

*Urban hazmat rail transit: Balancing risk and industrial necessity*

by *Steven W. Block* July 2005

*Reprinted with permission from  
Marine Digest and Transportation News*

Railroads regularly transport various hazardous materials (hazmats) through urban areas. As common carriers, they're actually required by law to do so whenever hazmat shippers make a reasonable service request. Recently, a number of city governments have expressed concern about terrorist threats hazmat-laden trains invite. They're afraid an attack on one of these trains could result in large-scale contamination that might devastate urban areas.

The District of Columbia enacted an ordinance that would prohibit trains from hauling recognized hazmats, as well as the railroad cars designed for such freight, within 2.2 miles of the U.S. Capitol. DC felt that U.S. Department of Transportation (DOT) regulatory requirements didn't do the trick in protecting against a hazmat disaster, and that DC didn't have any real chance of getting DOT to change its tune. Some 8,500 rail cars of toxic chemicals go through DC each year. One government study showed that a terrorist attack on a train hauling certain hazmats could kill 100,000 people lounging on the National Mall in half an hour.

Earlier this year, railroad CSX Transportation instigated legal action in the U.S. District Court for the District of Columbia which is fascinating to transportation regulatory lawyers, but confusing, irritating and perhaps boring to most everyone else. The issue, however, is of vital importance to America's industrial transportation infrastructure and internal security system.

CSX, which owns the tracks that run through and around Washington, asked the court to put the quietus on DC's hazmat ban. What's a choo-choo to do, CSX asked, when one set of federal laws requires it to do one thing, but a city ordinance says something else? Besides, rerouting train tracks would be difficult and cost prohibitive, forcing commerce to suffer significantly as a whole.

The district court didn't buy CSX's arguments. DC's ordinance, as originally enacted, was only temporary until Congressional review and new federal legislation addressing urban hazmat transit could be adopted. The court noted that CSX could simply pass along rerouting costs to its customers, and that other modes of transportation probably would undercut CSX's hazmat business anyway. The judge's heart was in the right place; he offered to broker a settlement deal between DC and CSX, after publicly asking President Bush to get the feds to share security information with DC's reps so that they could haggle out the issues productively.

No one was happy with the court's ruling, and up it went to the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals, to most of the railroad industry's

delight, reversed the district court, stopping DC's hazmat ban in its tracks - at least for the time being.

The decision isn't quite one on the merits. Rather, it's a procedurally required determination that CSX "likely will prevail" after the district court takes another look at the issues subject to the appellate pronouncement. The court ruled that this is a federal regulatory issue, one which should be analyzed by federal transportation specialists charged with taking care of the public. DC should take its concerns to DOT and Congress, not unilaterally enact law that conflicts with federal regs. DC's ordinance has been banned pending upcoming proceedings.

The Court of Appeals also bought the railroad industry's argument that DC's ban, if left unchecked, would prompt a "patchwork" of similar ordinances to crop up all over the country. A number of cities, notably Cleveland and Baltimore, already are moving forward with similar ordinances. While public safety is a paramount concern, we can't just paralyze U.S. industry. The Association of American Railroads notes that the instance of train mishaps with hazmat contamination repercussions is infinitesimal, and a much smaller threat than that posed by trucks. Because rerouting the entire U.S. track network to accommodate city government concerns isn't realistic, more expensive and riskier trucking likely would replace railroad carriage if bans on urban hazmat transit were upheld. The National Industrial Transportation League notes that transport of hazmats is a component of ensuring safety and national security as well, and that crippling transit of them poses its own risks.

The district court proceedings will be pending for at least several months, and most specialists agree the losing side probably will take the matter to the U.S. Supreme Court. That process might take years, and we're dealing with an issue that could have imminent consequences. Industry players are hoping to get transportation regulatory agencies, such as the Surface Transportation Board, to take jurisdiction over the issue. By whom, how, and to what extent DC's ordinance ultimately will be adjudicated is far from clear.

So while the DC hazmat ban is a fun topic of debate at transportation lawyer cocktail parties, we really need a national policy on this issue ASAP. That policy should be formulated by transportation, security, and legal specialists from government and industry. The court system's adversarial process, refereed by a well-intending but industry-inexperienced judge, is not conducive to serving the public's best interests. The problem solvers should be sitting at a round table.

**Ref: *CSX Transportation., Inc. v. Williams*, 406 F.3d 667 (C.A.D.C. 2005)**