Association Highlights

This edition of Highlights features a little something for every taste. For those who like international adventure, our motor carrier contributors, Bob Spira and Steve Block, offer an amusing tale about a household carrier who mistakenly shipped a load of guns to the UAE instead of their intended destination, storage in California. The owner of the guns, who was moving to the UAE, was promptly arrested by authorities there. Not surprisingly, he brought suit against the carrier for their unfortunate error and the carrier responded by claiming that he was the one in the wrong place due to an arbitration clause in the household goods moving contract. The result, no doubt of more interest to our readers, is an informative Ninth Circuit decision upholding Carmack's supremacy over an arbitration clause that the carrier sought to enforce.

For the reader who enjoys scary stories about things rising from the dead, read Donald Smith's tale of the filed rate doctrine being used to defeat an antitrust claim brought against some domestic offshore carriers. Many of you may have thought that that doctrine was no longer viable, but the Ninth Circuit again came to the rescue, not only demonstrating that the doctrine is alive in some settings, but that it can be applied to rates that are not even filed.

For those of you who like to dabble in dangerous chemicals, Kathy Gainey offers us (among many other informative items in her railroad column) the story of an STB proceeding that concerns the reasonableness of certain railroad tariff restrictions on the transportation of TIH products, e.g., chlorine. The tension between the common carrier obligation and restrictions on the transportation of dangerous goods seems in fact to be a never-ending story.

Likewise, the story of the long pending Surface Transportation Reauthorization bill is one that seems to be without an end, as John Cutler informs us in his contribution on motor carrier legislative matters. John's update suggests that a bill may advance through Congress in the coming months, but recent history suggests that you shouldn't put too much money on that bet.

And for those who enjoy old favorites, preemption remains a topic common to many different forms of transportation law, as illustrated by the contributions of our Aviation (John Maggio and Alicia Surcouf) and Labor (Robert Fried) columnists. Field preemption in the area of aviation safety is explored in the aviation article and while other forms of preemption (and the marketplace participation doctrine) are addressed in some interesting cases discussed in the labor column.

Contract and indemnity issues are also old favorites. Our Maritime columnist (Jennifer Davis) underscores this in her description of a case in which a vessel owner failed to protect itself against the harshness of common law by not inserting an appropriate indemnification clause in its contracts.

Happy reading.

David H. Coburn
Editor-in-Chief

PRESIDENT'S MESSAGE

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Dear ATLP Members:

As we move into this holiday season, I'd like to remind everyone that now is the perfect time to renew your membership in ATLP and to encourage your colleagues to join this wonderful organization as well. As you know, ATLP provides a host of phenomenal membership benefits, and we'd like all of the members of your firm or company to partake of these benefits.

Speaking of benefits, just a reminder that our annual meeting will be held in Chicago on June 13, 14 and 15, 2012. Mark your calendars now! The meeting will be held at the Union League Club of Chicago which has been heralded as the number one private club in the United States. In addition, we will have the opportunity to attend the annual dinner of the Traffic Club of Chicago on the evening of June 13, 2012. This annual dinner will bring together approximately 900 senior executives from all transportation modes as well as the shippers who utilize those transportation services. This dinner will be a unique opportunity for ATLP members to mingle with their clients and prospective clients!

Finally, ATLP is focusing on reducing its environmental footprint. In that regard, we are asking our members whether or not they would be willing to receive the Quarterly Journal of Law Logistics and Policy in electronic form rather than paper form. For firms who have multiple ATLP members, we are suggesting that one member receive the hard copy in printed form for the firm/office library and the balance of the members receive the journal in electronic form. If you are interested in switching from a printed journal to an electronic version, please give Lauren a call at the ATLP offices.

Once again, have a wonderful and healthy holiday season!

Very TrulyYours,

Myles L. Tobin
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ANTITRUST

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Antitrust Claims Against Domestic Ocean Carriers Barred By Filed Rate Doctrine

The filed rate doctrine bars private antitrust claims alleging collusion between ocean carriers in the domestic offshore trade, even where the rates at issue were not actually filed with or reviewed by the Surface Transportation Board, according to a ruling by the U.S. Court of Appeals for the Ninth Circuit. *In re Hawaiian & Guamanian Cabotage Antitrust Litigation,* No. 10-36165 (9th Cir. Sept. 29, 2011). So long as the agency has not "abdicated its rate-making authority," the court held, rates for domestic ocean shipments that are subject to regulation by the STB are immune from private antitrust actions. The Ninth Circuit's unpublished ruling affirmed a decision by a federal district court in Seattle, dismissing antitrust claims against Matson Navigation, Horizon Lines, LLC, and other affiliates.

The plaintiffs ship goods between the mainland United States, Hawaii, and Guam. They asserted that Matson and Horizon have a virtual duopoly on domestic ocean trade between these points, and alleged that Matson and Horizon conspired to fix rates, implement collusive fuel surcharges, and engage in other anti-competitive conduct in violation of the Sherman and Clayton Acts (15 U.S.C. §§ 1, 3, 15, and 26). In particular, the plaintiffs alleged that Matson and Horizon colluded to increase fuel surcharges simultaneously, to share vessel capacity, to refrain from extra-tariff rate agreements with customers, and to allocate customers between the two carriers.

The plaintiffs also relied in part on the fact that certain Horizon Lines executives previously had pleaded guilty to antitrust charges involving the domestic shipping trade between the continental United States and Puerto Rico. *See Association Highlights, Antitrust* (March-April 2011) (noting guilty plea and admissions by Horizon Lines involving Puerto Rico trade). The district court, however, gave little or no weight to these prior pleas, noting that Matson was not alleged to be involved in the Puerto Rico trades, and that any anticompetitive agreements concerning Puerto Rico shipping therefore could not have involved Matson.

The district court held that the filed rate doctrine precludes private antitrust actions seeking monetary relief relating to tariffs or rate schedules filed with a federal regulatory agency. 754 F. Supp. 2d 1239, 1242 (W.D. Wash. 2010), *citing Keogh v. Chicago & N.W. Ry. Co.,* 260 U.S. 156 (1922). Because the governing statute requires that rates for most movements by water carrier in noncontiguous domestic trade must be filed with the STB, the district court held that the plaintiffs' claims must be dismissed. Although the plaintiffs argued that the STB engages in "no meaningful review" of water carrier rates, the district court rejected this theory and held that the application of the filed rate doctrine does not depend upon "meaningful agency review" of the filed rates. *Id.* at 1245.

The plaintiffs also argued that some of the shipments at issue, including bulk cargo and forest products, were exempt from the statute's tariff-filing requirements. But the district court noted that the statute's rate reasonableness requirement (49 U.S.C. § 13701) applied to all of the rates involved, whether or not they were filed with the STB, and held that "Congress intended for the STB to regulate [domestic offshore water carrier] rates, regardless of the type of cargo and irrespective of whether the rates are filed." *Id.* at 1254. Because the STB retained jurisdiction to regulate the reasonableness of these rates, the court held, the filed rate doctrine applied, and the plaintiff's antitrust action was barred.

On appeal, the shippers reiterated their argument that the filed rate doctrine should not apply to rates that were not subject to the statute's tariff-filing requirements, and were not filed with the STB. The Ninth Circuit rejected this view, relying on its decision in *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1033 (9th Cir. 2007). In *Gallo*, the Ninth Circuit held that the filed rate doctrine barred challenges to market-based rates for natural gas that had been authorized by, but not filed with, the Federal Energy Regulatory Commission. The court noted that FERC had exercised its authority to regulate rates by choosing not to require tariff filing, but rather to monitor the rates through a complaint process. In *Gallo*, the court held that the filed rate doctrine should apply to agency-regulated rates, whether or not those rates were literally filed with the agency. *Id.* at 1040, 1042 n.12.

The Ninth Circuit relied expressly on *Gallo* in the *Hawaiian & Guamanian* case, holding that the "STB's regulation of rates in noncontiguous domestic trade parallels FERC's regulation of natural gas rates in *Gallo*." Therefore, the court held, "*Gallo* forecloses Shippers' argument that the filed rate doctrine does not bar claims based on rates charged for items excepted from the [statutory] filing requirements." Similarly, the court held, the *Gallo* ruling precluded the shippers' contention that the filed rate doctrine should apply only when there is "meaningful agency review" of a filed rate. To the contrary, the Ninth Circuit said, "so long as the agency has not 'abdicated its rate-making authority,'" the filed rate doctrine would apply (*citing Gallo*, 503 F.3d at 1040). Because the STB had not abdicated its authority over domestic offshore rates, the court held, the filed rate doctrine was fully applicable and barred the plaintiffs' antitrust claims.

The Ninth Circuit's memorandum opinion was designated "not for publication," meaning that it is not regarded as precedential within the circuit (with certain exceptions), but may be cited in federal courts. *See* Ninth Circuit Rule 36-3; FRAP Rule 32.1.

AVIATION

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Recent Aviation Decisions

Implied Field Preemption Under the Federal Aviation Act of 1958

In September 2011, we reported on several decisions finding preemption in the field of aviation safety under the Federal Aviation Act of 1958 (the "1958 Act"). When litigation arises after an aviation-related event, plaintiffs generally assert negligence-based causes of action relying upon state standards of care to recover damages. In response, defendants have argued that the federal government exclusively and completely controls and regulates aircraft operation in the United States with "plenary authority," including the field of aviation safety, which was Congress's intent in enacting the 1958 Act. Accordingly, federal standards of care, not state law standards, relating to aviation safety apply to plaintiffs' negligence claims. The majority of courts that have addressed the issue of preemption in the context of aviation safety have concluded that plaintiffs must establish a violation of a federal standard of care before allowing remedies under state law.

Recently, the Southern District of New York followed suit. *See In re: September 11 Litigation*, No. 21 MC 101, 2011 WL 4089596, at *1 (S.D.N.Y. Sept. 7, 2011). The Southern District followed precedent set out by the Second Circuit in *Goodspeed Airport LLC v. East Haddam Inland, Wetlands & Watercourses Comm'n*, 634 F.3d 206 (2d Cir. 2011), that federal field preemption of air safety extends to state law standards of care; state law causes of action and state law remedies remain available under the 1958 Act's savings clause, which provides that "a remedy under this part is in addition to any other remedies provided by law."

The case dealt with the terrorist hijackings of United Airlines Flight 175 on September 11, 2001, and plaintiff's claims were based on the hijackers having passed through a security checkpoint controlled by the airline and managed by its security contractor. The court found that applying a state standard of care to plaintiff's claims would "directly affect federal standards and contradict the statutory requirement that the FAA Administrator, 'to the maximum extent practicable, require a uniform procedure to…protect passengers and property on an aircraft operating air transportation…'." *Id.* at p. 11 (citing 49 U.S.C. § 44903(b)). The court held that the concept of minimum standards is contrary to the 1958 Act's mandate for uniformity.

During oral argument on the preemption motion, the court's primary concern was the practical problem of articulating a "federal standard of care" to the jury. The court observed that a series of complex federal regulations may not be helpful for the jury; rather the standard of care should be presented in a form that is easily digested by a non-attorney. The court rejected plaintiff's argument that the standard, even if federal in nature, should nonetheless be one of reasonableness. In its decision, the court appears to have resolved this issue by shifting the burden of production to defendants to show substantial compliance with applicable federal regulations and procedures. The court justified this burden-shifting method because defendants are in the best position to know their own compliance; in other words, defendants have "superior access to the proof." *Id.* at *10.

The recent decisions interpreting preemption under the 1958 Act are likely to change the nature of aviation litigation. It appears that plaintiffs' standard arguments that federal regulations provide merely minimum safety requirements are no longer valid, at least in the district courts within the Second Circuit. Courts will now have to resolve, and litigants will have to consider, the issue of articulating to juries a single standard of care based on federal law.

COMINGS & GOINGS

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RRB Has New Labor Member

Walter A. Barrows is the new Labor Member of the Railroad Retirement Board. He replaces the now-retired V.M Speakman, Jr. who was a Labor member longer than any other person in the history of the RRB. Barrows began his railroad career in the signal department in 1974, and most recently was Secretary-Treasurer, Brotherhood of Railroad Signalmen, a position he first held in 1999. Among other positions held by Barrows, he was a Trustee of the National Railroad Retirement Investment Trust for the past several years.

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A Window into the Impact of Regulatory Agencies on Independent Contractor Classifications

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Much has been written on the demise of the independent contractor classification. Most litigation has occurred in traditional labor law civil cases and National Labor Relations Act claims and complaints. United States Department of Labor has coupled its increased enforcement with a limited amnesty program announced by the Internal Revenue Service. (See http://www.dol.gov/opa/media/press/whd/WHD20111373.htm)

This article will focus on this issue in a different way - the degree to which independent regulatory agencies increasingly are seen as proactive tools to directly impact classification decisions that might otherwise be made in the civil courts. It will highlight two recent opinions of the United States Court of Appeal for the Ninth Circuit, -- *Kairy v SuperShuttle International*, Case No. 10-16150 (C.A. 9, Nov. 3, 2011); *American Trucking Associations, Inc. v City of Los Angeles*, Case No. 10-56465 (C.A. 9, Sep. 26, 2011). It is informed by decisions of the United States Supreme Court, such as *Chamber of Commerce v. Brown,* 128 S. Ct. 2408 (2008), which marked the first of the modern test cases articulating limiting factors on regulatory power ("neutrality" requirements in contracting).

Kairy v. SuperShuttle dealt with the potentially pre-emptive effect of public utility regulation. California Public Utility Commission (CPUC) jurisdiction extends to modes of transportation, including air and rail. At issue was whether regulated airport shuttle service regulations extended to shuttle bus drivers and, if they did, would a civil wage action on driver status be subject to dismissal.

American Trucking Association v. City of Los Angeles dealt with the potentially pre-emptive effect of the Federal Aviation Administrative Act and, *inter alia*, its provisions relating to concession agreements mandating use of employees rather than independent contractors; and if pre-empted, whether the market participant exception nonetheless permitted such an agreement.

Kairy v SuperShuttle International.

Prior to 2001, SuperShuttle had classified its California drivers as "employees." Subsequently, it shifted to a "unit franchise model," in which the SuperShuttle City Licensees hire drivers as independent contractors/"franchisee." SuperShuttle's drivers were regulated as "passenger stage corporation drivers" by the California Public Utilities Commission. Cal. Pub. Util. Code §§ 211(c), 216(a), 226(a) and General Order 158-A.

As is common in such cases involving the control test of independent contractor status, Plaintiffs asserted that SuperShuttle treated its drivers like employees in many respects, such as requiring drivers to work within designated geographical areas, charge set fares, and obey detailed standards regarding their appearance and behavior while working. What is distinctive in this case is that the PUC had specifically authorized operators to maintain control of these aspects of performance regardless of whether the driver was an employee or an independent contractor. The SuperShuttle code of conduct added only one factor to the CPUC mandate - facial hair.

In this context, it is no surprise that SuperShuttle argued that such detailed regulatory control superseded any parallel action in the courts to redefine the status of the affected drivers. They relied on California Public Utility Code section 1759(a), which provides that "No court of this state, except the Supreme Court and the court of appeal . . . shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties . . . ."

The Ninth Circuit assessed what it described as "the tension between Public Utilities Code section 1759 and public and private remedies in the context of a three-part test evolved under California case law to resolve any conflict, e.g., (1) whether the PUC had the authority to adopt a regulatory policy on the subject matter of the litigation; (2) whether the PUC had exercised that authority; and (3) whether action in the case before the court would hinder or interfere with the CPUC's exercise of regulatory authority.

The Court found no issue with the first two factors, a result which would otherwise lead to the conclusion that the regulatory framework and actual action by the regulator pre-ordained preemption, However, on the third factor, whether judicial action would hinder or interfere with the CPUC's exercise of regulatory authority over the PSC-driver relationship, the tipping point was whether application of the California independent contractor/ employee test would hinder, frustrate, or interfere with the CPUC's requirement in General Order 158-A § 5.03 that drivers, regardless of their employment status, be under the "complete supervision, direction and control" of SuperShuttle.

In this context, the ultimate decision of the Court declining to find pre-emption because the CPUC had specifically declined to state a preference in its regulations between employee versus independent contractor status and had affirmed its position in filing an *amicus* brief, the broader lesson to be drawn for other counsel in regulatory forums is that the CPUC could well have extended its authority into the employee status question, which would have indeed shifted the decisional authority away from permitting civil litigation.

American Trucking Association v. City of Los Angeles

American Trucking Association (ATA) arose from an effort, beginning in 2008, wherein the Port of Los Angeles (POLA or the Port) prohibited motor carriers from operating drayage trucks on Port property unless the motor carriers entered into "concession agreements" with the Port. The concession agreements were adopted as part of the Port's "Clean Truck Program" which includes a progressive ban on older (and arguably higher polluting) trucks on Port property, a multi-faceted incentive program to support acquisition of clean trucks, and a system of penalties on transport of cargo by older trucks. The POLA action also implicated the interests of the Teamsters Union in limiting port operations to employees who were or could be organized.

The employee-driver provision required all concessionaires to gradually cease using independent owner-operators for Port drayage. At the end of a five-year period, each Port drayage driver must be an employee of a licensed motor carrier. The District Court held that the provision was pre-empted by the Federal Aviation Administration Authorization Act (FAAA Act), 49 U.S.C. §14501 *et seq.* as related to rates, routes and services, and rejected the Port's argument that the provision was safety related. The Port did not challenge those holdings on appeal, so the employee-driver provision would survive pre-emption only if it fell within the market participant doctrine.

ATA challenged the concession agreements on a variety of bases arguing that they were pre-empted by the FAAA. ATA argued that the independent contractor/employee provisions, even though implemented as a "concession agreement," were pre-empted because they were not true procurements as the effect was to regulate employee status.

The Ninth Circuit concluded that the nature of the concession agreements was essentially proprietary, rejecting ATA's argument that the Port's actions must be limited to "efficient procurement" to be considered proprietary. However, while the agreements were promulgated by the Port as a manager of Port facilities exchanging access to its property for a drayage carrier's compliance, the effect of the agreements was to unlawfully regulate the employee status of the independent contractor drivers - third parties whose "behavior [was] unrelated to the performance of the concessionaire's obligations to the Port." Thus even if one of the Port's primary motives in adopting the employee driver provision was to increase stability in Port drayage by ensuring that drivers were paid higher wages, as a facilities provider "it may not obtain that stability by unilaterally inserting itself into the contractual relationship between motor carriers and drivers." Stated differently, a market participant agreement under the FAAA can have broad ranging regulatory effect, provided that the agreement is limited to those actually party to it, including affected individual operators.

Further & Concluding Thoughts

The "tension" the Ninth Circuit identified as intrinsic to the interplay between regulatory action and the civil courts is uniquely displayed in the cited cases. *Chamber vs. Brown* concluded that state level regulation of its contracts with vendors could not include provisions on "neutrality" in union organizing premised solely on the fact that the state as spending its own money as a market participant. While *SuperShuttle* indicated the potential for agency control of litigable issues if adequately addressed in regulatory language and action, *ATA* echoes *Brown* as a guide, co to where the limits of such regulatory power are located.

MARITIME

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District Court Reaffirms that Common Law Indemnity and Contribution Under Maritime Law is Considerably Limited.

HLL Barents Schiffahrtsgesellschaft MBH & Co.KG v. Stolthaven New Orleans, L.L.C., No. 10-2059 (E.D.La. May 24, 2011)

At issue in this case is the carriage of styrene monomer[1] shipped by Defendant Kolmar Americas, Inc. ("Kolmar Americas") from Braithwaite, Lousiana to Antwerp, Belgium aboard a vessel owned by Plaintiff HLL Barents Schiffahrtsgesellschaft MBH & Co.KG ("HLL"). The vessel arrived at the facility of Defendant Stolthaven New Orleans, L.L.C. ("Stolthaven")[2] on July 24, 2009 to load the shipment of styrene monomer. However, during the loading process, operations were suspended at the request of the vessel's master due to a dispute over the quality of the styrene monomer. Testing of the cargo was performed, and the cargo was approved for continued loading by two surveyors—one for Shell Chemicals and the other for American Styrenics, L.L.C. Following the testing, Kolmar Americas ordered the loading of the cargo to resume.

On August 19, 2009, the vessel arrived in Antwerp, Belgium. Kolmar Group AG ("Kolmar Group"), the cargo receivers, claimed that the styrene monomer was contaminated with benzene. Kolmar Group declined the cargo. HLL was required to place security in favor of Kolmar Group in the amount of $4.2 million in order to avoid the arrest and detention of the vessel.

On December 13, 2010, Kolmar Group and its underwriters filed suit against HLL to recover damages for the allegedly contaminated cargo (the "*Kolmar Group litigation").*

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1. Styrene Monomer is a colorless oily liquid with an aromatic odor. It is used in making polystyrene plastics, protective coatings, polyesters, resins, and as a chemical intermediate.

2. Stolthaven was not in privity of contract with either Kolmar or HLL, and was not a party to the bill of lading.

HLL brought suit against Kolmar Americas and Stolthaven in the Eastern District of Louisiana under the court's admiralty and maritime jurisdiction (the "*HLL litigation"). In the verified complaint, HLL argued that Kolmar Americas had a legal and contractual duty to HLL and the vessel, pursuant to the bill(s) of lading, to provide cargo which is fit and seaworthy. HLL further alleged that Kolmar Americas was negligent and failed to exercise due care and breached its contractual obligations to HLL by providing either off-spec or contaminated cargo to be loaded on the vessel. Lastly, HLL contended that if it is found liable in the Kolmar Group litigation, then it should be able to recover from Kolmar Americas by way of contribution and/or indemnity for any sums that HLL is required to pay Kolmar Group.* HLL asserted similar negligence claims against Stolthaven: "specifically, that it was negligent and failed to exercise due care in its duties as a terminal operator."

Kolmar Americas subsequently moved to dismiss on the grounds that HLL could not state a valid claim for indemnity or contribution. Kolmar Americas first argued that HLL's contribution and/or indemnity claim was flawed because HLL failed to identify any express written agreement upon which this claim is based. Second, Kolmar Americas argued that, absent a written indemnity or contribution agreement, HLL must resort to federal maritime law to support its claim. However, the availability of common law indemnity or contribution under maritime law is considerably limited. Kolmar Americas argued that a tort indemnity claim exists only when:

1. There is an indemnitor and indemnitee relationship and consequent duty owed;
2. There is a significant difference in the indemnitor and indemnitee's degree of conduct; and
3. There is a difference in the character of the duties owed by the two to the injured party.

(*citing Cities Serv. Co. v. Lee-Vac, Ltd., 761 F.2d 238, 240 (5th Cir. 1985)). Alternatively, Kolmar Americas noted that the U.S. Supreme Court has recognized a tort indemnity claim based on the warranty of workmanlike performance ("WWLP"), which is implied in maritime contracts under Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). Kolmar Americas asserted that HLL was not entitled to indemnification or contribution under any of these theories.*

Defendant Stolthaven also moved to dismiss on these same grounds.

In considering the Kolmar Americas and Stolthaven motions, the district court began by noting that HLL's verified complaint did not identify any written indemnity or contribution agreement between HLL and Kolmar Americas, or between HLL and Stolthaven. Rather, the only contract identified by HLL was the bill of lading. However, the district court rejected HLL's argument that the bill of lading imposed an indemnity or contribution obligation upon Kolmer Americas or Stolthaven. The court specifically found that HLL (as the vessel owner) had "neither alleged nor proven any rights under the bill of lading." Moreover, even if HLL could allege that it was in privity of contract with the defendants by way of the bill of lading, HLL would not be entitled to contribution or indemnity because the bill of lading did not contain any provision which imposed such an obligation. The court concluded that "contractual indemnity only lies where the indemnity provision is express and unequivocal."[3]

Consequently, the district court determined that HLL could only prevail if it is entitled to common law contribution or indemnity under maritime law. In its opposition, HLL argued that parties that have committed no negligent acts are entitled to indemnity from those guilty of actual fault under maritime law in the Fifth Circuit. HLL asserted that it can be held responsible under the complex burden shifting scheme of the Carriage of Goods by Seas Act ("COGSA") even if it committed no negligent acts. HLL claimed that it is entitled to indemnity from the defendants because it can show at trial that the defendants' negligence caused the contamination of the cargo.

With respect to this issue, the district court focused on HLL's theory that a "non-negligent tortfeasor may be entitled to indemnity from a co-debtor that is actually at fault." [4]

[3.] *See Hardy v. Gulf Oil Corp., 949 F.2d 826, 834 (5th Cir. 1992).*

[4.] Although Kolmar Americas and Stolthaven presented other theories of tort indemnity (which they claim are irrelevant), the district court instead focused on HLL's single theory. However, the district court noted that it agreed with Kolmar Americas and Stolthaven's arguments that the other tort indemnity theories are inapplicable.

See Marathon Pipe Line v. Drilling Rig ROWAN/ODESSA, 761 F.2d 229, 236 (5th Cir. 1985). In Marathon, the Fifth Circuit held that the user of a defective product could be indemnified by the product's manufacturer when the product failed because of a manufacturing defect and caused damages. However, the district court concluded that, under prior Fifth Circuit precedent (Hardy), HLL is not the kind of defendant to whom Marathon's indemnity principles apply. The court explained that HLL is an ordinary party that owes Kolmar Group damages only if the jury agrees that it was negligent. "And as an ordinary party, HLL . . . is adequately protected under the comparative negligence system." Contrary to HLL's arguments, the district court explained that COGSA does not hold a carrier strictly liable for damages without fault.[5] *Rather, a carrier is liable only if the factfinder concludes that the carrier was negligent. The court further noted that "general maritime law does not authorize an action for tort indemnity against a third-party defendant for property/cargo damage."* [6]

Accordingly, the court rejected HLL's arguments and granted defendants' motions to dismiss the indemnity/contribution claim.

TAKE-AWAY

Significantly, the district court's decision contained a word of caution to HLL and all other vessel owners. The court stated as follows:

> *Truly, if HLL Barents had desired to guard against potential cargo claims, it can and should have protected itself with an express contract that provided for indemnification or contribution. Because HLL Barents failed to do so, it must now face the consequences of that decision.*

Given the limited availability of common law indemnity and contribution under maritime law, vessel owners should heed the district court's warning and obtain express contract language regarding indemnity.

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5. *See Mitsui Sumitomo Ins. Co., Ltd. v. Evergreen Marine Corp.*, 621 F.3d 215 (2d Cir. 2010).
6. *See Hardy*, 949 F.2d at 834.

MOTOR CARRIER LEGISLATIVE ACTIVITIES

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Infrastructure Progress?

Rep. John Mica, Chairman of the House Transportation & Infrastructure Committee, announced months ago that he would have a bill through his Committee by September 30, 2011, two years to the day after the last Highway Bill, SAFETEA-LU, expired (it has been subject to a series of extensions since September 2009).

However, Chairman Mica's version of a Highway Bill was very different from the draft bill prepared in the last Congress by his predecessor, former Chairman Oberstar (D-MN), and also very different from the plans for highway infrastructure spending announced earlier this year by the White House.

Former Chairman Oberstar had envisioned a $450 billion bill which closely followed the policy recommendations of the National Surface Transportation Policy and Revenue Study Commission and National Surface Transportation Infrastructure Financing Commission. Of particular importance for ATLP members was the draft bill's emphasis on support for freight transportation.

Oberstar pushed for prompt action on his bill as a way to stimulate the economy and create jobs, despite Republican opposition to increased spending or taxes, but the Senate and White House preferred to hold off until after the mid-term elections in November 2010. Their thinking may have been that the economy would be on the rebound, Democrats would retain control of Congress, and a strong successor to SAFETEA-LU, possibly along the lines envisioned by Oberstar, would result. Of course, Democrats lost control of the House and the Tea Party pushed Republicans even farther away from anything resembling higher taxes or more deficit spending.

Chairman Mica's original idea of a feasible new Highway Bill involved infrastructure expenditures based on existing highway fuel tax receipts, because the House would not vote for higher taxes. Recognizing that this meant a reduction below SAFETEA-LU amounts, Mica also called for adding in any unspent stimulus money, and for stretching existing funding by making highway construction less expensive and more expeditious.

At the other extreme, the White House initially called for $556 billion in infrastructure spending over 6 years, with $336 billion for roads and bridges (48% more than SAFETEA-LU, $119 billion for transit (127% more than SAFETEA-LU), $53 billion for high speed rail, and $30 billion for an infrastructure bank, which could provide leverage for significant additional funding.

The main problem with Chairman Mica's approach was that it involved reducing highway funding by approximately 30% at a time when the nation should spend more, not less. The main problems with the White House approach are that it diverts too much spending to transit and high speed rail, and it does not address the source of funding. And while it might seem that the Mica approach had the virtue of being something the House was likely to enact, the Senate, controlled by Democrats, showed no inclination to go along with Mica.

In fact, Senator Barbara Boxer (D-CA), who chairs the Senate Environment and Public Works Committee, which has jurisdiction over Highway Bills, called for a two-year bill with funding closer to current SAFETEA-LU levels as an alternative to Chairman Mica's call for a new six year bill with reduced funding.

Chairman Boxer's approach would move the toughest funding decisions beyond the next Presidential election, in November 2012, in a manner reminiscent of the Senate's preference to postpone action on the Oberstar draft bill until after the 2010 Congressional elections. Readers may recall that both Governor Bill Graves, President of the American Trucking Associations, and Senator Max Baucus (D-MT), Chairman of the Senate Finance Committee, have predicted that there will be no new Highway Bill until after the 2012 elections.

More recently, the focus has sharpened on funding and timing issues. On timing, the seventh extension of SAFETEA-LU expired September 30, 2011, and the House and Senate agreed to an eighth extension, to March 31, 2012. However, Chairman Mica announced that he would oppose any additional extensions.

As for funding, the White House is now emphasizing the AmericanJobs Act, which includes $50 billion for "imedaite investmetns for highways, transit, rail and aviation," along with $10 House is now emphasizing the American Jobs Act, which includes $50 billion for "immediate investments for highways, transit, rail and aviation," along with $10 billion for a National Infrastructure Bank.

These amounts are obviously lower than those in the Administration's proposal for a six-year replacement for SAFETEA-LU, but opposition to the Jobs Act emerged quickly. Congressional Republicans have argued that there are better ways to promote jobs, including completion of three international trade agreements (which have now been completed), reducing federal government spending and regulation, and cutting taxes.

Adding to the difficulty of moving the Jobs Act through Congress is the White House plan to pay for it through a new deficit reduction program, which turns out to involve repeal of the Bush-era tax cuts for couples making over $250,000 per year, a new tax rate for those making over $1 million per year, and new limits on tax deductions for corporations and wealthier Americans. These proposals will be resisted vigorously by Republicans and some Democrats.

An illustration of the difficulty was provided recently when Ed Rendell, former Governor of Pennsylvania, commented that highway fuel taxes, which have not been raised since 1993 and have therefore lost much of their purchasing power, should be indexed for inflation at some future date. Grover Norquist, President of

Americans for Tax Reform, responded that politicians are too likely to use increased highway taxes for non-highway purposes. This has in fact happened on some past occasions when highways were sold or leased to private investors.

Mr. Norquist's group has successfully urged many Republican Members of Congress to sign a pledge against raising any taxes. There had been concerns that Mr. Norquist would oppose the most recent extension of funding under SAFETEA-LU, based on reasoning similar to that behind Republican opposition to raising the debt limit last summer, but such opposition did not materialize. However, if funding for the next Highway Bill is increased above current fuel tax levels, Norquist's group, and many Republicans, would insist that the increases be paid for by cuts elsewhere in the federal budget.

In the last few weeks, the gap between the infrastructure priorities of the House and Senate has narrowed, raising hopes for progress on Capitol Hill. In the Senate, Chairman Boxer scheduled a markup for November 9, 2011, on Moving Ahead for Progress in the 21st Century ("MAP-21"), a bill with bipartisan support in the EPW Committee.

In addition to increasing funding levels to $109 billion a year for the next two years, MAP-21 would consolidate 87 SAFETEA-LU programs into 30, establish a National Freight Program to improve freight transportation, including improvements to freight intermodal connectors, and expedite infrastructure projects.

The biggest news, however, comes from the House, where Chairman Mica announced recently that his leadership had authorized funding for a new Highway Bill at SAFETEA-LU levels, i.e. $286 billion per year, rather than at lower Highway Fuel Tax revenue levels. Mica now envisions a 6-year bill that, if it does not increase current funding, will at least not reduce funding, or not reduce it by so much, depending on who is doing the math. It has even been reported that Mica's House Transportation & Infrastructure Committee Staff is considering the possibility of reconfiguring Highway Fuel Taxes in order to increase revenues.

Despite these glimmers of hope, it is too soon to predict that a new Highway Bill will be enacted before the 2012 elections. Sources for funding the gap between current fuel tax receipts and MAP-21 or SAFETEA-LU spending levels have not yet been identified, Chairman Mica does not yet have a bill, and reconciling the differences between Boxer's MAP-21 and Mica's successor to SAFETEA-LU will not be easy.

CONGRESS AND FMCSA

Though not yet at the stage of serious legislative efforts centered on pending bills, there are two areas in which the intersection of legislation and regulation is worth readers' attention. Both involve the Federal Motor Carrier Safety Administration.

First, over 100 Members of Congress have written a letter to FMCSA asking the agency to maintain the current regulations on truck driver Hours of Service. Despite the downward trend in highway crash and fatality rates to record lows under the current rules, FMCSA has proposed to reduce driver hours in several ways. Maximum daily hours could drop from 11 to 10, and drop further due to mandated breaks. Moreover, proposed restrictions on drivers' off duty time on weekends (the weekly "restart") are projected to expand such time off from the current minimum of 34 hours to a minimum that could reach 48 hours.

The FMCSA Hours of Service rules made the list of regulations whose impact on the economy could exceed $1 billion annually, included in a letter on current regulatory initiatives sent to House Speaker John Boehner (R-OH) by the White House. In follow-up letters to the White House, Speaker Boehner and Chairman Mica have indicated that the new rules will be opposed on Capitol Hill as detrimental to the economy. Though due out in late October, FMCSA has announced that it will not be able to meet that deadline. The new rules were received for review by OMB's Office of Information and Regulatory Affairs on November 1, 2011. Challenges in Congress and in the D. C. Circuit are a certainty.

In addition, the FMCSA recently issued its draft "2011-2016 Strategic Plan, Raising the Safety Bar." Public Comments were due July 29, 2011.

Among the proposals floated by FMCSA was the possibility of regulating the entire "CMV [commercial motor vehicle] transportation life cycle." Of particular interest for shippers and other customers of motor carriers was the following strategic goal:

> Identify gaps in current legislative and regulatory authorities that prevent FMCSA from reaching certain elements of the FMCSA transportation life-cycle (e.g., entities touching roadway movement of passengers and freight: shippers, receivers, brokers, freight forwarders) who may have a deleterious effect on safety through their actions.

The focus of FMCSA's concern seems to be delays in loading and unloading at origins and destinations, and Rep. DeFazio (D-OR) has introduced a bill, H.R. 756, that would authorize DOT to prescribe standards for the maximum number of hours of detention permitted for truck drivers.

It seems unlikely that this Congress would go along with the massive expansion of jurisdiction – covering all shippers, receivers, brokers and forwarders using motor carriers – that FMCSA proposes to seek. FMCSA has its hands full regulating safe operations by more than 500,000 registered trucking companies and several million drivers, implementing its Compliance Safety Accountability (CSA) program, addressing shortcomings in its electronic on board recorder (EOBR) program, recently struck down on appeal, and managing other safety initiatives.

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COURTS

Internet-based freight brokerage leads to fraudulent booking and lost freight.
***Fireman's Fund Insurance Co. v. Reckart Logistics, Inc., et al. v. Fore Transportation, Inc.*, 2011 WL 4062508 (N.D. Ill. 2011)**

The internet has spawned any number of service options which are more convenient than those offered by good old brick-and-mortar enterprises, but the lack of a face-to-face relationship, and the complacency that convenience can engender, certainly have their downsides. Just ask shipper Alliant Technosystems and its insurer, Fireman's Fund, after Alliant's cargo of steel coils disappeared while in possession of a daisy chain of players initiated by freight broker Reckart Logistics. Reckart went on line to the Internet Truckstop to find a carrier to transport Alliants' freight from East Alton, Illinois to Lewiston, Idaho, and got in touch with one "Sam," who identified himself as a principal of S&G Transportation. Reckart exchanged faxes with Sam to document the booking, apparently ignoring the fact that Sam's fax transmissions came from an Office Depot.

Sam apparently went to GetLoaded.com and rebooked the freight with carrier Mr. Bult's Inc. ("MBI"). He then directed MBI to ignore the bill of lading, and deliver the freight to Chicago-based Fore Transportation, where it was transloaded into new trucks. That's the last anyone saw of Alliant's coils.

Sam didn't work for S&G. In fact, S&G didn't know anything about Sam or the transaction. So when subrogated Fireman's Fund sued it in the Northern District of Illinois, summary judgment was granted based on identity theft and the absence of any evidence of culpability. Reckart, which settled out, hadn't done enough homework to ensure it knew its partner.

The insurer also sued MBI and, was granted summary judgment. MBI urged that lost cargo wasn't subject to Carmack (huh?), and that this intricate fraud constituted an "act of public enemy," a rarely cited Carmack defense that's pretty much reserved for losses caused by enemy combatants. Those arguments failed, and MBI is on the hook.

MBI brought a third-party indemnity action against Fore. In response to the latter's motion for summary judgment, the court, based on its own research (neither party argued it in briefing), found that Carmack might bar state and common law indemnity actions, and even preclude them based on federal common law. Asking for additional briefing on the subject, the court deferred ruling.

Cargo packager isn't a Carmack carrier, and can't "consent" to federal subject matter jurisdiction as such. *Daily Express, Inc. v. Maverick Transportation, LLC*, 2011 WL 5008313 (M.D. Pa. 2011)

Shipper PPG Industries hired carrier Daily Express to haul a load consisting of high-end glass from Pennsylvania to Massachusetts. Daily Express retained Maverick Transportation to package and secure the load. Something went wrong en route; the glass was broken, and Daily Express had to pay a hefty replacement bill to PPG. When Maverick ignored Daily Express's opened palm requesting indemnity, the carrier sued Maverick in a Pennsylvania state court. Maverick removed the action to the U.S. District Court for the Middle District of Pennsylvania, claiming Carmack governed the claim, which prompted Daily Express to amend its complaint to allege a Carmack cause of action. An "in the alternative, just in case" kind of thing, without conceding that Carmack applied. In cross motions, Daily Express sought to remand, and Maverick moved for summary judgment to dismiss the carrier's common law indemnity claim as preempted by Carmack.

The court remanded, thereby ending the action before it reached Maverick's motion. Maverick might have a motor carrier license, and might even operate as one in other transactions, but it wasn't doing so here. Load securement is definitely a transportation-related service – even an essential one – but without more, it doesn't equate to motor carrier services. No matter that Daily Express added a Carmack cause of action; you can do that without conceding it applies. Alternative pleading like that doesn't implicate the doctrine of judicial estoppel, which precludes a party from arguing legally inconsistent theories. Even if it did, federal courts have to address subject matter jurisdiction *sua sponte*, as this one did here, when it appears federal jurisdiction doesn't apply. This is a state law indemnity claim properly heard in state court.

The broker's disadvantage: Carmack-blessed deadlines run even if intermediary doesn't know it has a claim. *5K Logistics, Inc. v. Daily Express, Inc.*, 2011 WL 5024223 (4th Cir. 2011)

Here's a case we reported on in January 2011 with some trepidation (i.e., concern about how it was "a bad precedent for freight brokers"). A subsequent hearing reversed the decision in ways which, believe it or not, spell further bad news for our friends in the middle. It derives from the nature of the role freight brokers play, and the liability they sometimes voluntarily assume, in the transportation process.

In August 2006, Shipper Dominion Resources Services hired freight broker 5K Logistics to arrange transit of a cargo of "tube bundles" from Pennsylvania to Maryland. 5K booked the transit on Dominion's behalf with motor carrier Daily Express, Inc., which goes by "DXI." In keeping with proper legal and industry procedure, DXI issued two bills of lading naming itself as carrier and Dominion as the shipper of record. Incorporated into the bills of lading was DXI's tariff, which contained terms requiring notice of loss within nine months, and a two-year period to file suit. When the tubes arrived damaged, Dominion refused the delivery.

Three months later, 5K sent a letter to DXI stating that Dominion was claiming 192 grand in damages, and that if 5K were required to compensate Dominion, it would seek indemnity from DXI. DXI responded that it would deny the claim.

Fast forward to May 2009, when Dominion sued 5K in the Eastern District of Virginia to recover on the cargo damage. In September 2009, over three years after the loss, 5K filed a third-party indemnity action against DXI. The trial court found the broker liable, and then entertained DXI's motion to dismiss 5K's indemnity claim on the ground that 5K missed the deadlines for both notice of claim and time to file suit. It denied the motion, finding Carmack's preemptive application didn't extend to an unripened indemnity claim.

The Fourth Circuit Court of Appeals, addressing only the indemnity issue (5K's liability to Dominion apparently wasn't appealed), reversed. 5K's letter to Dominion was a conditional, perhaps hypothetical, assertion of an intent to seek indemnity, and didn't qualify as notice of claim. Suit was instituted well after two years. No matter that 5K didn't know, or even couldn't know, it was on the hook for Dominion's loss until after these deadlines had expired. It did know about the accident and its dollar value. While state and common law might allow an equitable indemnity action after expiration of an applicable statute of limitations, Carmack preempts such theories. The court noted that 5K also could have protected itself by contract provisions both with Dominion and DXI.

This result, the court noted somewhat reluctantly, is a harsh circumstance we must accept as "the bad with the good." Congress has largely exempted brokers from Carmack liability, but drafted Carmack to be paramount as to carrier rights and obligations in cargo litigation. All in all, a bad day in the Fourth Circuit for intermediaries.

Driver's retention of authority to lock and unlock container keeps carrier on hook for stolen cargo.
***Merchants Terminal Corp. v. L&O Transport, Inc., et al.*, 2011 WL 4507002 (D. Md. 2011)**

Here's another example of how our industry's peculiar business practices can dictate liability for lost freight. Merchants Terminal Corp. ("MTC"), a Maryland outfit that hires carriers to transport its customers' freights between the Port of Baltimore and distribution centers, had a load delivered by carrier L&O Transport from Delaware to the port. L&O had an owner-operator lease with Charles Elmore, but had sought to cancel it before the haul in question. MTC dispatches its carriers' drivers itself, and had called up Elmore before L&O could get the driver's interchange authority at the port discontinued.

After running a load up to Delaware, Elmore, under L&O's authority, and at MTC's direction, returned with a cargo of salmon owned by MTC's customer. At MTC's direction, he had a kingpin that secured the container while it was within a gated area of MTC's facility at the port. His plan, per procedure, was to finish the delivery the following morning by confirming the cargo matched the shipping documents description, etc. He left the salmon-laded trailer in the gated area, but apparently the gate was cut open overnight. The trailer was missing. When it was found, some of the salmon had been stolen, and the remainder had to be sold at salvage.

On cross motions for summary judgment brought by MTC and L&O, the District of Maryland first grappled with the issue of whether release of the container to MTC's facility and its storage there overnight constituted delivery which would relieve L&O from Carmack liability. No, the court found. There were several more steps in the process both sides knew must happen before the carrier's obligations were complete. The job's not over until the paperwork's done. Moreover, Elmore retained exclusive control over the load by having the kingpin key.

L&O successfully dodged MTC's dispositive motion by raising issues of fact about whether its rep had authority, even apparent authority, to sign a lease with Elmore. Evidence in the record suggested he was a rogue employee out to score a buck by way of an unauthorized transaction. If MTC could and should have known this, then L&O might win at trial.

Carmack trumps Federal Arbitration Act and arbitration clause in shipping contract.
***Smallwood v. Allied Van Lines, Inc., et al.*, 2011 WL 4927404 (9th Cir. 2011)**

The circumstances behind this one sound like they'd be the foundation of a great movie script, with all the international intrigue, shocking plot twists, guns and prisons one might encounter in a modern thriller. While the transportation law principle the Ninth Circuit pronounced is comparatively mundane, it could be significant in an era of increasing foreign participation in U.S. transportation relationships.

California resident Gary Smallwood apparently was a firearms enthusiast. When he decided to move to the United Arab Emirates, he engaged UAE-based forwarder Allen Pickfords to arrange transportation of his household goods. Pickfords booked transit with Allied Van Lines (AVL) and a couple of its affiliates to make the surface haul to port. Smallwood packed up his guns, and designated them on their packaging for storage in a California warehouse while he was away, and marked his household stuff for transit to UAE. He then flew out to his new home overseas.

Somehow, AVL reversed the designations, and delivered a load of firearms and ammunition to UAE, whose customs authorities seized the cargo and arrested Smallwood. He was charged with smuggling weapons, spent eleven days in a UAE pokey, and faced deportation. He brought suit against AVL and Pickfords in a California state court.

The defendants removed the action to the U.S. District Court for the Southern District of California on the ground Carmack governed their potential liability. They then sought to dismiss the action in favor of arbitration as mandated by a clause in the Pickfords-Smallwood quotation, which the court found to be a contract. Affirming the trial court, the Ninth Circuit found the arbitration clause unenforceable, and retained jurisdiction.

Otherwise, the court ruled, Carmack's supremacy as a nationally uniform liability regime would be threatened. Household goods carriers (and their forwarders and brokers) are expressly prohibited from contracting around the statute's requirements, and Carmack provides the venues in which a shipper may file suit. An arbitration clause essentially creates a new forum, one which Carmack doesn't permit. AVL tried to argue that the Federal Arbitration Act, 9 USC §§1-14 (FAA), is another federal statute at odds with Carmack on this issue, and that FAA trumps Carmack because it was more recently enacted (1947, as compared to 1906 for Carmack). The court found that Carmack had been modified and recodified several times since 1947, such that Congress must have intended Carmack to be a minor exception to the general enforceability of arbitration clauses. This one stays stateside in federal court.

AGENCIES

Supplemental Notice of Proposed Rulemaking; Federal Motor Carrier Safety Administration; *Unified Registration System*; FMCSA Docket No. 97-2349; 76 *Fed. Reg*. 66506 (October 26, 2011)

In response to direction from Congress, FMCSA has reviewed the rules, regulations, and processes applicable to registration of transportation entities subject to U.S. Department of Transportation jurisdiction. The result is a *Supplemental Notice of Proposed Rulemaking* extending 90 pages in the *Federal Register*, including a 30-page form (MCSA-1) and 20 pages of instructions. The SNPRM follows the proposal from FMCSA regarding establishment of the Unified Registration System originally announced in 2005.

FMCSA's goal is to have a restatement of the rules and regulations applicable to the registration process. Carriers, brokers, freight forwarders, intermodal equipment providers, and others will all be covered under MCSA-1.

Those of us who have worked closely with the registration process since the ICCTA deregulation in 1995 are likely to recognize the provisions in the form as they would apply to a routine application or other transaction. FMCSA is not changing the process, rather, it's just trying to reorganize it. However, there are a few changes that are part of the proposal. For example,

- FMCSA has proposed to reinstate the $5,000 cargo insurance requirement.
- Certificates of insurance have to be filed for cargo coverage in addition to the usual filing for the liability coverage.

- Carriers which are not “for hire” carriers will be subject to registration and filing requirements similar to the for hire carriers. For example, they will have to file evidence of insurance and biennial updates.
- Filing fees have been raised to $300.

So far, there has been much talk concerning various pieces and parts of the SNPRM and Unified Registration System. Comments are due December 21, 2011.

RAILROADS

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STB RULEMAKING AND OTHER PROCEEDINGS

The Board Deferred Consideration of NITL’s Petition for Rulemaking to Adopt Revised Competitive Switching Rules

On November 4, 2011, the Board issued a decision regarding The National Industrial Transportation League’s (NITL) petition for rulemaking to adopt revised competitive switching rules. Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Ex Parte 711, at 2 (STB served Nov. 4, 2011) (November 4 Decision). NITL filed its petition for rulemaking after participating in Competition in the Railroad Industry, STB Ex Parte No. 705 (STB served Jan. 11, 2011), where the Board solicited comments regarding the following topics: (1) financial state of the railroad industry, (2) alternative through routes, (3) terminal facilities access, (4) reciprocal switching agreements, (5) bottleneck rates, (6) access pricing, and the (7) impact of any proposed change in competitive access rules/policies. After NITL filed its petition for rulemaking in Ex Parte 711, several parties filed responses. Some supported the institution of a rulemaking proceeding, and others opposed it.

The Board “defer[red] a decision granting or denying NITL’s request to institute a rulemaking pending [its] review of the issues and arguments presented in EP 705.” November 4 Decision, at 2. The Board explained that deferring a decision on NITL’s petition would “conserve and use efficiently the Board’s resources” since “we continue to consider the extensive arguments presented in EP 705 regarding competitive access, including reciprocal switching.” Id. at 1-2.

The Board Finds that Union Pacific is Revenue Adequate for the Year 2010

On November 3, 2011, the Board made its annual determination of railroad revenue adequacy for the year 2010. R.R. Revenue Adequacy—2010 Determination, STB Ex Parte No. 552 (Sub-No. 15), at 1 (STB served Nov. 3, 2011). A railroad is revenue adequate under 49 U.S.C. § 10704(a) if its rate of return on net investment is equal to or greater than the current cost of capital for the railroad industry. To make its determination for 2010, the Board compared each Class I railroad’s return on net investment to the agency’s finding that the 2010 railroad industry cost of capital was 11.03%. Id. at 1 (citing R.R. Cost of Capital—2010, STB Ex Parte No. 558 (Sub-No. 14) (STB served Oct. 3, 2011). The Board found that one Class I railroad was revenue adequate—Union Pacific Railroad Company (UP).

The Board Proposed Amendments to Its Rules Requiring Class I Railroads to Separately Report PTC Expenditures In Their Annual Reports

On October 13, 2011, the Board proposed amendments to its rules to "require rail carriers that submit to the Board R-1 reports that identify information on capital and operating expenditures for Positive Train Control (PTC) to break out those expenses so that they can be viewed both as component parts of and separately from other capital investments and expenses." Reporting Requirements for Positive Train Control Expenses & Invs., STB Ex Parte No. 706, at 1 (STB served Oct. 13, 2011). The Rail Safety Improvement Act of 2008 requires rail carriers to "make expenditures related to installation, operation, and maintenance of PTC." Id. at 2-3 (citing 49 U.S.C. § 20157(a)(1)). This proceeding arose from UP's petition asking the Board to "institute a rulemaking regarding to adopt supplemental schedules that would require Class I carriers to separately identify PTC expenditures." Id. at 3. In a previous decision, the Board granted UP's petition and instituted a rulemaking proceeding. The Board's October 13 decision addressed the merits of UP's proposal, and Commissioner Mulvey dissented from the decision. Id. (citing Reporting Requirements for Positive Train Control Expenses & Invs., STB Ex Parte No. 706 (STB served Feb. 10, 2011)).

In its decision, the Board proposed to amend its rules to require each Class I railroad to file a "PTC Supplement" with its annual report. The Board has statutory authority to require a rail carrier to file an annual report that "'shall contain an account, in as much detail as the Board may require, of the affairs of the rail carrier.'" Id. at 2 (quoting 49 U.S.C. § 11145(b)(1)). Under the Board's proposed rules, the PTC Supplement will reflect the "amounts attributable to PTC for the filing year," the "aggregate mileage on which PTC is installed," the "number of locomotives equipped with PTC," the "PTC-related expenditures for passenger-only service not otherwise captured in the individual schedules," and the "value of funds from government transfers . . . used or designated to purchase or create PTC assets or to offset PTC costs." Id. at 5. The Board explained that the PTC Supplement will "provide us with important information" because PTC expenses are "projected to be high," Class I railroads "are already incurring PTC-related costs," and PTC costs are a "relatively specific set of expenditures prompted directly by legislative mandate." Id. at 3-4. Comments are due on December 12, 2011, and replies are due on January 11, 2012.

Commissioner Mulvey dissented. He explained that "today's decision to propose rules that would require PTC-related costs to be separately reported from other capital expenditures is premature" because the Board has a pending rulemaking proceeding – Ex Parte 681 (EP 681) – concerning "*whether* and *how* it should update its railroad reporting requirements and the Uniform Railroad Costing System to better capture the operating costs of transporting hazardous materials." Id. at 7 (Mulvey dissenting) (citing Class I Railroad Accounting & Fin. Reporting – Transp. of Hazardous Materials, STB Ex Pate No. 681 (STB served Jan. 5, 2009)) (emphasis in original). He asserted that the Board should "first decide how such costs may be used in Board proceedings" because the Board "made clear in EP 681 that it has not decided that it should allow hazardous materials transportation costs to be used in a prescribed way in Board proceedings." Id.

The other Board members—Chairman Elliott and Vice Chairman Begeman—disagreed. In the majority decision, they acknowledged that "PTC expenses fall under the umbrella of the many issues" in EP 681, but they explained that "nothing precludes the Board from extracting from that complex proceeding for more expeditious treatment the relatively straightforward issue of identifying PTC expenses while continuing to consider the remaining issues—including the regulatory uses to which PTC data may be put—separately." Id. at 3.

The Board Requested Comments Regarding Improving Regulation and Regulatory Review

On October 12, 2011, the Board requested comments regarding "whether any of its regulations may be outmoded, ineffective, insufficient, or excessively burdensome, and how to modify, streamline, expand, or repeal them, as appropriate." Improving Regulation & Regulatory Review, STB Ex Parte No. 712, at 1 (STB served Oct. 12, 2011). The Board's request for comments stems from President Obama's instruction to independent agencies to "retrospectively analyze existing regulations and produce a plan to periodically reassess and streamline their existing regulations." Id. at 1-2 (citing Executive Order 13579, Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41,587-88 (July 14, 2011)). The Board previously reported its "ongoing efforts to conduct, on a voluntary basis, an analysis of its existing regulations," including "competition in the rail industry and environmental regulations" in response to President Obama's order to executive agencies. Id. at 2 (citing Executive Order 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3,821-23 (Jan. 31, 2011)). Comments are due by January 10, 2012.

The Board Instituted a Declaratory Order Proceeding Regarding the Use of Acquisition Cost in the Annual URCS and Revenue Adequacy Determinations for BNSF

On September 28, 2011, the Board instituted a declaratory order proceeding regarding the use of acquisition cost in the annual Uniform Railroad Costing System (URCS) and annual revenue adequacy determinations for BNSF Railway Company (BNSF) after its acquisition by Berkshire Hathaway, Inc. Western Coal Traffic League—Petition for Declaratory Order, STB Fin. Docket No. 35506, at 2-3 (STB served Sept. 28, 2011). This proceeding arose from a petition for declaratory order filed by Western Coal Traffic League (WCTL) under 49 U.S.C. § 10707(d)(1)(B). WCTL asked the Board to "exclude the write-up [of $7,625,000,000] in BNSF's net investment base attributable to the difference between the book value and the price that Berkshire Hathaway Inc. . . . paid to acquire BNSF in 2010, and make corresponding changes in BNSF's annual URCS depreciation calculations." Id. at 1-2. In reply, BNSF opposed WCTL's petition because the "Board's precedent on this subject is well-settled" since the "Board, the Interstate Commerce Commission . . . , the Railroad Accounting Principles Board, and the courts have determined repeatedly that acquisition cost is an economically accurate measure of current market value." Id. at 2. BNSF also asked that if the Board initiated a declaratory order proceeding, the Board should expand the proceeding to include consideration of the impact of acquisition costs on the annual revenue adequacy determinations.

The Board initiated the proceeding "to resolve the controversies raised by WCTL and BNSF." Id. at 2. The Board requested public comment regarding the "effect of the subject net investment base write-up on the annual URCS and revenue adequacy determinations for BNSF beginning in the year 2010." Id. at 2-3. The Board explained that it will process the "previous year's URCS data and revenue adequacy calculations . . . using the 2010 R-1 data" filed by BNSF, and the Board will "consider any necessary recalculation or revisions" if it "later determines that the write-up is inappropriate." Id. at 3. Opening, reply, and rebuttal evidence from parties of record is due between October and December 2011.

The Board also granted WCTL's motion for a protective order for copies of the "workpapers supporting BNSF's write-up and depreciation calculations." Western Coal Traffic League—Petition for Declaratory Order, STB Fin. Docket No. 35506, at 1 (STB served Sept. 28, 2011) (granting motion for a protective order). The Board directed BNSF to provide the workpapers "no later than 3 business days after an appropriate request." Id. at 2.

UNREASONABLE RULES OR PRACTICE CASES

The Board Instituted a Proceeding Regarding the Reasonableness of RailAmerica's Standard Operating Practice Regarding TIH

On September 30, 2011, the Board instituted a proceeding regarding RailAmerica, Inc.'s (RailAmerica) Standard Operating Practice (SOP) regarding toxic inhalation hazards (TIH) in response to two challenges by chemical shippers and trade associations. CF Indus., Inc. v. Indiana & Ohio Ry., Point Comfort & N. Ry., & the Michigan Shore R.R.—Petition for Declaratory Order, STB Fin. Docket No. 35517, Am. Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Inst., and PPG Indus., Inc. v. Alabama Gulf Coast Ry. & RailAmerica, Inc., STB Docket No. 42129, at 1 (STB served Sept. 30, 2011). In Docket Number 35517, CF Industries petitioned for a declaratory order requesting the STB to declare invalid and unenforceable certain tariffs and the associated implementing SOP issued by three RailAmerica railroads regarding transportation of TIH materials. Id. at 4. In Docket Number 42129, American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. filed a complaint against Alabama Gulf Coast Railway (AGR) and RailAmerica alleging that the SOP, as well as "special train services," is an unreasonable practice under 49 U.S.C. § 10702 and a violation of the common carrier obligation under 49 U.S.C. § 11101. Id. at 2.

The Board will address the two cases in one proceeding since the "issues in these dockets are substantially similar because the shippers in both cases appear to challenge the same tariff requirements and the same RailAmerica [SOP] for handling TIH/PIH materials." Id. at 2. The Board concluded that "good cause exists to address the issues raised in both cases in one proceeding and to allow for broad public input" since the parties "seek guidance regarding the validity and enforceability of requirements related to the transportation of TIH/PIH materials." Id. at 6-7. The Board noted that these tariffs "share common substantive terms," the "relevant facts concerning the practices of the defendant railroads appear to be substantially the same," and the "same precedent should [ ] apply to both cases." Id. at 6. The Board requested public input since the "legal issues presented may ultimately affect . . . others within the industry that transport, handle, receive, or ship TIH/PIH," and the "Board's determination in either of these cases is likely to resolve similar issues that might be raised in future proceedings." Id. at 6.

The Board established a procedural schedule. Discovery concludes on November 29, 2011. Opening, reply, and rebuttal evidence are due from parties of record between January 13, 2012 and March 13, 2012.

The Board will hold Docket Number 42129 "in abeyance pending issuance of the Board's final decision" in Docket 35517 after the Board decides complainants' request for injunctive relief. Id. at 1, 4. To decide complainants' request for injunctive relief, the Board instructed complainants to file additional information on October 17, 2011, and defendants to file replies on October 31, 2011. Such information is necessary because there are "questions about exactly what practices complainants are challenging and seeking to enjoin" since AGR cancelled the tariff cited in the complaint and published a replacement tariff. Id. at 5. The Board instructed complainants to "file supplemental information . . . clarifying briefly what specific practices, whether found in the SOP, replacement tariff, or elsewhere (including the actual tariff or other items that are the subject of the request for injunctive relief), they are challenging and seeking to enjoin." Id. at 5.

The Board Instituted a Proceeding Regarding Norfolk Southern's Tariff Imposing Charges for Overweight Cars Due to Weather Conditions

On September 22, 2011, the Board instituted a declaratory order proceeding regarding the reasonableness of Norfolk Southern Railway Company's (NS) tariff "impos[ing] charges and penalties on loaded rail cars that exceed the car's weight limit as a result of weather conditions encountered after the car is delivered to the railroad." Ag Processing Inc. A Cooperative—Petition for Declaratory Order, STB Fin. Docket No. 35387, at 1 (STB served Sept. 22, 2011). Ag Processing Inc. A Cooperative filed a petition for declaratory order challenging NS's tariff, and the petition was joined by Bunge North America, Inc., Archer Daniels Midland Company, Louis Dreyfus Corporation, and Perdue Agribusiness, Inc. After the parties' efforts to mediate the dispute failed, NS filed a motion to dismiss.

The Board held oral argument on October 25, 2011, and asked the parties to address four issues: "(1) industry practice relating to cars made overweight by snow or ice; (2) how frequently closed-hopper cars and tank cars are made overweight by snow and ice and how those cars have been brought into compliance in the past; (3) what [NS's] overweight policies were prior to adopting the procedures in question; and (4) whether the agency's treatment of demurrage—which also involves issues of due diligence and equipment usage—is a useful model to employ here." Id. The Board stated that it "does not anticipate the need for additional evidentiary filings in this proceeding." Id.

RATE CASES AND STANDARDS FOR RATE CASES

The Board Dismissed AEP Texas Rate Case Based on Voluntary Settlement

On October 26, 2011, the Board granted AEP Texas North Company's (AEP Texas) request to dismiss the complaint against BNSF because the parties reached a voluntary settlement. AEP Tex. N. Co. v. BNSF Ry. Co., STB Docket No. 41191 (Sub-No. 1), at 1 (STB served Oct. 26, 2011) (October 26 Decision). This case concerned BNSF's rates for transportation of coal from the PRB to the Oklaunion Generating Station near Vernon, Texas. In 2007, the Board concluded that AEP Texas failed to demonstrate that BNSF's rates were unreasonable, and in 2009, the Board denied AEP Texas' petition for reconsideration. AEP Tex. N. Co. v. BNSF Ry. Co., STB Docket No. 41191 (Sub-No. 1) (STB served Sept. 10, 2007 & May 15, 2009). AEP Texas filed a petition for review at the D.C. Circuit. The Court vacated the "Board's decision, in part, and remanded to the Board to reassess the ‘decisionmaking for the 2005 cost of equity estimate.’” October 26 Decision, at 1 (quoting AEP Tex. N. Co. v. STB, 609 F.3d 432, 444 (D.C. Cir. 2010)). In its request to dismiss the complaint, AEP Texas explained that the parties had reached settlement “on all matters at issue in this proceeding,” and the Board discontinued the proceeding.

OTHER REGULATORY DEVELOPMENTS

FRA Notices Public Hearing and Extends Comment Period Regarding Notice of Proposed Rulemaking Relating to Positive Train Control

On November 10, 2011, the Federal Railroad Administration (FRA) held a public hearing on the agency’s NPRM “proposing amendment of the regulation requiring certain railroads to implement PTC systems.” Positive Train Control Systems, 76 Fed. Reg. 63,899, 63,899 (Oct. 14, 2011) (citing Positive Train Control Systems, 76 Fed. Reg. 52,918 (Aug. 24, 2011)). FRA’s proposed amendment “would remove regulatory provisions requiring railroads to either conduct further analyses or meet certain risk-based criteria in order to avoid positive train control (PTC) system implementation on track segment that do not transport poison- or toxic-by-inhalation (PIH) hazardous materials traffic and are not used for intercity or commuter rail passenger transportation as of December 31, 2015.” Id. The FRA also extended the comment period to November 25, 2011, to solicit comments at the hearing and to “afford interested parties the opportunity to submit comments in response to views or information provided at the public hearing.” Id. FRA announced the public hearing “to provide interested persons to provide comments on the proposal and to discuss further development of the regulation.” Id. Shipper organizations, shippers, and the Association of American Railroads provided comments at the hearing.

RECENT JUDICIAL DEVELOPMENTS
THE UNITED STATES SUPREME COURT

The United States Supreme Court Heard Argument in a Case Regarding Whether Federal Railroad Safety Acts Preempt State Law Claims

On November 9, 2011, the United States Supreme Court held oral argument in a case raising the question whether Federal Railroad Safety Acts preempt state law product liability claims. Kurns v. R.R. Friction Prods. Corp. & Viad Corp., No. 10-879 (cert. petition granted June 6, 2011). At issue was the Third Circuit’s conclusion that plaintiffs’ state law claims were preempted by the Locomotive Inspection Act (LIA), 49 U.S.C. § 20701, et seq. Kurns v. A.W. Chesterton Inc., 620 F.3d 392, 397-98 (3d Cir. 2010). Plaintiffs, filing suit on behalf of a deceased railroad worker, alleged that decedent was exposed to asbestos when he installed brake pads and engine valves that were manufactured by Railroad Friction Products Corporation and Viad Corporation. The Third Circuit affirmed the district court’s grant of summary judgment for defendants, holding that the Locomotive Inspection Act “preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation.” Id. at 397. The Third Circuit had concluded that “Congress’s intent in enacting and amending the LIA was to preempt completely the field of railroad parts and appurtenances, and that the locomotive components which are the subject of plaintiffs’ products liability action undoubtedly fall within that category.” Id. at 399.

The Association of Transportation Law Professionals
Wishes you and your family
A safe, happy and healthy
Holiday Season
&
All the best in 2012!

HEADQUARTER NOTES

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Committee Chair: Eric Hocky, Thorp Reed & Armstrong LLP, Phila., PA

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Programs:

Committee Chair: Michael Barron, Jr., Fletcher & Sippel LLC, Chicago, IL

83rd Annual Meeting:

Believe it or not, the 83rd Annual Committee on Programs is off to a great start in planning the CLE education program for this next June 2012 in Chicago. Mark your calendars! Our fearless leader, Myles Tobin is concurrently serving as President of the Chicago Traffic Club and has arranged for ATLP Annual Meeting attendees to be invited to the Annual Awards Dinner of the Chicago Traffic Club on Wednesday, June 13th. There will be over 1,000 traffic industry professionals convened in one place….this is a great opportunity for you to network! For golfers, there will be an opportunity to join in the Traffic Club's golf tournament on Tuesday, June 12th.

Thank you to the following Program committee members: Michael Barron, Jr., (Chair) *Fletcher & Sippel LLC*; Charles A. Spitulnik, (Co-Chair) *Kaplan, Kirsch & Rockwell, LLP*; John Maggio, *Condon & Forsyth, LLP*; Peter A. Pfohl, *Slover & Loftus, LLP*; Mickey R. Dragash, *Exel US*; Mack Shumate, *Union Pacific Railroad Company*; and Beth Clark, *Foster Pepper PLLC.*

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Mark your calendars

83rd Annual Meeting
Union League Club of Chicago
Chicago, IL

June 13-15, 2012

ASSOCIATION OF TRANSPORTATION LAW PROFESSIONALS

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