

The Rail Industry And The East Palestine Wreck: 1 Year Later

By **Linda Chiem**

Law360 (January 31, 2024, 7:45 PM EST) -- A year after a Norfolk Southern train carrying toxic chemicals derailed on the border of Ohio and Pennsylvania, sprawling consolidated litigation and proposed regulations carry the promise of preventing a recurrence even though federal accident investigators have not yet issued a final determination on what caused the disaster.

The fiery Feb. 3, 2023, derailment in East Palestine left smoldering tank cars and plumes of thick black smoke, and exposed thousands of residents, businesses and property owners in the **surrounding communities** to large volumes of contaminants. What followed was immediate criticism of the **disjointed federal and state response** to the disaster — specifically, officials' controversial decision to do a controlled burn of highly flammable petrochemicals — along with political squabbling and **renewed scrutiny** of perceived gaps in the nation's rail safety regulations.

Here, Law360 highlights key developments to watch a year after the East Palestine derailment.

Accident Investigation

National Transportation Safety Board investigators are still finalizing their report on what might've caused the derailment, as well as their recommendations for future safety improvements. The NTSB **is also delving into** the readiness of emergency workers to respond to the size and scale of the derailment, the condition of the tank cars, the integrity of pressure relief devices and placards labeling the tank cars' contents as hazardous materials.

Investigators are also examining the decision by Norfolk Southern, its hazmat response contractors and other local officials to conduct a controlled burn of vinyl chloride — a colorless and flammable chemical used to make a variety of hard plastics — that was in five tank cars that were among the rail cars that derailed that day.

The NTSB's **preliminary findings** pointed to an **overheated wheel bearing** on Car No. 23. The car was owned by a GATX Corp. subsidiary and was leased to another customer that was transporting non-hazardous plastic pellets.

Ultimately, the NTSB's findings and recommendations will have major implications for pending lawsuits seeking to carve out liability for the accident, as well as enforcement actions and any proposed rail safety legislation and regulation.

In the meantime, the largest Class I freight rail carriers that own most of the nation's rail tracks have stepped up and made significant safety investments since East Palestine, according to the Association of American Railroads.

The AAR said in a Jan. 26 statement that hundreds of additional hotbox or hot-bearing detectors have been installed on key routes to monitor the temperature of bearing housings as rail cars pass by. The industry in July 2023 also adopted new standards for stopping and inspecting trains when an HBD reading exceeds 170°F, instead of the industry's previous threshold of 200°F, according to the AAR.

Before the Norfolk Southern train derailed, it had passed three HBDs along its route — hitting 253°F above ambient right before derailing, according to the NTSB's preliminary findings. On that Feb. 3 night, the ambient temperature was about 10°F.

Environmental Remediation

The U.S. Environmental Protection Agency **ordered Norfolk Southern** to excavate the polluted soil from beneath and between its tracks — resulting in more than 176,000 tons of soil being hauled from the derailment site — and to rigorously test air, soil and drinking water.

In its Jan. 26 earnings report, Norfolk Southern estimated that its derailment-related environmental cleanup and legal costs have topped \$1.1 billion, with approximately \$101 million of that being covered by insurance.

Norfolk Southern said it has committed \$103 million to East Palestine and the surrounding areas in Ohio and

Pennsylvania. That amount includes \$25 million for a regional safety training center, \$25 million in planned improvements to East Palestine's city park, \$9 million for local first responders, \$2 million for community-directed projects, \$500,000 in economic development grants, and \$4.3 million for upgrades to municipal drinking water infrastructure such as the installation of the new carbon filtration system.

The **EPA sued Norfolk Southern** — and **so did the state of Ohio** — seeking reimbursement for government emergency response efforts and environmental damages. Norfolk Southern has gone on the offensive by filing a **third-party complaint** against the owners of tank cars that had derailed, alleging they are also responsible under the Comprehensive Environmental Response, Compensation and Liability Act for past and future cleanup costs that Norfolk Southern so far has borne on its own.

Plaintiffs Litigation

The rail giant is also contending with sprawling litigation from local residents, business and property owners, and other plaintiffs alleging numerous harms. Those include lost income, property damage, contamination at residences and workplaces, and increased risk of serious and potentially fatal illnesses including cancer and organ damage necessitating ongoing medical monitoring, according to court documents.

Simmons Hanly Conroy LLP partner Jo Anna Pollock, co-chair of the science and experts committee for plaintiffs in the consolidated litigation, told Law360 that during the past six months, there's been a "massive undertaking" to review hundreds of thousands of documents, take depositions and compile expert reports that are due in early April.

Norfolk Southern has similarly filed third-party claims against the owners of the five tank cars carrying vinyl chloride, contending they must also shoulder their fair share of any recoverable personal and property damages asserted by the various classes of plaintiffs. But OxyVinyls LP, Trinity Industries Leasing Co., GATX Corp. and its subsidiary General American Marks Co. have countered in court filings that the rail giant cannot try to shift liability for the "100% preventable" derailment.

Case Western Reserve University law professor Andrew S. Pollis told Law360 that the railroad's litigation defenses aren't surprising.

"It's entirely proper for a party to seek to allocate proportional liability to other responsible parties. The legal system has a framework for doing so, even when the original lawsuit does not name the other actors," Pollis said. "Norfolk Southern's pursuit of those remedies is not necessarily inconsistent with its commitment to the community; it's simply a way for Norfolk Southern to seek financial participation from other actors that may have liability for the injury."

U.S. District Judge Benita Y. Pearson said earlier in January that while there are seven pending motions to dismiss the litigation, "at this time it appears that all parties will remain in the present case after the court resolves these pending motions."

"That's the only signal we have from the court, but it's an important signal that all the defendants are going to remain and bear some responsibility," Pollock said.

Cory Watson PC principal Jon Conlin, who is representing some of the plaintiffs in the consolidated litigation, told Law360 that the general sentiment among many clients is one of continued "concern and distrust."

"We have multiple businesses that were multimillion-dollar cash flow businesses that just stopped like a flick of the switch," he said. "The longer that goes on and the longer they're unable to open, the more permanent those damages are and the less likely they can ever recover."

Rail Safety Rules

Train crew staffing, tank car design standards, enhanced rail safety technology, track inspection protocols, and classifications for hazardous materials-carrying trains are some of the areas that lawmakers and regulators have **zeroed in on**. Lawmakers last year introduced a bipartisan package of rail safety enhancements, but the Railway Safety Act of 2023 has languished since **clearing a Senate committee** last summer. The AAR has stated that "railroads will continue good-faith efforts with policymakers to find a path for common-sense legislation that can help prevent an incident like what happened in East Palestine."

The bill called for major carriers to reinforce alerting systems and inspection protocols or face stiffer penalties for potential safety violations. It also required railroads to invest in HBDs, also known as wayside defect detectors, and comply with stricter mandates for trains transporting hazardous materials such as speed restrictions and enhanced braking technology, among other things.

But Pollock told Law360 that the ongoing litigation has made clear that "actually little has changed with the railroad industry and specifically with respect to Norfolk Southern."

"They're still building massive trains. They don't inspect the trains before they leave and they're still policing themselves," she said. "So the legislation that had been proposed that people were hoping could help rectify the situation, prevent another catastrophe, there's been no movement on it."

The Railway Safety Act also proposed a permanent mandate for the largest rail carriers to operate with a minimum two-person crew. But the DOT in 2022 had already 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.

"It is also partially moot because one provision is already set to become a federal rule: The FRA has been working on a crew size mandate, which is currently with the [White House's Office of Management and Budget] and should be published within a matter of weeks," said Benjamin R. Dierker, executive director of the Alliance for Innovation and Infrastructure, a think tank specializing in infrastructure policy. "That policy is unnecessary and would not have made a difference in East Palestine given the crew number involved."

Meanwhile, Norfolk Southern this week said it's the first of the Class I railroads to participate in a new Federal Railroad Administration pilot program called the Confidential Close Call Reporting System.

The program, a partnership with rail labor unions, would allow employees to confidentially report unsafe events they experience, and be protected from disciplinary actions by the railroad.

U.S. Transportation Secretary Pete Buttigieg said in a Jan. 29 statement that "Norfolk Southern has taken a good first step, and it's time for the other Class I railroads to back up their talk with action and make good on their promises to join this close call reporting system and keep America's rail network safe."

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