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Commercial Transportation

by Madeline E. McNeeley,* Yvonne S. Godfrey,** T. Peyton Bell,*** Elizabeth M. Brooks,**** and Stephen G. Lowry*****

I. INTRODUCTION

Commercial transportation involves all of the significant forms of passenger and freight transportation across the United States. This Article surveys significant judicial, regulatory, and legislative developments in commercial-transportation law in the Eleventh Circuit during the period from January 1, 2019 through December 31, 2019. The first three areas discussed here are subject to heavy federal regulation due to their far-reaching effects on interstate commerce: trucking and other commercial motor vehicles, aviation, and railroads. This Article also touches on two additional issues: passenger transportation for hire (i.e., livery and rideshare services) and the development of autonomous-vehicle technology. While these issues are regulated primarily at the state and local levels, they interact with federal law in important ways, and autonomous-vehicle technology is poised to face ever more extensive federal regulation as it permeates throughout ground-based commercial transportation.

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II. TRUCKING AND OTHER COMMERCIAL MOTOR VEHICLES

The United States Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) was established on January 1, 2000,¹ to regulate commercial motor vehicles by "consider[ing] the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation."² More specifically, the FMCSA is charged with enforcing federal laws and regulations, and particularly the Federal Motor Carrier Safety Regulations (FMCSRs).³ The FMCSRs "are applicable to all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce."⁴

In addition to complying with the FMCSRs, commercial motor vehicle operators must comply with state and local laws and regulations, including obtaining and maintaining a commercial driver's license (CDL).⁵ Although issued by individual states, CDLs are regulated nationwide by the Motor Carrier Safety Improvement Act of 1999.⁶

A. Regulation

Most of the regulatory developments in 2019 affecting commercial motor vehicles (CMVs) addressed driver qualification and training requirements. On October 31, 2019, the FMCSA finalized a rule prohibiting states from "issuing, renewing, upgrading, or transferring a hazardous materials endorsement on a CDL [commercial driver's license] unless TSA [conducts a security assessment and] has determined that the holder of the CDL does not pose a security risk."⁷ Similarly, a new rule went into effect on September 23, 2019,⁸ that enables the 2018 "No Human Trafficking on Our Roads Act."⁹ Pursuant to the Act and the amended regulation, any individual who uses a CMV

1. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (1999) (codified at 49 U.S.C. § 113).

2. 49 U.S.C. § 113(b).

3. 49 C.F.R. §§ 350-99 (2017).

4. 49 C.F.R. § 390.3(a)(1) (2017).

5. 49 C.F.R. § 390.3(b) (2017); 49 C.F.R. § 383.3(a) (2017).

6. Pub. L. No. 106-159, 113 Stat. 1748.

7. Limitations on the Issuance of Commercial Driver's Licenses With a Hazardous Materials Endorsement, 84 Fed. Reg. 52,029 (Oct. 1, 2019).

8. Lifetime Disqualification for Human Trafficking, 84 Fed. Reg. 35,335 (July 23, 2019).

9. Pub. L. No. 115-106, 131 Stat. 2265 (2018) (codified at 49 U.S.C. § 31310(d)(2)).

in committing a felony involving a severe form of human trafficking is banned for life from ever again operating a CMV.¹⁰ The rule takes its definition of "severe forms of [human] trafficking" from the existing definition codified in the Trafficking Victims Protection Act at 22 U.S.C. § 7102(11).¹¹ On May 6, 2019, the entry-level driver training (ELDT) regulations, called the "Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators,"¹² were amended.¹³ The amendment to the training adopts a new Class A CDL curriculum that reduces the training time and costs for commercial drivers who already have a Class B CDL.¹⁴ Finally, the FMCSA issued a rule extending the date for mandatory compliance with the 2016 rule requiring states to request information from the Commercial Driver's License Drug and Alcohol Clearinghouse about individuals before completing CDL transactions.¹⁵ Mandatory compliance was due to begin on January 6, 2020, but the FMCSA delayed that deadline to January 6, 2023, while providing that states may begin voluntarily complying as early as January 6, 2020.¹⁶

In other developments, the FMCSA amended provisions to its hours-of-service (HOS) requirements for drivers of property-carrying commercial motor vehicles.¹⁷ In particular, the amendment removed a requirement that a thirty-four-hour restart include two periods between 1:00 a.m. and 5:00 a.m. and limited use of a restart to once every 168 hours.¹⁸ Another final rule took effect on October 15, 2019, regarding the lease of passenger-carrying CMVs and the interchange of passenger-carrying CMVs between motor carriers.¹⁹ The rule, established in 49 C.F.R. § 390.403,²⁰ narrowed the definition of "lease" in the federal regulations by excluding certain contracts and other

10. Lifetime Disqualification for Human Trafficking, 84 Fed. Reg. at 35,335; 49 C.F.R. § 383.51(b)(10) (2019).

11. 22 U.S.C. § 7102(11) (2019).

12. 81 Fed. Reg. 88,732 (Dec. 8, 2016).

13. *Id.*; 49 C.F.R. § 380.707 (2019).

14. 49 C.F.R. § 380 (2019).

15. Extension of Compliance Date for States' Query of the Drug and Alcohol Clearinghouse, 84 Fed. Reg. 68,052 (Dec. 13, 2019).

16. 49 C.F.R. § 382.725(a) (2019); 49 C.F.R. § 383.73(b)(10), (c)(10), (d)(9), (e)(8), and (f)(4) (2019); 49 C.F.R. § 384.235 (2019).

17. Hours of Service of Drivers—Restart Provisions, 84 Fed. Reg. 48,077 (Sept. 12, 2019).

18. *Id.* at 48,079.

19. Lease and Interchange of Vehicles; Motor Carriers of Passengers, 84 Fed. Reg. 40,272 (Aug 14, 2019).

20. 49 C.F.R. § 390.403 (2019).

agreements between motor carriers of passengers that have active passenger-carrier operating authority registrations with FMCSA, thus reducing the number of passenger carriers and passenger-carrying CMV trips that are subject to the requirement of entering into a lease and interchange agreement.²¹ This same rule suspended 49 C.F.R. § 390.5²² indefinitely.²³

B. Recent Cases

The United States Court of Appeals for the Eleventh Circuit published an opinion in 2019 addressing a litigant's standing to sue the federal government—here, the FMCSA. In *Flat Creek Transportation, LLC v. Federal Motor Carrier Safety Administration*,²⁴ a commercial trucking company sued the FMCSA alleging it "had unfairly targeted [the trucking company] for compliance reviews and used an unsound methodology."²⁵ The appellate court held the company's allegations did not satisfy the injury-in-fact requirement for standing under Article III of the U.S. Constitution.²⁶

The FMCSA uses a rating methodology to quantify carriers' safety-fitness performance.²⁷ Included in this assessment is a review of seven metrics: "(1) unsafe driving, (2) fatigued driving, (3) driver fitness, (4) controlled-substance and alcohol usage, (5) vehicle maintenance, (6) hazardous-material compliance, and (7) crash history."²⁸ If a non-passenger carrier has not received an onsite investigation and scores high in two out of the seven categories, it receives a "High Risk" designation, which can lead to more in-depth investigations and compliance reviews.²⁹ Here, Flat Creek claimed it received false and misleading scores and was subject to "an unusually high number of [compliance review] interventions," because the FMCSA was prejudiced against it.³⁰ Importantly, however, after the FMCSA's compliance reviews, the carrier never had a review that resulted in less than a "Satisfactory" rating—the highest possible rating.³¹ The carrier filed a

21. *Id.*

22. 49 C.F.R. § 390.5 (2019).

23. Lease and Interchange of Vehicles, 84 Fed. Reg. at 40,293.

24. 923 F.3d 1295 (11th Cir. 2019).

25. *Id.* at 1297.

26. *Id.* at 1301.

27. *Id.* at 1297.

28. *Id.*

29. *Id.*

30. *Id.* at 1298, 1301.

31. *Id.* at 1299.

declaratory judgment action seeking injunctive relief to prevent FMCSA from conducting more investigations and compliance reviews of it.³²

The Eleventh Circuit determined that the carrier had suffered no injury-in-fact, as required for Article III standing, because its final reviews all resulted in a "Satisfactory" rating.³³ Flat Creek additionally argued that FMCSA would use future reviews as a pretext to fabricate regulatory violations and shut down its operations, but the court determined the risk of Flat Creek being designated a "High Risk" carrier in a future assessment and subjected to increased likelihood of performance reviews was too conjectural and hypothetical to constitute an injury.³⁴ The court also held the threat of a future "High Risk" designation was not sufficiently imminent, as FMCSA regulations prohibited the agency from even conducting another assessment for another eighteen months after its most recent onsite inspection.³⁵ Because there was no concrete and imminent injury, the carrier lacked Article III standing and the federal courts lacked jurisdiction to address its claims.³⁶

Although no other notable opinions were published in 2019 related to commercial motor vehicles, the Middle District of Georgia issued an unpublished opinion relevant to determining whether and how to impose sanctions for spoliation of evidence. In *Allen v. Sanchez*,³⁷ an individual whose vehicle was struck by a truck driver sent a spoliation letter to the trucking company shortly after the wreck directing it to preserve driver logs, inspection reports, and other evidence. The plaintiffs then requested those documents during discovery, but the defendant failed to produce them and made only a partial production after the plaintiffs filed a motion for sanctions.³⁸ The district court found that the defendant had, indeed, spoliated the evidence.³⁹ To determine whether sanctions were warranted, the court went on to apply a five-factor test:

- (1) whether the movant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the alleged spoliator acted in

32. *Id.*

33. *Id.* at 1300–01.

34. *Id.* at 1301.

35. *Id.*

36. *Id.*

37. No. 5:18-CV-145 (MTT), 2019 U.S. Dist. LEXIS 115198, *1 (M.D. Ga. July 11, 2019).

38. *Id.* at *2–4.

39. *Id.* at *6.

good or bad faith; and (5) the potential for abuse if expert testimony about the evidence is not excluded.⁴⁰

The court found the first three factors were established as a matter of law and the fifth factor was not at issue in this situation, but concluded the question of whether the defendants acted in bad faith was a question of fact for the jury.⁴¹ The court ruled that the jury would be tasked with determining whether the defendant acted in bad faith when it spoliated the evidence and that such spoliation can give rise to a rebuttable presumption that the evidence was harmful to the defendant's position.⁴²

III. AVIATION

Federal courts and statutes shape most of the legal landscape regarding commercial aviation, even at the state level. Regulations promulgated by the Federal Aviation Administration (FAA),⁴³ as well as international treaties,⁴⁴ provide the structure for almost every aspect of commercial aviation and preempt state or local attempts that may conflict or be inconsistent with that structure.

On the regulatory front, the FAA Reauthorization Act of 2018⁴⁵ resulted in new proposed regulations and rulemaking in 2019, while international environmental efforts have also begun to take shape. On the judicial side, cases decided in the Eleventh Circuit that affect commercial aviation continue to demonstrate the significant effect federal legislation, regulations, and even advisory opinions can have on the outcome of civil cases.

40. *Id.* at *6–7 (quoting *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005)).

41. *Id.* at *8–10.

42. *Id.* at *10.

43. Robin C. Larner, 15 Ga. Jur. Personal Injury and Torts § 29:25 (2020) ("Federal aviation regulations have been promulgated to regulate virtually every aspect of aviation in the United States; these regulations are duly published in accordance with law in the Code of Federal Regulations, and they have the force of law.").

44. The United Nations treaty regarding international carriage by air, the Montreal Convention (which replaced its predecessor, the Warsaw Convention), sets forth uniform rules for claims that arise out of incidents that occur during international air transportation. *See Marotte v. Amer. Airlines, Inc.*, 296 F.3d 1255, 1259 (11th Cir. 2002) ("[T]he Warsaw convention is the exclusive mechanism of recovery for personal injuries suffered on board an aircraft or in the course of embarking or disembarking from an airplane." (citation omitted)); *Ugaz v. Amer. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1360 (S.D. Fla. 2008) ("The Montreal Convention entered into force in the United States on November 4, 2003 and superseded the Warsaw Convention.").

45. Pub. L. No. 115-254 (H.R. Res. 302), 132 Stat. 3186 (2016).

A. Legislation and Regulation

As background, the FAA Reauthorization Act of 2018 was enacted on October 5, 2018, creating significant changes in commercial aviation regulation.⁴⁶ The stated purpose of the Act was to reauthorize federal aviation programs, to improve aircraft safety certification processes, and for other purposes.⁴⁷ Of relevance to the 2019 commercial aviation landscape, the Act set forth new conditions for the recreational and commercial use of Unmanned Aircraft Systems (UAS), more commonly referred to as drones.⁴⁸ In particular, the Act required the FAA to develop, within one year, a rule to allow package delivery by small drones.⁴⁹

On December 31, 2019, the FAA published its Notice of Proposed Rulemaking for remote identification of UAS/drones in the Federal Register.⁵⁰ The proposed rule contemplates compliance with remote identification requirements within the next three years.⁵¹ The remote identification requirements are considered to be an essential building block to allow the further development of an "unmanned traffic management ecosystem."⁵²

On the international and environmental fronts, the International Civil Aviation Organization (ICAO) implemented a carbon-offsetting scheme, referred to as the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), which went into effect on January 1, 2019.⁵³ The ICAO is a specialized agency of the United Nations of which the United States is a member.⁵⁴ CORSIA will require most of ICAO's member states, including the United States, to implement an emissions monitoring plan into their national laws.⁵⁵

The ICAO also increased the monetary limits of liability for claims relating to passenger injury, delay, baggage, and cargo for international

46. *Id.*; 49 U.S.C. §§ 40101–30.

47. Pub. L. No. 115-254 (H.R. Res. 302), 132 Stat. 3186.

48. Pub. L. No. 115-254, § 341, 132 Stat. at 3284–87; 49 U.S.C. § 44801–02.

49. Pub. L. No. 115-254, § 348, 132 Stat. at 3297; 49 U.S.C. § 44808.

50. 84 Fed. Reg. 72,438-523 (Dec. 31, 2019).

51. *Id.* at 72439.

52. *Id.*

53. See Jordan Labkon & Barry Moss, *CORSIA Creates Complexities for Aviation Financiers*, 32(1) AIR & SPACE LAW. 4 (2019).

54. *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 10 (1986) (noting that the United States became a member of the ICAO by virtue of being a party to the Chicago Convention on International Civil Aviation, 61 Stat. 1180 (1944)).

55. Labkon & Moss, *supra* note 53, at 4.

travel that falls under the Montreal Convention.⁵⁶ The increased limits became effective as of December 28, 2019.⁵⁷

B. Recent Cases

In the past year, only one case within the Eleventh Circuit was decided that may directly impact commercial aviation, in large part due to the already extensive federal regulation in that area. The case discussed below illustrates how federal and state legislation interact to define and restrict the liability of commercial aviation providers, even in the context of claims for unfair practices and deceptive trade, unjust enrichment, and federal racketeering. Accordingly, knowledge of federal aviation law and how it will likely shape litigation is essential, even in cases not directly pertaining to commercial aviation.

In *Dolan v. JetBlue Airways Corporation*,⁵⁸ Milita Barbara Dolan filed suit in the Southern District of Florida, seeking to bring claims on behalf of herself and a putative class regarding "trip insurance" sold as a part of booking air travel on JetBlue Airways Corporation's website. Dolan's claims centered around JetBlue's failure to disclose that it received a portion of the fee paid for trip insurance. Specifically, Dolan alleged that JetBlue "dupes" its customers into believing that the amount charged for trip insurance is paid to a third party in exchange for the insurance coverage, when, in fact, a portion of every trip insurance policy sold is paid as a kickback to JetBlue. Dolan alleged that the kickbacks were illegal, as JetBlue received commissions from insurance policies without a license to do so, the third-party insurance companies concealed the unlicensed commissions on state regulatory filings, the commissions paid to JetBlue were disguised as "marketing" or "advertising" fees, and there was no correlation between the actual risk being underwritten and the cost of the policy.⁵⁹ Dolan set forth claims under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)⁶⁰ and the Racketeer Influenced and Corrupt Organizations Act (RICO),⁶¹ and she also alleged an unjust enrichment claim under Florida law.⁶²

56. 2019 Revised Limits of Liability Under the Montreal Convention of 1999, https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx (last visited Feb. 10, 2020).

57. *Id.*

58. 385 F. Supp. 3d. 1338 (S.D. Fla. 2019).

59. *Id.* at 1342–43.

60. Fla. Stat. § 501.201–501.213.

61. 18 U.S.C. § 1961–68.

62. *Dolan*, 385 F. Supp. 3d. at 1342.

JetBlue moved to dismiss the complaint, arguing, *inter alia*, that the Airline Deregulation Act (ADA)⁶³ preempted Dolan's state law claims under the FDUTPA and for unjust enrichment, and that the McCarran-Ferguson Act⁶⁴ barred her RICO claims.⁶⁵ District court Judge Robert N. Scola, Jr. denied JetBlue's motion in large part and granted it to a limited extent.⁶⁶

As background, the ADA preempts state laws that are "related to a price, route, or service of an air carrier that may provide air transportation."⁶⁷ The ADA, enacted in 1978, was designed "to ensure that the States would not undo federal deregulation with regulation of their own."⁶⁸ A state law is considered "related to a price, route, or service of an air carrier" when it has "a connection with, or reference to, airline 'rates, routes, or services.'"⁶⁹ The term "related to" is intended to have a "broad scope" and "expansive sweep."⁷⁰ However, the Eleventh Circuit has previously explained that the ADA does not "result in the pre-emption of virtually everything an airline does"; rather, the ADA's preemptive effect is "limited to the *bargained-for* aspects of airline operations over which carriers compete."⁷¹

In *Dolan*, JetBlue argued that the unjust enrichment and FDUTPA claims arise from "an offer of sale of optional travel insurance during the ticket purchasing process," and that, therefore, an airline rate, route, or service is implicated, triggering ADA preemption.⁷² The district court disagreed.⁷³

The court in *Dolan* focused its analysis on whether the offering of trip insurance relates to the "service of an air carrier."⁷⁴ As set forth by the Eleventh Circuit, for a particular service to be deemed a "service of

63. 49 U.S.C. § 41713(b)(1) (1997).

64. 15 U.S.C. § 1012(b) (1948).

65. *Dolan*, 385 F. Supp. 3d. at 1342.

66. *Id.*

67. 49 U.S.C. § 41713(b)(1).

68. *Amerijet Int'l, Inc. v. Miami-Dade Cty.*, 627 F. App'x 744, 747 (11th Cir. 2015) (unpublished) (quotation omitted).

69. *Id.*; *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

70. *Amerijet Int'l, Inc.*, 627 App'x at 747 (quoting *Morales*, 504 U.S. at 384).

71. *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1256, 1258 (11th Cir. 2003) (emphasis in original); *see also Amerijet Int'l, Inc.*, 627 F. App'x at 749 (holding that a "service" under the ADA "must fit within the limited range of services over which airlines compete" and must be provided as part of a "bargained-for exchange . . . between an air carrier and its consumers").

72. *Dolan*, 385 F. Supp. 3d at 1344–45.

73. *Id.* at 1346.

74. *Id.* at 1345.

an air carrier" under the ADA, three elements are required.⁷⁵ First, the service must fall within the "limited range of services over which airlines compete."⁷⁶ Second, it must be bargained for, and third, the bargain must occur between an air carrier and its consumers.⁷⁷

Based on this test, the court found that JetBlue failed to establish the first element, as there was no indication in the record that trip insurance is a service over which airlines compete.⁷⁸ The court rejected JetBlue's argument that, because other carriers offer trip insurance, the sale of trip insurance was "part of the customer's experience of air travel or considered in evaluating the quality of their flight."⁷⁹ In fact, the court noted, "Providing a mechanism whereby consumers can insure airline-ticket purchases through a third party is not unique or limited to the airline industry."⁸⁰ Instead, perhaps echoing the complaint of many modern travelers, the court in *Dolan* observed, "[I]t appears JetBlue's offering of trip insurance merely serves to extract extra revenue for the airline from customers who have already decided to purchase a ticket . . ."⁸¹ Accordingly, the court declined to dismiss the plaintiff's claims as based on ADA preemption.⁸²

Next, the district court addressed JetBlue's argument that Dolan's claims were covered by Florida's Unfair Insurance Trade Practices Act, and therefore, the McCarran-Ferguson Act applied.⁸³ The McCarran-Ferguson Act provides that, unless Congress enacts legislation that "specifically relates to the business of insurance," the business of insurance and its regulation are left to the states.⁸⁴ Thus, Dolan's federal RICO claims would be barred if: (1) the federal statute at issue did not specifically relate to the business of insurance; (2) the state statute implicated *was* enacted to regulate the business of insurance; and (3) application of the federal statute "would invalidate, impair, or supersede the state statute."⁸⁵ Agreeing that many of Dolan's claims pertained to insurance regulation under Florida law, the district court granted JetBlue's motion to dismiss only to the extent that

75. *Amerijet Int'l Inc.*, 627 F. App'x at 747-49.

76. *Id.* at 749.

77. *Id.*

78. *Dolan*, 385 F. Supp. 3d at 1345.

79. *Id.* (quoting *Branche*, 342 F.3d at 1258).

80. *Dolan*, 385 F. Supp. 3d at 1346.

81. *Id.*

82. *Id.*

83. *Id.*

84. 15 U.S.C. § 1012(b).

85. *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1220 (11th Cir. 2001) (quotation and alterations omitted).

Dolan's claims regarding insurance were covered by Florida's Unfair Insurance Trade Practices Act.⁸⁶

Finally, the court in *Dolan* addressed the plaintiff's FDUTPA, RICO, and unjust enrichment claims, and found that the plaintiff sufficiently alleged those claims to the extent they were not covered by state insurance regulation.⁸⁷ As the court observed, many of Dolan's claims centered on JetBlue's "unearned, undisclosed, and in fact, concealed, kickbacks and its alleged fraudulent representation that the price the consumer paid was not grossly inflated by amounts received by JetBlue—allegations unrelated to any insurance-based claims."⁸⁸ Accordingly, the court denied JetBlue's motion to dismiss those claims in their entirety.⁸⁹

Notably, the court in *Dolan* emphasized that it made its findings under the motion-to-dismiss standard and the record before it.⁹⁰ Thus, the ultimate outcome of *Dolan* and its potential effect on Eleventh Circuit law and airlines offering trip insurance remains to be seen.

IV. RAILROADS

Congress passed no new legislation in 2019 affecting railroad transportation, but the Federal Railroad Administration (FRA) made several notable changes to the regulatory landscape. In the judicial realm, the U.S. Supreme Court decided a case involving interpretation of the Railroad Retirement Tax Act (RRTA),⁹¹ continuing the recent series of cases addressing the interaction of taxation and railroads.

A. Regulation

The Federal Railroad Administration (FRA) amended the Railroad Noise Emission Compliance regulations at 49 C.F.R. part 210⁹² in 2019 to eliminate the requirement that a permanent badge or tag be displayed on the cabs of locomotives for the purpose of certifying that

86. *Dolan*, 385 F. Supp. 3d at 1350.

87. *Id.* at 1350–55.

88. *Id.* at 1349–50.

89. *Id.* at 1350. The district court also granted JetBlue's motion to dismiss a portion of Dolan's nationwide class allegations, finding that the FDUTPA and unjust-enrichment claims pertained only to actions occurring within Florida, and were thus improper for nationwide class certification. *Id.* The court determined, however, that Dolan's class allegations based on the federal RICO statute were not subject to dismissal. *Id.*

90. *Id.* at 1350.

91. 26 U.S.C. §§ 3231–3241 (2014).

92. 49 C.F.R. pt. 210 (1976).

the locomotive is compliant with noise emission standards.⁹³ The Environmental Protection Agency (EPA) promulgated these standards in 40 C.F.R. part 201, pursuant to the Noise Control Act of 1972.⁹⁴ The FRA collaborated with the EPA at the time to develop regulations in 49 C.F.R. part 210 for the purpose of ensuring railroad compliance with noise emission standards.⁹⁵ The regulations required locomotives built after 1979 to attach a permanent badge or tag in the cab of the locomotive to display results of a noise emission certification test.⁹⁶ But, effective April 15, 2019, the FRA found this obligation irrelevant, and it is now no longer mandated.

Additionally, a final rule was issued to revise and clarify the requirements for comprehensive oil spill response plans.⁹⁷ The Pipeline and Hazardous Materials Safety Administration (PHMSA), along with the Department of Transportation (DOT), and in consultation with the FRA, jointly cooperated pursuant to the Fixing America's Surface Transportation Act of 2015 (FAST Act)⁹⁸ to "provide regulatory flexibility and improve response readiness to mitigate effects of rail accidents and incidents involving petroleum oil and HHFTs [high-hazard flammable trains]."⁹⁹ Effective April 1, 2019, the rule requires that rail carriers operating high-hazard flammable trains (HHFTs) must notify the appropriate state and federal agencies, and it requires railroads subject to the regulation to prepare and submit an oil spill response plan for approval by PHMSA.¹⁰⁰ Although the number of HHFTs operating in the United States is low, this regulation signifies an important avenue of protection for not only the environment but the public at large.¹⁰¹

Perhaps the most significant development from the FRA during this survey period was its decision to withdraw a Notice of Proposed Rulemaking published on March 15, 2016.¹⁰² The proposed rule¹⁰³ arose after a variety of investigations into rail safety issues following two

93. *Id.*

94. 40 C.F.R. pt. 201 (2019); Pub. L. No. 92-574, 86 Stat. 1234.

95. 41 Fed. Reg. 49183, 49,183-84 (Nov. 8, 1976).

96. 49 C.F.R. pt. 210.27 (1976).

97. Hazardous Materials: Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains, 84 Fed. Reg. 6,910-01 (Feb. 28, 2019).

98. Pub. L. No. 114-94, 129 Stat. 1312 (2015).

99. 84 Fed. Reg. at 6,910-01.

100. *Id.* at 6,939-01.

101. *Id.* at 6,944-01.

102. Train Crew Staffing, 84 Fed. Reg. 24,735 (May 29, 2019).

103. Train Crew Staffing, 81 Fed. Reg. 13,918 (Mar. 15, 2016).

major rail accidents in 2013.¹⁰⁴ The FRA was concerned that "as railroads implement positive train control (PTC) and other technologies, they may expand use of less than two-person crews on operations without considering safety risks or implementing risk-mitigating actions that FRA believes are necessary."¹⁰⁵ The proposed rule would have required at least two crewmembers for all rail operations and would have established "minimum requirements for the roles and responsibilities of the second train crewmember on a moving train, and promote[d] safe and effective teamwork."¹⁰⁶ On May 29, 2019, however, the FRA withdrew the proposed rule, claiming the investigations following the 2013 accidents lacked any conclusion that the number of crewmembers present on the trains had any correlation to the accidents.¹⁰⁷

B. Recent Cases

The issue of taxation under the Railroad Retirement Tax Act (RRTA) has been a contested issue in recent years.¹⁰⁸ In *BNSF Railway Company v. Loos*,¹⁰⁹ the Supreme Court of the United States affirmatively answered the question of whether a railroad's payment to an employee for working time lost due to an on-the-job injury is taxable compensation under the RRTA.¹¹⁰ Respondent Michael Loos sued petitioner BNSF Railway Company after he was injured while working at BNSF's railyard, alleging violations of the Federal Employers' Liability Act (FELA)¹¹¹ and the Federal Railroad Safety Act (FRSA). A jury found in favor of the plaintiff and awarded him \$126,212.76, delineating \$30,000 of the total amount for wages the plaintiff lost during the time he was unable to work. Defendant BNSF argued that a percentage of the \$30,000 amount, \$3,765, should be withheld in order to cover taxes under the RRTA.¹¹² The plaintiff disagreed, arguing that the meaning of "compensation" under the RRTA does not include payments made to compensate for an injury.¹¹³ The district court and

104. *Id.* at 13,921.

105. *Id.* at 13,919.

106. *Id.* at 13,958.

107. 84 Fed. Reg. 24,735, 24,739.

108. See Madeline E. McNeeley et al., *Commercial Transportation, 2018 Eleventh Circuit Survey*, 70 MERCER L. REV. 923, 935–36 (2019).

109. 139 S. Ct. 893 (2019).

110. *Id.* at 895.

111. 45 U.S.C. §§ 51–60 (1939).

112. *Id.*

113. *Id.* at 896.

the Eighth Circuit Court of Appeals agreed, but Justice Ginsburg, in delivering the opinion of the Supreme Court, did not.¹¹⁴ In a classic example of statutory interpretation and stare decisis, she relied on the Court's prior holdings in *Social Security Board v. Nierotko*¹¹⁵ and *United States v. Quality Stores, Inc.*,¹¹⁶ as well as the definition of "compensation" within the RRTA, determining that it is textually similar to the definition of "wages" under the Federal Insurance Contributions Act (FICA)¹¹⁷ and the Social Security Act (SSA).¹¹⁸ In those prior cases, the Court had concluded that a backpay award counts as wages "because it compensates for the 'loss of wages which the employee suffered from the employer's wrong.'"¹¹⁹ Justice Ginsburg concluded that "compensation" under the RRTA similarly "encompasses not simply pay for active service but, in addition, pay for periods of absence from active service—provided that the remuneration in question stems from the 'employer–employee relationship.'"¹²⁰

V. OTHER ISSUES

Fewer legal developments transpired in the Eleventh Circuit with respect to regulation of rideshare companies (also known as transportation network entities or transportation network companies) and livery (taxicab and limousine) services, which remain primarily state and local matters at present. Notable federal decisions in 2019 focused primarily on the scope of the arbitration provisions ridesharing companies include in their mobile apps' terms of service. Readers of the 2017 edition of this survey may recall a discussion of two Southern District of Florida orders that compelled arbitration of Fair Labor Standards Act (FLSA)¹²¹ disputes between rideshare company Uber and its drivers.¹²² Those orders determined that even the threshold question of whether the FLSA claims were arbitrable was itself subject to arbitration under the terms of the contract.¹²³ In 2019, the courts

114. *Id.* at 897.

115. 327 U.S. 358, 359 (1946).

116. 572 U.S. 141, 146 (2014).

117. 26 U.S.C. §§ 1301–3128 (1954).

118. 74 Pub. L. No. 271, 46 Stat. 620 (1935); *Loos*, 139 S. Ct. at 898–99.

119. *Loos*, 139 S. Ct. at 899.

120. *Id.*

121. 29 U.S.C. §§ 201–219 (2012).

122. McNeeley et al., *Commercial Transportation, 2017 Eleventh Circuit Survey*, 69 MERCER L. REV. 1087, 1098–1100 (2018) (discussing *Richemond v. Uber Techs., Inc.*, 263 F. Supp. 3d 1312 (S.D. Fla. 2017), and *Lamour v. Uber Techs., Inc.*, No. 1:16-cv-21449, slip op., 2017 U.S. Dist. LEXIS 29706 (S.D. Fla. Mar. 1, 2017)).

123. *Id.*

applied this principle to require arbitration of the arbitrability of another FLSA dispute¹²⁴ and extended it to compel arbitration of whether a customer was required to arbitrate his claims that Uber violated the Telephone Consumer Protection Act¹²⁵ by sending him unwanted text messages.¹²⁶ Notably, these orders compelling arbitration are effectively unreviewable. The FLSA plaintiff in *Gray v. Uber, Inc.*,¹²⁷ attempted to appeal, but the Eleventh Circuit Court of Appeals dismissed, holding that it lacked jurisdiction because an order compelling arbitration and staying the case "is not final or immediately appealable."¹²⁸ These cases continue the worrying trend of forcing individuals to give up their rights to judicial review of their legal claims in favor of secretive private arbitration proceedings.

Likewise, the development of autonomous-vehicle technology (sometimes referred to as an automated driving system or self-driving vehicle) is still regulated primarily by state and local governments, to the extent it is being regulated at all. As the technology comes ever closer to commercial viability, however, federal actors are continuing to consider how current laws and regulations might need to be adapted to anticipate the deployment of these systems in freight and passenger transportation vehicles. To that end, Congress appropriated funds for Fiscal Year 2020 to the Department of Transportation for "behavioral research on Automated Driving Systems and Advanced Driver Assistance Systems and improving consumer responses to safety recalls" and to "establish a Highly Automated Systems Safety Center of Excellence within the Department of Transportation, in order to have a Department of Transportation workforce capable of reviewing, assessing, and validating the safety of automated technologies."¹²⁹

124. *Gray v. Uber, Inc.*, 362 F. Supp. 3d 1242, 1245–46 (M.D. Fla. 2019), appeal dismissed, No. 19-11576-F, 2019 WL 3408912 (11th Cir. June 18, 2019). Not all transportation providers have drafted their arbitration provisions as broadly and, consequently, not all have had Uber's success at forcing FLSA claims into arbitration. In *Brandt v. Gasolinera, Inc.*, the Southern District of Florida denied a limousine company's attempt to compel arbitration of its driver's FLSA claim. No. 18-80472-CIV, 2019 WL 3890330, at *2–*3 (S.D. Fla. Mar. 13, 2019).

125. 47 U.S.C. § 227 (2019).

126. *Schuster v. Uber Techs., Inc.*, No. 8:18-CV-2389-T-35JSS, 2019 WL 545441, at *1–*3 (M.D. Fla. Feb. 7, 2019).

127. No. 19-11576-F, 2019 WL 3408912, at *1 (11th Cir. June 18, 2019).

128. *Id.*

129. Further Consolidated Appropriations Act of 2020, Pub. L. No. 116-94, 133 Stat. 2534 (2019).

VI. CONCLUSION

As this Article illustrates, commercial-transportation law involves an often-complex interaction of state and federal laws and reaches into wide-ranging areas of American life, from employment to the environment to the right to redress of grievances in the civil justice system. Staying well informed about the laws and regulations affecting commercial transportation is indispensable for practitioners across legal practice areas.