Suzanne Lindamood *Legislative Service Commission*

Bill Analysis

H.B. 328

127th General Assembly
(As Introduced)

Rep. Patton

BILL SUMMARY

- Amends the Ohio Emergency Planning Law by requiring rail facility owners and operators to conduct vulnerability assessments and to implement other programs related to rail facility safety and security.
- Requires a rail facility owner or operater of a rail facility to conduct a vulnerability assessment and to develop and implement a rail infrastructure protection program to protect rail facilities from acts of sabotage, terrorism, or other crimes and to provide for the security of critical infrastructure.
- Specifies procedures for the handling and storage of hazardous cargo and other security and employee issues for a rail facility that handles cargo within 15 miles of a community facility.
- Requires communication capability regarding alerts in the event of sabotage, terrorism, or other crimes.
- Prohibits punitive action against an employee who reports violations of the bill and permits the employee to seek damages and other remedies.
- Provides a civil penalty for a violation of the bill.

TABLE OF CONTENTS

Background--the Ohio Emergency Planning Law 2
Definitions 3
Definitions under continuing law 4
Rail facility vulnerability assessment 4
Sharing a vulnerability assessment 4
Rail infrastructure protection program 5

Handling cargo near community facilities 5
Communications capability 6
Applicability, training of railroad contractor employees 7
Prohibition against retaliatory punitive action 7
Prohibitions and penalties under the bill 7
Sanctions under continuing law 7
Definitions in continuing law 8
Regulatory scheme for railroads 9
Potential federal preemption 9
Preemption decisions 10

CONTENT AND OPERATION

Background--the Ohio Emergency Planning Law

The Ohio Emergency Planning Law, Chapter 3750. of the Revised Code, was enacted in 1988 to provide for comprehensive chemical emergency preparedness and response. The law closely parallels the federal "Emergency Planning and Community Right to Know Act" (EPCRA) which was passed as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA). The federal law provides for the coordinated efforts of industry, local fire departments, local emergency planning committees, and a state emergency response commission.

The Ohio Emergency Planning Law implements the federal law by establishing an Emergency Response Commission consisting of the directors of nine state agencies, ten appointed representatives, and as non-voting members, the chairs of the House and Senate Energy and Environmental Committees (R.C. 3750.02, not in the bill). The law also establishes local emergency planning committees which are appointed by the state commission, upon nomination by county commissioners (R.C. 3750.03, not in the bill). The local committees prepare and implement plans and monitor local compliance with the law's requirements.

The Ohio law requires the state commission to adopt rules consistent with the federal EPCRA, identifying or listing extremely hazardous substances and hazardous chemicals and establishing threshold quantities for the law's purposes and prescribing information to be included in the chemical emergency response and preparedness plans the local emergency planning committees prepare and submit. The law provides for the regulation of facilities with hazardous substances and includes reporting and monitoring requirements.

Railroad "rolling stock" generally is not included in the law's definition of "facilities," which are "buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites . . ." (R.C. 3750.01(D)). However, the law expressly includes "rolling stock" as a facility for the purposes of R.C. 3750.06, which requires specific notices and acts by a facility's owner upon the release of a hazardous substance or an extremely hazardous substance, in a reportable quantity. (R.C. 3750.06, not in the bill.)

Definitions

The bill defines the following new terms (R.C. 3750.23(A)). These terms apply only to the bill's provisions and do not apply to the existing remainder of the Emergency Planning Law.

(1) "Community facilities" includes schools, hospitals, nursing homes, and other similar sensitive or vulnerable public facilities.

(2) "Critical infrastructure" includes bridges, tunnels, signal systems, and other points of vulnerability on a rail system that handles hazardous cargo.

(3) "Hazardous cargo" means any hazardous chemical or hazardous substance.

(4) "Public authority" means any of the following:

(a) The local emergency planning committee of the emergency planning district in which the rail facility is located;

(b) The fire department with jurisdiction over the rail facility;

(c) The sheriff of the county in which the rail facility is located;

(d) The chief of police of any municipal corporation with jurisdiction over the rail facility;

(e) Any state agency involved in the development of plans to protect railroads or other businesses against terrorist attack, including the Department of Public Safety, the State Highway Patrol, the Office of Homeland Security, the Emergency Management Agency, the Public Utilities Commission, and the Department of Transportation.

(5) "Rail facilities" includes tracks, terminals, stations, structures, rolling stock, rights-of-way, bridges, tunnels, signal systems, and any other rail property or equipment of the owner or operator that is considered necessary for the operation of rail services.

Definitions under continuing law

The definitions under the continuing Emergency Planning Law apply to the provisions of this bill (R.C. 3750.01, not in the bill). These definitions include terms used in the bill's definitions: "hazardous chemical," "hazardous substance," and "emergency planning district." The definitions of these terms are included at the end of this analysis.

Rail facility vulnerability assessment

The bill requires every owner or operator of a rail facility to develop a vulnerability assessment of each rail facility in the state. The bill requires the assessment to describe all of the following:

(1) All facilities and their functions;

(2) The types of cargo that move through the facilities, including any hazardous cargo and the approximate annual amounts of hazardous cargo;

(3) Any storage of hazardous cargo in rail facilities;

(4) The distance from rail facilities that transport or store hazardous cargo to community facilities located within 15 miles of the rail facilities;

(5) The practices or measures the rail owner or operator employs to prevent acts of sabotage, terrorism, or other crimes on rail facilities;

(6) All required employee security training programs;

(7) The emergency response procedures of the rail owner or operator with regard to acts of sabotage, terrorism, or other crimes;

(8) The procedures the rail owner or operator has established to communicate with public authorities in the event of acts of sabotage, terrorism, or other crimes. (R.C. 3750.23(B)(1).)

Sharing a vulnerability assessment

By reference to R.C. 3750.22(A)(2) (not in the bill), any public authority that receives a vulnerability assessment developed pursuant to the bill may provide a copy of that assessment to any other public authority but may not share the vulnerability assessment with any other public or private office unless required to do so by federal or state law. (R.C. 3750.23(B)(2).)

By reference to R.C. 3750.22(B)(1) (not in the bill), any vulnerability assessment or other security-sensitive information a public office receives

pursuant to the bill is not a public record and the assessment or information is not subject to the mandatory disclosure requirements of the Ohio Open Records Law (R.C. 149.43). (R.C. 3750.23(B)(2).)

Rail infrastructure protection program

The bill requires every owner or operator of a rail facility in this state to establish and implement a rail infrastructure protection program to protect rail facilities from acts of sabotage, terrorism, or other crimes and provide for the security of critical infrastructure. In carrying out this directive, the bill requires each rail owner or operator to do all of the following:

(1) Notify each public authority of the location, size, function, and importance of its critical infrastructure;

(2) Protect critical infrastructure from acts of sabotage, terrorism, or other crimes by providing, at minimum, 24 hour per day surveillance, monitoring, and protection of the facilities;

(3) Train and equip rail personnel to prevent acts of sabotage, terrorism, or other crimes, and to respond in the event of such acts;

(4) Inspect any rail facility located within 15 miles of a community facility and that handles hazardous cargo on a regular basis to determine the condition of the rail facility and the vulnerability of the rail facility to acts of sabotage, terrorism, or other crimes;

(5) Update its infrastructure protection program at least once every year and provide a current copy of the program to each public authority. (R.C. 3750.23(C)(1).)

Under the bill, the Ohio Office of Homeland Security is responsible for reviewing each infrastructure protection program. The bill authorizes the Office to order the rail owner or operator to improve, modify, or change its program to comply with the bill's requirements. (R.C. 3750.23(C)(2).)

Handling cargo near community facilities

For any rail facility that handles cargo within 15 miles of a community facility, the bill requires the owner or operator of the rail facility to do all of the following:

(1) Provide adequate security personnel for a rail facility that handles or stores hazardous cargo;

(2) Store hazardous cargo only in secure facilities designed for such storage, which cannot include railroad rights-of-way;

(3) Require rail personnel to be present when locomotive equipment is running and lock unattended locomotive equipment;

(4) Make adequate, qualified personnel available to assist, replace, or relieve train operators who need assistance;

(5) Ensure that the cabs of occupied locomotives can be secured against outsiders who threaten to hijack the locomotive or commit acts of sabotage or terrorism;

(6) Limit the use of remote control locomotives to equipment not involving hazardous cargo;

(7) Secure remote control devices to prevent access to such devices by unauthorized personnel, including persons intent on acts of sabotage, terrorism, or other crimes;

(8) Ensure that all employees connected with rail facilities that transport hazardous cargo within 15 miles of a community facility receive, at least once every 12 months, training related to security, shipment of hazardous cargo, and terrorism prevention. (R.C. 3750.23(D).)

The bill prohibits an owner or operator of a rail facility that handles cargo within 15 miles of a community facility from failing to comply with the obligations described in paragraphs (1) to (8) above. A rail owner or operator who violates that prohibition must pay a civil penalty of not more than $50,000 for each day of the violation. (R.C. 3750.23(G) and 3750.20(B)(4).)

Communications capability

The bill requires each rail owner or operator in Ohio to provide communications capability other than a railroad radio, to do all of the following:

(1) Alert public authorities in the event of sabotage, terrorism, or other crimes;

(2) Allow bridge tenders on movable bridges to alert public authorities in the event of sabotage, terrorism, or other crimes;

(3) Notify rail workers of the local or national threat level for the rail industry. (R.C. 3750.23(E).)

Applicability, training of railroad contractor employees

The bill applies to any rail owner or operator, any contractor or subcontractor working on facilities of the rail owner or operator, and any other individual or corporation performing work on rail facilities in Ohio. Employees of a railroad contractor or subcontractor, and any other individual or corporation performing work on rail facilities in Ohio must receive training adequate to make them as well-trained as employees of the rail owner or operator performing such work, and must be required to undergo the same background skills and fitness for duty checks as employees of the rail owner or operator. (R.C. 3750.23(F)(1).)

Prohibition against retaliatory punitive action

The bill prohibits any rail owner or operator from taking punitive action of any kind against an employee who reports violations of the bill. An employee subject to punitive action may seek damages in an amount not to exceed $1 million from any employer who takes such an action, in addition to other remedies including back pay, reinstatement, and other damages. (R.C. 3750.23(F)(2).)

Prohibitions and penalties under the bill

The bill prohibits a rail owner or operator from failing to establish and implement, within 360 days after the bill's effective date, a rail infrastructure protection program as the bill requires, from failing to comply with the obligations described in paragraphs (1) to (5) above, or from failing to comply with an order issued by the Office of Homeland Security to improve, modify, or change its rail infrastructure protection program to comply with the bill. A rail owner or operator who violates any of the prohibitions must pay a civil penalty of not more than $50,000 for each day of the violation. (R.C. 3750.23(G) and 3750.20(B)(4).)

Sanctions under continuing law

Because the bill amends the Ohio Emergency Planning Law, any violation of the bill is subject to penalties established under the continuing Emergency Planning Law. A violation of any provision of that law or a rule adopted under it, for which no civil penalty is otherwise provided, can result in a civil penalty of not more than $10,000 for each day of violation. The continuing law requires the Attorney General, the prosecuting attorney of the county, or the city director of law where the violation occurs, upon the written request of the Executive Committee of the Emergency Response Commission, the committee of the emergency planning district, or the fire department having jurisdiction, to bring an action against any person who commits a violation and to prosecute to termination

or bring an action for injunction against any person who violates the law or rules adopted or orders issued under it. (R.C. 3750.20(B)(5).)

The court of common pleas in which an action for injunction is filed has jurisdiction and has authority under continuing law to grant preliminary and permanent injunctive relief, upon a showing that the person against whom the action is brought has violated any section of the law or rule adopted or order issued under it. (R.C. 3750.20(A).)

Upon the certified written request of any person, the Director of Environmental Protection is required to conduct any investigation and make any inquiries that are necessary to secure compliance with the Emergency Planning Law and the rules adopted or orders issued under it. The Director or the Emergency Response Commission, upon request or on their own initiative, may investigate or make inquiries into any alleged violation of the Law or the rules or orders issued under it. (R.C. 3750.20(A).)

Definitions in continuing law

The Ohio Emergency Planning Law includes the following definitions in continuing law that relate to the bill's provisions. (R.C. 3750.01, not in the bill.)

"**Hazardous chemical**" has the same meaning as in 29 C.F.R. 1910.1200(c). The term also includes chemicals identified or listed in rules adopted under R.C. 3750.02(C)(5), but does not include any of the following: (1) any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration of the United States Department of Health and Human Services, (2) any substance present as a solid in any manufactured item, to the extent that exposure to the substance does not occur under normal conditions of use, (3) any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public, including, without limitation, household and consumer products that are stored prior to or displayed for distribution to the consumer when in the same form and concentration and products that are not intended for distribution to the general public and are in the same form and concentration as products packaged for distribution to and use by the general public, unless the chemical is subject to a reporting requirement for which a variance has been issued under R.C. 3750.11(B) or (C), (4) any substance to the extent it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual, or (5) any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.

"**Hazardous substance**" means a substance identified or listed by the rules adopted under R.C. 3750.02(B)(1)(c) or (C)(5).

"**Emergency planning district**" means an emergency planning district or joint emergency planning district designated under R.C. 3750.03 or a joint interstate emergency planning district established by agreement under that section.

COMMENT

Regulatory scheme for railroads

Several federal agencies have responsibility for different aspects of railroad safety and security: the Department of Homeland Security, the Federal Railroad Administration, and the Research and Special Programs Administration within the Department of Transportation. A report of the U.S. Senate Committee on Commerce, Science and Transportation, May 21, 2004, summarizes the current federal regulatory scheme as follows:

> Primary regulatory jurisdiction over rail security rests with DHS [Department of Homeland Security] while jurisdiction over rail safety rests with the Federal Railroad Administration (FRA) and the Research and Special Programs Administration (RSPA) within the Department of Transportation (DOT). FRA has jurisdiction over the safety of freight railroads, Amtrak, the Alaska Railroad, and 18 commuter rail authority . . . . RSPA is responsible for the regulation of hazardous materials transportation by all modes, including the development of container and packaging standards and testing procedures.

In Ohio, railroads generally are regulated by the Public Utilities Commission under Chapter 4907. of the Revised Code.

Potential federal preemption

Any statute that regulates railroad operations has the potential of being preempted by federal law due to the Supremacy Clause of the U.S. Constitution, which provides that the laws of the United States "shall be the supreme law of the land." (U.S. Const. Art. VI, cl. 2.) The two primary federal laws that regulate railroads, the Federal Railroad Safety Act and the Hazardous Materials Transportation Uniform Safety Act, both contain express preemption provisions.

The Federal Railroad Safety Act (FRSA) has the goal of establishing uniform railroad regulations throughout the U.S., stating "[l]aws, regulations, and orders related to railroad safety and laws, regulations and orders related to railroad security shall be nationally uniform to the extent practicable." The law expressly preempts state law, allowing that a state may only enforce more stringent or additional requirements than the federal laws if the state requirement: (1) is necessary to eliminate or reduce an essentially local safety or security hazard, (2) is not incompatible with a federal law or regulation, and (3) does not unreasonably burden interstate commerce. (49 U.S.C. 20106.)

The federal Hazardous Materials Transportation Uniform Safety Act (HMTA) preempts state law if (1) complying with both the state law and the federal requirement is not possible, or (2) the state requirement is an obstacle to carrying out federal law and regulations. The federal law preempts state laws with respect to the classification of hazardous materials, packing, labeling, and placarding and execution of shipping documents are preempted unless they are substantively the same as federal regulations. The law provides a mechanism for a state to apply to the Secretary of Transportation for a waiver of federal preemption. (49 U.S.C. 5125.)

Preemption decisions

Issues of federal preemption generally are left to the courts. Given the regulatory scheme of railroads and the express preemption clauses in the major acts governing railroad safety and security, it is possible that a court would find any state law governing railroad safety and security to be preempted by federal law unless the statute meets the specific exemption situations referred to above. The question of federal preemption has resulted in frequent litigation. "Courts have been faced with interpreting the preemptive force of the Federal Railroad Safety Act on numerous occasions." (*Mehl, et. al. v. Canadian Pacific, Ltd.*, 2006 WL 522435 (D.N.D. at 4).)

In *Mehl*, the court dismissed claims for injuries that were filed on the basis of a state law, finding that the claims were preempted by the Federal Railroad Safety Act (FRSA). (*Mehl* at 23.) The court ruled "[e]ven if the Court were to conclude that the Plaintiffs' claims were not preempted by the FRSA, to allow such claims to go forward would undoubtedly run afoul of the exclusive enforcement provision of the FRSA. In other words, even if this Court concluded a state cause of action exists to enforce a federal standard of care, it is clear that Congress has granted the exclusive authority to resolve such claims to the Secretary of Transportation. *(Mehl* at 21.)

In an earlier decision, the U.S. District Court for the Southern District of Ohio, Eastern Division, ruled that an Ohio statute that incorporated portions of the

federal Hazardous Materials Transportation Act (HMTA) to authorize the Public Utilities Commission of Ohio (PUCO) to adopt railroad safety laws, was preempted by federal law. (*CSX Transportation v. The Public Utilities Commission of Ohio*, 701 F.Supp 608 (1988).) The court concluded "Ohio has attempted to do precisely that which Congress sought to prohibit. . . . The Ohio statutes and administrative regulations fall squarely within the preemption provisions of the FRSA because the Secretary of Transportation has adopted rules and regulations covering the same subject matter." (*CSX* at 28.)

The decision was upheld by the U.S. Court of Appeals for the Sixth Circuit, stating "federal power to regulate transportation of hazardous materials is absolute; state power is limited." (*CSX v. PUCO*, 901 F., 2d 497 (1990) at 502.) The court applied the FRSA preemption provisions, citing "[t]he national character of railroad regulation and the need for regulation of hazardous material transportation." (*CSX* at 503.) The U.S. Supreme Court denied certiorari, thereby letting the Sixth Circuit decision stand. (*PUCO of Ohio v. CSX*, No. 90-95, 111 S.Ct. 781, January 22, 1991.)

HISTORY

ACTION	DATE
Introduced	09-27-07

H0328-I-127.doc/jc