"The Voice of Transportation Labor"
UNITED TRANSPORTATION UNION

Railroad security still needs upgrades

The July 2005 London subway bombings and July 2006 railway attacks in Mumbai, India dramatically revealed the vulnerability of passenger rail and other surface transportation systems worldwide to terrorist attack and demonstrated the need for increased focus on the security of these systems.

The Department of Homeland Security's Office of Grants and Training has conducted risk assessments of passenger rail systems to identify and protect rail assets that are vulnerable to attack, such as stations and bridges. TSA has also begun to conduct risk assessments of passenger railways.

While TSA has begun to establish a methodology for analyzing and characterizing risks, as of January 2007, the agency has not completed a comprehensive risk assessment of the US passenger rail system, according to analysts with the Government Accountability Office.

Until TSA does so, the agency may be limited in its ability to prioritize passenger rail assets and help guide security investments. DHS has also begun developing a framework to help agencies and the private sector develop a consistent approach for analyzing and comparing risks among and across different transportation sectors.

However, until this framework is finalized, it may not be possible to compare risks across different sectors, prioritize them, and allocate resources accordingly.

(The preceding article by Jim Kouri appeared on the Web site www.theconservativevoice.com on August 17, 2007.)

August 17, 2007

"The Voice of Transportation Labor"
UNITED TRANSPORTATION UNION

Runaway rail cars no accident: RCMP

A deliberately released hand brake sent a string of railroad cars crashing through barriers in a Saskatchewan village, police told CBC News.

Damages and the cost of removing the cars that derailed on Wednesday in Beechy is estimated to be "in the tens of thousands of dollars," the RCMP said.

According to the Mounties, the 16 cars picked up speed as they rolled downhill, then smashed through the stops and continued across the highway.

They came to rest in an elementary school parking lot less than five metres from the school building, which was empty at the time.

People in town were awakened by a loud bang.

"Quite a few people were down there looking," said Pat Erickson, who works at West Central Road and Rail. "Small town, Beechy, not a lot happening."

While no one was hurt, the highway was blocked and traffic had to be rerouted.

The police hope anyone with information about the case will give them a call.

Beechy is in the southwest part of the province, about 120 kilometres northeast of Swift Current.

(This item was distributed Aug. 17, 2007, by CBC News.)

August 17, 2007

"The Voice of Transportation Labor"
UNITED TRANSPORTATION UNION

Terror suspected in Russia train blast

MOSCOW -- Russian investigators Tuesday (Aug. 14) launched a terrorism investigation into a bomb blast that derailed an express train from Moscow to St. Petersburg, injuring more than 60 people traveling on one of the country's busiest rail routes, according to this report by Alex Rodriguez published by The Chicago Tribune.

The explosion occurred late Monday near the city of Novgorod, about 300 miles northwest of Moscow. Investigators said they believe a homemade bomb placed beneath the tracks was detonated by remote control as the Nevsky Express train passed by with 251 people aboard.

The blast tore a 3-foot-wide gap in the rail line just 100 feet before a bridge. However, because the train was traveling at 80 m.p.h., it had enough momentum to cross the bridge before derailing, Russian authorities said.

Though no one was killed, the blast unnerved a nation that has seen a lull in terrorist activity outside the volatile North Caucasus region in the past couple of years.

Nikolai Patrushev, director of the Federal Security Service, the KGB's successor agency, said at a national anti-terrorist committee meeting in Moscow that "the threat of extremism and terrorism has not been completely eliminated."

The bomb blast near Novgorod mirrored the attack on a train traveling from Grozny to Moscow on June 12, 2005, in which a remote-controlled bomb planted on a stretch of track near the capital derailed the train and injured 42 people. In April, two Russian ultranationalists were convicted of engineering the attack.

No one had claimed responsibility for the blast near Novgorod as of Tuesday evening. In the past, separatist rebels fighting for Chechnya's independence from Russia have been linked to a litany of terrorist attacks, including the 2002 takeover of a Moscow theater that killed 129 hostages and the 2004 school siege in Beslan that killed 331 people, 186 of them children.

In December 2003, Chechen separatists were blamed for a bomb blast that killed 47 people on a train traveling from Kislovodsk to Mineralny Vody in southern Russia.

The train targeted Monday, the Nevsky Express, is popular with foreign tourists traveling between St. Petersburg and Moscow, though there were no reports of any foreigners injured in the blast.

Crew members interviewed on Russian television said nearby villagers and passengers broke through the windows of the toppled cars to free those trapped inside.

"I heard an explosion, felt the railway car shaking, and then it fell off the rails," said Larisa Panteleyeva, a waitress in the restaurant car. "The car apparently rolled over, though I really don't remember."

Russian authorities said that of the 60 people injured, 25 were hurt seriously enough to be hospitalized. Five people were listed in critical condition.

Television footage from the scene showed a 5-foot-wide crater where the blast occurred, and what appeared to be frayed wire by the broken rail line. At least a half-mile of track was destroyed.

Investigators said they found a wire leading to a nearby thicket, where they believe someone may have detonated the bomb by remote control. About 4 1/2 pounds of TNT were used in the blast, investigators said.

(The preceding report by Alex Rodriguez was published by The Chicago Tribune on Wednesday, Aug. 15, 2007.)

August 15, 2007

"The Voice of Transportation Labor"
UNITED TRANSPORTATION UNION

FBI investigates possible train track sabotage

BEND, Ore. -- The Federal Bureau of Investigation, Burlington Northern police, and Deschutes County Sheriff's deputies are investigating a possible sabotaging of the train tracks near La Pine after "something" on or near the tracks was found that was described as an apparent attempt to cause damage to the track, potentially causing a train derailment.

According to a news release prepared by Sheriff Larry Blanton, deputies were called to the scene about 1 p.m., August 10.

While declining to say what item(s) or substance was found, Blanton said that it was discovered when a northbound train en route from Klamath Falls to Bend was carrying seven cars of a hazardous material (anhydrous ammonia).

"There was no derailment, no damage to the track, and no injuries," the sheriff said. Evacuation of the area was not required.

The investigation is continuing.

(The preceding article by Cheryl McDermott was published August 11, 2007, by the Bend Weekly News.)

August 13, 2007

"The Voice of Transportation Labor"
UNITED TRANSPORTATION UNION

Railroads' national shame

(This column, by United Transportation Union representative Frank N. Wilner, was published in the Aug. 17, 2007, Florida Times-Union newspaper in Jacksonville, and is answered below by a CSX official.)

Imagine your neighbor boasting of buying an expensive new car and boat after receiving a promotion and pay raise, and then asking neighbors to help pay for a room addition on his home. CSX sees no problem.

Indeed, CSX purchased a full-page advertisement in The Washington Post in July to boast it had doubled earning power over three years, tripled its dividends to stockholders over two years and is using its increased earnings to repurchase up to 15 percent of its common stock in order to boost the stock price.

At the same time, CSX, along with other railroads, is lobbying Congress for a $400 million annual federal subsidy to help pay for track and freight-yard expansion.

It is a subsidy, because railroads would pay lower taxes on their record profits, and other taxpayers would pay more or suffer the negative impact of reduced federal spending. Under congressional budget rules, every reduction in someone's taxes must be balanced by an increase in someone else's taxes or a reduction in federal spending.

The investment tax credit that CSX and other railroads are seeking would follow a 2006 half-billion dollar tax break that railroads received from Congress over the past several years through lower locomotive fuel taxes and employee-pension taxes.

Were railroads struggling like the airline industry, there might be a reason for tax relief; but railroads are posting record profits, and foreign equity funds are buying into the railroad industry in expectation that railroads can use their freight-transportation monopoly to double prices over the next 10 years.

Let us hope CSX Chairman Michael Ward has not adopted the phrase of disgraced hotel executive Leona Helmsley, who boasted, "Only the little people pay taxes."

Who gets hurt when railroads pay fewer taxes? Cancer patients who can't afford health insurance and must stop taking medicine they can't afford. Some 46 million Americans have no health insurance.

CSX and other railroads are no stranger to deadly accidents caused by problem track, but when railroads pay fewer taxes, the Transportation Security Administration - already unable to afford even 100 specialists to inspect 140,000 miles of track in the U.S. - may have to furlough

even more inspectors.

Recently, inspectors from the Federal Railroad Administration found 170 defective freight cars at CSX's Baldwin Yard in Jacksonville, but when railroads pay fewer taxes, the Federal Railroad Administration may be forced to lay off some of its specialists who inspect the cars carrying deadly hazmat such as chlorine.

When CSX and other railroads pay fewer taxes, there is less money available to supply our troops in Iraq and Afghanistan; and America already is shocked by revelations that severely wounded soldiers are receiving substandard care at Walter Reed Army Hospital in Washington, D.C., because of budget woes.

Of course, the taxes avoided by wealthy railroads could be made up by individual citizens paying higher taxes - such as working families in Jacksonville already struggling and often taking extra jobs to make ends meet. If that's the railroads' answer, then surely the railroads have lost their moral compass.

When wealthy corporations avoid paying an equitable share of taxes, civilized society suffers. It is a national shame that railroads are blind to their civic responsibility.

The answer is for Congress to say "no" to the railroads' demand for a $400 million annual investment tax credit.

Frank N. Wilner is an economist and director of public relations for the 125,000-member United Transportation Union, which represents train crews on CSX and other railroads.

CSX RESPONDS

(This response, by CSX representative Lisa Mancini, also was published in the Aug. 17, 2007, Florida Times-Union.)

America needs more transportation. U.S. highways are overwhelmed. The population is growing fast, and so is the need to move goods. There are not enough roads or railroads - not enough places for goods and people to travel.

America's freight railroads are the only type of transportation that pays its own way. Taxpayers foot most of the bill for airports, highways and ports. Transportation experts and government officials estimate that nearly $200 billion is needed to grow U.S. rail systems in the next 20 years.

CSX's railroad is spread through 23 states and serves two-thirds of the U.S. population. It costs a lot to maintain. CSX and all freight railroads spend dramatically more just to maintain their assets than any other American industry.

The railroads are just in the last few years turning the corner financially. Thirty years ago, about one of four U.S. rail miles belonged to a railroad in bankruptcy. It just is not realistic to expect that freight railroads, on their own, will come close to being able to meet the demands of a fast-growing nation.

Recently, railroads have shown real promise. We're proud of that, and we're proud of the employees who made it happen. We want America to know that railroads can bring real solutions to some of today's major problems. Like what?

- Highway congestion: One train can take 280 to 500 trucks off the crowded highways.

- Safety: Railroads are the safest, most secure, land transportation.

- Environment and energy independence: Railroads are the most fuel-efficient land transportation. They can carry a ton of freight 423 miles on a gallon of fuel, sharply cutting emissions and fuel demand.

- Moving what matters: Railroads move products that keep the lights on, the water clean, the store shelves stocked. High-quality freight rail transportation is one of the real advantages American industry has compared to companies abroad.

- Jobs: On average, railroad jobs pay in the top ten percent of the American workforce; they hire thousands of people each year.

The railroads are asking Washington for an approximately 25 percent tax credit for investment in expansion. The railroads, not the taxpayers, would still bear the lion's share of the $200 billion needed over the next 20 years. The tax credit would be modest government support to speed up, and increase, the railroads' ability to add safe, environmentally friendly ways for goods and people to travel.

Regrettably, one union feels the need to regularly attack the railroads on issues important to Americans in order to try to influence ongoing collective bargaining negotiations. U.S. rail unions have been in negotiations with the major railroads, and only this union of the 13 representing our contract-covered employees has failed to reach a new labor agreement.

Here's the bottom line. This country needs nearly $200 billion in rail investment in the next 20 years, mostly from railroads. A tax credit to provide a fair incentive to accelerate that investment is legitimate, appropriate and in the interest of Americans concerned about highways, safety, energy, the environment, the economy and jobs.

Lisa Mancini is vice president - strategic infrastructure initiatives, for CSX.

August 17, 2007

Wisconsin Railroad Committee

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BNSF Railway
CN Railway
Canadian Pacific
Union Pacific

SB-152 Opposition Points

First, it's not as if nothing is being done. There are new laws, and hundreds of pages of federal rules in force and proposed, which the railroad industry already does to deal with safe transport and handling of hazardous materials. Several Federal agencies have jurisdiction.

- Federal rule and law preempt attempts by the states in this area of regulation. It is unlikely that anything in SB-152 would stand up in federal court. How inefficient can we make our interstate commerce by passing a patchwork of state laws, requiring different administration for railroad operations in the various states?

- If there were a demonstrated void in federal action in this area that might make a better case for the need for this legislation, but this is not the case. At least four federal agencies are under authority to regulate safe transportation by railroads of HazMat. Literally hundreds of pages of regulations are already in place covering the field.

- For example, since the introduction of this bill, Congress passed and the President signed in July, 2007, HR 1 "The 9-11 Commission Recommendation Act of 2007" As it affects railroads it includes among other things:

  1. Routing Analysis for HazMat routing on railroads
  2. Department of Homeland Security (DHS) is tasked with creating a program to evaluate the ability of railroads to prevent, prepare for, mitigate, respond to, and recover from acts of terrorism.
  3. After DHS issue regulations, railroad carriers are required to submit for review and approval a security training program for frontline employees for potential security threats. After the training program is approved, carriers have one year to complete training of all frontline employees.

Represented by Samuel O. Gratz

This legislation singles out railroads by imposing regulations and costs that are not applied to other carries of hazardous materials.

- The bill is another Wisconsin effort to diminish and single out freight rail. If HazMat security is truly a concern, then where in this bill are the requirements for fixed-site handlers and highway carriers of hazardous materials?

- This legislation would be costly and burdensome for railroads and their customers, but even more so for others, if 'total' security is the goal. What are our plans for chlorine used for water treatment? What about the agricultural chemicals stored in many small towns? How does the local feed mill provide 24-hour security for the dangerous storage under their control?

This bill would diminish, not increase safety.

- Making freight rail transportation more costly and less efficient will drive more hazardous materials to highways where it is statistically more likely to be involved in an incident. As a result the bill would actually make us less secure and less safe.

- Railroads are a far safer means of transporting hazardous materials than highway modes.

- The bill's requirement that railroads provide their 'security' plans to potentially hundreds of recipients becomes a 'blueprint for rail terrorism', with a great potential for these plans to fall into the wrong hands.

The legislation works against other expressed concerns. Lower cost, more efficient and dependable freight rail is vital to our state's economy. Adding additional burden unique to Wisconsin, makes us less competitive in the national and world marketplace.

- This is the wrong message to send to shippers that are trying to control costs, including transportation. This will add unnecessary costs to their shipping.

- IF we really have passenger and commuter rail concerns, we should support a viable freight rail system, on which infrastructure passenger rail depends.

- Then, there is the question of fiscal impact. What is the DOT cost to review and administer the requirements? It would also make sense to ask about the cost to the Attorney General (and to the railroads) to resolve the Interstate Commerce issues in federal court?

Joint Council 39 of the International Brotherhood of Teamsters

Senator Jeff Plale
Chairman, Committee on Commerce, Utilities & Rail
Room 313 South
State Capitol
Madison, WI 53707-7882

Dear Chairman Plale and Members of the Committee,

On behalf of the more than 50,000 members of the International Brotherhood of Teamsters who live, work and pay taxes in Wisconsin I am respectfully submitting for the Committee's consideration our support of SB-152 a bill pertaining to rail security.

SB-152 is vitally important to the future public safety of the residents of our state. There will be those who will testify before you today who will say that this bill is onerous or too costly or some other lame excuse. I choose the word "lame" with intent because what they are really asking you to do is to choose corporate and railroad profits over the lives of the people living along the rail corridors or next to rail yards as well as those of our emergency services personnel.

No doubt you will have heard during testimony about the thousands of tons of hazardous materials which are transported through our state every year via the rail system. Obviously, the vast majority of those shipments arrive at their destination without incident. However, we can all recall those times when the unthinkable occurred. As a former firefighter and resident of Douglas County my sharpest memory of such an occurrence is the Nemadji Spill in June of 1992.

It literally took hours for us to learn what the contents where of the tank cars which had plummeted off of that railroad trestle. While waiting for that vital information, several of my fellow firefighters as well as law enforcement officers worked in that chemical fog to evacuate nearby homes and to make certain no one was injured or trapped in the wreckage. These brave men and women risked their lives because no one could tell them what chemicals they were being exposed to. Absent concrete information about the threat, they made the decision to risk their lives to help save others.

In closing, SB-152 is simply a bill whose time is long overdue. No reasonable person can conclude that this bill is overly costly or intrusive when you measure those inconveniences against the safety of the public.

Respectfully,
Don Garner-Gerhardt
Government Affairs Director, Joint Council 39,
International Brotherhood of Teamsters

Senate Rail Commerce & Utilities Committee
August 23, 2007 11:00a.m.
State Capital, Madison, WI

Testimony by Bill Gardner
Wisconsin & Southern Railroad Co.
Phone (414) 438-8820

Hello! My name is Bill Gardner and I am President of Wisconsin & Southern Railroad Co. Thank you for this opportunity to address you here today.

Wisconsin & Southern Railroad is a privately owned regional railroad company operating nearly 600 miles of a publicly-owned railroad system in the southern half of the State of Wisconsin, including the urban areas of Oshkosh, Milwaukee, Janesville & Madison.

We partner with state agencies, county & municipal governments, and local & regional development organizations in preserving local freight railroad service, including making our rail corridors and our communities safe. In total, the public railroad system serves over 1,400 communities spanning 21 Wisconsin Counties.

Headquartered in Milwaukee, Wisconsin, the Wisconsin & Southern Railroad has terminal yard facilities in Madison, Janesville & Horicon, WI and employs over 250 people.

I am here to oppose Senate Bill 152 relating to emergency and security requirements for railroads.

First, as I just mentioned Wisconsin & Southern works collectively with state, county & local governments in making our rail corridors safe. Through our partnerships

with emergency management agencies both at the state and local levels, each year Wisconsin & Southern hosts emergency training reenactments where emergency responders learn on site techniques for dealing with hazardous situations in their communities.

In April of 2006, the Wisconsin & Southern hosted an all day emergency response drill with emergency responders from the City of Ripon and Fond du Lac County. During this drill, a 2-person train crew volunteered to act the part of injured railway employees that resulted from an incident in which an act of vandalism caused a westbound freight train to derail in their community. The purpose of this training exercise was to test emergency communications, and local response efforts to protect the public and provide appropriate rescue for multiple injuries at the Ripon High School and for the two railroad employees.

In October of 2006, Wisconsin & Southern participated in a 3-hour training exercise with over 90 Walworth County area firefighters to promote railway safety and enhanced awareness of emergency situations. Last year also included a 3-day seminar with the Dane County Haz Mat Team and City of Madison EMT's and firefighters in providing training for situations involving the release of hazardous materials.

This year so far, our company has provided training to City of Hartford EMT's and firefighters, City of Horicon & Dodge County Firefighters and law enforcement personnel, Beloit & Rockford EMT's and firefighters including hazardous materials specialists. And, we have four more exercises before the year ends, including emergency response training to City of Milton and Rock County emergency responders.

One event in particular I would like to note is that earlier this month, we partnered with GATX a dealer of rail tank cars in providing training to local law enforcement & emergency responders from all over southern Wisconsin. This 3-day event was held in Janesville, WI and attracted over 125 emergency responders. For this event, an actual tank car was on site for attendees to walk through and see first hand the safety mechanisms that today's tank cars have in place to protect the safety of the public.

While we are overly pleased with our collaboration with state & local governments in emergency response training, we recognize the importance of the federal government in overseeing interstate commerce and railway safety. With over 140,000 miles of rail track all across the U.S. spanning across all state borders, interstate commerce and railway security should indeed be enforced by our federal government agencies. This past February, the Department of Homeland Security's Transportation Security Administration was here to visit our railroad to conduct a risk assessment in terms of terminal yard security. Although TSA found no alarming risks associated with the manner in which we transport or contain hazardous materials within our terminal facilities, our company is taking measures internally to reduce our exposure such as employee identifications, visitor check-in & additional security of our terminals and places of highest threats. We are fully committed to working together with the National Department of Homeland Security and the Federal Railroad Administration in conducting a risk assessment of our nation's railroads and administering and enforcing appropriate policies that enhance public safety.

Through the National Organization Operation Lifesaver, Wisconsin & Southern conducts on average over a dozen operation lifesaver presentations each year to local schools, bus companies, driver's education classes, construction companies, and other organizations that travel over our at-grade crossings on a daily basis. It has been the goal of our organization to actively seek out presentation opportunities and to not deny any civic or public group access to safety information that Operation Lifesaver provides. Our organization has several trained employees who are qualified to represent the National Operation Lifesaver organization in its highest regard.

For the reasons stated herein, I ask that you oppose Senate Bill 152. Securing our infrastructure and protecting the communities that we live and operate in requires oversight and enforcement at the national level. The Wisconsin & Southern will continue to work with the Department of Homeland Security and the Federal Railroad Administration to take necessary precautions that enhance public safety and security.

THANK YOU FOR YOUR TIME!

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: MEMBERS OF THE SENATE COMMITTEE ON COMMERCE, UTILITIES, AND RAIL

FROM: David L. Lovell, Senior Analyst

RE: 2007 Senate Bill 152, Relating to Rail Security; Federal Preemption Challenge to Similar California Legislation

DATE: August 31, 2007

At your August 23, 2007, hearing, your committee heard testimony regarding 2007 Senate Bill 152 (SB 152), relating to rail security. Proponents of the bill stated that similar legislation had been enacted in California and had been proposed in every other state except Hawaii. Opponents of the bill countered that federal law preempts state action in the area of rail safety and security, noting that the California law has been challenged on those grounds in federal court.

The litigation regarding the California law, *Union Pacific Railroad Company v. Cal. Public Utilities Commission*,[1] was settled by an agreement between the parties, approved by the court on May 30, 2007. In very general terms, under the settlement, the California Public Utilities Commission (PUC) agreed to enforce the California law only to the extent that it does not exceed the requirements of federal law.

This memorandum responds to a request from the committee for further information regarding federal preemption of legislation such as SB 152, and the California litigation in particular. It describes SB 152 and chapter 867, California Laws of 2006 (the California law), and the complaint and settlement agreement in the California litigation, all of which is summarized in the enclosed table. The memorandum concludes with a brief discussion.

[1] *Union Pacific Railroad Company, et al., v. California Public Utilities Commission, et al.*, case no. 1:07-CV-0001 OWW-TAG, in the Fresno Division of the United States District Court for the Eastern District of California.

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Summary

While the outcome of the California litigation is not controlling with regard to SB 152, that outcome and the plain language of several federal laws suggest a strong possibility that most provisions of SB 152 would, if challenged, be found to be preempted by federal law.

Wisconsin and California Legislation

2007 Senate Bill 152 and the California law are very similar and consist of three principal provisions. First, the bills require each railroad to prepare a risk assessment. The risk assessment must identify rail facilities and the types of cargo moved through the facilities, including identification of the nature and amount of hazardous cargo, and a description of the railroad's practices and procedures to prevent and respond to sabotage, terrorism, or other crimes at these facilities (referred to collectively as "sabotage" in the remainder of this memorandum). The railroad must submit the risk assessment to a variety of law enforcement and emergency response agencies. The risk assessment is subject to review and approval by the Department of Transportation (DOT) or, in the California law, the PUC.

Second, the legislation requires each railroad to develop an infrastructure protection protocol or, in the California law, an infrastructure protection program. These call for such measures as provision of adequate security personnel, the provision of secure facilities for storage of hazardous materials, and various requirements regarding railroad operations. Again, the railroad must submit the protocol or program to various law enforcement and emergency response agencies, and the protocol or program is subject to review at the state level.

Third, the legislation requires each railroad to have the communications capabilities to notify law enforcement and emergency response agencies in the event of sabotage and to notify railroad personnel of the local or national threat level for the rail industry.

In addition, the bills include provisions to protect sensitive information from release, enforcement mechanisms and penalties, and protection for "whistleblowers" from any punitive action by a railroad. The California law includes a number of provisions not found in SB 152. These provisions relate to signage and flagging, notices of accidents, and notifications regarding the use of remote-controlled locomotives.

Court Challenge to California Law

Complaint

In their complaint, the Union Pacific Railroad Company and its co-plaintiffs (the railroads) cite numerous provisions of federal law as preempting state action with regard to various aspects of rail security, including the following:

1. Federal Rail Safety Act (FRSA). This Act states Congress' intent that the regulation of railroad safety be nationally uniform to the extent practicable. It provides that a state may not enforce a law if the U.S. DOT has promulgated regulations or issued orders covering the same subject matter. From this, the railroads argue that states are preempted on any subject

on which the U.S. DOT has "occupied the field," whether under the FRSA or any other authority.

2. Homeland Security Act (HSA). This Act reproduces the language quoted from the FRSA and applies it as well to regulations and orders of the Department of Homeland Security.

3. Locomotive Boiler Inspection Act (LIA). The railroads assert that this Act occupies the field of locomotive equipment and safety, and so preempts state regulation in this area.

4. Hazardous Materials Transportation Act (HMTA). This Act establishes uniform national standards for the transport of hazardous materials and provides that a state regulation is preempted if it "is an obstacle to accomplishing and carrying out" the HMTA.

5. ICC Termination Act (ICCTA). This Act vests exclusive jurisdiction in the federal Surface Transportation Board over many aspects of the construction and operation of railroad facilities.

The complaint draws links between each provision of the California law and these federal Acts or regulations promulgated under them. From these links, the railroads argue that the individual provisions are preempted by federal law. In addition, in several instances, the railroads make separate arguments, asserting that the provisions are in violation of the Commerce Clause.

Settlement Agreement

The settlement agreement stipulates how the California PUC will interpret the California law and what will constitute compliance with that law on the part of the railroads. With one exception, the agreement does not state any conclusions with regard to federal preemption. (The one exception is a statement of agreement that provisions relating to the locking or securing of locomotives and remote control devices are preempted.) However, the agreement states that the railroads do not waive any right to raise federal preemption in any future action to enforce the California law or modify the agreement.

The principal terms of the agreement pertinent to the provisions of the California law that are also found in SB 152 are as follows:

1. Compliance with federal rail security program requirements will constitute compliance with California's risk assessment and infrastructure protection program requirements.

2. The PUC will have specified inspection authority, subject to need to know and security clearance; this inspection authority will constitute compliance with requirement for the submission of risk assessments and infrastructure protection programs.

3. The PUC's authority to require changes to risk assessments and infrastructure protection programs and to issue orders is limited to changes and orders required under federal law.

4. The PUC's inspection, surveillance, and enforcement powers are limited to powers specifically granted by federal law.

5. Compliance with federal law regarding remote-controlled locomotives will constitute compliance with California's requirements regarding remote-controlled locomotives.

The agreement does not address the provisions regarding communications capabilities.

Discussion

Federal preemption of states' authority to legislate arises from the Supremacy Clause of the U.S. Constitution. In general, a state law is preempted if the law "stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress."[2] Whether any particular law will be found to be preempted is highly fact-specific. One line of inquiry a court will follow is to look for evidence of whether Congress intended to preempt state action in a particular field.

The clearest congressional intent is found when Congress states explicitly that state action is preempted or that a certain federal agency has exclusive jurisdiction over a subject. Such is the case with the subject of rail security. As was outlined above, numerous federal statutes explicitly preempt state regulation of rail safety, reserving that authority for the federal government. A statement by Congress of the need for uniformity in the regulation of a subject can also be interpreted as preempting state action; such statements apply here, as well.

The California settlement agreement is of limited value in predicting whether any provision of SB 152 would be preempted by federal law. In particular, it is only an agreement between the parties; while the agreement is approved by the court, it does not represent findings of the court. However, it is a very telling document. It is the job of a state's attorneys to defend that state's laws. The fact that the attorneys for the California PUC did not take the railroads' challenge of its rail security law to trial but, in fact, agreed to a settlement that requires the state to very substantially bend its law to conform to federal laws, suggests their judgment that the railroads' case was strong enough that the state would do no better in court.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

DLL:ksm

Enclosure

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[2] *Jones v. Rath Packing Company*, 430 U.S. 519, 97 S. Ct. 1305 (1977).

Substantive Provisions of Wisconsin and California Legislation Regarding Rail Security and Treatment of the California Legislation in the Settlement Agreement to Litigation Alleging Federal Preemption

Subject	2007 Wisconsin Senate Bill 152	Chapter 896, 2006 Laws of California	Treatment of California Law Under Settlement Agreement
RISK ASSESSMENT			
Requirement	Each railroad must prepare a risk assessment within 180 days of the effective date	Each railroad must prepare a risk assessment by July 1, 2007	Compliance with federal rail security program requirements will constitute compliance with California's risk assessment requirements PUC will have specified inspection authority, subject to need to know and security clearance; inspection authority constitutes compliance with requirement for submission of risk assessments PUC's authority to require changes to risk assessments and to issue orders limited to changes and orders required under federal law PUC's inspection, surveillance, and enforcement powers limited to powers specifically granted by federal law
Distribution of risk assessment	Each railroad must distribute its risk assessment to: • state law enforcement and emergency response agencies • law enforcement and emergency response agencies in each city, village, town, or county, through which the railroad travels • Wisconsin Department of Transportation (DOT)	Each railroad must distribute its risk assessment to: • state Director of Homeland Security • state Office of Emergency Services for each rail facility • California Public Utilities Commission (PUC)	
Contents of risk assessment	Risk assessment must include: • a list of all railroad	Risk assessment must include: • a list of all railroad	

Subject	2007 Wisconsin Senate Bill 152	Chapter 896, 2006 Laws of California	Treatment of California Law Under Settlement Agreement
	facilities and their functions • the type of cargo that moves through each facility • identification of hazardous cargo, and amounts moved each year • distance between facilities that transport or store hazardous cargo and schools, hospitals, nursing homes, and other vulnerable facilities • description of railroad's practices to prevent sabotage • procedures in place to respond to sabotage • procedures in place to communicate with local, state, and federal law enforcement and emergency response agencies and the DOT in	facilities and their functions • the type of cargo that moves through each facility • identification of hazardous cargo, and amounts moved each year • description of railroad's practices to prevent sabotage • procedures in place to respond to sabotage • procedures in place to communicate with local and state law enforcement personnel, emergency personnel, transportation officials, and other first responders in event of an act of sabotage • all training programs for the railroad's employees	

Subject	2007 Wisconsin Senate Bill 152	Chapter 896, 2006 Laws of California	Treatment of California Law Under Settlement Agreement
	event of an act of sabotage		
PROTECTION OF RAIL INFRASTRUCTURE FROM ACTS OF SABOTAGE			
Requirements	Each railroad must: • develop (within one year of effective date) and annually update an infrastructure protection protocol, which must "provide specifically for the protection of critical infrastructure" • provide a list of critical infrastructure to state and local law enforcement and emergency agencies and the DOT • describe its methods of securing critical infrastructure from sabotage	Each railroad must develop (by January 1, 2008) and annually update an infrastructure protection program, which must "address the security all of critical infrastructure"	Compliance with federal rail security program requirements will constitute compliance with California's infrastructure protection requirements PUC will have specified inspection authority, subject to need to know and security clearance; inspection authority constitutes compliance with requirement for submission and annual updating of protection programs PUC's authority to require changes to risk assessments and to issue orders limited to changes and orders required under federal law PUC's inspection, surveillance, and enforcement powers limited to powers specifically granted by federal law Compliance with federal law
Distribution and review of protocol or program	Each railroad must distribute its protocol to: • state law enforcement and emergency response	Each railroad must distribute its program to: • state Office of Emergency Services	

Subject	2007 Wisconsin Senate Bill 152	Chapter 896, 2006 Laws of California	Treatment of California Law Under Settlement Agreement
	agencies • law enforcement and emergency response agencies in each city, village, town, or county, through which the railroad travels • DOT DOT must review the proposed program and order changes, as required comply with the law	• State Director of Homeland Security • PUC PUC must review the program, in consultation with the Office of Emergency Services	regarding remote-controlled locomotives will constitute compliance with California's requirements regarding remote-controlled locomotives Federal law preempts California's requirements regarding locking and securing locomotives and remote-control devices
Contents of protocol or program	Protection protocol must include: • training and equipment for railroad personnel for detection and prevention of sabotage • 24-hour surveillance and protection of critical infrastructure For facilities that handle hazardous cargo and are within 15 miles of sensitive community facilities, the protection protocol must include: • schedule of inspection to	Protection program must: • provide training to railroad employees on how to recognize, prevent, and respond to acts of sabotage • require equivalent training and evaluation for all employees of contractors and subcontractors of a rail operator Each railroad must: • provide adequate security personnel	

Subject	2007 Wisconsin Senate Bill 152	Chapter 896, 2006 Laws of California	Treatment of California Law Under Settlement Agreement
	assess condition and vulnerability of facilities to sabotage • adequate security personnel • secure facilities for storage of hazardous materials • prohibition against leaving locomotive running or unlocked • adequate, qualified personnel to operate trains • securing of cabs against hijacking or sabotage • prohibition against handling hazardous materials with remote-controlled locomotives • securing of remote controls from unauthorized persons • annual anti-sabotage training for personnel involved in transport of hazardous materials	• use secure facilities for storage of hazardous materials • not leave a locomotive running or unlocked • secure cabs against hijacking or sabotage • not handle hazardous materials with remote-controlled locomotives • secure remote controls from unauthorized persons	

Subject	2007 Wisconsin Senate Bill 152	Chapter 896, 2006 Laws of California	Treatment of California Law Under Settlement Agreement
COMMUNICATIONS CAPABILITIES			
	Each railroad must be able to: • alert local and state law enforcement and emergency agencies and the DOT in the event of sabotage. Railroad radio does not satisfy this requirement • provide bridge tenders on movable bridges the ability to alert local and state law enforcement and emergency agencies and the DOT in the event of sabotage • notify railroad personnel of the local or national threat level for the rail industry	Each railroad must be able to: • alert local and state law enforcement personnel, emergency personnel, transportation officials, and other first responders in the event of sabotage • provide bridge tenders on movable bridges the ability to alert local and state law enforcement personnel, emergency personnel, transportation officials, and other first responders in the event of sabotage • notify railroad personnel of the local or national threat level for the rail industry	Settlement agreement is silent regarding communications provisions
OTHER REQUIREMENTS			
Signage and flagging	No requirements	Detailed requirements regarding: • signage on approach to grade crossing	Certain requirements will not be enforced and others will be limited by specified modifications providing

Subject	2007 Wisconsin Senate Bill 152	Chapter 896, 2006 Laws of California	Treatment of California Law Under Settlement Agreement
		• temporary warning flags regarding track condition • placement of milepost markers, whistle signs, and permanent speed signs	flexibility to the railroads
Notices of accidents	No requirements	Requirement of notices regarding accidents, incidents, or other events	Settlement agreement is silent regarding required notices
Remote-controlled locomotives	No requirements	Requirement of notices regarding the use of remote-controlled locomotives	Railroads will provide such notifications whenever they first begin to use remote-controlled locomotives at facilities where they did not use remote-controlled locomotives prior to January 1, 2007

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