

IN THE SUPREME COURT OF OHIO

NORFOLK SOUTHERN RAILWAY  
COMPANY,

Plaintiff-Appellant

v.

HOMER R. BOGLE, *et al.*,

Defendants-Appellees

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Case No. 2006-1025

On Appeal from the Court of Appeals  
Eighth Appellate District Cuyahoga  
County, Ohio, Case No. 86339

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MERIT BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS  
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT  
NORFOLK SOUTHERN RAILWAY COMPANY

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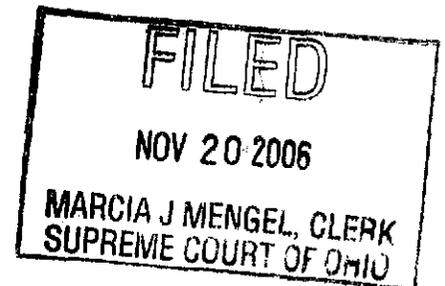
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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

*Amicus Curiae* Association of American Railroads (“AAR”) is an incorporated, nonprofit trade association representing the nation’s major freight railroads and Amtrak. AAR’s members operate approximately 78 percent of the rail industry’s line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts, and administrative agencies in matters of common interest.

One such matter is the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. §§ 51–60, a tort-based law through which railroad employees injured in the course of their employment may seek compensation from their employers. In 1908, Congress enacted the FELA to provide a progressive remedy to railroad workers, who, at the time, suffered a high rate of on-the-job injuries.<sup>1</sup> The FELA replaced the common law of the several states with a nationally uniform compensation scheme. *See New York Cent. R.R. v. Winfield* (1917), 244 U.S. 147. Since 1908, the FELA has been the exclusive remedy of railroad workers against their employer and stands in the place of the no-fault workers’ compensation laws that apply to virtually all other American workers.

During the era in which the FELA was enacted, negligence law was an unrefined instrument and typically made recovery for personal injury difficult to come by. To promote recovery, the FELA made significant changes to the prevailing law by eliminating some of the existing common law defenses. For example, rather than adopting the common law rule that barred a claim when there was any contributory negligence by the plaintiff, Congress opted for a

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<sup>1</sup> Congress enacted FELA initially in 1906 and, after addressing constitutional flaws in the original statute, again in 1908. *See Howard v. Illinois Cent. R.R.* (1908), 207 U.S. 463; *Second Employers’ Liability Cases* (1912), 223 U.S. 1.

comparative negligence scheme. 45 U.S.C. §53. The defense of assumption of the risk also was eliminated, 45 U.S.C. §54, as was the fellow servant doctrine. *See Chesapeake & Ohio Ry. Co. v. De Atley* (1916), 241 U.S. 310, 313. Notwithstanding these recovery-promoting revisions to common law, the FELA was designed as a fault-based statute, with the employee required to prove the traditional elements of negligence—duty, breach, foreseeability and causation—to recover. *See Roberts v. Consolidated Rail Corp.* (C.A. 1, 1987), 832 F.2d 3, 6; *Davis v. Burlington Northern, Inc.* (C.A. 8 1976), 541 F.2d 182, 185, *cert denied*, (1976) 400 U.S. 879. Although the FELA was enacted primarily to provide compensation to railroad employees for the physical perils of the job, *Consolidated Rail Corp. v. Gottshall* (1994), 512 U.S. 532, 542, injuries caused by occupational exposure to harmful substances also are compensable. *Urie v. Thompson* (1949), 337 U.S. 163, 180 (“[S]ilicosis is within the statute’s coverage when it results from the employer’s negligence.”).

The FELA predated, and stands in contrast to, the workers’ compensation laws that today cover work-related injuries in virtually every other industry in the United States and provide benefits to workers injured on the job on a no-fault basis. Despite the tort system having been long ago discarded as the means of compensating employees for workplace injuries,<sup>2</sup> the FELA remains intact and results in a significant amount of litigation between railroads and their employees. Thousands of FELA lawsuits are filed annually, and railroads spend substantial sums of money every year defending those lawsuits and in payment of FELA settlements and judgments.

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<sup>2</sup> No-fault workers’ compensation laws of general application were enacted by the states beginning with New York in 1910, and the last was adopted in 1948. *See Fishback & Everett Kantor, The Adoption of Workers’ Compensation in the United States, 1900-1930*, 41 J.L & ECON. 305, 320 (1998). Other than railroad employees, only seamen, by virtue of the Jones Act, 46 U.S.C. § 688, are covered by a fault-based compensation law.

Not only are large numbers of FELA cases filed annually, significant numbers of these cases tend to be filed in a handful of jurisdictions, deliberately chosen because of perceived advantages to FELA plaintiffs. This patent forum shopping is facilitated by the broad venue provision of the FELA, under which railroads are subject to the jurisdiction of either state or federal courts in any district in which the railroad does business. 45 U.S.C. § 56. As a result, the FELA provides wide latitude to plaintiffs to choose the jurisdiction where the suit is litigated, permitting the filing of suits where there is little connection between the facts and circumstances of the underlying cases and the forum state. Moreover, even though the FELA is a federal statute, plaintiffs can ensure that FELA cases will be heard in state court if deemed advantageous, as lawsuits brought in state court cannot be removed. 28 U.S.C. § 1445(a). Although some courts will apply the doctrine of *forum non conveniens* to dismiss FELA suits with little connection to the forum, other jurisdictions, like Cuyahoga County, appear unwilling to utilize that judicial tool in FELA cases. *See, e.g., Hess v. Norfolk Southern Ry. Co.* (Cuyahoga Cty. 2003), 153 Ohio App.3d 565, 570–573 (denying railroad’s motion to dismiss FELA suit filed in Ohio for *forum non conveniens* even though all the plaintiffs resided, worked, and were allegedly injured in North Carolina.) Thus, plaintiffs are generally successful in focusing on jurisdictions with both favorable juries and welcoming courts.

This case involves a common subspecies of FELA litigation: claims alleging injury from workplace exposure to asbestos, which, in recent years, have accounted for over a third of all the FELA lawsuits. In 2004, the Ohio General Assembly enacted Am. Sub. H.B. No. 292 (H.B. 292), which sets forth certain procedures that a plaintiff must satisfy to proceed with an asbestos claim in Ohio courts. Norfolk Southern, a railroad that is subject to FELA asbestos suits in Ohio, brought a complaint for declaratory judgment seeking a ruling that this newly-enacted statute

applies to actions brought under the FELA and now appeals an adverse judgment below. *See Norfolk Southern Ry. Co. v. Bogle* (Cuyahoga Cty. 2006), 166 Ohio App.3d 449. The outcome of that appeal is of great interest to AAR's member railroads as it will impact all pending and future FELA asbestos suits in Ohio courts.

The FELA's susceptibility to forum shopping makes this an especially important case for the railroad industry. The railroad industry is enmeshed in its third decade of substantial asbestos litigation under the FELA. The use of asbestos in the rail industry ended for the most part in the 1950s when steam engines were replaced by diesel locomotives. Beginning in the 1980, and continuing today, railroads have seen many thousands of FELA claims alleging asbestos-related injuries by rail employees. Just as Ohio is a popular venue for asbestos lawsuits in general,<sup>3</sup> it is a popular venue for the filing of asbestos suits brought under the FELA. Moreover, mirroring asbestos litigation in general, the vast majority of FELA asbestos claimants have little, if any, physical impairment as a result of their alleged exposure. Given the ease with which cases can be imported into a state's courts, all of the 33 railroads that operate in Ohio may potentially face FELA asbestos suits in Ohio courts, even in cases having little connection to Ohio. All of these claims would potentially be impacted by this Court's ruling in this case and, if the ruling below is upheld, railroads will be the only Ohio asbestos defendants against which plaintiffs will not have to comport with the procedural requirements of H.B. 292.

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<sup>3</sup> *See* H.B. 292, Section 3(A)(3)(b) ("Ohio is one of the top five state court venues for asbestos filings").

## STATEMENT OF THE CASE AND FACTS

AAR adopts the Statement of the Case and Facts set forth in the Merit Brief of Plaintiff-Appellant Norfolk Southern Railway Company.

### ARGUMENT

**Proposition Of Law: The criteria and the administrative dismissal process set forth in R.C. 2307.92 and R.C. 2307.93 are procedural and not substantive and are thus applicable to asbestos-related FELA/LBIA claims filed in state court without offending the Supremacy Clause of the United States Constitution or the doctrine of federal preemption.**

**A. Mass filings by unimpaired asbestos claimants, including many potentially fraudulent claims, has led to an asbestos litigation crisis that cries out for a legislative solution.**

Asbestos litigation has bedeviled the railroad industry for years, just as it has a wide swath of American business and industry, and is a trend that continues unabated. In a recent FELA case, the U.S. Supreme Court repeated its admonition that the “elephantine mass of asbestos cases’ lodged in state and federal courts ‘defies customary judicial administration and calls for national legislation.’” *Norfolk & Western Ry. Co. v. Ayers* (2003), 538 U.S. 135, 166, quoting *Ortiz v. Fireboard Corp.* (1999), 527 U.S. 815, 821. Congress has taken up the Supreme Court’s challenge, but thus far has struggled with crafting an appropriate resolution. One proposed legislative solution to the asbestos crisis considered during the current congressional session would replace the tort system as the venue for resolving asbestos claims with an administrative system designed to provide defined levels of compensation to claimants based on the nature of their impairments. See S. 852, *The Fairness in Asbestos Injury Resolution Act of 2005*, 109<sup>th</sup> Cong. (2005). Although Congress has yet to reach a consensus on the contours of the new approach, it has clearly identified the scope and severity of the problems that it is attempting to address.

The magnitude of the problem is immense. Today, there are over 8,000 asbestos defendants who have been named in asbestos suits, up from approximately 300 in the 1980s. S. Rep. 109-97 at 12 (2005). As of a few years ago, an estimated 200,000 asbestos cases were pending, and more than 600,000 individual claimants had brought claims, with a potential for another 2.7 million additional claims to be filed in the future. *Id.* at 17. Over 70 companies have gone into bankruptcy as a result of asbestos claims, with more entering bankruptcy in the first half of this decade than in the previous three decades combined. *Id.* at 14. This has led to significant job loss and economic disruption. *Id.* The real problem however, has been the inability of the system to provide fair and prompt compensation to those in need.

The number of asbestos claims has exploded in the past decade, “overwhelm[ing] the ability of the courts to provide fair, individualized justice in a timely manner.” *Id.* at 16. One of the primary culprits identified by Congress is the multitude of claims filed by unimpaired plaintiffs that have so overwhelmed the system and diverted resources so as to make it likely that many seriously injured plaintiffs will be unable to recover. Congress concluded that a substantial number of the claims “are brought by people with no impairment” and that “[s]uch a trend threatens to deplete the amount of funds available to compensate future, legitimately impaired asbestos victims. . . . For claimants, the flood of cases has meant delay, inequitable compensation, and increasing uncertainty that the defendants responsible for their injury will remain solvent and able to compensate their claims.” *Id.*

The U.S. Supreme Court has recognized this problem as well. *See Amchem Products, Inc. v. Windsor* (1997), 521 U.S. 591, 598. (“[D]ockets in both federal and state courts continue to grow; long delays are routine; . . . transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose

altogether.”) Compounding these problems is the emergence of evidence of potential fraud. In fact, concern over the methods that have been employed for generating asbestos claims has been longstanding. *See, e.g., Raymark Ind., Inc. v. Stemple* (1990 D. Kan.), 1990 WL 72588. Evidence brought forth in recent litigation has underscored that concern.

In February 2005, a federal court in Texas conducted a hearing pursuant to *Daubert v. Merrell Dow Pharm., Inc.* (1993), 509 U.S. 579, in the context of multidistrict litigation involving over 10,000 silicosis claims, *i.e.*, claims alleging an injury contracted from inhalation of silica dust. *In re Silica Products Liability Litigation* (S.D.Tex. 2005), 398 F.Supp.2d 563. After the hearing, the court found the testimony of the plaintiffs’ doctors inadmissible under the *Daubert* standard. Significantly, the hearing revealed that thousands of the silica claimants—whose diagnoses were provided through mass screening companies hired by plaintiffs’ law firms—had previously made claims alleging they suffer from an asbestos-related disease. *Id.* at 603.

Further, over 1,800 of those dual diagnoses had been rendered by the same doctor. *Id.* at 608. Inasmuch as the likelihood of both diseases appearing in the same individual is remote, 398 F.Supp.2d at 595, citing *Hearings Before the Senate Judiciary Comm., Asbestos: The Mixed Dust and FELA Issues*, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. (February 2, 2005) (testimony of Dr. David Weill, Associate Professor of Medicine, University of Colorado), this finding calls into question the validity of one or both diagnoses in thousands of claimants. *See also* David Hechler, *Silica Plaintiffs Suffer Setbacks*, THE NATIONAL LAW JOURNAL, Feb. 28, 2005 (“One of the most explosive revelations that has emerged from the litigation is that at least half of the approximately 10,000 plaintiffs in the silica MDL had previously filed asbestos claims.”) To the extent fraudulent asbestos claims are processed through the tort system, expending great judicial

resources and soaking up available settlement dollars, they further exacerbate the problems experienced by the judicial system in providing timely and adequate compensation to the truly impaired claimants. *See Silica Products Liability Litigation*, 398 F.Supp.2d at 636; *see also* S. Rep. 109-97 at 16 (citing to a study finding that in 41 percent of claims audited, the claimant had no disease or the severity of disease was exaggerated.)

Concern over potential fraud in asbestos litigation also surfaced at congressional hearings. *See* S. Rep. 109-97 at 129. Although the extent to which outright fraud has exacerbated the asbestos crisis is unknown, there is a strong consensus that the crush of claims by unimpaired plaintiffs has created a litigation crisis of huge proportions. As a result, the paramount objective to emerge from Congress' effort to address the asbestos litigation crisis is to assure that truly impaired claimants have first priority at recovery. A corollary goal is to weed out fraudulent and frivolous claims. If and when Congress enacts comprehensive legislation addressing asbestos claims, it will establish a uniform approach of national applicability and preempt state law. At this time, however, federal legislation addressing the asbestos crisis is far from being enacted into law.

**B. H.B. 292 is the Ohio legislature's attempt to manage the asbestos litigation in the State's courts, including cases brought under the FELA, in the absence of a national solution to the asbestos litigation crisis.**

In view of the failure of Congress to move rapidly in this area, states like Ohio are filling the breach. Not surprisingly, the problems identified by the Ohio General Assembly that led to enactment of H.B. 292 parallel those identified by Congress. Specifically, the Ohio General Assembly found that "[t]he extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts," that "the vast majority of Ohio asbestos claimants . . . do not suffer from an asbestos-related impairment," and that "sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick." The General Assembly also found that

“Ohio has become a haven for asbestos claims” and that “[a]t least five Ohio-based companies have been forced into bankruptcy because of an unending flood of asbestos cases brought by claimants who are not sick.” *See* Sec. 3. The General Assembly observed:

The public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants’ ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits, and savings of the state’s employees and the well being of the Ohio economy.

Sec. 3(A)(7).

Consistent with these legislative findings, in an effort to manage asbestos litigation in Ohio, H.B. 292 has two primary and related purposes: to prioritize among asbestos claims filed in Ohio courts to ensure that the more seriously injured claimants receive priority in the resolution of their claims and to weed out fraudulent claims. The purposes of H.B. 292 are just as applicable to FELA asbestos claims as they are to other asbestos claims and do not undermine any substantive rights under the FELA. Like all other asbestos claimants, FELA asbestos claimants must prove that they are injured and that their injury was caused by exposure to asbestos. Many thousands of asbestos claims, primarily by unimpaired plaintiffs, have been brought under the FELA. AAR’s large member railroads have advised AAR that over 18,000 such claims were brought in the five year period ending in 2004. Of this multitude of FELA asbestos claims, the overwhelming majority are filed by plaintiffs with little or no impairment. (Of the over 18,000 claims made during that recent five-year period, less than 1,000 alleged a malignancy.) In fact, the doctor who diagnosed numerous individuals with both asbestosis and silicosis, *see Silica Products Liability Litigation*, 398 F.Supp.2d at 604–08, has provided diagnoses for many FELA asbestos claimants, raising a question as to the legitimacy of those claims.

**C. H.B. 292 is not preempted with respect to FELA cases because it is a procedural tool rather than a substantive rule.**

Though a natural reading of the broad language of H.B. 292 covers asbestos claims brought under the FELA, see R.C. 2307.91(C) & (M), defendants have argued that the statute is inapplicable to FELA cases because it is preempted by the Supremacy Clause of the United States Constitution. AAR acknowledges that substantive federal law applies to FELA actions regardless of the forum in which the suit is brought and has vigorously argued in favor of that principle in other cases, including some in this Court. *See* Merits Brief Amicus Curiae of Association of American Railroads as *Amicus Curiae* in *Hess v. Norfolk Southern Ry. Co.* (filed May 3, 2004) (arguing that a state statute restricting the ability of the railroad to obtain setoff to account for settlement with other defendants may not apply to FELA cases because the measure of damages is a substantive issue). To the extent it establishes procedural requirements, however, H.B. 292 is applicable to FELA suits brought in Ohio courts and must be applied as it is to all other cases. *See St. Louis SW Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411.

The Ohio statute addresses the concerns raised by the mass of asbestos litigation, including those brought under the FELA, through utilization of procedural tools that are designed to prioritize claims in favor of truly injured claimants and weed out fraudulent claims. As it pertains to FELA cases, H.B. 292 calls for Ohio courts to enforce rights under the FELA in accordance with those procedural requirements. H.B. 292 serves a judicial gatekeeping function by mandating that certain evidentiary requirements be met at the outset of the litigation in order for a plaintiff to proceed with an asbestos lawsuit. Notably, H.B. 292 focuses on eliminating claims that manifest an indicia of fraud by requiring that the medical evidence offered by a plaintiff demonstrate a true asbestos-related impairment and be provided by a competent medical

authority—a requirement aimed at discouraging the kind of claim-generation practices that may be responsible for a large number of the “unimpaired” claims that are inundating the system.

To proceed with a lawsuit, claimants are required to submit evidence that demonstrates they are actually impaired as a result of exposure to asbestos. The statute specifically and directly addresses the serious concerns recently brought to light about the relationship between plaintiffs’ lawyers, mass screening companies, and physicians hired to diagnose claimants for the purpose of litigation. H.B. 292 requires evidence of a diagnosis by a “competent medical authority,” which is defined as, among other things, a doctor who has actually treated the claimant or has or had a doctor-patient relationship with the patient. *See Adams v. Harron* (C.A. 4 1999), 191 F.3d 447, 1999 WL 710326 (holding that a doctor hired by a law firm to interpret and classify x-rays in an effort to screen for potential asbestos plaintiffs and who failed to communicate cancer diagnosis to the plaintiff could not be held liable for medical malpractice because he did not have a physician-patient relationship with the plaintiff). The Ohio General Assembly has determined that one way to assure timely access to its court by truly injured asbestos plaintiffs is to require all asbestos plaintiffs to demonstrate that their claim is not based on the highly questionable, and apparently common, mass screening process. Contrary to the Court of Appeals’ decision in this case, to require FELA asbestos claimants to meet this requirement does not “gnaw” at the claimant’s substantive rights under the FELA. *Bogle*, 166 Ohio App.3d at 459.

To advance the goal of prioritizing asbestos claims, a *prima facie* showing under H.B. 292 must include evidence of a proper diagnosis by a competent medical authority. R.C. 2307.92(B)(3). Specifically, a doctor providing a diagnosis for the purpose of constituting *prima facie* evidence must actually be treating or have treated, or have a doctor-patient

relationship with, the plaintiff. Among other things, such a doctor may not have relied on reports or opinions of a doctor, clinic, laboratory, or testing company that (1) performed an examination, test, or screening of the plaintiff's medical condition without clearly establishing a doctor-patient relationship with the plaintiff or (2) required the plaintiff to agree to retain the services of a law firm sponsoring the examination, test, or screening. Further, to qualify as a competent medical authority, a doctor may not spend more than 25 percent of his or her professional practice time in providing consulting or expert services in connection with actual or potential tort action and may not derive more than 20 percent of his or her revenue from providing such services. R.C. 2307.91(Z)(1)-(4).

To permit this procedural tool to be utilized in FELA cases, as it is in all others, does not adversely impact the substantive rights of FELA claimants. FELA plaintiffs who can meet the procedural requirements of H.B. 292 are free to pursue their claims in accordance with all of the substantive rules of the FELA; those who cannot are free to pursue their claims whenever they are able to meet those procedural requirements. To the extent it gives priority to the truly injured FELA plaintiffs, it advances FELA's goal of compensating rail employee who suffer an injury. On the other hand, the failure to apply H.B. 292 to FELA claims will result in unimpaired FELA claimants being given equal priority in Ohio courts with seriously injured non-FELA claimants.

- 1. Federal courts have already concluded that cases initiated through mass screenings may be subject to administrative dismissal without prejudice.**

Federal courts are already using a similar procedural device in asbestos cases. *See In re Asbestos Products Liability Litigation (NO.VI)* (J.P.M.L. 1991), 771 F.Supp. 415. After concluding that what had "been a frustrating problem is becoming a disaster of major proportions . . . which the courts are ill-equipped to meet effectively," *id* at 418, all asbestos

cases filed in federal court were transferred to the Eastern District of Pennsylvania for coordinated pretrial proceedings pursuant to an order issued under 28 U.S.C. § 1407(a). In 2002, after years of experience, the presiding judge determined that it was necessary to implement procedures in order to give priority “to the malignancy and other serious health cases over the asymptomatic claims.” See Administrative Order No. 8. The court ordered that all cases initiated through mass screenings were to be subject to administrative dismissal without prejudice, with the tolling of all applicable statutes of limitation.

This is the same way that claims that do not meet the filing requirements of H.B. 292 are treated. See R.C. 2307.93(C). MDL plaintiffs may seek reinstatement of their cases, but they have the burden of showing “evidence of asbestos exposure and evidence of an asbestos-related disease.” Similarly, Ohio plaintiffs’ asbestos claims that are administratively dismissed may be reinstated when they can satisfy the evidentiary requirements of H.B. 292. Thus, FELA claimants who file suit in federal court have for several years been subject to a claims prioritization procedure that is similar to H.B. 292. If Administrative Order No. 8, which establishes that procedure, was tantamount to a substantive revision of the FELA, it would have been outside the authority of the court to apply it to FELA cases, yet it remains applicable today, including for FELA plaintiffs.

**2. The validity of “*Lone Pine*” Orders confirms that the *prima facie* requirements of H.B. 292 are procedural.**

Perhaps the most glaring defect with the Court of Appeals decision is that it failed to recognize that courts around the nation have long implemented case management orders requiring *prima facie* showings similar to those required by H.B. 292. Courts promulgate these orders pursuant to Federal Rule of Civil Procedure 16 (and the applicable states’ counterpart rule

of civil procedure) as failing within the wide discretion afforded trial judges over the management of their cases and thus are necessarily procedural in nature.

In the management of mass toxic tort litigation, for example, courts have recognized the utility of issuing pre-discovery case management orders, or what is often referred to as “*Lone Pine Orders*” after the seminal case of *Lore v. Lone Pine Corp.* (N.J. Super. Ct. Nov. 18, 1986), 1986 N.J. Super. LEXIS 1626. *Lone Pine Orders* require plaintiffs to make certain *prima facie* showings prior to any other discovery being conducted.

In *Lone Pine, supra*, a group of plaintiffs instituted an action against 464 defendants, asserting they had sustained a variety of injuries and that their properties depreciated in value because of polluted waters from a landfill. 1986 N.J. Super. LEXIS 1626 at \*3. At a case management conference, the court issued a case management order requiring the plaintiffs to produce the following information with respect to plaintiffs’ personal injury claims:

- Facts of each individual plaintiff’s exposure to alleged toxic substances at or from the landfill; and
- Reports of treating physicians and medical or other experts, supporting each individual plaintiff’s claim of injury and causation by substances from the landfill.

The order also required plaintiffs to produce the following information with respect to their property damage claims:

- Reports of real estate or other experts supporting each individual plaintiff’s claim of diminution of property value, including the timing and degree of such diminution and the causation of same; and
- Each individual plaintiff’s address, including tax block and lot number, for the property alleged to have declined in value.

*Id.* at \*3-4.

In explaining its rationale for entering such an order, the court noted that “organization was required to manage the case.” *Id.* at \*2. The court did not view its order as imposing a

difficult burden for plaintiffs to meet, noting that the order merely required “the basic facts plaintiffs must furnish in order to support their claims.” Indeed, the court noted this information, including “preliminary expert reports,” should have been obtained “prior to filing suit.” *Id.* at \*8. See also *In re Mohawk Rubber Co.* (Tex. App. 1998), 982 S.W.2d 494 (holding that a trial court erroneously denied a request to issue a *Lone Pine* Order).

The *prima facie* requirements that are often found in *Lone Pine* Orders are similar to those in H.B. 292. Courts utilizing *Lone Pine* Orders confirm that the requirement that a plaintiffs make certain *prima facie* showings prior to discovery is not a change in the law that “gnaws” at the substantive rights of plaintiffs (regardless of whether those substantive rights are governed by the FELA or some other substantive law). On the contrary, these courts implement *Lone Pine* Orders pursuant to the trial court’s discretion under the applicable Rules of Civil Procedure. If such orders “gnawed” at the substantive rights of plaintiffs (as the Court of Appeals concluded), then the trial courts would not be permitted to issue them.

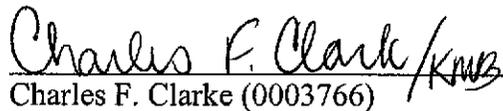
### CONCLUSION

Ohio is at the forefront of states that, in the absence of a comprehensive solution from Congress, have adopted administrative procedures to deal with the “elephantine mass of asbestos cases.” Appellees have chosen to bring their actions in Ohio’s state court system. Given the FELA’s liberal venue provisions, most no doubt were equally able to file their suits in other jurisdictions. Having chosen to file suit in Ohio courts, however, they have no cause to complain about being subject to the pleading requirements of H.B. 292. Exempting FELA claims from H.B. 292 would thwart Ohio’s attempt to manage its asbestos docket by prioritizing claims in a rationale manner and taking reasonable steps in an effort to weed out fraudulent claims. When an FELA plaintiff “chooses to bring his case in a state court, he must take the procedure therein

as he finds it.” *Atlantic Coast Line v. Strickland* (Ga. App. 1953), 74 S.E.2d 897, 910; *see also Texas & N.O. R.R. v. Pool* (Tex. App. 1953), 263 S.W.2d 582, 589 (“[B]y the institution of his suit [plaintiff] invoked the jurisdiction of the State Courts and the suit must be tried as any other suit for damages for negligence is tried in the Sate Courts, provided there is a specific compliance with the federal Statutes.”).

For all of the foregoing reasons, the Association of American Railroads as *Amicus Curiae* respectfully requests that this Court reverse the decision of the Eighth Appellate District Court of Appeals.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merits Brief of the Association of American Railroads as *Amicus Curiae* in Support of the Plaintiff-Appellant Norfolk Southern Railway Company was served by regular U.S. Mail, postage prepaid, this 20th day of November 2006 to the following:

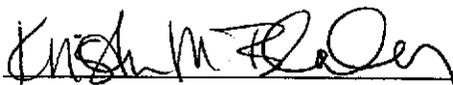
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