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A Year-End Summary of Recent Railroad Preemption Cases

Transportation Legal Update

Railroads have long defended certain state law tort claims in crossing accident and trespasser cases by invoking the doctrine of federal preemption. The past year is no exception. Although the discussion of the cases below is organized by topic, it is important to note that most of these cases actually involve more than one preemption issue.

1. Train Speed

As a general matter, "federal law necessarily preempts state law excessive speed claims of any nature, regardless of their basis." *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 103, 249 P.3d 607, 615 (2011). Nonetheless, plaintiffs continue to assert inventive theories to avoid the effect of preemption and novel issues sometimes arise. Recent cases of interest analyzing train speed claims include:

- *Lopez v. CSX Transportation, Inc.*, --- F. Supp. 3d ----, No. 3:14-CV-257, 2017 WL 4063931 (W.D. Pa. Sept. 13, 2017) (regulation on accuracy of train speed indicators allowing 3 mph variance did not "raise" applicable federal train speed limit of 10 mph to 13 mph, so that excessive speed claim was preempted, but claim still dismissed for failure to establish that excessive speed was proximate cause of accident).
- *Murphy v. Town of Darien*, 64 Conn. L. Rptr. 267, No. FBT-CV-136039787, 2017 WL 1656911 (Conn. Super. Ct. Apr. 10, 2017) (unpublished) (in case where pedestrian was killed after falling from station platform and being struck by through train, negligent track selection claim preempted in part as disguised excessive speed claim and in part by

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pervasive federal scheme regulating railroad track, even in absence of specific federal regulation on track selection).

- *Janero v. Norfolk S. Ry. Co.*, No. 1:13-CV-155-TLS, 2017 WL 993055 (N.D. Ind. Mar. 15, 2017) (in crossing case, excessive speed claims preempted where railroad offered undisputed evidence that its train was traveling under 60 mph federal limit for freight trains operating on class 4 track).

2. Horn Audibility

Federal regulations establish the requirements for locomotive horn audibility and the accompanying procedure to test compliance with those requirements. *See, e.g.,* 49 C.F.R. 229.129. Cases that have recently evaluated horn audibility claims include:

- *Ryder v. Union Pac. R.R. Co.*, No. CV 15-431-SDD-EWD, 2017 WL 4364412 (M.D. La. Sept. 29, 2017) (in vehicle-train collision case at private crossing in construction site, claims based on horn audibility, emergency horn sounding sequence, and training of employees in horn use were preempted).
- *Hughs v. Union Pac. R.R. Co.*, No. 5:15-06079-CV-RK, 2017 WL 1609646 (W.D. Mo. Apr. 28, 2017) (claim based on alleged failure to maintain horn under federal standard established by Locomotive Inspection Act preempted).

3. Crew Training

The standards for the "eligibility, training, testing, certification and monitoring of all locomotive engineers" are also a subject of federal regulation. 49 C.F.R. § 240.1(b). These regulations establish a detailed procedure that a railroad must follow to obtain Federal Railroad Administration (FRA) approval of its engineer and conductor certification programs, including its criteria for continuing education, testing, training, and monitoring of performance. Recent cases in which plaintiffs have asserted negligence claims based on allegedly inadequate crew training include:

- *Marsh v. Norfolk S., Inc.*, 243 F. Supp. 3d 557 (M.D. Pa. 2017) (in case brought by estate of minor high school student killed while walking alongside railroad tracks, claim that railroad failed to properly train, supervise, and instruct train crew on stopping or slowing when confronted with person on tracks was preempted).

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- *Hidalgo v. S. California Rail Auth.*, No. B268534, 2017 WL 474355 (Cal. Ct. App. Feb. 6, 2017) (unpublished) (in case brought by estate of man who was struck and killed by commuter train while horseback riding on railroad bridge, claims for negligent hiring, training, and retention of a locomotive engineer were preempted).

4. Adequacy of Warning Devices at Grade Crossings

If the Federal Highway Administration approves a crossing improvement project, a state installs the warning devices using federal funds, and the devices are in operation, federal regulations governing the adequacy of warning devices apply and state tort law is preempted. *See, e.g., CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 670 (1993); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 354 (2000). Cases that have applied this rule in the past year include:

- *Stevenson v. Fort Worth & W. R.R. Co.*, No. 10-16-00244-CV, 2017 WL 4413445 (Tex. App. Oct. 4, 2017) (unpublished) (holding that plaintiff's claim was preempted where retro-reflective tape on crossbuck was installed pursuant to federal safety improvement program and 2007 amendments to Federal Railroad Safety Act clarifying scope of Act's preemptive effect did not impact plaintiff's arguments).
- *Rucker v. RDS Farm, Inc.*, No. 2:15-CV-272-TLS, 2017 WL 3720200 (N.D. Ind. Aug. 28, 2017) (holding that state law hazardous crossing claims of Amtrak engineer injured in collision between train and farm equipment on CSX track were preempted).
- *Malinski v. BNSF Ry. Co.*, No. 15-CV-502-JED-FHM, 2017 WL 1294438 (N.D. Okla. Mar. 31, 2017) (finding inadequate warning device claim not preempted given absence of evidence linking Federal Highway Administration's approval of crossing protection project to the specific crossing where accident occurred).

Conclusion

Federal preemption will nearly always be at issue in railroad crossing and trespasser cases. By keeping abreast of the most preemption cases, lawyers representing railroads can bring the full scope of preemption-based defenses to bear and effectively counter creative theories developed to avoid these defenses.

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