

WRITTEN TESTIMONY
BY THOMAS C. JONES
DAVIS, BETHUNE & JONES
ON BEHALF OF THE AMERICAN ASSOCIATION FOR JUSTICE
FOR THE FEDERAL RAILROAD ADMINISTRATION
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Introduction

My name is Tom Jones and I am an attorney who represents families who have been harmed by railroads and I am here to testify because I believe this rule, given its discovery protection provisions, will not actually improve safety. The railroad industry's categorical disregard for the safety of the American public is undeniable. Unfortunately, this rulemaking is the result of the industry's failure to voluntarily undertake its own risk reduction program, leaving the FRA to take regulatory action when the industry has failed to do. However, if implemented as proposed, the impact of the Risk Reduction Program rule will do quite the opposite. The FRA has proposed to protect any information compiled or collected solely for the purpose of developing, implementing or evaluating an RRP from discovery, admission into evidence, or consideration for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, and property damage. The information protected would include a railroad's identification of its safety hazards, analysis of its safety risks, and its statement of the mitigation measures with which it would address those risks including plans, reports, documents, surveys, schedules, lists, or data. This provision will negatively impact public safety in America.

For the past 20 years I've represented surviving members of families who've been hit by trains at railroad crossings. I've wrestled in America's courts with our largest railroads, BNSF, Union Pacific, CSX, Norfolk Southern, Amtrak, CN and Kansas City Southern. Their strategy in

pretrial discovery is consistent; try to protect relevant and important evidence from being considered by a jury. If this proposed rule is finalized as drafted, it will give the railroads an invaluable tool. Relevant and persuasive evidence will be suppressed and victims will be unable to prove their claims. It will deny the public access to unreasonable and unconscionable hazards known by the railroads. This rulemaking will not reduce risk, it will increase it.

Cases Brought by Victims

The forces present in a crossing collision are incredibly powerful, and cause immense harm. Even an empty coal train hitting a car is the equivalent of an 18 wheel over the road truck running over an empty Coke can. I have represented families from around the country who have suffered serious yet preventable harms caused by the unsafe condition railroad crossings.

- A brain injured 7 year old Oklahoma girl who lost her mother, hit by a train at a skewed crossing where train came from essentially behind their family van from behind a row of trees blocking the view.
- Three brain injured children and their devastatingly injured grandmother in Oklahoma who were hit at a blind crossing in Northern Oklahoma where trees, vegetation and elevated land on the railroad's right of way blocked the view of the oncoming train.
- A Louisiana man suffering loss of limbs with brain injury who lost his wife of 20 years and 16 year old daughter. They were hit by a UPRR freight train at a blind southern Arkansas crossing taking their daughter to church camp. Investigation showed at least 28 collisions over the 40 years which gave this very same railroad detailed knowledge of all the dangers presented. Local witnesses testified to telling this railroad over and over about the unique sight distance dangers at the crossing. Repeatedly, UPRR trains harmed families at this very same crossing. The information protection involved in this RRP

would have made it difficult to prove UPRR's knowledge of the dangers proven in these prior collisions.

- A young couple in Northern Ohio, 18 year old woman dead, boyfriend brain injured after a train came from behind a wall of trees at an unprotected crossing with no flashing lights or automatic gates signal system.
- A mother and permanently brain injured 3 year old child in Western Kentucky who were crushed by a speeding track machine, operated facing backwards through a crossing where the railroad had turned off the lights and gates signals without telling the public.
- A 34 year old mother of two teenage girls hit was permanently disabled by a brain injury suffered after being struck by a 78 mph Amtrak train coming out of a tunnel of trees at an unprotected, unguarded crossing in rural Missouri. Local witnesses testified to telling the railroad over and over before this wreck about the sight distance dangers presented at this crossing. UPRR and Amtrak would have argued that RRP protects them from producing their historical knowledge of these known dangers.

Unfortunately, their stories are not unique. There are many more people, and their families, who are injured by hazardous crossings known by the railroads, that deserve the opportunity to hold the responsible parties—the railroads—accountable.

Elements of a Claim

To prove that a railroad is accountable for a harm, the victim has the burden of proof. Specifically, they must demonstrate that the railroad has knowledge of the danger presented and that the danger was unreasonable. They must answer the question, “what did the railroad know about this particular hazard, when did the railroad know it, and how did the railroad become aware of it.” This is why the discovery process is so crucial. During discovery the victims, who

would otherwise have no way to find this information, may uncover that a railroad had knowledge of such dangers as:

- Absence of active flashing light signals and automatic gates.
- Blocked Sight Lines or Restricted visibility of the oncoming train.
- History of collisions and “near misses” at the crossing
- Allowing Vegetation/Trees on railroad right of way that obscure the view of an oncoming train
- Failing to properly sound the train horn on approach
- High train volumes
- High speed train activity
- High traffic volumes
- Hazardous materials traffic
- School bus traffic

Similarly, through this process, the railroad is given the opportunity to discover if the injured party had knowledge of the danger and the actions taken to alleviate it. However, if one side is allowed to conceal their historical knowledge of these known public safety hazards, the jury will not receive the whole picture of evidence, and justice will be obstructed. That is the very real risk that the information protection provision of this rule presents.

The Railroad Industry’s Litigation Strategy

Trying to get relevant and legally discoverable information from railroads in these case is already an uphill battle. The present climate and litigation strategy of the rail industry is to claim that anything requested in discovery is protected from discovery and admissibility by 23 USC

409. This statute offers protection from discovery or use for any purpose information obtained pursuant to a Section 130 federal funding program. Of course, the industry argues essentially that this statute protects everything attempting to drag everything under the guise of these protections. The industry's consistent opening litigation response to legitimate requests for the railroad's crossing file, materials, documents, evaluations of a crossing, is to claim blanket protection based upon 23 USC 409. This blanket protection is of course not available when the rule is truly applied, but that doesn't stop them from floating this argument just to see if the judge will stand up to this strategy or let them get away with it.

This practice is well documented and in addition to trying to hide behind this statute, railroads have been repeatedly caught manipulating and hiding evidence. In 2010, Burlington Northern Santa Fe was fine \$4.2 million for destroying, misplacing and mishandling evidence in a wrongful death lawsuit and was involved in similar misconduct in at least 20 other cases.¹ A jury trial my firm tried 2 years ago revealed the railroad had failed to preserve the original download from the locomotive event recorder and later was caught substituting another event recorder for the one involved in the wreck. Careful review of the serial numbers demonstrated this subterfuge. Another case, revealed that the railroad shortly after the wreck sent their claims rep out to the aftermath and then manipulated the wheel size measurement in an effort to conceal that the train was speeding. Regularly, and I mean every case, files showing the railroad historically knew that a particular crossing had all the dangerous conditions that require upgrade to automatic lights and gates signals, have to be located in local city government files and other places because the railroad hides these documents behind its wrongfully claimed shield of 23

¹ ProPublica, *In Courts Across the Country, Railroad Company Mishandled Evidence in Collision and Injury Cases*, Marian Wang, December 6, 2010.

USC 409. Case after case, we find giant trees and vegetation on the railroad's land blocking the view of oncoming trains, but when we try to discover the railroad's historical knowledge, the railroad aggressively hides behind 23 USC 409 at least until they find out whether the judge has the fortitude to stand up to the railroad. Between July 2001 and January 2003 Union Pacific was subject to court sanctions for destroying or failing to preserve evidence under the guise of a document retention policy.² The reason they do this? It is often cheaper and easier to hide their historical knowledge of rail safety hazards from the public, and avoid liability for the injuries caused by such hazards, than it is to fix them.

Unintended Consequences

You may be thinking, "Why would it ever be a bad idea to pass a rule to reduce risk?" Generally one would hope this to be true. It's not true here. You may not realize this but the effect or unintended consequence of passing this rulemaking with the "information protection provisions" will be to:

- Suppress relevant persuasive evidence of the railroad's knowledge of a particular hazard from disclosure to juries and the public at large
- Create a lopsided discovery process where the railroad is entitled to all relevant information from victims, but victims are not entitled to the same.
- Create mini-trials on each discovery request as to whether this rulemaking makes a certain piece of evidence protected or not. We already have these battles in each case, repeatedly briefing and educating each judge new to 23 USC 409 whether this statute indeed offers protection to certain documents. Lawyers from around the country call me

² The New York Times, *In Deaths at Rail Crossings, Missing Evidence and Silence*, Walt Bogdanich, July 11, 2004.

regularly requesting help because the railroad is blocking all kinds of discovery claiming this shield. Showing brazen chutzpah, while the railroad knows that 23 USC 409 says if a document falls under its purview, the document may not be used for any purpose, railroads in every case use these very same documents to support their claims for federal preemption protections. The industry uses 23 USC 409 as both a shield and sword and will do the exact same thing with this new RRP information.

- Embolden the railroads to obstruct the discovery process, causing the time and money cost of litigation to be very expensive for the public to pursue. As a result, victims and their families will be left to shoulder the economic and emotional burden of severe or fatal injuries. Families will be economically bullied from participating in litigation.

Unintended Costs of Shielding Discovery

Another unexamined impact of the proposed discovery protections are the increased costs that will certainly be borne by the government. When you create an atmosphere where it is extremely difficult or impossible for crossing collision victims hold the party who injured them accountable, in this case a railroad, then the costs of those injuries are often shifted to the tax payers. Medicare and Medicaid foot the bill for medical treatment that should be the responsibility of the railroad. This increases government cost dramatically and is inappropriate cost shifting. Isn't responsibility for one's own actions the mantra in America? Shouldn't railroad companies also be responsible for their own behavior?

The Baker Botts Report is Inadequate and Biased

The provision in the rule is based on a study conducted by the law firm Baker Botts that concluded that limiting the disclosure of evidence was in the public interest. This so called study should not be considered the basis for any decision made by the FRA. First, Baker Botts is not a

disinterested party and therefore is unable to conduct a fair and adequate study. Baker Botts has a known history of representing the interests of the rail industry. In fact, one of the firm's first clients was Southern Pacific Railway. It is therefore unsurprising that the study concluded that it was in the public interest to limit discovery. This outcome favors the railroad industry that Baker Botts has historically represented. Not only is the study biased, but it does not truly evaluate whether limiting discovery is actually in the public interest. The Baker Botts report is merely a compendium of existing laws that already offer certain discovery protections. Nowhere does the study take an in depth look of what the impact of this particular discovery protection will be on the public, in particular given the lengthy history of the railroad industry of hiding hazards. Further the study doesn't offer any evidence that providing discovery protections will actually promote the railroads to look at hazards more closely and implemented risk reduction plans better. The only thing the results of this study reveals is that railroads will label everything "prepared solely for the purposes of the RRP" and then will claim everything is protected from production in civil litigation. It cannot be in the public's best interest to allow railroads to keep unsafe practices shielded from public disclosure, and leave people who suffer serious injuries or death because of unreasonable hazards without justice.

The FRA Can Implement a Risk Reduction Rule Without Limiting Discoverability

The FRA can easily and without worry implement a risk reduction rule without any limitations on discoverability or admissibility. There are many existing protections in the civil justice system that safeguard irrelevant or secret materials. For example, when parties request documents from each other, a civil judge is there to filter what evidence is admissible for a jury to see. Similarly, under the Federal Rules of Civil Procedure, there are already rules against disclosing certain pieces of information, and parties can request that information is protected.

These are well established features of our court system, and the FRA does not need to impose additional regulations upon it.

Limiting the Discovery Provision to Documents Prepared “Solely” for the Purposes of a Risk Reduction Program Will Dramatically Increase Satellite Litigation

I do not support any limitation on the discoverability of safety information from railroads, however, I must note that the framework proposed by the FRA will dramatically increase litigation and litigation costs. The FRA has proposed to clarify or limit their proposed discovery limitation to documents “solely” prepared for the purposes of a risk reduction plan. All this is going to do is embolden railroads to try and argue in every court proceeding that every plan, report or analysis was “solely” created for the purpose of a risk reduction program. In practice, this means that in every proceeding there will have to be a mini discovery proceeding regarding whether a report was “solely” created for the risk reduction plan or whether it was actually created for some other purpose. This increases time spent and costs in any railroad-related claim and yet again benefits the railroad industry. Victims are often times badly injured, cannot work and on a limited budget. Lengthening the legal process and increasing the costs surrounding it are a much more significant hardship to them than to the railroads. As such, if the FRA does move forward with some sort of discovery restriction they should provide much clearer and stricter guidance surrounding what documents are actually protected. To that end, I intend to submit for the record a list of the types of documents that are currently discoverable in railroad litigation today, as well as some examples of documents that have been received as a part of discovery. Again, if juries are not able to consider a railroad’s historical knowledge of a known safety hazard, then the jury will not receive the full picture of an accident or injury and will be unable to hold the appropriate party accountable.

Conclusion

In conclusion, this program will do more harm than good. It will unnecessarily undercut the ability of innocent victims who are severely injured or killed because a railroad knowingly placed the public in danger to have their claims heard in a court of law. I ask you not to lose sight of the real reason for the railroad requesting this information protection—to escape accountability for their own actions, policies and procedures. Passed in this form, this Risk Reduction Program Rule will be one more thing I'll need to explain to a family grieving about their lost child or spouse. It will reduce the railroad's risk of a jury holding it accountable.