennfedbmwe.org/Docs/reference/RLA_Simplified.html (last accessed Mar. 31, 2015).

[514] 45 U.S.C. § 153 (2014) (establishing the NRAB).

[515] 45 U.S.C. § 153, *et seq.* (2014) and 45 U.S.C. § 153(i) (2014); *see* 29 C.F.R. §§ 301.1–301.9 (2014).

[516] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945).

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Cases **615**

4. NRAB's Exclusive Jurisdiction over Minor Disputes 615

Brotherhood of Maintenance of Way Employees Division/IBT v. Norfolk Southern Railway Co.[517] concerned an alleged violation of a collective bargaining agreement. A federal district court in Illinois stated that the standard for determining whether a case qualified as a minor dispute is: when "an employer asserts a contractual right to take the contested action, the ensuing dispute is minor *if the action is arguably justified* by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are *frivolous or obviously insubstantial*, the dispute is major."[518]

5. Interpretation of Implied Agreements Is a Minor Dispute 617

In *Kan. City Southern Ry. v. Bhd. of Locomotive Eng'rs & Trainmen*,[519] a Louisiana federal district court held that because the unions previously had consented to video surveillance, the dispute was a minor one regarding whether there were implied agreements that sanctioned the installment of inward facing cameras.

6. Preemption of State Law Claims 618

In *Johnson v. Norfolk Southern Railway*,[520] a federal district court in Maryland held that the plaintiff's claim required an interpretation or application of a collective bargaining agreement and thus qualified as a minor dispute under the RLA, but that the court lacked jurisdiction because the claim had to be referred to arbitration.

7. Requirement that the NRAB Exercise Its Jurisdiction 619

In *Union Pacific Railroad Co. v. Brotherhood of the Locomotive Engineers & Trainmen General Committee of Adjustment*,[521] the Supreme Court affirmed the Seventh Circuit's decision that the NRAB's jurisdiction is not conditioned on whether the parties attempted to resolve their dispute in a conference as required by the RLA.

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[517] 2012 U.S. Dist. LEXIS 136649, at *1 (N.D. Ill. 2012).

[518] *Id.* at *52–53 (citation omitted) (emphasis in original).

[519] 2013 U.S. Dist. LEXIS 104622, at *1, 18 (W.D. La. 2013).

[520] 2011 U.S. Dist. LEXIS 22225, at *1, 3–6 (D. Md. 2011).

[521] 558 U.S. 67, 83, 130 S. Ct. 584, 597, 175 L. Ed. 2d 428, 444 (2009).

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8. Judicial Power to Enjoin a Strike to Compel Compliance with the RLA 620

In *Aircraft Service International, Inc. v. International Brotherhood of Teamsters AFL-CIO, Local 117*,[522] the Ninth Circuit held that the district court had jurisdiction because the Norris–LaGuardia Act, which "withdraws jurisdiction from federal courts to enjoin strikes 'growing out of any labor disputes,'" does not prevent federal courts from issuing an injunction to compel the parties to comply with the requirements of the RLA.[523]

Articles **622**

9. Overview of the RLA and Other Labor Relations Laws 622

A report by the Congressional Research Service provides an overview of three major labor relations laws, including the RLA; provides a brief history of each law; explains how each statute operates and is administered; and discusses the rights and duties of parties subject to the law.[524]

10. Whether the RLA Completely Preempts Claims Under State Law 623

An article in the *Transportation Law Journal*, which examines the principles and the application of the doctrine of federal preemption, particularly in regard to the RLA, concludes that the Supreme Court's decision in *Beneficial National Bank v. Anderson*[525] means that the RLA should completely preempt claims under state law that involve disputes over labor agreements.[526]

11. Contractual Due Process and Regulations on Certification of Locomotive Engineers 623

An article in the *Transportation Law Journal* examines the federal government's certification program for locomotive engineers and explains that the FRA made the appellate

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[522] 742 F.3d 1110 (9th Cir. 2014).

[523] *Id.* at 1114 (citation omitted).

[524] ALEXANDRA HEGJI, FEDERAL LABOR RELATIONS STATUTES: AN OVERVIEW 6-14 (Congressional Research Service, 2012), available at http://www.fas.org/sgp/crs/misc/R42526.pdf (last accessed Mar. 31, 2015).

[525] 539 U.S. 1, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003).

[526] Kelly Collins Woodford, Harry A. Rissetto, & Thomas J. Woodford, *Complete Preemption under the Railway Labor Act: Protecting Congressionally Created Grievance Arbitration Procedures*, 36 TRANSP. L. J. 261, 269, 297–98 (2009).

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provisions regarding certification completely separate from those governing disputes over collective bargaining agreements that are covered by the RLA.[527]

C. The Labor Management Relations Act 625

***Statutes* 625**

1. Suits By and Against Labor Organizations 625

Section 301 of the LMRA, codified in 29 U.S.C. § 185, "protects the rights of management and organized labor and establishes a comprehensive scheme of dispute resolution."[528]

***Cases* 626**

2. Hybrid Actions for Alleged Misconduct of the Employer and the Union 626

Abramowich v. CSX Transportation, Inc.,[529] is an example of a hybrid action that may be brought under § 301 of the LMRA and the RLA. A hybrid action consists of two causes of action, one against the employer for breach of the collective bargaining agreement and one against the union for breach of its duty of fair representation.[530]

3. Six-Month Statute of Limitations Applies to Hybrid Actions 629

In 1983, the Supreme Court held that the 6-month statute of limitations in the NLRA applied to hybrid actions and to actions for breach of fair representation under the LMRA.[531]

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[527] John LaRocco & Richard Radek, *The Dilemma of Locomotive Engineer Certification Regulations Vis-à-vis Contractual Due Process in Discipline Cases*, 40 TRANSP. L. J. 81, 83–84 (2013).

[528] Christopher L. Sagers, *Due Process Review under the Railway Labor Act*, 94 MICH. L. REV. 466, 466 (1995).

[529] 2013 U.S. Dist. LEXIS 138150, at *1 (W.D. Pa. 2013).

[530] *See* Barbara J. Van Arsdale, *When Does Six-Month Limitations Period, Applicable to Employee's "Hybrid" Action against Employer and Union under § 301 of Labor Management Relations Act of 1947 Begin to Run*, 194 A.L.R. FED. 1.

[531] DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 155, 103 S. Ct. 2281, 2285, 76 L. Ed. 2d 476, 483 (1983).

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D. Protective Labor Arrangements for Employees of Transit Agencies Receiving Federal Funding 630

***Statutes* 630**

1. Section 13(c) 630

As discussed in this subpart, certain provisions of the federal labor laws apply to any activity a private party performs under contract for a transit agency when the costs will be reimbursed by federal funds.[532]

***Case* 631**

2. Applicability of Section 13(c) to a Transit Employee on Loan to Another Agency 631

Mancuso v. City of Durham[533] involved an employee's complaint that his § 13(c) rights[534] were violated when he was on loan from the Metropolitan Transportation Authority to the Triangle Transit Authority because "he was placed in a temporary position with duties that were not comparable to the duties of his prior position."[535] The North Carolina Court of Appeals remanded the case for a ruling on whether the parties were bound by an arbitration clause in the union contract with the city of Durham.[536]

***Cases* 632**

E. Employees and Application of the First and Fourth Amendments to Transit Authorities 632

1. Transit Authority Did Not Violate Employee's Freedom of Speech 632

In *Anemone v. Metro. Transp. Authority*,[537] an employee of the MTA alleged that the MTA violated his right of free speech. The Second Circuit affirmed a federal district court's

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[532] FEDERAL TRANSIT ADMINISTRATION, REPORT TO CONGRESS ON THE COSTS, BENEFITS, AND EFFICIENCIES OF PUBLIC-PRIVATE PARTNERSHIPS FOR FIXED GUIDEWAY CAPITAL PROJECTS 41, available at http://www.fta.dot.gov/documents/Costs_Benefits_Efficiencies_of_Public-Private_Partnerships.pdf (last accessed Mar. 31, 2015).

[533] 2013 N.C. App. LEXIS 427, at *1 (N.C. App. 2013).

[534] 49 U.S.C. § 5333(b).

[535] *Mancuso*, 2013 N.C. LEXIS 427, at *2.

[536] *Id*. at *7.

[537] 629 F.3d 97 (2d Cir. 2011).

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decision granting the MTA's motion for a summary judgment, in part, because "no reasonable jury could find that [Anemone was terminated] out of a desire to punish him for his allegedly protected expressive activity."[538]

2. Transit Authority's Alleged Violation of the Rights of Free Speech and the Exercise of Religion 634

In *Lewis v. New York City Transit Authority*,[539] a federal district court in New York held that the Transit Authority's policies were not facially neutral because after an employee was transferred, the Transit Authority published a series of bulletins that indicated that it was targeting women who wore headscarves.

3. Regulations Requiring Rail Employees to Undergo Observed Drug Testing Do Not Violate the Fourth Amendment 636

BNSF Ry. Co. v. United States DOT[540] involved a 2008 DOT regulation regarding the DOT drug testing requirements that required all return-to-duty and follow-up tests to use a "direct observation" method that entailed a same-gender observer to watch the collection of a urine sample. The District of Columbia Circuit held that the regulations did not violate the Fourth Amendment.[541]

XXVIII. NEGLIGENCE AND RAILROAD LIABILITY 639

A. Introduction 639

This part of the digest discusses statutes, cases, and articles on tort law as it applies to railroads. Sections B and C discuss the attractive nuisance doctrine as it has been applied to railroads and various issues that have arisen out of collisions between motor vehicles and trains. Sections D and E address contributory negligence, the standing train doctrine, and other state laws that may apply. Section F summarizes statutes or rules that require motorists to stop, look, and listen. Section G discusses statutes and cases specifically involving accidents in connection with crossings and crossing gates. Sections H through J cover the doctrine of *res ipsa loquitor*, the last clear chance doctrine, and whether and when evidence of prior accidents is admissible to prove that a railroad company had knowledge or notice of a dangerous condition of its property.

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[538] *Id*. at 113.

[539] 2014 U.S. Dist. LEXIS 46471, at *1, 91–92 (E.D.N.Y. 2014).

[540] 566 F.3d 200, 202 (D.C. Cir. 2009) (*citing* 49 C.F.R. § 40.67(i) (2014)).

[541] *Id.* at 208.

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Cases **640**

B. Whether the Attractive Nuisance Doctrine Applies to Railroads 640

1. Definition of an Attractive Nuisance 640

Although an owner of land owes no duty to a trespasser on his or her land, an exception is that a landowner owes a duty of reasonable care to children who are trespassers to protect them from a dangerous condition when certain elements are established.[542] Who qualifies as a child appears to vary from state to state.[543]

2. Obvious Trains Held Not To Be an Attractive Nuisance 641

In *Choate v. Indiana Harbor Belt R.R. Co.*,[544] the Supreme Court of Illinois held that the plaintiff failed to prove that the alleged defective structure or dangerous condition was likely to injure children on the basis that children were incapable of appreciating the risk presented.

3. Attractive Nuisance Doctrine Inapplicable to Moving Trains that Injure Children 642

In *Woods v. CSX Transp., Inc.*,[545] a federal district court in Indiana held that the attractive nuisance doctrine "does not apply as a matter of law in cases where child trespassers are injured by moving trains because a moving train is not a subtle or hidden danger and its potential for causing serious bodily injury or death to anyone in its path is readily apparent, even to young children."[546]

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[542] *See* Choate v. Indiana Harbor Belt R.R. Co., 366 Ill. Dec. 258, 265, 980 N.E.2d 58, 65 (Ill. 2012).

[543] *See Restatement (Second) of Torts*, § 339, cmt. c. (1979 and later supplements).

[544] 366 Ill. Dec. 258, 265–69, 980 N.E.2d 58, 62, 64–69 (Ill. 2012).

[545] 2008 U.S. Dist. LEXIS 97068, at *1 (N.D. Ind. 2008).

[546] *Id.* at *43 (citation omitted) (internal quotation marks omitted).

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C. Motor Vehicle Collisions with Trains Including at Highway–Railroad Grade Crossings 644

1. Interstate Commerce Commission Termination Act's Preemption of a Claim for Negligence *Per Se* 644

In *Elam v. Kansas City Southern Ry. Co.*,[547] the Fifth Circuit held that the ICCTA preempted Elam's claim for negligence *per se* but did not preempt her simple negligence claim.

2. Preemption of FELA Claims by the Federal Railroad Safety Act and the Locomotive Inspection Act 645

Garza v. Norfolk Southern Ry. Co.[548] involved Garza's claim that arose after he was injured when an automobile drove through a railroad crossing, striking a Norfolk Southern train on which Garza was working; however, the Sixth Circuit held that the Federal Railroad Safety Act and the Locomotive Inspection Act preempted the engineer's claims.[549]

3. FRSA's Preemption of State Laws on Collisions at Crossings 646

In *Driesen v. Iowa, Chi. & E. R. R. Corp.*,[550] a federal district court in Iowa held that the FRSA preempted state and local laws regulating the speed of trains, reflectorization of railcars, warning devices, and locomotive horns.

4. Liability of a Railroad Based on the Doctrine of *Respondeat Superior* 647

In *England v. Cox*,[551] a federal district court in Kansas, applying the doctrine of *respondeat superior,*[552] held that the railroad was liable for the conduct of its employee who was

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[547] 635 F.3d 796 (5th Cir. 2011), *motion granted by, remanded by*, 2011 U.S. Dist. LEXIS 55564 (N.D. Miss., May 23, 2011) (stating that "[h]aving fully reviewed the record in this case, the Court is of the opinion that the remaining claims are the equivalent of a routine crossing case which is typically resolved in state court"), *affirmed by, appeal after remand at, appeal dismissed by, in part*, 2012 U.S. App. LEXIS 6404 (5th Cir. Miss., Mar. 26, 2012).

[548] 2013 U.S. App. LEXIS 17134, at *1 (6th Cir. 2013).

[549] *Id.* at *1–2.

[550] 777 F. Supp. 2d 1143, 1160 (N. D. Iowa 2011).

[551] 2012 U.S. Dist. LEXIS 109364, at *1 (D. Kan. 2012), *reconsideration denied*, 2012 U.S. Dist. LEXIS 123197, at *1 (D. Kan. Aug. 30, 2012).

[552] The doctrine of *respondeat superior* imposes liability "upon an employer for the acts of his employees committed in the course and scope of their employment." BALLENTINE'S LAW DICTIONARY (3d ed.).

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acting within the scope of his employment when he negligently caused his truck to collide with a locomotive by stopping his truck on the tracks.

D. Contributory Negligence as a Defense to a Claim Against a Railroad 648

1. Railroad Not Liable When a Motorist Was Intoxicated 648

In *Doyle v. Union Pacific R. Co.*,[553] the Fifth Circuit held that Union Pacific was not liable for injuries sustained by the plaintiff Doyle when a train and Doyle's automobile collided, because Doyle, who was driving under the influence, did not stop, look, and listen before crossing the tracks.

2. Railroad Not Liable for the Death of a Person on the Tracks 649

In *Owens v. Norfolk Southern Corp.*,[554] a federal district court in Indiana held that Norfolk Southern was not responsible for a man's death when the decedent Owens was lying on the tracks and under the influence of alcohol and illegal substances.

3. Child Trespasser Statute Inapplicable to Occupier of Land 650

In *Jad v. Boston and Maine Corp.*,[555] the Massachusetts Court of Appeals held that the Boston and Maine Corporation (B&M) was not liable to the plaintiff because under Massachusetts law a railroad is not "'liable for negligence in causing the death of a person…walking or being upon such railroad contrary to law.'"[556]

***Articles* 651**

4. Standing Train Doctrine and Other State Laws 651

A 2008 law review article entitled *Railroad Law* analyzes Virginia law on railroad crossings, the "standing train" doctrine that relieves railroad companies of liability when a motorist crashes into the side of a nonmoving train at a crossing, the effect of a railroad employee's contributory negligence on a claim under the Federal Employer's Liability Act, a passenger's contributory negligence barring recovery for a railroad's alleged negligence, and other issues.[557]

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[553] 442 Fed. Appx. 964, 966 (5th Cir. 2011).

[554] 2011 U.S. Dist. LEXIS 62457, at *1, 24 (N. Dist. Ind. 2011).

[555] 26 Mass. App. Ct. 564, 530 N.E.2d 198 (Mass. Ct. App. 1988).

[556] *Id.,* 26 Mass. App. Ct. at 565, 530 N.E.2d at 198 (*quoting* MASS. GEN. LAWS., ch. 229 § 2).

[557] Brent M. Timberlake, *Railroad Law*, 43 U. RICH. L. REV. 337 (2008).

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5. Presumption of Contributory Negligence in Occupied Crossing Cases 653

Another law review article discusses the "occupied crossing" doctrine and contributory negligence and explains that the occupied crossing doctrine presumes that unless a crossing is determined to be ultra-hazardous, a plaintiff is contributorily negligent when the plaintiff's vehicle collides with a train in a railroad crossing.[558]

Cases **654**

E. Contributory Negligence and Deaf Individuals 654

In *Box v. South Georgia Ry. Co.*,[559] the court held that the South Georgia Railway Company was not liable for hitting and killing Josie Ellis, who was deaf, because she was contributorily negligent by walking on the tracks at the time of the accident.

F. Failure to Stop, Look, and Listen as Precluding a Plaintiff's Claim 655

1. Railroad Not Liable When Plaintiff Fails to Stop, Look, and Listen 655

In *Kinchen v. Missouri P. R. Co.*,[560] the Fifth Circuit held that the plaintiff was contributorily negligent for having failed to comply with a Louisiana law that requires a motorist to stop, look, and listen for an approaching train at a railroad crossing.

2. Intoxication Is Not an Excuse for a Failure to Stop, Look, and Listen 656

In *Baker v. CSX Transportation*,[561] a federal district court in Alabama held that the plaintiff's intoxication did not excuse his contributory negligence for failing to stop, look, and listen for an oncoming train.

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[558] Joseph R. Wheeler, *Recent Developments: Torts—the Occupied Crossing Doctrine—Determining Contributory Negligence as a Matter of Law in Railroad Accident Cases*, 53 TENN. L. REV. 435, 440 (1986).

[559] 433 F.2d 89, 94 (5th Cir. 1970).

[560] 678 F.2d 619, 624–25 (5th Cir. 1982).

[561] 46 F. Supp. 2d 1230, 1231–33 (M.D. Ala. 1999).

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G. Liability of a Railroad Because of Defective Crossing Gates 657

***Statutes and Regulations* 657**

1. Inspections of Gates at Railroad Crossings 657

The FRA, which has promulgated regulations on the inspection of gates at railroad crossings, requires that each gate arm and gate mechanism must be inspected at least once each month.[562]

***Cases* 657**

2. Railroad Not Liable When the Plaintiff Ignored a Nondefective Gate 657

In *Hall v. Consolidated Rail Corp.*,[563] the Supreme Court of Michigan held that the plaintiff Hall failed to provide sufficient evidence that the lights and gates at a crossing were not working at the time of the accident and further held that Conrail was not on notice of a defect "because Conrail inspected the signal system the day before the accident and found it to be working properly."[564]

3. Liability of a Railroad When Crossing Gates Failed to Lower Prior to the Train's Approach 658

In *Mills v. Norfolk Southern Ry. Co.*,[565] the Georgia Court of Appeals reversed the trial court's postjudgment ruling granting Norfolk Southern a new trial. The appeals court held that Norfolk Southern was liable for the death of a driver and for injuries to a passenger when the active warning system at a crossing failed to activate sufficiently in advance to provide the driver with notice that a train was approaching.[566]

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[562] 49 C.F. R. § 234.255 (2014).

[563] 462 Mich. 179, 612 N.W.2d 112 (Mich. 2000).

[564] *Id.,* 462 Mich. at 187, 612 N.W.2d at 116.

[565] 242 Ga. App. 324, 526 S.E.2d 585 (Ga. Ct. App. 1999).

[566] *Id*., 242 Ga. App. at 326, 526 S.E.2d at 588.

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4. Railroad Not Liable When a Minor Is on the Tracks by Avoiding a Safety Gate 661

In *Boyd v. Amtrak*,[567] the Appeals Court of Massachusetts held that a railroad operator is not negligent when an individual is injured or killed when the person is on a railroad track; however, the Supreme Judicial Court of Massachusetts reversed and remanded the case on the basis that the plaintiff had provided sufficient evidence to overcome Amtrak's motion for a summary judgment.[568]

H. Liability of a Railroad for Falling Objects 662

1. Doctrine of *Res Ipsa Loquitor* Held to Apply When Train Moved During Loading of Cargo 662

In *Miles v. St. Regis Paper Co.*,[569] the court held that the doctrine of *res ipsa loquitor*[570] applies to a railroad company when there is evidence that the train moved during unloading of logs immediately prior to the accident.

2. Railroad Not Liable for Injuries Caused by a Falling Object 663

In *Casella v. Norfolk & W. R. Co*.,[571] the Fourth Circuit held that a railroad is only responsible for safely transporting cargo and is not "responsible for a shipper's improper loading of a bulk commodity which caused injury to an employee of the consignee."[572]

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[567] 62 Mass. App. Ct. 783, 790, 821 N.E.2d 95, 100–01 (Mass. App. Ct. 2005), *rev'd*, 446 Mass. 540, 845 N.E.2d 356 (reversing the appellate court's dismissal of the reckless conduct claims but declining to hear an appeal on the negligence claims).

[568] Boyd v. Amtrak, 446 Mass. at 553–54, 845 N.E.2d at 367.

[569] 77 Wash. 2d 828, 834, 467 P.2d 307, 310 (1970).

[570] As for the meaning of the *res ipsa loquitor* doctrine, when "a plaintiff's evidence establishes that an instrumentality under the exclusive control of the defendants caused an injurious occurrence, which ordinarily does not happen if those in control of the instrumentality use ordinary care, there is an inference, permissible from the occurrence itself, that it was caused by the defendant's want of care." Kind v. Seattle, 50 Wash. 2d 485, 489, 312 P.2d 811, 814 (1957).

[571] 381 F.2d 473 (4th Cir. 1967).

[572] *Id.* at 475–76 (*citing* Lewis v. New York, O. & W. Ry., 210 N.Y. 429, 104 N.E. 944 (N.Y. 1914)).

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I. Last Clear Chance Doctrine 664

1. Doctrine Held Inapplicable to a Collision Between an Automobile and a Train at a Railroad Crossing 664

In *Newman v. Missouri P. R. Co.*,[573] the Fifth Circuit held the last clear chance doctrine did not apply to a collision between an automobile and a train at what the court described was an "unusual and dangerous" crossing, because "[t]here was no compelling evidence establishing that there existed a time during which plaintiff was helpless while the train crew were not."[574]

***Article* 665**

2. Determining When the Last Clear Chance Doctrine Applies 665

An article entitled *Last Clear Chance in Tennessee* explains that the prerequisite for the application of the last clear chance doctrine is that the plaintiff must have been contributorily negligent; thus, when the doctrine is applied it has the effect of excusing the plaintiff's contributory negligence.[575]

***Cases* 666**

J. Admissibility of Evidence of Prior Accidents 666

1. Admissibility of Prior Accidents as Evidence of a Railroad's Knowledge of a Dangerous Condition 666

In *Mikus v. Norfolk and Western Ry. Co.*,[576] an Illinois appellate court held that evidence of prior incidents of broken gates at a crossing was properly admitted into evidence because the evidence showed that N&W knew of a dangerous condition at the crossing; moreover, N&W's defense counsel's examination of the signal maintainer for the railroad opened the door to the introduction of such evidence.

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[573] 545 F.2d 439 (5th Cir. 1977).

[574] *Id.* at 447.

[575] L. Anderson Galyon III, *Comment: Last Clear Chance in Tennessee*, 39 TENN. L. REV. 104, 107 (1971).

[576] 312 Ill. App. 3d 11, 24–25, 726 N.E.2d 95, 106–07 (Ill. App. 2000).

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2. Inadmissibility of Evidence of Prior Accidents Too Remote in Time 667

In *Richardson v. Norfolk Southern Ry. Co.*,[577] the Supreme Court of Mississippi held that accidents 13 years apart were too remote to be admitted as evidence of prior accidents and that in general evidence of accidents over a year prior to an accident is not admissible.

3. Evidence of Prior Accidents Inadmissible When Vehicles Were Traveling in Opposite Directions 668

The Supreme Court of Arkansas held in *Union Pacific R. R. Co. v. Barber*[578] that conditions were not substantially similar when vehicles involved in other accidents or incidents (i.e., near-misses) had approached the same crossing from opposite directions; however, the trial court properly admitted evidence of overgrown vegetation that obstructed the vision of motorists travelling northbound.

Article 669

4. Admission of Evidence of Prior Accidents in Tort Cases Involving Defective Premises 669

An article in the *Journal of the Missouri Bar*, which analyzes Missouri law on the admissibility of evidence of prior accidents in negligence cases involving defective premises and the same defendant, argues that evidence of prior accidents may not be used to show that a defendant was negligent, only to show that the defendant was on notice of a dangerous condition.[579]

XXIX. MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES—PART 8 671

A. Introduction 671

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[577] 923 So. 2d 1002, 1009–1010 (Miss. 2006) (*followed by* Irby v. Travis, 935 So. 2d 884 (Miss. 2006) (holding that evidence of prior accidents was inadmissible because the conditions of the accidents were not similar)).

[578] 356 Ark. 268, 291, 149 S.W.3d 325, 340 (Ark. 2004), *cert. denied*, *motion granted by* 125 S. Ct. 320, 160 L. Ed. 2d 249 (2004).

[579] James D. Walker, Jr., *Evidence of Prior Accidents/Incidents in Premises Defect Cases*, 64 J. MO. B. 22 (2008).

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Part 8 of the *Manual on Uniform Traffic Control Devices* (MUTCD or Manual) governs Traffic Control for Railroad and Light Rail Transit Grade Crossings.[580] Section B explains why the MUTCD is the national standard. Section C discusses the meaning of the paragraphs in the MUTCD that are designated as standards, guidance statements, option statements, and support statements. Section D highlights some of the specific changes that the 2009 edition of the MUTCD made to Part 8. Sections E and F explain two important revisions that were made to the MUTCD after its adoption and publication. Section G provides information on the various dates when some states adopted the 2009 version. Section H analyzes several recent cases that involve railroads and the MUTCD.

Statutes and Regulations **671**

B. The MUTCD as the National Standard **671**

The 2009 MUTCD promulgated by the FHWA "is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel."[581]

C. MUTCD's Standards, Guidance, Options, and Support **672**

The MUTCD is "organized to differentiate between 'Standards that must be satisfied…Guidances that should be followed…and Options that may be applicable for the particular circumstances of a situation.'"[582] Only those provisions that are designated as standards are mandatory.[583]

D. Discussion of Some Specific Changes in Part 8 of the 2009 MUTCD **674**

FHWA's final rule published on December 16, 2009, discusses the amendments to Part 8 of the MUTCD on Traffic Controls for Railroad and Light Rail Transit (LRT) Grade Crossings.[584]

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[580] The MUTCD is available at http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd09r1r2editionhl.pdf and is hereinafter referred to as the "2009 MUTCD."

[581] 23 C.F.R. § 655.603(a) (2014).

[582] Yonkings v. Piwinski, 2011-Ohio-6232 P23 (Ohio App. 2011) (citation omitted).

[583] American Family Mutual Insurance Co. v. Outagamie County, 2012 WI. App. 60, P19, 341 Wis. 2d 413, 816 N.W.2d 340 (Wis. Ct. App. 2012) (citation omitted).

[584] Federal Highway Administration, National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision; Final Rule, 74 Fed. Reg. 66730, 66780-84, 66847 (Dec. 16, 2009), available at http://www.gpo.gov/fdsys/pkg/FR-2009-12-16/html/E9-28322.htm (last accessed Mar. 31, 2015).

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E. Revision 1 of the MUTCD 677

Since 2009 FHWA has made at least two important revisions to the MUTCD.[585] The effect of the final rule and Revision 1 is 1) to omit certain language that was included in the 2009 MUTCD and 2) to restore language that appeared in the 2003 MUTCD but that was deleted in the 2009 edition.

F. Revision 2 of the MUTCD 678

The second important revision, published on May 14, 2012, of the 2009 MUTCD concerns compliance dates in Table I-2.[586]

G. Date of State Adoption of the 2009 MUTCD 679

The version of the Manual in effect at the time of any alleged violation of the Manual is the version that applies in a tort action.[587]

Cases 680

H. Cases Involving Railroads and the MUTCD 680

1. Federal Preemption of Claims Based on Alleged Violations of the MUTCD 680

In *Illinois Central Railroad Company v. Daniel*,[588] a federal district court in Mississippi held that "federal law pre-empted state law at the time federally funded signals were installed at this crossing."[589]

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[585] Federal Highway Administration, National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision; Final Rule, 77 Fed. Reg. 28456 (May 14, 2012). The rule became effective on June 13, 2012.

[586] *Id*. at 28460.

[587] Shope v. City of Portsmouth, 2012 Ohio 1605 at P20 (Ohio Ct. App. 2012).

[588] 901 F. Supp. 2d 790 (S.D. Miss. 2012).

[589] *Id*. at 803.

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2. Federal Preemption of Negligence Claims for Inadequate Warning Devices 681

In *Murrell v. Union Pacific Railroad Company,*[590] although the MUTCD is not mentioned, a federal district court in Oregon held that federal law preempted the plaintiff's claims that there were inadequate warning devices.

3. Waiver of Federal Preemption Based on Federal Funding to Upgrade or Replace Warning Devices 682

In *Indiana Rail Road Company v. Davidson*,[591] the issue concerned preemption and traffic warning devices at the site of a fatal collision. The Indiana Court of Appeals held that the Indiana Rail Road's motion for a partial summary judgment was properly denied because there was "a genuine issue of material fact whether the federal government affirmatively abandoned the project" and, thus, whether federal preemption applied any longer to the railroad crossing.[592]

4. Failure to Show that a Crossing Did Not Comply with the MUTCD 683

In *Ill. Cent. Gulf R.R. Co. v. Travis,*[593] in which one issue was whether a crossbuck sign violated Mississippi Code Section 77-9-247 and the 2009 MUTCD Section 8B.03, the Supreme Court of Mississippi held that that "Travis presented no evidence that the crossbuck sign was not in compliance with the MUTCD."[594]

5. Failure to Show that a Crossing Was Unusually Dangerous at Common Law 684

In *Brown v. Illinois Central Railroad*,[595] the only issue was whether an alleged "unusually dangerous" crossing triggered a common law duty to install additional signaling devices; however, the plaintiff's expert failed to show how the crossing was any more "deceptively dangerous…than the hundreds of other crossings in Mississippi."[596]

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[590] 544 F. Supp. 2d 1138, 1152 (D. Or. 2008).

[591] 983 N.E.2d 145 (Ind. Ct. App. 2012).

[592] *Id*. at 152.

[593] 106 So. 3d 320 (Miss. 2012), *rehearing denied,* 2013 Miss. LEXIS 93 (Miss., Feb. 14, 2013).

[594] *Id*. at 334 (emphasis in original).

[595] 705 F.3d 531 (5th Cir. 2013).

[596] *Id*. at 539 (footnote omitted).

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XXX. MAP-21 686

A. Introduction 686

MAP-21, effective in October 2012, authorized programs through September 30, 2014.[597] Although there is no specific rail title in MAP-21,[598] as discussed in Sections B through F, there are several sections of MAP-21 that may improve rail service.

B. Public Transportation Safety 687

Under MAP-21 § 20021, amending 49 U.S.C. § 5329, the "FTA must develop safety performance criteria for all modes of transportation (rail, bus, etc.)" and minimum safety performance standards for all public transportation excluding rolling stock regulated by the Secretary or another Federal agency.[599]

C. Comprehensive Freight Plan 689

In MAP-21 § 1118, added in a note to 23 U.S.C. § 167, the Secretary of Transportation is to encourage each state to develop a comprehensive state freight plan.[600]

D. Highway Safety Improvement Program 690

MAP-21 § 1112, amending 23 U.S.C. § 148, that authorized the Highway Safety Improvement Program (HSIP)[601] requires states involved in the project to identify hazardous locations including railway-highway crossings that pose a significant threat to human safety.[602]

E. State of Good Repair Grants 691

Under MAP-21 § 20027, amending 49 U.S.C. § 5337, that established "a new grant program to maintain public transportation systems in a state of good repair," funding is limited to

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[597] Federal Transit Administration, FTA Office of Budget and Policy, Moving Ahead for Progress in the 21st Century Act (MAP-21), at 1, available at http://www.fta.dot.gov/documents/MAP21_essay_style_summary_v5_MASTER.pdf (last accessed Mar. 31, 2015), hereinafter referred to as "FTA MAP-21 Summary."

[598] Joseph C. Szabo, Federal Railroad Administrator, Prepared Remarks, American Short Line and Regional Railroad Association Annual Convention, *100 Years of Connections* (Apr. 29, 2013), at 6, available at http://www.fra.dot.gov/Elib/Details/L04514 (last accessed Mar. 31, 2015).

[599] FTA MAP-21 Summary, *supra* note 597, at 2; MAP-21 § 20021; *see* 49 U.S.C. § 5329(b)(2) (2014).

[600] MAP-21 § 1118; *see* 23 U.S.C. § 167 note (2014).

[601] MAP-21 § 1112; *see* 23 U.S.C. § 148(b)(2) (2014).

[602] MAP-21 § 1112; *see* 23 U.S.C. § 148(c)(2)(B)(i) (2014).

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fixed guideway systems, including rail, bus rapid transit, passenger ferries, and high intensity bus lanes.[603]

F. Asset Management Provisions 691

MAP-21 § 20019, 49 U.S.C. § 5326, is a new section that "requires FTA to define the term 'state of good repair' and create objective standards for measuring the condition of capital assets, including equipment, rolling stock, infrastructure, and facilities."[604]

XXXI. OCCUPATIONAL SAFETY AND HEALTH ACT 692

A. Introduction 692

FRA has issued a policy statement describing when the FRA, DOT, or OSHA have sole or concurrent jurisdiction over the occupational safety and health of railroad employees.

Statutes and Regulations **693**

B. Occupational Safety and Health Act and Its Territorial Scope 693

The Occupational Safety and Health Act does not supersede or affect any workmen's compensation law.[605]

C. Occupational Safety and Health Standards and Their Applicability 694

The Code of Federal Regulations provides that "[n]one of the standards in this part shall apply to working conditions of employees with respect to which Federal agencies other than the Department of Labor…exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."[606]

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[603] FTA MAP-21 Summary, *supra* note 597, at 3; *see* 49 U.S.C. §§ 5337(a)(1)(A)-(E) (2014).

[604] Anita Estell & Christian Washington, *Special Transportation Report: The Moving Ahead for Progress in the 21st Century Act (MAP-21)*, at 50 (discussing MAP-21's amendment of 49 U.S.C. § 5301), available at http://www.polsinelli.com/~/media/Articles%20by%20Attorneys/Estell_Washington_July2012 (last accessed Mar. 31, 2015). *See* MAP-21 § 20021; 49 U.S.C. § 5329(c)(2014), at 45; FTA MAP-21 Summary, *supra* note 597, at 3.

[605] 29 U.S.C. § 653(a) (2014).

[606] 29 C.F.R. § 1910.5(b) (2014).

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D. FRA Policy Statement on Occupational Safety and Health Standards for Railroads 694

FRA has stated that it will concentrate its efforts on providing regulations that address railroad safety in areas directly related to railroad operations and on "addressing hazardous working conditions in those traditional areas of railroad operations in which [the FRA has] special competence."[607]

E. Facilitating OSHA and FRA Coordination Regarding the Federal Railroad Safety Act and Employee Protection 700

A Memorandum of Agreement (MOA) between FRA, DOT, and OSHA states that "[w]hen an individual notifies FRA of alleged discrimination by a railroad carrier for engaging in conduct protected by 49 U.S.C. 20109, FRA will inform the individual that a personal remedy for discrimination is available through OSHA."[608]

Cases **702**

F. Whether OSHA Regulations Are Preempted in a Specific Case 702

In *Callahan v. National R.R. Passenger Corp.,*[609] involving a worker's negligence action against Amtrak after sustaining permanent bodily injury when he fell from a ladder, the court could find no authority to support Amtrak's argument that FRA had preempted the OSHA regulations that applied to catenary poles and ladders.

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[607] On Mar. 14, 1978, FRA withdrew its notice of a proposed rulemaking on occupational and health standards for railroads. *See* United States Department of Transportation, Federal Railroad Administration, 49 C.F.R. pt. 221, Railroad Occupational Safety and Health Standards; Termination of Rulemaking Proceeding and Issuance of Policy Statement, 43 *Fed. Reg*. 10583 and 10585 (Mar. 14, 1978), available at http://www.orosha.org/pdf/mous/F-1.pdf (last accessed Mar. 31, 2015).

[608] Memorandum of Agreement Between the Federal Railroad Administration, U.S. Department of Transportation, and the Occupational Safety and Health Administration, U.S. Department Of Labor (July 16, 2012), available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=1125 (last accessed Mar. 31, 2015).

[609] 2009 PA Super 132, at *1, 979 A.2d 866, 872 (Pa. Super. Ct. 2009) (*quoting* 29 U.S.C. § 653(b)(1)), *appeal denied*, 2010 Pa. LEXIS 2546 (Pa., Nov. 9, 2010).

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G. Noncompliance with OSHA Regulations May Be Used as Evidence of Employer's Negligence 702

In *CSX Transp., Inc. v. Smith*,[610] the Supreme Court of Georgia held in accordance with FRA's policy statement that "the OSHA stairway regulations in 29 CFR § 1910.24 apply to railroad office buildings."[611]

XXXII. PREEMPTION OF STATE LAWS RELATING TO RAILROADS 704

A. Introduction 704

Because of the railroads' importance to interstate commerce, Congress has enacted numerous statutes that regulate the railroad industry and that preempt state laws in part because of the railroads' difficulty in complying with different laws on the same subject. Section B discusses recent preemption decisions by the federal courts. Sections C and D discuss recent preemption cases decided, respectively, by state courts and the Surface Transportation Board (STB). Section F cross-references this part of the digest to other preemption cases discussed in the digest.

Cases **704**

B. Recent Preemption Decisions by Federal Courts 704

1. Claim for Wrongful Termination Not Preempted by the Railway Safety Act 704

Powell v. Union Pac. R.R. Co.[612] involved Union Pacific's termination of Powell based on Powell's alleged false injury report. Although a federal district court in California held that the Federal Railroad Safety Act preempted Powell's claim under FELA, the Railway Labor Act did not preempt Powell's wrongful termination claim because his cause of action was based on state law, not on a right conferred by a collective bargaining agreement.[613]

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[610] 289 Ga. 903, 717 S.E.2d 209 (Ga. 2011).

[611] *Id.*, 289 Ga. at 906, 717 S.E. at 212.

[612] 864 F. Supp. 2d 949 (E.D. Cal. 2012).

[613] *Id*. at 957–59.

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2. ICCTA Held to Preempt State Antiblocking Statute and Negligence *Per Se* Claim Based on the Statute — 705

In *Elam v. Kansas City S. Ry. Co.,*[614] involving a Mississippi statute regulating the amount of time that a train may occupy a crossing, the Fifth Circuit held that because the state's "antiblocking statute directly attempts to manage KCSR's switching operations," the ICCTA preempted the state statute completely.

3. ICCTA Held Not to Preempt Tort Claims Under State Law Not Involving Railroad Transportation of Passengers or Property or Related Services — 706

In *Emerson v. Kansas City S. Ry. Co.*,[615] the plaintiffs alleged that actions of the Kansas City Southern Railway Co. caused flooding of the plaintiffs' adjacent properties. The Tenth Circuit held that "[t]hese acts (or failures to act) are not instrumentalities 'of any kind related to the movement of passengers or property' or 'services related to that movement'" and remanded the case.[616]

4. ICCTA Held to Preempt Vermont Environmental Land Use Statute Having a Preconstruction Permit Requirement — 708

In *Green Mountain R.R. Corp. v. Vermont*,[617] the Second Circuit held that the ICCTA preempted Vermont's environmental land use statute, Act 250, Vt. Stat. Ann. Tit. 10, § 601, *et seq*., as applied to the railroad's proposed transloading facilities. The court held that the ICCTA preempted Act 250 because its "pre-construction permit requirement…'unduly interfere[s] with interstate commerce.'"[618]

5. ICCTA Preempted a City Ordinance Regulating Transportation of Bulk Materials, Including Ethanol — 709

In *Norfolk S. Ry Co. v. City of Alexandria,*[619] after the city amended its ordinance to prohibit the transportation of bulk materials on its streets, including ethanol, the Fourth Circuit

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[614] 635 F.3d 796, 807 (5th Cir. 2011).

[615] 503 F.3d 1126 (10th Cir. 2007).

[616] *Id*. at 1130 (citation omitted).

[617] 404 F.3d 638 (2d Cir. 2005).

[618] *Id*. at 643 (citations omitted).

[619] 608 F.3d 150, 154 (4th Cir. 2010).

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held that the ICCTA preempted the City's bulk materials ordinance as it applied to Norfolk Southern.

6. No Preemption by the ICCTA of State Law on Minimum Track Clearance 709

In *Tyrrell v. Norfolk Southern Railway Co.*,[620] the Sixth Circuit adopted a narrow interpretation of preemption under the ICCTA in rejecting Norfolk Southern's argument that the ICCTA preempted a state law regulating minimum track clearances.

7. No Preemption of State Law on Storm Water Runoff 710

In *MD Mall Associates, LLC v. CSX Transportation, Inc.*,[621] the Third Circuit held that the FRSA's express preemption provision did not apply to MD Mall Associates, LLC's claim in a negligence action against CSX that resulted from a spill of stormwater from CSX property.

8. No Preemption of a State Statute When a Railroad Company Violates a Federal Standard of Care 711

In *Zimmerman v. Norfolk S. Corp.*,[622] the Third Circuit held that Zimmerman's claims against the railroad for excessive speed and failure to maintain a safe crossing area were not preempted.

9. Preemption of State Law on Maximum Allowable Speed 713

In *CSX Transp., Inc. v. Easterwood,*[623] in which the Supreme Court established a broad interpretation of preemption under the FRSA, the Court held that the FRSA preempted virtually all causes of action under state law against railroads regarding railroad safety.

10. Whether the ICCTA Preempts a State Statute Requiring a Railroad to Pay for Sidewalks 714

In *Adrian & Blissfield R.R. v. Village of Blissfield*,[624] the Sixth Circuit held that the ICCTA did not preempt a Michigan statute that required a railroad to pay for a pedestrian

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[620] 248 F.3d 517, 525 (6th Cir. 2001).

[621] 715 F.3d 479, 496, 497 (3d Cir. 2013), *cert. denied,* CSX Transp., Inc. v. MD Mall Assocs., LLC, 2014 U.S. LEXIS 530 (U.S., Jan. 13, 2014).

[622] 706 F.3d 170, 188 (3d Cir. Pa. 2013), *cert. denied*, 134 S. Ct. 154, 187 L. Ed. 2d 41 (2013).

[623] 507 U.S. 658, 664, 113 S. Ct. 1732, 1737, 123 L. Ed. 2d 387 (1993), *superseded by statute as stated in* Garza v. Norfolk Southern Ry. Co., 2012 U.S. Dist. LEXIS 123011, at *1 (N.D. Ohio July 23, 2012).

[624] 550 F.3d 533 (6th Cir. 2008).

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crossing installed by a village across a railroad company's tracks and sidewalks near the railroad's property.[625]

C. Recent Preemption Decisions by State Courts 715

1. ICCTA Preempted Local Model Flood Plain Management Ordinance as Applied to Railroads 715

In *Village of Big Lake v. BNSF Ry. Co., Inc.*,[626] the village complained that BNSF and the Missouri Highways and Transportation Commission violated the village's Model Floodplain Management Ordinance. A Missouri appellate court held that "[t]he Ordinance and statute at issue…fall into the two broad categories of state and local actions that are categorically preempted by the ICCTA."[627]

2. ICCTA Held to Preempt Oregon Statute that Prohibited Trains from Blocking Railroad-Highway Grade Crossings for More than 10 Minutes 716

In 2009 in *Burlington N. & Santa Fe Ry. Co. v. Dep't of Transportation,*[628] involving a state statute that generally prohibited trains from blocking railroad–highway grade crossings for more than 10 minutes, the Oregon Court of Appeals held that the Oregon law was by its express terms an "'operating rule' and a 'regulation of rail transportation.'"[629]

3. ICCTA Held to Preempt Railroad's Breach of Contract Action for Use of Plaintiff's Railroad Cars on the Defendants' Railroad Lines 716

At issue in *San Luis Central Railroad Co. v. Springfield Terminal Railway Co.*[630] were state-law claims, including one for the defendants' breach of an agreement for the use of the plaintiff's railroad cars on the defendants' railroad lines. A federal district court in Massachusetts held that the state law was preempted because the agreement "has regulatory force and receives continued regulatory oversight."[631]

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[625] *Id*. at 535, 537 (*citing* MICH. COMP. LAWS S 462.309).

[626] 382 S.W.3d 125 (Mo. App. 2012).

[627] *Id*. at 130 (citation omitted).

[628] 227 Or. App. 468, 206 P.3d 261 (2009), *review denied*, 347 Or. 446 (2009).

[629] *Id*., 227 Or. App. at 474, 206 P.3d 264 (*quoting* Friberg v. Kansas City Southern Ry. Co., 267 F.3d 439, 443 (5th Cir. 2001) (*citing* 49 U.S.C. § 10501(b))).

[630] 369 F. Supp. 2d 172 (D. Mass. 2005).

[631] *Id*. at 176.

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4. No Preemption of a State Statute on Eminent Domain that Does Not Regulate Railroad Transportation **717**

In *Norfolk Southern. Ry. Co. v. Intermodal Props., L.L.C.,*[632] after Intermodal rejected several offers by Norfolk Southern to purchase Intermodal's property, Norfolk Southern sought to acquire the property through eminent domain. The state court held that the ICCTA did not preempt New Jersey's eminent domain statute because the statute did "not constitute the regulation of railroad transportation."[633]

5. State Claims for Damages Not Preempted for Breach of Contract or Breach of a Covenant Granting an Easement **718**

In *PCS Phosphate Co. v. Norfolk Southern Corp*.,[634] the Fourth Circuit held that the ICCTA presumptively does not apply to voluntary agreements between private parties and does not expressly preempt claims for breach of contract or breach of a covenant granting an easement.

D. Recent ICCTA Preemption Decisions by the STB **719**

1. ICCTA Preemption of Local Permitting or Preclearance Requirements **719**

In *Grafton and Upton Railroad Company*,[635] the town of Grafton, Massachusetts, issued a cease and desist order against the construction of a new facility to transfer propane received by tank cars to trucks for delivery. The STB ruled that the local permitting or preclearance requirements were preempted because the facility would constitute transportation by rail carrier.[636]

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[632] 424 N.J. Super. 106, 35 A.3d 726 (App. Div. 2012).

[633] *Id*., 424 N.J. Super. at 128, 35 A.3d at 739 (*citing* N.J. STAT. ANN. § 48:12-35.1).

[634] 559 F.3d 212, 217–219 (4th Cir. 2009).

[635] *Grafton & Upton Railroad Co.–Pet. for Declaratory Order,* FD 35752, slip op. at 2 (STB served Sept. 19, 2014), available at http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/F9E35D4FF5F63EFF85257D58004A446A/$file/43910.pdf (last accessed Mar. 31, 2015).

[636] *Id*. at 8.

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2. ICCTA Preemption of Local Zoning Ordinance and Order 721

In *Boston and Maine Corporation and Springfield Terminal Railroad Company*,[637] a zoning board directed all railroad traffic to a warehouse to cease and desist. The STB granted the petitioner's request for a declaratory order allowing the continuation of the freight rail transportation to the warehouse because the Town's actions were "plainly preempted by § 10501(b) [of the ICCTA]."[638]

3. Preemption of State Tort Claims Arising out of Railroad's Action Allegedly Causing Flooding of Adjacent Property 722

In *Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust and Individually, and Dana Lynn Tubbs, Trustee of the Dana Lynn Tubbs Revocable Trust and Individually*,[639] the board concluded that the petitioners' state law claims were preempted under the ICCTA; however, the petitioners' claims that BNSF violated certain federal regulations issued under the Federal Railroad Safety Act regarding drainage under railroad tracks were not preempted under the ICCTA.

E. Preemption Cases Summarized Elsewhere in the Digest 724

This subpart of the digest cross-references to preemption cases that are discussed in other parts of the digest.

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[637] *Boston & Maine Corp.–Pet. for Declaratory Order*, FD 35749 (STB served July 19, 2013), available at http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/43B8F53F6BF4C92185257BAD006B2D2C/$file/43203.pdf (last accessed Mar. 31, 2015).

[638] *Id.* at 4.

[639] *Thomas Tubbs–Pet. for Declaratory Order,* FD 35792, slip op. at 7 (STB served Oct. 29, 2014), available at http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/2C4E7A01A148E0A385257D8200477BE9/$file/43738.pdf (last accessed Mar. 31, 2015).

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XXXIII. PUBLIC SERVICE COMMISSIONS 730

A. Introduction 730

Although states have established Public Service Commissions (PSC), PUC, or the equivalent to regulate public service corporations, the state commissions' duties are more limited with respect to railroads because of federal preemption.[640] Nevertheless, as discussed in Section B, states may participate in the investigation and enforcement of federal railroad safety laws and regulations. Sections C through H discuss some of the state commissions. Section I analyzes whether a PUC or the STB has jurisdiction over the installation of new railroad bridges prior to charging railroads for their construction. Section J discusses a case in which it was held that a PUC may not authorize a change in audible devices that is contrary to federal statutory authority.

Statutes and Regulations **731**

B. State Enforcement of Federal Railroad Safety Regulations 731

The federal government offers states through FRA the opportunity to participate in federal investigative and enforcement activities in accordance with the standards and procedures for participation in 49 U.S.C. part 212.

C. California Public Utilities Commission 732

The California Public Utilities Commission must consent before any road may be built across any railroad track, and a railroad company must receive the Commission's consent to construct a railroad track across any road.[641]

D. Florida Public Service Commission 733

When the railroad industry was deregulated in 1985, the Florida Public Service Commission ceased having jurisdiction over railroads.[642]

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[640] Interstate Commerce Commission Termination Act of 1995 (ICCTA), PL 104–88, 109 Stat. 803 (codified as amended in scattered sections of Title 49 of the United States Code); Hazardous Materials Safety Act (HMSA), Pub. L. No. 93-633, 88 Stat. 2156 (Jan. 3, 1975) (codified as amended at 49 U.S.C. §§ 5101–5128 (2014)); and the Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 (Oct. 16, 1970) (codified as amended at 49 U.S.C. §§ 20101–21311 (2014)).

[641] CAL. PUB. UTIL. CODE § 1201 (2014).

[642] Florida Public Service Commission, available at http://www.floridapsc.com/about/history.aspx (last accessed Mar. 31, 2015).

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E. Illinois Commerce Commission 733

The ICC, which supervises all public utilities in Illinois, including transportation, has jurisdiction to enforce and administer laws establishing general safety requirements for railroad tracks, facilities, and equipment in Illinois.[643] No public roads may be built across a railroad track, nor may a railroad track be constructed across a public road, without the ICC's prior permission.[644]

F. North Dakota State Public Service Commission 734

The North Dakota State Public Service Commission has jurisdiction over the rights of landowners in North Dakota, such as fencing along railroad rights-of-way, the sale of land adjacent to abandoned railroad rights-of-way, and leasing rates on property owned by railroads.[645]

G. West Virginia Public Service Commission 735

The West Virginia Public Service Commission's railroad safety section in the transportation enforcement division is responsible for administering federal and state safety regulations that govern rail transportation.[646]

H. Wisconsin Public Service Commission 736

The Public Service Commission of Wisconsin retains jurisdiction to enforce federal regulations that apply to railroad services, to conduct fact-finding investigations on railroad practices, and to represent the interests of the state and its residents before the STB.[647]

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643 220 ILL. COMP. STAT. 5/4-101 (2014). *See* Illinois Commerce Commission, available at http://www.icc.illinois.gov/railroad/ (last accessed Mar. 31, 2015).

644 625 ILL. COMP. STAT. 5/18c-7401(3) (2014).

645 North Dakota Public Service Commission, Jurisdiction: Railroad, available at http://www.psc.nd.gov/jurisdiction/railroad/index.php (last accessed Mar. 31, 2015). *See* N.D. CENT. CODE, §§ 49-09-04, 49-09-04.1, 49-09-11, and 49-11-24 (2014).

646 Public Service Commission of West Virginia, Transportation Administration Division, available at: http://www.psc.state.wv.us/div/trans.htm (last accessed Mar. 31, 2015). *See* W. VA. CODE §§ 24-2-1 and 24-2-1a (2014).

647 Public Service Commission of Wisconsin, PSC Overview, available at http://psc.wi.gov/aboutUs/organization/PSCoverview.htm (last accessed Mar. 31, 2015). *See* WIS. STAT. § 196.02(1) (2014).

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Cases **737**

I. Whether a PUC or the STB Has Jurisdiction over the Installation of New Railroad Bridges Prior to Charging Railroads for Their Construction 737

In *Union Pacific R.R. Co. v. City of Des Plaines*,[648] Union Pacific refused to pay two-thirds of the cost of two new bridges because they were part of a highway project. A federal district court in Illinois held that the ICC would have to determine whether a local safety or security hazard was present before determining whether Union Pacific could be required to pay for the bridges.

J. Whether a PUC May Authorize a Change in Audible Devices that Are Contrary to Federal Law 738

In *BNSF Railway Co. v. Public Utility Commission*,[649] a California appellate court set aside the CPUC's decision that it had jurisdiction to consider approving the use of wayside horns in lieu of locomotive-mounted horns.

XXXIV. QUIET ZONES 740

A. Introduction 740

State laws that are not preempted may regulate the use of locomotive horns outside federal quiet zones. Sections B through D, respectively, discuss federal law on the use of audible warnings at highway–rail grade crossings, exceptions to the use of a locomotive horn, and minimum requirements for the establishment of quiet zones. Section E discusses state laws relating to quiet zones. Sections F and G analyze cases on the use of audible warning devices outside federal quiet zones and on whether state administrative procedures are preempted. Section H discusses guidance that is available on how to establish a quiet zone.

Statutes and Regulations **741**

B. Audible Warnings at Highway–Rail Grade Crossings 741

Federal law provides in part that "the Secretary may…order railroad carriers operating over one or more crossings to cease temporarily the sounding of locomotive horns at such crossings."[650]

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[648] 2003 U.S. Dist. LEXIS 20615, at *1, 6 (N.D. Ill. 2003).

[649] 218 Cal. App.4th 778, 798, 160 Cal. Rptr. 3d 492, 506 (Cal. App. 2013).

[650] 49 U.S.C. § 20153(e) (2014).

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C. Exceptions to the Use of a Locomotive Horn 741

Under certain conditions pursuant to Section 222.33, a railroad company operating over a public highway–rail crossing has discretion not to sound a train's horn except when "active grade crossing warning devices have malfunctioned."[651]

D. Minimum Requirements for a Quiet Zone 741

Section 222.35 of the regulations outlines the minimum requirements for quiet zones; for example, a quiet zone must be at least one-half mile long.[652]

E. State Laws Relating to Quiet Zones 744

States that have enacted statutes with procedures and criteria to establish quiet zones that conform to 49 U.S.C. § 20153 also provide information on the federal and local statutes and regulations that are applicable to quiet zones.[653]

Cases 746

F. California Law Regulating the Use of Audible Warning Devices Outside of Federal Quiet Zones 746

In *BNSF Railway Company v. Public Utilities Commission*,[654] a California appellate court stated that federal regulations required an audible warning device to be mounted on a locomotive; therefore, an audible device mounted at a crossing did not comply with 49 C.F.R. § 222.21.

G. Preemption and Administrative Procedures 747

In *BNSF Railway Company v. Arizona Corporation Commission*,[655] the Arizona Court of Appeals held that the Arizona Corporation Commission's action "to investigate and approve or deny installation of modifications to crossings" was an administrative procedure that "fit []

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[651] 49 C.F.R. §§ 222.33(a) and (b) (2014).

[652] 49 C.F.R. §§ 222.35 and 222.35(a)(1)(i) (2014).

[653] *See, e.g.*, Quiet Zones, Cal. Pub. Utilities Comm'n, available at http://www.cpuc.ca.gov/PUC/safety/Rail/Crossings/quietzones.htm (last accessed Mar. 31, 2015).

[654] 160 Cal. Rptr. 3d 492, 503 (Cal. Ct. App. 2013).

[655] 268 P.3d 1138 (Ariz. Ct. App. 2012).

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within the preemption exemption"[656] and was "precisely what the federal regulations permit State authorities to do."[657]

Article **748**

H. Guidance on How to Create a Quiet Zone 748

The FRA provides guidance on how to create Quiet Zones, flow charts illustrating the steps that need to be followed, and sample documents and checklists.[658]

XXXV. RAILROAD RETIREMENT AND DISABILITY EARNINGS ACT 749

A. Introduction 749

In 1934, Congress enacted legislation for the regulation of railroad employees' pensions.[659] In 1937, Congress enacted the Railroad Retirement Program.[660] The Railroad Unemployment Insurance Act (RUIA), which replaces state unemployment taxes and arrangements for railroad employees, is discussed in Part XXXVII. Sections B and C discuss the Railroad Retirement Act of 1974 (RRA) and the amendments to the Act, as well as the Railroad Retirement Solvency Act of 1983, the Railroad Retirement and Survivors' Improvement Act of 2001, and ARRA. Section D explains some of the key provisions of the RRA. Sections E through K discuss disability benefits; the effect, if any, of retirement benefits on claims for damages; and other issues. Sections L and M summarize articles on the collateral source rule and on the Railroad Retirement Tax Act and the role of the Railroad Retirement Board.

Statutes **750**

B. Railroad Retirement Act of 1974 750

The RRA sets forth the framework currently used for railroad retirement. The 1974 Act divided benefits into two tiers: Tier I, similar to the annuity benefits provided by Social Security, and Tier II, similar to private pension plans with more benefits.[661]

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[656] *Id.* at 1145.

[657] *Id.* at 1146.

[658] United States Dep't of Transp., Federal Railroad Administration, How to Create a Quiet Zone (Sept. 27, 2012), available at http://www.fra.dot.gov/eLib/details/L03055 (last accessed Mar. 31, 2015). See link for downloading a PDF document for the referenced guidance.

[659] U.S. Comm. on Ways & Means, "Earned Entitlements for Railroad Employees–Legislative History," Green Book (2011), available at http://greenbook.waysandmeans.house.gov/2011-green-book/chapter-5-earned-entitlements-for-railroad-employees/railroad-retirement-legislative (last accessed Mar. 31, 2015).

[660] *Id.*

[661] 45 U.S.C. §§ 231–31v (2014).

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C. Amendments to the 1974 Act 751

1. Railroad Retirement Solvency Act of 1983 751

The Railroad Retirement Solvency Act of 1983 instituted measures to increase the financial stability of the program, such as increasing payroll taxes, subjecting Tier II benefits to federal income taxes the same as private pensions, and instituting a 5-month waiting period for disability benefits.[662]

2. Railroad Retirement and Survivors' Improvement Act of 2001 751

In 2001, Congress modified railroad retirement benefits and financing with the Railroad Retirement and Survivors' Improvement Act (RRSIA). For example, the RRSIA provides full Tier I and II benefits to employees (and their spouses) who retire after the age of 60 after completing at least 30 years of railroad service.[663]

3. American Recovery and Reinvestment Act of 2009 752

ARRA[664] included railroad retirement beneficiaries in its one-time economic recovery payments;[665] for example, extending the length of the maximum time that railroad workers could receive unemployment benefits.[666]

D. Key Provisions of the Railroad Retirement Act 753

1. Definition of Employer 753

Section 231(a) of the RRA defines an employer to include, for instance, "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle

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[662] Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, 97 Stat. 411, 45 U.S.C. §§ 231–231f, 231f-1, 231m, 231n, 231n-1, 231u, and 231v (1983).

[663] Railroad Retirement and Survivors' Improvement Act of 2001, Pub. L. No. 107-90, 115 Stat. 878, 45 U.S.C. §§ 231a–31f, 231n, 231n-1, 231q, 231r, 231u, and 231v (2001). *See* U.S. Comm. on Ways & Means, *Earned Entitlements for Railroad Employees–Legislative Histor*y, Green Book (2011), available at http://greenbook.waysandmeans.house.gov/2011-green-book/chapter-5-earned-entitlements-for-railroad-employees/railroad-retirement-legislative (last accessed Mar. 31, 2015), hereinafter referred to as "Earned Entitlements for Railroad Employees–Legislative History."

[664] Pub. L. No. 111-5, 123 Stat. 115 (2009).

[665] Earned Entitlements for Railroad Employees–Legislative History, *supra* note 663.

[666] *Id*.

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IV of title 49"[667] and "any railway labor organization, national in scope, which has been or may be organized in accordance with the provisions of the Railway Labor Act, as amended."[668]

2. Definition of Employee 753

Under Section 231(b) of the RRA, an employee includes "any individual in the service of one or more employers for compensation"[669] and "any individual who is in the employment relation to one or more employers,"[670] as well as other categories set forth in the statute.[671]

3. Eligibility Requirements for an Annuity 753

Under Section 231a(a) of the RRA, an employee generally qualifies for an annuity. For example, when the employee has worked for a railroad for 10 years and reached the age of retirement under the Social Security Act or has worked for 30 years and reached the age of 60.[672]

4. Supplemental Annuity 754

Under 45 U.S.C. § 231a(b) of the RRA, a supplemental annuity is payable when a railroad employee is 60 years of age and has worked in the industry for at least 30 years or is age 65; has worked in the railroad industry for at least 25 years; is eligible to receive an annuity under § 231(a)(1); was connected to the railroad industry at the time the annuity began to accrue; and "performed compensated service in at least one month prior to October 1, 1981."[673]

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[667] 45 U.S.C. § 231(a)(1)(i) (2014).

[668] 45 U.S.C. § 231(a)(v) (2014).

[669] 45 U.S.C. § 231(b)(1)(i) (2014).

[670] 45 U.S.C. § 231(b)(1)(ii) (2014).

[671] 45 U.S.C. § 231(b) (2014).

[672] 45 U.S.C. §§ 231a(a)(1)(i) and (ii) (2014).

[673] 45 U.S.C. § 231a(b) (2014).

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5. Other Individuals Who Are Eligible for an Annuity 755

Other provisions of the RRA provide for an annuity for spouses,[674] surviving widows and widowers,[675] children,[676] and others.[677]

6. Computation of an Annuity 755

Section 231b of the RRA governs the computation of an annuity. The amount of the annuity is usually equal to the old-age insurance benefit or disability benefit for which the employee would be eligible under Social Security.[678]

7. Railroad Retirement Board 755

The RRA is administered by the Railroad Retirement Board (RRB or Board).[679]

8. Judicial Review 755

Decisions of the RRB "determining the rights or liabilities of any person under this subchapter shall be subject to judicial review in the same manner…as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act [45 U.S.C. 351 *et seq*.]."[680]

E. Disability Benefits 756

The Board has the authority to determine the physical and mental conditions for which employees may be disqualified to work in the several occupations in the railroad industry. Regulations regarding the Board's determination of a disability under the RRA are set forth in 20 C.F.R. §§ 220.1–220.187.

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[674] 45 U.S.C. § 231a(c) (2014).

[675] 45 U.S.C. §§ 231a(d)(i) and (ii) (2014).

[676] 45 U.S.C. § 231a(d)(iii) (2014).

[677] *See* 45 U.S.C. §§ 231(e) and (e)(a)(5) (2014).

[678] 45 U.S.C. § 231b(a)(1) (2014).

[679] 45 U.S.C. § 231f(a) (2014).

[680] 45 U.S.C. § 231g (2014).

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Cases 756

F. Effect of Retirement Benefits on Damages 756

In *McCarthy v. Palmer,*[681] involving a railroad employee who sustained injuries working as a trainman, the Second Circuit held that the railroad employer could not use the amounts contributed to the railroad pension system to reduce the damages to which the employee was entitled.

G. Employers Subject to the Railroad Retirement Act 757

In *Herzog Transit Services v. United States Railroad Retirement Board,*[682] the plaintiff Herzog Transit Services (Herzog) contracted with the owners of a railway to operate an interstate commercial rail service and perform dispatching services. The Seventh Circuit upheld a decision of the RRB that Herzog's dispatching services meant that Herzog was a covered employer under the RRA.

H. Effect of Retirement on an Employee's Ability Under FELA to Recover Damages for Lost Future Wages 758

In *CSX Transportation, Inc. v. Miller*,[683] CSX unsuccessfully argued that Miller, a CSX employee who brought a FELA claim for a permanent injury that caused him to retire early, could not because of his retirement recover damages for his loss of future wages. The Supreme Court of Alabama held that the trial court did not err in denying CSX's pre-verdict motion for judgment as a matter of law on Miller's claim for lost wages after March 2003.[684]

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[681] 113 F.2d 721, 723 (2d Cir. 1940), *cert. denied*, 311 U.S. 680, 61 S. Ct. 50, 85 L. Ed. 438 (1940).

[682] 624 F.3d 467, 469 (7th Cir. 2010).

[683] 46 So. 3d 434, 444 (Ala. 2010).

[684] *Id.* at 453–54.

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I. Computation of Disability Benefits 758

The Supreme Court of Montana held in *Bonner v. Railway Employees Mutual Ass'n*[685] that the benefits in § 231(a)(1)(iv) are not measured by an employee's disability.

J. Railroad Retirement Benefits Are a Collateral Source 759

In *Sloas v. CSX Transp. Inc.*,[686] the Fourth Circuit held that Tier II benefits received by railroad workers under the RRA qualify as a collateral source and that the railroad employer's contribution to funds used to pay for the employee's disability benefits could not be used to offset damages in a FELA claim.

K. Admissibility of Evidence of Retirement Benefits in FELA Claims 759

In *Norfolk Southern Railway Co. v. Tiller*,[687] involving a FELA claim for work-related injuries, the Court of Special Appeals of Maryland held that the employee's retirement benefits are a collateral source; thus, the court upheld the trial court's decision not to admit evidence of the employee's eligibility for railroad retirement benefits.[688]

Articles **760**

L. Recourse for Railroads After the *Tiller* Decision 760

An article entitled "Pension Benefits as an Evidentiary Collateral Source" discusses a possible unique application of the collateral source rule after the decision in *Tiller*, *supra*, Part XXXV.K.[689] The authors argue that an expert for the defense "could presumably testify about the percentages of railroad workers with 30 years of railroad experience who retire at ages 60, 61, 62, and 63," as long as the intent is not to "bring pension benefits to the attention of the jury."[690]

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[685] 119 Mont. 63, 170 P.2d 400 (1946) (*cited by* Laird v. Illinois C. G. R. Co., 208 Ill. App. 3d 51, 566 N.E.2d 944, 956 (Ill. App. Ct. 5th Dist. 1991)).

[686] 616 F.3d 380, 392 (4th Cir. 2010).

[687] 179 Md. App. 318, 944 A.2d 1272 (Md. Ct. Sp. App. 2008).

[688] *Id.,* 179 Md. App. at 339–40, 944 A.2d at 1285–86.

[689] Lane B. Hudgins & Thomas R. Ireland, *Pension Benefits as an Evidentiary Collateral Source*, 15 J. LEGAL ECON. 75 (2008).

[690] *Id*. at 78.

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M. Railroad Retirement Tax Act and Role of Railroad Retirement Board 761

According to the Internal Revenue Service (IRS) Railroad Retirement Tax Act Desk Guide,[691] the Railroad Retirement Tax Act (RRTA) is the responsibility of the IRS and the RRB. Railroad employers are subject to a system of employment taxes that is separate from the Federal Insurance Contributions Act and the Federal Unemployment Tax Act that cover "most other employers."[692]

XXXVI. RAILROAD REVITALIZATION AND REGULATORY REFORM ACT AND OTHER RAILROAD TAXATION ISSUES 763

A. Introduction 763

The Railroad Revitalization and Regulatory Act (4R Act) prohibits the imposition of discriminatory taxes on rail carriers at the state level. Section B discusses some of the provisions of the 4R Act. Section C discusses judicial approaches to determining the proper class of property or proper taxpayer to use to compare to railroad property or railroad companies being assessed. Sections D discusses cases involving the scope of § 11501(b)(4) of the 4R Act. Sections F and G, respectively, cover statutes applicable to reorganizing railroads and state taxes that are due and trustees' tax liability for railroads undergoing reorganization. Section H discusses an article on the 4R Act within the context of the Commerce Clause of the U.S. Constitution.

B. The Railroad Revitalization and Regulatory Reform Act 764

Statute **764**

1. Definition of Rail Transportation and of Commercial and Industrial Property 764

The 4R Act defines key terms such as "rail transportation property" and "commercial and industrial property."[693]

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[691] Available at http://www.irs.gov/Businesses/Railroad-Retirement-Tax--Act-%28RRTA%29-Desk-Guide-%28January-2009%29#2 (Jan. 2009) (last accessed Mar. 31, 2015).

[692] *Id*.

[693] 49 U.S.C. § 11501(a)(4) (2014).

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2. The 4R Act's Prohibition on Taxes that Discriminate Against Railroads — 764

Section 11501(b) of the 4R Act describes "acts [that] unreasonably burden and discriminate against interstate commerce" that the 4R Act prohibits.[694] Under subsection (b)(4) of the 4R Act, a state, subdivision of a state, or an authority acting for a state or subdivision of a state may not "[i]mpose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part."[695]

Cases — **765**

C. Judicial Approaches to Determining the Proper Class of a Property or Taxpayer for Comparison to Railroad Property or a Railroad Company — 765

1. The Functional Approach — 765

In *Kansas City S. Ry. Co. v. Koeller,*[696] involving the 4R Act, the Seventh Circuit held that a tax was discriminatory that was applied to railroad property located in a flood zone that was taxed in a manner that differed from other commercial and industrial properties in the same zone.

2. The Competitive Approach — 768

In *Burlington N. Santa Fe Ry. Co. v. Lohman*,[697] the Eighth Circuit stated that under the 4R Act there are two possible classes from which to choose to compare railroad property and the property of other taxpayers: the "competitive mode class" and the commercial and industrial class and that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case."[698]

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694 49 U.S.C. § 11501(b) (2014).

695 49 U.S.C. § 11501(b)(4) (2014).

696 653 F.3d 496, 511 (7th Cir. 2011).

697 193 F.3d 984 (8th Cir. 1999).

698 *Id.* at 986.

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D. Scope of Section 11501(b)(4)'s Prohibition on Discriminatory Taxes **770**

1. Whether State *Ad Valorem* Tax that Exempted Certain Classes of Business Property Applied to Railroad Cars **770**

Dep't of Revenue v. ACF Industries, Inc.[699] involved Oregon's *ad valorem* tax that was imposed on all property except for certain "classes of business personal property [that were] exempt."[700] The Supreme Court held that that "[i]t would be illogical to conclude that Congress, having allowed the State to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)."[701]

2. Whether a State's Exemption of a Railroad's Competitors from the State's Sales Tax Is Discriminatory Under Section 11501(b)(4) of the 4R Act **771**

a. Decision by the Eleventh Circuit **771**

In *CSX Transportation v. Alabama Dep't of Revenue*,[702] the Eleventh Circuit, in ruling that an Alabama diesel fuel tax discriminated against rail carriers, held that rail carriers had to be compared to their competitors that offer freight transportation within the state of Alabama rather than to all taxpayers in the state.

2. Second Reversal and Remand by the Supreme Court **773**

On March 4, 2015, in an opinion by Justice Scalia, the Supreme Court reversed and remanded the case for the second time.[703] The Court agreed with the Eleventh Circuit that "a comparison class of competitors consisting of motor carriers and water carriers was appropriate, and differential treatment vis-à-vis that class would constitute discrimination."[704] However, the Court held that it was improper for the Eleventh Circuit to refuse to consider Alabama's

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[699] 510 U.S. 332, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1993).

[700] *Id.*, 510 U.S. at 335, 114 S. Ct. at 846, 127 L. Ed. 2d at 170.

[701] *Id.*, 510 U.S. at 343, 114 S. Ct. at 849, 127 L. Ed. 2d at 175.

[702] 720 F.3d 863 (11th Cir. 2013), *reversed, remanded,* CSX Transportation, Inc. v. Ala. Dep't of Revenue, 131 S. Ct. 1101, 179 L. Ed. 2d 37 (2011), *reversed and remanded*, Ala. Dep't of Revenue v. CSX Transp., 135 S. Ct. 1136, 191 L. Ed. 2d 113, 2015 U.S. LEXIS 1739 (U.S., Mar. 4, 2015).

[703] Ala. Dep't of Revenue v. CSX Transp., 135 S. Ct. 1136, 191 L. Ed. 2d 113, 2015 U.S. LEXIS 1739, at *1 (U.S., Mar. 4, 2015).

[704] *Id.,* 135 S. Ct. at 1143, 191 L. Ed. 2d at 122, 2015 U.S. LEXIS 1739, at *14.

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alternative tax justifications.[705] The Court remanded the case for "that court to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption."[706]

E. Privately Owned, Unaffiliated Companies Are Not Protected by the 4R Act 774

In *Midwest Railcar Repair, Inc. v. South Dakota Dep't of Revenue & Regulation*,[707] the Eighth Circuit held that entities protected by the 4R Act may include adjuncts or corporate subsidiaries but not "unaffiliated enterprises that merely provide [] railcar repair services."[708]

Statutes 775

F. Reorganizing Railroads Required to Pay Taxes Due to the State 775

Railroads undergoing reorganization due to bankruptcy are barred from withholding taxes owed to any state or political subdivision thereof.[709]

G. Tax Liability for Trustees of Railroads Undergoing Reorganization 776

Although there are exceptions for specific situations, receivers or trustees of railroads undergoing reorganization must pay taxes when the railroad is still being operated as though it were conducted by an individual or corporation.[710]

Article 776

H. The 4R Act Within the Context of the Commerce Clause 776

An article in the *Michigan State Law Review* argues that Congress acts "outside the scope of [its broad] power when it preempts a state tax that does not reflect economic protectionism," but concludes that Congress's treatment of railroads under the 4R Act is more consistent with the

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[705] *Id.,* 135 S. Ct. at 1143–44, 191 L. Ed. 2d at 122–23, 2015 U.S. LEXIS 1739, at *15, 16.

[706] *Id.,* 135 S. Ct. at 1144, 191 L. Ed. 2d at 123, 2015 U.S. LEXIS 1739, at *16.

[707] 659 F.3d 664 (8th Cir. 2011).

[708] *Id.* at 670.

[709] 45 U.S.C. § 794(a) (2014).

[710] *See* 28 U.S.C. § 960(a) (2014); Lyford v. New York, 140 F.2d 840 (2d Cir. 1944).

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historic application of the Commerce Clause rather than an unjustified usurpation of state power.[711]

XXXVII. RAILROAD UNEMPLOYMENT INSURANCE ACT 778

A. Introduction 778

The RUIA is an unemployment and sickness insurance benefit program for railroad workers.[712] The RRB collects the taxes for and administers the RUIA.[713] Section B discusses the RUIA and benefits payable under the Act. Sections C through G discuss what constitutes an employer under the Act; whether an employee's receipt of severance pay disqualifies the employee from receiving RUIA benefits, whether an employee who refuses to return to work may receive benefits, and other issues. Sections H and I discuss two articles, one on the history of railroad unemployment insurance and the other on trends in railroad unemployment insurance.

Statutes and Regulations **779**

B. Railroad Unemployment Insurance Act 779

1. Benefits Under the RUIA 779

Under the RUIA any qualified employee who has been unemployed for over 4 days in a registration period is entitled to receive benefits.[714] However, if an employee's unemployment is because of a strike, the employee is not entitled to benefits for the first 14 days of unemployment.[715]

2. Qualified Employees and Willingness to Work Under the RUIA 779

The subpart discusses when an employee qualifies for coverage[716] and also that an employee may receive benefits for unemployment only if the employee is willing to work.[717]

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[711] Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 46 (2012).

[712] IRS RRTA Desk Guide, available at http://www.irs.gov/Businesses/Railroad-Retirement-Tax--Act-%28RRTA%29-Desk-Guide-%28January-2009%29#2 (last accessed Mar. 31, 2015).

[713] *Id*.

[714] 45 U.S.C. § 352(a)(1)(A) (2014).

[715] *Id*.

[716] 20 C.F.R. § 302.3(a) (2014).

[717] 20 C.F.R. § 327.1 (2014).

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Cases **780**

C. Whether a Company Acting as a Dispatcher Is an Employer Under the RUIA **780**

In *Herzog Transit Servs., Inc. v. U.S. R.R. Ret. Bd.*,[718] the Seventh Circuit upheld the STB's decision that because the role of Herzog Transit Services, Inc., (Herzog) as a dispatcher was integral to the operation of intrastate trains, Herzog was a rail carrier under the statute. The court identified factors to be considered in making such a determination, including the purpose of the company, the ratio of carrier business to other business, and the nature of the carrier business separate from other activities.[719]

D. The Receipt of Severance Pay Bars an Employee from Receiving Benefits Under the RUIA **781**

In *Hudspeth v. Railroad Retirement Board*,[720] the Eighth Circuit affirmed the Board's ruling that the severance pay the employee had received was a separation allowance that barred her from receiving other benefits.

E. Unemployment Benefits Unavailable to Workers Who Refuse to Return to Work **782**

In *Cobb v. Retirement Railroad Board,*[721] involving Cobb's failure to return, the Fifth Circuit affirmed the Board's decision in rejecting Cobb's argument that he could "condition [] the 'acceptance' of his restoration to seniority on" receiving back pay.[722]

F. Employee May Not Receive Benefits for Unemployment or Sickness While Also Collecting a Social Insurance Benefit **783**

As confirmed by the Second Circuit in *Kaiser v. Railroad Retirement Board,*[723] the RUIA prohibits providing unemployment or sickness benefits to an individual who is receiving any social insurance benefits under state or federal law.

[718] 624 F.3d 467 (7th Cir. 2010).

[719] *Id.* at 476.

[720] 73 F. Appx. 191, 192 (8th Cir. 2003).

[721] 431 F.2d 406 (5th Cir. 1970).

[722] *Id*. at 408.

[723] 264 F.2d 684, 687 (2d Cir. 1959).

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G. Recovery of Overpayments to Recipients Under the Railroad Retirement Act and the Social Security Act Are Limited to 50 Percent of the Overpayment — 783

In *Linquist v. Bowen*,[724] at issue were the plaintiff Linquist's receipt of survivor benefits under the RRA and benefits under the Social Security Act (SSA) for her own work and plaintiff Burns' receipt of primary benefits under the SSA and survivor benefits under the RRA. A federal district court in Missouri held in part that there should be coordination to ensure that beneficiaries "lose no more than $1 of benefits for each $2 of excess earnings."[725]

Articles — 785

H. History of Railroad Unemployment Benefits — 785

An article in the *Yale Law Journal* that describes the history of railroad unemployment insurance and the RUIA also explains why the Act was enacted separately from the SSA or other unemployment insurance acts at the time.[726]

I. Trends in Railroad Unemployment Insurance — 786

An article in the *Monthly Labor Review* that summarizes trends in the railroad unemployment insurance program states that the decline in railroad employment has led to more railroad employees' benefits under the RUIA.[727] The article argues that in most instances railroad workers benefit more under the RUIA than they would have under a state plan.[728]

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[724] 633 F. Supp. 846 (W.D. Mo. 1986), *aff'd*, 813 F.2d 884 (8th Cir. Mo. 1987); *cert. denied*, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed. 2d 247 (1988); *but see* Action Alliance of Senior Citizens v. Leavitt, 483 F.3d 852 (D.C. Cir. 2007).

[725] *Id*. at 866.

[726] Edwin E. Witte, *Development of Unemployment Insurance*, 55 YALE L. J. 21 (1945).

[727] Martha F. Riche, *Railroad Unemployment Insurance: Designed to Meet the Special Circumstances of Railroad Employment, the RUI System Provides Some Interesting Contrasts with the State Plans*, 90 MONTHLY LAV. REV. 9, 10 (1967).

[728] *Id.* at 13, 14.

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XXXVIII. STATE LAWS AND REGULATIONS ON RAILROADS 788

A. Introduction 788

The regulation of railroads is governed by federal and state statutes. Section B discusses some of the state laws that apply to railroads in states such as California, Illinois, New York, New Jersey, and Wisconsin. Section C discusses miscellaneous state laws affecting railroads. Section D provides the name of and citation to railroad and related statutes in the 10 largest or most populous states.

Statutes **788**

B. State Statutes Applicable to Railroads 788

1. California 788

California regulates corporations and persons that "own, operate, control, or manage a line, plant, or system for the transportation of people or property."[729]

a. California State Constitution 788

California's Constitution states that railroads are subject to regulation by the state legislature.[730]

b. California Public Utilities Code 789

California requires that when railroad tracks intersect with other railroad tracks, "the rails of either or each road shall be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible";[731] that railroad companies are required to fence their tracks and property to prevent injury to domestic animals;[732] and that rail facilities that handle hazardous cargo must be designed for such storage and have adequate security.[733]

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[729] 53 *Cal. Jur.*, Railroad § 7 (2014).

[730] CAL. CONST. art. XII, § 3 (2014).

[731] CAL. PUB UTIL. CODE § 7535 (2014).

[732] CAL. PUB UTIL. CODE § 7626 (2014).

[733] CAL. PUB UTIL. CODE § 7665.6 (2014).

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2. Illinois 790

The state of Illinois regulates railroads in Chapter 610 of the Illinois Compiled Statutes; the city of Chicago regulates railroads pursuant to Chapter 9-124 of its municipal code.

a. Formation of a Railroad 790

A railroad corporation may be formed in the state of Illinois when at least five people apply to do so and become authorized to construct and operate a railroad in Illinois,[734] purchase land, and borrow money.[735]

b. Railroad Obstruction Act 791

The Railroad Obstruction Act prohibits a locomotive engineer from willfully and maliciously abandoning a locomotive on a railroad.[736]

c. Railroad Sanitation Act 791

The Railroad Sanitation Act requires railroad owners or operators to provide clean and sanitary rail cars.

d. Railroad Depot Act 791

The Railroad Depot Act requires all railroads in Illinois to build and maintain depots in all towns of 200 or more people where they receive passengers or freight.[737]

3. New York 791

In the state of New York, railroads are regulated by the Railroad Law, the Rapid Transit Law, and the common carrier provisions of the Transportation Law.[738] The New York Business Corporation Law governs railroad corporations that are formed under the Railroad Law.[739]

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[734] 610 ILL. COMP. STAT. 5/1 (2014).

[735] 610 ILL. COMP. STAT. 5/19 (2014).

[736] 610 ILL. COMP. STAT. 95/1 (2014).

[737] 610 ILL. COMP. STAT. 55/1 (2014).

[738] 89 *N.Y. Jur.*, Rail Transportation § 5 (2014).

[739] *Id.*

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a. New York Railroad Law 792

New York requires railroads to construct and maintain fences to prevent farm animals such as sheep, cattle, horses, and pigs from entering the railway.[740] The Railroad Law prohibits railroads from transporting passengers or goods unless the rail carrier has an operable communications system.[741]

b. New York Rapid Transit Law 793

Each city in New York is required to have a board of transportation[742] that "is empowered to operate any railroad acquired, owned, constructed, or provided by such city in accordance with the provisions of [the] law."[743]

c. New York Transportation Law 793

The New York Commissioner of Transportation has jurisdiction over common carriers in the state, including railroads.[744]

4. New Jersey 794

This subpart notes that the Transportation Act of 1966 established the New Jersey Department of Transportation (NJDOT)[745] and summarizes the authority of the New Jersey Commissioner of Transportation.[746]

5. South Dakota 794

South Dakota is an example of a state having statutes that govern the duties and liability of railroad companies with tracks adjacent to private property. South Dakota requires railroads to provide an owner of adjacent land with the materials needed to construct a fence, and, if the landowner has livestock, a railroad must construct a fence to prevent livestock from trespassing on railroad property.[747] A railroad has 45 days to supply materials and construct a fence after it

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[740] N.Y. R.R. LAW § 52 (2014).

[741] N.Y. R.R. LAW § 54-a (2014).

[742] N.Y. RAPID TRANS. LAW § 10a (2014).

[743] N.Y. RAPID TRANS. LAW § 30 (2014).

[744] N.Y. TRANSP. LAW § 80(1) (2014).

[745] N.J. STAT. ANN. § 27:1A-2 (2014).

[746] N.J. STAT. ANN. § 27-1a-5.1a-c (2014).

[747] S.D. CODIFIED LAWS § 49-16A-91 (2014).

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has received notice from a landowner that the landowner has finished a portion of a fence.[748] When a railroad fails to comply with the two aforementioned statutes, the railroad will be liable for the cost of the landowner's materials that are needed to construct a fence and any resulting damages for neglect or refusal to do so.[749]

6. Wisconsin 795

In Wisconsin, the boards of villages are authorized to request railroad companies to apply oil or water to their roadbeds to control dust.[750] Railroads are required to build and maintain fences and cattle guards as well as farm crossings.[751] Wisconsin requires railroad companies to provide certain safety information within 48 hours of applying pesticide to a right-of-way.

C. Railroad and Related Statutes in the 10 Largest or Most Populous States 796

This section provides the name of and a citation to state railroad and related statutes in the 10 most populous states, including some states whose laws were summarized in the preceding subpart.

XXXIX. SURFACE TRANSPORTATION BOARD 802

A. Introduction 802

The STB [752] is the successor to the ICC.[753] Sections B through D summarize the Board's regulatory and adjudicatory powers and discuss its jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of railroad lines; its jurisdiction over rates and classifications; its authority to prescribe rules and practices; and some of the Board's recent decisions. Sections E and F discuss judicial review of STB orders.

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[748] S.D. CODIFIED LAWS § 49-16A-92 (2014).

[749] S.D. CODIFIED LAWS § 49-16A-93 (2014).

[750] WIS. STAT. § 61.44 (2014).

[751] WIS. STAT. § 192.33(1) (2014).

[752] 49 U.S.C. § 701, *et seq.* (2014).

[753] Pub. L. No. 104-88 (Dec. 29, 1995), summary available at Govtrack.us: https://www.govtrack.us/congress/bills/104/hr2539/summary.

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Statutes **802**

B. Surface Transportation Board's Regulatory and Adjudicatory Powers **802**

The STB is an economic regulatory agency created by Congress to resolve issues and disputes concerning railroad rates and service and to review proposed railroad mergers, as well as other matters discussed below.

C. Surface Transportation Board's Jurisdiction **805**

1. STB's Exclusive Jurisdiction over the Construction, Acquisition, Operation, Abandonment, or Discontinuance of Railroad Lines **805**

The STB has exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of railroad lines.[754]

2. Rates, Classifications, Rules, and Practices Prescribed by the STB **806**

The STB has the authority to regulate rates charged by railroads for transportation.[755]

Cases **807**

D. Surface Transportation Board Decisions **807**

1. What Constitutes a Rail Line Subject to the Surface Transportation Board's Jurisdiction? **807**

In *Brotherhood of R.R. Signalmen v. Surface Transp. Bd.*,[756] the District of Columbia Circuit held that the STB's decision to grant the Massachusetts Department of Transportation an exemption regarding its purchase of railroad track and other assets from CSX Transportation, Inc., was reasonable under a *Chevron* analysis as explained further in this subpart of the digest.

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[754] 49 U.S.C. § 10501(b)(2) (2014).

[755] 49 U.S.C. § 10704(a)(1) (2014).

[756] 638 F.3d 807, 813 (D.C. Cir. 2011), *rehearing, en banc, denied*, 2011 U.S. App. LEXIS 26370 (D.C. Cir., May 5, 2011).

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2. Whether a Transload Facility Is Subject to the Surface Transportation Board's Jurisdiction 808

New York & Atl. Ry. Co. v. Surface Transp. Bd.[757] involved transportation by the New York & Atlantic Railway Company to a facility owned by Coastal Distribution, LLC (Coastal). The Second Circuit held that that Coastal was not a rail carrier and, thus, was not subject to the STB's exclusive jurisdiction.[758]

3. No STB Jurisdiction over Proposed Intrastate Passenger Rail Service in Florida 809

In *All Aboard Florida–Operations LLC and All Aboard Florida–Stations–Construction and Operation Exemption–in Miami, Fla. and Orlando, Fla.*,[759] concerning a proposed 230-mi intrastate rail passenger service in Florida, the STB ruled that it had no jurisdiction because the Line, located entirely within the state of Florida, "would not be part of the interstate rail network."[760]

4. Recent Board Decision on an Exemption 811

In *City of Belfast, Maine–Abandonment Exemption–In Belfast, ME*,[761] the STB granted an exemption but "subject to trail use, environmental, and standard employee protective conditions" because the line was only used for intrastate tourist purposes and had not been used for freight services since 1996.[762]

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[757] 635 F.3d 66 (2d Cir. 2011).

[758] *Id*. at 72, 73.

[759] Surface Transportation Board, Docket No. FD 35680, at 1 (Service Date, Dec. 21, 2012).

[760] *Id*.

[761] 2014 STB LEXIS 110, also available at http://www.stb.dot.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/f93f3a565a22df0085257cca004ec643?OpenDocument (last accessed Mar. 31, 2015).

[762] *Id.* at *2.

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5. Railroads Ordered to Provide Weekly Reports 812

In *United States Rail Service Issues*,[763] the STB ordered Canadian Pacific and BNSF to send the STB weekly reports of their fertilizer shipment delivery plans after testimony at a hearing by farmers and agricultural producers that they would not be able to begin planting their spring crops without timely delivery of fertilizer.

6. STB Decision on Demurrage Rules 812

In 2014 the STB adopted final rules that address who may charge demurrage and who is subject to demurrage.[764]

Article 813

7. STB Ruling that the California High-Speed Rail Authority Comes Within the STB's Jurisdiction 813

An online news article discusses a recent STB ruling that the California High-Speed Rail Authority comes within the STB's jurisdiction.[765]

Statute 813

E. Judicial Review of STB Orders 813

Federal law provides that "district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the [STB];" "to enjoin or suspend, in whole or in part, any order of the [STB] for the payment of money or the collection of fines, penalties, and forfeitures;" and "to enjoin or suspend, in whole or in part, a rule, regulation of the [STB]."[766]

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[763] 2014 STB LEXIS 97, at *1, 2, also available at http://www.stb.dot.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/ad4c55d3da22d5e985257cbb006e8cda?OpenDocument (last accessed Mar. 31, 2015).

[764] *Demurrage Liability*, 2014 STB LEXIS 89, also available at http://www.stb.dot.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/a9a5fd9636dd982785257cb7004d8f3f?OpenDocument (last accessed Mar. 31, 2015).

[765] Kathy Hamilton, *Surface Transportation Board Rules Against Rail Authority*, EXAMINER, Apr. 28, 2013, available at http://www.examiner.com/article/surface-transportation-board-rules-against-rail-authority (last accessed Mar. 31, 2015).

[766] 28 U.S.C. §§ 2321 and 1336(a) (2014).

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Case **814**

F. Judicial Denial of a Petition for Review **814**

In *Riffin v. Surface Transp. Bd.*,[767] the District of Columbia Circuit denied a petition to review an STB decision that rejected an "application for a certificate authorizing the acquisition and operation of a small length of industrial railroad track because [the] application refused any obligation to transport 'toxic inhalation hazard' products."[768]

XL. FIREARMS AND OTHER WEAPONS OR DEVICES ON RAILROADS 815

A. Introduction 815

This part of the digest discusses federal, as well as state, laws applicable to firearms and other weapons or devices on railroads. Section B discusses the Firearm Owners' Protection Act and its applicability to rail transportation. Section C addresses Amtrak rules on the possession of firearms and other devices on its trains. Section D summarizes laws that exist in numerous states that prohibit the possession and/or use of firearms and other weapons or devices on or near railroads. Sections E and F discuss cases against railroads involving firearms.

Statutes **815**

B. Applicability of the Firearm Owners' Protection Act to Rail Transportation 815

With certain exceptions applicable to law enforcement, under the Firearm Owners' Protection Act, it is unlawful for any person who is not licensed to deal with firearms or ammunition to ship, transport, or receive any firearm or ammunition in interstate commerce.[769]

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[767] 733 Fed. 3d 340 (D.C. Cir. 2013).

[768] *Id.* at 341.

[769] 18 U.S.C. §§ 922(a)(1)(A)-(B) (2014).

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Regulations **816**

C. Amtrak's Rules on the Possession of Firearms and Other Devices on Trains **816**

1. Prohibition of Firearms and Other Devices **816**

Firearms and/or ammunition are prohibited on board an Amtrak train but may be transported in checked baggage. However, Amtrak prohibits the transportation, for example, of black powder and gunpowder-based ammunition and materials and devices. As discussed in this subpart, there are other items that may not be carried onto trains or be placed in checked baggage, including certain sharp objects.[770]

Article **817**

2. Amtrak Policy Permitting Firearms in Checked Baggage **817**

As explained in an online article, in 2009 Congress allowed Amtrak, a government-owned corporation, to follow the same policy used by airlines concerning persons travelling with firearms.[771]

Statutes **818**

D. State Laws Regulating the Transportation or Use of Weapons Directed Against Railroads **818**

Some states have statutes that regulate the possession, transportation, or use of firearms or other devices on railroads.[772] In addition, some states prohibit firearms and other devices being directed at or near railroads. Section D discusses such laws in Alabama, Arkansas, Arizona, Illinois, Iowa, Florida, Minnesota, Mississippi, Missouri, Montana, New York, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia.

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[770] Amtrak, Prohibited Items, available at http://www.amtrak.com/prohibited-items (last accessed Mar. 31, 2015).

[771] Manikandan Raman, *Amtrak to Allow Guns on Trains*, INTERNATIONAL BUSINESS TIMES (Dec. 1, 2010), available at http://www.ibtimes.com/amtrak-allow-guns-trains-248972 (last accessed Mar. 31, 2015).

[772] National Rifle Association of America, Institute for Legislative Action, *Guide to the Interstate Transportation of Firearms*, available at http://www.nraila.org/gun-laws/articles/2010/guide-to-the-interstate-transportation.aspx (last accessed Mar. 31, 2015).

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Cases **823**

E. Denial of Benefits to a Former Railroad Employee Fired for Carrying a Firearm **823**

Brotherhood's Relief & Comp. Fund v. Rafferty[773] involved the Brotherhood's Relief & Comp. Fund's (the Fund) denial of benefits to a former railroad employee who was terminated because of a willful violation of a railroad policy on firearms. An Alabama appellate court reversed the lower court in holding that the Fund had not acted arbitrarily.[774]

F. Railroad Not Liable When an Employee's Gun Injures Another Employee **824**

In *Cluck v. Union Pac. R. Co.*,[775] a railroad employee was shot accidentally when a pistol discharged as the employee was unloading luggage from a van for the railroad crew. The Supreme Court of Missouri ruled that the employee could not impute liability under FELA to the railroad without showing that the pistol in the luggage was in furtherance of the interests of the employer's business.[776]

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[773] 91 So. 3d 693 (Ala. App. 2011), *reh'g denied,* 2011 Ala. Civ. App. LEXIS 384 (Dec. 9, 2011), *cert. denied*, No. 1110372 (Apr. 6, 2012).

[774] *Id.* at 698.

[775] 367 S.W.3d 25 (Mo. 2012), *reh'g denied* (July 3, 2012), *cert. denied*, 133 S. Ct. 932, 184 L. Ed. 2d 724 (2013).

[776] *Id*. at 27.

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Railroad Legal Issues and Resources

SUMMARIES OF STATUTES, REGULATIONS, CASES, AND ARTICLES

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I. ABANDONMENT OF RAIL LINES OR DISCONTINUANCE OF SERVICE

A. Introduction

Part I of the Report concerns issues arising out of a federal regulatory abandonment of a rail line, that is, an abandonment that is subject to the jurisdiction of the Surface Transportation Board (STB or the Board). Part I, thus, only concerns abandonment of rail lines and federal regulatory issues, whereas part XVII of the Report discusses abandonment of a railroad's easement as a matter of state property law.

Section B discusses the abandonment or discontinuance of a rail line or a portion thereof that is subject to 49 U.S.C. § 10903, *et seq.* and the regulations in 49 C.F.R. § 1152, *et seq*. The STB has exclusive and plenary authority to approve or deny applications submitted by rail carriers for abandonment or discontinuance of rail lines. The STB, created by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), is the successor agency to the Interstate Commerce Commission (ICC).[777] The STB is authorized to exempt rail carriers or classes of rail carriers from statutory provisions when certain criteria are satisfied.

Section C summarizes federal statutes and discusses issues arising out of federal grants of rights of way that the United States made at one time to railroads, the abandonment of federally granted rights of way, and reversionary interests to the rights of way claimed by the federal government, as well as the rights of abutting landowners or municipalities to abandoned federal rights of way.

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[777] Surface Transportation Board, Overview, available at: http://www.stb.dot.gov/stb/about/overview.html (last accessed March 31, 2015).

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Section D discusses the National Trails Systems Act (Trails Act) and the interim use of railroad rights of way for recreational trails pursuant to the Rails-to-Trails amendment to the Trails Act.

Section E analyzes whether and when there is a taking of an abutting landowner's property because of the use of an abandoned rail line as an interim recreational trail and claims against the United States under the Tucker Act for an alleged taking of property under the Rails-to-Trails Act of 1994.[778]

B. Law Applicable to an Abandonment of a Rail Line or a Discontinuance of Rail Service

1. Distinction between Abandonment and Discontinuance

At the outset, it is important to distinguish between two concepts that are frequently referred to by the same term, namely, the term abandonment. In *Mich. Dep't of Natural Res. v. Carmody-Lahti Real Estate, Inc.*[779] the Supreme Court of Michigan distinguished an abandonment from "mere discontinuance of service" as follows: an abandonment "involves relinquishing rail lines and underlying property interests. Discontinuance, on the other hand, 'allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future.'"[780] As stated by the Sixth Circuit, "[a]bandonment consists of 'a permanent or indefinite cessation of rail service, which terminates

[778] *See* 16 U.S.C. § 1247(d) (2014).

[779] 472 Mich. 359, 699 N.W.2d 272 (Mich. 2005).

[780] *Id*., 472 Mich. at 365, 699 N.W.2d at 276 (citations omitted).

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a rail carrier's public service obligation.' … 'An abandoned railroad corridor is one that is no longer used for rail service and is removed from the national transportation system.'"[781]

Statutes and Regulations

2. Procedures Applicable to an Abandonment or Discontinuance

Federal law governs "abandonment of rail lines and discontinuance of rail service by common carriers."[782] When a railroad carrier subject to the jurisdiction of the STB decides to abandon or discontinue any part of a railroad line, the carrier must file an application with the STB.[783]

The statute requires an application to provide certain information, including a summary of the reasons for the abandonment or discontinuance and a detailed description of the line or lines that the railroad company is proposing to abandon or discontinue.[784] Sections 1152.20 through 1152.29 of the Code of Federal Regulations (C.F.R.) furnish details on the procedure for filing an application and the required information.[785] Applications for abandonment or discontinuance must contain, *inter alia*, a detailed map of the rail line to be abandoned or discontinued;[786] a description of the service that the rail carrier provides;[787] a statement of the

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[781] *R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 531 (6th Cir. 2002) (citations omitted) (some internal quotation marks omitted).

[782] *See* 49 U.S.C. §§ 10903-10905; 49 C.F.R. § 1152.1(a) (2014).

[783] 49 U.S.C. § 10903(a)(1) (2014).

[784] 49 U.S.C. §§ 10903(a)(2) and (b)(2) (2014).

[785] 49 C.F.R. §§ 1152.20-1152.29 (2014).

[786] 49 C.F.R. § 1152.22(a)(4) (2014).

[787] 49 C.F.R. § 1152.22(c) (2014).

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impact of the abandonment or discontinuance on the community;[788] an environmental impact statement;[789] and a draft notice for the *Federal Register* regarding the rail line that is to be abandoned or discontinued.[790] When a railroad files an application there are specific methods of notice that the carrier is required by statute to give.[791] Section 10903 also requires that any abandonment or discontinuance of a rail line or lines contain provisions to protect the interests of employees.[792]

Section 1152.50 of the C.F.R allows a rail carrier to submit a notice of class exemption from the procedures in 49 U.S.C. § 10903, *et seq*.[793] The section includes the procedures that a party seeking an exemption must follow, as well as the process that the STB must follow when determining whether to grant or deny an application for an exemption.[794] *See* part I.B.3 below.

The STB has three options when a rail carrier does not qualify for an exemption. First, "if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance," the STB may approve a rail carrier's application to abandon or discontinue certain portions of a line.[795] Second, the Board may approve an application with

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[788] 49 C.F.R. § 1152.22(e) (2014).

[789] 49 C.F.R. § 1152.22(f) (2014).

[790] 49 C.F.R. § 1152.22(i) (2014).

[791] 49 U.S.C. § 10903(a)(3) (2014).

[792] 49 U.S.C. § 10903(b)(2) (2014).

[793] 49 C.F.R. § 1152.50 (2014); 49 U.S.C. § 10502 (2014) (establishing the authority of the STB to exempt rail carriers or certain provisions).

[794] 49 C.F.R. § 1152.50 (2014).

[795] 49 U.S.C. § 10903(d)-(e)(1)(a) (2014).

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modifications.[796] When the Board approves an application with modifications, the Board may set conditions that it finds are required by public convenience and necessity with which the rail carrier must comply.[797] Furthermore, "[i]f the Board finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board."[798] Finally, the Board may deny outright an application if it fails to "find[] that the present or future public convenience and necessity require or permit the abandonment or discontinuance."[799] When the Board determines that present or future public convenience and necessity require or permit the abandonment or discontinuance of a rail line, the Board must consider "whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development."[800]

Within four months of a rail carrier submitting its application to discontinue or abandon a line, any party, including a governmental authority, may offer to provide financial assistance to avoid an abandonment or discontinuance.[801] An offer of financial assistance may be in the form of a subsidy or an offer to purchase the rail line or lines.[802] Under 49 U.S.C. § 10904 a rail carrier must provide to the STB and any parties that offer to provide financial assistance to avoid

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[796] 49 U.S.C. § 10903(e)(1)(B) (2014).

[797] *Id.*

[798] 49 U.S.C. § 10905 (2014).

[799] 49 U.S.C. § 10903(e)(2) (2014).

[800] 49 U.S.C. § 10903(d) (2014).

[801] 49 U.S.C. § 10904(c) (2014).

[802] 49 U.S.C. § 10904(c) (2014).

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the abandonment or discontinuance of a line: (1) an estimate of the subsidy or purchase price needed to keep the rail line operational; (2) current reports on the condition of the rail line or lines to be abandoned or discontinued; (3) all the necessary data (*e.g.* traffic, revenue) to calculate an estimate of the subsidy or purchase price; and (4) any other information that the Board may determine is necessary for an accurate calculation of a subsidy or purchase price.[803] When multiple parties offer financial assistance, a rail carrier may select the party it prefers for the purpose of the transaction.[804]

When a rail carrier and a financially responsible person, including a governmental authority, fail to agree on an amount or the terms of a subsidy or purchase, either part within 30 days after an offer is made may request the STB to establish the conditions and amount of compensation.[805] When an offer of financial assistance is made, the discontinuance or abandonment of a line will be postponed until the rail carrier and the offeror agree on compensation or until the STB on request establishes the conditions and the amount of compensation that are required to keep the rail line from being abandoned or discontinued.[806] The Board is required to establish the conditions and compensation within a 30-day period.[807]

As for proposed subsidies, the statute provides that "the Board shall establish the compensation as the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return

[803] 49 U.S.C. § 10904(b) (2014).

[804] 49 U.S.C. § 10904(f)(3) (2014).

[805] 49 U.S.C. § 10904(e) (2014).

[806] 49 U.S.C. § 10904(d)(2) (2014).

[807] 49 U.S.C. § 10904(f)(1)(A) (2014).

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on the value of the line."[808] A subsidy arrangement entered into between a rail carrier and another party that is approved by the Board shall not "remain in effect for more than one year, unless otherwise mutually agreed by the parties."[809] Furthermore,

> for proposed sales, the Board shall determine the price and other terms of sale, except that in no case shall the Board set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services)….[810]

A party that purchases a line may not transfer or discontinue service for two years from the date of purchase, nor may it transfer the line to another party for five years from the date of purchase.[811]

3. STB's Authority to Exempt a Person, Class of Persons, or a Transaction or Service

As provided in 49 U.S.C. § 10502, the Board

> shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
>
> (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
>
> (2) either—
>
> (A) the transaction or service is of limited scope; or
>
> (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

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[808] 49 U.S.C. § 10904(f)(1)(C) (2014).

[809] 49 U.S.C. § 10904(f)(4)(B) (2014).

[810] 49 U.S.C. § 10904(f)(1)(B) (2014).

[811] 49 U.S.C. § 10904(f)(4)(A) (2014).

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Besides being able to commence a proceeding on its own initiative,[812] the Board is empowered to specify the effective period of an exemption[813] and may revoke an exemption when "necessary to carry out the transportation policy" described in 49 U.S.C. § 10101. Furthermore, an exemption order may not "operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with" 49 U.S.C. § 11706 that is applicable to the liability of rail carriers under receipts and bills of lading.

There are regulations that apply to exemptions. For example, 49 C.F.R. § 1121.1, *et seq.* governs petitions filed under 49 U.S.C. § 10502 to exempt a transaction or service from 49 U.S.C. subtitle IV, or any provision of 49 U.S.C. subtitle IV, or to revoke an exemption previously granted. Section 1121.3 provides in part that

> (a) A party filing a petition for exemption shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time it files its petition.
> (b) A petition must comply with environmental or historic reporting and notice requirements of 49 CFR part 1105, if applicable.
> (c) A party seeking revocation of an exemption or a notice of exemption shall provide all of its supporting information at the time it files its petition. Information later obtained through discovery can be submitted in a supplemental petition pursuant to 49 CFR 1121.2.

It may be noted also that 49 CFR § 1152.50 applies to exempt abandonments and discontinuances of service and trackage rights.

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[812] 49 U.S.C. § 10502(b) (2014).

[813] 49 U.S.C. § 10502(c) (2014).

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Cases

4. Statutory and Common Law Principles for Establishing an Abandonment

In *Avista Corp. v. Wolfe*[814] the Ninth Circuit clarified 43 U.S.C. § 912, discussed also in part C.1 below) and the process for determining whether land is abandoned and when rights vest in the land. In 1958, Pacific Northwest abandoned its right of way to certain land and granted a quitclaim deed to Washington Water and Power to portions of Pacific Northwest's right of way to the land, a deed that Sanders County accepted. In 2004, Sanders County gave a quitclaim deed for Government Lot 5 to the descendants of Arthur and Fanny Hampton. Avista Corp. commenced an action to quiet title and sought a declaratory judgment regarding the ownership of the right of way across Government Lot 5.

The Ninth Circuit held that the Northern Pacific Railroad Company physically abandoned the right of way.[815] The court explained that a determination of whether a railroad has abandoned its right of way is determined based on the plain language of 43 U.S.C. § 912 and common law principles of abandonment: the present intent to abandon and physical acts demonstrating the clear intent to abandon.[816] However, the land could not be conveyed by a quitclaim deed, because Northern Pacific only "held title in the form of a non-conveyable limited fee that reverted in the event that the company ceased to use or retain the land for which it was granted."[817] The Ninth Circuit held that according to the plain language of 43 U.S.C. § 912

[814] 549 F.3d 1239, 1248 (9th Cir. 2008).

[815] *Id*.

[816] *Id*.

[817] *Id*. N 9 (internal quotations omitted).

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declarations of abandonment may not be made retroactively.[818] Therefore, after a right of way is abandoned and a public road is not built within a year of the right of way's abandonment the inchoate interests in the land become vested.[819] The court affirmed the district court's determination that the railroad had abandoned its right of way.[820]

5. Recent Railroad Abandonment Decisions by the STB

a. Request for Exemption under 49 U.S.C. § 10502 from Prior Approval Requirements of 49 U.S.C. § 10903

In *CSX Transp. Inc., - Aban. Exemption – In White County, Ind.*[821] CSX Transportation, Inc. (CSXT) sought "an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon an approximately 9.67-mile rail line in White County, Ind. (the Line)."[822] Monticello Farm Service, Inc. (MFS), the only shipper on the line, opposed the petition primarily because of CSXT's low estimate of future carloads of nitrogen fertilizer that MFS would be receiving.[823] CSXT argued that it was entitled to the exemption process under 49 U.S.C. § 10502 because its costs for the Line greatly exceeded the "total revenues attributable to the Line…."[824]

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[818] *Id*. at 1250.

[819] *Id*. at 1252.

[820] *Id*.

[821] *CSX Transp. Inc., - Aban. Exemption – In White County, Ind.,* EB 43833, Slip Op. (STB served Sept. 19, 2014), available at: http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/15AA5535B36F775E85257D58004CE5AC/$file/43833.pdf (last accessed March 31, 2015).

[822] *Id*. at 1.

[823] *See id*. at 2.

[824] *Id*. at 2-3 (footnote omitted).

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The Board explained that

> [u]nder 49 U.S.C. § 10502 … we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.[825]

Furthermore, abandonment proposals that are subject to the exemption process are those in which "shippers do not contest the abandonment or, if they do contest it, the revenue from the traffic on the line is clearly marginal compared to the cost of operating the line."[826] The problem for CSXT's petition was that there was insufficient evidence to enable the Board to compare the revenue attributable to the Line to the cost of operating it.[827] As amended, CSXT's petition was "unreliable because of miscalculations, unexplained discrepancies, or a lack of supporting evidence" that resulted in too many "unresolved questions."[828] Therefore, the Board could not evaluate the alleged economic burden to continue operating the Line even though there was an active shipper.[829] Although the Board denied the petition, CXST could file an appropriate abandonment application or petition for exemption that cured the "defects" in the current petition.[830]

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[825] *Id*. at 3-4.

[826] *Id*. at 4.

[827] *Id*.

[828] *Id*. at 5, 6.

[829] *Id*. at 1.

[830] *Id*. at 6.

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b. Request to Authorize a Third Party or Adverse Abandonment of a Line

In *Paulsboro Refining Company LLC – Adverse Abandonment – in Gloucester County, N.J.*[831] Paulsboro Refining Company LLC (PRC) requested the Board to authorize the third-party abandonment, referred to as an adverse abandonment, of approximately 5.8 miles of PRC's rail line (the Line) that SMS Rail Service, Inc. (SMS), a Class III railroad, operated for PRC. PRC owned the Line that was within PRC's 970-acre refinery in Paulsboro, N.J.[832] PRC, which was the Line's primary shipper, planned to replace SMS with Savage Services Group (Savage), a noncarrier contract switching operator, pursuant to a private contract.[833] Consolidated Rail Corporation, on behalf of Norfolk Southern Railway Company and CSX Transportation, Inc., identified by the Board as the "Interchange Carriers," took a neutral position on the abandonment other than to request that the Board stay the exercise of any abandonment authority until PRC completed appropriate agreements with the Interchange Carriers.[834]

The Board reiterated the legal standard that it had to apply:

> Under 49 U.S.C. § 10903(d), the standard that applies to any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in a third-party or adverse abandonment context, the Board considers whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests.[835]

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[831] AB 1095 (Sub-No.1), Slip Op. at 1 (STB served Dec. 2, 2014), available at: http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/7A83E1ACF028CC8385257DA200546855/$file/43977.pdf (last accessed March 31, 2015).

[832] *Id*. at 1.

[833] *Id*. at 5.

[834] *Id*. at 7.

[835] *Id*. at 4 (footnote omitted).

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In view of PRC's dispute with SMS, the Board stated that it "does not allow its jurisdiction to be used as a bar to state law remedies in the absence of an overriding federal interest"[836] and that its decision to remove the agency's jurisdiction would enable "the applicant to pursue other legal remedies against the incumbent carrier…."[837] Because there was no present or future need for common carrier service, the Board approved the application. The Board rejected SMS's claims that the abandonment should be denied because federal railroad safety regulations would no longer apply. The Board noted that other federal safety regulations would continue to apply.[838] Based on the Final Environmental Assessment by the Board's Office of Environmental Analysis, the Board stated that no environmental conditions were needed;[839] however, the Board imposed certain "employee protective conditions."[840] The Board also agreed to require SMS to cooperate with PRC and the Interchange Carriers during the transition and ordered that the abandonment authority could be exercised only after all "necessary agreements were in place."[841]

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[836] *Id*.

[837] *Id*. at 5 (footnote omitted).

[838] *Id*.

[839] *Id*. at 6.

[840] *Id*. (*citing Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979)).

[841] *Id*. at 7.

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c. Denial of Petition to Reopen Declaratory Order Proceeding in the Absence of Changed Conditions or New Evidence

In *BNSF Railway Company – Petition for Declaratory Order*[842] the Board followed-up on its 2010 authorization of BNSF to abandon 1.54 miles of a rail line in Oklahoma City, Oklahoma pursuant to 49 U.S.C. § 10903.

In 2005, when the Oklahoma Department of Transportation was planning to relocate Interstate 40 in downtown Oklahoma City, BNSF

> invoked the Board's expedited class exemption procedures under 49 C.F.R. 1152 Subpart F—which are available only for lines that have not had any local traffic for at least two years—to abandon 2.95 miles of its Chickasha Subdivision between milepost 539.96 and milepost 542.91 (…the "Chickasha Line").[843]

Although no shipper objected, a non-shipper Edwin Kessler objected, who claimed that there had been local traffic on the Chickasha Line within the two-year period.[844]

In June 2008, the Board ruled that BNSF's use of the expedited procedure was inappropriate because of the presence of "an undetermined level of local traffic" on the eastern end of the line. Although the Board rejected BNSF's notice of exemption, the Board stated that BNSF could seek to abandon the Chickasha Line by filing either a petition for an individual exemption or a formal abandonment application.[845] Instead, in July 2008 BNSF argued that it was entitled to a declaratory order finding that what BNSF characterized as a relocation of two segments of the Chickasha Line, the eastern and middle segments, did not require the Board's

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[842] *BNSF Railway Company – Petition for Declaratory Order*, FD 35164, Slip Op. at 1 (STB served May 7, 2010), available at: http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/BFDBAEB594ECED188525771B00702699/$file/40399.pdf (last accessed March 31, 2015).

[843] *Id*. at 2.

[844] *Id*.

[845] *Id*.

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prior approval.[846] Although it was asserted that a shipper Boardman, Inc. (Boardman) would be deprived of rail service, Boardman informed the Board that it would be unaffected by BNSF's plans for the middle segment and that in any case BNSF had assured Boardman that it would continue to have access to rail service as needed.[847]

Nevertheless, after the initiation in October 2008 of the declaratory order proceeding, Edwin Kessler's brother, John Kessler (J. Kessler), argued that BNSF's plan for the middle segment would adversely affect Boardman and thus required prior Board authorization.[848] Nevertheless, the Board decided that BNSF's plan for the eastern segment was a relocation that did not require the Board's prior authorization and that the previous and current proceedings demonstrated "ample support" for approval of the abandonment of the middle segment.[849]

In June 2009 J. Kessler filed a petition to reopen BNSF's petition for a declaratory order. J. Kessler argued that that the Board should not have accepted BNSF's explanation of how service would be provided to Boardman.[850] The petition to reopen was not supported by a showing of changed circumstances or by new evidence. The Board determined that Boardman did not currently need rail service, that BNSF would provide rail service when Boardman required it, and that J. Kessler's arguments regarding the absence of future rail service for Boardman were nothing more than speculation.

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846 *Id*.

847 *Id*. at 3

848 *Id*.

849 *Id*. at 4.

850 *Id*.

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In response to another party's arguments that the abandonment exemption should be revoked and that BNSF should be required to prepare an EIS, the Board stated that

> [w]hile abandonments do require environmental review, they generally involve an Environmental Assessment (EA) rather than a full EIS. The Board's Section of Environmental Analysis (SEA) prepared an EA in connection with BNSF's proposed abandonment of the Chickasha Line and the Board made the exemption subject to all 5 of the environmental conditions recommended by SEA.[851]

The Board denied J. Kessler's petition to reopen the declaratory order proceedings.[852]

6. Class Exemption and Relocation

In *Kessler v. Surface Transportation Board,*[853] the STB's decisions having been discussed in the previous part B.5.c, Kessler petitioned the District of Columbia Circuit to review the Board's decision to exempt BNSF, but the court dismissed Kessler's petition.[854] The court held that the STB's decision was not arbitrary or capricious or an abuse of discretion. The Board reasonably relied on BNSF's representations concerning the use of the middle segment of the rail line and the Oklahoma DOT's representations on the need for the highway and its costs.[855] The court explained that it is within the STB's discretion to exempt a rail carrier from abandonment procedures under 49 U.S.C. § 10904 "when the right-of-way to be abandoned is needed for a public purpose and there is no overriding public need for continued rail service."[856] Furthermore, the court agreed with the STB's interpretation of 49 C.F.R. § 1152.50(d)(3) that

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[851] *Id*. at 8 (footnote omitted).

[852] *Id*. at 9.

[853] 635 F.3d 1, 3 (D.C. Cir. 2011).

[854] *Id*. at 8.

[855] *Id*. at 5.

[856] *Id*.

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when an application for an exemption is void *ab initio*, only the rail carrier is prohibited from the use of the exemption.[857] The Board is not prevented from "relying upon any part of the record before it that is not false or misleading or … later, upon a proper showing, granting the rail carrier an individual exemption."[858] The court ultimately denied Kessler's request to review the Board's decision to exempt BNSF from the abandonment procedures in 49 U.S.C. § 10904 and dismissed Kessler's due process claim.[859]

7. Judicial Approval of the Abandonment of a Line of a Railroad Company Reorganizing in Bankruptcy

Normally, the STB must authorize the abandonment of a railroad line, but in the case of a railroad company reorganizing in bankruptcy, a court may authorize an abandonment.[860] An abandonment may be authorized when a court determines either that it is "in the best interest of the estate" or that the abandonment is "essential for the formulation of a plan" and is "consistent with the public interest."[861] However, if the Board's approval is required under a federal statute, the trustee is required to file an application with the Board.[862]

8. STB's Authority in Adverse Abandonment Proceeding and in Involuntary Bankruptcy Proceeding

A bankruptcy case decided by the First Circuit is one of the more recent appellate decisions discussing 49 U.S.C. § 10903 that involved the STB rather than its predecessor the

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[857] *Id*.

[858] *Id*.

[859] *Id*.

[860] 11 U.S.C. § 1170 (2014).

[861] 11 U.S.C. § 1170(a) (2014).

[862] 11 U.S.C. § 1170(b) (2014).

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ICC. The decision in *Howard v. Surface Transportation Board*[863] is relevant because the First Circuit confirmed the power, jurisdiction, and involvement of the Board in deciding whether rail lines may be abandoned, including in bankruptcy proceedings. In 2001, Bangor & Aroostook Railroad Company (BAR) and Canadian National (CN) entered into several agreements regarding the rights to and use of the Madawaska rail line.[864] Several months later, certain creditors brought an involuntary Chapter 11 bankruptcy proceeding against BAR.[865] Part of the bankruptcy plan was an agreement for Montreal, Maine & Atlantic Railway LTD (MM&A) to acquire the Madawaska line and other BAR rail assets from the trustee.[866] The MM&A agreement included a provision that would require MM&A to pay BAR $5 million if BAR successfully removed Canadian National from the Madawaska line prior to January 1, 2005.[867] In bankruptcy court the appointed trustee in bankruptcy attempted to oust Canadian National from the Madawaska rail line.[868] However, the STB denied the trustee's petition filed with the Board to revoke Canadian National's rights in the line.[869] The trustee then asserted that the

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[863] 389 F.3d 259, 267 (1st Cir. 2004).

[864] *Id*. at 261-262 (All the agreements between the two railroad companies were approved by the Board in the same year).

[865] *Id*. at 262.

[866] *Id*.

[867] *Id*.

[868] *Id*. at 262-263.

[869] *Id*.

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Board did not have the final authority and that the bankruptcy court could make a final determination on whether a rail line may be abandoned adversely.[870]

In *Howard*, the First Circuit explained that "[g]enerally, the [Board's] authority over abandonment of rail lines is exclusive and plenary" with the one exception of bankruptcy proceedings.[871] In bankruptcy proceedings the Board plays an important advisory role, but the bankruptcy court has the power to make final determinations.[872] Thus, the court held that "Congress made it clear in enacting 11 U.S.C. § 1170 that it wanted the bankruptcy court, not the STB, to make the final determination of whether a debtor's rail lines could be *abandoned* and the STB to play an advisory role, subject to time constraints."[873]

> Importantly, the STB was not ousted of its exclusive jurisdiction over all matters pertaining to bankrupt railroads. *See* 11 U.S.C. § 1166 … If, for example, the debtor as part of its reorganization plan wanted to "construct an extension to any of its railroad lines," "construct an additional railroad line," or "provide transportation over ... an extended or additional railroad line," it would first have to apply to the STB for a certificate authorizing such activity. *See* 49 U.S.C. § 10901.[874]

The First Circuit differentiated between "abandonment" proceedings and "adverse abandonment" proceedings that are initiated by a third party.[875] The court held that a bankruptcy court has the power to make final determinations in abandonment or discontinuance proceedings but that the Board retains its jurisdiction over "adverse" abandonment or discontinuance

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[870] *Id*. at 263-264.

[871] *Id*. at 268.

[872] *Id*.

[873] *Id*. (emphasis in original).

[874] *Id*.

[875] *Id*. at 270.

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proceedings.[876] Therefore, the First Circuit affirmed the district court's dismissal of the trustee's request for an "order from the bankruptcy court authorizing the discontinuance of CN's trackage rights and the abandonment of CN's easement."[877] The First Circuit further affirmed the STB's order denying the trustee's application for an adverse abandonment and discontinuance.[878]

9. Preemption of Actions in State Court for Damages Caused by Abandonment of a Rail Line

In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*[879] the Supreme Court preempted actions in state court for damages when the STB's predecessor, the ICC, had approved the abandonment or discontinuance of a rail line. The Chicago & N.W. Transportation Co. filed a petition with the ICC to abandon a 5.6 mile rail line between Kalo and Fort Dodge in Iowa.[880] While the petition for abandonment was pending before the ICC, the respondent filed claims for damages in state court.

Although the Court of Appeals of Iowa ruled that federal law did not preempt state abandonment law,[881] the United States Supreme Court held that the ICC had plenary and exclusive power over the abandonment of interstate rail lines and "purely local lines operated by regulated carriers."[882] The Court held "that the Interstate Commerce Act precludes a shipper

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[876] *Id*. at 268, 270-271.

[877] *Id*. at 263, 270.

[878] *Id*. at 271.

[879] 450 U.S. 311, 101 S. Ct. 1124, 67 L. Ed.2d 258 (1981).

[880] *Id*., 450 U.S. at 314-315, 101 S. Ct. at 1128-1129, 67 L. Ed.2d 258.

[881] *Id*., 450 U.S. at 316-317, 101 S. Ct. at 1129-1130, 67 L. Ed.2d 258.

[882] *Id*., 450 U.S. at 320, 101 S. Ct. at 1131-1133, 67 L. Ed.2d 258.

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from pressing a state-court action for damages against a regulated carrier when the [ICC], in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise in state court."[883] The Court reserved "for another day the question whether such a cause of action lies when no application is made to the Commission."[884] The Supreme Court reversed the Iowa Court of Appeals and remanded the case for further proceedings not inconsistent with the Court's opinion.[885]

C. Federal Grants of Rights of Way to Railroads, Abandonment, and Reversionary Rights

Articles

1. Statutes Applicable to Grants of Rights of Way to Railroads by the United States

An article published by the Congressional Research Service provides an analysis of important federal statutes pursuant to which the federal government previously granted rights of way to railroads and on the issue of who owns the property after a railroad abandons the easement or right of way.[886]

The article explains that the 1875 General Railroad Right of Way Act (the 1875 Act)[887] permitted railroads to obtain a 200-foot federal right of way for rail lines across public lands.[888]

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[883] *Id.,* 450 U.S. at 322-323, 101 S. Ct. at 1132-1133, 67 L. Ed.2d 258.

[884] *Id.*

[885] *Id*., 450 U.S. at 332, 101 S. Ct. at 1137, 67 L. Ed.2d 258.

[886] Pamela Baldwin and Aaron M. Flynn, Congressional Research Service, CRS Report for Congress, "Federal Railroad Rights of Way," at 16 (Updated May 3, 2006), available at: http://congressionalresearch.com/RL32140/document.php (last accessed March 31, 2015), hereinafter referred to as "CRS Report for Congress."

[887] 43 U.S.C. § 934 (repealed).

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In 1976 Congress repealed the 1875 Act when it enacted the Federal Land Policy and Management Act (FLPMA).[889] The FLPMA also repealed some laws known as the pre-1871 Acts under which railroads had been granted rights of way. In the Act of 1922,[890] Congress provided that "upon forfeiture or abandonment, the lands granted to any railroad company for use as a right of way for its railroad … would pass to a municipality if the right of way passed through one, or to adjacent landowners, except that a highway could be established within the right of way within one year after the date of a forfeiture or abandonment."[891]

The CRS article states that "Congress has legislated numerous times over the years regarding federal railroad rights of way, as though Congress believed it had continuing authority over their ultimate disposition."[892] Thus,

> [t]he 1922 Act and the report language explaining it reveal an important point that arguably has not received adequate attention. Clearly, Congress believed that it had retained the authority to provide for the disposition of railroad rights of way, whether because Congress continued to hold some traditional property interest, such as a reversionary interest …, or because its retained authority over the termination of the rights granted was an element of the property interests granted.[893]

With the Rails to Trails Act, discussed in parts D and E of the Report, Congress sought

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[888] CRS Report for Congress, *supra* note 886, at 1.

[889] *See* Memorandum, Solicitor General of the United States Department of the Interior re Opinion M-370265 (November 4, 2011), available at: http://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.20306.File.tmp/MOpinionQAs.pdf (last accessed March 31, 2015).

[890] *See* 43 U.S.C. § 912 (2014) (disposition of abandoned or forfeited railroad grants).

[891] CRS Report for Congress, *supra* note 886, at 10.

[892] *Id*. at 2.

[893] *Id*. at 12.

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> to deal with the problem of state property laws providing for the expiration of easements upon abandonment. As codified at 16 U.S.C. § 1247(d), Congress provided railroads wishing to discontinue service on a particular route an opportunity to negotiate with state, municipal, or private entities who were prepared to assume responsibility for conversion and management of the rail corridor as a trail. … By avoiding final abandonment status, the railroad right of way did not pass under applicable state law or 43 U.S.C. § 912.[894]

The authors argue that it is "increasingly difficult to reconcile the sequence of congressional enactments and judicial holdings into a coherent body of law."[895] They point out that there is some judicial authority holding that the United States retained a reversionary interest in the aforesaid grants of rights of way. However, in *Beres v. United States,*[896] summarized in part XVII.D.3, involving the 1875 Act, the Court of Federal Claims held that because only an easement was granted for a right of way "when the right of way was no longer used for railroad purposes, the easement was lifted and no property interest reverted to the United States."[897] Finally, after the 2006 CRS article, in 2014 in *Marvin M. Brandt Revocable Trust v. United States,*[898] summarized in part I.C.3, the Supreme Court "held that abandoned railway rights-of-way that had been granted to railroad companies under the General Railroad Right-of-Way Act of 1875 left underlying landowners with property free of the rights-of-way[] and [that] the United States government has no interest in the abandoned land."[899]

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[894] *Id*. at 13 (footnotes omitted).

[895] *Id*. at 4.

[896] 97 Fed. Cl. 757 (Fed. Cl. 2011).

[897] CRS Report for Congress, *supra* note 886, at 16.

[898] 134 S. Ct. 1257, 188 L. Ed.2d 272 (2014).

[899] Erica Stutman, Snell & Wilmer, "Brandt Revocable Trust v. U.S. – the United States' theory of land ownership derailed," March 30, 2014, available at: http://www.swlaw.com/blog/real-estate-

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2. Whether the Federal Government retains any Ownership in Railroad Rights of Way Granted after 1871

A law review article, written prior to the *Brandt* case, discussed in part I.C.3, discusses the split in the federal circuit courts of appeals on whether the federal government retains any ownership in railroad rights of way that were granted after 1871, the year in which Congress discontinued granting land to railroad companies in favor of granting rights of way to the companies.[900] In 2005, in *Hash v. United States*[901] the Federal Circuit held that the United States retained no property rights in land abandoned by a railroad after 1871 and therefore any reuse of the property would constitute a taking under the Fifth Amendment that would entitle a property owner to compensation.[902] However, the Seventh, Ninth, and Tenth Circuits held that the United States did retain and may assert its property rights to land granted to railroads when a railroad abandons a federally granted right of way.[903] Because the STB on several occasions authorized the conversion of rights of way abandoned by railroads for use as recreational trails, a new group

litigation/2014/03/30/brandt-revocable-trust-v-u-s-the-united-states-theory-of-land-ownership-derailed/ (last accessed March 31, 2015).

[900] Darwin R. Roberts, "The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's '1871 Shift,'" 82 *U. Colo. L. Rev.* 85, 85-86 (2011), hereinafter referred to as "Roberts."

[901] 403 F.3d 1308 (Fed. Cir. 2005).

[902] Roberts, *supra* note 900, at 90-91.

[903] *Id*. at 90. *See Avista Corp. v. Wolfe*, 549 F.3d 1239, 1246-1251 (9th Cir. 2009); *Samuel C. Johnson 1988 Trust v. Bayfield County.*, 520 F.3d 822 (7th Cir. 2008); *Mauler v. Bayfield County.*, 309 F.3d 997 (7th Cir. 2002); *Phillips Co. v. Denver and Rio Grande W. R.R. Co.*, 97 F.3d 1375 (10th Cir. 1996); *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994); *Vieux v. E. Bay Regional Park Dist.*, 906 F.2d 1330 (9th Cir. 1990); *King County. v. Burlington N. R.R. Co.*, 885 F. Supp. 1419 (W.D. Wash. 1994).

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of cases has arisen.[904] The article agrees with the United States' position that the government may take rights of way abandoned by railroads and reuse them for use as recreational trails without violating the Takings Clause of the Fifth Amendment.[905]

Case

3. Property Owner's Right after a Railroad's Abandonment of an Easement

Marvin M. Brandt Revocable Trust v. United States,[906] decided by the Supreme Court in March 2014, involved interests granted under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934-939, a statute that was repealed in 1976 by the Federal Land Policy and Management Act, § 706(a), 90 Stat. 2793. In 1976, the United States patented to Melvin and Lulu Brandt in fee simple an 83-acre parcel of land in Fox Park that contained several easements that would terminate if they were not used by the United States or its assigns for a period of five years.[907] A land patent, the highest form of title, is a conveyance of land owned by the United States to a private individual.[908] Specifically, the 1976 land patent stated that "the land was 'subject to those rights for railroad purposes as have been granted pursuant to the General Railroad Right-of-Way Act of 1875 to the Laramie, Hahn's Peak & Pacific Railway Company,

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[904] Roberts, *supra* note 900, at 89-90. *See, e.g., Beres v. United States*, 64 Fed. Cl. 403 (2005); *Ellamae Phillips Co. v. United States*, 77 Fed. Cl. 387 (2007), *vacated and remanded by Ellamae Phillips Co. v. United States*, 564 F.3d 1367 (Fed. Cir. 2009).

[905] Roberts, *supra* note 900, at 93.

[906] 134 S. Ct. 1257, 188 L. Ed.2d 272 (2014).

[907] *Id*., 134 S. Ct. at 1262, 188 L.Ed.2d at 277.

[908] *See Ballentine's Law Dictionary* (3d Ed.)

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its successors or assigns.'"[909] However, the patent did not mention what would occur if the right of way were abandoned.[910] In 1996, LHP&P's successor, Wyoming and Colorado Railroad, notified the STB that it would abandon the right of way and completed the abandonment in 2004.[911]

In 2004, the railroad in possession of the right of way properly abandoned it pursuant to the STB's procedures and approval.[912] In 2006, the United States sought to quiet title to the abandoned right of way including a right of way over the Brandts' property. However, the Brandt family trust counterclaimed and argued that the right of way "was a mere easement that was extinguished upon abandonment by the railroad, so that, under common law property rules, [the trust] enjoyed full title to the land without the burden of the easement."[913]

As it had held in *Great Northern R. Co. v. United States*,[914] the Supreme Court held that the General Railroad Right-of-Way Act of 1875 granted only an easement to the railroad company, not an interest in fee.[915] As such, in 2004 when the railroad company properly abandoned the right of way the "Brandt's land became unburdened of the easement, conferring on him the same full rights over the right of way as he enjoyed over the rest of the Fox Park

[909] *Marvin M. Brandt Revocable Trust*, 134 S. Ct. at 1262, 188 L.Ed.2d at 278.

[910] *Id*.

[911] *Id.*, 134 S. Ct. at 1263, 188 L. Ed.2d at 278-279.

[912] *Id.*, 134 S. Ct. at 1263, 188 L.Ed.2d at 278.

[913] *Id.,* 134 S. Ct. at 1263, 188 L. Ed.2d at 279.

[914] 315 U.S. 262, 271, 62 S. Ct. 529, 86 L. Ed. 836 (1942).

[915] *Marvin M. Brandt Revocable Trust*, 134 S. Ct. at 1264, 188 L.Ed.2d at 280.

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parcel."[916] Therefore, the Supreme Court reversed the Tenth Circuit and remanded for further proceedings consistent with the Court's opinion.[917]

Although the government argued that the National Trails System Improvement Act of 1988 preserved the government's interest in abandoned railroad rights of way, the United States had already waived any claim to the right of way by reason of the 1976 land patent to the Brandts twelve years earlier. Thus, "if there is no 'right, title, interest, [or] estate of the United States' in the right of way, … then the statutes simply do not apply."[918]

Statutes

D. The National Trails System Act

1. Authorization for the Interim Use of Railroad Rights of Way for Recreational Trails

In 1968, Congress enacted the National Trails System Act (Trails Act).[919] In 1976 Congress supplemented the Trails Act by enacting the Railroad Revitalization and Regulatory Reform Act (4R Act) to encourage the use of unused railroad rights of way as trails.[920] Thereafter, the National Trails Systems Improvements Act of 1988[921] amended the Trails Act and provided that:

> Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in [43 U.S.C. § 912], shall

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[916] *Id*., 134 S. Ct. at 1266, 188 L.Ed.2d at 282.

[917] *Id*., 134 S. Ct. at 1269, 188 L.Ed.2d at 285.

[918] *Id.,* 134 S. Ct. at 1268, 188 L. Ed.2d at 284 (*quoting* 43 U.S.C. § 912).

[919] Pub. L. 90–543, 82 Stat. 919 (October 2, 1968), *codified at* 16 U.S.C. § 1241, *et seq*.

[920] Pub. L. No. 94-210, 90 Stat. 33. *See* 45 U.S.C. § 801, *et seq*. (2014).

[921] Pub. L. No. 100-470, 102 Stat. 2281, 2281 (1988), *codified at* 16 U.S.C. § 1248(c).

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> remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.[922]

The Rails-to-Trails Act of 1994 (Rails-to-Trails) preserved abandoned railroad rights of way by preventing them from reverting to the original grantor of the easement or the grantor's successor-in-interest.[923] Thus, § 1247(d) presently provides, first, that:

> The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801, *et seq*.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs.

Second, § 1247(d) further provides that:

> [I]n the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, *such interim use shall not be treated*, for purposes of any law or rule of law, *as an abandonment of the use of such rights-of-way for railroad purposes*.[924]

Third, when

> a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way … the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.[925]

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[922] 16 U.S.C. § 1248(c) (2014).

[923] 16 U.S.C. § 1247(d) (2014).

[924] Emphasis supplied.

[925] *Id*.

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Thus, federal law allows the Secretary of Transportation and the STB on an interim basis to preserve an abandoned railroad right of way as a recreational trail until the right of way is used again for railroad purposes.[926]

Regulations

2. Requirements for Interim Trail Use of Railroad Right of Way

Federal regulations lists the requirements with which a state, political subdivision, or private organization must comply when requesting to use abandoned railroad right of way for interim trail use.[927] The requirements include:

> (1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;
> (2) A statement indicating the trail sponsor's willingness to assume full responsibility for:
>
> (i) Managing the right-of-way;
> (ii) Any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and
> (iii) The payment of any and all taxes that may be levied or assessed against the right-of-way; and
>
> (3) An acknowledgment that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service.[928]

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[926] *See* 16 U.S.C. § 1247(d) (2014).

[927] 49 C.F.R. § 1152.29(a) (2014).

[928] 49 C.F.R. §§ 1152.29(a)(1)-(3) (2014).

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E. Whether and When Interim Use as a Recreational Trail of an Abandoned Railroad Right of Way is a Taking under the Fifth Amendment

1. Takings when an Easement was Granted or Obtained only for Railroad Purposes

This section of the Report discusses the rights that a private property owner has when a railroad abandons a right of way that crosses the owner's land. Whether a private property owner is entitled to just compensation depends on the type of property interest held by the railroad. When an easement was granted or obtained only for railroad purposes, a private property owner may claim a right to just compensation when the government re-purposes a right of way after it has been abandoned by a railroad.[929] However, if a railroad acquired a fee simple interest in the property used as a rail line and later abandons it the prior owner or successor-in-interest has "no interest in that strip of land, and can claim no damages for its later use as a recreational trail."[930]

Statute

2. The Tucker Act and Claims against the United States

The Tucker Act[931] provides that the Court of Federal Claims has jurisdiction to

> render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or un-liquidated damages in cases not sounding in tort.[932]

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[929] *Presault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996).

[930] *Id.* at 1536.

[931] 28 U.S.C. § 1491 (2014).

[932] 28 U.S.C. § 1491(a)(1) (2014).

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Therefore, any claims in excess of $10,000 by property owners against the United States for takings subject to the Fifth Amendment to the Constitution caused by or relating to abutting railroad property must be brought in the Court of Federal Claims.[933] The United States District Courts retain concurrent jurisdiction over Tucker Act claims for $10,000 or less.[934]

Cases

3. Takings Claims against the United States arising under the Trails Act

Although the decision has been distinguished by a few lower federal courts, *Preseault v. Interstate Commerce Commission*[935] is an important Supreme Court case on claims against the United States for a taking under the Trails Act. In *Preseault*, the petitioners had a reversionary interest in land over which a railroad had a right of way. The petitioners attempted to obtain a certificate of abandonment from the ICC, but the state of Vermont intervened, claiming that the state had a right of way in fee simple or in the alternative had an easement that had not been abandoned.[936] The state of Vermont petitioned the ICC to allow the railroad to discontinue service and transfer the right of way to the city of Burlington for interim use as a public trail.[937] The petitioners argued that the Trails Act was unconstitutional under the Fifth Amendment because the statute constituted a taking without just compensation and because the statute was not a valid exercise of congressional power under the Commerce Clause.[938]

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[933] *Id*.

[934] 28 U.S.C. § 1346(a)(2) (2014).

[935] 494 U.S. 1, 110 S. Ct. 914, 108 L. Ed.2d 1 (1990).

[936] *Id*., 494 U.S. at 9, 110 S. Ct. at 920, 108 L. Ed.2d 1.

[937] *Id*.

[938] *Id*., 494 U.S. at 9, 110 S. Ct. at 914, 108 L. Ed.2d 1

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The Court's decision observed that the Tucker Act establishes jurisdiction in the Court of Federal Claims for claims based on a federal taking.[939] The Court explained that the Tucker Act "is an implied promise to pay just compensation which individual laws need not reiterate" and applies as well to rail-to-trail conversions.[940] First, the Court held that it was premature for the petitioners to seek "review of the ICC's order in the … Second Circuit…."[941] Second, it was "clear" that the Interstate Commerce Act and the ICC's authority "pre-empt[] the operation and effect of certain state laws that conflict with or interfere with federal authority over the same activity."[942] Third, in affirming the Second Circuit's judgment the Court held that the Tucker Act requires that a claim based on a federal taking of property be brought in the Court of Federal Claims and that the Trails Act was a valid exercise of congressional power under the Commerce Clause.[943]

4. Requirement of Just Compensation when New Uses are Imposed

In *Toews v. United States*[944] the Federal Circuit held that "[t]he Government has the legal power ... to impose such new uses upon the fee interests held by the adjacent landowners. But ...

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[939] *Id*., 494 U.S. at 11-12, 110 S. Ct. at 921-922, 108 L. Ed.2d 1.

[940] *Id.,* 494 U.S. at 13, 110 S. Ct. at 922, 108 L. Ed.2d 1 (*citing* 16 U.S.C. § 1247(d) (internal quotation marks omitted).

[941] *Id.,* 494 U.S. at 17, 110 S. Ct. at 927, 108 L. Ed.2d 1.

[942] *Id*., 494 U.S. at 21, 110 S. Ct. at 927, 108 L. Ed.2d 1 (O'Connor, J., concurring) (internal quotation marks omitted).

[943] *Id*., 494 U.S. at 11-13, 110 S. Ct. at 921-22, 108 L. Ed.2d 1.

[944] 376 F.3d 1371 (Fed. Cir. 2004).

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the private property interests taken are not free; the Government must pay the just compensation mandated by the Constitution."[945]

In *Toews*, the plaintiffs alleged that the city of Clovis took their property in violation of their Fifth Amendment rights by converting an abandoned railroad right of way for use as a recreational trail under the Trails Act. The original deed from the plaintiffs' predecessors-in-interest granted a right of way to the railroad for the use of designated land for railroad purposes but provided that the land would automatically revert to the original property owner or his or her successor-in-interest if the right of way were abandoned.[946]

After the railroad petitioned the ICC for permission to cease operating a segment of its right of way, the ICC issued a Notice of Interim Trail Use or Abandonment (NITU) because the city had requested that the abandoned rail line be used for an interim trail.[947] The NITU permitted the use of the right of way as a recreational trail on the condition that the railroad would convey its interest in the right of way to the city.[948] The Federal Circuit held that the use of a railroad right of way as a recreational trail was an entirely different use; thus, the NITU constituted a taking under the Fifth Amendment.[949] The basis of the holding was that the city had "used an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement."[950] The court further held that when the federal government "acts through

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[945] *Id*. at 1379.

[946] *Id.* at 1373.

[947] *Id.* at 1374.

[948] *Id.*

[949] *Id.* at 1376.

[950] *Id.*

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a state agent" to bring about a taking it is not "absolve[d] ... from the responsibility, and the consequences, of its actions" and therefore must compensate the landowner.[951] Because the United States had authorized the city to use the right of way for non-railroad purposes, the court affirmed the trial court's judgment holding the United States liable for a taking.[952]

5. Whether there is a Taking of a Reversionary Right or Interest

In *Thompson v. United States*[953] a complaint in a class action alleged that the STB's issuance of a NITU constituted a taking because the disposition of a right of way was delayed for up to 180 days that allowed the railroad to be converted for use as a public trail with the land eventually being sold.[954] Moreover, the plaintiffs proffered authenticated, recorded deeds and local tax records that were "sufficient to establish a fee simple absolute at the time the railroad acquired a property interest…."[955] Thus, the plaintiffs had a reversionary interest in fee simple absolute when the government converted the right of way to a public recreational trail.[956] Because the plaintiffs had a reversionary interest in the easements to their properties, and because Michigan laws did not authorize the use of railroad easements for public recreational

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[951] *Id.* at 1381-1382.

[952] *Id.* at 1372.

[953] 101 Fed. Cl. 416 (Fed. Cl. 2011).

[954] *Id*. at 421-423.

[955] *Id*. at 431.

[956] *Id*. at 434.

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trails, the government's actions constituted a taking.[957] The court granted the plaintiffs' motion for summary judgment with the issue of just compensation left for determination at trial.[958]

6. Effect of an STB Notice of Interim Trail Use as a Taking

When a NITU is issued by the STB pursuant to 16 U.S.C. § 1247(d), some courts have held that the notice constitutes a taking under the Fifth Amendment. In *Ellamae Phillips Co. v. United States*[959] the Ellamae Phillips Co. (Phillips) owned a tract of land traversed by a railroad corridor. The corridor, at the time held by the Roaring Fork Railroad Holding Authority, was converted to a bike path pursuant to the Trails Act.[960] The Phillips company argued that the government's conversion of the railway corridor into a recreational path constituted a taking.[961] However, the Federal Circuit explained that "under any view of takings law, only some rail-to-trail conversions will amount to takings.... Others are held as easements that do not even as a matter of state law revert upon interim use as nature trails."[962] Whether there is a taking "rest[s] on the scope, not abandonment, of the easement, as the taking of a reversionary interest in a right-of-way is compensable regardless [of] whether the right-of-way has been abandoned."[963] The court held that the trial court had the authority to determine the scope of the easement and whether a railway had been abandoned in deciding whether the government was liable for a

[957] *Id*.

[958] *Id*.

[959] 564 F.3d 1367, 1368 (Fed. Cir. 2009).

[960] *Id*. at 1369.

[961] *Id*. at 1370.

[962] *Id*. at 1372.

[963] *Id*.

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taking.[964] The Federal Circuit therefore vacated and remanded the case for a determination of the scope of the easement and whether the easement had been abandoned.

Article

7. Elements of Liability in Takings Claims based on the Trails Act

An article in the *Ecology Law Quarterly* analyzes the main points of *Preseault*, discussed *supra*, part I.E.3, and analyzes the proceedings that followed the Supreme Court's decision.[965] The author begins by explaining the purpose of the National Trails System Act and its regulatory framework. The article observes that "Congress passed the first iteration of the Trails Act in 1968, seeking to preserve unwanted railway lines for possible future use."[966] Several years later the Congress added provisions "encouraging third parties to acquire the lines for recreational use."[967] The article also summarizes the regulatory framework and the STB's involvement in the process of railbanking, *i.e.*, the preservation of right of way for potential future railroad use.[968]

The author provides guidance on whether a landowner has a viable takings claim under the Trails Act and discusses the organization and analysis of arguments to be presented on the issue of liability in a takings claim.[969] Part of the analysis is to determine whether the right of

[964] *Id*. at 1373.

[965] Cecilia Fex, "The Elements of Liability in a Trails Act Takings: A Guide to the Analysis," 38 *Ecology L.Q*. 673 (2011).

[966] *Id*. at 677.

[967] *Id*.

[968] *Id*. at 682.

[969] *Id*.

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way has been abandoned *de jure* or *de facto*[970] and whether the landowner owned the property at the time of the taking.[971] The author points out that even if it is not clear whether an abandonment has occurred the statute of limitations for a takings claim under the Trails Act is six years.[972]

The article further explains that there are three issues to consider when litigating takings claims under the Trails Act.[973] The first issue is whether a railroad company acquired land in fee simple or acquired an easement.[974] Second, if there is an easement, the scope of the easement must be established to determine whether the federal government is liable.[975] When determining the scope of the easement, the question is whether the easement "was limited in its terms to railroad purposes, or whether the terms were less specific, allowing for uses beyond railroad use, and if so what the parameters of the other uses are."[976] The third and final issue, although not always necessary, is whether there was an abandonment of the right of way.[977] The Federal Circuit has explained that the abandonment issue should be raised only if the scope of the easement cannot be determined and that the issue of abandonment should be raised last;[978] thus,

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[970] *Id*.

[971] *Id*. at 683-685.

[972] *Id*.

[973] *Id*. at 685-700.

[974] *Id*. at 686-689.

[975] *Id*. at 689-698.

[976] *Id*. at 685.

[977] *Id*. at 698-700.

[978] *Id*.

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"the Federal Circuit places the abandonment issue behind the scope of easement issue, indicating [that] courts need only reach the issue if the question of scope is not dispositive."[979] Therefore, if the second issue relating to easements has been resolved, the last issue need not be addressed.[980]

[979] *Id*. at 699.

[980] *Id*. at 698-700.

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II. AMERICANS WITH DISABILITIES ACT

A. Introduction

The Americans with Disabilities Act (ADA) was enacted to "provide a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities"[981] in employment, transportation, public accommodations, communications, and government activities.[982]

Section B discusses provisions of the ADA that apply to transportation by rail, including the Act's prohibition of discrimination against employees and patrons. Section C discusses what is required for a *prima facie* case of employment discrimination because of a disability. Section D addresses the meaning of a disability under the Act before and after the 2008 amendments to the Act. Section E reviews issues concerning the feasibility of alterations to make facilities accessible to rail patrons. Sections F and G summarize articles on the ADA and the ADA Amendments Act of 2008 and transportation and civil rights.

Statute

B. Americans with Disabilities Act

The ADA protects both railroad employees and passengers with disabilities. The statute begins with an overarching definition of disability and then separately covers employment

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[981] Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. *See also,* ADA.gov., Americans with Disabilities Act of 1990 (as amended), available at: http://www.ada.gov/pubs/adastatute08.htm (last accessed March 31, 2015).

[982] United States Department of Labor, Disability Resources, Americans with Disabilities Act, available at: http://www.dol.gov/dol/topic/disability/ada.htm (last accessed March 31, 2015) (last accessed March 31, 2015), hereinafter referred to as "Disability Resources."

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discrimination and discrimination by a public entity providing services or benefits.[983] Railroad employees are protected under the employment section of the ADA.[984]

The ADA includes provisions that apply to transportation by rail; for example, 42 U.S.C. § 12142 provides that "[it] shall be considered discrimination … for a public entity which operates a fixed route system to purchase or lease a new … rapid rail vehicle, a new light rail vehicle … if such rail vehicle is not readily accessible to and usable by individuals with disabilities."[985] When purchasing or leasing a used vehicle for use on such a system, the entity is required to make "demonstrated good faith efforts" to make the vehicle readily accessible.[986] Moreover, § 12162 requires intercity rail transportation to have "at least one passenger car per train that is readily accessible to and usable by individuals with disabilities."[987]

The United States Department of Labor, the Equal Employment Opportunity Commission (EEOC), Department of Transportation (DOT), and two other federal agencies enforce the ADA.[988] Complementary statutes and regulations, including Transportation Services

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[983] 42 U.S.C. § 12132 (2014).

[984] 42 U.S.C. § 12112(a) (2014) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.")

[985] 42 U.S.C. § 12132 (a) (2014) (emphasis supplied).

[986] 42 U.S.C. § 12142(b) (2014).

[987] 42 U.S.C. § 12162(a)(1) (2014).

[988] Disability Resources*, supra* note 982.

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for Individuals with Disabilities,[989] have been enacted or promulgated, respectively, to effectuate the ADA's provisions.

Cases

C. *Prima Facie* Case of Employment Discrimination under the ADA

In *Norman v. Union Pacific R.R. Co.,*[990] involving a train dispatcher whose employment was terminated, the plaintiff alleged that she was terminated in violation of the ADA based on a perceived mental disability. The plaintiff, however, failed to establish a *prima facie* case.[991] A *prima facie* case for discrimination because of a disability requires three elements: "(1) an ADA-qualifying disability; (2) qualifications to perform the essential functions of her position with or without reasonable accommodation; and (3) an adverse employment action due to her disability."[992]

Norman did not satisfy the third element for a *prima facie* case because Union Pacific demonstrated that Norman's termination was the result of her failure to submit a release from a physician stating that she could return to work after recovering from physical ailments.[993] The company's alleged mischaracterization of Norman's illness as a mental disability did not eliminate the third element that the plaintiff had to prove for a *prima facie* case.[994] The Eight

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[989] 49 C.F.R. §§ 37.1-37.215 (2014) (implementing parts of the ADA related to transportation, such as prohibiting a transportation entity from imposing special charges on a person with disabilities).

[990] 606 F.3d 455 (8th Cir. 2010).

[991] *Id.* at 460.

[992] *Id.* at 459.

[993] *Id.* at 460.

[994] *Id.*

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Circuit agreed that the plaintiff did not establish a *prima facie* case of disability discrimination and affirmed the district court's grant of a summary judgment for Union Pacific.[995]

D. Disability within the Meaning of the ADA

1. Physical or Mental Impairment that Substantially Limits One or More Major Life Activities

In *EEOC v. Burlington Northern & Santa Fe Ry. Co.*[996] the EEOC initiated an action under the ADA on behalf of Thomas Freeman. Freeman had applied for a position of conductor-trainee at BNSF but was rejected because of an alleged weakness in his left arm caused by a previous injury. The EEOC claimed that BNSF's failure to hire Freeman violated the ADA.[997] To prevail, the EEOC had to prove that Freeman was disabled within the meaning of the ADA. One definition of disability in the ADA is "a physical or mental impairment that substantially limits one or more major life activities."[998] The term substantially limited in the context of employment has been interpreted to mean "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."[999]

Freeman was regarded as being disqualified for train service; however, the court held that the category of train service that included a position as conductor-trainee did not constitute a "class of jobs" as the term is used in the ADA. Thus, Freeman was not a person with a disability

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[995] *Id.* at 461.

[996] 211 F. Appx. 682, 683-684 (10th Cir. 2006).

[997] *Id.* at 683-684

[998] Id. at 684 (*citing* 42 U.S.C. § 12102(1)).

[999] *EEOC*, 211 F. Appx. at 684.

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within the meaning of the statute.[1000] The Tenth Circuit agreed with the district court's determination that when "an individual cannot perform a specific required task in a particular position or positions but can perform other tasks, he is not considered excluded from a 'class of jobs.'"[1001] The appellate court affirmed the district court's grant of a summary judgment for BNSF.[1002]

2. A Record of or Having Being Regarded as Having an Impairment

The ADA defines the term disability to mean with respect to an individual

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment (as described in paragraph (3)).[1003]

Coale v. Metro-North Railroad Co.[1004] illustrates the significance of the ADA amendments in 2008. In *Coale*, the plaintiff, an assistant conductor, was injured in September 2002 while stepping off a train at work.[1005] Coale was unable to work for approximately eight and one-half months but was cleared to return to full-duty without medical restrictions in June 2003.[1006] Among the issues in the case was Coale's desire to obtain a position as a training

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[1000] *Id.* at 686.

[1001] *Id.* (*quoting EEOC v. Burlington N. & Santa Fe Ry. Co.*, 406 F. Supp.2d 1228, 1237 (W.D. Okla. 2005)).

[1002] *EEOC*, 211 F. Appx. at 687.

[1003] 42 U.S.C. § 12102(1) (2014).

[1004] 2014 U.S. Dist. LEXIS 31764, at *1 (D. Conn. 2014).

[1005] *Id*. at *1.

[1006] *Id*. at *1-2.

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instructor, a position he apparently did not secure because the defendant may have wanted instructors with "accident-free work histories" so that they would be "more credible."[1007]

Coale alleged that he was disabled under the ADA because the defendant regarded him "as having an impairment that substantially limited the major life activity of working…."[1008] Coale's discrimination case was based also on what he said was his record of disability.[1009] The court concluded, however, that the plaintiff was not disabled "at the time of the events in question."[1010]

Relying on precedent in the Second Circuit, the court held that under the ADA prior the amendments the plaintiff could not

> be found to have been 'regarded by' Defendant in the relevant time period to have had an impairment 'that substantially limited] one or more of [his] major life activities' pursuant to 42 U.S.C. § 12102(2)(C) (2008) - and that, consequently, Plaintiff cannot succeed in making out a prima facie case of discrimination under the ADA.[1011]

The court noted, however, that its

> interpretation of the ADA might not be applicable to events which occurred subsequent to the application of the 2008 Amendments, due to the inclusion of 42 U.S.C. § 12102(3)(A), pursuant to which "[a]n individual meets the requirement of 'being regarded as having such an impairment'" for purposes of 42 U.S.C. § 12102(1)(C) "if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or

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[1007] *Id*. at *8.

[1008] *Id*. at *12-13 (citations omitted).

[1009] *Id*. at *13.

[1010] *Id*. at *21. *See also*, *id*. at 26-27.

[1011] *Id*. at *33.

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> mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*."[1012]
>
> The court granted the defendant's motion for summary judgment.

3. Definition of Disability before and after the ADA Amendments

In *Gaus v. Norfolk S. Ry. Co.*[1013] a federal court in Pennsylvania examined the "regarded as" prong both before and after the enactment of the 2008 amendments to the ADA. Gaus was an electrician who had been employed by Norfolk Southern since 2004 and who suffered from various illnesses causing back, joint, and abdominal pains that required him to take time off from work to seek treatment.[1014] In the summer of 2008 Gaus received a letter from his doctor stating that he was fit to return to work.[1015] Although Norfolk Southern examined his case, in January 2009 the company refused to allow Gaus to return.[1016] Because Gaus was still on narcotic medications for pain, Norfolk Southern considered Gaus's use of medication on the job to be a safety issue.[1017] However, Norfolk Southern informed Gaus that he could be eligible for more sedentary or clerical positions at the company.[1018] Eventually Gaus's pain eased; he no longer needed narcotic pain medications; and Norfolk Southern declared him medically fit to return to

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[1012] *Id*. at *24 N 5.

[1013] 2011 U.S. Dist. LEXIS 111089, at *1 (W.D. Penn. Sept. 28, 2011).

[1014] *Id.* at *4, 6-8.

[1015] *Id.* at *8-9.

[1016] *Id.* at *11.

[1017] *Id.*

[1018] *Id.* at *13.

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work as an electrician in 2010.[1019]

For the railroad's actions prior to January 1, 2009 and the ADA amendments, the court found that Gaus did not have a disability under the ADA. The reason was that Norfolk Southern did not regard Gaus as having an impairment that substantially limited major life activities.[1020] As Norfolk Southern did not issue its opinion on the matter until 2009, the court determined that Norfolk Southern viewed Gaus's condition as being temporary, rather than permanent, and did not consider his condition as one that rendered him unable to perform a wide range of jobs.[1021]

However, for events after January 1, 2009, when the ADA amendments were in effect, the court held that there was a genuine issue of material fact regarding whether Norfolk Southern regarded Gaus as having an impairment.[1022] In regard to the 2008 amendments, the court observed:

> In enacting the ADAAA, Congress rejected the narrow interpretation of disability adopted by the Supreme Court in *Toyota Motor*, specifically, the Supreme Court's standard regarding "substantially limits," finding that this standard "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA," and directed the EEOC to revise that portion of its regulations which defines "substantially limits" as "significantly restricted" to be consistent with the ADAAA.[1023]

Thus, under the ADA as amended

> [a]n individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or

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[1019] *Id.* at *32.

[1020] *Id.* at *45.

[1021] *Id.* at *45-47.

[1022] *Id.* at *60-61.

[1023] *Id.* at *50-51 (citations omitted).

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mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[1024]

The regulations further provide that an employer must show that an impairment is objectively transitory and minor to establish a defense to a claim of disability discrimination under this test.[1025] Bodily pain qualifies as an impairment,[1026] a condition that Norfolk Southern's evidence did not dispute.[1027] Furthermore, Gaus presented the order preventing him from returning to work as evidence of an adverse action resulting from his impairment.[1028] The court held that a reasonable jury could find that Gaus could have been disabled under the "regarded as" test of the ADA as amended.[1029] Accordingly, the court granted Norfolk Southern's motion for a summary judgment for the events prior to January 1, 2009, but denied the motion for the events after January 1, 2009.

E. Feasibility of Accessibility Modifications for Rail Patrons

1. Alteration of Two Subway Stations Requiring the Installation of Elevators

In *Disabled in Action of Pennsylvania v. S.E. Pennsylvania Transp. Authority*[1030] a nonprofit organization for the rights of the disabled challenged the decisions of the Southeastern Pennsylvania Transportation Authority (SEPTA) regarding the authority's alteration of two subway stations without installing elevators. The plaintiff complained that the agency's action

[1024] *Id.* at *51-52 (*citing* 42 U.S.C. § 12102(3) (2011)).

[1025] *Id.* at *53.

[1026] *Id.* at *56.

[1027] *Id.* at *57.

[1028] *Id.* at *58.

[1029] *Id.* at *60-61.

[1030] 655 F. Supp.2d 553, 567 (E.D. Pa. 2009), *aff'd*, 635 F.3d 87, 98 (3d Cir. 2011).

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would deny disabled individuals equal access to public transit. A federal district court in Pennsylvania held that the installation of the elevators was required to minimize the distance that wheelchair users had to travel compared to members of the general public.[1031] The court held that technical feasibility rather than economic feasibility determined whether a facility is being made accessible to disabled patrons.[1032] The court held that the alleged need for the city's permission to install an elevator did not preclude a finding of feasibility.[1033] On appeal, the Third Circuit affirmed the district court's decision that elevators were required.[1034]

2. Feasibility of Accessibility Modifications for a Port Authority Station

In *HIP, Inc. v. The Port Authority of New York and New Jersey*[1035] the plaintiffs alleged that the ADA compelled the Port Authority of New York and New Jersey (Port Authority) to make renovations to a train station in such a manner that the station was accessible to the disabled.[1036] The ADA and accompanying regulations[1037] required that a station be accessible "to the maximum extent feasible."[1038] Because two approaches for making the station accessible

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[1031] *Id.* at 566.

[1032] *Id.* at 567.

[1033] *Id.*

[1034] *Disabled in Action of Pennsylvania*, 635 F.3d 87, 98 (3d Cir. 2011).

[1035] 693 F.3d 345, 353 (3d Cir. 2012).

[1036] *Id.* at 349.

[1037] *Id.* at 351 (*citing* 42 U.S.C. § 12147(a) and 49 C.F.R. § 37.43(a)(1)).

[1038] *HIP, Inc.*, 693 F.3d at 351-352.

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were feasible, the district court granted the plaintiffs' motion for a summary judgment and ordered the Port Authority to make certain alterations.[1039]

On appeal, the issue was whether it would be feasible for the Port Authority to make the station accessible to the handicapped. The Port Authority argued that the accessibility alterations necessitated the acquisition of property not owned by the Port Authority; that the alterations were "technically infeasible;" and that the Port Authority possibly would be unable to make the alterations conform to the fire-safety code.[1040] The court, however, did not know whether Jersey City, the current owner of the land needed for the accessibility modifications, would cooperate by providing the property to the Port Authority.[1041] In reversing and remanding the case, the appellate court held that neither side was entitled to a summary judgment.[1042]

Articles

F. ADA Amendments Act of 2008

As noted, the ADA Amendments Act of 2008 (ADAAA or the Amendments) broadened the definition of disability in response to Supreme Court decisions that had narrowed the definition beyond the original intent of Congress.[1043] A law review article argues that

> [b]y implicitly elevating impairment to protected class status, the ADAAA offers a profound yet still unrealized opportunity for reframing the existing disability

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[1039] *Id.* at 350.

[1040] *Id.* at 352.

[1041] *Id.* at 354.

[1042] *Id.* at 352, 358.

[1043] Michelle A. Tavis, "Impairment as Protected Status: A New Universality for Disability Rights," 46 *Ga. L. Rev*. 937, 938 (2012), hereinafter referred to as "Tavis."

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rights debate around a new form of universality that could meaningfully advance the disability rights movement.[1044]

The article discusses a 2008 case, *Middleton v. CSX Transportation, Inc.,*[1045] in which the plaintiff Middleton alleged that CSX "refused to hire him as a freight conductor because he was morbidly obese."[1046] Because the case arose prior to the ADA Amendments, the plaintiff had to produce evidence of a "physiological basis for his weight" to prove that he had an actual or perceived impairment under the ADA.[1047] The article observes that the ADA "medicaliz[ed]" impairment, thus preventing individuals without proof of any underlying biological problem from successfully asserting an ADA claim.[1048] The article argues that the interpretation of impairments as being "only significant, unusual, and medically recognized biological abnormalities" may hinder the intent of Congress in expanding the "regarded as" prong in the ADAAA.[1049]

G. Transportation and Civil Rights

A 2013 article by the American Association of People with Disabilities (AAPD) emphasizes the key roles played by transportation and mobility "in the struggle for civil rights

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[1044] *Id.*

[1045] 2008 U.S. Dist. LEXIS 24977, at *1 (N.D. Fla. 2008).

[1046] Tavis, *supra* note 1043, at 964.

[1047] *Id.*

[1048] *Id.* at 965.

[1049] *Id.* at 971.

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and equal opportunity in the disability community."[1050] According to the AAPD, "affordable and reliable transportation allows people with disabilities access to important opportunities in education, employment, health care, housing, and community life."[1051] With respect to railroad transportation, the article notes that the ADA requires "all new rail stations and facilities" be accessible and key stations of "previously existing rail systems … be made accessible."[1052]

[1050] American Association of People with Disabilities, Equity in Transportation for People with Disabilities, available at: http://www.aapd.com/resources/publications/transportation-disabilities.pdf (last accessed March 31, 2015)

[1051] *Id.*

[1052] *Id.*

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III. AMTRAK

A. Introduction

In 1970, Congress enacted the Rail Passenger Service Act (Amtrak Act) that created the National Railroad Passenger Corporation (Amtrak), a federally funded, private company.[1053] In the decades prior to the passage of the Amtrak Act, passenger rail service had become unprofitable because of the increased use of air and automobile transportation in lieu of rail service. By reason of the Amtrak Act, Amtrak replaced most but not all of the providers of intercity passenger rail service. For example, the Alaska Railroad continues to provide intercity passenger rail service independent of Amtrak.[1054] Amtrak also gained priority access to the tracks and stations of other private rail companies in exchange for assuming the companies' intercity passenger common carrier obligations.[1055] A Board of Directors supervises Amtrak's management; the Board has eight members, one of whom is the Secretary of Transportation, appointed by the President with the approval of the Senate.[1056] Since 2003, after a series of financial crises almost forced a shutdown of the passenger rail system, Congress has overseen Amtrak's appropriations and required DOT approval of federal funds for Amtrak.[1057]

[1053] FRA, Amtrak, available at: https://www.fra.dot.gov/Page/P0052 (last accessed March 31, 2015), hereinafter referred to as "Amtrak."

[1054] *Id*. For a discussion of the Alaska Railroad Transfer Act, *see* 45 U.S.C. § 1201 *et seq*. (2014); see also, Federal Railroad Administration, Privatization of Intercity Rail Passenger Service in the United States, at 20-21 (March 1998), available at: www.fra.dot.gov/eLib/Document/2759 (last accessed March 31, 2015), hereinafter referred to as "Privatization of Intercity Rail Passenger Service."

[1055] *See* Amtrak Historical Society, available at: http://www.amtrakhistoricalsociety.org/bah.htm#board (last accessed March 31, 2015).

[1056] *Id*.

[1057] FRA, Amtrak Capital Grants, available at: https://www.fra.dot.gov/Page/P0249 (last accessed March 31, 2015).

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Sections B through D discuss the Amtrak Act and the Passenger Rail Investment and Improvement Act of 2008 (PRIAA), as well as the 1997 repeal of Amtrak's exclusive franchise. Sections E through H discuss judicial decisions regarding whether Amtrak is a private corporation or a public entity, whether Amtrak is exempt from state public utility rules, and whether other exemptions also may apply to Amtrak. Sections I through K discuss articles that address Amtrak's exemption from claims under the False Claims Act (FCA), Amtrak tax exemptions, and Amtrak and high-speed rail.

Statutes

B. Amtrak Act

The Amtrak Act defines Amtrak as a "railroad carrier … operated and managed as a for-profit corporation" that is "not a department, agency, or instrumentality of the United States Government."[1058] The statute subjects Amtrak to laws and regulations on safety and employee relations that apply to rail carriers.[1059] However, the statute preempts state or local laws related to rates, routes, service, and pay periods.[1060] The Act also preempts certain work requirements for employees, laws on joint use or operation of facilities and equipment, and additional taxes on personal and real property and taxes levied after September 30, 1981.[1061]

[1058] 49 U.S.C. § 24301(a)(1)-(3) (2014).

[1059] *See, e.g.,* 49 U.S.C. § 24301(d) (2014).

[1060] 49 U.S.C. § 24301(g)-(h) (2014).

[1061] 49 U.S.C. § 24301(i)-(l) (2014).

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C. Repeal of Amtrak's Exclusive Franchise in 1997

A 1998 FRA report on Privatization of Intercity Rail Passenger Service in the United States in a brief history of Amtrak discusses how the Rail Passenger Service Act (RPSA)[1062] "provided Amtrak with the exclusive right to provide intercity rail passenger service over the corridors that it operated" but that the "exclusive franchise" was repealed in 1997.[1063] According to findings in § 2 of S. 738 that was enacted by Congress, some of the reasons for the repeal appear to have included Amtrak's "financial crisis, with growing and substantial debt obligations" that severely limited Amtrak's ability to cover operating costs that jeopardized its long-term viability all of which required "immediate action" if Amtrak were to be able to survive.[1064]

D. The Passenger Rail Investment and Improvement Act of 2008

Under the Amtrak Act, Amtrak received dispatching priority over freight trains in exchange for assuming freight companies' passenger common carrier obligations. In 2008, the Passenger Rail Investment and Improvement Act or PRIAA was enacted in response to Amtrak's unreliable passenger service in part because of some freight rail companies' apparent disregard of federal law.[1065] PRIIA authorized the STB to penalize private freight companies that caused Amtrak to fail to achieve certain goals.[1066]

[1062] 45 U.S.C. §§ 501-502, *et seq. (repealed), subsequently recodified* at 49 U.S.C. 24101, *et seq*. (2014).

[1063] Privatization of Intercity Rail Passenger Service, *supra* note 1054, at 4.

[1064] Available at: https://www.govtrack.us/congress/bills/105/s738 (last accessed March 31, 2015).

[1065] Bradon Smith, "Changing Signals: A New Approach to the Enforcement of Rail Passenger Traffic Preference in Response to the Passenger Rail Investment and Improvement Act of 2008," 38 *Iowa J. Corp. L*. 441, 442 (2013), hereinafter referred to as "Smith."

[1066] *Id*. at 451.

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PRIIA tasked Amtrak and other stakeholders with improving Amtrak's service, operations, and facilities in respect to its long-distance routes and the Northeast Corridor (NEC), state-sponsored corridors, and the development of high-speed rail corridors.[1067] PRIIA authorized "grants to Amtrak to cover operating costs, capital investments, including in part, efforts to bring the NEC to a state-of-good-repair, and repayment of Amtrak's long-term debt and capital leases…."[1068] Besides implementing a modern financial accounting and reporting system, Amtrak was required to have a 5-year financial plan that addressed at least sixteen categories of information.

PRIIA also required the FRA and Amtrak, in cooperation with the STB, "to develop metrics and minimum standards for measuring the performance and service quality of intercity passenger train service…."[1069] However, as noted in a 2014 Report by Amtrak's Office of the

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[1067] Federal Railroad Administration Overview, Highlights and Summary of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), at 1 (prepared March 10, 2009), available at: https://www.fra.dot.gov/eLib/Details/L02830 (last accessed March 31, 2015), hereinafter referred to as "FRA Summary of PRIIA." *See* Smith, *supra* note 1065, at 451, who states:

> The PRIIA offered a new regulatory mandate and a new administrative remedy to address commercial freight railroad's noncompliance with federal law. Section 210 of the PRIIA mandated that the FRA and the governing STB, in consultation with Amtrak, propagate new and improved metrics. The new metrics would measure on-time performance, avoidable delays, cost per passenger to prevent further delays, and intercity connectedness. The PRIIA also permitted the STB to administer penalties when it determined Amtrak's failing to meet goals was traceable to freight interference.

(footnotes omitted); and Justin J. Marks, "No Free Ride: Limiting Freight Railroad Liability When Granting Right-of-Way to Passenger Rail Carriers," 36 *Transp. L. J.* 313, 331-332 (2009), who states that "PRIAA authorizes the Surface Transportation Board to conduct nonbinding mediation between the parties if after a 'reasonable period of negotiation, a public transportation authority cannot reach agreement with a rail carrier' for shared usage of track. The Board is to model the mediation from its current process it uses to settle rate cases").

[1068] FRA Summary of PRIIA, *supra* note 1054, at 1 (*citing* PRIIA §§ 101 and 102).

[1069] *Id*. at 2 (*citing* PRIIA § 207).

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Inspector General (Amtrak OIG Report), in July 2013 the District of Columbia Circuit "ruled that the performance metrics and standards developed under PRIIA were not enforceable."[1070] In June 2014 the Supreme Court granted *certiorari*.[1071] As discussed in the next subpart of the Report, on March 9, 2015, the Supreme Court reversed and remanded the case to the Court of Appeals.

In regard to the Intercity Passenger Rail Route Structure, Amtrak was "required to evaluate and rank each of its long distance trains according to its overall performance as belonging to the best performing third of such routes, the second best performing third of such routes or the worst performing third of such routes…."[1072] For Northeast Corridor Facility and Service Improvement, PRIIA required Amtrak in consultation with others to prepare a capital spending plan for needed infrastructure projects.[1073] PRIIA also required enhanced state involvement by tasking states to establish or designate a state rail transportation authority to develop statewide rail plans.[1074]

[1070] Amtrak OIG Report, "Passenger Rail Investment and Improvement Act of 2008: Accomplishments and Requirements that Deserve Consideration for Future Authorizing Legislation," at Report Highlights (Jan. 2014), available at: http://www.amtrakoig.gov/sites/default/files/reports/oig-a-2014-003.pdf (last accessed March 31, 2015), hereinafter referred to as "Amtrak OIG Report." *See Association of American Railroads v. United States Dep't of Transp.*, 721 F.3d 666, 669 (D.C. Cir. 2013), *rehearing, en banc, denied,* 2013 U.S. App. LEXIS 20745 (D.C. Cir., Oct. 11, 2013), *cert. granted, DOT v. Ass'n of Am. R.R.,* 134 S. Ct. 2865, 189 L. Ed.2d 805 (2014).

[1071] *Dept. of Transportation v. Ass'n of American Railroads,* 134 S. Ct. 2865, 189 L. Ed.2d 805 (2014).

[1072] FRA Summary of PRIIA*, supra* note 1067, at 2 (*citing* PRIIA § 210).

[1073] *Id*. (*citing* PRIIA § 211).

[1074] *Id*. at 3 (*citing* PRIIA § 303).

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PRIIA authorized three new federal intercity rail capital assistance programs: one for the Intercity Passenger Rail Service Corridor Capital Assistance Program, one for High-Speed Rail Corridor Development, and one for congestion relief.[1075] PRIIA also established opportunities for private sector interests.[1076]

Among other features of PRIIA, Amtrak was directed to study ADA "accessibility needs at the stations it serves and to identify improvements required to bring those stations into compliance with ADA requirements, including a detailed plan, schedule and recommendations for funding the necessary improvements."[1077]

Finally, the aforementioned Amtrak OIG Report stated, *inter alia*, that Amtrak had successfully restructured Amtrak's debt on 13 capital leases.[1078]

Cases

E. Private Corporation or Public Entity?

The issue of Amtrak's status as defined in 49 U.S.C. § 24301 has been litigated most recently in a case decided by the United States Supreme Court on March 9, 2015, in which the Court reversed and remanded a decision by the District of Columbia Circuit in *Department of Transportation v. Association of American Railroads*.[1079]

[1075] *Id*. at 4-5 (*citing* PRIIA §§ 301, 501, and 302, respectively). *See also,* Joshua Rogers, "The Great Train Robbery: How Statutory Construction May Have Derailed an American High Speed Rail System," 2011 *U. Ill. J.L. Tech. & Pol'y* 215, 229 (2011) (*stating* that "[s]ection 501 of Public Law 110-432, commonly referred to as the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), is the section of the law that deals specifically with high speed rail corridors").

[1076] *Id*. at 5 (*citing* PRIIA §§ 214-216, 502).

[1077] *Id*. at 6 (*citing* PRIIA § 219).

[1078] Amtrak OIG Report, *supra* note 1070, at 4.

[1079] 135 S. Ct. 1225, 191 L. Ed.2d 153, 2015 U.S. LEXIS 1763 (U.S., Mar. 9, 2015).

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1. Decision by the District of Columbia Circuit

In *Association of American Railroads v. United States Department of Transportation*,[1080] the Association of American Railroads (AARR) argued that that § 207 of PRIIA was unconstitutional. Section 207 empowered Amtrak and the FRA "to jointly develop performance measures to enhance enforcement of the statutory priority Amtrak's passenger rail service has over other trains."[1081] First, the District of Columbia Circuit held that Amtrak is a private corporation, because "Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit."[1082] As for § 207 of PRIIA, the court held that the section was unconstitutional on two grounds. The first ground was that no case has permitted a private company to have regulatory power equal to that of an administrative agency.[1083] As for the second ground, the court explained that § 207 directs the FRA and Amtrak to "'jointly … develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.'"[1084] However, if the FRA and Amtrak disagreed over "the composition of these 'metrics and standards,' either 'may petition the [STB] to appoint an arbitrator to assist the

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[1080] 721 F.3d 666, 670 (D.C. Cir. 2013), *rehearing denied,* 2013 U.S. App. LEXIS 20746 (D.C. Cir., Oct. 11, 2013), *rehearing, en banc, denied*, 2013 U.S. App. LEXIS 20745 (D.C. Cir., Oct. 11, 2013), *vacated and remanded, Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 191 L. Ed.2d 153, 2015 U.S. LEXIS 1763, at *1 (U.S., Mar. 9, 2015).

[1081] *Id.* at 668.

[1082] *Id.* at 674, 677.

[1083] *Id.* at 673.

[1084] *Id*. at 699 (*quoting* PRIIA § 207(a), 49 U.S.C. § 24101 (note)).

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parties in resolving their disputes through binding arbitration.'"[1085] Furthermore, "'[t]o the extent practicable,' Amtrak and its host rail carriers must incorporate the metrics and standards into their Operating Agreements."[1086]

Because the arbitration clause did not prohibit a private actor from being appointed as arbitrator, the court held that § 207 would permit "metrics and standards to go into effect that had not been assented to by a single representative of the government."[1087] In reversing the district court's grant of a summary judgment for the DOT, the appeals court held that the statute was an unconstitutional delegation of regulatory power to a private entity.[1088]

2. Decision by the United States Supreme Court

On March 9, 2015, the Supreme Court unanimously reversed the decision of the District of Columbia Circuit and remanded in an opinion by Justice Kennedy in which Justice Thomas filed a concurring opinion.[1089] The Court held that "for purposes of determining the validity of the metrics and standards[] Amtrak is a governmental entity."[1090]

After making specific findings regarding Amtrak's structure, ownership, and governance, the Court summarized the reasons for its holding:

> Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively

[1085] *Id*. (*quoting* PRIIA § 207(d), 49 U.S.C. § 24101 (note)).

[1086] *Id*. (*quoting* PRIIA § 207(c), 49 U.S.C. § 24101 (note)).

[1087] *Id.* at 674.

[1088] *Id.* at 677.

[1089] 135 S. Ct. 1225, 191 L. Ed.2d 153, 156, 2015 U.S. LEXIS 1763, at *1 (U.S., Mar. 9, 2015).

[1090] 2015 U.S. Lexis 1763 at * 6.

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> supervised and substantially funded by the political branches. … Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. [1091]

The Court relied on its decision in *Lebron v. National Railroad Passenger Corp*.[1092] that "teaches, that 'for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status."[1093]

On remand, the Court of Appeals, "after identifying the issues that are properly preserved and before it,"[1094] will need to address the "substantial questions respecting the lawfulness of the metrics and standards--including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U. S. Const., Art. II, § 2, cl. 2" that are still present in the case.[1095]

F. Exemption of Amtrak from State Public Utility Rules

City of New York v. Amtrak,[1096] decided by a federal court in the District of Columbia, is a recent case clarifying 49 U.S.C. § 24301(g). The case arose out of New York City's claim that a 1906 deed that transferred title to land, which supported a bridge, from the city to a predecessor of Amtrak obligated Amtrak to maintain the bridge in perpetuity. The parties disagreed over

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[1091] *Id*. at *17.

[1092] 513 U. S. 374, 115 S. Ct. 961, 130 L. Ed.2d 902 (1995).

[1093] *Id*. at *19.

[1094] *Id*. at *20.

[1095] *Id*. at *6.

[1096] 960 F. Supp.2d 84 (D.D.C. 2013).

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"whether this agreement was an affirmative covenant running with the land or merely a contract."[1097] Section 24301(g) provides that "'[a] state or other law related to rates, routes, or service does not apply to Amtrak in connection with rail passenger transportation.'"[1098] As for whether the statute preempted any agreement on the cost of maintaining the bridge, the court ruled in favor of Amtrak because the Regional Rail Reorganization Act of 1973 (3R Act) required that all land be "conveyed free and clear of any liens or encumbrances."[1099]

The city, however, also argued that Amtrak was responsible for the cost of removing its electrical equipment based on New York's public utility rule that required public service corporations "'to relocate their structures at their own expense whenever the public health, safety or convenience requires the change to be made.'"[1100] The city argued that when Amtrak attached its electrical facilities to the bridge Amtrak assumed the "'the risk of their location and is bound to make such changes'" as required by the rule at its own expense.[1101] Because the city had paid Amtrak to remove the equipment, the city sought to recover the funds that the city had paid to Amtrak.

The court held that the applicability of Amtrak preemption depended on "whether [the public utility] rule … is 'related to … routes,' and whether the City seeks to apply that rule 'to Amtrak in connection with rail passenger transportation.'"[1102] The court held that neither

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[1097] *Id*. at 86.

[1098] *Id*. at 95 (*quoting* 49 U.S.C. § 24301(g)).

[1099] *City of New York v. Amtrak*, 960 F. Supp.2d at 90.

[1100] *Id*. at 94 (citation omitted).

[1101] *Id*. at 95 (citation omitted).

[1102] *Id*. at 96 (citation omitted).

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requirement was satisfied because the public utility rule would only impose a cost on Amtrak without "[altering] the course of the trains [or subjecting] the railroad company to the vagaries of varied local ordinances."[1103]

Although the court held that the public utility rule was not preempted, the court, nevertheless, ruled in favor of Amtrak.[1104] The court's reasoning was that "no reasonable jury could find that the danger presented by the ongoing bridge decay was sufficiently acute and severe to justify recovery under the emergency assistance doctrine" relied on by the city.[1105]

G. Preemption of a Negligence Claim Relating to Service but not of a Claim for Negligent Design of a Railcar

In *Rubietta v. Amtrak*[1106] the plaintiff brought an action for damages for personal injuries that she sustained as a passenger on an Amtrak train. One issue was whether the Amtrak Act preempted her claims under state law for negligence arising out of a railcar's design and seating.[1107] Under the Act, "'[a] State or other law related to … service does not apply to Amtrak.'"[1108] The court interpreted the term service to include "items such as ticketing, boarding procedures, provision of food and drink, [and] baggage handling, in addition to the transportation itself…."[1109] The court held that the plaintiff's claim for negligent seating was

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[1103] *Id*. at 97.

[1104] *Id.*

[1105] *Id.* at 99.

[1106] 2012 U.S. Dist. LEXIS 12047, at *1 (N.D. Ill. Jan. 30, 2012).

[1107] *Id.* at *9-11.

[1108] *Id.* at *11 (*quoting* 49 U.S.C. § 24301(g).

[1109] *Id.* at *11-12.

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preempted because the claim related to service.[1110] However, because the Americans with Disabilities Act neither has an express preemption provision that may be applied to railcar design nor has the Act occupied the field of railcar safety, the court held that the negligent design claim was not preempted.[1111]

H. Express and Implied Preemption of Condemnation of Amtrak Property

In *Amtrak v. McDonald*[1112] Amtrak sued the Commissioner of the New York State Department of Transportation because of its condemnation of six parcels of Amtrak's land and its pending condemnation of a seventh parcel for a project in the South Bronx.[1113] Amtrak moved for a summary judgment because the Commissioner's actions were "impliedly preempted" by the Regional Rail Reorganization Act of 1973 **(3R Act)** and the Rail Passenger Service Act (RPSA); "because the federal government has occupied the field of ownership and control of Amtrak property;" and because of 49 U.S.C. § 24902(j) (the federal enclave provision) and 49 U.S.C. § 24301(g) of the RPSA.[1114] Furthermore, the Commissioner's actions would impair "the federal government's mortgage interest in the property[] in violation of the Property Clause of the Constitution."[1115]

[1110] *Id.* at *12.

[1111] *Id.* at *9-11.

[1112] 2013 U.S. Dist. LEXIS 144107, at *1 (S.D.N.Y. Sept. 26, 2013).

[1113] *Id.* at *1-2.

[1114] *Id.* at *23.

[1115] *Id.*

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However, the court granted McDonald's motion for summary judgment on procedural grounds.[1116] First, because the Eleventh Amendment entitled the defendant to sovereign immunity, the court ruled that it lacked subject matter jurisdiction over claims regarding the six parcels already condemned.[1117] Moreover, because Amtrak was seeking retroactive relief for an alleged violation of federal law that was not ongoing, the rule in *Ex parte Young* did not apply.[1118] Finally, the court held that either or both of two applicable statutes of limitation barred Amtrak's claim on the last parcel that the Commissioner was in the process of condemning.[1119]

Articles

I. Amtrak Exemption from Claims under the False Claims Act

An article in *Recent False Claims Act & Qui Tam Decisions* discusses the applicability of the False Claims Act (FCA) to Amtrak.[1120] The FCA imposes liability for "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval" from or by the federal government.[1121] In discussing FCA lawsuits against Amtrak and other entities,[1122] the article notes *United States ex rel. Totten v. Bombardier Corp.*[1123] Totten brought

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[1116] *Id.* at *2.

[1117] *Id.* at *25.

[1118] *Id.* at *27.

[1119] *Id.* at *67, 68, 70-71.

[1120] Taxpayers against Fraud (TAF) Education Fund, "Recent False Claims Act & Qui Tam Decisions," 35 *False Cl. Act and Qui Tam Q. Rev*. 3 (Oct. 2004), hereinafter referred to as "Recent FCA Claims."

[1121] 31 U.S.C. § 3729(a) (2014). *See also*, U.S. Department of Justice, The False Claims Act: A Primer, available at: http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf (last accessed March 31, 2015).

[1122] *E.g.*, *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731 (D.C. Cir. 1998); *United States v. Harvard Coll.*, 323 F.Supp.2d 151 (D. Mass. 2008).

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a *qui tam* suit against Bombardier Corporation that had contracted with Amtrak to provide Amtrak's rail cars with new toilet systems.[1124] Totten alleged that Bombardier knowingly delivered defective cars and later submitted "invoices to Amtrak for payment from an account that included federal funds."[1125] However, the district court granted Amtrak a summary judgment because Bombardier never presented a false claim to the government.[1126]

On appeal, the District of Columbia Circuit affirmed the district court's decision.[1127] "[T]he FCA contains a 'presentment requirement,' requiring claims to be 'presented to an officer or employee of the Government before liability can attach."[1128] However, the Amtrak Act provides that Amtrak is "'not a department, agency, or instrumentality of the United States Government'"[1129] and thus bars FCA suits against Amtrak.[1130] Thus, the appellate court's decision effectively exempts Amtrak from FCA actions in spite of Amtrak's federal ties because Amtrak does not qualify as "the Government."[1131]

[1123] 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 3967 (U.S., May 16, 2005), *superseded by statute as stated in United States v. Carell*, 782 F. Supp.2d 553, 2011 U.S. Dist. LEXIS 28965 (M.D. Tenn. 2011). *See Department of Transportation v. Association of American Railroads,* 135 S. Ct. 1225, 191 L. Ed.2d 153, 2015 U.S. LEXIS 1763 at * 1, 6 (U.S., March 9, 2015) in which the Supreme Court held for purposes of § 207 of the Passenger Rail Investment and Improvement Act (PRIAA) that Amtrak was a "governmental entity."

[1124] *Totten*, 380 F.3d at 490.

[1125] *Id.*

[1126] *Id.*

[1127] *Id.*

[1128] Recent FCA Claims*, supra* note 1120.

[1129] *Id*. at 491 (*quoting* 49 U.S.C. § 24301(a)(3)).

[1130] Recent FCA Claims*, supra* note 1120.

[1131] *Id*. at 490.

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J. Amtrak Tax Exemption

A law review article discusses the Amtrak tax exemption.[1132] The article analyzes a dispute over public utility costs that gave rise to a series of lawsuits by the Pennsylvania Public Utility Commission (PUC) beginning with the PUC's suit against Amtrak for a contribution toward the cost of maintaining safety at railway crossings.[1133] The litigation resulted in a "set of conflicting decisions" involving Pennsylvania and the federal courts.[1134] Opinions were divided on whether "Amtrak's immunity from local 'taxes or other fees' … extends to assessments for local improvements of the kind at issue here."[1135] The article argues that although state courts correctly noted the differences between a tax and the costs at issue, the federal court's broad interpretation was "consistent with the presumed congressional intent to minimize state taxes and fees on Amtrak."[1136]

K. High-Speed Rail Projects

An article on high-speed rail (HSR) projects argues that if Amtrak wishes to begin more HSR projects, Amtrak is uniquely positioned regarding certain real property issues.[1137] The

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[1132] Symposium, "A Case of Irreconcilable Differences with the Federal District Court: An Agency Caught in a Judicial Vise Grip," 21 *Widener L.J.* 213 (2011).

[1133] *Id.* at 214.

[1134] *Id.* at 213.

[1135] *Id.* at 214.

[1136] *Id.* at 226 (discussing *National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission (Amtrak IV)*, 342 F.3d 242, 246 (3d Cir. 2003)).

[1137] Darren A. Prum and Sarah L. Catz, "High-Speed Rail in America: An Evaluation of the Regulatory, Real Property, and Environmental Obstacles a Project Will Encounter,"13 *N.C. J.L. & Tech.* 247 (2012).

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article discusses the government's recent allocation of significant resources to HSR projects[1138] and the governmental, real property, environmental, and policy issues that accompany such projects.[1139] Because of Amtrak's ability to use existing right of ways or privately owned freight tracks for future HSR projects, the article contends that Amtrak is uniquely situated.[1140] The article states that because other operators would be at the mercy of the private freight companies Amtrak has "distinct cost advantages" for HSR projects.[1141]

[1138] *Id.* at 248-249.

[1139] *Id.* at 250.

[1140] *Id.* at 268-269.

[1141] *Id.* at 269.

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IV. BUY AMERICA ACT

A. Introduction

A 2015 NCRRP Report, entitled "Buy America Requirements for Federally Funded Rail Projects,"[1142] summarized briefly in this part of the Report, is an authoritative, comprehensive study of the Buy America requirements applicable to federal grants for passenger and freight rail development.[1143] The Report provides a detailed history of the Buy America statutes, beginning with the original Buy America Act enacted in 1933.[1144]

B. General Statutory Issues

The Report discusses the statutory issues and differences among the various Buy America provisions, including their coverage and applicability; exceptions, exclusions, and waivers; and bid certification and potential penalties, as well as multiple funding sources with a Buy America provision applicable to a project.[1145] For example, in regard to multiple funding sources, the Report cautions that "grant recipients must be cognizant of situations in which multiple Buy America provisions apply to a project," including state and local provisions.[1146]

C. Buy America Provisions and the Federal Railroad Administration

Although in 2008 Congress enacted a Buy America provision applicable to the Federal Railroad Administration (FRA) for the High-Speed Intercity Passenger Rail (HSIPR) program,

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[1142] Timothy R. Wyatt, "Buy America Requirements for Federally Funded Rail Projects," NCRRP *Legal Research Digest* 1 (2015), available at: http://onlinepubs.trb.org/Onlinepubs/ncrrp/ncrrp_lrd_001.pdf (last accessed March 31, 2015).

[1143] *Id*. at 3.

[1144] *Id*.

[1145] *Id*. at 4-9.

[1146] *Id*. at 9.

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the Report points out that since 1978 the "FRA has also been responsible for administering the Amtrak Buy America provision applicable to procurements made by Amtrak with funds from its capital grant."[1147]

The Report, first, discusses in some detail the FRA HSIPR Buy America provision, including coverage and applicability, exceptions and waivers, and certification and enforcement.[1148] The Report observes that

> [t]he FRA Buy America provision does not include any express requirements for enforcement by FRA grant recipients. However, FRA has published a list of actions that FRA grant recipients "need to do" to demonstrate compliance with the FRA Buy America provision.[1149]

The section also notes that a project may have multiple funding sources with each having a Buy America provision.[1150]

The Report points out that the "FRA has yet to issue regulations for administering the FRA Buy America provision. This is somewhat problematic from a legal perspective, in part because waivers of the FRA Buy America provision are discretionary."[1151] However, there is some interim guidance as discussed in the Report.[1152]

The Report also includes a helpful section entitled "Waiver Case Studies."[1153]

[1147] *Id*.

[1148] *Id*. at 9-14.

[1149] *Id*. at 13 (footnote omitted).

[1150] *Id*. at 13 and 21.

[1151] *Id*. at 16.

[1152] *Id*. at 18.

[1153] *Id*. at 20-26.

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Second, the Report discusses the Amtrak Buy America provision, noting that since 1978 "Amtrak has been subject to a statutory domestic preference … which applies to Amtrak's direct purchases using its federal funds"[1154] and provides an analysis similar to the analysis of the FRA HSIPR Buy America provision (*e.g.*, coverage and applicability, exceptions and waivers, and certification and enforcement).[1155] Case studies are included also.

D. Buy America Provisions and the Federal Transit Administration

The Report analyzes the Buy America provision applicable to the Federal Highway Administration (FHWA),[1156] followed by an explanation of the Buy America provision that applies to the Federal Transit Administration (FTA).[1157] Once more, the Report analyzes the Buy America provision's coverage and applicability, exceptions and waivers, certification and enforcement, and other issues including when there are multiple funding sources with a Buy America provision.[1158] The Report covers the 2005 legislative revision or update of the FTA Buy America provision.[1159] The publication also includes a section with case studies.[1160]

[1154] *Id*. at 26 (footnote omitted).

[1155] *Id*. at 26-33.

[1156] *Id*. at 39-52.

[1157] *Id*. at 52.

[1158] *Id*. at 52-57.

[1159] *Id*. at 57 (footnote omitted).

[1160] *Id*. at 69-72.

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Although, as noted, the FRA to date has not promulgated Buy America regulations the FTA's "regulations and administrative history are so voluminous that research is often required to determine how to apply the various waivers to a given procurement."[1161]

[1161] *Id*. at 72.

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V. CARMACK AMENDMENT AND LIABILITY FOR LOST OR DAMAGED GOODS

A. Introduction

When a train transporting cargo derails, for example, many issues may arise under the Carmack Amendment concerning a carrier's liability. Section B discusses statutes and regulations on the Carmack Amendment and the liability of railroads. Section C addresses the applicability of the Carmack Amendment and issues such as preemption of all claims under state law, when an intrastate shipment is part of an interstate shipment, and claims against an originating rail carrier in the judicial district where the point of origin is located. Section D discusses the applicability of the Carriage of Goods by Sea Act (COGSA) and the Harter Act. Sections E through G consider whether the Carmack Amendment applies when the parties contract otherwise, the rule applicable to an international shipment on a through bill of lading when a freight forwarder contracts for the inland rail portion, and the effects of covenants not to sue in a through bill of lading. Because there are several articles that criticize laws limiting the liability of railroads, Section H summarizes articles that discuss whether there is a need for a uniform law, whether the Carmack Amendment applies to intermodal exports, and whether the Supreme Court has misinterpreted the plain language of the Carmack Amendment and COGSA.

Statutes and Regulations

B. The Carmack Amendment's Effect on the Liability of Railroad Carriers

A railroad's liability for lost or damaged goods is subject to several laws governing interstate transportation. Although the Carmack Amendment is the most relevant statute affecting railroad liability, COGSA and the Harter Act may be implicated when multimodal transportation includes an inland rail segment to transport goods. Furthermore, in intermodal

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transportation intermediary carriers may create by contract their own terms of liability with an initial carrier, thus allowing them to opt out of the aforementioned statutory provisions.

Congress enacted the Carmack Amendment in 1906 to amend the Interstate Commerce Act.[1162] The Amendment creates a uniform system for interstate shippers to recover for actual loss or injury to property caused by carriers.[1163] The Amendment contains separate but similar provisions that limit the liability of railroads, motor carriers, water carriers, brokers, and freight forwarders.[1164] The provisions insulate carriers from liability from claims that could result in an award of damages in excess of the value of the property that was lost or damaged.[1165]

Although the Carmack Amendment limits the liability of a carrier to the value of the damaged goods, the Amendment imposes strict liability on common carriers for goods that are lost, damaged, or not delivered on time, thus preempting state and common law claims in these instances.[1166]

Section 11706 of the Carmack Amendment imposes liability on railroad carriers for "the actual loss or injury to property caused by (1) the receiving rail carrier; (2) the delivering rail carrier; or (3) another rail carrier over whose line or route the property is transported."[1167] A rail

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[1162] *See* 49 U.S.C. §§ 11706 and 14706 (2014).

[1163] Patricia O. Alvarez and Marc J. Yellin, "Where to Start with a Motor Carrier Cargo Claim," Trucking Law Committee (Feb. 2006), available at http://www.dkslaw.com/articles/Trucking_CargoClaim.pdf (last accessed March 31, 2015), hereinafter referred to as "Alvarez and Yellin." *See also* 49 U.S.C. § 11706 (2014).

[1164] *See* 49 U.S.C. §§ 11706, 14706 (2014).

[1165] Alvarez and Yellin, *supra* note 1150, at 29.

[1166] *Id*.

[1167] 49 U.S.C. § 11706(a)(1)-(3) (2014).

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carrier that issues a bill of lading or that delivers the goods may recover the amount owed to the owners of the goods from the rail carrier over whose rail where the destruction or damage to the property occurred.[1168] The Amendment also provides a cause of action against "the originating rail carrier … the delivering rail carrier … and the carrier alleged to have caused the loss or damage."[1169] But the Amendment allows railroads to limit their liability, first, by allowing trains carrying passengers to limit their liability under their passenger rates for loss of or damage to baggage[1170] and, second, by allowing railroads to limit liability for transported property to the value established by written agreement between a shipper and a carrier.[1171]

The details on railroad liability under the Carmack Amendment are set forth in parts 1005 and 1035 of Title 49 of the Code of Federal Regulations.[1172] Part 1005 applies to the processing of claims and specifically includes all railroads that are subject to the Interstate Commerce Act.[1173] Part 1035 describes the requirements for bills of lading for common carriers.[1174]

[1168] 49 U.S.C. § 11706(b) (2014).

[1169] 49 U.S.C. § 11706(d)(2)(i)-(iii) (2014).

[1170] 49 U.S.C. § 11706(c)(2) (2014).

[1171] 49 U.S.C. § 11706(c)(3)(A) (2014).

[1172] 49 C.F.R. §§ 1005.1 and 1035.1 (2014).

[1173] 49 C.F.R. § 1005.1 (2014)

[1174] 49 C.F.R. § 1035.1 (2014).

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Cases

C. Applicability of the Carmack Amendment

1. Preemption of all Claims under State Law

The Carmack Amendment bars all claims that would permit a railroad to be held liable under state law.[1175] In *Gulf Rice Arkansas, LLC v. Union Pacific R.R. Co.*[1176] the shipper Gulf Rice Arkansas, LLC. (Gulf Rice) brought an action in a state court against the railroad carrier Union Pacific and its agent for the loss of railcars containing beans that were being shipped into Mexico. Gulf Rice alleged that it orally directed the carrier not to ship the remaining three railcars of beans, but the carrier shipped them anyway; the products were either confiscated or lost during shipment.[1177] The shipper sued the carrier for breach of contract, negligence, breach of bailment, conversion, and for its liability as a common carrier. The state claims were barred based on Congress's intent that the Carmack Amendment would "provide the exclusive cause of action for loss or damages to goods arising from the interstate transportation of those goods by a common carrier."[1178] Only a suit for a common carrier's obligation under the Carmack Amendment was extant.[1179] Therefore, Congress's intent in enacting the Carmack Amendment and its goal in providing uniformity are relevant to the liability of a railroad company under the Carmack Amendment.

[1175] *Gulf Rice Arkansas, LLC v. Union Pacific R.R. Co.*, 376 F. Supp.2d 715, 719 (S.D. Tex. 2005).

[1176] *Id.* at 717.

[1177] *Id.* at 719.

[1178] *Id.*

[1179] *Id.*

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2. Intrastate Shipment that was Part of an Interstate Shipment

In *Chartis Mexico, S.A. v. HLI Rail & Rigging, LLC*[1180] a shipper's property was damaged severely when a rail carrier operating a train between two Texas cities derailed.[1181] The shipment had originated in Mexico and the second segment was entirely within Texas on a separate bill of lading.[1182] The court held that the Carmack Amendment applied because the parties' bills of lading did not constitute an agreement that would exempt the shipment from Carmack's default rules on liability.[1183] When the bills of lading for overseas transport ends at a United States port and the cargo owners then contract with another carrier for the inland portion of the transport, the Carmack Amendment applies.[1184] The court distinguished intrastate transport from shipments originating overseas under a single through bill of lading. In the latter case, the initial carrier is liable for the inland portion of the transportation and thus may be exempt from the Carmack Amendment.[1185]

In a subsequent opinion and order the district court granted summary judgment to HLI Rail & Rigging, LLC on Kansas City Southern Railway Co.'s (KCSR) cross-claim for indemnity against HLL. The court stated that

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[1180] *Chartis Mexico, S.A. v. HLI Rail and Rigging, LLC*, 2014 U.S. Dist. LEXIS 33745, at *1, 35-36 (S.D.N.Y. March 13, 2014) (stating that "'Congress's authority to regulate even intrastate aspects of the operation of railroads is beyond question'") (citation omitted), *on reconsideration by, modified by, in part, summary judgment granted in part*, 2015 U.S. Dist. LEXIS 15909 (S.D.N.Y., Feb. 9, 2015).

[1181] *Id.* at *5-6.

[1182] *Id.* *37, 40.

[1183] *Id.* at *32.

[1184] *Id.* at *32-33.

[1185] *Id.*

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> as it found in the March 13, 2014 Opinion & Order, no reasonable jury could find that the Rules Publication was incorporated into the BOLs. Like other contracts, a bill of lading is generally held to incorporate the terms of an extrinsic document where there is a "specific reference" to that document and "unmistakable language" in the bill of lading that the terms in that document have been incorporated.[1186]

The court further found that "no reasonable jury could conclude that 'Price is subject to 9012' is a sufficiently specific reference to the Rules Publication because it does not cite to the Rules Publication which is merely an internal KCSR document accessible only on its website."[1187]

3. Claims Brought against the Originating Rail Carrier in the Judicial District where the Point of Origin is Located

The Carmack Amendment allows claims to be brought against originating rail carriers in the judicial district where the point of origin is located.[1188] The special venue statute allows one court to exercise control over all claims subject to the Carmack Amendment.[1189] In *Pacer Global Logistics, Inc. v. Amtrak*,[1190] a Wisconsin federal district court, which denied a motion to dismiss for improper venue and a motion to transfer, held that the action was filed in the proper venue under the special venue provision as a result of the Carmack Amendment.[1191] Pacer Global Logistics, Inc. (Pacer) contracted with Amtrak to transport cargo from Wisconsin to

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[1186] *Chartis Mexico, S.A. v. HLI Rail and Rigging, LLC*, 2015 U.S. Dist. LEXIS 15909, at *1, 9 (S.D.N.Y., Feb. 9, 2015).

[1187] *Id.* at *10.

[1188] 49 U.S.C. § 11706(d)(2)(A) (2014).

[1189] *Pacer Global Logistics, Inc. v. Amtrak*, 272 F. Supp.2d 784, 788 (E.D. Wis. 2003).

[1190] 72 F. Supp.2d 784 (E.D. Wis. 2003).

[1191] *Id.* at 789.

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California, but an earthquake that occurred while the cargo was in transit caused a railcar carrying Pacer's cargo to derail.[1192] During discovery Pacer learned that the damage to the cargo did not occur when the rail car derailed but when Amtrak and the other defendants attempted to re-rail the rail car.[1193] Claims under the Carmack Amendment may be "brought against the originating rail carrier 'in the judicial district in which the point of origin is located.'"[1194] The court held that the claims against the non-railroad defendant were properly brought in that district in spite of the fact that the usual venue would have been California; it was proper to try all the claims in one action because they arose out of the same nucleus of facts.[1195]

Statutes and Regulations

D. Applicability of the Carriage of Goods by Sea Act and the Harter Act

When shipments originate overseas under a single through bill of lading, or the shipper and carrier contract to limit the liability of intermediary carriers and freight forwarders, the Carmack Amendment may not apply. In the former instance, provisions on choice of law and limits of liability that are included in the contract will govern; in the latter instance only the initial carrier will be liable under the applicable law.

When the initial carrier is an ocean carrier, COGSA[1196] or the Harter Act[1197] will apply. COGSA is the United States' statutory enactment and implementation of the International

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[1192] *Id.* at 787.

[1193] *Id.*

[1194] *Id.* (citation omitted).

[1195] *Id.* at 791.

[1196] 28 U.S.C. § 1300, *et seq*. (2014).

[1197] 46 U.S.C. § 30701, *et seq*. (2014).

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Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (also known as the Hague Rules). COGSA provides that "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter"[1198] and specifies the responsibilities and liabilities of common carriers for damage to or loss of cargo.[1199] The convention has at least eighty contracting parties, including the United States. Although both COGSA and the Convention may apply to an international shipment, a few minor differences exist between the two laws. When a conflict occurs between COGSA and the Convention, COGSA prevails.[1200]

The Harter Act governs the liability of water carriers and provides that "[a] carrier may not insert in a bill of lading or shipping document a provision avoiding its liability for loss or damage arising from negligence or fault in loading, stowage, custody, care, or proper delivery. Any such provision is void."[1201] The Harter Act applies to contracts of carriage of goods by sea between United States ports and between United States and foreign ports, whereas COGSA specifically applies to contracts between United States ports and foreign ports.[1202]

[1198] 28 U.S.C. § 1300 (2014).

[1199] 28 U.S.C. § 1303 (2014).

[1200] Michael F. Sturley, "The History of COGSA and the Hague Rules," 22 *J. Mar. L. & Com.* 1, 55 (1991).

[1201] *Id*.

[1202] Gerard J. Mangone, *United States Admiralty Law* 85 (1997).

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Cases

E. Carmack Amendment Inapplicable When the Parties Contract Otherwise

When parties engaged in maritime commerce enter into a contract and select COGSA to govern any dispute, the Carmack Amendment will not apply to the rail segment of an international shipment.[1203] In *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*[1204] a shipping company issued the cargo owners in China four through bills of lading for multimodal transportation of their goods, including an inland rail segment that was subcontracted to Union Pacific. The bills of lading permitted the shipping company to extend the bill's limitations on liability and defenses to a subcontractor and to make COGSA applicable to the transportation of the goods until their delivery.[1205] After a train derailment in Oklahoma destroyed their cargo, the owners brought an action against the railroad and the shipping company that issued the bills of lading.[1206] The issue was whether the Carmack Amendment applied to the inland rail segment of a shipment originating overseas under a single through bill of lading.[1207]

The Supreme Court emphasized that parties engaged in international maritime commerce have the freedom to structure their contracts. The Court held that the Carmack Amendment, which is "textually and historically limited to the carriage of goods received for domestic rail transport," did not apply in this situation.[1208] The Court held that the agreement that provided

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[1203] *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 177 L. Ed.2d 444 (2010).

[1204] *Id*., 130 S. Ct. at 2439, 177 L. Ed.2d at 433-434 (2010).

[1205] *Id*., 130 S. Ct. at 2439, 177 L. Ed.2d 424.

[1206] *Id*.

[1207] *Id*., 130 S. Ct. at 2440, 177 L. Ed.2d at 434.

[1208] *Id*., 130 S. Ct. at 2449, 177 L. Ed.2d at 444.

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that Kawasaki and Regal-Beloit would litigate any dispute in Tokyo and that further provided that COGSA would apply to the entire journey prevented the Carmack Amendment's application to the rail transportation segment of the international shipment.[1209]

Furthermore, allowing a shipment to be governed both by the Carmack Amendment and by COGSA would undermine COGSA. The Carmack Amendment only applies to property for which a receiving rail carrier has issued a bill of lading.[1210] When an international shipment is governed by a through bill of lading, there is no receiving rail carrier because the initial carrier did not receive the cargo for transport by domestic rail.[1211] Furthermore, applying the Carmack Amendment to international shipments governed by a through bill of lading would create jurisdictional issues: the Carmack Amendment provides for venue within the United States; however, a through bill of lading may call for jurisdiction of claims outside the United States.[1212]

Before the Supreme Court's decision, the Ninth Circuit had ruled that a forum selection clause did not apply because the Carmack Amendment governs an international shipment's inland segment under a through bill of lading.[1213] The Second Circuit had taken a similar position, whereas the Fourth, Sixth, Seventh, and Eleventh Circuits had decided that the

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[1209] *Id*.

[1210] *Id*., 130 S. Ct. at 2445, 177 L. Ed.2d at 440.

[1211] *Id*., 130 S. Ct. at 2444-2445, 177 L. Ed.2d at 439.

[1212] *Id*., 130 S. Ct. at 2445-2447, 177 L. Ed.2d at 439-441.

[1213] *Id*., 130 S. Ct. at 2440, 177 L. Ed.2d at 434.

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Carmack Amendment did not apply in this situation.[1214] The Supreme Court's decision therefore resolved a split among the circuits.

F. International Shipment on a Through Bill of Lading when a Freight Forwarder Contracted for the Inland Portion

The Carmack Amendment's applicability also is limited when a shipment originated overseas under a single through bill of lading that covers the inland segment of the transportation.[1215] In *Norfolk Southern Railway Co. v. Sun Chemical Corp.*[1216] Sun Chemical Corporation (Sun Chemical) hired an ocean carrier to ship products from Kentucky to Brazil.[1217] The through bill of lading granted the ocean carrier the authority to enter into a contract with a freight forwarding company to coordinate the transportation; the freight forwarder thereafter contracted with Norfolk Southern to move the products from Kentucky to Savannah where they would be shipped to Brazil.[1218] En route to Savannah, the train derailed, destroying the products.[1219] After the lower court granted a summary judgment for Sun Chemical on the claims of negligence and breach of contract, the Georgia Court of Appeals reversed.

The appeals court held that the Carmack Amendment did not apply to Norfolk Southern.[1220] First, the bill of lading was a contract governed by federal maritime law, not by the

[1214] *Id*.

[1215] *Norfolk Southern Railway Co. v. Sun Chemical Corp.*, 735 S.E.2d 19 (Ga. Ct. App. 2012), *cert. denied*, 2013 Ga. LEXIS 403 (Ga., Apr. 29, 2013).

[1216] *Id.* at 22.

[1217] *Id.* at 21.

[1218] *Id.* at 21-22.

[1219] *Id.*

[1220] *Id.* at 28-29.

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Carmack Amendment.[1221] Second, the ocean carrier, not Norfolk Southern, was the "receiving carrier" of the products; thus, Norfolk Southern was not liable under Carmack.[1222] Because of the Supreme Court's decision in *Kawasaki*, *supra*, part V.H.1, the Georgia court held that the application of the Carmack Amendment has been "significantly limited" in that the Carmack Amendment does not apply when "'property is received at an overseas location under a through bill [of lading] that covers the transport into an inland location in the United States.'"[1223] The Carmack Amendment only applies to the "initial receiver," which was the ocean carrier, and the freight forwarder and receiving rail carrier could contract out of the Carmack Amendment in subsequent agreements.[1224] Because the freight forwarder contracted with Norfolk Southern regarding its own liability, the Carmack Amendment did not apply.[1225]

G. Effect of Covenants not to sue in a Through Bill of Lading on a Subcontractor

The presence of a covenant not to sue in a through bill of lading prohibits a suit against a subcontractor. In *Federal Insurance Company v. Union Pacific R. Co.*[1226] the Ninth Circuit had to determine whether Union Pacific, as a subcontractor of an ocean carrier, was liable to the

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[1221] *Id.* at 28 (stating that "we construe the bill of lading issued by the ocean carrier which is before us, including its land components, as a 'maritime contract' governed by federal law … because [its] primary objective is to accomplish the transportation of goods by sea" from a foreign country to the United States and stating that "Carmack does not apply to 'what are essentially maritime contracts….'"). *See id*. at 28-29.

[1222] *Id.* at 28.

[1223] *Id.* at 22 (citation omitted).

[1224] *Id.* at 25.

[1225] *Id.* at 28.

[1226] 651 F.3d 1175, 1177 (9th Cir. 2011).

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Federal Insurance Company (FIC) for the destruction of property that Union Pacific was transporting when one of its trains derailed. The FIC had insured the goods that were being transported by an ocean carrier for a shipper. The ocean carrier subcontracted with Union Pacific to make the inland delivery of the goods.

The appeals court held that a covenant not to sue in the through bill of lading between the shipper and the ocean carrier prohibited FIC from suing Union Pacific because the railroad was merely a subcontractor.[1227] Both the Hague Rules and COGSA allow a carrier to accept liability for the negligence of its subcontractor. Thus, under the court's decision, if a rail carrier is a subcontractor and its train derails, the railroad is not liable for the damaged goods if the shipper covenanted not to sue anyone other than the ocean carrier. The court also held that parties can opt out of the Harter Act, which generally covers goods before delivery and after discharge from a vessel, by extending the coverage of the COGSA or the Hague Rules by contract to cover the same period.[1228]

Articles

H. Recent Criticism of Laws Limiting Railroad Liability

Several articles have discussed the overlap of the Carmack Amendment and COGSA and the courts' conflicting interpretations of the Carmack Amendment. The articles stress the need for uniform laws on railroad liability to protect the integrity of foreign trade and to reduce shipping costs.

[1227] *Id.* at 1180.

[1228] *Id.* at 1179.

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1. Need for a Uniform Law

A law review article published prior to *Kawasaki, supra,* part V.H.1, discusses the legislative history of the Carmack Amendment and some of the conflicting decisions on the Carmack Amendment's applicability to the inland segment of a shipment by intermodal transportation that originates overseas.[1229] As discussed in the article, the Ninth Circuit's view was that "the language of [the Amendment] also encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading."[1230] The Second Circuit, however, held that the Carmack Amendment only covers rail and motor carriers and that the arranging of transportation by rail under a through bill of lading is not the same as providing transportation by a rail carrier.[1231] The author argues that there is a need to "provide the maximum degree of uniformity" of the law on international maritime trade and cautions that deviating from the principle of uniformity will "increase the expense of U.S. foreign trade."[1232] The article argues that the Carmack Amendment should apply to the inland segment of intermodal transportation, because the law on liability will not be uniform or predictable "if the law … change[s] with the geographical location of the cargo or with the mode of transportation."[1233]

2. Whether the Carmack Amendment Applies to Intermodal Exports

Another law review article argues that the *Kawasaki* case was wrongly decided, that the decision "will have a dramatic impact in the shipping industry," and that the decision will affect

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[1229] William P. Byrne, "Loss and Damage Freight Claims," 36 *Transp. L. J.* 145 (2009).

[1230] *Id*. at 164-165 (citation omitted).

[1231] *Id*. at 162-163.

[1232] *Id*. at 174.

[1233] *Id*.

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imports and exports.[1234] The article argues that an exemption under the Carmack Amendment of the inland segment of an overseas shipment eliminates the Amendment's application to a substantial amount of trade, because "[r]oughly 60% of all U.S. intermodal carriage involves international shipments."[1235] In addition, the article argues that the *Kawasaki* Court irrationally applied the Amendment to imports but not to exports.[1236] The author argues that there is no textual or practical support for the Court's decision to "leave for another day the issue of Carmack's application to intermodal exports."[1237]

3. Alternative Reasoning for the *Kawasaki* Decision

Another article criticizes the *Kawasaki* decision but argues that the Supreme Court should have used different reasoning to reach the same conclusion.[1238] The author states that the Supreme Court misinterpreted the plain language of COGSA and the Carmack Amendment.[1239] The author explains:

> A Clause Paramount in the bill of lading extends COGSA with the force of contract beyond the points of loading and discharge, that is, from the initial receipt of shipment until final delivery. This Clause Paramount should not bear on the Carmack Amendment's applicability because COGSA is not supposed to interfere with other federal statutes. Meanwhile, the Carmack Amendment should apply to the first rail carrier upon its receipt of goods inside the United States from the ocean carrier…. Moreover, because COGSA

[1234] Patrick M. Talbot, "How Swiftly the Carmack Amendment is Washed Away," 42 *J. Mar. L. & Com*. 631, 633-34 (2011).

[1235] *Id*. at 633, 634.

[1236] *Id*. at 664.

[1237] *Id*. at 633-634.

[1238] O. Shane Balloun, "The Derailment of a Transport Statute: How Regal-Beloit Shipwrecked the Carmack Amendment on the Shoals of the COGSA," 37 *Tul. Mar. L. J.* 379 (2013).

[1239] *Id*. at 380.

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> and the Carmack Amendment contemplate specialized service contracts, both the ocean carrier and rail carrier would be able to enter into contracts with one another that subject the rail carrier to COGSA liability rather than Carmack Amendment liability. The carriers would be able to choose to avoid Carmack Amendment liability on the through bill of lading under the principle of the freedom of contract, but both statutes would remain in effect as default regimes.[1240]

The article discusses whether the Supreme Court's decision also will apply to exports and notes that some lower court decisions after *Kawasaki* have stated that the Carmack Amendment applies to export shipments on through bills of lading.[1241]

4. Judicial Split on Applicability of Carmack or COGSA to International Shipments

An article in the *Transportation Law Journal* analyzes and harmonizes the decisions that were part of the split among the federal circuit courts of appeal on whether the Carmack Amendment or COGSA applies to the transportation by rail of cargo that was initiated overseas.[1242] The article, which does not mention *Kawasaki*, appears to have been published just prior to the Supreme Court's decision in *Kawasaki*.

In 2003, the Supreme Court held in *Norfolk Southern Railroad Co. v. Kirby*[1243] that subcontractors may rely on the protection of a Himalaya Clause, referring to a clause in a bill of lading that "seeks to extend to non-carriers partial immunity or other protections afforded to the carrier by the bill of lading,"[1244] even though the subcontractor is not a party to an agreement

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[1240] *Id*. at 393-394.

[1241] *Id*. at 394 (citations omitted).

[1242] Matthew K. Bell, "Forget what you Intended: Surprisingly Strict Liability and COGSA Versus Carmack," 37 *Transp. L. J.* 57, 58 (2010), hereinafter referred to as "Bell."

[1243] 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed.2d 283 (2004).

[1244] Bell, *supra* note 1242, at 58.

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between the carrier and the shipper.[1245] The Court, however, did not address the issue of whether COGSA or the Carmack Amendment governed the liability of a carrier for the inland transportation segment of an international shipment, thus creating an opportunity for the courts of appeal to choose which act would govern.[1246] Four federal circuit courts of appeals held that the Carmack Amendment did not govern the domestic portion of an international shipment when a bill of lading extended COGSA to cover the domestic portion of a shipment,[1247] whereas two federal circuits ruled that the Amendment covered the inland portion of an international shipment even when a bill of lading attempted to extend COGSA's application.[1248]

The article argues that the Carmack Amendment should not apply "for the following reasons: Carmack's own language must be given effect; Supreme Court precedent requires it; judicial economy and economic certainty demand a bright-line rule; and the *Kirby* decision."[1249] The article argues that the Carmack Amendment does not govern the inland portion of an international shipment because a separate bill of lading is not issued for the inland portion.[1250] However, the Supreme Court held in *Reider v. Thompson*[1251] that the Carmack Amendment did

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[1245] *Id.* at 63.

[1246] *Id.*

[1247] *Id.* at 64-65.

[1248] *Id.* at 65-66.

[1249] *Id.* at 67-70.

[1250] *Id.* at 68.

[1251] 338 U.S. 113, 70 S. Ct. 499, 94 L. Ed. 698 (1950).

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apply to the inland portion of an international shipment because a domestic bill of lading was issued.[1252]

The article contends that applying the Carmack Amendment to inland segments of international shipments subject to a through bill of lading would "increase litigation and create uncertainty through conflict between contractual terms and domestic laws. It would also require judicial determination as to the exact point in time when the ocean carrier and the inland carrier exchange the risk of loss for the goods."[1253] The article notes that in *Kirby* the Supreme Court held that "Carmack should not apply to inland segments of multimodal shipments subject to a through bill of lading, with COGSA applying to the other segments of the shipment, because this would destroy uniformity in maritime law."[1254] The article concludes that the courts should respect the parties' intent to the extent that they contract to extend COGSA to inland transportation.[1255]

[1252] Bell, *supra* note 1242, at 68-69.

[1253] *Id.*

[1254] *Id.* at 70.

[1255] *Id.* at 71.

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VI. CHANGE IN DRAINAGE

A. Introduction

Railroads are required by state statutes and case law to construct culverts and ditches that provide adequate drainage to ensure that water flows in its natural course and is unobstructed. Section B summarizes a Missouri statute that obligates railroads to divert water to prevent damage neighboring properties. Sections C through E discuss federal law that requires railroads to facilitate water flow from the roadbed, whether the Federal Railroad Safety Act preempts claims under state law for water damage caused by negligence, and whether the Interstate Commerce Commission Termination Act (ICCTA) preempts state claims for water damage allegedly caused by a railroad's actions. Section F addresses whether a change in topography resulting in changes in drainage modifies a railroad's duty to provide proper drainage. Section G discusses an article that analyzes the principal rules of riparian rights that apply to landowners adjacent to a watercourse, including the rule of reasonable use adopted in many states.

Statutes

B. Duty of a Railroad to Construct and Maintain Ditches and Drains

Missouri state law regulates a railroad's obligation to provide outlets for water so that the water may follow its natural path and not damage adjacent property.

> It shall be the duty of every corporation or person owning or operating any railroad or branch thereof in this state, and of any corporation or person constructing any railroad in this state, within three months after the completion of the same through any county in this state, to cause to be constructed and maintained suitable openings across and through the right-of-way and roadbed of such railroad, and suitable ditches and drains along the roadbed of such railroad, to connect with ditches, drains and watercourses, so as to afford sufficient outlet to drain and carry off the water, including surface water, along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad, except that such openings, ditches and drains

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shall not be required to be reconstructed by the corporation to accommodate changes in land conditions not caused by the corporation….[1256]

C. Applicable Federal Law Requires Railroads to Facilitate Water Flow from the Roadbed

Federal law requires that "[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction[] to accommodate expected water flow for the area concerned."[1257] As held in *Miller v. SEPTA,* discussed below, the foregoing regulation preempted Pennsylvania law.

Cases

D. Whether the Federal Railroad Safety Act Preempts Claims under State Law for Water Damage Caused by Negligence

1. Decision by Pennsylvania Commonwealth Court

In *Miller v. SEPTA*[1258] the plaintiffs sued the Southeastern Pennsylvania Transportation Authority (SEPTA) for negligently causing water damage in 1996, 1999, and 2001 to a hotel, adjacent to the Sandy Run Creek, when a hurricane and two tropical storms flooded the hotel's basement and first floors. The plaintiffs alleged that SEPTA's negligent maintenance of a bridge impeded the flow of water to the creek, thus causing it to flood the hotel.[1259] An expert witness for the plaintiffs concluded that "the twin arches of the 1912 bridge acted as a 'choke point' that

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[1256] Mo. Rev. Stat. § 389.660 (2014).

[1257] 49 C.F.R. § 213.33 (2014).

[1258] 65 A.3d 1006 (Pa. Commw. Ct. 2013), *reversed by, remanded*, 103 A.3d 1225 (Pa. 2014).

[1259] 65 A.3d at 1008.

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restricted the flow of the Sandy Run Creek and caused a backup of upstream waters" that resulted in flooding where the hotel was located.[1260]

A Pennsylvania court held that the Federal Railroad Safety Act of 1970 (FRSA) preempted a state claim for negligence because the Secretary of Transportation had promulgated a regulation, discussed in part C above, that covered drainage issues. The court observed that "[s]ection 213.33 of the 'Track Safety Standards' regulation states [that] … [e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction[] to accommodate expected water flow for the area concerned."[1261]

Although the regulation refers only to roadbeds, the FRA had clarified that the regulation applied to bridges as well.[1262] The savings clause in § 20106(a)(2)(A)-(C) of the FRSA could not prevent the preemption of the state claim.[1263] The savings clause requires that to avoid preemption it must be shown that the state law "(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce."[1264] The court, following the precedent set by the United States Supreme Court in *CSX Transportation, Inc. v. Easterwood,*[1265] held that the FRSA preempted state claims for

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[1260] *Id.*

[1261] *Id.* at 1012 (*quoting* 49 C.F.R. § 213.33).

[1262] *Id.* at 1013.

[1263] *Id.* at 1015.

[1264] *Id*. at 1014 (*quoting* 49 U.S.C. § 206106(a)(2)(A)-(C)).

[1265] 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed.2d 387 (1993) (holding that the FRSA preempted state claims of negligence for operating a train at an excessive speed and for failing to maintain adequate warnings)).

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negligence, because common law negligence does not address an essentially local safety hazard.[1266] Thus, the plaintiffs' claims failed to meet the required elements to avoid preemption.[1267] Furthermore, the issue of water flow was an area completely occupied by federal law and to require railroads to comply with the common law of fifty states would burden interstate commerce.[1268] Therefore, SEPTA was not liable for storm damage to the hotel.

2. Decision by the Supreme Court of Pennsylvania

On October 30, 2014, in *Miller v. SEPTA*[1269] the Supreme Court of Pennsylvania reversed and remanded the decision of the Commonwealth Court. The court held "that the instant state law riparian rights claim is neither covered by the FRSA's preemption provision, nor Section 213.33 of the federal Track Safety Standards regulations."[1270]

> The instant lawsuit does not pertain to any state railroad safety law, but pertains instead to riparian rights under Pennsylvania's common law, a field which Pennsylvania has traditionally occupied, as other states have, vis-à-vis the riparian rights afforded therein. …
>
> These principles of Pennsylvania common law have no direct or significant relation to railroad safety. Moreover, these riparian rights principles fall within the historic police powers of Pennsylvania, and are not to be superseded by a federal act unless superseding these common law principles is the clear and manifest purpose of Congress.[1271]

[1266] *Miller*, 65 A.3d at 1014.

[1267] *Id*.

[1268] *Id.* at 1015.

[1269] 103 A.3d 1225 (Pa. 2014).

[1270] *Id*. at *1236.

[1271] *Id*. at *1237.

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Furthermore, the court ruled that § 213.33 of the Track Safety Standards was not "dispositive of preemption as a regulation which covers the subject matter of the governing state law…."[1272] The court stated that § 213.33 "simply does not address, much less cover, the subject matter of Pennsylvania's common law riparian rights."[1273]

E. Whether the Interstate Commerce Commission Termination Act of 1995 Preempts State Law Claims for Water Damage

In *Village of Big Lake v. BSNF Ry. Co.*[1274] the village brought an action against BSNF for raising the height of the track in and around the village that caused water damage to property within the village. The railroad bed created a barrier that artificially confined flood water and prevented it from receding.[1275] The village alleged that the increased height violated a village ordinance, as well as a state statute on drainage.[1276] The village sought a permanent injunction to require BNSF to lower its rail bed and to produce a hydrological and hydraulic study on the effect of the heightened rail bed on the village's flood plan as such studies were required by a local ordinance.[1277]

A Missouri appellate court held that the village's claims were preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), which "expressly provides that the

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1272 *Id*. at *1238.

1273 *Id*.

1274 382 S.W.3d 125 (Mo. App. 2012), *remanded, by Village of Big Lake v. BNSF Ry. Co.,* 2014 Mo. App. LEXIS 634 (Mo. Ct. App., June 3, 2014).

1275 *Village of Big Lake,* 382 S.W.3d at 126-127.

1276 *Id.* at 126 (*citing* Mo. Rev. Stat. § 389.660 (2000).

1277 *Id.* at 127.

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[STB] has exclusive jurisdiction over the 'construction' of railroad tracks."[1278] The court's reasoning was that the state statute and the local ordinance requiring a study were preempted *per se* by the ICCTA:

> [T]he STB has recognized two broad categories of state and local actions that are categorically preempted regardless of the context or rationale for the action: (1) "any form of state or local permitting or preclearance, that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the [STB] has authorized" and (2) "state or local regulation of matters directly regulated by the [STB] – such as the construction, operation or abandonment of rail lines...."[1279]

The appellate court determined that the applicable Missouri statute and local ordinances did not come within the exception to the preemption that requires that a state regulation must neither "discriminate against rail carriers" nor "unreasonably burden rail carriage."[1280]

However, after the Village of Big Lake appealed, the Court of Appeals of Missouri reversed and remanded the grant of a summary judgment in favor of BNSF and Massman Construction Co. The respondents argued that language in the permit agreements between Big Lake and BNSF's predecessor, Burlington Northern, released Big Lake's claims for negligence and trespass relating to damage to Big Lake's underground water lines and a fire hydrant. The held that "genuine issues of material fact [exist] as to which Respondents bear the burden of proof and persuasion," thus "summary judgment [was] precluded as a matter of law."[1281]

[1278] *Id.* at 129.

[1279] *Id.* at 128-129 (citations omitted).

[1280] *Id.* at 129 (*citing Norfolk Southern Railroad Co. v. City of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010) and *CSX Transportation, Inc.,* 2005 STB LEXIS 657).

[1281] *Village of Big Lake v. BNSF Ry. Co.,* 433 S.W.3d 460, 461 (Mo. Ct. App., June 3, 2014).

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F. Change in Topography Resulting in Changes in Drainage does not Modify a Railroad's Duty to Provide Proper Drainage

In *City of Atlanta v. Kleber*[1282] the Supreme Court of Georgia held that Norfolk Southern and the city of Atlanta were not liable for damage to the plaintiffs' property. Two homeowners brought actions for negligence and nuisance against Norfolk Southern and the city for water damage to their property that occurred during a period of heavy rainfall.[1283] The homeowners argued that Norfolk Southern's and city's failure to properly maintain a drainage pipe and culvert caused the damage.[1284]

The city was not liable for the damage because its mere approval of home construction in the neighborhood that may have contributed to an increase in flooding did not make it responsible for the maintenance of a railroad culvert.[1285] As for Norfolk Southern, it was not liable for the damage because the culvert and drainage ditch that it installed were sufficient to drain water at the time they were installed in the 1970s, and Norfolk Southern had maintained them adequately since their installation. Norfolk Southern had committed no breach of duty to the plaintiffs, because it did not take "any subsequent action to increase the flow of water onto the homeowners' property. Changes in the topography of the surrounding neighborhood not caused by Norfolk Southern did not create any new duty to change the parameters of the

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[1282] *City of Atlanta v. Kleber*, 285 Ga. 413, 419, 677 S.E.2d 134, 139 (Ga. 2009).

[1283] *Id.*, 285 Ga. at 413, 677 S.E.2d at 136.

[1284] *Id.*, 285 Ga. at 413, 677 S.E.2d at 135.

[1285] *Id.,* 285 Ga. at 419, 677 S.E.2d at 139. *See also, Hardin County Drainage Dist. 55, Div. 3 v. Union Pac. R.R. Co*., 826 N.W.2d 507 (Iowa 2013) (holding that Union Pacific was not obligated to pay for repairs or improvements to subterranean drainage tile because under Iowa law railroads are responsible for the upkeep of culverts but not of drainage tile); *Louisville & N. R. Co. v. Bush*, 336 S.W.2d 578 (Ky. 1960) (holding that the railroad was not liable for the increased water flow onto the plaintiff's land because the railroad "did not change the natural course of the water, nor did it cause the water to collect and be cast upon the lower estate in an unnatural volume or in an unusual or swift stream").

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properly-installed drainage ditch and pipe."[1286] The homeowners' separate nuisance claim was held to be barred by the statute of limitations.[1287]

Article

G. Surface Water Rules in Arkansas

A law review article discusses the issue of diffused surface water in Arkansas and analyzes several court cases, including some against railroads. Arkansas follows a rule of riparian rights under which landowners adjacent to a watercourse have the right to benefit from the water. The courts decide whether water is in a watercourse or is diffused surface water.[1288]

The article discusses the first railroad case in Arkansas involving liability for water damage. In 1882, in *Little Rock and Fort Smith Railway Co. v. Chapman*[1289] the railroad had constructed an embankment that caused water to collect on the plaintiff's property.[1290] The court adopted a "modified common enemy rule" for the state. Under the common enemy rule "a property owner may take whatever steps [are] necessary to protect against" diffused surface water.[1291] The modified common enemy rule imposes liability on a homeowner who acts negligently in protecting himself from diffused surface water by unnecessarily harming a

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[1286] *Kleber*, 285 Ga. at 418, 677 S.E.2d at 138.

[1287] *Id.*

[1288] J. W. Looney, "Diffused Surface Water in Arkansas: Is it Time for a New Rule?" 18 *U. Ark. Little Rock L.J.* 393, 394 (1996), hereinafter referred to as "Looney."

[1289] 39 Ark. 463, 1882 Ark. LEXIS 181 (1882).

[1290] Looney, *supra* note 1288, at 408.

[1291] *Id*. at 404.

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neighboring property.[1292] The court held that the railroad was liable for water damage because it constructed its roadbed without sufficient drains that caused unnecessary damage to the plaintiff's land, thereby violating the modified common enemy rule.[1293] Because the railroad could have protected its property from water damage without damaging the plaintiff's property, the railroad was negligent when it acted to protect itself from diffused surface water.[1294]

The article argues that Arkansas should adopt a "reasonable use rule." Under the reasonable use rule "liability is determined by the reasonableness of the property owner's actions [that] altered the surface water flow."[1295] Recently, many states have adopted the reasonable use rule because the common enemy rule historically was not intended to apply to surface water.[1296] Under the reasonable use rule a property owner may be liable for interfering with the flow of water in a watercourse or for negligence in controlling, diverting, or otherwise handling diffused surface water.[1297]

[1292] *Id*. at 405.

[1293] *Id*. at 408.

[1294] *Id*.

[1295] *Id*. at 406-407.

[1296] *Id*. at 415.

[1297] *Id*. *See also*, J.M. Kelley, "*Burlington Northern, et al. v. Benson County* –The North Dakota Supreme Court Dammed Water District from Extending Reasonable Use to Diffused Surface Waters in Natural Drainways," 6 *Great Plains Nat. Resources J.* 162 (2002).

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VII. CHANGE OF GRADE

A. Introduction

This part of the Report discusses whether damages are recoverable for grade changes usually at highway-railway crossings. As discussed in Sections B and C, municipalities are authorized to change the grade of streets; however, in many states railroads are also granted the same authority because of their status as public-service corporations. Property owners having a claim because of a change of grade will rely on their state's constitution as a basis for relief or possibly a state statute that provides for the recovery of damages from either a municipality or the railroad. A railroad company may be liable when a change of grade is for a railroad purpose rather than for a public use. Section D discusses liability when a change of grade was for a public use but the railroad contractually agreed with a municipality to be responsible for damages. Section E reviews a law review article that traces the development of amendments to state constitutions so as to permit the recovery of just compensation when a landowner's abutting property either is taken or damaged because of a change of grade. Section F addresses liability to private land owners when access to their property is altered or obstructed by a change of grade.

Statutes

B. Recovery of Damages because of a Change of Grade

In Wisconsin, a property owner is entitled to "[d]amages to property abutting on a highway right-of-way due to change of grade where accompanied by a taking of land."[1298] In New York the Transportation Law provides in part that:

[1298] Wis. Stat. § 32.09(6)(f) (2014).

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> *If the work of any grade crossing elimination project shall cause actual damage to property not acquired as provided in this article, the state shall be liable therefor*, but this provision shall not be deemed to create any liability not already existing by statute. … If the amount of any such claim is not agreed upon, such claim may, pursuant to the provisions of the eminent domain procedure law, be presented to the court of claims which shall hear such claim and determine if the amount of such claim or any part thereof is a legal claim against the state and, if it so determines, to make an award and enter judgment thereon against the state….[1299]

In Pennsylvania, "[a]ll condemnors, including the Commonwealth, shall be liable for damages to property abutting the area of an improvement resulting from [a] change of grade of a road or highway, permanent interference with access or injury to surface support, *whether or not any property is taken*."[1300]

Cases

C. Liability of Railroads for a Taking or Damaging of an Owner's Property Caused by a Change of Grade

In 1915 in *Bennett v. Winston-Salem South-Bound Ry. Co.*[1301] the North Carolina Supreme Court held that unless the work was performed negligently a property owner may not recover for damage to his property caused by a change of grade that was authorized by the state or a political subdivision thereof.[1302] The court held that property owners are not entitled to compensation when a state authorizes a change of grade to a highway. No compensation is due because the change of grade was made for a public purpose, and the compensation paid to the landowner when the property was taken initially for a highway precludes additional

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[1299] N.Y. Trans. Law § 228 (12) (2014) (emphasis supplied).

[1300] 26 Pa. Cons. Stat. § 714 (2014) (emphasis supplied).

[1301] 170 N.C. 389, 391, 87 S.E. 133, 134 (N.C. 1915).

[1302] *See Marchi v. Brackman,* 130 Mont. 228, 299 P.2d 761 (1956) (holding that a city cannot transfer to another entity the power and authority used by the city for a public purpose).

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compensation for later improvements to the highway.[1303] The current edition of *Nichols on Eminent Domain* confirms the point. The treatise states that "when public highways are established, the government generally acquires a fee or easement interest that also includes the right to initially establish the grade of the roadway and to alter it at any time, and from time to time, as public necessity and convenience may require."[1304]

Although railroads are private companies, they are considered to be public-service corporations. Consequently, they are endowed with statutory authority to condemn land for their use.[1305] However, railroad companies do not have a continuing power or authorization to change or improve the grade without paying compensation. Although a railroad has the right to condemn land, the land is being taken for a private purpose, that is, for the railroad, not for a public purpose.[1306] Therefore, a railroad must compensate a landowner for the diminished value of the property caused by a change of grade and for any damage caused by negligence in performing the work.[1307] In *Bennett*, the taking was solely for a railroad purpose because it helped the railroad "better control its track and appurtenances, and facilitate the movement of its trains over it."[1308]

[1303] *Bennett.,* 170 N.C. at 392, 87 S.E. at 135.

[1304] 2A-6 *Nichols on Eminent Domain* § 6.02[10].

[1305] *Bennett*, 170 N.C. at 392-393, 87 S.E. at 136.

[1306] Although the question is beyond the scope of this Report, according to *Nichols on Eminent Domain*, there is no "precise and fixed meaning" of public use in the context of the power of eminent domain. 2A-7 *Nichols on Eminent Domain* § 7.02[1].

[1307] *Bennett*, 170 N.C. at 393, 87 S.E. at 135.

[1308] *Id.*, 170 N.C. at 393, 87 S.E. at 136.

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D. Contracts between States or their Local Governments and Railroads for Damages Caused by a Change of Grade

Rigney v. New York Cent. & H. R. R. Co.[1309] illustrates that a railroad under some circumstances may be held liable for damage to private property that occurred because of a change of grade that was for a public purpose. The court held that when a railroad and a municipality agree that the railroad will be liable for damage to property caused by a change of grade, the property owner may sue the railroad rather than the municipality for damages.[1310]

In *Rigney*, because a bridge above railroad tracks was unsafe and needed repair, the city of Rensselaer requested the railroad company that was changing the grade of the street to repair the bridge.[1311] The contract between the railroad and the municipality stated that the railroad company

> expressly covenants and agrees that in the event of any damage resulting from the "work" as it progresses, or thereafter, as a result or in consequence thereof, or from any matter or thing connected therewith, arising therefrom, to any person or property, including damage resulting from change of grade of street, being approaches to said bridge, it will pay and liquidate the same at its own expense and assume the liability therefor….[1312]

The court held that because the railroad agreed to assume liability for damages the provision was more than a covenant by the railroad to indemnify the city.[1313] To recover under the provision, however, a property owner had to meet two requirements as set forth in *Lawrence*

[1309] 217 N.Y. 31, 37, 111 N.E. 226, 228 (1916).

[1310] *Id.*

[1311] *Id.,* 217 N.Y. at 34, 111 N.E. at 227.

[1312] *Id.,* 217 N.Y. at 35, 111 N.E. at 227.

[1313] *Id.,* 217 N.Y. at 37, 111 N.E. at 228.

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v. Fox:[1314] the municipality must have intended to secure a public benefit for owners of land affected by a change of grade, and the municipality must have had an obligation to the landowners.[1315] In *Rigney*, the property owner's action met both requirements.

Articles

E. History of Liability for Taking or Damage to Property

An article in the *Vanderbilt Law Review* traces the liability under state constitutions for government takings of property.[1316] In the 1800s, property owners seeking compensation for actions interfering with their property rights relied on the common law. However, after 1890 many state courts held that "just compensation provisions were themselves the source of property owner's rights of action for damages."[1317] By 1912, over half of the then forty-eight states had adopted a constitutional amendment requiring the payment of just compensation when property was taken or damaged rather than just taken.[1318] The article discusses the courts' different approaches to compensation for a taking or damaging of property.[1319] The article observes that because landowners could be awarded just compensation for a change of grade the

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[1314] *Id.* (*citing Lawrence v. Fox*, 20 N.Y. 268 (1859)).

[1315] *Id.,* 217 N.Y. at 37-38, 111 N.E. at 228.

[1316] Robert Brauneis, "The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 *Vand. L. Rev*. 57 (1999).

[1317] *Id*. at 109.

[1318] *Id*. at 115 (*e.g*., Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming).

[1319] *Id*. at 120-133.

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courts were unlikely to grant property owners injunctive relief to prevent a change of grade.[1320] The author concludes by discussing the issues of governmental immunity to actions for just compensation and whether injunctive relief is available under certain limited circumstances.

F. Liability for a Change in a Landowner's Access to Property Caused by a Change of Grade

A recent law review article discusses government regulation of access to roads and highways.[1321] In a 1906 landmark case, *Sauer v. City of New York*,[1322] the United States Supreme Court held that a property owner was not entitled to compensation for loss of access to the street in front of his building because the city, not a railroad company, constructed the viaduct that obstructed his access.[1323] The Court observed that the city constructed the viaduct for public purposes and that railroads were not permitted to use it.[1324]

Stokes discusses cases since *Sauer* and the amendment of state constitutions to provide for the payment of just compensation for either a taking or damaging of property and reviews current law on loss of access.[1325] The article suggests that only when access to their land is obstructed do property owners have a claim for just compensation.[1326]

[1320] *Id*. at 133.

[1321] Michael L. Stokes, "Access Management: Balancing Public and Private Rights in the Modern 'Commons' of the Roadway," 60 *Clev. St. L. Rev*. 585, 590 (2012), hereinafter referred to as "Stokes."

[1322] *Sauer v. City of New York*, 206 U.S. 536, 27 S. Ct. 686, 51 L. Ed. 1176 (1907); Stokes, *supra* note 1308, at 599. *See also*, Elizabeth Arens, "Note: the Elevated Railroad Cases: Private Property and Mass Transit in Gilded Age New York," 61 *N.Y.U. Ann. Surv. Am. L*. 629 (2006).

[1323] Stokes, *supra* note 1321, at 601.

[1324] *Id*. at 600.

[1325] *Id*. at 601-602, 626-642.

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On the subject of damages for loss of access, the Stokes article may be compared with *Nichols on Eminent Domain*. *Nichols* states that a landowner may be entitled to damages when government construction results in a loss of access to property.[1327] Specifically, when there is a change of grade and a loss of access to abutting property, a property owner "is entitled to compensation under the 'damage' provision of the Constitution."[1328] However, when access to land is only partially obstructed, compensation is not warranted.[1329] Finally "[a]n owner *specially damaged* by a change of grade is entitled to compensation without regard to whether the grade is changed by a public entity for the convenience of travelers or by [a] private corporation such as a railroad, street railway, or other public service corporation."[1330] A land owner is specially damaged when his injury is one not shared by the general public.[1331]

[1326] *Id*. at 654.

[1327] 2A-6 *Nichols on Eminent Domain* §§ 6.02[1] and 6.02[9].

[1328] *Id*. at § 16.05[3] (emphasis supplied).

[1329] *Id*.

[1330] *Id*.

[1331] *Id*.

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VIII. CHICAGO REGION ENVIRONMENTAL AND TRANSPORTATION EFFICIENCY PROGRAM (CREATE)

A. Introduction

The Chicago Region Environmental and Transportation Efficiency Program (CREATE) is "a first-of-its-kind public/private partnership" among the state of Illinois, city of Chicago, American Association of Railroads (*e.g.*, BNSF, Canadian National, CSX, and Norfolk Southern), National Railroad Passenger Corp (Amtrak), and the Commuter Rail Division of the RTA (Metra).[1332] The total estimated cost for the CREATE partners is $3.2 billion.[1333] CREATE is "the first state-local-private partnership aimed at solving an infrastructure problem" on such a large scale.[1334]

CREATE has twenty-one projects that will benefit Metra commuter service, for example, on five Metra routes by decreasing delays and making service more reliable by reducing "conflict points" with freight trains.[1335] Some funding has been committed, including $86 million provided by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A

[1332] Chicago Region Environmental and Transportation Efficiency Program (CREATE), "What is CREATE?," available at: http://www.aurora-il.org/documents/cnrailway/docs_meeting/Call%20to%20Action%20CREATE%20Exhibit.pdf (last accessed March 31, 2015). *See also*, Jeff Stagl, Transportation Improvement Program Posts Progress in Chicago, *Maintenance of Way* (July 2012) (describing the CREATE projects, importance, partners, and funding to improve railroad efficiency in Chicago), available at: http://www.progressiverailroading.com/mow/article/Transportation-improvement-program-posts-progress-in-Chicago-- (last accessed March 31, 2015).

[1333] Jacki Murdock, University of California-Los Angeles, "Evolution and Financing of the Chicago Region Environmental and Transportation Efficiency Program," at 16, available at: http://jackimurdock.files.wordpress.com/2013/03/create.pdf (last accessed March 31, 2015), hereinafter referred to as "Evolution and Financing of CREATE."

[1334] Mark Perlman and Julia Pulidindi, "Public-Private Partnerships for Transportation Projects," at 4 National League of Cities, Municipal Action Guide (May 2012).

[1335] Chicago Region Environmental and Transportation Efficiency Program, Passenger Rail Benefits, available at: http://www.createprogram.org/factsheets/pass_benefits.pdf (last accessed March 31, 2015).

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Legacy for Users (SAFETEA-LU) and $100 million by the United States Department of Transportation (DOT) in 2010 as part of the Transportation Investment Generating Economy Recovery program (TIGER), a discretionary program under the American Recovery and Reinvestment Act of 2009 (ARRA).[1336] As of 2010, contributions toward the funding of CREATE also included $100 million from the railroads, $30 million from the city of Chicago, and $100 million from the state of Illinois.[1337]

As discussed in Section B, the National Environmental Policy Act (NEPA) applies to CREATE. Part C discusses funding made available under TIGER and the ARRA. Parts D and E, respectively, summarize a 2013 report that provides an overview of CREATE's projects and funding and a recent article that reports that CREATE as of June 2013 had not secured the funding required to complete its projects.

Statutes and Regulations

B. National Environmental Policy Act's Applicability to CREATE

Under the National Environmental Policy Act or NEPA an agency must review a program for its potential environmental effects if the program is partially funded or directed by a federal agency.[1338] The CREATE program is partially funded with federal money, and, therefore, must be reviewed by a federal agency.[1339]

[1336] Evolution and Financing of CREATE, *supra* note 1333, at 18-19.

[1337] *Id*. at 19.

[1338] *See* 42 U.S.C. §§ 4332 and 4332(2)(C) (2014) ("major Federal actions significantly affecting the quality of the human environment").

[1339] CREATE: Final Feasibility Plan (2005), available at: http://www.createprogram.org/linked_files/final_feasibility_plan_orig.pdf (last accessed March 31, 2015).

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C. TIGER Program under the American Recovery and Reinvestment Act

The United States Department of Transportation (DOT) established the TIGER program through the American Recovery and Reinvestment Act (ARRA) for the purpose of awarding grants to improve infrastructure for transportation.[1340] The program includes funding for passenger and freight rail transportation projects.[1341] Grant money under the TIGER program cannot be less than $20 million or more than $300 million for any one project.[1342]

Articles

D. Overview of CREATE's Origin, Purpose, Projects, and Funding

A 2013 report by the Infrastructure Council of the Illinois Chamber of Commerce provides an overview of CREATE's origin, purpose, projects, and funding and describes the Chicago area's need for the CREATE program.[1343] Chicago, the largest rail port in North America, is heavily congested by rail traffic.[1344] CREATE is in response to the need for a cohesive plan to address the congestion in the Chicago area through seventy different projects.[1345] Seventeen of the projects have been completed and eleven more are underway.[1346]

[1340] Pub. L. No. 111-5, 123 Stat. 115, 516 (Feb. 19, 2009). *See* U.S. DOT, Tiger Discretionary Grants Enacted FY 2015 Appropriations Bill Includes $500 Million Tiger Program, available at: http://www.dot.gov/tiger (last accessed March 31, 2015).

[1341] Pub. L. No. 111-5, 123 Stat. 115, 516 (Feb. 19, 2009).

[1342] *Id*.

[1343] Benjamin J. Brockschmidt, Infrastructure Council of the Illinois Chamber of Commerce, CREATE Ten Years: The Past, Present, and Future of the Chicago Region's Railroads (2013), available at: http://www.cmap.illinois.gov/documents/10180/125910/CREATE-Report-Final.pdf/382726e9-8c31-4b58-ab8b-8ddb65dc72cf (last accessed March 31, 2015).

[1344] *Id*. at 2.

[1345] *Id*. at 2-3.

[1346] *Id*. at 3.

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The area already has attained a reduction in congestion because of the completion of some projects.[1347] Reportedly, there has been a twenty-eight percent reduction in freight delays and a thirty-three percent reduction in passenger delays.[1348] The report also discusses CREATE's economic and environmental benefits and the anticipated increase in freight traffic in the coming years.[1349]

E. CREATE's Future as Dependent on Additional Funding

A June 2013 article in the *Chicago Tribune* discusses the possibility that funding for the CREATE program will diminish.[1350] As of the date of the article, the CREATE program still needed $2 billion for the completion of its projects.[1351] Partners in the program, including Amtrak, have testified before a House Subcommittee on Transportation on the CREATE projects that already have been completed successfully.[1352] CREATE has yet to secure the funding needed to finish its projects.[1353]

[1347] *Id*. at 5.

[1348] *Id*.

[1349] *Id*. at 5-9.

[1350] Richard Wronski, "Chicago Rail Program a Success, but Future Funding in Doubt, Officials Say," *Chicago Tribune* (June 11, 2013), available at: http://articles.chicagotribune.com/2013-06-11/news/ct-met-railroad-bottlenecks-20130611_1_rail-crossings-create-program-englewood-flyover (last accessed March 31, 2015).

[1351] *Id*.

[1352] *Id*.

[1353] *Id*.

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IX. COMMON CARRIER OBLIGATION OF RAILROADS

A. Introduction

The common carrier obligation of railroads, now a statutory requirement, is codified at 49 U.S.C. § 11101. A railroad company is required to provide transportation to all parties upon reasonable request, including for hazardous materials. Exceptions to the common carrier obligation are not to be implied. Finally, rail carriers generally are insulated from tort claims under state law but a Clarification Amendment (49 U.S.C. § 20106(b)) has increased a rail carrier's liability.

Sections B and C discuss statutes, regulations, and policies that apply to a rail carrier's common carrier obligation, services, and rates under § 11101, including a carrier's obligation to accept and transport hazardous materials. As for relevant cases, as discussed in section D, exceptions to a railroad company's common carrier obligations are not to be implied. Section E illustrates more particularly the statutory obligation of a railroad company as a common carrier to transport hazardous materials. Finally, section F discusses a recent article on the preemption of tort claims under state law with respect to a railroad company's transportation of such materials.

Statutes, Regulations, and Policies

B. Common Carrier Transportation, Service, and Rates

Under 49 U.S.C. § 11101(a)

> [a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service.[1354]

[1354] 49 U.S.C. § 11101(a) (2014).

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Furthermore, the law provides that "[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable."[1355]

C. Common Carrier Obligation of Railroads to Transport Hazardous Materials

According to the STB and pursuant to § 11101 railroads have a common carrier obligation to transport hazardous materials, a service that must be provided on reasonable request by shippers. A shipper of hazardous materials has made a reasonable request for rail transportation when the shipper tenders its product to a rail carrier in a rail car meeting DOT packaging and mechanical requirements.[1356] As stated by the Eighth Circuit, "a railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable."[1357]

More recently, in a statement by the Department of Transportation (DOT), the DOT agreed with the STB that "railroads have a common carrier obligation to transport hazardous materials and cannot refuse to provide this service merely because to do so would be in convenient or unprofitable."[1358] The DOT noted that the transportation of hazardous materials is currently very safe but that the DOT has made several initiatives to increase the safety of transporting such materials.[1359]

[1355] *Id*.

[1356] *Surface Transportation Board Shippers Committee, OT-5 v. The Ann Arbor R.R.*, 5 ICC 856 (1989).

[1357] *G.S Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998).

[1358] United States Department of Transportation, Common Carrier Obligation of Railroads – Transportation of Hazardous Materials, at 1 (July 22, 2008), available at: http://www.fra.dot.gov/eLib/Details/L02847 (last accessed March 31, 2015).

[1359] *Id.* at 2.

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As stated by the DOT, the transportation of hazardous materials is essential to our daily lives and therefore unavoidable.[1360] Furthermore, railroads transport a majority of the shipments of hazardous materials that are toxic to inhale. Transportation of hazardous materials by highway would require a substantial investment to equal the capacity currently available by rail. A transfer of shipments of hazardous materials to motor carriers would increase fuel consumption and pollution, as well as increase the cost of the goods. Moreover, trucks are involved in more accidents than rail cars.[1361] A pipeline is not feasible because a pipeline would require a substantial investment in infrastructure.[1362] A pipeline also would require a substantial environmental investment.

When there are accidents, the DOT and the Federal Railroad Administration (FRA) respond by implementing supplementary regulations to address any human factors that caused or contributed to an accident.[1363] The DOT and FRA have promulgated regulations to improve the integrity of tank cars to reduce the possibility of spillage or leakage.

Moreover, the DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) has published rules (49 C.F.R. § 172.80, *et seq.*) that require bulk shippers and carriers of hazardous materials to develop safety plans to address "personnel security, unauthorized access, and en route security and … possible transportation security risks," as well as other risks already

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[1360] *Id.*

[1361] *Id.* at 3-5 (noting the declining number of train accidents, deaths, and injuries).

[1362] *Id.* at 4.

[1363] *Id.* at 5-6.

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identified.[1364] The PMHSA has trained and equipped first responders in local communities to assist them in handling any rail incidents involving hazardous materials.[1365]

Cases

D. Exceptions to the Common Carrier Obligation are not to be Implied

In 1967, in *Am. Trucking Ass'n v. Atchison, Topeka, & Santa Fe Ry. Co*.[1366] the Supreme Court heard three cases that challenged two rules promulgated by the Interstate Commerce Commission (ICC).[1367] The Court considered whether the ICC had the "authority to promulgate rules providing … that railroads which offer trailer-on-flatcar (TOFC or 'piggyback') service to the public under open-tariff publications must make such service available on the same terms to motor and water common and contract carriers" and whether "motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service."[1368] The Interstate Commerce Act provided that "it shall be the duty of common carriers by rail to provide transportation 'upon reasonable request therefor' and to establish just and reasonable rates."[1369] The Court held that the "obligation as common carriers is comprehensive and exceptions are not to be implied."[1370] Because a rail carrier is required to provide the same

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[1364] *Id.* at 10.

[1365] *Id.* at 13-14.

[1366] 387 U.S. 397, 87 S. Ct. 1608, 18 L. Ed.2d 847 (1967).

[1367] *Id.*, 387 U.S. at 400, 87 S. Ct. at 1610.

[1368] *Id.*, 387 U.S. at 397, 400, 87 S. Ct. at 1610.

[1369] *Id.*, 387 U.S. at 406, 87 S. Ct. at 1614 (citation omitted). *See* 49 U.S.C. § 11101 (2014).

[1370] *Id.*, 387 U.S. at 407, 87 S. Ct. at 1614.

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services to all parties the carrier may not discriminate against and refuse service to motor carriers or other competitors.[1371]

E. Statutory Common Carrier Obligation to Transport Hazardous Materials

In *Riffin v. Surface Transportation Board*[1372] Riffin and Strohmeyer filed an application with the STB to acquire and operate approximately 800 feet of privately-owned railroad track in New Jersey. The STB rejected their application because it "'explicitly propose[d] to limit the goods to be shipped to non-Toxic Inhalation Hazard ['TIH'] products.'"[1373]

Strohmeyer argued that an applicant requesting to become a common carrier is not required to carry hazardous materials and has a common-law right to designate the goods it is willing to carry for hire.[1374] However, the STB ruled that "railroads have … a statutory common carrier obligation to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations,"[1375] noting that a railroad's statutory obligation under § 11101 supersedes the common law.[1376]

Riffin petitioned the District of Columbia Circuit to review the Board's decision, advancing the same argument that Strohmeyer had made.[1377] The court held that the Board's

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[1371] *Id*.

[1372] 733 F.3d 340 (D.C. Cir. 2013).

[1373] *Id*. at 341 (citation omitted).

[1374] *Id*. at 342

[1375] *Id*.

[1376] *Id*. at 343.

[1377] *Id*.

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interpretation of the statutory requirement in 49 U.S.C. § 11101 was permissible.[1378] The common carrier obligation requires a rail carrier to provide transportation or service upon reasonable request and when

> an agency has promulgated comprehensive safety regulations for a particular type of cargo (helping to ensure the safety of shipments of that category of freight)[] those regulations can be viewed as transforming a shipping request into a presumptively reasonable one under § 11101.[1379]

The District of Columbia Circuit held that the Board's decision and reasoning were not arbitrary, capricious, or contrary to law[1380] and stated that the only way for a rail carrier to avoid its common carrier obligation "'are abandonment, discontinuance, or embargo.'"[1381] The court denied the petition.[1382]

Article

F. The Common Carrier Obligation and the Preemption of State Tort Law on the Transportation of Hazardous Materials

As one article explains, the common carrier obligation that began as a common law doctrine was enforced in the 1887 Act to Regulate Commerce and later codified by the Hepburn Act of 1906.[1383] The common carrier "obligation is premised on the public need to transport certain materials, even though considered dangerous or otherwise more trouble than worthwhile

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[1378] *Id*. at 346.

[1379] *Id*. at 346-347.

[1380] *Id*.

[1381] *Id*. at 347 (citation omitted).

[1382] *Id*. at 348.

[1383] Aaron Ries, "Railroad Tort Liability After the "Clarifying Amendment:" Are Railroads Still Protected by Preemption," 77 *Def. Couns. J.* 92, 97 (2010), hereinafter referred to as "Ries."

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for the carrier."[1384] The common carrier obligation mandates that railroads transport hazardous materials, toxic inhalation hazard (TIH) materials, nuclear materials, and other non-nuclear hazardous materials as long as there is a comprehensive regulatory framework that governs the transportation of the materials, such as 49 U.S.C. § 5101, *et seq.* (Transportation of Hazardous Materials) and 49 U.S.C. §20101, *et seq.* (Federal Railroad Safety Act).[1385]

Railroad companies have attempted to limit their liability when transporting hazardous materials through indemnification clauses; however, the companies have "lived under the shadow of strict liability in the event [that] such hazardous materials cause[] damage to life and property."[1386] The Federal Railroad Safety Act and the Hazardous Materials Safety Act preempt tort claims under state law.[1387] Because later cases limited the ability of injured parties to secure relief Congress enacted a Clarifying Amendment (49 U.S.C. § 20106(b)) that provides that "a railroad may be liable if it fails to satisfy a standard of care placed on it by federal regulations."[1388]

[1384] *Id*.

[1385] *Id*. at 100.

[1386] *Id*. at 100-101.

[1387] *Id*. at 102-103.

[1388] *Id*. at 107.

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X. COMPETITION AND RAILROADS

A. Introduction

As discussed in this part, railroad competition and mergers currently are regulated by the Surface Transportation Board (STB).[1389] Section B discusses regulatory reform, deregulation, and mergers and acquisitions of railroads; the Regional Rail Reorganization Act of 1973; the Railroad Revitalization and Regulatory Reform Act of 1976; the Staggers Act of 1980; factors applicable to consolidations, mergers, and acquisitions of railroads; the role and authority of the Surface Transportation Board (STB); and competitive access.[1390] Section C discusses the railroads' express or implied immunity from antitrust liability and the preemption of state antitrust laws by the Interstate Commerce Commission Act of 1995 (ICCTA).[1391] The articles summarized in part C suggest how the antitrust exemptions and regulatory environment governing railroads could be modified. Section D discusses competitive access for railroads, the use of terminal facilities and reciprocal switching agreements, as well as a proceeding at the STB in which the Board considered whether to change the rules that regulate mandatory competitive switching arrangements.

[1389] 49 U.S. Code § 701, *et seq.* (2014).

[1390] "Competitive access generally refers to the ability of a shipper or a competitor railroad to use the facilities or services of an incumbent railroad to extend the reach of the services provided by the competitor railroad." Petition For Rulemaking to Adopt Revised Competitive Switching Rules, Docket No. EP 711, 42264, 2012 STB LEXIS 273, at *5.

[1391] Pub. L. 104-88 (Dec. 29, 1995), summary available at Govtrack.us: https://www.govtrack.us/congress/bills/104/hr2539/summary (last accessed March 31, 2015).

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Statutes

B. Regulatory Reform, Deregulation and Mergers and Acquisitions of Railroads

1. Regional Rail Reorganization Act of 1973

Because many railroad companies were facing bankruptcy in the early 1970s Congress enacted the Regional Rail Reorganization Act of 1973 (3R Act) for the reorganization of regional rail lines and to provide the lines with governmental assistance to make them more profitable.[1392] The 3R Act also established the United States Railway Association (USRA) and the Consolidated Rail Corporation (Conrail).[1393] The duties of the USRA were "to organize and finance the reorganization of bankrupt railroads in the Northeast and Midwest" and to monitor the financial performance of Conrail.[1394] Conrail was required to grant the USRA access to pertinent information that was necessary for the USRA to fulfill its obligations concerning Conrail's financial performance.[1395] The USRA was abolished in 1987 "after CONRAIL gained financial independence."[1396] In 1997, the STB approved a joint stock purchase that permitted Norfolk Southern and CSX to acquire Conrail.[1397]

[1392] 45 U.S.C. § 701(a) (2014) (as amended in 1975, 1976, 1978).

[1393] *See* 45 U.S.C. § 701(b)(3)-(4) (2014).

[1394] United States Railway Association Studies and Reports, 1973-1987, available at: http://www.libraries.psu.edu/findingaids/1836.htm (last accessed March 31, 2015), hereinafter referred to as "USRA Studies and Reports." *See also*, 45 U.S.C. § 712(a)(1).

[1395] *See* 45 U.S.C § 713 (2014).

[1396] USRA Studies and Reports, *supra* note 1394. *See also*, 45 U.S.C. § 1341(a)(1)(1987).

[1397] Conrail, A Brief History of Conrail, available at: http://www.conrail.com/history.htm (last accessed March 31, 2015). As explained by Conrail, the "restructuring plan transformed Conrail into a switching and terminal railroad that operates on behalf of its owners, Norfolk Southern and CSX, in the Shared Assets Areas of Northern New Jersey, Southern New Jersey/Philadelphia, and Detroit." *Id*.

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Articles

2. The Railroad Revitalization and Regulatory Reform Act of 1976

A study of the effect of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act)[1398] published in the University of Chicago' *Journal of Law & Economics* in 2007 argues that the 4R Act, along with the Staggers Act of 1980, discussed below, "brought sweeping changes for both rail rates and abandonments of freight service."[1399] The authors conclude, however,

> that average densities on U.S. railroads (in 2001) were more than 34 percent higher than they would have been under the presence of regulation. Furthermore, we estimate that the benefits (in enhanced operating efficiencies) from these increased densities were quite substantial, that is, an order of magnitude of $7-$10 billion per year as of 2001, or 10-22 percent of total operating costs, depending on the assumptions made for the configuration of a typical railroad.[1400]

The authors explain that their "measure of this density is net revenue ton-miles divided by route-miles."[1401]

3. The Staggers Act of 1980

In an article entitled "The Success of the Staggers Rail Act of 1980" the author contends that the Staggers Act[1402] represented a "dramatic change in the evolution of the U.S. railroad industry" and that as a result of the Act there was a consolidation in the industry that had

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[1398] *See* 45 U.S.C. § 801*, et seq*. (2014).

[1399] John. D. Bitzan and Theodore E. Keeler, "Economies of Density and Regulatory Change in the U.S. Railroad Freight Industry," 50 *J. Law & Econ.* 157, 159 (2007).

[1400] *Id*. at 175.

[1401] *Id*. at 159 (footnote omitted).

[1402] *See* 49 U.S. Code § 10101, *et seq*. (2014).

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"beneficial effects on shippers and railroads" alike.[1403] The article states that railroads had to "reduce their costs to improve financial performance" but that deregulation allowed railroads to negotiate contract rates.[1404] The author concludes that "rail deregulation accomplished its primary purpose of putting the U.S. rail industry on a more secure financial footing."[1405]

Statutes

4. Factors Applicable to Consolidations, Mergers, and Acquisitions of Railroads

As a result of the ICCTA, 49 U.S. Code § 11323(a) states that "transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board," including, for example, the "[c]onsolidation or merger of the properties or franchises of at least 2 rail carriers into one corporation for the ownership, management, and operation of the previously separately owned properties" and the "[a]cquisition of control of a rail carrier by any number of rail carriers."[1406] Thus, railroads may not merge, acquire control of another rail carrier, or acquire trackage rights over another's railroad tracks without the STB's approval.[1407]

Section 11324 sets forth the factors that the STB considers when approving a railroad merger:[1408]

[1403] Clifford Winston, "The Success of the Staggers Rail Act of 1980," AEI-Brookings Joint Center for Regulatory Studies 1, 5 (Oct. 2005), available at: http://www.brookings.edu/research/papers/2005/10/railact-winston (last accessed March 31, 2015).

[1404] *Id*. at 6.

[1405] *Id*. at 8.

[1406] 49 U.S.C. § 11323 (a)(1) and (3) (2014) (enacted in 1995).

[1407] 49 U.S.C. § 11323(1) (2014).

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> (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of rail carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.[1409]

Pursuant to 49 U.S.C. § 1132(c), "[t]he Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest" and "may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities."[1410] Transactions between minor railroads, that is, carriers that have an annual carrier operating revenue of less than $250 million,[1411] must be approved unless "as a result of the transaction, there is likely to be [a] substantial lessening of competition, [the] creation of a monopoly, or [a] restraint of trade...; and the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs."[1412]

5. Interstate Commerce Commission Termination Act of 1995

The ICCTA dissolved the ICC, created the STB, and transferred the ICC's powers over the railway industry to the STB.[1413] The ICCTA prescribes the number of members on the Board

[1408] 49 U.S.C. § 11324 (2014).

[1409] 49 U.S.C. § 11324(b)(1)-(5) (2014).

[1410] 49 U.S.C. § 11324(c) (2014).

[1411] 49 C.F.R. part 1201 (2014) (General Instructions, 1-1 (classification of carriers)).

[1412] 49 U.S.C. § 11324(d)(1)-(2) (2014).

[1413] 49 U.S.C. § 701(a)-(b)(4) (2014).

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and their qualifications.[1414] Under § 703 the STB has the status of a governmental agency.[1415]

The STB has authority to

> (1) inquire into and report on the management of the business of carriers providing transportation and services subject to subtitle IV;
> (2) inquire into and report on the management of the business of a person controlling, controlled by, or under common control with those carriers to the extent that the business of that person is related to the management of the business of that carrier;
> (3) obtain from those carriers and persons information the Board decides is necessary to carry out subtitle IV; and
> (4) when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.[1416]

The STB also has the power to subpoena witnesses and take depositions.[1417]

Cases

6. Authority of the STB to Impose Environmental Conditions on Minor Mergers

The District of Columbia Circuit's ruling in *Village of Barrington v. Surface Transportation Board*[1418] is an important interpretation of the STB's discretion to set conditions when approving railroad mergers. In *Barrington*, the court held that the STB has the authority to impose environmental conditions when approving minor mergers.[1419] Canadian National proposed to acquire the Elgin, Joliet and Eastern Railway Company to avoid rail traffic

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[1414] 49 U.S.C. § 701(b)(1)-(2) (2014). *See also*, 49 U.S.C. § 702 (2014) (stating that the STB "shall perform all functions that, immediately before January 1, 1996, were functions of the Interstate Commerce Commission….").

[1415] 49 U.S.C. § 703(a)(b) (2014).

[1416] 49 U.S.C. § 721(b) (2014).

[1417] 49 U.S.C. § 721(c)(d) (2014).

[1418] 636 F.3d 650 (D.C. Cir. 2011).

[1419] *Id.* at 651.

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congestion in Chicago but needed the STB's approval as required under 49 U.S.C. § 11323.[1420] Subsection (d) requires approval of minor transactions unless anticompetitive effects are likely to occur, but subsection (c) permits the STB to impose conditions.[1421] After reviewing the environmental impact statement, which disclosed concerns regarding traffic congestion, safety, spills of hazardous materials, and the impact on wildlife, the STB imposed two conditions that would cost Canadian National approximately $68 million.[1422] The conditions required Canadian National to pay "67% of building a grade separation at Ogden Avenue, near Aurora, Illinois and 78.5% of the costs of building one" at another location in Illinois.[1423]

The court, which granted *Chevron* deference to the STB's interpretation of its authority, held that the STB had the authority to impose the above conditions under subsection (d).[1424] Under *Chevron*, the court must first determine whether the intent of Congress is clear from the statute.[1425] If Congress's intent is not clear, the court must determine whether the agency's interpretation is reasonable.[1426] The court held that there was "nothing in section 11324 [that] unambiguously forecloses the Board from imposing environmental conditions on 'minor'

[1420] *Id.* at 652-653.

[1421] *Id.* at 654.

[1422] *Id.* at 653-654.

[1423] *Id.* at 654.

[1424] *Id.* at 658-659 (*citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984)).

[1425] *Id.* at 659.

[1426] *Id.* at 660.

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mergers."[1427] The court further held that because the STB's interpretation of subsection (d) was reasonable the court had to give a high degree of deference to the agency's decision to impose environmental conditions.[1428]

7. Challenging a Railroad's Rate caused by a Bottleneck

In respect to railroads, because a bottlenecking carrier is "'a necessary participant in all available routes, ... it can usually control the overall rate sufficiently to preclude effective competition.'"[1429] In *Burlington N. R. Co. v. Surface Transportation Board*[1430] the court held that the STB was correct in finding that the railroad's rate was unreasonable and in lowering the rate the shipper was required to pay.[1431] Burlington Northern transported coal from a mine in Wyoming to a station in Texas at the rate of $19.36 per ton of coal.[1432] Petitioning the ICC, the STB's predecessor, a shipper, the West Texas Utilities Company (WTU), alleged that the rate was unreasonably high.[1433] Because Burlington Northern was a bottleneck carrier, the STB agreed with the shipper, set the new rate at $13.68 per ton of coal, and ordered Burlington Northern to pay the shipper the difference between the two charges.[1434] The STB used the Coal

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[1427] *Id.* at 664-665

[1428] *Id.* at 665-667.

[1429] *Burlington N. R. R. v. Surface Transportation Board*, 114 F.3d 206, 210 (D.C. Cir. 1997) (*quoting Consolidated Papers, Inc. v. CNW Transportation Co.*, 7 ICC2d 330, 339 (1991) (holding that railroad market dominance existed over eight traffic movements beginning February 27, 1979 and ending on certain dates due to market conditions)).

[1430] 114 F.3d 206 (D.C. Cir. 1997).

[1431] *Id.* at 209.

[1432] *Id.*

[1433] *Id.* at 210.

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Rate Guidelines (Guidelines) as a stand-alone test to determine whether the railroad's rate was reasonable.[1435] Under the Guidelines "a carrier's rates may not exceed the rates a hypothetical 'stand-alone railroad' would have to charge in order to recover the costs of building a rail system to carry the complaining shippers' traffic and earn a reasonable return."[1436] The court held that the STB's use of the Guidelines was reasonable.[1437]

Articles

8. History of the Regulation and Deregulation of Railroads

A recent law review article entitled "The Rise and Fall of the Interstate Commerce Commission: the Tortuous Path from Regulation to Deregulation of America's Infrastructure" states that the transportation industry was the first major industry to be regulated in the United States and the first to be deregulated.[1438] Initially, railroads were not highly regulated but reaction to price discrimination led state legislatures to enact laws regulating railroads.[1439] In 1887, Congress enacted the Act to Regulate Commerce that created the ICC that would regulate the railroad industry.[1440] The ICC, which had the authority to regulate interstate rates charged by railroads, required railroads to publicize their rates.[1441]

[1434] *Id.* at 210, 211.

[1435] *Id.* at 212.

[1436] *Id.*

[1437] *Id.* at 214.

[1438] Paul Stephen Dempsey, "The Rise and Fall of the Interstate Commerce Commission: the Tortuous Path from Regulation to Deregulation of America's Infrastructure," 95 *Marq. L. Rev*. 1151, 1152 (2012).

[1439] *Id.* at 1158.

[1440] *Id.* at 1160.

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In 1920, Congress enacted the Esch-Cummins Act that gave the ICC the power to regulate entry and exit from markets and to regulate mergers.[1442] However, after motor vehicles became a strong competitor to railroads, the ICC lost some of its independence and railroads became less profitable.[1443] Deregulation was seen as a means to make the railroads more profitable and competitive by encouraging a free market model.[1444]

In 1995, Congress enacted the ICCTA that dissolved the ICC and transferred its powers to the STB.[1445] The article notes the impact of the deregulation of the financial, electric power, and airline industries, stating that the deregulation of the industries led, respectively, to "a trillion-dollar bailout of the savings and loan industry;" "Enron wreak[ing] havoc on consumers and investors;" and the airlines lagging "in every category, including fleet age, service quality and international reputation" compared to airlines in other countries.[1446] The article argues that the deregulation of the railroad industry could have similar adverse effects on the economy and the public.[1447]

9. Anticompetitive Behavior

An article entitled "Injecting Competition in the Railroad Industry through Access" in the *Transportation Law Journal* considers the anticompetitive effects of bottlenecking and how to

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[1441] *Id.* at 1161 (*citing* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887)).

[1442] *Id.* at 1165 (*citing* Ch. 91, 41 Stat. 456 (1920)).

[1443] *Id.* at 1171-1172.

[1444] *Id.* at 1175.

[1445] *Id.* at 1185.

[1446] *Id.* at 1187-1188.

[1447] *Id.* at 1188.

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address them.[1448] Bottlenecks are "portions of the [rail] network where only one railroad can provide services."[1449] When a railroad has exclusive control over a destination there is a risk of anticompetitive behavior. Thus, a shipper has to agree to the price offered by the railroad because there is no alternative means of shipment.[1450]

Although railroads have saved costs, it is said that the deregulation of the industry has not led to a reduction in shipping rates.[1451] For example, "[s]hippers claim that the savings from deregulation are not shared" and that "captive shippers pay[] 20 to 30% higher rates than shippers who can choose between railroad carriers."[1452] According to the article, when the Union Pacific and Southern Pacific Railroads merged, there were promises of improved service and lower rates.[1453] Although shippers have complained about service on the merged line, they have been reluctant to report the problem because of concern that the railroads may retaliate by increasing rates.[1454]

The article observes that the railroad industry is regulated by the STB, not by the antitrust laws, and argues that the STB's policy is to approve mergers even if a merger will result in a

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[1448] Salvatore Massa, "Injecting Competition in the Railroad Industry through Access," 27 *Transp. L. J.* 1 (2000), hereinafter referred to as "Massa."

[1449] *Id*. at 2.

[1450] *Id.* at 4.

[1451] *Id.* at 10-11.

[1452] *Id.* at 11.

[1453] *Id.* at 12.

[1454] *Id.*

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bottleneck.[1455] The article states that the STB is likely to suggest a through route rather than reciprocal switching[1456] as a remedy to bottlenecking.[1457] If a shipper petitions for a reasonable rate, the "railroad firm must show that the rate it charges 'results in a revenue-variable cost percentage for such transportation that is less than 180 percent.'" [1458] Finally, the article offers four proposals to alleviate bottlenecking.[1459]

C. Antitrust Exemptions for Railroads

Statutes

1. Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[1460] Section 1 continues:

> Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a

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[1455] *Id.* at 13.

[1456] The author explains that under a reciprocal switching arrangement "'a bottleneck carrier, for a fee, transports the cars of the non-bottleneck carrier over its lines to [the] destination, thereby permitting the non-bottleneck carrier to establish single-line rates for customers to which it does not have direct access.'" *Id*. at 27 (citation omitted).

[1457] *Id.* at 16-7.

[1458] *Id.* at 17 (citation omitted). A "variable cost ratio compares costs, which fluctuate depending on production levels, to the revenues made on those products. This ratio relates the specific costs to the revenues they generate." Investopedia, Variable Cost Ratio, available at: http://www.investopedia.com/terms/v/variable-cost-ratio.asp (last accessed March 31, 2015).

[1459] Massa, *supra* note 1448, at 23-40.

[1460] 15 U.S.C. § 1 (2014).

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> corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[1461]

Under section 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[1462]

2. Railroads' Exemption from the Antitrust Laws

Federal law, however, provides that

> [a] rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.[1463]

3. Exemption of Rate Agreements from Antitrust Laws

As stated, the ICCTA abolished the ICC and transferred its duties to its successor the STB. Federal law requires that

> [a] rail carrier providing transportation subject to the jurisdiction of the Board under this part that is a party to an agreement of at least 2 rail carriers that relates to rates … shall apply to the Board for approval of that agreement under this subsection. … *If the Board approves the agreement*, it may be made and carried out under its terms and under the conditions required by the Board, and *the Sherman, the Clayton Act, the Federal Trade Commission Act, sections 73 and 74 of the Wilson Tariff Act, and the Act of June 19, 1936 do not apply to parties and other persons with respect to making or carrying out the agreement*.[1464]

[1461] *Id.*

[1462] 15 U.S.C. § 2 (2014).

[1463] 49 U.S.C. § 11321(a) (2014).

[1464] 49 U.S.C. § 10706(a)(2)(A) (2014) (emphasis supplied).

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As the Second Circuit has stated,

> [b]ecause … concerted action in the area of rate-making clearly falls within the proscriptions of the federal anti-trust laws, Congress in authorizing such associations exempted them from the anti-trust laws, but in so doing it provided that any agreement establishing the procedure for the determination of joint rates must afford "each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure."[1465]

4. Exemption of Conferences on Unification and Coordination of Railroads from Antitrust Laws

On the request of a railroad the Secretary of Transportation may hold conferences on the unification or coordination of railroads.[1466] Attendees at such conferences, including "officers and directors of an affected rail carrier" and "representatives of rail carrier employees who may be affected," are not liable under the antitrust laws for their participation at the conference or for any agreements that are concluded with the approval of the Secretary of Transportation.[1467]

5. Exemption of Acquisitions Approved by the DOT from the Clayton Act

Section 7 of the Clayton Act prohibits a corporation from acquiring the assets of another business entity when "the effect of such acquisition may be substantially to lessen competition[] or tend to create a monopoly."[1468] However, the act specifically exempts all transactions approved by several federal agencies, including the Secretary of Transportation and the Surface Transportation Board.[1469]

[1465] *Ajayem Lumber Corp. v. Penn Cent. Transp. Co.,* 487 F.2d 179, 181 (2d Cir. 1973) (*quoting* 49 U.S.C. § 5b(6)).

[1466] 49 U.S.C. § 333(d) (2014).

[1467] *Id*.

[1468] 15 U.S.C. § 18 (2014).

[1469] *Id.*

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Cases

6. Implied Immunity from Antitrust Litigation

In *In re Wheat Rail Freight Rate Antitrust Litigation*[1470] the plaintiff alleged that several railroads violated § 1 of the Sherman Act by conspiring to fix freight rail rates for wheat and wheat products. The Seventh Circuit held that a railroad is not expressly exempt from the antitrust laws when it does not adhere to a rate agreement approved by the ICC, now the STB.[1471] However, the court held that a railroad is impliedly immune from antitrust liability when it fails to adhere to the procedural requirements of an agreement.[1472]

First, the court stated that it could not "discern … how permitting antitrust suits to be filed against carriers who fail to follow the procedures of their Agreement promotes competition or provides some benefit to the ultimate consumer of the railroads' services."[1473] Second, "[t]o subject railroads to treble damages for a failure to follow the procedures of their Agreement might aid competitors, at least those who win their antitrust suits, but it does nothing to promote competition."[1474] Third, "[i]ncreased competition, in the sense of gaining a lower price or some other benefit for the consumer, [would] not be the result of an imposition of antitrust liability for failure to follow the procedures for collectively fixing these rates."[1475]

Finally, the court stated that

[1470] 759 F.2d 1305, 1306 (7th Cir. 1985).

[1471] *Id*. at 1309.

[1472] *Id*. at 1316.

[1473] *Id*. at 1315.

[1474] *Id*.

[1475] *Id*. at 1315-1316.

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> [t]he regulation of the railroad industry by the ICC prevents the antitrust laws from having their intended effect of increasing competition and benefitting consumers. To uphold antitrust liability here, then, would fail to promote the goals of the antitrust law while frustrating regulatory policy in the sense of creating uncertainty among carriers regarding liability for the very collective rate making activity in which they are obliged to engage.[1476]

7. ICCTA's Preemption of Antitrust Claims under State Law

In *Fayus Enterprises v. BNSF Railway Co*.[1477] the plaintiffs alleged that several railroads violated state antitrust laws by conspiring to impose fuel surcharges in a manner that increased shipping rates above competitive levels. The District of Columbia Circuit, observing that not all antitrust suits are preempted by the ICCTA, held that antitrust claims invite "judicial supervision of the reasonableness and fairness of rates charged to shippers" and allow "state law antitrust claims of this nature [to] undermine the deregulatory and anti-balkanization policies underlying the ICCTA."[1478] The court stated that the intent of Congress to preempt state antitrust laws is to be found in the ICCTA: "The jurisdiction of the Board over ... transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications [and] rules ... is exclusive."[1479]

Articles

8. Elimination of Transportation Exemptions in Favor of Periodic Review of Transactions that have Anticompetitive Risks

An article in the *Oregon Law Review* argues that there should be a revaluation of transportation industries' antitrust liability because the exemption of railroads from the antitrust

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[1476] *Id*. at 1316.

[1477] 602 F.3d 444, 445 (D.C. Cir. 2010), *cert. denied*, 2010 U.S. LEXIS 9776 (U.S., Dec. 13, 2010).

[1478] *Id*. at 454.

[1479] *Id*. at 446.

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laws shields anticompetitive agreements that are contrary to the public interest.[1480] The article notes that there are six antitrust exemptions for commercial transportation, including exemptions for railroads under the ICCTA.[1481] The article argues that antitrust exemptions for transportation industries should be repealed and that any joint ventures or legitimate transactions that continue should be subject to periodic review.[1482] The author's thesis is that transactions should be subject to review by the regulating agency and the Department of Justice after the parties request a "Robust Business Review Clearance."[1483]

> What is needed is access to a robust form of a time-limited, business review clearance explicitly focused on avoiding unnecessarily anticompetitive agreements or mergers while providing better protection for legitimate, reasonable ventures. ... The process should be based on the current review procedures already employed by the U.S. Department of Justice (DOJ) but should contain a more robust result, such as suspension of antitrust liability for the duration of that clearance, if the transaction or venture is found not to raise serious competitive concerns.[1484] … The clearance would, therefore, provide a shield from antitrust claims during the period of the clearance. No court could impose antitrust liability either for damages or injunctive relief based on conduct occurring during that period.[1485]

[1480] Peter C. Carstensen, "Replacing Antitrust Exemptions for Transportation Industries: The Potential for a 'Robust Business Review Clearance,'" 89 *Or. L. Rev.* 1059, 1061-1062 (2011).

[1481] *Id*. at 1065-1066.

[1482] *Id*. at 1099.

[1483] *Id*.

[1484] *Id*. at 1062-1063 (footnote omitted).

[1485] *Id*. at 1100 (footnotes omitted).

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The article recommends that when a proposed transaction does not pose a risk to competition the parties should be immune from antitrust liability for a five-year renewable period.[1486]

9. Proposal that the Approval of Mergers be Transferred from the STB to the Courts

An article in the *Transportation Law Journal* examines the public interest standard used by the STB in determining whether to approve a railroad merger; discusses how the STB has approved almost every proposed merger; and questions whether the courts rather than the STB should have authority to approve mergers.[1487] The article focuses on the merger of the Union Pacific and Southern Pacific railroads that was approved, even though the merger reduced the number of Class I railroads west of the Mississippi to two and was alleged by "shippers, other railroad carriers, state governments, and the U.S. Department of Justice" to be anticompetitive.[1488]

Under the STB's public interest standard, a merger of two Class I railroads requires application of the five factor test quoted in part X.B.2 of the Report.[1489] The STB approved the merger of the Union Pacific and Southern Pacific railroads because the Board found that the benefit to the public interest substantially outweighed any anticompetitive costs. The Board

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[1486] *Id*.

[1487] Salvatore Massa, "Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific," 24 *Transp. L. J.* 413, 415-416 (1996).

[1488] *Id*. at 415.

[1489] *Id*. at 418 (*citing* 49 U.S.C. § 11344(b)(1) and 49 C.F.R. § 1180.1).

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rejected the contention that the merger would create a duopoly to control prices.[1490] The article argues, however, that the STB approves mergers because of a political agenda favoring deregulation.[1491] The writer contends that because courts are "politically neutral" the courts are "best suited" to review proposed mergers.[1492] According to the article, the concern is that the continued approval of applications for mergers of Class I railroads will lead to only one or two transcontinental railroad systems, thus increasing the risk of anticompetitive pricing.[1493]

10. Proposed Legislation that would Affect the Antitrust Exemptions of Railroads

An article in the *Administrative Law Review* examines the economic consequences of an antitrust act applicable to railroads. More specifically, the article weighs the benefits, if Congress had enacted the proposed legislation, of the Railroad Antitrust Enforcement Act of 2009.[1494] In January 2009, when the bill was introduced in both houses of Congress, the bill proposed amending certain federal statutes applicable to railroads and anticompetitive

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[1490] The author summarizes the five factor test thusly:

> (1) the impact the merger has on the adequacy of public transportation; (2) the effect of including or excluding other railroads in the region from the transaction on the public interest; (3) the total fixed charges that result from the transaction; (4) the interest of railroad employees affected by the transaction; and (5) the adverse effect on railroad competition in the affected region.

Id. at 422-423.

[1491] *Id*. at 440.

[1492] *Id*.

[1493] *Id*. at 441-442.

[1494] Russell Pittman, "Recent Development: The Economics of Railroad 'Captive Shipper,'" 62 *Admin L. Rev.* 919 (2010), hereinafter referred to as "Pittman." The Railroad Enforcement Act of 2009 was never enacted but the Railroad Enforcement Act that was introduced in Congress in 2013 proposed the elimination of antitrust exemptions for railroads.

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behavior.[1495] Although the proposed legislation would not have eliminated antitrust exemptions for railroads, it would have increased the scrutiny of "paper barriers" and "refusals to deal."[1496] A paper barrier "is a contractual clause limiting the ability or incentive of the purchaser or lessee of a rail line to interchange traffic with railroads other than the line's seller or lessor."[1497] A "refusal to deal" is when a shipper is served by a railroad that refuses either to

> (a) allow the trains of a competing railroad to serve the shipper over the monopoly railroad's tracks[] or [to] (b) offer to carry the shipper's goods only to the nearest interchange with a competing railroad, rather than insisting on hauling the goods for the entire route itself.[1498]

According to the article, the legislation, if enacted, would have protected captive shippers and increased competition, as well as reduced the profits of Class I railroad companies, which the author contends are earning profits in excess of normal returns.[1499]

D. Competitive Access for Railroads

Statutes

1. Use of Terminal Facilities and Reciprocal Switching Agreements

Federal law provides in part that the

> Board may require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal, owned by a rail carrier providing transportation subject to the jurisdiction of the Board under this part, to be used by another rail

[1495] *Id*. at 920.

[1496] *Id*. at 926.

[1497] Surface Transportation Board, Surface Transportation Board Proposes Additional Reporting Requirements for Interchange Commitments, available at: http://www.stb.dot.gov/newsrels.nsf/cee25ffbd056e9d1852565330043f0d6/e4624ecadcf001e285257aa900514d2d?OpenDocument (last accessed March 31, 2015).

[1498] Pittman, *supra* note 1494, at 930.

[1499] *Id*. at 934-935.

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> carrier if the Board 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.[1500]

The law also provides that "[t]he rail carriers are responsible for establishing the conditions and compensation for use of the facilities. However, if the rail carriers cannot agree, the Board may establish conditions and compensation for use of the facilities…."[1501]

Furthermore,

> [t]he Board may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.... The Board may require reciprocal agreements entered into by rail carriers pursuant to this subsection to contain provisions for the protection of the interests of employees affected thereby.[1502]

The purpose of the law is to increase competition in areas where reciprocal switching is possible to aid shippers.[1503]

Proceeding

2. Proposal to the STB Requesting a Modification of the Mandatory Competitive Switching Standards

In 2011, the National Industrial Transportation League (NITL) petitioned the STB to modify its standards for mandatory competitive switching.[1504] Because the Board was not provided with information that would allow it to determine the impact of the proposed changes,

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[1500] 49 U.S.C. § 11102(a) (2014).

[1501] *Id*.

[1502] 49 U.S.C. 11102(c) (1) (2014).

[1503] *Central States Enterprises, Inc. v. Interstate Commerce Com.*, 780 F.2d 664, 668-669 (7th Cir. 1985).

[1504] *Petition*, Docket No. EP 711, 42264, 2012 STB Lexis 273, at *2.

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the STB asked the parties to provide additional information.[1505] The STB requested information on:

> (1) the impact on rates and service for shippers that would qualify under the competitive switching proposal; (2) the impact on rates and service for captive shippers that would not qualify under this proposal (because they are not located in a terminal area or within 30 miles of a working interchange); (3) the impact on the railroad industry, including its financial condition, and network efficiencies or inefficiencies (including the potential for increased traffic); and (4) an access pricing proposal.[1506]

The STB also asked those commenting to analyze the ramifications of modifying the NITL's proposal.[1507] The NITL's proposal would require competitive switching by a Class I rail carrier

> if four conditions were met: (1) the shipper (or group of shippers) is served by a single Class I rail carrier; (2) there is no effective intermodal or intramodal competition for the movements for which competitive switching is sought; (3) there is or can be "a working interchange" within a "reasonable distance" of the shipper's facility; and (4) switching is safe and feasible, with no adverse effect on existing service.[1508]

The Association of American Railroads (AAR), representing Class I railroads, opposed the NITL proposal and argued that no changes were needed to the STB's regulations on competitive access.[1509] Stating that it wanted to receive more information on the impact of the proposal, the STB failed to issue a final determination.[1510] On October 16, 2013, because of a

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[1505] *Id*. at *3-4.

[1506] *Id*. at *4.

[1507] *Id*. at *4-5.

[1508] *Id*. at *9-10.

[1509] *Id*. at *13.

[1510] *Id*. at *21.

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government shutdown, the STB postponed the hearing on Ex Parte 711 that had been scheduled for October 22, 2013, without setting a new date for a hearing.[1511]

[1511] *Id*. at *2.

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XI. CONSTITUTIONAL LAW AND RAILROADS

A. Introduction

Although the primary basis on which a railroad challenges a state law is that federal law preempts the state law, state laws regulating railroads also may be challenged for being unconstitutional under the Fourteenth Amendment to the United States Constitution. Thus, even if a state statute is not preempted, the state law still may be unconstitutional. It should be noted that some of the statutes discussed herein, which the courts held were constitutional, were later held to be preempted by federal law.

Section B discusses the provisions in the United States Constitution that railroad companies have used to challenge state statutes. Sections C and D discuss some of the state statutes that railroads have challenged, such as laws that require full crews on trains or that require railroads to fence railroad rights of way to protect adjacent property and livestock. Section D discusses a cases brought by plaintiffs alleging that a transit authority violated their Fourth Amendment rights.

B. The United States Constitution

First, under Article I of the United States Constitution the Congress is empowered "[t]o regulate Commerce ... among the several States."[1512] Railroad companies have challenged state laws applicable to railroads on the basis that they violate the Commerce Clause by regulating interstate commerce impermissibly or because the state laws unduly burden interstate commerce.

Second, the Constitution's Contract Clause states that "[n]o State shall ... make any ... Law impairing the Obligation of Contracts...."[1513] Railroads have challenged the validity of a

[1512] U.S. Const. Art. I § 8, cl. 3.

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state law under the Contracts Clause on the basis that the statute nullifies a provision of a contract to which a railroad is a party.

Third, under the Fourteenth Amendment to the Constitution "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1514] Cases reviewed for this section of the Report frequently involved challenges to state law on the grounds of alleged violations of the Due Process and Equal Protection Clauses. As noted, even if a state statute affecting railroads is constitutional the statute may be preempted by federal law.

Statutes

C. State Statutes Requiring Full Crews

Railroads have challenged state laws requiring full crews on the ground that they are unconstitutional because other common carriers are not required to have the same number or types of employees in their crews. A full crew statute has been held not to violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. Under the Wisconsin full crew law a train operator in Wisconsin is required to have a crew consisting of at least two members, one of whom has to be a certified railroad locomotive engineer. The other member may hold the same position or be a qualified trainman.[1515]

[1513] U.S. Const. Art. I § 10, cl. 1.

[1514] U.S. Const. Amend. 14 § 1.

[1515] Wis. Stat. § 192.25(2) (2014).

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Cases

1. State Statute Requiring a Full Crew on Trains does not Violate the Due Process Clause or the Equal Protection Clause

As described by the Supreme Court in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R. I. & P. R. Co.,*[1516] for safety reasons Arkansas required trains travelling at least fifty miles to have an engineer, a fireman, a conductor, and three brakemen on board. The Chicago, Rock Island & Pacific Railroad Co. challenged the statutes on the grounds that they violated the Due Process and Equal Protection Clauses. The Supreme Court held that the statutes did not violate the Equal Protection Clause because requiring "'an engineer, a fireman, a conductor and three brakemen[]' could scarcely be extended in their present terms to such means of transportation as taxicabs or airplanes."[1517] The legislature is not "required to investigate the various differing hazards encountered in all competing industries and then to enact additional legislation to meet these distinct problems."[1518] The Court held that because the additional costs imposed on the railroads in having the crewmen aboard were not "unduly oppressive" there was no violation of the Due Process Clause.[1519] Finally, there was no violation of the Commerce Clause because Arkansas may decide the "price society should pay to promote safety in the railroad industry."[1520]

[1516] 393 U.S. 129, 131, 89 S. Ct. 323, 324, 21 L. Ed.2d 289, 392-393 (1968).

[1517] *Id.*, 393 U.S. at 143, 89 S. Ct. at 330, 21 L. Ed.2d at 299.

[1518] *Id.*

[1519] *Id.*

[1520] *Id.*, 393 U.S. at 144, 89 S. Ct. at 331, 21 L. Ed.2d at 300.

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Likewise, in *Chicago & N.W. Ry. Co. v. La Follette,*[1521] in which eight interstate railroad companies challenged Wisconsin's full crew statutes, the court held the that the statutes were not unconstitutional. The statutes in question were Wis. Stat. § 192.25(2) (requiring a fireman in a five-man crew inroad or outside of yard freight service); Wis. Stat. § 192.25(4) (requiring a three-man crew in a single engine); and Wis. Stat. § 192.25(4a) (requiring a five-man crew for switching operations). For example, Wisconsin required a minimum crew of at least "five men [that] must consist of 'an engineer, a fireman, a conductor, and 2 brakemen'" for trains operating at least ten miles of route outside of yard limits.[1522]

The companies alleged that the Wisconsin full crew laws violated the Due Process Clause because of the burden associated with employing firemen.[1523] The companies argued that the requirement to maintain a fireman as part of a crew violated a railroad company's freedom to contract and violated due process unless the requirement was an exercise of the state's police power.[1524] In determining whether the statute was arbitrary and unreasonable, the Supreme Court of Wisconsin considered the cost of complying with the statute. The plaintiffs argued that the cost of using the required firemen was over $6 million per year, costs that were not justifiable.[1525] However, the court held that "[t]f there is any reasonable basis for the exercise of police power by the legislature the court must uphold the right of the legislature to act."[1526] The

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[1521] 43 Wis.2d 631, 169 N.W.2d 441 (1969).

[1522] *Id.,* 43 Wis.2d at 649, 169 N.W.2d at 449 (*quoting* Wis. Stat. § 192.25 (2)).

[1523] *Id.*, 43 Wis.2d at 645, 169 N.W.2d at 447.

[1524] *Id.,* 43 Wis.2d at 644, 169 N.W.2d at 446.

[1525] *Id.,* 43 Wis.2d at 651, 169 N.W.2d at 450.

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court held that the additional costs were justified because requiring firemen on trains increased rail safety.[1527]

The railroads also alleged a violation of the Equal Protection Clause because the full crew statutes did not apply to "railroads that operate less than 10 miles of route outside of yard limits."[1528] However, the court held that the full crew statutes were reasonably related to safety and thus was constitutionally permissible.[1529]

However, it has been ruled that some of the provisions of the aforesaid Wisconsin statutes are preempted by federal law. In 1999 in *Burlington N. & Santa Fe Ry. Co. v. Doyle*[1530] the Seventh Circuit held that

> the qualification requirements for locomotive engineers in sec. 192.25(1)(a) and for trainmen in sec. 192.25(1)(b) are preempted. Section sec. 192.25(2)'s requirement that a locomotive engineer be at the controls of a locomotive anytime it moves is also preempted. Section 192.25(2)'s two-person crew requirement is preempted for hostling and helper movements. It is also preempted to the extent that one-person operations are the subject of a Safety Compliance Agreement between Wisconsin Central and [the] FRA. Finally, the preempted portions of the statute are severable from the rest so that those provisions [that are] not preempted may stand on their own.[1531]

Likewise, in *Norfolk and Western Ry. Co. v. Public Service Commission of West Virginia*[1532] the railroad company challenged a West Virginia statute that required a minimum

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[1526] *Id.,* 43 Wis.2d at 646, 169 N.W.2d at 447.

[1527] *Id.,* 43 Wis.2d at 651-652, 169 N.W.2d at 450-451.

[1528] *Id.,* 43 Wis.2d at 655, 169 N.W.2d at 452.

[1529] *Id.,* 43 Wis.2d at 658, 169 N.W.2d at 454.

[1530] 186 F.3d 790 (7th Cir. 1999).

[1531] *Id*. at 804-805.

[1532] 858 F. Supp. 1213 (Special Court 1994).

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crew of two men on all locomotives.[1533] The special court established to adjudicate issues arising out of the 3R Act observed that the Act as amended by the § 711 of the Northeast Rail Service Act provided that "[n]o state may adopt or continue in force any law … requiring … [regional railroads] to employ any specific number of persons to perform any particular task…."[1534] Thus, West Virginia's minimum crew statute was preempted.

2. State Statutes requiring Fencing do not Violate the Due Process or Equal Protection Clauses

In *Berens v. Chicago M. S. P & P. R. Co.*[1535] the Supreme Court of South Dakota analyzed how the Due Process and Equal Protection Clauses apply to state laws that govern railroads. As noted, under South Dakota law railroads have an obligation to construct fences along their tracks, for example, to prevent harm to livestock.[1536] A railroad may be held liable for any damages caused by a failure to maintain a fence or otherwise comply with the fencing statutes. Under the statute "the killing or injuring of livestock by [a] railroad corporation, its agents, or employees [is] *prima facie* evidence of negligence."[1537]

[1533] *Id*. at 1215.

[1534] *Id.* at 1215 (*quoting* Northeast Rail Service Act § 711, 45 U.S.C. § 797j (1988)).

[1535] 80 S.D. 168, 120 N.W.2d 565 (1963). *See also*, *Union Pac. R.R. v. La. PSC*, 2010 U.S. Dist. LEXIS 122462, at *1 (M.D. La. 2010) (holding that Louisiana state laws regulating railroads did not violate Union Pacific's federal or state equal protection guarantees because the railroad company was not being treated differently from other common carriers); *Linenbrink v. Chicago & N. W. Ry. Co.,* 177 Neb. 838 (Neb. 1964) (holding that the classification of railroads and motor carriers is not arbitrary and in violation of the Due Process and Equal Protection Clauses because the classification promotes the public interest and welfare); *Chicago & N. W. R. R. v. Bishop*, 390 P.2d 731 (Wyo. 1964) (holding that a state law requiring the fencing of public roads adjacent to railroads to protect livestock does not violate the Equal Protection Clause).

[1536] *Berens*, 80 S.D. at 171, 120 N.W.2d at 567-568.

[1537] *Id.*, 80 S.D. at 173, 120 N.W.2d at 569.

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In *Berens,* the railroad argued that the South Dakota laws were an unconstitutional denial of equal protection under the Fourteenth Amendment because the statutes were not imposed on "motor carriers of freight and passengers travelling over public highways."[1538] However, the court held that when "the legislature exercises its police powers, and a classification is made that is reasonable and not arbitrary, there is no denial of equal protection of the law."[1539] Although "motor carriers and railroads are engaged in the same general business[] … the methods and means by which they perform their functions are far different and the legislature is acting within its prerogative to separate them into classes for regulation."[1540] The court held that because the legislature was within its right to change the burden of proof the statute's presumption of liability was not a denial of equal protection.[1541]

3. State Requirement of a Manned Caboose held not to Violate the Commerce Clause or the Contracts Clause

A Nebraska statute required "that the last car on any train over 1,000 feet long operating in the state must be a manned caboose."[1542] In *Burlington N. R. Co. v. Nebraska*[1543] the Eighth

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[1538] *Id.*, 80 S.D. at 176, 120 N.W.2d at 571.

[1539] *Id.*, 80 S.D. at 174, 120 N.W.2d at 569.

[1540] *Id.*, 80 S.D. at 176, 120 N.W.2d at 571.

[1541] *Id.*, 80 S.D. at 175, 120 N.W.2d at 570.

[1542] *Burlington N. R. Co. v. Nebraska*, 802 F.2d 994, 996 (8th Cir. 1986) (*quoting* Neb. Rev. Stat. § 74-5,100) (*repealed* 1994) (*superseded by statute as stated in Ragland v. State*, 385 Md. 706, 870 A.2d 609 (2005)).

[1543] *Id*. at 996-997. *See also*, *Warner Bros. Entm't, Inc. v. X One Prods*, 644 F.3d 584 (8th Cir. 2011); *US Salt, Inc. v. Broken Arrow, Inc.*, 563 F.3d 687 (8th Cir. 2009); *Educational Employees Credit Union v. Mutual Guar. Corp.*, 50 F.3d 1432 (8th Cir. 1995); *TIC- Indus. Co. Wyo., Inc. v. Factory Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 95687, at *1 (D. Neb. 2012); *Lexar Energy, Inc. v. Macquarie Bank Ltd.*, 2010 U.S. Dist. LEXIS 124094, at *1 (D. N.D. 2010); *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg.*

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Circuit held that the requirement that railroads have a manned caboose was not a violation of the Commerce and Contract Clauses of the United States Constitution.

It should be noted that in 1989, after Burlington Northern challenged a Minnesota statute that required a manned caboose, the Eighth Circuit held that the Federal Railroad Administration's (FRA) "power brake and rear-end marking device regulations, which accommodate the operation of cabooseless trains, and the FRA's refusal to impose a caboose requirement[,] preempt the Minnesota occupied caboose law."[1544] Minnesota argued that neither Congress nor the FRA intended to preempt its caboose law, and, therefore the FRA regulations did not preempt the statute.[1545] The court, however, observed that the FRA apparently did not consider the lack of a caboose to be a safety issue because it had failed to provide for a mandatory caboose requirement. The court held that the lack of a caboose regulation "has taken on the character of a ruling that no such regulation is appropriate[] and is therefore the kind of inaction that has preemptive effect."[1546] Because Minnesota's caboose requirement conflicts directly with the FRA's implied ruling that manned cabooses or cabooses generally are not required, the court that held federal law preempts the Minnesota statute.[1547]

Co., 199 F.R.D. 320 (D. Minn. 2000); *Hartzell Mfg. v. American Chem. Technologies*, 899 F. Supp. 405 (D. Minn. 1995).

[1544] *Burlington N. R. Co. v. Minnesota,* 882 F.2d 1349 (8th Cir. 1989).

[1545] *Id.* at 1352.

[1546] *Id.* at 1353-1354 (citations omitted).

[1547] *Id*. at 1354.

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D. Violation of the Fourth Amendment by a Railroad Security Officer Acting under Color of State Law

In *George v. CSX Transp. Inc.*[1548] the plaintiffs were stopped by a CSX police officer.[1549] After O'Keefe used his police lights to compel George, the driver, to stop,[1550] he detained the plaintiffs for a hour, issued George two tickets for violating New York laws, and then released them.[1551] The plaintiffs alleged that the vehicle stop was a Fourth Amendment seizure and that CSX and O'Keefe knew or should have known that O'Keefe lacked the authority to issue tickets.[1552]

A federal district court in New York began its inquiry by determining whether O'Keefe was acting under color of state law and, if so, had deprived the plaintiffs of a constitutional right.[1553] The court held that O'Keefe was acting under color of state law because the New York Railroad Law "gives railroad police full police authority."[1554] O'Keefe's use of the police lights on his vehicle and his approach of the plaintiffs in a police uniform gave the impression that O'Keefe had police power.[1555] However, the court dismissed the plaintiffs' claims of false arrest and malicious prosecution in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983 because the plaintiffs failed to allege that O'Keefe did not have probable cause to stop George's

[1548] 2014 U.S. Dist. LEXIS 10324, at *1 (E.D. N.Y. 2014).

[1549] *Id*. at *1-2.

[1550] *Id*. at *2.

[1551] *Id*.

[1552] *Id*. at *2-3.

[1553] *Id*. at *4.

[1554] *Id*. at *4-5 (*citing* N. Y. R. R. Law § 88 (2014)).

[1555] *Id*. at *7.

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vehicle.[1556] In addition, the court dismissed the plaintiffs' state law claim for malicious prosecution because it was identical to the federal statute.[1557] Finally, the court dismissed the plaintiffs' substantive due process claim, as well as the plaintiffs' remaining claims under state law.[1558]

[1556] *Id*. at *9.

[1557] *Id*. at *12-13.

[1558] *Id*. at *14-15.

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XII. CONSTRUCTION CONTRACTS

A. Introduction

This part of the Report discusses statutes, cases, and an article on construction contracts involving railroads. Sections B through D describe three state statutes, the first of which provides for a lien on railroad property when a railroad enters into a construction contract. The other two statutes apply to construction contracts between state agencies and railroads. Sections E through J discuss holdings in recent cases regarding contractual indemnification of a railroad company for an injury to an employee during construction; when a contract is a construction contract under state law; whether and when indemnity provisions are against public policy; the conflict between a public policy against indemnity agreements in certain construction contracts and a public policy in favor of a railroad company's ability to grant easements; a railroad company's liability for active interference with a contractor; and how an indemnity agreement may be affected by a choice of law provision. Section K discusses an article on indemnity clauses and public policy under Virginia law.

Statutes

B. Lien on Railroad Property by reason of a Construction Contract

A Tennessee statute provides that when "any railroad company contracts with any person for the grading of its roadway, the construction or repair of its culverts, bridges, and masonry, [and other work], or for the delivery of material for any of these purposes, or for engineering …, there shall be a lien upon such railroad, its franchise and property, in favor of the person with

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whom the railroad company contracts for the performance of the work or the delivery of the materials, to the amount of the debt contracted for such performance or delivery."[1559]

C. Authority to a Railroad Company Change the Grade of Existing Tracks or to Construct New Tracks

Under a New Jersey statute a municipality may enter a contract

> with any railroad company whose road lies wholly or partially within the municipality or whose route has been located therein as will secure greater safety to persons or property therein, or will facilitate the construction or maintenance of other than grade crossings of streets, highways or other railroads, or will provide for increased or improved station or terminal facilities and transportation service, or will improve the surroundings of or make more convenient the access to a station of the railroad within the municipality. …
>
> The railroad company may locate, relocate, change, alter grades of, depress or elevate any of its railroad tracks, bridges or facilities, and construct new or additional tracks and transportation or station facilities as shall be specified and provided for in the contract. …
>
> The cost and expenses of such lands, changes and improvements shall be borne by the municipality and the railroad company in such shares or proportions as may be provided in the contract.[1560]

D. Authorization under State Law to Enter into Contracts with Railroad Companies for the Construction of Grade Crossings or Tracks

A South Carolina statute provides that the South Carolina Department of Transportation (SCDOT) "may, without formalities of advertising, enter into lawful and appropriate agreements and contracts with railroad companies for the construction, reconstruction, or modifications of railroad-highway grade separation crossings or track or other property rearrangement…."[1561] The SCDOT may enter into contracts "with other persons, similarly jointly interested in

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[1559] Tenn. Code § 65-10-101 (2014).

[1560] N.J.S.A. § 48:12-79 (2014).

[1561] S.C. Code § 57-5-1640 (2014).

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particular items as property owners or lessees, for moving, clearing, rearranging or relocating public utilities, buildings and other structures."[1562]

Cases

E. Indemnity of a Railroad Company under a Construction Contract for an Injury to an Employee during Construction

In *Brown v. Baltimore & Ohio Railroad Co*.[1563] the county of Baltimore and the Baltimore and Ohio Railroad Company (B&O) had an agreement permitting the county to construct a sewer pipe under a railroad track. The county agreed to indemnify B&O for any injury, death, or damage arising out of the construction, maintenance, or relocation of the pipe. After the county contracted with a third party to construct the new pipeline, a train collided with a machine used by the construction company that was parked on the railroad tracks that caused an injury to a railroad employee.[1564] At trial a jury found that B&O and the construction companies were liable as joint tortfeasors to the employee.[1565] Holding that the parties intended to interpret the indemnification clause in the construction contract broadly, the court entered judgment for B&O against the county under the indemnification clause.[1566]

In upholding the decision, the Fourth Circuit ruled that a Maryland statute, which provided that indemnity clauses in certain circumstances were void, did not void the indemnity

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[1562] *Id*.

[1563] 805 F.2d 1133, 1135 (4th Cir. 1986).

[1564] *Id.* at 1136.

[1565] *Id.*

[1566] *Id.* at 1136, 1140.

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clause in the contract between the county and B&O.[1567] The Maryland statute was intended to void indemnity clauses that would permit construction companies to avoid liability for their own actions. The court held that

> the statute was not intended to apply to licensors or easement grantors such as the B & O who enter into railroad crossing indemnity agreements of this type. By such agreements railroads have long and customarily sought protection against liability resulting or arising in any way from their grants, for a multitude of purposes, of easements or licenses to use or cross their rights of way.[1568]

F. Whether a Contract with a Railroad to Paint a Bridge is a Construction Contract

In *Kurtin v. Nat'l Passenger R.R. Corp.*[1569] Amtrak had hired Campbell, a painting company, to paint a bridge. After a Campbell employee fell from the bridge, the injured employee sued Amtrak. Amtrak brought an action against Campbell, which brought an action against its insurance company.[1570] The insurance company's policy covered bodily injury "assumed by the insured under an 'insured contract'" and further provided that "an 'insured contract' does not include that part of any contract or agreement that indemnifies any person or

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[1567] *Id.* at 1141-42. The statute provided:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating connected with it, purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnity [sic], his agents or employees, is against public policy and is void and unenforceable. This section does not affect the validity of any insurance contract, workmen's compensation, or any other agreement issued by an insurer.

Md. Cts. and Jud. Proc. Code Ann. § 5-305 (1973).

[1568] *Brown*, 805 F.2d at 1141-1142 (footnote omitted).

[1569] 887 F. Supp. 676, 679 (S.D.N.Y. 1995).

[1570] *Id.* at 677.

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organization for 'bodily injury' … arising out of construction … within fifty feet of any railroad property."[1571] Campbell argued that its contract with Amtrak to paint the bridge did not come within the meaning of the term construction.[1572]

Although New York's labor laws defined construction to include painting, a federal district court in New York held that the term construction should be given its normal meaning and that a contract for the painting of a bridge was not a construction contract within the meaning of the insurance policy.[1573]

G. Whether Indemnity Provisions are against Public Policy

In *S. Pac. Transp. Co. v. Sandyland Protective Ass'n*[1574] the Sandyland Protective Association (Association), a homeowners association, and Southern Pacific entered into a contract to allow the Association to build a road across Southern Pacific's tracks. The contract contained a clause for the indemnification of Southern Pacific.[1575] After a train hit a car and injured the passengers, the passengers brought an action against Southern Pacific, which brought an action against the Association for indemnity.[1576] The Association defended on the basis that a

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[1571] *Id.* at 678.

[1572] *Id.* at 679.

[1573] *Id.* at 680, 681.

[1574] 224 Cal. App.3d 1494, 1496, 274 Cal. Rptr. 626 (Cal. Ct. App. 1990).

[1575] *Id.,* Cal. App.3d at 1496-1497, 274 Cal. Rptr. at 627-628.

[1576] *Id.,* Cal. App.3d at 1497, 274 Cal. Rptr. at 628.

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California statute voided contractual provisions as against public policy that indemnify a promissee for an injury or death caused by the promisee's negligence.[1577]

A California appellate court observed that the statute's intent was that a non-negligent party to a construction contract will not be held liable for the other party's negligence.[1578] Therefore, because the purpose of the indemnity clause between the Association and Southern Pacific was to shift responsibility for the railroad's negligence to the Association, the indemnity provision was void.[1579]

H. Conflict between a Public Policy against Indemnity Agreements in Construction Contracts and a Public Policy in favor of a Railroad's Ability to Grant Easements

In *Helm v. W. Md. Ry. Co.*,[1580] after the Western Maryland Railway Company (Western Maryland) lost a case to an injured employee, Western Maryland sought to enforce an indemnity clause in its construction contract with the county that permitted the county to perform construction work on the railway. The district court held that the indemnity provision was void under a Maryland statute that voids indemnity agreements in certain construction contracts to

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[1577] *Id. See* Cal. Civ. Code § 2782(a) (2014) that provides:

> Except as provided in Sections 2782.1, 2782.2, 2782.5, and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable; provided, however, that this section shall not affect the validity of any insurance contract, workers' compensation, or agreement issued by an admitted insurer as defined by the Insurance Code.

[1578] *S. Pac. Transp. Co.,* 224 Cal. App.3d at 1498, 274 Cal. Rptr. at 629.

[1579] *Id.*, 224 Cal. App.3d at 1498-1499, 274 Cal. Rptr. at 629.

[1580] 838 F.2d 729 (4th Cir. 1988).

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prevent the indemnification of a promisee for injury and liability caused by the promisee's negligence.[1581]

The issue for the Fourth Circuit was whether the railroad licensing agreement at issue was a construction agreement within the meaning of the Maryland statute.[1582] In an earlier case, *Brown v Balt. & Ohio Railroad*,[1583] the Fourth Circuit had held that the statute was not applicable to licensors and grantors of easements.[1584] In that case B&O granted an easement but did not control performance of the construction contract.[1585] The Fourth Circuit stated that two public policies were in conflict. On the one hand, Maryland wanted parties to construction contracts to be responsible for their negligence but on the other hand wanted railroads to grant easements.[1586] The court distinguished its decision in *Brown v Balt. & Ohio Railroad*, *supra*, because in this case Western Maryland was involved in the construction work for which it granted the easement.[1587] The Fourth Circuit affirmed the summary judgment granted by the district court against Western Maryland that had sought to enforce the indemnity clause.[1588]

[1581] *Id.* at 730, 731 (*citing* Md. Code Ann., Cts. & Jud. Proc. § 5-305 (1984)).

[1582] *Id.* at 732.

[1583] 805 F.2d 1133 (4th Cir. 1986).

[1584] *Helm*, 838 F.2d at 732.

[1585] *Id.*

[1586] *Id.*

[1587] *Id.*

[1588] *Id.* at 735.

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I. Railroad's Liability for Active Interference with a Contractor

In *U.S. Steel Corp. v. Mo. Pac. R.R. Co.*[1589] the Missouri Pacific Railroad (Missouri Pacific) entered into a contract with the American Bridge Division (ABD) of United States Steel for work on a bridge. The ABD could not begin work until a subcontractor had completed its work. The ABD was liable under its contract with Missouri Pacific on a per diem basis for delayed performance.[1590] Missouri Pacific notified the ABD when a subcontractor was expected to finish work, a notice that signaled ABD to begin preparations for construction. Because of the subcontractor's delays, ABD began work 175 days behind schedule. Missouri Pacific accordingly adjusted ABD's completion date.[1591] However, because Missouri Pacific did not inform the subcontractor of certain complications of which the railroad was aware the subcontractor's work was delayed. The district court held that, because Missouri Pacific gave notice to ABD when it should begin construction while knowing of complications affecting the subcontractor, Missouri Pacific had interfered with ABD's performance and therefore awarded damages to ABD.[1592]

On appeal, Missouri Pacific challenged the exception for active interference to the no damage clause in the contract.[1593] The active interference exception required an affirmative act that interfered with the contractor's work.[1594] The Eighth Circuit held that Missouri Pacific was

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[1589] 668 F.2d 435 (8th Cir. 1981).

[1590] *Id.* at 437.

[1591] *Id.*

[1592] *Id.* at 438.

[1593] *Id.*

[1594] *Id.* at 439.

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able to determine when ABD should commence work but that ABD could not forgo initiating its work and risk a breach of contract.[1595] Therefore, the court held that Missouri Pacific actively interfered with ABD's performance and that the no damage clause was unenforceable.[1596]

J. Interpretation of an Indemnity Provision Determined by the Contract's Choice of Law Provision

In *Wallace v. Amtrak*[1597] Weeks Marine, Inc. (Weeks) had a contract with Amtrak pursuant to which Weeks was to be the principal contractor for the rehabilitation of a bridge. The contract between Weeks and Amtrak had both a provision indemnifying Amtrak and a provision requiring Weeks to obtain insurance.[1598] Accordingly, Weeks purchased a railroad protective liability policy from Liberty Surplus Insurance Corp.[1599] After an employee of Weeks was injured while working on the bridge, Weeks denied its responsibility to defend the claim but provided counsel to represent Amtrak.[1600]

Weeks argued that under New York law Amtrak could not be indemnified under the contract because Amtrak could not be indemnified for incidents caused by its own negligence.[1601] Amtrak argued that the contract stated that the law of the District of Columbia

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[1595] *Id.*

[1596] *Id.*

[1597] 2014 U.S. Dist. LEXIS 36346, at *1, 3 (S.D.N.Y. Mar. 18, 2014).

[1598] *Id.* at *10-14.

[1599] *Id.* at *14.

[1600] *Id.* at *5-10.

[1601] *Id.* at *55-56.

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applied.[1602] A federal district court in New York, applying District of Columbia law, held that Weeks was not liable for a breach of contract because it denied its obligation to indemnify.[1603] However, the court held that Weeks was responsible for any claim brought by an employee because under District of Columbia law a party may be indemnified under a contract regardless of the party's negligence.[1604]

Article

K. Indemnity Clauses and Public Policy under Virginia Law

A law review article on developments in construction law in Virginia that also covers indemnity clauses in construction contracts discusses *W.R. Hall, Inc. v. Hampton Roads Sanitation District*,[1605] a case that involved a railroad company.[1606] As explained by the article, the issue was whether "a broad indemnification provision in a construction contract violated Virginia public policy."[1607] The Hampton Roads Sanitation District (HRSD) entered into an indemnity agreement with the Belt Line Railroad (Belt Line) regarding HRSD's proposed installation of a sewer line on railroad property.[1608] Thereafter, the HRSD entered into a contract with a contractor that "included broad indemnity provisions … requiring the contractor to hold

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[1602] *Id.*

[1603] *Id.* at *61.

[1604] *Id.* at *71-72.

[1605] 273 Va. 350, 641 S.E.2d 472 (Va. 2007).

[1606] D. Stan Barnhill, "Construction Law," 43 *U. Rich. L. Rev*. 107 (2008).

[1607] *Id*. at 116 (footnote omitted).

[1608] *Id*.

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[the HRSD] harmless from any claims brought against it as a result of the contractor's performance of the work."[1609]

After one of the contractor's employees was injured by a train, and the employee brought an action suit against Belt Line, the HRSD "honored its indemnity obligation."[1610] The contractor refused the HRSD's later demand that the contractor honor its indemnity obligation. The HRSD brought an action for a declaratory judgment to determine whether the indemnity provisions were enforceable.[1611] As explained in the article, "[t]he contractor argued that the obligation to indemnify a party for personal injury arising out of negligence not caused by the indemnifying contractor or the party to be indemnified was against public policy."[1612] However, the Supreme Court of Virginia held that an owner may "obtain broad indemnity from a contractor to protect it from future personal injury claims that were not caused by its negligence or the negligence of the indemnifying contractor."[1613]

[1609] *Id*. (footnote omitted).

[1610] *Id*. (footnote omitted).

[1611] *Id*. (footnote omitted).

[1612] *Id*. (footnote omitted).

[1613] *Id*. at 117 (footnote omitted).

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XIII. CONTRACTS AND RAILROADS

A. Introduction

The three sections in this part discuss implied covenants, indemnity provisions, and other agreements. Section B considers implied covenants principally in leases for maintaining and using a railroad, as well as implied covenants in mortgages on railroad property. Section C considers indemnity provisions, as well as related statutory provisions, and cases that hold that an obligation to indemnify is contractual in nature rather than being based on the common law and that a railroad's passive negligence does not negate a contractual indemnity made for its benefit. Section C also summarizes articles that discuss the limited liability of freight lines when a passenger carrier uses a freight line's tracks or when a railroad is acting as a landlord. Section D discusses statutes regulating labor agreements, cases interpreting easements, limitations on the states' use of condemnation to avoid leasing railroad property, and limitations on the mandating of joint use or switching agreements. Finally, section D also summarizes articles on the STB's deregulation of employee protections in sales agreements and its regulation of joint use agreements between freight and passenger rail lines.

B. Implied Covenants in Railroad Contracts

Statutes

1. Necessary Incidents Implied in a Contract

An Oklahoma statute mandates that anything considered necessary for the parties to carry out a contract is an implied condition of the contract, a provision that has been applied to contracts that grant a right of way.[1614] In one case involving a contract for a railroad right of

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[1614] 5 OK Stat. § 15-172 (2014).

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way, a state court ruled that the contract would be void if the railroad company were no longer operating.[1615]

Cases

2. Railroad's Obligation to Maintain and Operate a Railroad while under Lease

In *Southern Railway Co. v. Franklin & Pittsylvania Railroad Co.*[1616] the Supreme Court of Appeals of Virginia held that the obligation to continue to operate a railroad on leased property was an implied covenant in the lease.[1617] Franklin & Pittsylvania sought an injunction to prevent the Southern Railway Company (Southern Railway) from abandoning a railway.[1618] The lease was drawn so that the lessee would operate the road and not abandon it.[1619] Thus, the court held that there was an implied obligation to continue to operate the line for the period of the lease, as well as an implied prohibition on abandonment.[1620]

3. Lessor of Rail Property does not have a Common Law Duty to Repair the Property

However, the Sixth Circuit in *Felton v. Cincinnati*[1621] refused to find that there was an implied covenant in a lease that obligated the lessor to construct or repair a road to make it

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[1615] *Kan., Okla. & Gulf Ry. Co. v. Grand Lake Grain Co.*, 1967 OK 170, 434 P.2d 153 (Okla. 1967).

[1616] 96 Va. 693, 32 S.E. 485 (1899).

[1617] *Id.*, 96 Va. at 709, 693, 32 S.E. at 491.

[1618] *Id.*, 96 Va. at 699, 693, 32 S.E. at 487.

[1619] *Id.,* 96 Va. at 699, 700, 708, 32 S.E. at 487, 490.

[1620] *Id.*, 96 Va. at 696, 693, 32 S.E. at 486.

[1621] 95 F. 336 (6th Cir. 1899).

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suitable for its intended use.[1622] The city of Cincinnati leased property to the Cincinnati, New Orleans, & Texas Pacific Railway Company (CNO&TP) to operate a rail line.[1623] Because the bridges for the existing track were no longer operable, CNO&TP claimed that the city should repair the track to put it in a condition suitable for use as a railroad.[1624] However, the court held that the city as the lessor was not obligated under the lease to repair the bridges.[1625] Thus, unless otherwise required by the terms of the lease or required by statute, a lessor is not obligated to put property in an operable condition when leasing it to a railroad.[1626]

4. Prioritization of Income to Pay Expenses Incurred During Ordinary Operation over a Mortgage

In re Chicago, R.I. & R. Ry. Co.[1627] is a leading case on mortgages, railroad operations, and an implied priority on railroad income for the payment of operating expenses. The railroad faced several claims for damages to property and personal injury for which the Seventh Circuit ruled that the railroad had to compensate the claimants.[1628] The claimants argued that the payment of damages to them should be classified as operating expenses, thus giving the payment

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[1622] *Id.* at 340.

[1623] *Id.* at 337.

[1624] *Id.*

[1625] *Id.* at 343.

[1626] *Id. See, e.g., Smithfield Improvement Co. v. Coley-Bardin*, 156 N.C. 255, 72 S.E. 312 (1911).

[1627] 90 F.2d 312, 315 (7th Cir. 1937), *cert. denied*, 302 U.S. 717, 58 S. Ct. 37, 82 L. Ed. 554 (1937).

[1628] *Id.* at 314.

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priority over mortgage payments.[1629] The mortgagee argued that the railroad first had to meet its obligations under the mortgage before paying other indebtedness. The court held that

> it has long been established that mortgages upon railroad properties are subject to certain implied conditions. Every railroad mortgagee, in accepting its security, impliedly agrees that all current debts, accruing in the ordinary course of the operation of its business, shall be paid from the current income before [the mortgagee] has [a] claim thereto.[1630]

5. Implied Obligation in Railroad Contracts of Good Faith and Fair Dealing

In *Anderson v. Union Pac. R. Co.*[1631] an employee of Union Pacific alleged that the company had committed a breach of an implied covenant of good faith and fair dealing when the railroad terminated his employment. The Ninth Circuit held that the railroad had good cause to terminate Randal who had made inappropriate remarks regarding another coworker, attempted to influence individuals during the railroad's investigation of the incident, and made other inappropriate remarks to coworkers.[1632] The court relied on California law to define "good cause" as "a reasoned conclusion … supported by substantial evidence."[1633] The court held that Union Pacific's actions satisfied the definition of good cause under California law; therefore, the railroad did not commit a violation of an obligation of implied good faith and fair dealing.[1634]

[1629] *Id.*

[1630] *Id.* at 315 (citation omitted).

[1631] 359 Fed. Appx. 800 (9th Cir. 2009).

[1632] *Id.* at 801.

[1633] *Id.* (*citing Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412, 422 (1998)).

[1634] *Id.* at 801-802.

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C. Indemnity Provisions in Railroad Contracts other than Construction Contracts

Cases

1. Obligation to Indemnify a Railroad is Contractual

In a case decided by the Eighth Circuit, the court held that an obligation to indemnify a railroad arises by virtue of a contract, not the common law.[1635] In *Rice v. Union Pacific R. Co.*[1636] Gunderson Rail Services (Gunderson) and Union Pacific had a Track Lease Agreement (TLA) pursuant to which Gunderson leased track within its railyard to Union Pacific. After a Union Pacific employee was injured in Gunderson's railyard, Union Pacific brought an action against Gunderson for full indemnity.[1637] The principal issue was whether Gunderson was liable under the terms of its TLA with Union Pacific.[1638] The Eighth Circuit held that the "industry's obligation to indemnify a railroad … is a contractual duty and not a duty arising under the common law."[1639] The indemnity provision included a clause that required Gunderson and Union Pacific to share equally in the cost of concurring acts of negligence.[1640] The Eighth Circuit, therefore, upheld the district court's decision that Union Pacific and Gunderson were

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[1635] *Rice v. Union Pacific R. Co.,* 712 F.3d 1214 (8th Cir. 2013).

[1636] *Id.* at 1217.

[1637] *Id.* at 1216.

[1638] *Id.* at 1220-1221.

[1639] *Id.* at 1219 (*citing Burlington N., Inc. v. Bellaire Corp.*, 921 F.2d 760, 763 (8th Cir. 1990)).

[1640] *Id.* at 1217.

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each liable for half of the settlement with the employee and that Gunderson was not liable for Union Pacific's part.[1641]

2. Indemnity Provision not Negated by Party's Passive or Secondary Negligence

In *Booth-Kelly Lumber Co. v. S. Pac. Co.*[1642] Southern Pacific brought an action against Booth-Kelly Lumber Company (Booth-Kelly) to recover sums that Southern Pacific had paid to settle a judgment in an action against it by Mack Powers. Southern Pacific alleged that Booth-Kelly was obliged to indemnify Southern Pacific for the full amount of the judgment. Booth-Kelly and Southern Pacific had an agreement whereby the railroad maintained a spur track and allowed Booth-Kelly to use it.[1643] A provision in the agreement provided that Booth-Kelly would

> indemnify and hold harmless [Southern Pacific] for loss, damage, injury or death from any act or omission of [Booth-Kelly], its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said track….[1644]

The indemnity provision further provided that "if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally."[1645]

Southern Pacific argued that it was entitled to full indemnity because of Booth-Kelly's "active negligence" in leaving a wood cart forty-two inches from the track that caused the

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[1641] *Id.* at 1216.

[1642] 183 F.2d 902, 904 (9th Cir. 1950). *See Burlington Northern R. Co. v. Farmers Union Oil Co.*, 207 F.3d 526 (8th Cir. 2000) (ruling that a failure to warn a railroad of defective brakes was an act on the part of the lessee that triggered an indemnity provision in favor of the railroad).

[1643] *Booth-Kelly Lumber Co. v. S. Pac. Co.*, 183 F.2d at 905.

[1644] *Id.*

[1645] *Id.*

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accident.[1646] Southern Pacific argued that it was only passively negligent for failing to warn its brakeman of the presence of the cart.[1647] The court held that the indemnity provision assumes that there was some negligence on the part of Southern Pacific; however, because Southern Pacific was only passively negligent while the Booth-Kelly was actively negligent, Southern Pacific was entitled to a full indemnity under the provision.[1648]

Articles

3. Freight Rail has Limited Liability for Passenger Rail Incidents

A law review article discusses the issue of indemnification of freight rail lines when a passenger rail line, including mass transit lines, is granted a right of way on its lines.[1649] When a freight railroad and Amtrak enter into an agreement granting Amtrak a right of way on freight lines, the freight railroad is indemnified from liability for incidents arising out of the use of the railroad by Amtrak for its passengers.[1650] In *National R.R. Passenger Corp. v. Consolidated Rail Corp.,*[1651] Consolidated Railroad Corporation's (Conrail) freight train collided with an Amtrak

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[1646] *Id.* at 911.

[1647] *Id.*

[1648] *Id.*

[1649] Justin J. Marks, "No Free Ride: Limiting Freight Railroad Liability When Granting Right-of-Way to Passenger Rail Carriers," 36 *Transp. L.J.* 313 (2009), hereinafter referred to as "Marks."

[1650] *Id*. at 316 and N 27. The author states that

> [t]o protect the freight railroad from liability, Amtrak contractually indemnifies through a no fault liability agreement for injuries "resulting from any damages that occur to Amtrak passengers, equipment, or employees regardless of fault if an Amtrak train is involved."

Id. at 316 (*quoting* United States Government Accountability Office, Intercity Passenger Rail: National Policy and Strategies Needed to Maximize Public Benefits from Federal Expenditures 148 (2006)).

[1651] 892 F.2d 1066 (D.C. Cir. 1990).

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train, resulting in the deaths of and injuries to some passengers.[1652] The employees, who recently had used marijuana, were operating the train at a high speed with a broken cab signal.[1653] The trial court "determined that 'public policy will not allow enforcement of indemnification provisions that appear to cover such extreme misconduct because serious and significant disincentives to railroad safety would ensue.'"[1654] However, the District of Columbia Circuit reversed the district court without reaching the "public policy … or … substantive issues of contract interpretation…."[1655] Rather the appellate court reversed the district court because it "should have compelled arbitration as provided in the Operating Agreement between the parties…."[1656]

In discussing the above 1990 case, the Marks' article observes, first, that "the potential that future courts may weaken indemnity provisions in rail sharing contracts motivated congressional action to reinforce indemnification agreements;" that "[t]he 1997 Amtrak reauthorization legislation included a $200 million liability cap for all rail passengers;" and that the legislation "reinforced that '[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.'"[1657]

[1652] *Id*. at 1067.

[1653] *Id*.

[1654] *Id*. (citation omitted).

[1655] *Id*.

[1656] *Id*.

[1657] Marks, *supra* note 1649, at 317 (*quoting* 49 U.S.C. §§ 28103 (a)(2) and (b) (1996)).

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Second, the article argues that the "legislation will help inner-city transit agencies enforce indemnity agreements with owners of rights-of-way" and that that "[a]lthough the liability cap has not been tested, courts have upheld transit agencies['] indemnity agreements."[1658]

4. Indemnity Provisions and the Role of State Legislatures

The Marks' article, *supra*, part XIII.C.3, also discusses the role of state legislatures with respect to right of way and indemnity provisions.[1659] The article notes that "[f]orty-one passenger rail agencies operating in the United States (exclusive of Amtrak) share property with freight railroads, … [that] include commuter rail agencies…; however, some transit agencies lack the authority to grant indemnification and therefore must get State Legislative approval."[1660] The article explains that although passenger rail and freight lines negotiate rights-of-way, state legislatures are often involved in setting the terms of indemnity agreements,[1661] which range from the coverage of negligent acts to coverage of negligent and willful and wanton acts.[1662]

For example, a Colorado statute provides for an indemnity of freight railroads, including for "outrageous conduct," when public passenger railroads use their tracks.

> A railroad operating in interstate commerce that sells to a public entity, or allows the public entity to use, such railroad's property or tracks for the provision of public passenger rail service shall not be liable either directly or by indemnification for punitive or exemplary damages or for damages for outrageous conduct to any person for any accident or injury arising out of the operation and maintenance of the public passenger rail service by a public entity.[1663]

[1658] *Id*. at 318 N 41 (citations omitted).

[1659] *Id*. at 323 (*citing* Colo. Rev. Stat. § 24-10-114 (2007); *id*. at 324 (*citing* Minn. Stat. § 174.82 (West 2006) and Va. Code Ann. § 56-446.1 (West 2006)).

[1660] Marks, *supra* note 1649, at 321.

[1661] *Id*.

[1662] *Id*. at 327.

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Some states have refused to accede to freight rails' demands for no-fault liability indemnification.[1664] Both Florida and Massachusetts wanted to use CSX freight lines for passenger rail service, but CSX demanded no-fault indemnification provisions from the states.[1665] Some state legislation allows for freight and commuter rail services to enter into contracts that include indemnity provisions but that do not prescribe the limits of indemnification.[1666] Both Minnesota and Virginia have statutes on indemnification in freight and passenger rail agreements without specifying the terms.[1667]

5. Whether it is against the Public Interest to Release or Indemnify a Railroad Company Acting as a Landlord

As discussed in a law review article, when a railroad company is a landlord, the company may include an exculpatory provision in a lease that releases the railroad from any liability for damage to the lessee's property or a provision for indemnification of the railroad company.[1668] In *Griswold v. Illinois Central Railroad*[1669] an indemnity provision stated that

> the lessee, in consideration of the premises, hereby covenants and agrees with the lessor, its successors and assigns, to pay the said lessor, as rent for said premises, the sum of one dollar, to be paid at the time and in the manner following, to wit, on the delivery of this lease; and the lessee further covenants and agrees with the lessor that he will, from the date of this indenture, put to use and maintain a good,

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[1663] *Id*. at 323 (*citing* Colo. Rev. Stat. § 24-10-114 (4)(b) (2007)).

[1664] Marks, *supra* note 1649, at 323-324.

[1665] *Id*.

[1666] *Id*. at 324.

[1667] *Id*. at 324 (*citing* Minn. Stat. § 174.82 (West 2006); Va. Code Ann. § 56-446.1 (West 2006)).

[1668] William K. Jones, "Private Revision of Public Standards: Exculpatory Agreements in Leases," 63 *N.Y.U. L. Rev*. 717 (1988), hereinafter referred to as "Jones."

[1669] 57 N.W. 843 (Iowa 1984) (internal quotation marks omitted).

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> substantial elevator, coal sheds, and lumber yard on the above described premises; and further agrees to protect and save harmless said lessor from all liability for damage by fire, which, in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises.[1670]

Notwithstanding a state statute that imposed liability on railroads for fires arising out of railroad operations, the court enforced an indemnity provision in a lease agreement between the railroad and the claimant who lost property in a fire.[1671]

In *Stephens v. Southern Pacific Co.*[1672] the court also upheld an indemnity provision that was triggered by a fire caused by the railroad.[1673] The court held that there was no public policy interest at stake in upholding the indemnity provisions in such a lease.[1674] The law review article argues that allowing railroads as lessors to contract for indemnity is economically efficient and, therefore, should not be against public policy.[1675]

D. Other Contracts and Obligations Applicable to Railroads

Statutes

1. STB's Authority to Mandate Construction of Switch Connections

In addition to other matters, the ICCTA regulates fair wages for employees, public health and safety, and competition in the railroad industry.[1676] Under the statute "[a] person may

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[1670] *Id.*, 90 Iowa at 267, 57 N.W. at 844 (internal quotation marks omitted).

[1671] Jones, *supra* note 1668, at 720.

[1672] 109 Cal. 86, 41 P. 783 (1895).

[1673] Jones, *supra* note 1668, at 724.

[1674] *Id.*

[1675] *Id.* at 749-750.

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construct an extension to any of its railroad lines [or] construct an additional railroad line … only if the Board issues a certificate authorizing such activity."[1677] The STB now is authorized to mandate the construction of switch connections when an owner of a railroad applies to the Board for the connection.[1678] The authority of the STB has been confirmed in a number of cases.[1679]

Cases

2. No Right to use a Track after the Expiration of an Easement

In *Dakota, Minnesota & Eastern Railroad Corp. v. Wisconsin & Southern Railroad Corp.*[1680] Wisconsin & Southern purchased the "Janesville rail lines," including a spur that served Dakota, Minnesota & Eastern Railroad Corp.'s (DM&E) principal customer Freedom Plastics, Inc. (Freedom Plastics). The contract allowed DM&E to continue to operate trains on the Janesville lines being sold to Wisconsin & Southern and granted DM&E an exclusive easement to use a spur to serve Freedom Plastics.[1681] After Freedom Plastics went into receivership and was later sold, Wisconsin & Southern, the owner of the property, assumed the use of the spur track.[1682] DM&E brought an action claiming that it had sold the land under the track but not the track itself.[1683]

[1676] 49 U.S.C. §§ 10101(1) and (11) (2014).

[1677] 49 U.S.C. § 10901(a) (2014).

[1678] 49 U.S.C. § 11103(b) (2014).

[1679] *See, e.g.*, *Bhd. of R.R. Signalmen v. Surface Transp. Bd.,* 638 F.3d 807 (D.C. Cir. 2011) (upholding STB's interpretation of a "railroad line" as the right to operate as a common carrier and affirming the STB's authority to review, as an acquisition of a railroad line, the Massachusetts Department of Transportation's purchase of track and assets from CSX Transportation).

[1680] 657 F.3d 615 (7th Cir. 2011).

[1681] *Id*. at 617.

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The Seventh Circuit held that DM&E, after it sold the property to Wisconsin & Southern, did not retain any right to use the track when the easement to serve Freedom Plastics no longer applied. Furthermore, DM&E did not retain a property interest in the rails.[1684] The court held that

> the rails on a railroad's right of way are fixtures, … and fixtures are part of the real property to which they are attached. Anyone contemplating the purchase of the right of way would therefore justifiably assume in the absence of a contrary statement in the deed that the rails were being sold along with the right of way conveyed by the deed.[1685]

Thus, the court rejected DM&E's interpretation of the easement, held that the tracks were sold as a fixture with the land, and affirmed the district court's grant of a summary judgment for Wisconsin & Southern.[1686]

3. Unlawful Condemnation of Leased Railroad Property to Avoid a Lease

In *Union Pac. R. Co. v. Chicago Transit Auth.*[1687] the Chicago Transit Authority (CTA) attempted to condemn leased railroad property and retain a permanent easement to avoid paying high rents to the railroad as lessor. The CTA claimed that the use of the railroad would be the same under an easement as it would be under a lease and that, therefore, the use did not constitute interference.[1688] The Seventh Circuit held that the use of a railroad pursuant to an

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[1682] *Id*.

[1683] *Id*. at 621.

[1684] *Id*. at 622.

[1685] *Id*.

[1686] *Id*.

[1687] 647 F.3d 675, 683 (7th Cir. 2011).

[1688] *Id*. at 681.

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easement was not guaranteed to be the same as under a lease and that Union Pacific would lose property rights if its property were condemned.[1689] The court further held that the condemnation amounted to regulation that interfered with railroad transportation and, thus, was preempted by the ICCTA.[1690] The CTA could enter into a new lease, but it could not obtain a favorable arrangement for itself through condemnation.[1691]

4. STB's Review of Proposed Switching and Joint Use Agreements Limited by a Showing of Public Interest or Encouragement of Competition

In *Central States Enterprises, Inc. v. I.C.C.*[1692] Central States Enterprises, Inc. (Central), a grain elevator operator, requested the ICC to require two railroad companies to enter into a switching agreement or, alternatively, a joint use agreement. By statute "the Commission 'may' order relief in the form of a joint use or switching agreement where it is 'practicable and in the public interest.'"[1693] Central made the request based on the location of its grain elevators and having to use two railroad companies, transferring grain from one train to another, when shipping grain between elevators.[1694] Under either of the agreements, Central would not have to change trains.[1695] The STB now has jurisdiction to review agreements on acquisitions and

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[1689] *Id*. at 683.

[1690] *Id*. at 682.

[1691] *Id*. at 683.

[1692] 780 F.2d 664, 667-668 (7th Cir. 1985).

[1693] *Id*. at 668 (*quoting* 49 U.S.C. §§ 11103(a) and (c)(1)(1985)).

[1694] *Id*. at 667-668.

[1695] *Id*.

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mergers of railroads, as well as agreements concerning trackage rights or joint use.[1696] In reviewing proposed agreements the STB must consider the public interest and the effect on competition among railroads.[1697]

The Seventh Circuit upheld the Commission's finding that there had not been a showing of a compelling public need for joint terminal service; held that the Commission acted within its discretion in assessing what was in the public interest, and upheld the Commission's conclusion that the switching agreement was sought merely as a matter of convenience.[1698]

5. Construction of a Spur Track over a Pipeline on an Easement

In *Travis County v. Flint Hills Res., L.P.*[1699] Flint Hills Resources, L.P. (Flint Hills), which had an easement on property belonging to Travis County, built a pipeline on the property pursuant to the easement. The county later agreed to sell the property to Balcones Resources (Balcones) on which Balcones intended to build a spur track over the pipeline.[1700] Flint Hills argued that under the terms of the easement Balcones could not build the track over the pipeline but Flint Hills would allow the spur track if Balcones paid the expense of lowering the pipeline by several feet.[1701] Because the dispute over the spur track delayed the sale of the land, the county brought an action for a declaratory judgment that the easement gave the county a right to

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[1696] 49 U.S.C. § 11323(a) (2014).

[1697] 49 U.S.C. §§ 11324(b), (c), and (d) (2014).

[1698] *Central States Enterprises, Inc.,* 789 F.2d at 678-680.

[1699] 456 Fed. Appx. 410 (5th Cir. 2011).

[1700] *Id*. at 412.

[1701] *Id*.

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build a spur track across the easement.[1702] Although the district court held the county had the right to build a spur track on the land, the Fifth Circuit reversed and remanded the case.[1703]

The Fifth Circuit held that under Texas law the rules on the interpretation of contracts also apply to easements.[1704] However, because the easement was silent on which party should pay to lower the pipeline if a spur track were built across it, the court held that the Texas Health and Safety Code governed.[1705] The court further held that Balcones was a "constructor" within the meaning of the statute and that

> [t]he County or its grantee may not proceed to build the railroad spur until "the constructor pays the reasonable, necessary, and documented cost of the additional fortifications, barriers, conduits, or other changes or improvements necessary to protect the public or pipeline facility from that risk before proceeding with the construction."[1706]

Articles

6. Short Line Sales and Employee Protection Provisions

A law review article on the rise in recent years of short line railroads in the United States, but prior to the establishment of the STB, discusses the ICC's more permissive approach in the regulation of the railroads' obligations to employees and in the regulation of protections for employees in sales agreements.[1707] In 1985, the ICC promulgated new regulations to exempt parties to sales of short line railroads from the obligation to pay former employees of the railroad

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[1702] *Id*.

[1703] *Id*.

[1704] *Id*. at 413.

[1705] *Id*. (*citing* Tex. Health & Safety Code Ann. § 756.122 (2005)).

[1706] *Id*. at 415 (*quoting* Tex. Health & Safety Code Ann. §§ 756.121 and 756.123(2) (West 2005)).

[1707] Paul Stephen Dempsey and William G. Mahoney, "The U.S. Short Line Railroad Phenomenon: The Other Side of the Tracks," 24 *U. Tol. L. Rev*. 425, 428-430 (1993).

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after the sale or to employ displaced workers.[1708] According to the article, when there were existing contractual protections for employees, deregulation has resulted in the voiding of such contractual arrangements for employees.[1709]

7. Shifting Bargaining Power between Passenger Rail Lines and Freight Rail Lines through STB Regulation

As an article in the *Transportation Law Journal* explains, when it is in the public interest the STB may require the use of track facilities of one carrier for another carrier.[1710] Although the parties are to negotiate the terms, the Board may establish the necessary conditions when the parties are unable to do so.[1711] Commuter agencies may take advantage of the Board's power to establish conditions when negotiating for the use of freight lines.[1712]

As for the property that the STB may require to be used,

> [t]he property must be either a "terminal facility" or "main line track for a reasonable distance outside a terminal[,]" and these must be owned by a "rail carrier providing transportation subject to the jurisdiction of the Board under this part."[1713]

[1708] *Id*. at 429.

[1709] *Id*. at 435. The authors state, for example, that "[e]mployees have … been adversely affected by unregulated short line sales and leases which were specifically designed to nullify union contracts." *Id*. at 436. *But see Bhd. of Maint. of Way Employees Div. v. Burlington N. Santa Fe Ry. Co.,* 596 F.3d 1217 (10th Cir. 2010) (ruling that a worker's dispute over the sale of a railway to the New Mexico Department of Transportation was subject to mandatory arbitration by the National Railroad Adjustment Board under the Railway Labor Act).

[1710] Charles A. Spitulnik and Jamie Palter Rennert, "Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property," 26 *Transp. L.J.* 319, 329 (1999).

[1711] *Id*.

[1712] *Id*.

[1713] *Id*. at 330 (footnote omitted).

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Furthermore, "a terminal facility is 'any property of a carrier which assists in the performance of the functions of a terminal,'" but "the nature of the facilities and the area in which they are located are as important as the use, … such as … service [that] is performed within a cohesive commercial area…."[1714] Although a freight line will be compensated for the use of its track, freight lines may assert lack of capacity to avoid a forced agreement.[1715]

[1714] *Id*. (footnote omitted).

[1715] *Id*. at 337-338.

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XIV. CROSSINGS AT RAILROADS

A. Introduction

This part of the Report is devoted to several aspects of the important topic of highway-railway grade crossings. Section B discusses federal and state law on improvements to or the elimination of highway-railway grade-crossings, as well as the government's right to require changes to highway-railway grade crossings in the public interest. Section C discusses defective conditions at railroad crossings, such as inadequate warnings, uneven road and rail conditions, and vegetation obstructing a motorist's view of an oncoming train. Conditions of crossings and warning signs are often regulated by statute. Section D discusses a motorist's obligation to make a full stop at a railroad crossing in response to warning signals or a stop sign that may indicate an approaching train. Although a train's crew may assume that a driver will obey traffic laws and stop, both the crew and the motorist have a duty to exercise caution when approaching a crossing. Section E addresses the liability of railroads for accidents at railroad crossings, the Federal Railroad Safety Act's (FRSA) preemption of some state tort claims, and a railroad's duty to inspect a railway for defects, as well as to maintain a toll-free telephone service for persons to report malfunctions and other problems at crossings. Section F discusses state laws on the rights of utilities to use or cross certain railroad rights of way. Section G considers the issue of compensation for damage occasioned by the construction, relocation, or closure of crossings. Section H discusses liability of railroads for injuries at private crossings.

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B. Improvements to or Elimination of Highway-Railway Grade Crossings

Statutes

1. Federal Highway-Railway Crossings Program

As provided in 23 U.S.C. § 130(a), the Department of Transportation pays for the cost "of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings…."

Under subsection (b) of § 130, the Secretary classifies "the various types of projects involved in the elimination of hazards of railway-highway crossings" as a way of establishing for each classification a percentage of the construction that "shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction," not to exceed 10 percent.[1716]

When a railroad that is involved in a project to eliminate hazards at railway-highway crossings is paid as provided in the statute, the railroad is "liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section" as further provided in subsection (c).[1717]

[1716] 23 U.S.C. § 130(b) (2014).

[1717] 23 U.S.C. § 130(c) (2014).

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Each state is required to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose."[1718]

Each state must report annually to the Secretary "on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements."[1719] Moreover, the Secretary must submit a report to Congress every two years on the states' progress "in implementing projects to improve railway-highway crossings."[1720]

Article

2. Railroad Obligations under State Law on Grade Crossings

As discussed in subpart B.5 below, except when federal law preempts state law, "[m]ost aspects of jurisdiction over highway-rail grade crossings reside with the states."[1721] A Mississippi statute is an example of a railroad's obligations on crossings and needed improvements. The statute requires that when a railroad is constructed across a highway such that the highway must be raised or lowered, the railroad company is responsible to make and maintain a "proper and easy" grade for the crossing.[1722]

[1718] 23 U.S.C. § 130(d) (2014).

[1719] 23 C.F.R. § 123(g) (2014).

[1720] *Id*.

[1721] L. Stephen Jennings, "The Compilation of State Laws and Regulations Affecting Highway-Rail Grade Crossings," at ii (5th Ed. 2009), available at: http://www.plsc.net/docs/compilationofstatelawsRR2009.pdf (last accessed March 31, 2015).

[1722] Miss. Code Ann. § 77-9-251 (2014).

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Cases

3. Compensation when a Local Government and a Railroad Company Agree on a Change of Grade

In *Bercel Garages, Inc. v. Macomb County Road Comm'n*[1723] the plaintiffs owned stores adjacent to a crossing where the county decided to construct an overpass to alleviate congestion caused by an existing crossing.[1724] In Michigan, even if a change of grade is not a taking requiring compensation, a state statute provides that affected property owners may recover compensation from the local government.[1725] After the construction, because the plaintiffs' properties were less accessible from the highway, the plaintiffs sought damages from the county under the applicable statute.[1726] Although the statutory provisions relevant to the agreements for separation of grade and compensation for third parties were repealed later, Michigan still recognizes the ability of a road authority and a railroad to enter into agreements for a change of grade, including separation of a grade at crossings, and the responsibility to compensate adjacent landowners.[1727]

[1723] 190 Mich. App. 73, 475 N.W.2d 840 (Mich. Ct. App. 1991).

[1724] *Id.,* 190 Mich. App. at 76, 475 N.W.2d at 842.

[1725] *Id.*, 190 Mich. App. at 81-82, 475 N.W.2d at 845.

[1726] *Id.,* 190 Mich. App. at 76-77, 475 N.W.2d at 842-843.

[1727] Mich. Comp. Laws §§ 102.7, 462.321 (2014).

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Articles

4. Elimination or Modification of Railroad Crossings

A law review article on access to the Hudson River in New York discusses the construction or elimination of railroad grade crossings.[1728] As early as 1906, it was the policy of the state of New York to close grade crossings when possible.[1729] The Commissioner of Transportation may approve the installation, elimination, or relocation of grade crossings.[1730] In 1994, the Commissioner's authority was extended to private crossings.[1731] The city and state assume the expense when the Commissioner decides that it is in the public interest to change a grade.[1732] Otherwise, the railroad assumes half of the expense with the city and state dividing the remaining cost.[1733]

5. Compilation of State Laws and Regulations on Matters Affecting Highway-Rail Crossings

A compilation of state laws and regulations on matters affecting highway-rail crossings prepared in conjunction with the Federal Railroad Administration includes a chapter on "crossing treatment procedures."[1734] The compilation summarizes the law in each state on the processes

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[1728] Matthew R. Atkinson, "On the Wrong Side of the Railroad Tracks: Public Access to the Hudson River," 13 *Pace Envtl. L. Rev*. 747, 800-805 (1996).

[1729] *Id*. at 800.

[1730] *Id*. at 801.

[1731] *Id*.

[1732] *Id*. at 803 (*citing* N.Y. R.R. Law § 91).

[1733] *Id*. at 803-804.

[1734] L. Stephen Jennings, "The Compilation of State Laws and Regulations Affecting Highway-Rail Grade

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and procedures required and the roles of the state or local government and the railroads "when undertaking elimination, relocation, construction, repair, and/or improvement of grade crossings." As the report notes,

> [t]he designated agency having authority to order improvements is also the one with statutory authority to order outright elimination. But, there exists a distinction in some states in that an agency may have the authority to eliminate a highway-rail grade crossing, but only for the purposes of creating a grade separation.[1735]

The applicable sections of the statutes are included with each state. In most of the entries, a discussion of the division of the costs for elimination, relocation, construction, repair, and/or improvements of grade crossings is included.

C. Defective Conditions at Railroad Crossings

Statutes and Regulations

1. Safety Standards for Railroad Tracks, Roadbeds, and Nearby Areas

Federal regulations require railroad track, roadbed, and the areas around the roadbed to meet certain safety standards. Part 213 of title 49 of the C.F.R.

> prescribes minimum safety requirements for railroad track that is part of the general railroad system of transportation. … [A] combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.[1736]

Section 213.31 "prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed." Drainage facilities under and adjacent to the roadbed must be "maintained

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Crossings," 5th Ed. (2009), available at: http://www.plsc.net/docs/compilationofstatelawsRR2009.pdf (last accessed March 31, 2015).

[1735] *Id*. at ch. 2-1.

[1736] 49 C.F.R. § 213.1 (2014).

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and kept free of obstruction, to accommodate [the] expected water flow for the area…."[1737] The roadbed drainage system must be maintained and be unobstructed.[1738] Vegetation must be controlled so that it is not a hazard or otherwise obstructing warning signs, including signs at railroad crossings. Track owners must maintain track surfaces in accordance within the limits prescribed by the section.[1739] Under § 213.113(a) that applies to defective rails,

> [w]hen an owner of track to which this part applies learns, through inspection or otherwise, that a rail in that track contains any of the defects listed in the following table, a person designated under § 213.7 shall determine whether or not the track may continue in use.
>
> Furthermore,
>
> [i]f he determines that the track may continue in use, operation over the defective rail is not permitted until—
>
> (1) The rail is replaced; or
>
> (2) The remedial action prescribed in the table is initiated.[1740]

Depending on the class of the track, inspections of the track must be conducted monthly, weekly, or biweekly at a pace that allows for a survey of the track structure.[1741]

2. Duty to Maintain a Crossing beyond the Crossties and the Crossing

A Georgia statute requires railroads to maintain public crossings to permit "safe and reasonable passage of public traffic."[1742] A railroad is responsible to maintain that part of the

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[1737] 49 C.F.R. § 213.33 (2014).

[1738] 49 C.F.R. § 213.33 (2014).

[1739] 49 C.F.R. § 213.63 (2014).

[1740] 29 C.F.R. § 213(a)(1) and (2) (2014).

[1741] 49 C.F.R. § 213.233 (2014).

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road extending two feet beyond the crossties.[1743] A railroad is responsible for that part of the road four feet beyond the "traveled way or flush with the edge of the paved shoulder."[1744]

3. Applicability of the Manual on Uniform Traffic Control Devices to Railroad Crossings

As discussed in part XXIX of the Report, the Manual on Uniform Traffic Control Devices (MUTCD) requires that certain devices must be used at highway and rail or light rail transit crossings.[1745] When light rail transit and railroads use the same track, the standards for rail and highway crossings are to be used.[1746] For example, at a light rail transit and highway crossing, the crossing must have traffic signals or flashing signal lights.[1747] When an engineering study concludes that crossbucks, stop signs, or yield signs are required they may be used as well.[1748] Crossing signals must be retroreflectorized so that the color of the sign is the same both day and night.[1749] When there is a crossing in a temporary traffic control zone the signals should not cause vehicles to stop on the rail.[1750] The MUTCD's provisions cover the specific types of signs to use prior to a railroad crossing.

[1742] Ga. Code Ann. § 32-6-190 (2014).

[1743] *Id*.

[1744] *Id*.

[1745] FHWA, Manual on Uniform Traffic Control Devices 8A (2009), available at: http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/part8.pdf (last accessed March 31, 2015), hereinafter referred to as "MUTCD."

[1746] *Id*. at § 8A.01.

[1747] *Id*. at § 8A.03.

[1748] *Id*.

[1749] *Id*. at § 8A.04.

[1750] *Id*. at § 8A.08.

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Cases

4. Requirement of Notice of a Defective Condition at a Crossing to hold a Railroad Liable for the Condition

In *Goebel v. Salt Lake City S. R. Co.*[1751] the plaintiff was riding his bicycle across a railroad crossing when his bicycle allegedly was forced into a small gap in the roadway that caused his tire to jam against the rail. Goebel alleged that a gap had developed between the "field panels" that raise the road almost to the same height as the rail.[1752] After the trial court granted a directed verdict for the railroad, Goebel appealed. The plaintiff argued that the railroad had constructive notice of the gap in the road and that it was not necessary to prove notice because state law required a railroad to maintain crossings.[1753] Because the alleged condition was not one that the railroad installed or created, the Supreme Court of Utah held that evidence of notice was required.[1754] Moreover, because the railroad had inspected the crossing the plaintiff was unable to establish that the railroad had constructive notice. Finally, Goebel had biked through the crossing previously without observing the gap.[1755] The court upheld the trial court's directed verdict in favor of the railroad.[1756] Thus, a railroad must have notice of a defective condition at or in a crossing before it may be held liable for negligence for failing to maintain the crossing.

[1751] 104 P.3d 1185, 1189 (Utah 2004), *aff'd, Utah Transit Auth. v. Salt Lake City S. R.R. Co., Inc.*, 2006 UT App 46, 2006 Utah App. LEXIS 15 (2006).

[1752] *Id.*

[1753] *Id.* at 1189-1190.

[1754] *Id.* at 1193.

[1755] *Id.* at 1194.

[1756] *Id.* at 1198.

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5. Whether a Road Condition at a Crossing is an Unusually Dangerous Condition

In *Illinois Cent. Gulf R. Co. v. Travis*[1757] an oncoming train struck a motorist's truck when the motorist failed to stop prior to a railroad crossing. Among other claims, Travis alleged that there were several defects in the crossing.[1758] Whether a crossing is considered to be unusually dangerous depends on several factors, such as whether a motorist was able to see the approaching train; whether there was an unusually steep grade; whether a motorist was able to hear an approaching train; and whether there was unusual traffic congestion.[1759] A railroad's duties are to "make proper and easy grades in the highway" and to make certain that grades are convenient and safe to cross by one exercising reasonable care.[1760] However, railroads are not responsible for the condition of the road prior to a crossing.[1761] The grade was not unusually steep and the crossing lacked other defects that would prevent one from seeing or hearing a train.[1762] Thus, the railroad company was held not liable for the accident.[1763]

[1757] 106 So.3d 320, 324 (Miss. 2012), *rehearing denied*, 2013 Miss. LEXIS 93 (Miss., Feb. 14, 2013).

[1758] *Id.* at 338.

[1759] *Id.*

[1760] *Id.* at 338, 339 (*citing* Miss. Code Ann. § 77-9-251 (Rev. 2009)).

[1761] *Id.* at 339.

[1762] *Id.*

[1763] *Id.* at 340.

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6. Applicability of a Statute to a Crossing that was Installed after the Road's Construction

In *Bowman v. CSX Transportation, Inc.*[1764] a CSX train struck Bowman's vehicle as she attempted to proceed around a car that stopped in front of her while Bowman was still in the crossing.[1765] Bowman alleged that the CSX was negligent in maintaining the crossing, but the jury found in favor of CSX.[1766] A Mississippi statute provided that when a railroad is constructed across a highway and it becomes necessary to raise or lower the highway, the railroad's duty is "to make proper and easy grades in the highway, so that the railroad may be conveniently crossed."[1767] A Mississippi appellate court interpreted the statute to apply to railroad crossings that were installed after the construction of the road.[1768] However, although the statute "forms a consistent pattern with other authority" that requires a railroad to maintain a crossing,[1769] based on other evidence in the case the court upheld the jury's verdict in favor of CSX.[1770]

[1764] 931 So.2d 644 (Miss. Ct. App. 2006).

[1765] *Id.* at 648.

[1766] *Id.*

[1767] Id. at 652 (*quoting* Miss. Code Ann. § 77-9-251 (Rev. 2001)).

[1768] *Id.*

[1769] *Id.*

[1770] *Id.* at 664-665.

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Article

7. Maintaining a Crossing and Crossing Signs and Warning Devices

As discussed in a law review article, Virginia law requires a railroad to keep a public crossing in good repair, including when a railroad changes the grade of the tracks.[1771] A railroad must "maintain a safe vertical relationship between trackage and street surfaces" and crossbucks must be placed at every public railroad crossing.[1772] However, federal funds may be used to upgrade warning signs to reflective signs or to automatic warning signals at crossings.[1773] Under federal law the use of federal funds to upgrade crossings results in federal preemption of claims under state law alleging that railroad crossing warnings were inadequate.[1774] A railroad may only "install or upgrade a public grade crossing pursuant to an agreement with the Virginia Department of Transportation."[1775] A railroad may not decide unilaterally to install a warning system at a crossing.[1776] The article also discusses a railroad's responsibility to control vegetation that may impair a motorist's ability to see an oncoming train.[1777] However, when vegetation is present motorists have an obligation to approach a track more carefully.[1778]

[1771] Brent M. Timberlake, "Railroad Law," 43 *U. Rich. L. Rev*. 337 (2008).

[1772] *Id.* at 360 (*citing* Va. Code Ann. § 56-405.02 (Repl. Vol. 2007)).

[1773] *Id.* at 361.

[1774] *Id.*

[1775] *Id.* at 361-362 (*citing* Va. Code Ann. § 56-406.1 (Repl. Vol. 2007)).

[1776] *Id.*

[1777] *Id.* at 365.

[1778] *Id.*

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Although there is Virginia law on a railroad's obligation to sound a horn or bell when approaching a crossing, the FRA's regulations preempt state law.[1779] The FRA's regulations require the use of locomotive horns at railroad crossings except in quiet zones.[1780] However, under the standing train doctrine "'there is no duty on the railway company to provide special warning or safeguards to motorists … to prevent collisions with cars standing on or moving across a public grade crossing.'"[1781]

D. Failure by Motorists to Stop at Railroad Crossings

Statutes and Regulations

1. Full Stop Required at a Crossing when a Signal Indicates an Approaching Train

A Vermont statute requires motorists to make a complete stop fifty feet from the nearest rail of a railroad crossing when an approaching train is visible; an approaching train has sounded its horn; a crossing gate is down; a signal warns of an approaching train; or a stop sign is posted.[1782] A motorist still may cross the tracks when a warning signal is in operation as long as the motorist first comes to a complete stop and is able to cross the tracks safely.[1783]

[1779] *Id.* at 368.

[1780] *Id.*

[1781] *Id.* at 368-369 (*quoting Wojciechowski v. Louisville & N. R. Co.*, 277 Ala. 528, 173 So.2d 72 (Ala. 1964)).

[1782] 23 V.S.A. § 1071 (2014).

[1783] 23 V.S.A. § 1071(c) (2014).

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Cases

2. Passenger's Duty to Watch for Approaching Trains and Warn the Driver to Stop

In *Smith v. Union Pac. R. Co.*[1784] the plaintiff Smith was a passenger in a truck that collided with a Union Pacific train at a railroad crossing. Because of the plaintiff's contributory negligence the trial court granted a summary judgment in favor of Union Pacific.[1785] The issue on appeal was whether the passenger-plaintiff was contributorily negligent in failing to watch for and warn the driver of the approaching train.[1786] The Supreme Court of Kansas stated that "[a] passenger may properly rely upon the driver to attend to the operation of the vehicle, in the absence of the knowledge of danger, or facts which would give him such knowledge."[1787] A passenger may rely on the driver until the passenger has reason not to do so.[1788] If a passenger sees an approaching train and fails to warn the driver to stop, the passenger may be held to be contributorily negligent.[1789]

However, the court rejected the argument that a passenger is contributorily negligent as a matter of law when the passenger fails to watch for and warn the driver of an approaching train.[1790] Thus, it is a question of fact whether the passenger did not use reasonable care.[1791]

[1784] 564 P.2d 514, 515 (Kan. 1977).

[1785] *Id.*

[1786] *Id.* at 515-516.

[1787] *Id.* at 518.

[1788] *Id.* at 519.

[1789] *Id.*

[1790] *Id.*

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Having determined that the passenger was not contributorily negligent as a matter of law, the court remanded the case to determine whether based on the evidence the passenger was contributorily negligent.[1792]

3. Railroad Conductor's Duty to Watch for Motorists who may Fail to Stop

In *Illinois Cent. Gulf R. Co. v. Travis,*[1793] *supra*, part XIV.C.5, the court held that Mississippi law requires that a crew on a moving train to watch for vehicles approaching the tracks but that the law also allows the crew to assume that motorists will obey the traffic laws. In *Travis*, the driver of a truck approaching the railroad tracks stopped prior to the tracks to allow a tractor to cross.[1794] On seeing the tractor the conductor sounded the train's horn.[1795] The driver of the truck continued to approach the tracks slowly while the train continued toward the crossing.[1796] The conductor and engineer saw the truck stop for the tractor and then slowly approach the tracks, but they assumed that the truck would stop to allow the train to pass.[1797] The train struck the front of the truck, killing the driver.[1798] Because the crew kept an adequate

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[1791] *Id.*

[1792] *Id.* at 520.

[1793] 106 So.3d 320, 329-330 (Miss. 2012), *rehearing denied,* 2013 Miss. LEXIS 93 (Miss., Feb. 14, 2013).

[1794] *Id.* at 324.

[1795] *Id.*

[1796] *Id.*

[1797] *Id.* at 330.

[1798] *Id.* at 324.

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lookout for oncoming traffic and properly assumed that the truck would stop, the railroad was not liable for the driver's death.[1799]

E. Liability of Railroads for Defective Conditions at Crossings

Statutes and Regulations

1. Telephone Reporting of Problems at Crossings

Federal law requires each railroad carrier to

> (1) *establish and maintain a toll-free telephone service for rights-of-way over which it dispatches trains, to directly receive calls reporting*—
> (A) malfunctions of signals, crossing gates, and other devices to promote safety at the grade crossing of railroad tracks on those rights-of-way and public or private roads;
> (B) disabled vehicles blocking railroad tracks at such grade crossings;
> (C) obstructions to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach; or
> (D) other safety information involving such grade crossings….[1800]

Furthermore, railroads must

> (5) ensure the placement at each grade crossing on rights-of-way that it owns of appropriately located signs, on which shall appear, at a minimum—
> (A) *a toll-free telephone number to be used for placing calls described in paragraph (1) to the railroad carrier dispatching trains on that right-of-way*;
> (B) an explanation of the purpose of that toll-free telephone number; and
> (C) the grade crossing number assigned for that crossing by the National Highway-Rail Crossing.[1801]

[1799] *Id.* at 330.

[1800] 49 U.S. Code § 20152(a)(1)(A)-(D) (2014) (emphasis supplied).

[1801] 49 U.S. Code § 20152(a)(5)(A)-(C) (2014) (emphasis supplied). The requirement for toll-free telephone service may be waived for Class II and Class III rail carriers when "the Secretary determines that toll-free service would be cost prohibitive or unnecessary." 49 U.S.C. § 20152(b) (2014).

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Cases

2. Preemption of Claims under State Law Alleging Defective Warning Signs

Federal law preempts state claims based on railroads' alleged failure to maintain adequate warning signs at railroad crossings.[1802] For example, in *Norfolk S. Ry. Co. v. Shanklin,*[1803] after Shanklin's husband was killed in a collision with a Norfolk Southern train at a railroad crossing in Tennessee, the plaintiff alleged that Norfolk Southern failed to maintain adequate warning signs at the crossing. The warning signs consisted of advance warning signs and reflectorized crossbucks that had been installed with federal funds in 1987.[1804] The Supreme Court reversed the Sixth Circuit's holding that the FRSA did not preempt claims for inadequate warning signs under state law.[1805]

Rather, the Supreme Court held that the FRSA preempts state law when the FRSA "substantially subsumes the subject matter of the relevant state law."[1806] Federal regulations on the adequacy of warning devices at railroad crossings also apply when federal funds are used to install such devices and signs.[1807] When a state has used federal funds to install devices at a crossing, if the devices prove to be inadequate it is no longer possible to hold the railroad liable

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[1802] *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 120 S. Ct. 1467, 146 L.Ed.2d 374 (2000).

[1803] *Id.*, 529 U.S. at 347, 120 S. Ct. 1467, 146 L.Ed.2d 374.

[1804] *Id.*, 529 U.S. at 350, 120 S. Ct. 1467, 146 L.Ed.2d 374.

[1805] *Id.*, 529 U.S. at 350-351, 359, 120 S. Ct. 1467, 146 L.Ed.2d 374.

[1806] *Id.*, 529 U.S. at 352, 120 S. Ct. 1467, 146 L.Ed.2d 374.

[1807] *Id.*, 529 U.S. at 353-354, 120 S. Ct. 1467, 146 L.Ed.2d 374 (*citing* 23 C.F.R. §§ 646.214(b)(3), (4) (2014)).

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under state law.[1808] Because Tennessee had used federal funding to install warning devices at the crossing, federal law preempted the plaintiff's claims under state law for Norfolk Southern's alleged failure to maintain adequate warning devices.[1809]

3. Two-Step Approach in Determining Whether Tort Claims under State Law are Preempted by the Federal Railroad Safety Act

In *Zimmerman v. Norfolk S. Corp.,*[1810] while approaching the railroad tracks, Zimmerman did not see an oncoming Norfolk Southern train until seventy-six feet from the crossing. When Zimmerman's motorcycle malfunctioned as Zimmerman tried to brake, the plaintiff was thrown from his motorcycle and paralyzed as a result.[1811] The plaintiff claimed against Norfolk Southern for its failure to warn, maintain a safe crossing, and comply with federal regulations on crossing devices.[1812]

The Third Circuit applied a two-step approach to determine whether the FRSA preempted any of the motorist's claims.[1813] Under the first step of the analysis, the court asked whether the claim alleged that Norfolk Southern "violated a federal standard of care" created by a federal regulation or an internal railroad company rule.[1814] The court held that if Norfolk Southern did violate "a federal standard of care" created by a federal regulation or an internal rule,

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[1808] *Id.*, 529 U.S. at 358, 120 S. Ct. 1467, 146 L.Ed.2d 374.

[1809] *Id.*, 529 U.S. at 358-359, 120 S. Ct. 1467, 146 L.Ed.2d 374.

[1810] 706 F.3d 170, 174 (3d Cir. 2013), *cert. denied*, *Norfolk S. Corp. v. Zimmerman*, 2013 U.S. LEXIS 5469 (U.S., Oct. 7, 2013).

[1811] *Id.*

[1812] *Id.* at 175.

[1813] *Id.* at 178.

[1814] *Id.*

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Zimmerman's claim was not preempted.[1815] Even if the defendant did not violate a federal standard of care or an internal rule, the court still had to decide whether any federal regulations covered the claim.[1816] As discussed, a state claim is preempted by a federal regulation when the federal regulation "'substantially subsumes the subject matter' of the claim."[1817]

The Third Circuit held that the FRSA did not preempt the motorist's claim of excessive speed[1818] or failure to maintain a safe crossing area,[1819] but the FRSA did preempt Zimmerman's claim that Norfolk Southern was negligent *per se*.[1820] The federal regulations on mandatory protective devices preempted the motorist's state law claims that were based on the absence of such devices.[1821] The Third Circuit affirmed the summary judgment in part and reversed it in part.[1822]

4. Liability for a Defect in a Crossing that Causes Personal Injury

In *Alumbaugh v. Union Pac. R. Co.*[1823] the plaintiff was injured when he drove his motorcycle over a railroad crossing in Kansas City. Alumbaugh alleged that deteriorated rubber rail-crossing equipment caused unevenness in the crossing for which he brought claims against

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[1815] *Id.* (*citing* 49 U.S.C. § 20106(b)(1)(A)-(B) (2007)).

[1816] *Id.*

[1817] *Id.* (*quoting CSX Transp. Inc. v. Easterwood,* 507 U.S. 658, 113 S. Ct. 1732, 123 L.Ed.2d 387 (1993)).

[1818] *Id.* at 179-180.

[1819] *Id.* at 188.

[1820] *Id.* at 192.

[1821] *Id.* at 192-193 (*citing* 23 C.F.R. § 646.214(b)(3), (b)(4) (2014)).

[1822] *Id.*

[1823] 322 F.3d 520, 522-523 (8th Cir. 2003).

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Union Pacific for negligence and negligence *per se*.[1824] The Eight Circuit held that under Kansas law there was no cause of action for negligence *per se*.[1825] However, because the evidence was sufficient for the jury to find that Union Pacific should have known of the defective condition, the court reversed the trial court's grant of a summary judgment for Union Pacific on the negligence claim.[1826]

5. Liability of a Railroad for Failure to Keep a Crossing Clear of Vegetation

In *Bryant v. Tenn-Ken R.R. Co., Inc.*[1827] a train struck Julie Bryant in a crossing marked with a crossbuck.[1828] Bryant, who believed that the railroad track was not being used, was injured, but her passenger was killed.[1829] Bryant alleged that the railroad company was negligent for failing to clear the crossing of vegetation.[1830] On appeal, Bryant argued that the court should have instructed the jury on a Tennessee statute that "requires railroad operators to 'cut down all trees standing on [their] lands which are six (6) or more inches in diameter two feet (2') above the ground and of sufficient height to reach the roadbed if they should fall.'"[1831] The Sixth Circuit upheld the trial court's decision that the statute was not intended to protect motorists,

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[1824] *Id.* at 523.

[1825] *Id.* at 525.

[1826] *Id.* at 525-526.

[1827] 108 Fed. Appx. 256 (6th Cir. 2004).

[1828] *Id.* at 258.

[1829] *Id.*

[1830] *Id.*

[1831] *Id*. at 259 (*quoting* Tenn. Code Ann. § 65-6-132 (2004)).

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and, in any event, because of other evidence the requested instruction would have been unlikely to have affected the verdict.[1832]

6. No Preemption of a State Law when the Federal Law does not Subsume the Subject Matter Regulated by State Law

In *Strozyk v. Norfolk S. Corp.*[1833] the driver of a truck was killed in a collision with a Norfolk Southern train at a railroad crossing. Although crossbucks were in use at the crossing, Strozyk alleged that Norfolk Southern failed to maintain a grade crossing as required by state law and that vegetation obstructed drivers' view of oncoming trains.[1834] Federal regulations establish standards for "adequate devices … [when] Federal-aid funds participate in the installation of the devices."[1835] In *CSX Transp., Inc. v. Easterwood*[1836] the Supreme Court held that federal regulations preempt state law when the federal regulations "'subsume the subject matter of the relevant state law.'"[1837] A district court dismissed the plaintiff's claims because federal regulations applied to the warning devices at the crossings.[1838] The regulations identify factors that determine whether it is necessary to install active warning devices, including when there is an "unusually restricted sight distance."[1839] The district court held that the federal

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[1832] *Id.* at 260, 262.

[1833] 358 F.3d 268 (3d Cir. 2004).

[1834] *Id.* at 270.

[1835] *Id.* at 272 (*quoting* 23 C.F.R. § 646.214(b)).

[1836] 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed.2d 387 (1993).

[1837] *Strozky*, 358 F.3d at 271 (*quoting CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-665 (1993)).

[1838] *Id.* at 269, 272.

[1839] *Id.* at 272 (*quoting* 23 C.F.R. § 646.214(b) (2003)).

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regulations preempted both the claim for obstruction and the claim for failure to maintain the crossing.[1840]

The Third Circuit, however, held that although the federal regulations address adequate warning devices, the regulations did not "substantially subsume" the subject area of an obstruction impairing visibility; therefore, the federal regulations did not preempt the plaintiff's claim based on an obstruction to visibility.[1841] The court held that, because the regulations "do not eclipse those duties ensuring safe grade crossings that are unrelated to warning devices," the federal regulations did not preempt the plaintiff's claim under state law that Norfolk Southern failed to maintain the crossing.[1842]

7. Whether State Law that Applied to Crossings was Preempted by a Federal Statute when Federal Regulations had not been Issued

In *Langemo v. Montana Rail Link, Inc*.[1843] the court ruled that 49 U.S.C. § 20153 did not at the time of the accident preempt Mont. Code Ann. § 69-14-562(7). The Montana statute provided that "it is a misdemeanor for any railroad corporation to 'permit any locomotive to approach any highway, road, or railroad crossing without causing the whistle to be sounded at a point between 50 and 80 rods from the crossing, the bell to be rung from said point until the crossing is reached….'"[1844] Although § 20153 was enacted in 1994 and required the Secretary of Transportation to "'prescribe regulations requiring that a locomotive horn shall be sounded while

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[1840] *Id.*

[1841] *Id.* at 273.

[1842] *Id.* at 277.

[1843] 2001 ML 370, 2001 Mont. Dist. LEXIS 2131, at *1 (Mont. First Jud. Ct. 2001).

[1844] *Id.* at *14 (citation omitted).

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each train is approaching and entering upon each public highway-rail grade crossing,'"[1845] federal law did not preempt state law because only proposed rules were issued as of January 2000.[1846] Furthermore, the court ruled that the railroad was not negligent *per se* for "failing to sound a whistle, because the crossing was not in a public road."[1847]

8. Whether the Public Utilities Commission Controlled a Railroad Crossing and Owed a Duty to the Plaintiffs because the Crossing was a Dangerous Condition of Public Property

In *Public Utilities Commission v. The Superior Court of Los Angeles County*[1848] the plaintiffs alleged that a railroad crossing constituted a dangerous condition because a recommendation in 1989 of the California Public Utilities Commission (PUC) "to upgrade the crossing's warning devices by installing a gate was not implemented."[1849] At issue was whether the PUC, which did not own the railroad property where the crossing was located, controlled the property within the meaning of Cal. Gov't Code § 830.[1850] Specifically, in connection with the collision of a Union Pacific train and a truck that caused a fatal injury, the plaintiffs alleged that the PUC owed them a duty because the PUC owned or controlled the highway and crossing, because the public property constituted a dangerous condition, and because the PUC "failed to

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[1845] *Id.* at *15 (*quoting* 49 U.S.C. 20153 (1994)).

[1846] *Id.*

[1847] *Id.* at *19.

[1848] 181 Cal. App.4th 364, 105 Cal. Rptr.3d 234 (Cal. App. 2010).

[1849] *Id.,* 181 Cal. App.4th at 366, 105 Cal. Rptr.3d at 235.

[1850] *Id.*

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provide traffic control and/or warning signals, signs, markings or other devices necessary to warn of a dangerous condition…."[1851]

The court reviewed the duties of the former Railroad Commission, now the PUC, with respect to railroad tracks, as well as decisional authority, before holding that the PUC's "regulatory authority over the crossing does not establish control of that property within the meaning of section 830"[1852] and that "the PUC's right to inspect the crossing for safety violations and to close the crossing to vehicular and pedestrian (but not railroad) traffic does not establish control."[1853] Furthermore, "*no evidence* was offered that the PUC *ever actively* maintained the railroad crossing through any form of maintenance or repair."[1854]

Articles

9. Preemption of State Tort Claims under the *Easterwood, Shanklin,* and *Henning* Cases

One writer states that although the railroad industry has supported deregulation, the industry supports the FRSA's preemption of state law claims to ensure that railroads are not held to multiple standards.[1855] In *CSX Transp., Inc. v. Easterwood*[1856] the Supreme Court interpreted the FRSA to require that federal regulations must "substantially subsume the subject matter of

[1851] *Id.,* 181 Cal. App.4th at 367, 105 Cal. Rptr.3d at 368.

[1852] *Id.,* 181 Cal. App.4th at 375, 105 Cal. Rptr.3d at 243.

[1853] *Id.,* 181 Cal. App.4th at 376, 105 Cal. Rptr.3d at 243.

[1854] *Id.,* 181 Cal. App.4th at 379, 105 Cal. Rptr.3d at 246 (emphasis in original).

[1855] Ries, *supra* note 1383, at 103.

[1856] 507 U.S. 658, 113 S. Ct. 1732, 123 L.Ed.2d 387 (1993).

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the relevant state law."[1857] When a federal regulation merely touches upon a matter regulated by state law there is no federal preemption.[1858]

The writer notes that in *Norfolk Southern R.R. Co. v. Shanklin*,[1859] in which the plaintiff claimed that the railroad did not install adequate warning devices at a crossing, the Supreme Court held that because the warning signs were installed with federal funds the plaintiff's state law claim was preempted.[1860] However, a "clarifying amendment" later established some limits on preemption:[1861]

> (1) *Nothing in this section shall be construed to preempt an action under State law* seeking damages for personal injury, death, or property damage *alleging that a party –*
>
> (A) *has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation* (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;
>
> (B) *has failed to comply with its own plan, rule, or standard* that it created pursuant to a regulation or order issued by either of the Secretaries; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).[1862]

[1857] Ries, *supra* note 1383, at 103 (citation omitted)).

[1858] *Id.* at 104.

[1859] 529 U.S. 344, 120 S. Ct. 1467, 146 L. Ed.2d 374 (2000), *superseded by statute as stated in Hunter v. Canadian Pac. Ry. Ltd.*, 2007 U.S. Dist. LEXIS 85110 (D. Minn. Nov. 16, 2007.

[1860] Ries, *supra* note 1383, at 105-106.

[1861] *Id*. at 106.

[1862] 49 U.S.C. § 20106(b) (emphasis supplied). The amendment applies to "all pending State law causes of action arising from events or activities occurring on or after January 18, 2002." 49 U.S.C. § 20106(b)(2).

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In *Henning v. Union Pac. R. Co.*,[1863] in which the Eighth Circuit held that Henning's claims for inadequate signalization and negligent delay were preempted by the applicable federal regulations, the court stated that "[t]he clarification amendment merely rectified the … erroneous application of *Shanklin* and *Easterwood* to federal regulations establishing a federal standard of care."[1864] When the federal regulations "do not create a federal standard of care, the clarifying amendment is not applicable…."[1865]

As stated, preemption applies when federal regulations "substantially subsume" a matter regulated by state law.[1866] However, a railroad may be held liable for negligence when federal regulations impose a duty of care and the railroad fails to comply with the standard.[1867]

F. State Laws on to the Rights of Utilities to Use or Cross Certain Rights of Way

Statutes and Regulations

1. Rights of a Public Utility in California

If railroad tracks are on property that a public entity is authorized to acquire by eminent domain for a right of way for a public utility, "a plaintiff may require the relocation or removal of such tracks by exercise of the power of eminent domain."[1868]

2. Rights of Utilities in Michigan

Although not mentioning railroads, a Michigan statute provides:

[1863] 530 F.3d 1206 (8th Cir. 2008).

[1864] *Id*. at 1216.

[1865] *Id*. *See* Ries, *supra* note 1383, at 107-108.

[1866] Ries, *supra* note 1383, at 109.

[1867] *Id*. at 108.

[1868] Cal. Pub. Util. Code § 7557 (2014).

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(1) Except as otherwise provided under subsection (2) … public utility companies … may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, longitudinally within limited access highway rights-of-way…. A … public utility company … shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.

(2) A utility as defined in 23 CFR 645.105(m) may enter upon, construct, and maintain utility lines and structures, including pipe lines, longitudinally within limited access highway rights-of-way and under any public road, street, or other subsurface that intersects any limited access highway at a different grade, in accordance with standards approved by the state transportation commission and the Michigan public service commission that conform to governing federal laws and regulations and is not required to obtain the consent of the governing body of the city, village, or township as required under subsection (1).[1869]

3. Dispute Process to Petition the DOT for Hearing before an Administrative Law Judge regarding a Utility Crossing

Michigan's Railroad Code § 462.265(1)(a) provides in part that the railroad company and railroad authority must be given 30-days notice before stringing an electrical wire "over and across … crossings within the right-of-way of a public street, highway, road, or alley…." Subpart (1)(b) provides that

[f]or crossings at any other location not within the right-of-way of a public street, highway, road, or alley, notification shall first be given to the railroad company and railroad authority in writing of the place and the manner in which the corporation or person desires to string the wire and written or telegraphic permission shall be received from the railroad company and railroad authority prior to performance of the work. The railroad company shall respond positively or negatively to the request within 90 calendar days after the receipt of the request.[1870]

[1869] Mich. Comp. Laws § 247.183(1) (2014).

[1870] Michigan Railroad Code §§ 462.265(1)(a) and (b) (2014).

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Subsection (3) provides that "[i]n case of a dispute emanating from subsections (1) and (2) which the parties cannot resolve within a reasonable time, either party may petition the department for a hearing," which has jurisdiction to settle disputes.[1871]

Cases

4. Waiver of Immunity of a Commuter Rail Line from an Action by a Utility to Condemn a Right of Way

In *Oncor Electric Delivery Co. LLC v. Dallas Rapid Transit,*[1872] Oncor Electric Delivery Co. LLC (Oncor), an electric utility company in Texas, received approval from the Texas Public Utility Commission to construct a new transmission line. The new line would have to cross a public commuter rail line operated by the Dallas Area Rapid Transit and the Fort Worth Transportation Authority (the Authorities).[1873] When the Authorities and the electric utility company could not agree on Oncor's right of way, the utility sued the Authorities to condemn an easement.[1874] After an appellate court affirmed the trial court's holding that the Authorities as governmental entities were immune from a suit for condemnation of an easement,[1875] Oncor petitioned the Supreme Court of Texas for review.[1876] Meanwhile, the Texas legislature enacted legislation providing that "'the rights extended to an electric corporation … include all public

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[1871] Michigan Railroad Code § 462.265(3) (2014).

[1872] 369 S.W.3d 845, 847 (Tex. 2012).

[1873] *Id.*

[1874] *Id.* at 848.

[1875] *Id.*

[1876] *Id.*

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land, except land owned by the state.'"[1877] Oncor argued that the case should be remanded to consider the effect of the new law.[1878] The Supreme Court of Texas held that because the only purpose of the new statute was "to provide for rights that can actually be exercised" the statute waived the Authorities' governmental immunity.[1879] However, the Authorities' rail lines did not come within the exception for state-owned land.[1880]

5. Utility's Expropriation of Land for a Crossing as a Public Use

Under a Louisiana statute, a common carrier such as a pipeline company may condemn private property.[1881] In *Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co.,*[1882] after Union Pacific denied ExxonMobil's request to construct a crossing, ExxonMobil sought to expropriate a permanent right of way across Union Pacific's property.[1883] However, the district court held that ExxonMobil had failed to show that the expropriation was for a public use.[1884] Because ExxonMobil limited the use of the crossing to its own employees, an appellate court affirmed the district court's holding that the public's use of the property was restricted.[1885]

[1877] *Id.* (*quoting* Tex. Util. Code Ann. § 37.053(d)).

[1878] *Id.* at 848-849.

[1879] *Id.* at 850.

[1880] *Id.*

[1881] *Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co*., 35 So.3d 192, 193-194 (La. 2010) (*citing* La. Rev. Stat. § 45:254), *rehearing denied*, 2010 La. LEXIS 1070 (La., May 7, 2010).

[1882] *Id*. at 194.

[1883] *Id.* at 195.

[1884] *Id.* at 195-196.

[1885] *Id.*

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In later reversing and remanding the case the Supreme Court of Louisiana held that the use of the expropriated property would benefit the public because the road would allow the pipeline company to inspect its pipeline that provides petroleum to the public.[1886] Therefore, ExxonMobil was held to have the ability to expropriate a right of way across the rail line.[1887]

6. Whether an Independent Transmission Company could avail itself of a "Pay-and-Go" Procedure Used by Utilities to Cross a Railroad Right of Way

At issue in *Hawkeye Land Company v. Iowa Utilities Board*[1888] was an Iowa statute that "authorizes a 'pay-and-go' procedure with a legislatively predetermined $750 standard crossing fee the utility pays to the owner of the railroad right-of-way."[1889] The dispute arose when the Iowa Utilities Board allowed ITC Midwest, an independent transmission company, to avail itself of the "statute to run electrical power lines across a railroad at three locations--over the objection of the owner of the railroad-crossing easement."[1890] The owner, Hawkeye Land Co., did not own or operate a railroad but owned the "right to sell easements across active railroad tracks."[1891] Hawkeye had obtained the right to sell easements when the Chicago, Rock Island and Pacific Railroad "went through bankruptcy [and] the bankruptcy trustee separated the easement rights from the fee and transferred those easement rights to Chicago Pacific Corporation … [that] in

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[1886] *Id.* at 197-199, 202.

[1887] *Id.* at 202.

[1888] 847 N.W.2d 199 (Iowa 2014).

[1889] *Id.* at 201.

[1890] *Id.*

[1891] *Id.*

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turn deeded the easement rights to Hawkeye Land."[1892] Hawkeye argued that it did not acquire its rights directly from a railroad and, thus, the crossing statute did not apply to it or to ITC Midwest, "because [Hawkeye] is not a 'railroad' and ITC Midwest is not a 'public utility' within the meaning of the statute."[1893]

The court held that the definition of a public utility in Iowa Code § 476.1 did not include independent transmission companies.[1894] Rather, the statute only applied to a "direct transaction between [a] public utility and the public."[1895] Thus, ITC Midwest could not use the pay-and-go procedure under Iowa Code § 476.1.[1896] On the other hand, § 476.27(1)(g) applied to Hawkeye as a successor in interest to a railroad that owned the right to grant easements across railroad tracks. The court held that it was "immaterial that Hawkeye obtained the easement rights from an entity created by the railroad's bankruptcy trustee rather than directly from a railroad."[1897]

Article

7. Railroad Abandonment of Property also used by a Utility

An article in the *Ecology Law Quarterly* discusses ways in which a utility may be able to continue its easement after a railroad has abandoned a rail line.[1898] The article appears to be

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[1892] *Id.* at 212.

[1893] *Id.* at 201.

[1894] *Id.* at 214.

[1895] *Id.* at 216.

[1896] *Id.* at 219.

[1897] *Id.* at 212.

[1898] Danaya C. Wright & Jeffrey M. Hester, "Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Centuries," 27 *Ecology L.Q.* 351, 438 (2000).

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relevant to a situation when a utility does not occupy a railroad right of way but has been authorized to cross it. When a railroad easement includes a license for a utility, the railroad's abandonment of the property may affect the utility's right to the property. When a railroad terminates an easement, any utility sub-easement also is terminated.[1899] The doctrines of prescription, prior use, estoppel, and shifting public use may be used to prevent a termination of a sub-lease after the termination of a railroad's easement.[1900] Moreover, when a railroad owns property in fee simple absolute, a utility having an easement retains its rights to the property.[1901] If a railroad leases part of its easement to a utility, the leasing is evidence of the intent not to abandon the easement.[1902] Therefore, a railroad's leasing of land to a utility may protect a utility's rights in the subject property.[1903]

There are other ways that the utility may preserve its rights in the property after the railroad abandons it.[1904] For instance, if the owner of the property does not remove the utility, the utility may have an easement by prescription.[1905] Some states, such as Indiana, South Dakota, and Iowa, have statutes that allow utilities to remain on a property even after a railroad company abandons it.[1906]

[1899] *Id.* at 438-439.

[1900] *Id.* at 439.

[1901] *Id.*

[1902] *Id.*

[1903] *Id.*

[1904] *Id.*

[1905] *Id.*

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G. Compensation for Damage Occasioned by the Construction, Relocation or Closure of Crossings

In Pennsylvania, compensation for damages, after proper notice and hearing, is determined by the Pennsylvania Public Utility Commission.[1907] "Such compensation … shall be borne and paid … by the public utilities, municipal corporations, municipal authority or nonprofit organization authorized under section 2702(h)."[1908] Furthermore, "[t]he amount of damages or compensation determined and awarded to be paid the owners of adjacent property by the Commonwealth shall, in each instance, be paid by the State Treasurer, on a warrant drawn by the State Treasurer."[1909] If a party is dissatisfied with the Commission's determination, the dissatisfied party may appeal the determination in court.[1910] Compensation also may be mutually agreed upon and paid by the interested parties.[1911] The statute's provisions do not apply "to commerce with foreign nations, or among the several states, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress."[1912]

[1906] *Id.* at 440.

[1907] 66 Pa. Cons. Stat. § 2704(a) (2014).

[1908] *Id.*

[1909] 66 Pa. Cons. Stat. § 2704(c) (2014).

[1910] 66 Pa. Cons. Stat. § 2704(b) (2014).

[1911] 66 Pa. Cons. Stat. § 2704(a) (2014).

[1912] 66 Pa. Cons. Stat. § 104 (2014).

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Cases

H. Railroad Liability for Injuries at Private Crossings

1. Whether a Railroad has assumed a Duty of Care at a Private Crossing

In *Calhoun v. CSX Transportation, Inc.*[1913] the issue was whether a crossing was public or private. Although generally a railroad has no duty at a private crossing, a duty may arise when "a different duty was assumed; if the crossing is, or becomes, ultra-hazardous; or where, by pervasive use, the character of a private crossing has changed to a public one."[1914] The *Calhoun* case arose as a result of a non-fatal accident when a CSX train collided with a car driven by Mary Calhoun. The jury found that CSX did not breach any duty to Calhoun. On review, the Supreme Court of Kentucky had to determine whether the crossing was public or private. Because the unnamed gravel road was never established by statute and was maintained by two property owners, the court held that the crossing was private.[1915] In Kentucky a railroad is "'not liable for injuries to a traveler at [a private] crossing unless after discovery of his peril, they fail to use all means to avoid the accident' … and central to the present case [is that] a railroad has no duty to clear vegetation at private crossings."[1916]

The court held that the plaintiffs/appellants were asking the court "essentially [to] whitewash the entire common law framework created over the last two centuries."[1917] However, as for the exceptions to Kentucky's minimal duty rule at private railroad crossings, the Kentucky

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[1913] 331 S.W.3d 236 (Ky. 2011).

[1914] *Id.* at 238.

[1915] *Id.* at 241.

[1916] *Id.* at 242 (citations omitted).

[1917] *Id.* at 243.

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Supreme Court reversed the Court of Appeals' decision and remanded the case to the circuit court. The court ruled that the appellate court and the circuit court had erred because "there [was] a genuine issue of material fact for trial as to whether the BCS crossing was ultra-hazardous due to the vegetation and the relevant positioning of the crossing."[1918] The court affirmed the appellate court's other rulings.

2. Whether a Railroad has a Duty at a Private Crossing Alleged to be Extra-Hazardous

In *Gaw v. CSX Transportation, Inc.*[1919] the plaintiffs alleged that CSX had the duty to warn but failed to provide adequate warning of the approach of a train that killed Mr. Gaw and injured two others.[1920] Among other things, the plaintiffs alleged that the crossing where the accident occurred was "extra-hazardous" because of vegetation, that there was an "inappropriate slope" in the area, and that the "rough and uneven" area was a distraction to drivers.[1921] The court stated that in Kentucky "[t]he statutory requirements for public crossings do not apply to private crossings" and that "the general rule … has long been … that there exists no duty to warn, provide [a] lookout, or clear view obstructing vegetation at a private crossing."[1922] In Kentucky for a crossing to be a public crossing "the the crossing must be 'dedicated to public

[1918] *Id.* at 245-246 (citation omitted) (footnote omitted).

[1919] 2008 U.S. Dist. Lexis 23131, at *1 (W.D. Ky. 2008), *aff'd*, 2009 U.S. App. Lexis 11334 (6th Cir. 2009).

[1920] *Id.* at *5.

[1921] *Id.* at *5-6.

[1922] *Id.* at *8 (citations omitted).

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use' and incorporated into the state, county, or local road system. If [the] crossing does not meet both requirements, it is not a public crossing, and is considered a private one."[1923]

The court recognized that a "[i]f there is habitual and pervasive public use of an otherwise private crossing, Kentucky common law provides that this may impose [a] duty to warn, keep lookout, or slacken locomotive speed on the railroad."[1924] Duties may arise whereby a railroad must take action to protect the public at private crossings that are found to be "extra-hazardous."[1925] In addition, a railroad's actions at or before a crossing, such as signaling a train's approach, may support a finding on the railroad's assumption of a duty to the public.[1926]

Based on the record, however, discussed in the opinion, the court concluded that none of the exceptions applied and granted CSX's motion for a summary judgment.[1927]

3. Railroad's Duty at an Extra-Hazardous Private Crossing

In *Illinois Central Railroad Company v. White*[1928] the railroad argued that it had no duty under Mississippi law at a private crossing where a farmer was killed as he attempted to cross from one section of his farm to another.[1929] The railroad argued that the decedent was negligent for having violated Miss. Code Ann. § 63-3-1013, because the statute imposed "a mandatory duty upon the operator of any type of equipment having an operating speed of six or less miles

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[1923] *Id.* at *10-11 (citation omitted).

[1924] *Id.* at *12.

[1925] *Id.* at *14.

[1926] *Id.* at *17.

[1927] *Id.* at *19.

[1928] 610 So.2d 308 (Miss. 1992).

[1929] *Id.* at 309.

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per hour to inform the railroad prior to making a crossing."[1930] On the other hand, by reason of Miss. Code Ann. § 77-9-249 "a statutory violation in and of itself will not defeat recovery, and the question of negligence shall be left to the jury, along with the appropriate comparative negligence principles which would be applicable in such cases."[1931]

Although generally a railroad has no statutory duty

> [a]t private crossings which people habitually traverse, a railroad company's duty to give signals and maintain the crossing is relative to circumstances existing at the particular time. Thus, peculiar or extraordinary circumstances might differentiate such crossings from other private crossings, accordingly impacting on the railroad company's duty.[1932]

The court concluded that the record "support[ed] plaintiffs' assertion that the crossing was 'extra-hazardous.'"[1933] The court upheld a jury verdict that the railroad was negligent for "not doing more to warn of [the] impending approach of trains at the White's crossing."[1934]

4. Railroad's Right to Submit Evidence that it was not Required to Apply Safety Standards and Recommendations at a Private Crossing

In *Webb v. Union Pacific Railroad Company*,[1935] involving a train-vehicle collision at a railroad crossing, the court held that Union Pacific "should have been permitted to submit evidence and argument to show that it was not required to apply the safety standards and

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[1930] *Id.* at 315.

[1931] *Id.*

[1932] *Id.* at 316-317 (citation omitted).

[1933] *Id.* at 317.

[1934] *Id.* at 319.

[1935] 2012 Ill. App. Unpub. LEXIS 494, 2012 IL. App. (5th) 100607-U (Ill. App. 2012).

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recommendations at private crossings."[1936] The court, however, ruled that on remand on the railroad's claim that the crossing was a private one, the trial court would have "to determine whether control remains an issue. We do not find that the trial court abused its discretion in permitting some evidence on the issue of the Railroad's control over and maintenance of the subject crossing."[1937]

5. Whether a Railroad is Liable after Failing to Maintain Whistle Posts and Crossing Signs at a Railroad Crossing believed to be a Private Crossing

In *Cook v. CSX Transportation, Inc.*[1938] the plaintiff, an engineer for CSX Transportation (CSXT), was injured on a coal train when the train collided with a pickup truck at what Cook and the conductor mistakenly believed was a private crossing.[1939] At issue was whether CSXT violated federal and state law, in part, for failing to maintain whistle posts and road-crossing signs at the crossing.[1940] In granting a motion for summary judgment for CSXT, the court stated that

> for a jury to conclude, based on this argument, that CSXT breached its alleged duty to maintain the whistle post, the jury would have to impose on CSXT not only a near-constant duty to monitor all of its signs and signals, including those which federal law does not mandate, but also a near-immediate responsibility to repair or replace a noncompliant item. In effect, this would create a cause of action in strict liability rather than in negligence.[1941]

[1936] *Id.*, 2012 Ill. App. Unpub. LEXIS 494 at *16, 2012 IL. App. (5th) 100607-U at P18.

[1937] *Id.,* 2012 Ill. App. Unpub. LEXIS 494, at *33, 2012 IL. App. (5th) 100607-U at P41.

[1938] 2014 U.S. Dist. LEXIS 147661, at *1 (N.D. Ohio 2014).

[1939] *Id.* at *2.

[1940] *Id.* at *4.

[1941] *Id.* at *9 (citation omitted).

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The court also rejected Cook's claim "that CSXT was negligent because the crossbucks at the railway crossing [did] not comply with Ohio law" for the reason that the state law was "preempted by the Federal Railroad Safety Act…."[1942]

6. Whether the State DOT has Jurisdiction to Close a Private Crossing

In *B&W Lumber Company, Inc. v. Norfolk Southern Corporation*[1943] the plaintiff B&W Lumber Company, Inc. (B&W) owned commercial property near a railroad crossing. B&W filed an action to prohibit the closure of a crossing following a fatal accident at the crossing. The court explained that "B&W's assertion that the Disputed Crossing is or should be deemed a public crossing or public way provides the basis for naming SCDOT as a Defendant."[1944] Although the plaintiff acknowledged that the South Carolina DOT treats the crossing as a private one, B&W nevertheless argued that "it had a legitimate basis for seeking a declaration that the Disputed Crossing is public or should be treated as such by SCDOT given the long-term public use of the crossing."[1945]

In construing S.C. Code Ann. § 58-15-1625 regarding the transportation department's authority to close grade crossings, the court held that the language in the statute was not "so clear as to foreclose the possibility that a court will interpret the statute to allow (or require) SCDOT to assume jurisdiction over a private crossing…."[1946]

[1942] *Id.* at *11.

[1943] 2009 U.S. Dist. LEXIS 51732, at *1 (D. S.C. 2009).

[1944] *Id.* at *4.

[1945] *Id.* at *8.

[1946] *Id.* at *15, N 7.

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7. Calculation of Offset in Settlement with a Railroad in Claim against a Private Party for Creating a Hazardous Condition near Railroad Tracks

In *RGR, LLC v. Georgia Settle, Personal Representative of the Estate of Charles E. Settle, Sr., Deceased*[1947] Settle was fatally injured when a Norfolk Southern train struck the dump truck that he was driving on a private road that crossed railroad tracks owned by Norfolk Southern.[1948] At issue was whether the defendant created a hazardous condition when the defendant stacked lumber near the railroad tracks that blocked motorists' view of the tracks at the crossing.[1949] Although there was a settlement with Norfolk Southern, a jury later awarded $2.5 million to the decedent's estate in his wrongful death action. The Supreme Court of Virginia ruled that RGR, LLC was negligent and affirmed the verdict but remanded for further proceedings by the trial court on how to calculate the offset of $500,000 that the decedent's estate had obtained in a settlement with Norfolk Southern.[1950]

[1947] 764 S.E.2d 8, 2014 Va. LEXIS 161, at *1 (Va. 2014).

[1948] *Id.,* 764 S.E.2d at 12, 2014 Va. LEXIS 161, at at *2.

[1949] *Id.,* 764 S.E.2d at 12, 2014 Va. LEXIS 161, at *3.

[1950] *Id.,* 764 S.E.2d at 29, 2014 Va. LEXIS 161, at 56.

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XV. DAMAGE TO OR MAINTENANCE OF PROPERTY

A. Introduction

This part of the Report discusses damage to property caused by or sustained by a railroad. Section B discusses damage to railroad bridges and other property, state statutes that apply to the construction and maintenance of railroads, cases on damage caused by a vessel to a bridge owned or used by a railroad, and a state administrative agency's authority to allocate the cost of bridge repair to a railroad.

Section C deals with damage to property caused by a railroad beginning with a state statute applicable to property damage caused by a railroad, cases on the liability of railroads for flooding adjacent property, and whether the Interstate Commerce Commission Termination Act (ICCTA)[1951] preempts state tort claims against a railroad for property damage.

B. Liability of a Railroad for Neglect of a Bridge

Statutes

1. Damages for Violation of a Statute Applicable to Bridges

An Iowa statute requires that railroad companies build and maintain all bridges necessary for a railroad to cross over or under another railway, highway, or waterway.[1952] The railroad company is liable for damages to "any person by reason of any neglect or violation" of the statute.[1953]

[1951] Pub. L. 104–88 (Dec. 29, 1995). *See* 49 U.S.C. § 10102 (2014).

[1952] Iowa Code § 327F.2 (2014).

[1953] *Id*.

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2. Liability for the Cost of a Bridge Required for Drainage

In Illinois, when a drain apparently owned by a district authority (district) crosses an existing railroad and a bridge is necessary for the crossing the district is liable to the railroad for the cost of constructing and maintaining the bridge.[1954] If the district plans to construct a ditch for drainage under a railroad and the dimensions of a railroad bridge are not sufficient, the district may request the railroad to replace or enlarge the bridge.[1955] If a railroad does not construct the bridge within six months, the railroad is liable for all damage to surrounding property.[1956]

3. Liability for the Cost of a Crossing over or under a Railroad and for Bridge Repair

Under a Maine statute if a railroad is constructed over or under another railroad or canal, the "corporation making the crossing is liable for damages, occasioned by making the crossing."[1957] When a municipality notifies the corporation responsible for a bridge that it needs to be repaired the responsible corporation must repair the bridge within ten days of the notice.[1958]

[1954] 70 Ill. Comp. Stat. § 605/12-4 (2014).

[1955] *Id.*

[1956] *Id.*

[1957] 23 Me. Rev. Stat., title 23 § 7209 (2014).

[1958] *Id.*

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Cases

4. Whether a Railroad's Agreement with a Transit Company to Maintain a Bridge Relieved the Railroad of its Obligation under § 93 of the New York Railroad Law

In *City of Middletown v. Wallkill Transit Co.*[1959] the city of Middleton sought to collect the cost of repairing the framework of a steel and iron highway bridge crossing the tracks of the Erie Railroad Company over which a transit company operated. The Erie Railroad Company maintained that the transit company's predecessor "in consideration of the privilege of crossing the Erie Railroad Company's tracks, agreed to maintain the said bridge and keep it in repair."[1960]

At the time of the case, § 93 of the Railroad Law of New York provided:

> When a highway crosses a railroad by an overhead bridge, the frame-work of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over, and in which the same are situated.

The court held that the agreement did not relieve the railroad company of its obligation to the city under § 93.[1961] Although the railroad company may have had a claim against the transit company for the failure to repair and maintain the bridge, the city as a non-party to the agreement was not bound by it.[1962]

[1959] 18 Misc. 334, 193 N.Y.S. 297 (N.Y. Sup. Ct. 1922).

[1960] *Id.,* 18 Misc. at 335, 193 N.Y.S. at 298.

[1961] *Id.*

[1962] *Id.*

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5. Whether a Railroad's Duty under § 93 of the New York Railroad Law to Maintain and Repair a Bridge included a Duty to Erect Signage

In *Aramini v. CSX Transportation, Inc*.[1963] a sanitation department employee attempted to drive a truck on a street "over which CSX railroad tracks pass via a supporting railroad bridge…."[1964] The plaintiff argued that CSX was negligent, *inter alia*, in "operating a bridge with insufficient clearance" and in "failing to fulfill its duties under New York Railroad Law § 93…."[1965] Ultimately, the plaintiff's sole allegation concerned CSX's failure to provide a sign that adequately alerted drivers to the actual height of the bridge.[1966] The court held that the "statutory obligation to maintain and repair bridge structures" did not include "a duty to erect signage…."[1967] The duty to erect signs belonged to the city.[1968] Furthermore, there was no evidence that CSX "knew or should have known of the [existing] sign's condition."[1969]

6. Triable Issue of Fact on whether an Expansion Joint was Part of a Bridge and Abutments under § 93 of the New York Railroad Law

In *Oppenheim v. Village of Great Neck Plaza, Inc*.[1970] the plaintiff alleged that she was injured when her toe became stuck in an expansion joint of a bridge located above the railroad tracks. The court held that under New York Railroad Law § 93 the defendant Long Island

[1963] 2014 U.S. Dist. Lexis 74154, at *1 (W.D. N.Y. 2014).

[1964] *Id*. at *2.

[1965] *Id*. at *3-4.

[1966] *Id*. at *7.

[1967] *Id*. at *9-10.

[1968] *Id*. at *10.

[1969] *Id*. at *15.

[1970] 46 A.D.3d 527, 846 N.Y.S.2d 628 (N.Y. App. 2d Dep't 2007).

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Railroad "failed to provide evidence sufficient to establish that the expansion joint was not part of 'the framework of the bridge and its abutments'" and that there were "triable issues of fact … whether the expansion joint constituted a defective condition."[1971]

7. Whether the "Second Comer" Doctrine Imposed a Duty of Complete Reconstruction of a Bridge

In *Baltimore & Ohio Railroad Company v. Kuchta*[1972] the Court of Appeals of Maryland reviewed a trial court's decision holding that the Baltimore & Ohio Railroad Company (B&O) was liable to the city of Baltimore for the cost of reconstructing a bridge over B&O's tracks near Morrell Park. B&O argued that its responsibility to maintain the bridge did not include rebuilding it. As the court explained,

> [u]nder this so-called "second comer" doctrine, the builder of a new way or road whose course intersects another way or road already in existence and use is responsible to repair the damage it made in crossing the first way or road including the construction of a bridge or viaduct, if necessary, and to bear the cost of maintaining the viaduct or bridge in a manner which insures the safety and convenience of the users of the first way or road.[1973]

That is, as a second comer, B&O had to "provide a safe structure to carry the public road over its railroad."[1974]

B&O argued that an agreement between it and the county, the city's predecessor in interest, meant that the city had "abandoned its asserted common law right as first comer to the intersection of the railroad with the public way…."[1975] B&O also argued that the second comer

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[1971] *Id.*, 46 A.D.3d at 528, 846 N.Y.S.2d at 629.

[1972] 76 Md. App. 1, 543 A.2d 371 (1988).

[1973] *Id.,* 76 Md. App. at 6, 543 A.2d at 374 (citation omitted).

[1974] *Id.*, 76 Md. App. at 7, 543 A.2d at 374.

[1975] *Id.*

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doctrine did not include the rebuilding of a structure.[1976] The court held that the commissioners' attempt to relinquish the county's common law rights as a first comer was "beyond the scope of their authority[] and therefore *ultra vires*."[1977] Importantly, however, the court also rejected the "appellant's alternative argument that the second comer doctrine did not impose upon it the duty of completely reconstructing Bridge 5A."[1978]

8. 28 U.S.C § 130's Preemption of the "Second Comer" Doctrine in a Case involving Bridge Reconstruction and Maintenance

In *CSX Transportation, Inc. v. Mayor and City Council of Baltimore City, Maryland*[1979] the dispute concerned whether an agreement between the Baltimore and Ohio Railroad Company (B&O), the predecessor of CSX Transportation, Inc. (CSXT), and the City of Baltimore (City) was a valid and binding contract. Under the agreement the "City … assume[d] any responsibilities which CSXT may have for reconstruction and maintenance of the bridges in exchange for the payment by CSXT to the City of fifteen percent of the projects' costs, up to $916,000."[1980]

Based on the decision in *Baltimore and Ohio Railroad Co. v. Kuchta,*[1981] *supra*, XV.B.7, the city argued that the agreement was *ultra vires*. When the city and B&O were negotiating the agreement at issue in this case the same parties were "litigating a dispute over whether the B&O

[1976] *Id.*

[1977] *Id.,* 76 Md. App. at 8, 543 A.2d at 375.

[1978] *Id.,* 76 Md. App. at 10, 543 A.2d at 376 (citation omitted).

[1979] 759 F. Supp. 281 (D. Md. 1991).

[1980] *Id.* at 282.

[1981] 76 Md. App. 1, 543 A.2d 371, *cert. denied*, 313 Md. 688, 548 A.2d 128 (1988).

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was responsible for the cost of reconstruction of another bridge over B&O tracks in an area known as Morrell Park."[1982] In *Kuchta*,

> [t]he Court of Special Appeals held that the B&O was liable for paying the entire cost of reconstruction of the Morrell Park bridge and that a 1907 agreement, which B&O contended required the City to pay one-half of the reconstruction cost, was void. The decision rested upon the "second comer" doctrine, well established in the common law, which provides, in effect, that a party who builds a new road or way intersecting an existing right of way is responsible for constructing and maintaining a safe crossing at the intersection.[1983]

In *Kuchta* "[t]he court reasoned that, because the second comer doctrine made the B&O liable for one hundred percent of the cost of reconstruction of the Morrell Park bridge, the City unlawfully surrendered its police power and committed an *ultra vires* act when it entered into the 1907 agreement."[1984]

For purposes of the motion for summary judgment in this case, CSXT had assumed that because of the *Kuchta* decision the agreement with the city was void.[1985] However, the issue was whether 23 U.S.C. § 130 preempted the second comer doctrine.[1986] The court explained that 23 U.S.C. § 130 was enacted as a part of the Federal-Aid Highway Act of 1944, the purpose of which was "to relieve railroads of the burden of rehabilitating or replacing railway-highway crossings, including bridges."[1987] The court further noted that in 1958 when the statute was revised "Congress was fully aware of the general purpose of the Act to relieve railroads of the

[1982] *CSX Transportation, Inc.,* 759 F. Supp. at 283.

[1983] *Id.*

[1984] *Id.*

[1985] *Id.*

[1986] *Id.*

[1987] *Id.*

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burden of paying for the improvement of crossings."[1988] The court also noted that "language was added to 'limit the contribution for a railway-highway crossing elimination to 10 percent from all railroads involved in a particular project, and not expect 10 percent contribution from each railroad.'"[1989]

The court held that "[t]o permit states to recover from a railroad the cost of constructing or reconstructing a bridge under the second comer doctrine would be self-evidently inconsistent with Congress's intent to have at least ninety percent of that cost borne by governmental authorities on federally funded projects" and that "once a state or local government agrees to the federal funding of a railroad crossing construction or reconstruction project, it cannot seek to impose the cost of that project upon the railroad."[1990]

In discussing the applicable federal regulations, (*see* 23 C.F.R. § 646.210(a) and (b)(2)), the court determined that the "unspoken premise is that the second comer doctrine does not apply where federal funding is provided" and that "it is obvious that to permit a state or local government to first receive federal funding for a project, and then to obtain like reimbursement from a railroad for the cost of the same project would be to provide a windfall to the state or local government."[1991]

Therefore, to the extent that "*Kuchta* would have the effect of voiding the September 24, 1986 Agreement, it is preempted by federal law…."[1992]

[1988] *Id.* at 284.

[1989] *Id.* (citation omitted).

[1990] *Id.*

[1991] *Id.*

[1992] *Id.*at 286.

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9. Liability for Damage to a Bridge Owned by a Railroad when the Bridge is Struck by a Vessel

In *Union Pac. R. Co. v. Kirby Inland Marine, Inc.*[1993] the M/V MISS DIXIE and/or its tow collided on May 5, 1996, with the Clinton Railroad Bridge (Clinton Bridge) constructed in 1907 and owned by Union Pacific.[1994] To prove Union Pacific's negligence, the owner of the MISS DIXIE, Kirby Inland Marine, Ltd. (Kirby), sought to rely on a Coast Guard Order to Alter (Order), issued on February 28, 1996, that had found that the Clinton Bridge was an "unreasonable obstruction to navigation" pursuant to a federal statute, the Truman-Hobbs Act.[1995] Although the parties in the *Kirby Inland Marine, Inc*. case had entered into a settlement agreement, the agreement left one legal issue for the Iowa federal district court to resolve: whether the Coast Guard's Order made "inapplicable any presumption that negligence of the barge crew was the cause of an allision between a moving vessel and a stationary bridge."[1996]

The Eighth Circuit explained that the above presumption is based on the *Oregon* rule,[1997] which is "a presumption that a vessel's crew was negligent when a vessel strikes a stationary object such as a bridge."[1998] Thus, the issue was whether the Coast Guard's Order "trumps" the

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[1993] 296 F.3d 671 (8th Cir. 2002), *cert. denied, Union Pac. R.R. Co. v. Kirby Inland Marine, Inc*., 2003 U.S. LEXIS 1124 (U.S. Feb. 24, 2003); *cert. denied, Kirby Inland Marine, Inc. v. Union Pac. R.R.,* 2003 U.S. LEXIS 1123 (U.S. Feb. 24, 2003).

[1994] *Id*. at 673.

[1995] *Id*.

[1996] *Id*.

[1997] *The Oregon*, 158 U.S. 186, 197, 39 L. Ed. 943, 15 S. Ct. 804 (1895).

[1998] *Id*.

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Oregon rule.[1999] The district court had eliminated the *Oregon* rule by applying the *Pennsylvania* rule:[2000] "'where any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed *per se* negligence … and [the party] has the burden of proving that its statutory fault was not a contributing cause of the accident.'"[2001] The district court ruled that Union Pacific violated the Truman-Hobbs Act as evidenced by the Coast Guard Order. Thus, the *Oregon* rule that attached fault to the owner of the vessel was "shifted back" to the owner of the structure under the *Pennsylvania* rule.[2002] However, the Eight Circuit held that because the Truman-Hobbs Act has to do with funding, not safety,[2003] it was improper to shift responsibility from the vessel-owner back to the bridge-owner, Union Pacific.[2004] The Clinton Bridge may have been an obstruction but it was still a lawful bridge. The court held that the district court should have applied the *Oregon* rule.

The next question was whether the Coast Guard Order "rebuts the *Oregon* presumption and shifts the burden of proof back to the bridge owner."[2005] The Eighth Circuit held that it could not decide the issue as a matter of law. Rather, the Eighth Circuit held that on remand the

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[1999] *Kirby Inland Marine, Inc.*, 296 F.3d at 674.

[2000] *The Pennsylvania*, 86 U.S. 125, 136, 22 L. Ed. 148 (1873).

[2001] *Kirby Inland Marine, Inc.*, 296 F.3d at 674 (citation omitted).

[2002] *Id*.

[2003] *Id*.

[2004] *Id*. at 675.

[2005] *Id*. at 676.

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district court should determine whether the "*Oregon* presumption is rebutted by the Coast Guard's Order to Alter…."[2006]

10. Liability for Damage to Bridge Used but not Owned by a Railroad

In *Louisville & Nashville R.R. Co. v. M/V Bayou Lacombe,*[2007] after a tugboat hit a bridge used by the Louisville and Nashville Railroad Company (L&N) and L&N sued for damages under the Admiralty Extension Act, a district court granted a summary judgment for the tugboat and the Oil Transportation Co., the owner of the tugboat.[2008] The Admiralty Extension Act provides that maritime jurisdiction is applicable to all damage "caused by a vessel on navigable water."[2009] Previously, the Supreme Court had held that a plaintiff who does not have a property interest in a damaged vessel could not recover damages sustained by the vessel.[2010] Although in another case it was held that a railroad had a right similar to an easement in a bridge,[2011] L&N argued that under Alabama law it had a property interest in the bridge.[2012]

The Fifth Circuit held that L&N did not have a property interest in the bridge that would permit L&N to recover for damages to the bridge.[2013] The agreement between L&N and

[2006] *Id*.

[2007] 597 F.2d 469 (5th Cir. 1979).

[2008] *Id.* at 470.

[2009] *Id.* at 472 (*quoting* 46 U.S.C. § 740 (1975)).

[2010] *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S. Ct. 134 (1927).

[2011] *Louisville & Nashville R.R. Co.*, 597 F.2d at 471 (*citing Southern Ry. Co. v. Louisville & Nashville R.R. Co.*, 241 Ala. 691, 4 So.2d 400, 405-406 (1941)).

[2012] *Id.* at 472.

[2013] *Id.* at 474.

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Southern Railway only granted L&N the right to use Southern Railway's bridge.[2014] The court held that the agreement did not convey an interest in real property; that the right under the agreement to use the bridge was not permanent; and that L&N did have a joint duty with Southern Railway to maintain the tracks on the bridge.[2015] Furthermore, L&N suffered only the "loss of an economic expectancy," not a "proprietary loss."[2016] Thus, the Fifth Circuit affirmed the district court's grant of a summary judgment for the tugboat and its owner.[2017]

11. Liability for Damage to a Railroad Bridge during Hurricane Katrina

In *BNSF Ry. Co. v. Parker Drilling Offshore USA LLC*,[2018] prior to the arrival of Hurricane Katrina, the Browning Oil Company (Browning Oil) was attempting to move a rig to Amelia, Louisiana; however, because the operator was not at his post Browning Oil could not move the rig past the Bayou Boeuf Railroad Bridge.[2019] Therefore, the company secured the rig to a nearby dock.[2020] However, during the hurricane the rig struck the bridge.[2021] Although Browning operated the rig, Parker Drilling Offshore U.S.A. L.L.C. (Parker) owned the rig.[2022] After BNSF brought an action brought a suit against Parker, Parker cross-claimed against

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[2014] *Id.* at 471.

[2015] *Id.* at 473.

[2016] *Id.* at 474.

[2017] *Id.*

[2018] 332 Fed. Appx. 986 (5th Cir. 2009).

[2019] *Id.* at 986.

[2020] *Id.*

[2021] *Id.*

[2022] *Id.*

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Browning Oil under the indemnification clause in their contract.[2023] The court affirmed a summary judgment for Browning Oil on the claim by Parker under the contract for indemnification.[2024]

12. Whether a Railroad's Operating Agreement with Amtrak was a Valid Prior Cost Allocation Agreement divesting the Public Utility Commission of Jurisdiction to Allocate Costs

In *Norfolk Southern Railway Company v. Public Utility Comm'n*[2025] Norfolk Southern sought review of a final order of the Pennsylvania Public Utility Commission (PUC) . The PUC denied Norfolk Southern's exceptions to the decision of a PUC Administrative Law Judge (ALJ) who recommended that Norfolk Southern be allocated fifteen percent of the final cost of a bridge removal project at a railroad-highway crossing.[2026] Norfolk Southern argued that

> the PUC erred in determining that Norfolk's Operating Agreement with Amtrak, pursuant to which Norfolk operates on Amtrak's rail line at the crossing, did not constitute a valid private cost allocation agreement as contemplated by 66 Pa. C.S. § 2704(a), which would divest the PUC of jurisdiction to allocate Norfolk any costs for the Bridge removal.[2027]

However, for several reasons the Operating Agreement (OA) did not qualify as a private cost allocation agreement, in part, because other interested parties were not parties to the OA.[2028] As for Amtrak, it "is exempt under federal law from a cost allocation for the actual Bridge removal," and "it cannot be implied that Amtrak, in executing the Operating Agreement with

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[2023] *Id.*

[2024] *Id.* at 987.

[2025] *Norfolk Southern Railway Company,* 2014 Pa. Commw. Unpub. LEXIS 233 (Pa. Commw. Ct. 2014).

[2026] *Id.* at *1.

[2027] *Id.* at *12.

[2028] *Id.* at *19.

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Norfolk, intended to pay for the Bridge removal."[2029] Thus, the PUC was not precluded from allocating costs of the bridge removal project to Norfolk Southern.[2030]

Article

13. State Public Utility Commission Authority to Allocate the Expense of Bridge Repair to a Railroad

A law review article discusses *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Comm'n*[2031] and preemption by the ICCTA of the jurisdiction of the Pennsylvania Public Utility Commission (PUC).[2032] In an action in a Pennsylvania state court the issue was the allocation to the railroad of the expense of bridge repair. As the article notes, the ICCTA granted jurisdiction to the STB over railroad companies as common carriers.[2033] The ICCTA defines a railroad to include "a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad."[2034] On the other hand, the Pennsylvania statute granted authority to the PUC to regulate railroads; to determine whether a public utility, municipality, or the state would pay for construction or repairs at a crossing; and to investigate crossings for safety.[2035]

[2029] *Id.*

[2030] *Id.* at *20.

[2031] 778 A.2d 785 (Pa. Commw. Ct. 2001).

[2032] Tara L. Eberly, "Wheeling & Lake Erie Railway Co. v. Pennsylvania Public Utility Commission: Pennsylvania Maintains Police Powers over Railroad Bridge Construction Despite the Interstate Commerce Commission Termination Act of 1995," 11 *Widener J. Pub. L.* 191 (2002), hereinafter referred to as "Eberly."

[2033] *Id*. at 195.

[2034] 49 U.S.C. § 10102(6)(A) (2004).

[2035] 66 Pa. Cons. Stat. § 2704 (1999).

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The state court upheld the PUC's decision that the railroad should repair the bridge at its own expense.[2036] Because the ICCTA did not explicitly regulate the safety of railroad crossings, the Act did not preempt the state statute.[2037] Finally, the article observes that the ICCTA grants jurisdiction only to the STB on construction.[2038]

C. Liability for Damage to Other Property

Statute

1. Damage to Property Caused by a Railroad

A Michigan statute holds railroad companies liable for damage to property "by fire originating from engine's passing over the road, fires set by company employees by order of the officers of the road, or otherwise originating in the constructing or operating of the railroad."[2039] However, if the railroad company proves that the engine was in good order or that all safety precautions had been taken when working on or building the railroad, the company is not liable for damage caused by fire.[2040]

Cases

2. Liability for Damage to Private Property Caused by a Railroad Trestle

In *Irish v. BNSF Ry. Co.*[2041] the plaintiffs sued BNSF for negligence and nuisance because debris from a storm obstructed a trestle beneath a Burlington Northern Railway Bridge

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[2036] *Id*. at 195.

[2037] *Id*. at 196-97.

[2038] *Id*. at 199.

[2039] Mich. Comp. Laws § 462.259 (2014).

[2040] *Id*.

[2041] 674 F.3d 710, 711 (7th Cir. 2012).

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that caused flood damage to hundreds of nearby homes.[2042] A district court held that a Wisconsin statute provided the only remedy for relief from claims for flooding caused by the maintenance of railroad crossings.[2043] The statute prohibits the obstruction of water flow when a railroad company builds a track across a drainage area and provides that a landowner may sue in inverse condemnation for damages.[2044] However, because the plaintiffs did not comply with the required statutory notice, the court held that the plaintiffs were not entitled to relief.[2045]

3. Liability of a Railroad for Nuisance and Contamination of Property

In *Redevelopment Agency of City of Stockton*[2046] two railroad companies had maintained tracks on a parcel of land contaminated by petroleum. The petroleum originated from a spill at a nearby industrial site. The issue was whether the railroads were liable for the contamination under the law of nuisance or under California's Polanco Redevelopment Act (Polanco Act) and thus responsible for cleanup costs under the CERCLA-type provision in the Polanco Act.[2047]

The petroleum was able to migrate onto the property because of "french drains" that the railroads had installed to remove water from the roadbed. In 1988, the railroads sold their interest in the subject property to the Redevelopment Agency of the City of Stockton (Redevelopment Agency) that planned to develop the property. In 2005, the Redevelopment Agency sued the railroads for its costs to remediate the property and for an injunction requiring

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[2042] *Id.* at 712.

[2043] *Id.* at 711-712 (*citing* Wis. Stat. § 18.87).

[2044] *Id.* at 713 (*citing* Wis. Stat. § 88.87).

[2045] *Id.* at 712. The Seventh Circuit affirmed the district court's decision to dismiss the case because the plaintiff's argument on appeal was not preserved. *Id.* at 715-716.

[2046] *Redevelopment Agency of City of Stockton v. BNSF Railroad Co*., 643 F.3d 668, 676 (9th Cir. 2011).

[2047] *Id*. at 671 (*citing* Cal. Health & Safety Code § 33459, *et seq.).*

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the railroads to remediate any remaining contamination.[2048] However, the Ninth Circuit held that if the railroads did not create or assist in the creation of a nuisance they could not be held liable unless they acted unreasonably in failing to recognize or stop the nuisance.[2049] The court held that the railroads were not liable for creating the nuisance just because they had installed a drain or were in possession of the property.[2050]

As noted, the California statute uses the definition in CERCLA for the term "responsible party."[2051] Under CERCLA a responsible party is someone who owned or operated any facility at the time of the disposal of a hazardous substance.[2052] Because the sale of the land by the state to the railroads was invalid, and because the railroads' easement did not constitute ownership, the court held that the railroads were not owners.[2053] There was nothing to suggest that the railroads were operators within the meaning of the term under the state law's CERCLA provision.[2054]

Thus, the railroads were not liable because they were neither owners nor operators under the CERCLA definition incorporated in the state statute.[2055] The court reversed the grant of a

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[2048] *Id*. at 672.

[2049] *Id.* at 673.

[2050] *Id.* at 675.

[2051] *Id.* at 677.

[2052] *Id.*

[2053] *Id.* at 680 (*citing* 42 U.S.C. § 9607(a)(2)).

[2054] *Id.* at 679-680.

[2055] *Id.*

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summary judgment for the Redevelopment Agency and remanded the case for the entry of a summary judgment for the railroads.[2056]

4. Whether the ICCTA Preempts Tort Claims under State Law for Water Damage Caused by a Railroad

In *Emerson v. Kansas City S. Ry. Co*.[2057] adjacent property owners alleged that the Kansas City Southern Railroad Co.'s (KCS) failure to keep a drainage ditch clear of obstructions, debris, and vegetation resulted in the flooding of adjacent property.[2058] The district court granted a summary judgment to KCS based on the court's holding that the ICCTA preempted the state tort claims.[2059]

The ICCTA states that "'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.'"[2060] The ICCTA defines the term transportation to include the "movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use" and "services related to that movement."[2061] Because KCS's acts were not related to the "movement of passengers or property" or "services related to that movement," the Tenth Circuit held that KCS's alleged torts did not come within the meaning of the term transportation in the

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[2056] *Id*. at 680.

[2057] 503 F.3d 1126 (10th Cir. 2007), *summary judgment denied, Revocable Trust of Charley L. Davis v. Kan. City Southern Ry*., 2008 U.S. Dist. LEXIS 39742 (E.D. Okla., May 14, 2008).

[2058] *Id*. at 1128.

[2059] *Id.* at 1127.

[2060] *Id*. at 1129 (*quoting* 49 U.S.C. § 10501(b)).

[2061] *Id*. (*quoting* 49 U.S.C. §§ 10102(9)(A)-(B)).

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ICCTA.[2062] Thus, the court held that the ICCTA does not expressly preempt the state tort claims.[2063]

Although the STB has found that the ICCTA's preemption clause does not preclude some state actions for damage caused by railroad property,[2064] the Tenth Circuit held that a court must analyze the facts to determine whether allowing a remedy for an injury would interfere with railroad transportation.[2065] Thus, the Tenth Circuit held that the ICCTA did not *expressly* preempt the state tort claims for water damage caused by KCS but that the district court had insufficient facts to determine whether the ICCTA *impliedly* preempted the claims; thus, the district court erred in granting a summary judgment.[2066]

5. Claim for Gas and Smoke Caused by a Railroad Tunnel

In *Richards v. Washington Terminal Company*[2067] a property owner sought damages against a railroad company that built a tunnel and tracks near but not adjoining the plaintiff's home. The landowner alleged that a vent in the tunnel directed gas and smoke toward and into his house, destroying furniture and other belongings; that his property had depreciated in value after the construction; and that he could not rent the property.[2068] Although some claims alleged

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[2062] *Id.* at 1130.

[2063] *Id.*

[2064] *Id.* at 1133.

[2065] *Id.*

[2066] *Id.*

[2067] 233 U.S. 546, 34 S. Ct. 654, 58 L. Ed. 1088 (1914). *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed.2d 882 (1999) (concurring and dissenting opinions citing *Richards v. Washington Terminal*).

[2068] *Richards*, 233 U.S. at 549-550, 34 S. Ct. 654, 58 L. Ed. 1088.

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the existence of a *public* nuisance, the Supreme Court held that gas and smoke directed toward and into the plaintiff's house constituted a *private* nuisance.[2069] Thus, the landowner could recover for the damage caused by the gas and smoke from the tunnel.[2070]

[2069] *Id.,* 233 U.S. at 551-552, 34 S. Ct. 654, 58 L. Ed. 1088.

[2070] *Id.*, 233 U.S. at 551, 34 S. Ct. 654, 58 L. Ed. 1088.

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XVI. DEMONSTRATION PROJECTS OR PROGRAMS

A. Introduction

The Federal Railroad Administration (FRA) currently is sponsoring the Confidential Close Call Reporting System (C3RS) Demonstration Project. Launched in 2007, the project is designed to improve railroad safety by allowing railroad companies to report close calls without being penalized by the FRA. The term close call refers to an unsafe event that could have resulted in an accident but did not. The Bureau of Transportation Statistics (BTS) will analyze the data with the goal of determining areas of railroad safety that need improvement. To date, only Amtrak, New Jersey Transit, and United Pacific's North Platte Service Unit in Nebraska are permitted to participate. It should be noted that there may be federal transit demonstration projects as well.[2071]

The statutes summarized below in sections B and C authorize the Secretary of Transportation to create demonstration projects to improve railroad safety. The articles discussed hereafter in sections D and E focus on the C3RS with the first article addressing the benefits of implementing a close call system and the second article addressing some of the challenges associated with the C3RS demonstration project.

[2071] U.S. Dept. of Transportation, Federal Transit Administration, Fact Sheet: Research, Development, Demonstration, and Deployment Projects - Section 5312, available at: http://www.fta.dot.gov/documents/MAP-21_Fact_Sheet_-_Research_Development_Demonstration_and_Deployment_Projects.pdf (last accessed March 31, 2015).

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Statutes and Regulations

B. Section 163 of the Federal-Aid Highway Act of 1973

The Federal-Aid Highway Act of 1973 authorized the Secretary of Transportation to implement demonstration projects to improve safety at railroad-highway crossings.[2072] Section 163 of the Act lists many cities in which the Secretary of Transportation was permitted to carry out demonstration projects for the relocation or removal of railroad lines or the construction of overpasses at railroad-highway crossings to improve highway safety.[2073] Section 230 required states to identify projects to eliminate hazards at railroad-highway grade crossings for the Safer Roads Demonstration Program but emphasized that funds may not be used to eliminate a hazard.[2074]

C. Grade Crossings and Railroad Rights of Way

The Secretary of Transportation is required by statute to establish demonstration projects to determine whether train accidents would be reduced by using reflective markers and stop or yield signs at railroad grade crossings and speed bumps or rumble strips prior to a crossing.[2075]

[2072] Federal Aid Highway Act of 1973, Pub. L. No. 93-87, §§ 163 and 230, 87 Stat. 250 (1973). *See* 23 U.S.C. § 130 (2014); § 230 *repealed by* Federal Aid Highway Act of 1976, P.L. 94-280, §135(c), 90 Stat. 442.

[2073] Highway Act of 1973 § 163; 23 U.S.C. § 130 (2014).

[2074] Highway Act of 1973 § 230, *repealed by* Federal Aid Highway Act of 1976, P.L. 94-280, 90 Stat. 442 § 135(c).

[2075] 49 U.S.C. § 20134(c) (2014).

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Articles

D. Benefits of Using a Confidential Close Call Reporting System

The C3RS is funded by the FRA, which is authorized to sponsor projects that would improve railroad safety.[2076] A report by the FRA addresses the C3RS Demonstration Project and its importance in reducing railroad accidents.[2077] Because the traditional data collected from railroad accidents has decreased because of a decline in the number of accidents, the FRA has placed an emphasis on close call reporting to improve its ability to analyze risks to railroad safety.[2078]

The article notes the benefits of implementing a close call reporting system and discusses how a similar reporting system is benefiting the railroad industry in the United Kingdom. The benefits of collecting close call data include identifying weaknesses in safety, monitoring changes in safety over time, and revealing conditions not capable of being discovered by examining only reportable incidents.[2079] Reportable incidents include incidents at highway-rail grade crossings, rail equipment accidents resulting in damages exceeding the amount of $10,500 in 2014, and certain incidents involving death, injury, or occupational illness.[2080]

[2076] *See* 49 U.S.C. § 103 (2014), 49 C.F.R. § 225.1 (2014).

[2077] Jordan Mutler, "Improving Railroad Safety through Understanding Close Calls," at 1 (undated), available at: http://www.closecallsrail.org/pubs/closecalls05a.pdf (last accessed March 31, 2015), hereinafter referred to as "Mutler."

[2078] *Id*.

[2079] *Id*. at 4.

[2080] 49 C.F.R. §§ 225.19(a)-(d) (2014) (primary groups of accidents/incidents). *See* 79 *Fed. Reg*. 77397 (Dec. 24, 2014), "Monetary Threshold for Reporting Rail Equipment Accidents/Incidents for Calendar Year 2015," available at: http://www.gpo.gov/fdsys/pkg/FR-2014-12-24/html/2014-30113.htm (last accessed March 31, 2015).

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The United Kingdom implemented the Confidential Incident Report and Analysis System (CIRAS) to improve railroad safety.[2081] Reports are sent to an independent third party for the removal of all personal identifying information to ensure confidentiality and to encourage individuals to report close calls.[2082] CIRAS creates reports that analyze close calls for distribution to the railroad industry so that railroad companies may modify their internal policies to reduce further close calls.[2083]

E. Challenges to Using a Confidential Close Call Reporting System

In "Developing an Effective Corrective Action Process: Lessons Learned from Operating a Confidential Close Call Reporting System," the authors describe the process for the reporting of close calls, discuss challenges associated with the implementation of a C3RS, and offer some solutions.[2084]

Before agreeing to participate in the C3RS, a peer review team instructs a railroad company's staff on how to use the system.[2085] When a close call occurs, employees submit a report to a third party who in turn prepares a report for the railroad to use for the purposes of taking corrective action and monitoring its impact.[2086] However, at least four challenges have

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[2081] Mutler, *supra* note 2077, at 2.

[2082] *Id*. at 5.

[2083] *Id*. at 6.

[2084] Jordan Multer, Joyce Ranney, Julie Hile, and Thomas Raslear, "Developing an Effective Corrective Action Process: Lessons Learned from Operating a Confidential Close Call Reporting System" (undated), available at: http://www.closecallsrail.org/pubs/Lessons_Learned_From_Operating_A_Confidential_Close_Call_Reporting_System.pdf (last accessed March 31, 2015).

[2085] *Id*.

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arisen in using the system: (1) event analysis is slowed by the process of selecting peer review team members and by the large number of members; (2) the loss of individuals who are enthusiastic about the project; (3) the existence of gaps in reports of incidents; and (4) the limiting of analysis to frontline workers and managers.[2087]

In connection with the above challenges, the authors report, first, that peer review teams are comprised of twelve to twenty-four people who are selected by the FRA leadership and labor unions, a process that is quite time consuming.[2088] To increase efficiency the authors recommend limiting the number of members who may attend each meeting as well as reducing the number of individuals on peer review teams.[2089] Second, many individuals who were initially involved with the C3RS no longer promote its benefits to others within their company simply because they are no longer employed in a position that involves C3RS.[2090] Railroad companies have had difficulty finding new champions of C3RS to encourage employees to report on and extol the benefits of the system.[2091] Third, because the reports only provide a reporter's perspective rather than the views of everyone involved or present at an event, close call reports contain gaps in explaining the events, [2092] Moreover, one who is reporting on an incident may not know why an event

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[2086] *Id*.

[2087] *Id*.

[2088] *Id*.

[2089] *Id*.

[2090] *Id*.

[2091] *Id*.

[2092] *Id*.

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occurred, or a third party creating a report may miss important information.[2093] Finally, it is said that some members of peer review teams have limited knowledge of railroad operations.[2094] That is, a team may not be familiar with all areas of railroad operations, a situation that may lead a team to identify only those unsafe conditions with which they are familiar.[2095]

Nevertheless, the authors conclude that the system is worthwhile because it is capable of improving and adapting to challenges.[2096]

[2093] *Id*.

[2094] *Id*.

[2095] *Id*.

[2096] *Id*.

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XVII. EASEMENTS AND INTERPRETATION OF RAILROAD DEEDS

A. Introduction

As discussed in part I of the Report, federal law governs a railroad's abandonment of a right of way or discontinuance of service. Except under the circumstances discussed in part I of the Report, assuming that a railroad does not own the property used for a rail line in fee simple absolute,[2097] "[t]he abandonment of a railroad right-of-way for railroad purposes results in the termination of the [railroad's] easement"[2098] with the disposition of a railroad easement or right of way being governed by state law.

Part B discusses whether a railroad easement reverts to the original owner or the said owner's successor-in-interest of the property.[2099] Part C discusses state law, for example, in California, Iowa, Indiana, Maine, North Carolina, and South Dakota on whether an adjoining landowner has a right to an abandoned railroad right of way. Part D summarizes cases holding that a deed conveying a right of way conveyed an easement rather than an interest in fee simple, that there is a presumption that a deed conveys only an easement, that the courts rely on the

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[2097] *See Stone v. U.S.D. No. 222*, 278 Kan. 166, 171, 91 P.3d 1194, 1198 (2004) (stating, however, that "in Kansas, railroads take only an easement in strips taken for railroad right-of-ways regardless of whether taken by condemnation or deed" and that "[u]pon abandonment, the strip reverts back to the original landowners").

[2098] *Diaz v. Home Fed. S&L Ass'n*, 337 Ill. App.3d 722, 731, 86 N.E.2d 1033 (Ill. App. 2002), *appeal denied,* 204 Ill.2d 658, 792 N.E.2d 306, 1043 (2003).

[2099] *Anna F. Nordhus Family Trust v. United States*, 98 Fed. Cl. 331, 336 (2011) (stating that "the Court must examine under Kansas law whether the railroad easement would have been extinguished if not for the application of the Trails Act, and whether a new easement for recreational trails has been imposed"). *See also*, *Lucas v. Township of Bethel,* 319 F.3d 595 (3d Cir. 2003) (state property law controlling) (citation omitted); *Haggart v. United States*, 89 Fed. Cl. 523 (2009) (stating that if the STB "approves a standard abandonment application or grants an exemption and the railroad ceases operation, the [Board] relinquishes jurisdiction over the abandoned railroad right-of-way and state law reversionary property interests, if any, take effect") (citations omitted).

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terms of a deed to construe its intent to convey an easement or a fee simple interest, and that some courts rely on additional factors to differentiate between the grant of an easement or of a fee simple interest. Sections E and F, respectively, summarize cases on what is meant by the term right of way, whether a railroad is permitted to lease the subsurface of its right of way for non-railroad purposes, and whether a railroad has a right to exclude others from its right of way. Section G summarizes an article on whether a railroad has authority to repurpose a right of way for another use. Finally, section H discusses the issue of compensation for landowners when a railroad right of way is used by telecommunication companies.

Case

B. Whether an Original Grantor or Successor-in-Interest has a Right of Reversion to an Abandoned Railroad Right of Way

In *Stone v. U.S.D. No. 222*[2100] the issue was whether an abandoned railroad right of way was owned by the Stones, the successors-in-interest to the original grantors of the land at issue that was also adjacent to the Stones' property. In 1883 the Littles conveyed the real estate at issue to the Chicago Iowa and Kansas Railroad Company by a warranty deed. After the railroad conveyed part of the real estate, the remaining property was used for a railroad for over 100 years before the line was abandoned. The original railroad's successor-in-interest conveyed the property to the Burlington Northern Railroad Company which conveyed the property in 1986 to a school district. The plaintiffs argued that the property reverted to them because the first railroad had obtained only an easement for railroad purposes.[2101] The district court held that "that the deeds in the chain of title showed that the property was acquired by the predecessor

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[2100] 278 Kan. 166, 91 P.3d 1194 (2004).

[2101] *Id.*, 278 Kan. at 169-170, 91 P.3d at 1197.

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railroad for railroad purposes (construction and maintenance)[] and that the railroad held a right-of-way only because of the use for which the property was acquired."[2102]

The Court of Appeals affirmed the district court's grant of a summary judgment for the Stones, but the Supreme Court of Kansas reversed. The court held that the determining factor was the language in the original deed, not the use to which the property had been put.[2103] The right of way did not revert to the Stones as successors-in-interest to the original grantors because "the language of the original deed is void of any use restrictions … designating the land for use as a right-of-way or for other railroad purposes…."[2104] Furthermore, "[w]hen the language of the original warranty deed conveying land in fee simple absolute is unambiguous, courts thus may not use parol evidence to determine whether the land was conveyed for right-of-way purposes."[2105]

If the original deed to the property had shown that it was conveyed for railroad right of way purposes, the Kansas judicial decisions would have supported the Stones' argument "that upon abandonment of the right-of-way use, the property reverted to the original owners and their successors in interest."[2106] However, in this case "[t]he original unambiguous deed did not contain any use restriction or reversion clause and, thus, granted the railroad title to the land in fee simple absolute."[2107]

[2102] *Id*.

[2103] *Id*., 278 Kan. at 179, 91 P.3d at 1203.

[2104] *Id*. (citation omitted).

[2105] *Id*., 278 Kan. at 180, 91 P.3d at 1203.

[2106] *Id*., 278 Kan. at 173, 91 P.3d at 1199.

[2107] *Id*., 278 Kan. at 181-182, 91 P.3d at 1204.

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Statutes

C. State Law on Whether an Adjoining Landowner has a Right to an Abandoned Right of Way

1. California

California courts have held that the rules that apply to a highway or stream apply to a railroad right of way.[2108] In California "[a] transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."[2109] Although "[a]n owner of land bounded by a road or street is presumed to own to the center of the way, … the contrary may be shown."[2110]

2. Iowa

An Iowa statute provides that "property shall pass to the owners of the adjacent property at the time of abandonment. If there are different owners on either side, each owner will take to the center of the right-of-way."[2111] A property owner may perfect title by filing an affidavit with the county recorder and paying taxes on the property from the date the affidavit was filed.[2112] The statute also provides that "[u]tility facilities located on abandoned railroad right-of-way shall

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[2108] *See Freeman v. Affiliated Property Craftsmen*, 266 Cal. App.2d 723, 730, 72 Cal. Rptr. 357, 364-365 (1968).

[2109] Cal. Civ. Code § 1112 (2014).

[2110] Cal. Civ. Code § 831 (2014).

[2111] Iowa Code § 327G.77(1) (2014).

[2112] Iowa Code § 327G.77(2) (2014).

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remain on the right-of-way subject to payment by the utility of the fair market value of an easement for the facilities."[2113]

3. Indiana

An Indiana statute applies when "a railroad does not own the right-of-way fee."[2114] First, when "a railroad abandons its right to a railroad right-of-way, the railroad's interest vests in the owner of the right-of-way fee with a deed that contains a description of the real property that includes the right-of-way."[2115] Second, however, when "a deed described in subsection (b) does not exist, then the railroad's interest vests in the owner of the adjoining fee. The interest of the railroad that vests in the owner of the adjoining fee is for the part of the right-of-way from the center line of the right-of-way to the adjoining property line."[2116]

4. Maine

Maine has several statutes that are pertinent to the acquisition of a railroad's abandoned right of way, including a statute that prohibits a taking of railroad property by adverse possession.[2117] Under 23 M.R.S.A. § 7105, Maine's Department of Transportation is authorized to lease or purchase certain railroad lines that have been authorized to be abandoned. The statute provides that

> [i]f the department finds that the welfare of the State would be significantly and adversely affected by the loss of the line for railroad transportation purposes, the

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[2113] Iowa Code § 327G.77(3) (2014).

[2114] Ind. Code Ann. § 32-23-11-10(a) (2014).

[2115] Ind. Code Ann. § 32-23-11-10(b) (2014).

[2116] Ind. Code Ann. § 32-23-11-10(c) (2014).

[2117] 23 M.R.S.A. § 6025 (2014) ("No title to any real estate or any interest in real estate may be acquired against any railroad corporation by adverse possession, however exclusive or long continued.")

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> department shall seek to negotiate the purchase of the abandoned portion of the line. In making this determination, the department shall consider, among other criteria considered significant by the department, future economic development activities and opportunities in the area served by the abandoned railroad service.[2118]

Furthermore, in Maine

> [n]o railroad or railroad company may discontinue service to any point served prior to January 1, 1982, unless the railroad or railway company has filed with the Department of Transportation and with any municipality affected by the discontinuance of service and, in the case where service is discontinued solely to one shipper, with that shipper, a written notice of intention to discontinue that service.[2119]

In Maine, railroads are treated differently than roads. Under 23 M.R.S.A. § 3026(1),

> [a] municipality may terminate in whole or in part any interests held by it for highway purposes. A municipality may discontinue a town way or public easement after the municipal officers have given best practicable notice to all abutting property owners and the municipal planning board or office and have filed an order of discontinuance with the municipal clerk that specifies the location of the way, the names of abutting property owners and the amount of damages, if any, determined by the municipal officers to be paid to each abutter.
>
> Upon approval of the discontinuance order by the legislative body, and unless otherwise stated in the order, a public easement shall, in the case of town ways, be retained and all remaining interests of the municipality shall pass to the abutting property owners to the center of the way. For purposes of this section, the words "public easement" shall include, without limitation, an easement for public utility facilities necessary to provide service.

In a case decided by the Supreme Court of Maine, *Stuart v. Fox,*[2120] the primary issue was who could claim the westerly half of an abandoned railway line. The plaintiffs argued that the fee that had been conveyed to them extended to the center of the railroad property, whereas

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[2118] 23 M.R.S.A. § 7105(3)(A) (2014).

[2119] 23 M.R.S.A. § 5144 (2014).

[2120] 129 Me. 407, 152 A. 413 (1930), *appeal dismissed by* 284 U.S. 572, 52 S. Ct. 15, 76 L. Ed. 498 (1931).

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the defendants argued that the "title to the fee in this strip was retained by the grantors when the land on each side was conveyed."[2121] The plaintiffs argued that "the same rule which applies in the case of land bounded on a highway should apply to that adjoining a railroad."[2122] The court explained that

> [c]ourts have attempted to justify the presumption that title to land bounded on a highway extends to the center of the way on the theory that the grantor could not have intended to retain the ownership in a long narrow strip of land of no apparent benefit to himself. This is undoubtedly a consideration which should be given weight, but looking at the principle in its early origin, it seems to be of even greater moment that the grantor should not be presumed to retain for himself that which is of distinct benefit to his grantee in connection with the proper use and enjoyment of the estate conveyed.[2123]

However, the court decided that what "in the long run will do justice, is to rely on the language used by the parties interpreted in the light of established rules."[2124] The court distinguished railroads from highways, stating that "[t]he land owner beside the railroad has no use whatsoever of the railroad way. In fact he is absolutely excluded from it. The use of it by the railroad is altogether inconsistent with the idea that it could in any way be of advantage to his adjoining land."[2125] The court held that "the language used by the parties clearly excluded the railroad right of way. To hold otherwise would do violence to accepted rules for the interpretation of deeds."[2126]

[2121] *Id.*, 129 Me. at 413, 152 A. at 414.

[2122] *Id.*, 129 Me. at 410, 152 A. at 414.

[2123] *Id.*, 129 Me. at 411, 152 A. at 415.

[2124] *Id.*, 129 Me. at 419, 152 A. at 418.

[2125] *Id.*, 129 Me. at 418, 152 A. at 418.

[2126] *Id.*, 129 Me. at 420, 152 A. at 419.

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5. North Carolina

A North Carolina statute provides:

> Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner *extending to the centerline of the abandoned easement*.[2127]

6. South Dakota

A South Dakota statute states:

> A railroad which abandons service over, salvages and removes its rail, ties and other track material from any right-of-way in which it claims any right, title or interest in public lands … shall settle title claims with adjoining landowners and municipalities within one year after salvage of the abandoned road is complete or title to the abandoned railroad right-of-way easement reverts and vests, by operation of law.[2128]

Cases

D. Whether a Deed Conveying a Right of Way is a Conveyance of an Easement or a Fee Simple Interest

1. Presumption that a Deed Conveys only an Easement

In *Baltimore County v. AT&T Corp.,*[2129] a multi-district litigation in Indiana, an Indiana federal district court held that under applicable Maryland law (relevant to AT&T's motions) when a deed granted a right of way to a railroad the deed conveyed only an easement because the deed evinced no intention of conveying a fee simple interest. For a deed to convey a right of

[2127] N.C. Gen. Stat. Ann. § 1-44.2(a) (2014) (emphasis supplied).

[2128] S.D. Codified Laws § 49-16A-115 (2014).

[2129] 735 F. Supp.2d 1063 (S.D. Ind. 2010).

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way in fee simple there must be evidence of the grantor's intention to convey a fee simple interest to overcome the presumption that the intent was to convey only an easement.[2130]

2. Significance of Language in a Deed Indicating Conveyance of an Easement

In *Dale Henderson Logging, Inc. v. Department of Transportation,*[2131] involving two consolidated cases, Dale Henderson Logging, Inc. (DHL) and Oak Leaf Realty, Inc. (OLR) owned property over which there was a rail corridor once owned by the Maine Central Railroad Company (Maine Central). The plaintiffs sought, *inter alia*, a declaration that Maine Central held only a railroad easement that it had abandoned when it later conveyed its interest to the state transportation department. The plaintiffs argued that the transportation department owned nothing and that the plaintiffs owned the corridor in fee simple that traversed part of their property.[2132]

For different reasons, the Supreme Judicial Court of Maine held that the property owners did not now own the corridor in fee simple. As for the DHL claim to a portion of the corridor, now used as part of the Down East Sunrise Trail, the issue was whether the deeds in favor of Maine Central and its predecessor-in-title conveyed a right of way as an easement or in fee simple. The Maine Short Form Deeds Act (SFDA) that applied to the deeds in question provided that "'[a] conveyance or reservation of real estate, whether made before or after the effective date of this section, must be construed to convey or reserve an estate in fee simple, unless a different

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[2130] *Id.* 1071.

[2131] 2012 ME 99, 48 A.3d 233 (2012).

[2132] *Id.*, 2012 ME 99, *P1-3, 48 A.3d at 234.

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intention clearly appears in the deed.'"[2133] The court agreed with the trial court that "the only reason to insert the restriction '[t]his conveyance of right of way is for Railroad purposes only' is to make clear that a fee interest is not what the deed conveys."[2134] Thus, the state transportation department held an interest in the corridor that crossed the DHL property, an easement as discussed below that was not abandoned by Maine Central.

As for the OLR property, the condition in the deeds that had been given by DHL's predecessors-in-title was not present in the deeds to the OLR property; therefore, OLR's predecessors-in-title granted a fee simple interest to Maine Central's predecessor-in-title, property that was now owed in fee simple by the DOT after Maine Central's conveyance to the state.

The court rejected DHL's additional argument that the railroad easement to the corridor on its property had been abandoned prior to the state's acquisition of Maine Central's interest. The court held that the language in 23 M.R.S.A. § 4207(3) was dispositive: "The abandonment of service shall not mean or infer that the rights-of-way on a railroad line have been abandoned. In the event that the railroad, any person, firm or corporation, or any agency shows interest in the eventual restoration of service, the rights-of-way shall not be deemed abandoned."[2135] The record established to the court's satisfaction that the state transportation department has held the easement for "future railroad uses"[2136] and that "the Legislature has indicated that the ultimate

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[2133] *Id.*, 2012 ME 99, *P12, 48 A.3d at 236 (*quoting* 33 M.R.S. § 772(1)).

[2134] *Id.*, 2012 ME 99, *P13, 48 A.3d at 236-237.

[2135] *Id.*, 2012 ME 99, *P17, 48 A.3d at 238.

[2136] *Id.*, 2012 ME 99, *20, 48 A.3d at 238 (*quoting* 23 M.R.S.A. § 4207(3)(C); 23 M.R.S. § 7105(3)(C) (2011)).

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purpose of the corridor remains the resumption of rail service."[2137] The court affirmed the trial court's decision that the "DOT holds an easement that has not been abandoned [to the DHL] portion of the corridor[] and owns the fee simple portion of the [OLR] corridor."[2138]

3. Judicial Factors used to Differentiate between the Grant of an Easement or an Interest in Fee Simple

In *Beres v. United States*[2139] the United States Court of Federal Claims had to interpret the meaning of the term right of way under the law of the state of Washington. In *Beres*, when the government denied them a reversionary interest in a right of way on their properties, the plaintiffs brought an action for a taking of their property under the Fifth Amendment.[2140]

In brief, the Seattle, Lake Shore & Eastern Railway Company (SLS&E) had constructed the rail line in question between May 1887 and March 1888. During May and June 1887, the SLS&E acquired land needed to construct the railroad along the eastern shore of Lake Sammamish by right of way deeds from the plaintiffs' predecessors-in-title.[2141] The court stated that under Washington law "[t]he interpretation of a right of way deed is a mixed question of fact and law. Determining the parties' intent is a factual question and the courts must look to the entire document in order to ascertain such intent."[2142] However, "[t]he majority of railroad right of way cases decided by the State of Washington Supreme Court … have indicated that the

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[2137] *Id*., 2012 ME 99, *P21, 48 A.3d at 239.

[2138] *Id*., 2012 ME 99, *P3, *P28, 48 A.3d at 234, 241.

[2139] 97 Fed. Cl. 757 (Fed. Cl. 2011).

[2140] *Id*. at 764-765.

[2141] *Id*. at 759.

[2142] *Id*. at 780.

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phrase 'right of way' in railroad grants is indicative of conveying an easement and not a fee simple interest."[2143]

To determine whether the deeds at issue that conveyed a right of way conveyed an easement or an interest in fee simple, the court applied factors previously established in *Brown v. State*:[2144]

> (1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose; (3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof; (4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land; (5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor; (6) whether the consideration expressed was substantial or nominal; and (7) whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed.[2145]

Additionally, the *Brown* court stated that it had to look at "the circumstances surrounding the deed's execution and the subsequent conduct of the parties."[2146]

The *Beres* court held that all grantors of the SLS&E deeds, including a 1904 quit claim deed, had conveyed easements, not interests in fee, to the railroad. The court's ruling meant that the plaintiffs could proceed with their claims for a Fifth Amendment taking.[2147]

[2143] *Id*. at 779.

[2144] *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (Wash. 1996).

[2145] *Beres*, 97 Fed. Cl. at 774.

[2146] *Id*. at 774-775 (citation omitted).

[2147] *Id*. at 809.

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E. Meaning of the Term Right of Way

1. A Right of Way as a Strip of Land on which Railroad Companies Construct a Road-Bed

In 1891 in *Joy v. City of St. Louis*[2148] the United States Supreme Court interpreted the term right of way. The Court stated that the term right of way "sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed."[2149] The Court held that in every instance that the term was used the term referred to a strip of land rather than to a right to cross over the land.[2150] The Court explained that "[a] right of way is of no practical use to a railroad without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way."[2151] The Court, which gave effect to the parties' intention, held that an alternative definition would have defeated the purpose in granting the right of way.[2152]

2. Right to Lease the Subsurface for a Non-Railroad Purpose not included in a Railroad's Right of Way

A more recent case, *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.*,[2153] arose out of a dispute over whether Santa Fe Pacific Pipelines (SFPP) was required to pay rent to

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[2148] 138 U.S. 1, 11 S. Ct. 243, 34 L.E. 843 (1891).

[2149] *Id.,* 138 U.S. at 44, 11 S. Ct. at 256, 34 L. Ed. 857.

[2150] *Id.*

[2151] *Id.*, 138 U.S. at 45, 11 S. Ct. at 256, 34 L. Ed. at 858.

[2152] *Id.*

[2153] 2014 Cal. App. LEXIS 1007, at *1 (Cal. Dist. Ct. App. 2014).

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Union Pacific Railroad Company for subterranean use of railroad property.[2154] The court cited several federal and state court cases defining a right of way to determine what the railroad's property interest was.

The court held that Union Pacific did not have the right to collect rent from SFPP based on the acquisition of a right of way under the General Right-of-Way Act of 1875, because the Act did not make "the subsurface the 'property of the railroad.'"[2155] The court stated that the previous legislation, referred to in the opinion as the pre-1871 Acts, required railroads to use their rights of way for railroad purposes only; the leasing of the subsurface to generate profits is not a railroad purpose.[2156] However, the railroad claimed title to some of the land over which Congress did not grant the railroad a right of way; thus, the court remanded the case to the trial court to determine which land was owned by Union Pacific and which was land over which Union Pacific merely had a right of way.[2157] Although Union Pacific could collect rent for easements over its own property, the railroad could not collect rent for the pipelines under its rights of way.[2158]

The court held that the 1875 Act granted more than a "mere" easement because "[t]o operate its trains, a railroad needs, and has, more than that…."[2159] Thus, subterranean rights

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[2154] *Id*. at *29-30.

[2155] *Id*. at *47-48.

[2156] *Id*. at *48, 51. The pre-1871 acts include the Pacific Railroad Act of 1862, the Homestead Act, 30 U.S.C. § 21 (1866), and the Pacific Railroad Act of 1864.

[2157] *Id*. at *79.

[2158] *Id*.

[2159] *Id*. at *44-45.

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were not included as part of the railroad right of way because such rights do not further the purpose of constructing and running a railroad.[2160]

F. Railroad's Right to Exclude Others from its Right of Way

In *Western Union Tel. Co. v. Pennsylvania R. Co.*[2161] a telegraph company alleged that the railroad had no authority to evict it from certain property. The telegraph company argued that it had the power to take land through the use of eminent domain based on the Act of 1866[2162] and thus could erect telegraph poles as long as a railroad company was paid just compensation.[2163] The Act stated that "any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domains of the United States."[2164]

The Supreme Court held, however, that the Act did not permit a telegraph company to enter private property and erect structures without the consent of the owner of the property.[2165] The court held that "[a] railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement."[2166] Furthermore, the Court held that

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[2160] *Id.*

[2161] 195 U.S. 540, 25 S. Ct. 133, 49 L. Ed. 312, 318 (1904).

[2162] The Act of July 24, 1866, 14 Stat. 211. c. 230 (repealed 1947).

[2163] *Western Union*, 195 U.S. at 559, 25 S. Ct. at 136-137, 49 L. Ed. at 318.

[2164] *Id.*, 195 U.S. at 557, 25 S. Ct. at 136, 49 L. Ed. at 318 *(quoting* the Act of 1866, 14 Stat. 221. c. 230.d).

[2165] *Id.,* 195 U.S. at 562, 25 S. Ct. at 138, 49 L. Ed. at 320.

[2166] *Id.,* 195 U.S. at 570, 25 S. Ct. at 141, 49 L. Ed. at 323.

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> if a railroad's right of way was an easement it was one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property.... Unlike the use of a private way -- that is, discontinuous -- the use of land condemned by a railroad is perpetual and continuous.... A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or in part except upon the payment of compensation.[2167]

The Supreme Court also noted that New Jersey statutes had not granted the right of eminent domain to telegraph companies.[2168]

Articles

G. Railroad's Authority to Grant Easements to Utility Companies or Repurpose Land for Another Use

An article in the *Ecology Law Quarterly* discusses how an abandonment of railroad property or a rail line affects utility companies that had a license from a railroad company to lay pipes, cables, or wires on railroad property. The authors discuss a number of class actions in which private landowners have challenged a railroad's ownership of an abandoned right of way and the right of utility companies to lay fiber optic cables or install utility lines on abandoned railroad property, as well as the government's right to re-purpose abandoned property for use as recreational trails.[2169]

Property owners have argued that when railroad companies have only an easement for a rail line the railroad companies have no right to permit utility companies to lay pipes, cables, or

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[2167] *Id.* (citations omitted).

[2168] *Id.,* 195 U.S. at 574, 25 S. Ct. at 142, 49 L. Ed. at 324.

[2169] Danaya C. Wright and Jeffery M. Hester, "Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries," 27 *Ecology L.Q.* 352, 352 (2000).

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wires because such a right is one that only an owner of property in fee simple may convey.[2170] Furthermore, landowners have argued that a utility's use of a right of way after a railroad has abandoned the right of way is a taking under the Fifth Amendment requiring the United States to pay just compensation because the abandonment returns the property to an unencumbered state.[2171] The aforesaid rule applies to a right of way over land previously owned by the United States that was conveyed to a private owner as an easement.[2172]

It is argued that the term utility is not included in the term railroad purpose in an easement conveyed to a railroad.[2173] Furthermore, there is a "general principle that [the] termination of an easement will terminate a sub-easement."[2174] The principle implies that even if a railroad had a right to grant a sub-easement to a utility company any purported sub-easement ceases when a railroad abandons the line.[2175] A sub-easement holder's rights depend on the rights, if any, of the holder of the easement.[2176]

Some states have addressed the issue by statute. Indiana, South Dakota, and Iowa have enacted laws preserving a utility company's sub-easement after abandonment by a railroad but

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[2170] *Id*. at 360.

[2171] *Id*.

[2172] *See id.*

[2173] *Id*. at 360-361.

[2174] *Id*. at 438-439.

[2175] *Id*.

[2176] *Id*. at 439.

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still permit a private landowner to seek compensation for the continued use of the land.[2177] The courts could address the issue by invoking the "shifting public use doctrine," meaning that "public easements that are transformed to meet changing technologies, but which arguably retain some character of the original easement, will not be found to be extinguished or abandoned."[2178] In this context, shifting does not mean that the courts have broadened the meaning of what qualifies as or constitutes a public use but refers to the conversion of a railroad corridor reserved for one public use to another public use.[2179] The article argues that the shifting public use doctrine permits easements used for one purpose to be converted to another public purpose so as not to result in an abandonment of an easement by the railroad and that property owners accordingly have no claim because a taking would not have occurred.[2180] Thus, "[w]hen property has been taken for a public use, and full compensation made for the fee or a perpetual easement, its subsequent appropriation to another public use ... does not require further compensation to the owner."[2181]

H. Compensation for Use of Railroad Rights-of-Way by Telecommunication Companies for Line or Cables

An article in the *Drake Journal of Agricultural Law* discusses state constitutional law and the common law on rights of way, as well as several class action suits involving rights of

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[2177] *Id*. at 440.

[2178] *Id*. at 441-442.

[2179] *Id.* at 442.

[2180] *Id*. at 442-443.

[2181] *Id*. at 443.

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way.[2182] In the mid to late 1800s, several states such as Indiana amended their constitutions to prevent railroads from abusing their power of eminent domain. The amended constitutions required "private utilities, such as railroads, electric utilities, and telecom companies" to pay fair value before taking property.[2183] The author argues that landowners have learned that "telecommunications companies have taken and used their land with full knowledge that they had no legal rights to do so."[2184] According to the author, telecommunication companies entered onto land by claiming that they had authority to lay cables with the permission of the railroad companies that held rights-of-way.[2185]

A 1983 study commissioned by the American Association of Railroads "concluded that railroad rights-of-way often are limited to surface rights or restricted for railroad purposes;" therefore, telecommunication companies had no legal authority to lay cables on railroad rights-of-way with or without the permission of the railroad companies.[2186] The article states that CSX's chief negotiator for fiber-optic cable testified in a deposition that CSX had no right to authorize telecommunication companies to install fiber-optic cables on railroad rights-of-way.[2187]

The National Oceanic and Atmospheric Association has reported that the "value of the right to install and maintain conduits for fiber optic cables is reasonably estimated [to be]

[2182] Nels Ackerson, "Right-of-Way Rights, Wrongs and Remedies Status Report, Emerging Issues, and Opportunities," 8 *Drake J. Agric. L.* 177, 179 (2003).

[2183] *Id*. at 180-181.

[2184] *Id*. at 184.

[2185] *Id*. at 184-185.

[2186] *Id*. at 185.

[2187] *Id*.

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between $40,000 and $100,000 per mile."[2188] In some class action settlements involving AT&T and abandoned railroad rights of way "landowners have received compensation ranging from $125,700 per mile in Connecticut to $5,300 per mile in Maine, with the average compensation close to $45,000 per mile."[2189] However, the compensation is much less for active railroad rights-of-way and "range[s] from $13,728 per mile in Connecticut and Virginia to $8,976 per mile in Ohio with the average compensation in excess of $10,500 per mile."[2190] The article lists over twenty cases in which landowners have won class action lawsuits against railroads or telecommunication companies in disputes over compensation for the use of rights-of-way with only four cases having been decided against the landowners.[2191]

[2188] *Id*. at 191.

[2189] *Id*.

[2190] *Id*.

[2191] *Id*. at 195-198 (*citing*, *e.g.*, *Fritsch v. Interstate Commerce Commission*, 59 F.3d 248 (D.C. Cir. 1995) (holding that a new property interest cannot be created in a Right of Way if abandonment has already occurred); *Calumet National Bank v. AT&T*, 682 N.E.2d 785 (Ind. 1997) (holding the telecommunications company liable for trespass because the easement had extinguished when the railroad abandoned its Right of Way); *Schmitt v. United States*, 203 F.R.D 387 (S.D. Ind. 2001) (holding that the railroad company acquired an easement for railroad purposes and certifying a class action); *In re Telecomm. Providers' Fiber Optic Cable Installation Litig.*, 199 F. Supp.2d 1377 (2002) (denying request for class certification)).

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XVIII. EMINENT DOMAIN AND RAILROADS

A. Introduction

Many states have extended the right to take private land for public use to certain private companies, including railroads, because the states consider the use of such property to be fundamentally public. Section B discusses condemnation of property by railroads, the requirement that a condemnor pay just compensation for property taken or taken or damaged, limitations on railroads' use of eminent domain, and cases finding that the requirement of public use was satisfied in several examples of takings by railroads. Section C discusses the condemnation of property owned by railroads, including the effect of the Interstate Commerce Commission Termination Act (ICCTA), limitations under state law on condemnation of property owned or operated by railroads, and the preemption of a condemnation of railroad property because the taking would interfere with railroad operations. Sections D and E address the nature of the property interest taken in eminent domain actions and the difference between eminent domain and zoning. Section F summarizes cases and an article on the valuation of property and the determination of just compensation in eminent domain cases, as well as whether injunctive relief is available to a property owner in an action in eminent domain.

B. Condemnation of Property by Railroads

Constitutional Provisions and Statutes

1. Requirement of Just Compensation for Property Taken or Taken or Damaged

Most state constitutions and statutes include provisions requiring just compensation for property taken, or taken or damaged, by the state or by local governments for public use. Except as otherwise discussed herein, railroads generally have been granted the same power of eminent

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domain to take property as states have to condemn property.[2192]

States, including California,[2193] Texas,[2194] Pennsylvania,[2195] New York,[2196] and Virginia[2197] have a provision in their state constitutions requiring that the state pay just compensation for a taking of any property for a public use.[2198] In Virginia, the state constitution provides in part that "[n]o private property shall be damaged or taken for public use without just compensation to the owner thereof."[2199] As in many other state constitutions, Virginia's constitutional provision adds the term "damaged,"[2200] a term not included in the Fifth Amendment to the United States Constitution.[2201] A property owner may file an inverse condemnation claim and receive just compensation for a taking under § 8.01-187 of the Virginia

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[2192] *See, e.g., Buck v. District Court for Kiowa Cnty.*, 199 Colo. 344, 608 P.2d 350 (1980); *Chicago, I.&L.R. Co. v. Baugh*, 175 Ind. 419, 94 N.E. 571 (1911); *Bedford Quarries Co. v. Chicago*, 175 Ind. 303 94 N.E. 326 (1911); *City of Los Angeles v. Los Angeles Pac. Co.*, 159 P. 992, 31 Cal. App. 100 (Cal. App. 1916); and *F.C. Ayres Mercantile Co. v. Union Pac. R. Co.*, 16 F.2d 395 (8th Cir. 1926).

[2193] Cal. Const., art. 17 § 19.

[2194] Tex. Const., art. I § 17.

[2195] Pa. Const., art. 1 § 10.

[2196] N.Y. Const., art. I § 7.

[2197] Va. Const., art. 1 § 11.

[2198] For a more comprehensive list of state constitutional provisions on eminent domain, see Castle Coalition, *Current State Constitutional Provisions About Eminent Domain*, available at: http://www.castlecoalition.org/legislativecenter/185?task=view (last accessed March 31, 2015).

[2199] Va. Const., art. 1 § 11.

[2200] *Id*.

[2201] U.S. Const. 5th Amend. (stating in part: "nor shall private property be taken for public use, without just compensation").

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Code.[2202]

2. State Limitations on the Use of Eminent Domain

Some states have enacted laws that limit railroads' use of eminent domain in the taking of homes or sacred locations. In Maine, state law prohibits railroad companies from taking homes, meetinghouses, or burial grounds without the consent of the landowners.[2203] West Virginia similarly provides that railroad companies must obtain the consent of a landowner to "invade the dwelling house" of the landowner or the space sixty feet from the home, unless it is essential to prevent particular problems associated with the construction of the railway, such as having to move through narrow passages, at sharp angles, or on elevations.[2204]

Cases

3. Satisfaction of the Public Use Requirement

In *Buck v. District Court for Kiowa County*[2205] the Supreme Court of Colorado held that the construction of dust levees along the side of railroad tracks enhanced the operational efficiency of the railroad and thus was for a public use and benefit. Therefore, the condemnation of property adjoining the railroad was lawful.

4. Acquiring Land for Railroad Business

In *Hairston v. Danville & W. R. Co.*[2206] the United States Supreme Court held that a

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[2202] Va. Code Ann. § 8.01-187 (2014).

[2203] Me. Rev. Stat. Ann. tit. 23 § 6005 (2014).

[2204] W. Va. Code § 54-1-4 (2014). *See also,* Ind. Code Ann. 8-4-10-2 (2014).

[2205] 199 Colo. 344, 348, 608 P.2d 350, 351-352 (1980).

[2206] 208 U.S. 598, 608-609, 28 S. Ct. 331, 52 L. Ed. 637 (1908). *See also, Kelo v. City of New London*, 545 U.S. 469, 482, 125 S. Ct. 2655, 162 L. Ed.2d 439 (2005); *United States ex rel. Tennessee Valley*

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railroad could validly exercise the right of eminent domain to obtain property for the purpose of handling railroad business with nearby industrial or similar plants.

5. Takings by Railroad Companies of Property Adjoining a Railroad for Ancillary Uses or Spur Tracks

States have permitted railroad companies to take adjoining property through eminent domain for ancillary uses or for spur tracks.[2207] The courts generally have held that such takings are for a public use pursuant to the Fifth Amendment, state constitutional provisions, and case law.

6. Tracks Connecting the Railroad with a Private Business

In *Hughes v. Consol-Pennsylvania Coal Co.*[2208] the Third Circuit held that a railroad company had the right to condemn land for the purpose of connecting a private coal mine with its railway. The railroad contracted with the coal mine company to acquire land in its name that would be used to build a spur track connecting the coal mine with the rail line; the railroad agreed to the transfer the land to the coal mine via a trust.[2209] Brokers for the railroad induced property owners to sell land to the railroad, threatening that the railroad could condemn the properties if the owners did not agree to sell.[2210]

When the property owners learned of the arrangement between the coal mine and the

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Authority v. Welch, 327 U.S. 546, 552, 66 S. Ct. 715, 90 L. Ed. 843 (1946); and *Alton R. Co. v. Illinois Commerce Com.*, 305 U.S. 548, 553, 59 S. Ct. 340, 83 L. Ed. 344 (1939) (all citing *Hairston*).

[2207] *See, e.g., Union Lime Co. v. Chicago & Northwestern R. Co.*, 233 U.S. 211, 34 S. Ct. 522, 58 L. Ed. 924 (1914); *Hairston v. Danville & W. R. Co.*, 208 U.S. 598, 28 S. Ct. 331, 52 L. Ed. 637 (1908); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594 (3d Cir. 1991); *McCarthy v. Bloedel Donovan Lumber Mills*, 39 F.2d 34 (9th Cir. 1930).

[2208] 945 F.2d 594 (3d Cir. 1991).

[2209] *Id.* at 607.

[2210] *Id.* at 608.

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railroad company and brought suit against the railroad in Pennsylvania, they alleged that the brokers employed by the railroad misrepresented the railroad's condemnation powers to enable the railroad to obtain the properties at more favorable prices.[2211] The property owners argued that the condemnation did not meet the public use requirement because the spur track only connected to a private coal mine.[2212] Furthermore, they argued that the spur track did not have the approval of the ICC and that the track was not part of the railroad's chartered area.[2213]

Rejecting the plaintiffs' arguments, the Third Circuit held that the railroad had the authority to condemn the property at issue but remanded the case on the issues of fraudulent misrepresentation, conspiracy, and racketeering.[2214]

7. Spur Tracks for Private Railroads

In *McCarthy v. Bloedel Donovan Lumber Mills,*[2215] a private railroad, not a common carrier, condemned land to acquire a right of way to add a spur between its existing logging railroad and timberland that the railroad owned. The defendant argued that it had the authority to condemn the land for a right of way under chapter 133 of the Washington Laws 1913, Remington's Comp. Stat. 1922, §§ 6747-6749, which required that the company only take right of ways that were "necessary."[2216] The court looked to a previous Washington state case that

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[2211] *Id.*

[2212] *Id.* at 612.

[2213] *Id.*

[2214] *Id.* at 613.

[2215] 39 F.2d 34 (9th Cir. 1930).

[2216] *Id.* at 35.

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defined "necessary" as

> "not … an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route … considered in connection with the relative cost to one, and probable injury to the other.[2217]

The Ninth Circuit held that the taking was an appropriate exercise of the power of eminent domain because the evidence established that the spur to connect the logging holding areas with the railroad qualified as "necessary" for a right of way under the statute.[2218]

Other courts have held that railroads may take property adjoining the rails for other ancillary uses including stock pens,[2219] sidings and lateral railroads,[2220] and poles for power lines for electric railroads,[2221] as well as spur tracks.[2222]

C. Condemnation of Railroad Property

Statutes

1. Interstate Commerce Commission Termination Act

The Interstate Commerce Commission Termination Act (ICCTA), enacted in 1995, may preempt condemnation of railroad property by state or local governments.[2223] The ICCTA

2217 *Id.* (*quoting Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 601, 73 P. 670, 673 (1903)).

2218 *Id.* at 34, 36-37.

2219 *Chicago, I. & L.R. Co. v. Baugh*, 175 Ind. 419, 94 N.E. 571 (1911).

2220 *Bedford Quarries Co. v. Chicago*, 175 Ind. 303, 94 N.E. 326 (1911) (building sidetrack by railroad company to land containing building stone); *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N.E. 406 (1911) (lateral railroad to be built by a stone quarry as public use).

2221 *City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 P. 992 (Cal. App. 1916).

2222 *F.C. Ayres Mercantile Co. v. Union Pac. R. Co.*, 16 F.2d 395 (8th Cir. 1926); *Ozark Coal Co. v. Pennsylvania Anthracite R. Co.*, 97 Ark. 495, 134 S.W. 634 (1911).

2223 49 U.S.C. § 10501 (2014).

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created the Surface Transportation Board (STB) and gave it jurisdiction over transportation by rail carriers.[2224] Furthermore, the STB has exclusive jurisdiction over "the construction, acquisition, operation, abandonment or discontinuance" of rail tracks "even if the tracks are located, or intended to be located, entirely in one State."[2225] Therefore, the ICCTA preempts any state or local regulation that would interfere with the STB's exclusive jurisdiction over a railroad's operation and construction. The ICCTA did not intend to preempt all state eminent domain actions; preemption is determined on an "as applied" basis rather than "categorically."[2226] To distinguish between the two types of preemption, the Seventh Circuit has explained:

> Categorical preemption occurs when a state or local action is preempted on its face despite its context or rationale. If an action is not categorically preempted, it may be preempted "as applied" based on the degree of interference that the particular action has on railroad transportation – this occurs when the facts show that the action "would have the effect of preventing or unreasonably interfering with railroad transportation."[2227]

Therefore, to determine whether the ICCTA preempts a state or local regulation, including condemnation of railroad property, courts assess whether the regulation at issue would "prevent[] or unreasonably interfer[e]" with railroad transportation.[2228]

[2224] 49 U.S.C. § 10501(a) (2014).

[2225] 49 U.S.C. § 10501(b) (2014).

[2226] *Union Pac. R.R. v. Chicago Transit Auth.*, 647 F.3d 675, 680 (7th Cir. 2011).

[2227] *Id.* at 679 (*citing CSX Transp., Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 STB LEXIS 675, at *2-3 (S.T.B. May 3, 2005)).

[2228] *Id. See also*, *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007); Minnesota Department of Transportation, *Federal Laws Applicable to Railroads*, available at: http://www.dot.state.mn.us/frac/PDF/landusereg.pdf (last accessed March 31, 2015).

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2. State Limitations on Condemnation of Property Owned or Operated by Railroads

In some states the condemnation of railroad property differs from other types of condemnations of property.[2229] Many states have statutes that govern the exercise of eminent domain with respect to railroad property.[2230] State legislatures frequently permit the state or public utility companies to condemn land owned or operated by railroads for use in establishing telephone lines or other public utilities.[2231] For example, laws in California,[2232] Oregon,[2233] Oklahoma,[2234] and Georgia[2235] permit the state to acquire a right of way over railroad property but not to interfere with the railroad's operation.

3. Statutory Provisions in Oregon

Oregon is an example of a state with statutory provisions pursuant to which the state may "locate, relocate, or construct" a highway on a railroad's right of way when necessary for the construction of highways.[2236] Another Oregon statute authorizes the state to acquire a right of

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[2229] *See, e.g.,* Ga. Code Ann. § 46-5-1(a)(4) (2014); Okla. Stat. tit. 69 § 1722 (2014); Or. Rev. Stat. §§ 366.335(3) and 368.116 (2014).

[2230] *Id.*

[2231] *See, e.g.,* Cal. Pub. Util. §§ 7557, *et seq*. (2014) and 90402 (2014). Claims may be brought under state law challenging utility companies' ability to use or condemn railroad property. *Davis v. Williams Communications, Inc.*, 258 F. Supp.2d 1348 (N.D. Ga. 2003) (*citing* Ga. Code Ann. § 46-5-1(a)(4) 2003)); *Multnomah County v. Union Pacific Railroad Co.*, 297 Ore. 341, 685 P.2d 988 (1984) (*citing* Or. Rev. Stat. § 368.116 (1983)).

[2232] Ca. Pub. Util. §§ 7557 and 90402 (2014).

[2233] Or. Rev. Stat. §§ 366.335(3) and 368.116 (2014).

[2234] Okla. Stat. tit. 69 § 1722 (2014).

[2235] Ga. Code Ann. § 46-5-1(a)(4) (2014).

[2236] Or. Rev. Stat. § 366.335(1) (2014).

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way on railroad property when the acquisition is necessary for the construction or location of public roads.[2237] The Oregon Department of Transportation (ODOT) may negotiate with a railroad to acquire a right to use or occupy property.[2238] However, if ODOT and a railroad are unable to agree the state may commence a condemnation proceeding to acquire the right of way for a highway.[2239] The applicable statute also states that it does not authorize any use of land that would interfere with the operation of a railroad.[2240]

Case

4. Condemnation Preempted that would Interfere with Railroad Operations

In *Union Pacific Railroad v. Chicago Transit Authority*[2241] Union Pacific owned a right of way that was used for its own rail operations; the Chicago Transit Authority (CTA) had leased part of the right of way for almost five decades. CTA decided it was too expensive to continue leasing the right of way; thus, CTA attempted to condemn the land to acquire a perpetual easement.[2242] Union Pacific argued that the ICCTA preempted CTA's condemnation of the right of way.[2243] CTA's use of the right of way prevented Union Pacific from using the property for

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[2237] Or. Rev. Stat. § 368.116 (2014).

[2238] *Id*.

[2239] Or. Rev. Stat. § 366.335(2) (2014).

[2240] Or. Rev. Stat. § 366.335(3) (2014).

[2241] 647 F.3d 675 (7th Cir. 2011).

[2242] *Id.* at 676.

[2243] *Id.*

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additional tracks and affected its operations.[2244] Therefore, based on preemption under the ICCTA on an "as applied" basis,[2245] the Seventh Circuit held that the condemnation was preempted because the condemnation would interfere unreasonably with Union Pacific's operation.[2246] Although Union Pacific could agree to an arrangement by contract that interfered with its operations, the state could not do so through its use of eminent domain.[2247]

In *Reading Blue Mountain & Northern Railroad Co. v. UGI Utilities, Inc.*[2248] the Reading Blue Mountain & Northern Railroad Co. (RBMN) brought an action to prevent a utility company from drilling on the railroad's right of way to install a gas pipeline. RBMN argued that the drilling was a taking by the state that was preempted by the ICCTA. The utility company would take only about a 1,200 square foot area for drilling and would not impede the railroad's normal operations.[2249] The court compared BMMN's claim to Union Pacific's claim in *Union Pacific Railroad v. Chicago Transit Authority*,[2250] *supra*, in which the CTA used 40% of the railroad's right of way.[2251] In *RBMN*, the court denied the railroad's motion for a preliminary injunction because RBNM was unlikely to be successful on the merits as the ICCTA likely did not preempt

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[2244] *Id.* at 682.

[2245] *Id.* at 680.

[2246] *Id.* at 682.

[2247] *Id.*

[2248] 2012 U.S. Dist. LEXIS 8719, at *1 (M.D. Penn. 2012).

[2249] Id. at *6.

[2250] 647 F.3d 675 (7th Cir. 2011).

[2251] *Reading Blue Mt. & Northern R.R. Co.*, 2012 U.S. Dist. LEXIS 8719 at *5-6.

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the drilling.[2252]

Cases

D. Nature of Property Interest taken in Eminent Domain

1. Narrow Interpretation of a Property Interest Obtained by Eminent Domain

Eminent domain is generally a use-based acquisition of land that may result in a company acquiring an easement rather than a fee interest.[2253] State law determines the nature of a property interest that is acquired.[2254]

2. Whether Government retained Reversionary Interest in Public Land it Condemned and Granted to a Railroad

In *Samuel C. Johnson 1988 Trust v. Bayfield County*[2255] the Seventh Circuit had to determine whether Bayfield County retained a reversionary interest in land previously held by the government that it obtained by eminent domain. The county claimed that it owned a reversionary interest in undeveloped plots of land owned by a railroad with half being obtained through a land grant and the other half by condemnation.[2256] The county argued that it retained a reversionary interest in a land grant from the state of Wisconsin to the railroad for some of the property and that a statute created a reversionary interest in the state of Wisconsin for the remainder of the property that was obtained through condemnation.[2257] The court held that the

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[2252] *Id.* at *13, 23.

[2253] *Great Northern R. Co. v. United States,* 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942).

[2254] *Howard v. United States*, 106 Fed. Cl. 343, 367 (2012).

[2255] 649 F.3d 799 (7th Cir. 2011).

[2256] *Id.* at 801.

[2257] *Id.* at 802.

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land itself, not an easement, was conveyed outright to the railroad through eminent domain, leaving no reversionary interest.[2258]

E. Difference between Eminent Domain and Zoning

1. Eminent Domain as an Inalienable Right of Sovereignty

Numerous courts have held that the power of eminent domain is superior to local zoning regulations, particularly with respect to railroads.[2259] In *Forth Worth & D.C. Railway Co. v. Ammons*[2260] the plaintiff Forth Worth & D.C. Railway Co. (FWDC) wanted to extend an industrial spur line on land it already owned in a residential area.[2261] FWDC appealed after the city obtained an injunction that prevented the railroad from constructing the extension because of the area's residential zoning.[2262]

The use of eminent domain and zoning regulations are similar in that they both may be used to promote the use of property in ways that are beneficial to the general welfare. However, the power of eminent domain derives from the states' right to appropriate private property, "one of the inalienable rights of sovereignty," while the power to zone property is based on the states'

[2258] *Id.* at 808.

[2259] *See, e.g., Missouri Pac. R.R. v. 55 Acres of Land*, 947 F. Supp. 1301, 1312 (E.D. Ark. 1996); *City of Flint v. Chesapeake & Ohio Ry. Co.*, 464 F. Supp. 423 (E.D. Mich. 1978); *Seward Cnty. Board of Comm'rs v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976); *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960); *Fort Worth & D.C. Ry. Co. v. Ammons*, 215 S.W.2d 407 (Tex. Civ. App. 1948); *State ex rel. Helsel v. Board of Cnty. Comm'rs of Cuyahoga Cnty.*, 37 Ohio Op. 58, 79 N.E.2d 698 (1947).

[2260] 215 S.W.2d 407 (Tex. Civ. App. 1948). *See* Michael B. Kent, Jr., "Public Utilities, Eminent Domain, and Local Land Use Regulations: Has Texas Found the Proper Balance?," 16 *Tex. Wesleyan L. Rev*. 29, 31 (2009) (summarizing the *Ammons* decision), hereinafter referred to as "Kent."

[2261] *Ammons*, 215 S.W.2d at 408-409. *See Porter v. Sw. Pub. Serv. Co.*, 489 S.W.2d 361, 364 (Tex. Civ. App. 1972) (distinguishing the *Ammons* case because in *Ammons* the railroad company owned the land for a long time on which it wished to extend a spur line before zoning regulations were promulgated).

[2262] *Ammons*, 215 S.W.2d at 409.

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police powers.[2263] The court observed that although owners receive compensation for land taken by eminent domain, they are not compensated for the effects of changes in zoning or in the zoning laws.[2264] Therefore, the court stated that "[t]he absence of compensation makes the police power much harsher in operation than the power of eminent domain and, hence, subject to stricter limitations."[2265] However, even if FWDC did not have to comply with the zoning regulations, the court held that the railroad would have to obtain a construction permit from the city.[2266]

Article

2. Interaction of Local Land Use Regulations and Eminent Domain

A law review article argues that in cases involving railroads and local land use regulation and eminent domain the use of eminent domain is most consistent with promoting the general welfare.[2267] The article contends that utility companies and railroads have obligations that encompass a larger geographic area than local governments that serve the needs of their communities. Thus, the article argues that it is logical that railroads should have more discretion than local governments.[2268] The author summarizes the opinion in *Ammons,*[2269] *supra*, part XVIII.E.1, whose logic is prevalent in many Texas cases, and explains:

[2263] *Id.* at 409-410.

[2264] *Id.* at 410.

[2265] *Id.*

[2266] *Id.* at 411.

[2267] *See* Kent, *supra* note 2260.

[2268] *Id*. at 45.

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> The logic of that opinion can be traced as follows: (1) the state has a sovereign interest in railroads; (2) to promote this interest, the state delegated its power of eminent domain to the railroad company; and (3) absent an abuse of that delegated authority, the railroad's decision to promote the statewide interest necessarily takes precedence over the municipality's parochial concerns with regard to placement of the facilities.[2270]

However, greater discretion does not mean that utility companies have absolute discretion.[2271] Moreover, although courts may excuse utility companies from "siting" regulations (*i.e.,* related to the specific locations of projects) they are still subject to "non-siting" regulations that retain the "character" (*i.e.,* subjective qualities that are hard to measure objectively) of certain locations.[2272]

Cases

F. Valuation of Property and Just Compensation for Takings

1. Market Value

In *First English Evangelical Lutheran Church v. Los Angeles County*[2273] the Supreme Court held that when a condemnor takes property by eminent domain just compensation equals the market value of the property determined as of date of the taking.

2. Special Value not Compensable

In *Palazzolo v. Rhode Island*[2274] the Supreme Court held that any special value that a property has to the condemnor is not to be considered when determining market value.

[2269] *Fort Worth & D. C. Ry. Co. v. Ammons*, 215 S.W.2d 407 (Tex. Civ. App. 1948), *writ ref'd n.r.e.*

[2270] Kent, *supra* note 2260, at 45.

[2271] *Id*.

[2272] *Id*. at 48 (*citing* Bradley C. Karkkainen, "Zoning: A Reply to the Critics," 10 *J. Land Use & Envtl. L.* 45, 65 (1994)).

[2273] 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed.2d 250 (1987).

[2274] 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed.2d 592 (2001).

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3. Severance Damages

In *State by State Highway Commissioner v. Williams*[2275] a New Jersey appellate court held that when the government takes only part of a person's property "the measure of damages is the difference in the value of the tract before and after the taking, or the value of the land that is taken and compensation for the diminution in value [of the remainder] that will result from the taking."[2276]

4. Comparable Sales or Other Evidence

In *United States v. 329.73 Acres of Land,*[2277] although the Fifth Circuit observed that "comparable sales are often the most reliable form of evidence in determining market value," the court held that evidence other than comparable sales may be admissible in determining the value of property taken by condemnation.[2278]

5. Whether Injunctive Relief is Available

In *Osborne & Co. v. Missouri Pacific Railway Co.*[2279] Osborne & Co. (Osborne) owned property adjoining a public street where the Missouri Pacific Railway Company (Missouri Pacific) planned to lay track. Osborne sought an unconditional injunction against Missouri Pacific to prevent the company from laying tracks on the street.[2280] The Supreme Court held that the courts may deny an injunction when a property owner's injury (*i.e.*, the decrease in market

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[2275] 65 N.J. Super. 518, 168 A.2d 233 (N.J. App. Div. 1961).

[2276] *Id.,* 65 N.J. Super. at 524, 168 A.2d at 236.

[2277] 666 F.2d 281 (5th Cir. 1982).

[2278] *Id.* at 283.

[2279] 47 U.S. 248, 13 S. Ct. 299, 37 L. Ed. 155 (1893).

[2280] *Id.,* 147 U.S. at 260, 13 S. Ct. at 303, 37 L. Ed. at 161.

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value of the adjoining property) may be compensated fairly in damages.[2281]

Article

6. Whether Just Compensation should include Nonmarketable Elements

Some commentators argue that compensation based solely on market value is inadequate. Professor John Fee argues that the compensation model for eminent domain should be adjusted to include "nonmarketable elements of home ownership."[2282] Professor Fee draws an analogy between compensation for takings and compensation for wrongful death, noting that relatives of the deceased do not simply receive expected future earnings of the deceased.[2283] Therefore, the professor argues that just compensation should include damages in an amount that would make the homeowner "indifferent to the land acquisition at issue:"

> [T]he ideal award should make the owner indifferent to losing her land, it does not necessarily make her indifferent to the government's power of eminent domain. ... The goal of just compensation should not be to replicate as closely as possible the distribution of entitlements (including windfalls) that would exist in a world without eminent domain; rather, it should be to facilitate public projects that improve the social welfare while leaving condemnees as well off as if the government had left them alone.[2284]

[2281] *Id.*

[2282] John Fee, "Eminent Domain and the Sanctity of the Home," 81 *Notre Dame L. Rev.* 783 (2006).

[2283] *Id*. at 805.

[2284] *Id*. at 809.

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Railroad Legal Issues and Resources

PART II

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XIX. EMPLOYEES AND DRUG AND ALCOHOL TESTING

A. Introduction

Because of safety and security concerns the federal government has regulated the railroad industry's employment practices.[2285] Pursuant to congressional authorization, the Secretary of Transportation issued detailed regulations implementing policies and procedures for testing railroad employees for the use of drugs and alcohol. The United States Supreme Court has held that the Fourth Amendment covers drug and alcohol testing of railroad employees; thus, such testing must be sufficiently reasonable to pass judicial muster.[2286]

Sections B through F discuss statutes, regulations, and cases on drug and alcohol testing, including the Secretary of Transportation's authority to promulgate regulations on drug and alcohol testing; regulations on the control of drugs and alcohol use in railroad operations; applicability of the Fourth Amendment to drug and alcohol testing of railroad employees; regulations as amended in 2008 that established more stringent requirements for returning employees; the 2014 proposed regulations to expand alcohol and drug testing to employees performing maintenance-of-way activities; and civil rights claims under § 1983, as well as other issues. Section G discusses an article on the expansion of searches without prior suspicion. Section H discusses the use of drug and alcohol testing for other purposes such as unauthorized genetic testing.

[2285] *See Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 621, 109 S. Ct. 1402, 1415, 103 L. Ed.2d 639, 662 (1989). The FRA's interest in drug and alcohol testing was very much influenced by the January 1987 accident in Chase, Maryland where an Amtrak train collided with a set of Conrail locomotives. As one report notes, "in 1991, Congress passed the Omnibus Transportation Employee Testing Act, in part due to the Chase crash." Essex-Middle River Patch, "Chase Amtrak Crash: 25 Years Later" (Jan. 4, 2012), available at: http://patch.com/maryland/essex/chase-amtrak-crash-25-years-later (last accessed March 31, 2015).

[2286] *Id.,* 489 U.S. at 633-634, 109 S. Ct. at 1422, 103 L. Ed.2d at 670.

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B. Policies and Procedures Applicable to Drug and Alcohol Testing

Statutes and Regulations

1. Secretary of Transportation's Authority to Promulgate Regulations on Drug and Alcohol Testing

As provided by federal law, the Secretary of the Department of Transportation (DOT) is empowered to issue regulations on the use of controlled substances and alcohol through programs that require "preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions…."[2287] The law allows the Secretary temporarily to disqualify or dismiss employees who have been discovered to be using or who have been impaired by alcohol while working or while using a controlled substance at any time unless authorized for medical reasons.[2288]

The Secretary has discretion to "prescribe regulations and issue orders requiring railroad carriers to conduct periodic recurring testing of railroad employees responsible for safety-sensitive functions (as decided by the Secretary) for the use of alcohol or a controlled substance in violation of law or a Government regulation."[2289] In carrying out drug and alcohol testing, the Secretary is to promote the most privacy possible and implement the Department of Health and Human Services guidelines for laboratory testing.[2290] Furthermore, testing may not be conducted in a discriminatory manner, and test results must remain confidential.[2291]

[2287] 49 U.S.C. § 20140(b)(1)(A) (2014).

[2288] 49 U.S.C. § 20140(b)(1)(B) (2014).

[2289] 49 U.S.C. § 20140(b)(2) (2014).

[2290] 49 U.S.C. §§ 20140(c)(2)-(6) (2014).

[2291] 49 U.S.C. §§ 20140(c)(7)-(8) (2014).

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The statute authorizes the Secretary to issue regulations regarding rehabilitation programs for drug and alcohol use or abuse.[2292] The regulations must comply with the United States' international obligations,[2293] which are important with respect to the drug and alcohol testing of employees of foreign railroads who enter the United States to work.[2294] After consultations with the governments of Canada and Mexico, the Federal Railroad Administration (FRA) issued a final rule in 2004 that applies to the testing of such foreign railroad employees. The rule only applies to foreign employees who travel over ten miles each way within the United States (*i.e.*, over twenty miles roundtrip) before returning to their country.[2295]

2. Regulations for the Control of Alcohol and Drug Use in Railroad Operations

Transportation employers are subject to detailed requirements for drug and alcohol testing in the workplace for safety-sensitive employees.[2296] The regulations cover such matters as consent forms,[2297] laboratory requirements,[2298] the return to work of rehabilitated employees,[2299] and confidentiality.[2300] Part 219 of the Code of Federal Regulations (C.F.R.)

[2292] 49 U.S.C. § 20140(d) (2014).

[2293] 49 U.S.C. § 20140(e) (2014).

[2294] Control of Alcohol and Drug Use: Coverage of Maintenance of Way Employees, Retrospective Regulatory Review-Based Amendments (RRR), 79 Fed. Reg. 43830 (proposed July 28, 2014) (to be codified at 49 C.F.R. pt. 219), hereinafter referred to as "Control of Alcohol and Drug Use: Coverage of Maintenance of Way Employees."

[2295] 49 C.F.R. § 219.3(c) (2014).

[2296] 49 C.F.R. § 40.1(b) (2014); *see generally* 49 C.F.R. part 40 (2014).

[2297] 49 C.F.R. § 40.27 (2014).

[2298] 49 C.F.R. §§ 40.81-40.113 (2014); Appendix B § 219 (2014).

[2299] 49 C.F.R. §§ 40.281-40.313 (2014).

[2300] 49 C.F.R. §§ 40.321-40.333 (2014).

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describes in detail prohibitions that apply to railroad employees,[2301] as well as post-accident toxicological testing,[2302] testing for cause,[2303] identification of troubled employees,[2304] pre-employment tests,[2305] random alcohol and drug testing programs,[2306] and testing procedures.[2307]

Case

C. The Fourth Amendment Applies to Drug and Alcohol Testing of Railroad Employees

Skinner v. Railway Labor Executives' Association,[2308] decided by the United States Supreme Court, appears to be the seminal case on drug and alcohol testing of railroad employees. Although the Court analyzed a repealed version of the statute on testing for alcohol and controlled substances, the Court's analysis applies to the current version of the statute.

In *Skinner*, the Railway Labor Executives' Association (RLEA), a railroad labor organization, sought to enjoin the FRA's regulations on drug and alcohol testing of railroad employees who in particular are involved in train accidents and who disobey specific safety rules.[2309] After the FRA issued a final rule in 1985, the RLEA brought an action in a federal

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[2301] 49 C.F.R. §§ 219.101-219.107 (2014).

[2302] 49 C.F.R. §§ 219.201-219.213 (2014).

[2303] 49 C.F.R. §§ 219.300-219.302 (2014).

[2304] 49 C.F.R. §§ 219.401-219.407 (2014).

[2305] 49 C.F.R. §§ 219.501-219.505 (2014).

[2306] 49 C.F.R. §§ 219.601-219.611 (2014).

[2307] 49 C.F.R. § 219.701 (2014).

[2308] 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989).

[2309] *Id.*, 489 U.S. at 612, 109 S. Ct. at 1411, 103 L. Ed.2d at 657.

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district court seeking an injunction to prevent the implementation of the regulations.[2310]

The Supreme Court held that railroad companies act as agents of the federal government in carrying out drug and alcohol tests as required by the regulations; therefore, the FRA's rule on the railroads' testing of employees for the use of drugs and alcohol implicated the Fourth Amendment's protection from unreasonable searches and seizures.[2311]

The Court stated:

> We are unwilling to conclude, in the context of this facial challenge, that breath and urine tests required by private railroads in reliance on Subpart D will not implicate the Fourth Amendment. Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, … a question that can only be resolved "in light of all the circumstances….." The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct.[2312]

Based on a Fourth Amendment analysis, the Court balanced the safety needs of a railroad with the diminished privacy expectations of its employees.[2313] The Court ruled that urine and breath testing was an obvious violation of an expectation of privacy but one that society deems to be reasonable.[2314]

> In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological tests in this context, and the diminished expectation of privacy that attaches to information

[2310] *Id*.

[2311] *Id.*, 489 U.S. at 614, 109 S. Ct. at 1411, 103 L. Ed.2d at 658.

[2312] *Id.*, 489 U.S. at 614-615, 109 S. Ct. at 1411-1412, 103 L. Ed.2d at 658 (citations omitted).

[2313] *Id.*, 489 U.S. at 621, 109 S. Ct. at 1415, 103 L. Ed.2d at 662.

[2314] *Id.*, 489 U.S. at 616, 109 S. Ct. at 1413, 103 L. Ed.2d at 659.

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> pertaining to the fitness of covered employees, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired.[2315]

The Court held that drug and alcohol testing of employees as required by the FRA's regulations was reasonable under the Fourth Amendment.[2316]

Statutes and Regulations

D. 2008 Modifications and More Stringent Requirements for Returning Employees

In 2008, the DOT modified its drug and alcohol testing requirements by making them more stringent for employees who return to work after failing a drug test and completing a drug treatment program.[2317] In particular, the DOT required that tests for such employees must be conducted under direct supervision to prevent cheating.[2318] In *BNSF Railway Co. v. United States Department of Transportation*[2319] BNSF and multiple transportation unions argued that the revised regulations[2320] violated the Fourth Amendment to the United States Constitution; however, the District of Columbia Circuit held that the modifications were neither "arbitrary" nor "capricious" under the Administrative Procedure Act. The court explained:

> [T]he Department acted neither arbitrarily nor capriciously in concluding that the growth of an industry devoted to circumventing drug tests, coupled with returning employees' higher rate of drug use and heightened motivation to cheat, presented an elevated risk of cheating on return-to-duty and follow-up tests that justified the

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[2315] *Id.*, 489 U.S. at 634, 109 S. Ct. at 1422, 103 L. Ed.2d at 671.

[2316] *Id.*

[2317] *BNSF Ry. Co. v. United States Dep't of Transp.*, 566 F.3d 200 (D.C. Cir. 2009).

[2318] *Id*. at 202.

[2319] *Id.* at 203.

[2320] *Id*. at 202 (*citing* 49 C.F.R. §§ 40.285, 40.305, 40.307(d), and 40.309 (2008)).

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mandatory use of direct observation.[2321]

In addition, the court balanced the need for transportation safety with employees' right to privacy and concluded that the modified regulations did not violate the Fourth Amendment's prohibition on unreasonable searches and seizures.[2322]

E. 2014 Proposed Regulations to Expand Alcohol and Drug Testing to Employees Performing Maintenance-of-Way Activities

Pursuant to the congressional mandate in the Rail Safety Improvement Act of 2008, FRA "is proposing to expand the scope of its alcohol and drug regulations to cover employees who perform maintenance-of-way (MOW) activities" and to amend and clarify current alcohol and drug regulations.[2323] As used in the notice of proposed rulemaking, the term "'employee' includes employees, volunteers, and probationary employees of railroads and contractors (defined to include subcontractors) to railroads."[2324] The FRA

> is proposing a new term-of-art -- 'regulated service'-- that would encompass both covered service and MOW activities. Performance of regulated service would make an individual a 'regulated employee' subject to part 219, regardless of whether the individual is employed by a railroad or a contractor to a railroad.[2325]

The FRA also proposed amendments to part 219 to permit post-accident toxicological (PAT) "testing when an accident was likely due to human factors or involved a regulated employee fatality."[2326]

[2321] *Id.* at 206.

[2322] *Id.* at 209.

[2323] Control of Alcohol and Drug Use: Coverage of Maintenance of Way Employees, *supra*, footnote 2281.

[2324] *Id*. at 43831.

[2325] *Id*.

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The FRA intends to include MOW employees among those who may be tested for alcohol or drugs. The reason is that "MOW employees are at a high safety risk because they work along railroad track and roadbed and may suffer injury or death as a result of being struck by trains or other on-track or fouling equipment."[2327] The notice of proposed rulemaking cites recent railroad accidents as support for the need to test MOW employees. For example, in 2007 a Massachusetts Bay Transit Administration (MBTA) train operated by the Massachusetts Bay Commuter Railroad (MBCR) collided with a maintenance vehicle, killing two MBTA employees, the MOW foreman, and a track worker, and injuring two others.[2328] The foreman in charge of the MOW crew failed to comply with a MBCR rule that would have provided signal protection for the segment of track on which the MOW crew was working.[2329] Although the MOW employees were not covered employees, the remains of the deceased MOW could still be tested because § 219.203(e)(4)(ii) "require[s] PAT testing on the remains of any railroad employees fatally injured in a train accident or incident."[2330] The tests showed that the MOW foreman had used marijuana within three hours of the collision.[2331]

[2326] *Id*.

[2327] *Id*. at 43832.

[2328] *Id*.

[2329] *Id*.

[2330] *Id*. (*citing* 49 C.F.R. § 219.203(a)(4)(ii)).

[2331] *Id*.

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The National Transportation Safety Board (NTSB) conducted a ten-year review of railroad accidents involving MOW employee deaths and found a positive rate of 19.23% compared to a 6.56% for covered employees in PAT testing.[2332]

The proposed regulations define MOW activities to include:

> (1) The inspection, repair, or maintenance of track, roadbed, or electric traction systems; (2) the operation of on-track or fouling equipment utilized for the inspection, repair, or maintenance of track, roadbed, or electric traction systems; (3) the performance of flagman or watchman/lookout duties; (4) the obtaining of on-track authority and/or permission for the performance described by the proposed definition; or (5) the granting of on-track authority and/or permission for operation over a segment of track while workers are performing activities described by the proposed definition.[2333]

The FRA is requesting comment on whether MOW activities should include:

> (1) Boring a pipe under a track; (2) paving a highway-rail grade crossing; (3) placing detour or other signs in conjunction with grade crossing work; (4) operating cranes for the loading and unloading of MOW equipment, regardless of whether or not that equipment is being loaded onto or within the foul of a track; (5) clearing and repairing a railroad track following an accident or incident; and (6) operating a bridge if the employee is not covered under the [Hours of Service] laws.[2334]

The FRA also is proposing two new definitions for § 215.5.[2335] The first new term, "regulated employee," is defined as "any employee who is subject to part 219 (whether a covered or MOW employee)…."[2336] The second new term, "regulated service," is defined as "all

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[2332] *Id*. at 43833.

[2333] *Id*.

[2334] *Id*. at 43834.

[2335] *Id*. at 43835.

[2336] *Id*.

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activities subject to part 219 (again, both covered service and MOW activities)."[2337] The purpose of the new terms is to encompass all activities and individuals subject to part 219 and to eliminate more awkward terms such as maintenance-of-way employee.[2338]

The proposed regulations would grandfather all current MOW employees from pre-employment testing; thus, only MOW employees hired after the effective date would be subject to pre-employment testing.[2339]

Case

F. Civil Rights Claims under Section 1983

In *Griffin v. Long Island Railroad*,[2340] after the Long Island Railroad (LIRR) terminated Griffin for failing to pass a random drug test, the employee brought an action in a federal court in New York against LIRR under 42 U.S.C. § 1983. Because LIRR failed to inform Griffin of his right to ask for independent testing as required by the regulations Griffin argued that he was entitled to damages and back-pay.[2341] The court noted that the courts disagree on whether plaintiffs may bring § 1983 claims for violations of regulations;[2342] however, the court held that Griffin could bring an action in this instance because the statute authorizing the FRA to

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[2337] *Id*.

[2338] *Id*.

[2339] *Id*. at 43838-43839.

[2340] 1998 U.S. Dist. LEXIS 19336 *1 (E.D.N.Y. 1998).

[2341] *Id.* at *11.

[2342] *Id.* at *29.

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promulgate regulations created a right that was intended to benefit the plaintiff.[2343] Moreover, the statute did not expressly withdraw his right to relief under § 1983.[2344] Nevertheless, the court did not grant either party's motion for a summary judgment because the issue of whether the plaintiff knew of his right to request independent testing after learning of his positive drug test was a question of material fact.[2345]

Articles

G. Expansion of Suspicionless Searches

A law review article entitled "Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State" examines the Supreme Court's expansion of the special needs exception, as seen in *Skinner*, *supra*, to the individualized suspicion and warrant requirements of the Fourth Amendment.[2346] The article argues that the Supreme Court is "applying varying levels of deference in its special needs jurisprudence, depending on the degree of correlation between the government's asserted special need and the predefined regulatory objective at issue."[2347] The article urges that although the Supreme Court's approach may increase coherence and predictability in special needs cases the approach should be limited in scope and should not outweigh other factors.[2348]

[2343] *Id.* at *36, *38.

[2344] *Id.* at *54.

[2345] *Id.* at *60.

[2346] Fabio Arcila, Jr., "Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State," 56 *Admin. L. Rev.* 1223, 1224 (2004).

[2347] *Id*. at 1226.

[2348] *Id*.

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H. Genetic Testing

As the Supreme Court stated in *Skinner*, "[i]t is not disputed … that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic."[2349] An article entitled "Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States" explains how employers may use samples of bodily fluids to obtain medical information on employees without their knowledge.[2350] The article examines a case in which BNSF was alleged to have secretly ordered genetic tests during examinations of employees who had filed a work-related disability claim for carpal tunnel syndrome.[2351] BNSF allegedly did not inform the employees of the test because the company wanted to determine whether employees had a genetic predisposition to carpal tunnel syndrome.[2352] The Equal Employment Opportunity Commission filed an action in which it alleged that BNSF violated the Americans with Disabilities Act and sought to enjoin BNSF's conduct.[2353] However, the case settled when BNSF agreed to discontinue any genetic testing.[2354]

[2349] *Skinner*, 489 U.S. at 617, 109 S. Ct. at 1413, 103 L. Ed.2d at 659.

[2350] Nancy J. King, Sukanya Pillay, and Gail A. Lasprogata, "Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States," 43 *Am. Bus. L.J.* 79 (2006), hereinafter referred to as "King, Pillay, and Lasprogata."

[2351] *Id*. *See also*, Patricia A. Roche, "The Genetic Revolution at Work: Legislative Efforts to Protect Employees," 28 *Am. J.L. & Med.* 271, 272 (2002), hereinafter referred to as "Roche."

[2352] King, Pillay, and Lasprogata, *supra* note 2350, at 79.

[2353] *Id*.

[2354] Roche, *supra* note 2351, at 272.

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XX. ENVIRONMENTAL LAW AND RAILROADS

A. Introduction

This part of the Report discusses environmental law and railroads beginning with section B on the liability of railroad companies under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) applicable to railroads' release of hazardous substances, the enforcement efforts undertaken by the Environmental Protection Agency (EPA), state statutes that incorporate CERCLA, and cases arising under the state statutes. Section C discusses the Clean Railroads Act and environmental requirements for permits for new facilities. Section D addresses issues in connection with the Hazardous Materials Transportation Act (HMTA) that authorizes the Secretary of Transportation to issue regulations on the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. Section E discusses the requirements of the National Environmental Policy Act (NEPA), as well as regulations of the Federal Railroad Administration (FRA) and the Surface Transportation Board (STB). Section F summarizes an article on federal preemption of local air quality laws and regulations.

B. The Comprehensive Environmental Response Compensation and Liability Act

Statutes and Regulations

1. Liability under CERCLA

Under CERCLA a railroad company may be covered by CERCLA and held liable, *inter alia*, as the "owner and operator of a vessel or a facility;" as one "who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;" as one "who by contract, agreement, or otherwise arranged for disposal or

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treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person….;" and as one "who accepts or accepted any hazardous substances for transport to disposal or treatment facilities … from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance…."[2355]

There is no liability when a person subject to CERCLA is able to "establish by a preponderance of the evidence" that any release or threatened release was caused solely by an act of God, act of war, or "an act or omission of a third party other than an employee or agent of the defendant" or under other circumstances as are further described in the statute that will absolve one of liability.[2356]

Under CERCLA no person is liable for damages or costs "as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan or at the direction of an [on-scene] coordinator…."[2357] State and local governments are protected from liability as long as the costs or damages were not "a result of gross negligence or intentional misconduct by the State or local government."[2358]

2. EPA Enforcement and Civil Proceedings under CERCLA

Liability and fines apportioned by the EPA to an entity that has violated CERCLA may be challenged in a federal district court.[2359] Section 9613 of CERCLA grants exclusive

[2355] *See* 42 U.S.C. §§ 9607(a)(1)-(4) (2014).

[2356] *See* 42 U.S.C. §§ 9607(b)(1)-(3) (2014).

[2357] 42 U.S.C. § 9607(d)(1) (2014).

[2358] 42 U.S.C. § 9607(d)(2) (2014).

[2359] 42 U.S.C. §§ 9609(a)(4) and 9613 (2014).

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jurisdiction to federal district courts over all controversies that arise under CERCLA,[2360] including actions for damages to natural resources, recovery of costs, contribution, subrogation, and recovery of indemnification payments.[2361] Section 9613 provides that the courts will use the administrative record in reviewing "the adequacy of any response action taken or ordered by the President…."[2362] The statute also provides time limitations of between three to six years for filing an action for the recovery of costs for violations of § 9607.[2363]

Congress has authorized the President to enforce the provisions of CERCLA.[2364] However, by Executive Order the EPA and other federal agencies have been delegated the authority that is granted to the President under CERCLA.[2365] The enforcement process begins with the EPA identifying the potentially responsible parties (PRPs) that contributed to contamination.[2366] After the PRPs are identified, the EPA may conduct a cleanup of a site using Superfund money and seek to recover the cost of the cleanup from the PRPs.[2367] Alternatively, the EPA may issue a unilateral administrative order (UAO) or request a court to order the PRPs

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[2360] 42 U.S.C. § 9613 (2014).

[2361] 42 U.S.C. § 9613(g) (2014).

[2362] 42 U.S.C. § 9613(j)(1) (2014).

[2363] *Id*.

[2364] United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance Office of Site Remediation Enforcement, EPA PRP Search Manual: Overview of CERCLA and PRP Searches, at 2, available at: http://www2.epa.gov/sites/production/files/documents/prp-man-chap1-09.pdf (last accessed March 31, 2015), herein referred to as "PRP Search Manual."

[2365] *Id*.

[2366] *Id*. at 33.

[2367] 42 U.S.C. §§ 9604 and 9607 (2014).

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to clean up the site.[2368] The "EPA has adopted an 'enforcement first' policy for removal and remedial actions at CERCLA sites" and "will first pursue the PRPs to conduct the site response rather than conduct the cleanup with Superfund money."[2369] In addition, "EPA may seek to obtain PRP participation through settlements, unilateral orders, or litigation."[2370]

The EPA's "legal documents … describe the requirements of the response action."[2371] The EPA may require the PRPs to enter into an administrative order on consent (AOC) or a consent decree (CD).[2372] An AOC is a legally binding administrative order signed by the EPA and the PRPs, whereas the CD occurs as a result of a judicial action and is subject to the approval of a federal court and the Department of Justice (DOJ).[2373] CERCLA § 122(g)[2374] empowers the EPA to negotiate "de minimis settlements with parties whose contribution is minimal in amount and toxicity if the settlement involves only a minor portion of the response costs."[2375]

[2368] 42 U.S.C. § 9606 (2014).

[2369] PRP Search Manual, *supra* note 2364, at 4.

[2370] *Id*. at 5.

[2371] *Id*. at 37.

[2372] *Id*.; *see* 42 U.S.C. § 9622(d) (2014).

[2373] PRP Search Manual, *supra* note 2364, at 37.

[2374] 42 U.S.C. § 9622(g) (2014).

[2375] PRP Search Manual, *supra* note 2364, at 6.

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Cases

3. Unilateral Administrative Orders Issued by the EPA do not Violate the Fifth Amendment

In *General Electric v. Jackson*[2376] the District of Columbia Circuit held that the EPA's issuance of a CERCLA-UAO does not violate the Due Process Clause of the Fifth Amendment of the United States Constitution.[2377] CERCLA was enacted to address risks posed by industrial pollution and "[a]lthough CERCLA speaks in terms of the President, the President has delegated his UAO authority to the EPA" by an executive order.[2378] If the EPA determines that an environmental site warrants clean up, one of the agency's four options is to issue a UAO ordering the PRP(s) to clean up the site.[2379]

The EPA has issued several UAOs under CERCLA to General Electric (GE) and has reserved the right to issue more at other sites where it believes GE contributed to contamination.[2380] GE has argued that CERCLA's UAO regime violates the Due Process Clause because "UAO recipient[s'] only real option is to comply ... before having any opportunity to be heard on the legality and rationality of the underlying order."[2381] GE argued that a UAO deprives PRPs of the money that they must spend to comply with a UAO or fines that they must

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[2376] 610 F.3d 110 (D.C. Cir. 2010), *rehearing denied by, rehearing, en banc, denied* , 2010 U.S. App. LEXIS 27485 (D.C. Cir., Sept. 30, 2010), *cert. denied*, 131 S. Ct. 2959, 180 L. Ed.2d 245, 2011 U.S. LEXIS 4334 (U.S., 2011).

[2377] *Id*. at 113.

[2378] *Id*. at 114 (*citing* Exec. Order No. 12,580, 52 *Fed. Reg*. 2923 (Jan. 23, 1987)).

[2379] *Id*.

[2380] *Id*. at 115.

[2381] *Id*. at 116 (internal citations omitted).

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pay if they refuse to comply and that the "PRPs' stock price, brand value, and costs of financing ... are adversely affected by the issuance of a UAO."[2382]

The court held that the PRPs do not face a Hobson's choice by paying to comply or by paying fines because the PRPs are only fined when a federal court finds that a PRP willfully failed to comply without sufficient cause with a proper UAO and further finds in the court's discretion that the fines and treble damages are appropriate.[2383] The District of Columbia Circuit held that GE's consequential damages did not constitute a deprivation of rights because although GE may have suffered reputational harm GE must prove that the EPA deprived the company of a benefit to which it had a legal right[2384] or imposed a "stigma so severe that it 'broadly precludes' [GE] from pursuing 'a chosen trade or business.'"[2385] GE could prove neither.[2386] The court held that because recipients of UAOs may be complying in the belief that the orders are accurate and would pass judicial scrutiny, rather than because they believe that they are being coerced into complying, the UAO provisions were not being applied in a manner that violates the Fifth Amendment.[2387] The court affirmed the district court's decision.[2388]

[2382] *Id*. at 117.

[2383] *Id*. at 118-119.

[2384] *Id*. at 121.

[2385] *Id*. (*quoting Trifax Corp. v. District of Columbia*, 314 F.3d 614 (D.C. Cir. 2003)).

[2386] *Id*.

[2387] *Id*. at 128-129.

[2388] *Id*. at 129.

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4. Apportionment under CERCLA of Costs among Responsible Parties

Burlington Northern and Santa Fe Railroad Co. v. United States[2389] is the leading case interpreting what CERCLA means when the law imposes liability on those who "arrange for" the disposal of a hazardous substance.[2390] In *Burlington Northern* the Supreme Court considered who the responsible parties were and how the costs should be apportioned for a chemical leak on a property that was partially owned by a railroad, the owner of the facility, and a chemical manufacturer. In brief, in 1960, Brown & Bryant, Inc. (B&B), an agricultural chemical distributor, began operating on a parcel of land located in Arvin, California. B&B later expanded onto an adjacent parcel owned by BNSF and Union Pacific. B&B purchased and stored various hazardous chemicals that it purchased from Shell Oil Company (Shell) that contaminated the property because of spills and equipment failures.

Although CERCLA did not state what it meant to arrange for the disposal of a hazardous substance, the Court chose to use the plain meaning of the term. The Court held that "an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance."[2391] As for each party's respective share of liability, based on the *Restatement (Second) of Torts*, the Court held that liability may be apportioned when there is a basis for "determining the contribution of each cause to a single harm."[2392]

The Court held that "the Court of Appeals erred by holding Shell liable as an arranger under CERCLA for the costs of remediating environmental contamination at the Arvin,

[2389] 556 U.S. 599, 129 S. Ct. 1870, 173 L. Ed.2d 812 (2009).

[2390] *Id.,* 556 U.S. at 607, 129 S. Ct. at 1877, 173 L. Ed.2d at 821.

[2391] *Id.*, 556 U.S. at 611, 129 S. Ct. at 1879, 173 L. Ed.2d at 823.

[2392] *Id.,* 556 U.S. at 614, 129 S. Ct. at 1881, 173 L. Ed.2d at 825.

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California facility" but that "the District Court reasonably apportioned the Railroads' share of the site remediation costs at 9%." Because the owner-operator of the Arvin facility Brown & Bryant was insolvent, no liability for the cost of the cleanup was apportioned to it; therefore, the nine percent allocated to the railroads was the only cost not covered by the state.[2393]

Statute

5. Liability under State Law that Incorporates CERCLA

Under the Polanco Act in California "a local redevelopment agency can recover the costs it incurs for contamination remediation within a redevelopment project area from any 'responsible party.'"[2394]

As for the connection between CERCLA and the Polanco Act,

> [t]he Polanco Act defines a "responsible party" as any person described in either: (1) California Health and Safety Code section 25323.5 (which, in turn, refers to persons described in the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at 42 U.S.C. § 9607(a)); or (2) California Water Code section 13304(a).[2395]

Case

6. Railroads not Liable because they were not Owners or Operators nor did they Create or Assist in Creating a Nuisance

In *Redevelopment Agency v. BNSF Railway Company*[2396] BNSF and Union Pacific (the Railroads) at one time maintained railroad tracks on a parcel of land in Stockton, California that was later discovered to have been contaminated by a petroleum spill from a nearby facility. In

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[2393] *Id.,* 556 U.S. at 605, 129 S. Ct. at 1876, 173 L. Ed.2d at 820.

[2394] *Redevelopment Agency of City of Stockton v. BNSF Railroad Co*., 643 F.3d 668, 676 (9th Cir. 2011).

[2395] *Id*. at 677 (*citing* Cal. Health & Safety Code § 33459(h)).

[2396] 643 F.3d 668 (9th Cir. 2011).

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1968, because of highway construction the state of California entered into an agreement with the Railroads' predecessors-in-interest to relocate railroad tracks from the proposed site of an interchange to a nearby state-owned parcel.[2397] When BNSF and Union Pacific acquired an interest of some nature is not clear, but the state did not transfer the land by deed to the Railroads until 1983.[2398] Between 1968 and 1983 the Railroads installed a french drain beneath the roadbed to facilitate drainage.[2399] The french drain acted as a conduit or pathway for petroleum contaminants likely caused by a spill in 1974 from a nearby petroleum facility.[2400]

After the Railroads sold their interest to the Redevelopment Agency of the City of Stockton (Redevelopment Agency), and after the Agency sold a portion to a commercial developer, site excavation in "Area 3" of the property revealed contamination.[2401] The Redevelopment Agency sought to recover from the Railroads the cost of the remediation of the property. On cross-motions for summary judgment, a California district court held that the Railroads were liable. The Ninth Circuit affirmed in part, reversed in part, and remanded.

First, the Railroads were not liable under California nuisance law, even though the Railroads installed the french drain. The district court had held that the Railroads were liable because absent the french drain ("but for" the french drain) there would have been no contamination. However, the Ninth Circuit held:

[2397] *Id*. at 671.

[2398] *Id*.

[2399] *Id*.

[2400] *Id*. at 672.

[2401] *Id*. at 671-672.

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> Because the Railroads' conduct with regard to the specific nuisance condition--the contamination--was not active, affirmative, or knowing, the Railroads simply did not "create or assist in the creation" of the nuisance on the Property. … While the Railroads may have acted affirmatively with regard to the installation of the french drain, that conduct was wholly unrelated to the contamination.[2402]

Second, the Railroads were not liable for nuisance as "possessors of the Property:"

> No evidence has been adduced that the Railroads had actual knowledge of the contamination while they were in possession of the Property. … This is not a case in which, for example, the nuisance was in any way manifest on the surface of the land. … Indeed, the contamination was not discovered by any subsequent owner or possessor of the land, including the Agency itself, until excavation began at the Property some sixteen years after the Railroads sold it.[2403]

Third, the Railroads were not liable under California's Polanco Act:[2404] "Under the Polanco Act, a local redevelopment agency may recover the costs it incurs for the remediation of contamination within an area of a redevelopment project from any 'responsible party.'"[2405] The Railroads were not responsible parties because their involvement was "remote and passive;"[2406] the "french drain merely acted as a conduit for the waste that had been initially released into the environment at the L&M Site."[2407]

Fourth, the Polanco Act imposes liability on persons as described in CERCLA, 42 U.S.C. § 9607(a). CERCLA applies to "'any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed

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[2402] *Id*. at 674.

[2403] *Id*. at 675.

[2404] *See* id. at 677 (*citing* Cal. Health & Safety Code § 33459, *et seq*.).

[2405] *Id*. (citations omitted).

[2406] *Id*. at 678.

[2407] *Id*. at 677 (citations omitted).

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of.'"[2408] The Ninth Circuit agreed with the district court that the "Railroads were not liable under the Polanco Act's CERCLA provision because they were not 'owners' or 'operators' within the meaning of CERCLA."[2409]

It is somewhat unclear what the deed in 1983 transferred to the Railroads because one of the Redevelopment Agency's arguments was that "the Railroads were … 'owners' of the Property within the meaning of CERCLA when the petroleum release occurred because … they held an easement or license to operate trains over the Property pursuant to the Agreement."[2410] In any case, the court held that having an easement did not make the Railroads an owner.[2411] The Redevelopment Agency's argument that the Railroads had an easement may have been based on the aforesaid Agreement that allowed the Railroads to construct and use track on the property "as licensed by the Agreement…."[2412] Nevertheless, the Ninth Circuit agreed with the district court that the Railroads were not owners under CERCLA.[2413]

The Ninth Circuit affirmed that part of the opinion of the district court in favor of the Railroads but reversed the district court on other issues on which the district court had ruled in favor of the Redevelopment Agency.[2414]

[2408] *Id*. at 678 (*quoting* 42 U.S.C. § 9607(a)(2)).

[2409] *Id*.

[2410] *Id*.

[2411] *Id*. at 679.

[2412] *Id*.

[2413] *Id*.

[2414] *Id*. at 680.

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Statutes

7. Kentucky Statute on Contamination Caused by Hazardous Substances

Although no cases were located involving railroads and a Kentucky statute on contamination caused by hazardous materials, the statute applies, *inter alia*, to reportable quantities and to release notification requirements for hazardous substances, pollutants, or contaminants and remedial action to restore the environment, as well as to the liability of a financial institution acquiring property or serving as a fiduciary.[2415]

8. Liability under an Indiana Statute to the Same Extent as under CERCLA

Although no railroad cases were located involving an Indiana statute, the statute provides that except as otherwise provided a person liable under CERCLA is liable to the state of Indiana in the same manner and to the same extent.[2416]

9. Liability under the Pennsylvania Hazardous Sites Cleanup Act

Pennsylvania has its own cleanup statute, the Pennsylvania Hazardous Sites Cleanup Act (HSCA) that provides a remedy for expenses caused by releases of hazardous substances.[2417]

Cases

10. Railroads May Bring Claim for Contribution under CERCLA and HSCA

In *Reading Co. v. City of Philadelphia*[2418] the Reading Company (Reading) sued the city of Philadelphia and other defendants under CERCLA and Pennsylvania's HSCA, *supra*, for

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[2415] Ky. Rev. Stat. Ann. § 224.1-400 (2014).

[2416] Ind. Code Ann. §§ 13-25-4-8(a) and (a)(3)(C) (2014).

[2417] 35 Pa. Cons. Stat. Ann. § 6020.102(8) (2014).

[2418] 823 F. Supp. 1218 (E.D. Pa. 1993).

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> contribution from defendants for their share of the $8.6 million in clean-up costs already incurred by [Reading Co.], as well as any future costs incurred, in removing polychlorinated biphenyls (PCBs) from the viaduct which formerly bore tracks of the Ninth Street branch of the Reading Railroad to the Reading Terminal train shed, the Reading Terminal train shed, the structures associated with that train shed, the structural components of the train shed, and the interstitial materials lying between the floor of the train shed and the ceiling of the Reading Terminal Market.[2419]

The court denied a motion by several defendants for a summary judgment on all claims and held that Reading could maintain its contribution claim.

11. Liability under Washington's Model Toxics Control Act for Environmental Cleanup

The state of Washington's Model Toxics Control Act (MTCA) imposes liability for environmental cleanup.[2420] A case decided in 1999 involving the MTCA is *Harbor Steps Limited Partnership v. Seattle Technical Finishing, Inc*.[2421] in which the current property owner sued its predecessor-in-interest Burlington Northern for cleanup expenses for contaminated land. Burlington Northern "sold the property by real estate contract in 1910, shortly before the contamination occurred."[2422] A Washington appellate court affirmed a superior court decision granting Burlington Northern's motion for summary judgment because "under the MTCA secured creditor exceptions to liability … [Burlington Northern] held only a security interest in the property during the time that it was contaminated."[2423] Although the court stated that

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[2419] *Id.* at 1221-1222.

[2420] Wash. Rev. Code Ann. § 70.105D.040 (2014).

[2421] 93 Wash. App. 792, 970 P.2d 797 (1999).

[2422] *Id.*, 93 Wash. App. at 795, 970 P.2d at 798.

[2423] *Id.,* 93 Wash. App. at 795, 970 P.2d at 798-799.

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summary judgment was proper "irrespective of the 1995 amendments" to the MTCA secured creditor exceptions, summary judgment was "even more justified under the amended statute."[2424]

Articles

12. Survey of States with CERCLA-type Laws

An article entitled "Natural Resource Damages: Recovery under State Law Compared with Federal Laws" observes that "each state has the right to pass its own laws for recovery of natural resource damages;" that CERCLA "does not preempt any state from imposing additional liability or requirements regarding the release of hazardous substances;" and that "CERCLA … does not affect obligations under state law, including common law, with respect to the release of hazardous substances."[2425] The article includes a survey of state "environmental statutes for CERCLA-type laws pertaining to the release of a hazardous substance."[2426]

13. History of EPA's Enforcement of CERCLA

An article in the *Southwestern Law Review* summarizes the enforcement of CERCLA by the EPA from its inception through the first three years of President Barack Obama's presidency.[2427] At the end of the Carter Administration, the EPA created the Hazardous Waste Enforcement Task Force (HWTF) and the DOJ created the Hazardous Waste Section (HWS) to

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[2424] *Id.,* 93 Wash. App. at 795, 970 P.2d at 798-799. The court held that the 1995 amendments were retroactive anyway.

[2425] Lloyd W. Landreth and Kevin M. Ward, "Natural Resource Damages: Recovery Under State Law Compared With Federal Laws," 20 *Envir. L. Rep*. 10134, 10137 (1990), available at: http://elr.info/sites/default/files/articles/20.10134.htm (last accessed March 31, 2015).

[2426] *Id*.

[2427] Joel A. Mintz, "EPA Enforcement of CERCLA: Historical Overview and Recent Trends," 41 *Sw. L. Rev*. 645 (2012).

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clean up hazardous waste.[2428] Within eighteen months, the HWTF and HWS filed fifty-four judicial enforcement actions under the authority of the Resource Construction and Recovery Act (RCRA).[2429] In 1980, Congress enacted CERCLA but the EPA adopted a "non-confrontational approach" to enforcement because the Reagan Administration's position was that the process was too litigious; thus, the PRPs were to be asked to clean up sites voluntarily.[2430] After Congress opened investigations in 1982 into EPA's mismanagement and lack of enforcement, the EPA and DOJ bolstered their enforcement efforts.[2431]

Because the Superfund program lacked funds during President George W. Bush's administration the EPA increased its efforts to recover money from PRPs that was spent on cleanups. The EPA also "began to put greater stress on requiring adequate financial assurance[] in the form of insurance, performance bonds, and letters of credit[] from responsible parties in CERCLA enforcement orders and Consent Decrees" and on identifying companies engaged in fraud to avoid their cleanup responsibilities.[2432]

It is reported that during the Obama Administration the EPA has enunciated clear goals and priorities for enforcement, transparency, and public candor. However, the EPA's current level of resources and staff hinders its abilities to attain its goals.[2433] The author's conclusion is

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[2428] *Id*. at 646.

[2429] *Id*.

[2430] *Id*. at 646-647.

[2431] *Id*. at 648-650.

[2432] *Id*. at 656.

[2433] *Id*. at 657.

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that because of a stagnant economy and the congressional shift toward deregulation the enforcement of CERCLA has an uncertain future.[2434]

14. CERCLA in the Ninth Circuit

A 2012 law review article reviews some significant cases in the Ninth Circuit on environmental law.[2435] Four cases relating to CERCLA are discussed, including *Redevelopment Agency of the City of Stockton v. BNSF Railway Co., supra,* part XX.B.6. The article examines the application of CERCLA to railroads and other entities, such as manufacturers[2436] and maritime bodies,[2437] based on recent cases decided by the Ninth Circuit.[2438]

15. Remedies Available under State Statutory and Common Law for Damages and other Relief for Contaminated Property

In a 2012 law review article Professor Alexandra Klass makes a strong case for the importance of state statutory and common law in claims for contaminated property.[2439] The author notes that in more "modest" cases the "real money" is not "in the cleanup costs one can recover under CERCLA or state superfund laws. Instead, it is in the damages that are potentially recoverable, including punitive damages, under state common law claims such as nuisance,

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[2434] *Id*. at 659.

[2435] "Case Summaries 2011 Ninth Circuit Environmental Review Case Summaries," 42 *Envtl. L.* 793 (2012).

[2436] *Id.* at 831 (*citing Team Enterprises, LLC. v. Western Investment Real Estate Trust*, 647 F.3d 901 (9th Cir. 2011)).

[2437] *Id.* at 820 (*citing City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir. 2011)).

[2438] *Id.* at 827.

[2439] Alexandra B. Klass, "CERCLA, State Law, and Federalism in the 21st Century," 41 *Sw. L. Rev*. 679 (2012).

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negligence, or strict liability."[2440] Notwithstanding the differences between CERCLA and state statutory or common law, the writer argues that "all of the various standards can be applied without resulting in multiple recoveries or interfering with CERCLA or state cleanup goals."[2441]

The article provides an excellent overview of CERCLA, its legislative history, and amendments. The importance of CERCLA cannot be overestimated because the statute is "a vehicle for the federal government, state and local governments, tribes, and private parties to recover costs associated with contamination that occurred in the past, often decades ago, during a time when there were few requirements associated with the disposal of hazardous substances."[2442] Furthermore, "[l]iability under CERCLA is retroactive, joint, and several and is imposed on current as well as past owners and operators of facilities where there has been a release of a hazardous substance, as well as on those who have generated or transported hazardous substances."[2443] Although not summarized in detail here, the article discusses some of CERCLA's significant limitations, one limitation being that "[p]rivate parties are limited to recovering 'response costs' or monies paid toward a cleanup under section 107(a)."[2444]

The author provides a fairly detailed analysis of the claims that may be made under state statutory and common law, such as "superfund-type statutes that allow plaintiffs to recover response costs in a manner similar to that provided under CERCLA."[2445] However, Professor

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[2440] *Id*. at 680.

[2441] *Id*.

[2442] *Id*. at 683.

[2443] Id. at 684-685.

[2444] *Id*. at 685 (*quoting* 42 U.S.C. § 9607(a)(4) (limiting recovery to "response costs")).

[2445] *Id*. at 686.

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Klass emphasizes that relief under state law is much broader in some states, such as Alaska, Minnesota, and Washington, which "allow recovery for personal injury, lost profits, diminution in value to property, attorneys' fees, expenses, or other losses stemming from the contamination of property or harm to human health and the environment."[2446] The article identifies Minnesota's superfund statute, the Minnesota Environmental Response and Liability Act (MERLA), as one such example.[2447] However, in contrast to CERCLA, MERLA

> imposes liability on current owners and operators of facilities only if they owned or operated the facility at the time the hazardous substance was placed or came to be located on the facility, when the hazardous substance was located in or on the facility but before the release, or during the time of the release or threatened release.[2448]

Another Minnesota statute, the Minnesota Environmental Rights Act (MERA) may be used to seek injunctive relief.[2449]

As for claims at common law, the article argues that there are robust remedies available for use in contamination cases, including "claims of trespass, nuisance, negligence, and strict liability to obtain damages, injunctive relief, and punitive damages in addition to or instead of CERCLA and state superfund claims."[2450]

[2446] *Id*.

[2447] *Id*. at 687 (*citing* Minn. Stat. Ann. §§115B.05, 115B.14 (West 2005)).

[2448] *Id*.

[2449] *Id*. at 689.

[2450] *Id*. at 691. *See id*. at 691-699 for a discussion of each common law claim.

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As for preemption of state law by CERCLA, "virtually all courts are in agreement that Congress did not intend to preempt the field of hazardous substance remediation and did intend to leave considerable room for state law."[2451]

Finally, the article includes case studies of claims for contaminated property in *Union Pacific Railroad Co. v. Reilly Industries*[2452] and *Kennedy Building Associates v. Viacom*.[2453]

C. Environmental Requirements for Permits for New Facilities

Statutes and Regulations

1. The Clean Railroads Act

The Clean Railroads Act (CRA) provides in part:

> Each solid waste rail transfer facility shall be subject to and shall comply with all applicable Federal and State requirements … respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar solid waste management facility, as defined in section 1004(29) of the Solid Waste Disposal Act (42 U.S.C. 6903 (29)) that is not owned or operated by or on behalf of a rail carrier, except as provided for in section 10909 of this chapter.[2454]

The term solid waste rail transfer facility

> means the portion of a facility owned or operated by or on behalf of a rail carrier … where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place outside of original shipping containers....[2455]

However, the term does not include

[2451] *Id*. at 699.

[2452] *Id*. at 704-712 (*citing* 215 F.3d 830 (8th Cir. 2000)).

[2453] *Id*. at 712-719 (*citing* 476 F.3d 530 (8th Cir. 2007)).

[2454] 49 U.S.C. § 10908(a) (2014).

[2455] 49 U.S.C. § 10908(e)(1)(H)(i) (2014).

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> the portion of a facility to the extent that activities taking place at such portion are comprised solely of the railroad transportation of solid waste after the solid waste is loaded for shipment on or in a rail car … or a facility where solid waste is solely transferred or transloaded from a tank truck directly to a rail tank car.[2456]

Furthermore, the CRA authorizes the STB under prescribed circumstances to "issue a land-use exemption for a solid waste rail transfer facility that is or is proposed to be operated by or on behalf of a rail carrier" when, for example, "the Board finds that a State, local, or municipal law, regulation, order, or other requirement affecting the siting of such facility unreasonably burdens the interstate transportation of solid waste by railroad, [or] discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility…."[2457]

Section 10909(b) sets forth the procedures that govern the submission and review of applications for land-use exemptions for a solid waste rail transfer facility. The CRA provides that "if the Board grants a land-use exemption to a solid waste rail transfer facility, all State laws, regulations, orders, or other requirements affecting the siting of a facility are preempted with regard to that facility. An exemption may require compliance with such State laws, regulations, orders, or other requirements."[2458]

2. Requirement for Notice of Intent to Apply for a Land-Use-Exemption Permit

A solid waste facility or railroad that owns a facility must first submit a notice of intent to the STB to file an application for a land-use-exemption permit.[2459] The applicant is required to

[2456] 49 U.S.C. §§ 10908(e)(1)(H)(ii)(I) and (II) (2014).

[2457] 49 U.S.C. § 10909(a)(1) (2014) (some provisions omitted).

[2458] 49 U.S.C. § 10909(f) (2014).

[2459] 49 C.F.R. § 1155.20(a) (2014).

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submit an environmental or historical report forty-five days prior to filing an application.[2460] The Office of Environmental Assessment (OEA) is authorized to reject any report that it finds to be inadequate.[2461] If the applicant or STB hires a third party consultant, and the OEA approves the consultant's work in preparing an EIS, the normal requirements for environmental reporting are waived.[2462] In fact, "[t]he Board strongly encourages applicants to use third-party contractors to assist [the] OEA in preparing the appropriate environmental documentation in land-use-exemption-permit proceedings."[2463]

3. Board Determinations on an Exemption Permit

Pursuant to 49 U.S.C. § 10909 and the regulations thereto "[t]he Board will issue a land-use-exemption permit only if it determines that the facility at the existing or proposed location would not pose an unreasonable risk to public health, safety, or the environment" and meets or qualifies for the other statutory requirements and exemptions.[2464]

Case

4. Preemption of State Regulations by the Interstate Commerce Commission Termination Act

In *New York Susquehanna and Western Railroad Corp. v. Jackson*[2465] the issue was whether the Interstate Commerce Commission Termination Act (ICCTA) preempted state

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[2460] 49 C.F.R. § 1155.20(c) (2014).

[2461] *Id*.

[2462] 49 C.F.R. §§ 1155.20(a) and (c) (2014).

[2463] 49 C.F.R. § 1155.24(c) (2014).

[2464] 49 U.S.C. § 10901 (2014). *See also*, 49 U.S.C. § 10901(2) (2014) and 49 C.F. R. §§ 1155.26(b)(1)-(3) (2014).

[2465] 500 F.3d 238 (3d Cir. 2007).

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regulations for the practice of transloading solid waste from a truck to a railroad car and related facilities. The case addresses the requirements for new rail facilities that are constructed to store solid waste so that they will meet environmental standards. The New York Susquehanna and Western Railroad Corp. (NYSW) argued that because federal regulations preempted the state regulations the railroad did not have to follow state regulations.[2466]

The NYSW's activities qualified as "transportation by rail carrier" and came within the ICCTA;[2467] however, a "state law that affects rail carriage survives preemption if it does not discriminate against rail carriage and does not unreasonably burden rail carriage."[2468] The Third Circuit emphasized that local regulations may not "be so open-ended as to all but ensure delay and disagreement[] or actually be used unreasonably to delay or interfere with rail carriage."[2469] The court further explained that "some regulations … give too much discretion to survive a facial challenge because they invite delay. In addition, even a regulation that is definite on its face may be challenged as-applied if it is enforced unreasonably or "used as a pretext to carry out a policy of delay or interference."[2470] If challenged, such regulations may be preempted.[2471] The court vacated an injunction against New Jersey that had prevented the state from enforcing the

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[2466] *Id*. at 246.

[2467] *Id*. at 257.

[2468] *Id*. at 254.

[2469] *Id*.

[2470] *Id*. at 254-255.

[2471] *Id*.

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regulations and remanded the case for further fact-finding and a consideration of each individual regulation.[2472]

Articles

5. Railroad Deregulation and Waste Transfer Stations and the Presumption against Preemption

An article in the *Ecology Law Quarterly* states that "[u]nregulated railroad transfer stations have been opening and operating with impunity over the last few years in densely populated areas on the East and West Coasts."[2473] The article argues that the "[p]reemption doctrine is potentially a great obstacle to progressive state policies."[2474] The article further argues that "the rules of some states are more protective than proposed or existing federal rules" and that "citizens are left without any protections because no federal agency has assumed responsibility for overseeing environmental compliance at transfer facilities once state and local regulations are preempted."[2475]

The author uses railroad facilities that process solid waste as a way to explore the preemption doctrine. The author argues principally, first, that

> [a] confluence of circumstances has created a regulatory gap: solid waste transfer stations are regulated solely by the states, and the federal government has no regulatory apparatus to oversee railroads' operation of such facilities. Railroads claim they are exempt from many types of state regulation because of Congress's unrelated efforts to deregulate railroad economics in the Interstate Commerce Commission Termination Act of 1995 (ICCTA). Statutory ambiguity regarding the scope of preemption under ICCTA has led to a split between a broad view of

[2472] *Id*. at 257.

[2473] Carter H. Strickland Jr., "Revitalizing the Presumption against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations," 34 *Ecology L.Q*. 1147, 1150 (2007).

[2474] *Id*. at 1151.

[2475] *Id*. at 1150, 1151.

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ICCTA preemption in the Second, Ninth, and District of Columbia Circuits and a narrow view of preemption in the Third, Sixth, Eighth, and Eleventh Circuits.[2476]

Second, the author argues that

> [a]s a result, in cases involving railroad waste stations, lower courts have found state solid waste laws preempted by ICCTA. In their analyses, the courts have ignored the nuances of the statutory text and congressional intent and have failed to apply any presumption against preemption of traditional state regulation of solid waste. The courts have also failed to weigh the fact that their decisions may leave the public without any effective recourse for public health and environmental problems. Instead, the courts have relied on a general interest in uniformity and a general federal interest in protecting railroads as a quintessential form of interstate commerce.[2477]

According to the author, "[d]espite the obvious risks to public health and the environment from the deplorable conditions at unregulated railroad solid waste facilities, federal courts have preempted state solid waste laws under ICCTA. The absurd result of these decisions is that truck-to-truck and truck-to-barge transfer stations remain highly regulated, but truck-to-rail transfer stations are completely unregulated."[2478] Moreover, "none of the rail waste station decisions apply or discuss the presumption against preemption, which is intended to protect against overly broad displacement of sovereign state interests."[2479] The article argues for the recasting of the preemption doctrine to protect "against overly facile displacement of state law."[2480]

Finally, in addition to the courts, the article places part of the responsibility on the STB for the regulatory gap that the author perceives to exist. The article states that the STB asserts

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[2476] *Id*. at 1155-1156 (footnotes omitted).

[2477] *Id*. at 1156.

[2478] *Id*. at 1172.

[2479] *Id*. at 1179.

[2480] *Id*. at 1203.

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"that any 'state or local permitting process for prior approval of [a] project, or of any aspect of it related to interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted.'"[2481] The article argues that the STB's policy undermines state permit programs and thus opens up regulatory gaps.[2482]

6. Whether "Little NEPA" Laws and State and Local Permitting Requirements are Preempted by the ICCTA

A Report published by the Center for Climate Change at Columbia Law School includes an analysis of the effect of NEPA and other federal environmental laws on federal, state and local permitting requirements in the context of new railroad infrastructure for the movement of coal to ports for export.[2483] The Report was prompted in part because "the dominant method for transporting coal within the United States is rail" and that the expected "major increase in the volume of U.S. coal exports will require improvements to the infrastructure used to move coal from mines to ports.[2484]

The Report analyzes the STB's authority**,** summarized herein in part XXXIX of the Report, under the ICCTA enacted in 1995. The Report states that the Ninth Circuit held in 1998 in *Auburn v. United States*[2485] that "state environmental analysis laws may not be applied to

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[2481] *Id*. at 1169-1170 (footnotes omitted)

[2482] *Id*.

[2483] Columbia Law School, Center for Climate Change Law, Report on "Carbon Offshoring: The Legal and Regulatory Framework for U.S. Coal Exports" (July 2011), available at: http://powerpastcoal.org/wp-content/uploads/2011/09/ColumbiaLawSchool_coalexportpolicy11.pdf (last accessed March 31, 2015), hereinafter referred to as "U.S. Coal Legal and Regulatory Framework."

[2484] *Id*. at 3.

[2485] 154 F.3d 1025 (9th Cir. 1998).

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railroad projects."[2486] However, according to the Report, the 2008 Clean Railroads Act "overturned the Ninth Circuit's broad reading of ICCTA preemption in *Auburn*…."[2487] Nevertheless, "significant uncertainty remains in the absence of future litigation to determine the precise contours of the relationship between the ICCTA and the Clean Railroads Act on this question."[2488] The Report points out that under the Clean Railroads Act "'unreasonably burdensome' state laws remain preempted by the ICCTA."[2489] The Report observes that in 2010 in *American Railroads v. South Coast Air Quality Management District*[2490] "the Ninth Circuit struck down a local air pollution law regulating idling locomotives because it applied only to railroads."[2491]

The Report states that although

> most rail improvements supporting the expansion of coal exports do not require an STB permit, the STB permitting process for the extension of new lines, where they are needed, provides perhaps the best avenue for influencing coal export plans. Although the standards used by the STB under its organic statute tend to be amenable to railroads, the grant by the agency of a permit triggers environmental analysis under NEPA, providing citizens with the opportunity to engage in the decision making processes regarding rail infrastructure.[2492]

In addition,

[2486] U.S. Coal Legal and Regulatory Framework, *supra* note 2483, at 6.

[2487] *Id*. at 7.

[2488] *Id*.

[2489] *Id*.

[2490] 622 F.3d 1094, 1097-98 (9th Cir. 2010).

[2491] U.S. Coal Legal and Regulatory Framework, *supra* note 2483, at 7.

[2492] *Id*. at 8.

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> the grant by the [STB] of a permit triggers environmental analysis under NEPA, providing citizens with the opportunity to engage in the decision making processes regarding rail infrastructure, as well as … [under] other impact analysis statutes like the National Historic Preservation Act (NHPA).[2493]

The Report further explains that although the Clean Air Act applies to railroads' violations of the Act's emission standards the Act only applies after the commencement of operations and not to plans for the construction of new rail lines.[2494]

As for the effect of NEPA and other environmental laws on state and local permitting regulations that apply to railroad plans to construct new lines and infrastructure, the Report argues that "most state and local regulations directly targeting railroads or imposing truly burdensome costs on rail development likely will be preempted by the ICCTA."[2495]

The Report states that state environmental laws that apply generally to railroads are not preempted as "long as a given restriction does not unreasonably burden rail traffic or specifically discriminate against rail" but states further that "few state environmental laws apply specifically to the expansion of rail infrastructure for coal exports."[2496]

According to the Report, "little NEPA" laws,

> while not targeted at or unreasonably burdensome for railroads, [they] impose significant procedural requirements on the construction of new rail infrastructure. Of course, since the ICCTA preempts state permitting of railroads, many projects will not qualify for state environmental analysis. Moreover, little NEPAs cannot in and of themselves be used to impose state permitting requirements on railroads. However, state environmental review may be triggered by any separate state action necessary for railroad infrastructure projects. For example, little NEPA

[2493] *Id*.

[2494] *Id*. at 10 (*citing* 42 U.S.C. §§ 7401-7671q (2006)).

[2495] *Id*. at 13.

[2496] *Id*. at 14.

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requirements will apply when a state land management agency grants an easement for a railroad to cross state-owned land.[2497]

D. Transportation of Hazardous Materials

Statutes and Regulations

1. Hazardous Materials Transportation Act

The Hazardous Materials Transportation Act (HMTA) authorizes the Secretary of Transportation to issue regulations "for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce."[2498] The Secretary is authorized to "designate material … or a group or class of material as hazardous when … transporting the material … in a particular amount and form may pose an unreasonable risk to health and safety or property."[2499] The regulations apply, for example, to any person who transports hazardous material in commerce; causes hazardous material to be transported in commerce; or prepares or accepts hazardous material for transportation in commerce; or is otherwise responsible for the safety of transporting hazardous material in commerce.[2500] The regulations "govern safety aspects, including security, of the transportation of hazardous material" that the Secretary considers appropriate.[2501]

[2497] *Id*. at 14-15 (footnotes omitted).

[2498] 49 U.S.C. § 5103(b)(1) (2014).

[2499] 49 U.S.C. § 5103(a) (2014) (*e.g*., explosive, radioactive material, infectious substance, flammable or combustible liquid, solid, or gas, toxic, oxidizing, or corrosive material, and compressed gas).

[2500] 49 U.S.C. §§ 5103(b)(1)(A)(i)-(vii) (2014) (some provisions omitted).

[2501] 49 U.S.C. § 5103(b)(1)(B) (2014).

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2. Regulations Implementing the Hazardous Materials Transportation Act

The FRA has implemented regulations to ensure the safety of the transportation by rail of hazardous materials. The safety programs are directed at reducing accidents, casualties, loss of property, and threats to the human environment.[2502] The regulations are intended to ensure that the transportation of hazardous material is prohibited unless certain standards are met.[2503] The regulations apply to persons who perform pre-transportation or transportation services, including the design, manufacture or inspection of packages that are represented as qualified for the use of hazardous materials.

The minimum criteria that must be considered by rail carriers as required by 49 CFR § 172.820 include a thorough analysis of the hazardous materials,[2504] the routes to be used,[2505] a description of the threats identified, and vulnerabilities and mitigation measures to address the vulnerabilities.[2506]

Cases

3. Tension between Environmental Requirements and the Fourth Amendment

In *Wisconsin Central Limited v. Gottlieb*[2507] the Wisconsin Court of Appeals decided whether the Wisconsin Department of Transportation (DOT) had to have a search warrant to collect soil samples for a study on changing the path of a railroad track. The case arose because

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[2502] *See* 49 C.F.R. §§ 225.1-225.3 (2014).

[2503] 49 C.F.R. §§ 172.1-172.3 (2014).

[2504] 49 C.F.R. § 172.820(a)(b) (2014).

[2505] 49 C.F.R. § 172.820(c) (2014).

[2506] 49 C.F.R. § 172.820(d) (2014).

[2507] 832 N.W.2d 359 (Wis. Ct. App. 2013).

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the DOT took soil samples from railroad property when exercising its due diligence in respect to environmental requirements that were necessary prior to road construction.[2508] The Wisconsin Central Limited (WCL) had agreed to the construction of a new overpass as part of a settlement agreement with the village of North Fond du Lac. The DOT took soil samples in preparation for the project; however, WCL argued that the DOT conducted an unreasonable search and seizure.[2509]

Although WCL had revoked its permission to enter its property, the Wisconsin Court of Appeals held that there was no illegal search and seizure because WCL had co-sponsored and consented to the investigation of hazardous materials. The court held that the samples were required to complete the inspection required by the study and to complete the design phase of the project.[2510] By consenting to the project WCL impliedly allowed the taking of soil samples required for the project's design; thus, the court affirmed a lower court decision denying the railroad injunctive relief.

4. Federal Railroad Safety Act and Preemption of Local Law

The issue in *CSX Transportation, Inc. v. Williams*[2511] was whether the Federal Railroad Safety Act (FRSA) preempted the District of Columbia's Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 (the D.C. Act) that banned all shipments of certain hazardous materials, including explosives, flammable gases, poisonous gases and other poisonous materials by rail or truck within 2.2 miles of the United States Capitol without a

[2508] *Id*. at 360.

[2509] *Id*.

[2510] *Id*. at 365.

[2511] 406 F.3d 667 (D.C. Cir. 2005).

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permit from the District of Columbia Department of Transportation (DCDOT).[2512] The District of Columbia Circuit held that the FRSA preempted the D.C. Act because the city's prohibition would have a detrimental impact on CSX's business.[2513] A concurring opinion argued that the HMTA also preempted the D.C. Act.[2514] In reversing and remanding the case, because CSX demonstrated that it would suffer irreparable harm, the court directed the district court to grant CSX a preliminary injunction.

E. National Environmental Policy Act and Requirements

Statutes and Regulations

1. National Environmental Policy Act

Congress enacted the National Environmental Policy Act (NEPA) in 1969, which President Nixon signed into law on January 1, 1970.[2515] NEPA describes when an environmental impact statement (EIS) is required and the information that it must contain, mandates that agencies cooperate in complying with the Act,[2516] and requires that administrative procedures conform to national environmental policy.[2517]

Regulations promulgated by the Council of Environmental Quality (CEQ) for NEPA are found in 40 C.F.R. parts 1500 to 1509. For example, part 1500 sets forth NEPA's purpose, policy, and mandate. Part 1501 applies to NEPA and agency planning, such as when to prepare

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[2512] *Id.* at 669.

[2513] *Id.* at 673.

[2514] *Id.* at 674.

[2515] 42 U.S.C. § 4321 (2014).

[2516] 42 U.S.C. § 4332(C) (2014).

[2517] 42 U.S.C. § 4332 (2014).

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an environmental assessment (EA);[2518] whether to prepare an EIS;[2519] who are cooperating agencies;[2520] and applicable time limits.[2521] Part 1502 contains the requirements for an EIS, including major federal actions that necessitate the preparation of an EIS;[2522] preparation of draft, final, and supplemental statements;[2523] purpose and need;[2524] and alternatives, including the proposed action.[2525]

2. Department of Transportation

The Department of Transportation (DOT) has its own statutory requirements applicable to certain transportation projects that have a "de minimis" impact on the environment.[2526] The Secretary of Transportation has a duty to cooperate with other government agencies in the development of its transportation plans to ensure that the "plans and programs … include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities."[2527] Under 49 U.S.C. § 303, which applies to parks, recreation areas, wildlife or

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[2518] 40 C.F.R. § 1501.3 (2014).

[2519] 40 C.F.R. § 1501.4 (2014).

[2520] 40 C.F.R. § 1501.6 (2014).

[2521] 40 C.F.R. § 1501.8 (2014).

[2522] 40 C.F.R. § 1502.4 (2014).

[2523] 40 C.F.R. § 1502.9 (2014).

[2524] 40 C.F.R. § 1502.13 (2014).

[2525] 40 C.F.R. § 1502.14 (2014).

[2526] 49 U.S.C. § 303(d) (2014).

[2527] 49 U.S.C. § 303(b) (2014). For example, the DOT must cooperate with the Department of Agriculture, the Department of the Interior, the Department of Housing and Urban Development and with the states. 23 C.F.R. § 774.5(a) (2014).

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waterfowl refuges, and historic sites, the Secretary may approve a project requiring the use of public land only if there is no alternative to using the land and there are plans in place to minimize harm to the site and wildlife. If certain criteria are met, the Secretary also is authorized to make a finding that a transportation program or project will have a *de minimis* impact on historic sites or parks, recreation areas, wildlife, or waterfowl refuges.[2528]

The DOT Secretary is a member of the Cabinet Committee for the Environment that is tasked with securing the cooperation of federal, state, and local governments and private organizations.[2529]

3. Federal Railroad Administration

The FRA and the STB are subject to NEPA because both engage in "major federal actions affecting the human environment" and thus are required to have environmental assessments or environmental impact statements as appropriate.[2530] An applicant for FRA financial assistance or another major federal action subject to the jurisdiction of the FRA "may be requested to perform an environmental assessment of the proposed FRA action and to submit documentation of that assessment with the application" and also may be requested "to submit a proposed draft EIS or proposed [Finding of No Significant Impact] in connection with the application…."[2531]

[2528] 49 U.S.C. § 303(d) (2014).

[2529] 42 U.S.C. § 4332(2)(c) (2014).

[2530] 42 U.S.C. § 4332 (2014).

[2531] United States Department of Transportation, Federal Railroad Administration, Procedures for Considering Environmental Impacts, 64 *Fed. Reg*. 28545, 28549 (May 26 1999), available at: http://www.gpo.gov/fdsys/pkg/FR-1999-05-26/pdf/99-13262.pdf (last accessed March 31, 2015), hereinafter referred to as "Procedures for Considering Environmental Impacts."

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The FRA has developed procedures to comply with and expand on the CEQ's regulations.[2532] The FRA's regulations state in part that when an applicant requests "substitute service assistance, rail facility construction assistance, or rehabilitation or improvement assistance" (except for exempt rehabilitation or improvement assistance), the applicant must prepare an EA.[2533] The EA is used to determine whether the future use of the property will significantly affect the quality of the human environment and/or to provide sufficient documentation to enable the Administrator to determine that the project satisfies certain specified criteria.[2534]

The FRA recommends that prior to submitting an application an applicant seek the Administrator's advice regarding the "form and substance of the assessment for the project under consideration."[2535] The FRA will decide whether the proposed action is a major federal action and whether more environmental documents are needed.[2536] After evaluating the documents, the FRA will decide whether to issue a Finding of No Significant Impact (FONSI) (*see* section E.6.d); whether the action qualifies for a categorical exclusion or CE (*see* section E.6.c); or whether an EIS is required (*see* section E.6.e.).[2537] A draft EIS is to be submitted when an EA "concludes that the future use significantly affects the quality of the human environment."[2538]

[2532] 40 C.F.R. §§ 1500.3, 1505.1, 1507.3, and 1502.2 (2014).

[2533] 49 C.F.R. § 266.19(b)(1) (2014).

[2534] *Id*.

[2535] *Id*.

[2536] 40 C.F.R. § 1508.9 (2014); *see* Procedures for Considering Environmental Impacts, *supra* note 2531.

[2537] Procedures for Considering Environmental Impacts, *supra* note 2531, at 28553.

[2538] 49 C.F.R. §§ 266.19(b)(1)(ii) and (b)(2) (2014).

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When an EIS is required the FRA's Program Office will commence the preparation of the EIS with the Office of Chief Counsel.[2539] The Draft EIS may be released after the Administrator's approval.[2540] Once released, the period for public notice and comment is to be at least forty-five days.[2541] An EIS becomes final on its approval by the Administrator.[2542]

5. Surface Transportation Board

The STB is responsible for overseeing the construction, acquisition, mergers, or abandonment of railroads, whereas the FRA is responsible for the safety of railroads. In 2002, the STB and FRA issued final rules that allow the agencies to coordinate the integration of safety issues related to a consolidation or merger of railroads. Because each agency has its own regulations that must be satisfied, the rules will facilitate the agencies' coordination of their responsibilities.[2543]

The STB is responsible for ensuring that railroads meet the requirements of NEPA for actions that are subject to NEPA and to the Board's jurisdiction.[2544] The STB has exclusive jurisdiction over transportation by rail carriers; remedies with respect to rates, classifications,

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[2539] Procedures for Considering Environmental Impacts, *supra* note 2531, at 28553.

[2540] *Id*.

[2541] *Id*.

[2542] *Id*.

[2543] *See* Final Rule "Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, and Acquisitions of Control," 67 *Fed. Reg*. 11604 (Mar. 15, 2002); 49 C.F.R. parts 244 and 1106. *See also*, Progressive Railroading, STB, FRA Team up to Tame Merging-Railroad Integration, available at http://www.progressiverailroading.com/rail_industry_trends/news/STB-FRA-team-up-to-tame-mergingrailroad-integration--5718 (last accessed March 31, 2015).

[2544] 42 U.S.C. § 4332 (2014).

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rules, practices, routes, services, and facilities; and 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…."[2545]

The STB has promulgated regulations to assure that its decision-making processes comply with NEPA.[2546] The regulations provide in part that

> [t]he Chief of the Section of Environmental Analysis is responsible for the preparation of documents under these rules and is delegated the authority to provide interpretations of the Board's NEPA process, to render initial decisions on requests for waiver or modification of any of these rules for individual proceedings, and to recommend rejection of environmental reports not in compliance with these rules."[2547]

In the absence of the STB's approval, railroad companies may not proceed with certain proposed activities such as construction or mergers with other companies.[2548] Section 11324(c) states that "[t]he Board shall approve and authorize a transaction under this section when it finds [that] the transaction is consistent with the public interest."[2549] To satisfy the Board's obligations under NEPA, after the notice of an application is published in the *Federal Register* for public notice and comment,[2550] the Board must take environmental considerations into account; "address[] concerns raised by the parties, including federal, state, and local government

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[2545] 49 U.S.C. § 10501(b) (2014).

[2546] 49 C.F.R. §§ 1105.1 and 1105.2 (2014).

[2547] 49 C.F.R. § 1105.2 (2014).

[2548] 49 U.S.C. §§ 10901 and 11324 (2014).

[2549] 49 U.S.C. § 11324(c) (2014).

[2550] 49 U.S.C. § 11325(a) (2014).

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entities;"[2551] and encourage railroads to make private agreements with local communities to address specific local concerns.[2552] The Board emphasizes public participation "to ensure a fully developed record on the effects of a proposed railroad consolidation."[2553] The Board is required to consider the public's comments in its decision-making process.[2554] The STB may require that an applicant comply with certain conditions, including environmental ones, that the STB finds are necessary and in the public interest.[2555]

6. Railroads, Environmental Documents, and Findings

a. Environmental Reports

An applicant for an action identified in 49 C.F.R. §§ 1105.6(a) and (b) (that is, a proposed action that may require an EIS or an EA, respectively) must submit, except in the situations noted in the regulations not discussed herein, an Environmental Report (ER) on the proposed action containing the information required by § 1105.7(e)(1)-(10).[2556]

[2551] 49 C.F.R. § 1180.1(f)(1) (2014).

[2552] 49 C.F.R. §1180.1(f)(2) (2014).

[2553] 49 C.F.R. §1180.1(m) (2014).

[2554] 49 U.S.C. § 11324(a) (2014) (stating that "[t]he Board shall hold a public hearing unless the Board determines that a public hearing is not necessary in the public interest").

[2555] 49 U.S.C. § 10901(c) (2014). Subpart (c) provides:

> The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

[2556] 49 C.F.R. § 1105(7)(a) (2014).

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The ER must describe the proposed action and any reasonable alternatives; describe the effects of the proposed action on regional or local transportation systems and patterns; estimate the amount of traffic that will be diverted; provide details on land and whether the proposed action is consistent with existing land use plans; describe the effect of the proposed action on the transportation of energy resources and whether (and why) the proposed action will result in an increase or decrease in overall energy efficiency; and provide details on any hazardous materials that are expected to be transported.[2557] Additional information is required for proposed rail construction.[2558]

b. Environmental Assessment

The STB and FRA may require either an EIS or an EA but an EA must be prepared prior to all major FRA actions.[2559] An EA is for the purpose of providing sufficient evidence and analysis for determining whether to require an EIS or to issue a FONSI. An EA assists an agency in complying with NEPA when an EIS is not required, as well as in facilitating the preparation of an EIS when one is necessary.[2560] An EA "[s]hall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."[2561]

[2557] 49 C.F.R. §§ 1105.7(e)(1)-(10) and (f) (2014).

[2558] 49 C.F.R. §§ 1105.7(e)(11)(i)-(vii) (2014).

[2559] 40 C.F.R. § 1508.4 (2014).

[2560] 40 C.F.R. § 1508.9(a) (1)-(3) (2014).

[2561] 40 C.F.R. § 1508.9(b) (2014). *See* Environmental Protection Agency, National Environmental Policy Act, available at: http://www.epa.gov/compliance/basics/nepa.html (last accessed March 31, 2015).

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With some exceptions, an EA normally is prepared for any of the following as well as other proposed actions specified in the regulations: construction of connecting track within existing rail rights-of-way or on land owned by the connecting railroads; abandonment, with one exception noted, of a rail line; discontinuance, with some exceptions noted, of passenger train service or freight service; an acquisition, lease, or operation under 49 U.S.C. §§ 10901 or 10910, or consolidation, merger, or acquisition of control under 49 U.S.C. § 11343 when the action will result in either operational changes exceeding certain thresholds as noted; or an action that would normally require environmental documentation, such as construction or an abandonment.[2562]

As is the case of an EIS, an EA is made available for public comment and is announced by a notice in the *Federal Register*.[2563] Members of the public generally have thirty days to submit comments on the EA.[2564]

c. Categorical Exclusions

A proposed action may qualify for a categorical exclusion (CE), meaning that an EA or an EIS is not required.[2565] CEs are actions that "do not individually or cumulatively have a significant effect on the human environment and [that] have been found to have no such effect in procedures adopted by a Federal agency in [the] implementation of these regulations…."[2566] However, "[a]n agency may decide in its procedures or otherwise, to prepare environmental

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[2562] 49 C.F.R. §§ 1105.6(a) and (b)(1)-(4) (2014).

[2563] 49 C.F.R. § 1105.10(b) (2014).

[2564] *Id.*

[2565] 40 C.F.R. § 1508.4 (2014).

[2566] *Id.*

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assessments for the reasons stated in [40 C.F.R. § 1508.9] even though it is not required to do so."[2567]

The FRA has listed approximately twenty categories of actions that are categorically excluded from further environmental procedures because they do not individually or cumulatively have a significant effect on the human environment.[2568] For example, actions that are categorically excluded include financial assistance or procurements for planning or design activities that do not commit the FRA or its applicants to a particular course of action affecting the environment.[2569] There are more actions that are excluded by the CEQ regulations, including grants to Amtrak, enforcement of safety regulations, and issuance of emergency orders.[2570] Finally, there are actions that may qualify for a CE that are not already identified by the FRA when an action satisfies approximately seven criteria. One criterion is when a proposed action is one that "is not judged to be environmentally controversial from the point of view of people living within the environment affected by the action or controversial with respect to the availability of adequate relocation housing."[2571]

d. A Finding of No Significant Impact

The FRA's procedures for considering environmental impacts also include a Finding of no Significant Impact or FONSI. Under the FRA's procedures "[a] FONSI shall be prepared for all major FRA actions for which an environmental impact statement is not required[] as

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[2567] *Id*.

[2568] 49 C.F.R. § 266.19 (2014); Procedures for Considering Environmental Impacts," *supra* note 2531.

[2569] Procedures for Considering Environmental Impacts, *supra* note 2531, at 28547-28548.

[2570] *Id*. at 28548.

[2571] *Id*.

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determined in accordance with section 10(e) of these Procedures."[2572] Furthermore, "[n]o decision shall be made at any level of authority of the FRA to commit the FRA or its resources to a major FRA action for which a FONSI must be prepared until a FONSI covering the action has been prepared and approved in accordance with this section."[2573]

e. Environmental Impact Statement

As stated, NEPA requires that all federal agencies submit a "detailed statement" on the environmental impact of any proposed major federal action.[2574] For example, an EIS normally will be prepared for proposals for rail construction other than for the construction of connecting track within existing rail rights-of-way or on land owned by the connecting railroads.[2575]

If an EIS is determined to be required it must address the environmental impact of the proposed action; any adverse environmental effects that cannot be avoided if the proposal is implemented; alternatives to the proposed action; "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;" and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[2576]

An EIS is to be made available for public notice and comment. Thus, when an EIS "is prepared for a proposed action[] the Board will publish in the Federal Register a notice of its

[2572] *Id*. at 28551.

[2573] *Id*.

[2574] 42 U.S.C. § 4332(2)(C) (2014).

[2575] 49 C.F.R. § 1105.6(a) (2014).

[2576] National Environmental Policy Act, § 102(c); 42 U.S.C. §§ 4332(C)(i)-(v) (2014).

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intent to prepare an EIS … and a request for written comments on the scope of the EIS."[2577] Part of the scoping process for an EIS may include meetings open to the public and other interested parties.[2578] Once the draft EIS is available, it generally will be made available for forty-five days for written comments.[2579] If there is to be an oral hearing concerning the merits of a proposal, an EIS generally will be made public fifteen days prior to the hearing.[2580]

Cases

6. Judicial Review of Petitions Challenging an STB Decision

In *Alaska Survival v. Surface Transportation Board*[2581] the Ninth Circuit considered whether environmental requirements under NEPA and the provisions of the Interstate Commerce Commission Termination Act (ICCTA) governing railroad expansions allow the court to review a decision of the STB. The court interpreted the STB's authority to exempt a railroad from the full licensing provisions of 49 U.S.C. § 10901 that are required to authorize the construction and operation of a railroad line. In making its decision on an exemption the STB must balance public need with NEPA compliance.[2582] The STB may grant an exemption if the project is either of limited scope or if full statutory proceedings are not necessary to protect shippers from an abuse of market power. The STB has discretion to determine the public needs that the Board will

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[2577] 49 C.F.R. § 1105.10(a)(2) (2014).

[2578] *Id*.

[2579] 49 C.F.R. § 1105.10(a)(4) (2014).

[2580] *Id*.

[2581] 705 F.3d 1073 (9th Cir. 2013).

[2582] *Id*. at 1076.

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consider.[2583] In *Alaska Survival* the petitioners alleged that the expansion would damage wetlands and habitats for “wolves, bear, foxes, salmon, and other wildlife.”[2584] The STB granted the exemption after it determined there was sufficient public need and procedures to mitigate environmental impacts.[2585]

The court ruled that the STB considered sufficient alternatives to satisfy the public and private objectives for the project and to make an informed decision on whether to grant an exemption.[2586] An EIS does not need “to consider an infinite range of alternatives, only reasonable or feasible ones…. But failure to examine a reasonable alternative renders an EIS inadequate.”[2587] The court held that the STB’s measures and procedures were sufficient under the ICCTA. There was no error under NEPA because the purpose and need statement was adequate.[2588] The STB considered all viable and reasonable alternatives, and the EIS contained a detailed and thoughtful discussion of the environmental impacts.[2589] Thus, there was no violation of the ICCTA, NEPA, or for that matter the Administrative Procedure Act.[2590] The court denied the petition for review.

[2583] *Id*. at 1080.

[2584] *Id*. at 1076.

[2585] *Id*. at 1077.

[2586] *Id*.

[2587] *Id*. at 1087.

[2588] *Id*. at 1089.

[2589] *Id*.

[2590] *Id*. at 1088-1089.

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7. Reasonable Basis for a Finding of no Significant Impact

In *Township of Belleville v. Federal Transit Administration*[2591] the town challenged a FONSI for New Jersey Transit (NJT) that as a result authorized federal funds for the design and construction of a project known as the Newark City Subway Extension. The issue was whether the defendants met the required federal statutory provisions for a FONSI. The defendants, who included the executive director of NJT, argued that the proposed construction project was categorically excluded. They noted that actions that do not have significant environmental effects are categorized as "CLASS II" and as such are categorically excluded from the requirement for an EIS or EA. Class II projects include those for the updating or maintaining of existing structures rather than for the building of entirely new sections of track or facilities.[2592] Thus, the defendants argued that the project should have been classified as a CE that required neither an EIS nor an EA.[2593]

First, the court held the FTA acted reasonably in requiring an EA to be prepared because "[t]he base facility is to be constructed on a site zoned for industrial purposes" and because "[t]hat portion of the project falls squarely within the categorical exception."[2594] Although the upgrading of the Conrail track usually would "fall within the categorical exclusion … a question remained as to whether the environmental impacts due to the extension of subway service and increase in activity on the tracks would be significant."[2595] The court held that the FTA correctly

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[2591] 30 F. Supp.2d 782, 785 (D. N.J. 1998).

[2592] *Id*. at 797-799.

[2593] *Id*. at 797.

[2594] *Id*. at 798.

[2595] *Id*.

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classified the project as a Class III project, one for which "the significance of the environmental impact is not clearly established," and required an EA to determine which environmental document was required.[2596]

Second, the plaintiff argued that because the project presented "a substantial possibility of significant impacts" the "FTA acted unreasonably in issuing a FONSI for the project based on the EA[] without requiring an EIS."[2597] The court held, however, that "the EA submitted to the FTA provides a detailed analysis of the traffic impacts of the project" and that "the EA's conclusion that the project will not cause significant environmental impacts in terms of traffic" was reasonable.[2598] The court made identical findings concerning other impacts of the project, including any impact on pedestrian safety.[2599] The court held that the FTA acted reasonably in issuing a FONSI and granted the defendants' motions for a summary judgment.

8. Requirement that the STB take a Hard Look when Considering Environmental Impacts

In *Northern Plains Resource Council v. Surface Transportation Board*[2600] the Ninth Circuit considered the issue of whether a railroad company's applications to build new track were properly approved based on NEPA and public necessity and convenience. The STB had approved the railroad's applications to expand its lines through southeastern Montana, but the petitioners challenged the STB's approval on environmental and public convenience and

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[2596] *Id*.

[2597] *Id*. at 799-800.

[2598] *Id*. at 801.

[2599] *Id*. at 803.

[2600] 668 F.3d 1067 (9th Cir. 2011).

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necessity grounds. The petitioners argued that the STB's approval was in error because outdated information had been used in completing the EIS.[2601] Judicial review of the Board's decision under NEPA is limited to whether the agency took a "hard look" based on a strict interpretation of NEPA's requirements.[2602] To satisfy NEPA an EIS must consider the cumulative environmental impacts that a proposed action may have.[2603]

The court held that the Board did not satisfy NEPA's requirements in its preparation of the EIS, in part because of the use of outdated aerial survey photographs. The court's opinion addresses many issues concerning the STB's data or lack thereof. Even though the STB is required to consider future implications, the Board failed to include relevant data in respect to many of the environmental impacts presented; for example, "the Board has not sufficiently explained why it cannot or should not incorporate … available data concerning likely future development into its environmental impact analysis."[2604] Although the court upheld the STB's analysis of public necessity and convenience,[2605] the court ruled that the STB did not take the requisite hard look at the particular environmental impacts presented by the two applications as required by NEPA. The STB's decision was arbitrary and capricious for failing to consider the evidence.[2606] The Ninth Circuit affirmed the STB's decision in part and reversed and remanded it in part to the STB.[2607]

[2601] *Id.* at 1071-1074.

[2602] *Id.* at 1075-1077.

[2603] *Id.* at 1077.

[2604] *Id*. at 1079, 1086-1087.

[2605] *Id*. at 1093.

[2606] *Id.* at 1088.

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9. The STB's Authority to Impose Environmental Conditions on Minor Mergers

Village of Barrington v. Surface Transportation Board[2608] involved a merger of Canadian National, a Class I railroad, and Elgin, Joliet & Eastern Railway Company (EJE) in and around Chicago. Before the acquisition of EJE could be completed, Canadian National had to obtain the STB's approval.[2609] Because the acquisition involved only one Class I railroad, the STB classified the transaction as a minor merger. The STB, therefore, had to approve the transaction within 180 days unless the STB determined that the merger was likely to cause substantial anticompetitive effects.[2610] Finding that the merger would result in a substantial increase in freight traffic that would "'significantly affect[] the quality of the human environment,'"[2611] the Board directed its section on environmental analysis to prepare an EIS that the Board would use "to decide whether to impose 'environmental mitigation conditions' if and when it approved the transaction."[2612]

Ultimately, the STB exercised its environmental authority by imposing conditions that would mitigate the effects of the merger, as well as by requiring "Canadian National to comply

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[2607] *Id*. at 1099. Earlier the court stated that "[s]ection 706 of the Administrative Procedure Act (APA) governs judicial review of agency decisions made pursuant to NEPA. An agency's decision must be upheld unless it is 'arbitrary and capricious, with an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 1074 (*citing* 5 U.S.C. § 706).

[2608] 636 F.3d 650 (D.C. Cir. 2011), *subsequent appeal, petition denied,* 2014 U.S. App. LEXIS 13720 (D.C. Cir., July 18, 2014).

[2609] *Id.* at 653 (*citing* 49 U.S.C. § 11323).

[2610] *Id*. (*citing* 49 U.S.C. §§ 11324(d) and 11325(a) and (d)).

[2611] *Id*. (*citing* 42 U.S.C. § 4332(2)(C)).

[2612] *Id*.

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with voluntary mitigation commitments negotiated with several affected communities."[2613] After the acquisition was complete, Canadian National filed a petition for review that challenged "Condition 14" for being both "unlawful and arbitrary and capricious."[2614] Numerous local governmental entities, including the Village of Barrington, also filed petitions for review that challenged the Board's compliance with NEPA.[2615]

The District of Columbia Circuit considered whether the Staggers Rail Act deprived the STB of authority to impose environmental conditions on minor mergers. Congress enacted the Staggers Rail Act to deregulate railroads and in part to "expedite approval of smaller mergers."[2616] The court held that "nothing in [49 U.S.C. § 11324] unambiguously forecloses the Board from imposing environmental conditions on 'minor' mergers."[2617] The court held that given the statute's ambiguity "a range of interpretations is permissible[] and that the Board's current interpretation falls within that range."[2618]

Furthermore, the court held that "[t]he Board did all that NEPA required of it" because the STB

> set out the purpose and need for the transaction, evaluated alternatives that would reasonably and feasibly accomplish that purpose and need, identified and took a "hard look" at the transaction's environmental impacts, examined strategies for

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[2613] *Id*. at 657.

[2614] *Id*. at 654.

[2615] *Id*. at 654-655.

[2616] *Id.* at 657.

[2617] *Id*. at 664-655.

[2618] *Id*.

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> mitigating those impacts, and fielded and responded to thousands of comments from local, state, and federal agencies and from the community.[2619]

Thus, the court denied the petitions for review because the Staggers Rail Act did not foreclose the STB from imposing environmental conditions on minor mergers and because the court "found no 'error[s] [that] compromise[d] the objectivity and integrity of the [NEPA] process…."[2620]

10. Requirement of Cooperation of Federal and State Agencies

Judicial Watch Inc. v. United States Department of Transportation[2621] concerned a joint agreement of the FRA and the California High Speed Rail Association (CHSRA) to work together to create Environmental Impact Reports (EIR). The FRA and CHSRA were co-lead agencies with the FRA responsible for compliance with NEPA and with CHSRA responsible for compliance with the California Environmental Quality Act (CEQA). Although the case involved a request under the Freedom of Information Act, a District of Columbia federal court analyzed the FRA's obligations under NEPA to cooperate with other agencies and state and local governments. Because NEPA requires federal and state agencies to work together, and FRA and CHSRA were doing so, the court granted the defendant's motion for a summary judgment.

11. Requirement that STB Cooperate with other Agencies

In *Medina County Environmental Action Association v. Surface Transportation Board*[2622] the Medina County Environmental Action Association (MCEAA) petitioned for a review of the

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[2619] *Id*. at 673-674.

[2620] *Id*. at 673.

[2621] 950 F. Supp.2d 213 (D. D.C. 2013).

[2622] 602 F.3d 687 (5th Cir. 2010), *amended petition denied, motion denied*, 2010 U.S. App. LEXIS 9326 (5th Cir., Apr. 6, 2010).

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STB's decision that allowed a railroad to construct and operate a rail line to service a quarry. The petitioner argued that the STB and the United States Fish and Wildlife Service (FWS) failed to comply with 16 U.S.C. § 1536(a)(2) of the Endangered Species Act (ESA). ESA's regulations permit an agency to conduct a biological assessment as part of an EIS that is prepared in compliance with NEPA.[2623]

In assessing whether a proposed rail line is "likely to jeopardize" endangered or threatened species or their habitats, the STB is required to consult with the FWS.[2624] The issue was whether the STB improperly granted an exception without consulting with other agencies, namely the FWS. However, the STB had initiated an "informal consultation," the first step of which was to "determine whether an endangered or threatened species, or 'critical habitat' for such species, may be present in the vicinity of the proposed action.... If no such species or critical habitat may be present, no further consultation is required; if they may be present, then the informal consultation proceeds to the second step."[2625]

Because of information developed during the first step "the informal consultation proceeded to the second step" when the STB was required to conduct a "'biological assessment' of the effects of the proposed action."[2626] The court held that the STB's informal consultation

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[2623] *Id*. at 695.

[2624] *Id*. at 693 (*citing* 16 U.S.C. § 1536(a)(2)) (footnote omitted).

[2625] *Id*. (citations omitted) (footnotes omitted). "An 'informal consultation' is 'an optional process that includes all discussions, correspondence, etc., between the [FWS] and the Federal agency … designed to assist the Federal agency in determining whether formal consultation or a conference is required.'" *Id*.

[2626] *Id*. at 694 (*quoting* 16 U.S.C. § 1536(c)(1)).

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with the FWS combined with the EIS was sufficient to satisfy procedural requirements.[2627] The court denied MCEAA's petition for review.

12. State Environmental Law and Archaeological Impact Statements

In *Kaleikini v. Yoshioka,*[2628] although the construction of a rail line had been approved, the line likely would disturb archeological artifacts. The petitioner brought an action against the city and county of Honolulu and the state of Hawaii to challenge the approval of the Honolulu High-Capacity Transit Corridor Project that involved the construction of a fixed guideway rail system approximately twenty miles in length. All parties agreed that "the rail project has a 'high' likelihood of having a potential effect on archeological resources in certain areas of Phase 4 that includes Kaka'ako."[2629]

The petitioner argued that the city and the Department of Land and Natural Resources (DLNR) violated certain provisions of the Hawaii statutes. The petitioner argued that an Archeological Impact Statement (AIS) prior to construction had to be completed for the entire project and sought a declaration that an AIS must be prepared for the rail project prior to "decision-making on the project and/or [its] commencement."[2630] The petitioner sought a declaration that the final EIS was "unacceptable" under the law because it did not include an AIS and was inadequate also because the EIS did not consider the impacts that the construction

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[2627] *Id*. at 693.

[2628] 283 P.3d 60 (Haw. 2012).

[2629] *Id*. at 63.

[2630] *Id*. at 68.

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would have on native artifacts.[2631] The city, on the other hand, argued that the EIS satisfied the city's obligations.

The Supreme Court of Hawaii agreed with the city in holding that the EIS only needed to comply "in good faith" with the regulatory requirements, a test that the EIS satisfied, first, because it considered alternatives and the impacts on water, air, wildlife, as well as other impacts, and, second, because it proposed mitigation measures.[2632] The court further held that the EIS only needed in good faith to include documentation and recommendations for the mitigation of impacts on archeological artifacts.[2633] The court stated:

> [C]hapter 4.16 of the final EIS concerns archaeological, cultural, and historic resources. The EIS divided the rail corridor into ten different sub-areas to "evaluate below-ground effects on archaeological resources within the study corridor[]" and developed a qualitative rating system to describe potential archaeological impacts in each sub-area. … The EIS concluded that the potential for encountering burials in the Dillingham, Downtown, and Kaka'ako areas was high.[2634]
>
> With regard to mitigation, the EIS noted that "[t]he Project will have an 'effect, with proposed mitigation commitments' under State law[.]"
>
> Based on the foregoing, "the EIS discussion concerning [archaeological resources] was compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved."[2635]

[2631] *Id*.

[2632] *Id*. at 83.

[2633] *Id*. at 84.

[2634] *Id*. at 90.

[2635] *Id*. (citations omitted).

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The Supreme Court of Hawaii partially affirmed a summary judgment because "the final EIS was sufficient under HRS chapter 343" and because the city and state "gave full consideration to cultural and historic values as required under HRS chapter 205A."[2636]

13. Environmental Impact Statement Required to Consider Socioeconomic Impacts on the Local Population

In *Saint Paul Branch of the National Association for the Advancement of Colored People v. United States Department of Transportation,*[2637] involving the proposed construction of a light rail project, the issue was whether the final EIS (FEIS) failed to consider properly the impact of the construction on a primarily African-American residential neighborhood with low-income businesses. Although the EIS that had been submitted was sufficient to satisfy NEPA requirements, a proposed light rail line through a predominantly black neighborhood required an EIS exploring the socioeconomic impact.[2638] A Minnesota federal court, emphasizing that NEPA "requires federal agencies to prepare an EIS for 'major federal actions significantly affecting the quality of the human environment,'"[2639] held that there had been sufficient analysis within the EIS to comply with NEPA's technical requirements. The FEIS was *sufficient* in its consideration of the potential displacement of existing businesses and residents.[2640] However, the court held that the FEIS was *insufficient* in its consideration of lost business revenue as a consequence of

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[2636] *Id*. at 95.

[2637] 764 F.Supp.2d 1092 (D. Minn. 2011).

[2638] *Id*. at 1102.

[2639] *Id*. (citation omitted).

[2640] *Id*. at 1115.

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the light rail construction.[2641] Thus, the district court granted a summary judgment in part, denied it in part, and also denied the plaintiffs' request to enjoin the project.[2642]

14. STB's Adequate Consideration of Alternatives and of Horn Noise

The Eighth Circuit in *Mayo Foundation v. Surface Transportation Board*[2643] considered an STB decision to approve the updating and building of new rail lines without considering alternative routes. The Mayo Foundation, the City of Rochester, and Olmsted County argued that the Dakota, Minnesota & Eastern Railroad Corporation's (DM&E) acquisition of over 1,000 miles of existing rail line in Minnesota, Iowa, Kansas, Missouri, Wisconsin, and Illinois from I&M Rail Link (IMRL) constituted "significant new circumstances" that gave rise to the consideration of the new line as an alternative to routing trains through Rochester. However, the court held that "[t]he Board is required to consider all 'reasonable' alternatives" but is not required "to consider alternatives that would frustrate the very purpose of the project. [A]n 'alternative is unreasonable if it does not fulfill the purpose of the project.'"[2644] The court held that the Board considered "adverse effects of [an] expected increase in horn noise" and that the Board's "reasoned conclusions" regarding mitigating conditions were satisfactory to meet the foregoing standard.[2645] The court affirmed the STB's decision.

[2641] *Id*. at 1112-1113.

[2642] *Id*. at 1119.

[2643] 472 F.3d 545 (8th Cir. 2006).

[2644] *Id*. at 550 (citations omitted).

[2645] *Id*. at 554.

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Article

15. NEPA and the Role of Public Comments

A recent law review article discusses how the inclusion of public comments has influenced decisions by the courts on the issue of compliance with NEPA.[2646] The article is an update of a 1990 study that considered NEPA cases "in which the courts relied on agency comments to arrive at conclusions about NEPA compliance."[2647] The authors state that "[t]wo decades ago, agency comments explained a high percentage of the outcomes of NEPA litigation; twenty-some years later, the correlation between agency comments and case outcomes is somewhat less obvious."[2648]

The article "provide[s] background on NEPA's requirements for interagency comments….;"[2649] "evaluates recent cases in which courts employed agency comments to conclude either that an agency improperly failed to produce environmental impact statements, or that the statement an agency produced was inadequate;"[2650] discusses cases in which the courts consider "adverse comments from internal lead agency staff;"[2651] evaluates "cases in which courts held that lead agencies complied with NEPA's requirements, relying in part on

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[2646] Michael C. Blumm and Marla Nelson, "Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation," 37 *Vt. L. Rev.* 5 (2012).

[2647] *Id*. at 7.

[2648] *Id*.

[2649] *Id*.

[2650] *Id*. at 7-8.

[2651] *Id*. at 8.

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interagency comments supporting the lead agency's analysis;"[2652] and examines cases in which "courts made NEPA determinations that were inconsistent with agency comments – a practice that seems to contradict our thesis."[2653] Nevertheless, the authors suggest that public comments also are a vital part of the NEPA process.

Article

F. Federal Law Preempts Local District's Air Quality Rules

As discussed in a recent on line article, California has thirty-five air quality management districts and each is responsible for proposing and creating air quality rules in its district.[2654] The South Coast Air Quality Management District had a rule that required idling trains to limit the amount of emissions they release to reduce air pollution.[2655]

In *Association of American Railroads v. South Coast Air Quality Management District*,[2656] a case involving air pollution emissions from idling trains, the Ninth Circuit held that federal law preempted the local regulations.[2657] Railroad carriers in the state, which had sought a permanent injunction against enforcement of three of the district's local air quality rules, argued

[2652] *Id*.

[2653] *Id*.

[2654] Mike Cherney, 9th Circuit Finds Calif. Railroad Pollution Laws Preempted, Law360, available at: http://www.mayerbrown.com/files/News/1886584c-3771-45fe-a5a6-088affd3492e/Presentation/NewsAttachment/375bc41b-c80d-4c18-a307-c83b80f1c328/9thCirc-Finds_Calif.pdf (last accessed March 31, 2015), herein referred to as "Cherney."

[2655] *Id.*

[2656] 622 F.3d 1094 (9th Cir. 2010).

[2657] Cherney, *supra* note 2654.

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that the ICCTA preempted the rules.[2658] The Ninth Circuit explained that "[b]ecause the District's rules have the force of state law [the] ICCTA preempts those rules unless they are rules of general applicability that do not unreasonably burden railroad activity."[2659] The court held that the other two local rules that implemented reporting requirements under the threat of penalties did not meet the standard; therefore, the ICCTA preempted all three of the District's rules at issue.[2660] The article states that the holding in *Association of American Railroads* is consistent with the Ninth Circuit's ruling in a similar case when "a municipality in Washington state sought to regulate the reopening of a rail line."[2661]

The article also notes that the United States Environmental Protection Agency (EPA) has the authority to approve state air quality implementation plans under the Clean Air Act and that after the EPA has approved California's plans the local rules regulating idling trains have the force of federal law.[2662] However, according to the Ninth Circuit, until a state plan is approved "there is no authority for the courts to harmonize the district's rules with ICCTA."[2663]

[2658] 622 F.3d at 1095-1096.

[2659] Cherney, *supra* note 2654 (*quoting Association of American Railroads*, 622 F.3d at 1098) (citations omitted).

[2660] *Id*.

[2661] *Id.*

[2662] *Id*.

[2663] *Id*. (*quoting Association of American Railroads*, 622 F.3d at 1098) (citations omitted).

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XXI. FEDERAL EMPLOYERS' LIABILITY ACT

A. Introduction

In 1908, Congress enacted the Federal Employers' Liability Act (FELA) to ensure that railroad employees who were injured in the course of their employment would be able to recover damages for their injuries.[2664] Section B discusses some of FELA's provisions, including one that an employee's "contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee…."[2665] Section C discusses cases deciding whether other federal statutes, such as the Federal Railroad Safety Act (FRSA) or the Locomotive Inspection Act (LIA) preclude claims under FELA. Section D addresses whether some of the principles found in tort law are generally applicable in FELA cases, such as what standard applies to the amount of evidence that a plaintiff must adduce; whether there is a requirement that a plaintiff prove proximate cause; whether railroads may assert counterclaims; and whether the payment of a plaintiff's medical expenses by a railroad-sponsored health insurance plan affects the amount of damages recoverable by a plaintiff. Section E discusses claims under FELA for infliction of emotional distress, including the zone of danger test and the applicability of some common law principles to such claims. Section F discusses cases involving industrial or occupational diseases and poisoning when railroad employees are exposed to toxic substances and whether an employee may recover in a claim for asbestosis damages for a fear of developing cancer. Section G discusses claims under FELA for a railroad's violation of the Federal Safety Appliance Act.

[2664] 45 U.S.C. § 51, *et seq.* (2014).

[2665] 45 U.S.C. § 53 (2014).

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Finally, sections H through M discuss articles on causation and FELA, the effect of counterclaims by railroads in FELA cases, recovery under FELA for a fear of developing cancer because of job-related exposure to toxins, and whether FELA should be repealed.

B. Liability of Railroads for Negligent Injuries to Employees

Statute

The United States Code establishes the liability of a railroad common carrier operating in interstate commerce for personal injuries to its employees.[2666] Section 51 of FELA provides that a common carrier engaged in interstate commerce is liable for damages when an employee suffers an injury or when the employee dies while engaged in interstate commerce because of a common carrier's negligence.[2667] FELA only covers employees whose duties are in furtherance of interstate or foreign commerce.[2668] Common carriers having employees who are engaged in the furtherance of interstate commerce in the District of Columbia or any United States territory

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[2666] 45 U.S.C. § 51 (2014).

[2667] *Id*.

> *Every common carrier by railroad* while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, *shall be liable in damages to any person suffering injury while he is employed by such carrier* in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, *for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.*

(emphasis supplied).

[2668] 45 U.S.C. § 51 (2014).

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or possession also may be held liable under FELA for an injury to or the death of an employee.[2669]

An employee's contributory negligence will not bar the employee or his or her personal representative or next of kin from recovering damages, but the employee's contributory negligence will reduce the amount of damages awarded.[2670] Even if an employee is found to have committed negligence that contributed to his or her injury, the employee is not automatically barred from recovering damages.[2671] Rather, a jury may reduce damages that otherwise would be recoverable based on the jury's assessment of the extent of the employee's negligence. Furthermore, an employee should not be found to have been contributorily negligent when the employee's injury is the result of the employer having failed to adhere to "any statute enacted for the safety of employees [that] contributed to the injury or death of [the] employee."[2672]

In the event of a death covered by FELA, an employee's survivors may recover damages.[2673] An injury must result from negligence on the part of an employer or its agents involving railroad equipment, such as railroad cars, engines, machinery, or tracks.[2674] FELA

[2669] 45 U.S.C. § 52 (2014).

[2670] 45 U.S.C. § 53 (2014).

[2671] *Id*.

[2672] *Id*.

[2673] 45 U.S.C. §§ 51 and 59 (2014).

[2674] 45 U.S.C. § 51 (2014).

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creates a cause of action under federal law that permits railroad employees to bring claims against their employers for negligence rather than the employees having to rely on state law.[2675]

A railroad company may not "contract out" of its liability[2676] or use "assumption of the risk" as a defense to liability.[2677] Finally, a railroad company may not in any way prevent employees from supplying information to persons of interest regarding a FELA claim.[2678]

Cases

1. Determining Who is an Employee

In *Kelley v. Southern Pacific Company*[2679] after Kelley was injured when he fell from a tri-level railroad car he brought an action against his employer Southern Pacific.[2680] At the time of his accident, Kelley was employed by the Pacific Motor Trucking Company (PMT), a wholly-owned subsidiary of Southern Pacific.[2681] PMT's contract with Southern Pacific stated that PMT would unload cars from the rail yard, load them onto PMT trucks, and transport them into the city.[2682]

The *Kelley* Court explained:

[2675] *Id*.

[2676] 45 U.S.C. § 55 (2014).

[2677] 45 U.S.C. § 54 (2014).

[2678] 45 U.S.C. § 60 (2014).

[2679] 419 U.S. 318, 95 S. Ct. 472, 42 L. Ed.2d 498 (1974).

[2680] *Id*., 419 U.S. at 319, 95 S. Ct. at 474, 42 L. Ed.2d 498.

[2681] *Id*.

[2682] *Id*., 419 U.S. at 320-321, 95 S. Ct. at 474, 42 L. Ed.2d 498.

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> Under common-law principles, there are basically three methods by which a plaintiff can establish his "employment" with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Finally, he could be a subservant of a company that was in turn a servant of the railroad.[2683]

The Court held that a non-railroad employee must demonstrate that a railroad company has a supervisory responsibility over the non-railroad employee before the employee may be "deemed *pro hac vice* [an] employee[] of the railroad" for the purpose of liability under FELA.[2684]

2. Requirement of Physical Harm as Antecedent to Claim for Emotional Distress

Consolidated Rail Corporation v. Gottshall,[2685] decided in 1953 by the United States Supreme Court, was a consolidation of two cases against Consolidated Rail Corporation (Conrail). In one case, Gottshall had witnessed a coworker and good friend suffer and die from a heart attack while repairing defective tracks.[2686] As a result of Gottshall's aforementioned experience and his becoming "extremely agitated and distraught," Gottshall was diagnosed as suffering from severe depression and post-traumatic stress disorder.[2687] In the other case, Carlisle was a train dispatcher whose duties involved "ensuring the safe and timely movement of passengers and cargo."[2688] Because of a reduction in the number of Conrail employees Carlisle

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[2683] *Id*., 419 U.S. at 324, 95 S. Ct. at 476, 42, L. Ed.2d 498.

[2684] *Id*., 419 U.S. at 330, 95 S. Ct. at 479, 42 L. Ed.2d 498.

[2685] 512 U.S. 532, 114 S. Ct. 2396, 129 L.Ed.2d 427 (1994).

[2686] *Id*., 512 U.S. at 535-537, 114 S. Ct. at 2400-2401, 129 L.Ed.2d 427.

[2687] *Id*., 512 U.S. at 536-537, 114 S. Ct. at 2401, 129 L.Ed.2d 427.

[2688] *Id*., 512 U.S. at 539, 114 S. Ct. at 2402, 129 L.Ed.2d 427.

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suffered a nervous breakdown after being assigned additional responsibilities and being forced to work extended hours. Both Gottshall and Carlisle asserted claims of negligent infliction of emotional distress, but neither employee had been physically injured while on the job.[2689]

Although FELA is to be construed liberally in furtherance of Congress's remedial purpose to shift liability to an employer, the Court held that FELA is not a worker's compensation statute.[2690] That is, "FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis of [an employer's] liability is his negligence, not the fact that injuries occur."[2691] Although negligent infliction of emotional distress is cognizable under FELA,[2692] the zone of danger test that applies to claims of negligent infliction of emotional distress under FELA requires an employee to have experienced a physical harm as an antecedent to a claim for emotional distress that is associated with a physical injury.[2693]

3. Inapplicability of FELA to a Claim for Wrongful Discharge

In *Lewy v. Southern Pacific Transportation Company*[2694] Lewy was injured in a railroad collision that resulted in hospitalization; pain in his neck, back, head, and right leg; and, eventually, lower-back surgery.[2695] Because Lewy's employer Southern Pacific believed that

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[2689] *Id*., 512 U.S. at 537, 114 S. Ct. at 2401, 129 L.Ed.2d 427.

[2690] *Id*., 512 U.S. at 543, 114 S. Ct. at 2404, 129 L.Ed.2d 427.

[2691] *Id*., 512 U.S. at 543, 114 S. Ct. at 2404, 129 L.Ed.2d 427 (citations omitted) (internal quotation marks omitted).

[2692] *Id*., 512 U.S. at 550, 114 S. Ct. at 2407, 129 L.Ed.2d 427.

[2693] *Id*., 512 U.S. at 557, 114 S. Ct. at 2411, 129 L.Ed.2d 427.

[2694] 799 F.2d 1281 (9th Cir. 1986).

[2695] *Id*. at 1283.

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Lewy was malingering, the company ordered Lewy to be examined by a company physician.[2696] Because Lewy refused to meet with the physician, he was discharged in 1980 but was allowed to return to work for Southern Pacific in September 1982 after receiving his physician's approval.[2697]

Lewy asserted claims for aggravation and wrongful discharge under FELA.[2698] The Ninth Circuit explained that the original purpose of FELA was to "enable injured railroad workers to overcome a number of traditional defenses to tort liability that had previously operated to bar their actions, including contributory negligence, contractual waiver of liability, the fellow-servant rule, and assumption of the risk."[2699] The court noted that FELA covers "negligent acts that expose employees to occupational diseases;" accidents caused by "external violent or accidental means;" and "wholly mental injuries."[2700] In spite of its broad coverage, the Ninth Circuit held that FELA only covers work-related or "on the job" injuries.[2701] FELA does not apply to claims of wrongful discharge, because wrongful discharge is not considered an on the job injury caused by the employer's negligence.[2702]

[2696] *Id*. at 1283-1284.

[2697] *Id*. at 1284.

[2698] *Id*. at 1283.

[2699] *Id*. at 1288 (citations omitted).

[2700] *Id*. (citations omitted).

[2701] *Id*. at 1289.

[2702] *Id*.

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4. Inapplicability of FELA to Purely Intrastate Activities

In *Felton v. Southeastern Pennsylvania Transportation Authority*[2703] Felton was employed in the city transit division of the Southeastern Pennsylvania Transportation Authority (SEPTA).[2704] The city transit division engaged in purely intrastate transportation.[2705] Felton sustained an injury that left him totally disabled under the applicable Pennsylvania statute and was awarded worker's compensation.[2706] Thereafter, Felton filed a FELA claim against SEPTA to recover damages for his work-related injuries.[2707] The Third Circuit held that Congress had no intention of extending FELA coverage to employees of urban transportation systems such as subways.[2708] Although the interstate division and the city transit division were both under SEPTA, both divisions were operationally distinct and unconnected, thereby making FELA inapplicable to city transit and its purely intrastate activities.[2709]

[2703] 952 F.2d 59 (3d Cir. 1991).

[2704] *Id*. at 60.

[2705] *Id*.

[2706] *Id*. at 60-61.

[2707] *Id*. at 61.

[2708] *Id*. at 66.

[2709] *Id*. at 64-66.

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Cases

C. Whether other Federal Laws may Preclude a Claim under FELA

1. FELA, the Federal Railroad Safety Act, and Preclusion of Federal Claims

In *Cowden v. BNSF Railway Company,*[2710] after Cowden was injured while working as a locomotive conductor for BNSF, he was unable to return to work for BNSF.[2711] Cowden's action under FELA in a federal district court alleged that BNSF failed to provide reasonably safe working conditions.[2712] The district court granted BNSF's motion for a summary judgment based on an issue that BNSF did not raise – "whether compliance with applicable FRSA safety regulations precludes a finding that the railroad has been negligent for the purposes of the FELA."[2713] Nevertheless, the Eighth Circuit considered the issue of whether a railroad's compliance with federal safety regulations affected the plaintiff's FELA claim.

The FRSA is intended to promote safety in all areas of railroad operations and imposes upon employers a duty to provide a reasonably safe place to work.[2714] The FSRA "states that '[l]aws, regulations, and orders related to railroad safety and laws, regulations and orders related to railroad security shall be nationally uniform to the extent practicable.'"[2715] As the court stated in *Cowden*, the Supreme Court in *CSX Transp., Inc. v. Easterwood*[2716] "did not address how the

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[2710] 690 F.3d 884 (8th Cir. 2012).

[2711] *Id*. at 886.

[2712] *Id*.

[2713] *Id*. at 888 (internal quotation marks omitted).

[2714] *Id*. at 890.

[2715] *Id*. (*quoting* 49 U.S.C. § 20106(a)(1)).

[2716] 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed.2d 387 (1993).

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FRSA interacted with federal negligence claims under the FELA, and the Supreme Court has yet to address the issue. Three other circuits, however, have used *Easterwood* as a guide in holding that FRSA regulations preclude federal tort claims under the FELA."[2717] Although the district court raised the above issue *sua sponte,*[2718] even if the Eighth Circuit were to presume that the FSRA precluded the claim, the district court in this case failed to consider "whether an FRSA regulation 'substantially subsumes' the negligence claim."[2719] Because the district court failed to make the "substantially subsumes" analysis and because of the insufficiency of the record below, the Eighth Circuit reversed and remanded the district court's grant of a summary judgment for BNSF.[2720]

2. FELA, the Locomotive Inspection Act, and Federal Preclusion

In contrast, a California federal district court in *Glow v. Union Railroad Co*.[2721] held that a FELA claim is not precluded when a railroad has complied with the Locomotive Inspection Act (LIA).[2722] Neither the LIA nor regulations issued thereunder foreclose an employee's FELA claim.[2723]

[2717] *Cowden*, 690 F.3d at 890 N 6 (*citing Nickels v. Grand Trunk Western R.R., Inc*., 560 F.3d 426, 430 (6th Cir. 2009)); *Lane v. R.A. Sims, Jr., Inc*., 241 F.3d 439, 443 (5th Cir. 2001); *Waymire v. Norfolk & W. Ry. Co*., 218 F.3d 773, 776 (7th Cir. 2000)).

[2718] *Id.* at 893.

[2719] *Id*.

[2720] *Id*. at 895.

[2721] 652 F. Supp.2d 1135 (E.D. Cal. 2009).

[2722] *Id*. at 1141.

[2723] *Id*.

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Cases

D. Principles that Generally Apply in FELA Cases

1. Determining whether Employees are engaged in Interstate Commerce under FELA

In *Geraty v. Northeast Illinois Regional Commuter Railroad Corporation*[2724] Geraty, a patrol officer for the Northeast Illinois Regional Commuter Railroad Corporation (Metra), filed a FELA claim against Metra for a slip-and-fall injury that Geraty sustained on railroad property when she was working.[2725] Under FELA "coverage extends to an employee of a railroad carrier (i) if any part of the employee's duties 'shall be the furtherance of interstate or foreign commerce,' or (ii) if any part of the employee's duties 'in any way directly or closely and substantially, affect[s] such commerce.'"[2726] An Illinois federal district court pointed out that an employee's duties do not have to include the actual operation of the railroad and that there does not have to be an actual crossing of state lines multiple times to qualify for being "engaged in interstate commerce."[2727] The employee's duties included "assisting patrons, making arrests, and patrolling a span of tracks that Metra made available to certain interstate trains," as well as "prevent[ing] and deter[ring] vandalism on the tracks … and respond[ing] and investigat[ing] grade crossing collisions or anything else on the rails that might delay the trains."[2728] The court

[2724] 2009 U.S. Dist. LEXIS 20573, at *1 (N.D. Ill. 2009).

[2725] *Id*. at *2-8 (N.D. Ill. 2009), *summary judgment denied,* 2010 U.S. Dist. LEXIS 29578 (N.D. Ill., Mar. 29, 2010).

[2726] *Id*. at *12 (*quoting* 45 U.S.C. § 51).

[2727] *Id.* at *13, *20.

[2728] *Id*. at *20, 21.

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held that Geraty's duties were in furtherance of interstate commerce and therefore denied Metra's motion for a summary judgment.[2729]

2. Permissibility of Counterclaims by Railroads in FELA Claims

In *Cavanaugh v. Western Maryland Railway Co.*[2730] the Fourth Circuit ruled that if railroads were unable to assert a counterclaim for an employee's negligence railroads would be incapable of recovering damages to their property while the plaintiff received absolute immunity from liability in spite of his negligent behavior.[2731] Because Congress wrote the statute to preclude assumption of the risk and "substantially modified the defense of contributory negligence," the Fourth Circuit held that congressional failure to preclude railroads explicitly from asserting counterclaims indicates that counterclaims are allowable.[2732]

3. Whether a Plaintiff must prove Proximate Cause in a FELA Action

In *CSX Transportation v. McBride,*[2733] decided by the United States Supreme Court, McBride alleged that CSX was negligent because the company required him to use unsafe equipment and failed to train him on how to operate the equipment. The Supreme Court considered whether it was necessary under FELA for McBride to prove that CSX's alleged negligence was the proximate cause of McBride's injuries. Although CSX argued that McBride

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[2729] *Id*.

[2730] 729 F.2d 289 (4th Cir. 1984).

[2731] *Id*. at 291.

[2732] *Id*. *See also*, *Withhart v. Otto Candies*, L.L.C., 431 F.3d 840 (5th Cir. 2005) (holding that the FELA did not preclude employer ship owner from recovering for property damage from a negligent employee); *Nordgren v. Burlington N. R.R. Co*., 101 F.3d 1246 (8th Cir. 1996) (holding that FELA did not preclude a railroad from recovering against an employee for property damage).

[2733] 131 S. Ct. 2630, 180 L.Ed.2d 637 (2011).

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had to prove proximate cause, the Court held that juries should be instructed to find liability whenever a "railroad's negligence played any part in bringing about the injury."[2734]

According to the Court, its decision was based on the intent of Congress when enacting FELA. The Court explained that liability under FELA is limited to railroads and to their employees only for injuries sustained in the course of employment and that an injury must have resulted "in whole or in part from the negligence" of the carrier.[2735] CSX's position was that causation under FELA requires a direct relationship between an asserted injury and allegedly injurious conduct or negligence.[2736] However, the Court held that the language in and purpose of FELA demonstrates that the statute does not incorporate proximate cause as traditionally exists in tort actions.[2737] Thus, because it was not error to refuse to use "proximate cause terminology" in FELA actions, the court affirmed the Seventh Circuit's decision.[2738]

4. Low Standard for Evidence Required in FELA Cases

In *Rivera v. Union Pac. R.R. Co.*,[2739] based on the Supreme Court's ruling in *McBride*, the Fifth Circuit held that there is a very low standard for the evidence that a plaintiff needs to prove a FELA claim. In a FELA suit, the court must deny a defendant's motion for judgment as a matter of law for lack of evidentiary support "unless there is a complete absence of probative

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[2734] *Id.*, 131 S. Ct. at 2634, 180 L. Ed.2d at 643.

[2735] *Id.*, 131 S. Ct. at 2636, 180 L. Ed.2d at 645.

[2736] *Id.*, 131 S. Ct. at 2642, 180 L. E.2d at 651.

[2737] *Id.*, 131 S. Ct. at 2642-2643, 180 L. Ed.2d at 652.

[2738] *Id.*, 131 S. Ct. at 2644, 180 L. Ed.2d at 653.

[2739] 378 F.3d 502 (5th Cir. 2004).

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facts to support the conclusion reached by the jury."[2740]

5. The Use of Comparative Negligence rather than Contributory Negligence in FELA Cases

Some states follow a contributory negligence rule whereby any negligence on the part of a plaintiff is a complete bar to recovery; however, the doctrines of contributory negligence and assumption of the risk do not apply to cases brought under FELA.[2741] Section 53 of FELA effectively provides that the principles of comparative negligence apply when it is alleged that a plaintiff was contributorily negligent.[2742] In contrast to a contributory negligence rule, in a FELA case an employee's negligence will not bar a recovery completely. If an employee's negligence contributed to his or her injury, the employee's damages will be reduced to the extent of the negligence that is attributable to the employee.

In *Norfolk Southern Railway v. Sorrell*[2743] the Supreme Court held that the same causation standards should be used for the negligence of a railroad and any contributory negligence of the employee to calculate any reduction in damages that otherwise would be owed to the employee.[2744] In *Sorrell*, to determine whether the same causation standard should be used, the Court considered how the common law dealt with the issue. The Court decided to

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[2740] *Id*. at 505 (*citing Lavender v. Kurn*, 327 U.S. 645 (1946); *Wooden v. Missouri Pac. R.R. Co*., 862 F.2d 560 (5th Cir. 1994)).

[2741] *See Toledo, St. L. & W. R. Co. v. Slavin*, 236 U.S. 454, 35 S. Ct. 306, 59 L. Ed. 671 (1915); *Central V. R. Co. v. White*, 238 U.S. 507, 35 S. Ct. 865, 59 L. Ed. 1433 (1915).

[2742] 45 U.S.C § 53 (2014).

[2743] 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed.2d 638 (2007).

[2744] *Id*., 549 U.S. at 160, 127 S. Ct. at 802, 166 L. Ed.2d at 644.

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follow the common law because "'[a]bsent express [statutory] language to the contrary, the elements of a FELA claim are determined by reference to the common law [of negligence]."[2745]

6. FELA's Preemption of Actions under State Law

Many years ago in *New York Central Rail Company v. Winfield,*[2746] involving Winfield's loss of an eye because of a flying pebble, the Supreme Court held that FELA precluded an employee from claiming damages under state law.[2747] The Court held that Winfield could not seek damages under the state's Workmen's Compensation Law because FELA was too comprehensive to allow additional options for recovery.[2748]

7. Whether Transit Authority Employee Assigned to Work on the Long Island Railroad was Employee of an Entity Operating as a Common Carrier in Interstate Commerce

In *Greene v. Long Island Railroad Company*[2749] a police officer employed by the New York Metropolitan Transit Authority (MTA) brought an action under FELA for an injury he suffered while patrolling the Long Island Railroad (LIRR).[2750] In 1997, after the MTA was

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[2745] *Id*., 549 U.S. at 165-166, 127 S. Ct. at 805, 166 L. Ed.2d at 647.

[2746] 244 U.S. 147, 37 S. Ct. 546, 61 L. Ed. 1945 (1917).

[2747] *Id.*, 244 U.S. at 153-154, 37 S. Ct. at 549, 61 L. Ed. at 1049.

[2748] *Id.,* 244 U.S. at 148, 37 S. Ct. at 548, 61 L. Ed. at 1048-1049.

[2749] 99 F. Supp.2d 268 (E.D.N.Y. 2000), *aff'd,* 280 F.3d 224 (2d Cir. 2002). *See* Jeffrey J. Amato, Comment, "The MTA, It's Not 'Going Your Way' – Liability of the Metropolitan Transportation Authority under FELA: Greene v. Long Island R.R.," 75 *St. John's L. Rev*. 113, 135-136 (2001) in which the author argues:

> The unwarranted extension of FELA liability to the MTA perpetuated an unsound theory of employer liability and evinced an inaccurate judicial perception of the actual functions of the MTA. The MTA functions as a coordinator, managing an integrated public transportation system, which incidentally includes two railroads subject to the FELA. The MTA, itself, does not operate as a common carrier under the meaning of the statute and therefore should not be held liable under the FELA.

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empowered to maintain a police force, the LIRR ceased having its own police force. Many LIRR police officers, as did the plaintiff, became employed by the MTA.[2751] The MTA claimed that it was "not a proper defendant under FELA" because the MTA was "not a common carrier within the meaning of the statute."[2752] The LIRR argued that although it is a common carrier the LIRR was not liable because Greene was no longer its employee at the time of the accident.[2753]

A federal district court in New York denied the defendants' motion for summary judgment. The court noted that the Supreme Court of the United States has defined a common carrier as "'one who operates a railroad as a means of carrying for the public….'"[2754] Based on the MTA's purpose, structure, and functions, the court determined that the MTA was a common carrier but that only "those employees of MTA who are engaged in the interstate common carrier operations of its commuter rails" are covered by FELA.[2755] The court held that although "it is certainly true that the LIRR operates a common carrier, it is also true that MTA's extensive involvement in this entity leads to the conclusion that it, too, operates this common carrier."[2756] Thus, MTA employees such as the plaintiff who are "assigned to work on the LIRR[] are employed by an entity operating a common carrier engaged in interstate commerce. Plaintiff is

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[2750] *Greene,* 99 F. Supp.2d at 270.

[2751] *Id*. at 270.

[2752] *Id*. at 271.

[2753] *Id*.

[2754] *Id*. (citation omitted).

[2755] *Id*. at 275.

[2756] *Id*. at 274.

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no less employed by a common carrier today than when he performed the same duties when employed by the LIRR."[2757]

MTA employees engaged only in intrastate rail operations are covered by workers' compensation law, not FELA.[2758] As the court cautioned, the court's holding

> *is limited to those employees of MTA who are engaged in the interstate common carrier operations of its commuter rails*. Specifically, the holding that MTA operates a common carrier does not lead to the conclusion that all MTA employees, including those employed strictly in the MTA's intrastate operations (such as employees of the New York City Transit Authority), are to be covered by FELA.[2759]

In *dicta*, the court stated that "FELA's liability standard regarding railroad workers injured on the job is one that has become outmoded" and that railroad workers should be covered by workers' compensation the same as other employees.[2760]

8. The Effect of Medical Insurance on the Amount of an Employee's Recoverable Damages

In *Leighton v. CSX Transportation*[2761] a court considered the collateral source rule in deciding whether an employee's recovery of medical expenses should be only the amount of the employee's out-of-pocket expenses.[2762] The Railroad Employees National Health and Welfare

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[2757] *Id*.

[2758] *Id*. at 272-275.

[2759] *Id*. at 274-275 (emphasis supplied).

[2760] *Id*. at 270.

[2761] 338 S.W.3d 818 (Ky. Ct. App. 2011).

[2762] *Id*. at 819.

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Plan paid the majority of Leighton's medical expenses on behalf of CSX.[2763] The Kentucky Court of Appeals relied on decisions of other courts that had ruled that payments by an insurance plan on behalf of a railroad were not a collateral source.[2764] The court held that because the payments by the health insurance plan were not a collateral source, the employee's recovery must be limited to out-of-pocket expenses.[2765]

Cases

E. Whether a Claim of Infliction of Emotional Distress may be made under FELA

1. Whether the Zone of Danger Test Applies to a Claim under FELA for Intentional Infliction of Emotional Distress

In *Goodrich v. Long Island Rail Road Co*.,[2766] involving a claim of intentional infliction of emotional distress under FELA against the Long Island Rail Road Co. (LIRR), Goodrich argued that while he was out sick the defendants took his sick leave form and added "'[a]nd HIV positive' beneath the doctor's flu diagnosis and posted it on a public bulletin board at the LIRR's facility."[2767] Goodrich alleged that because the defendants were at work and were in the LIRR facility when they posted the sick leave form they were acting within the scope of their employment.[2768]

[2763] *Id*. at 820.

[2764] *Id*. at 821.

[2765] *Id*. at 822.

[2766] 654 F.3d 190 (2d Cir. 2011).

[2767] *Id*. at 192.

[2768] *Id*.

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The Second Circuit considered whether the zone of danger test applied to such claims for emotional distress under FELA. LIRR argued that the company could not be held liable for negligent or intentional infliction of emotional distress unless a plaintiff satisfies the zone of danger test. The test requires that a plaintiff must have "sustained a physical impact or been placed in immediate risk of physical harm by the conduct of the LIRR or its agents."[2769] Although the text of FELA only refers to negligence that causes an injury or death, the Supreme Court has held that FELA is a "broad remedial statute" that has been long understood to apply to intentional torts, such as battery, in addition to negligence claims.[2770]

The Second Circuit had decided in an earlier case that claims of intentional infliction of emotional distress may be brought under FELA but did not address the zone of danger test.[2771] In *Goodrich*, the court cited precedents from other circuits in stating that FELA has not applied in cases of intentional infliction of emotional distress when there has been no physical harm to the employee.[2772] The "core concern of FELA … [is] that employees must suffer some kind of physical harm, impact, or invasion before they may recover under the Act."[2773] The court held that the zone of danger test applies to intentional infliction of emotional distress claims under

[2769] *Id*.

[2770] *Id*. at 193.

[2771] *Id*. at 199.

[2772] *Id*. at 196 (stating that "[i]ndeed, our understanding of FELA is shared by all our sister Circuits that have expressly considered the extent to which claims based on emotional distress may be brought under the Act" and *citing Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340, 341-42 (6th Cir. 1987) (per curiam) (holding that "FELA has not been applied to any intentional torts lacking any physical dimension such as assault") and *Rivera v. Nat'l R.R. Passenger Corp*., 331 F.3d 1074, 1082 (9th Cir. 2003) (stating that FELA compensates for an "injury caused by a physical phenomenon").

[2773] *Id*. (*citing Higgins v. Metro-North R.R. Co*., 318 F.3d 422 (2d Cir.2003)).

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FELA. However, the court held that Goodrich did not have a claim under FELA because Goodrich failed to allege that because of LIRR's actions he had sustained a "physical impact" or was placed in "immediate risk of physical harm."[2774]

2. Whether the Zone of Danger Test Applies to a Claim under FELA for Negligent Infliction of Emotional Distress

Similar to *Sorrell*, in *Conrail v. Gottshall*[2775] the Supreme Court also applied the common law in FELA claims asserted on the basis of negligent infliction of emotional distress.[2776] The Court held that a claim for negligent infliction of emotional distress was actionable under FELA because of FELA's broad definition of injury; however, the Court embraced the zone of danger test under the common law that is in harmony with FELA's focus on physical injuries.[2777]

Cases

F. Claims under FELA for Industrial or Occupational Diseases and Poisoning

1. Recovery of Damages for a Fear of Developing Cancer

CSX Transportation v. Hensley,[2778] decided by the Supreme Court, appears to be the leading case on suits by employees against railroads under FELA for exposure to asbestos. Hensley brought an action under FELA against CSX to recover damages for asbestosis and pain and suffering including damages for his fear of developing lung cancer.[2779] Citing its prior

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[2774] *Id*.

[2775] 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed.2d 427 (1994).

[2776] *Id*., 512 U.S. at 535, 114 S. Ct. at 2400, 129 L. Ed.2d at 435.

[2777] *Id*., 512 U.S. at 569-570, 114 S. Ct. at 2417, 129 L. Ed.2d at 456.

[2778] 556 U.S. 838, 129 S. Ct. 2139, 173 L.Ed.2d 1184 (2009).

[2779] *Id*., 556 U.S. at 839, 129 S. Ct. at 2140, 173 L. Ed.2d at 1186-1187.

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decision in *Norfolk & Western Ry. v. Ayers,*[2780] the Supreme Court held that an employee may be able to recover under FELA for emotional distress for fear of developing cancer without exhibiting physical manifestations as long as the individual is only seeking damages for asbestosis-related pain and suffering and the plaintiff's fear of developing cancer is "genuine and serious."[2781] The Court held that "[a]lthough plaintiffs can seek fear-of-cancer damages in some FELA cases, they must satisfy a high standard in order to obtain them."[2782] Therefore, jury instructions must state the proper standard that is applicable to a claim for damages for a plaintiff's fear of developing cancer.[2783]

2. Liability of a Railroad under FELA for an Employee's Exposure to a Toxic Substance

In *Norfolk & Western Ry.* v. *Ayers*[2784] railroad employees sued Norfolk Southern under FELA because of their exposure to asbestos that led to each employee being diagnosed with asbestosis.[2785] The issues for the Supreme Court were (1) whether the employees could recover damages for mental anguish as part of their damages for pain and suffering because of their fear of developing cancer and (2) whether Norfolk Southern was liable for all damages related to the injury that the railroad negligently caused in whole or in part (*i.e.*, whether the railroad was

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[2780] 538 U.S. 135, 123 S. Ct. 1210, 155 L.Ed.2d 261 (2003).

[2781] *Hensley*, 556 U.S. at 841, 129 S. Ct. at 2141, 173 L. Ed.2d at 1188.

[2782] *Id*., 556 U.S. at 841-842, 129 S. Ct. at 2141, 173 L. Ed.2d at 1188.

[2783] *Id*., 556 U.S. at 843, 129 S. Ct. at 2141, 173 L. Ed.2d at 1188.

[2784] 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed.2d 261 (2003).

[2785] *Id*., 538 U.S. at 141-142, 123 S. Ct. at 1215, 155 L. Ed.2d at 271-272.

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responsible for the entire amount even if another party also negligently caused the injury).[2786] On the first issue, the Court held that employees could recover for mental anguish when they are able to prove that their fear is a genuine and serious one.[2787] On the second issue, the Court held that a railroad is responsible for the entire amount of compensation that is awarded in spite of the possibility that another party's negligence may have caused the injury as well.[2788]

3. Liability of a Railroad for Industrial or Occupational Disease or Poisoning

In *Fraynert v. Delaware and Hudson Railway Co.*[2789] a Court of Common Pleas in Pennsylvania ruled on whether the three year statute of limitations under FELA barred the claims of six former employees who alleged that the Delaware and Hudson Railway Co. (Delaware & Hudson) negligently exposed them to coal dust that caused their pulmonary injuries.[2790] As the court explained, "[t]o obtain summary judgment, the railroad must establish that the plaintiffs knew, or in the exercise of reasonable diligence should have known, of their pulmonary damage and its cause more than three years prior to filing these FELA actions."[2791]

At that stage of the proceedings the court denied Delaware & Hudson's motion for a summary judgment regarding five plaintiffs because it was not clear whether they "possessed sufficient critical facts to objectively discover their pulmonary harm and its cause more than

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[2786] *Id.*, 538 U.S. at 140, 123 S. Ct. at 1214, 155 L. Ed.2d at 271.

[2787] *Id.*, 538 U.S. at 141, 123 S. Ct. at 1215, 155 L. Ed.2d at 271.

[2788] *Id.*

[2789] 2013 Pa. Dist. & Cnty. Dec. LEXIS 299, at *1 (Pa. Ct. Com. Pl. 2013).

[2790] *Id.* at *12 (*citing* 45 U.S.C. § 56).

[2791] *Id.* at *1.

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three years before suit was commenced."[2792] However, the court granted the railroad's motion concerning "one plaintiff [who] knew seven years before he filed his FELA claim that his pulmonary testing revealed serious lung damage, that railroad workers were suffering respiratory and pulmonary problems from lung contamination, and that his coughing and breathing difficulties were attributable to occupational coal dust exposure."[2793]

Cases

G. Violations of the Federal Safety Appliance Act and Claims under FELA

1. Liability for an Employee's Injury Occurring when a Train was in Use

In *Woodard v. CSX Transportation, Inc.*[2794] the plaintiff Woodard, a stevedore for CSX, was injured when unloading a railcar. Along with his FELA claim, Woodard filed a claim under the Federal Safety Appliance Act (FSAA)[2795] for which a "violation constitutes negligence *per se* in a FELA suit."[2796] The issue was whether a railcar was "in use" at the time of the accident.[2797] A federal district court in New York held that because the employee was injured while unloading the railcar when it was on a CSX track the railcar was in use at the time of the injury.[2798] The court denied CSX's motion for a partial summary judgment.[2799]

[2792] *Id*.

[2793] *Id*. at *1-2.

[2794] 2012 U.S. Dist. LEXIS 16704, at *1 (N.D. N.Y Feb. 10, 2012).

[2795] *Id*.

[2796] *Id*. at *3.

[2797] *Id*. at *2-4.

[2798] *Id*. at *4.

[2799] *Id*.

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2. Liability of a Railroad under FELA based on a Violation of the FSAA

In *Strickland v. Norfolk Southern Ry. Co.,*[2800] involving claims against Strickland's employer Norfolk Southern under the FSAA and FELA, the Eleventh Circuit held that a violation of the FSAA may be asserted under FELA.[2801] Although Strickland later could not identify the railroad car that caused his injury, the plaintiff alleged that he sustained a serious shoulder injury because of a faulty handbrake. The court held that a summary judgment in favor of Norfolk Southern because of the worker's failure to identify the railcar where his injury occurred was inappropriate. To survive a motion for a summary judgment on a FELA claim, a plaintiff only needs to demonstrate "that a question of fact exists concerning whether the employer's negligence played a part, however slight, in the employee's injuries."[2802]

Thus, if there were a question of fact whether a Norfolk Southern railcar caused Strickland's injury his action should survive a motion for a summary judgment. Relying on the Supreme Court's statement in *McBride*, *supra*, that FELA was enacted to counteract harsh rules of state common law the court stated that a "summary judgment in the instant case would be counter to that forgiving standard."[2803] Moreover, the court held that there was a genuine issue of material fact because of a conflict between the plaintiff's deposition and his affidavit. A summary judgment is improper when "a fact-finder is required to weigh a deponent's credibility…."[2804] The court reversed and remanded the district court's order granting a

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[2800] 692 F.3d 1151 (11th Cir. 2012).

[2801] *Id*. at 1151-1153.

[2802] *Id*. at 1157.

[2803] *Id*. at 1160.

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summary judgment to Norfolk Southern.[2805]

Articles

H. What a Plaintiff must Prove Regarding Causation under FELA

A recent law review article analyses the Supreme Court's decision in 1957 in *Rogers v. Missouri Pacific Railroad Co.*[2806] in which the Court held that FELA requires only "that employer negligence played any part, even the slightest, in producing the injury."[2807] The article begins by explaining that when Congress enacted FELA the "standards were quite different from those discussed" in the article.[2808]

The article argues that the statement that "FELA adopted 'a relaxed standard of causation' makes no sense in relation to factual cause because factual cause is not a matter of degree. It might make sense if applied to scope of liability because it encompasses a range of foreseeability."[2809] The author analyzes the *Rogers* case in an effort to show that it is flawed in numerous respects.[2810] The article speculates that one of the reasons for the expansive holding in *Rogers* was the tendency at the time for trial judges to take FELA cases from juries on the

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[2804] *Id*. at 1162.

[2805] *Id*.

[2806] 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed.2d 493 (1957).

[2807] Michael D. Green, "The Federal Employers' Liability Act: Sense and Nonsense about Causation," 61 *DePaul L. Rev*. 503, 504 (2012).

[2808] *Id*. at 508.

[2809] *Id*. at 518 (footnote omitted).

[2810] *Id*. at 523.

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ground of the insufficiency of the plaintiff's evidence.[2811] The article attempts to explain the *Rogers* case on the basis that the decision was about "factual causation."[2812]

The author argues that post-*Rogers* the courts

> endorse[d] the *Rogers* language for use in jury instructions and duck[ed] out of the way. The effect of this is to leave the jury without any meaningful standard for deciding causation and to fail to inform the jury that, before the defendant can be held liable, the jury must find that the plaintiff's harm would not have occurred if the defendant had acted nonnegligently.[2813]

Two other possible explanations of the *Rogers* case are based on the theory of the burden of production or legal sufficiency of the evidence[2814] or the scope of liability of FELA, the latter being a "difficult interpretative puzzle" to decipher.[2815] However, the article states that post-*Rogers* "[a] number of courts … interpreted *Rogers* as having adopted a less rigorous, or even eliminating any, scope of liability limitation from the statute."[2816] Even so, the author does not believe that there is any risk of "virtually limitless liability" of railroads in part because claims may be brought only by railroad employees.[2817]

Finally, the author suggests that the Court in *CSX Transportation v. McBride*, *supra*, could have cleared away much of the confusion caused by the *Rogers* case if only the Court had "insisted that factual causation be distinguished from scope of liability….;" "made plain that the

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[2811] *Id*.

[2812] *Id*. at 528-529.

[2813] *Id*. at 531 (footnote omitted).

[2814] *Id*. at 531-532.

[2815] *Id*. at 532-534.

[2816] *Id*. at 532.

[2817] *Id*. at 534.

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plaintiff has the burden of proof to establish that the defendant's negligence was a necessary condition/but for/without which/*sine qua non* (take your pick) of the plaintiff's harm;" decide[d] whether, within … FELA's statutory language, there is room for some scope of liability limitation on a defendant's liability;" and "confronted and resolved the effect of the 'in whole or in part' language on the burden of production with regard to factual cause."[2818]

I. The Extent of Causation Required in FELA Claims after *McBride*

In "Causation Issues in FELA and Jones Act Cases in the Wake of McBride" the author explores the uncertainty of the *McBride* decision.[2819] The article traces the origins of the *McBride* decision to the 1957 Supreme Court decision in *Rogers v. Missouri Pacific Railroad Co.* that first relaxed the standard of causation under FELA.[2820] After years of confusion and controversy among the circuits because of the *Rogers* decision, the *McBride* decision offered some clarity but left unclear what exactly the standard of causation should be for FELA claims.[2821] The author argues that the Supreme Court's decision means that "FELA lacks a formal … [proximate cause] requirement, but courts can find a way within the *Rogers* language to rule as a matter of law for defendants in cases of extremely and inappropriately remote causation."[2822] Although the holding in *McBride* was a major win for plaintiffs filing claims under FELA, the author argues that the Supreme Court did not go so far as to remove completely

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[2818] *Id*. at 538-539.

[2819] David W. Robertson, "Causation Issues in FELA and Jones Act Cases in the Wake of McBride," 36 *Tul. Mar. L. J.* 397 (2012).

[2820] *Id*. at 399.

[2821] *Id*. at 400.

[2822] *Id*. at 411, 417-418.

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the element of proximate cause.[2823] The author submits that the decision "will not work out to be as great as it looks on paper," because the courts commonly use reasoning that is based on proximate cause, even when declaring there is no proximate cause requirement.[2824]

J. The Effect of Counterclaims by Railroads on FELA Claims

In "Sidetracking the FELA: The Railroads' Property Damage Claims" the author argues that FELA's value is compromised by the increased instances in employees' suits under FELA when railroads counterclaim for property damage.[2825] The author argues that the potential for counterclaims by railroads deters employees and their families from filing claims under FELA.[2826]

K. When an Employee may Recover under FELA for a Fear of Developing Cancer

An article in *Trial* analyzes the application of FELA in cases when there are substances in the workplace that cause non-malignant harm but that may cause cancer in the long term.[2827] Although railroads have resisted claims by employees based on their fear of developing cancer from job-related exposure to toxins, the Supreme Court has begun to clarify the issue.[2828] In *Norfolk & Western v. Ayers*, *supra*, part XXI.F.2, the Court considered whether a plaintiff in a

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[2823] *Id*. at 421.

[2824] *Id*.) (*citing Heath v. Matson Navigation Co*., 333 F. Supp. 131, 135-36, 1972 AMC 1063, 1068-70 (D. Haw. 1971)).

[2825] William P. Murphy, "Sidetracking the FELA: The Railroads' Property Damage Claims," 69 *Minn. L. Rev*. 349, 350 (1985).

[2826] *Id*. at 386-87.

[2827] William P. Gavin, "FELA and the Fear of Cancer," *Trial* (Jan. 2011).

[2828] *Id*. at 44.

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FELA case who was diagnosed with asbestosis but not with cancer could recover damages based on a fear of developing cancer even without symptoms of emotional distress. The Court held that such a claim is actionable as long as the one suffering from asbestosis seeks damages for fear of developing cancer as an element of the damages for asbestosis-related pain and suffering.[2829] After the decision in *Ayers*, other courts held that even a plaintiff who is not exhibiting any sign of physical symptoms stemming from emotional distress may bring a claim for emotional distress that is related to asbestosis and the fear of having cancer eventually.[2830]

The article discusses how *CSX Transportation v. Hensley, supra*, part XXI.F.1, altered the *Ayers* precedent. In *Ayers* the Court had held that damages for pain and suffering may include damages for the fear of developing cancer that accompanies physical injury, whereas the Court in *Hensley* ruled that it was reversible error to fail to give a limiting instruction on the recovery of damages for fear-of-cancer, thus setting a higher bar for receiving an award for a fear of developing cancer because of asbestosis.[2831] The Court did not explain what the standard should be or include.

Besides discussing relevant case law, the article includes suggestions on how to harmonize the cases and the guidelines that they establish in permitting awards that include damages for fear-of-cancer.

L. Whether the Cost of FELA Claims is too High

In "The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform," the authors argue that over the last century the Supreme Court has sought to diminish a

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[2829] *Id*.

[2830] *Id*. at 47-48.

[2831] *Id*. at 47.

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plaintiff's burden of proof for claims under FELA.[2832] The authors note that in eighty-four percent of FELA cases in which the Supreme Court has granted *certiorari* "the Court reversed the lower court for setting aside a jury verdict for the employee or taking the case from the jury."[2833] The authors argue that the costs of FELA claims are very high, not only because damages may include lost wages, medical expenses, estimated future earnings, and pain and suffering, but also because the low requirement for proof of negligence all but ensures that counsel will be involved, thus increasing the transaction costs of FELA claims.[2834]

M. Whether FELA should be Repealed

In "Why Congress Should Repeal the Federal Employers' Liability Act of 1908" the author argues that FELA should be repealed or clarified.[2835] The author argues that FELA is outdated, overburdens the federal courts, and should be replaced by state workers' compensation funds.[2836]

[2832] Arnold I. Havens and Anthony A. Anderson, "The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform," 34 *Fed. B. News & J.* 310 (1987).

[2833] *Id*. at 312.

[2834] *Id*. at 313.

[2835] Thomas E. Baker, "Why Congress Should Repeal the Federal Employers' Liability Act of 1908," 29 *Harv. J. on Legis*. 79 (1992).

[2836] *Id*. at 87, 92.

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XXII. FEDERAL FINANCING FOR RAILROAD PROJECTS

A. Introduction

Congress has authorized billions of dollars to support the expansion and upgrading of transportation systems across the country.[2837] Section B discusses the Moving Ahead for Progress in the 21st Century Act (MAP-21), discussed in more detail in part XXII of the Report, which Congress enacted in 2012. Section C addresses the Transportation Infrastructure Finance and Innovation Act (TIFIA). Section D covers the Railroad Rehabilitation and Improvement Financing Act (RRIF). Section E discusses funding for the Railway-Highway Crossings Program. Finally, Section F discusses the 2009 American Recovery and Reinvestment Act (AARA).

Statutes

B. Moving Ahead for Progress in the 21st Century Act – MAP-21

1. Programs Affected by MAP-21

Under MAP-21 Congress authorized $105 billion for fiscal year 2013-2014. MAP-21 includes many programs, examples of which are the National Highway Performance Program (§ 1106);[2838] the Surface Transportation Program (§ 1108);[2839] the Highway Safety and Improvement Program (§ 1112);[2840] the Congestion Mitigation and Air Quality Improvement

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[2837] United States Department of Transportation, Federal Highway Administration, "MAP-21 Moving Ahead for Progress in the 21st Century," available at: https://www.fhwa.dot.gov/map21/ (last accessed March 31, 2015), hereinafter referred to as "MAP-21 Moving Ahead for Progress."

[2838] MAP-21, P.L. 112-141 § 1104.

[2839] *Id*. § 1108.

[2840] *Id*. § 1112.

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Program (§ 1113);[2841] and the Transportation Alternatives Program (§ 1122).[2842] According to the Federal Highway Administration (FHWA), MAP-21 "creates a streamlined and performance-based surface transportation program and builds on many of the highway, transit, bike, and pedestrian programs and policies established in 1991."[2843]

2. Funding for Surface Transportation Programs

In 2012, MAP-21 authorized funding for several surface transportation programs and the utilization of a performance-based evaluation system for the programs.[2844] MAP-21 seeks to expand numerous projects already in progress within the various highway programs.[2845] MAP-21 also includes funding for TIFIA and for the upgrading of railway-highway crossings, both of which are discussed below.[2846]

Statutes and Regulations

C. Transportation Infrastructure Finance and Innovation Act

1. Funding

The Transportation Infrastructure Finance and Innovation Act or TIFIA, enacted in 1998 and modified by MAP-21, "makes three forms of credit assistance available – secured (direct) loans, loan guarantees and standby lines of credit – for surface transportation projects of national

[2841] *Id*. § 1113.

[2842] *Id*. § 1122.

[2843] MAP-21 Moving Ahead for Progress, *supra* note 2837.

[2844] *Id*.

[2845] *Id*.

[2846] MAP-21 § 2002 (2012), 23 U.S.C. §§ 601-609 (2014); MAP-21 § 1519, 23 U.S.C. § 130 (2014).

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or regional significance."[2847] TIFIA provides federal credit assistance for eligible surface transportation projects and is designed to allow state and local governments to finance large-scale projects.[2848] Loans are available for surface transportation projects such as highway, railroad, intermodal freight, and transit projects; moreover, port-access projects may apply for financial assistance that may be combined with private funding.[2849]

The source of TIFIA funding is the Highway Trust Fund.[2850] A project eligible for TIFIA may secure a line of credit, a loan, or both. A TIFIA line of credit may be secured for an amount up to 33% of the cost of a project, whereas a TIFIA loan may be made for up to 49% of a project's cost.[2851]

2. Project Eligibility

Rail projects that are eligible for a TIFIA line of credit or loan include intercity passenger rail facilities (as well as Amtrak); public and private freight rail projects, although the latter must provide a "public benefit for highway users;" intermodal freight transfer facilities; and projects that improve the service of freight rails.[2852] Eligible projects include urban infrastructure

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[2847] United States Department of Transportation, FHWA, "Transportation Infrastructure Finance and Innovation Act," available at: https://www.fhwa.dot.gov/map21/factsheets/tifia.cfm (last accessed March 31, 2015); available at: https://www.fhwa.dot.gov/map21/factsheets/tifia.cfm; http://www.fra.dot.gov/Page/P0340 (last accessed March 31, 2015), hereinafter referred to as "TIFIA."

[2848] MAP-21 § 2002 (2012), 23 U.S.C. §§ 601-609 (2014) (setting forth the definitions of eligibility for infrastructure finance projects); United States Department of Transportation, FHWA, "Introduction to TIFIA FAQ," available at: http://www.fhwa.dot.gov/ipd/tifia/faqs/ (last accessed March 31, 2014.

[2849] TIFIA, *supra* note 2847; MAP-21 § 2002, 23 U.S.C. §§ 601-609 (2014).

[2850] *Id*.

[2851] *Id*.

[2852] *Id*.

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projects costing more than $50 million; rural infrastructure projects costing at least $25 million; an "intelligent transportation system" costing at least $15 million; or a project that costs up to one-third of a state's formula apportionment in a given year.[2853]

D. Railroad Rehabilitation and Improvement Financing Program

Statutes and Regulations

1. Direct Loans and Loan Guarantees

As a result of the Transportation Equity Act for the 21st Century (TEA-21), RRIF authorized up to $35 billion in direct loans and loan guarantees for railroad infrastructure projects. The statutory and regulatory authority for direct loans and loan guarantees under the RRIF program are 45 U.S.C. §§ 821, *et seq*. and 49 C.F.R. § 260, *et seq*. Section 821 of the statute defines important terms, such as the calculation of the estimated long-term cost to the government of a direct loan or loan guarantee; § 822 sets forth the specific provisions that apply to direct loans and guarantees; and § 823 deals with administration.

Under § 822(a) of the statute the Secretary of Transportation is authorized to provide direct loans and loan guarantees to:

> (1) State and local governments;
> (2) interstate compacts consented to by Congress under section 410(a) of the Amtrak Reform and Accountability Act of 1997 (49 U.S.C. 24101 note);
> (3) government sponsored authorities and corporations;
> (4) railroads;
> (5) joint ventures that include at least one railroad; and
> (6) solely for the purpose of constructing a rail connection between a plant or facility and a second rail carrier, limited option rail freight shippers that own or operate a plant or other facility that is served by no more than a single railroad.[2854]

[2853] *Id*.

[2854] 45 U.S.C. § 822(a) (2014); 49 C.F.R. § 260.1 (2014).

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The foregoing authority has been delegated to the Administrator of the Federal Railroad Administration.[2855]

When applications are being evaluated, priority is given to projects, for example, that will enhance public safety or the environment, promote economic development, preserve or enhance rail or intermodal service to small communities or rural areas, or enhance service and capacity in the national rail system.[2856]

The statute and regulations establish certain limitations, conditions prerequisites, and requirements. For example, under § 822(d) of the statute one limitation is that

> [t]he aggregate unpaid principal amounts of obligations under direct loans and loan guarantees made under this section shall not exceed $35,000,000,000 at any one time. Of this amount, not less than $7,000,000,000 shall be available solely for projects primarily benefiting freight railroads other than Class I carriers.[2857]

There are several conditions for assistance, one of which is that a railroad or railroad partner

> will not use any funds or assets from railroad or intermodal operations for purposes not related to such operations, if such use would impair the ability of the applicant, railroad, or railroad partner to provide rail or intermodal services in an efficient and economic manner, or would adversely affect the ability of the applicant, railroad, or railroad partner to perform any obligation entered into by the applicant under this section….[2858]

Two of the five prerequisites for assistance are that the "repayment of the obligation is required to be made within a term of not more than 35 years from the date of its execution" and

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[2855] 49 C.F.R. § 260.1 (2014).

[2856] 45 U.S.C. § 822(c)(1), (2), (6) and (7) (2014). *See also*, 49 C.F.R. § 260.7 (2014).

[2857] 45 U.S.C. § 822(d) (2014).

[2858] 45 U.S.C. § 822 (h)(1)(A) (2014). *See also*, 45 U.S.C. §§ 822(h)(1)(B) and (C) (2014).

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that "the direct loan or loan guarantee is justified by the present and probable future demand for rail services or intermodal facilities…."[2859]

One of the requirements for assistance is that the Secretary must determine the amount of a credit risk premium that must be paid before the disbursement of any loan.[2860] The factors that the Secretary must consider are identified in 45 U.S.C. § 822(f)(2), including the applicant's circumstances and the proposed schedule of loan disbursements.[2861]

Lastly, the subsidy cost is the estimated long term cost to the government of a loan or loan guarantee, which "may be funded by Federal appropriations, direct payment of a Credit Risk Premium by the Applicant or a non-Federal infrastructure partner on behalf of the Applicant, or any combination thereof."[2862] As defined by the regulations, a credit risk premium is the portion of the total subsidy cost to the government of a direct loan or loan guarantee not covered by federal appropriations that must be paid by the applicant or its non-federal "infrastructure partner" before disbursement of a direct loan or the issuance of a loan guarantee.[2863] When "[f]ederal appropriations are inadequate to cover the subsidy cost, a non-

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[2859] 45 U.S.C. § 822(g)(1) and (2) (2014); *see also*, 45 U.S.C. §§ 822(g)(3)-(5) (2014), *but see* 49 C.F.R. § 260.9 (2014) that states that the repayment period may not exceed 25 years.

[2860] 45 U.S.C. §§ 8222(f)(2) and (3) (2014). *See also*, 49 C.F.R. § 260.13 (2014). That is, a credit risk premium must be paid before there is a full or incremental disbursement of a direct or guaranteed loan. *See* 49 C.F.R. § 260.15(c) (2014).

[2861] 45 U.S.C. §§ 822(f)(2)(A) and (B) (2014). *See also*, 45 U.S.C. §§ 822(f)(2)(C)-(F) (2014).

[2862] 49 C.F.R. § 260.13 (2014).

[2863] 49 C.F.R. § 260.3(e) (2014).

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Federal infrastructure partner may pay to the Administrator a Credit Risk Premium adequate to cover that portion of the subsidy cost not covered by Federal appropriations."[2864]

Of course, if direct loans or loan guarantees under RRIF do not cover the complete cost of a project, other financing or investment may be needed for a project.

2. Project Eligibility

Under the statute and regulations financial assistance is available to:

> (A) acquire, improve, or rehabilitate intermodal or rail equipment or facilities, including track, components of track, bridges, yards, buildings, and shops;
> (B) refinance outstanding debt incurred for the purposes described in subparagraph (A); or
> (C) develop or establish new intermodal or railroad facilities.[2865]

However, financial assistance under the program may not be used to pay railroad operating expenses.[2866]

Article

3. Repurposing RRIF to include Commuter Rail

According to one source, "[t]t is now time to transform RRIF into a source of financing for large commuter rail projects."[2867] The RRIF has been shown to be a successful model that has helped short-haul rail companies to expand and to acquire new freight rail facilities and

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[2864] 49 C.F.R. § 260.15(a) (2014).

[2865] 45 U.S.C. §§ 822(b)(1)(A)-(C) (2014); 49 C.F.R. §§ 260.5(a)(1)-(3) (2014).

[2866] 45 U.S.C. § 822(b)(2) (2014); 49 C.F.R. § 260.5(b) (2014).

[2867] Barney A. Allison, "Perspective: Refining RRIF to Include Commuter Rail" (Jan. 15, 2014), available at: http://www.railwayage.com/index.php/passenger/commuter-regional/perspective-refining-rrif-to-include-commuter-rail.html?channel=56 (last accessed March 31, 2015).

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equipment.[2868] Although the funding program reportedly has up to $35 billion for use only about $1.7 billion has been spent since 1998; seventy-two percent of the loans have been provided to Class II and III railroads.[2869] The article argues that "[d]emand for public transportation is real and growing, but oddly, commuter rail demand lags other modes" and that "greater frequency and interconnectivity will increase ridership, meeting an untapped demand of currently underserved riders."[2870] The article states that providing RRIF funding for commuter rail may be accomplished by following the TIFIA-model for highways whereby RRIF could be a source of "low-cost debt capital for commuter rail[] with some mode-appropriate changes."[2871] RRIF could accomplish this objective by considering creditworthy revenue streams such as sales taxes, use of credit ratings, the use of TIFIA and RRIF together, and the development of credit criteria for greater predictability rather than utilizing only hard assets as collateral.[2872] The article concludes that practitioners should convince the House Transportation and Infrastructure Committee to repurpose the RRIF to expand commuter rail.[2873]

[2868] *Id.*

[2869] *Id.*

[2870] *Id.*

[2871] *Id.*

[2872] *Id.*

[2873] *Id.*

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Statutes

E. Railway-Highway Crossings Program

1. Funding

The purpose of the Railway-Highway Crossings Program is to reduce the number of injuries and fatalities at public grade crossings.[2874] As with the TIFIA program the source of the funds is the Highway Trust Fund.[2875] A state's funding is determined based on formula factors for the Surface Transportation Program and the number of railway-highway public grade crossings.[2876] Overall, each state is guaranteed at least .5% of the program funds.[2877] When a state qualifies for funding the federal share is ninety percent.[2878]

2. Project Eligibility

To receive funding for railway-highway crossings a state must survey all highways to determine the railroad crossings that require attention. A railroad must compensate the state transportation department for ten percent of the net benefit of a railroad project. The state must submit annual reports and update the United States Department of Transportation National Crossing Inventory, which is a national database that includes information on each public

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[2874] U.S. Department of Transportation, Federal Highway Administration, "Railway-Highway Crossings Program Fact-Sheet," available at: https://www.fhwa.dot.gov/map21/factsheets/rhc.cfm (last accessed March 31, 2015), hereinafter referred to as "Railway-Highway Crossings Program;" MAP-21 § 1519, 23 U.S.C. § 130 (2014).

[2875] *Id*.

[2876] *Id*.; MAP-21 § 1519, 23 U.S.C. § 130 (2014).

[2877] *Id*.

[2878] Railway-Highway Crossings Program, *supra* note 2874; 23 U.S.C. § 130(f)(3) (2014).

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crossing within a state's borders, such as warning devices and signage.[2879] All previous projects that were eligible under 23 U.S.C. § 130 continue to be eligible.[2880]

Statutes

F. The American Recovery and Reinvestment Act (ARRA)

1. Stimulus Funds for Passenger Rail Projects

The AARA, enacted in 2009, provides short-term funding for sectors across the economy, including agriculture, labor, education, health, housing, and infrastructure projects. The majority of the authorized funding has been used and should be depleted between 2014 and 2016.[2881] The ARRA funds are "obligated" to a specific project and work may begin or continue on a project after funds are committed to the project.[2882]

Congress made $8 billion available through ARRA to develop high-speed intercity passenger rail service in the United States. In April 2009 FRA published a High-Speed Rail Strategic Plan and in June 2009 launched the High-Speed Intercity Passenger Rail (HISPR) program.[2883]

[2879] Railway-Highway Crossings Program, *supra* note 2874; 23 U.S.C. §§ 130(a)-(l) (2014).

[2880] Railway-Highway Crossings Program, *supra* note 2874.

[2881] ARRA, P.L. 111-5 (2009).

[2882] U.S. Department of Transportation, Federal Transit Administration, "American Recovery and Reinvestment Act," available at: http://www.fta.dot.gov/about/12835.html (last accessed March 31, 2015).

[2883] Federal Railroad Administration, High-Speed Rail Overview, available at: https://www.fra.dot.gov/Page/P0060 (last accessed March 31, 2015).

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2. Project Eligibility

ARRA funding may be made available to current recipients of FTA's Urbanized Area Formula Program (49 U.S.C. § 5307); Formula Grants for other than Urbanized Areas Program (49 U.S.C. § 5311); Fixed Guideway Modernization Formula Program (49 U.S.C. § 5309); federally recognized tribes (49 U.S.C. § 5311(c) (1)); and Capital Investment Grants (49 U.S.C. § 5309).[2884]

[2884] Federal Transit Administration, available at: http://www.fta.dot.gov/about/12835_9325.html#Eligibility (last accessed March 31, 2015).

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XXIII. FEDERAL RAILROAD SAFETY ACT

A. Introduction

In 1970, Congress enacted the Federal Railroad Safety Act (FRSA) to ensure the national uniformity of safety regulations for railroads. Section B discusses the statutory elements, the limited ability of states to establish their own regulations to address "local safety or security hazard[s]," *i.e.*, the local hazards savings clause, and the FRSA's preemption of state laws so as to protect whistleblowers who report safety violations.[2885] Sections C, D, and E, respectively, discuss cases applying the FRSA, such as to a local regulation on grade crossings and to the preemption of negligence claims under state law against railroad companies. Finally, Section F discusses an article on the 2007 amendment to the FRSA clarifying the statute's preemption of state laws.

Statute

B. Federal Railroad Safety Act's Regulation of Every Area of Railroad Safety

The FSRA authorizes the Secretary of Transportation to prescribe regulations for every area of railroad safety[2886] and for the "investigative and surveillance activities necessary to enforce the safety regulations."[2887] Because of the legislative intent that laws, regulations, and orders related to railroad security will be "nationally uniform,"[2888] the FRSA preempts state or municipal laws to the extent practicable, including state laws regarding whistleblowers.[2889]

[2885] 49 U.S.C. § 20101, *et seq.* (2014).

[2886] 49 U.S.C. § 20103(a) (2014).

[2887] 49 U.S.C. § 20105(a) (2014).

[2888] 49 U.S.C. § 20106(a)(1) (2014).

[2889] *See Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989).

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However, when "necessary to eliminate or reduce an essentially local safety or security hazard" a state may adopt an "additional or more stringent law, regulation or order."[2890] The local hazards savings clause is an exception to preemption under the FRSA for "specific local hazards … that the Secretary of Transportation did not and, as a practical matter, could not take into account in determining laws or regulations under the FRSA."[2891]

1. Amendments to 49 U.S.C. §§ 20109(a)(1)-(7) of the FRSA by the 9/11 Commission Act of 2007

Originally, the FRSA provided that "a railroad carrier … may not … discriminate against an employee if such discrimination is due" to the employee's lawful act to "file a complaint, or directly cause to be brought a proceeding" regarding the enforcement of railroad safety laws or to testify or agree to testify in such a proceeding.[2892]

Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act of 2007) amended the FRSA by increasing the type of protected activities in which a railroad employee may engage. Although the reader should consult the entire statutory section, a railroad employee is permitted:

> (1) to provide information … or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation [as defined in subsections (A) through (C) of subsection (1)] stemming from the provided information….

[2890] 49 U.S.C. § 20106(a)(2) (2014).

[2891] *Boyd v. National R.R Passenger Corp.*, 62 Mass. App. Ct. 783, 792, 821 N.E.2d 95, 103 (Mass. App. Ct. 2005), *rev'd*, 2006 Mass. LEXIS 119 (2006) (reversal discussed in part XXIII.C).

[2892] 49 U.S.C. §§ 20109(a) and (a)(3) (2014).

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> (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;
> (3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;
> (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;
> (5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;
> (6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or
> (7) to accurately report hours on duty pursuant to chapter 211.[2893]

2. Amendments to 49 U.S.C. §§ 20109(b)(1)-(7) of the FRSA by the 9/11 Commission Act of 2007

Prior to the 2007 amendments, the FRSA's provision on employees and protection from hazardous conditions prohibited railroad carriers from retaliating against railroad employees who refused to work in hazardous conditions.[2894] As amended by § 1521 of the 9/11 Commission Act of 2007, the FRSA's provisions on whistleblower protection now state that a railroad carrier engaged in interstate or foreign commerce or an officer thereof

> shall not shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for –
>
> (A) reporting, in good faith, a hazardous safety or security condition;
> (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or
> (C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the

[2893] 49 U.S.C. §§ 20109(a)(1)-(7) (2014) (as amended by the 9/11 Commission Act of 2007, §§ 1521(a)(1)-(7)).

[2894] 49 U.S.C. § 20109(b) (2014).

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equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.[2895]

3. Transfer of Enforcement of Whistleblower Protection from the National Railroad Adjustment Board to the Occupational Safety and Health Administration

Section 1521 of the 9/11 Commission Act of 2007 also amended the FRSA by transferring enforcement of whistleblower complaints from the National Railroad Adjustment Board to the Occupational Safety and Health Administration (OSHA).[2896] An employee who alleges retaliation for whistleblowing may file a complaint with the Secretary of Labor.[2897] If the Secretary of Labor has not issued a final decision within 120 days, the complainant may file an

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[2895] 49 U.S.C. §§ 20109(b)(1)(A)-(C) (2014) (as amended by 9/11 Commission Act of 2007, §§ 1521(b)(1)(A)-(C)). Under subjection (C)(2) (as amended by the 9/11 Commission Act of 2007, §§ 1521(b)(2)(a)(A)-(C)),

> a refusal is protected under paragraph (1)(B) and (C) if –
>
> (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
> (B) a reasonable individual in the circumstances then confronting the employee would conclude that—
> (i) the hazardous condition presents an imminent danger of death or serious injury; and
> (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
> (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

[2896] 49 U.S.C. §§ 20109(c) and (d) (2014) (as amended by the 9/11 Commission of 2007 Act, §§ 1521(c) (Enforcement Action) and (c)(1) ("by filing a complaint with the Secretary of Labor") and 1521(d) (Remedies). OSHA is part of the Department of Labor and is tasked with assuring safety and healthful working conditions.

[2897] 49 U.S.C. § 20109(d)(1) (2014).

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action in a United States District Court.[2898] The remedies available to a prevailing complainant include "all relief necessary to make the employee whole" including reinstatement, backpay, with interest and compensatory damages.[2899] In certain cases, punitive damages up to $250,000 may be awarded.[2900] The provisions on whistleblower protection also allow other federal or state laws to provide safeguards against discrimination in railroad employment.[2901] The intent is to provide "broad scale federal legislation" without "disturb[ing] these existing railroad safety laws."[2902]

4. Amendments to the FRSA by Section 419 of the Railroad Safety Improvement Act of 2008

Section 419 of the Railroad Safety Improvement Act of 2008 amended the FRSA by prohibiting a railroad carrier from "disciplin[ing], or threaten[ing] discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician."[2903] An employee may follow the process (*see* preceding subsection 3 of this part of

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[2898] 49 U.S.C. § 20109(c)(3) (2014).

[2899] 49 U.S.C. § 20109(e)(1)-(2) (2014).

[2900] 49 U.S.C. § 20190(d)(3) (2014).

[2901] 49 U.S.C. § 20109(g) (2014).

[2902] Frank J. Mastro, "Preemption is not Dead: The Continued Vitality of Preemption Under the Federal Railroad Safety Act following the 2007 Amendment to 49 U.S.C. § 20106," 37 *Transp. L. J.* 1, 6 (2010), hereinafter referred to as "Mastro."

[2903] 49 U.S.C. § 20109(c)(2) (2014). Under the statute the term "'discipline' means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record." *Id*.

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the Report) to enforce an action for retaliatory discipline against a railroad carrier.[2904] OSHA has promulgated regulations to handle complaints of retaliation under the FRSA.[2905]

5. Increase in OSHA's FRSA Whistleblower Complaints

Whistleblower complaints for violations of the FRSA have become an increasingly significant part of OSHA whistleblower docket. Since 2007 when OSHA acquired jurisdiction of FRSA complaints, OSHA's number of FRSA-based complaints has increased from 1 in fiscal year 2007 to 384 and 353 complaints, respectively, in fiscal years 2012 and 2013.[2906] The percentage of OHSA's docket of FRSA whistleblower complaints has increased from 1% in 2007 to 13.3% and 11.9%, respectively, for fiscal years 2012 and 2013.[2907]

Cases

C. Whether an Exception under State Law for a Railroad's Reckless Conduct Survives Preemption

In *Boyd v. National R.R. Passenger Corp.*[2908] Boyd, a fifteen-year-old girl, was struck and killed instantly by an Amtrak train at a grade crossing that was equipped with automatic safety gates, warning bells, and warning lights. Boyd's father commenced a wrongful death action against Amtrak, the Massachusetts Bay Transportation Authority (MBTA), and Prone, the

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[2904] 49 U.S.C. § 20109(d)(1) (2014).

[2905] 29 C.F.R. § 1982.100, *et seq*. (2014).

[2906] United States Department of Labor, Occupational Safety and Health Administration, Whistleblower Investigation Data FY2005-FY2013, available at: http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13.pdf (last accessed March 31, 2015).

[2907] *Id*.

[2908] 446 Mass. 540, 845 N.E.2d 356 (Sup. J. Ct. Mass. 2006).

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engineer who was operating the train at the time of the accident.[2909] The complaint alleged that Amtrak, the MBTA, and Prone were negligent; that there were statutory violations because of Amtrak's and the MBTA's failure to give adequate warnings; and that Amtrak and the MBTA were guilty of gross negligence and willful, wanton, or reckless conduct.[2910] After the Superior Court dismissed the complaint, the Appeals Court of Massachusetts affirmed.[2911] The appeals court held that dismissal below was proper, in part, because "local speed limit and safety gate requirements were preempted by the [FRSA] …. and related regulations promulgated by the [FRA]…."[2912]

On review by the Supreme Judicial Court of Massachusetts, the issue on appeal was limited to the one issue of reckless conduct.[2913] Although the issue was not directly before the Supreme Judicial Court, the Appeals Court of Massachusetts had held that the FRSA preempted Boyd's state law claims because the conditions at the crossing did not qualify as a local hazard under the savings clause and because "[g]eneral conditions at grade crossings are not local hazards because they are "[s]tatewide in character" and "amenable to uniform, national standards."[2914] Under the Massachusetts Wrongful Death statute, there is

> a specific exemption to liability for railroads that states that "a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and

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[2909] *Id.*, 446 Mass. at 540-541, 845 N.E.2d at 359.

[2910] *Id.*, 446 Mass. at 541, 845 N.E.2d at 359.

[2911] *Id*.

[2912] *Id*. (citation omitted).

[2913] *Id*., 446 Mass. at 542, 845 N.E.2d at 360.

[2914] *Boyd v. Amtrak*, 62 Mass. App. Ct. 783, 792, 821 N.E.2d 95, 103 (2005).

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> regulations of the carrier" ... However, even where a decedent is a trespasser, a railroad can be held liable for damages if the conduct of its agents that caused such death was *wilful, wanton, or reckless*.[2915]

After reviewing the evidence, the Supreme Judicial Court concluded that Boyd had presented sufficient evidence to raise a triable issue of fact on whether the defendants were reckless.[2916]

First, "[b]y sounding the horn only 600 to 700 feet from the grade crossing, Prone effectively halved the amount of time that Boyd could escape an accident once she started across the tracks and realized that a train was bearing down on her."[2917] Second, the plaintiff's evidence, "if believed, would suggest that Prone had been exceeding the federally prescribed speed limit at the time the train hit Boyd."[2918] The court stated that the exception for reckless conduct is much more than mere negligence and a difficult bar to reach:

> [T]he risk created by a defendant's conduct must be substantially greater than that which would constitute negligence, and the risk must be one involving an easily perceptible danger of death or grave physical harm. … This is a significant distinction, and our decision should not be interpreted as diminishing in any way the high evidentiary standard that must be satisfied in order to establish reckless conduct, rather than negligence.[2919]

[2915] *Boyd*, 446 Mass. at 546, 845 N.E.2d at 362 (citations omitted) (emphasis supplied).

[2916] *Id.*, 446 Mass. at 549, 845 N.E.2d at 365.

[2917] *Id.*, 446 Mass. at 551, 845 N.E.2d at 366.

[2918] *Id.*, 446 Mass. at 552, 845 N.E.2d at 366.

[2919] *Id.*, 446 Mass. at 553, 845 N.E.2d at 367 (citation omitted).

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D. Under the FRSA only Federal Regulations and Orders of the Secretary of Transportation Establish a Federal Standard of Care that Preempts State Law

In *Sanchez v. BNSF Railway Company*[2920] the plaintiff Sanchez filed a negligence claim against BNSF for personal injuries that Sanchez sustained because of BNSF's use of allegedly oversized ballast that caused Sanchez to fall. After BNSF removed the case to a federal district court in New Mexico on the ground of diversity jurisdiction, BNSF moved for a summary judgment on the basis that the FRSA preempted Sanchez's claim. BNSF argued that the "[p]laintiff's claims 'regarding the use of improper and oversized ballast' are 'wholly preempted by federal law.'"[2921] Quoting an opinion by the Sixth Circuit, the district court stated:

> Under the FRSA's express preemption provision, "[l]aws, regulations, and orders related to railroad safety … shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). "A State may adopt or continue in force a law, regulation, or order related to railroad safety … until the Secretary of Transportation … prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). A state-law negligence action is "covered" and therefore preempted if a FRSA regulation "substantially subsume[s]" the subject matter of the suit.[2922]

The court explained that "the 'clarification amendment' to 49 U.S.C. § 20106, titled 'Clarification Regarding State Law Causes of Action,' [explained] … that Congress merely was clarifying that 'FRSA preemption does not apply when a railroad violates a federal safety standard of care.'"[2923] Sanchez argued that "such a standard apparently is to be implied from the

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[2920] 2013 U.S. Dist. LEXIS 147656, at *1 (D. N.M. 2013).

[2921] *Id.* at *3 (citation omitted).

[2922] *Id.* at *10 (*quoting Nickels v. Grand Trunk W. R.R., Inc*., 560 F.3d 426, 429 (6th Cir. 2009)).

[2923] *Id.* at *13 (*quoting Henning v. Union Pacific Railroad Co.,* 530 F.3d 1206, 1214-1216 (10th Cir. 2008)).

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engineering standards for ballast promulgated by the American Railway Engineering and Maintenance of Way Association" (AREMA).[2924] However, the court rejected the argument because "[a]s the clarification amendment to the FRSA preemption provision provides, the federal standard of care is 'established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters).'"[2925] The AREMA standards did not establish a federal standard of care because they were not issued by the Secretary and were merely non-binding recommendations.[2926] Thus, the court granted BNSF's motion for a summary judgment on Sanchez's ballast-related claims.

E. Exclusive Federal Whistleblower Protection for Railroad Employees

In *Rayner v. Smirl*[2927] Rayner, an employee of CSX, was allegedly discharged in retaliation after observing several safety violations and reporting them to his supervisors. At issue was whether the FRSA provided exclusive whistleblower protection that preempted the plaintiff's state law claim. The 1980 amendments to the FRSA provided that a "railroad carrier … may not discharge … an employee" because such employee has "filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws."[2928] Not only did the statute include an explicit preemption

[2924] *Id.* at *14.

[2925] *Id*. (citation omitted).

[2926] *Id*. (citation omitted).

[2927] 873 F.2d 60, 62 (4th Cir. 1989), *cert. denied*, 493 U.S. 876, 110 S. Ct. 213, 107 L. Ed.2d 166 (1989), *superseded by statute as stated in Gonero v. Union Pac. R.R. Co*., 2009 U.S. Dist. LEXIS 100962, at *1 (E.D. Cal. 2009).

[2928] *Id.* at 63 (*quoting* 45 U.S.C. § 441(a)).

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provision,[2929] but also the legislative history demonstrated a clear congressional intent to provide uniform protection to all railroad employees who report safety violations.[2930]

The court's opinion further explained:

> Congress presumably believed that this statutory "whistleblower" provision was a law "relating to railroad safety" when it included it in the Federal Railroad Safety Authorization Act of 1980 and codified it in the United States Code under the title of "Railroad Safety." ….
>
> The comprehensive remedial scheme for aggrieved railroad employees provided in § 441 serves to confirm its preemptive scope. The parties may petition for a hearing before the National Railroad Adjustment Board and may be represented by counsel. An employee who prevails before the Board may seek enforcement of the Board's order in the federal district courts, and either party may petition the federal district courts for review of the Board's decisions.[2931]

The Fourth Circuit held that 45 U.S.C. § 441 "provides a broad federal remedy for railroad 'whistleblowers'" and that the court would "refuse to narrow this federal remedial provision to allow appellant to pursue a state action in tort."[2932] Furthermore, "the 'whistleblower' provision of the [FRSA] provides appellant a federal remedy for his employer's alleged retaliatory acts" and, therefore, § 441 preempted Rayner's cause of action under Maryland law for wrongful discharge.[2933] While affirming the judgment of the district court, the court stated that the affirmance of the dismissal of Rayner's complaint was without prejudice so that he could pursue his federal administrative remedies.[2934]

[2929] *Id.* at 65.

[2930] *Id.*

[2931] *Id.*

[2932] *Id.* at 64.

[2933] *Id.* at 67.

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Article

F. The FRSA's Continued Preemption of State Laws since the 2007 Amendment

An article published in the *Transportation Law Journal* examines the state of federal preemption under the FRSA after the 2007 amendment.[2935] In two Supreme Court cases decided before the amendment, the Court held that the FRSA preempted state "common law tort duties."[2936] The two decisions prompted concern that the FRSA did not provide a cause of action for a party injured by a railroad's alleged tortious acts, and, therefore, in some cases the FRSA had produced harsh results.[2937] In enacting the 2007 amendment, Congress clarified the FRSA by listing exceptions to the general rule of preemption.[2938] The article states that the "[c]ourts have been uniform in ruling that the amended § 20106 does not permit railroads to remove state court actions to federal court based on the complete preemption doctrine," but "[t]he inability to remove a case under the complete preemption doctrine … does not preclude a railroad from raising preemption as an affirmative defense."[2939] Although the rule of complete preemption no

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[2934] *Id.*

[2935] Mastro, *supra* note 2902, at 3.

[2936] *Id*. at 7 (*citing CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed.2d 387 (1993); *Norfolk So. Ry. Co. v. Shanklin*, 529 U.C. 344, 120 S. Ct. 1467, 146 L. Ed.2d 374 (2000)).

[2937] Mastro, *supra* note 2902, at 12.

[2938] *Id*. at 12-17; *see also,* 49 U.S.C. § 20106(a)(2) (2014) (the local hazards savings clause) and 49 U.S.C. § 20106(b) (2014) (providing that an action under state law for damages for personal injuries allegedly caused by a party's failure to comply with a federal standard of care, state law, or the party's own standard is not preempted).

[2939] Mastro, *supra* note 2902, at 21 (footnotes omitted).

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longer applies,[2940] "the statute will continue to assure that federal regulations regarding particular areas of railroad safety will supersede state laws covering the same subject."[2941]

[2940] *Id*. at 25.

[2941] *Id*.

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XXIV. FEDERAL SAFETY APPLIANCE ACT

A. Introduction

The original Safety Appliance Act was enacted by Congress in 1893 to promote the safety of employees and travelers on the railroads.[2942] This part of the Report discusses the safety appliances that are required by the current Federal Safety Appliance Act (FSAA) and the application of the FSAA to a claim for the death or injury of a railroad employee.[2943] Section B discusses statutory provisions on safety precautions and devices, including the standards for safety devices under the FSAA and the requirements applicable to safety appliances under the federal regulations. Section B also discusses civil penalties that may be imposed for violations of the FSAA. Section C discusses cases arising out of a violation of the FSAA resulting in death or injury, the determination of when a train is in use under the FSAA, whether a violation of the FSAA is negligence *per se* for the purpose of a FELA claim, whether handbrakes must work properly every time they are used, and whether it is a question of law whether a device is governed by the FSAA, as well as an article on specific safety devices and appliances that are required under the FSAA. Section D calls attention to rules published by the American Association of Railroads.

[2942] Safety Appliance Act, 27 Stat. 531 (March 2, 1893); *see* 49 U.S.C. §§ 20301-20306 (2014).

[2943] *Magelky v. BNSF Ry. Co*., 579 F. Supp.2d 1299 (D. N.D. 2008) ("The duty imposed on a railroad carrier by the Federal Safety Appliance Act is an absolute one.") (*citing Brady v. Terminal R.R. Ass'n of St. Louis*, 303 U.S. 10, 15, 58 S. Ct. 426, 82 L. Ed. 614 (1938)).

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Statutes and Regulations

B. Regulation of Railroad Equipment Safety

1. Standards for Safety Devices under the FSAA

The FSAA describes the devices that railroads have to install prior to using a vehicle or railcar.[2944] For example, under the statute a railroad may use only vehicles that have couplers that attach automatically and that do not require an individual to pass between vehicles to uncouple them.[2945] The FSAA also requires that a vehicle must have secure sill steps, efficient hand brakes, secure ladders, and handholds;[2946] that locomotives must be "equipped with a power-driving wheel brake and appliances for operating the train-brake system;"[2947] and that a train be equipped properly so that an engineer may control the speed of the train with the braking system.[2948]

2. Requirements for Safety Appliances under the Federal Regulations

The requirements for specific safety appliances are described in more detail in the federal regulations.[2949] For instance, locomotives used in switching are required to have four switching steps that have to be on each side of the locomotive at each end of the locomotive.[2950] The

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[2944] 49 U.S.C. § 20302 (2014).

[2945] 49 U.S.C. § 20302(a)(1)(A) (2014).

[2946] 49 U.S.C. §§ 20302(a)(1)(A)-(B) (2014).

[2947] 49 U.S.C. § 20302(a)(4) (2014).

[2948] 49 U.S.C. § 20302(a)(5) (2014).

[2949] 49 C.F.R. § 231.0 (2014).

[2950] 49 C.F.R. § 231.30(c) (2014).

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switching steps must have vertical handrails on each side of the steps.[2951] Moreover, locomotives built after 1975 may not have end footboards or pilot steps.[2952] The FSAA allows defective vehicles to be moved from one track to another without incurring a civil penalty.[2953] However, a railroad company does not escape liability for death or injury of a railroad employee as the result of moving a defective vehicle.[2954]

3. No Assumption of Risk by Railroad Employees

An employee of a railroad carrier does not assume the risk of injury resulting from the use of a train that is in violation of the FSAA.[2955] Even if an employee "continues to be employed by the carrier after learning of [a] violation" of the FSAA, the employee "does not assume the risk of injury."[2956]

4. Civil Penalties for Violations of the FSAA

Civil penalties are separate from a claim for damages. Under the regulations any person who violates federal railroad safety laws is subject to civil penalties.[2957] For example, if a person negligently creates a risk of injury or death or actually causes injury or death to occur, the person is liable for civil penalties not exceeding $105,000 per incident.[2958] A person includes "a

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[2951] 49 C.F.R. § 231.30(e) (2014).

[2952] 49 C.F.R. § 231.30(d) (2014).

[2953] 49 U.S.C. §§ 20303(a) and 21302 (2014).

[2954] 49 U.S.C. § 20303(c) (2014).

[2955] 49 U.S.C. § 20304 (2014).

[2956] *Id*.

[2957] 49 C.F.R. § 229.7(b) (2014).

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railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; [and] any employee of such owner, manufacturer, lessor, lessee or independent contractor."[2959] The federal regulations also provide a number to call when an accident occurs.[2960] Accidents are investigated by the Federal Railroad Administration (FRA).[2961] The regulations include a schedule of civil penalties.[2962] Civil penalties imposed by the Secretary of Transportation may be collected by a civil action filed in a federal district court.[2963]

Cases

C. Claims for Injury or Death of Employees for a Violation of the FSAA

1. When a Train is "In Use" under the FSAA

In *Deans v. CSX Transportation, Inc*.[2964] when Deans, a conductor who was assigned to take a train from West Virginia to Maryland, checked the hand brakes on the railcars prior to departure, Deans was able to release all of the hand brakes on the cars except one.[2965] On the fourth attempt to disengage the brake Deans experienced pain in his neck and back and had to be

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[2958] *Id*.

[2959] *Id*.

[2960] 49 C.F.R. § 229.17(a) (2014).

[2961] *Id*.

[2962] 49 C.F.R. § pt. 229, app. B (2014).

[2963] 49 U.S.C. § 21302(a)(2) and (b) (2014).

[2964] 152 F.3d 326 (4th Cir. 1998).

[2965] *Id.* at 328.

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treated at a hospital.[2966] An inspection revealed that the brake was defective.[2967] Deans sued CSX under the FSAA, claiming that CSX was liable for his injuries.[2968] Finding that the railcar was not in use for purposes of the FSAA, the district court granted the railroad company's motion for a summary judgment.[2969] However, the Fourth Circuit reversed the judgment of the district court on Deans' FSAA claim and remanded.[2970]

The FSAA "imposes absolute liability on railroad carriers" for violations of the law if a train is "in use" at the time of an accident.[2971] The FSAA provides that a railroad company shall not use a vehicle on its line if it lacks efficient hand brakes.[2972] The court, therefore, had to determine whether the train was in use within the meaning of the FSAA in deciding whether CSX was liable for injuries caused by deficient hand brakes. The Fifth Circuit had held that a train was not in use when an employee was injured while checking a train's brakes prior to the conductor taking control.[2973] On the other hand, the Fourth Circuit had held that a train was in use when the engine had been inspected and the train declared ready for use.[2974]

[2966] *Id.*

[2967] *Id.*

[2968] *Id.*

[2969] *Id.*

[2970] *Id.* at 331.

[2971] *Id.* at 328.

[2972] *Id.* (*quoting* 49 U.S.C. § 20302(a)).

[2973] *Id.* at 329 (*citing Trinidad v. S. Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (holding that a train is in use when switching and pre-departure inspections are complete and the train is assembled)).

[2974] *Id.* at 329 (*citing Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980)).

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In *Deans*, the Fourth Circuit held that the primary factors in determining whether a train was in use at the time of an accident are the location of the train and the activity of the injured party.[2975] In *Deans*, the train was ready for departure and the conductor was attempting to put the train in motion.[2976] Thus, the court held that the train was in use at the time of the accident and reversed the district court's grant of a summary judgment for CSX.[2977]

2. When a Violation of the FSAA is Negligence *Per Se* for the Purpose of a FELA Claim

In *Marshall v. Grand Trunk W. R.R. Co.*,[2978] decided by a federal district court in Michigan, the plaintiff Marshall was an employee of Grand Trunk W. R.R. Co. (Grand Trunk) when he suffered injuries in four separate incidents. Marshall suffered injuries to his knees and back when the sill step on the train gave way beneath him on two different occasions; when he was ordered to walk along a steep hill to find a train's brake problem; and when he slipped on ice while using a ground switch to move tracks.[2979] Marshall brought an action against the railroad under FELA.[2980]

Under FELA Marshall had to prove that the railroad was negligent.[2981] However, if Grand Trunk had violated the FSAA, the railroad's violation constituted negligence *per se* under

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[2975] *Id.*

[2976] *Id.* at 330.

[2977] *Id.* at 331.

[2978] 850 F. Supp.2d 686, 689 (W.D. Mich. 2011).

[2979] *Id.* at 690-692.

[2980] *Id.* at 689.

[2981] *Id.* at 695.

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FELA.[2982] The FSAA does not provide a right of action by itself but does provide a basis for an injured employee's claims under FELA.[2983] Therefore, the FSAA and FELA are to be applied together.[2984] Furthermore, the court held that to prove an FSAA violation Marshall did not have to show that Grand Trunk had prior notice of the defect.[2985]

One of Marshall's claims arose because he had walked on steep ground to repair a brake system. Marshall argued that but for the malfunction of the brake system he would not have walked on steep ground for the long distance that caused his injury.[2986] However, the court held that the defect in the train's brake system did not cause his injury.[2987] Although Marshall's motion for a summary judgment was denied, the claim was preserved for trial.[2988] As for the two separate incidents when a sill step collapsed under Marshall, the court held that Grand Trunk was negligent *per se* for failing to maintain the steps and granted Marshall a summary judgment on the claims.[2989] As for Marshall's claim based on slipping on ice, although the court granted Marshall's motion for a summary judgment on the ground that the railroad was negligent *per se*,

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[2982] *Id.* at 696-697.

[2983] *Id.* at 696 (*quoting* 49 U.S.C. § 20302; 45 U.S.C. § 51).

[2984] *Id.* at 697.

[2985] *Id.* at 698.

[2986] *Id.* at 699.

[2987] *Id.*

[2988] *Id.* at 708.

[2989] *Id.* at 700.

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the jury or trial judge would have to determine the nature and extent of his injuries and the appropriate amount of damages.[2990]

3. Requirement that Efficient Handbrakes Work Properly Every Time they are Used

In *Schroeder v. Grand Truck W. R.R. Co.*,[2991] decided by a Michigan federal district court, the plaintiff Schroeder was injured when attempting to engage a handbrake. When Schroeder was in the process of tightening the handbrake it suddenly released and pulled his arm with it.[2992] Schroeder sued the railroad company, Grand Trunk, under the FSAA and FELA.[2993]

Schroeder's handbrake expert testified that the handbrake that injured the plaintiff was defective.[2994] Although the expert noted that a handbrake may work inefficiently in one incident and efficiently the next, a handbrake's performance is adequate only when it works efficiently every time; an inefficient handbrake violates the FSAA.[2995] The expert testified that an employee operating such a handbrake would only be able to determine whether there was a problem with the brake when the employee is properly trained, thus suggesting that Schroeder was not trained to recognize defects.[2996] The court denied Grand Trunk's motion for a summary judgment.[2997]

[2990] *Id.*

[2991] 2011 U.S. Dist. LEXIS 139233, at *1, 4 (E.D. Mich. Dec. 5 2011).

[2992] *Id.* at *4-5.

[2993] *Id.* at *9.

[2994] *Id.* at *10.

[2995] *Id.*

[2996] *Id.* at *11.

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4. Whether a Device comes within the FSAA is a Question of Law

In *Johnson v. Union Pacific R. Co.*[2998] the plaintiff Johnson was inspecting a Union Pacific train when he noticed a loose support for an air hose. Johnson signaled to the conductor to stop the train so that Johnson could walk between the cars and secure the loose support.[2999] While the plaintiff was securing a strap, the train lurched forward and ran over his foot.[3000] Johnson sued Union Pacific under FELA and the FSAA.[3001]

To determine whether Union Pacific was strictly liable under the FSAA, a federal district court in California first discussed the kinds of appliances that are subject to the FSAA, a decision that is a question of law.[3002] Although the FSAA does not define the term safety appliance, it does enumerate the appliances to which the Act applies.[3003] Union Pacific argued that the fact that a support strap is not listed in the statute means that it is not a safety appliance that is subject to the FSAA.[3004] However, the court held that the list of safety appliances should be understood to mean categories of appliances.[3005] The court held that the support for the air hose was part of the brake system and, therefore, a safety appliance under the statute.[3006] Johnson's evidence was

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[2997] *Id.* at *34.

[2998] 2004 U.S. Dist. LEXIS 22151, at *1, 2 (N.D. Cal. Oct. 27, 2004).

[2999] *Id.* at *2.

[3000] *Id.* at *3.

[3001] *Id.* at *4.

[3002] *Id.* at *6.

[3003] *Id.* at *6-7 (*citing* 49 U.S.C. § 20302(a)(1)).

[3004] *Id.* at *7-8.

[3005] *Id.* at *8 (*citing Jordan v. S. Ry. Co.*, 970 F.2d 1350, 1354 (4th Cir. 1992)).

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sufficient to support the court's holding, including his evidence that the support system must be secured properly to avoid interference with the brake system.[3007] Because a support strap is a safety appliance under the FSAA, if a strap is found to be defective, the railroad is strictly liable for the defective condition.[3008] The court denied the railroad's motion for a summary judgment.[3009]

5. When a Violation of the FSAA is Negligence for the Purpose of an Indemnity Claim

In *Burlington Northern R.R. Co. v. Farmers Union Oil Co. of Rolla*[3010] Farmers Union Oil Company (Farmers Union) and Burlington Northern Railroad Company (Burlington Northern) had entered into an industrial track lease with an indemnity clause. Two employees of Farmers Union noticed that a brake on a railroad car was sticking but did not notify Burlington Northern.[3011] Rolla Grain, another company with which Burlington Northern had a track lease agreement and that operated grain elevators nearby, received the same railroad car from Farmers Union along with several other railroad cars that were delivered directly by Burlington Northern to be loaded with grain.[3012] Thereafter, an employee of Rolla Grain suffered injuries because of the same defective car.[3013] Burlington Northern settled the action with the injured employee for

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[3006] *Id.* at *12.

[3007] *Id.* at *11.

[3008] *Id.* at *12.

[3009] *Id.* at *13.

[3010] 207 F.3d 526, 529 (8th Cir. 2000).

[3011] *Id.* at 530.

[3012] *Id.*

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$400,000 and then sought $200,000 from Farmers Union and Rolla Grain.[3014] The case centered on whether the facts of the incident triggered an indemnity clause in the track lease agreement between Burlington Northern and Farmers Union.[3015]

To determine whether an act or omission by Farmers Union had occurred for purposes of the indemnity provision, the court first analyzed the duties of Burlington Northern and Farmers Union under the FSAA.[3016] Burlington Northern had a duty to secure safe and functional brakes on its railroad cars as required by the FSAA, and if Burlington Northern failed to maintain safe brakes the company had violated FELA.[3017] Farmers Union had a duty to assist Burlington Northern in maintaining effective brakes, a duty that Farmers Union breached when it failed to notify Burlington Northern of the defective brake.[3018] The court held that an act or omission had occurred under FELA.[3019]

Although Farmers Union argued that Burlington Northern's violation of the FSAA determined Burlington Northern's negligence, the court rejected the argument.[3020] The court relied on another precedent from the Eighth Circuit, *Colorado Milling & Elevator Co. v.*

[3013] *Id.*

[3014] *Id.*

[3015] *Id.* at 530-531.

[3016] *Id.* at 532.

[3017] *Id.*

[3018] *Id.*

[3019] *Id.*

[3020] *Id.* at 533.

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Terminal R. Ass'n of St. Louis,[3021] in support of its holding that the FSAA violation was not enough to establish Burlington Northern's negligence because of a defective railroad car.[3022] Burlington Northern's lessee of the railcar failed to prove that Burlington Northern could have discovered the defect through an inspection or that the railcar was defective before the lessee received it.[3023] Because Farmers Union failed to provide sufficient evidence of Burlington Northern's negligence, the court held that Farmers Union owed $200,000 to Burlington Northern under the indemnity provision.[3024]

Article

6. Specific Safety Devices and Appliances Required Under the FSAA

As discussed in an article available on line, the FSAA mandates that trains have train brakes that allow the engineer to control the speed of the train; secure running boards, handholds, grab irons, sill steps and ladders; and functional couplers so that employees do not have to pass between cars to uncouple them.[3025] Moreover, the FSAA does not permit any part of a brake system, including air hoses, air reservoirs, and connecting pipes, to be defective.[3026]

[3021] 350 F.2d 273 (8th Cir. 1965).

[3022] *Burlington N. R.R. Co.*, 207 F.3d at 533.

[3023] *Id.*

[3024] *Id.* at 534.

[3025] *FELA Federal Safety Appliance Act*, Online Lawyer Source, available at: http://www.onlinelawyersource.com/fela/safety-act/ (last accessed March 31, 2015).

[3026] *Id.*

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D. Rules Published by the American Association of Railroads

Also relevant to the regulation of railroad equipment safety are rules published by the American Association of Railroads (AAR):[3027] the Office Manual of the AAR Interchange Rules[3028] and the Field Manual of the AAR Interchange Rules.[3029] The Office Manual "combines mandatory rules covering all aspects of billing car repairs, mechanical requirements for new or rebuilt cars … settlement of disputes, and transfers and adjustments of lading."[3030] The Field Manual "contains all the rules dealing with care and repair, responsibility for, disposition of, [and] settlement of freight cars."[3031] As an Illinois appellate court has held, the rules do not have the force of law, but "[e]vidence of standards, safety rules, regulations, and codes are admissible to aid the finder of fact in deciding the standard of care in negligence actions."[3032] A violation of a rule is not negligence *per se,* because a party charged with violating an AAR rule may introduce evidence that it acted reasonably under the circumstances in not complying with the standard.[3033]

[3027] The AAR's members include most of the large and small freight railroads in the United States, Canada and Mexico. *See* Association of American Railroads, AAR Members Across the Globe, available at: https://www.aar.org/Pages/AboutUs.aspx?t=aarmembers (last accessed March 31, 2015).

[3028] Association of American Railroads, Office Manual of the AAR Interchange Rules (2015), hereinafter referred to as "Interchange Rules."

[3029] Association of American Railroads, Field Manual of Interchange Rules (2015).

[3030] Interchange Rules, *supra* note 3028.

[3031] *See* https://www.aar.org/StatisticsAndPublications/Publications/Documents/Catalog.pdf (last accessed March 31, 2015).

[3032] *Grimming v. Alton & S. R. Co.*, 204 Ill. App.3d 961, 991, 562 N.E.2d 1086, 1105 (Ill. App. Ct. 5th Dist. 1990) (internal quotation marks omitted) (*quoting* M. Graham, Cleary & Graham, Handbook of Illinois Evidence § 406.5 (5th ed. 1990)).

[3033] *Id.* 204 Ill. App.3d at 992, 562 N.E.2d at 1106.

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XXV. HIGH-SPEED RAIL

A. Introduction

It is a longstanding national policy to "promote the construction and commercialization of high-speed ground transportation."[3034] Federal law authorizes the Secretary of Transportation to "lead and coordinate federal efforts" to "foster the implementation of … high-speed steel wheel on rail transportation systems."[3035] The United States has encouraged investment in the development of a high-speed rail system most recently through the American Recovery and Reinvestment Act (ARRA). However, the articles discussed herein highlight the need for greater awareness and investment to ensure the eventual success of high-speed rail projects.

Sections B and C discuss, respectively, the development of high-speed rail and funding provided by the ARRA. Sections D and E summarize articles that address what is needed for the development of high-speed rail and the current level of reportedly insufficient funding for its development.

Statutes

B. Development of High-Speed Rail

The Secretary may award contracts and grants and establish related national programs for demonstrations to determine the contribution of high-speed rail to more efficient ground transportation systems or enter into cooperative research and development agreements with companies in the United States for the purpose of overcoming technical barriers and transferring

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[3034] 49 U.S.C. § 302(d) (2014).

[3035] 49 U.S.C. § 309(a) (2014).

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technologies for high-speed rail.[3036] The Secretary has a statutory obligation to "submit to Congress a study of the commercial feasibility" of high-speed ground transportation systems and to establish the necessary national policy.[3037]

C. Funding by the American Recovery and Reinvestment Act

In 2009, Congress enacted the American Recovery and Reinvestment Act or ARRA. The Act specifically provided $8 billion in funding for passenger rail capital projects with priority given to the development of intercity high-speed rail.[3038] The ARRA directed the Secretary to "submit to the House and Senate Committees on Appropriations a strategic plan that describes how the Secretary will use the funding provided under this heading to improve and deploy high speed passenger rail systems."[3039]

In 2009 Secretary Ray LaHood submitted such a strategic plan. The plan outlined the background and context for the development of high-speed rail; a proposed strategy for the creation of a rail network, including how projects will be funded, selected, and implemented; and the next steps necessary to proceed with projects, such as input from stakeholders and the public.[3040]

[3036] 49 U.S.C. §§ 309(b) and (c) (2014).

[3037] 49 U.S.C. §§ 309(d) and (e) (2014).

[3038] 111 P.L. 5, 123 Stat. 115 (2009); *see* 26 U.S.C. § 1 note (2014).

[3039] *Id*. (Title XII subsection Federal Railroad Administration: Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service).

[3040] United States Department of Transportation, Vision for High Speed Rail in America: High-Speed Rail Strategic Plan (April 2009), available at: http://www.fra.dot.gov/eLib/Details/L0283 (last accessed March 31, 2015).

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Articles

D. Continued Growth of High-Speed Rail

A law review article argues that "high-speed rail transit would serve as a meaningful form of alternative transportation."[3041] The article contends that the "political will and growing public-private partnerships" could overcome the "challenges in adopting high-speed trains within existing transportation schemes."[3042] Although the construction, maintenance, and operation of high-speed rail transit involve enormous costs, high-speed rail would "create[] economic integration among various regions" and re-direct the use of energy from sources other than traditional fossil fuels to "cleaner forms of nuclear energy."[3043] The article argues that the demonstrated advantages and recent success of high-speed transit increase the political will to foster its continued growth in the United States.

E. Insufficient Funding for High Speed Rail

According to one source, studies have shown that "high speed rail operating at an average speed of more than 150 mph can compete favorably with air travel over distances of 500 miles or less."[3044] However, given the difficulties in construction and maintenance, the cost would be "anywhere from $400-$800 billion" to establish a successful nationwide high-speed rail

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[3041] Kamaal R. Zaidi, "High Speed Rail Transit: Developing the Case for Alternative Transportation Schemes in the Context of Innovative and Sustainable Global Transportation Law and Policy," 26 *Temp. J. Sci. Tech. & Envtl. L.* 301, 302 (2007).

[3042] *Id*.

[3043] *Id*. at 339.

[3044] Joshua Rogers, Note, "The Great Train Robbery: How Statutory Construction may have Derailed an American High Speed Rail System," 2011 *U. Ill. J.L. Tech. & Pol'y* 215, 224 (2011).

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system.[3045] The article states that the $8 billion grant authorized by the ARRA "when projected over an equal period of time" is nearly identical to the three percent of federal funding historically provided for traditional passenger rail over the last fifty years, a percentage that is insufficient to stimulate the development of high-speed rail.[3046] The author proposes the establishment of "a federal high speed rail administration to provide a continual stream of financing."[3047]

[3045] *Id*. at 227.

[3046] *Id*.

[3047] *Id*. at 235.

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XXVI. INSURANCE AND INDEMNITY AGREEMENTS

A. Introduction

According to one source, unlike motor vehicles, in general railroads are not required to carry insurance.[3048] However, railroad companies often purchase insurance and have indemnification agreements to protect them in the conduct of their business and operations.[3049]

Sections B through D discuss Mandatory Insurance for the Feeder Railroad Development Program; Railway-Highway Liability Insurance; and the Amtrak Reform and Accountability Act of 1997. Section E discusses cases involving railway-highway liability insurance. Section F analyzes cases dealing with disputes over insurance coverage, such as the use of a declaratory judgment action to determine the parties' rights and duties and escape clauses and excess insurance. Section G reports on cases involving indemnification agreements, including whether 49 U.S.C. § 28103 preempts state law on such agreements and whether an indemnity clause in an agreement is a waiver of sovereign immunity. Section H discusses arbitration of disputes arising under indemnification agreements, such as whether a public policy defense precludes enforcement of an arbitration agreement and whether an arbitral panel may enforce an indemnity agreement notwithstanding the other party's gross negligence that resulted in the liability claims sought to be indemnified. Finally, sections I and J discuss a report issued by the United States Government Accountability Office regarding insurance arrangements between freight railroads and railroad passenger service and alternative insurance arrangements for the transportation of hazardous material.

[3048] Matthew Bender & Company, Inc., *Transportation Safety and Insurance Law* § 19.04 (LexisNexis 2013).

[3049] *See, e.g., CSX Transportation, Inc. v. Mass. Bay Transp. Auth.,* 697 F. Supp.2d 213 (D. Mass. 2010); *Orr v. Indiana Harbor Belt R.R.,* 976 F. Supp. 1151 (N.D. Ill. 1997).

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Statutes

B. Mandatory Insurance for the Feeder Railroad Development Program

The Feeder Railroad Development Program includes a statutory mandate that private railroads must carry insurance.[3050] The program permits the Surface Transportation Board (STB) to force a sale of a rail line to "allow[] shippers, communities, or other interested parties to acquire rail lines before an abandonment application is filed"[3051] and therefore prevent abandonment of the line. The application to participate in the program must include the insurance coverage carried by the railroad.[3052] The regulations require that an applicant seeking to use the tracks of another railroad obtain insurance to indemnify a railroad owner for any personal or property damage caused by the applicant's negligence.[3053]

C. Railway-Highway Insurance Protection

When the Federal Highway Administration (FHWA) provides funding for highway construction projects that affect property owned by railroads, the federal government may pay for public liability insurance for contractors[3054] and for insurance for property damage for the

[3050] 49 U.S.C. § 10907 (2014); *see* 49 C.F.R. § 1151.3(8) (2014).

[3051] Surface Transportation Board, Office of Public Services, *So You Want to Start a Small Railroad: Surface Transportation Board Small Railroad Application Procedures* at 20, available at: http://www.stb.dot.gov/stb/docs/So_You_Want_to_Start_Small_RR.pdf (last accessed March 31, 2015).

[3052] 49 C.F.R. § 1151.3(8) (2014).

[3053] *Id*.

[3054] Public liability insurance protects the insured from claims brought by members of the public for injuries or property damages resulting from the insured's activities. Heitz Insurance Agency, "General Liability Insurance vs Public Liability Insurance" (2012), available at: http://www.heitzinsurance.com/2012/03/06/general_liability_vs_public_liability_insurance/ (last accessed March 31, 2015).

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contractors and railroads.[3055] The regulations also provide that contractors must purchase protective insurance for railroads when the work involves eliminating railroad-highway crossing hazards or takes place partially or completely in a railroad's right-of-way.[3056] The insurance is "limited to damage suffered by the railroad on account of occurrences arising out of the work of the contractor on or about the railroad right-of-way, independent of the railroad's general supervision or control, except [for the negligence of certain railroad employees]."[3057]

D. Amtrak Reform and Accountability Act of 1997

The Amtrak Reform and Accountability Act of 1997 (ARAA), which limited the liability to rail passengers to $200 million,[3058] was the result of freight railroads requesting increased compensation associated with the risks of sharing a freight railroad's right of way.[3059] The ARRA also provided that "[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for all claims" so that state law would not interfere with the railroads' indemnification agreements.[3060]

An earlier Senate Report explained the rationale for indemnity provisions:

> Amtrak and the freight railroads believe legislation is necessary to confirm enforceability of the indemnification agreements they have entered into regarding operation over each others' rail lines, notwithstanding allegations of gross

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[3055] 23 C.F.R. §§ 646.101-111 (2014). *See* 23 U.S.C. §§ 109(e), 120(c), 130, 133(d)(1), and 315 (2014).

[3056] 23 C.F.R. § 646.107 (2014).

[3057] 23 C.F.R. § 646.109(a) (2014).

[3058] 49 U.S.C. § 28103(a)(2) (2014).

[3059] Amtrak Reform and Accountability Act of 1997, S. Rep. No. 105-85, at 5 (1997), available at: http://www.gpo.gov/fdsys/pkg/CRPT-105srpt85/html/CRPT-105srpt85.htm (last accessed March 31, 2015), hereinafter referred to as "S. Rep. No. 105-85."

[3060] 49 U.S.C. § 28103(b) (2014).

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> negligence by a freight railroad or Amtrak. As long as there is the possibility that state laws governing indemnification contracts may make these contracts unenforceable, Amtrak and a freight railroad may find themselves litigating with each other. Amtrak believes that such litigation inevitably would not only adversely impact business relationships between Amtrak and the host freight railroads, but it would also lead to significantly higher outlays in settlements and judgments to plaintiffs.[3061]

Under the ARAA, Amtrak also is required to "maintain a total minimum liability coverage for claims through insurance and self-insurance of at least $200,000,000 per accident or incident."[3062]

Cases

E. Railway-Highway Liability Insurance

In *Orr v. Indiana Harbor Belt Railroad*[3063] the plaintiff Orr, a railroad employee, sustained an injury working on the Indiana Harbor Belt Railroad (IHB).[3064] IHB alleged that a construction company negligently allowed debris to fall onto the railroad that injured Orr; thus, IHB filed a cross-claim seeking contribution from the construction company.[3065] In accordance with the regulations in 23 C.F.R. § 646, because the project crossed over part of IHB's right of way, the construction company had agreed to obtain liability insurance to cover the railroad for any injuries caused by the construction company's work.[3066] A federal district court in Illinois

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[3061] S. Rep. No. 105-85, *supra* note 3059, at 5.

[3062] 49 U.S.C. § 28103(c) (2014).

[3063] 976 F. Supp. 1151 (N.D. Ill. 1997).

[3064] *Id.* at 1152.

[3065] *Id.*

[3066] *Id.* at 1152-53.

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applied Illinois state law to determine whether in a FELA case IHB could seek contribution from a third party.[3067] The court cited a previous Illinois case that held that

> [w]hen parties to a business transaction mutually agree that insurance will be provided as part of the bargain then that agreement must be interpreted as providing mutual exculpation to the bargaining parties. The parties are deemed to have agreed to look solely to the insurance in the event of loss and not impose liability on the part of the other party.[3068]

The district court held that because the parties had agreed only to use the insurance in the event of an injury, IHB could not seek contribution from the construction company.[3069] The court granted the construction company's motion for judgment as a matter of law.[3070]

F. Disputes over Insurance Coverage

1. Use of Declaratory Judgment Action to Determine Insurance Coverage

In *All America Insurance Company v. Steadfast Insurance Company*[3071] two insurance companies, All America Insurance Company (All America) and Central Mutual Insurance Company (Central Mutual), brought a declaratory judgment action against the defendant Steadfast Insurance Company (Steadfast). Steadfast had issued a Contingent Liability Insurance Policy – Railroad Equipment to Chicago Freight Car and Leasing Company (CFCL) that applied, according to All American and Central Mutual, to CFCL's defense in another lawsuit pending in

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[3067] *Id.* at 1152.

[3068] *Id.* at 1153 (*quoting Briseno v. Chicago Union Station Co.*, 197 Ill. App.3d 902, 905, 557 N.E.2d 196, 198 (Ill. App. 1990)).

[3069] *Id.*

[3070] *Id.* at 1154.

[3071] 2011 U.S. Dist. LEXIS 54435, at *1 (N.D. Ind. 2011).

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an Illinois state court.[3072] The complaint in the declaratory judgment action stated that the plaintiff Central Mutual was defending CFCL in the state court action.

The complaint in the declaratory judgment action concerned the plaintiffs' claim that the Steadfast policy covers CFCL for the loss that is alleged to have occurred in the state court action, a claim that arose out of a welder's injuries sustained on a CFCL railcar that resulted in the welder's death two days after the incident.[3073] Steadfast contends that the state court lawsuit does not come within the terms of the policy it issued to CFCL and that Steadfast does not have an obligation to defend CFCL. Although the court duty denied Steadfast's motion to dismiss the complaint, the court stated that "[i]n Indiana, declaratory judgment actions to determine insurance coverage are not uncommon, and they are often a preferred method for insureds and insurers to litigate contractual rights under insurance policies."[3074]

2. Escape Clauses and Excess Insurance

In *Federal Insurance Co. v. Lexington Insurance Co.*[3075] two insurance companies supplied insurance policies to Trona Railway Co. (Trona) that was involved in a lawsuit. Federal Insurance Co. (Federal) issued Trona a policy entitled "Liability Insurance for Energy Industries" that covered up to $1 million for each instance of bodily injury falling within the policy and included coverage for both property damage and personal injury.[3076] Lexington Insurance Co. (Lexington) issued a "Railroad Liability Insurance" policy that similarly provided

[3072] *Id*. at *1-2.

[3073] *Id*. at *3, 11.

[3074] *Id*. at *10-11.

[3075] 2011 U.S. Dist. LEXIS 91375, at *1 (C.D. Cal. 2011).

[3076] *Id.* at *1-2.

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coverage for property damage and personal injury and covered Trona up to $2 million for each instance of bodily harm coming within the policy.[3077] The issue concerned each policy's "other insurance" clauses. Federal's policy stated that if Trona had another insurance policy that also covered a claim coming within Trona's policy, Federal's policy was excess insurance. Moreover, Federal would not have to defend Trona if any other insurance company had a duty to defend Trona.[3078] Lexington's policy, on the other hand, stated that it provided excess insurance if Trona had other insurance that met specific requirements.[3079]

A federal district court in California explained that excess insurance "is expressly understood by both the insurer and the insured to be secondary to specific underlying coverage which will not begin until after that underlying coverage is exhausted and which does not broaden that underlying coverage."[3080] Under California law, disputes regarding "other insurance" may arise only between insurers at the same level of coverage.[3081] The court held that both policies provided primary insurance because liability attached under the policies as soon as an incident occurred that was covered by the policy.[3082] Furthermore, the court held that as a matter of public policy Federal should not be able to use a clause "buried in a general liability

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[3077] *Id.* at *3.

[3078] *Id.* at *2-3.

[3079] *Id.* at *4.

[3080] *Id.* at *11 (*quoting American Cas. Co. v. Gen. Star Indem. Co*., 125 Cal. App.4th 1510, 1521, 24 Cal. Rptr.3d 34 (2005)).

[3081] *Id.*

[3082] *Id.*

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policy" to escape its obligations to provide primary insurance coverage.[3083] Thus, the court held that Federal could seek equitable contribution, rather than equitable subrogation, from Liberty because both policies provided primary insurance coverage.[3084]

G. Indemnification Agreements

1. Whether 49 U.S.C. § 28103 Preempts State Law

In *CSX Transportation, Inc. v. Massachusetts Bay Transportation Authority*[3085] a federal district court in Massachusetts ruled that 49 U.S.C. § 28103(b), which allows railroads to enter into indemnification agreements, did not preempt a Massachusetts law that prohibited a party from indemnifying another party for injuries or damage caused by gross negligence or recklessness. CSX brought an action for a declaratory judgment against the Massachusetts Bay Transportation Authority (MBTA) to compel the MBTA to indemnify and defend CSX in a wrongful death action.[3086] The wrongful death action involved one of MBTA's employees who was struck and killed by a CSX train.[3087]

CSX and the MBTA had signed a trackage rights agreement (TRA) that required the MBTA to indemnify CSX for any injuries sustained by MBTA employees working on CSX's rails.[3088] The court held that the MBTA was obligated to defend CSX and to indemnify CSX

[3083] *Id.* at *15.

[3084] *Id.* at *16.

[3085] 697 F. Supp.2d 213 (D. Mass. 2010).

[3086] *Id.* at 216.

[3087] *Id.*

[3088] *Id.* at 217.

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under the contract.[3089] The court stated that "[o]n its face … § 28103(b) authorizes the MBTA and CSX to enter into the TRA, but it does not deny Massachusetts the power to limit the agreement's scope."[3090] Thus, the court held that federal law did not preempt the Massachusetts law because § 28103(b) does not limit the content of indemnification agreements, such as when the agreements provide indemnification for the other party's "grossly negligent, reckless, willful, or wanton conduct."[3091] However, the court also held that the agreement to indemnify was unenforceable under Massachusetts state law as a matter of public policy to the extent that the MBTA agreed to indemnify CSX for "grossly negligent, reckless, willful, or wanton conduct."[3092]

In *O&G Industries, Inc. v. Amtrak*,[3093] the Second Circuit held that § 28103(b) preempted a Connecticut law banning indemnity agreements in a construction contract when the agreement indemnified a party for acts caused by its own negligence. To gain access to parts of Amtrak's railway to complete a construction project, O&G Industries, Inc. (O&G) agreed to provide full protection to Amtrak for any liabilities caused by O&G regardless of Amtrak's fault or negligence.[3094] The construction company attempted to use the Connecticut law in its defense against Amtrak in wrongful death and personal injury suits.[3095] Nevertheless, the court held that

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[3089] *Id.* at 222-224.

[3090] *Id.* at 230.

[3091] *Id.* at 233.

[3092] *Id.*

[3093] 537 F.3d 153 (2d Cir. 2008).

[3094] *Id.* at 157.

[3095] *Id.* at 159.

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§ 28103(b) preempted the Connecticut law because the Connecticut law would prevent Amtrak from entering into indemnification agreements protecting the railroad from liability for any claim arising from the construction project, which § 28103(b) expressly authorized.[3096] Therefore, the court affirmed the district court's grant of Amtrak's motion for judgment as a matter of law.[3097]

2. Interpretation of Indemnification Provisions

In *Fekete v. Amtrak*[3098] the plaintiff's dump truck was damaged because of Amtrak's alleged negligence while delivering stone to Amtrak's property on behalf of the quarry where the stone originated. Amtrak had an agreement with the quarry that included an indemnity provision.[3099] Amtrak argued that the quarry should indemnify Amtrak because the damage arose out of work performed under the contract and because the language of the contract was sufficiently broad to include liabilities caused by Amtrak's negligence.[3100]

A federal district court in Pennsylvania recognized that contracts do not require specific terms to indemnify a party for its own negligence; however, the court held that the contractual provision did not include such a provision.[3101] The contract included a provision that the quarry would indemnify Amtrak "irrespective of any negligence or fault on the part of" Amtrak for claims based on "injuries (including death) to any of [the quarry's] employees, agents or

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[3096] *Id.* at 161-162.

[3097] *Id.* at 168.

[3098] 2012 U.S. Dist. LEXIS 109771, at *1 (E.D. Penn. 2012).

[3099] *Id.* at *2.

[3100] *Id.* at *6.

[3101] *Id.* at *7.

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subcontractors."[3102] Although the claim related to property damage instead of bodily injury, the provision that indemnified Amtrak "against any and all claims and liability" related to the contractual work and did not mention negligence.[3103]

After Amtrak argued that § 28103(b) should not prevent Amtrak from enforcing its indemnity agreement, the court distinguished the separate issues of being able to enter into an indemnification agreement and of interpreting the terms of an indemnification agreement. The court explained:

> This principle is not in dispute here. If the indemnification provision before this Court was clear that Amtrak and Dyer intended that Dyer would indemnify Amtrak for Amtrak's negligence, neither federal law nor the laws of the District of Columbia would prevent this Court from giving full effect to that intent. But the Court will not redraft the provision to ensure it includes the sweeping language Amtrak failed to include.[3104]

Therefore, the court held that the quarry was liable only for claims resulting from Amtrak's negligence that involve personal injury or wrongful death, not property damage as in this case.[3105]

3. Whether Indemnity Clause in a Lease Waives Sovereign Immunity

In *Apfelbaum v. National Railroad Passenger Corporation*[3106] the action arose out of an alleged slip-and-fall accident at the 30th Street Station in Philadelphia owned by the Southeastern Pennsylvania Transportation Authority (SEPTA) that was leased to Amtrak.

[3102] *Id.* at *14-15.

[3103] *Id.* at *8, *15-16.

[3104] *Id.* at *16.

[3105] *Id.* at *17.

[3106] 2002 U.S. Dist. LEXIS 20321, at *1 (E.D. Pa. 2002).

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SEPTA moved for summary judgment on the basis of sovereign immunity on the co-defendants' cross-claims against SEPTA. The co-defendants argued that SEPTA waived its immunity when it agreed to indemnify Amtrak "from any and all liability arising from or in connection with the use or occupation of the 30th Street Station as part of the lease agreement…."[3107] A federal district court in Pennsylvania granted SEPTA's motion because

> a claim against a Commonwealth party is actionable only if the basis for the alleged governmental culpability falls within one of nine exceptions to immunity enumerated in the Sovereign Immunity Act (the 'Act'), 42 Pa. Consol. Stat. § 8522(b).[3108]

The only possible exception to sovereign immunity that applied was the real estate exception that permits an action when "a 'dangerous condition of commonwealth agency real estate' caused the claimed injury."[3109] For the real estate exception to apply to a claim involving government property, a plaintiff must establish that there was "an artificial condition or defect of the property itself" that did "*not arise from a source outside the property*."[3110] Based on Pennsylvania judicial precedents, the court ruled that slip-and-fall cases do not come within the meaning of the real estate exception to sovereign immunity.

Second, the district court held that SEPTA had not waived its immunity in the lease. Relying on the Supreme Court of Pennsylvania's decision in *City of Philadelphia v. Gray*,[3111] the court held "that a Commonwealth agency may not do indirectly what it is expressly

[3107] *Id*. at *2.

[3108] *Id*. at *5-6.

[3109] *Id*. at *6 (footnote omitted).

[3110] *Id*. at *7 (emphasis in the original) (*quoting Finn v. City of Philadelphia*, 541 Pa. 596, 664 A.2d 1342, 1343-1344 (Pa. 1995)).

[3111] 534 Pa. 467, 633 A.2d 1090 (Pa. 1993).

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forbidden to do directly, and may not waive its immunity by 'any procedural devise,' to include contract, and expose itself to liability foreclosed by the legislature."[3112]

Thus, SEPTA had not waived its immunity and could not be made a party to the negligence actions.[3113]

H. Arbitration of Disputes arising under Indemnification Agreements

1. Whether a Public Policy Defense Precludes Enforcement of an Arbitration Agreement

National Railroad Passenger Corporation v. Consolidated Rail Corporation[3114] involved the collision on January 4, 1987, of a Conrail locomotive with an Amtrak train on Amtrak's main passenger line near Chase, Maryland. The accident resulted in the deaths of fifteen passengers and the Amtrak engineer and caused injuries to hundreds of other passengers and some railroad employees.[3115] With respect to later liability claims against Conrail, Conrail sought to invoke a clause in the Operating Agreement (OA) between it and Amtrak that, according to Conrail, obligated Amtrak to defend Conrail against the plaintiffs' claims and to indemnify Conrail for liability arising from their injuries or deaths.[3116] Amtrak's position was that the indemnification clause was contrary to public policy and unenforceable to the extent that Conrail sought to

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[3112] *Apfelbaum*, 2002 U.S. Dist. LEXIS 20321 at *13 (footnote omitted).

[3113] *Id*. at *13.

[3114] 892 F.2d 1066 (D.C. Cir. 1990).

[3115] *Id*. at 1067.

[3116] *Id*.

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extend the clause to cover "conduct more culpable than ordinary negligence and … punitive damages."[3117]

Conrail brought an action in a federal district court in the District of Columbia to compel Amtrak to arbitrate based on the arbitration clause. The district court held that "public policy will not allow enforcement of indemnification provisions that appear to cover such extreme misconduct because serious and significant disincentives to railroad safety would ensue."[3118]

In reversing the district court, the District of Columbia Circuit stated that "there is no question that the parties agreed to arbitrate this dispute."[3119] Furthermore, the court held that the district court "erred in treating the arbitration clause as unenforceable merely because the substantive contract provision in dispute between the parties may -- if the district court is correct about public policy -- be unenforceable."[3120]

The appeals court further stated:

> For a court to intervene before the arbitrator has determined what the contract means, and what it requires in the particular circumstances of their dispute, because he may determine that it requires the performance of an unlawful act, prematurely disrupts the system of private ordering upon which "public policy" -- as declared in the Arbitration Act and in the Supreme Court cases liberally interpreting it -- places maximum possible reliance.[3121]

[3117] *Id*.

[3118] *Id*. (internal quotation marks omitted).

[3119] *Id*. at 1069.

[3120] *Id*. at 1070.

[3121] *Id*. at 1071.

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Thus, the district court could not "bypass the arbitration process simply because a public policy issue might arise."[3122] In vacating the declaratory judgment below, the appeals court reversed the district court's order denying Conrail's motion to compel arbitration.[3123]

2. Arbitral Decision Enforcing Indemnity Agreement notwithstanding Other Party's Gross Negligence that Resulted in Liability Claims

Maryland Transit Administration v. National Railroad Passenger Corporation,[3124] decided by a federal district court in Maryland, concerned cases that arose out of arbitrations involving the Maryland Transit Administration (MTA) and the National Railroad Passenger Corporation (Amtrak).[3125] In brief, on June 17, 2002, a northbound Amtrak intercity passenger train destined for New York proceeded through a "stop indication" and collided with a southbound commuter train just south of the Baltimore train station, causing "significant damage."[3126] At issue was a January 1, 1994, agreement (Agreement) between the MTA and Amtrak (as successor to CSX Transportation, Inc.) for the provision of equipment, personnel, and various services to the MTA regarding its operation of commuter rail passenger service between Perryville, Maryland, and Washington, D.C.[3127] The Agreement contained a "broad arbitration clause."[3128]

[3122] *Id*.

[3123] *Id*. at 1073.

[3124] 372 F. Supp.2d 478 (D. Md. 2005).

[3125] *Id*. at 479.

[3126] *Id*. at 480.

[3127] *Id*. at 479-480.

[3128] *Id*. at 480.

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A majority of the panel in the first arbitration, not discussed herein, determined that the Amtrak locomotive engineer's gross negligence caused the accident.[3129] In the second arbitration, Amtrak asserted that because of § 10 of the Agreement the MTA was required to provide insurance coverage to Amtrak for the June 2002 accident, notwithstanding the first arbitral panel's determination that the cause of the accident was the Amtrak locomotive engineer's gross negligence. However, a majority of the panel in the second arbitration agreed with Amtrak, holding that by reason of the Agreement the "MTA had contractually bound itself to procure liability insurance to protect both itself and Amtrak from losses arising out of accidents of the type involved here."[3130]

The district court held that even if the arbitrators had erred in their decision they had "committed, at most, mere errors of law" that did not justify a *vacatur* of the arbitral award.[3131]

Articles

I. Insurance Arrangements between Freight Railroads and Passenger Carriers

In 2009, the United States Government Accountability Office issued a report on liability and indemnity provisions in agreements between freight railroads and commuter rail agencies.[3132] The report found that regardless of fault commuter rail agencies usually must take

[3129] *Id*. at 479, 481.

[3130] *Id*. at 479.

[3131] *Id*. at 484.

[3132] United States Government Accountability Office, *Commuter Rail: Many Factors Influence Liability and Indemnity Provisions and Options Exist to Facilitate Negotiations* (2009), available at: http://www.stb.dot.gov/stb/docs/Liability%20Report%20letter%206-10.pdf (last accessed March 31, 2015).

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on most of the liability and risk for commuter operations.[3133] The report suggests options to facilitate negotiations between freight railroads and commuter rail agencies, such as giving commuter rail agencies more leverage by "providing commuter rail agencies with statutory access to freight-owned infrastructure"[3134] and physically separating passenger rail from freight rail.[3135]

J. Alternative Insurance Arrangements for Transportation of Hazardous Material

In "Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality"[3136] the authors make several policy recommendations on the transportation of toxic inhalation chemicals and discuss risk and liability alternatives for the transportation of such chemicals. The authors examine other insurance arrangements that distribute the risk of dangerous products that benefit the public, such as the Price-Anderson Act's federal pool of funds for the nuclear power industry.[3137] To compensate any future victims of nuclear accidents, nuclear reactors must have a certain level of insurance to create a primary pool.[3138] If damages were to exceed the level of insurance, the licensees of nuclear reactors would have to contribute

[3133] *Id*. at 5.

[3134] *Id*. at 7.

[3135] *Id*.

[3136] Lewis M. Branscomb, Mark Fagan, Philip Auerswald, Ryan N. Ellis, and Raphael Barclan, "Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality," Harvard Kennedy School Belfer Center Discussion Paper #2010-01 (2010), available at: http://belfercenter.ksg.harvard.edu/files/Rail-Transportation-of-Toxic-Inhalation-Hazards-Final.pdf (last accessed March 31, 2015).

[3137] *Id*. at 33.

[3138] *Id*.

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to a second pool.[3139] The government then has the power to create a compensation system when damages exceed the second pool's funds.[3140] The authors recommend the creation of a compensation fund by producers, transporters, and users who are involved in the movement of toxic inhalation hazards[3141] to "internaliz[e] external costs" associated with the inherent risk in the transportation of hazardous materials by rail.[3142]

[3139] *Id*.

[3140] *Id*.

[3141] *Id.* at 65.

[3142] *Id*. at 2.

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XXVII. LABOR RELATIONS AND EMPLOYMENT

A. Introduction

Numerous federal laws affect the rights of employees in the railroad industry. Section B discusses the Railway Labor Act (RLA). The Act demonstrates a strong federal commitment to regulate labor relations in the railroad industry,[3143] particularly railroad employees' collective bargaining rights.[3144] The RLA established a mechanism for the resolution of disputes between railroad employers and their employees and provides the courts with the authority to enjoin strikes by employees and other actions that may circumvent procedures for dispute resolution.[3145] Section B discusses the history and purpose of the RLA; arbitration of disputes under the RLA; the National Railroad Adjustment Board's (NRAB) exclusive jurisdiction over minor disputes; and other issues arising under the RLA, such as injunctions, preemption, and the regulations for certification of locomotive engineers. Section C discusses the Labor Management Relations Act (LMRA),[3146] including suits by and against labor organizations, hybrid actions (claims by employees against both the employer and the union), and the applicable statutes of

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[3143] Alexandra Hegji, "Federal Labor Relations Statutes: An Overview," Congressional Research Service 1 (2012), available at: http://www.fas.org/sgp/crs/misc/R42526.pdf (last accessed March 31, 2015), hereinafter referred to as "Hegji."

[3144] 45 U.S.C. § 152 (2014).

[3145] Hegji, *supra* note 3143, at 1-2, 10. *See also,* Angie A. Welborn, "The Railway Labor Act: Dispute Resolution Procedures and Congressional Authority to Intervene," Congressional Research Service (2002), available at: http://congressionalresearch.com/RS20883/document.php?study=The+Railway+Labor+Act+Dispute+Resolution+Procedures+and+Congressional+Authority+to+Intervene (last accessed March 31, 2015).

[3146] 29 U.S.C. § 185 (2014).

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limitations.[3147] Section D addresses the federal requirement under certain circumstances that transit agencies must protect employees' collective bargaining and other rights by utilizing "protective labor agreements."[3148] Section E addresses the rights of employees and the application of the First and Fourth Amendments of the United States Constitution to transit authorities.

B. The Railway Labor Act

Statutes and Regulations

1. History and Purpose of the Railway Labor Act

After decades of labor unrest, which included widespread and often violent strikes, railroads and unions finally reached an agreement and jointly drafted what was designated as the Railway Labor Act of 1926.[3149] Since its enactment there have been several important amendments, including one in 1934 that established the National Railroad Adjustment Board (NRAB)[3150] and an amendment in 1951 that allowed carriers and unions to enter into union security agreements.[3151] As one source explains, "[t]he NRAB is a federal tribunal under the National Mediation Board (NMB) that arbitrates grievances in the railroad industry."[3152] The NMB administers and enforces the RLA, "has delegated its powers to investigate and adjudicate

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[3147] *See UPS v. Mitchell*, 451 U.S. 56, 66-67, 101 S. Ct. 1559, 1565-1566, 67 L. Ed.2d 732, 742-743 (1981).

[3148] 49 U.S. C. § 5333 (2014).

[3149] "The Railway Labor Act Simplified," available at: http://www.pennfedbmwe.org/Docs/reference/RLA_Simplified.html (last accessed March 31, 2015).

[3150] 45 U.S.C. § 153 (2014).

[3151] 45 U.S.C. § 152 (2014).

[3152] Hegji, *supra* note 3143, at 10.

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representation disputes to its General Counsel[,] and oversees mediation and arbitration under the RLA."[3153]

In 1966, Congress enacted additional amendments to the RLA that gave both parties in a dispute the right to request a Public Law Board (PLB); in 1981, Congress added emergency procedures to the RLA that are applicable to certain commuter rail carriers that are funded and operated by the government.[3154] The amendments in 2012 to the RLA pursuant to the Federal Aviation Administration Modernization and Reform Act (FAAMRA) are the most recent changes. FAAMRA revised some rules governing union elections and certifications and required the NMB to conduct regular audits and evaluations.[3155]

The RLA "forbid[s] any limitation upon freedom of association among employees" and "provide[s] for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions."[3156] To fulfill these objectives, the Act both mandates and prohibits certain actions on the part of railroad companies, employees, and other involved parties. Section 152 provides that carriers and employees have the duty to exert every reasonable effort to settle disputes[3157] and that employees during a dispute have the right to designate representatives without interference or coercion by an employer.[3158] The Act provides that no carrier may

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[3153] *Id*.

[3154] 45 U.S.C. § 153 (2014); 45 U.S.C. 159a (c) (2014). *See also* Hegji, *supra* note 3143, at 4.

[3155] P.L. 112-95, 126 Stat. 11 (2012) (codified at 45 U.S.C. §§ 151-52). *See* 29 C.F.R. §§ 1206.1(b) and 1206.2 (2014). *See also* Hegji, *supra* note 3143, at 4.

[3156] 45 U.S.C. § 151a (2014).

[3157] 45 U.S.C. § 152, First (2014).

[3158] 45 U.S.C. § 152, Third (2014).

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require an employee to agree to join or not join a labor organization.[3159] The NMB's procedure for handling disputes that are cognizable under the RLA is set forth in 29 C.F.R. §§ 1206.1-8.

2. National Railroad Adjustment Board

As stated, the NRAB was established by a 1934 amendment to the RLA.[3160] A labor dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" may be referred to the NRAB if the chief operating officer of the carrier designated to handle the dispute fails to reach an adjustment of the dispute.[3161] The decisions of the NRAB are subject to a narrow standard of judicial review, namely whether the NRAB failed to comply with its legal obligations, failed to confine itself to matters within the scope of its jurisdiction, or engaged in some form of fraud or corruption.[3162] The rules of procedure for disputes before the NRAB are set forth in 29 C.F.R. §§ 301.1-01.9.

The NRAB has four divisions with jurisdiction over different types of disputes; for example, the first division adjudicates "disputes involving train- and yard-service employees of carriers."[3163] The second division adjudicates "disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers."[3164] The third division exercises jurisdiction over "disputes involving station, tower, and telegraph

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[3159] 45 U.S.C. § 152, Fifth (2014).

[3160] 45 U.S.C. § 153, *et seq*. (2014)

[3161] 45 U.S.C. § 153(i) (2014).

[3162] 45 U.S.C. § 153(q) (2014).

[3163] 45 U.S.C. § 153(h) (2014).

[3164] *Id*.

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employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees."[3165] The fourth division has jurisdiction over "disputes involving employees of carriers directly or indirectly engaged in [the] transportation of passengers or property by water[] and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions."[3166]

3. Arbitration of Disputes under the RLA

The RLA structure divides labor disputes into major and minor disputes,[3167] each of which has its own mechanism for dispute resolution. Minor disputes relate "to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."[3168] Minor disputes, which typically involve employee grievances and discipline for alleged employee misconduct, must be arbitrated by the NRAB.[3169]

Major disputes are those concerning "the formation of collective agreements or efforts to secure them" and frequently relate to the negotiation, mediation and arbitration process utilized to avoid self-help (*i.e.,* work stoppages and strikes) upon the expiration of a collective bargaining agreement.[3170] Typically, if negotiations are not successful, the parties to a major dispute may request an NMB mediator, who thereafter may refer a dispute to arbitration if the parties are

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[3165] *Id.*

[3166] *Id.*

[3167] *See Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945).

[3168] *Id.,* 325 U.S. at 723, 65 S. Ct. at 1290, 89 L. Ed. at 1894.

[3169] 45 U.S.C. §§ 153, First, (j), and (o), and § 155 (2014); Hegji, *supra* note 3143, at 12-13.

[3170] *Elgin, J. & E. Ry.*, 325 U.S. at 723, 65 S. Ct. at 1289-1290, 89 L. Ed. at 1894.

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unable to resolve the dispute *and* agree to binding arbitration. If the parties decline arbitration and a mediation board concludes that a dispute "threatens substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the President is authorized to set up an Emergency Board (PEB) under the RLA to find a resolution.[3171] The PEB investigates the dispute, which may include hearings and meetings with the parties, and issues a *non-binding* report setting forth its conclusions with respect to the reasonableness of the parties' positions. During the pendency of a PEB investigation and for thirty days after the issuance of the Board's report, all parties must maintain the status quo.[3172]

Cases

4. NRAB's Exclusive Jurisdiction over Minor Disputes

In *Brotherhood of Maintenance of Way Employees Division/IBT v. Norfolk Southern Railway Co.*[3173] the plaintiff Brotherhood of Maintenance of Way Employees Division/IBT argued that Norfolk Southern violated the collective bargaining agreement (CBA) between it and the union. The plaintiff alleged that Norfolk Southern did so by the

> use [of] reports from third-party expert witnesses at the on-property disciplinary hearings it conducts concerning possible misconduct by BMWED-represented employees without having given notice or copies of such reports to the union in advance of the hearings and without bringing the experts to the hearings or otherwise making them available for questioning by the union.[3174]

[3171] 45 U.S.C. § 160 (2014).

[3172] *See* Report of Presidential Emergency Board No. 245 (May 20, 2014)m available at: http://utu.org/worksite/PDFs/PEBS/PEB245Report.pdf (last accessed March 31, 2015) .

[3173] 2012 U.S. Dist. LEXIS 136649, at *1 (N.D. Ill. 2012).

[3174] *Id.* at *1-2.

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The CBA provided for the imposition of discipline only after a "fair and impartial investigation."[3175] A federal district in Illinois court relied on a previous precedent that set forth the standard for determining whether a case qualified as a minor dispute:

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor *if the action is arguably justified* by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are *frivolous or obviously insubstantial*, the dispute is major.[3176]

The court held that Norfolk Southern claims were "arguably justified." First, the CBA did not expressly prohibit the railroad's practice of using third-party expert reports, and, second, the practice actually was consistent with Norfolk Southern's and the union's past practices, as well as with common law applicable to the railroad industry.[3177] Therefore, the court held that under its interpretation of the CBA the dispute qualified as a minor dispute, a decision that brought the matter under the NRAB's exclusive jurisdiction.[3178] The court granted Norfolk Southern's motion for a summary judgment.[3179]

Another example of a minor dispute is *Litaker v. CSX Transportation, Inc.*[3180] Litaker sued CSX after it disciplined Litaker for disobeying his supervisors' instructions and continuing to submit payment claims for travel time and mileage to which Litaker was not entitled.[3181]

[3175] *Id.* at *2.

[3176] *Id.* at *52-53 (citation omitted) (emphasis in original).

[3177] *Id.* at *59.

[3178] *Id.* at *83.

[3179] *Id.*

[3180] 2011 U.S. Dist. LEXIS 117060, at *1 (D. Md. 2011).

[3181] *Id.* at *7-8.

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Litaker argued that he was disciplined for pursuing the resolution of a minor dispute through the mechanisms of the RLA. CSX argued that it disciplined Litaker for "insubordination pursuant to the collective bargaining agreements after he disobeyed the direct instructions of his supervisors when he continued to seek mileage reimbursement through the payroll system."[3182] CSX further argued that Litaker did not follow the grievance protocol in the CBA and that the entire dispute should be considered a minor dispute under the RLA.[3183] A Maryland federal district court held that both the entitlement to travel pay and the discipline issue were minor disputes within the NRAB's exclusive jurisdiction.[3184] CSX's contention that the employee was "not entitled to the travel pay … is arguably justified by the terms of" certain contracts between the railroad and employee.[3185] Furthermore, the issue of discipline "implicates the discipline procedures … [and] appears to turn on the interpretation of the term 'claim'" in one of the collective bargaining agreements.[3186] Thus, the court granted CSX's motion for a summary judgment.[3187]

5. Interpretation of Implied Agreements is a Minor Dispute

In *Kan. City Southern Ry. v. Bhd. of Locomotive Eng'rs & Trainmen*[3188] Kansas City Southern (KCS) and two unions disagreed over a decision to install inward facing video-cameras. Although a Louisiana federal district court had to decide on the method to use to

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[3182] *Id.* at *15.

[3183] *Id.*

[3184] *Id.* at *19, *23.

[3185] *Id* at *19.

[3186] *Id.* at *21-22.

[3187] *Id.* at *24.

[3188] 2013 U.S. Dist. LEXIS 104622, at *1 (W. D. La, 2013).

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resolve the issue,[3189] a related issue was whether the dispute was a major or minor one under the RLA.[3190] Major disputes require "conference, mediation, possibly voluntary arbitration, and a thirty day cooling-off period before either party may resort to economic self-help."[3191] Minor disputes, however, are to be "resolved through binding arbitration."[3192] In this case, because the unions previously had consented to surveillance practices the practices were regarded as implied agreements with KCS.[3193] Thus, the court held that the dispute was a minor one regarding whether the implied agreements covered the installment of the cameras.[3194]

6. Preemption of State Law Claims

In *Johnson v. Norfolk Southern Railway*[3195] a railroad employee brought a claim *pro se* in a state court alleging that Norfolk Southern had committed a breach of the CBA. After Norfolk Southern removed the case to a Maryland federal district court, the company argued that the RLA preempted the employee's state law claims.[3196] The court agreed and held that the claim required an interpretation or application of a CBA and thus qualified as a minor dispute under the RLA.[3197] Therefore, the RLA's mechanism for the resolution of minor disputes preempts a claim

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[3189] *Id.* at *1-2.

[3190] *Id.* at *2.

[3191] *Id.* at *9-10.

[3192] *Id.* at *2.

[3193] *Id* at *15-17.

[3194] *Id.* at *18.

[3195] 2011 U.S. Dist. LEXIS 22225, at *1 (D. Md. 2011).

[3196] *Id.* at *2.

[3197] *Id.* at *4-5.

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under state law, thus preventing a federal district court from deciding the issue.[3198] The court lacked jurisdiction because the claim had to be referred to arbitration.[3199]

7. Requirement that the NRAB Exercise its Jurisdiction

In *Union Pacific Railroad Co. v. Brotherhood of the Locomotive Engineers & Trainmen General Committee of Adjustment*[3200] the Supreme Court reviewed the decision of an NRAB panel in which the panel dismissed an arbitration petition for lack of jurisdiction because the railroad did not submit proof of pre-arbitration "conferencing" as required by the RLA. The case concerned a dispute between Union Pacific and its employees after Union Pacific charged certain employees with disciplinary violations.[3201] At the request of a panel, Union Pacific submitted evidence of the conferencing, but the panel refused to examine the evidence. The panel stated that it was "an appellate tribunal, as opposed to one which is empowered to consider and rule on *de novo* evidence and arguments."[3202] After the panel dismissed the case for lack of jurisdiction and Union Pacific appealed, a federal district court upheld the panel's decision.[3203] However, on appeal, the Seventh Circuit held that the panel's decision not to view the evidence violated Union Pacific's rights of due process and overturned the decision.[3204]

[3198] *Id.*

[3199] *Id.* at *3, *6.

[3200] 558 U.S. 67, 130 S. Ct. 584, 175 L. Ed.2d 428 (2009).

[3201] *Id.,* 558 U.S. at 76, 130 S. Ct. at 593, 175 L. Ed.2d at 440.

[3202] *Id.*, 558 U.S. at 77, 130 S. Ct. at 594, 175 L. Ed.2d at 441.

[3203] *Id.,* 558 U.S. at 77-78, 130 S. Ct. at 594, 175 L. Ed.2d at 441.

[3204] *Id.,* 558 U.S. at 78-79, 130 S. Ct. at 595, 175 L. Ed.2d at 441-442.

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The Supreme Court affirmed the Seventh Circuit's decision but for a different reason.[3205] The Court held that the panel's decision should have been overturned on statutory, not constitutional, grounds.[3206] Although Congress granted the NRAB the power to make rules and processes for claims presented to it, the NRAB was not authorized to refuse to exercise its jurisdiction, *i.e.*, the "jurisdiction to adjudicate grievances of railroad employees that remain unsettled after pursuit of internal procedures."[3207] The Court held that by refusing to hear the claim on jurisdictional grounds the panel "failed 'to conform, or confine itself, to matters [that Congress placed] within the scope of [the NRAB's] jurisdiction.'"[3208] The NRAB's authority to adjudicate is not conditioned on the parties' attempts to resolve disputes in conference as required by the RLA; thus, the requirement for conferencing is not "jurisdictional."[3209] Moreover, the Court held that the RLA does not require the production of evidence of conferencing before the NRAB may exercise its jurisdiction of a dispute.[3210]

8. Judicial Power to Enjoin a Strike to Compel Compliance with the RLA

A recent case decided by the Ninth Circuit that involved a strike by employees and a later injunction against the strike is *Aircraft Service International, Inc. v. International Brotherhood of Teamsters AFL-CIO, Local 117*.[3211] The issue was whether a company providing aircraft

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[3205] *Id.,* 558 U.S. at 80, 130 S. Ct. at 595-596, 175 L. Ed.2d at 442-443.

[3206] *Id.*

[3207] *Id.*, 558 U.S. at 71, 130 S. Ct. at 590, 175 L. Ed.2d at 437.

[3208] *Id.*, 558 U.S. at 80, 130 S. Ct. at 596, 175 L. Ed.2d at 443.

[3209] *Id.,* 558 U.S. at 83, 130 S. Ct. at 597, 175 L. Ed.2d at 444.

[3210] *Id.*, 558 U.S. at 85-86, 130 S. Ct. at 598-599, 175 L. Ed.2d at 446.

[3211] 742 F.3d 1110 (9th Cir. 2014).

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services qualified as a "carrier" under the RLA.[3212] Although the case does not involve railroad employees, the principles apply to all employees covered by the RLA. The workers planned a strike because of an employee's suspension that the employees considered to be unfair.[3213] Aircraft Service International sought an injunction to prevent the strike.[3214] After a district court granted a temporary restraining order and later a preliminary injunction the union appealed to the Ninth Circuit.[3215] The union argued that the federal district court did not have jurisdiction under the Norris-LaGuardia Act and, alternatively, that the injunction violated the employees' First Amendment rights.[3216]

The Ninth Circuit held that the district court had jurisdiction because the Norris-LaGuardia Act, which "withdraws jurisdiction from federal courts to enjoin strikes 'growing out of any labor disputes,'" does not prevent federal courts from issuing an injunction to compel the parties to comply with the requirements of the RLA.[3217] The Ninth Circuit observed that the employees were unwilling to bargain and planned to strike, one of the very reasons that Congress enacted the RLA because "carrier employees collectively threatening a strike [are] capable of single-handedly interrupting interstate commerce by shutting down an airport."[3218] Furthermore,

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[3212] *Id.* at 1112.

[3213] *Id.*

[3214] *Id.* at 1113.

[3215] *Id.*

[3216] *Id.*

[3217] *Id.* at 1114 (citation omitted).

[3218] *Id.* at 1120.

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the injunction did not violate the employees' First Amendment rights. The court had held previously that the requirements of the RLA are "'enforceable by whatever appropriate means might be developed on a case-by-case basis,' including strike injunctions."[3219] Affirming the district court's decision, the Ninth Circuit held that the district court properly balanced the equities and did not abuse its discretion in ruling that the balance of the equities favored American Service International.[3220]

Articles

9. Overview of the RLA and Other Labor Relations Laws

A report by the Congressional Research Service (CRS) provides an overview of three major labor relations laws, including the RLA, provides a brief history of each law, and discusses how each statute operates and is administered.[3221] The report summarizes the RLA as a labor dispute resolution system that emphasizes mediation and arbitration.[3222] The report discusses the rights and duties of parties that are subject to the law and the multiple entities that are responsible for the administration and enforcement of dispute resolution.[3223] The report discusses other major labor laws, including the National Labor Relations Act (NLRA) and the Federal Service Labor-Management Relations Statute (FMSLMRS). The report notes the

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[3219] *Id.* at 1122 (citation omitted).

[3220] *Id.* at 1123.

[3221] Hegji, *supra* note 3143 (summarizing three major labor relations statutes: the Railway Labor Act (RLA), the National Labor Relations Act (NLRA), and the Federal Service Labor-Management Relations Statute (FSLMRS)).

[3222] Hegji, *supra* note 3143, at 1-5.

[3223] *Id*. at 6-14.

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differences among the three major labor relations laws, for example, explaining that "[u]nlike the RLA and NLRA, the FSLMRS does not have any emergency dispute resolution provisions."[3224]

10. Whether the RLA Completely Preempts Claims under State Law

An article in the *Transportation Law Journal* examines the principles and the application of the doctrine of federal preemption, particularly in regard to the RLA.[3225] The article summarizes how courts historically have relied on preemption by the RLA and discusses the current split among the federal circuits on whether the RLA completely preempts claims under state law.[3226] However, the article concludes that a decision by the Supreme Court in *Beneficial National Bank v. Anderson*[3227] means that the RLA should preempt claims under state law completely that involve disputes over labor agreements.[3228]

11. Contractual Due Process and Regulations on Certification of Locomotive Engineers

Another article in the *Transportation Law Journal* examines the federal government's certification program for locomotive engineers.[3229] The article explains that the FRA made the appellate provisions regarding certification completely separate from those governing disputes

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[3224] *Id*. at 42.

[3225] Kelly Collins Woodford, Harry A. Rissetto, & Thomas J. Woodford, "Complete Preemption under the Railway Labor Act: Protecting Congressionally Created Grievance Arbitration Procedures," 36 *Transp. L. J.* 261 (2009), hereinafter referred to as "Woodford, Rissetto, & Woodford."

[3226] *Id*. at 268, 288-297.

[3227] 539 U.S. 1, 123 S. Ct. 2058, 156 L. Ed.2d 1 (2003).

[3228] Woodford, Rissetto, & Woodford, *supra* note 3225, at 269, 297-98.

[3229] John LaRocco and Richard Radek, "The Dilemma of Locomotive Engineer Certification Regulations Vis-à-vis Contractual Due Process in Discipline Cases," 40 *Transp. L. J.* 81 (2013).

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over collective bargaining agreements that are covered by the RLA.[3230] Under the current framework a railroad has a duty to monitor engineers' performance; if an engineer violates a rule or is involved in an incident, the railroad conducts a hearing to determine whether the engineer's certification (also known as a license) should be revoked.[3231] A decision may be appealed to the FRA Administrator and later to the Locomotive Engineer Review Board.[3232] At the same time, a railroad may institute disciplinary proceedings against an engineer under the CBA that triggers the RLA's dispute resolution mechanism.[3233] An arbitrator is required to make a decision in harmony with the FRA Administrator's decision when the FRA already has made a determination.[3234]

The article explains that there is a dilemma:

> On organized railroads, an appeal of the disciplinary penalty may be, and usually is, instituted by the Union pursuant to the CBA. With respect to the individual's certification revocation, an appeal must be made to the FRA within 180 days of the railroad's decision to revoke. For both appeals, the record produced at the company-level hearing comprises the appellate record. Thus, the same incident, and the same record, which led to both the disciplinary and revocation decisions, is appealed to two distinct tribunals. The disciplinary appeal, after grievance handling, ends up in arbitration pursuant to the Railway Labor Act, as amended (RLA). The revocation decision is appealed to the Locomotive Engineer Review Board (LERB). It is at this point a dilemma takes root.[3235]

[3230] *Id*. at 83-84.

[3231] *Id*. at 83.

[3232] *Id*. at 84.

[3233] *Id*. at 83-84.

[3234] *Id*. at 86.

[3235] *Id*. at 83-84 (footnotes omitted).

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The article states that separate decisions, which could be contradictory, are made based on the same events and records.[3236] To remedy the problem the article suggests that a RLA arbitrator should be allowed to make determinations both on the revocation of an engineer's certification and on the disciplinary matter.[3237]

C. The Labor Management Relations Act

Statutes

1. Suits By and Against Labor Organizations

Section 301 of the LMRA, codified in 29 U.S.C. § 185, "protects the rights of management and organized labor and establishes a comprehensive scheme of dispute resolution."[3238] Congress enacted the LMRA in 1947 to expand the jurisdiction of federal courts on issues arising under the RLA so as to include suits brought by or against labor organizations.[3239] The Act provides for federal jurisdiction over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce."[3240] The Act also provides that an employer and the union are bound by the acts of their agents.[3241] Section 301 is an exception to the general rule of the NLRB's exclusive

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[3236] *Id*. at 89.

[3237] *Id*. at 89-90.

[3238] Christopher L. Sagers, "Due Process Review under the Railway Labor Act," 94 *Mich. L. Rev*. 466, 466 (1995).

[3239] O. S. Hoebreckx, "The Federal Courts under Section 301," 43 *Marquette L. R.* 417 (1960), hereinafter referred to as "Hoebreckx."

[3240] 29 U.S.C. § 185(a) (2014).

[3241] 29 U.S.C. § 185(b) (2014).

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jurisdiction. Section 301 creates a practical method for enforcing labor contracts in federal courts that also enables plaintiffs to recover money damages from labor organizations.[3242]

Cases

2. Hybrid Actions for Alleged Misconduct of the Employer and the Union

A unique action that may be brought under § 301 of the LMRA and the RLA is a hybrid action. In a hybrid action an employee alleges intertwined misconduct of the employer and the union. Such an action

> is a hybrid "§ 301 and breach of duty [suit]," brought by an employee against both his employer and his union in order to set aside a "final and binding" determination of a grievance, arrived at through the collectively bargained method of resolving the grievance. It is, therefore, a direct challenge to "the private settlement of disputes under [the collective-bargaining agreement]." Moreover, … the respondent employee here has two claims, each with its own discrete jurisdictional base. The contract claim against the employer is based on § 301, but the duty of fair representation is derived from the NLRA. Yet the two claims are inextricably interdependent. "To prevail against either the company or the Union, … [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." Accordingly, *a plaintiff must prevail upon his unfair representation claim before he may even litigate the merits of his § 301 claim against the employer*.[3243]

Thus, a hybrid action contains two causes of action, one against the employer for breach of the collective bargaining agreement, and one against the union for breach of its duty of fair representation.

A recent example of a hybrid action against a railroad company and a labor organization is *Abramowich v. CSX Transportation, Inc.*[3244] decided by a Pennsylvania federal district court.

[3242] Hoebreckx, *supra* note 3225, at 417.

[3243] *UPS*, 451 U.S. at 66-67, 101 S. Ct. at 1565-1566, 67 L. Ed.2d at 742-743 (citations omitted) (emphasis supplied).

[3244] 2013 U.S. Dist. LEXIS 138150, at *1 (W.D. Penn. 2013).

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In *Abramowich*, employees of CSX believed that CSX was paying them a rate lower than that specified in their agreement and was withholding back pay in violation of the CBA.[3245] The Brotherhood of Locomotive Engineers and Trainmen (BLET) reached a settlement with CSX over the issues of the rate of pay and back pay; however, the employees were not convinced that the settlement provided them with their full back pay but were convinced that they had forfeited their rights to dispute the amount.[3246]

The employees' hybrid claim against CSX and BLET argued that CSX violated the RLA by committing a breach of the CBA and that BLET violated its duty of fair representation in its settlement of the employees' claim for back pay.[3247] In hybrid actions a plaintiff must succeed on both claims to prevail; if the claim against the union fails then the claim against the employer will not proceed.[3248] The court first approached the issue of whether BLET had committed a breach of its duty of fair representation.[3249] The court held that although "a union has the duty to represent all members of the bargaining unit fairly" labor organizations also have some discretion because they "must attempt to satisfy the collective needs of a group of employees."[3250] A plaintiff must prove that a labor organization's actions were "arbitrary,

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[3245] *Id*. at *3.

[3246] *Id.* at *14-17. The employees' belief was based apparently on BLET's suggestion that the employees not seek an arbitration of the dispute.

[3247] *Id.* at *3, 17.

[3248] *Id.* at *23-24.

[3249] *Id.* at *24.

[3250] *Id.* at *21.

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discriminatory, or made in bad faith."[3251] Negligence or poor judgment is insufficient to succeed on a claim of breach of fair representation.[3252] The court held that because of the risks inherent in arbitration BLET had logical reasons for settling with CSX for less than the full amount.[3253] The court held that the employees presented no evidence that BLET's advice not to seek arbitration was made arbitrarily, discriminatorily, or in bad faith.[3254] Furthermore, the court held that "contrary to Plaintiffs' arguments, the record is replete with evidence that the union avidly pursued a reasonable resolution of the Plaintiffs' claims against CSX in a rational and fair manner favorable to the Plaintiffs."[3255] Finally, the court considered BLET's conduct in entering into the settlement agreement with CSX (but not the terms of the settlement) to determine whether BLET had violated its duty of fair representation. The court held that the union had not.[3256]

Because the action was a hybrid action and the employees had failed to show that BLET violated its duty of fair representation, the court did not proceed to the merits of the case against CSX for a violation of the RLA.[3257] The court granted the defendants' motion for a summary judgment.[3258]

[3251] *Id.* at *21-22.

[3252] *Id.* at *23.

[3253] *Id.* at *29-30.

[3254] *Id.* at *35.

[3255] *Id.*

[3256] *Id.* at *38-39.

[3257] *Id.* at *40-41.

[3258] *Id.* at *41.

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3. Six-Month Statute of Limitations Applies to Hybrid Actions

Congress did not include a statute of limitations in the FMRA on a claim by a union for a breach of fair representation, an issue that the Supreme Court addressed in 1983[3259] and 1987.[3260] In 1983, the Court held that the six-month statute of limitations in the NLRA applied to hybrid actions and to actions for breach of fair representation under the LMRA.[3261] The NLRA is similar to the RLA and covers workers in a wide variety of industries but not those already covered by the RLA.[3262] In *West v. Conrail*[3263] a railroad employee brought a hybrid action under the RLA and FMRA against his employer and union, a case that the Supreme Court decided in 1987. The employee filed the claim within the six-month period but failed to complete service of process within six months.[3264] Citing its 1983 decision holding that a six-month statute of limitations applied to all FMRA claims for breach of the duty of fair representation, even though the case involved claims based on the RLA, not the NLRA, the held that a six-month statute of limitations applied to the *West* case as well.[3265] The Court also held that in its 1983 decision only the statute of limitations was borrowed from the NLRA, not the

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[3259] *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 155, 103 S. Ct. 2281, 2285, 76 L. Ed.2d 476, 483 (1983).

[3260] *West v. Conrail*, 481 U.S. 35, 107 S. Ct. 1538, 95 L. Ed.2d 32 (1987).

[3261] *DelCostello*, 462 U.S. at 155, 103 S. Ct. 2285, 76 L. Ed.2d at 483. *See* Barbara J. Van Arsdale, "When Does Six-Month Limitations Period, Applicable to Employee's 'Hybrid' Action against Employer and Union under § 301 of Labor Management Relations Act of 1947 Begin to Run," 194 *A.L.R. Fed.* 1.

[3262] Hegji, *supra* note 3143, at 17.

[3263] *West,* 481 U.S. at 36, 107 S. Ct. at 1540, 95 L. Ed.2d at 35.

[3264] *Id.,* 481 U.S. at 37, 107 S. Ct. at 1540, 95 L. Ed.2d at 36.

[3265] *Id.*, 481 U.S. at 38-40, 107 S. Ct. at 1540, 95 L. Ed.2d at 36.

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NLRA's procedures.[3266] The Court remanded the case because the service of process complied with the Federal Rules of Civil Procedure.[3267]

D. Protective Labor Arrangements for Employees of Transit Agencies Receiving Federal Funding

Statutes

1. Section 13(c)

Certain provisions of the federal labor laws apply to any activity a private party performs under contract for a transit agency when the costs will be reimbursed by federal funds.[3268] One objective is to protect current employees from reductions in personnel.[3269] If the affected employees are union members "the bargaining process ... normally governs employee rights for continued employment as well as for seniority recognition, accrued benefits disposition, pay and other benefit issues...."[3270]

When federal funding is involved, 49 U.S.C. § 5333(b), (still referred to as § 13(c)), requires that public transportation agencies protect existing labor agreements, *i.e.*, by the use of "protective arrangements" that must be certified by the Department of Labor and that must be in

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[3266] *Id.*, 481 U.S. at 38, 107 S. Ct. at 1541, 95 L. Ed.2d at 37.

[3267] *Id.*, 481 U.S. at 40, 107 S. Ct. at 1542, 95 L. Ed.2d at 38.

[3268] Federal Transit Administration, "Report to Congress on the Costs, Benefits, and Efficiencies of Public-Private Partnerships for Fixed Guideway Capital Projects," at 41, available at: http://www.fta.dot.gov/documents/Costs_Benefits_Efficiencies_of_Public-Private_Partnerships.pdf (last accessed March 31, 2015), hereinafter referred to as "FTA Report to Congress on PPPs."

[3269] Chasity H. O'Steen and John R. Jenkins, "Local Government Law Symposium: Article: We Built It, and They Came! Now What? Public-Private Partnerships in the Replacement Era," 41 *Stetson L. Rev.* 249, 294 (2012).

[3270] *Id.*

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effect before FTA funds may be released to a mass transit provider.[3271] Thus, when § 13(c) applies, transit agencies must protect employees' rights to collective bargaining; preserve their rights, privileges, and benefits under existing collective bargaining agreements; maintain paid training or retraining programs; assure employees of continued employment and priority of reemployment in the event of lay-offs; and protect employees "against a worsening of their positions related to employment."[3272]

Case

2. Applicability of Section 13(c) to a Transit Employee On Loan to Another Agency

In recent years apparently only a few cases have been decided involving § 13(c).[3273] In *Mancuso v. City of Durham*[3274] the city of Durham entered into an agreement in June 2010 with Triangle Transit Authority (TTA) that provided for TTA to assume the management and operation of the Durham Area Transit Authority. Mancuso was employed by the city of Durham as a transit administrator from March 1997 to October 2011. He remained an employee of the city but was "on loan" to TTA from October 1, 2010 to September 30, 2011. Mancuso

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[3271] 49 U.S.C. § 5333(b) (2014); *see* United States Department of Labor, Office of Labor-Management Standards, available at: http://www.dol.gov/olms/regs/compliance/QandA.htm (last accessed March 31, 2015).

[3272] FTA Report to Congress on PPPs, *supra* note 3268, at 40.

[3273] *See City of Colo. Springs v. Solis*, 589 F.3d 1121 (10 Cir. 2009); *City of Colo. Springs v. Chao*, 587 F. Supp.2d 1185 (10th Cir. 2008) (referring to purchase of two buses to be used in the operation of Colorado Springs's Mountain Metropolitan Transit service); *Mancuso v. City of Durham*, 741 S.E.2d 926 (N.C. App. 2013); *DART v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659 (Tex. 2008); *Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union*, 2012 UT 75, 289 P.3d 582 (2012); *Mid-Ohio Valley Transit Auth. v. Amalgamated Transit Union Local 1742*, 2013 W. Va. LEXIS 513, at *1 (W.Va. 2013).

[3274] 2013 N.C. App. LEXIS 427, at *1 (N.C. App. 2013).

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complained that his § 13(c) rights were violated "when he was placed in a temporary position with duties that were not comparable to the duties of his prior position."[3275] The court remanded the matter to the trial court for findings on whether the parties were bound by an arbitration clause in the union contract with the city of Durham. If the trial court holds that there is an enforceable agreement to arbitrate, the trial court must determine whether the plaintiff's claim comes within the "substantive scope" of the agreement.[3276] If so, an arbitrator will decide the merits of the plaintiff's complaint, not the court.[3277]

Cases

E. Employees and Application of the First and Fourth Amendments to Transit Authorities

1. Transit Authority did not Violate Employee's Freedom of Speech

In *Anemone v. Metro. Transp. Authority*[3278] an employee of the Metropolitan Transportation Authority (MTA) alleged that the MTA violated his right of free speech under the federal and New York constitutions.[3279] Anemone was hired as the Director of Security and the Deputy Executive Director of the MTA and Casale was hired as the MTA's Deputy Director of Security.[3280] As part of their jobs, Anemone and Casale investigated allegations of corruption at the MTA.[3281] As a result of an investigation Anemone learned that multiple MTA contractors

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[3275] *Id*. at *2.

[3276] *Id*. at *7.

[3277] *Id*.

[3278] 629 F.3d 97 (2d Cir. 2011).

[3279] *Id*. at 99.

[3280] *Id*. at 100.

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were submitting fraudulent bills for their work, a matter that Anemone referred to the Manhattan District Attorney's office.[3282] Anemone also opened an investigation of the president of the Long Island Railroad (LIRR) to determine whether he had received improper gifts from Plasser American.[3283]

An Interim Report, however, issued by the Office of the Inspector General (OIG) stated that Anemone and Casale fabricated the existence of a confidential informant and behaved in a manner that was unacceptable for high ranking members of the MTA.[3284] As a result of the report, MTA placed Anemone and Casale on administrative leave.[3285] MTA later terminated Anemone's employment.[3286] The OIG's final report found that Bauer had in fact engaged in ethics violations and, therefore, Anemone and Casale were entitled to have their names cleared.[3287] Anemone filed suit against the MTA for taking "a number of adverse employment actions in retaliation for First Amendment-protected activity exposing corruption at the MTA…."[3288]

A federal district court had granted the MTA's motion for a summary judgment because "no reasonable jury could find that [Anemone was terminated] out of a desire to punish him for

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[3281] *Id*.

[3282] *Id*.

[3283] *Id*. at 101.

[3284] *Id*. at 102, 109-110.

[3285] *Id*.

[3286] *Id*. at 111.

[3287] *Id*.

[3288] *Id*. at 112.

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his allegedly protected expressive activity."[3289] Second, the district court held that "a reasonable jury could not help but find that Anemone would have suffered the alleged adverse employment actions even in the absence of his allegedly protected activity."[3290] Third, instances cited by Anemone as "protected activity ... were in fact unprotected employee speech...."[3291] The Second Circuit affirmed the district court's decision.[3292]

2. Transit Authority's Alleged Violation of the Rights of Free Speech and the Exercise of Religion

In *Lewis v. New York City Transit Authority*[3293] Lewis brought an action as the administrator of his wife's estate in which he alleged that his wife, a bus driver for the New York City Transit Authority (Transit Authority), was discriminated against because as a Muslim she refused to remove her head scarf.[3294] When Lewis left on medical leave, the Transit Authority instituted a new dress code that only authorized employees to wear depot caps and uniform hats with logos.[3295] Upon returning to work, Lewis refused to remove her headscarf or wear a uniform cap over her headscarf.[3296] Because of her refusal, Lewis was transferred to a position in a bus

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[3289] *Id*. at 113.

[3290] *Id*.

[3291] *Id*.

[3292] *Id*. at 121.

[3293] 2014 U.S. Dist. LEXIS 46471, at *1 (E.D. N.Y. 2014).

[3294] *Id*. at *1-2.

[3295] *Id*. at *6-8.

[3296] *Id*. at *8-9.

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depot where the headgear policy did not apply.[3297] A few months later a new policy allowed employees to wear turbans and headscarves with the Transit Authority logo.[3298] Lewis was reassigned to a position as a station agent but was terminated because she did not wear the logo as required by the new policy.[3299] After she was transferred to a position as a bus driver, the Transit Authority ultimately terminated her position; however, for medical reasons she could not perform the duties of a bus driver.[3300] The suit against the Transit Authority claimed that the authority retaliated against Lewis for exercising her right to the free exercise of religion and her right of free speech.[3301]

A New York federal district court stated that when "'the government seeks to enforce a law that is neutral and of general applicability ... it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices.'"[3302] The court held that the Transit Authority's policies were not facially neutral because after Lewis was transferred, the Transit Authority published a series of bulletins that indicated that the Transit Authority was targeting women who wore headscarves.[3303] The court held that the transfer of female Muslim employees to the bus depot was not an action that was tailored to achieve the

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[3297] *Id*.

[3298] *Id*. at *14.

[3299] *Id*. at *17.

[3300] *Id*. at *17, 18.

[3301] *Id*. at *82-83.

[3302] *Id*. at *84-85 (*quoting Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002)).

[3303] *Id*. at *91-92.

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Transit Authority's goal of having a uniform workforce.[3304] Because there was a genuine issue of material fact regarding whether the Transit Authority's policies violated Lewis's right to the free exercise of religion, the court denied the Transit Authority's motion for a summary judgment.[3305]

The plaintiff alleged that the Transit Authority also discriminated against Lewis for exercising her right of free speech when she spoke to the media on the policies regulating headgear.[3306] Because the Transit Authority did not demonstrate that in the absence of her statements to the media it would have transferred Lewis multiples times and then terminated her, the district court denied the Transit Authority's motion for a summary judgment.[3307] The court also denied the Transit Authority's motion for a summary judgment on the plaintiff's claims for "disparate treatment, failure to accommodate, disparate impact and retaliation," as well as other claims.[3308]

3. Regulations Requiring Rail Employees to Undergo Observed Drug Testing do not Violate the Fourth Amendment

In *BNSF Ry. Co. v. United States DOT*[3309] BNSF along with other petitioners challenged a Department of Transportation (DOT) regulation that required rail employees who fail or refuse to take a drug test to enroll in a drug treatment program and pass urine tests for jobs with a safety

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[3304] *Id*. at *92-93.

[3305] *Id*. at *93.

[3306] *Id*. at *95.

[3307] *Id*. at *96-97.

[3308] *Id*. at *24.

[3309] 566 F.3d 200 (D.C. Cir. 2009).

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component.[3310] BNSF argued that the regulation violated the Administrative Procedure Act (APA) and the Fourth Amendment's protection against unreasonable searches.[3311] The DOT may promulgate regulations under the Omnibus Transportation Employee Testing Act of 1991 that requires drug tests for transportation employees.[3312]

In 2008, a new DOT regulation required all return-to-duty and follow-up tests to use a "direct observation" method that entailed a same-gender observer to watch the collection of the urine sample to ensure that an employee was not cheating.[3313] The Supreme Court has held that compulsory urine tests are searches under the Fourth Amendment and that drug tests for transportation safety do not require warrants.[3314] The District of Columbia Circuit held that the DOT regulations did not violate the Fourth Amendment "given the vital importance of transportation safety, the employees' participation in a pervasively regulated industry, their prior violations of the drug regulations, and the ease of obtaining cheating devices capable of defeating standard testing procedures."[3315] The court also held that the DOT did not violate the APA's prohibition on arbitrary and capricious action when promulgating the regulations.[3316] The DOT was justified in promulgating regulations that were more strict on drug testing after it

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[3310] *Id*. at 202.

[3311] *Id*.

[3312] *Id*. (*citing* 49 C.F.R. Part 40)(2014)).

[3313] *Id*. (*citing* 49 C.F.R. § 40.67(i) (2014)).

[3314] *Id*. at 206 (*citing See Skinner v. Ry. Labor Executives Ass'n,* 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989)).

[3315] *Id.* at 208.

[3316] *Id*. at 203.

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concluded "that the growth of an industry devoted to circumventing drug tests, coupled with returning employees' higher rate of drug use and heightened motivation to cheat, presented an elevated risk of cheating on return-to-duty and follow-up tests that justified the use of mandatory use of direct observation."[3317]

[3317] *Id*. at 205.

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XXVIII. NEGLIGENCE AND RAILROAD LIABILITY

A. Introduction

This part of the Report discusses statutes, cases, and articles on tort law as it applies to railroads. Section B discusses the attractive nuisance doctrine as it has been applied to railroads. Section C discusses various issues that have arisen in collisions between motor vehicles and trains, including at highway-railroad crossings, such as whether the doctrine of negligence *per se* may be applied to railroads, whether the Federal Railroad Safety Act (FRSA) and the Locomotive Inspection Act (LIA) preempt negligence claims brought under the Federal Employers' Liability Act (FELA), whether the FRSA preempts state laws that apply to railroad crossings, and whether the doctrine of *respondeat superior* applies to railroads. Section D addresses the issue of contributory negligence and whether a railroad may be held liable when a motorist was intoxicated at the time of the accident, as well as other instances when a railroad company may not be liable because of a cyclist's, motorist's, or pedestrian's contributory negligence. Section D also discusses articles on the standing train doctrine and other state laws that may apply to accidents and the presumption of contributory negligence in cases involving occupied crossings. Section E discusses cases involving contributory negligence and individuals who are deaf. Section F addresses statutes or rules that require motorists to stop, look, and listen. Section G deals with statutes and cases specifically involving accidents because of crossing gates, including issues related to inspections and allegedly defective gates at crossings. Section H covers cases involving falling objects and when, for example, the doctrine of *res ipsa loquitor* applies. Section I analyzes the last clear chance doctrine and its applicability to railroad cases. Section J discusses cases and articles on the issue of whether and when

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evidence is admissible to prove a railroad company's knowledge or notice of a dangerous condition of its property.

Cases

B. Whether the Attractive Nuisance Doctrine Applies to Railroads

1. Definition of an Attractive Nuisance

In general, an owner of land owes no duty to a trespasser on his or her land; however, there is an exception. A landowner owes a duty of reasonable care to children who are trespassers to protect them from a dangerous condition when:

> (1) the landowner knew or should have known that children habitually frequent the property; (2) a defective structure or dangerous condition was present on the property; (3) the defective structure or dangerous condition was likely to injure children because they are incapable, based on age and maturity, of appreciating the risk involved; and (4) the expense and inconvenience of remedying the defective structure or dangerous condition was slight when compared to the risk to children.[3318]

As for the meaning of the term child within the meaning of the attractive nuisance doctrine, a comment to the *Restatement (Second) of Torts* states that in attractive nuisance cases the plaintiff is often younger than twelve years of age. Although older cases usually involved children between the ages of six and twelve, in more recent cases the courts have recognized that children may be as old as seventeen. The *Restatement* states that attractive nuisance claims are "not limited to 'young' children, or to those 'of tender years,' so long as the child is still too

[3318] *Choate v. Indiana Harbor Belt R.R. Co.*, 366 Ill. Dec. 258, 265, 980 N.E.2d 58, 65 (Ill. 2012).

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young to appreciate the danger."[3319] Although most courts have not set an age limit, some courts have held that after the age of fourteen the rule is no longer applicable.[3320]

2. Obvious Trains Held not to be an Attractive Nuisance

In *Choate v. Indiana Harbor Belt R.R. Co.*[3321] a twelve-year old boy attempted to jump on a moving train to impress his friends but ended up severing part of his left foot. The Supreme Court of Illinois held that the plaintiff failed to prove two elements of the attractive nuisance doctrine quoted above: that the alleged defective structure or dangerous condition was likely to injure children on the basis that children are incapable of appreciating the risk presented, and that the expense and inconvenience of remedying the defective structure or dangerous condition was slight when compared to the risk that the condition presented to children. The test for determining the existence of an attractive nuisance is an objective one: whether a landowner reasonably expects a child to understand the risk, not whether a child actually understands the risk.[3322]

In *Choate*, the court held that the risk of jumping onto a moving train is an open and obvious risk to a twelve-year old child.[3323] As for the element of expense and inconvenience, because a court must compare the risk of injury with the expense and inconvenience of

[3319] *Restatement (Second) of Torts*, § 339, cmt. c. (1979 and later supplements).

[3320] *See Moseley v. Kansas City*, 170 Kan. 585, 228 P.2d 699 (1951); *Cates v. Beauregard Electric Cooperative, Inc.*, 316 So.2d 907 (La. App. 1975); *Jones v. Maryland Casualty Co.*, 256 So.2d 358 (La. App. 1971); *Lipscomb v. Cincinnati, N. & C. St. R. Co.*, 239 Ky. 587, 39 S.W.2d 991 (1931); *State use of Potter v. Longeley*, 161 Md. 563, 158 A. 6 (1932); *Keck v. Woodring*, 201 Ok. 665, 208 P.2d 1133 (1948); *Sidwell v. McVay*, 282 P.2d 756 (Ok. 1955); *Hanson v. Freigang*, 55 Wash.2d 70, 345 P.2d 1109 (1959); and *Schulte v. Willow River Power Co.*, 234 Wis. 188, 290 N.W. 629 (1940).

[3321] 366 Ill. Dec. 258, 980 N.E.2d 58 (Ill. 2012).

[3322] *Id.,* 366 Ill. Dec. at 268, 980 N.E.2d at 68 (internal citation omitted).

[3323] *Id.,* 366 Ill. Dec. at 266, 980 N.E.2d at 67.

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preventing a potentially dangerous condition, the court held that the railroad did not have a duty to fence its property to prevent injury to children.[3324] The imposition of such a duty would require a railroad to erect fences at great expense in all locations where children could trespass.[3325] In the *Choate* case, moreover, although only portions of the railroad corridor were fenced, fencing would not have deterred the plaintiff who ignored the existing segments of fencing and existing warning signs.[3326] The court held that "the responsibility for a child's safety lies primarily with his parents, whose duty it is to see that the child does not endanger himself."[3327] The Supreme Court of Illinois reversed the ruling of an appellate court and later denied a petition for a rehearing.[3328]

3. Attractive Nuisance Doctrine Inapplicable to Moving Trains that Injure Children

In *Woods v. CSX Transp., Inc*[3329] three boys, aged seven, nine, and ten, who were walking home from school alone for the first time, began to cross a railroad track in the belief that the train had stopped on the tracks.[3330] The nine- and ten-year old crossed safely, but the seven-year old child was struck by a CSX train when his shoe became caught on the track.[3331]

[3324] *Id.,* 366 Ill. Dec. at 268, 980 N.E.2d at 68.

[3325] *Id.,* 366 Ill. Dec. at 269, 980 N.E.2d at 69.

[3326] *Id.*

[3327] *Id.,* 366 Ill. Dec. at 270, 980 N.E.2d at 70 (citation omitted).

[3328] *Id.*

[3329] 2008 U.S. Dist. LEXIS 97068 at *1, 42-43 (N.D. Ind. 2008).

[3330] *Id.* at *3-4.

[3331] *Id.* at *4.

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The train's engineer, who saw the children in the vicinity of the tracks, sounded the train's whistle several times within a forty-three second span but failed to engage the emergency brakes until the boys ran toward the tracks.[3332]

A federal district court in Indiana held that the attractive nuisance doctrine did not apply when a child is injured or killed by a moving train.[3333] In ruling that CSX was entitled to a summary judgment on the plaintiffs' attractive nuisance claim, the court stated:

> The overwhelming weight of authority [is that the attractive nuisance doctrine] does not apply as a matter of law in cases where child trespassers are injured by moving trains because a moving train is not a subtle or hidden danger and its potential for causing serious bodily injury or death to anyone in its path is readily apparent, even to young children.[3334]

The court also held that the FRSA preempted the plaintiffs' tort claims based on the train's speed as a train is not obligated to stop or reduce its speed until a specific, individual hazard is presented.[3335] However, the FRSA did not preempt the plaintiff's claims for CSX's failure to maintain a lookout or its breach of duty to slow down when a specific hazard is presented, namely the boys' intent to cross the tracks.[3336] Nevertheless, CSX was not liable for negligence. CSX exercised reasonable care because the engineer engaged the emergency brake when he recognized that the boys intended to cross the tracks.[3337] In the absence of CSX's

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[3332] *Id.* at *6-7.

[3333] *Id.* at *42-43.

[3334] *Id.* at *43 (citation omitted) (internal quotation marks omitted).

[3335] *Id.* at *22.

[3336] *Id.* at *23.

[3337] *Id.* at *33, 45-6.

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negligence, the court dismissed the plaintiffs' remaining claims for negligent infliction of emotional distress and loss of services.[3338]

C. Motor Vehicle Collisions with Trains Including at Highway-Railroad Grade Crossings

1. Interstate Commerce Commission Termination Act's Preemption of a Claim for Negligence *Per Se*

In *Elam v. Kansas City Southern Ry. Co.*[3339] the plaintiff Elam, a motorist, was injured when her vehicle struck the side of a Kansas City Southern (KCS) train. Elam alleged that KCS was negligent *per se* for having violated the state's anti-blocking statute.[3340] An anti-blocking statute in railroad parlance is a statute that regulates the amount of time a railroad may block a crossing.[3341] The Fifth Circuit held that the Interstate Commerce Commission Termination Act (ICCTA) preempted Elam's for negligence *per se* but that the ICCTA did not preempt her claim simply for negligence.[3342] The ICCTA preempted the claim for negligence *per se*, because the Act "does not permit states to directly regulate 'a railroad's economic decisions such as those pertaining to train length, speed or scheduling.'"[3343] On the other hand, the ICCTA did not preempt the plaintiff's other claim for negligence because the claim did "not directly attempt to

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[3338] *Id.* at *44-46.

[3339] 635 F.3d 796 (5th Cir. 2011), *motion granted by, remanded by*, 2011 U.S. Dist. LEXIS 55564 (N.D. Miss., May 23, 2011) (stating that "[h]aving fully reviewed the record in this case, the Court is of the opinion that the remaining claims are the equivalent of a routine crossing case which is typically resolved in state court"), *affirmed by, appeal after remand at, appeal dismissed by, in part*, 2012 U.S. App. LEXIS 6404 (5th Cir. Miss., Mar. 26, 2012).

[3340] *Elam*, 635 F.3d at 801, 804.

[3341] *Id.* at 801.

[3342] *Id.*

[3343] *Id.* at 806 (citation omitted).

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manage or govern a railroad's decisions in the economic realm" as does a claim for negligence *per se*.[3344]

2. Preemption of FELA Claims by the Federal Railroad Safety Act and the Locomotive Inspection Act

In *Garza v. Norfolk Southern Ry. Co.*[3345] Garza was injured when an automobile drove through a railroad crossing striking a Norfolk Southern train on which Garza was working. Garza, the train's engineer, brought four claims in tort against Norfolk Southern, his employer, under FELA; however, the Sixth Circuit held that the FRSA and the LIA preempted the engineer's claims.[3346] The court also held that Norfolk Southern "complied with the posted notifications of the Federal Rail Administration speed limit for the track;" thus, Garza could not show that Norfolk Southern failed to abide by a statutory duty or violated a duty to act with due care.[3347] Moreover, Garza was unable to prove that the configuration of his cab seat caused his injuries.[3348] Thus, the Sixth Circuit affirmed the grant of a summary judgment on all claims for Norfolk Southern.[3349]

[3344] *Id.* at 813, 814.

[3345] 2013 U.S. App. LEXIS 17134, at *1, 3 (6th Cir. 2013).

[3346] *Id.* at *1-2.

[3347] *Id.* at *7.

[3348] *Id.* at *11.

[3349] *Id.* at *11-13.

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3. FRSA's Preemption of State Laws on Collisions at Crossings

In *Driesen v. Iowa, Chi. & E. R. R. Corp.*[3350] the court held that the FRSA preempted state and city laws regulating railroad safety and therefore granted the defendant Iowa, Chicago & Eastern Railroad Corporation's (IC&E) motion for a partial summary judgment. When one of the plaintiffs drove the Driesens' vehicle onto a railroad track the vehicle struck the third railcar of a moving IC&E train.[3351] Because the state and local laws at issue regulated a train's presence in a crossing, active warning devices, railcar reflectorization, and the use of the locomotive's horn, the laws overlapped federal law regulating the same matters. The court held that the FRSA preempted state and local laws regulating the speed of trains, reflectorization of railcars, warning devices, and locomotive horns.[3352] The fact that IC&E had not complied with its own safety rules did not prevent federal law from preempting the Driesens' state claims because the Driesens did "not cite to any federal regulation mandating these internal rules."[3353] Only the plaintiffs' claim of IC&E's failure to warn of a defective warning device was not dismissed.[3354] Because new crossbucks and reflective tape had not been installed at the intersection there could be no "federal preemption" until "the planned devices" were installed and operational.[3355]

[3350] 777 F. Supp.2d 1143 (N. D. Iowa 2011).

[3351] *Id.* at 1147.

[3352] *Id.* at 1160.

[3353] *Id.* at 1158.

[3354] *Id.* at 1157.

[3355] *Id.* at 1155 (internal quotation omitted).

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However, the court also ruled that a jury would decide whether the driver's contributory negligence was more than fifty percent that would bar his recovery.[3356]

4. Liability of a Railroad Based on the Doctrine of *Respondeat Superior*

The doctrine of *respondeat superior* imposes liability "upon an employer for the acts of his employees committed in the course and scope of their employment."[3357] In *England v. Cox,*[3358] in which both the railroad and its employee were defendants, the court applied the doctrine of *respondeat superior*. The railroad was held liable for the conduct of its employee because the employee was acting within the scope of his employment when he negligently caused his truck to collide with a locomotive by stopping his truck on the tracks.[3359]

The plaintiff who was riding in the locomotive brought an action against the truck driver, a railroad employee.[3360] Kansas law prohibits a vehicle from being driven "'onto any railroad grade crossing unless there is sufficient space on the other side of the ... railroad grade crossing to accommodate the vehicle he or she is operating without obstructing the passage of other vehicles ... or railroad trains notwithstanding any traffic-control signals indication to proceed.'"[3361] The driver's erroneous belief that there was room on the other side of the crossing to accommodate his truck was insufficient to preclude the truck driver from being held liable.

[3356] *Id.* at 1145.

[3357] *Ballentine's Law Dictionary,* 3d ed.

[3358] 2012 U.S. Dist. LEXIS 109364 at *1, 10-11 (D. Kan. 2012), *reconsideration denied*, 2012 U.S. Dist. LEXIS 123197, at *1 (D. Kan. Aug. 30, 2012).

[3359] *Id.*

[3360] *Id.* at *1.

[3361] *Id.* at *2 (*quoting* Kan. Stat. Ann. § 8-1584).

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The truck driver was negligent *per se* because he violated the Kansas statute; his railroad-employer was held liable under the doctrine of *respondeat superior.*[3362] Furthermore, the FRSA preempted the truck driver's claim that the crossing signals were defective.[3363] The court granted the plaintiff's motion for a summary judgment.[3364]

D. Contributory Negligence as a Defense to a Claim against a Railroad

1. Railroad not Liable when a Motorist was Intoxicated

In *Doyle v. Union Pacific R. Co.*[3365] the Fifth Circuit held that Union Pacific was not liable for injuries sustained by the plaintiff Doyle when a train and Doyle's automobile collided because the motorist, who was driving under the influence, did not stop, look, and listen before crossing the tracks. Louisiana law provides that no one shall be liable for injury to an operator of a vehicle "when (1) 'the operator is legally intoxicated, (2) the operator is more than twenty-five percent negligent, and (3) his negligence is a contributing factor in the accident.'"[3366] Although there was evidence that the crossing light signals were not working and that the train's whistle did not sound prior to the accident, the court affirmed the trial court's grant of a summary judgment for Union Pacific.[3367]

[3362] *Id.* at *5, 10-11.

[3363] *Id.* at *12-14.

[3364] *Id.* at *14.

[3365] 442 Fed. Appx. 964, 966 (5th Cir. 2011).

[3366] *Id.* at 965 (*quoting* La. Rev. Stat. Ann. § 9:2798.4)).

[3367] *Id*. at 966.

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2. Railroad not Liable for the Death of a Person on the Tracks

In *Owens v. Norfolk Southern Corp.*[3368] the court held that Norfolk Southern was not responsible for a man's death when the decedent Owens was lying on the tracks and under the influence of alcohol and illegal substances. The Norfolk Southern crew members had seen an object on the tracks but were unable to determine what the object was until the train was one car length away.[3369] On realizing that the object was a person, the crew applied the emergency brakes in an attempt to avoid hitting the decedent.[3370]

Because the decedent was a trespasser on Norfolk Southern's property, the court held that Norfolk Southern only owed Owens a duty not to willfully or wantonly injure him and to "exercise ordinary care to avoid injury after it becomes cognizant of the peril."[3371] However, Norfolk Southern had no duty to watch for trespassers.[3372] Because the railroad had no knowledge that residents in the area crossed the tracks at the location where the decedent was struck, the railroad did not have constructive knowledge of Owens's possible presence on the tracks.[3373] The decedent's intoxicated state, illegal drug use, and statements to his medical care providers that he was attempting to commit suicide constituted conclusive evidence that the decedent was the sole proximate cause of the accident.[3374]

[3368] 2011 U.S. Dist. LEXIS 62457, at *1, 24 (N. Dist. Ind. 2011).

[3369] *Id.* at *5-6.

[3370] *Id.* at *6.

[3371] *Id.* at *9-10 (citation omitted) (internal quotation marks omitted).

[3372] *Id.*

[3373] *Id.* at *15.

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3. Child Trespasser Statute Inapplicable to Occupier of Land

In *Jad v. Boston and Maine Corp.*[3375] an Amtrak train struck and killed a 15-year old boy when he was crossing the tracks on his way to school. The Appeals Court of Massachusetts held that Boston and Maine Corporation (B&M) was not liable to the plaintiff because under Massachusetts law a railroad is not "'liable for negligence in causing the death of a person … walking or being upon such railroad contrary to law….'"[3376] The child trespasser statute assigns liability to a landowner who maintains an artificial condition on his property that causes injury to a trespassing child.[3377] However, the court also held that because B&M "was an occupier rather than the owner of land" the company was not liable under the child trespasser statute.[3378]

The plaintiff had argued that the foregoing two statutes were inconsistent and that because the child trespasser statute was more recent it superseded the statute that exempted a railroad operator.[3379] The court held that the two statutes were not inconsistent. First, the more general child trespasser statute must yield to the more specific statutory exemption for a railroad operator.[3380] Second, the child trespasser statute did not apply because the defendant B&M was an occupier of land, not a landowner.[3381]

[3374] *Id.* at *21, 24.

[3375] 26 Mass. App. Ct. 564, 530 N.E.2d 197 (Mass. Ct. App. 1988).

[3376] *Id.,* 26 Mass. App. Ct. at 565, 530 N.E.2d at 198 (*quoting* Mass. Gen. Laws., ch. 229 § 2).

[3377] *Id.,* 26 Mass. App. Ct. at 566-567, 530 N.E.2d at 199 (*citing* Mass. Gen. Laws., ch. 231 § 85Q).

[3378] *Id.,* 26 Mass. App. Ct. at 565, 530 N.E.2d at 198.

[3379] *Id.,* 26 Mass. App. Ct. at 570, 530 N.E.2d at 201.

[3380] *Id.,* 26 Mass. App. Ct. at 579, 530 N.E.2d at 201.

[3381] *Id.,* 26 Mass. App. Ct. at 570-571, 530 N.E.2d at 201 (*citing* Mass. Gen. Laws., ch. 231 § 85Q).

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Articles

4. Standing Train Doctrine and other State Laws

A 2008 law review article entitled "Railroad Law" analyzes Virginia law on railroad crossings, the effect of a railroad employee's contributory negligence on a claim under FELA, railroad crossings law, and other issues.[3382]

First, Virginia courts developed the "standing train" doctrine that relieves railroad companies of liability when a motorist crashes into the side of a non-moving train at a crossing.[3383] In such cases, the courts have held that only the motorist is negligent. Because the presence of a train on a track constitutes a sufficient warning, a motorist is required to exercise ordinary care to prevent a collision.[3384]

Second, in regard to railroad crossing law, particularly in Virginia, first, the article explains that there are "two distinct groups" of crossings – public crossings and private crossings.[3385] The author notes that the FRA and the Commonwealth of Virginia regulate public crossings in Virginia.[3386] As for public crossings, there are "two distinct categories – those with automated warning devices and those with passive warning devices."[3387] The Virginia Code "governs the installation of automated warning devises" in Virginia.[3388] Under the statute,

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[3382] Brent M. Timberlake, "Railroad Law," 43 *U. Rich. L. Rev*. 337 (2008).

[3383] *Id*.

[3384] *Id*. at 368-370.

[3385] *Id*. at 358

[3386] *Id*. (*citing* 49 C.F.R. §§234.1-234.275 (2007) and Va. Code Ann. §§ 56-355.1 to -369, 56-405 to -412.2 (Repl. Vol. 2007)).

[3387] *Id*.

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> [a] railroad shall not unilaterally select or determine the type of grade crossing warning system to be installed at any crossing of a public highway and railroad at grade. The railroad shall only install or upgrade a grade crossing warning system at any crossing of a public highway and railroad at grade pursuant to an agreement with the Virginia Department of Transportation or representative of the appropriate public road authority authorized to enter into such agreements.[3389]
>
> Furthermore, Va. Code Ann. § 56-406.1 provides in part that
>
> [w]hen required by the Commonwealth Transportation Commissioner or representative of the appropriate public road authority, every railroad company shall cause a grade crossing warning device including flashing lights approved by the Department of Transportation at such heights as to be easily seen by travelers, and not obstructing travel, to be placed, and maintained at each public highway at or near each place where it is crossed by the railroad at the same level.[3390]

As for private crossings, a railroad generally owes no duty to licensees.[3391] A licensee is "a person who enters upon the property of another for his own convenience, pleasure, or benefit, his presence being tolerated, not invited, by the person in possession."[3392] A "railroad is 'only liable to a licensee for willful and wanton injury which may be inflicted by the gross negligence of its agents and employees'" at a private crossing.[3393]

Third, in some cases passengers have been held to be contributorily negligent for failing to exercise due care for their own safety, thereby completely barring them under Virginia law

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[3388] *Id*. at 361 (*citing* Va. Code Ann. §§ 56-406.1to 406.2) (Repl. Vol. 2007)).

[3389] 361-362 (*citing* Va. Code Ann. § 56-406.1 (Repl. Vol. 2007)).

[3390] *Id*. at 363.

[3391] *Id*. at 376.

[3392] *Ballentine's Law Dictionary* (3d Ed.) (*citing Greenfield v. Miller*, 173 Wis. 184, 180 N.W. 834 (1921)).

[3393] Timberlake, *supra* note 3382, at 376 (citation omitted).

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from any recovery for a railroad company's alleged negligence.[3394] For example, in *Norfolk & Western Railway Co. v. Gilliam*[3395] two estates could not recover damages after their decedents were killed when the vehicle in which they were riding struck a train.[3396] Because the passengers had a better opportunity to see the train than the driver of their vehicle, and because they apparently failed to look and listen for an approaching train, the estates' claims were barred by the respective passengers' contributory negligence.[3397]

5. Presumption of Contributory Negligence in Occupied Crossing Cases

Another law review article discusses the "occupied crossing" doctrine and contributory negligence.[3398] The occupied crossing doctrine presumes that unless a crossing is determined to be ultra-hazardous a plaintiff is contributorily negligent when the plaintiff's vehicle collides with a train in a railroad crossing.[3399] According to the article, "[a]n extra-hazardous crossing is one that obscures the view of the traveling public approaching [the] crossing. This may consist of cuts, embankments, vegetation or other obstacles that obstruct the view of the traveling public in close proximity to the crossing."[3400] A plaintiff alleged to have been contributorily negligent has the burden of proving the existence of an ultra-hazardous crossing to prevent the plaintiff's own

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[3394] *Id*. at 371.

[3395] 211 Va. 542, 178 S.E.2d 499 (Va. 1971).

[3396] *See* Timberlake, *supra* note 3382, at 371 (*citing Norfolk & Western. R. Co. v. Gilliam*, 211 Va. 542, 178 S.E.2d 499 (Va. 1971)).

[3397] *Id*. at 371-372.

[3398] Joseph R. Wheeler, "Recent Developments: Torts – the Occupied Crossing Doctrine – Determining Contributory Negligence as a Matter of Law in Railroad Accident Cases," 53 *Tenn. L. Rev*. 435 (1986).

[3399] *Id*. at 440.

[3400] *Id*. at 458.

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negligence from barring the plaintiff's claim.[3401] On the other hand, some courts have not held that a plaintiff is contributorily negligent as a matter of law simply because the plaintiff was familiar with the crossing; rather, the courts permit the jury to decide whether the plaintiff was contributorily negligent.[3402] When the issue is to be decided by a jury, a plaintiff should be allowed to submit evidence on the extent to which the train was visible to a motorist, particularly at night.[3403]

Cases

E. Contributory Negligence and Deaf Individuals

In *Box v. South Georgia Ry. Co.*[3404] the court held that South Georgia Railway Company (South Georgia) was not liable for hitting and killing Josie Ellis, who was deaf, because she was contributorily negligent by walking on the tracks at the time of the accident. South Georgia's crew was entitled to assume that Ellis could see and hear the train and would remove herself from the track.[3405] South Georgia had no duty to Ellis until it was clear that Ellis was not leaving the tracks.[3406] Furthermore, as Ellis had turned and looked in the direction of the train, it was reasonable for the crew to expect Ellis to leave the tracks.[3407] Finally, as soon as the crew

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[3401] *Id*. at 470-471.

[3402] *Id*. at 449-454.

[3403] *Id*.

[3404] 433 F.2d 89 (5th Cir. 1970).

[3405] *Id*. at 92.

[3406] *Id*.

[3407] *Id*. at 93.

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realized that Ellis was not leaving the tracks the crew took all possible measures to avoid hitting her.[3408]

Although the court did not hold that walking on the tracks was negligence *per se*, the court held as a matter of law that "it is negligent for a deaf person to walk on a railroad track without utilizing carefully the remaining sense of sight."[3409] The decedent's disability did not excuse her negligent conduct.[3410] Moreover, the court held that the last clear chance doctrine, discussed below in subpart I, did not "apply to a case where the negligence of the person injured continued up to the very moment of the injury[] and was a contributory and efficient cause thereof."[3411] The decedent's estate was unable to recover from the railroad.

F. Failure to Stop, Look, and Listen as Precluding a Plaintiff's Claim

1. Railroad not Liable when Plaintiff Fails to Stop, Look, and Listen

In *Kinchen v. Missouri P. R. Co.*[3412] the plaintiff Kinchen was injured in a truck and train collision. The plaintiff was contributorily negligent for failing to comply with a Louisiana law that requires a motorist to stop, look, and listen for an approaching train at a railroad crossing. The court also held that the last clear chance doctrine did not excuse the plaintiff's contributory negligence.[3413] The court held that the defendant Missouri Pacific Railroad was not required to have constructed a crossbar or gate at the crossing to increase safety, nor was the company

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[3408] *Id*.

[3409] *Id*.

[3410] *Id*.

[3411] *Id*. at 94 (internal citation omitted).

[3412] 678 F.2d 619 (5th Cir. 1982).

[3413] *Id*. at 624-625.

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responsible based on the rule of strict liability because there was no evidence that a defect in the train caused the accident.[3414]

2. Intoxication is not an Excuse for a Failure to Stop, Look, and Listen

In *Baker v. CSX Transportation*[3415] the plaintiff Baker's intoxication did not excuse his contributory negligence for failing to stop, look, and listen for an oncoming train.[3416] When Baker was injured when his truck collided with a CSX train, Baker did not have a valid driver's license and his blood alcohol level was twice the legal limit in Alabama.[3417] Under Alabama law, one has a duty to stop, look, and listen for an approaching train before crossing the tracks.[3418] Failure to do so constitutes contributory negligence when "the plaintiff (1) had knowledge of the dangerous condition; (2) had appreciation of the danger under the surrounding circumstances; and (3) failed to exercise reasonable care by placing himself in the way of danger."[3419] In granting a summary judgment for CSX, a federal district court in Alabama held that Baker's conduct met all of the required elements of contributory negligence and that Baker's intoxication did not excuse his negligence.[3420]

[3414] *Id*. at 626-627.

[3415] 46 F. Supp.2d 1230 (M.D. Ala. 1999).

[3416] *Id*. at 1231-1233.

[3417] *Id*. at 1232.

[3418] *Id*. (*citing* Ala. Code § 32-5A-150 (1975)).

[3419] *Id*. at 1233 (*citing Ridgeway v. CSX Transportation*, 723 So.2d 600 (Ala. 1998) (*citing Southern Railway v. Randle*, 221 Ala. 435, 438, 128 So. 894, 897 (1930))).

[3420] *Id*.

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G. Liability of a Railroad because of Defective Crossing Gates

Statutes and Regulations

1. Inspections of Gates at Railroad Crossings

The FRA, which has promulgated regulations on the inspection of gates at railroad crossings, requires that each gate arm and gate mechanism must be inspected at least once each month.[3421] The FRA requires that a gate arm movement must be observed for proper operation at least once each month.[3422]

Cases

2. Railroad not Liable when the Plaintiff Ignored a Non-defective Gate

In *Hall v. Consolidated Rail Corp.*[3423] the Supreme Court of Michigan held that Hall failed to provide sufficient evidence that the lights and gates at a crossing were not working at the time of the accident.[3424] Pursuant to federal regulations that require railroads to inspect crossings monthly, the defendant Conrail had inspected the railroad crossing the day prior to the accident but failed to find any defect.[3425] Three members of the train crew and the engineer operating the train testified that the signals were operating properly.[3426] The plaintiff's evidence was that the lights and gates at the intersection were defective; that they habitually malfunctioned; and that motorists drove around the gates because the gates would be down for

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[3421] 49 C.F. R. § 234.255(a) (2014).

[3422] 49 C.F.R. § 234.255(b) (2014).

[3423] 462 Mich. 179, 612 N.W.2d 112 (Mich. 2000).

[3424] *Id.,* 462 Mich. at 187, 612 N.W.2d at 115-116.

[3425] *Id.,* 462 Mich. at 181, 612 N.W.2d at 113.

[3426] *Id.*

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extended periods without the lights flashing.[3427] Sometimes the gates would lower after cars were on the tracks.[3428] In any event, the plaintiff had driven her car around two lowered gates before being struck by the train.[3429] The court held that Conrail was not on notice of a defect "because Conrail inspected the signal system the day before the accident and found it to be working properly."[3430]

3. Liability of a Railroad when Crossing Gates Failed to Lower Prior to the Train's Approach

In *Mills v. Norfolk Southern Ry. Co.*[3431] the Georgia Court of Appeals held that Norfolk Southern was liable for the death of a driver and for injuries to a passenger when the active warning system at a crossing failed to activate sufficiently in advance to provide the driver with notice that a train was approaching.[3432] The plaintiffs' sons were unable to see the approaching train because of a high fence that blocked their view.[3433] The plaintiffs appealed a trial court's grant of a new trial to Norfolk Southern in a wrongful death action that arose "when the automatic warning devices at the crossing failed to timely activate before the vehicle entered the

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[3427] *Id.,* 462 Mich. at 183-184, 612 N.W.2d at 114-115.

[3428] *Id.*

[3429] *Id.,* 462 Mich. at 182, 612 N.W.2d at 113.

[3430] *Id.,* 462 Mich. at 187, 612 N.W.2d at 116.

[3431] 242 Ga. App. 324, 526 S.E.2d 585 (Ga. Ct. App. 1999).

[3432] *Id*., 242 Ga. App. at 326, 526 S.E.2d at 588.

[3433] *Id.,* 242 Ga. App. at 325, 526 S.E.2d at 587.

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crossing."[3434] The appeals court in this opinion reversed the trial court's decision that granted Norfolk Southern a new trial.

The appeals court's opinion discusses the various federal regulations applicable to crossings at the time of the collision. First, the court stated that "[f]ederal regulations … mandated that all automatic warning devices provide the same minimum standard of configuration and performance for all such automatic warning devices at all crossings so that each performs the same."[3435]

Second, "[u]nder federal regulations, the warning lights must flash at least twenty seconds prior to the arrival of the train and the gate must begin to descend at least three seconds after the lights begin to flash and close at least five seconds before the train arrives."[3436]

Third, the court stated that

> [d]espite the federal regulations that an active warning system must activate warning devices 20 seconds before the train enters the crossing and the automatic warnings have 3.5 to 4 seconds of flashing lights and bells, followed by the descent of the gate over the next 20 seconds, this automatic warning system failed to meet such minimum federal standards.[3437]

The court further stated that under the regulations "the bells stop, but the gate must be completely down with the lights flashing when the train enters the crossing. When the train exits the crossing, the lights stop flashing immediately and the gates go up."[3438]

[3434] *Id*., 242 Ga. App. at 324, 526 S.E.2d at 586.

[3435] *Id*. (*citing* 49 CFR § 234.1; 2 59 *Fed. Reg*. 50105).

[3436] *Id*., 242 Ga. App. at 325, 526 S.E.2d at 587 (*citing* 49 C.F.R. §§ 234.5 (defining activation failure) and *citing* 234.223 (gate arm) and 234.225 (activation of warning system)).

[3437] *Id*., 242 Ga. App. at 326, 526 S.E.2d at 587 (*citing* 49 CFR § 234.5; 56 *Fed. Reg*. 33728).

[3438] *Id*., 242 Ga. App. at 326, 526 S.E.2d at 587-588.

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Fourth, a "'delayed activation failure' occurs when the warning is activated late by the train after it passes the sensor so that the train reaches the crossing before the gates go down and before motorists can receive a proper warning of the approach of the train."[3439] The court explained that "[d]elayed activation failures result from short circuits in the track circuit monitored by warning system control devices; this type of failure is called a 'shunt.'"[3440]

The court held that "the facts all fit a delayed activation failure."[3441] The court found that the

> [m]aintenance records for this crossing kept by signal maintainer Jones showed that between the inspections in December 1987 and January 1988 that a "false alarm" malfunction occurred. Delayed activation failures are first [preceded] by "false alarm" malfunctions. Norfolk Southern's training and instruction materials stated that a signal maintainer must look for and correct the cause of prior "false alarm" malfunctions, even if they clear up, because the condition may deteriorate into a delayed activation failure. Jones failed to do this before the collision. Thus maintenance did not discover and correct the cause of the delayed activation failures prior to the collision.[3442]

The court held that "all the prior similar occurrences had sufficient substantial similarity to the activation failure in this case to be relevant and material for admission into evidence…."[3443]

The plaintiffs established a *prima facie* case at trial because "there was a delayed activation failure at the time of the train-vehicle collision and a failure to maintain by the railroad, which caused the warning devices at the crossing not to work timely."[3444]

[3439] *Id*., 242 Ga. App. at 326, 526 S.E.2d at 588 (*citing* 49 CFR § 234.5; 56 *Fed. Reg*. 33728).

[3440] *Id.*

[3441] *Id*.

[3442] *Id*., 242 Ga. App. at 327, 526 S.E.2d at 588 (footnote omitted).

[3443] *Id*., 242 Ga. App. at 324, 526 S.E.2d at 587.

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After the appeals court's decision Norfolk Southern moved for reconsideration; however, the appeals court rejected Norfolk Southern's argument that the court should not have relied on 49 C.F.R. § 234.225 because the collision occurred in 1988 and the regulation was not adopted until 1994. The court held that "the substantial equivalent rules and regulations had governed railroad grade crossing signal devices since 1978 as approved by the Federal Highway Administrator as the National Standards for All Highways in unofficially published form and as the basis for such later rules and regulations."[3445]

Thus, the plaintiffs established that the railroad was on notice that there was a problem with the activation of the signals and gates at the crossing and that the crew should have used the train's horn to warn motorists of the train's approach or should have reduced the train's speed.[3446]

4. Railroad not Liable when a Minor is on the Tracks by Avoiding a Safety Gate

In *Boyd v. Amtrak,*[3447] *supra*, XXVIII.G.4, an Amtrak train killed a fifteen-year old girl after she rode her bicycle around a safety gate and into the path of an oncoming train.[3448] The Massachusetts wrongful death statute includes an exception that protects railroad operators from

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[3444] *Id*.

[3445] *Id*., 242 Ga. App. at 333, 526 S.E.2d at 592 (*citing* 23 U.S.C. §§ 109(b) and (d); 402 (a); 23 C.F.R. § 1204).

[3446] *Id.,* 242 Ga. App. at 327, 526 S.E.2d at 588.

[3447] 62 Mass. App. Ct. 783, 821 N.E.2d 95 (Mass. App. Ct. 2005), *rev'd*, 446 Mass. 540, 845 N.E.2d 356 (reversing the appellate court's dismissal of the reckless conduct claims but declining to hear an appeal on the negligence claims).

[3448] *Id.,* 62 Mass. App. Ct. at 786, 821 N.E.2d at 99.

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liability when a person is walking on a railroad track contrary to law.[3449] Massachusetts law "expressly prohibits all manner of trespass on railroad property and, implicitly, the presence of unauthorized persons when the approach of a train is imminent, *i.e.*, when the gates are lowered blocking entrance to the crossing."[3450] The court held that a railroad operator is not negligent when an individual, including a minor, is injured or killed when the person is on a railroad track in violation of state law.

Although Amtrak failed to sound its horn and exceeded the speed limit, the appellate court affirmed the dismissal of the plaintiff's claim for recklessness.[3451] However, the Supreme Judicial Court of Massachusetts remanded the case to the trial court because the plaintiff had provided sufficient evidence to overcome Amtrak's motion for a summary judgment.[3452]

H. Liability of a Railroad for Falling Objects

1. Doctrine of *Res Ipsa Loquitor* held to apply when Train moved during Loading of Cargo

In *Miles v. St. Regis Paper Co.*[3453] the decedent, a member of an unloading crew for a rafting company, died when logs from a flatcar that he was unloading fell on him.[3454] The decedent's estate and surviving spouse sued the decedent's employer as well as the Northern

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[3449] *Id.,* 62 Mass. App. Ct. at 788-789, 821 N.E.2d at 101.

[3450] *Id.,* 62 Mass. App. Ct. at 789, 821 N.E.2d at 101.

[3451] *Id.,* 62 Mass. App. Ct. at 798, 821 N.E.2d at 107.

[3452] *Boyd v. Amtrak*, 446 Mass. 540, 553-554, 845 N.E.2d 356, 367 (2006).

[3453] 77 Wash.2d 828, 467 P.2d 307 (1970).

[3454] *Id.,* 77 Wash.2d at 829, 467 P.2d at 308.

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Pacific Railroad Company (Northern Pacific) that was transporting the logs.[3455] The court held that the doctrine of *res ipsa loquitor*[3456] applies to a railroad company when there is evidence that the company was negligent immediately prior to the accident.[3457] When there is a *prima facie* showing that the doctrine of *res ispa loquitor* may apply, the burden shifts to the defendant to show that the defendant was not negligent.[3458] Employees of Northern Pacific testified that the train had not moved after it was prepared for unloading; however, an employee of the rafting company testified that after a few logs had been unloaded the train moved fifteen to twenty seconds prior to the accident.[3459] Based upon the testimony of the rafting company, the court held that the trial court's instruction on *res ipsa loquitor* was proper and affirmed the jury verdict that awarded damages to the surviving wife and administratrix of the decedent's estate.[3460]

2. Railroad not Liable for Injuries Caused by a Falling Object

In *Casella v. Norfolk & W. R. Co.*[3461] the court held that Norfolk & Western Railway Company (N&W) was not liable for injuries sustained by Casella, an employee, when unloading

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[3455] *Id.,* 77 Was.2d at 829, 467 P.2d at 307.

[3456] As stated in *Kind v. Seattle*, 50 Wn.2d 485, 489, 312 P.2d 811, 814 (1957), when "a plaintiff's evidence establishes that an instrumentality under the exclusive control of the defendants caused an injurious occurrence, which ordinarily does not happen if those in control of the instrumentality use ordinary care, there is an inference, permissible from the occurrence itself, that it was caused by the defendant's want of care."

[3457] *Miles*, 77 Wash.2d at 834, 467 P.2d at 310.

[3458] *Id.*

[3459] *Id.*, 77 Was.2d at 829-830, 467 P.2d at 308.

[3460] *Id.,* 77 Wash.2d at 835, 467 P.2d at 310.

[3461] 381 F.2d 473 (4th Cir. 1967).

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cargo from its train's cars because there was no evidence that N&W caused the accident.[3462] A railroad has a limited duty to correct latent defects on the outside of the railcar observable by an inspection or to correct defects of which the railroad was previously made aware or that it created.[3463] Casella was injured when a bale of paper struck him on the head as he opened the door to a railcar where the bale was stored.[3464] However, the Fourth Circuit held that a railroad is only responsible for safely transporting cargo and is not "responsible for a shipper's improper loading of a bulk commodity which caused injury to an employee of the consignee."[3465]

I. Last Clear Chance Doctrine

1. Doctrine held Inapplicable to a Collision between an Automobile and a Train at a Railroad Crossing

In *Newman v. Missouri P. R. Co.*[3466] the Fifth Circuit held that the last clear chance doctrine did not apply to a collision between an automobile and a train at what the court described was an "unusual and dangerous" crossing.[3467] If a crossing is unusual and dangerous, a plaintiff's claim is not barred because of the plaintiff's contributory negligence.[3468] However, the court held that the plaintiff Newman was negligent because Newman did not stop at the crossing before proceeding across it.[3469] The last clear chance doctrine that may have saved the

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[3462] *Id.* at 479.

[3463] *Id.* at 476.

[3464] *Id.* at 475.

[3465] *Id.* at 475-476 (*citing Lewis v. New York, O. & W. Ry.*, 210 N.Y. 429, 104 N.E. 944 (N.Y. 1914)).

[3466] 545 F.2d 439, 447 (5th Cir. 1977).

[3467] *Id.* at 442.

[3468] *Id.* at 445.

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plaintiff's claim did not apply because "[t]here was no compelling evidence establishing that there existed a time during which plaintiff was helpless while the train crew were not."[3470] The plaintiff was helpless once it became apparent that he would not be able to stop his vehicle before reaching the railroad tracks.[3471] The court affirmed in part and reversed in part by finding that the trial court erred in imposing liability on the train's engineer.[3472]

Article

2. Determining when the Last Clear Chance Doctrine Applies

An article entitled "Last Clear Chance in Tennessee" discusses how the states interpret and apply the last clear chance doctrine in negligence cases.[3473] A prerequisite for the doctrine is that the plaintiff must have been contributorily negligent.[3474] When the last clear chance doctrine applies it has the effect of excusing the plaintiff's contributory negligence, resulting in the defendant remaining liable for its own negligence. As defined by the cases discussed in the article, the doctrine means that "'even though plaintiff was negligent, yet, if the defendant after discovering his peril, or by the exercise of ordinary care should have discovered it, could have avoided the consequence of such negligence by the exercise of ordinary care and failed to do so, the defendant is liable.'"[3475] Thus, the doctrine

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[3469] *Id.* at 441.

[3470] *Id.* at 447.

[3471] *Id.* at 447 N 9.

[3472] *Id.* at 447.

[3473] L. Anderson Galyon III, "Comment: Last Clear Chance in Tennessee," 39 *Tenn. L. Rev*. 104 (1971).

[3474] *Id*. at 107.

[3475] *Id*. at 105 (*quoting Harbor v. Wallace*, 31 Tenn. App. 1, 9-10, 211 S.W.2d 172, 175 (1946)).

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> is an exception to the common law rule of contributory negligence, with proximate cause used as its justification or basis. Thus the defendant's ability to avoid the accident "renders plaintiff's negligence remote and defendant's negligence the proximate cause thereof." …
>
> Although a few states reject the doctrine, most will apply it where the plaintiff is in peril and cannot extricate himself from his situation and the defendant actually discovers this peril, has the opportunity to avoid the accident, but fails to do so because of a lack of reasonable care.[3476]

Cases

J. Admissibility of Evidence of Prior Accidents

1. Admissibility of Prior Accidents as Evidence of a Railroad's Knowledge of a Dangerous Condition

In *Mikus v. Norfolk and Western Ry. Co.*[3477] the plaintiff Mikus, an employee of N&W, sued under FELA after being injured when a motorist drove through a railroad crossing and broke a safety gate that struck Mikus.[3478] An Illinois appellate court held that evidence of prior accidents was properly admitted into evidence because the evidence showed that N&W knew of a dangerous condition at the crossing. Moreover, the court held that N&W's defense counsel opened the door to evidence of prior incidents of broken gates at the crossing when counsel examined a signal maintainer for the railroad.[3479] The signal maintainer testified for the defense "that the gates operated safely for several years prior to [the date of the incident] and defendant maintained a crossing with safely operating gates."[3480]

[3476] *Id*. at 106 (footnotes omitted).

[3477] 312 Ill. App.3d 11, 726 N.E.2d 95 (Ill. App. 2000).

[3478] *Id.,* 312 Ill. App.3d at 15, 726 N.E.2d at 99, 100.

[3479] *Id.,* 312 Ill. App.3d at 24-25, 726 N.E.2d at 106-107.

[3480] *Id.*, 312 Ill. App.3d at 25, 726 N.E.2d at 107.

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However, the cross-examination showed that N&W was on notice of a hazardous condition at the crossing.[3481] The signal maintainer admitted on cross-examination that he repaired the signals at the crossing over one hundred times over a two year period in 1991 and 1992;[3482] that he repaired the gates at least once a week and sometimes twice a day in the months prior to the accident; and that N&W changed the material of the gate from wood to aluminum and fiberglass so that the gates could be repaired more quickly and less expensively.[3483] The court held that N&W was liable under FELA because the railroad knew of prior accidents and broken crossing gates at the crossing but failed to warn employees of the hazard.[3484]

2. Inadmissibility of Evidence of Prior Accidents too Remote in Time

In *Richardson v. Norfolk Southern Ry. Co.*[3485] a sixteen-year old motorist died after he drove his vehicle across a railroad crossing and a Norfolk Southern train struck his vehicle.[3486] The decedent's mother sued Norfolk Southern and Alcorn County where the accident occurred.[3487] The plaintiff alleged that Norfolk Southern failed to maintain adequate warning devices; that it negligently allowed overgrown vegetation to obstruct visibility at the crossing;

[3481] *Id.*

[3482] *Id.,* 312 Ill. App.3d at 23, 726 N.E.2d at 105.

[3483] *Id.,* 312 Ill. App.3d at 18, 726 N.E.2d at 101.

[3484] *Id.,* 312 Ill. App.3d at 22, 726 N.E.2d at 104-105.

[3485] 923 So.2d 1002, 1009-1010 (Miss. 2006) (*followed by Irby v. Travis*, 935 So.2d 884 (Miss. 2006) (holding that evidence of prior accidents was inadmissible because the conditions of the accidents were not similar).

[3486] *Id.*

[3487] *Id.*

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and that the train's crew failed to use the train's horn and did not operate the train at a safe speed.[3488] At trial, the plaintiff attempted to admit evidence of a prior accident at the same crossing that occurred thirteen years earlier.

The Supreme Court of Mississippi held that accidents thirteen years apart are too remote to be admitted as evidence of prior accidents. For prior accidents to be admissible, a plaintiff must prove "(1) the existence of a dangerous condition[] and[] (2) the defendant's notice or knowledge of such dangerous condition."[3489] However, in general, evidence of accidents over a year prior to the accident in dispute is not admissible; neither is evidence admissible of accidents that occurred after the accident.[3490] In *Richardson*, the court also held that the FRSA preempted the plaintiff's tort claim under state law based on inadequate signalization even though the crossing did not have flashing signal lights and automatic gates.[3491]

3. Evidence of Prior Accidents Inadmissible when Vehicles were Travelling in Opposite Directions

The court in *Union Pacific R. R. Co. v. Barber*[3492] held that conditions were not substantially similar when vehicles involved in other accidents or incidents (*i.e.,* near-misses) had approached a crossing in opposite directions and, thus, "'had entirely different perspectives of the crossing.'"[3493] In *Barber*, a Union Pacific train struck a garbage truck that one of the

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[3488] *Id.*

[3489] *Id*. (citations omitted).

[3490] *Id.* at 1010.

[3491] *Id.* at 1006, 1009.

[3492] 356 Ark. 268, 149 S.W.3d 325 (Ark. 2004), *cert. denied, motion granted by*, 125 S. Ct. 320, 160 L. Ed.2d 249 (2004).

[3493] *Id.,* 356 Ark. at 291, 149 S.W.3d at 340 (citation omitted).

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plaintiffs was driving in a northbound direction. The truck driver alleged that his vision was blocked by excessive vegetation and that the train failed to give any warning that it was approaching.[3494] The trial court permitted evidence of two prior near misses at the same crossing, one involving a vehicle that was traveling northbound, and one that was traveling southbound.[3495] The Supreme Court of Arkansas held that the party offering the evidence for admission has the burden of showing that the prior events are substantially similar to the accident being litigated.[3496] The plaintiffs' evidence did not meet the test of substantial similarity when the evidence was based on vehicles that were travelling in opposite directions.[3497] However, the trial court properly admitted evidence of overgrown vegetation that obstructed the vision of motorists travelling northbound.[3498] The court affirmed the jury verdict in favor of the plaintiffs.

Article

4. Admission of Evidence of Prior Accidents in Tort Cases involving Defective Premises

An article in the *Journal of the Missouri Bar* analyzes Missouri law on the admissibility of evidence of prior accidents in negligence cases involving the same defendant and defective

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[3494] *Id.*, 356 Ark. at 279, 149 S.W.3d at 332.

[3495] *Id.*, 356 Ark. at 290, 149 S.W.3d at 339.

[3496] *Id.* 356 Ark. at 288-289, 149 S.W.3d at 338.

[3497] *Id.,* 356 Ark. at 291, 149 S.W.3d at 340.

[3498] *Id.* The court held that the record presented sufficient evidence to support a verdict by the jury for negligence. *Id.*, 356 Ark. at 294, 149 S.W.3d at 342. The court also held that punitive damages of $25 million were not excessive in light of the railroad's highly reprehensible conduct of ignoring constant complaints about the dangerous condition and destroying relevant evidence. *Id.,* 356 Ark. at 303, 149 S.W.3d at 348.

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premises.[3499] Evidence of prior accidents may not be used to show that a defendant was negligent but only to show that the defendant was on notice of a dangerous condition.[3500] The article discusses two Missouri cases against railroads in which the plaintiffs wanted to present evidence of prior accidents. In one case, the Missouri Supreme Court upheld the appellate court's decision to "permit[] evidence of previous close calls at a railroad crossing due to an inaudible warning bell at the crossing" because "the defendant was bound to know that they were unusual and that the roadway was thereby rendered more dangerous."[3501] In the second Missouri case, an appellate court upheld the admission of evidence of prior signal malfunctions and accidents. The accidents or incidents were sufficiently similar to the one being litigated and showed the railroad's knowledge of a high degree of danger at a crossing.[3502]

[3499] James D. Walker, Jr., "Evidence of Prior Accidents/Incidents in Premises Defect Cases," 64 *J. Mo. B.* 22 (2008).

[3500] *Id*.

[3501] *Id*. at 23 (discussing *Grothe v. St. Louis-San Francisco Railway Co.*, 460 S.W.2d 711 (Mo. 1970)).

[3502] *Id*. at 24 (discussing *Lohmann v. Norfolk & Western Railway Co.*, 948 S.W.2d 659 (Mo. App. W.D. 1997)).

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XXIX. MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES – PART 8

A. Introduction

Part 8 of the Manual on Uniform Traffic Control Devices (MUTCD or Manual) governs Traffic Control for Railroad and Light Rail Transit Grade Crossings.[3503] Section B explains why the MUTCD is the national standard. Section C discusses the meaning of the paragraphs in the MUTCD that are designated as standards, guidance statements, option statements, and support statements. Section D highlights some of the specific changes that the 2009 edition of the Manual made to part 8. Sections E and F explain two important revisions that were made to the MUTCD after its adoption and publication. Section G provides information on when some states adopted the 2009 version. Section H analyzes several recent cases that involve railroads and the MUTCD, such as federal preemption of claims under state law, limited situations when there may be a waiver of federal preemption even though federal funds were used to upgrade or replace warning devices, and a plaintiff's failure to show that a crossing did not comply with the MUTCD or that a crossing was unusually dangerous.

Statutes and Regulations

B. The MUTCD as the National Standard

The FHWA is authorized to prescribe standards for traffic control devices on all roads open to public travel pursuant to 23 U.S.C. §§ 109(d), 114(a), 217, 315, and 402(a). Consequently, the 2009 MUTCD promulgated by the FHWA "is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel."[3504]

[3503] The MUTCD is available at http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd09r1r2editionhl.pdf and is hereinafter referred to as the "2009 MUTCD."

[3504] 23 C.F.R. § 655.603(a) (2014).

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In the MUTCD the phrase open to public travel "includes toll roads and roads within shopping centers, airports, sports arenas, and other similar business and/or recreation facilities that are privately owned but where the public is allowed to travel without access restrictions."[3505]

To remain eligible for federal highway and highway safety program funds, a state must adopt the national MUTCD as a state regulation; adopt a state MUTCD that is approved by the Secretary of Transportation as being in "substantial conformance"[3506] with the national MUTCD; or adopt the national MUTCD in conjunction with a state supplement.[3507]

C. MUTCD's Standards, Guidance, Options, and Support

As explained by an Ohio court, the MUTCD is "organized to differentiate between 'Standards that must be satisfied … Guidances that should be followed … and Options that may be applicable for the particular circumstances of a situation.'"[3508] Only those provisions that are designated as standards are mandatory.[3509]

In the MUTCD a statement that is a standard signifies "required, mandatory, or specifically prohibitive practice regarding a traffic control device."[3510] Standards typically use

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[3505] 23 C.F.R. part 655 subpart F (2014). *See also, Oliver v. Ralphs Grocery Co*., 654 F.3d 903, 909-910 (9th Cir. 2011).

[3506] For the meaning of meaning of "substantial conformance" *see* Federal Highway Administration, Traffic Control Devices on Federal-Aid and Other Streets and Highways; Standards, Final Rule, 74 *Fed. Reg*. 75111 (Dec. 14, 2006).

[3507] *See* 23 U.S.C. §§ 109(d) 402(c)(2014); 23 C.F.R. § 655.603(b)(3) (2014).

[3508] *Yonkings v. Piwinski*, 2011-Ohio-6232 P23 (Ohio App. 2011) (citation omitted).

[3509] *American Family Mutual Insurance Co. v. Outagamie County*, 2012 WI. App. 60, P19, 341 Wis.2d 413, 816 N.W.2d 340 (Wis. Ct. App. 2012) (citation omitted).

[3510] 2009 MUTCD, *supra* note 3503, at 10.

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the verb shall and never use the term should or may.[3511] Standards are "sometimes modified by Options."[3512]

A guidance statement in the Manual is a "statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or [an] engineering study indicates the deviation to be appropriate."[3513] Guidance statements typically use the verb should and never use the term shall or may.[3514] Guidance statements also are sometimes modified by Options.[3515] Although standards are mandatory, guidance statements are not mandatory.[3516]

As stated, standards and guidance statements may be modified by Options.[3517] An option statement is a "statement of practice that is a permissive condition [that] carries no requirement or recommendation."[3518] Options typically use the verb may and never use the term shall or should.[3519]

The final type of statements found in the MUTCD are Support statements, which are "informational" and do "not convey any degree of mandate, recommendation, authorization,

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[3511] *Id.*

[3512] *Id.*

[3513] *Id.*

[3514] *Id.*

[3515] *Id.*

[3516] *Walters v. Columbus*, 2008 Ohio 4258 (Ohio App. 2008).

[3517] *Id.*

[3518] *Id.*

[3519] *Id.*

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prohibition, or enforceable condition."[3520] Support statements do not use the verbs shall, should, or may.[3521]

D. Discussion of Some Specific Changes in Part 8 of the 2009 MUTCD

On December 16, 2009, the FHWA published its final rule in regard to its notice of proposed amendments (NPA) on changes to be incorporated in the 2009 MUTCD.[3522] The final rule discusses the amendments to part 8 of the MUTCD on Traffic Controls for Railroad and Light Rail Transit (LRT) Grade Crossings.[3523]

For example, several changes were made throughout Section 8B, Signs and Markings, so as to require the installation of a YIELD sign or STOP sign at all passive highway-rail grade crossings.[3524] The current version of the 2009 MUTCD includes in Chapter 8 a Standard (*i.e.,* a mandatory provision) that seems to be consistent with what the FHWA said in its Final Rule noted above. Sections 8 B.04(01) and (05) and the Guidance statement (06) seem to be of particular interest. It may be remembered that Standards are in bold print in the MUTCD.

[3520] *Id.*

[3521] *Id.*

[3522] Federal Highway Administration, National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision; Final Rule, 74 *Fed. Reg*. 66730, 66780-66784 (Dec. 16, 2009), available at: http://www.gpo.gov/fdsys/pkg/FR-2009-12-16/html/E9-28322.htm (last accessed March 31, 2015), hereinafter referred to as the "2009 Final Rule – MUTCD."

[3523] *Id*. at 66847.

[3524] *Id*.

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Section 8B.04 Crossbuck Assemblies with YIELD or STOP Signs at Passive Grade Crossings

Standard:

01 A grade crossing Crossbuck Assembly shall consist of a Crossbuck (R15-1) sign, and a Number of Tracks (R15-2P) plaque if two or more tracks are present, that complies with the provisions of Section 8B.03*, and either a YIELD (R1-2) or STOP (R1-1) sign installed on the same support*, except as provided in Paragraph 8. If used at a passive grade crossing, a YIELD or STOP sign shall be installed in compliance with the provisions of Part 2, Section 2B.10, and Figures 8B-2 and 8B-3.

***

05 *A YIELD sign shall be the default traffic control device for Crossbuck Assemblies on all highway approaches to passive grade crossings unless an engineering study performed by the regulatory agency or highway authority having jurisdiction over the roadway approach determines that a STOP sign is appropriate*.

Guidance:

06 *The use of STOP signs at passive grade crossings should be limited to unusual conditions where requiring all highway vehicles to make a full stop is deemed essential by an engineering study*. Among the factors that should be considered in the engineering study are the line of sight to approaching rail traffic (giving due consideration to seasonal crops or vegetation beyond both the highway and railroad or LRT rights-of-ways), the number of tracks, the speeds of trains or LRT equipment and highway vehicles, and the crash history at the grade crossing.[3525]

Some of the other changes to the 2009 edition include the following.

- In Section 8A.01, Introduction, the FHWA relocated and revised lightrail transit grade crossing information that had been in Section 10A.01 in the 2003 MUTCD.[3526]

- The FHWA relocated Section 10A.02 of the 2003 MUTCD to a new Section 8A.03, Use of Standard Devices, Systems, and Practices at Highway-LRT Grade Crossings, as also revised by the 2009 edition.[3527] The new section contains provisions that apply only to light-rail grade crossings.[3528]

[3525] 2009 MUTCD, *supra* note 3503, at § 8B.04 (emphasis supplied).

[3526] 2009 Final Rule – MUTCD, *supra* note 3522, at 66847.

[3527] *Id*.

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● The FHWA adopted a new Section 8A.06 on Illumination at Grade Crossings that contains information that had been included in Section 8C of the 2003 MUTCD.[3529]

● The MUTCD includes a new Section 8A.07, Quiet Zone Treatments at Highway-Rail Grade Crossings.[3530]

● In Section 8B.01, Purpose, the existing SUPPORT and STANDARD statements were relocated from Section 10C.01 of the 2003 MUTCD with some editorial revisions.[3531]

● Figure 8B–1 (Figure 8B–3 in the 2003 MUTCD), Regulatory Signs and Plaques for Grade Crossings, combines Figure 8B–3 and Figure 10C–2 that were in the 2003 MUTCD and incorporated the NPA's proposed R8–10a and R10–6a signs.[3532]

● Section 10C.04 in the 2003 MUTCD was relocated to Section 8B.05 and re-titled ''Use of STOP (R1–1) or YIELD (R1–2) Signs without Crossbuck Signs at Highway-Light Rail Grade Crossing.''[3533]

● The lightrail transit grade crossing information that was proposed in the NPA was combined with Section 8B.04 in the 2003 MUTCD and revised to form new Section 8B.06 entitled Grade Crossing Advance Warning Signs (W10 Series).[3534]

Other changes specifically relating to Part 8 of the MUTCD are explained in the final rule.[3535]

[3528] *Id*.

[3529] *Id*. at 66847-66848.

[3530] *Id*. at 66848.

[3531] *Id*. at 66849.

[3532] *Id*.

[3533] *Id*. at 66850.

[3534] *Id*.

[3535] *See* 2009 Final Rule – MUTCD, *supra* note 3522.

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E. Revision 1 of the MUTCD

Since 2009 the FHWA has made at least two important revisions of the MUTCD. As originally published, the 2009 edition of the MUTCD stated that standards "shall not be modified or compromised based on engineering judgment or engineering studies,"[3536] a provision that the FHWA deleted in a rule published on May 14, 2012.[3537] In its final rule the FHWA explained that this

> prohibition has always been inherent in the meaning of Standards, but the FHWA is aware of cases where the lack of explicit text to this effect has resulted in the misapplication of engineering judgment or studies. Some agencies believed that Standards could be ignored based on engineering judgment or an engineering study, which is not the case.[3538]

Nevertheless, the FHWA's final rule specifically clarified the definition of the term standard in the MUTCD, as well as clarified the use of engineering judgment and studies in relation to standards in the application of traffic control devices.[3539] The effect of the final rule and Revision 1 is (1) to omit certain language that was included in the 2009 MUTCD and (2) to restore language that appeared in the 2003 MUTCD but that was deleted in the 2009 edition.[3540]

First, the FHWA removed the sentence "[s]tandard statements shall not be modified or compromised based on engineering judgment or engineering study" that had been added to the

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[3536] *Id*. at 66737.

[3537] National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision, 77 *Fed. Reg*. 28,456; 28,457 (May 14, 2012).

[3538] *Id*.

[3539] Federal Highway Administration, National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision; Final Rule, 77 *Fed. Reg*. 28456 (May 14, 2012). The rule became effective on June 13, 2012. *Id*.

[3540] *Id*.

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MUTCD in Section 1A.13 on definitions of headings, words, and phrases.[3541] Second, the FHWA restored three guidance sentences that were included in Section 1A.09, "Engineering Study and Engineering Judgment," of the 2003 edition that were deleted in the 2009 edition. The guidance sentences that the FHWA restored and that now are a part of the 2009 MUTCD are:

> The decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment. Thus, while this Manual provides Standards, Guidance, and Options for design and applications of traffic control devices, this Manual should not be considered a substitute for engineering judgment. Engineering judgment should be exercised in the selection and application of traffic control devices, as well as in the location and design of roads and streets that the devices complement.[3542]

The FHWA stated that "[t]he inclusion of such language will continue our current practice under Official Interpretation 1(09)–1 (I) to allow deviations from a STANDARD only on the basis of either an engineering study or the application of engineering judgment."[3543]

F. Revision 2 of the MUTCD

The second important revision of the 2009 MUTCD concerns compliance dates in Table I-2. On May 14, 2012, FHWA also published a second final rule that revised

> Table I–2 of the MUTCD by eliminating the compliance dates for 46 items (8 that had already expired and 38 that had future compliance dates) and extends and/or revises the dates for 4 items. The target compliance dates for 8 items that are deemed to be of critical safety importance will remain in effect.[3544]

In the final rule FHWA explained, moreover, that "[w]hen new provisions are adopted in

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[3541] *Id*. at 28457.

[3542] *Id*. at 28458.

[3543] *Id*.

[3544] Federal Highway Administration, National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision, Final Rule, 77 *Fed. Reg*. 28460 (May 14, 2012).

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a new edition or revision of the MUTCD, any new or reconstructed traffic control devices installed after adoption are required to be in compliance with the new provisions…."[3545] However, unless the FHWA establishes compliance dates for upgrading existing devices, such "[e]xisting devices already in use that do not comply with the new MUTCD provisions are expected to be upgraded by highway agencies over time to meet the new provisions…."[3546]

G. Date of State Adoption of the 2009 MUTCD

The version of the Manual in effect at the time of any alleged violation of the Manual is the version that applies in a tort action.[3547] Of twenty-one states responding to a survey conducted for a recent NCHRP publication on the 2009 MUTCD, eighteen states had adopted the 2009 MUTCD.[3548] Of those states that had adopted the MUTCD, eight adopted it in 2012; five did so in 2011, and one in 2010. Several states reported that they had adopted their own version that is in substantial conformance with the MUTCD.[3549] The term substantial

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[3545] *Id*.

[3546] *Id*.

[3547] *Shope v. City of Portsmouth*, 2012 Ohio 1605 at P20 (Ohio Ct. App. 2012).

[3548] *E.g*., Arizona DOT (adopted on January 13, 2012 (as modified by the Arizona Supplement to the 2009 MUTCD), available at: http://azdot.gov/docs/business/arizona-supplement-to-the-manual-on-uniform-traffic-control-devices-(2009-mutcd-edition).pdf) (last accessed March 31, 2015); Caltrans (Jan. 13, 2012); Kansas DOT (Dec. 16, 2011); Mich. DOT (adopted a Michigan version of the MUTCD on Dec. 1, 2011, that is in substantial compliance with the MUTCD); Nebraska Department of Roads (Apr. 26, 2012); New Hampshire DOT (Jan. 2012); New York DOT (2010); Oklahoma DOT (Apr. 2, 2012); Pennsylvania DOT (Feb. 2012); Texas DOT (adopted a MUTCD adopted on December 8, 2011, that is in "substantial compliance" with the 2009 National MUTCD); Virginia DOT (Jan. 1, 2012); Washington DOT (Dec. 19, 2011); and Wisconsin DOT (May 25, 2011).

[3549] Indiana DOT (Indiana adopted an Indiana version of the 2009 MUTCD in November 2011 that was revised in October 2012); Missouri Highway and Transportation Commission (adopted an Engineering Policy Guide (EPG)); Utah DOT (stating that in January 2012 the Utah MUTCD was found to be in substantial compliance with the National 2009 MUTCD); Washington DOT (stating that the MUTCD was adopted with modifications by the department on Dec. 19, 2011).

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conformance means that a state MUTCD or supplement conforms at a minimum to the standards included in the national MUTCD.[3550] For example, Missouri has developed an FHWA-approved Engineering Policy Guide (EPG) that is in substantial conformance with the MUTCD.[3551]

Cases

H. Cases involving Railroads and the MUTCD

1. Federal Preemption of Claims based on Alleged Violations of the MUTCD

In *Illinois Central Railroad Company v. Daniel*[3552] the action began when Illinois Central sued Michael Daniel (M. Daniel), his employer, and M. Daniel's estate for negligence in damaging an Illinois Central train and the company's railroad tracks and right-of-way. The defendant and counter-plaintiff Clydine Daniel (C. Daniel) sued Illinois Central for negligence for having caused the death of her husband M. Daniel when an Illinois Central train collided with the decedent's tanker-truck at a railroad crossing.[3553] Illinois Central moved the court to dismiss a number of C. Daniel's negligence claims.[3554] C. Daniel relied on an expert's report that stated "that under MUTCD (2003), § 8B.03, because the angle of the crossing restricted sight distance, an additional crossbuck sign should have been installed on the left side of the highway and that the backs of the crossbuck blades at the crossing were missing a strip of retroflective white

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[3550] *See* 23 CFR § 655.603(b)(1) (2014).

[3551] Missouri Highway and Transportation Commission (stating that the FHWA approved the EPG by letter dated December 30, 2011 and that the Commission has not adopted the National MUTCD in Missouri since 2001).

[3552] 901 F. Supp.2d 790 (S.D. Miss. 2012).

[3553] *Id*. at 792.

[3554] *Id*. at 794.

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material required by the MUTCD."[3555] However, on the MUTCD claims, the court, relying on precedents established by the United States Supreme Court and the Fifth Circuit, held that "federal law pre-empted state law at the time federally funded signals were installed at this crossing. The intervening installation of additional signs does not operate to replace federal law with state law. Tort claims based on the adequacy of signals and warnings, then, are pre-empted by federal law."[3556]

2. Federal Preemption of Negligence Claims for Inadequate Warning Devices

Another case on preemption is *Murrell v. Union Pacific Railroad Company*.[3557] On June 28, 2004, Elfriede Murrell, plaintiff's decedent, was struck and killed by an Amtrak train as she walked across the railroad tracks.[3558] Although the MUTCD is not mentioned, on the plaintiff's claims that there were inadequate warning devices, the court held that federal law preempted the claims.[3559] Furthermore, federal law also preempted a claim for failure to warn.[3560] However, on the claim for inadequate visibility the court held that because the federal regulations at issue "do not 'cover' state common law sight distance claims, it follows that plaintiff's visibility claims are not preempted."[3561] Thus, the court granted Union Pacific's and Amtrak's motions to dismiss the

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[3555] *Id*. at 802.

[3556] *Id*. at 803.

[3557] 544 F. Supp.2d 1138 (D. Or. 2008).

[3558] *Id*. at 1142.

[3559] *Id*. at 1152 (holding that 23 C.F.R. §§ 646.214(b)(3) and (4) preempted state law claims for failure to maintain adequate warning devices at railroad crossings when federal funds were used to improve the crossing at issue).

[3560] *Id*. at 1153.

[3561] *Id*. at 1154.

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plaintiff's negligence claims based on the train's excessive speed and the defendants' failure to issue a slow order, failure to warn, and inadequate warning devices.[3562] However, the court denied the railroad defendants' motions to dismiss the plaintiff's negligence claims for defendants' failure to provide adequate visibility, failure to eliminate a dangerous condition, and failure to maintain a proper lookout.[3563]

3. Waiver of Federal Preemption based on Federal Funding to Upgrade or Replace Warning Devices

In *Indiana Rail Road Company v. Davidson*[3564] the issue was whether federal preemption applied concerning the adequacy of traffic warning devices that were installed at the site of a fatal collision between an Indiana Rail Road Company (Indiana Rail Road) locomotive and Davidson's vehicle.[3565] The court explained that originally in 1978 reflectorized crossbuck signs had been installed under a federally funded project at the crossing where the accident occurred.[3566] On June 5, 2009, prior to the accident, Indiana Rail Road removed the crossbuck signs at the crossing. To fund the installation of new signs the railroad company applied for and received state funds from the Indiana Department of Transportation.[3567]

The railroad argued on appeal that the trial court erred when it denied the Indiana Rail Road's motion for a partial summary judgment. Relying on "established case law" the company

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[3562] *Id*. at 1159.

[3563] *Id*.

[3564] 983 N.E.2d 145 (Ind. Ct. App. 2012).

[3565] *Id*. at 146.

[3566] *Id*. at 146-147.

[3567] *Id*.

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argued that "once federal funds have been applied in the installment of traffic warning devices at a particular railroad crossing, state tort law is preempted regardless of later changing circumstances…."[3568] The court held, however, that federal preemption no longer applied:

> Because state funds were requested and granted, the Indiana Rail Road became responsible for assessing the crossing's safety needs pursuant to INDOT's regulations. There is no evidence indicating that the federal government approved the newly located crossbucks. [W]e conclude that there is a genuine issue of material fact whether the federal government affirmatively abandoned the project and federal preemption no longer applies to the Feree Drive railroad crossing.[3569]

For that reason, the Court of Appeals ruled that the trial court properly denied the Indiana Rail Road's motion for a partial summary judgment.[3570]

4. Failure to Show that a Crossing did not Comply with the MUTCD

In *Ill. Cent. Gulf R.R. Co. v. Travis*[3571] the decedent Travis died on May 16, 1997, when an Illinois Central Railroad Company (Illinois Central) train struck his vehicle at a crossing.[3572] Although there was a trial verdict in favor of Travis for $4.875 million, the Supreme Court of Mississippi reversed the trial court's decision to deny Illinois Central's motion for judgment notwithstanding the verdict.[3573] Although there were a number of issues asserted by Illinois Central on appeal, one issue was whether a crossbuck sign violated Mississippi Code § 77-9-247

[3568] *Id*. at 148-150 (*citing Cochran v. CSX Transportation, Inc*., 112 F. Supp.2d 733 (N.D. Ind. 2000)).

[3569] *Id*. at 152.

[3570] *Id*.

[3571] 106 So.3d 320 (Miss. 2012), *rehearing denied,* 2013 Miss. LEXIS 93 (Miss., Feb. 14, 2013).

[3572] *Id*. at 323.

[3573] *Id*.

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and the MUTCD § 8B.03 (2009 ed.). Although § 8B.03 of the MUTCD included a standard[3574] as well as guidance, the court held that "Travis presented no evidence that the crossbuck sign was not in compliance with the MUTCD."[3575] On this and other issues asserted on appeal, the court held that the trial court erred in denying Illinois Central's motion for judgment notwithstanding the verdict.

5. Failure to Show that a Crossing was Unusually Dangerous at Common Law

In *Brown v. Illinois Central Railroad*[3576] an Amtrak passenger train struck the plaintiff/appellant Brown in May 2008 as he drove his garbage truck across railroad tracks owned and operated by Illinois Central.[3577] Although an expert report cited the MUTCD, the Fifth Circuit noted that "[u]nder Mississippi law, a railroad company owes the public a duty to signalize railroad crossings. Generally, it can satisfy this duty by complying with certain minimum statutory requirements, including the obligation to place a 'railroad crossbuck' sign at a specified distance from the railroad crossing."[3578] Brown did not assert that Illinois Central failed to maintain the crossing at issue in accordance with statutory requirements. Thus, the only issue was whether the crossing was "unusually dangerous" and therefore triggered a common law duty to install additional signaling devices.[3579] However, Brown's expert failed to show how

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[3574] "As a minimum, one Crossbuck sign shall be used on each highway approach to every highway-rail grade crossing, alone or in combination with other traffic control devices." *Id.* at 333 (*quoting* Standard in 2009 MUTCD § 8B.03).

[3575] *Id*. at 334 (emphasis in original).

[3576] 705 F.3d 531 (5th Cir. 2013).

[3577] *Id*. at 533.

[3578] *Id*. at 537 (footnotes omitted).

[3579] *Id*.

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the crossing was any more “deceptively dangerous … than the hundreds of other crossings in Mississippi.”[3580]

[3580] *Id*. at 539 (footnote omitted).

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XXX. MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY - MAP-21

A. Introduction

The Moving Ahead for Progress in the 21st Century Act (MAP-21), effective in October 2012, authorized programs through September 30, 2014.[3581] MAP-21 authorized $10.6 billion in fiscal year 2013 and $10.7 billion in fiscal year 2014 for public transportation.[3582] Joseph C. Szabo, the Administrator of the Federal Railroad Administration (FRA), noted that MAP-21 does not contain a rail title but rather focuses on the authorization and funding of programs for highways and transit programs.[3583] Most rail programs are authorized and funded either by the Rail Safety Improvement Act (RSIA) or the Passenger Rail Investment and Improvement Act (PRIIA).[3584] RSIA "has enabled [the FRA] to focus on risk reduction programs and some of the most challenging areas of safety."[3585] PRIIA "laid the policy framework for [FRA] to invest in more than 150 passenger rail projects."[3586] RSIA and PRIIA expire in fiscal year 2014.

Although there is no specific rail title in MAP-21, several sections of MAP-21 are applicable to railroads; thus, "[w]hile intercity passenger rail projects are not eligible under

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[3581] Federal Transit Administration, FTA Office of Budget and Policy, Moving Ahead for Progress in the 21st Century Act (MAP-21), at 1, available at: http://www.fta.dot.gov/documents/MAP21_essay_style_summary_v5_MASTER.pdf (last accessed March 31, 2015), hereinafter referred to as "FTA MAP-21 Summary."

[3582] *Id*.

[3583] Joseph C. Szabo, Federal Railroad Administrator, Prepared Remarks American Short Line and Regional Railroad Association Annual Convention "100 Years of Connections" (April 29, 2013) at 6," available at: http://www.fra.dot.gov/Elib/Details/L04514 (last accessed March 31, 2015), hereinafter referred to as "Szabo."

[3584] *Id*. at 2.

[3585] *Id*.

[3586] *Id*.

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MAP-21, projects that improve commuter rail service are eligible under the same programs that can fund transit projects. As many commuter rail systems operate on the same tracks as Amtrak service, these projects can help improve reliability for both commuter rail and Amtrak trains."[3587]

As discussed in sections B through F, there are several sections of MAP-21 that may improve rail service.

B. Public Transportation Safety

Under MAP-21 § 20021, amending 49 U.S.C. § 5329, the "FTA must develop safety performance criteria for all modes of transportation (rail, bus, etc.)" and minimum safety performance standards for all public transportation excluding rolling stock regulated by the Secretary or another federal agency.[3588] Furthermore, MAP-21 includes new requirements for the State Safety Oversight program (SSO or SSOP) "through which States with heavy rail, light rail, and streetcar systems must establish safety oversight for these transit systems."[3589] MAP-21 "provides FTA with several additional authorities including the authority to inspect and audit all public transportation systems...."[3590] For fiscal year 2013, $21,945,771 has been allocated for eligible states to develop or carry out SSO program activities;[3591] for fiscal year 2014,

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[3587] Transportation for America, Making the Most of MAP-21: A Guide to the 2012 Federal Transportation Law and How to Use it for Positive Change in your Community, at 81, available at: http://t4america.org/wp-content/uploads/2012/11/MAP-21-Handbook-Web.pdf (last accessed March 31, 2015).

[3588] FTA MAP-21 Summary, *supra* note 3581, at 2; MAP-21 § 20021; *see* 49 U.S.C. § 5329(b)(2) (2014).

[3589] FTA MAP-21 Summary, *supra* note 3581, at 2; MAP-21 § 20021; *see* 49 U.S.C. § 5329(4) (2014).

[3590] FTA MAP-21 Summary, *supra* note 3581, at 2; MAP-21 § 20021; *see* 49 U.S.C. § 5329(f) (2014).

[3591] Federal Transit Administration, FY 2013 Section 5329(e) State Safety Oversight Program Apportionment, available at: http://www.fta.dot.gov/documents/Table_13--FY_13_SSO_Apportionments.pdf (last accessed March 31, 2015).

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$22,293,250 is available.[3592] Although SSO programs oversee rail transit, not all funds may be used for any purpose related to rail transit. Funds for the SSO program are

> intended to support administrative and operating costs for State safety oversight of rail transit systems. Therefore, the following costs are ineligible: (a) Project costs that cover rail transit system expenses; (b) Project costs for State activities unrelated to the SSOP; (c) Project costs that directly support the operation or maintenance of a rail transit system; (d) Project costs for which the recipient has received funding from another Federal agency; and (e) Other project costs that FTA determines are not appropriate for the SSOP (sic).[3593]

MAP-21 § 20021, amending 49 U.S.C. § 5329, calls for the Secretary of Transportation to "establish a public transportation safety certification training program for Federal and State employees"[3594] pursuant to which "each recipient or State[] shall certify that the recipient or State has established a comprehensive agency safety plan...."[3595] MAP-21 defines "recipient" as "a State or local governmental authority, or any other public transportation system operator, that receives financial assistance."[3596] An eligible state is a state that has "a rail fixed guideway public transportation system within the jurisdiction of the state" that is not regulated by the FRA

[3592] *Id*.

[3593] State Safety Oversight Formula Grant Program, 79 *Fed. Reg*. 13385 (March 10, 2014).

[3594] Anita Estell and Christian Washington, "Special Transportation Report: The Moving Ahead for Progress in the 21st Century Act (MAP-21)," at 50 (discussing MAP-21's amendment of 49 U.S.C. § 5301), available at: http://www.polsinelli.com/~/media/Articles%20by%20Attorneys/Estell_Washington_July2012 (last accessed March 31, 2015); MAP-21 §20021; *see* 49 U.S.C. § 5329(c)(2014), hereinafter referred to as "Estell and Washington."

[3595] *Id*. at 47-48; MAP-21 § 20021; *see* 49 U.S.C. §§ 5329(d)(1)(A)-(G)(2014).

[3596] *Id*. at 47; MAP-21 § 20021; *see* 49 U.S.C. § 5329(a) (2014).

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or "a rail fixed guideway public transportation system" that is under construction and will not be regulated by the FRA.[3597]

C. Comprehensive Freight Plan

In MAP-21 § 1118, added in a note to 23 U.S.C. § 167, the Secretary of Transportation is to encourage each state to develop a comprehensive state freight plan.[3598] That is, "[s]tates are strongly encouraged to coordinate [the] development of their State rail plans with their freight planning efforts, including preparation of the State freight plan, considering shifts in the nature of freight demand and the type of freight in assessing emerging freight markets for rail."[3599]

As one source observes, "MAP-21 also calls for a National Strategic Freight Plan."[3600] Thus, the United States Department of Transportation (DOT) created the Freight Policy Council that "is committed to taking a multimodal approach to freight development that allows each mode to do what it does most efficiently.... Secretary LaHood also has announced the formation of a Freight Advisory Committee."[3601]

The DOT's "National Freight Advisory Committee (NFAC) will provide advice and recommendations to the Secretary on matters related to freight transportation in the United States

[3597] MAP-21 § 20021; *see* 49 U.S.C. §§ 5329(e)(2)(A)-(B) (2014).

[3598] MAP-21 § 1118; *see* 23 U.S.C. § 167 note (2014).

[3599] Szabo, *supra* note 3583, at 6.

[3600] *Id*.

[3601] *Id*.

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including the implementation of the freight transportation requirements of [MAP-21]" and the establishment of a National Freight Network.[3602] According to the NFAC's charter, it

> shall undertake information gathering activities, develop technical advice, and present recommendations to the Secretary to further inform this policy including: development of a National Freight Strategic Plan; Establishment of the National Freight Network; Strategies to help States implement State Freight Advisory Committees and State Freight Plans; Development of measures of condition, safety, and performance for freight transportation...; [and] Other issues relating to the implementation of freight-related requirements of MAP-21 (sic).[3603]

D. Highway Safety Improvement Program

MAP-21 § 1112, amending 23 U.S.C. § 148, authorized the Highway Safety Improvement Program (HSIP). As the name suggests, the program provides grants to improve highway safety by reducing "traffic fatalities and serious injuries on all public roads."[3604] States involved in this project are required to identify hazardous locations including railway-highway crossings that pose a significant threat to human safety.[3605] In addition to identifying dangerous locations, the states must collect data on crashes and determine the extent of the danger presented by a particular intersection, as well as create programs to correct and prevent hazardous conditions.[3606]

[3602] United States Department of Transportation, National Freight Advisory Committee, available at: http://www.dot.gov/nfac (last accessed March 31, 2015).

[3603] United States Department of Transportation, National Freight Advisory Committee, NFAC Charter, available at: http://www.dot.gov/nfac/charter (last accessed March 31, 2015).

[3604] MAP-21 § 1112; *see* 23 U.S.C. § 148(b)(2) (2014).

[3605] MAP-21 § 1112; *see* 23 U.S.C. § 148(c)(2)(B)(i) (2014).

[3606] MAP-21 § 1112; *see* 23 U.S.C. §§ 148(c)(2)(C)-(E) (2014).

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E. State of Good Repair Grants

MAP-21 § 20027, amending 49 U.S.C. § 5337, established "a new grant program to maintain public transportation systems in a state of good repair" that "replaces the fixed guideway modernization program...."[3607] Under the program, funding is limited to fixed guideway systems, including rail, bus rapid transit, passenger ferries, and high intensity bus lanes, *i.e*., buses that operate in high occupancy vehicle or HOV lanes.[3608] The State of Good Repair program was granted $2,136.3 million for fiscal year 2013 and $2,165.9 million for fiscal year 2014.[3609] Grants provided under this section may be used to replace and rehabilitate "rolling stock; track; line equipment and structures; signals and communications; power equipment and substations; passenger stations and terminals; [and] maintenance facilities and equipment...."[3610]

F. Asset Management Provisions

MAP-21 § 20019, 49 U.S.C. § 5326, is a new section that "requires FTA to define the term 'state of good repair' and create objective standards for measuring the condition of capital assets, including equipment, rolling stock, infrastructure, and facilities."[3611]

[3607] FTA MAP-21 Summary, *supra* note 3581, at 3; *see* 49 U.S.C. §§ 5337(a)(1)(A)-(E) (2014).

[3608] *Id*.

[3609] U.S. Department of Transportation, Federal Transit Administration, MAP-21, Fact Sheet: State of Good Repair Grants Section 5337, available at: http://www.fta.dot.gov/documents/MAP-21_Fact_Sheet_-_State_of_Good_Repair_Grants.pdf (last accessed March 31, 2015).

[3610] Estell and Washington, *supra* note 3594, at 55-56; 49 U.S.C. §§ 5337(b)(1)(A)-(K) (2012).

[3611] Estell and Washington, *supra* note 3594, at 45; FTA MAP-21 Summary, *supra* note 3581, at 3.

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XXXI. OCCUPATIONAL SAFETY AND HEALTH ACT

A. Introduction

The Occupational Safety and Health Act establishes standards and regulates the occupational safety and health of all employees. However, the Act's standards and regulations do not apply when another federal or state statute or regulation exercises authority over an employee's working conditions.

The Federal Railroad Administration (FRA) has issued a policy statement describing when the FRA, the United States Department of Transportation (DOT), or the Occupational Safety and Health Administration (OSHA) have sole or concurrent jurisdiction over the occupational safety and health of railroad employees. Moreover, the FRA and OSHA have signed a memorandum of agreement giving OSHA the authority to investigate claims of alleged discrimination against FRA employees.

Finally, although the FRA has delineated when its standards supersede OSHA's standards, when there is a dispute regarding which agency has jurisdiction, the courts decide by determining the extent to which FRA guidelines take precedence over OSHA regulations. Even when OSHA regulations are not applicable, evidence of an applicable OSHA regulation is admissible as evidence of a railroad's negligence.

Sections B and C discuss the OSHQA, its territorial scope, and standards and their applicability. Section D summarizes the FRA's policy statement on occupational safety and health standards for railroads. Section E discusses OSHA and FRA coordination regarding the Federal Railroad Safety Act and employee protection. Sections F and G discuss whether OSHA regulations are preempted in a specific case and whether noncompliance with OSHA regulations may be used as evidence of an employer's negligence.

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Statutes and Regulations

B. Occupational Safety and Health Act and its Territorial Scope

> [T]he Occupational Safety and Health Act] shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. § 1331 et seq.], Johnston Island, and the Canal Zone.[3612]

The Occupational Safety and Health Act does not supersede or affect any workmen's compensation law, nor does the Act "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."[3613] Furthermore, nothing in the Occupational Safety and Health Act applies "to working conditions of employees with respect to which other Federal agencies[] and State agencies … exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."[3614]

Section 655 provides that the Secretary of Labor will

> promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.[3615]

[3612] 29 U.S.C. § 651, *et seq*. (2014); *see* 29 U.S.C. § 653(a) (2014).

[3613] 29 U.S.C. § 653(a) (2014).

[3614] 29 U.S.C. § 653(b)(1) (2014).

[3615] 29 U.S.C. § 655(a) (2014).

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State agencies and courts still have jurisdiction over occupational safety and health standards and regulations promulgated pursuant to state law as long as there is no federal or national consensus standard that has been promulgated under § 655.[3616] A state may apply to the Secretary of Labor to preempt applicable federal standards by submitting a state plan for the development of such standards and their enforcement; the Secretary may approve a plan based on eight criteria that are delineated in § 667.[3617]

The heads of federal agencies, except the head of the United States Postal Service, is responsible for establishing and maintaining "an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 655…."[3618]

C. Occupational Safety and Health Standards and their Applicability

The Code of Federal Regulations provides:

> None of the standards in this part shall apply to working conditions of employees with respect to which Federal agencies other than the Department of Labor, or State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.[3619]

D. FRA Policy Statement on Occupational Safety and Health Standards for Railroads

In a policy statement the FRA has explained that it would concentrate its efforts on providing regulations that address railroad safety in areas directly related to railroad

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[3616] *Id.*

[3617] 29 U.S.C. § 667(c) (2014).

[3618] 29 U.S.C. § 668 (2014).

[3619] 29 C.F.R. § 1910.5(b) (2014).

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operations.[3620] The FRA stated that it would focus its efforts on "addressing hazardous working conditions in those traditional areas of railroad operations in which [the FRA has] special competence."[3621] The areas of railroad operation include track, roadbed, and associated devices and structures; equipment; and human factors.[3622] The FRA continues to exercise its jurisdiction through regulations that are applicable to the areas identified. Furthermore, the FRA "will continue to administer a comprehensive system of accident/incident reporting for all events bearing on the safety or health of employees involved in any aspect of the rail transportation business" and will make the data available to OSHA.[3623]

The FRA has exercised its jurisdiction over track, roadbed, and associated devices through the Track Safety Standards (49 C.F.R. part 213);[3624] the Signal Inspection Act (49 U.S.C. 26);[3625] Signal Systems Reporting Requirements (49 C.F.R. part 233); Applications for

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[3620] On March 14, 1978, the FRA withdrew its notice of a proposed rulemaking on occupational and health standards for railroads. In its document terminating the rulemaking proceeding, the FRA issued a policy statement concerning the relationship between FRA's and OSHA's jurisdiction on occupational and health standards applicable to railroads. *See* United States Department of Transportation, Federal Railroad Administration, 49 C.F.R. part 221, Railroad Occupational Safety and Health Standards; Termination of Rulemaking Proceeding and Issuance of Policy Statement, 43 *Fed. Reg*. 10583 and 10585 (Mar. 14, 1978), available at: http://www.orosha.org/pdf/mous/F-1.pdf (last accessed March 31, 2015).

[3621] *Id*.

[3622] *Id*. at 10586.

[3623] *Id*. at 10585.

[3624] *Id*. at 10586 (prescribing geometric and other technical standards for track structures and roadbed and requiring a program for inspections).

[3625] *Id*. (providing FRA with plenary authority over the installation, modification, inspection and maintenance of all signal systems and related systems and appliances).

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the Discontinuance or Modification of Systems (49 C.F.R. part 235); and its General Inspection and Maintenance Standards (49 C.F.R. part 236).[3626]

The FRA has exercised its jurisdiction over equipment through the Safety Appliance Acts (45 U.S.C. §§ 1-16 (repealed after the policy statement));[3627] regulations detailing how safety appliances must be designed and affixed (49 C.F.R. part 231); regulations prescribing certain inspection and maintenance standards for power brakes (49 C.F.R. part 232); the Locomotive Inspection Act (49 U.S.C. §§ 22-34);[3628] the Steam Locomotive and Maintenance Standards (49 C.F.R. part 230); the Freight Car Safety Standards (49 C.F.R. part 215);[3629] and regulations governing the removal of unsafe locomotives from service (49 C.F.R. part 216).[3630]

The FRA exercises control over and regulates human factors through regulations requiring programs of instruction, operational tests, and inspections (49 C.F.R. part 217); operating rules pertaining to the protection of employees working between or under rolling equipment, operations within yard limits, and rear flag protection (49 C.F.R. part 218); and regulations on the use of radio communications and the issuance of train orders (49 C.F.R. part 220).[3631] Although the FRA has noted that there are some exceptions regarding sleeping quarters

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[3626] *Id*.

[3627] *Id*. (requiring certain appliances such as automatic couplers, secure grab irons, and power brakes on all cars and locomotives).

[3628] *Id*. (requiring that locomotives and appurtenances thereto be safe and suitable for the service to which they are put).

[3629] *Id*. (regulations on the proper maintenance and inspection of freight cars issued in 1973 under the Federal Railroad Safety Act of 1970).

[3630] *Id*.

[3631] *Id*.

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for employees not covered by the Hours of Service Act, the FRA has exercised its jurisdiction via the Hours of Service Act (45 U.S.C. §§ 61-64b).[3632] OSHA has jurisdiction over the sleeping quarters of employees not covered by the Hours of Service Act and has concurrent jurisdiction with the FRA over sleeping quarters that are camp or bunk cars (*e.g.*, railroad cars outfitted as temporary lodgings).[3633]

The FRA also enforces the Hazardous Materials Regulations that assure the occupational safety of employees by regulating the carriage or shipment of hazardous materials by rail (49 C.F.R. parts 171-74).[3634]

OSHA regulations "concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings" that are generally applicable in railroad offices, shops, and other fixed work places.[3635] However, there are three exceptions. First, the OSHA regulations do not apply to the design of locomotives and other rolling equipment used on a railroad.[3636] Second, OSHA regulations on the guarding of open pits and ditches do not apply to "inspection pits in locomotive or car repair facilities."[3637] Third,

> OSHA regulations [do] not apply to ladders, platforms, and other surfaces on signal masts, catenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way. These are

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[3632] *Id*. (limiting the hours of service certain major categories of employees who are engaged in or connected with railroad operations).

[3633] *Id*. at 10587.

[3634] *Id*.

[3635] *Id*.

[3636] *Id*.

[3637] *Id*.

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> areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety.[3638]

OSHA regulations on egress do not apply to rolling equipment but they do apply to fixed railroad facilities other than including sleeping quarters covered by the Hours of Service Act.[3639]

OSHA regulations governing powered platforms, manlifts, and vehicle-mounted work platforms do apply to the railroad industry.[3640]

With a few exceptions, OSHA regulations related to ventilation, occupational noise exposure, and radiation apply to the railroad industry.[3641] First, 29 C.F.R. § 1919.94 does not apply to "locomotive cab or caboose environments, to passenger equipment, or to operational situations in yards or along the right-of-way."[3642] Second, the FRA has exercised its jurisdiction over occupational noise exposure of employees in railroad operations.[3643] Third, "[t]he transportation of hazardous materials by rail is governed wholly by Department of Transportation Regulations (Chapter I, Title 49, Code of Federal Regulations)."[3644] The OSHA

[3638] *Id*.

[3639] *Id*. at 10587-10588.

[3640] *Id*. at 10588.

[3641] *Id*.

[3642] *Id*.

[3643] *Id*.

[3644] *Id*.

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regulations only apply in circumstances in which the DOT regulations do not apply, such as the use, handling, and storage of hazardous substances.[3645]

OSHA's General Environmental Controls govern sanitation, temporary labor camps, and specifications for accident prevention signs and tags.[3646] The regulations on sanitation generally apply to railroad work places.[3647] Except those covered by the Hours of Service Act the regulations on temporary labor camps apply to specified facilities.[3648] The regulations on color codes for physical hazards apply to hazards other than those arising out of railroad operations.[3649] OSHA regulations for accident prevention signs and tags do not cover safety signs for railroads.[3650]

OSHA's regulations that are associated with fire protection apply to the railroad industry except to fire protection on rolling stock.[3651] OSHA's regulations relating to compressed gas and compressed air equipment apply except when the DOT's Hazardous Material Regulations apply or the compressed gas is used in the course of railroad operations.[3652]

[3645] *Id*. "OSHA regulations concerning personal protective equipment apply according to their terms, except to the extent the general requirements might be read to require protective equipment responsive to hazards growing out of railroad operations." *Id.*

[3646] *Id*.

[3647] *Id*.

[3648] *Id*. at 10589.

[3649] *Id*.

[3650] *Id*.

[3651] *Id*.

[3652] *Id*.

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OSHA's regulations concerning the handling and storage of materials apply generally with two exceptions. FRA's policy statement provides, first, that "the general requirements of 29 C.F.R. § 1910.176 have no application to the operations of railroads in the general system of transportation…."[3653] Second, locomotive trains and other on-track vehicles are governed by the Locomotive Inspection Act.[3654]

OSHA's regulations on toxic and hazardous substances are applicable to the railroad industry. However, the shipment or transportation of hazardous materials is governed by the DOT's Hazardous Materials Regulations. Specific FRA regulations "bearing on the locomotive cab environment address cab ventilation (49 CFR 5230.229(f)(2)) and exhaust gases (49 CFR 5230.259)."[3655]

Finally, OSHA's General Industry standards (29 C.F.R. part 1926) apply to the railroad industry except where "working conditions fall within FRA's exercise of authority relating to the safety of railroad operations."[3656]

E. Facilitating OSHA and FRA Coordination Regarding the Federal Railroad Safety Act and Employee Protection

A Memorandum of Agreement (MOA) between the FRA, the DOT, and the OSHA states

that

> [w]hen an individual notifies FRA of alleged discrimination by a railroad carrier for engaging in conduct protected by 49 U.S.C. 20109, FRA will inform the

[3653] *Id.*

[3654] *Id.*

[3655] *Id.*

[3656] *Id.*

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> individual that a personal remedy for discrimination is available through OSHA, rather than FRA, and that the individual should personally contact OSHA.[3657]

The FRA is required to provide the individual with the appropriate contact information for OSHA and to advise the individual that he or she must file a complaint with OSHA within one hundred and eighty days of the alleged discrimination.[3658]

OSHA will send the FRA copies of complaints, findings, and orders that OSHA receives or issues under 49 U.S.C. § 20109.[3659] The FRA has agreed to support OSHA at OSHA's request and when both have established procedures to coordinate and support the enforcement of 49 U.S.C. § 20109.[3660]

> Nothing in this MOA is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory functions, including OSHA's authority under the Occupational Safety and Health Act, 29 U.S.C. 651 et seq., nor is it intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any other person.[3661]

[3657] Memorandum of Agreement Between the Federal Railroad Administration, U.S. Department of Transportation, and the Occupational Safety and Health Administration, U.S. Department Of Labor (July 16, 2012), available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=1125 (last accessed March 31, 2015).

[3658] *Id*.

[3659] *Id*. (stating that "[w]hen, in the course of its investigation of a complaint under 49 U.S.C. 20109, OSHA learns of a potential violation of an FRA accident/incident reporting regulation under 49 CFR Part 225, or other violation of federal railroad safety regulations, OSHA may, to the extent authorized by law, share such information with FRA and provide documentation of the relevant facts").

[3660] *Id*.

[3661] *Id*.

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Cases

F. Whether OSHA Regulations are Preempted in a Specific Case

Callahan v. National R.R. Passenger Corp.[3662] involved a worker's negligence action against Amtrak after sustaining permanent bodily injury when he fell from a ladder. Amtrak argued that it was error for the trial court to permit an expert witness for the worker to testify regarding certain provisions of the Occupational Safety and Health Act and regulations. Amtrak argued that the OSHA regulations did not apply because the FRA's policy statement, *supra*, preempted them. However, the court found no authority to support Amtrak's argument that the FRA had preempted the OSHA regulations that applied to catenary poles and ladders. However, in affirming the trial court's judgment for the work, the Superior Court of Pennsylvania held:

> Amtrak does not point to any regulation issued by the FRA which relates to catenary poles and ladders, nor has our research discovered same. We simply cannot conclude that OSHA regulations addressing this subject are preempted by the FRA in the absence of any exercise of authority by the FRA in this respect. Such a determination would ignore the express purpose of the FRSA to promote safety in "every area of railroad operations" and reduce accidents.[3663]

Therefore, the court "reject[ed] Amtrak's contention that the FRA preempted any and all OSHA regulations in this case….."[3664]

G. Noncompliance with OSHA Regulations may be used as Evidence of Employer's Negligence

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[3662] 2009 PA Super 132, at *1, 979 A.2d 866, 872 (Pa. Super. Ct. 2009), *appeal denied*, 2010 Pa. LEXIS 2546 (Pa., Nov. 9, 2010).

[3663] *Id.,* 2009 Pa. Super 132, at *14, 979 A.2d at 873.

[3664] *Id.*

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In *CSX Transp., Inc. v. Smith*[3665] Smith was injured when he slipped while walking up a flight of stairs in CSX's Terminal Administration Building apparently because of a small amount of soap on the stairs. Smith brought an action against CSX under the Federal Employers' Liability Act (FELA). Smith appealed after a jury returned a verdict in favor of CSX. The Court of Appeals reversed because the trial court refused to instruct the jury "regarding a federal Occupational Safety and Health Administration (OSHA) stair regulation requiring that '[a]ll treads shall be reasonably slip-resistant and the nosings shall be of nonslip finish.'"[3666]

In affirming the judgment of the Court of Appeals, the Supreme Court of Georgia held in accordance with the FRA policy statement that:

> [T]he OSHA stairway regulations in 29 CFR § 1910.24 apply to railroad office buildings. Moreover, as our discussion above should make clear, the Court of Appeals correctly held that,
>
> > [i]n the context of 29 CFR Part 1910, the modifier "general industry" or "general industrial" plainly denotes that the standard has general application to any workplace and is not limited to certain industries that are subject to additional, particularized standards. …. Subpart D, which provides standards for "walking-working surfaces," is such a general standard.[3667]

The trial court, therefore, "should have given Smith's request to charge the jury that it could consider a violation of that regulation as evidence of negligence on the part of CSX."[3668]

[3665] 289 Ga. 903, 717 S.E.2d 209 (Ga. 2011).

[3666] *Id.*, 289 Ga. at 903, 717 S.E. at 210 (citation omitted).

[3667] *Id.*, 289 Ga. at 905, 717 S.E. at 212.

[3668] *Id.*, 289 Ga. at 906, 717 S.E. at 212.

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XXXII. PREEMPTION OF STATE LAWS RELATING TO RAILROADS

A. Introduction

Because of the railroads' importance to interstate commerce, Congress has enacted numerous statutes that regulate the railroad industry and that preempt many state laws in part because of the railroads' difficulty in complying with different laws on the same subject. Section B discusses recent preemption decisions by the federal courts. Sections C and D discuss recent preemption cases decided, respectively, by state courts and the Surface Transportation Board. Section F cross-references this part of the Report to other preemption cases discussed in the Report.

Cases

B. Recent Preemption Decisions by Federal Courts

1. Claim for Wrongful Termination not Preempted by the Railway Safety Act

In *Powell v. Union Pac. R.R. Co.*[3669] the plaintiff Powell sued Union Pacific for a violation of the Federal Employee Liability Act (FELA), for failure to provide a safe working environment in violation of the Federal Railroad Safety Act, and for wrongful termination, eavesdropping, and retaliation.[3670] After using a switch in a rail yard, Powell experienced pain in his back that allegedly prevented him from performing the duties of his employment, thus causing Powell to file an injury report.[3671] After Union Pacific filmed Powell engaged in activities similar to his duties at work, Union Pacific alleged that Powell falsified his report and commenced an investigative hearing that found Powell to be in violation of Union Pacific's

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[3669] 864 F. Supp.2d 949 (E.D. Cal. 2012).

[3670] *Id*. at 951.

[3671] *Id*. at 952.

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Discipline Policy.[3672] After Union Pacific terminated Powell after a hearing, Powell appealed his termination to the Railway Labor Board, which denied his petition.[3673]

A federal district court in California held that the Railway Labor Act did not preempt Powell's wrongful termination claim because his cause of action was based on state law, not on a right conferred by a collective bargaining agreement.[3674] However, the court held that the FRSA preempted Powell's claim under FELA. The court denied each party's motion for a summary judgment on the claim for eavesdropping.[3675] The district court later granted Powell's motion for a summary judgment on the eavesdropping claim and granted Union Pacific's motion to deny Powell actual and punitive damages; thus, Powell could recover only statutory damages.[3676]

2. ICCTA Held to Preempt State Antiblocking Statute and Negligence *Per Se* Claim based on the Statute

In 2012 in *Elam v. Kansas City S. Ry. Co.,*[3677] involving a Mississippi statute regulating the amount of time that a train may occupy a crossing, the Fifth Circuit held that the state's "antiblocking statute directly attempts to manage KCSR's switching operations, including KCSR's decisions as to train speed, length, and scheduling. The statute thus 'reach[es] into the area of economic regulation … in a direct way.'"[3678] Thus, the ICCTA preempted the state

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[3672] *Id*.

[3673] *Id*. at 952-953.

[3674] *Id*. at 957-959.

[3675] *Id*. at 953, 961.

[3676] *See Powell v. Union Pacific. R. R. Co.*, 2012 U.S. Dist. LEXIS 119177 at *19-20 (2012).

[3677] 635 F.3d 796, 801 (5th Cir. 2011).

[3678] *Id*. at 807 (citation omitted).

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statute completely.[3679] Moreover, because "the Elams' negligence *per se* claim [was] based solely on Mississippi's antiblocking statute, it too is completely preempted."[3680]

As for the plaintiffs' simple negligence claims based on KCSR's alleged failure to provide adequate warnings of the train's presence at the crossing at issue, the court stated that the issue was "whether KCSR has demonstrated that providing such warnings would unreasonably burden or interfere with its switching operations."[3681] KCSR relied on an affidavit to argue that the simple negligence claims were preempted. The appeals court stated that

> although the affidavit addresses the burdens of Mississippi's antiblocking statute, it does not address the burdens of providing adequate warnings of the train's presence at the Pine Crest Road crossing. We see no apparent reason why providing such warnings would require changes in KCSR's switching, train length, and crew operations. Second, in any event, the affidavit does not demonstrate that providing adequate warnings at the Pine Crest Road crossing would unreasonably burden or interfere with KCSR's operations. In the absence of such evidence, we presume Congress did not intend to preempt this "typical dispute[]" concerning the safety of a "typical crossing[]."[3682]

Because KCSR's affidavit was inadequate, the court reversed and remanded the case to the district court.

3. ICCTA Held not to Preempt Tort Claims under State Law not involving Railroad Transportation of Passengers or Property or Related Services

In *Emerson v. Kansas City S. Ry. Co.*[3683] the plaintiffs alleged that Kansas City Southern Railway Co. (KCSR) had discarded railroad ties in a drainage ditch and allowed the ties and

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[3679] *Id*.

[3680] *Id*.

[3681] *Id*. at 814.

[3682] *Id*. (citation omitted).

[3683] 503 F.3d 1126 (10th Cir. 2007).

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vegetation to impede the flow of water through the ditch and a culvert that resulted in flooding of the plaintiffs' adjacent properties.[3684] KCSR argued that the ICCTA preempted the plaintiffs' state law claims in tort for trespass, unjust enrichment, public and private nuisance, negligence, and negligence *per se*.[3685] The Tenth Circuit held that the ICCTA could not be

> read to include the conduct that the Landowners complain of here.… These acts (or failures to act) are not instrumentalities 'of any kind related to the movement of passengers or property' or 'services related to that movement.' … [T]he ICCTA does not expressly preempt the generally applicable state common law governing the Railroad's disposal of waste and maintenance of the ditch.[3686]

The court stated that preemption under these circumstances would be "absurd,"[3687] because such a reading of the ICCTA would mean that a railroad could leave a "dilapidated engine in the middle of Main Street."[3688]

However, the appeals court reversed and remanded the case to the district court because federal preemption is an affirmative defense which the defendants have the burden to establish. The appeals court held that to "decide whether § 10501(b) impliedly preempts application of the Oklahoma tort laws at issue" the district court must make "a factual assessment" on "whether requiring the Railroad to remedy the injury claimed by the Landowners would have the effect of preventing or unreasonably interfering with railroad transportation."[3689]

[3684] *Id*. at 1128.

[3685] *Id*.

[3686] *Id*. at 1130 (citation omitted).

[3687] *Id*. at 1132.

[3688] *Id*.

[3689] *Id*. at 1133, 1134 (citations omitted).

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4. ICCTA Held to Preempt Vermont Environmental Land Use Statute having a Pre-Construction Permit Requirement

In *Green Mountain R.R. Corp. v. Vermont*[3690] the railroad proposed to build transloading facilities on is property in Vermont. At issue in the railroad's action for a declaratory judgment was whether the ICCTA preempted Vermont's environmental land use statute, Act 250, Vt. Stat. Ann. Tit. 10, § 601, *et seq*. as applied to the railroad. Vermont argued that not all state and local regulations are preempted by the ICCTA because

> states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.[3691]

However, the Second Circuit held that the ICCTA preempted Act 250, because its "pre-construction permit requirement … 'unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations,'" and because the permit requirement "can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely."[3692] The court rejected Vermont's contention that Act 250 was an environmental and not an economic regulation.[3693]

[3690] 404 F.3d 638 (2d Cir. 2005), *cert. denied, Vt. v. Green Mt. R.R. Corp.*, 2005 U.S. LEXIS 7869 (U.S., Oct. 31, 2005).

[3691] *Id*. at 643.

[3692] *Id*. (citations omitted).

[3693] *Id*. at 644.

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5. ICCTA Preempted a City Ordinance Regulating Transportation of Bulk Materials, Including Ethanol

In 2008 Norfolk Southern began operating an ethanol transloading facility in Alexandria, Virginia to transfer shipments in bulk of ethanol from its railcars onto surface tank trucks operated by third parties. After Norfolk Southern declined to comply with the city's ordinance prohibiting certain materials on its streets, the city amended its ordinance so that it applied to bulk materials including ethanol. A violation of the ordinance constituted a misdemeanor criminal offense.[3694] In *Norfolk S. Ry Co. v. City of Alexandria*[3695] the Fourth Circuit held that the ICCTA preempted the city's ordinance as it applied to Norfolk Southern.[3696]

6. No Preemption by the ICCTA of State Law on Minimum Track Clearance

In *Tyrrell v. Norfolk Southern Railway Co.*[3697] the Sixth Circuit adopted a narrow interpretation of preemption under the ICCTA in rejecting Norfolk Southern's argument that the ICCTA preempted a state law regulating minimum track clearances. The court distinguished between economic regulation, which the court stated comes within the scope of the ICCTA, and the STB's jurisdiction and the regulation of rail safety that is subject to the FRSA.[3698] The court in its decision followed other precedents applying the FRSA, which has its own provision on preemption.[3699] The court held that "because no FRA regulation or action covers the subject

[3694] *Id*. at 155.

[3695] 608 F.3d 150 (4th Cir. 2010).

[3696] *Id*. at 154.

[3697] 248 F.3d 517 (6th Cir. 2001).

[3698] *Id*. at 521. *See* Pub. L. 91-458, 84 Stat. 971 (1970).

[3699] *See* 49 U.S.C. § 20106.

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matter of minimum track clearance, the Ohio regulation serves as a permissible gap filler in the federal rail safety scheme;"[3700] thus, there was no preemption of state law.

7. No Preemption of State Law on Storm Water Runoff

The case of *MD Mall Associates, LLC v. CSX Transportation, Inc.*[3701] concerned an appeal by MD Mall Associates, LLC (Mall Associates) of a district court's decision that granted a summary judgment in Mall Associates' negligence action against CSX for damages that Mall Associates sustained because of a spill of stormwater from CSX property. Mall Associates alleged that CSX violated a federal regulation (49 C.F.R. § 213.33) enacted pursuant to the FRSA that "require[d] that CSX manage and control the stormwater occurring on its property."[3702] The Third Circuit stated that

> [p]ursuant to the previously described 2007 Clarification Amendment to that express preemption provision, even though a federal regulation "covers" a state law related to railroad safety, a plaintiff may still bring claims "seeking damages for personal injury, death, or property damage" when the plaintiff "alleg[es] that a party ... has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation."[3703]

The court stated that Mall Associates' "claims are only preserved from preemption if no federal regulation enacted pursuant to the FRSA 'cover[s] the subject matter [*i.e.* storm water runoff] of the State requirement.'"[3704] The court turned next to CSX's argument that § 213.33 by

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[3700] *Tyrrell*, 248 F.3d at 525.

[3701] 715 F.3d 479 (3d Cir. 2013), *cert. denied, CSX Transp., Inc. v. MD Mall Assocs*., LLC, 2014 U.S. LEXIS 530 (U.S., Jan. 13, 2014).

[3702] *Id*. at 484.

[3703] *Id*. at 487-488 (citation omitted).

[3704] *Id*. at 488 and N 8 (citation omitted).

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its terms requires "that a railroad's drainage facilities 'under or immediately adjacent to' the track 'be maintained and kept free of obstruction[]' … preempts Pennsylvania law governing storm water runoff."[3705] However, in rejecting the argument the court stated:

> A regulation must do more than "touch upon or relate to [the] subject matter" of a state law claim; it must "substantially subsume" it. … We cannot read the silence of § 213.33 on a railroad's duties to its neighbors when addressing track drainage as an express abrogation of state storm water trespass law. Given that the FRSA provides no express authorization for disposing of drainage onto an adjoining property, the presumption must be that state laws regulating such action survive….[3706]

The court held that the FRSA's express preemption provision did not apply to Mall Associates' claim and therefore vacated the district court's grant of a summary judgment in favor of CSX and remanded.[3707]

8. No Preemption of a State Statute when a Railroad Company Violates a Federal Standard of Care

In *Zimmerman v. Norfolk S. Corp.*[3708] the plaintiff Zimmerman, a motorcyclist, brought an action against Norfolk Southern after he was thrown from his motorcycle when attempting to brake to avoid colliding with a train.[3709] As a result of the accident, Zimmerman was partially

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[3705] *Id*. at 490.

[3706] *Id*. at 491 (citations omitted).

[3707] *Id*. at 495, 497.

[3708] 706 F.3d 170 (3d Cir. Pa. 2013), *cert. denied*, 134 S. Ct. 154, 187 L. Ed.2d 41 (2013).

[3709] *Id*. at 174.

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paralyzed.[3710] Zimmerman brought three tort claims under state law against Norfolk Southern.[3711]

The Third Circuit upheld Zimmerman's claims for excessive speed and failure to maintain a safe crossing area but held that the FRSA preempted Zimmerman's claim for negligence *per se*.[3712] Zimmerman's claim for excessive speed was not preempted because the Norfolk Southern train was travelling at more than twice the speed limit, a violation of the speed limit established by federal law that also gave rise to a federal standard of care.[3713] "[B]ecause 49 C.F.R. § 234.245 creates a federal standard of care governing the maintenance of crossbucks," and because the state statute did not regulate the adequacy of the warning devices used at the crossing, there was no preemption of the claim for a failure to maintain a safe crossing area.[3714] However, because the federal regulations at issue did not create a federal standard of care, the negligence *per se* claim was preempted.[3715] The Third Circuit further held that the district court improperly excluded eight crossing reports and nine accident reports.[3716]

The district court had granted a summary judgment on all of Zimmerman's claims; however, the Third Circuit reversed the summary judgments for Norfolk Southern on the claims for excessive speed and failure to maintain a safe crossing area but affirmed the lower court's

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[3710] *Id*.

[3711] *Id*.

[3712] *Id*. at 193.

[3713] *Id*. at 179; *see* 49 C.F.R. § 213.9.

[3714] *Id*. at 188.

[3715] *Id*. at 192.

[3716] *Id*.180-185.

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grant of a summary judgment for Norfolk Southern on the negligence *per se* claim.[3717] In 2013, the Supreme Court denied Norfolk Southern's petition for *certiorari*.[3718]

9. Preemption of State Law on Maximum Allowable Speed

In *CSX Transp., Inc. v. Easterwood*[3719] the Supreme Court explained the FRSA's preemption language. The *Easterwood* Court established a broad interpretation of preemption under the FRSA, holding that the FRSA preempted virtually all causes of action under state law against railroads regarding railroad safety.[3720] The Court relied on the explicit preemption language in the FRSA that reads in part:[3721] "A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement."[3722] Because the FRSA established a rule that set the maximum allowable speed, the Court held that federal law preempted the state law. However, as noted by other courts, the *Easterwood* case, which held that 49 C.F.R. § 213.9 covered the subject matter of claims based on excessive speed, was decided before Congress clarified its position on the preemptive effect of the FRSA.[3723]

[3717] *Id*. at 193.

[3718] *Norfolk Southern Corp. v. Zimmerman*, 134 S. Ct. 154, 187 L. Ed.2d 41 (2013).

[3719] 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed.2d 387 (1993), *superseded by statute as stated in Garza v. Norfolk Southern Ry. Co*., 2012 U.S. Dist. LEXIS 123011, at *1 (N.D. Ohio July 23, 2012).

[3720] *Id*., 507 U.S. at 664, 113 S. Ct. at 1737, 123 L. Ed.2d at 397.

[3721] *Id*., 507 U.S. at 662, 113 S. Ct. at 1736, 123 L. Ed.2d at 395.

[3722] 45 U.S.C. § 434 (1970), amended by 49 U.S.C. § 20106(a) (2007).

[3723] *See Garza v. Norfolk Southern Ry. Co*., 2012 U.S. Dist. LEXIS 123011 at *1, 9 (N.D. Ohio 2012) (stating that "[i]n 2007, Congress limited the reach of *Easterwood* and the FRSA, by enacting a savings

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10. Whether the ICCTA Preempts a State Statute Requiring a Railroad to Pay for Sidewalks

In *Adrian & Blissfield R.R. v. Village of Blissfield*[3724] the Sixth Circuit held that the ICCTA did not preempt a Michigan statute that required a railroad to pay for a pedestrian crossing installed by the village across a railroad company's tracks and sidewalks near the railroad's property.[3725] Adrian & Blissfield Railroad Company (A&B), which operated a short-line railroad in the Village of Blissfield, owned about 2.5 miles of track that did not cross state lines.[3726] After the village began a program to construct certain sidewalks, the village requested A&B to complete the sidewalk; otherwise, the village would complete it and bill A&B.[3727] A&B's response was that the ICCTA and the FRSA preempted the state statute pursuant to which the village ordered A&B to complete the sidewalk or pay for its construction.[3728]

In reversing and remanding the case to the district court, the Sixth Circuit held that the ICCTA did not preempt the Michigan statute because the statute was "not unreasonably burdensome" and did not discriminate against railroads, and the sidewalks were needed for pedestrian safety.[3729]

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clause barring preemption where a state, local, or industry regulation exists[] and does not conflict with the Secretary of Transportation's regulation"); *Hunter v. Canadian Pac. Ry. Ltd*., 2007 U.S. Dist. LEXIS 85110 at *1, 12 (D. Minn. 2007); *see* 49 U.S.C. §§ 20106(b)-(c) (2014).

[3724] 550 F.3d 533 (6th Cir. 2008).

[3725] *Id*. at 535, 537 (*citing* Mich. Comp. Laws S 462.309).

[3726] *Id*. at 535.

[3727] *Id*. at 536.

[3728] *Id*. at 536-538.

[3729] *Id*. at 541-542.

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C. Recent Preemption Decisions by State Courts

1. ICCTA Preempted Local Model Flood Plain Management Ordinance as Applied to Railroads

Village of Big Lake v. BNSF Ry. Co., Inc.[3730] was an action by the Village of Big Lake against BNSF and the Missouri Highways and Transportation Commission based on their actions over a 15-year period whereby they raised the height of a rail line and a highway within the village. The village argued that the defendants' actions violated the village's Model Floodplain Management Ordinance, which the village had enacted as required by the United States National Flood Insurance Program.[3731] Under the ordinance any work that affected the flood plain in the village required a hydrological and hydraulic study and the village's prior approval of any work.

A Missouri appellate court affirmed the trial court's dismissal of the case. As the appellate court observed, "several courts recognize that the ICCTA preempts most pre-construction or preclearance permit requirements imposed by states and localities."[3732] The court held that "[t]he Ordinance and statute at issue … fall into the two broad categories of state and local actions that are categorically preempted by the ICCTA. The Ordinance is a form of local permitting or preclearance process…. '[T]he congressional intent to preempt this kind of state and local regulation is explicit in the plain language of the ICCTA and the statutory framework surrounding it.'"[3733]

[3730] 382 S.W.3d 125 (Mo. App. 2012).

[3731] *Id*. at 126.

[3732] *Id*. at 129 (citation omitted.

[3733] *Id*. at 130 (citation omitted).

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2. ICCTA Held to Preempt Oregon Statute that Prohibited Trains from Blocking Railroad-Highway Grade Crossings for More than Ten Minutes

In 2009 in *Burlington N. & Santa Fe Ry. Co. v. Dep't of Transportation*[3734] BNSF sought review of an Oregon DOT order that imposed "civil penalties for violations of *OAR 741-125-0010*, which generally prohibits trains from blocking railroad-highway grade crossings for more than 10 minutes."[3735] The DOT argued that the state law was not preempted by the ICCTA because a "state regulation survives preemption if it does not discriminate against or unreasonably burden rail transportation."[3736] Although the DOT relied on several judicial precedents in support of its position,[3737] the Oregon Court of Appeals held that the precedents were inapplicable because the Oregon law was "not a law of general applicability" but by its express terms an "'operating rule' and a 'regulation of rail transportation.'"[3738]

3. ICCTA Held to Preempt Railroad's Breach of Contract Action for Use of Plaintiff's Railroad Cars on the Defendants' Railroad Lines

In *San Luis Central Railroad Co. v. Springfield Terminal Railway Co*.[3739] the issue was whether the ICCTA preempted plaintiff's claims under state law, including a breach of contract

[3734] 227 Or. App. 468, 206 P.3d 261 (2009), *review denied*, 347 Ore. 446 (2009).

[3735] *Id*., 227 Or. App. at 470, 206 P.3d at 262.

[3736] *Id*., 227 Or. App. at 471, 206 P.3d at 263.

[3737] *See id*., 227 Or. App. at 472, 206 P.3d at 263 (*citing Emerson v. Kansas City Southern Ry. Co*., 503 F.3d 1126 (10th Cir. 2007); *New York Susquehanna v. Jackson*, 500 F.3d 238 (3d Cir. 2007); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005), *cert denied*, 546 U.S. 977, 126 S. Ct. 547, 163 L. Ed.2d 460 (2005)).

[3738] *Id*., 227 Or. App. at 474, 206 P.3d 264 (*quoting Friberg v. Kansas City Southern Ry. Co*., 267 F.3d 439, 443 (5th Cir 2001) (*citing* 49 U.S.C. § 10501(b))).

[3739] 369 F. Supp.2d 172 (D. Mass. 2005).

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claim.[3740] The San Luis Central Railroad (San Luis Central) brought an action alleging various state-law claims including for breach of contract against defendants[3741] for $36,212.54 for the defendants' breach of a Car Service and Car Hire Agreement for the use of the plaintiff's railroad cars on the defendants' railroad lines.[3742] A federal district court in Massachusetts pointed out that "[t]he STB has the authority to regulate car service, including the compensation paid for the use of freight cars."[3743] The court agreed with the defendants that the plaintiff's only remedy was to file a complaint with the STB or in federal court and that any state-law remedy was preempted under § 10501(b) of the ICCTA.[3744] The court held that the state-law cause of action for breach of the agreement was preempted because the agreement "has regulatory force and receives continued regulatory oversight."[3745] The court also held that the tort claim for conversion was preempted.[3746]

4. No Preemption of a State Statute on Eminent Domain that does not Regulate Railroad Transportation

In *Norfolk Southern Ry. Co. v. Intermodal Props., L.L.C.,*[3747] Intermodal Properties, L.L.C. (Intermodal) owned 5.88 acres of property in Secaucus, New Jersey that were adjacent to

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[3740] *Id.* at 173.

[3741] Springfield Terminal Railway Company, Maine Central Railroad Company, Boston and Maine Corporation, and Portland Terminal Company.

[3742] *San Luis Central Railroad Co.,* 369 F. Supp.2d at 173.

[3743] *Id*. at 174 (*citing* 49 U.S.C. § 11122(a)).

[3744] *Id*. at 175-176.

[3745] *Id*. at 176.

[3746] *Id*. at 177. The court, however, did grant the plaintiffs leave to file an amended complaint.

[3747] 424 N.J. Super. 106, 35 A.3d 726 (App. Div. 2012), *aff'd, Norfolk Southern Ry. Co. v. Intermodal Properties, LLC*, 215 N.J. 142, 71 A.3d 830, 2013 N.J. LEXIS 818 (2013).

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more than 240 acres of land owned by Norfolk Southern.[3748] After Intermodal rejected several offers by Norfolk Southern to purchase Intermodal's property, Norfolk Southern filed a petition with the NJDOT to acquire Intermodal's property through eminent domain.[3749] An administrative law judge (ALJ) granted permission to Norfolk Southern to acquire the property and held that the ICCTA preempted the provision for on-site accommodation in N.J. Stat. Ann. § 48:12-35.1.[3750] The on-site accommodation provision requires a railroad to show that "alternative property suitable for the specific proposed use of the property ... is unavailable ... through on-site accommodation...."[3751]

The state court held that the ICCTA did not preempt New Jersey's eminent domain statute, because the statute did "not constitute the regulation of railroad transportation."[3752] The court reversed the ALJ's decision that the ICCTA preempted § 48:12-35.1 and remanded the case.[3753]

5. State Claims for Damages not Preempted for Breach of Contract or Breach of a Covenant Granting an Easement

In *PCS Phosphate Co. v. Norfolk Southern Corp*.[3754] the Fourth Circuit held that the ICCTA, 49 U.S.C. § 10501, does not expressly preempt claims for breach of contract or breach

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[3748] *Id.,* 424 N.J. Super. at 113, 35 A.3d at 729-730.

[3749] *Id*.

[3750] *Id.,* 424 N.J. Super. at 115, 35 A.3d at 731.

[3751] *Id*., 424 N.J. Super. at 124, 35 A.3d at 736.

[3752] *Id*., 424 N.J. Super. at 128, 35 A.3d at 739.

[3753] *Id*., 424 N.J. Super. at 129, 35 A.3d at 739.

[3754] 559 F.3d 212, 217-219 (4th Cir. 2009).

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of a covenant granting an easement because the statute applies to regulatory acts and because voluntary agreements between two private parties presumptively are not regulatory acts. When determining whether § 10501 impliedly preempts claims for breach of contract and for breach of a covenant granting an easement, the Fourth Circuit applied the "the generally accepted test for ICCTA implied or conflict preemption: does the enforcement action 'unreasonably interfer[e]' with rail transportation?"[3755] The Board has recognized that voluntary agreements "reflect[] the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce."[3756] Because the claims were not expressly or impliedly preempted by § 10501, remedies and damages under state law were available.[3757] Therefore, the Fourth Circuit affirmed the judgment of the district court.[3758]

D. Recent Preemption Decisions by the STB

1. ICCTA Preemption of Local Permitting or Preclearance Requirements

In *Grafton and Upton Railroad Company*[3759] Grafton and Upton (G&U) sought to build a transloading facility on a parcel of land in North Grafton adjacent to G&U's line and existing rail yard. The new facility would be used to transfer propane received by tank cars that would be stored and later transferred to trucks for delivery. Relying on its municipal zoning and

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[3755] *Id*. at 220-221 (stating that it is a fact specific assessment) (citations omitted).

[3756] *Id*. at 221 (citations omitted).

[3757] *Id*. at 220.

[3758] *Id*. at 224.

[3759] *Grafton & Upton Railroad Co. – Pet. for Declaratory Order,* FD 35752, slip op. at 2 (STB served Sept. 19, 2014) available at: http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/F9E35D4FF5F63EFF85257D58004A446A/$file/43910.pdf (last accessed March 31, 2015).

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permitting ordinances, the town of Grafton, Massachusetts issued a cease and desist order against the construction of the facility.[3760] The town also filed a complaint in the Superior Court for Worcester County, Massachusetts, which stayed its decision pending the STB's ruling on ICCTA preemption. The dispute between the parties was "whether the proposed transload facility would be part of G&U's transportation by rail carrier entitled to federal preemption, or rather a third-party transload operation run by non-railroads that may be regulated by states and localities."[3761]

Although the STB has jurisdiction to determine issues of preemption relating to the regulation of railroads, the activities at issue must "constitute 'transportation' and must be performed by, or under the auspices of, a 'rail carrier.'"[3762] The Board generally considers six factors when determining whether transloading activities are within the Board's jurisdiction or are a part of an independent business.[3763]

> (1) Whether the rail carrier holds itself out as providing transloading service; (2) whether the rail carrier is contractually liable for damage to the shipment during loading or unloading; (3) whether the rail carrier owns the transloading facility; (4) whether any third party that performs the physical transloading receives compensation from the rail carrier or the shipper; (5) the degree of control retained by the rail carrier over the third party; and (6) other terms of the contract between the rail carrier and third party.[3764]

Based on the contracts G&U signed with third parties and on its financing plans, the STB determined that G&U's proposed transloading facility was to be an "integral part of its

[3760] *Id*. at 2.

[3761] *Id*. at 4.

[3762] *Id*. at 5 (citation omitted).

[3763] *Id*.

[3764] *Id*. at 6.

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operations as a rail carrier."[3765] Therefore, the Board concluded that the facility would constitute transportation by rail carrier under the ICCTA, thus qualifying for federal preemption of the local permitting or preclearance requirements.[3766] The Board granted Grafton & Upton's petition for a declaratory order that the local permitting ordinance was preempted by federal law.[3767]

2. ICCTA Preemption of Local Zoning Ordinance and Order

In *Boston and Maine Corporation and Springfield Terminal Railroad Company,*[3768] the petitioning railroad used a set of tracks and a warehouse located in the town of Winchester, Massachusetts. The residents living near the warehouse complained to the zoning board about noise caused by trains "coupling and switching at night."[3769] After the zoning board directed all traffic to the warehouse to cease and desist, the railroad appealed to the STB.

The STB emphasized that the ICCTA, which "provides that the jurisdiction of the Board over transportation by rail carriers is exclusive," defines the term transportation broadly so as to encompass any property or facility related to the operation of railroads.[3770] Furthermore, preemption under the ICCTA is designed to prevent localities' regulations from interfering with interstate commerce. Thus, "state or local permitting or preclearance requirements, including

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[3765] *Id*. at 8.

[3766] *Id*.

[3767] *Id*. at 9.

[3768] *Boston & Maine Corp. – Pet. for Declaratory Order*, FD 35749, slip op. (STB decided July 19, 2013), available at: http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/43B8F53F6BF4C92185257BAD006B2D2C/$file/43203.pdf (last accessed March 31, 2015).

[3769] *Id*. at 2.

[3770] *Id*. at 3 (citation omitted).

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building permits, zoning ordinances, and environmental and land use permitting requirements are preempted."[3771]

In this case, because a town zoning ordinance decreed that a warehouse was not allowed to operate as a freight yard, the town ordered all rail traffic to the warehouse to cease. However, the STB ruled that "[s]uch an attempt to prohibit common carrier rail transportation directly conflicts with the most fundamental common carrier rights and obligations provided by federal law and the Board's exclusive jurisdiction over that service. The Town's actions [were] therefore plainly preempted by § 10501(b) [of the ICCTA]."[3772] The STB granted the petitioner's request for a declaratory order allowing the continuation of freight rail transportation to the warehouse in Winchester.[3773]

3. Preemption of State Tort Claims Arising out of Railroad's Action Allegedly Causing Flooding of Adjacent Property

In *Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust and Individually, and Dana Lynn Tubbs, Trustee of the Dana Lynn Tubbs Revocable Trust and Individually,*[3774] the petitioners filed suit against BNSF in Holt County, Missouri. They sought compensation for property damage that BNSF allegedly caused in connection with a flood that damaged the petitioners' property. The petitioners, who had initiated an action in state court asserting tort claims under state law, petitioned the STB to declare that "their state court claims against BNSF

[3771] *Id*.

[3772] *Id.* at 4.

[3773] *Id*. at 5.

[3774] *Thomas Tubbs - Pet. for Declaratory Order,* FD 35792, slip op. (STB served Oct. 29, 2014), available at: http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/2C4E7A01A148E0A385257D8200477BE9/$file/43738.pdf (last accessed March 31, 2015).

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are not federally preempted."[3775] A section of BNSF's track was situated above an embankment adjacent to the petitioners' property. Although BNSF had fortified the embankment "by placing rock, rip-rap, and other material trackside" in anticipation of flooding by the Missouri River, the embankment had not prevented the flooding of the petitioners' farm.[3776] According to the petitioners "the soil on their farm was washed away, rendering their property virtually worthless."[3777] The petitioners alleged that BNSF constructed the embankment without proper drainage and that breaches in the embankment channeled floodwater onto their property.[3778] The petitioners sought a declaration that their claims were not preempted by federal law and that, therefore, they could proceed with their state law claims for damages.[3779]

The STB observed that the ICCTA granted it "broad and exclusive jurisdiction over transportation by rail carrier" and that the broad definition of transportation includes any "property, facility, structure or equipment" related to the operation of a railroad.[3780] The Board noted that § 10501(b) of the ICCTA grants the STB regulatory, preemptory power over states or localities that attempt to intrude into matters that are subject to the STB's authority. The STB stated that if categorical preemption did not apply "state and local actions may be preempted 'as

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[3775] *Id.* at 1.

[3776] *Id.* at 2.

[3777] *Id.*

[3778] *Id.*

[3779] *Id.*

[3780] *Id.* at 3.

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applied' – that is, if they would have the effect of unreasonably burdening or interfering with rail transportation."[3781]

Even though the petitioners' claims were tort claims under state law, the claims arose out of the construction and maintenance of BNSF's tracks. The tracks are subject to the Board's exclusive jurisdiction "because damages awarded under state tort laws can manage or regulate a railroad as effectively as the application of any other type of state statute or regulation."[3782] The Board concluded that the petitioners' state law claims were preempted under the ICCTA. However, the Board declared that the Petitioners' claims that BNSF violated certain federal regulations under the Federal Railroad Safety Act regarding drainage under railroad tracks were not preempted under the ICCTA. Thus, any tort claims arising out of the alleged violations also were not preempted by the ICCTA.[3783] The Board granted the petitioners' request in part for a declaratory order.

E. Preemption Cases Summarized Elsewhere in the Report

1. Federal Cases

a. Carmack Amendment's Preemption of State Claims

The Carmack Amendment bars all claims that would permit a railroad to be held liable under state law.[3784] *See* part V.C.1.

b. FELA's Preemption of Actions under State Law

In *New York Central Rail Company v. Winfield*[3785] the Supreme Court held that FELA precluded an employee from claiming damages under state law. *See* part XXI.D.6.

[3781] *Id*. at 4.

[3782] *Id*.

[3783] *Id.* at 7.

[3784] *Gulf Rice Arkansas, LLC v. Union Pacific R.R. Co.*, 376 F. Supp.2d 715, 719 (S.D. Tex. 2005).

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c. FRSA's Preemption of Local Regulation of Transportation of Hazardous Material

In *CSX Transportation, Inc. v. Williams*[3786] the District of Columbia Circuit held that the FRSA preempted the District of Columbia's Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005. *See* part XX.D.4.

d. ICCTA's Preemption of Antitrust Claims under State Law

In *Fayus Enterprises v. BNSF Railway Co*.[3787] the District of Columbia Circuit held that the ICCTA preempted antitrust claims under state law. *See* part X.C.7.

e. Local Air Quality Regulations Preempted

In *Association of American Railroads v. South Coast Air Quality Management District*[3788] the Ninth Circuit held that federal law preempted certain local air quality regulations. *See* part XXXIX.G.

f. Negligence Claim Relating to Service Preempted but a Claim for Negligent Design of a Railcar not Preempted

In *Rubietta v. Amtrak*[3789] the court held that the plaintiff's claim for negligent seating was preempted because the claim related to service but that a claim based on alleged negligent design was not preempted. *See* part III.G.

g. Obstruction to Visibility Claim not Preempted

In *Strozyk v. Norfolk S. Corp*.[3790] the Third Circuit held that federal regulations did not preempt the plaintiff's claim based on an obstruction to visibility. *See* part XIV.E.6.

[3785] 244 U.S. 147, 148, 153-154, 37 S. Ct. 546, 548, 549, 61 L. Ed. 1045, 1048-1049 (1917).

[3786] 406 F.3d 667, 669 (D.C. Cir. 2005).

[3787] 602 F.3d 444 (D.C. Cir. 2010).

[3788] 622 F.3d 1094 (9th Cir. 2010).

[3789] 2012 U.S. Dist. LEXIS 12047, at *1, 9-11, 12 (N.D. Ill. Jan. 30, 2012).

[3790] 358 F.3d 268 (3d Cir. 2004).

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h. Preemption by the FRSA Inapplicable when a Railroad Violates a Federal Safety Standard of Care

In *Sanchez v. BNSF Railway Company*[3791] a federal court in New Mexico explained that FRSA preemption does not apply when a railroad violates a federal safety standard of care. *See* part XXIII.D.

i. Preemption of an Action in State Court for Damages Caused by Abandonment of a Rail Line

In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*[3792] the Supreme Court held that the Interstate Commerce Act precludes a shipper's action in state court for damages against a carrier when the ICC in approving the carrier's application for abandonment "reaches the merits of the matters the shipper seeks to raise in state court."[3793] *See* part I.B.7.

j. Preemption of Claims under State Law Alleging Defective Warning Devices by the FRSA

In *Norfolk S. Ry. Co. v. Shanklin*[3794] the Supreme Court held that the FRSA preempts claims under state law alleging defective devices at crossings when the state has used federal funds to install devices at a crossing. *See* part XIV.E.2.

k. Preemption of Condemnation of Leased Railroad Property to Avoid Leasing the Property

In *Union Pac. R. Co. v. Chicago Transit Auth.,*[3795] when the Chicago Transit Authority attempted to condemn leased railroad property and retain a permanent easement to avoid paying high rents to the railroad-lessor, the Seventh Circuit held that the condemnation amounted to regulation that interfered with railroad transportation and, thus, was preempted by the ICCTA. *See* part XIII.D.3.

[3791] 2013 U.S. Dist. LEXIS 147656, at *1, 13, 14 (D. N.M. 2013).

[3792] 450 U.S. 311, 101 S. Ct. 1124, 67 L. Ed.2d 258 (1981).

[3793] *Id.,* 450 U.S. at 322-323, 101 S. Ct. at 1132-1133, 67 L. Ed.2d 258.

[3794] *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358-359, 120 S. Ct. 1467, 146 L.Ed.2d 374 (2000).

[3795] 647 F.3d 675, 682 (7th Cir. 2011).

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l. Preemption of Deed Requiring Amtrak to Maintain a Bridge in Perpetuity

In *City of New York v. Amtrak*[3796] a federal district court in the District of Columbia held that Amtrak was not obligated by reason of a 1906 deed to maintain the bridge in dispute in perpetuity because any such agreement was preempted by federal law. *See* part III.F.

m. Preemption of Employee's FELA Claims by the FRSA and the Locomotive Inspection Act

Garza v. Norfolk Southern Ry. Co.[3797] the Sixth Circuit held that the FRSA and the Locomotive Inspection Act (LIA) preempted the engineer's claims for injuries sustained when an automobile drove through a railroad crossing striking a Norfolk Southern train on which Garza was working. *See* part XXVIII.C.2.

n. Preemption of State Statutes Requiring Full Crews

In *Burlington N. & Santa Fe Ry. Co. v. Doyle*[3798] the Seventh Circuit ruled that federal law preempted some provisions of a Wisconsin law requiring full crews on trains. *See* part XI.C.1.

o. FRSA's Preemption of State and Local Railroad Laws

In *Driesen v. Iowa, Chi. & E. R. R. Corp.*[3799] a federal district court in Iowa held that the FRSA preempted state and local laws regulating the speed of trains, reflectorization of railcars, warning devices, and locomotive horns. *See* part XXVIII.C.3.

p. State Law applicable to Railroad Crossing Preempted by the FRSA

In *Cook v. CSX Transportation, Inc*.[3800] a federal district court in Ohio held that an Ohio law applicable to railroad crossings was preempted by the FRSA. *See* part XIV.H.5.

[3796] 960 F. Supp.2d 84, 90, 94-95 (D.D.C. 2013).

[3797] 2013 U.S. App. LEXIS 17134, at *1 (6th Cir. 2013).

[3798] 186 F.3d 790, 804-805 (7th Cir. 1999).

[3799] 777 F. Supp.2d 1143, 1160 (N. D. Iowa 2011).

[3800] 2014 U.S. Dist. LEXIS 147661, at *1 (N.D. Ohio 2014).

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q. State Law on Agreements in Construction Contracts Preempted by Federal Law

In *O&G Industries, Inc. v. Amtrak*[3801] the Second Circuit held that 49 U.S.C. § 28103(b) preempted a Connecticut law banning indemnity agreements in a construction contract when the agreement indemnified a party for acts caused by its own negligence. *See* part XXVI.G.1.

r. State Law on Indemnity Agreements not Preempted by 49 U.S.C. § 28103

In *CSX Transportation, Inc. v. Massachusetts Bay Transportation Authority*[3802] a federal district court in Massachusetts ruled that 49 U.S.C. § 28103(b), which allows railroads to enter into indemnification agreements, did not preempt a Massachusetts law that prohibited a party from indemnifying another party for injuries or damage caused by gross negligence or recklessness. *See* part XXVI.G.1.

s. State Law Preempted by Installation of Federally Funded Signals

In *Illinois Central Railroad Company v. Daniel*[3803] a federal district court in Mississippi held that federal law preempted a state law because federally funded signals had been installed at the crossing. *See* part XXIX.H.1.

2. State Cases

a. Alleged Conditions at Crossing Preempted by the FRSA

In *Boyd v. National R.R. Passenger Corp.,*[3804] although the issue was not before the Supreme Judicial Court of Massachusetts, the court noted that the Court of Appeals had held that the FRSA preempted the plaintiff's state law claims because the conditions at the crossing did not qualify as a local hazard under the savings clause. *See* part XXIII.C.

[3801] 537 F.3d 153 (2d Cir. 2008).

[3802] 697 F. Supp.2d 213 (D. Mass. 2010).

[3803] 901 F. Supp.2d 790 (S.D. Miss. 2012).

[3804] 446 Mass. 540, 549, 845 N.E.2d 356, 365 (Sup. J. Ct. Mass. 2006).

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b. Occupational Safety and Health Administration Regulations applicable to Catenary Poles and Ladders not Preempted

In *Callahan v. National R.R. Passenger Corp.*[3805] the court stated that it could find no authority to support Amtrak's argument that the FRA had preempted OSHA regulations that applied to catenary poles and ladders. *See* part XXX1.F.

c. Preemption of Claims that Warning Devices were Inadequate

In *Murrell v. Union Pacific Railroad Company*[3806] a federal district court in Oregon held that federal law preempted the plaintiff's claims that there were inadequate warning devices. *See* part XXIX.H.2.

d. State Administrative Procedures that come within Preemption Exemption

In *BNSF Railway Company v. Arizona Corporation Commission*[3807] the Arizona Court of Appeals held that the Arizona Corporation Commission's action to investigate and approve or deny installation of modifications to crossings was an administrative procedure that came within the preemption exemption. *See* part XXXIV.G.

e. State Law on Riparian Rights not Preempted

In *Miller v. SEPTA*[3808] the Supreme Court of Pennsylvania held that the state's law on riparian rights was not preempted by the FRSA, nor by § 213.33 of the federal Track Safety Standards regulations. *See* part VI.D.2.

f. State Law that Applied to Crossings not Preempted because Federal Regulations had not been Issued

In *Langemo v. Montana Rail Link, Inc*.[3809] the court held that that 49 U.S.C. § 20153, enacted in 1994, did not preempt state law because the federally required regulations applicable to locomotive horns when approaching and entering public highway-rail grade crossings were not in effect at the time of the accident. *See* part XIV.E.7.

[3805] 2009 PA Super 132, at *1, 979 A.2d 866, 872 (Pa. Super. Ct. 2009) (*quoting* 29 U.S.C. § 653(b)(1)), *appeal denied*, 2010 Pa. LEXIS 2546 (Pa., Nov. 9, 2010).

[3806] 544 F. Supp.2d 1138, 1152 (D. Or. 2008).

[3807] 268 P.3d 1138 (Ariz. Ct. App. 2012).

[3808] 103 A.3d 1225 (Pa. 2014).

[3809] 2001 ML 370, 2001 Mont. Dist. LEXIS 2131, at *1 (Mont. First Jud. Ct. 2001).

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XXXIII. PUBLIC SERVICE COMMISSIONS

A. Introduction

Based on the police power of states to protect their citizens,[3810] all states have established Public Service Commissions (PSC), Public Utilities Commissions (PUC), or the equivalent to regulate public service corporations that furnish services to their residents, such as electricity, gas, and transportation.[3811] The commissions seek to protect residents through the publication of safety standards and the avoidance of wasteful spending and the imposition of undue burdens on public service corporations.[3812] However, in the railroad sector, because of federal laws and regulations that preempt state laws that conflict with or overlap federal law, the state commissions' duties are more limited.[3813] Preemption may leave the commissions only with the responsibilities of representing the state's rail interests before federal agencies and conducting negotiations with rail carriers and the Surface Transportation Board (STB) or with landowners.

Nevertheless, as discussed in section B states may participate in the investigation and enforcement of federal railroad safety laws and regulations. Sections C through H discuss commissions in California, Florida, Illinois, North Dakota, West Virginia, and Wisconsin. Section I discusses the Illinois Commerce Commission (ICC). Section J discusses whether Amtrak is exempt from natural gas taxes that were passed on to Amtrak by the supplier. Section

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[3810] *See* U.S. Const. amend. X.

[3811] 12 *McQuillin Mun. Corp*. § 34:9 (3d ed.).

[3812] *Id*.

[3813] Interstate Commerce Commission Termination Act of 1995 (ICCTA), PL 104–88, 109 Stat. 803 (codified as amended in scattered sections of title 49 of the United States Code); Hazardous Materials Safety Act (HMSA), Pub. L. 93-633, 88 Stat. 2156 (Jan. 3, 1975) (codified as amended at 49 U.S.C. §§ 5101-5128 (2014)); and the Federal Railroad Safety Act, Pub. L. 91-458, 84 Stat. 971 (Oct. 16, 1970) (codified as amended at 49 U.S.C. §§ 20101-21311 (2014)).

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K analyzes whether a PUC or the Surface Transportation Board (STB) has jurisdiction over the installation of new railroad bridges prior to charging railroads for their construction. Section K discusses a case in which it was held that a PUC may not authorize a change in audible devices that is contrary to federal statutory authority.

Statutes and Regulations

B. State Enforcement of Federal Railroad Safety Regulations

As the New Mexico Public Regulation Commission states, "[s]ince 1970, the federal government has preempted state railroad safety regulation. However, the federal government through the Federal Railroad Administration ('FRA') offers states the opportunity to participate in federal investigative and enforcement activities."[3814]

Part 212 of the Code of Federal Regulations (C.F.R.) "establishes standards and procedures for State participation in investigative and surveillance activities under the Federal railroad safety laws and regulations."[3815] As stated in § 212.105, the principal method of federal-state cooperation is through an agreement between the FRA and a state either for a fixed term or an indefinite duration.[3816] Section 212.105(d) sets forth the common terms for such an agreement. Section 212.201 specifies the general qualifications required of state inspection personnel with the sections that follow addressing specific types of inspectors, such as for track, locomotives, cars, operating practices, and highway-rail grade crossings.

[3814] New Mexico Public Regulation Commission, Transportation-Railroad, available at: http://www.nmprc.state.nm.us/transportation/railroad.html (last accessed March 31, 2015).

[3815] 49 C.F.R. § 212.1 (2014).

[3816] 49 C.F.R. § 212.105(a) and (b) (2014).

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C. California Public Utilities Commission

The California the California Public Utilities Commission (CPUC), which supervises and regulates every public utility in California,[3817] "may establish rates or charges for the transportation of passengers and freight by railroads and other transportation companies."[3818] The commission must give its consent before any road may be built across any railroad track, and a railroad company must receive the Commission's consent to construct a railroad track across any road.[3819] The CPUC also has the authority in consultation with the DOT to "adopt rules and regulations prescribing uniform standards regarding the time after the warning signal begins at the railroad crossing at which traffic enforcement shall begin."[3820]

The CPUC may determine the amount of just compensation to be awarded for property or any interest in property that is taken or damaged in the separation of grades at any crossing and the construction, alteration, or relocation of elevated tracks.[3821] In CUPC "is responsible for inspection, surveillance, and investigation of the rights-of-way, facilities, equipment, and operations of railroads," as well as public mass transit guideways; its "rail inspectors are federally-certified to enforce state and federal laws, regulations, orders, and directives pertaining to rail transportation."[3822] The CPUC is authorized to hire a minimum of six additional rail

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[3817] Cal. Pub. Util. Code § 701 (2014)

[3818] Cal. Pub. Util. Code § 728.5 (2014).

[3819] Cal. Pub. Util. Code § 1201 (2014).

[3820] Cal. Pub. Util. Code § 1201.1 (2014).

[3821] Cal. Pub. Util. Code § 1206 (2014).

[3822] California Public Utilities Commission, ROSB Regulatory Authority, Rules, and Regulations, available at:

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inspectors to enforce compliance with state and federal safety regulations in the state.[3823] The CPUC inspects railroad yards and tracks that pose the greatest safety hazard.[3824] The CPUC is empowered to order more railroad trains or cars to meet the demands of rail traffic.[3825]

D. Florida Public Service Commission

The Florida Public Service Commission (FPSC) has jurisdiction over telecommunications, water and water waste, and gas utilities.[3826] In 1985 when the railroad industry was deregulated the FPUC ceased having jurisdiction over railroads.[3827] The FPSC's website states that its mission is the facilitation of safe and reliable utility services at fair prices.[3828]

E. Illinois Commerce Commission

The Illinois Commerce Commission (ICC) supervises all public utilities in Illinois, including telecommunications, natural gas, electric, water and sewer, transportation, and cable and video.[3829] The ICC's jurisdiction is "exclusive and shall extend to all intrastate and interstate rail carrier operations within the State, except to the extent that its jurisdiction is preempted by

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http://www.cpuc.ca.gov/PUC/safety/Rail/Railroad/ROSB_Regulatory_Authority_Rules_and_Regulations.htm (last accessed March 31, 2015).

[3823] Cal. Pub. Util. Code § 765.5(c) (2014).

[3824] Cal. Pub. Util. Code § 765.5(e) (2014).

[3825] Cal. Pub. Util. Code § 763(a) (2014).

[3826] Fla. Stat. §§ 364.01(2), 367.011, 368.05(1) (2014).

[3827] Florida Public Service Commission, available at: http://www.floridapsc.com/about/history.aspx (last accessed March 31, 2015).

[3828] Florida Public Service Commission, available at: http://www.psc.state.fl.us/home/files/SAOO.pdf (last accessed March 31, 2015).

[3829] 220 Ill. Comp. Stat. 5/4-101 (2014).

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valid provisions of the Staggers Rail Act of 1980."[3830] The ICC has jurisdiction to enforce and administer laws establishing general safety requirements for railroad track, facilities, and equipment in Illinois.[3831] The ICC requires railroad carriers to register with the ICC to operate in Illinois and requires registration to begin or to continue construction of any railroad tracks or facilities.[3832] Under the Illinois Commercial Transportation Law, enforced by the ICC, rail carriers are required to provide adequate service at reasonable rates without discrimination.[3833] No public roads may be built across a railroad track, nor may a railroad track be constructed across a public road, without the ICC's prior permission.[3834] The ICC investigates all railroad accidents reported to the Commission.[3835] Finally, the ICC implements a railroad safety education program, the Illinois Operation Livesaver.[3836]

F. North Dakota State Public Service Commission

Various statutes define the mission and powers of the North Dakota State Public Service Commission over the state's public utilities.[3837] The Commission has limited power over the railroad industry because of the ICCTA's preemption of certain state laws and regulations as

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[3830] 625 Ill. Comp. Stat. 5/18c-701 (2014).

[3831] Illinois Commerce Commission, available at: http://www.icc.illinois.gov/railroad/ (last accessed March 31, 2015).

[3832] 625 Ill. Comp. Stat. 5/18/c-7201(1) (2014).

[3833] 625 Ill. Com. Stat. 5/18c-7202 (2014).

[3834] 625 Ill. Com. Stat. 5/18c-7401(3) (2014).

[3835] 625 Ill. Com. Stat. 5/18c-7402(3)(b) (2014).

[3836] Illinois Commerce Commission, available at: http://www.icc.illinois.gov/railroad/ (last accessed March 31, 2015).

[3837] North Dakota Public Service Commission, available at: http://www.psc.nd.gov/ (last accessed March 31, 2015). *See* N.D. Cent. Code, §§ 49-02-01, 49-02-01.1, 49-02-02, 49-02-03, and 49-02-04 (2014).

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discussed elsewhere in the Report.[3838] However, the Commission continues to represent the state's interest before federal agencies and may enter into negotiations with rail carriers that conduct business in the state.[3839] The Commission has jurisdiction over the rights of landowners in North Dakota, such as fencing along railroad rights-of-way, the sale of land adjacent to abandoned railroad rights of way, and leasing rates on property owned by railroads.[3840]

G. West Virginia Public Service Commission

The West Virginia Public Service Commission's railroad safety section in the transportation enforcement division is responsible for administering federal and state safety regulations that govern rail transportation.[3841] The public safety section conducts inspections and enforces regulations that apply to the railroad industry in the state.[3842] One responsibility of the Commission is to promote safe rail services. For example, the Commission conducts an annual railroad safety camp for children in West Virginia through the nonprofit West Virginia Operation Livesaver to teach safe conduct when approaching grade crossings.[3843]

[3838] N.D. Cent. Code § 10.1-01 (2014).

[3839] *Id*.

[3840] North Dakota Public Service Commission, Jurisdiction: Railroad, available at: http://www.psc.nd.gov/jurisdiction/railroad/index.php (last accessed March 31, 2015). *See* N.D. Cent. Code, §§ 49-09-04, 49-09-04.1, 49-09-11, and 49-11-24 (2014).

[3841] Public Service Commission of West Virginia, Transportation Administration Division, available at: http://www.psc.state.wv.us/div/trans.htm (last accessed March 31, 2015). *See* W. VA. Code §§ 24-2-1 and 24-2-1a (2014).

[3842] Public Service Commission of West Virginia, Mission and Vision Statements, available at: http://www.psc.state.wv.us/missionstatement.htm. *See* W. Va. Code § 22-18-7(b) (2014) (last accessed March 31, 2015).

[3843] Public Service Commission of West Virginia, Transportation Administration Division, available at: http://www.psc.state.wv.us/div/trans.htm (last accessed March 31, 2015).

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H. Wisconsin Public Service Commission

The Public Service Commission of Wisconsin, an independent agency pledged to serve the public interest, regulates Wisconsin's public utilities.[3844] However, the STB regulates railroad rates and services and thus preempts the state's regulation of rates and services.[3845] The Commission retains jurisdiction to enforce federal regulations that apply to railroad services and to conduct fact-finding investigations on railroad practices. The Commission represents the interests of the state and its residents before the STB. The Commission promotes safe and reliable rail services by submitting written comments in response to a notice of proposed rulemaking by the STB. For example, in September 2007, the Commission, in collaboration with a coalition of utilities, agriculture, and manufacturing industries, hosted a forum with the Chair of the STB to call for reforms of the nation's railroad services that would increase the reliability and affordability of railroad service.[3846] Since the forum, the STB penalized the Union Pacific Railroad and the Burlington Northern Santa Fe Railways by requiring them to pay reparations and reduce rates because of overcharging captive utilities in the coal industry.[3847]

[3844] Public Service Commission of Wisconsin, PSC Overview, available at: http://psc.wi.gov/aboutUs/organization/PSCoverview.htm. *See* Wis. Stat. § 196.02(1) (2014) (last accessed March 31, 2015).

[3845] Public Service Commission of Wisconsin, Rail Service in Wisconsin, available at: http://psc.wi.gov/initiatives/railService/railService.htm. *See* 49 U.S.C. § 10501(b) (2014) (last accessed March 31, 2015).

[3846] *E.g.*, the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP), and Badger-Cure, a coalition of utilities, agriculture, and others interested in freight rail shipping rates. *See* Public Service Commission of Wisconsin, Rail Service in Wisconsin, available at: http://psc.wi.gov/initiatives/railService/railService.htm (last accessed March 31, 2015).

[3847] Public Service Commission of Wisconsin, Rail Service in Wisconsin, available at: http://psc.wi.gov/initiatives/railService/railService.htm (last accessed March 31, 2015). *See Western Fuels Association, Inc., and Basin Electric Power Cooperative v. BNSF Railway Co.*, STB Docket No. 42088 (2009); and *United States Magnesium, L.L.C. v. Union Pacific Railroad Co.*, STB Docket No.42114.

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Cases

I. Whether a PUC or the STB has Jurisdiction over the Installation of New Railroad Bridges prior to charging Railroads for their Construction

In *Union Pacific R.R. Co. v. City of Des Plaines*,[3848] an Illinois federal district court, in granting the city of Des Plaines' motion to dismiss, held that the Illinois Commerce Commission had jurisdiction over the matter in dispute.[3849] The Illinois Department of Transportation and the city of Des Plaines planned to straighten Route 14 in Des Plaines but to complete the task a railroad bridge needed to be replaced with two new bridges.[3850] Although Union Pacific offered to repair the current bridge, it refused to pay the suggested two-thirds of the cost for new bridges because they were part of a highway project, not a railroad project, and because the STB preempted the state ICC's jurisdiction.[3851] Union Pacific sought a declaratory judgment to avoid paying the cost of the bridges and an injunction to prevent Des Plaines from petitioning the ICC.[3852]

The court held that 49 U.S.C. § 20106 precluded declaratory and injunctive relief, because the ICC would have to determine whether a local safety or security hazard was present before determining whether Union Pacific could be required to pay for the bridges.[3853] Although

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[3848] 2003 U.S. Dist. LEXIS 20615, at *1 (N.D. Ill. 2003).

[3849] *Id*. at *6-7.

[3850] *Id*. at *1.

[3851] *Id*. at *1-2.

[3852] *Id*. at *4 (*citing* 49 U.S.C. § 10501(b)(2)).

[3853] *Id*. at *6. Section 20106 permits a state to adopt a railroad law that is necessary to eliminate or reduce a local safety or security hazard.

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the city filed a petition on December 16, 2003, the petition was dismissed without prejudice on August 16, 2006. The reason was that the parties did not want the case to remain on the ICC's docket while the city continued to search for funding for the highway portion of the project.[3854]

J. Whether a Public Utility Commission may Authorize a Change in Audible Devices that are Contrary to Federal Law

In *BNSF Railway Co. v. Public Utility Commission*[3855] a California appellate court held that the defendant California Public Utility Commission or CPUC did not have "the authority to order railroads to stop using locomotive-mounted horns at certain pedestrian rail crossings in the City of San Clemente."[3856] In San Clemente, a railroad track separates a beach from the residential and commercial areas of the city. The CPUC approved a project for a trail along the beach and for pedestrian rail crossings to permit access to the trail.[3857] Because approximately fifty passing trains each day were required to sound their horns at each of the seven at-grade pedestrian crossings, there were numerous complaints of noise.[3858] San Clemente petitioned the CPUC to replace the use of horns with an Audible Warning System to be used during non-emergency conditions at the at-grade pedestrian crossings.[3859] BNSF responded to the city's

[3854] *See City of Des Plaines v. Union Pacific Railroad Company*, available at: http://www.icc.illinois.gov/downloads/public/edocket/180071.pdf (last accessed March 31, 2015).

[3855] 218 Cal. App.4th 778, 160 Cal. Rptr.3d 492 (Cal. App. 2013).

[3856] *Id.*, 218 Cal. App.4th at 781, 160 Cal. Rptr.3d at 492-494.

[3857] *Id.*, 218 Cal. App.4th at 781, 160 Cal. Rptr.3d at 493.

[3858] *Id.,* 218 Cal. App.4th at 782, 160 Cal. Rptr.3d at 493-494.

[3859] *Id.*

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petition by arguing that under California state statutes the CPUC had no authority to alter the type of audible warning system used at at-grade pedestrian crossings.[3860]

The California court held that "however broad the scope of the commission's authority over railroad crossings may be, the commission does not have the authority to contravene the expressed will of the Legislature in this area."[3861] The Public Utility Code § 7604, in accordance with 49 C.F.R. § 222.12, requires the use of locomotive-mounted audible warning devices at all crossings in California unless the crossing is located in a federally established quiet zone.[3862] The court set aside the CPUC's decision that it had jurisdiction to consider approving the use of wayside horns in lieu of locomotive-mounted horns.[3863]

[3860] *Id.,* 218 Cal. App.4th at 783, 160 Cal. Rptr.3d at 495.

[3861] *Id.,* 218 Cal. App.4th at 785, 160 Cal. Rptr.3d at 495.

[3862] *Id.,* 218 Cal. App.4th at 781, 160 Cal. Rptr.3d at 493, 503.

[3863] *Id.,* 218 Cal. App.4th at 798, 160 Cal. Rptr.3d at 506.

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XXXIV. QUIET ZONES

A. Introduction

This part of the Report discusses the regulatory framework involving quiet zones. In lieu of train horns, federal law allows for the use of alternative safety measures to "promote the quiet of communities affected by rail operations."[3864] The regulations establish the procedures that govern the establishment of quiet zones and outline the application requirements, minimum requirements, and time frames.[3865] With a few exceptions the regulations preempt state laws, rules, regulations, or orders on the sounding of a locomotive horn at public highway-rail grade crossings. Although states laws provide that quiet zones must comply with federal laws and regulations, state laws that are not preempted may regulate the use of locomotive horns outside federal quiet zones.

Sections B through D, respectively, discuss federal law on the use of audible warnings at highway-rail grade crossings, exceptions to the use of a locomotive horn, and minimum requirements for the establishment of quiet zones. Section E discusses state laws relating to quiet zones. Sections F and G summarize cases on the use of audible warning devices outside federal quiet zones and whether state administrative procedures are preempted. Section H discusses guidance that is available on how to establish a quiet zone.

[3864] 49 U.S.C. § 20153 (2014).

[3865] 49 C.F.R. § 222.33, *et seq.* (2014).

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Statutes and Regulations

B. Audible Warnings at Highway-Rail Grade Crossings

Federal law provides that

> to promote the quiet of communities affected by rail operations and the development of innovative safety measures at highway-rail grade crossings, the Secretary may, in connection with [the] demonstration of proposed new supplementary safety measures, order railroad carriers operating over one or more crossings to cease temporarily the sounding of locomotive horns at such crossings. Any such measures shall have been subject to testing and evaluation and deemed necessary by the Secretary prior to actual use in lieu of the locomotive horn.[3866]

C. Exceptions to the Use of a Locomotive Horn

Section 222.33 gives a railroad operating over a public highway-rail crossing the discretion not to sound its train's horn when the locomotive is traveling fifteen miles per hour or less and members of the trains' crews or appropriately equipped flaggers warn motorists of approaching trains.[3867] The section is not applicable when "active grade crossing warning devices have malfunctioned and [the] use of the horn is required by 49 C.F.R. 234.105, 234.106, or 234.107."[3868]

D. Minimum Requirements for a Quiet Zone

Section 222.35 outlines the minimum requirements for quiet zones.[3869] A quiet zone must be at least one-half mile long.[3870] As long as there is no public highway-rail grade crossing

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[3866] 49 U.S.C. § 20153(e) (2014).

[3867] 49 C.F.R. § 222.33(a) (2014).

[3868] 49 C.F.R. § 222.33(b) (2014).

[3869] 49 C.F.R. § 222.35 (2014).

[3870] 49 C.F.R. § 222.35(a)(1)(i) (2014).

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where locomotive horns are sounded routinely, the minimum length of a quiet zone may be waived when a new Quiet or Partial Quiet Zone is added to an existing quiet zone.[3871] No later than the implementation date for a quiet zone, a quiet zone must be equipped at active grade crossings with warning devices having both flashing lights and gates in conformity with the Manual on Uniform Traffic Control Devices (MUTCD).[3872] Highway approaches to new Quiet and Partial Quiet Zones must "be equipped with an advance warning sign that advises the motorist that train horns are not sounded at the crossing."[3873] Public highway-rail grade crossings in Quiet and Partial Quiet Zones that are "subject[] to pedestrian traffic and equipped with one or more automatic bells shall retain those bells in working condition."[3874]

A public authority may establish quiet zones regardless "of State laws covering the subject matter of sounding or silencing locomotive horns at public highway-rail grade crossings."[3875] A public authority may establish a quiet zone without an application to the FRA as long as it complies with either § 22.39 (a)(1),[3876] (a)(2),[3877] or (a)(3).[3878] If an intended quiet zone does not comply with the aforementioned paragraphs

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[3871] 49 C.F.R. § 222.35(a)(1)(ii) (2014).

[3872] 49 C.F.R. § 222.35(b)(1) (2014).

[3873] 49 C.F.R. §§ 222.35(c)(1)-(2) (2014).

[3874] 49 C.F.R. § 222.35(d)(1) (2014).

[3875] 49 C.F.R. § 222.37 (2014).

[3876] The regulations provide that "[a] quiet zone may be established by implementing, at every public highway-rail grade crossing within the quiet zone, one or more [Supplementary Safety Measures] identified in appendix A of this part." 49 C.F.R. § 222.39(a)(1) (2014).

[3877] 49 C.F.R. § 222.39(a)(2) (2014) provides:

> A quiet zone may be established if the Quiet Zone Risk Index is at, or below, the Nationwide Significant Risk Threshold, as follows:

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> [t]he public authority shall provide written notice, by certified mail, return receipt requested, of its intent to create a New Quiet Zone or New Partial Quiet Zone under § 222.39 … or to implement new [Supplementary Safety Measures (SSM)[3879]] or [Non-engineering Alternative Safety Measures (ASM)[3880]] within a Pre-Rule Quiet Zone or Pre-Rule Partial Quiet Zone under § 222.41(c) or (d) of this part.[3881]

The notice should be sent to: "[a]ll railroads operating over the public highway-rail grade crossings within the quiet zone; the State agency responsible for highway and road safety; and the State agency responsible for grade crossing safety."[3882] A Notice of Intent must be mailed at least sixty days before mailing the Notice of Quiet Zone Establishment; comments may be submitted to the public authority during the sixty–day period after the mailing of the Notice of Intent.[3883] The information that is required to be included in a Notice of Intent, Notice of Quiet

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> (i) If the Quiet Zone Risk Index is already at, or below, the Nationwide Significant Risk Threshold without being reduced by implementation of SSMs; or
>
> (ii) If SSMs are implemented which are sufficient to reduce the Quiet Zone Risk Index to a level at, or below, the Nationwide Significant Risk Threshold."

[3878] The regulations state that a quiet zone may be established when SSMs are implemented that are sufficient to reduce the Quiet Zone Risk Index to a level at or below the Risk Index with Horns. 49 C.F.R. § 222.39(a)(3) (2014).

[3879] The FRA advises that "SSMs are engineering improvements, which when installed at highway-rail grade crossings within a quiet zone, would reduce the risk of a collision at the crossing." United States Department of Transportation, Federal Railroad Administration, Train Horn Rule - Glossary, available at: http://www.fra.dot.gov/Page/P0629 (last accessed March 31, 2015), hereinafter referred to as "Train Horn Rule – Glossary."

[3880] The FRA also states that "[a] safety system or procedure provided by the appropriate traffic control authority which, after individual review and analysis, is determined by the [FRA] to be an effective substitute for the locomotive horn at specific highway-rail grade crossings." Train Horn Rule – Glossary, *supra* note 3879.

[3881] 49 C.F.R. § 222.43(a)(1) (2014).

[3882] *Id*.

[3883] 49 C.F.R. §§ 222.43(b)(1) and (3) (2014).

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Zone Establishment, and Notice of Quiet Zone Continuation is set forth in 49 C.F.R. § 222.43.[3884]

Section 222.7 states that part 222 of the C.F.R. (Use of Locomotive Horns at Public Highway-Rail Grade Crossings) "preempts any State law, rule, regulation, or order governing the sounding of the locomotive horn at public highway-rail grade crossings[] in accordance with 49 U.S.C. 20106."[3885] However, with a few exceptions part 222 does not preempt any state law, rule, regulation, or order that governs "the sounding of locomotive horns at private highway-rail grade crossings or pedestrian crossings;" whether SSMs or ASMs may be used for traffic controls; or "the modification or installation of engineering improvements at highway-rail grade crossings."[3886]

E. State Laws Relating to Quiet Zones

Several states have enacted statutes with procedures and criteria to establish quiet zones that conform to 49 U.S.C. § 20153, including Colorado,[3887] Minnesota,[3888] Montana,[3889] New Mexico,[3890] North Dakota,[3891] Ohio,[3892] and Texas.[3893] For example, the Minnesota statute states:

[3884] 49 C.F.R. §§ 222.43(b)(2), (c)(2), and (d)(2) (2014).

[3885] 49 C.F.R. § 222.7(a) (2014).

[3886] 49 C.F.R. §§ 222.7(b)-(e) (2014).

[3887] Colo. Rev. Stat. § 31-25-1212.5 (2014).

[3888] Minn. Stat. § 219.166 (2014).

[3889] Mont. Code Ann. § 69-14-620 (2014).

[3890] N.M. Stat. Ann. § 63-3-34 (2014).

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> A county, statutory or home rule charter city, or town may apply to the Federal Railroad Administration for the establishment of a "quiet zone" in which the sounding of horns, whistles, or other audible warnings by locomotives is regulated or prohibited. All quiet zones, regulations, and ordinances adopted under this section must conform to federal law and the regulations of the Federal Railroad Administration under United States Code, title 49, section 20153.[3894]

Many states provide information on the federal and local statutes and regulations that are applicable to quiet zones, including California,[3895] Michigan,[3896] Ohio,[3897] and Oregon.[3898] Several cities such as Boulder,[3899] Denver,[3900] Richmond (CA), and San Antonio[3901] also provide information to the public on federal and local statutes and regulations that are associated with quiet zones.

[3891] N.D. Cent. Code 49-11-21 (2014).

[3892] Ohio Rev. Code Ann. § 4955.42 (2014).

[3893] Tex. Transp. Code Ann. § 311.054 (2014).

[3894] Minn. Stat. § 219.166 (2013).

[3895] Quiet Zones, Cal. Pub. Utilities Comm'n, available at: http://www.cpuc.ca.gov/PUC/safety/Rail/Crossings/quietzones.htm (last accessed March 31, 2015).

[3896] Quiet Zones, Mich. DOT, available at: https://www.michigan.gov/mdot/0,1607,7-151-11056_22444_56486_56529---,00.html (last accessed March 31, 2015).

[3897] Railroad Quiet Zones, Ohio Pub. Utilities Comm'n, available at: http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/railroad-quiet-zones/ (last accessed March 31, 2015).

[3898] Train Horn Rule - Quiet Zones, Or. DOT, available at: http://www.oregon.gov/ODOT/rail/Pages/whistle_noise.aspx (last accessed March 31, 2015).

[3899] Train Noise and Quiet Zones, City of Boulder, available at: https://user.govoutreach.com/boulder/faq.php?cid=23324 (last accessed March 31, 2015).

[3900] Quiet Zone Implementation, Regional Transp. Dist., available at: http://www.rtd-fastracks.com/nw_57 (last accessed March 31, 2015).

[3901] Railroad Quiet Zones, San Antonio Dep't Pub. Works, available at: http://www.sanantonio.gov/publicworks/railroadquietzones.aspx (last visited Apr. 24, 2014) (last accessed March 31, 2015).

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Cases

F. California Law Regulating the Use of Audible Warning Devices Outside of Federal Quiet Zones

In *BNSF Railway Company v. Public Utilities Commission*[3902] a California appellate court recognized that federal regulations require the use of audible warning devices in certain situations but not in others.[3903] If a federal regulation leaves it to the states to regulate the use of audible sounds, the state may do so outside of federal quiet zones. In California, the relevant statute is Cal. Pub. Util. Code § 7604, which was amended in 2006 to "replace[] the express requirement of a locomotive-mounted audible warning device with the express requirement that an audible warning device be sounded in accordance with Section 222.21 – a federal regulation that itself expressly requires the sounding of a [l]ocomotive horn…."[3904] Therefore, the legislative intent was to require that an audible warning device mounted on a locomotive must be sounded at every railroad crossing in California.[3905]

Furthermore, the court clarified that although the California statute does not explicitly state that an audible warning device must be mounted on the locomotive, the statute does provide that an audible warning device must comply with § 222.21 of the C.F.R.[3906] Because § 222.21 requires that an audible warning device be mounted on a locomotive, the court held that an

[3902] 160 Cal. Rptr.3d 492, 505 (Cal. Ct. App. 2013).

[3903] *Id.* at 504.

[3904] *Id.* at 505.

[3905] *Id.*

[3906] *Id.* at 503.

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audible device mounted at a crossing was not in accordance with § 222.21.[3907] The court ruled in favor of BNSF and, thus, set aside the decision of the Public Utilities Commission.[3908]

G. Preemption and Administrative Procedures

In *BNSF Railway Company v. Arizona Corporation Commission*[3909] the City of Flagstaff filed an application with the Arizona Corporation Commission to upgrade two crossings by installing additional audible warning devices or wayside horns.[3910] After proper notice to all parties and a full evidentiary hearing, the Commission approved Flagstaff's application. As stated in the Commission's opinion, "the Train Horn Rules do not preempt the Commission's 'administrative procedures' regarding applications for the alteration of public at-grade crossings included or to be included in Quiet Zones[] to the extent that the alterations contemplated involve modification or installation of 'engineering improvements.'"[3911]

The Arizona Court of Appeals agreed and held that because the issue at the hearing was the approval or denial of a modification at a crossing the Commission's actions were administrative procedures.[3912] The "[a]ction taken by the Commission to investigate and approve or deny installation of modifications to crossings, pursuant to statutorily granted authority, maintains its character as an administrative procedure and as such fits within the

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[3907] *Id.*

[3908] *Id.* at 505.

[3909] 268 P.3d 1138 (Ariz. Ct. App. 2012).

[3910] *Id.* at 1139.

[3911] *Id.* at 1140-1141 (citation omitted).

[3912] *Id.* at 1145.

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preemption exemption."[3913] Furthermore, the installation of wayside horns constitutes an "engineering improvement."[3914] The court stated that "[m]aking certain that these modifications (1) are undertaken in a safe manner and (2) provide for physical safety at the crossing after completion (with the exception of the actual sounding of the horn) is precisely what the federal regulations permit State authorities to do."[3915] Inasmuch as the actions of the Commission were not preempted the appellate court affirmed the trial court's order in favor of the Commission.[3916]

Article

H. Guidance on How to Create a Quiet Zone

The FRA provides guidance on how to create Quiet Zones and refers to the relevant statutes and regulations for Pre-Rule Quiet Zones: Qualifying for Automatic Approval, Pre-Rule Quiet Zones not Qualified for Automatic Approval, and Creating a New Quiet Zone using SSMs.[3917] The guidance provides flow charts illustrating the steps that need to be followed to establish or create quiet zones.[3918] Finally, the FRA's guidance provides sample documents and checklists that are associated with the process for establishing quiet zones.[3919]

[3913] *Id.*

[3914] *Id.* at 1146.

[3915] *Id.*

[3916] *Id.*

[3917] United States Dept. of Transp., Federal Railroad Administration, How to Create a Quiet Zone (Sept. 27, 2012), available at: http://www.fra.dot.gov/eLib/details/L03055 (last accessed March 31, 2015). See link for downloading a PDF document for the referenced guidance.

[3918] *Id.*

[3919] *Id.*

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XXXV. RAILROAD RETIREMENT AND DISABILITY EARNINGS ACT

A. Introduction

In the late 1800s and early 1900s, railroad companies were some of the largest and most successful companies in the United States. Over eighty percent of railroad employees had pension plans in the 1920s, plans that faced insolvency and other major financial issues because of the Great Depression in the 1930s.[3920] In 1934, Congress enacted legislation for the regulation of railroad employees' pensions. In 1937, Congress enacted the Railroad Retirement Program.[3921] Since the 1930s, although there have been many changes to the program, the federal government continues to regulate benefits.[3922] Some of the more significant legislative changes are described below.[3923] The Railroad Retirement Program also provides disability benefits for railroad employees who suffer from a permanent physical or mental disability.[3924] Please note that the Railroad Unemployment Insurance Act (RUIA), which replaces state unemployment taxes and arrangements for railroad employees, is discussed in part XXXVII.

Sections B and C discuss the Railroad Retirement Act of 1974 (RRA) and the amendments to the Act, as well as the Railroad Retirement Solvency Act of 1983, the Railroad

[3920] U.S. Comm. on Ways & Means, "Earned Entitlements for Railroad Employees – Legislative History," Green Book (2011), available at: http://greenbook.waysandmeans.house.gov/2011-green-book/chapter-5-earned-entitlements-for-railroad-employees/railroad-retirement-legislative (last accessed March 31, 2015), hereinafter referred to as "Earned Entitlements for Railroad Employees – Legislative History."

[3921] *Id*.

[3922] *Id*.

[3923] *Id*. *See* United States Social Security Administration, "An Overview of the Railroad Retirement Program," Social Security Bulletin Vol. 68, No. 2 (2008), available at: http://www.ssa.gov/policy/docs/ssb/v68n2/v68n2p41.html (last accessed March 31, 2015).

[3924] 45 U.S.C. §§ 231a(a)(1)(iv) and (v) (2014).

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Retirement and Survivors' Improvement Act of 2001, and the American Recovery and Reinvestment Act of 2009. Section D explains some of the key provisions of the RRA. Section E discusses disability benefits. Sections F through K discuss the effect of retirement benefits on claims for damages, employees who are covered by the RRA, the effect of retirement on the ability to bring a claim under the Federal Employers' Liability Act (FELA), whether railroad retirement benefits are a collateral source, and the admissibility of evidence regarding retirement benefits in FELA cases. Section L discusses an article on the collateral source rule.

Statutes

B. Railroad Retirement Act of 1974

The Railroad Retirement Act of 1974 or RRA sets forth the framework currently used for railroad retirement. The 1974 Act divided benefits into two tiers: Tier I, similar to the annuity benefits provided by Social Security, and Tier II, similar to private pension plans with more benefits.[3925]

Tier I benefits, "like social security benefits, and unlike most private pension plans, … are not contractual. Congress may alter or even eliminate them at any time."[3926] Tier II benefits are more similar to a private pension plan in which pension benefits are directly related to a worker's earnings and length of service. Unless an employee suffers a disability, an employee does not receive any benefits until he or she reaches the age of retirement. Railroad employers

[3925] 45 U.S.C. §§ 231-31v (2014).

[3926] *Lee v. Lee*, 727 So.2d 622, 626 (La. App. 1998).

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and employees each pay taxes to the IRS to fund the Tier I and Tier II programs. Social Security and other taxes also fund the program.[3927]

C. Amendments to the 1974 Act

1. Railroad Retirement Solvency Act of 1983

In 1983, financial difficulties caused by declining numbers of railroad employees, inflation, and increased numbers of beneficiaries prompted Congress to make further changes to railroad retirement.[3928] The Railroad Retirement Solvency Act of 1983 instituted measures to increase the financial stability of the program, such as increasing payroll taxes, subjecting Tier II benefits to federal income taxes the same as private pensions, and instituting a five-month waiting period for disability benefits.[3929]

2. Railroad Retirement and Survivors' Improvement Act of 2001

In 2001, Congress modified railroad retirement benefits and financing with the Railroad Retirement and Survivors' Improvement Act (RRSIA). The RRSIA provides employees (and their spouses) who retire after the age of 60 and after completing at least thirty years of railroad service with full Tier I and II benefits.[3930] Spouses may receive their own benefits while the

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[3927] *Id.*

[3928] Earned Entitlements for Railroad Employees – Legislative History, *supra* note 3920.

[3929] Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, 97 Stat. 411, 45 U.S.C. §§ 231-231f, 231f-1, 231m, 231n, 231n-1, 231u, and 231v (1983).

[3930] Railroad Retirement and Survivors' Improvement Act of 2001, Pub. L. No. 107-90, 115 Stat. 878, 45 U.S.C. §§ 231a-31f, 231n, 231n-1, 231q, 231r, 231u, and 231v (2001). *See* Earned Entitlements for Railroad Employees – Legislative History, *supra* note 3920.

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employee is still alive.[3931] The RRSIA repealed a monthly cap on retirement and disability benefits and increased benefits for certain widows of railroad workers.[3932] Furthermore, the RRSIA created the National Railroad Retirement Investment Trust to invest money in government securities and nongovernmental assets.[3933] The RRSIA also modified payroll taxes for railroad employers and employees and made other financial and accounting changes.[3934]

3. American Recovery and Reinvestment Act of 2009

The 2009 changes to railroad retirement plans occurred as a result of the American Recovery and Reinvestment Act (ARRA).[3935] The ARRA included railroad retirement beneficiaries in its one-time economic recovery payments.[3936] The ARRA also extended the length of the maximum time that railroad workers could receive unemployment benefits and excluded up to $2,400 in unemployment and sickness benefits from federal or state income taxes in 2009 and thereafter.[3937]

[3931] *See* U.S. Railroad Retirement Board, "Railroad Retirement Spouse Benefits," available at: http://www.rrb.gov/pdf/lmo_educational_materials/RRB_Spouse_Benefits.pdf (last accessed March 31, 2015).

[3932] Earned Entitlements for Railroad Employees – Legislative History, *supra* note 3920.

[3933] *Id*.

[3934] *Id*.

[3935] Pub. L. No. 111-5, 123 Stat. 115 (2009).

[3936] Earned Entitlements for Railroad Employees – Legislative History, *supra* note 3920.

[3937] *Id*.

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D. Key Provisions of the Railroad Retirement Act

1. Definition of Employer

Section 231(a) of the RRA defines an employer to include, for example, "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49"[3938] and "any railway labor organization, national in scope, which has been or may be organized in accordance with the provisions of the Railway Labor Act, as amended."[3939]

2. Definition of Employee

Under § 231(b) of the RRA an employee includes "any individual in the service of one or more employers for compensation"[3940] and "any individual who is in the employment relation to one or more employers,"[3941] as well as other categories set forth in the statute.[3942]

3. Eligibility Requirements for an Annuity

The eligibility requirements for an annuity are set forth in § 231a(a)(1) of the RRA:

> (1) The following-described individuals, if they shall have completed ten years of service (or, for purposes of paragraphs (i), (iii), and (v), five years of service, all of which accrues after December 31, 1995) and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e), (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title—
>
> (i) individuals who have attained retirement age (as defined in section 216(l) of the Social Security Act [42 U.S.C. 416 (l)]);
> (ii) individuals who have attained the age of sixty and have completed thirty years of service;

[3938] 45 U.S.C. § 231(a)(1)(i) (2014).

[3939] 45 U.S.C. § 231(a)(v) (2014).

[3940] 45 U.S.C. § 231(b)(1)(i) (2014).

[3941] 45 U.S.C. § 231(b)(1)(ii) (2014).

[3942] 45 U.S.C. § 231(b) (2014).

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(iii) individuals who have attained the age of sixty-two and have completed less than thirty years of service, but the annuity of such individuals shall be reduced by 1/180 for each of the first 36 months that he or she is under retirement age (as defined in section 216(l) of the Social Security Act [42 U.S.C. 416 (l)]) when the annuity begins to accrue and by 1/240 for each additional month that he or she is under retirement age (as defined in section 216(l) of the Social Security Act) when the annuity begins to accrue;
(iv) individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty; and
(v) individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

4. Supplemental Annuity

Section 231a(b) describes who is eligible for a supplemental annuity:

An individual who—
(i) has attained age 60 and completed thirty years of service or attained age 65;
(ii) has completed twenty-five years of service;
(iii) is entitled to the payment of an annuity under subsection (a)(1) of this section;
(iv) had a current connection with the railroad industry at the time such annuity began to accrue; and
(v) has performed compensated service in at least one month prior to October 1, 1981;
shall, subject to the conditions set forth in subsections (e) and (h) of this section, be entitled to a supplemental annuity in the amount provided under section 231b of this title: Provided, however, That in cases where an individual's annuity under subsection (a)(1) of this section begins to accrue on other than the first day of the month, the amount of any supplemental annuity to which he is entitled for that month shall be reduced by one-thirtieth for each day with respect to which he is not entitled to an annuity under subsection (a)(1) of this section.[3943]

[3943] *See* United States Railroad Retirement Board, Railroad Retirement and Survivor Benefits, available at: http://www.rrb.gov/pdf/opa/ib2.pdf (last accessed March 31, 2015).

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5. Other Individuals who are Eligible for an Annuity

Other provisions of the RRA provide for an annuity for spouses,[3944] surviving widows and widowers,[3945] children,[3946] and others.[3947]

6. Computation of an Annuity

Section 231b of the RRA governs the computation of an annuity. The amount of the annuity is usually equal to the old-age insurance benefit or disability benefit for which the employee would be eligible under Social Security.[3948] Other provisions in § 231b, however, determine the amount of an annuity as there are provisions that increase or decrease an annuity, as well as other important provisions.[3949] Section 213c applies to the computation of an annuity for a spouse or survivor.[3950]

7. Railroad Retirement Board

The RRA is administered by the Railroad Retirement Board (RRB or Board) established by the Railroad Retirement Act of 1937 as an independent agency in the executive branch.[3951]

8. Judicial Review

With respect to judicial review of a decision of the Board, the law provides:

[3944] 45 U.S.C. § 231a(c) (2014).

[3945] 45 U.S.C. §§ 231a(d)(i) and (ii) (2014).

[3946] 45 U.S.C. § 231a(d)(iii) (2014).

[3947] *See* 45 U.S.C. §§ 231(e) and (e)(a)(5) (2014).

[3948] 45 U.S.C. § 231b(a)(1) (2014).

[3949] 45 U.S.C. § 231b (2014).

[3950] 45 U.S.C. § 231c (2014).

[3951] 45 U.S.C. § 231f(a) (2014).

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> Decisions of the Board determining the rights or liabilities of any person under this subchapter shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act [45 U.S.C. 351 *et seq*.] except that the time within which proceedings for the review of a decision … may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.[3952]

E. Disability Benefits

As stated, the RRA provides disability benefits for certain railroad employees.[3953] The Board has the authority to determine the physical and mental conditions for which employees may be disqualified to work in the several occupations in the railroad industry. The standards are to be determined with the cooperation of employers and employees in the railroad industry.[3954] Regulations regarding the Board's determination of a disability under the RRA are set forth in 20 C.F.R. §§ 220.1—220.187.

Cases

F. Effect of Retirement Benefits on Damages

McCarthy v. Palmer[3955] involved "[a]n interesting question as to the measure of damages in view of the provisions of the Railroad Retirement Act of 1937 (45 U.S.C.A. § 228a *et seq*.)."[3956] In *McCarthy* the Second Circuit denied the railroad employer's request to reduce the amounts of damages for an injury sustained by a railroad employee when he fell from a caboose

[3952] 45 U.S.C. § 231g (2014).

[3953] *See* 45 U.S.C. §§ 231a(a)(1)(iv) and (v) (2014).

[3954] See 45 U.S.C. § 231a(a)(2) (2014).

[3955] 113 F.2d 721 (2d Cir. 1940), *cert. denied*, 311 U.S. 680, 61 S. Ct. 50, 85 L. Ed. 438 (1940).

[3956] *Id.* at 723.

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while working as a trainman.[3957] The railroad employer argued that it mitigated damages by contributing to the railroad retirement pension plan from which the employee would receive an annuity.[3958] The court held that the future benefits that would be received by the employee from his pension plan were the result of his length of service in the railroad industry and not because of his injuries.[3959] Therefore, the railroad employer could not use the amounts contributed to the railroad pension system to reduce the damages to which the employee was entitled.[3960]

G. Employers Subject to the Railroad Retirement Act

In *Herzog Transit Services v. United States Railroad Retirement Board*[3961] the plaintiff Herzog Transit Services (Herzog) contracted with the owners of a railway to operate an interstate commercial rail service and to perform dispatching services. The RRA provides that an employer covered by the law means any rail carrier subject to the jurisdiction of the Surface Transportation Board (STB).[3962] The Railroad Retirement Board determined that because of Herzog's dispatching services Herzog qualified as one performing the functions of a common carrier. Thus, Herzog's dispatching unit was a covered employer under the RRA.[3963] The Seventh Circuit upheld the decision on appeal.[3964]

[3957] *Id.*

[3958] *Id.*

[3959] *Id.*

[3960] *Id.*

[3961] 624 F.3d 467 (7th Cir. 2010).

[3962] *Id.* at 472 (*citing* 45 U.S.C. § 231(a)(1)(i) (2010)).

[3963] *Id.* at 469.

[3964] *Id.* at 478.

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H. Effect of Retirement on an Employee's Ability under FELA to Recover Damages for Lost Future Wages

In *CSX Transportation, Inc. v. Miller*,[3965] Miller, an employee of CSX, brought a claim under FELA for CSX's alleged negligence that caused Miller to sustain a permanent injury to his neck. Because of his pain, Miller decided to retire earlier than he would have but did not file for disability benefits in addition to his retirement benefits.[3966] When Miller later brought a FELA claim, CSX argued that Miller's retirement precluded his ability to recover damages for his loss of future wages.[3967] However, the court held:

> Miller's retirement and his voluntary relinquishment of his right to employment with CSX would not preclude him from seeking as damages under the FELA wages that, but for the alleged negligence of CSX and his resulting injury, he would have continued to earn through his employment with CSX.[3968]

Therefore, the Supreme Court of Alabama held that the trial court did not err in denying CSX's pre-verdict motion for judgment as a matter of law on Miller's claim for lost wage after March 2003.[3969]

I. Computation of Disability Benefits

The Supreme Court of Montana held in *Bonner v. Railway Employees Mutual Ass'n*[3970] that the benefits in § 231(a)(1)(iv) are compensation for the services an employee contributed previously; therefore, the benefits are not measured by an employee's disability.

[3965] 46 So.3d 434 (Ala. 2010).

[3966] *Id.* at 440.

[3967] *Id.* at 444.

[3968] *Id.* at 453.

[3969] *Id.* at 453-454.

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J. Railroad Retirement Benefits are a Collateral Source

The collateral source rule provides that if an injured party is receiving benefits from a collateral source that is independent of the wrongdoer, the benefits will not offset the amount of damages recoverable from one who caused the injury.[3971] In *Sloas v. CSX Transp. Inc.*[3972] the Fourth Circuit held that Tier II benefits received by railroad workers under the Railroad Retirement Act qualify as a collateral source. The Fourth Circuit affirmed the district court's decision that the railroad employer's contribution to funds used to pay for the employee's disability benefits could not be used to offset damages in a FELA claim.[3973]

K. Admissibility of Evidence of Retirement Benefits in FELA Claims

In *Norfolk Southern Railway Co. v. Tiller*,[3974] Tiller, an employee of Norfolk Southern, brought a FELA claim for injuries stemming from an accident at work. Only damages were at issue because Norfolk Southern admitted that it was negligent.[3975] To calculate damages in the form of lost future wages, Tiller testified that he likely would work until he was 65; however, Norfolk Southern wanted to introduce evidence that the RRA would allow Tiller to retire at age 60 with full benefits so that the jury should determine Tiller's loss of future wages until age 60,

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[3970] 119 Mont. 63, 170 P.2d 400 (1946) (*cited by Laird v. Illinois C. G. R. Co*., 208 Ill. App.3d 51, 566 N.E.2d 944, 956 (Ill. App. Ct. 5th Dist. 1991)).

[3971] *See Giddens v. Kansas City S. Ry. Co*., 29 S.W.3d 813 (Mo. 2000); *see also, Melton v. Illinois Cent. Gulf R. Co*., 763 S.W.2d 321 (Mo. Ct. App. 1988).

[3972] 616 F.3d 380, 392 (4th Cir. 2010).

[3973] *Id.*

[3974] 179 Md. App. 318, 944 A.2d 1272 (Md. Ct. Sp. App. 2008).

[3975] *Id.,* 179 Md. App. at 320, 944 A.2d at 1274.

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not 65.[3976] Although the Maryland Special Court of Appeals noted the relevance of the age when an employee would become eligible for retirement benefits, the court held that Tiller's retirement benefits are a collateral source. Such evidence should be excluded at trial "'because of the danger that the jury would use this evidence for the improper purpose of mitigating [Tiller's] damages or reducing [Norfolk Southern's] liability.'"[3977] Therefore, the court upheld the trial court's decision not to admit evidence of the employee's eligibility for railroad retirement benefits.[3978]

Articles

L. Recourse for Railroads after the *Tiller* Decision

An article entitled "Pension Benefits as an Evidentiary Collateral Source"[3979] discusses a possible unique application of the collateral source rule after the decision in *Tiller*. The article states that although the *Tiller* decision favors plaintiffs, the railroads are not left without recourse.[3980] A decision prior to *Tiller* implied that patterns of retirement among railroad workers, rather than retirement benefits, should be admissible to determine damages for lost future wages.[3981] The authors argue that "[w]hile pension benefits themselves cannot be

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[3976] *Id.*, 179 Md. App. at 321, 944 A.2d at 1275.

[3977] *Id.,* 179 Md. App. at 341, 944 A.2d at 1287 (*quoting Griesser v. National Railroad Passenger Corp.*, 2000 PA Super 313, P24, 761 A.2d 606, 613 (Pa. Super. 2000)).

[3978] *Id.,* 179 Md. App. at 339-340, 944 A.2d at 1285-1286.

[3979] Lane B. Hudgins and Thomas R. Ireland, "Pension Benefits as an Evidentiary Collateral Source," 15 *J. Legal Econ.* 75 (2008).

[3980] *Id*. at 77-78.

[3981] *Id*. (*citing Griesser v. National Railroad Passenger Corp.*, 2000 PA Super 313, 761 A.2d 606 (Pa. Super. 2000)).

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introduced to demonstrate the unlikelihood of a railroad worker working to age 65, the retirement percentages of railroad workers with 30 years of railroad experience that were discussed above do not require specific mention of pension benefits."[3982] The authors argue that an expert for the defense "could presumably testify about the percentages of railroad workers with 30 years of railroad experience who retire at ages 60, 61, 62, and 63" as long as the intent is not to "bring pension benefits to the attention of the jury."[3983] They discuss three "decisions that have reached the conclusion that pension benefits are an evidentiary collateral source in the sense that we have been describing."[3984]

M. Railroad Retirement Tax Act and Role of Railroad Retirement Board

According to the Internal Revenue Service (IRS) Railroad Retirement Tax Act (RRTA) Desk Guide, dated January 2009,[3985] the RRTA is the responsibility of the IRS and the Railroad Retirement Board (RRB). Railroad employers are subject to a system of employment taxes that is separate from the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) that cover "most other employers."[3986] RRTA taxes fund railroad worker retirement benefits that are the responsibility of the IRS. Thus, the RRB's role is to administer the benefits of the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA). As for who is an employer subject to the RRTA, the RRB investigations on

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[3982] *Id*. at 78 (footnote omitted)).

[3983] *Id*.

[3984] *Id*. at 77.

[3985] Available at: http://www.irs.gov/Businesses/Railroad-Retirement-Tax--Act-%28RRTA%29-Desk-Guide-%28January-2009%29#2 (last accessed March 31, 2015), hereinafter referred to as "IRS RRTA Desk Guide."

[3986] *Id*.

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whether an employer is an RRA employer are referred to as "determinations of coverage."[3987] However, the IRS's policy is to construe "the term 'employer' for RRTA purposes in the same manner" as the term is construed and applied for RRA and RUIA purposes.[3988] The IRS also notes that the STB "requires companies involved in the transportation industry to file reports and to list in these reports all affiliated companies"[3989] and that "[a]ny company listed in these schedules will generally be railroad employers set out in Treas. Reg. § 31.3231(a)-1."[3990]

[3987] *Id*.

[3988] *Id*. (*citing* Rev. Rul. 77-445, 1977-2 C.B. 357; Rev. Rul. 74-121, 1974-1 C.B. 300; *City of Galveston by and through Board of Trustees v. United States*, 33 Fed. Cl. 685 (1995); *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371 (7th Cir. Ill. 1987*); Galveston by and through Board of Trustees v. United States*, 22 Cl. Ct. 600 (1991); and *Carland, Inc. v. United States*, 75 A.F.T.R.2d 1234 (W.D. Mo. 1995)).

[3989] *Id*. The IRS RTA Desk Guide notes that "[t]hese reports provide information regarding the principal business activity, the form of control, the percentage of control, along with information regarding any other company that may own a portion of the affiliated company."

[3990] *See id*. for an extensive list of categories of railroad employers subject to the RRTA.

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XXXVI. RAILROAD REVITALIZATION AND REGULATORY REFORM ACT AND OTHER RAILROAD TAXATION ISSUES

A. Introduction

The Railroad Revitalization and Regulatory Act (4R Act) prohibits the imposition of discriminatory taxes on rail carriers at the state level. Section B discusses the 4R Act, its definitions, and its prohibitions on discriminatory taxes on railroads. Section C discusses judicial approaches to determining the proper class of property or proper taxpayer to use to compare to railroad property or railroad companies being assessed. Some courts use a functional approach that compares the property of railroad companies to the property of other industrial and commercial properties in the area, whereas other courts use a competitive approach that compares a railroad company to its main competitors in the area in determining whether the assessed taxes discriminate against railroads.

Sections D through G, respectively, discuss cases involving the scope of § 11501(b)(4) of the 4R Act, whether an Oregon *ad valorem* tax was discriminatory as to railcars, whether a state's exemption of a railroad's competitors from the state's sales tax is discriminatory under § 11501(b)(4) of the 4R Act, whether privately owned but affiliated companies are protected by the 4R Act, federal laws that require railroads that are reorganizing in bankruptcy to pay taxes that are owed to a state, and the tax liability of trustees of railroads that are undergoing reorganization. Finally, section H discusses an article on the meaning of the 4R Act within the context of the Commerce Clause of the United States Constitution.

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B. The Railroad Revitalization and Regulatory Reform Act

Statute

1. Definition of Rail Transportation and of Commercial and Industrial Property

The 4R Act defines the term "rail transportation property" to be that property "owned or used by a rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation] Board."[3991] The term "commercial and industrial property" is defined as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax."[3992]

2. The 4R Act's Prohibition on Taxes that Discriminate against Railroads

Section 11501(b) of the 4R Act describes "acts [that] unreasonably burden and discriminate against interstate commerce" that the 4R Act prohibits.[3993] Under subsection (b)(4) of the 4R Act a state, subdivision of a state, or an authority acting for a state or subdivision of a state may not "[i]mpose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part."[3994]

Although the entire statute should be reviewed, § 11501(c) of the 4R Act provides in part that "[r]elief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed

[3991] 49 U.S.C. § 11501(a)(3) (2014).

[3992] 49 U.S.C. § 11501(a)(4) (2014).

[3993] 49 U.S.C. § 11501(b) (2014).

[3994] 49 U.S.C. § 11501(b)(4) (2014).

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value to true market value of other commercial and industrial property in the same assessment jurisdiction."[3995] State law determines the burden of proof for determining assessed value.[3996]

Finally, § 11501(c) of the 4R Act grants jurisdiction to federal district courts "without regard to the amount in controversy or citizenship of the parties" to provide relief when there is a violation of subsection (b) of the statute.[3997]

Cases

C. Judicial Approaches to Determining the Proper Class of a Property or Taxpayer for Comparison to Railroad Property or a Railroad Company

1. The Functional Approach

In *Kansas City S. Ry. Co. v. Koeller,*[3998] involving the 4R Act, the Seventh Circuit held that a tax was discriminatory that was applied to railroad property located in a flood zone that was taxed in a manner that differed from other commercial and industrial properties in the same zone. Kansas City Southern and Norfolk Southern operate on Sny Island in Illinois that has a levee and drainage system to prevent flooding caused by the Mississippi River.[3999] Each year for decades Sny Island collected an annual maintenance assessment from landowners, including railroads.[4000] With some adjustment based on the elevation of each track of land,

[3995] 49 U.S.C. § 11501(c) (2014).

[3996] *Id*.

[3997] *Id*.

[3998] 653 F.3d 496 (7th Cir. 2011), *injunction granted, on remand,* 2011 U.S. Dist. LEXIS 97235 (C.D. Ill., Aug. 30, 2011), *cert. denied*, 132 S. Ct. 855, 181 L. Ed.2d 551, 2011 U.S. LEXIS 8932 (U.S., Dec. 12, 2011).

[3999] *Id.* at 499.

[4000] *Id*.

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> Sny Island simply divided its operating budget by the total number of benefited acres and assessed a per-acre fee to each landowner based upon the number of acres owned. … On average, landowners paid $8.50 per acre. This rate had been in place since 1987 and, by all accounts, it provided sufficient funding for the [Sny Island Levee Drainage] District.[4001]

However, after 2008 because of severe flooding and an increase in the price of diesel fuel, the commissioners of Sny Island decided that an increase in the annual maintenance assessment was required for 2009.[4002] Although the opinion discusses in detail how the new assessment was determined, in essence the approach for railroads was to "multipl[y] the total cost of replacing the rail line – which includes ballast (the layer of crushed rock on which the railroad track is laid), track, ties, and embankments – by the number of days" the rail line was expected "to be closed as a result of a flood or clean-up following a flood."[4003]

Although the approach was refined before being implemented, the result was that

> the commissioners adopted a benefit figure of $1,296,125 for Kansas City Southern and $1,422,990 for Norfolk Southern. [F]or the Railroads this 'refined' assessment represented an astronomical increase in assessment: $85,545 for Kansas City Southern, a 4800% increase over its 2008 assessment of $1,774, and $93,920 for Norfolk Southern, an 8300% increase over its 2008 assessment of $1,126. Had the Railroads been assessed on a per-acre basis for 2009, Kansas City Southern would have been obligated to pay $3,898, while Norfolk Southern would have owed $2,578.[4004]

The railroad companies brought an action under the 4R Act for a violation of 49 U.S.C. § 11501(b)(4), which provides that a state may not "impose another tax that discriminates against a

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[4001] *Id.* at 499-500.

[4002] *Id.*

[4003] *Id.* at 501.

[4004] *Id.* at 502.

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rail carrier providing transportation subject to the jurisdiction of the Board under this part."[4005] The district court held that the railroads failed to prove a violation under § 11501(b)(4) because they failed to present evidence of the true market value of the property.[4006]

On appeal, the Seventh Circuit addressed two questions: "first, whether the assessment charged by Sny Island constitutes 'another tax' within the meaning of subsection (b)(4) of the 4R Act; and second, if so, whether that tax impermissibly discriminates against them."[4007] The court held that the fee imposed by the island constituted a tax under § 11501(b)(4).[4008] As the commissioners conceded, the fee

> raises general revenues, and its ultimate use is for the whole District. Unlike an assessment for a small project, the money raised is available for all the work of the District; no particular expenditure is tied to a particular benefit obtained by a specific taxpayer. The commissioners use their funds to pay their salaries, make repairs to levees far away from railroad property, purchase new equipment, and pay for diesel fuel to operate the pumps. Bearing in mind the expansive reading of the term "tax" that the Supreme Court has endorsed, this is enough to make it a "tax" for purposes of the 4-R Act.[4009]

As for whether the tax discriminated against railroads, the court first had to determine the class of property to which the railroads' property should be compared.[4010] The circuit courts of appeal generally have utilized three approaches: (1) a universal approach that examines all property owners in the area; (2) a functional approach that considers other commercial and

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[4005] 49 U.S.C. § 11501(b)(4).

[4006] *Kan. City S. Ry. Co.*, 653 F.3d at 503.

[4007] *Id.* at 504.

[4008] *Id.* at 507.

[4009] *Id.* (citation omitted).

[4010] *Id.* at 508.

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industrial property in the area; and (3) a competitive approach that compares railroad companies to their main competitors in the area.[4011] The court concluded that the intent of Congress was that § 11501(b)(4) of the 4-RAct must be read in conjunction with subsections (1)-(3) of § 11501(b) because the other subsections use commercial and industrial property for the purpose of comparison.[4012] Because the island imposed the tax unequally on commercial and industrial property owners, the court held that the tax was discriminatory.[4013] The Seventh Circuit remanded the case to the district court to enjoin the 2009 assessment, although "leaving the [Sny Island Levee Drainage] District free to go back to the drawing board and craft an assessment that is nondiscriminatory."[4014]

2. The Competitive Approach

In *Burlington N. Santa Fe Ry. Co. v. Lohman,*[4015] also concerning the 4R Act, the Eighth Circuit considered allegations of discrimination in the taxation of railroad companies with respect to Missouri's general sales and use taxes on diesel fuel for which trucks and barges were exempt. BNSF alleged that the imposition of the tax on it but not on its competitors, trucks and barges, was discriminatory in violation of the 4R Act.[4016] The court stated that under the 4R Act

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[4011] *Id.*

[4012] *Id.* at 509.

[4013] *Id.* at 511.

[4014] *Id.* at 512. Also applying the functional approach are *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona,* 78 F.3d 438 (9th Cir. 1996) (holding that the district court erred in applying the competitive approach to § (b)(4)); *Kansas City S. Ry. Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987) (holding that the Louisiana Tax on Transportation and Communication Utilities violated the section).

[4015] 193 F.3d 984 (8th Cir. 1999).

[4016] *Id.* at 985.

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there are two possible classes from which to choose to compare railroad property and the property of other taxpayers: the "competitive mode class" and the commercial and industrial class.[4017] The court stated that the purpose of § 11501(b)(4) of the 4R Act is "to prevent discriminatory taxation in any form and to cover a wide variety of taxing techniques" and that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case."[4018] The Eighth Circuit concluded that Congress purposefully omitted a "specific comparison class" from the subsection and therefore held that the "proper comparison class for Missouri sales and use taxes is the competitive mode."[4019]

As for whether the tax discriminated against BNSF, the court considered the sales and use taxes imposed on fuel to determine whether there was a discriminatory application of the tax.[4020] Because barges and trucks did not pay a tax that the railroads were required to pay, the court held that the tax was discriminatory.[4021] In reversing and remanding the district court's holding that the tax was nondiscriminatory, the Eighth Circuit instructed the district court to enter a declaratory judgment and to grant BNSF injunctive relief.[4022]

[4017] *Id.*

[4018] *Id.* at 986.

[4019] *Id.*

[4020] *Id.*

[4021] *Id.*

[4022] *Id.* Also applying the competitive approach are *Burlington N. R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993) (applying the competitive approach to § (b)(4) and holding that the Minnesota sales and use taxes imposed on the railroad were discriminatory under § (b)(4) when compared to the taxes imposed on other forms of transportation); and *Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338 (Iowa 1983) (applying the competitive approach to § (b)(4) and holding that the Iowa tax on fuel consumption violated the subsection when the tax on the railroad was compared to taxes imposed on other transportation industries).

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D. Scope of Section 11501(b)(4)'s Prohibition on Discriminatory Taxes

1. Whether State *Ad Valorem* Tax that Exempted Certain Classes of Business Property applied to Railroad Cars

Another case involving the 4R Act is *Dep't of Revenue v. ACF Industries, Inc.*[4023] The issue was Oregon's *ad valorem* tax that was imposed on all property except for certain "classes of business personal property [that were] exempt."[4024] Railroad companies brought an action for declaratory and injunctive relief because the Oregon tax applied to the companies' railroad cars when other classes of personal property were exempt.[4025] A district court held that Oregon's *ad valorem* property tax did not violate subsection (b)(4) of § 11503 of the 4R Act because the tax did not exempt "more than 50% of nonrailroad commercial personal property."[4026] In reversing the district court, an appeals court held that an exemption from a tax that is allowed taxpayers other than railroad companies may come within subsection (b)(4) of § 11503 and be discriminatory.[4027]

The Supreme Court held that because "identical words" used in a statute in different sections must have the same meaning, the meaning of "commercial and industrial property" throughout the act must mean "property subject to a property tax levy" as it is defined in subsection (c)(1).[4028] Therefore, "the definition of 'commercial and industrial property' excludes

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[4023] 510 U.S. 332, 343, 114 S. Ct. 843, 849, 127 L Ed.2d 165, 175 (1993).

[4024] *Id.*, 510 U.S. at 335, 114 S. Ct. at 846, 127 L. Ed.2d at 170.

[4025] *Id.*, 510 U.S. at 335-336, 114 S. Ct. at 846, 127 L. Ed.2d at 171.

[4026] *Id.*, 510 U.S. at 337, 114 S. Ct. at 847, 127 L. Ed.2d at 172.

[4027] *Id.*, 510 U.S. at 337-338, 114 S. Ct. at 847, 127 L. Ed.2d at 172.

[4028] *Id.*, 510 U.S. at 341, 342, 114 S. Ct. at 848-849, 127 L. Ed.2d at 174-175.

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property that is exempt [from a tax]" because exempt property is not covered under subsections (b)(1)-(3) that refer to commercial and industrial property.[4029] The court held that "[i]t would be illogical to conclude that Congress, having allowed the State to grant property tax exemptions in subsections (b)(1)-(3), would turn around and nullify its own choice in subsection (b)(4)."[4030] The Supreme Court reversed and remanded.[4031]

2. Whether a State's Exemption of a Railroad's Competitors from the State's Sales Tax is Discriminatory under § 11501(b)(4) of the 4R Act

1. Decision by the Eleventh Circuit

In *CSX Transportation, Inc. v. Alabama Dep't of Revenue,*[4032] although rail carriers, motor carriers, and water carriers compete for business shipping freight in interstate commerce, Alabama has a different method of taxing diesel fuel tax according to the type of carrier. Rail carriers pay a four percent state sales tax; motor carriers pay an excise tax of nineteen cents per gallon; and water carriers pay no fuel tax.[4033] Section 11501(b)(4) of the 4R Act provides that a state may not impose a tax that discriminates against a rail carrier. CSX Transportation Inc. (CSX) alleged that Alabama's exemption of its main competitors from the state's sales tax

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[4029] *Id.*, 510 U.S. at 342, 114 S. Ct. at 849, 127 L. Ed.2d at 175.

[4030] *Id.*, 510 U.S. at 343, 114 S. Ct. at 849, 127 L. Ed.2d at 175.

[4031] *Id.*, 510 U.S. at 348, 114 S. Ct. at 852, 127 L. Ed.2d at 178.

[4032] 720 F.3d 863 (11th Cir. 2013), *reversed, remanded, CSX Transportation, Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 179 L. Ed.2d 37 (2011), *reversed and remanded*, *Ala. Dep't of Revenue v. CSX Transp*., 135 S. Ct. 1136, 191 L. Ed.2d 113, 2015 U.S. LEXIS 1739 (U.S., Mar. 4, 2015).

[4033] *Id*. at 865.

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discriminated against rail carriers because CSX's competitors are granted a competitive advantage.[4034]

The Supreme Court reversed and remanded the Eleventh Circuit's affirmance of a district court's dismissal of the CSX complaint.[4035] The Court held that CSX could challenge Alabama's sales and use taxes on the basis that they discriminate against rail carriers under § 11501(b)(4).[4036]

On remand, the district court held that the sales tax did not discriminate against CSX in violation of the 4R Act because motor carriers paid a similar amount in taxes and CSX did not demonstrate that the exemption of water carriers was discriminatory.[4037]

The Eleventh Circuit reversed and remanded, holding that the Alabama sales tax discriminates against rail carriers and that the state did not offer a sufficient justification for the discrimination. The court ruled that the competitive model applied; that the purpose of the 4R Act was to ensure "financial stability" for rail carriers; and that rail carriers, therefore, had to be compared to their competitors that offer freight transportation within the state of Alabama rather than to all tax payers in the state.[4038] The court further ruled that CSX established a *prima facie* case for discrimination because CSX has to pay a four percent sales tax whereas its competitors are not required to pay it.[4039] Thus, the state had the burden of justifying the discriminatory tax.

[4034] *Id*.

[4035] *CSX Transportation, Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 179 L. Ed.2d 37 (2011).

[4036] *CSX Transportation, Inc.,* 720 F.3d at 866.

[4037] *Id*. at 866, 867.

[4038] *Id*. at 869.

[4039] *Id*. at 871.

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Although Alabama argued that motor carriers and rail carriers pay roughly the same amount in taxes in spite of the difference in the form of taxation, the state failed to justify why the rail carrier's competitors were exempt from the four percent sales tax.[4040]

> This case, then, becomes much simpler than it would appear at first blush. Rail carriers pay the State's sales tax--motor and water carriers do not. It is not a sufficient justification for the State to counter that its tax code will ultimately level the playing field.[4041]

On July 1, 2014, the Supreme Court granted *certiorari*.[4042]

2. Second Reversal and Remand by the Supreme Court

On March 4, 2015, in an opinion by Justice Scalia, the Supreme Court reversed and remanded the case for the second time.[4043] First, the Court agreed with the Eleventh Circuit that "a comparison class of competitors consisting of motor carriers and water carriers was appropriate[] and differential treatment vis-à-vis that class would constitute discrimination."[4044] Second, however, the Court held that it was improper for the Eleventh Circuit to refuse to consider Alabama's alternative tax justifications:

> We think that an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory. …
>
> It is undoubtedly correct that the "tax" (singular) must discriminate--but it does not discriminate unless it treats railroads differently from other similarly situated taxpayers without sufficient justification….

[4040] *Id*.

[4041] *Id*.

[4042] *Ala. Dep't of Revenue v. CSX Transp., Inc*., 134 S. Ct. 2900, 189 L. Ed.2d 854 (2014).

[4043] *Ala. Dep't of Revenue v. CSX Transp.,* 135 S. Ct. 1136, 191 L. Ed.2d 113, 2015 U.S. LEXIS 1739, at *1 (U.S., Mar. 4, 2015).

[4044] *Id.,* 135 S. Ct. at 1143, 191 L. Ed.2d at 122, 2015 U.S. LEXIS 1739, at *14.

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There is simply no discrimination when there are roughly comparable taxes.[4045]

The Court remanded the case to the Eleventh Circuit for "for that court to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption."[4046]

E. Privately Owned, Unaffiliated Companies not are Protected by the 4R Act

The 4R Act's bar on discriminatory taxes against rail carriers does not extend to privately owned companies when the challenged tax is not one that is imposed on a railroad company. In *Midwest Railcar Repair, Inc. v. South Dakota Dep't of Revenue & Regulation*[4047] a railcar repair company brought an action against the South Dakota Department of Revenue & Regulation. The Midwest Railcar Repair (Midwest) argued that the sales and complementary use tax that the revenue department imposed on Midwest's repair services violated the 4R Act because the tax was "tantamount to imposing 'another tax that discriminates against a rail carrier.'"[4048] The Eighth Circuit held, however, that the only entities that come within the protection of the 4R Act are railroads or "other entities that can show 'that because of the close relationship between [themselves] and common carriers by railroad, tax discrimination against [the non-railroad entities] *results* in discriminatory treatment of common carriers by railroad.'"[4049] Therefore,

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[4045] *Id.,* 135 S. Ct. at 1143–44, 191 L. Ed.2d at 122-123, 2015 U.S. LEXIS 1739, at *15, 16.

[4046] *Id.,* 135 S. Ct. at 1144, 191 L. Ed.2d at 123, 2015 U.S. LEXIS 1739, at *16.

[4047] 659 F.3d 664 (8th Cir. 2011).

[4048] *Id.* at 665-666 (citation omitted).

[4049] *Id.* at 669 (*quoting Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471 N 5 (8th Cir. 1983) (emphasis in original).

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entities protected by the 4R Act may include adjuncts or corporate subsidiaries but not "unaffiliated enterprises that merely provide[] railcar repair services."[4050]

Statutes

F. Reorganizing Railroads Required to Pay Taxes Due to the State

Railroads undergoing reorganization due to bankruptcy are barred from withholding taxes owed to any state.[4051] In 1975, Congress enacted the Regional Rail Reorganization Act Amendments (RRRA Amendments) in order "'to provide emergency financial assistance to bankrupt rail carriers in the Northeast and Midwest in order to continue essential rail services.'"[4052] The goal of the RRRA Amendments was "to prevent the imminent cessation of rail service for lack of cash."[4053] Although apparently a rarely used provision in the 4R Act, § 794 of the RRRA Amendments require that a portion of the monies collected from the debtor railroad's tenants be used to pay the railroad's portion of tax owed to a state or its political subdivision.[4054] Railroads that withhold any portion of a tax owed to a state that has been collected from its tenants are subject to a fine of "not more than $10,000 for each such violation."[4055]

[4050] *Id.* at 670.

[4051] 45 U.S.C. § 794 (2014).

[4052] *In re Pa. Cent. Transp. Co.,* 402 F. Supp. 106, 107 (E.D. Penn. 1975) (*quoting* House Committee, 94th Cong., Rep. on Interstate and Foreign Commerce 3 (1975)).

[4053] *Id.* at 109.

[4054] 45 U.S.C. § 794(a) (2014).

[4055] 45 U.S.C. § 794(b) (2014).

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G. Tax Liability for Trustees of Railroads Undergoing Reorganization

Receivers or trustees of railroads undergoing reorganization must pay taxes when the railroad is still being operated as though it were conducted by an individual or corporation.[4056] Federal law states that "officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."[4057] However, there are exceptions for specific situations, such as when the tax is a property tax secured by a lien against abandoned property[4058] or the payment of the tax is otherwise excused under a specific provision of Title 11.[4059]

Article

H. The 4R Act within the Context of the Commerce Clause

The 4R Act is said to be best understood in the context of the Commerce Clause. However, an article in the *Michigan State Law Review* argues that Congress acts "outside the scope of [its broad] power when it preempts a state tax that does not reflect economic protectionism."[4060] The author argues that

> [m]ost of the recently proposed Congressional preemptions fall into this latter category, as they purport to preempt state taxes as applied to a specific industry merely on the theory that state taxes apply more heavily to that industry-i.e., a

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[4056] *See* 28 U.S.C. § 960(a) (2014); *Lyford v. New York*, 140 F.2d 840 (2d Cir. 1944).

[4057] 28 U.S.C. § 960(a) (2014).

[4058] 28 U.S.C. § 960(b)(1) (2014).

[4059] 28 U.S.C. § 960(b)(2) (2014).

[4060] Michael T. Fatale, "Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax," 2012 *Mich. St. L. Rev*. 41, 46 (2012).

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> supposed "discrimination" as between types of industries-and not because the state is favoring in-state commercial interests.[4061]

The article discusses the Commerce Clause's impact on the 4R Act and focuses on Congress's unique treatment of railroads.[4062] Although the article considers the 4R Act to be one that addresses economic protectionism, the author does conclude that Congress's treatment of railroads under the Act is more consistent with the historic application of the Commerce Clause rather than an unjustified usurpation of state power.[4063] The author observes that the

> protection of "interstate transportation" is one of the rare areas where the Supreme Court "appears to do more under the dormant Commerce Clause than merely suppress state protectionism," likely because "there is a genuine … national interest in the existence of an effective transportation network linking the states' even though the 'Constitution does not say that explicitly.'"[4064]

The article argues that there is a tendency for Congress to preempt state taxes because of the absence of "stated judicial rules that specifically impose limitations on such federal preemptions."[4065] The absence of specific limitations creates unchecked Congressional "capacity to preempt state taxes."[4066] The author argues that the Commerce Clause should be construed in a manner that respects both federal and state power.[4067]

[4061] *Id*.

[4062] *Id*. at 100.

[4063] *Id*. at 100-101.

[4064] *Id*. (*quoting* Donald H. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," 84 *Mich. L. Rev*. 1091, 1182-84 (1986)).

[4065] *Id*. at 102.

[4066] *Id*.

[4067] *Id*.

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XXXVII. RAILROAD UNEMPLOYMENT INSURANCE ACT

A. Introduction

This part of the report discusses statutory provisions, cases, and articles on the Railroad Unemployment Insurance Act (RUIA). As the IRS has explained, the RUIA is an unemployment and sickness insurance benefit program for railroad workers.[4068] The Railroad Retirement Board (RBB) administers the RUIA.[4069] Section B discusses the RUIA, benefits payable under the Act, and conditions to receiving benefits. Sections C through G discuss what constitutes an employer under the Act, whether an employee's receipt of severance pay disqualifies the employee from receiving RUIA benefits, whether an employee who refuses to return to work may receive benefits, whether an employee may collect a state pension as well as RUIA benefits, and whether double beneficiaries under the RUIA and the Social Security Act lose one hundred percent of an overpayment. Finally, Sections H and I discuss two articles, one on the history of railroad unemployment insurance, and the other on trends in railroad unemployment insurance with a comparison of the federal program to state unemployment insurance.

[4068] IRS RRTA Desk Guide, *supra* note 3985.

[4069] *Id*.

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Statutes and Regulations

B. Railroad Unemployment Insurance Act

1. Benefits under the RUIA

Under the RUIA any qualified employee who has been unemployed for over four days in a registration period is entitled to receive benefits.[4070] However, if an employee's unemployment is because of a strike the employee is not entitled to benefits for the first fourteen days of unemployment.[4071] Sick days exceeding four days in one registration period also require the payment of benefits.[4072] An employee may receive benefits only for 130 sick days and 130 days of unemployment.[4073]

2. Qualified Employees and Willingness to Work under the RUIA

Under the regulations an employee qualifies for coverage when the employee meets two requirements.[4074] First, the employee must have earned at least two and one-half months pay during the year.[4075] Second, if the employee did not receive compensation the previous year he or she must have received compensation in five months of the current year.[4076] Moreover, the regulations provide that an employee may receive benefits for unemployment only if the

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[4070] 45 U.S.C. § 352(a)(1)(A) (2014).

[4071] *Id*.

[4072] 45 U.S.C. § 352(a)(1)(B) (2014).

[4073] 45 U.S.C. § 352(c) (2014).

[4074] 20 C.F.R. § 302.3(a) (2014).

[4075] *Id*.

[4076] *Id*.

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employee is willing to work.[4077] An employee is willing to work when the employee is "willing to accept and perform for hire such work as is reasonably appropriate" under the circumstances.[4078]

Cases

C. Whether a Company Acting as a Dispatcher is an Employer under the RUIA

In 1994 the Railroad Retirement Board (Board) declared that Herzog Transit Services, Inc. (Herzog), a commuter train operator, was not an employer as the term is defined under the RUIA.[4079] In 2006, at the request of an employee of Herzog, after a hearing to determine whether Herzog's status as an employer had changed,[4080] the STB found that only Herzog's dispatching unit was an employer under the Act.[4081] In support of its decision, the Board considered the Federal Railroad Administration's (FRA) regulations that recognize that the role of dispatching is indispensible to carrier service.[4082]

Under the Railroad Retirement Act (RRA), an employer is defined in one of five ways.[4083] The definition relevant to this case was that the term includes "any carrier by railroad

[4077] 20 C.F.R. § 327.1(2014).

[4078] 20 C.F.R. § 327.5(b) (2014).

[4079] *Herzog Transit Servs., Inc. v. U.S. R.R. Ret. Bd.*, 624 F.3d 467, 468 (7th Cir. 2010), *rehearing, en banc, denied,* 2011 U.S. App. LEXIS 618 (7th Cir., Jan. 3, 2011).

[4080] *Id.* at 469.

[4081] *Id.*

[4082] *Id.* at 469-470.

[4083] *Id.* at 472.

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subject to the [STB]."[4084] The Board reasoned that the parties before it and in other cases have assumed that the RUIA defines an employer in the same manner as the RRA.[4085] The Board ruled that Herzog's role as a dispatcher was integral to the operation of intrastate trains and, therefore, that Herzog was a rail carrier under the statute.[4086] The Seventh Circuit upheld the Board's decision because it was consistent with the factors that the Board must consider in determining whether a company is covered by the Act.[4087] The factors include the purpose of the company, the ratio of carrier business to other business, and the nature of the carrier business separate from other activities.[4088]

D. The Receipt of Severance Pay Bars an Employee from Receiving Benefits under the RUIA

On August 18, 2000, after Phoebe Hudspeth, an employee of BNSF, was fired after she refused to sign a Resignation and Release Agreement with severance pay,[4089] Hudspeth secured other employment. However, on August 24, 2001, after Hudspeth was terminated at her second job she signed the agreement previously offered to her by BNSF and received severance pay.[4090] Hudspeth received unemployment benefits under the RUIA for a period of unemployment from

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[4084] *Id.* (*quoting* 45 U.S.C. § 235(a)(1)(i)).

[4085] *Id.*

[4086] *Id.* at 474.

[4087] *Id.* at 475-476 (*citing* 20 C.F.R. § 202.3).

[4088] *Id.* at 476.

[4089] *Hudspeth v. Railroad Retirement Board*, 73 F. Appx. 191 (8th Cir. 2003).

[4090] *Id.* at 191

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February 26 to August 12, 2001.[4091] Thereafter, Hudspeth was notified that she could not receive benefits when she already had received severance pay, a determination that the Board confirmed after the employee appealed.[4092] Under the statute an employee may not receive benefits when the employee has received a separation allowance.[4093] The Eighth Circuit affirmed the Board's ruling that severance pay the employee received was a "separation allowance" that barred her from receiving other benefits.[4094]

E. Unemployment Benefits Unavailable to Workers who Refuse to Return to Work

In *Cobb v. Retirement Railroad Board,*[4095] Cobb, a train switchman, appealed a decision by the Retirement Railroad Board that found him ineligible for benefits because after his seniority was restored he still did not return to work and voluntarily quit his job.[4096] The Retirement Railroad Board concluded that Cobb's failure to return to work was "'a voluntary quit' and that he could no longer rely on the continued prosecution of his claim against the Railway for reinstatement as a basis for eligibility for benefits."[4097] Therefore, to continue to receive unemployment benefits Cobb had to prove that he made good faith efforts to find

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[4091] *Id.* at 192.

[4092] *Id.*

[4093] *Id.* (*quoting* 45 U.S.C. § 354(a-1)(iii)).

[4094] *Id.*

[4095] 431 F.2d 406 (5th Cir. 1970).

[4096] *Id*. at 406-407.

[4097] *Id*.

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employment elsewhere and that he could not do so.[4098] The court rejected Cobb's argument that he could "condition[] the 'acceptance' of his restoration to seniority on" receiving back pay and affirmed the Board's decision.[4099]

F. Employee may not Receive Benefits for Unemployment or Sickness while also Collecting a Social Insurance Benefit

The RUIA prohibits providing unemployment or sickness benefits to an individual who is receiving any social insurance benefits under state or federal law. In *Kaiser v. Railroad Retirement Board*[4100] the Board determined that Kaiser's pension was a social insurance benefit under the laws of New York.[4101] The court affirmed the Railroad Retirement Board's decision.[4102]

G. Recovery of Overpayments to Recipients under the Railroad Retirement Act and the Social Security Act are Limited to Fifty Percent of the Overpayment

In *Linquist v. Bowen*[4103] the plaintiff Linquist received survivor benefits under the Railroad Retirement Act (RRA) and benefits under the Social Security Act (SSA) for her own work.[4104] Plaintiff Burns also received primary benefits under the SSA and survivor benefits

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[4098] *Id*.

[4099] *Id*. at 408.

[4100] 264 F.2d 684 (2d Cir. 1959).

[4101] *Id*.

[4102] *Id*. at 687.

[4103] 633 F. Supp. 846 (W.D. Mo. 1986), *aff'd*, 813 F.2d 884 (8th Cir. Mo. 1987), *cert. denied*, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed.2d 247 (1988), *criticized in Action Alliance of Senior Citizens v. Leavitt*, 483 F.3d 852 (D.C. Cir. 2007).

[4104] *Linquist*, 633 F. Supp. at 850.

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under the RRA.[4105] Because they had received overpayments the plaintiffs were informed that they needed to return half of their overpayment.[4106] Linquist appealed the Social Security's authority to take half of her overpayment after she had already paid half to the Board; Burns appealed the Board's authority to take half of her overpayment after she had already paid half to Social Security.[4107]

A Missouri federal district court dismissed all claims against the Board by Burns because she should have pursued those claims when she sought judicial review in a prior case against the Board; however, she "will not be collaterally estopped from raising her due process and equitable estoppel claims against the Secretary."'[4108] The court granted Linquist's motion for class certification for all persons receiving benefits under both the SSA and RRA who are denied the right to receive half of their overpayment.[4109]

Neither the SSA nor the RRA specify how a deduction should be made if recipients are receiving benefits under both programs.[4110] The court held that there should be coordination to ensure that beneficiaries "lose no more than $1 of benefits for each $2 of excess earnings."[4111]

[4105] *Id*. at 851.

[4106] *Id*.

[4107] *Id*.

[4108] *Id*. at 857.

[4109] *Id*. at 861.

[4110] *Id*. at 862

[4111] *Id*. at 866.

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Articles

H. History of Railroad Unemployment Benefits

An article in the *Yale Law Journal* describes the history of railroad unemployment insurance.[4112] At the time the Social Security Act was passed, Congress expected the RUIA also to come to fruition, something that happened in 1938.[4113] The Act established a national insurance program for employees of railroad companies.[4114] The Railroad Retirement Board oversees the national insurance system under the Act.[4115] The Act required railroad carriers to contribute three percent.[4116] The schedule of benefits required under the Act, initially between a $1.75 and $3.00 per day, was less than the amounts provided to employees under state laws.[4117] However, Congress reformed the Act in 1940 so that the benefits afforded to railroad employees would be similar to the average benefits under state law.[4118] The article explains why the Act was enacted separately from the Social Security Act or other unemployment insurance acts at the time.

[4112] Edwin E. Witte, "Development of Unemployment Insurance," 55 *Yale L. J.* 21 (1945).

[4113] *Id*. at 45.

[4114] *Id*.

[4115] *Id*.

[4116] *Id*.

[4117] *Id*.

[4118] *Id*.

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I. Trends in Railroad Unemployment Insurance

An article in the *Monthly Labor Review* summarizes trends in the railroad unemployment insurance program.[4119] RUIA has been providing rail workers with unemployment benefits since 1939 when Congress provided a program for railroad workers because the federal-state unemployment systems proved problematic for railroad workers who often crossed state lines for work.[4120] Employers must "pay a tax on each worker's earnings up to a certain limit" and a worker's benefits are based on his income in the calendar year prior to his claim.[4121]

The article states that the decline in railroad employment has led to more railroad employees' benefits under the RUIA.[4122] Much of railroad traffic is seasonal because certain jobs relating to construction and maintenance require safe weather conditions and seasonal industries reduce their use of railroads in their off season.[4123] Many beneficiaries tend to be repeat beneficiaries, a tendency suggesting that railroad employees may have trouble finding comparable work outside the railroad industry or fail to look beyond the rail industry for employment opportunities.[4124]

State unemployment compensation programs vary from state to state and in most instances railroad workers benefit more under the RUIA than they would have under a state

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[4119] Martha F. Riche, "Railroad Unemployment Insurance: Designed to Meet the Special Circumstances of Railroad Employment, the RUI System Provides some Interesting Contrasts with the State Plans," 90 *Monthly Lav. Rev*. 9 (1967).

[4120] *Id.*

[4121] *Id.*

[4122] *Id* at 10.

[4123] *Id* at 11.

[4124] *Id.* at 13.

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plan.[4125] The article states that "5 to 10 percent of RUIA beneficiaries are unemployed for reasons that would disqualify them for benefits under most State programs," because state programs would not grant benefits to a worker who was "discharged or suspended from his last job (particularly for misconduct), or was on strike."[4126] State programs do not offer minimum or maximum payments as high as those offered under the RUIA.[4127] Benefits are granted to beneficiaries for a longer period of time under the RUIA than state programs.[4128] Older beneficiaries are more likely to exhaust the benefits because they are less likely than younger railroad workers to find work in other industries.[4129]

One of the article's conclusions is that the program under the RUIA is superior to state programs but that railroad employment is likely to decline and that railroad employees should be offered relocation benefits to enable them to seek gainful employment elsewhere.[4130]

[4125] *Id.* at 14.

[4126] *Id.* at 15.

[4127] *Id.*

[4128] *Id.* at 17.

[4129] *Id.*

[4130] *Id.* at 18.

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XXXVIII. STATE LAWS AND REGULATIONS ON RAILROADS

A. Introduction

Regulation of railroads is governed by federal and state statutes. Section B discusses some of the state laws applicable to railroads in the states of California, Illinois, New York, New Jersey, South Dakota, and Wisconsin. The state statutes cover a wide range of subjects such as fences to protect livestock from trains, the maintenance of sanitary conditions on trains, or the formation of a railroad corporation. Section C discusses miscellaneous state laws affecting railroads. Section D provides the name of and citation to railroad and related statutes in the ten largest or most populous states.

Statutes

B. State Statutes Applicable to Railroads

1. California

California's constitution and its Public Utility Code are the main sources of California law on the regulation of railroads within the state.[4131] California regulates corporations and persons that "own, operate, control, or manage a line, plant, or system for the transportation of people or property."[4132]

a. California State Constitution

California's Constitution states that railroads are subject to regulation by the state legislature.[4133]

[4131] 53 *Cal. Jur.*, Railroad § 7 (2014).

[4132] *Id*.

[4133] Cal. Const, Art. XII § 3.

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b. California Public Utilities Code

Pursuant to its Public Utilities Code, California requires that when railroad tracks intersect with other railroad tracks "the rails of either or each road shall be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible."[4134]

Railroad companies in California are required to fence their tracks and property to prevent injury to domestic animals.[4135] If a railroad's failure to fence its tracks and property results in an injury to a domestic animal, the railroad company must pay the owner the fair market price of the animal unless the owner was at fault.[4136]

California regulates rail facilities that handle hazardous cargo by requiring that the facilities be designed for storage and have adequate security.[4137]

California criminalizes certain behavior related to railroads. For example, it is a misdemeanor to fail to use an audible warning device at a "distance of at least 1,320 feet from [a] crossing[] and until the lead locomotive has passed through the crossing."[4138] It is a misdemeanor for certain railroad employees to become intoxicated while performing the duties of their employment.[4139]

[4134] Cal. Pub. Util. Code § 7535 (2014).

[4135] Cal. Pub. Util. Code § 7626 (2014).

[4136] *Id*.

[4137] Cal. Pub. Util. Code § 7665.6 (2014).

[4138] Cal. Pub. Util. Code § 7678 (2014).

[4139] Cal. Pub. Util. Code § 7679(2014); *see* 53 *Cal. Jur.* Railroads § 7.

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2. Illinois

The state of Illinois regulates railroads in chapter 610 of the Illinois Compiled Statutes; the city of Chicago regulates railroads pursuant to chapter 9-124 of its municipal code.

a. Formation of a Railroad

A railroad corporation may be formed in the state of Illinois when at least five people apply to do so.[4140] Such a corporation is authorized to construct and operate a railroad in Illinois and is "authorized and empowered to purchase, own, operate and maintain any railroad sold or transferred under order or powers of sale or judgment of, or sale under foreclosure of mortgage or deed of trust…."[4141] Furthermore, corporations that were "heretofore organized under the provisions of the Act hereby amended, their successors or assigns, shall have and possess all the powers and privileges conferred" by the said law.[4142]

Illinois also grants the power to every railway corporation formed in the state to survey land to determine where to locate its route; to purchase land; to construct a railway and stations and buildings necessary for a railway; to connect a railway with previously constructed railways; to regulate the transportation of passengers and property by rail; and to borrow money to construct and operate a railway.[4143]

[4140] 610 ILCS 5/1 (2014).

[4141] *Id.*

[4142] *Id.*

[4143] 610 ILCS 5/19 (2014).

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b. Railroad Obstruction Act

The Railroad Obstruction Act prohibits a locomotive engineer from willfully and maliciously abandoning a locomotive on a railroad.[4144] Under the law it is also a misdemeanor for a person to obstruct or conspire to obstruct the operation of a railroad company.[4145]

c. Railroad Sanitation Act

The Railroad Sanitation Act requires railroad owners or operators to provide clean and sanitary rail cars and requires that rail cars must be cleaned and fumigated regularly.

d. Railroad Depot Act

The Railroad Depot Act requires all railroads in Illinois to build and maintain depots in all towns of two hundred or more people where they receive passengers or freight.[4146]

3. New York

In the state of New York, railroads are regulated by the Railroad Law, the Rapid Transit Law, and the common carrier provisions of the Transportation Law.[4147] To avoid conflict the laws are to be interpreted together.[4148] The New York Business Corporation Law governs railroad corporations that are formed under the Railroad Law.[4149] Moreover, rail transportation

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[4144] 610 ILSC 95/1 (2014).

[4145] 610 ILSC 95/2-3 (2014).

[4146] 610 ILSC 55/1 (2014).

[4147] 89 *N.Y. Jur.*, Rail Transportation § 5.

[4148] *Id.*

[4149] *Id.*

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is regulated by administrative rules and regulations, as well as by the charter of the city of New York.[4150]

a. New York Railroad Law

New York requires railroads to construct and maintain fences to prevent farm animals such as sheep, cattle, horses, and pigs from entering the railway.[4151] If fences are not constructed or are not in good repair a railroad may be held liable for any damages to a domestic animal.[4152] New York requires that in cities of more than one million inhabitants a railroad having an electrified third rail must build and maintain a fence along the boundary of its right of way.[4153]

The New York Railroad Law requires that all railroad employees on passenger trains or working in stations for passengers wear a badge on their hats that designates their employment and the initials of their railroad corporation.[4154]

The Railroad Law prohibits railroads from transporting passengers or goods unless the rail carrier has an operable communications system.[4155] Railroads in New York must provide sanitary locomotives with potable drinking water and clean toilets that provide privacy to those using them.[4156] The Railroad Law requires:

> Whenever the commissioner of transportation shall cause to be personally served upon any railroad corporation controlling any tunnel or part of a tunnel in this

[4150] *Id*.

[4151] N.Y. R.R. Law § 52 (2014).

[4152] *Id*.

[4153] N.Y. R.R. Law § 52-a (2014).

[4154] N.Y. R.R. Law § 65 (2014).

[4155] N.Y. R.R. Law § 54-a (2014).

[4156] N.Y. R.R. Law § 77-c (2014).

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> state for the purpose of operating a railroad … by delivering a copy … of a notice or order of said commissioner of transportation, stating and specifying the structures to be erected, the manner, means, mechanical appliances and apparatus to be used in lighting or ventilating any tunnel or tunnels used by said corporation … said corporation shall[] within thirty days … cause said tunnel or tunnels so used by it as aforesaid to be lighted or ventilated, or both, in the manner … pointed out in said notice or order.[4157]

b. New York Rapid Transit Law

Each city in New York is required to have a board of transportation[4158] that "is empowered to operate any railroad acquired, owned, constructed, or provided by such city in accordance with the provisions of [the] law."[4159] A board of transportation may purchase all materials necessary to operate and maintain a railroad.[4160]

c. New York Transportation Law

The New York Commissioner of Transportation has jurisdiction over common carriers in the state, including railroads.[4161] The Transportation Law requires common carriers to provide safe and adequate service for just and reasonable charges.[4162] If a shipper has applied for a connection a railroad is required to provide a switch connection "with a lateral line of railroad or a private side-track owned, operated or controlled by" the shipper.[4163] Unless authorized by

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[4157] N.Y. R.R. Law § 104 (2014).

[4158] N.Y. Rapid Trans. Law § 10a (2014).

[4159] N.Y. Rapid Trans. Law § 30 (2014).

[4160] *Id.*

[4161] N.Y. Transp. Law § 80(1) (2014).

[4162] N.Y. Transp. Law § 96 (2014).

[4163] N.Y. Transp. Law § 97(1) (2014).

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another section of the Transportation Law, common carriers may not discriminate by charging different amounts to passengers or shippers when performing a "like and contemporaneous service."[4164]

4. New Jersey

The Transportation Act of 1966 established New Jersey Department of Transportation (NJDOT).[4165] As head of NJDOT, the Commissioner of Transportation is authorized to:

> Plan, design, construct, equip, operate, improve and maintain, either directly or by contract with any public or private entity, a railroad, subway, street traction or electric railway, or connecting roadways and facilities for the purpose of carrying freight in this State or between this State and points in other states; Acquire by purchase, condemnation, lease, gift or otherwise, on terms and conditions and in the manner he deems proper, any land or property, real or personal, tangible or intangible, which he may determine is reasonably necessary for the purposes of this section; Lease as lessor, sell or otherwise dispose of, on terms and conditions which he may prescribe as appropriate, real and personal property....(sic)[4166]

5. South Dakota

South Dakota is an example of a state having statutes that govern the duties and liability of railroad companies with tracks adjacent to private property. State laws requiring the fencing of railroads are not preempted by federal law.[4167] A South Dakota statute requires railroads to provide an owner of adjacent land with the materials needed to construct a fence, and, if the landowner has livestock, a railroad must construct a fence to prevent livestock from trespassing

[4164] N.Y. Transp. Law § 101 (2014).

[4165] N.J. Stat. Ann. § 27:1A-2 (2014).

[4166] N.J. Stat. Ann. § 27-1a-5.1a-c (2014).

[4167] *See Lin v. Amtrak*, 2002 Conn. Super. LEXIS 501 (Conn. Super. Ct. 2002) (holding that there is no express congressional intent to preempt state law regulating the fencing of railroads); *State ex rel. Okla. Corp. Comm'n v. Burlington Northern*, 24 P.3d 368 (Okla. Civ. App. 2000) (holding the Federal Rail Safety Act did not preempt Oklahoma laws requiring railroads to fence their rights-of-way and maintain them as well).

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on railroad property.[4168] The South Dakota statute also requires that a railroad maintain a supply of fencing materials.[4169]

Under South Dakota law, a railroad has forty-five days to supply materials and construct a fence after it has received notice from a landowner that the landowner has finished a portion of a fence.[4170] When a railroad fails to comply with the aforementioned statutes, the railroad will be liable for the cost of the landowner's materials that are needed to construct a fence and will be liable for all damages resulting from the railroad company's neglect or refusal to do so.[4171]

6. Wisconsin

In Wisconsin, the boards of villages are authorized to request railroad companies to apply oil or water to their roadbeds to control dust.[4172] Railroads are required to build and maintain fences and cattle guards as well as farm crossings.[4173]

Wisconsin requires railroad companies to provide certain safety information within forty-eight hours of applying pesticide to a right of way. A railroad must provide the following information in a central location accessible to railroad employees: the area where the pesticide is to be applied; the name of the pesticide; the time and date it will be applied; notice of any restrictions on entering the location where it is applied; a copy of the information listed on the

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[4168] S.D. Codified Laws § 49-16A-91 (2014).

[4169] *Id*.

[4170] S.D. Codified Laws § 49-16A-92 (2014).

[4171] S.D. Codified Laws § 49-16A-93 (2014).

[4172] Wis. Stat. § 61.44 (2014).

[4173] Wis. Stat. § 192.33(1) (2014).

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pesticide label; and emergency medical contact information.[4174] Railroads are required to provide information about the pesticide to the public on its website and to train employees annually on pesticide safety.[4175]

C. Railroad and Related Statutes in the Ten Largest or Most Populous States

This subpart of the Report provides a listing by name and citation of the railroad and related statutes in the ten most populous states, including some states whose laws were summarized in the preceding subparts of the Report.

1. California

a. California High-Speed Rail Service, Cal. Pub. Util. Code, 185000, *et seq.* (2014)

b. California Passenger Rail Financing Commission Act, Cal. Gov't. Code § 92000, *et seq*. (2014)

c. Peninsula Rail Transit District, Cal. Pub. Util. Code § 160000, *et seq.* (2014)

d. Railroads, Cal. Pub. Util. Code § 7801, *et seq.* (2014)

e. Railroad Corporations, Cal. Pub. Util. Code § 7503, *et seq.* (2014)

f. Railroad Crossings, Cal. Pub. Util. Code § 1201, *et seq.* (2014)

g. Resettlement of Street, Suburban and Interurban Railroad Franchises, Cal. Pub. Util. Code § 6451, *et seq.* (2014)

2. Florida

a. Florida Public Service Commission, Fla. Stat. § 350.001, *et seq.* (2014)

b. Railroads, Fla. Stat. § 351.03, *et seq*. (2014)

[4174] Wis. Stat. §§ 94.697(2)(a)(2)-(7) (2014).

[4175] Wis. Stat. §§ 94.697(2)(e)-(3) (2014).

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3. Georgia

a. Public Service Commission, Ga. Code Ann. § 46-2-20, *et seq*. (2014)

b. Railroad Companies, Ga. Code Ann. § 46-8-20, *et seq*. (2014)

c. Rapid Rail Passenger Service, Ga. Code Ann. § 46-8A-1, *et seq.* (2014)

d. Transportation of Freight and Passengers Generally, Ga. Code Ann. § 46-2-20 and § 46-9-1, *et seq*. (2014)

4. Illinois

a. Bulk Grain Act, 610 Ill. Comp. Stat. Ann. 110/1, *et seq*. (2014)

b. Elevated Railroad Approval Act, 610 Ill. Comp. Stat. Ann. 130/1, *et seq*. (2014)

c. Railroad Bond Guarantee Act, 610 Ill. Comp. Stat. Ann. 65/1, *et seq*. (2014)

d. Railroad Borrowing Act, 610 Ill. Comp. Stat. Ann. 20/1, *et seq.* (2014)2.

e. Railroad Bridge Act, 610 Ill. Comp. Stat. Ann. 40/1, *et seq.* (2014)

f. Railroad Company Charter Change Act, 610 Ill. Comp. Stat. Ann. 10/1, *et seq*. (2014)

g. Railroad Consolidation Act, 610 Ill. Comp. Stat. Ann. 25/1, *et seq.* (2014)

h. Railroad Depot Act, 610 Ill. Comp. Stat. Ann. 55/1, *et seq.* (2014)

i. Railroad Director Residence Act, 610 Ill. Comp. Stat. Ann. 75/1, *et seq*. (2014)

j. Railroad Employees Medical Treatment Act, 610 Ill. Comp. Stat. Ann. 107/1, *et seq*. (2014)

k. Railway Employees Water Act, 610 Ill. Comp. Stat. Ann. 105/1, *et seq.* (2014)

l. Railroad Incorporation Act, 610 Ill. Comp. Stat. Ann. 5/1, *et seq.* (2014)

m. Railroad Interstate Line Consolidation Act, 610 Ill. Comp. Stat. Ann. 30/1, *et seq*. (2014)

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n. Railroad Intoxicating Liquor Act, 610 Ill. Comp. Stat. Ann. 90/1, *et seq.* (2014)

o. Railroad Lessees Act, 610 Ill. Comp. Stat. Ann. 45/1, *et seq.* (2014)

p. Railroad Mooring Act, 610 Ill. Comp. Stat. Ann. 100/1, *et seq*. (2014)

q. Railroad Motor and Aerial Transport Act., 610 Ill. Comp. Stat. Ann. 60/1, *et seq.* (2014)

r. Railroad Obstruction Act, 610 Ill. Comp. Stat. Ann. 95/1, *et seq*. (2014)

s. Railroad Operative Contract Act, 610 Ill. Comp. Stat. Ann. 35/1, *et seq.* (2014)

t. Railroad Police Act, 610 Ill. Comp. Stat. Ann. 80/2, *et seq*. (2014)

u. Railroad Powers Act, 610 Ill. Comp. Stat. Ann. 70/1, *et seq*. (2014)

v. Railroad Sanitation Act, 610 Ill. Comp. Stat. Ann. 85/1, *et seq*. (2014)

w. Railroad Stock Transfer Act, 610 Ill. Comp. Stat. Ann. 15/1, *et seq.* (2014)

x. Railroad Water Craft Act, 610 Ill. Comp. Stat. Ann. 50/1, *et seq*. (2014)

y. Street Railroad Bridge Act, 610 Ill. Comp. Stat. Ann. 120/1 (2014)

z. Street Railroad Right of Way Act, 610 Ill. Comp. Stat. Ann. 115/1, *et seq*. (2014)

aa. Street Railroad Vestibule Act, 610 Ill. Comp. Stat. Ann. 125/1, *et seq*. (2014)

5. Michigan

a. Consolidation of Public Utility Companies, Mich. Comp. Laws Serv. § 473.1, *et seq.* (2014)

b. Railroads, Mich. Comp. Laws Serv. § 462.2, *et seq.* (2014)

c. Street Railways, Mich. Comp. Laws Serv. § 472.1, *et seq*. (2014)

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6. New York

a. The Railroad Law, N.Y. R.R. Law § 1, *et seq*. (2014)

b. The Rapid Transit Law, N.Y. Rapid Trans. Law § 1, *et seq.* (2014)
c. Transportation Law, N.Y. Transp. Law § 1, *et seq.* (2014)

7. North Carolina

a. Railroads, N.C. Gen. Stat. § 136-190, *et seq*. (2014)

b. Railroad Revitalization, N.C. Gen. Stat. § 136-44.35, *et seq.* (2014).

8. Ohio

a. Consolidation of Railroads, Ohio Rev. Code Ann. § 4967.01, *et seq.* (2014)

b. Crimes Relating to Railroads, Ohio Rev. Code Ann. § 4999.01, *et seq.* (2014)

c. Elimination of Crossings, Ohio Rev. Code Ann. § 4957.01, *et seq*.

d. Employees; Policemen, Ohio Rev. Code Ann. § 4973.01, *et seq.* (2014)

e. Grade Crossings, Ohio Rev. Code Ann. § 5523.01, *et seq*. (2014)

f. Passenger Fares, Ohio Rev. Code Ann. § 4965.50, *et seq.* (2014)

g. Public Utilities Commission -- Railroad Powers, Ohio Rev. Code Ann. § 4907.01, *et seq*. (2014)

h. Rail Development Commission, Ohio Rev. Code Ann. § 4981.01, *et seq.* (2014)

i. Railroad Sales; Railroad Receivers, Ohio Rev. Code Ann. § 4969.01, *et seq.* (2014)

j. Reorganization of Railroads, Ohio Rev. Code Ann. § 4971.01*, et seq.* (2014)

k. Right of Way Drainage and Fences, Ohio Rev. Code Ann. § 4959.01, *et seq.* (2014)

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l. Special Powers of Railroads, Ohio Rev. Code Ann. § 4961.01, *et seq.* (2014)

m. Street Railways and Interurban Railroads, Ohio Rev. Code Ann. § 4951.01, *et seq*. (2014)

n. Tracks; Crossings, Ohio Rev. Code Ann. § 4955.10, *et seq.* and § 4955.41, *et seq*.

o. Trains; Equipment, Ohio Rev. Code Ann. § 4963.01, *et seq*. (2014)

9. Pennsylvania

a. Common Carriers, 66 Pa. Cons. Stat. §2301, *et seq.* (2014)

b. Metropolitan Transportation Authorities, 74 Pa. Cons. Stat. § 1701, *et seq*. (2014)

c. Railroads, 66 Pa. C. S. § 2701, *et seq* (2014).

10. Texas

a. Commuter Rail Districts, Tex. Transp. Code § 174.001, *et seq.* (2014)

b. Engineer's Operator Permit and Train Operator Permit, Tex. Transp. Code § 192.001, *et seq*. (2014)

c. Freight Rail Districts, Tex. Transp. Code § 171.001, *et seq*. (2014)

d. General Provisions, Tex. Transp. Code § 81.001, *et seq*. (2014)

e. Hazardous Materials, Tex. Transp. Code § 193.001, *et seq.* (2014)

f. Intermunicipal Commuter Rail Districts, Tex. Transp. Code § 173.001, *et seq*. (2014)

g. Miscellaneous Provisions, Tex. Transp. Code § 199.001 (2014)

h. Miscellaneous Railroads, Tex. Transp. Code § 131.001, *et seq*. (2014)

i. Powers and Duties of Railroads, Tex. Transp. Code § 112.001, *et seq.* (2014)

j. Provision of Utilities by Certain Railway Corporations, Tex. Transp. Code § 194.001, *et seq.* (2014)

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k. Rail Facilities, Tex. Transp. Code § 91.001*, et seq.* (2014)

l. Regulation by Texas Department of Transportation, Tex. Transp. Code § 111.001, *et seq.* (2014)

m. Rural Rail Transportation Districts, Tex. Transp. Code § 172.001, *et seq*. (2014)

n. Structures and Materials near Railroad or Railway, Tex. Transp. Code § 191.001, *et seq.* (2014)

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XXXIX. SURFACE TRANSPORTATION BOARD

A. Introduction

The Surface Transportation Board (STB or Board),[4176] created by the 1995 Interstate Commerce Commission Termination Act (ICCTA), is the successor to the Interstate Commerce Commission (ICC).[4177]

Section B reviews the Board's regulatory and adjudicatory powers. Section C discusses the Board's jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of railroad lines; its jurisdiction over rates and classifications; and its authority to prescribe rules and practices.

Section D discusses some of the Board's recent decisions, such as on what constitutes a rail line or whether a transload facility is subject to STB jurisdiction. Sections E and F discuss judicial review of STB orders.

Statutes

B. Surface Transportation Board's Regulatory and Adjudicatory Powers

The STB is an economic regulatory agency created by Congress to resolve issues and disputes concerning railroad rates and service and to review proposed railroad mergers, as well as other matters discussed below. Although the STB is affiliated administratively with the United States Department of Transportation (DOT), the Board makes decisions independently of the DOT.

[4176] 49 U.S. Code § 701, *et seq.* (2014).

[4177] Pub. L. 104-88 (Dec. 29, 1995), summary available at Govtrack.us: https://www.govtrack.us/congress/bills/104/hr2539/summary (last accessed March 31, 2015).

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The STB, both a regulatory and an adjudicatory body, has jurisdiction over issues pertaining to railroad rates and service and the restructuring of railroads, such as mergers, sales of lines, construction of line, and abandonment of lines.[4178] The STB's jurisdiction extends to the structure, financing, and operations of intercity passenger bus companies, and certain rate matters pertaining to trucking companies, moving vans, non-contiguous ocean shipping companies, as well as the rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission.[4179]

After the Board has approved or exempted a transaction the participating rail carriers "may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority."[4180] After the STB approves a transaction, a rail carrier is exempt from state and municipal laws that would inhibit the carrier's operation of its property.[4181] However, when a purchase, lease, sale, consolidation,

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[4178] 49 U.S. Code § 10501 (2014) (general jurisdiction); 49 U.S. Code § 10901 (2014) (authorizing of construction and operation of railroad lines). 49 U.S. Code § 10903 (2014) (filing and procedure for application to abandon or discontinue); 49 U.S. Code § 10905 (2014) (offering abandoned rail properties for sale for public purposes); and 49 U.S. Code § 10907 (2014) (railroad development). 49 U.S.C. § 10501(b)(1) states that the Board's jurisdiction is "exclusive" over the

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> (2) 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….

[4179] United States Department of Transportation, Surface Transportation Board, available at: http://www.stb.dot.gov/stb/about/overview.html (last accessed March 31, 2015).

[4180] 49 U.S.C. § 11321(a) (2014).

[4181] *Id.*

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or merger of a corporation is involved in a transaction, the transaction must be approved by a majority of the corporation's stockholders or by the number required by state law.[4182]

The Board's decisions may be located by accessing the STB website and clicking Decisions under QuickLinks on the right hand side of the page.[4183] The Board has the authority to subpoena witnesses and records related to a Board proceeding; in a proceeding the Board may depose witnesses and order them to produce records.[4184] The Board may "at any time on its own initiative because of material error, new evidence, or substantially changed circumstances--reopen a proceeding; grant [a] rehearing, reargument, or reconsideration of an action of the Board; or change an action of the Board."[4185]

The Board may begin an investigation of a rail carrier after a person has filed a complaint that a rail carrier providing transportation or service under the Board's jurisdiction has committed a violation of 49 U.S.C. § 10101, *et seq*.[4186] When there is a violation, the Board is authorized to compel the rail carrier's compliance.[4187]

[4182] *Id.*

[4183] United States Department of Transportation, Surface Transportation Board, available at: http://www.stb.dot.gov/stb/index.html (last accessed March 31, 2015).

[4184] 49 U.S.C. §§ 721(c)-(d) (2014).

[4185] 49 U.S.C. §§ 721(c)(1)-(3) (2014).

[4186] 49 U.S.C. §§ 11701(a)-(b) (2014).

[4187] 49 U.S.C. § 11701(a) (2014).

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C. Surface Transportation Board's Jurisdiction

1. STB's Exclusive Jurisdiction over the Construction, Acquisition, Operation, Abandonment, or Discontinuance of Railroad Lines

The STB has exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of railroad lines.[4188] As provided in 49 U.S.C. §§ 10901 (a)(1)-(4), a person may construct an extension to any of its railroad lines, construct an additional line, or provide transportation over or by means of an extended or additional line, or, in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line "only if the Board issues a certificate authorizing such activity" under subsection (c). Under § 10901(b) a proceeding to grant such authority begins with the filing of an application with the Board that is followed by the Board's giving of "reasonable public notice, including notice to the Governor of any affected State…."[4189]

Under subsection (c) of the statute "[t]he Board shall issue a certificate" granting such authority as requested "unless the Board finds that such activities are inconsistent with the public convenience and necessity."[4190] The Board may approve an application as it was filed, approve the application with modifications, or require the applicant to comply with certain conditions, such as for the protection of labor, that the Board finds to be necessary in the public interest.

Under subsection (d)(1), when the Board issues a certificate that authorizes the construction or extension of a railroad line,

> no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if—

[4188] 49 U.S.C. § 10501(b)(2) (2014).

[4189] 49 U.S.C. § 10901(b) (2014).

[4190] 49 U.S.C. § 10901(c) (2014).

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> (A) the construction does not unreasonably interfere with the operation of the crossed line;
> (B) the operation does not materially interfere with the operation of the crossed line; and
> (C) the owner of the crossing line compensates the owner of the crossed line.[4191]

It may be noted that if the "parties are unable to agree on the terms of operation or the amount of payment" either party may submit the dispute to the Board, which must determine the dispute within 120 days of the submission of the dispute to the Board.[4192]

2. Rates, Classifications, Rules, and Practices Prescribed by the STB

The STB has the authority to regulate rates charged by railroads for transportation.[4193] After conducting a full hearing the STB may prescribe a maximum rate, classification, rule, or practice that is to be followed.[4194] The Board may order a rail carrier to stop a violation associated with a rate, classification, rule, or practice.[4195] The Board is authorized to determine whether a carrier is earning an adequate revenue and "shall make an adequate and continuing effort to assist those carriers in attaining" adequate "revenue levels."[4196] Adequate revenue levels are defined as those that

> provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and attract and retain

[4191] 49 U.S.C. § 10901(d)(1)(A)-(C) (2014).

[4192] 49 U.S.C. § 10901(d)(2) (2014).

[4193] 49 U.S.C. § 10704(a)(1) (2014).

[4194] *Id.*

[4195] *Id.*

[4196] 49 U.S.C. § 10704(a)(2) (2014).

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capital in amounts adequate to provide a sound transportation system in the United States.[4197]

The STB has the authority to regulate and approve rate agreements made between railroads to ensure that the railroads are not colluding in charging shippers an unreasonable rate.[4198] The STB is also empowered to exempt rate agreements from federal and state antitrust laws.[4199]

Cases

D. Surface Transportation Board Decisions

1. What Constitutes a Rail Line Subject to the Surface Transportation Board's Jurisdiction?

In *Brotherhood of R.R. Signalmen v. Surface Transp. Bd.*[4200] a group of unions petitioned the STB to review its decision that the Massachusetts Department of Transportation's (MassDOT) purchase of railroad track and other assets from CSX Transportation, Inc. should not have been exempted under the ICCTA from the "statutory requirement that a 'person other than a rail carrier' obtain a certification of authorization in order to 'acquire a railroad line.'"[4201] The plaintiffs argued that because MassDOT purchased more than seventy miles of track and real estate, rights-of-way, and other property rights, MassDOT's actions constituted a purchase of a railroad line under 49 U.S.C. § 10901(a)(4) and, therefore, were subject to the STB's

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[4197] 49 U.S.C. §§ 10704(a)(2)(A)-(B) (2014).

[4198] 49 U.S.C. 10706(a)(2)(A) (2014).

[4199] *Id*.

[4200] 638 F.3d 807 (D.C. Cir. 2011), *rehearing, en banc, denied*, 2011 U.S. App. LEXIS 26370 (D.C. Cir., May 5, 2011).

[4201] *Id.* at 810 (*quoting* 49 U.S.C. § 10901(a)(4)).

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authorization.[4202] The court held that the STB's decision to grant MassDOT an exemption, the decision that the unions were appealing, was reasonable under a *Chevron* analysis.[4203] The STB's interpretation both of the statute and the term railroad line were held to be reasonable; thus, the court upheld the STB's decision granting an exemption.[4204]

2. Whether a Transload Facility is Subject to the Surface Transportation Board's Jurisdiction

In *New York & Atl. Ry. Co. v. Surface Transp. Bd.*[4205] a local township petitioned the court to review three STB orders that ruled that a transload facility in the city of Babylon was not under the STB's exclusive jurisdiction, was not entitled to federal preemption, but was subject to local regulation.[4206] The respondents argued that the ICCTA did not preempt local zoning laws.[4207] The New York & Atlantic Railway Company (NYAR) transported waste to the facility owned by Coastal Distribution, LLC (Coastal).[4208] The STB has held consistently that it does

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[4202] *Id*. at 810.

[4203] *Id*. at 813. As explained by a federal district court in the District of Columbia in *Prime Time Int'l Co. v. Vilsack*, 930 F. Supp.2d 240, 248 (D.D.C. 2013), a court must review an agency's interpretation of a statute under the framework set forth by the Supreme Court in *Chevron v. N.R.D.C.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). "The threshold inquiry … is determining whether Congress has delegated interpretive authority to the agency in question." *Prime Time Int'l Co.* 930 F. Supp.2d at 248 (citations omitted). If so, the *Chevron* analysis next "requires 'that both the agency and the courts give effect to Congress's unambiguously expressed intent if the underlying statute speaks directly to the precise question at issue.'" *Id*. (citation omitted). When a statute is clear, the "unambiguous intent of Congress" controls and *Chevron* inquiry is complete. *Id*. On the other hand, when a statute is silent or ambiguous on an issue and the agency's interpretation is reasonable, the reviewing court may not substitute its judgment for the agency's and must defer to the agency's reasonable interpretation. *Id*.

[4204] *Id*. at 809.

[4205] 635 F.3d 66 (2d Cir. 2011).

[4206] *Id.* at 68.

[4207] *Id*. at 69.

[4208] *Id*.

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not have jurisdiction over a matter unless a rail carrier is engaged in transportation activity.[4209] Although the railroad's actions constituted transportation, the court held that Coastal was not a rail carrier.[4210] Nevertheless, the STB's jurisdiction "extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier or the rail carrier holds out its own service through the third-party as an agent or exerts control over the third-party's operations."[4211] Neither was NYAR controlling the activities of Coastal nor was Coastal acting as NYAR's agent; therefore, Coastal was not subject to the STB's exclusive jurisdiction.[4212] Holding that the STB's decision was neither arbitrary nor capricious, the Second Circuit upheld the Board's ruling.[4213]

3. No STB Jurisdiction over Proposed Intrastate Passenger Rail Service in Florida

In *All Aboard Florida – Operations LLC and All Aboard Florida – Stations—Construction and Operation Exemption—in Miami, Fla. and Orlando, Fla.*,[4214] All Aboard Florida - Operations LLC (AAF-O) and its corporate affiliate, All Aboard Florida - Stations LLC (AAF-S) (collectively referred to as AAF), filed a petition with the Board for an exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate approximately 230 miles of passenger rail line between Miami, Fla., and Orlando, Fla. (the Line). Together

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[4209] *Id*. at 72.

[4210] *Id*.

[4211] *Id.* at 73 (internal citation omitted).

[4212] *Id*.

[4213] *Id*.

[4214] Surface Transportation Board, Docket No. FD 35680, at 1 (Service Date, December 21, 2012).

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with the petition AAF moved to dismiss for lack of jurisdiction on the ground that "the Line would be located entirely within the state of Florida and would not be part of the interstate rail network."[4215]

The Board noted its jurisdiction under 49 U.S.C. § 10501(a)(2)(A)

> over transportation by rail carriers (1) between a place in a state and a place in another state, and (2) between a place in a state and another place in the same state, as long as that intrastate transportation is carried out as "part of the interstate rail network."[4216]

The Board further noted that its decision on whether the proposed intrastate passenger rail service was part of the interstate rail network was "a fact-specific determination."[4217]

AAF explained that 200 miles of the Line would be "built and operated within the existing [Florida East Coast Railway LLC (FECR)] right-of-way along the east coast of Florida (the FEC Corridor), alongside FECR's existing tracks."[4218] Furthermore, AAF had petitioned the Board because it was seeking financing under the FRA's Railroad Rehabilitation and Improvement Financing (RRIF) program and the proceeding was "a prerequisite for FRA to act on AAF's RRIF application."[4219] The AAF's position was that the Board did not have jurisdiction because the proposed Line would "not be 'part of the interstate rail network'" and "would not connect with AMTRAK or any other interstate passenger rail provider."[4220]

[4215] *Id*.

[4216] *Id*. at 3 (citation omitted).

[4217] *Id*.

[4218] *Id*. at 2.

[4219] *Id*. at 3.

[4220] *Id*.

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The Board agreed that it lacked jurisdiction. The Board also stated that "the proximity of a planned station at or near an airport [did] not make the proposed intrastate passenger rail service a part of the interstate rail network," nor did "FECR's plan to dispatch AAF's trains together with its own freight services within the FEC Corridor … make AAF's proposed operations" subject to the Board's jurisdiction.[4221] A dissenting opinion by the Board's Vice Chairman argued that the proposed Line was "clearly related to the movement of passengers in interstate commerce."[4222]

4. Recent Board Decision on an Exemption

In *City of Belfast, Maine--Abandonment Exemption--In Belfast, ME*[4223] the STB first granted the City of Belfast an exemption from the prior approval requirements to abandon two miles of a rail line.[4224] After the Belfast and Moosehead Lake Railroad (BMLRR) sold a portion of its line to the State of Maine in 1995, the line was conveyed eventually to Belfast in 2010.[4225] The STB must exempt a transaction from regulation when regulation is not necessary to further the nation's rail transportation policy.[4226] The line was only used for intrastate tourist purposes

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[4221] *Id*. at 4.

[4222] *Id*. at 5 (Mulvey, Vice Chairman, dissenting).

[4223] 2014 STB LEXIS 110, also available at: http://www.stb.dot.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/f93f3a565a22df0085257cca004ec643?OpenDocument (last accessed March 31, 2015).

[4224] *Belfast*, 2014 STB LEXIS 110, at *1.

[4225] *Id.* at *2-3.

[4226] *Id.* at *3-4; *see* 49 U.S.C. § 10502 (2014).

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and had not been used for freight services since 1996.[4227] The STB granted the exemption "subject to trail use, environmental, and standard employee protective conditions."[4228]

5. Railroads Ordered to Provide Weekly Reports

In another recent decision, *United States Rail Service Issues,*[4229] the STB ordered Canadian Pacific and BNSF to send the STB weekly reports of their fertilizer shipment delivery plans.[4230] The reports must be sent for six weeks beginning April 25, 2014.[4231] The STB made its decision after testimony by farmers and agricultural producers at a hearing in which they stated they would not be able to begin planting their spring crops without timely delivery of fertilizer.[4232]

6. STB Decision on Demurrage Rules

The STB recently adopted final rules that address who may charge demurrage and who is subject to demurrage.[4233] "Demurrage is a charge for detaining rail cars for loading or unloading beyond a specified amount of time called 'free time.'"[4234] Demurrage rules are applicable to

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[4227] *Belfast*, 2014 STB LEXIS 110, at *3-4.

[4228] *Id.* at *2.

[4229] 2014 STB LEXIS 97, also available at: http://www.stb.dot.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/ad4c55d3da22d5e985257cbb006e8cda?OpenDocument (last accessed March 31, 2015).

[4230] *Id.* at *2.

[4231] *Id.*

[4232] *Id.* at *1.

[4233] *Demurrage Liability*, 2014 STB LEXIS 89, also available at: http://www.stb.dot.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/a9a5fd9636dd982785257cb7004d8f3f?OpenDocument (last accessed March 31, 2015).

[4234] *Id.* at *2.

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"both railroad-owned cars and privately owned cars when such privately owned cars are held on railroad property."[4235] The STB also removed the proposed agency exception rule that eliminated liability for demurrage for an agent receiving rail cars on behalf of another if the rail carrier has notice that the person is an agent and also knows the identity of the principal.[4236]

Article

7. STB ruling that the California High-Speed Rail Authority comes within the STB's Jurisdiction

An on line news article discusses a recent STB ruling that the California High-Speed Rail Authority comes within the STB's jurisdiction.[4237] Although high-speed rail will operate within California, the track will serve Amtrak trains as well.[4238] Because Amtrak trains are part of the interstate rail networks, the STB has jurisdiction over the California High-Speed Rail Authority.[4239] The Authority is seeking an exemption from the STB's regulation.[4240]

Statute

E. Judicial Review of STB Orders

Federal law provides that "district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the [STB] and to enjoin or suspend, in whole or in part,

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[4235] *Id.* at *33.

[4236] *Id.* at *34-35.

[4237] Kathy Hamilton, Surface Transportation Board Rules Against Rail Authority, *Examiner* (April 28, 2013), available at: http://www.examiner.com/article/surface-transportation-board-rules-against-rail-authority (last accessed March 31, 2015).

[4238] *Id.*

[4239] *Id.*

[4240] *Id.*

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any order of the [STB] for the payment of money or the collection of fines, penalties, and forfeitures."[4241] United States District Courts have jurisdiction "to enjoin or suspend, in whole or in part, a rule, regulation of the [STB]."[4242] A party wishing to do so may appeal a decision by the STB to a United States district court within sixty days of the decision.[4243]

Case

F. Judicial Denial of a Petition for Review

In *Riffin v. Surface Transp. Bd.*[4244] Riffin petitioned the District of Columbia Circuit to review an STB decision "rejecting his application for a certificate authorizing the acquisition and operation of a small length of industrial railroad track because his application refused any obligation to transport 'toxic inhalation hazard' products."[4245] In previous decisions the Board had stated that railroads have a statutory obligation to transport hazardous materials and therefore any application seeking to exclude transporting a toxic inhalation hazard is inherently defective.[4246] The Board also stated that a carrier's common law right to determine the type of goods that it will or will not carry may not defeat the carrier's statutory obligation to carry a toxic inhalation hazard.[4247] The court denied the petition for review because the STB's rejection of the application was reasonable.[4248]

[4241] 28 U.S.C. § 1336(a) (2014).

[4242] 28 U.S.C. § 2321 (2014).

[4243] 28 U.S.C. § 2344 (2014).

[4244] 733 Fed.3d 340 (D.C. Cir. 2013).

[4245] *Id.* at 341.

[4246] *Id.* at 342.

[4247] *Id.* at 343.

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XL. FIREARMS AND OTHER WEAPONS OR DEVICES ON RAILROADS

A. Introduction

This part of the Report discusses federal, as well as state, laws applicable to firearms and other weapons or devices on railroads. Section B discusses the Firearm Owners' Protection Act and its applicability to rail transportation. Under federal law a rail officer may carry a firearm; however, individuals or companies may not ship or transport firearms without a license.[4249] Section C discusses Amtrak rules on the possession of firearms and other devices on its trains. Section D discusses laws that exist in numerous states that prohibit the possession and/or use of firearms and other weapons or devices on or near railroads. Sections E and F discuss cases on whether a former railroad employee may be denied benefits when fired for carrying a firearm and whether a railroad may be held liable when an employee's gun injures another employee.

Statutes

B. Applicability of the Firearm Owners' Protection Act to Rail Transportation

Under the Firearm Owners' Protection Act (FOPA), it is unlawful for any person who is not licensed to deal with firearms or ammunition to ship, transport, or receive any firearm or ammunition in interstate commerce.[4250] An exception in § 922 is that the statute does not apply to the transfer to or the possession of a gun by a police officer who is employed by a rail carrier.[4251] Moreover, an individual must be certified or commissioned as a police officer under

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[4248] *Id.* at 348.

[4249] 18 U.S.C. § 922 (2014).

[4250] 18 U.S.C. §§ 922(a)(1)(A)-(B) (2014).

[4251] 18 U.S.C. § 922(z)(2)(B) (2014).

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the laws of a state for the use of a handgun for the purpose of law enforcement.[4252] FOPA prohibits "any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition" if the carrier knows or has reason to know "that the shipment, transportation, or receipt thereof would be in violation of" FOPA.[4253] Common carriers are prohibited from delivering a firearm in interstate or foreign commerce without obtaining written acknowledgement that the firearm package has been received.[4254]

Regulations

C. Amtrak's Rules on the Possession of Firearms and other Devices on Trains

1. Prohibition of Firearms and Other Devices

As discussed in this and the next subpart, firearms and/or ammunition are prohibited onboard an Amtrak train but may be transported in checked baggage. However, Amtrak prohibits the transportation of black powder, percussion caps, or any ammunition used with a matchlock, flintlock, percussion-cap ignition system, or similar type, including self-loaded, gunpowder-based modern ammunition. The following items are also prohibited in be carried onto trains or to be placed in checked baggage: archery equipment, batteries with acid that can spill or leak; canisters, tanks, or other devices containing propellants, except certain oxygen equipment for medical reasons may be allowed onboard; corrosive or dangerous chemicals or materials, including but not limited to liquid bleach, tear gas, electronic control devices (*e.g.*, stun guns, TASER guns), radioactive or harmful bacteriological materials; incendiaries, including but not limited to flammable gases, liquids, fuels, fireworks, and other explosive

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[4252] *Id*.

[4253] 18 U.S.C. § 922(f)(1) (2014).

[4254] 18 U.S.C. § 922(f)(2) (2014).

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devices; and martial-arts and self-defense items, including but not limited to billy clubs, nightsticks, and nunchuks.[4255]

Amtrak also bans sharp objects such as axes, ice picks, knives, spears and swords on their trains, but scissors, nail clippers, corkscrews, and razors are allowed in carry-on baggage. Sheathed equipment, including fencing equipment, is also allowed to be transported in checked baggage.[4256]

Article

2. Amtrak Policy Permitting Firearms in Checked Baggage

As explained in an on line article, in 2009 Congress allowed Amtrak, a government-owned corporation, to follow the same policy used by airlines regarding persons travelling with firearms.[4257] Individuals may travel with guns as long as the guns are unloaded and stored in the locked baggage holds.[4258] A passenger transporting a weapon also must inform Amtrak that he or she will be transporting a firearm and must complete a firearms-declaration prior to the day of departure.[4259]

[4255] Amtrak, Prohibited Items, available at: http://www.amtrak.com/prohibited-items (last accessed March 31, 2015).

[4256] *Id*.

[4257] Manikandan Raman, "Amtrak to Allow Guns on Trains," *International Business Times* (Dec. 1, 2010), available at: http://www.ibtimes.com/amtrak-allow-guns-trains-248972 (last accessed March 31, 2015).

[4258] *Id*.

[4259] *Id*.

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Statutes

D. State Laws Regulating the Transportation or Use of Weapons Directed against Railroads

Some states have statutes that regulate the possession, transportation, or use of firearms or other devices on railroads.[4260] In addition, some states prohibit firearms and other devices being directed at or near railroads.

1. Alabama

In Alabama,

> [a]ny person, except a duly authorized law enforcement officer acting in the line of duty or person otherwise authorized by law, who hunts or discharges any firearm from, upon, or across any ... railroad, or the rights-of-way of any ... railroad, or any person, except a landowner or his or her immediate family hunting on land of the landowner, who hunts within 50 yards of a ... railroad, or their rights-of-way [with certain firearms] shall be guilty of a misdemeanor...[4261]

2. Arkansas

In Arkansas, it is a misdemeanor to throw stones, sticks, clubs, or other missiles at, into, or against a train of any type.[4262]

3. Arizona

In Arizona, "[a] person who knowingly discharges a firearm at a nonresidential structure is guilty of a class 3 felony." The term structure is defined to include a railroad car.[4263]

[4260] National Rifle Association of America, Institute for Legislative Action, Guide to the Interstate Transportation of Firearms, available at: http://www.nraila.org/gun-laws/articles/2010/guide-to-the-interstate-transportation.aspx (last accessed March 31, 2015).

[4261] Ala. Code § 9-11-257 (2014).

[4262] Ark. Code Ann. § 23-12-804 (2014).

[4263] Ariz. Rev. Stat. §§ 13-1211(B) and (C)(3) (2014).

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4. Illinois

In Illinois, a person commits a criminal offense when he or she shoots a firearm at any portion of a railroad.[4264]

5. Iowa

In Iowa,

> [a] person commits a class "C" felony when the person, with the intent to injure or provoke fear or anger in another, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a ... railroad engine [or] railroad car occupied by another person … and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.[4265]

Furthermore,

> [a] person commits a class "D" felony when the person shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person … and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.[4266]

6. Florida

In Florida, Title XLVI, Chapter 790 of the Florida Statutes provides that

> [w]hoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within … any train, locomotive, railway car,

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[4264] 720 Ill. Comp. Stat. Ann. 5/21-1(a)(7) (2014).

[4265] Iowa Code § 708.6 (2014).

[4266] *Id.*

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> caboose, cable railway car, street railway car, monorail car, or vehicle of any kind which is being used or occupied by any person … shall be guilty of a felony of the second degree….[4267]

7. Minnesota

A Minnesota statute applies to various crimes committed against railroad employees and property, including action intended to cause a derailment or other forseeable risk of harm.[4268] However, subdivision 3 of the statute applies to anyone who "intentionally shoots a firearm at any portion of a railroad train, car, caboose, engine or moving equipment so as to endanger the safety of another…."[4269]

8. Mississippi

In Mississippi, although the statute does not mention firearms, a statute provides that "[i]t shall be unlawful for any person at any time to bomb, or to plant or place any bomb, or other explosive matter or chemical, biological or other weapons of mass destruction or thing in, upon or near any... railroad station, railroad car or coach...."[4270]

9. Missouri

In Missouri is it is illegal to knowingly carry a concealed knife or other weapon "readily capable of lethal force."[4271]

[4267] Fla. Stat. § 720.19 (2014).

[4268] Minn. Stat. § 609.85, subdivs. 1 and 2 (2014).

[4269] Minn. Stat. § 609.85, subdiv. 3 (2014). *See also*, Minn. Stat. § 609.85, subdivs. 4, 5, and 6 (2014).

[4270] Miss. Code Ann. § 97-37-25 (2014).

[4271] Mont. Code Ann. § 571.030 (2014). *See also*, Miss. Code Ann. § 97-37-25 (2014) (explosives and weapons of mass destruction; unlawful use); § 97-25-41 (2014) (railroads; wilfully shooting from or on moving train); and § 97-25-47 (2014) (railroad trains, buses, trucks, motor vehicles, depots, stations, and other transportation facilities; wilfully shooting or throwing at).

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10. Montana

Montana prohibits “knowingly... [d]ischarg[ing] or shoot[ing] a firearm into ... a railroad train....”[4272]

11. New York

In New York, “[a]ny person who wilfully discharges a loaded firearm or any other gun, the propelling force of which is gunpowder ... at any railway or street railroad train ... or at a locomotive, car, bus or vehicle standing or moving upon such railway, railroad or public highway, is guilty of a [felony].”[4273]

12. Oklahoma

In Oklahoma “any person shall be guilty of a felony if the person discharges a firearm or weapon at a train, or rail-mounted work equipment.”[4274]

13. Pennsylvania

Pennsylvania prohibits entering “any railroad train, locomotive, tender or car thereof, or into or upon any automobile or other conveyance used for the carrying of freight or passengers” while carrying nitroglycerine or other explosive.[4275]

14. South Carolina

South Carolina prohibits an unauthorized individual from placing explosives on railroad rails.[4276] Another South Carolina statute bans railroads from transporting firearms across state lines.[4277]

[4272] Mont. Code Ann. § 571.030 1(3) (2014).

[4273] N.Y. Penal Law § 265.35 (2014).

[4274] Okla. Stat. Ann. 21 § 1752.1(B) (2014).

[4275] 18 Pa. Cons. Stat. § 6161 (2014).

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15. South Dakota

South Dakota prohibits entering a train with any type of weapon intending to commit a crime.[4278]

16. Texas

In Texas it is a Class B misdemeanor if a person throws an object or discharges a firearm or weapon at a train or rail-mounted work equipment "unless the person causes bodily injury to another, in which event the offense is a felony of the third degree."[4279]

17. Utah

In Utah, a "[a] person may not discharge any kind of dangerous weapon or firearm … at railroad equipment or facilities including any sign or signal….[4280]

18. Virginia

As provided in the Code of Virginia, it is a class 4 felony for "[a]ny person who maliciously shoots at, or maliciously throws any missile at or against[] any train or cars on any railroad or other transportation company …. whereby the life of any person on such train … may be put in peril…." It is murder in the second degree if the shooting results in the death of a person but murder in the first degree when the death was "willful, deliberate and

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[4276] S. C. Code Ann. § 58-15-830 (2014).

[4277] S.C. Code § 16-23-220 (2014).

[4278] S. D. Codified Laws § 49-16A-105 (2014).

[4279] Tex. Penal Code Ann. §§ 28.07(b)(1) and (c) (2014).

[4280] Utah Code Ann. § 76-10-508(1)(a)(v) (2014).

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premeditated…." When such an "act is committed unlawfully, but not maliciously, the person so offending is guilty of a Class 6 felony and, in the event of the death of any such person, resulting from such unlawful act, the person so offending is guilty of involuntary manslaughter."[4281]

19. Washington

A Washington statute applies to malicious injury to railroad property:

> Every person who, in such manner as might, if not discovered, endanger the safety of any engine, motor, car or train, or any person thereon, shall in any manner interfere or tamper with or obstruct any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure, or appliance pertaining to or connected with any railway, or any train, engine, motor, or car on such railway, and every person who shall discharge any firearm or throw any dangerous missile at any train, engine, motor, or car on any railway, is guilty of a class B felony and shall be punished by imprisonment in a state correctional facility for not more than ten years.[4282]

20. West Virginia

It is a felony in West Virginia to "willfully damage[] or attempt[] to damage railroad property or willfully endanger[] or attempt[] to endanger the safety of another, by ... [s]hooting a firearm or other dangerous weapon at a locomotive, railroad car or train...."[4283]

Cases

E. Denial of Benefits to a former Railroad Employee Fired for Carrying a Firearm

In *Brotherhood's Relief & Comp. Fund v. Rafferty*[4284] a former employee sued a local worker's group for denying him a stipend after he had been fired for having a firearm at his job

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[4281] Va. Code Ann. § 18.2-154 (2014).

[4282] Wash. Rev. Code § 81.60.070 (2014).

[4283] W. Va. Code §§ 61-3-28(b)(3)-(5) (2014).

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on the railroad.[4285] The Fund denied benefits to him because he was terminated for a willful violation of a railroad's policy on firearms.[4286] An Alabama appellate court stated that the Fund had not acted arbitrarily when it made its decision and reversed the lower court for substituting its judgment for that of the Fund.[4287]

F. Railroad not Liable when an Employee's Gun Injuries another Employee

In *Cluck v. Union Pac. R. Co*.[4288] a railroad employee was shot accidentally by a fellow employee when the latter had packed a pistol in his luggage. The pistol discharged as Cluck was unloading luggage from a van for the railroad crew during the employees' hours of employment.[4289] The court ruled that the employee's proposed jury instructions failed to instruct the jury on whether the injury-causing conduct was done in furtherance of the interests of the employer's business.[4290] The Supreme Court of Missouri stated that the employee could not impute liability under FELA to the railroad because the jury was unable to determine whether "the carrying of the pistol in his luggage ... was done in furtherance of the interests of the employer's business," a key element to the doctrine of *respondeat superior*.[4291] The petitioner

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[4284] 91 So.3d 693 (Ala. App. 2011), *reh'g denied,* 2011 Ala. Civ. App. LEXIS 384 (Dec. 9, 2011), *cert. denied*, No. 1110372 (Apr. 6, 2012).

[4285] *Id.* at 695.

[4286] *Id.* at 694.

[4287] *Id.* at 698.

[4288] 367 S.W.3d 25 (Mo. 2012), *reh'g denied* (July 3, 2012), *cert. denied*, 133 S. Ct. 932, 184 L. Ed.2d 724 (2013).

[4289] *Id*. at 28.

[4290] *Id*. at 27.

[4291] *Id*.

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argued that the doctrine of *respondeat superior* did not apply in FELA actions and that he only needed to show that Clark (the pistol owner) was acting on behalf of the employer at the time of the shooting.[4292] The court, however, disagreed:

> To submit an imputed negligence claim under FELA, Petitioner was obligated to make a submissive case that he and Clark were acting within the cause and scope of their employment, that is, that Clark's negligent conduct was undertaken in furtherance of the interests of the employer.[4293]

The court held there was no reversible error and affirmed the judgment in favor of Union Pacific.[4294]

[4292] *Id*. at 28-29.

[4293] *Id*. at 32.

[4294] *Id*. at 34.

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