

# F&S HIGHLIGHTS

A Periodic Update for the Clients and Business Associates of Fletcher & Sippel

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## Can A Grade Crossing Case Be Removed To Federal Court?

Most grade crossing cases are brought in state court, as opposed to federal court. Depending on the venue, there may be a tactical advantage to being in federal court instead of state court. For example, the jury pool in federal court may be more favorable to the defense, a federal court may be more receptive of preemption defenses, and it is generally less likely that the plaintiff's attorney has a close personal relationship with a federal judge. A defendant can "remove" a state case to federal court if the suit originally could have been brought in federal court.

Generally, a lawsuit can be brought in federal court only if the claim arises under federal law or there is diversity of citizenship, *i.e.*, the plaintiff is a citizen of a different state than each of the defendants. For purposes of diversity, a corporation is deemed a citizen in the state of incorporation and in the state in which its principal place of business is located. Even if diversity exists, a defendant can not remove a state case to federal court on diversity grounds if it is a citizen of the forum state.

Most grade crossing cases on their face do not arise under federal law, and unless the plaintiff is a citizen of a different state from the rail carrier, there is no diversity. Thus, historically, there has not been a basis

*Continued on page 2...*

## Illinois Supreme Court to Review Illinois Appellate Court Victory

The Fall 2006 issue (No. 5) of *F&S Highlights* featured an article concerning Fletcher & Sippel's victory in the Illinois Court of Appeals regarding *Village of Mundelein v. Wisconsin Central Ltd.* Late in 2006, the Illinois Supreme Court granted the Village's petition requesting a review of the Appellate Court decision that said the FRSA preempted the ordinance.

*Continued on page 5...*

## ICCTA Preemption

Fletcher & Sippel attorneys continue to establish the scope of federal preemption of local railroad regulation. Last month the Second Circuit Court of Appeals in New York approved an injunction obtained by New York & Atlantic Railroad against enforcement of a local zoning board order prohibiting operation of a transloading operation.

*Continued on page 2...*

## IN THIS ISSUE

Can A Grade Crossing Case Be Removed to Federal Court .....	1
Illinois Supreme Court to Review Illinois Appellate Court Victory .....	1
ICCTA Preemption .....	1
Do You Have An E-Discovery Plan? ....	3
Upcoming Events Calendar.....	4
Team Fastrack Update .....	5
2006 Top 10 ALS Walk4Life Teams .....	5

**Grade Crossing Case...continued from page 1**

in most grade crossing cases for removal to federal court. Several federal courts have recently recognized the doctrine of complete preemption as a basis for removing a grade crossing case to federal court. While there is a split in the courts regarding under what circumstances the doctrine of complete preemption can create a jurisdictional basis for removal to federal court, several courts have reasoned that a grade crossing plaintiff's complaint raises a federal question, regardless of what the plaintiff alleges, if the plaintiff's allegations or the relief requested depends on an interpretation of federal law, such as FRA regulations, and that that interpretation is an important aspect of the case. Other courts have held that a grade crossing case can be removed to federal court where the plaintiff has alleged that the carrier was negligent in carrying out an act that is pervasively regulated by the FRA. For example, some courts have held that because the sounding of locomotive horns is regulated by the federal government, the complete preemption doctrine applies to claims that the crew failed to sound the horn as the train approached the crossing. Still other federal courts have been reluctant to recognize the doctrine of complete preemption in grade crossing cases.

While the federal courts are split on the recognition of complete preemption as a basis for removal of grade crossing claims, given the potential tactical advantages, removal is certainly something a railroad defendant should at least consider at the beginning of the case. If you want additional information on complete preemption or want to discuss removal and/or complete preemption further, please contact [James D. Helenhouse](#) by telephone or email.

**ICCTA Preemption...continued from page 1**

NY&AR entered into a transload operating agreement under which they allowed an agent to erect a structure enclosing part of its rail yard to house a transloading operation. The agent was also allowed to market and operate the facility on behalf of NY&AR. The local township slapped a "Stop Work" order on the facility as it neared completion and the Zoning Board of Appeals concluded that a transload operation violated its zoning ordinances. Most freight transloaded at this facility consists of outbound Construction and Demolition Debris.

NY&AR, represented by [Ronald A. Lane](#), and the operator jointly sought an injunction preventing the town from enforcing its order. The federal court for the Eastern District of New York issued a preliminary injunction, finding that the federal Interstate Commerce Commission Termination Act preempted the town's zoning ordinance. Now, the Court of Appeals has affirmed that injunction.

Fletcher & Sippel continues to work with a number of clients who want to participate in the emerging market for rail shipment of waste materials. Transload facilities used for this commodity often generate local opposition from environmental interests, neighbors, competitors and municipal governments. Balanced against those concerns is the overriding public interest in efficient disposal of waste and reduction in highway congestion. We have more experience and continuing involvement than any other firm in this important and evolving area of law.



## **Do You Have An E-Discovery Plan? The New Federal Rules For E-Discovery Are In Effect**

The new rules will require litigants to reach a specific (and perhaps expensive) discovery agreement early on in litigation to preserve and produce the company's electronically stored information. These agreements are required to be in place within roughly 100 days of receiving a lawsuit. Litigation "hold letters" can involve mandatory retention of significant volumes of electronic data that might otherwise be deleted.

An e-discovery agreement will likely encompass virtually every aspect of a company's electronically managed data: word processing files, spreadsheets, databases, web pages, voice mail, cad drawings, instant messages, Blackberries, PDA's, cell phones, and business and home computers. A corporate e-discovery plan is crucial to assuring that discovery is applied consistently across all corporate litigation. A case-by-case approach to e-discovery will, in the end, not only be more costly, but may pave a trail to an expensive spoliation claim.

The first step in tackling an e-discovery plan is to *identify the key corporate players* needed to design the

plan and who will be the liaison to in-house or outside counsel in crafting individual production agreements. These players will logically include the company's IT staff, record managers and outside e-discovery consultants. The development of an e-discovery plan should be controlled by business managers with hands on knowledge of the various media used by the company, the data systems involved, the records maintained in those systems, and corporate record retention policies.

The next step is to *identify the elements that will be involved in a comprehensive e-discovery plan, and draft the plan*. In short, the plan needs to identify what data is kept, where it's kept and for how long; what search engines will be used in the discovery process; corporate charts, enterprise data and system maps that will allow the process to targeted properly; what back-up systems are in place and; a detailed understanding of the costs involved in various types of searches, particularly those involved in restoring data. The objective is to arrive at a discovery plan that is reasonable, comprehensive, and can be defended.

The last step is the *Case Management Conference* This is where the parties hammer out an agreement on the type and amount of e-discovery that will be required in a given case and the costs that will be incurred by each side in producing the data. The topics discussed will likely include: the focus and scope of the discovery requests; specifying in what format data will be produced, clarifying what data will be preserved and, equally im-

*Continued on page 4...*

E-Discovery...from page 3

portant, what will not be preserved; identifying which corporate officials' are within the scope; defining data search parameters; explaining what corporate disaster-recovery or back-up preservation systems are already in place; identifying what cost-sharing requirements should be in the agreement; setting timelines and discovery phases; and limiting what information must be produced in native electronic format as opposed to traditional written interrogatory answers or readily available hard copy format.

The ability of counsel to limit e-discovery will focus on 3 elements: (1) the use of effective arguments to limit the scope and relevance of the information requested; (2) a comprehensive understanding of the technology involved to be able readily to identify alternative approaches to discovery, and (3) a good working knowledge of the company's data systems to narrow searches though the use of key search words or limiting the actual media sources that will be searched.

The better the e-discovery plan, the better armed your negotiators are. Remember, if you appear to lack the expertise to respond to a production request, or are unable to articulate what systems you have or how they work, the court may grant a request from opposing counsel to use its own experts to retrieve the requested information.

## UPCOMING EVENTS

APRIL 22-24, 2007

ASLRRRA 94<sup>TH</sup> ANNUAL MEETING

*Marriott Waterfront Hotel – Baltimore, Maryland*

Join industry peers, distinguished presenters and a virtual who's who in the railroad industry, for the ASLRRRA's Annual Convention. This year's themes are *Navigating Change, Charting New Courses and Forging Our Future*. For registration information please visit: [www.aslrra.org](http://www.aslrra.org).

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APRIL 25, 2007

BREAKFAST PANEL DISCUSSION:

USE OF RAIL IN TRANSPORTING SOLID WASTE

*Marriott Waterfront Hotel – Baltimore, Maryland*

Following the conclusion of the ASLRRRA annual meeting, Fletcher & Sippel will host a breakfast and panel discussion on an important issue for the industry: *The Use of Rail in Transporting Solid Waste*. All are welcome to attend. Please RSVP via e-mail to [Phyllis A. Jones](mailto:Phyllis.A.Jones@fletcherandsippel.com) (Fletcher & Sippel).

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MAY 2-4, 2007

MIDWEST CLAIMS CONFERENCE

*Hilton Suites and Drury Lane Convention Center – Oak Brook Terrace, Illinois*

As always, the Midwest Claims conference focuses on evaluating the current events in our industry to provide you and your staff with many opportunities to continue education and growth. We encourage you to take this opportunity to continue to increase the value of your assets.

For more information please visit:

[www.chicagoclaimassoc.org/midwest/](http://www.chicagoclaimassoc.org/midwest/).

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JUNE 17-19, 2007

ATLP 78<sup>TH</sup> ANNUAL MEETING

*Millennium Knickerbocker Hotel – Chicago, Illinois*

The Association of Transportation Law Professionals will be hosting a series of panel discussions on topics of unique interest to the transportation industry, including: *Class I-Regional Railroad Relationships, Infrastructure Development, Current Issues in Labor and Employment Law* and more. Scheduled speakers include: W. Douglas Buttrey, Vice Chairman, Surface Transportation Board; Kevin Schieffer, President & CEO, DM&E Railroad; Ed Burkhardt, President & CEO, Rail World, Inc.; J. Reilly McCarren, Chairman of the Board, Arkansas & Missouri Railroad, and Tom Hoback, President, The Indiana Railroad Company.

For more information please visit: [www.atlp.org](http://www.atlp.org).

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JUNE 27-30, 2007

14<sup>TH</sup> ANNUAL RAILROAD LIABILITY SEMINAR

*The Samoset Resort – Rockport, Maine*

This year's Railroad Liability Seminar is sponsored by the Maine Montreal & Atlantic Railway. For registration and sponsorship details, go to [www.mmarail.com](http://www.mmarail.com). If you would like to see details about The Samoset Resort, go to [www.samoset.com](http://www.samoset.com). For more information, please contact [Norma J. Griffiths](mailto:Norma.J.Griffiths@mmarail.com) (MM&A).

## Team Fast Track Update

The final totals are in and the 2006 ALS Walk4Life was a huge success. Congratulations to Team Fast Track, which managed to raise \$22,478 to help find a cure for ALS! Keep up the good work. Special thanks to everyone who worked so hard, our team's success was due to your generosity!

### 2006 Top Ten Fundraising Teams\*

1. Beat This for Bill.....\$55,535
2. Ask About Aimee .....\$38,777
3. Hope4Mike .....\$29,110
4. ROAR .....\$28,995
5. WOA – Wipe Out ALS.....\$28,745
- 6. Fast Track to Cure ALS.....\$22,478**
7. Team Reckamp.....\$22,090
8. Marty's Marchers.....\$21,685
9. Marching for Maria .....\$18,695
10. Super Dave's Squadron .....\$17,500

\*ALS Walk4Life Fundraising information courtesy of ALS Today Newsletter, Winter 2006 Issue.

## Illinois Supreme Court Review

...continued from page 1

Shortly before the Appellate Court decision in the *Mundelein* case, an appellate court in southern Illinois had ruled against Union Pacific in a blocked crossing case, saying preemption did not apply. Union Pacific asked for Supreme Court review on its case in light of the Appellate Court decision in the *Mundelein* case. The Supreme Court agreed to hear both cases.

Briefing on both cases should be completed early this spring, with oral argument and then decisions to follow. Wisconsin Central Ltd. will be represented by [Michael J. Barron, Jr.](#)

## F&S HIGHLIGHTS

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