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Proposed Rules for Small Unmanned Aircraft Systems

Thomas Lehrich and Matthew Hersey

Background

On February 15, 2015, the Federal Aviation Administration (FAA) proposed regulations addressing the operation of unmanned aircraft systems (UAS), certification of their operators, registration, and display of registration markings. The NPRM eliminates the need for an airworthiness certification, and it prohibits UAS from posing a danger to the National Airspace System. This article summarizes the new rules for small UAS proposed by the Department of Transportation (DOT) and FAA.

The FAA has approved the use of UAS on a case-by-case basis. Businesses are required to apply for a special permit directly from the FAA, and governmental agencies are required to apply for a Certificate of Waiver or Authorization (COA) from the FAA. About 28 companies have been granted this special permit and approximately 600 COAs have been approved by the FAA.

UAS often have a camera mounted to the body; this camera provides an important utility for both businesses and public entities. They may also be mounted with telecommunication equipment to temporarily enhance and extend communication signals. It is expected that as operational costs drop and technology advances, UAS will have a transformative impact on the fields of urban infrastructure management, farming, and disaster response. The FAA illustrates the following possible uses for UAS:

- DFG FG Crop monitoring/inspection;
- Research and development;
- Educational/academic uses;
- Power-lin/pipeline inspection in hilly or mountainous terrain;
- Antenna inspections;
- Aiding certain rescue operations, such as locating snow avalanche victims;Bridge inspections;
- Aerial photography; and
- Wildlife nesting area evaluations.

Proposed Regulations

The FAA has authority to regulate UAS. *See* 49 U.S.C. § 40103(b) (1) and (2) and 49 U.S.C. § 44701(a) (5). This rulemaking was promulgated under the authority described in the FAA Modernization and Reform Act of 2012 (Public Law 112-95). Section 333 of Public Law 112-95 directs the Secretary of Transportation to determine whether "certain unmanned aircraft systems may operate safely in the national airspace system." If the Secretary determines, pursuant to Section 333, that certain unmanned aircraft systems may operate safely in the national airspace system, then the Secretary must "establish requirements for the safe operation of such aircraft systems in the national airspace system. "The proposed UAS rule regulates non-governmental users and non-recreational activities.

The FAA defines a series of baseline limitations: maximum weight for the UAS to be less than 55 lbs.; maximum airspeed of 100 mph (87 knots); maximum altitude of 500 feet above ground level; minimum weather visibility of 3 miles from control station; and the maximum altitude is set at 500 feet above ground level.

The operator, or a visual observer, must have visual line of sight to the aircraft at all times. The visual observer may communicate with the operator via radio. However, the operator must at all times be able to have visual line of sight. Visual line of sight is defined as meaning human eyesight unaided by devices except corrective lenses. This also applies to the use of "see and avoid" first person cameras, which may be used but only as long as visual line of sight is maintained. The UAS may never be allowed to fly over people on the ground except for those directly involved in the use of the aircraft. The operator and visual observer must follow all alcohol and drug prohibitions and should not operate the aircraft if they become aware of any physical or mental condition that would impair their ability to safely pilot the aircraft. The operator must

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Chair's Corner

Thomas Lehrich, Chair of the Transportation and Transportation Security Law Section

Not that long ago, my first and lasting impression of the FBA came as a new lawyer at the Department of Transportation. The famous Bern Diederich, a lawyer from the General Counsel's office was running through the office suite in bike shorts handing out FBA flyers and encouraging new members. As our section continues to move forward from those days, one major goal is to increase our mentorship of young lawyers and students with interest in transport law.

Bern does not have to run through your offices to get the word out about the special things we are doing for our profession. We are increasing our social media presence, beginning with the launch of our own twitter feed, @FBA_Trans. We hope to use this to better communicate important information on transportation-related topics and to highlight the achievements of our members.

Mentorship remains a key goal of my tenure, and I encourage each of you to bring young lawyers and law clerks to our programs so we can collectively contribute to their professional development. Now is time to tap into and appreciate the amazing support we have from some of the best leaders and teachers in the legal field. We have had such great support from the leadership in TSA, DOT, NTSB, and WMATA. The training and innovative programs could not been done without the support from the leaders of such high caliber legal organizations.

I extend a warm welcome to my fellow officers for 2014/15: Alice Koethe, Lisa Harig, Scott Mirelson, Kathryn Gainey, and John Wood. Our Board, representing transportation lawyers from both private and public sectors, all remain dedicated to making your membership valuable. We were pleased to see so many of you at the 2014 Chief Counsels' Reception, honoring Christopher "Kip" Tourtellot as Transportation Lawyer of the Year and Emily Su as Transportation Security Lawyer of the Year. Everyone in attendance stood in awe of the achievements and contributions these two extraordinary lawyers have made. I also want to congratulate our past chair, Dave Rifkind, for his successful stewardship of the Section. Under his leadership, the Section won an FBA Section Award, recognizing our section's leadership, administration, programming and membership outreach.

Please feel free to reach out to our board about your ideas for programs. More importantly, get involved. This is the year to spread your wings and fly with us…the section that helps people move. ❖

Thomas Lehrich, Chair of the
Transportation and Transportation
Security Law Section

Letter From the Editor

John C. Wood

On behalf of the Board of the Transportation and Transportation Security Law Section, we thank you for your membership and involvement in the Section. We look forward to seeing you at our upcoming events and welcome your suggestions for future events. Our next event will be the Annual Transportation Security Law Forum on Thursday, May 14 from 1:00 to 5:00 p.m. at the Transportation Security Administration headquarters on 601 12th Street, Arlington, Virginia.

In this issue, John Anderson and Colin Ferguson co-authored an article discussing two cases involving the Carmack Amendment that were decided in 2013. T&TSL Board members Erva Cockfield, Lisa Harig, Alice Koethe, and John Wood penned the Year in Review, which highlights T&TSL's 2014 programs. Kathryn Gainey provided an overview of two regulatory proposals, including proposed rules relating to the transportation of crude oil by rail. Finally, Tom Lehrich and Matthew Hersey summarized proposed rules for small unmanned aircraft systems.

Finally, we welcome your submissions to *TransLaw*. Articles could describe a recent case or legal development in transportation, profile a transportation lawyer, or summarize an event. With many interesting legal developments in transportation and transportation security law, there is plenty of material in the transportation modes. Please contact Sherwin Valerio at svalerio@fedbar.org to propose or submit an article to *TransLaw*. ❖

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inspect the aircraft prior to usage and may not fly more than one UAS at a time. UAS may only operate in the daylight hours defined as official sunrise to official sunset, local time.

Operators of UAS must be at least 17 and pass an aeronautical knowledge test at an FAA-approved knowledge testing center. They must then submit to a vetting process by the Transportation Security Administration and take a recurrent aeronautical knowledge test every 24 months. Operators must conduct a preflight inspection before every flight to ensure that the aircraft is safe and report to the FAA any accidents that result in injury or property damage within 10 days. They must also agree to submit the UAS to the FAA, upon request, for inspection or testing. The UAS must have the same markings required of all aircraft, though they may be reduced in size to fit the aircraft.

UAS Presidential Memorandum

Prior to the release of the proposed rule, the President issued a Memorandum directing all UAS operation comply with U.S. law regarding privacy, civil rights, and civil liberties. The Memorandum is significant as it delineates the White House's expectations for the government's current and future UAS use and the how UAS-collected data across the nation will ultimately be authorized. The President ordered that all governmental use of UAS must follow the Privacy Act of 1974 (5 U.S.C. § 552a). This contemplates that all personally identifiable information (PII) will be used transparently, follow proper accountability procedures, and should not violate privacy laws.

The Memorandum directs that by June 23, 2015, a stakeholder engagement process should be used to develop a framework for the commercial use of UAS. The Commerce Department will lead the new multi-stakeholder engagement process across agencies and the private sector to develop and publish UAS-related privacy best practice. The agencies must formulate appropriate UAS policies and procedures, and reexamine them every three years. Agencies have 180 days to report on this initial implementation. Such reports must be published in one year.

The proposed regulations are an important step in advancing the commercial use and safety for UAS. ❖

Thomas Lehrich is the Chair of the Federal Bar Association, Transportation and Transportation Security Law Section. He is the Deputy Inspector General and Counsel for the Architect of the Capitol. Mr. Lehrich spent ten years at the Department of Transportation serving as the Chief Counsel to the DOT Inspector General and held senior legal posts with the Transportation Security Administration and the Federal Maritime Commission. Matthew Hersey is a student at Georgetown University in the School of Continuing Studies.

General Counsel's Reception

Year In Review

Erva Cockfield, Lisa Harig, Alice Koethe, and John Wood

2014 proved to be another successful year of Transportation & Transportation Security Law Section programs and events. The Section's programs kicked off last February with the 2014 Legislative Outlook panel. Chris Bertram, Chief of Staff for the House Committee on Transportation and Infrastructure, joined Tom Herlihy, U.S. Department of Transportation's Assistant General Counsel for Legislation, to discuss legislative hot topics that included surface transportation legislation and funding issues, water infrastructure legislation, and a look ahead to FAA reauthorization. The program was moderated by John Wood, an attorney with the FAA Office of the Chief Counsel Legislation Division. The program was a timely preview of the second session of the 113th Congress.

The Section's Spring program "Hot Topics in Transportation Security Law" was a half day devoted to cutting-edge security related topics. The program was held at the Transportation Security Administration's Town Hall in Arlington, Virginia. TSA Chief Counsel Francine Kerner welcomed guests and participants with remarks that were followed by a keynote speech by David Berg, Senior Vice President and General Counsel for Airlines for America. The keynote was followed by two panels. The first panel was titled "The Evolution of Collective Bargaining at TSA," and it was moderated by Mendelssohn McLean, TSA Assistant Chief Counsel for Labor Relations. Panelists included labor representatives and TSA attorneys. The second panel was titled "Transportation Security Intellectual Property: Generation to Commercialization," and it was moderated by William Washington, who is a TSA Attorney. Panelists included Lavanya Ratnam, DHS Assistant General Counsel for Intellectual Property, as well as science and technology officials.

In Spring, the Section also held a meet-and-greet at George Washington University Law School. The gathering provided young attorneys and law students with the opportunity to network with established practitioners and discuss issues relevant to transportation law.

On September 8, 2014, the T&TSL Section hosted a panel discussion titled "The Role of the Transportation System in Human Trafficking." The event was moderated by U.S. Department of Transportation attorney, Erva Cockfield, who opened the discussion with an overview of the initiatives that DOT is working on with other government agencies and transportation stakeholders to eliminate human trafficking across the nation. Christine Raino, Policy Counsel for the non-profit NGO Shared Hope International, spoke about the various players involved in transporting human trafficking victims, and she highlighted the legislative trends in the area. Specifically, Christine noted the rise in laws to decriminalize victims of sex and human trafficking. Amtrak Chief of Police, Polly Hanson, spoke about Amtrak's implementation of an interactive human trafficking training program that has been used with great success to train more than 8,000 frontline employees on identifying and reporting suspected trafficking. Ms. Hanson also highlighted Amtrak's involvement in the Blue Campaign, which is a Department of Homeland Security initiative to combat human trafficking by raising public awareness and bringing those who exploit human lives to justice.

October began with a "lunch and learn" panel discussion on "Communicating with Your Regulator in Enforcement Cases." Panelists included a mix of government, corporate, and law firm practitioners. Greg Stofko, Senior Attorney from FedEx, kicked off the program with an overview of the FAA enforcement process. Assistant Chief Counsel for Civil Enforcement at TSA, Emily Su, spoke about TSA enforcement matters, including differences from the FAA enforcement process. Scott Mitchell, an Attorney in FAA's Office of Airports and Environmental Law, highlighted Part 13 and 16 cases, which involve airports and airport service providers. Finally, Sheryl Israel, Counsel at Hogan Lovells, gave the audience the private practitioner's point of view of enforcement cases.

Also in October, the Chief and General Counsels of DOT, TSA, FAA, and NTSB, as well as a group of top transportation lawyers from both both private and public sectors and their guests, gathered on Capitol Hill for the Section's annual Counsels' Reception. The event included presentation of the John T. Stewart Transportation Lawyer of the Year Award and the John T. Stewart Transportation Security Lawyer of the Year Award. The 2014 Transportation Lawyer of the year award was presented by DOT General Counsel Kathryn Thomson to Christopher "Kip" Tourtellot, Senior Attorney in the U.S. DOT Office of the General Counsel's International Law Office. Tourtellot was recognized for over twenty-five years of service that included substantial contributions to the Department's most significant achievements in the international arena, particularly in the areas of aviation and maritime law. Over the course of his career, Tourtellot has participated in more than sixty rounds of bilateral negotiations and was the legal draftsman for more than twenty bilateral agreements. TSA Chief Counsel Francine Kerner presented the 2014 Transportation Security Lawyer of the Year Award to Emily Su, Assistant Chief Counsel for Civil Enforcement, Transportation Security Administration. Kerner recognized Su's leadership in collaborative efforts to help industry comply with security requirements, taking appropriate enforcement measures to

bring regulated entities into compliance, developing a specialized team to manage enforcement efforts generated by evolving security threats and the complex regulatory regime required to mitigate those treats, and developing specialized training for TSA's inspectors. Outgoing Section Chair David Rifkind concluded the reception by presenting past Section chair and longtime Section Board member Nancy Kessler with a special award for her contributions to the section over the years. Kessler retired from the Department of Transportation as Senior Attorney at the end of 2014.

The year's programs concluded with a panel discussion titled "APA Adjudications: A Luncheon with the Administrative Law Judges" on October 29, 2014, at the DOT Conference Center. The event was moderated by U.S. Department of Transportation attorney Alice Koethe, and featured three distinguished Administrative Law Judges in the field of transportation law. The judicial representatives were Chief Judge Alfonso Montaño, National Transportation Safety Board; Chief Judge Walter Brudzinski, U.S. Coast Guard; and Judge J.E. Sullivan of the U.S. Department of Transportation, Office of Proceedings. After Chief Judge Brudzinksi provided an overview of the provisions of the Administrative Procedure Act applicable to ALJs, each judge described their dockets, representative cases, and tips for practitioners. The well-attended program provided an opportunity for transportation lawyers to gain additional exposure to the important work of the ALJs.

2014 was another exciting year of valuable transportation law programs! Special thanks to 2014 Section Chair David Rifkind and to all program planners and contributors. ❖

Regulatory Update On Transportation of Crude Oil By Rail

Kathryn J. Gainey

In recent years, the amount of crude oil transported by rail has increased substantially. Several federal agencies have considered ways to enhance safety during transportation.[1] Their efforts have received a significant level of interest from different constituencies. For example, in response to the Pipeline and Hazardous Materials Safety Administration's (PHMSA) advance notice of proposed rulemaking regarding tank car design in 2013, PHSMA received more than 100 comments. Commenters included tank car manufacturers, offerors, rail carriers, Congress members, the National Transportation Safety Board, environmental groups, municipal and state government entities, and members of the public.

This article provides an overview of two proposals released in July 2014. First, PHMSA, in coordination with the Federal Railroad Administration (FRA), requested comments on proposed rules relating to rail transportation of crude oil. *See* Notice of Proposed Rulemaking, *Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, Docket No. PHMSA-2012-0082 (HM-251), RIN 2137-AE91, 79 Fed. Reg. 45,016 (Aug. 1, 2014) (hereinafter 2014 NPRM). PHMSA proposed several rules relating to "high-hazard flammable trains," which are trains carrying twenty tank cars or more of a flammable liquid classified as Class 3, including crude oil. For these trains, PHMSA proposed rules, including timelines for discontinuing use of existing DOT Specification 111 tank cars, speed restrictions, braking systems, and new tank car design. PHMSA further proposed rules that would require information be provided to State Emergency Response Commissions regarding shipments of 1,000,000 gallons or more of crude oil from the Bakken shale formation. Second, PHMSA, in consultation with the FRA, requested comments relating to the threshold of crude oil per train that would trigger the requirement to prepare a comprehensive oil spill response plan. *See* Advance Notice of Proposed Rulemaking, *Hazardous Materials: Oil Spill Response Plans for High-Hazard Flammable Trains*, Docket No. PHMSA-2014-0105, RIN 2137-AF08, 79 Fed. Reg. 45,079 (Aug. 1, 2014) (hereinafter 2014 ANPRM).

Definition of High-Hazard Flammable Train

PHMSA proposed to define a "high-hazard flammable train" as a "single train containing 20 or more tank carloads of Class 3 (flammable liquid) material." 2014 NPRM at 45,040. PHMSA stated that crude oil and ethanol are the "only known Class 3 (flammable liquid) materials transported in trains consisting of 20 tank cars or more." *Id*. The definition of "high-hazard flammable train" thus would not apply to other Class 3 flammable liquids, such as acetone and ethyl methyl ketone.

PHMSA solicited comments regarding its proposed definition. It requested estimates of the costs and benefits of adding other materials to the definition of "high-hazard flammable train," including materials classified as a flammable gas (Division 2.1) or a combustible liquid.

Notification to State Emergency Response Commissions

PHSMA proposed to require a railroad to notify State Emergency Response Commissions "or other appropriate state delegated entities" if it transports a train with 1,000,000 gallons or more (*i.e.*, approximately 35 tank cars) of crude oil from the Bakken shale formation in the Williston Basin, located in North

Dakota, South Dakota, and Montana in the United States or Saskatchewan or Manitoba in Canada. *Id.* at 45,041 (quoting proposed rule 49 C.F.R. § 174.310). This proposal was an effort "to codify and clarify" the requirements in the emergency order issued by the United States Department of Transportation in May 2014.[2] *Id.* at 45,042. Under PHMSA's proposal, railroads would be required to provide "(1) a reasonable estimate of the number of affected trains that are expected to travel, per week, through each county within the State; (2) the routes over which the affected trains will be transported…" among other information. *Id.* at 45,076 (quoting proposed rule 49 C.F.R. § 174.310). PHMSA also proposed to require railroads to "update notifications … prior to making any material changes in the estimated volumes or frequencies of trains traveling through a county." *Id.*

PHMSA requested comments on questions such as whether the 1,000,000-gallon threshold should be changed, whether the 20-car threshold from the definition of "high-hazard flammable train" should be adopted instead, and whether the estimated burdens would change if the proposal applied to all crude oil, including that originating outside the Bakken formation. PHSMA also solicited comments relating to the confidentiality of information provided by railroads. PHMSA noted that "DOT prefers that this information be kept confidential," that "railroads may have an appropriate claim that this information constitutes confidential business information," and that concerns have been raised that the "routing and traffic information … would be made public under individual state's open records laws." *Id.* at 45,041. PHMSA asked whether it should limit "the disclosure of the notification information provided" and whether the information should be designated as Sensitive Security Information. *Id.* at 45,042.

Rail Routing Analyses

PHMSA proposed to amend its regulations to require each railroad operating "high-hazard flammable trains" to perform routing analyses. 2014 NPRM at 45,063. Current regulations require routing analyses for "security-sensitive hazardous materials," such as chlorine. *Id.* at 45,028. In a routing analysis, rail carriers "must assess available routes using, at a minimum, the 27 factors listed in [Appendix D to 49 C.F.R. Part 1172] to determine the safest, most secure routes." *Id.* at 45,029. Some railroads have "taken steps to extend the routing requirements … to certain [high-hazard flammable trains] transporting crude oil." 2014 NPRM at 45,042.

PHMSA asked how "voluntary compliance" with the routing assessments has "changed the operational practices for crude oil shipments." *Id.* at 45,043. PHMSA also asked commenters to estimate the costs and benefits of requiring small rail carriers to conduct routing assessments.

Classification, Packaging, and Testing

PHSMA proposed several rules relating to classification, packaging, and testing of mined gases and liquids, including crude oil. The offeror must certify that hazardous material is "properly classified, described, packaged, marked, and labeled," and the classification is used to "select[] proper equipment (tank, service equipment, interior lining or coating)." *Id.* at 45,044.

PHMSA further proposed to adopt timelines for discontinuing the use of existing DOT 111 tank cars in "high-hazard flammable trains" to transport flammable liquids (Class 3). The proposed timelines depend upon the packing group classification. Under the proposal, DOT 111 tank cars would not be authorized for use in "high-hazard flammable trains" to transport flammable liquids (Class 3) in Packing Group I (which PHMSA described as "pos[ing] the highest danger") after October 2017, in Packing Group II after October 2018, and in Packing Group III (which PHMSA described as the "lowest" danger) by October 2020. *Id.* at 45,043. Under PHMSA's proposal, existing DOT 111 tank cars would be permitted for "crude oil and ethanol that are classed as flammable liquids (all packing groups) and not transported in [high-hazard flammable trains]" and for "combustible liquid service." *Id.* at 45,059. PHMSA solicited comments regarding the proposed timelines.

PHMSA also proposed a "sampling and testing program for mined gases and liquids, including crude oil." *Id.* at 45,044. The proposed program would include "[f]requency of sampling and testing to account for appreciable variability of the material" and "[s]ampling at various points along the supply chain to understand the variability of the material during transportation." *Id.* PHMSA requested information relating to its proposals, including whether the proposal "provides sufficient clarity to offerors" and whether "more or less specificity regarding the components of a sampling and testing program [would] aid offerors … to be in compliance." *Id.* at 45,045. PHSMA also asked how the agency could "provide flexibility and relax the sampling and testing requirements for

offerors who voluntarily use the safest packaging and equipment replacement standards." *Id.*

Speed Restrictions

PHMSA proposed speed restrictions for "high-hazard flammable trains" depending on the braking system and the design of the tank car. In the proposed rules, "high-hazard flammable trains" would be "limited to a maximum speed of 50 mph." *Id.* at 45,076 (quoting proposed 49 C.F.R. § 174.310(a)(3)). PHMSA proposed a speed restriction for "high hazard flammable trains" of 40 miles per hour "unless all tank cars containing flammable liquids meet or exceed the proposed performance standards for the DOT Specification 117 tank car," which are discussed below. *Id.* at 45,047. PHMSA's proposal includes three options regarding the location where the 40-mile per hour speed restriction would apply: (1) in "all areas," (2) in "areas with more than 100,000 people," or (3) in "high-threat urban areas." *Id.* Finally, PHMSA proposed a speed restriction of 30 miles per hour for the "high-hazard flammable train" if "a rail carrier cannot comply with the proposed braking requirements," which are discussed below. *Id.* at 45,046. PHMSA prepared a Regulatory Impact Analysis regarding the "economic impact" of its proposed speed restrictions, although it stated that the analysis "has several limitations" and did "not estimate any effects from speed reductions on other types of rail traffic throughout the rail network (e.g., passenger trains, intermodal freight, and general merchandise)." *Id.*

PHMSA sought information regarding its proposed speed restrictions, such as the effects of the 40-mile per hour speed restriction "on other traffic on the network, including passenger and intermodal traffic," the costs of delays for "high-hazard flammable trains," costs of delays "for other types of traffic on the network," and the estimated amount of track miles impacted by the second and third options of the proposed 40-mile per hour restriction. *Id.* at 45,047. PHMSA also asked for information regarding the extent to which a 40-mile per hour speed restriction would "cause rail traffic to be diverted to other lines" and "cause rail traffic, particularly intermodal traffic, to be diverted onto truck or other modes of transit as a result of rail delays." *Id.* at 45,048. PHMSA solicited estimates of costs and benefits of (1) "limiting the proposed 40 mph speed restrictions, under each Option, only to DOT 111 tank cars carrying a particular hazardous material (e.g., only crude oil)," and (2) "excluding existing Jacketed CPC-1232 cars from the proposed 40 mph speed restrictions … if PHMSA selects a more stringent tank car specification than the Enhanced Jacketed CPC-1232." *Id.*

Braking Systems

PHSMA proposed to "require each [high-hazard flammable train] to be equipped with an enhanced brake signal propagation system." *Id.* at 45,051. PHSMA offered four proposals involving end of train devices, distributed power systems, or electronic controlled pneumatic brakes. As noted above, PHMSA proposed an exception for a rail carrier that "does not comply with the proposed braking requirements" where the rail carrier may operate "high-hazard flammable trains" at a speed of 30 miles per hour or less. *Id.*

PHMSA requested comments on several aspects of its braking systems proposals, including the cost of installing electronic controlled pneumatic brakes on new tank cars, retrofitted tank cars, and locomotives. PHMSA also solicited information regarding the "annual capacity of tank car and locomotive manufacturing and retrofit facilities to install or implement [electronic controlled pneumatic], [distributed power] and [end of train] systems." *Id.*

New Tank Car Design

PHMSA proposed to require tank cars "constructed after October 1, 2015 that are used to transport Class 3 flammable liquids in ['high-hazard flammable trains'] to meet the specification requirements for the DOT Specification 117 tank car or the proposed performance specifications" known as "DOT Specification 117P." *Id.* PHMSA stated that the DOT Specification 117 tank car "would change the specification requirements for rail tank cars authorized to transport crude oil and ethanol," and the design "would be phased in over time depending on the packing group of the flammable liquid." *Id.*

PHMSA proposed three options for design specifications of DOT 117 tank cars. Option 1 is the tank car designed by PHMSA and FRA, and it includes rollover protection and electronic controlled pneumatic brakes. *Id.* at 45,052. PHMSA described Option 2 as the "[Association of American Railroads] 2014 Recommended Car," which has the "same safety features as the Option 1 car, including the same increase in shell thickness, jacket requirement, thermal protection requirement, and head shield requirement, but it lacks rollover protection and the [electronic controlled pneumatic] brake requirement." *Id.* PHMSA identified Option 3 as the "Enhanced Jacketed CPC-1232," which "would modify the CPC-1232 standard by requiring improvements to the bottom outlet handle and pressure relief valve." *Id.* The Option 3 tank car would have a thinner shell than the Option1 or Option 2 tank cars, and it would not include rollover protection or electronic controlled pneumatic brakes. Each option has a "proposed performance standard" that must be approved by FRA, and the performance standards are "intended to encourage innovation in tank car designs, including materials of construction and tank car protection features, while providing an equivalent level of safety as the DOT Specification 117." *Id.* at 45,058. PHMSA solicited comments regarding its proposals for new tank cars, including whether its proposals would reduce car capacity or impact braking systems, track integrity, or loading. *Id.* at 45,053. PHMSA also sought estimates of the "benefits and costs of allowing CPC-1232 cars ordered before October 1, 2015 to be placed into service for their useful life." *Id.* at 45,057.

Retrofitting Existing Tank Cars

PHMSA proposed that "DOT Specification 111 tank cars may be retro-

fitted to DOT Specification 117, retired, repurposed, or operated under speed restrictions." *Id.* at 45,060. PHMSA stated that "the requirements for newly constructed tank cars and retrofits are the same," except that PHMSA's proposal does not require existing tank cars to be retrofitted with top fitting protections. *Id.* As noted above, under PHMSA's proposal, existing DOT 111 cars used in "high-hazard flammable trains" will be phased out between 2017 through 2020 according to packing group, although they "can continue to be used to transport other commodities, including flammable liquids provided they are not in a [high-hazard flammable train]." *Id.* at 45,061.

PHMSA sought information regarding the "impacts associated with each tank car option as a standard for existing tank cars," including "which portions of the fleet commenters expect would be retrofitted, repurposed, or retired under each option, and the anticipated costs and benefits." *Id.* at 45,058. PHMSA asked whether "CPC-1232 cars [should] be exempted from some or all of the retrofitting requirements" or "have a different implementation timeframe than legacy DOT 111 cars." *Id.* at 45,061. PHSMA solicited comments regarding whether the options would require "structural changes to existing tank cars," would cause "engineering challenges," or would impact braking systems, track integrity, and loading. *Id.*

Oil Spill Response Plans

PHMSA also released an advance notice of proposed rulemaking where PHMSA considered oil spill response plans for "high-hazard flammable trains." PHMSA is responding to a recommendation by the National Transportation Safety Board that the agency should amend the current "spill response planning thresholds." 2014 ANPRM at 45,082. Current regulations require a "basic" oil spill response plan for "oil shipments in a packaging having a capacity of 3,500 gallons or more" and a "comprehensive" oil spill response plan for "oil shipments in a package containing more than 42,000 gallons (1,000 barrels)." *Id.* at 45,080. PHMSA is "re-examining whether it is more appropriate to consider the train in its entirety when setting the threshold for comprehensive [oil spill response plans]." *Id.* at 45,082.

PHMSA requested comments to "inform a potential future [notice of proposed rulemaking] that would adjust threshold quantities to trigger comprehensive [oil spill response plan] requirements for [high-hazard flammable trains]." *Id.* at 45,083. PHMSA sought comments regarding four thresholds of crude oil per train to require preparation of a comprehensive oil spill response plan: (1) 1,000,000 gallons or more; (2) 20 carloads or more; (3) 42,000 gallons (*i.e.*, two carloads); or (4) "[a]nother threshold." *Id.* at 45,082. PHMSA solicited comments regarding whether "elements [] should be added, removed, or modified from the comprehensive [oil spill plan response] requirements." *Id.* PHMSA also posed other questions, including whether it should "require that the basic and/or the comprehensive [oil spill response plans] be provided to the State Emergency Response Commissions …. and/or made available to the public." *Id.* at 45,083.

Conclusion

Comments on PHMSA's proposed rules and its advance notice of proposed rulemaking were due in early October 2014. Approximately 3,000 comments were submitted in response to PHMSA's proposed rules. Several additional rulemakings are on the horizon. FRA proposed rules regarding securement and attendance. Notice of Proposed Rulemaking, *Securement of Unattended Equipment*, Docket No. FRA-2014-0032, 79 Fed. Reg. 53,356 (Sept. 9, 2014). Aside from PHMSA's upcoming proposed rules regarding oil spill response plans, PHSMA also stated that it will conduct a "future rulemaking" regarding other comments it received in 2013, "particularly regarding modernization of Part 174 of the [hazardous materials regulations]." 2014 NPRM at 45,031. ❖

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Endnotes

[1]*See, e.g., Emergency Order Establishing Additional Requirements for Attendance and Securement of Certain Freight Trains and Vehicles on Mainline Track or Mainline Siding Outside of a Yard or Terminal*, FRA Emergency Order No. 28, Notice No. 1, 78 Fed. Reg. 48,218 (Aug. 7, 2013); Advance Notice of Proposed Rulemaking, *Hazardous Materials: Rail Petitions and Recommendations to Improve the Safety of Railroad Tank Car Transportation (RRR)*, Docket No. PHMSA-2012-0082, 78 Fed. Reg. 54,849 (Sept. 6, 2013); Notice of Safety Advisory, *Recommendations for Tank Cars Used for the Transportation of Petroleum Crude Oil By Rail*, Docket No. PHMSA-2014-0049, 79 Fed. Reg. 27,370 (May 13, 2014).

[2]DOT issued this emergency order pursuant to the "Secretary's authority to abate imminent hazards at 49 U.S.C. § 5121(d)." 2014 NPRM at 45,040. *See* Notice of Issuance and Availability of Emergency Order, *Emergency Order Providing for Local Notification of High-Volume Rail Transport of Bakken Crude Oil*, Docket No. DOT-OST-2014-0067, 79 Fed. Reg. 27,363 (May 13, 2014). DOT's Emergency Restriction/Prohibition Order is available at http://www.dot.gov/briefing-room/emergency-order (last accessed July 25, 2014).

2013 Case Law Review Under the Carmack Amendment

John E. Anderson Sr. and Colin Ferguson

The Carmack Amendment provides a uniform system of liability for loss and damage to property in interstate transportation. As will be discussed below, case law from 2013 reminds us that both shippers and carriers need to be cognizant of the requirements and consequences of the Carmack Amendment.

Carmack Amendment—Shipper Beware

The recent case of *Mlinar v. United Parcel Service, Inc. et al.*, 2013 Fla. App. LEXIS 19193 (Fla. Dist. Ct. App. 4th Dist. 2013), applied the preemptive effect of the Carmack Amendment to the detriment of the shipper. In *Mlinar*, the plaintiff appealed a final order dismissing all of her claims against the shipper on the grounds that the claims were preempted by the Carmack Amendment.

Mlinar was an artist who created two valuable oil paintings. Mlinar's husband took the paintings to a third-party retailer, Pak Mail, to be shipped via UPS to New York, but the container was empty when it arrived at its intended destination. The paintings had been removed from the container. Mlinar reported the loss to UPS and Pak Mail. Months later, Pak Mail offered Mlinar $100 for the missing contents of the package.

At some point, UPS sold the paintings to its lost goods contractor, Cargo Largo, who later auctioned the paintings. An individual named Aaron Anderson purchased one of the paintings at the auction. About two years after Mlinar lost possession of the paintings, she received a telephone call from Anderson, who informed her he had just purchased one of the paintings at the auction sale. Anderson inquired into the value of the painting, and Mlinar informed him that it had been appraised to be worth $20,000. Anderson also informed Mlinar that the other painting was auctioned in the same lot, but he did not know the identity of the purchaser. Anderson placed a listing online offering to sell the painting and even offering to introduce the buyer to Mlinar. Anderson eventually acquired the other painting as well, and then placed advertisements online in which he offered to sell or trade both paintings, and again offered to introduce the buyer to Mlinar.

Based upon the above facts, Mlinar filed suit against UPS, Pak Mail, Cargo Largo, and Anderson. Mlinar asserted four claims in her complaint: conversion, profiting by criminal activity, unauthorized publication of name or likeness, and a claim under Florida's Deceptive and Unfair Trade Practices Act. The trial court dismissed all of Mlinar's claims against UPS, ruling that the claims were preempted by the Carmack Amendment.

On appeal, the court discussed the preemptive effect of the Carmack Amendment. It commented that the amendment preemption included all losses resulting from a failure to discharge a carrier's duty as to any part of the agreed transportation. It noted that a cause of action not within the ambit of the preemptive scope of the Carmack Amendment was a rare exception. *Mlinar*, 2013 Fla App. LEXIS 19193 at 3 (citing *Brightstar Int'l Corp. v. Minuteman Int'l.*, 2011 WL 4686432 (N.D. Ill. 2011)). Further, it held that the proper test for whether the claims were preempted by Carmack was whether they were based on conduct separate and distinct from the delivery, loss of, or damage to goods. "In other words, separate and distinct conduct rather than injury must exist for a claim to fall outside the preemptive scope of the Carmack Amendment." *Id.* at 4 (citing *Smith v. United Parcel Serv.*, 296 F.3d at 1249 (11th Cir. 2002)).

The appellate court analyzed each of the claims against UPS. First, it held that the claim for conversion was preempted because it was predicated upon UPS's failure to deliver Mlinar's goods. Second, Mlinar's claim against UPS for unauthorized use of her name or likeness was preempted, as courts have held that claims of slander or damage to reputation are preempted by the Carmack Amendment. Finally, the appellate court held that the remaining two claims against UPS also were preempted, as the claims of fraud and deceptive conduct were related to the formation of a shipping contract or closely related to the performance of the contract. All of the plaintiff's claims against UPS, therefore, were held to be preempted by the Carmack Amendment. Accordingly, the appellate court affirmed the trial court's dismissal of all claims against UPS.

Carmack Amendment—Carrier Beware

In the case of *ABB, Inc. v. CSX Transp., Inc.*, 721 F.3d 135 (4th Cir. 2013), rail carrier CSX Transportation, Inc. transported an electrical transformer worth approximately $1.3 million from shipper ABB Inc.'s plant in Missouri to a customer in Pennsylvania. ABB filed a complaint in district court alleging the transformer was damaged in transit and that CSX was liable for more than $550,000, the full amount of the damage. CSX denied liability and contended that even if the court found it liable, the parties had agreed in the bill of lading to limit CSX's liability to a maximum of $25,000.

The bill of lading executed by ABB had incorporated by reference a $25,000 liability limitation contained in a separate price list used by CSX. It was a standard form used by ABB, and it included general shipping information as well as a product value of $1,384,000. The bill of lading did not include a price for the shipment or indicate the level of liability assumed by CSX for lost or damaged cargo. A space labeled "rate authority" was left blank by the ABB employee who filled out the form because, as he testified, he had been unable to get rate information from CSX and thus he would only learn the price of the shipment once he received an invoice. The bill of lading contained certification language providing in relevant part:

> " … [E]very service to be performed hereunder shall be subject to all the terms and conditions the Uniform Domestic

> Straight Bill of Lading set forth … in Uniform Freight Classification in effect on date hereof, if this is a rail or rail-water shipment … Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns." *Id*. at 140-141.

The CSX price list set forth numerous rules applicable to its transportation of machinery, such as procedures related to billing. One section labeled "price restrictions" included the following: "Carriers' maximum liability for lading loss or damage will not exceed $25,000 per shipment. Full liability coverage is only available by calling your sales representative for a specific quote." *Id*. at 141. A CSX employee testified in his deposition that the price list did not provide varying rates associated with different levels of liability, and that full liability required direct rate negotiation with the carrier. ABB employees testified that they were unaware of the existence of the price list.

The district court held that the parties had limited CSX's potential liability in the bill of lading to $25,000. The parties entered into a consent judgment, preserving ABB's right to appeal the district court's decision regarding liability limitation.

The Fourth Circuit noted that the Carmack Amendment imposed the burden of securing limited liability on the carrier, CSX, not on the shipper. *Id*. at 142. It held that in the absence of a clear, written agreement by the shipper, the carrier was subject to full liability for actual losses. *Id.* "A carrier cannot limit liability by implication. There must be an absolute, deliberate, and well-informed choice by the shipper." *Id*. (citing *Aero Automation Sys. v. Iscont Shipping*, 706 F. Supp. 413, 416 (D. Md. 1989)). Despite the fact that ABB, the shipper, prepared the bill of lading, the court held that the Carmack Amendment imposed full liability on the carriers, without regard to which party prepared the bill of lading. *Id*. at 142.

The Fourth Circuit disagreed with CSX's argument that the certification language in the bill of lading indicating that the terms and conditions included "in the classification or tariff which governs the transportation of this shipment" incorporated by reference the CSX price list document. *Id.* The Court noted that the bill of lading did not specifically reference that document, and if they followed CSX's reasoning, carriers could limit their liability using documents shippers never had notice of. *Id*. at 143. Since carriers are no longer required to publish their tariffs, shippers could no longer be charged with constructive knowledge of them. *Id.* The court commented that allowing reference to a general tariff without citing a specific rate authority or code would allow carriers to unilaterally change their limitation of liability at any time, unbeknownst to shippers. *Id.*

The court noted there was no indication that ABB was aware of the relevant CSX price list, and that, in their prior deals they had used varying different price lists. *Id*. at 144. It also noted that CSX employees testified they often changed the price lists and declined to charge ABB with constructive notice. *Id.*

The Fourth Circuit held that the Carmack Amendment subjected CSX to full liability for the shipment, and that the parties did not modify CSX's level of liability by written agreement as permitted in the statute. The court therefore vacated the portion of the district court's judgment limiting CSX's liability. ❖

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