

Norfolk Southern Derailment Sparks Rail Regs Scrutiny

By **Linda Chiem**

Law360 (February 24, 2023, 9:10 PM EST) -- The images of smoldering tank cars, plumes of thick black smoke and a charred rural Ohio town reeling from the fiery Feb. 3 Norfolk Southern train derailment have sparked calls for tougher rail safety rules, but experts say findings from investigators and litigants will determine the scope of any regulatory overhaul.

As the National Transportation Safety Board continues its investigation three weeks after the derailment, residents of East Palestine, Ohio, are anxious about the immediate and long-term health effects of being exposed to toxic chemicals and fumes, and are pressing officials for more answers in the aftermath of the wreckage.

But the immediate uproar over the **disjointed federal and state response** to the disaster — and officials' controversial decision to do a controlled burn of certain flammable petrochemicals — has since made way for political squabbling and renewed focus on perceived gaps in the nation's rail safety regulations.

Transportation disasters of a size and scale like this one inevitably amplify calls for stricter regulatory scrutiny, according to legal experts who told Law360 that train crew staffing, tank car design standards, enhanced rail safety technology, track inspection protocols, and classifications for hazardous materials-carrying trains are just some of the areas that lawmakers and regulators will be examining closely.

"The response had a lot of problems, how they just decided to start burning that stuff in the air that night ... they emitted a ton of toxic materials into the atmosphere that the people in that 10-mile radius are breathing," said Stuart Ratzan, founder of Miami-based trial boutique Ratzan Weissman & Boldt, who's litigated transportation negligence, catastrophic injury and wrongful death cases. "So it's scary. Who's making those decisions and there's not any accountability for that at that time."

Ratzan, who is not involved in litigation over the Norfolk Southern derailment, said he supports measures and efforts that bring attention to enhancing safety. But the politics must be separated out because this incident raises human and community safety issues, he noted.

"Train derailments have gone on for a long time [and] I think we're having almost 1,000 of them a year at this point — it's not new, and it's not related to one administration or another," Ratzan told Law360. "It's an unfortunate fact of this industry."

"That there are voices in the industry seeking higher safety standards is a reflection of something that's needed, which is more attention to safety in the industry," he added. "We might get legislation, but again, that's a political question."

The NTSB, which is leading the investigation into the incident, has not yet determined a probable cause, and NTSB Chair Jennifer Homendy has repeatedly cautioned against rampant speculation and misinformation about what led to the derailment or what could've prevented it.

In a preliminary report Thursday, the NTSB said the train's operators **tried to slow down** after being alerted to an **overheating wheel bearing** moments before it derailed. But the early findings have raised questions about how Norfolk Southern spaces out detection systems along its railways that monitor when wheel bearings start to overheat and provide audible real-time warnings to train crews.

Biden administration officials in recent weeks have **defended** their response efforts amid scorching criticism of how they've handled the environmental and public health disaster in East Palestine.

Republicans, in particular, have blasted Transportation Secretary Pete Buttigieg, accusing him of neglecting East Palestine residents by waiting weeks to visit the derailment site, and targeting him for what they view as President Joe Biden's misguided attempt to shift blame and pursue heavy-handed regulation of the industry.

The U.S. Department of Transportation on Feb. 21 put the rail industry on notice that "profit and expediency must never outweigh the safety of the American people," and that it's considering a number of enhanced rail safety policies. The DOT last year revived an Obama-era proposal to mandate two-person train crews, which was floated in response to crewmember fatigue concerns after two catastrophic railroad accidents in 2013 at Lac-Mégantic, Quebec, in Canada and Casselton, North Dakota, involving trains carrying crude oil.

Railroad giants had **decried that 2016 proposal** as a sweeping, costly and redundant fail-safe that wouldn't necessarily enhance safety, and successfully lobbied for the Trump administration to **ditch the rulemaking altogether**.

Additionally, there's been renewed focus on the Trump administration's **2017 decision rescinding** a requirement that trains carrying crude oil, ethanol and other flammable liquids be outfitted with advanced braking technology known as electronically controlled pneumatic brakes. The ECP brake rule had previously been finalized by the Pipeline and Hazardous Materials Safety Administration and the Federal Railroad Administration as part of a **May 2015 final rule** establishing a spate of new tank car standards for high-hazard flammable trains.

Kristen Boyles, managing attorney of Earthjustice's Northwest regional office in Seattle, told Law360 that the renewed scrutiny is warranted, and it is telling that nearly 10 years later, "we're still speaking to the theme of the inherent risk in shipping hazardous, explosive substances by rail."

"It's correct to be looking at broader rail regulations, even if there are rail regulations that you can't push to and say, 'Oh, if only we had had that, there would have been no disaster,'" Boyles said. "Because what you're talking about is the fact that in the United States, hazardous materials are shipped by rail, so what are the overarching measures we're taking to minimize those risks."

Benjamin Dierker, executive director of the Alliance for Innovation and Infrastructure, a think tank specializing in infrastructure policy, said the train crew staffing rule wasn't relevant in the East Palestine incident, because the NTSB preliminarily identified an overheated wheel bearing as a focus of its investigation. The NTSB said Thursday that the Norfolk Southern train was staffed by three crew members, one of whom was a trainee.

"Nothing in the FRA proposed rule on train crew staffing would have made a definitive difference in this case," Dierker said. "Similarly, precision scheduled railroading is receiving extra attention, but is not clearly related to this incident."

"Those two topics, along with train length and a few others, are longstanding issues that have been debated and many are using this as an opportunity to advance their perspective," Dierker noted. "Until the complete NTSB investigation is concluded and more data is known, most of the current calls for policy change appear to be rearticulations of policy preferences by industry, labor, government, and partisans."

Ultimately, assessing and achieving accountability for this derailment will be a multilayered process involving a lot of fact-finding, according to Jayne Conroy, a shareholder at Simmons Hanly Conroy LLC, who is representing East Palestine families that filed the first **proposed class action** against Norfolk Southern days after the derailment.

"We need to know a lot more about what happened because there are still trains coming through East Palestine, really long trains, like every 10 minutes. So people are very concerned that something like this doesn't happen here again or anywhere else in the United States," Conroy told Law360. "I don't, right now, have any reason to believe there's been anything particularly different about what

happened that would mean that it wouldn't happen if it had been Pennsylvania or West Virginia or somewhere else in Ohio or Illinois."

She explained that there are still plenty of questions about the hot bearing detectors, and why the valves on some of the tanker cars were jammed, which eventually led to officials' decision to force a controlled burn.

"So there are lots of questions that are going to bring us to standing regulations, whether those regulations were breached and should regulations be tightened," Conroy said. "Were there enough crew members on board? Can you really inspect a train that's this long and in the time that's afforded?"

Lawsuits against Norfolk Southern are mounting by the day, Ohio's attorney general indicated that the **state may sue**, and the Biden administration has signaled that civil penalties and emergency orders, along with other enforcement actions or remedies, are all on the table.

The lawsuits seek to represent a range of parties, from those whose homes and businesses were in the original one-mile-by-two-mile evacuation zone around the crash site, to anyone impacted by potential effects of the leaking and burning chemicals that may have been carried further by smoke or the Ohio River watershed.

While some legal experts have signaled that litigants will likely **face an uphill battle** when it comes to showing concrete injuries or that they're entitled to remedies for long-term impacts from the derailment, others said the rising tide of lawsuits will undoubtedly move the needle in advancing rail safety.

"Like any large litigation that we see, when you begin to amass the evidence and look at why things occurred, and you compare that to the standards in the industry and whether they're actually following the law, we often do see significant change," Conroy explained.

"When you see a tragedy like this, it gets a national audience, and people realize it could happen anywhere in the United States, the evidence that we're collecting really starts to matter," she added. "People may have different agendas and that's fine, but it's hard to run away from the real evidence."

Ratzan agreed, saying that discovery and courtroom battles can reveal a lot.

"We have a court system, and the basic question is whether Norfolk Southern exercised reasonable care in how it mechanized or outfitted its trains, what kinds of systems it built its trains with, and what kind of warning or alert systems it employed," Ratzan explained. "Transporting hazardous materials [triggers] the highest duty to be safe, and if it didn't do that, it would be accountable to the community. That by itself can be a powerful sword and shield to protect us from this happening again."

The Association of American Railroads, the rail industry's lead lobbying group, has maintained that safety-conscious railroads are committed to addressing the cause of the East Palestine accident and preventing similar accidents.

The AAR said this week that the NTSB's independent investigators have undertaken a "deliberate and methodical approach under these challenging circumstances," and that their work should continue "unimpeded by politics and speculation."

"All stakeholders — railroads along with federal, state and local officials — must work to restore the public's trust in the safety and security of our communities. We can only do that by letting the facts drive the post-accident response," the AAR said in a Feb. 21 statement. "At this time, the focus must be on the most pressing issue at hand — ensuring the community of East Palestine has all the support they need as it moves forward."

Train crew staffing, track maintenance and inspection protocols, and other railroad industry practices are some of the issues that labor unions have been flagging for years, and more recently when the government made a **last-ditch move to avert** what would've been a devastating rail workers' strike to close out 2022. Congress heeded **Biden's call to intervene** and **pass legislation** imposing

previously negotiated tentative agreements on rank-and-file union members who had voted to reject them.

Greg Regan, president of the Transportation Trades Department, AFL-CIO, said in a statement that details of the NTSB's preliminary report and Chair Homendy's remarks "lead us to believe that there is room for improvement surrounding Norfolk Southern's use of these [wayside defect] detectors."

"As NTSB Chair Homendy said in the briefing, all accidents are preventable," Regan said. "Rail labor unions and workers have been sounding the alarm about preventable rail accidents for years and are exploring all solutions to create a safer rail system for all."

--Additional reporting by Matthew Santoni, Eric Heisig and Juan Carlos Rodriguez. Editing by Emily Kokoll.