

Rail Transport 2020

Contributing editor
Matthew J Warren



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between July and August 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019

No photocopying without a CLA licence.

First published 2018

Second edition

ISBN 978-1-83862-156-8

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Rail Transport

2020

Contributing editor**Matthew J Warren****Sidley Austin LLP**

Lexology Getting The Deal Through is delighted to publish the second edition of *Rail Transport*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Matthew J Warren of Sidley Austin LLP, for his continued assistance with this volume.



London

August 2019

Reproduced with permission from Law Business Research Ltd

This article was first published in September 2019

For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview	3	Netherlands	37
Matthew J Warren Sidley Austin LLP		V J A (Viola) Sütő LegalRail	
Belgium	5	Poland	45
Michael Jürgen Werner Norton Rose Fulbright		Marcin Bejm and Mikołaj Markiewicz CMS Cameron McKenna Nabarro Olswang LLP	
Canada	11	Russia	50
Douglas Hodson QC, Kristen MacDonald, Ryan Lepage and Jocelyn R Sirois MLT Aikins LLP		Karina Chichkanova and Valentin Yurchik Dentons	
Germany	17	Singapore	56
Michael Jürgen Werner Norton Rose Fulbright		Adrian Wong, Christopher Kang and Joseph Yeo CMS Cameron McKenna Nabarro Olswang LLP	
India	24	United Kingdom	62
Ashish Suman, Kartikeya GS and Vishnu Sudarsan J Sagar Associates		Martin Watt, Jonathan Smith, Joshua Fox, Rebecca Owen-Howes, Sam Boileau and Zara Skelton Dentons	
Mexico	30	United States	72
Eduardo Bravo Senderos, Jorge Guadarrama Yañez, Luis Amado, Mario Facio Salazar and Pamela Lemus Baker McKenzie		Matthew J Warren, Donald H Smith, Marc A Korman and Morgan Lindsay Sidley Austin LLP	

United States

Matthew J Warren, Donald H Smith, Marc A Korman and Morgan Lindsay

Sidley Austin LLP

GENERAL

Industry structure

1 | How is the rail transport industry generally structured in your country?

The freight rail industry in the United States is almost all privately owned. Unlike in some jurisdictions, where separate entities control rail infrastructure and rail operations, in the United States, rail infrastructure and operations over that infrastructure are typically controlled by the same entity. Railways may also enter into agreements with one another to share infrastructure or operations on a line. For example, a railway may have trackage rights to operate its trains over the lines of another railway or switching agreements whereby another railway agrees to provide switching access to a customer facility. These arrangements are typically voluntary, but there are limited circumstances in which a railway may be forced to give another railway access to its infrastructure. (See 'Sharing access with other companies'.)

Freight railways are categorised as Class I, Class II or Class III based on their annual operating revenues. Railways with over US\$489.9 million in annual revenues are 'Class I railways' that are subject to more rigorous regulation and reporting requirements. The seven Class I railways are BNSF Railway Co; CSX Transportation, Inc; Grand Trunk Western Railroad (the US affiliate of Canadian National Railway); Kansas City Southern Railway Co; Norfolk Southern Railway Co; Soo Line Railroad (the US affiliate of Canadian Pacific Railway); and Union Pacific Railroad. In addition, there are over 550 Class II and Class III railways in the United States, which include regional railways; short-line railways; and switching and terminal railways.

Passenger rail is largely government-owned or -supported. The largest passenger system is the National Railroad Passenger Corporation (Amtrak), which is owned by the federal government and provides intercity passenger rail service. Amtrak owns and controls some rail lines and infrastructure, particularly on the 'Northeast Corridor' between Washington, DC, and Boston. Outside the Northeast Corridor, Amtrak trains typically operate over the lines of freight railways. Some other intercity passenger systems are in various stages of development. The privately owned Virgin Trains in Florida has operations between West Palm Beach and Miami, and recently broke ground on an extension of service north to Orlando. Other private intercity passenger systems have been proposed in various states, and construction has begun on a state-supported high-speed rail system in central California.

There are also numerous commuter railways that transport passengers in and around a single metropolitan region. Commuter railways are typically supported by state and local governments and often operate over rail lines owned by other railways.

Ownership and control

2 | Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

In general, the government is a regulator of freight rail services, not a provider. A very small number of short-line freight railways are owned by state and local governments, most of whom purchased them from private railways to preserve rail service. In the passenger sphere, the federal government owns Amtrak, and state and local governments often own or financially subsidise commuter railways.

3 | Are freight and passenger operations typically controlled by separate companies?

In general, railways carry either freight or passengers, but not both. There is no regulatory prohibition against a railway transporting both freight and passengers, however, and historically this was a common practice. As discussed in 'Industry structure', many rail lines host operations by both freight railways and passenger or commuter railways.

Regulatory bodies

4 | Which bodies regulate rail transport in your country, and under what basic laws?

The Surface Transportation Board (STB) regulates most non-safety-related rail transport issues, including rates, service, entry and exit, and transactions involving rail carriers. The STB succeeded to the functions of the Interstate Commerce Commission (ICC) in 1996. The Interstate Commerce Act (49 USC 10101-16106) and regulations promulgated by the STB at 49 Code of Federal Regulations (CFR) Parts 1000-1185 govern these issues. The Interstate Commerce Act dates back to 1887, and it has been subject to several significant amendments that substantially changed the scope of rail regulation. The most relevant amendments for railways today are the Staggers Rail Act of 1980 (which partially deregulated the rail industry) and the ICC Termination Act of 1995 (ICCTA) (which further deregulated the industry and transferred the ICC's remaining functions to the STB).

The Department of Transportation (DOT), through several of its component agencies, is the safety regulator of the railway industry. Chief among these agencies is the Federal Railroad Administration (FRA). The primary laws governing rail safety are the Federal Railroad Safety Act (FRSA) and safety regulations promulgated by the FRA at 49 CFR Parts 200-299. Other disparate laws affect rail safety, such as the Safety Appliances Act, Hours of Service Act and Rail Safety Improvement Act.

Commuter railways are outside the jurisdiction of the STB. They are regulated on the safety side by FRA and in other areas by the Federal Transit Administration.

Amtrak was originally established by the Rail Passenger Service Act of 1970. While Amtrak is statutorily exempt from most STB regulation, the STB retains jurisdiction over other intercity passenger railways that operate in more than one state or that otherwise connect to the interstate rail network.

MARKET ENTRY

Regulatory approval

5 | Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

In general, regulatory approval from the STB is required to enter the market as a rail transport provider, whether by the construction of a new line or by the acquisition of an existing rail line. The STB has the authority to approve an application to the agency, and it also has the power to issue 'exemptions' from the obligation to file a full application. The STB can exempt a person or transaction if it finds that formal regulation is not necessary to carry out US rail transport policy, and either the transaction or service is of limited scope, or regulation is not needed to protect shippers from an abuse of market power. The STB can grant petitions for exemption in individual cases and has also established 'class exemptions' that allow parties to forgo the application process for certain types of transactions.

The type of regulatory process that is required varies based on the type of transaction and the identity of the new entrant (and particularly on whether it already controls a railway). See below for the processes required to acquire an existing rail carrier or line of railway, and to construct a new line of railway.

6 | Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

The process for regulatory approval differs for acquisitions by a non-carrier and acquisitions by an existing rail carrier. A non-carrier (ie, an entity that does not own and is not affiliated with any rail carrier) may acquire control of an existing carrier through a stock purchase without approval or exemption by the STB. Because such a transaction does not require STB approval, it may be subject to pre-merger notification and waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This act requires persons contemplating mergers or acquisitions meeting certain jurisdictional thresholds to notify the Federal Trade Commission and the Department of Justice and wait a specific period (usually 30 days) before consummating a proposed acquisition. If the reviewing agency believes that a proposed transaction may violate antitrust laws, it may seek an injunction in federal court to prohibit consummating the transaction.

A non-carrier acquiring control of an existing carrier through an asset purchase can obtain STB authorisation through a class exemption. Under these streamlined procedures, non-carriers may file a verified notice providing specified details about the transaction. The class exemption will be effective 30 to 45 days after the notice is filed (depending on the size of the new carrier). Potential opponents may seek to revoke the exemption for cause, but a petition to revoke does not automatically stay the exemption. If the projected annual revenue of the rail lines to be acquired or operated, together with the acquirer's projected annual revenue, exceeds US\$5 million, the applicant must post a notice of the proposed transaction at least 60 days in advance.

Transactions involving combinations of two or more rail carriers are subject to more stringent regulatory review. The STB classifies proposed transactions involving more than one rail carrier as 'major',

'significant', 'minor' or 'exempt'. Major transactions involve the merger of two or more Class I railways, and significant transactions are those that do not involve the merger of two or more Class I railways but are found to be 'of regional or national transportation significance'. Exempt transactions are those for which the agency has found that regulation is not necessary to carry out US rail transport policy and has thus adopted a class exemption (eg, the acquisition of non-connecting carriers and trackage rights agreements). Transactions that are not major, significant or exempt are minor transactions.

Major, significant and minor transactions all require applications of varying complexity. Applicants in major and significant transactions also must submit a pre-filing notification describing the proposed transaction for publication in the Federal Register. The STB's rules prescribe the information that will be included in the notice and the application, which differ based on the type of transaction. The STB will also establish a procedural schedule allowing interested parties to comment and request conditions, submit responsive applications or seek other relief. The procedural schedule will allow the evidentiary proceeding to be completed within one year for major transactions, 180 days for significant transactions and 105 days for minor transactions, with a final decision issued within 45 to 90 days thereafter.

The STB is required by statute to approve significant and minor transactions unless it finds both that the transaction is likely to cause a substantial lessening of competition and that the anticompetitive effects of the transaction outweigh the public interest in meeting significant transport needs.

Major transactions, by contrast, may only be approved if the STB finds the transaction is 'consistent with the public interest'. A 2001 STB policy statement on major transactions indicates that the agency does not favour Class I consolidations that reduce transport alternatives 'unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved', including 'improved service, enhanced competition, and greater economic efficiency'. (No major transactions have been completed since the STB issued its 2001 policy statement.)

Parties to transactions that qualify for a class exemption must file a verified notice of the transaction with the STB at least 30 days before the transaction is consummated. The notice must specify which class exemption applies to the transaction, certify whether the proposed transaction involves any 'interchange commitments' that may limit future interchange with connecting carriers, and provide specified information about such commitments. Potential opponents may seek to revoke the exemption for cause, but a petition to revoke does not automatically stay the exemption.

The STB has the authority to place conditions on its approval of a transaction. These conditions are typically required to include labour protections for workers affected by the transaction, and they also may contain environmental mitigation or measures to preserve competitive options.

7 | Is special approval required for rail transport companies to be owned or controlled by foreign entities?

The STB's standards for review and approval of acquisitions, ownership and control of rail carriers do not distinguish between domestic and foreign entities. However, applicants for a major merger that would involve transnational operations are required to address certain cross-border issues in their application. The Committee on Foreign Investment in the United States (CFIUS)'s review may also apply to a transaction that would result in a foreign entity controlling a railway.

8 | Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

The construction of new rail lines that extend a railway into new territory requires regulatory approval or exemption by the STB, whether the construction is proposed by a new carrier or an existing carrier. However, no STB approval is needed for an existing carrier to construct ancillary tracks to facilitate service on its existing lines. For example, no STB approval is necessary to construct passing sidings or side tracks along existing tracks or to construct additional yard tracks.

The STB must authorise a new rail line construction project unless it finds it to be 'inconsistent with the public convenience and necessity'. The STB may impose modifications or conditions it finds to be 'necessary in the public interest'.

Parties seeking approval for new rail line construction may either apply to the STB, including the information specified by the agency's rules (49 CFR Part 1150), or submit an individual petition for exemption. Under either approach, parties must comply with the STB's energy and environmental regulations (including consulting with the STB at least six months in advance to identify environmental issues). The STB must comply with the National Environmental Policy Act (NEPA) before granting a construction application or petition for exemption, which will typically require an environmental impact statement.

MARKET EXIT

Discontinuing a service

9 | What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

A rail carrier may not abandon or discontinue operations over any part of its railway lines unless the STB finds that the 'present or future public convenience and necessity require or permit the abandonment or discontinuance'.

Railways can submit applications to abandon or discontinue service, which the STB shall grant if it finds that the public convenience and necessity standard is satisfied. Most abandonments occur through a class exemption that permits abandonment of any line that has been out of service for two years or more. Abandonment can also be sought through a petition for exemption.

After an abandonment application or notice of class exemption is filed, any person (including a government entity) may submit an 'offer of financial assistance' to subsidise or purchase the rail line at issue. If the STB finds that one or more financially responsible persons have offered financial assistance for the operation of the rail line at issue, the abandonment or discontinuance shall be postponed until the parties have reached agreement on a transaction for subsidy or sale of the line, or the conditions and amount of compensation are established by the STB.

Parties also have an opportunity to request that a line proposed for abandonment be set aside for interim trail use or offered for sale to be used for public purposes. Interim trail use is only permitted if the abandoning railway consents and the trail proponent agrees to certain conditions (including that rail service could be reactivated on the corridor). While the STB may impose a condition that the property be offered for sale for public purposes over a railway's objection, the STB cannot force such a sale, and such a condition may not be in place for more than 180 days, after which the abandoning railway is free to sell the property to whomever it chooses. The STB is currently considering extending the 180-day period to one year.

10 | On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

The same legal standard (public convenience and necessity) governs applications for abandonments and discontinuation of service filed by third parties seeking to force a railway to abandon a line. Such third-party abandonments are often called 'adverse abandonments'. The STB must consider the impact of abandonment on all interested parties, including the railway, shippers who have used the line, and the community involved. In general, the STB will not grant an adverse abandonment where the incumbent railway or shippers on the line can demonstrate some need for continued rail service.

A rail carrier opposing an adverse abandonment has the right to contest the abandonment before the STB and to seek judicial review if necessary.

Insolvency

11 | Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

A special subchapter of the Bankruptcy Code (11 US Code Subchapter IV – Railroad Reorganization) applies to railway bankruptcies and reorganisations. This subchapter requires the bankruptcy court and the trustee to consider the public interest in addition to the interests of the debtor, creditors and equity security holders.

A railway in bankruptcy may be required to continue operations until it is authorised to abandon some or all of its lines, or until it is liquidated, but courts have recognised that, in some situations, a railway that has insufficient funds to pay its employees and suppliers simply cannot operate, thus preventing an orderly liquidation.

COMPETITION LAW

Competition rules

12 | Do general and sector-specific competition rules apply to rail transport?

Both general and sector-specific competition rules apply to rail carriers, with some exceptions. A rail carrier engaged in a multi-carrier transaction approved by the STB is exempt from the antitrust laws (and 'all other law') as necessary to allow it to carry out the approved transaction. This means, for example, that a rail carrier engaged in a merger approved by the STB cannot be found liable for violating the antitrust laws simply for carrying out that merger. Similarly, rates for rail transport, which are subject to STB rate regulation in some cases, cannot be challenged under antitrust law.

Regulator competition responsibilities

13 | Does the sector-specific regulator have any responsibility for enforcing competition law?

The STB does not enforce federal antitrust laws, although it may consider antitrust principles in assessing whether a particular transaction should be approved or exempted.

Competition assessments

- 14 | What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

The STB's principal concerns in such cases are the preservation of competitive rail service where it exists and the enhancement of rail competition. The STB is particularly focused on avoiding or remediating any situation where a transaction would reduce the number of competitors from two to one and, to a lesser extent, from three to two. The STB usually requires that competitive rail service by at least two rail carriers be maintained wherever it existed before a merger or control transaction.

PRICE REGULATION

Types of regulation

- 15 | Are the prices charged by rail carriers for freight transport regulated? How?

Some prices for freight transport are regulated by the STB. The STB has no jurisdiction to regulate the following rates: rates that are agreed to in rail transport contracts; rates for transport that is subject to 'effective competition' from another railway or mode of transport (ie, the railway is not market-dominant); and rates with a revenue to variable cost ratio (R/VC) of 180 per cent or less. The R/VC is calculated by dividing the challenged rate by the variable costs for the movement as calculated by an STB costing model called the Uniform Rail Costing System (URCS). Further, the STB has granted commodity exemptions that preclude rate or other regulation of various commodities that have been determined to be subject to effective competition; however, the STB retains the power to revoke these exemptions in whole or for particular movements.

Shippers wishing to challenge rates that do not fall within the above categories have the right to file a rate reasonableness complaint with the STB.

- 16 | Are the prices charged by rail carriers for passenger transport regulated? How?

The STB has statutory authority to determine the reasonableness of passenger rates for intercity transport within its jurisdiction, but it has never done so and has no rules governing such determinations. Amtrak is exempt from STB jurisdiction on most matters, and the prices it charges are unregulated. There are no generally applicable rules as to the fares charged by commuter rail lines, although state and local laws may apply.

- 17 | Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

For traffic that is subject to rate regulation, shippers may file a complaint with the STB asking it to rule that the rate is unreasonably high. The STB has adopted several methodologies to adjudicate rate complaints, the most commonly used of which is the stand-alone cost (SAC) test. Other available methodologies that have been used by the STB include a simplified SAC methodology and a three-benchmark methodology designed for use in smaller cases. A shipper that successfully proves that its rate was unreasonable under its chosen methodology may receive reparations for rates paid above the maximum reasonable level and a prescription requiring the railway to charge a lower rate in future. The STB has several active proceedings in which it is considering potential changes to its rate methodologies.

- 18 | Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

No, unless the shippers are requesting identical service (eg, the same types of shipments between the same origins and destinations) and the railway cannot identify another sound reason for pricing the identical services differently.

NETWORK ACCESS

Sharing access with other companies

- 19 | Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

In general, entities that control rail infrastructure are not required to grant network access to other rail providers. One important exception is for Amtrak: freight railways are required to grant Amtrak access to their network at Amtrak's request. The STB has authority to impose various forms of network access upon complaint, but under the STB's current rules, such relief is only granted if the agency finds an abuse of market power or service failure. The STB also sometimes imposes network access as a condition to a transaction to mitigate a loss of competition that might otherwise result from a merger.

While in most instances railways are not required to give other railways network access, railways must cooperate with other railways to allow for the uninterrupted flow of traffic over the national rail network. Railways are required to provide switch connections to the track of other railways, accept traffic from other railways when necessary to complete rail service, provide reasonable facilities for interchanging traffic with other railways and establish reasonable through routes with other railways.

Access pricing

- 20 | Are the prices for granting of network access regulated? How?

Prices for network access are negotiated in the first instance by the railways involved. If the railways cannot agree on pricing, the STB has the jurisdiction to set a price. The STB has not established a uniform methodology for pricing network access.

Competitor access

- 21 | Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

There is no declared policy specifically regarding access for new market entrants. The Rail Transportation Policy in the Interstate Commerce Act encourages the STB to allow competition and the demand for services to establish reasonable rates to the maximum extent possible. The STB's policy statement regarding Class I mergers encourages proposals that would enhance competition, in part to offset other possible harm that could arise from such transactions.

SERVICE STANDARDS

Service delivery

- 22 | Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Freight railways have a common carrier obligation to provide service to freight customers upon reasonable request. Common carriers generally

cannot discriminate in providing service and must respond to reasonable requests for service.

Generally, Amtrak and commuter railways do not have a federal common carrier obligation but may be subject to certain other state or federal legal requirements that limit their ability to refuse service to potential customers.

23 | Are there legal or regulatory service standards that rail transport companies are required to meet?

Freight railways do not have specific service standards required by law or regulation, but they are required to provide service upon reasonable request and to establish reasonable rules and practices for providing service. Railways are also required to maintain a safe and adequate supply of rail cars. The STB requires Class I railways to regularly report on various service metrics.

Challenging service

24 | Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

Freight shippers can bring complaints to the STB alleging that a railway is engaging in an unreasonable practice or is violating its common carrier or car supply obligations. The STB's rules allow each party to present evidence and arguments, after which the STB will make its decision.

In service emergencies where a railway is not providing adequate service, the STB has the power to issue emergency service orders that temporarily direct the handling of traffic or order another railway to provide service (49 USC section 11123). Such emergency service orders may be in place for a maximum of 270 days. This emergency power has rarely been used.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

Freight, passenger and commuter rail are all subject to federal regulation, primarily by the FRA. The FRA uses its broad authority granted by the FRSA to 'promote safety in every area of railway operations and reduce railway-related accidents and incidents'. (49 USC section 20101.) The FRA typically promulgates regulations in the CFR under the authority granted by these statutes. These detailed regulations include standards for inspection, types of equipment, hours of work, operations and record-keeping. The FRA enforces these rules and regulations through inspections and by issuing notices and civil penalties for any violations. The FRA can also issue emergency orders under certain circumstances to initiate immediate actions. See 49 USC section 20104.

Some relevant statutory provisions and FRA regulations specifically reference and incorporate standards set by the Association of American Railroads (AAR) as a minimum or safe harbour for compliance with the FRA's regulations.

Broadly speaking, if the FRA has issued regulations on a rail safety issue, FRSA pre-empts state or local regulations on that issue. If the FRA has not acted, in some circumstances, states may issue more stringent regulations to address an essentially local safety or security hazard.

Competent body

26 | What body has responsibility for regulating rail safety?

As discussed above, the FRA has primary responsibility for regulating rail safety. The Pipeline and Hazardous Materials Safety Administration (PHMSA) has some oversight over hazardous materials moved by rail, and the Transportation Safety Administration (TSA) has some oversight where safety and security concerns overlap. The Federal Transit Administration does not have direct safety oversight of railways but does work with commuter railways on some safety issues, including technical assistance. Finally, the National Transportation Safety Board (NTSB) may issue non-binding recommendations after investigations. (See 'Maintenance rules'.)

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

Federal statutes (eg, 49 USC sections 20701 et seq, 20133 and 20155) and FRA regulations (eg, 49 CFR Parts 215, 221, 223, 224, 229, 231 and 232) apply safety standards for freight cars, passenger cars, locomotives and other rolling stock, many of which require actions by the manufacturer for such equipment to be used by railways. PHMSA also has regulatory authority over rail equipment used to move hazardous materials.

There are also AAR standards for equipment that AAR members comply with and that are sometimes incorporated in regulation.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

Federal statutes (eg, 49 USC sections 20142 and 20134) and multiple FRA regulations (eg, 49 CFR Parts 213, 232, 233 and 237) address the maintenance of track, signal systems and other rail infrastructure.

29 | What specific rules regulate the maintenance of rail equipment?

Federal statutes and multiple FRA regulations address the maintenance of rail equipment, including required inspections and reporting on such inspections. Some of the most relevant provisions by equipment type are:

- locomotives: 49 USC section 20702; 49 CFR Part 229;
- freight cars: 49 CFR Part 215;
- passenger cars: 49 USC section 20133; 49 CFR Part 238; and
- brakes: 49 CFR Part 232.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

Railways are required to report all accidents to the FRA. The FRA investigates serious train accidents, including all accidents involving fatalities to railway employees or contractors. No part of a report of an FRA accident investigation may be admitted as evidence in a suit for damages for the accident.

The NTSB also investigates major transport accidents, including train accidents. Investigations are conducted by NTSB staff, who designate parties to participate in the investigation. The NTSB will issue a factual report, including a determination of probable cause for the accident and any safety recommendations. To ensure that NTSB investigations focus only on improving transport safety, the NTSB's analysis of

factual information and its determination of probable cause cannot be entered as evidence in a court of law. Unlike the FRA, the NTSB does not have direct regulatory authority over railways to mandate compliance with any safety recommendations it makes. However, NTSB recommendations typically carry persuasive weight, and they may be implemented by other regulatory agencies.

Accident liability

- 31 | Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

There is a statutory limitation on liability for injury, death or damage to property of a passenger arising in connection with the provision of rail passenger transport of US\$200 million. (49 USC section 28103.) The US\$200 million liability limit applies to all awards to all passengers from all defendants arising from a single accident or incident. There is no similar limitation on damages arising from freight operations.

FINANCIAL SUPPORT

Government support

- 32 | Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

Government entities provide little or no direct financial support to freight rail carriers, although carriers sometimes benefit indirectly from broad-based tax policies and incentives. Freight rail carriers sometimes partner with states and regional authorities on an ad hoc basis to finance major transport infrastructure investments and improvements. In addition, the DOT administers the Railroad Rehabilitation and Improvement Financing programme, through which low-interest, long-term loans can be obtained to finance freight or passenger projects.

On the passenger side, Amtrak is subsidised by the federal government, and state and local governments often own or financially subsidise commuter railways. Moreover, some short line railways are owned by state and local governments. The nature of financial support for these commuter railways and short lines varies widely, and may include loans, tax benefits and direct financial subsidies.

Requesting support

- 33 | Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

There are no sector-specific rules governing financial support to rail carriers. The processes for requesting or challenging such support are ad hoc and case by case. As noted in 'Government support', many passenger and commuter railways receive some form of public subsidy.

LABOUR REGULATION

Applicable labour and employment laws

- 34 | Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

Labour relations between rail carriers and their employees are governed by the Railway Labor Act (RLA), which sets forth specialised labour laws that are broadly applicable to freight railways; Amtrak; select commuter

SIDLEY

Matthew J Warren
mjwarren@sidley.com

Donald H Smith
dhsmith@sidley.com

Marc A Korman
mkorman@sidley.com

Morgan Lindsay
morgan.lindsay@sidley.com

1501 K Street, NW
Washington, DC 20005
United States
Tel: +1 202 736 8000
Fax: +1 202 736 8711
www.sidley.com

railways that retain some freight rail functions; and entities that provide services related to rail transport for which there is common ownership or control between the entity and an RLA carrier. The RLA generally does not apply to any wholly intra-state railways, including street, interurban or suburban electric railways. When the RLA applies, it occupies the entire field of rail labour law and pre-empts state labour laws entirely.

The RLA differs significantly from standard federal labour laws in the National Labor Relations Act (NLRA). Unlike the NLRA, one of the RLA's main purposes is to avoid any interruption to interstate commerce. As such, the RLA prescribes an elaborate scheme of mandatory and time-consuming procedures that must take place before self-help measures are permitted. The RLA imposes a positive duty on both carriers and employees to exert every reasonable effort to make and maintain collective bargaining agreements and to settle all disputes. The RLA creates federal entities, including the National Mediation Board and the National Railroad Adjustment Board, for adjudicating disputes under the Act. Actions to enforce the RLA can be litigated in federal court.

ENVIRONMENTAL REGULATION

Applicable environmental laws

- 35 | Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

In general, standard federal environmental laws apply to rail transport companies. Both the FRA and STB are subject to the National Environmental Policy Act (NEPA), which requires agencies to consider the environmental impacts of any major federal action. As such, any matter that requires agency action (such as approval of an application or the grant of an exemption) is subject to an environmental review of the impact of the action.

Many state and local regulations, including environmental regulations, are inapplicable to railways because of the pre-emption provisions of the ICC Termination Act. Whether a particular state or local regulation is pre-empted by federal law requires an individualised analysis.

UPDATE AND TRENDS**Update and trends****36 | Are there any emerging trends or hot topics in your jurisdiction?**

The Trump administration's general policies of deregulation have had some impact on transport regulations. In recent years, the DOT has withdrawn some rail operational regulations proposed by DOT agencies under the Obama administration. For example, in late 2018, the DOT withdrew a proposal to require electronically controlled pneumatic braking systems on certain crude oil trains, and in 2019, the agency withdrew a proposed rule to mandate two-person crews on certain freight trains.

One potential departure from this deregulatory trend is the STB, which is actively considering more aggressive regulatory policies, including the proposed revocation of some regulatory exemptions and potential new methodologies to assess rate reasonableness. The STB has also increased its scrutiny of railway service and operational plans, often in the context of railways incorporating precision-scheduled railroading into their operating plans.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Rail Transport
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Real Estate
Agribusiness	Dominance	Joint Ventures	Real Estate M&A
Air Transport	e-Commerce	Labour & Employment	Renewable Energy
Anti-Corruption Regulation	Electricity Regulation	Legal Privilege & Professional Secrecy	Restructuring & Insolvency
Anti-Money Laundering	Energy Disputes	Licensing	Right of Publicity
Appeals	Enforcement of Foreign Judgments	Life Sciences	Risk & Compliance Management
Arbitration	Environment & Climate Regulation	Litigation Funding	Securities Finance
Art Law	Equity Derivatives	Loans & Secured Financing	Securities Litigation
Asset Recovery	Executive Compensation & Employee Benefits	M&A Litigation	Shareholder Activism & Engagement
Automotive	Financial Services Compliance	Mediation	Ship Finance
Aviation Finance & Leasing	Financial Services Litigation	Merger Control	Shipbuilding
Aviation Liability	Fintech	Mining	Shipping
Banking Regulation	Foreign Investment Review	Oil Regulation	Shipping
Cartel Regulation	Franchise	Patents	Sovereign Immunity
Class Actions	Fund Management	Partnerships	Sports Law
Cloud Computing	Gaming	Pensions & Retirement Plans	State Aid
Commercial Contracts	Gas Regulation	Pharmaceutical Antitrust	Structured Finance & Securitisation
Competition Compliance	Government Investigations	Ports & Terminals	Tax Controversy
Complex Commercial Litigation	Government Relations	Private Antitrust Litigation	Tax on Inbound Investment
Construction	Healthcare Enforcement & Litigation	Private Banking & Wealth Management	Technology M&A
Copyright	Healthcare M&A	Private Client	Telecoms & Media
Corporate Governance	High-Yield Debt	Private Equity	Trade & Customs
Corporate Immigration	Initial Public Offerings	Private M&A	Trademarks
Corporate Reorganisations	Insurance & Reinsurance	Product Liability	Transfer Pricing
Cybersecurity	Insurance Litigation	Product Recall	Vertical Agreements
Data Protection & Privacy	Intellectual Property & Antitrust	Project Finance	
Debt Capital Markets		Public M&A	
Defence & Security		Public Procurement	
Procurement		Public-Private Partnerships	
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)