

# Hazardous Materials/FAST Act: Federal Appellate Court Addresses Challenge to PHMSA Disclosure Regulations



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On March 17, 2020, the United States Court of Appeals, District of Columbia Circuit (“Court”) addressed a question arising under the Fixing America’s Surface Transportation Act (“FAST”). See *Union Pacific Railroad Co. v. Pipeline and Hazardous Materials Safety Admin.*, 2020 WL 1264220 (D.C. Cir. 2020).

The issue involved Section § 7302 of FAST requiring the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) to promulgate regulations governing disclosures to be made by railroads transporting hazardous materials.

This statutory provision requires that PHMSA mandate that railroads provide state emergency response commissions with aggregated data regarding the transportation of particular types of flammable liquid. The aggregate data provides first responders an opportunity to understand the risks they may face and plan accordingly.

Further, it directs railroads to indicate to the state commissions whether it believes any part of the information is “security sensitive or proprietary and exempt from public disclosure.” The purpose of this direction is to provide the state agencies the flexibility to spread the information while also guarding against inadvertent disclosure. States can, therefore, hold close any information that is sensitive and potentially protected by state law.

Union Pacific Railroad Company (“Union Pacific”) challenged the regulation PHMSA promulgated to implement this statutory provision. The railroad argued it provided insufficient protection of its data. Thus, the regulation was argued to fail to meet its FAST § 7302 requirement to establish security and confidentiality protections to prevent access to the information by unauthorized parties.

Since the regulation was neither dependent on a misreading of the statute nor arbitrary or capricious, the court denied petition for review. It noted that to the extent the railroad may have been arguing that FAST requires the agency to adopt the same protective scheme for every type of disclosed information, it was mistaken. This was deemed to be the case because FAST established multiple levels of information that pose different levels of risk. The multiple levels include precise data and aggregate data. This bifurcated system authorized the agency to adopt different measures appropriate for each type of data.

Union Pacific also asserted a policy argument. The release of the information to the public would give everyone access to the information through the state’s freedom of information laws. This led to a

concern that the statutory category “unauthorized person” would include no one. The court denied this argument for two reasons.

First, PHMSA gave substance to the term “unauthorized person” by treating those persons not entitled to the information under the relevant state’s freedom of information law. The court held that such a reading does not improperly subdelegate the agency’s regulatory authority to states.

Second, and most importantly, PHMSA made a specific uncontradicted finding that requiring the railroad to flag the information to the response commission was sufficient to ensure confidentiality and security. Conversely, Union Pacific did not provide any evidence that the type of data at issue has been or could be exploited. Because Union Pacific failed to provide evidence to deny the agency’s express finding, the court denied the petition for review.

A copy of the decision can be downloaded [here](#).