

2024 TLA Annual Conference & CTLA Mid-Year Meeting

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Wyndham Grand Rio Mar Puerto Rico
Golf and Beach Resort
Rio Grande, Puerto Rico



Transportation Lawyers
Association

CTLA



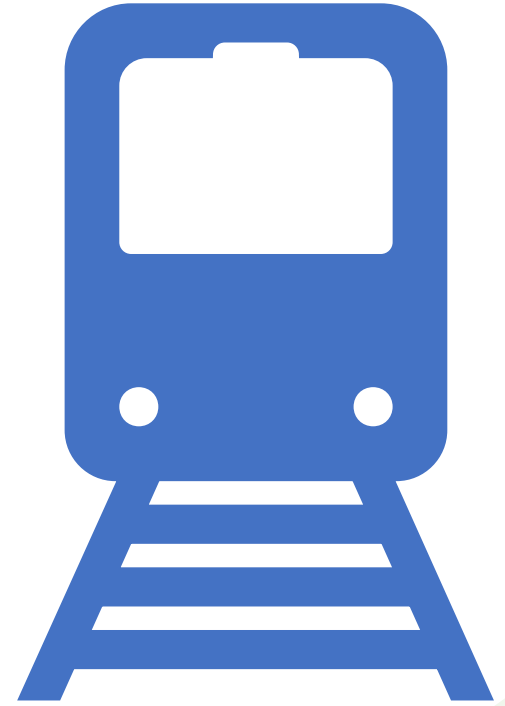
Multi-Modal and International Law Update - Rail



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Agenda

Florida East Coast Railway: Sustainability

U.S., Mexican Partnership: International Rail Car-Ferry Service

Surface Transportation Board: Reciprocal Switching

Surface Transportation Board: The Passenger Rail Advisory Committee

The Federal Maritime Commission: M.E. Dey. v. Hapag-Lloyd AG v. CSXT

East Palestine, Ohio Train Derailment

Shared Freight-Passenger Corridor Principles: Safety, Capacity, Compensation and Liability



Florida East Coast Railway

Sustainability

- FEC is committed to providing our customers with sustainable intermodal and carload supply chain solutions, providing reduced:
 - Highway congestion
 - Air pollution
 - Greenhouse gas emissions

FEC is collaborating with Waste Management to transport waste from Miami-Dade County by rail. Starting at the FEC Hialeah rail terminal, crews will transport waste from Miami-Dade County by rail instead of by truck all the way up to the Okeechobee landfill for disposal.

- FEC locomotives are fueled by liquified natural gas and are four times more fuel efficient than diesel trucks, which means that under this program greenhouse emissions will be reduced by up to 45%.



U.S., Mexican Partnership International Rail Car-Ferry Service

- Genesee & Wyoming (G&W) is partnering with Grupo Mexico Transportes (GMXT) to provide rail car ferry service between the U.S. and Mexico through CG Railway (CGR).
- CGR is a Class III railroad that provides a rail route between the U.S., Canada and Central & Southern Mexico.
- G&W originally partnered with SEACOR Holdings Inc. but GMXT announced its intention to purchase SEACOR's stake in CGR and become G&W's new joint venture partner for CGR.



Surface Transportation Board

- The Surface Transportation Board (STB) is an independent federal agency that is responsible for the economic regulation of various modes of surface transportation, primarily freight rail.
- The STB has jurisdiction over a railroad's rates, practices, and service issues. The STB also oversees rail restructuring transactions (mergers, lines sales, constructions and abandonments).
- Statutory authority under The ICC Termination Act of 1995



Surface Transportation Board: Reciprocal Switching

- Reciprocal switching occurs when a customer is physically served by only one railroad but arranges for a nearby railroad to provide service. Access to the second railroad is granted at an interchange point where the first railroad transfers the shipper's freight cars to the second railroad who pays a compensatory per-car switching fee.
- On July 27, 2016, the Board granted in part a petition for rulemaking filed by the National Industrial Transportation League seeking revised reciprocal switching regulations under Docket No. EP 711 (Sub-No. 1).
- On September 7, 2023, because of changes in the freight rail industry the Board determined not to pursue the proposed revisions in Docket No. EP 711 (Sub-No. 1) and closed that Docket.
- The Board opened a new proceeding under Docket No. EP 711 (Sub-No. 2) to address reciprocal switching.
- The newly proposed regulations would “provide for the prescription of a reciprocal switching agreement when service to a terminal-area shipper or receiver fails to meet certain objective performance standards.”



Reciprocal Switching Cont.

The newly proposed regulations would provide a streamlined path for the prescription of a reciprocal switching agreement when service to a terminal-area shipper fails to meet any of the three performance standards.

- Service Reliability: The measure of a Class I rail carrier's success in delivering a shipment by the original estimated time of arrival (OETA) that the rail carrier provided to the shipper.
- Service Consistency: The measure of a rail carrier's success in maintaining, over time, the carrier's efficiency in moving a shipment through the rail system.
- Inadequate Local Service: The measure of a rail carrier's success in performing local deliveries ("spots") and pick-ups ("pulls") of loaded railcars and unloaded private or shipper-leased railcars within the applicable service window, often referred to as "industry spot and pull" (ISP).



Surface Transportation Board

Inaugural Membership for the Passenger Rail Advisory Committee

- On March 28, 2024, STB Board Chairman Martin J. Oberman announced that he has appointed, with Board approval, members to the newly formed Passenger Rail Advisory Committee (PRAC).
- PRAC was established to help the Board fulfill its responsibilities in overseeing certain aspects of passenger rail service.
- Members of the PRAC will advise the Board on issues impacting the development of passenger rail service.
- The PRAC has 21 members with either 2- or 3-year terms. Members include DOT officials, Amtrak Counsel, Commuter Rail officials, and executives from Class II or III Railroads.



The Federal Maritime Commission

- The FMC is an independent federal agency that regulates the movement of cargo by ocean between the United States and a foreign port.
- Statutory authority under the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act (OSRA) of 1998, and the Ocean Shipping Reform Act of 2022.
- Responsible for ensuring that the policies, practices, and procedures of ocean common carriers and marine terminal operators (MTOs) in the handling and transportation of cargo are reasonable, 41102(c). (FMC jurisdiction can also apply to the inland movement of cargo under a through bill of lading).
- FMC Docket No. 22-35, *M.E. Dey. v. Hapag-Lloyd AG v. CSXT*, the ocean carrier Hapag filed a third-party complaint against rail carrier CSXT. Hapag argues that the FMC has jurisdiction over CSXT because the cargo moved under a through bill of lading and the charges at issue were rail storage charges. CSXT has filed a motion to dismiss asserting that the STB not the FMC has jurisdiction over the rail carrier. The motion to dismiss is pending.



East Palestine, Ohio Train Derailment

- On February 3, 2023, a Norfolk Southern freight train derailed in East Palestine, Ohio.
- 20 of the rail cars contained hazardous materials.
- The derailment resulted in a pile of burning rail cars and contamination of the community's air, land, and water. The fire lasted for several days and Residents living near the derailment site were evacuated.
- The EPA issued a Unilateral Administrative Order under CERCLA to Norfolk Southern requiring the company to develop and implement plans to address contamination and pay EPA's response costs associated with the order.
- The EPA has become the lead decision maker at the site.
- On March 31, 2023, the EPA and Justice Department Filed a Complaint Against Norfolk Southern Railway Company for Unlawful Discharge of Pollutants and Hazardous Substances in East Palestine Derailment.
- Almost a year later, the crash site is still under active construction, clean up efforts remain underway and have already cost Norfolk Southern more than \$800 million.



Shared Freight-Passenger Corridor Principles

Safety

Railroads are an extremely safe way to move people and freight, and everyone involved in railroading wants to keep it that way. That's why safety has to come first when it comes to passenger trains sharing track or rights-of-way with freight trains.

Capacity

Passenger rail use of freight rail corridors should not compromise freight railroads' ability to serve present or future customers.

Compensation

Freight railroads should not be expected to subsidize passenger railroads.

Liability

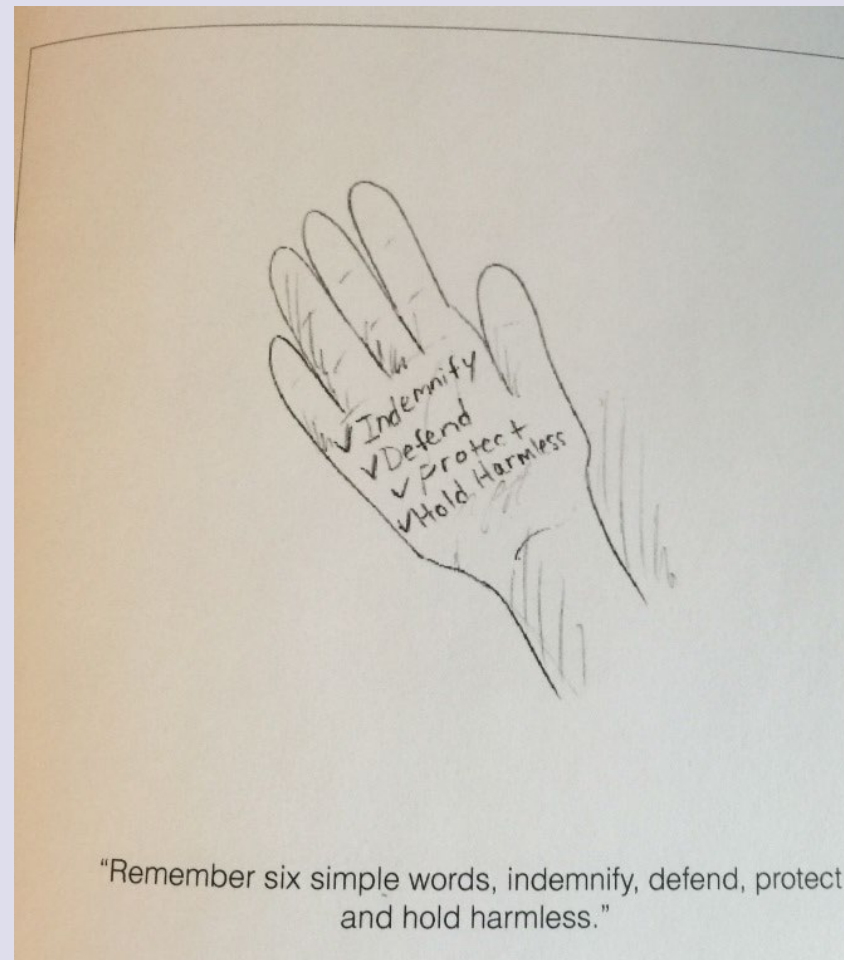
Freight railroads require adequate protection from liability before they can agree to host passenger trains.

Additional Considerations

No One-size Fits All Approach — *Each project involving passenger rail on freight-owned corridors has unique challenges and circumstances that should be evaluated on a case-by-case basis.*

AAR Policy Position -*U.S. freight railroads provide the literal foundation for the overwhelming majority of intercity passenger service in America. Policymakers should ensure that the passenger rail service on corridors owned by freight railroads is done safely and does not impede freight rail service.*

Liability – essential principles



First Mark-up Session



“Run it by the legal department—but don’t let them see you.”

Cartoon by Kaamran Hafeez and Al Batt March 27, 2024



Liability Overview – Federal Law

- 49 U.S.C. § 28103(b) “**Contractual Obligations.**— A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.” Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, December 2, 1997, 111 Stat. 2570 at *2571 (“ARAA”)
- Provides for a \$200,000,000 cap on passenger claims – 49 U.S.C. § 28103(a) (adjusted every five years) Applies to all railroads, not just Amtrak
 - GAO Report U.S. Gen. Accounting Office, Commuter Rail: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations, Rep. to the Ranking Democratic Member, Comm. on Transp. and Infrastructure, House of Reps., GAO-04-240 app. II (2004).
 - GAO Report U.S. Gen. Accounting Office, Commuter Rail: Many Factors Influence Liability and Indemnity Provisions and Options Exist to Facilitate Negotiations, Rep. to Congressional Requesters, GAO-09-282 (2009).



Liability Overview

➤ Source of 49 U.S.C. § 28103

Nat'l R.R. Passenger Corp. v. Consolidated Rail Corp., 698 F. Supp. 951, 972 (D.D.C. 1988) rev'd on other grounds, 892 F.2d 1066 (D.C. Cir. 1990).

Court denies indemnity for reckless, wanton or willful misconduct or punitive damages (1) because the agreement between the parties did not contain clear, unequivocal and express intent do so, and (2) “due to very strong public policy considerations.”

➤ Challenges to Preemptive Effect of 49 U.S.C. § 28103

- Indemnity for Carrier's Own Negligence: O & G Indus., Inc. v. Nat'l R.R. Passenger Corp., 537 F.3d 153 (2d Cir. 2008)
- Sovereign Immunity Defense: Deweese v. Nat' l R.R. Passenger Corp., 590 F. 3d 239 (3d Cir 2009)