

RICHARD P. SCHWEITZER, P.L.L.C.

Attorney at Law

1776 K Street, NW ■ Suite 800 ■ Washington, DC 20006
Phone: (202) 223-3040 Fax: (202) 223-3041
www.rpslegal.com

MEMORANDUM

TO: Amici Curiae in *CSXT v. Williams*

FROM: Richard P. Schweitzer

DATE: January 23, 2007

RE: *CSXT v. Williams* Oral Argument on Summary Judgment

The U.S. District Court for the District of Columbia (Judge Sullivan) held a hearing today on cross motions for summary judgment in the case of *CSX Transportation v. Williams*, regarding whether HM-232 preempts the District of Columbia's law prohibiting the transport of certain hazardous materials by rail or truck within the a designated area of the nation's capital. While the judge made no ruling, the attorneys for CSX and the United States were clearly on the defensive. In the end, the judge took the case under advisement and gave no indication of when he might rule.

The judge questioned what effect, if any, the December 21, 2006 proposed rules from TSA and PHMSA on rail security should have on the outcome of this case. He stated outright that he would not stay the case pending the outcome of the rulemakings, and none of the parties suggested that a stay was appropriate. (The judge also stated that "some" would be suspicious at the timing of the release of the proposed rules.) But he asked several questions as to what consideration the court should give the two rulemakings. The District argued that the proposed rules make it clear that DOT did not consider rail re-routing when adopting HM-232, and thus the D.C. ordinance should not be preempted. CSX pointed out that neither HM-232 nor the proposed rules mandate re-routing, and that the proposed rules merely add requirements to rail security planning and implementation.

Judge Sullivan spent a great deal of time questioning whether there is evidence in the record demonstrating that DOT considered and rejected mandatory rail re-routing during the HM-232 rulemaking. (As you know, the legal question on preemption is whether the agency covered the subject matter of the District's ordinance, and if DOT considered and rejected mandatory re-routing, that indicates that DOT intended to preempt the D.C. law.) CSX and the United States argued that the record clearly shows that DOT considered comments about re-routing, and that mandating re-routing was in the proposed rule. But because mandatory re-routing was not made part of the final rule, one may conclude by implication that the agency considered but rejected the concept.

The judge suggested, and CSX and the United States agreed, that it would have been an easier case if DOT had included analysis and written explanation about why it chose not to

mandate re-routing. The District and the Sierra Club, however, asserted that there was no evidence in the record that DOT considered rail re-routing, and that the court cannot conclude it did so simply by implication. Additionally, as noted above, they argued that the newly proposed rules demonstrate that DOT did not consider re-routing with regard to HM-232.

The District argued that it assumed that DOT in the HM-232 rulemaking was going to consider re-routing and that the final rule would make the District safer. But such was not the case, and there is no analysis or explanation regarding DOT's consideration and rejection of mandatory re-routing in the final rule. The judge remarked that was a "persuasive" argument. Though he did not say so explicitly, it appeared that the judge does not see sufficient evidence in the record that DOT considered and rejected mandatory re-routing. The judge even suggested at one point that he should dissolve the earlier preliminary injunction that stayed enforcement of the D.C. Act so it could be enforced immediately. (He was reminded later that the injunction was imposed on the Emergency Act, which has been superseded by the current D.C. law, and that the parties have mutually agreed that the law would not be enforced pending the outcome of this case.)

Finally, Judge Sullivan was particularly interested in the Sierra Club's argument (he called it their strongest argument) that statutory language prohibits DOT from promulgating security regulations that have preemptive effect. In its cross motion for summary judgment, the Sierra Club argued briefly that the Homeland Security Act of 2002, P.L. 107-296 ("HSA"), amended the FRSA and HMTA to permit DOT to regulate hazardous materials transportation safety and security. However, they assert that section 1710(c) of the HSA divided FRSA preemption authority between DOT and DHS, and that only DHS rail security regulations can have preemptive effect. The Sierra Club argued before the judge that HM-232 was the product of a "small sub-group" within DOT, and that the regulation was in no way indicative of a unified federal policy, and certainly not a product of DHS. Therefore, by law, HM-232 could have no preemptive effect on state rail security ordinances.

The attorneys for CSX and the United States argued that the regulation was the product of extensive, government-wide review, and that DHS and DOT worked together, through memoranda of understanding, to promulgate the regulation. Further, CSX argued that the HMTA clearly allows DOT to regulate with regard to security, which is a part of safety, and that the HMTA and FRSA together allow DOT to preempt state law. As this is a matter of statutory interpretation, CSX also argued that the court should give some deference to DOT's conclusion that HM-232 preempts state laws. (CSX noted that the United States Supreme Court will decide a case this term which should determine whether agencies are entitled to *Chevron* deference on such questions.)

Because this final issue has not been extensively briefed by any party, the judge said he would probably order additional briefing just on this issue. He was also interested in seeing a side-by-side comparison of the HSA amendments and the prior statutory language.