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What Attys Should Know 6 Mos. After Ohio Train Derailment

By **Matthew Santoni**

Law360 (August 2, 2023, 6:58 PM EDT) -- Six months after 38 cars of a Pennsylvania-bound Norfolk Southern train derailed in East Palestine, Ohio, and left behind fears of contaminated water, soil and air, the fight has moved from the small border town to courtrooms in Youngstown, Columbus and Pittsburgh, and to the halls of state and federal legislatures.

Litigation is moving through early motions over dismissal or finding the proper venue, and the first efforts to impose new regulations on railroads at the state or federal levels are prompting pushback from industry groups and praise from workers' unions.

Meanwhile, Norfolk Southern has expanded an outside counsel **team that started** with a pair of Pittsburgh-based Dickie McCamey & Chilcote PC attorneys with experience in other derailment cases, and **recently hired** Tesla's former head of general litigation, F. Nathaniel "Nate" Smith III, for its in-house team.

Here is where things stand half a year after the Feb. 3 derailment.

Paying for Cleanup, Community Support

Norfolk Southern is **paying for much** of the ongoing cleanup effort under the Comprehensive Environmental Response, Compensation and Liability Act, and is also donating millions to community groups and first responders in Ohio and Pennsylvania.

In March, Pennsylvania and the railroad **announced** Norfolk Southern would front \$5 million to replace volunteer firefighters' equipment that was contaminated when they responded to the crash, while other money reimbursed state health, environmental and emergency management officials for their initial response. Pennsylvania Gov. Josh Shapiro announced in July that \$1 million was paid to communities in two counties, across the state line from East Palestine, to fund other community initiatives.

"Gov. Shapiro recognizes that this is just the beginning — Norfolk Southern's train derailment hurt Western Pennsylvania communities, and the governor will continue working to hold Norfolk Southern accountable and deliver the help and resources Pennsylvanians need," said Shapiro's press secretary Manuel Bonder on the eve of the derailment's six-month anniversary.

The U.S. Environmental Protection Agency and the **state of Ohio** have sued claiming Norfolk Southern should reimburse state and **federal agencies** for the emergency response and environmental damage, but the railroad has filed a **third-party complaint** seeking to attribute blame to the companies that made, owned and loaded the specific rail cars that derailed and leaked.

Conor Lamb of Kline & Specter PC, a former U.S. representative whose district included parts of Western Pennsylvania affected by the derailment, said there was a disconnect between Norfolk Southern's efforts to make big donations in the community and its bid to shift blame in the courtroom.

"Norfolk Southern is going on a PR blitz, giving out money to local communities and volunteer firefighters, in a way that I think is designed to make them look remorseful, while in court they're denying accountability," he told Law360. "It just tells you Norfolk Southern is more in the wrong than

can be fixed by a few contributions. ... This case deserves a measure of respect."

The cases are State of Ohio v. Norfolk Southern Corporation et al., case number 4:23-cv-00517, and U.S. v. Norfolk Southern Railway Co. et al., case number 4:23-cv-00675, in the U.S. District Court for the Northern District of Ohio.

Keeping Consolidated Class Claims Alive

More than 30 proposed class actions brought by residents, landowners and businesses have been **grouped together** in the Youngstown division of Ohio's Northern District following the derailment, with a consolidated master complaint filed May 8.

The **consolidated suit** seeks to represent classes and subclasses of business owners, residents, property owners and employees within a 30-mile radius of the derailment. It includes people and businesses in Ohio, Pennsylvania and West Virginia, with claims seeking damages, medical monitoring and environmental testing.

According to the consolidated complaint, Norfolk Southern acted in an unsafe manner by deprioritizing safety inspections and maintenance, arranging the train cars in a way that increased the odds of a derailment and understaffing the train. Additionally, its early warning system failed to alert the train's crew until just before the crash about the wheel bearing that caught fire and allegedly caused the derailment, the suit says.

In the days after the crash, Norfolk Southern also made the call to release more chemicals from five of the derailed cars to prevent an uncontrolled blast. But the "controlled release" of vinyl chloride set off a fireball that sent more chemical byproducts into the air, the suits said.

Norfolk Southern **sought to dismiss** the consolidated suits in early June, arguing that the claims of health effects and environmental damage are unfounded and that the state law claims were precluded by federal law that required the railroad, as a "common carrier," to transport hazardous chemicals like those that were leaked and burned.

The residents **fired back** at the beginning of July, arguing that the lack of federal regulations governing trains' maintenance or the maintenance and operation of the "hot box" detectors that didn't stop the train sooner means their claims aren't precluded by federal law.

Norfolk Southern's motion to dismiss is still pending before U.S. District Judge Benita Y. Pearson, who set Aug. 2 as the deadline for dispositive motions and motions for class certification, court records show. Similar to its response in the lawsuit filed by the state of Ohio, Norfolk Southern on July 25 filed a third-party complaint seeking to join the railcars' owners, manufacturers and loaders to the suit, which is also still pending.

Lamb of Kline & Specter said he did not anticipate the proposed class action settling anytime soon, noting that one of the lead attorneys acting as interim class counsel, Jayne Conroy of Simmons Hanly Conroy LLC, worked on opioid litigation that lasted a decade.

"They're going to be dealing with this litigation for a very long time," Lamb said.

Interim counsel for the proposed class did not immediately respond to requests for comment Wednesday.

The case is In re: East Palestine Train Derailment, case number 4:23-cv-00242, in the U.S. District Court for the Northern District of Ohio.

Schools' Suits Stay in Pennsylvania

In addition to the residents and businesses whose lawsuits have been filed and consolidated in Ohio, three school districts in Beaver and Lawrence Counties in Pennsylvania have filed suit in Western District federal courts alleging that the crash and fire contaminated their campuses and caused elevated health risks for students and staff.

The **Ambridge Area School District, Blackhawk School District** and Western Beaver County School District all filed complaints in the Pittsburgh federal court between March and April.

Norfolk Southern **wanted the suits moved** to join the rest others in Ohio under the so-called first-filed rule. But U.S. District Judge Cathy Bissoon **denied that request** in May, reasoning that the schools' claims were different enough from the proposed class actions and their damages focused enough on Pennsylvania to keep the cases there.

Since that ruling, however, court records show the cases were put on hold while the plaintiffs' lawyers decide whether to consolidate them or file an amended complaint as another proposed class action.

Counsel for the school districts did not respond to requests for comment.

The cases are Blackhawk School District v. Norfolk Southern, case number 2:23-cv-00500; Western Beaver County School District v. Norfolk Southern, case number 2:23-cv-00587; and Ambridge Area School District v. Norfolk Southern, case number 2:23-cv-00664, in the U.S. District Court for the Western District of Pennsylvania.

Norfolk Southern Clashes With Shareholders

A proposed class of Norfolk Southern shareholders, led by the retirement fund for Bucks County, Pennsylvania, employees, **filed suit** in Ohio's Southern District in March, claiming the company's executives artificially inflated stock prices with cost-cutting measures that undermined safety, leading to results like the East Palestine crash.

Norfolk Southern is **fighting to move the suit** to its home turf in Georgia, arguing that the Southern District of Ohio is neither home to the corporation nor where the derailment took place, and the company's lobbying in the state capitol was not enough to keep the suit there.

Court records show that Norfolk Southern's bid to change venue is scheduled for a hearing Aug. 17.

The case is Bucks County Employees Retirement Systems v. Norfolk Southern Corp. et al., case number 2:23-cv-00982, in the U.S. District Court for the Southern District of Ohio.

New Rules for Railroads Draw Challenges

Norfolk Southern's alleged failures leading up to the derailment have led to calls at both the state and federal levels for stricter regulation of major rail carriers to prevent similar disasters in the future.

The U.S. Department of Transportation has **called for a requirement** that railroads keep real-time records of any hazardous materials their trains are moving, and that they immediately pass that information on to emergency responders in the event of a derailment, crash or spill.

Meanwhile, Ohio's \$13.5 billion transportation funding bill passed in March with provisions that mandated at least two crew members aboard trains at all times. A **bill currently in the Pennsylvania Legislature** includes a similar minimum crew requirement and would give additional oversight powers to the state Public Utility Commission.

But a trade group for the largest railroads **filed a federal lawsuit** in late June claiming that Ohio's blanket, no-exceptions crew requirement runs afoul of laws that reserve economic regulation of railroads for the federal government. That suit is awaiting a pretrial hearing in Ohio's Southern District, court records show.

In contrast, the Transportation Trades Department of the AFL-CIO, representing U.S. freight rail workers, issued a statement on the anniversary of the derailment supporting additional regulations.

"Rail companies have lobbied to evade or weaken safety provisions, such as the two-person crew minimum staffing standard in legislation pending before Congress. They have also sought to gut proposed safety requirements for rail inspections, defect detectors, and more," the statement said.

"Congress must pass a comprehensive rail safety bill that addresses the issues rooted in the industry's current operating practices. Absent these federal actions, rail corporations will keep choosing Wall Street over Main Street and rail safety will further deteriorate."

Representatives for Norfolk Southern did not immediately respond to requests for comment.

The case is Association of American Railroads v. Yost et al., case number 2:23-cv-02096, in the U. S. District Court for the Southern District of Ohio.

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