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Chris McChesney

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TOXIC TRAINS: CHEMICAL TRANSPORTATION REGULATION, TERRORISM, AND THE U.S. CAPITOL

by Chris McChesney*

INTRODUCTION

Not far from the U.S. Capitol building in Washington, DC (the “District”) runs a railroad track that is part of CSX Corporation’s (a major North American railroad company) North-South railroad corridor along the Eastern coast of the United States.¹ While a railroad track is not normally a cause for concern, rail cars on this particular track carry large volumes of some of the world’s most dangerous chemicals.² For instance, 90-ton rail tankers filled with hazardous chemicals such as chlorine gas regularly pass over a small bridge that is unsecured, in a low traffic area, and easily accessible to anyone.³ A recent study by the Naval Research Laboratory estimated that a terrorist explosion set in such a strategic location, during a political rally or celebration on the National Mall, could result in the release of toxic gases with the potential to seriously injure or kill over one hundred thousand people within half an hour.⁴

The possibility of such a catastrophic event should be of major concern not only to the chemical transportation industry, but also to the federal and District government. While the federal government has done little to address this risk, the City Council of Washington, DC (“DC Council”) has taken measures to regulate the transportation of hazardous materials (hereinafter “hazmats”) around the Capitol.⁵ The Bush Administration and CSX are currently fighting this regulation in the *CSX Transportation, Inc. v. Anthony A. Williams* case. This article will argue that the DC Council’s regulation of hazmats in the District should be upheld, and will also explore other potential means to secure transportation of dangerous chemicals in and around the nation’s Capitol.

REGULATION OF HAZMATS AROUND THE U.S. CAPITOL

THE TERRORISM PREVENTION IN HAZARDOUS MATERIALS TRANSPORTATION EMERGENCY ACT OF 2005

The controversy over hazmat regulation around the U.S. Capitol began on February 1, 2005 when the DC Council approved the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 (hereinafter “the DC Act”).⁶ The DC Act creates an area deemed the “Capitol Exclusion Zone,” defined as: “all points within 2.2 miles of the United States Capitol building; provided, that the Capitol Exclusion Zone shall not extend beyond the geographic boundaries of the District of Columbia.”⁷ The Act prohibits the shipment of hazmats through the zone without a permit from the District’s Department of Transportation (“DDOT”).⁸ The CSX Corporation controls the only two rail corridors that carry hazmats through the District, the North-South corridor and the East-West line, which originates in Washington, DC. This regulation

effectively banned CSX from transporting hazmats through the District by either of these two tracks. Wishing to prevent increased costs of transportation, CSX brought suit against the District to enjoin the DC Act from going into effect.⁹ This suit spawned continuing litigation that centers not only on the regulation of chemical transportation, but also on national security and federalism, including the precarious role the District has as both the federally controlled capital and a local state-like government. Although the DC Court of Appeals ultimately placed a stay on the DC Act,¹⁰ CSX has agreed to temporarily halt transportation of hazmats through the District during the pending litigation.¹¹

THE CSX v. WILLIAMS LITIGATION

Procedural History

In *CSX v. Williams*, CSX sought to enjoin the enforcement of the DC Act, alleging that the act: (1) violated the Commerce Clause of the U.S. Constitution; (2) was preempted by federal law; and (3) went beyond the authority granted to the DC local government in the Home Rule Act.¹² In a well-reasoned opinion, U.S. District Judge Emmet G. Sullivan denied both CSX’s Motion for Summary Judgment and Motion for a Preliminary



A map depicting the proximity of the CSX bridge to the U.S. Capitol Building.

Injunction.¹³ Additionally, the United States was denied its Motion to Enforce a decision made by the Surface Transportation Board (“STB”) against Washington, DC.¹⁴

Even though the U.S. Court of Appeals for the District of Columbia reversed the District Court’s denial of a Preliminary

* Chris McChesney is a JD candidate, May 2007, at American University, Washington College of Law.

Injunction, ruling in favor of CSX,¹⁵ this article asserts that Judge Sullivan used the correct analysis. A preliminary injunction requires the court to consider four factors: likelihood of success of the moving party, irreparable harm to the moving party, a balancing of the harms/risks, and the public interest.¹⁶ With respect to the likelihood of success, the District Court reviewed all of CSX's claims against the act and found it unlikely that CSX would prevail on the merits.¹⁷ However, the Court of Appeals disagreed, finding that CSX was likely to prevail on the claim of federal preemption.¹⁸ Because it is not contested that CSX will be unlikely to prevail on its claim of a violation of the "dormant" commerce clause, and because the United States will be unlikely to prevail on its Motion to Enforce the STB's opinion, this article will only discuss the issues surrounding the claim of federal preemption.

Issues of Federal Preemption

CSX and the United States claimed that the Federal Railroad Safety Act ("FRSA"), the Hazardous Materials Transportation Act ("HMTA"), and the Interstate Commerce Commission Termination Act ("ICCTA") preempted the DC Act.¹⁹ The FRSA provides that "states may regulate in the area of railroad safety and security 'until' the federal government 'prescribes a regulation or issues an order covering the subject matter of the State requirement,'" and that for local hazards, states may impose more strict regulations "as long as they are not 'incompatible' with federal regulation, and do not 'unreasonably burden interstate commerce.'"²⁰ The District Court interpreted this to mean that the DC Act would survive a preemption challenge against the FRSA if the act was filling a gap in federal law or if it was addressing a mainly local hazard without interfering with federal law.²¹ CSX and the United States argued that the DC Act facially violated the FRSA because Final Rule HM-232, issued by the U.S. Department of Transportation ("U.S. DOT"), addressed the same subject matter.²² However, HM-232 merely requires private industry "to develop and implement *voluntary* security plans" [*emphasis added*].²³ As such, the District Court found that the rule did not conflict with federal law; rather, it helped further it.²⁴

The HMTA similarly allows states to regulate the transportation of hazmats unless the non-federal regulation creates an obstacle to complying with federal law or if it is not possible to comply with both regulations.²⁵ Again, CSX and the United States argued that HM-232 preempted the DC Act under this standard.²⁶ According to the federal government, the purpose behind such lax regulation is to allow for flexibility in how industry provides for security.²⁷ CSX and the United States claimed that the DC Act hindered this flexibility.²⁸ While the District Court did not question the government's policy decision regarding the flexibility of security plans, it determined that the

DC Act neither presented an obstacle to the federal policy, nor was it impossible for CSX to comply with both the DC Act and the federal policy.²⁹

The ICCTA, unlike the FRSA and HMTA, does not expressly allow for state regulation; CSX and the United States thus argued that the ICCTA preempted any state attempt to regulate the railroads.³⁰ The District Court disagreed with this position, stating that such a position "interprets the ICCTA in a 'contextual vacuum', completely ignoring the existence of the surrounding statutory framework, including the FRSA."³¹ The District Court went on to hold that the DC Act did not deal with interstate commerce or the infrastructure of the railroad – both of which would fall under the jurisdiction of the ICCTA – the DC Act only dealt with safety and security, and thus fell within the historical cooperation of state and federal regulation of the railroads.³²

The District Court concluded that the DC Act would likely not be preempted by any of the federal laws presented by CSX and the United States.³³ The Court of Appeals, however, did not agree and ordered the reversal of the District Court's denial of a preliminary injunction.³⁴ The Court of Appeals found that CSX was likely to succeed in its argument that the FRSA would preempt the DC Act.³⁵ Accordingly, the court found a preliminary

injunction to be appropriate.³⁶ The difference in opinions between the District Court and the Court of Appeals is based on conflicting interpretations of whether the current federal regulation HM-232, substantially covered the subject matter of the DC Act, and whether the DC Act was an obstacle to the implementation of the federal regulation or "unreasonably burden[ed] interstate com-

merce."³⁷ The Court of Appeals decided the District Court was incorrect in determining what HM-232 covered, and that the DC Act created both an obstacle to complying with HM-232 and "unreasonably burden[ed] interstate commerce."³⁸ For example, the Court of Appeals reasoned that because U.S. DOT specifically rejected routing requirements during the development of HM-232, the rule substantially subsumes the subject matter of the DC Act.³⁹ As such, HM-232 likely preempted the DC Act.⁴⁰

Pursuant to §20106 of the FRSA, however, both HM-232 and the DC Act can stand so long as the DC Act does not interfere with compliance of HM-232 and it does not "unreasonably burden interstate commerce."⁴¹ Again, the Court of Appeals agreed with CSX and the United States, determining that the DC Act frustrated HM-232 by not allowing rail carriers the flexibility the regulation intended.⁴² In addition, the court found that the DC Act likely would "unreasonably burden interstate commerce," because if allowed to stand, other local governments would enact a patchwork of similar bans that would interfere with the national hazmat transportation system.⁴³

While CSX and the United States successfully moved the Court of Appeals to preliminarily enjoin the DC Act from being

The DC Act places tight regulations on the transportation of hazmats through a particularly high-risk area.

enforced, it has yet to be determined whether the District Court will issue a permanent injunction. Though the Court of Appeals decided that CSX and the United States are likely to succeed on the claim of federal preemption, this reasoning was flawed. The DC Act deals with the unique potential for a chemical catastrophe to occur in a highly populated urban center that is also in the seat of the federal government. Although HM-232 gives private industry the responsibility of securing the nation's railroad system, it does not "substantially" cover the unique local safety risks that face Washington, DC. Rather, the rule merely touches the subject matter of security and does not "substantially subsume" it, as required by caselaw.⁴⁴ Additionally, the DC Act only prohibits the most hazardous of chemicals transported through the Capitol Exclusion Zone and allows an exception for permit holders. This does not create a significant obstacle in allowing industry flexibility in implementing self-determined security measures.

Critics might argue that the DC Act essentially bans hazmat transportation through the entire state, which would be a violation of the dormant commerce clause.⁴⁵ However, this is not what the DC Act does. The DC Act places tight regulations on the transportation of hazmats through a particularly high-risk area of the DC Council's jurisdiction.⁴⁶ As previously discussed, under the current federal statutory scheme regulating the transportation of hazmats, states are allowed to impose more stringent regulations than those of the federal agencies. As such, the District Court should not permanently enjoin the DC Act.

ALTERNATIVE MEANS TO PROTECT THE CAPITOL AREA

If the DC Act is permanently enjoined, there are other possible means to secure transportation of dangerous chemicals in and around the Capitol. Currently, CSX and the U.S. Department of Homeland Security ("DHS") are working to create a "virtual boundary" around the District's rail corridor.⁴⁷ Such a boundary would involve two hundred surveillance cameras around the rail corridor that would allow for 24-hour monitoring.⁴⁸ Also involved in the plan are several rapid response teams that would act in conjunction with the surveillance to increase security of the corridor.⁴⁹

While this "virtual boundary" might increase security, it will not eliminate the threat. To more adequately address the issue, bills have been introduced in Congress, yet none have been passed.⁵⁰ One of the more comprehensive bills is Senator Joseph Biden's (D-DE) Hazardous Materials Vulnerability Reduction Act of 2005 (hereinafter "HMVRA") and its House companion bill.⁵¹ The main purpose of HMVRA would be to

require DHS to promulgate regulations to properly secure high-risk urban corridors involving the transportation of hazmats, including dangerous chemicals, via rail.⁵² These regulations would include criteria for determining high-risk corridors, which would then require that any hazmats be rerouted around the corridor with few exceptions.⁵³ Additionally, the Secretary of Homeland Security would annually report to Congress on the frequency of and contents of hazmat transportation and owners of hazmat transportation operations would have to notify local government officials when transporting hazmats through their jurisdiction.⁵⁴ The other sections of the bill provide for increased hazmat transportation security not specifically related to urban areas. Section 4 of HMVRA would authorize the Secretary of Homeland Security to award grants to both local governments and private railroad companies for the purposes of training and providing safety equipment to those who work transporting hazmats. Section 5 of HMVRA would require the Secretary to report to Congress after studying potential new security technologies, and section 6 would provide for whistleblower protection.⁵⁵ Such legislation would be a tremendous step forward in securing the transportation of hazmats, including dangerous chemicals. Currently, the bill is still in committee, but the Bush Administration does not support it.⁵⁶

CONCLUSION

In an era where defense against terrorism is a national priority, the chemical industry has the burden of addressing immense security concerns while still providing a national service. The government of Washington, DC has a unique obligation to protect not only a densely populated urban core, but also the seat of the federal government. The transportation of any dangerous chemicals or other hazmats, poses a threat in any location, but the transportation corridor through the District poses a unique risk that must be addressed. While the Administration has facially addressed the issue, the DC Council properly took action to protect the people within its jurisdiction. Because of industry complaint, this action has all but been destroyed, and now faces a permanent injunction. It is this article's position, however, that the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 should not be permanently enjoined. In conjunction with the DC Act, or in light of the Act being enjoined, Congress should take action not only to protect itself, but the city it calls home. Senator Biden's bill, if passed, would be a step in the right direction in limiting the transportation of hazardous chemicals through Washington, DC.



ENDNOTES: Toxic Trains

¹ *Washington's Deadly Bridge*, N.Y. TIMES, July 5, 2005, at A1, available at <http://www.nytimes.com/2005/07/05/opinion/05tue1.html?ex=1278216000&en=7806df7623b3d0a2&ei=5090&partner=rssuserland&emc=rss> (last visited Mar. 19, 2006).

² *Deadly Bridge*, *id.*

³ *Deadly Bridge*, *id.*

⁴ Senator Joseph Biden, Introductory Statement, S.1256: The Hazardous Materials Vulnerability Reduction Act of 2005, June 16, 2005, available

at <http://www.govtrack.us/congress/billtext.xpd?bill=s109-1256> (last visited Mar. 12, 2006).

⁵ See *Court Orders Feds to Produce Documents in Toxic Trains Case*, Press Release, DC Councilmember Kathy Paterson (Dec. 14, 2005), available at <http://www.dccouncil.washington.dc.us/patterson/pages/printfo/Orderfor%20discovery%20in%20Toxins%20Case%2012.14.05.doc> (last visited Mar. 12, 2006); *Cities Tackle Chemical Transportation*

Security, OMB Watch (Aug. 8, 2005), available at <http://www.omb-watch.org/article/articleview/2976/1/1> (last visited Mar. 12, 2006).

⁶ The Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 [hereinafter DC Act], available at <http://www.dccouncil.washington.dc.us/patterson/pages/prinfo/HAZMAT.htm> (last visited Mar. 12, 2006).

⁷ DC Act, *id.* at § 3(1).

⁸ DC Act, *id.* at §§ 4-5.

⁹ CSX Transportation, Inc. v. Anthony A. Williams, 2005 U.S. Dist. LEXIS 6569 (D.D.C. 2005)

¹⁰ CSX v. Williams, 406 F.3d 667 (D.C. Cir. 2005).

¹¹ Michelle Bryner, *First Stop: 'Safety Culture'*, CHEMICAL WEEK 29, Feb 8, 2006, available at <http://www.chemweek.com/inc/articles/t/2006/02/08/045.html> (last visited Mar. 19, 2005).

¹² CSX, 2005 U.S. Dist. LEXIS 6569 at *2.

¹³ CSX, 2005 U.S. Dist. LEXIS 6569, at *97.

¹⁴ CSX, 2005 U.S. Dist. LEXIS 6569, at *97. The STB is an administrative board within the Dept. of Transportation that has jurisdiction over rail carriers.

¹⁵ CSX, 406 F.3d 667 (D.C. Cir. 2005).

¹⁶ CSX, 2005 U.S. Dist. LEXIS 6569 at *79-94.

¹⁷ CSX, 2005 U.S. Dist. LEXIS 6569 at *80-84.

¹⁸ CSX, 406 F.3d at 674.

¹⁹ CSX, 2005 U.S. Dist. LEXIS 6569, at *21-22.

²⁰ CSX, 2005 U.S. Dist. LEXIS 6569, at *22-23 (citing FRSA, 49 U.S.C. § 20106).

²¹ CSX, 2005 U.S. Dist. LEXIS 6569, at *30.

²² CSX, 2005 U.S. Dist. LEXIS 6569, at *33-34.

²³ CSX, 2005 U.S. Dist. LEXIS 6569, at *33-34.

²⁴ CSX, 2005 U.S. Dist. LEXIS 6569, at *39-40.

²⁵ CSX, 2005 U.S. Dist. LEXIS 6569, at *24.

²⁶ CSX, 2005 U.S. Dist. LEXIS 6569, at *39.

²⁷ CSX, 2005 U.S. Dist. LEXIS 6569, at *39.

²⁸ CSX, 2005 U.S. Dist. LEXIS 6569, at *39.

²⁹ CSX, 2005 U.S. Dist. LEXIS 6569, at *39-40.

³⁰ CSX, 2005 U.S. Dist. LEXIS 6569, at *41.

³¹ CSX, 2005 U.S. Dist. LEXIS 6569, at *42.

³² CSX, 2005 U.S. Dist. LEXIS 6569, at *44.

³³ CSX, 2005 U.S. Dist. LEXIS 6569, at *80-83.

³⁴ CSX, 406 F.3d at 674.

³⁵ CSX, 406 F.3d at 673.

³⁶ CSX, 406 F.3d at 674.

³⁷ CSX, 406 F.3d, at 672-673.

³⁸ CSX, 406 F.3d, at 672-673

³⁹ CSX, 406 F.3d, at 671.

⁴⁰ CSX, 406 F.3d, at 671-672.

⁴¹ CSX, 406 F.3d, at 671.

⁴² CSX, 406 F.3d, at 673.

⁴³ CSX, 406 F.3d, at 673.

⁴⁴ CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 666, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993); *see also*, CSX, 406 F.3d at 671.

⁴⁵ CSX, U.S. Dist. LEXIS 6569, 62-72 (D.D.C. 2005) (discussing the dormant commerce clause).

⁴⁶ DC Act, *supra* note 6.

⁴⁷ Amy Tsui, *CSX Anticipates Starting Construction on D.C. 'Virtual' Rail Security Corridor*, Jan. 30, 2006, available at <http://www.dccouncil.washington.dc.us/patterson/pages/prinfo/HazmatPress.htm> (last visited Mar. 12, 2006).

⁴⁸ Tsui, *id.*

⁴⁹ Tsui, *id.*

⁵⁰ *See* Hazardous Materials Vulnerability Reduction Act of 2005, S.1256, 109th Cong. (2005) (currently referred to the Senate Committee on Commerce, Science and Transportation); Hazardous Materials Vulnerability Reduction Act of 2005, H.R.3510, 109th Cong. (2005) (currently referred to the House Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity); Extremely Hazardous Materials Transportation Security Act of 2005, H.R.1414, 109th Cong. (2005) (currently referred to the House Subcommittee on Management, Integration and Oversight); Extremely Hazardous Materials Rail Transportation Act of 2005, S.773, 109th Cong. (2005) (currently referred to the Senate Committee on Commerce, Science, and Transportation). *But See* To prevent the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 and the Terrorism Prevention in Hazardous Materials Transportation Temporary Act of 2005, as passed by the Council of the District of Columbia, from taking effect, H.R.2057, 109th Cong. (2005) (currently referred to House Committee on Government Reform).

⁵¹ Hazardous Materials Vulnerability Reduction Act of 2005, S.1256, H.R.3510, 109th Cong. (2005) [hereinafter HMVRA]; *see generally*, Biden, *supra* note 4.

⁵² HMVRA, *supra* note 51, at § 3.

⁵³ HMVRA, *id.*

⁵⁴ HMVRA, *id.*

⁵⁵ HMVRA, *id.*, at §§ 5-6.

⁵⁶ *Deadly Bridge*, *supra* note 1.