No. 10-235

In The
Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MCBRIDE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN TRAIN DISPATCHERS ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION, BROTHERHOOD OF RAILROAD SIGNALMEN, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS & BLACKSMITHS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, NATIONAL CONFERENCE OF FIREMEN & OILERS DISTRICT OF LOCAL 32 BJ, SEIU, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, TRANSPORT WORKERS UNION OF AMERICA, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION AND UNITED TRANSPORTATION UNION IN SUPPORT OF RESPONDENT ROBERT MCBRIDE

CLINTON J. MILLER, III
General Counsel
UNITED TRANSPORTATION UNION
24950 Country Club Blvd.
Suite 340
North Olmsted, Ohio 44070
(216) 228-9400

HAROLD A. ROSS*
Counsel for Brotherhood of Locomotive Engineers and Trainmen
1370 Ontario St., Mezzanine
Cleveland, Ohio 44113
(216) 241-2630
haross1@ble-t.org
**Counsel of Record*

Counsel for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The American Train Dispatchers Association (ATDA), Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees Division (BMWED), Brotherhood of Railroad Signalmen (BRS), International Brotherhood of Boilermakers & Blacksmiths (IBBB), International Brotherhood of Electrical Workers (IBEW), National Conference of Firemen & Oilers District of Local 32 BJ, SEIU (NCFO), Sheet Metal Workers International Association (SMWIA), Transport Workers Union of America (TWU), Transportation Communications International Union (TCIU) and United Transportation Union (UTU) (collectively "Rail Labor Coalition") are employee associations and labor unions organized under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*[1]

ATDA is the collective bargaining representative for the craft of train dispatchers; BLET, locomotive engineers; BMWED, maintenance of way employees; BRS, signalmen; IBBB, boilermakers; IBEW, mechanical

[1] Pursuant to Rule 37.6, the *Amici Curiae* unions (Coalition) state that no person or entity other than the Coalition has made any monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part. Petitioner and Respondent have consented to the Rail Labor Coalition's filing of a brief.

and communications electricians; NCFO, roundhouse and mechanical shop laborers; TCIU, clerical employees and carmen; TWU, carmen and cleaners; and UTU, conductors and other train service employees. Petitioner and Respondent have consented to the Rail Labor Coalition's filing of a brief.

Most of the members of the Rail Labor Coalition represent the employees on all of the nation's major freight railroads, Amtrak and many of the regional and short line railroads. Some of them have existed since 1863 and most were extant when the Federal Employers' Liability Act (FELA) was enacted in 1908. Together they represent well over 90% of the workers employed by the railroad industry and, separately or joined as here, have frequently appeared before Congress, administrative agencies, such as the Federal Railroad Administration (FRA) and the National Transportation Safety Board, and the courts on matters important to rail labor. Coalition members have participated in past FELA cases before this Court, such as *Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158 (2007), and *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003).

In virtually every congressional session during the past several decades, Rail Labor Coalition members have been forced to resist lobbying efforts by the railroad industry to abolish or weaken FELA. Most recently in 2007, the main lobbyist for the rail industry, the Association of American Railroads (AAR), asked Congress to modify the causation standard recognized

in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957), to proximate cause; however, no action was taken to change the standard. *The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of Ameican Railroads: Hearing Before the House Committee on Transportation and Infrastructure*, 110th Cong., 1st Sess., 238, 243-46 (Oct. 25, 2007) (statement of Edward Hamberger, President of AAR). In sum, for over 50 years, these efforts have failed and the 100-year old Act has remained unchanged.

The major purpose of FELA was the promotion of safety within the railroad industry. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329-30 (1958). In light of the safety purposes of the statute, the Court has recognized that FELA imposes a continuing and non-delegable duty on railroads to provide their employees with a reasonably safe place in which to work. *Bailey v. Vermont Central Ry. Co.*, 319 U.S. 350, 353 (1943). The position asserted by the railroad industry in this case, as a practical matter, would mean that railroads no longer have this duty, and that there would be no effective deterrent to their negligence.

FELA was also intended as remedial legislation to facilitate recovery by workers who are injured or killed in the course of their railroad employment. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Congress desired for injured workers to receive fair compensation for their injuries. In order

to serve Congress' humanitarian purposes in enacting FELA, the Court has consistently held that FELA altered some harsh common-law rules and thereby "shift[ed] part of the human overhead of doing business from employees to their employers." *Ayers*, 538 U.S. at 145.

In this case, the Coalition has a clear interest in assisting rail employees in protecting their rights and hopes to aid the Court in vindicating an important protection for railroad workers and public safety that is threatened by the rail industry's position herein.

SUMMARY OF ARGUMENT

The Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, was adopted in 1908 as the safety law for railroad workers, one of the most hazardous occupations in the nation then and now. Also, then and now, the standard of causation to recover for a workplace injury is stated in the Act as "resulting in whole or in part from the negligence" of the railroad employer. 45 U.S.C. § 51.

From adoption of the FELA, its safety purpose and the humanitarian aspect thereof were consistently thwarted by application of traditional common law defenses. This failure to reduce the number of injuries to rail workers and to create a safe place for them to work led to the 1939 amendments of the FELA. Those amendments broadened the scope of the statute, abolished the assumption of risk defense in all

cases, extended the statute of limitations by fifty percent, and criminalized suppression of the voluntary furnishing of information concerning a FELA case. At the same time, the Congress expressly declined to narrow causation by requiring proximate cause as a basis for liability. *See Wilkerson v. McCarthy,* 336 U.S. 53, at 68 (1949) (Douglas, J., concurring (citing H.R. Rep. No. 1386, 60th Cong., 1st Sess., 2 (1908)). By reason of the adoption of a comparative negligence standard in 1908, establishment of a proximate cause standard was unnecessary; the trier of fact as to whether the employee's injury resulted "in whole or in part from the negligence" of both the employee and the employer must consider the extent of the negligence by either or both at the same time in reaching its decision as to each party's percentage of liability. *See Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 168 (2007).

Notwithstanding the consistent demand of the railroads to change the standard of causation to proximate cause, the Congress has refused to do so and the courts have applied a relaxed causation standard. *See Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 543 (1994); *also see Norfolk Southern Ry. Co. v. Sorrell, supra* at 177 (Ginsburg, J., concurring).

By 1970, it had become inescapable that the first safety law applicable to the rail industry, the Safety Appliance Act of March 2, 1893, 27 Stat. 531, currently 45 U.S.C. §§ 20301-20305, and successor safety statutes did not, even with the FELA, sufficiently

protect railroad employees or the public from unsafe railroad operations. The enactment of the Federal Railroad Safety Act of 1970 was the first statutory revision of railroad safety laws and was intended to create the means to build on the FELA safety enhancements in a significant way in the rail industry. The Federal Railroad Administration (FRA), which had been created by the Department of Transportation Act of 1966, was assigned, among other things, certain enforcement powers. However, by 1974, some in Congress were dissatisfied with the interim results. Hearings were held, and the response was adoption of Section 203 of the Rail Safety Improvement Act of 1974.

The congressional dissatisfaction with the FRA became more pronounced in 1975, when the House Committee on Intrastate and Foreign Commerce stated: "The Committee feels that these statistics [from a consulting firm contracted by the FRA to study its rail safety enforcement and inspection programs] are telling that the Federal Railroad Administration (FRA) is not doing its job adequately." This lack of success on the part of the agency led Congress to enact several amendments to put some teeth into FRA's enforcement activities. Nevertheless, enforcement by the FRA has been largely ineffectual in the four decades following 1970. In turn, the failure to meet the expectations for the safety laws resulted in Congress broadening the FELA again, this time to deem FRA safety regulations – as well as rail safety regulations in states that participate jointly

with FRA in rail safety investigative and surveillance activities – to be statutes in the application of FELA's Section 3 bar on contributory negligence when a carrier has violated a statute enacted for the safety of employees (P.L. 103-272, § 4(i), July 5, 1994, 108 Stat. 1365), and led to passage of the Rail Safety Improvement Act of 2008, P.L. 110-432.

Although it may be asserted that these efforts have resulted in a reduction of railroad accidents and a drop in FELA claims, and, therefore, public policy permits a relaxation in applying FELA with a proximate cause standard and the enforcement of the FRA's regulations without further changes or more aggressively, a comparison of the available data shows otherwise. Moreover, the FRA has primarily promulgated only minimum safety standards. *See*, *e.g.*, 49 C.F.R. §§ 213.1, 214.1(b), 215.1, 218.21, 218.31, 219.1(b), 220.1, 221.1, 223.1, 229.1, 230.1, 232.1(a), 234.1, 236.0, 238.1(b), 239.1(b), and 240.1(b).

In sum, the FELA continues to be the cornerstone of the broad, remedial scheme to promote rail safety that Congress has fashioned and desires enforced. 49 U.S.C. § 103(c). This Court has construed the FELA's "in whole or in part" standard as "simple and direct" and has held that consideration "of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purpose." *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949). To make it more difficult for an injured or deceased railroad employee to establish negligence by the introduction of a proximate cause standard in the FELA

would cause safety to suffer. Railroads could relax safety protections except for the minimum standards promulgated by the Department of Transportation and the Department of Labor's Occupational Safety and Health Administration. This, in turn, would increase a railroad's willingness to cut corners and endanger lives. The FELA remains the most effective incentive for railroads to maintain a safe workplace. A change from the relaxed causation standard to proximate causation will eliminate that incentive. The legislative history of FELA, more than 70 years of congressional consideration of proposals to either introduce a proximate cause standard or repeal the Act in its entirety, and the fact and data driven recent actions by the Congress to broaden remedial protection for railroad workers who are injured on the job all militate most strongly against the Petitioner's arguments requesting the Court to legislate such change.

———♦———

ARGUMENT

I. THE FEDERAL EMPLOYERS' LIABILITY ACT FULFILLS AND CONTINUES TO ENHANCE THE SAFETY PURPOSE OF THE SCHEME DEVELOPED BY CONGRESS TO REDUCE THE NUMBER AND SEVERITY OF EMPLOYMENT ACCIDENTS TO RAIL WORKERS.

A. The FELA Was the Congressional Response to Unique Railroad Industry Hazards.

The hazards facing railroad workers at the time of the FELA's enactment in 1908 is well documented. Citing the Second Annual Report on the Statistics of Railways in the United States to the Interstate Commerce Commission for the Year Ending June 30, 1889 (Washington, D.C. 1890), at 36-38, one scholar has stated:

> "When the newly established Interstate Commerce Commission (ICC) released the first national report of railroad accident statistics in 1889, railroad companies revealed that one out of every 375 employees had been killed in the previous year. One out of 35 had been injured. Running trade members faced even greater risks. Nationally, one out of 117 men employed in the running trades had been killed. One out of every 12 trainmen had been injured on the job during the previous year."

Williams-Searle, John, "Risk, Disability, and Citizenship: U.S. Railroaders and the Federal Employers'

Liability Act," DISABILITY STUDIES QUARTERLY, Vol. 28, No. 3 (2008), http://www.dsq-sds.org/article/view/113/113. This carnage was so severe that in 1892 Edward A. Moseley, secretary of the Interstate Commerce Commission (ICC), found it "appalling . . . that more of the grand army of railway men of this country were cut and bruised and maimed and mangled last year than all the Union wounded and missing on the bloody field of Gettysburg." *Id.*, citing RAILROAD TRAINMEN'S JOURNAL 10 (Nov. 1893) at 938.

Passage of the Safety Appliance Act (Mar. 2, 1893, 27 Stat. 531), which made air brakes and automatic couplers mandatory on all trains in the United States, only made a minuscule reduction in the number of casualties. As another author reports:

> "By the turn of the twentieth century, work related accidents killed one in three hundred railroad employees each year and one in fifty was injured in an accident. In 1908 alone, 281,645 employees were injured at work, and some 12,000 killed."

Witt, John Fabian, "Federal Employers' Liability Act (1908)," Major Acts of Congress, 2004, http://www.encyclopedia.com.

As conceded by *amicus* Association of American Railroads (AAR) in its brief in support of grant of the petition, the FELA was enacted "in response to what was perceived as an intolerably high injury rate in the railroad industry," referring to the ICC, Statistics of Railways in the United States 1908. AAR Brief on

Petition at 13 & n.6. The dire situation had been acknowledged in the preceding decade, when "President Harrison had admonished Congress to act to protect rail employees, a plea which resulted in enactment of the Safety Appliance Act, c.196, 27 Stat. 531 (1893), the first federal railroad safety legislation. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904)." *Id.* As previously noted, this law was a modest approach which had minuscule effect.

With this manslaughter taking place, the Congress was forced to directly address the travesty and in 1906 passed the Employers' Liability Act. The legislation, as written, was found unconstitutional because its exercise was beyond the power vested in the federal government by the Commerce Clause. *See The Employers' Liability Cases*, 207 U.S. 463 (1908). Congress corrected the infirmities in the law almost immediately thereafter by enacting the FELA in 1908, which passed constitutional muster in the *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

Clearly, the FELA was adopted in 1908 as the primary safety law for railroad workers. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329-30 (1958). In view of the safety purpose of the Act, this Court has recognized that the statute imposes a continuing and non-delegable duty on railroads to provide their employees with a reasonably safe place to work. *Bailey v. Vermont Central Ry. Co.*, 319 U.S. 350, 353 (1943). FELA is the cornerstone of the congressional scheme to reduce railroad accidents and injuries. Then, as now, the standard for causation

to recover for an injury in the railroad workplace is stated in the Act as "resulting in whole or in part from the negligence" of the railroad employer. 45 U.S.C. § 51. This statutory scheme, based on FELA and the Safety Appliance Act, was supplemented by empowering the ICC to issue rules, orders and standards to address safety and risk issues.[2]

However, the humanitarian and remedial purposes of the FELA, which provided strength to the overall safety scheme, were consistently thwarted by application of traditional common law defenses, which led to the 1939 amendment of the FELA. Those amendments covered more rail workers, abolished the defense of assumption of risk in all cases, extended the statute of limitations from two years to three years, criminalized the suppression of the voluntary furnishing of information concerning a FELA claim and reaffirmed the comparative negligence standard. Thus, the amended FELA was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all of these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence, as this Court has held on innumerable occasions.[3] During the

---

[2] The ICC maintained bureaus and/or divisions having jurisdiction over: safety, generally; safety appliances; locomotive inspection, including boiler inspection; accidents; hours of service; and several other aspects of rail safety. *See*, http://www.archives.gov/research/guide-fed-records/groups/399.html.

[3] The brief of *amicus curiae* AAR goes to great lengths to argue that the FELA's relaxed causation standard improperly

(Continued on following page)

first decades of FELA's existence, judges had permitted numerous defenses so that the employer was often effectively insulated from liability even though it was responsible for the unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from the employees the "prodigious burden" of personal injuries which that system had placed upon them, and to relieve workers "who by the exigencies and necessities of life are bound to labor" from the risks and hazards that could be avoided or lessened "by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work." *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (citing H.R. Rep. No. 1386, 60th Cong., 1st Sess., 2 (1908)).

---

transforms it into "a no-fault type" statute. *See* AAR Brief at pp. 5-7, 15-21. More than a century of administration of the FELA by the courts plainly belies this claim, as the various reporters are well populated with opinions denying recovery to injured railroad workers because the FELA's relaxed causation standard under assault here was not met in those cases. *See*, *e.g.*, *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994). Because AAR-member railroads continue to argue in all venues – and not without success – that particular FELA claims should be denied as a matter of law because railroads are not insurers under the liability-based statute, AAR's disingenuous argument that any standard below proximate cause creates a hybrid FELA/no-fault system should be vigorously rejected.

B. Congress Has Consistently Expressed the Long-Standing Intent to Afford Railroad Workers Injured on the Job Broad Statutory Protections Under the Scheme Based Upon FELA Safety Laws.

As noted at page 4, *supra*, the FELA of 1908 adopted a causation standard of injury to a railroad worker engaged in interstate commerce, or in the case of a fatality to the estate of a railroad worker, "resulting in whole or in part from the negligence of a common carrier" by railroad who employs such worker. 45 U.S.C. § 51. Obviously, this standard is not the common law "proximate cause" standard. That Congress intended a relaxed standard, and not the common law standard for causation, was reaffirmed when Section 54 of Title 45, U.S. Code, was retained in 1939 as it was written in 1908 to include those exact words, after Congress twice considered, and rejected, raising the standard to proximate cause. *Black's Law Dictionary* 1391 (4th ed. 1951) defines "proximate cause" in the following terms:

> "The last negligent act contributory to an injury, without which such injury would not have resulted. *Estep v. Price*, 93 W. Va. 81, 115 S.E. 861, 863. The dominant cause. *Ballagh v. Interstate Business Men's Acc. Ass'n*, 176 Iowa 110, 155 N.W. 241, 244, L.R.A. 197A, 1050. The moving or producing cause. *Eberhardt v. Glasco Mut. Tel. Ass'n*, 91 Kan 163, 139 P. 416, 417. . . . The efficient cause; the one that necessarily sets the other

causes in operation. *Baltimore & O. R. Co. v. Ranier*, 84 Ind. App. 542, 149 N. E. 361, 364."

The statutory language on its face is clearly distinguishable from proximate cause, which is used in the sense of the main or direct cause. The latter's interpretation and application is totally removed from Congress' intent to provide a relaxed comparative negligence standard in 1908, which was retained as such in 1939 by Congress, and later reaffirming it by rejecting amendments to replace that standard with proximate cause. Indeed, it is antithetical to the very structure of FELA to conclude that congressional intent was to impose a proximate cause standard, when liability is determined under the FELA by explicitly recognizing multiple causes, with the trier of fact determining the percentage of fault to be assigned each actor.

The railroad industry has made continuous, strident efforts to limit or negate the FELA's intended statutory protections for railroad workers injured on the job since its adoption. First, as noted at 11, *supra*, the initial Employers' Liability Act was successfully challenged on constitutional grounds. Then, when the FELA was found to be within the power of Congress to regulate interstate commerce, the railroads undermined the law by various artifices, forcing Congress to amend the statute, including prescribing civil and criminal penalties for suppressing voluntary information concerning a FELA claim. These efforts were redoubled when the proposed amendments of 1939 were revealed. In amending the FELA,

the Congress declined to include proximate cause as the basis for liability. An amendment proposed that year would have revised Section 4 to read: "In any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his employment in any case where . . . the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death of such employees." *See* 42 Cong. Rec. 10,710 (1939) (emphasis added). This followed up on a similar amendment proposed the preceding year. *See* H.R. Rep. No. 75-2153, at 1 (1938). However, those amendments were rejected by Congress, and Section 4, 45 U.S.C. § 54, following the 1939 amendments – and to the present day – states that "[i]n any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his employment in any case where such injury or death *resulted in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier. . . ." (emphasis supplied).

Even though these attempts to introduce a proximate cause standard into FELA preceded the standard clearly articulated in *Rogers v. Missouri Pacific R.R. Co.,* 352 U.S. 500 (1957) – the precedent that is under direct attack here – Congress must be presumed as being aware of this Court's interpretation of the statute. *Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978). In fact, not only has Congress not acted to reverse *Rogers*, it has rejected repeated attempts by the industry to repeal the FELA, each

time effectively approving the holding in *Rogers*. *See*, *e.g.*, *Federal Employers' Liability Act: Hearing before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. (1989); *Railroad Safety Programs: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 102nd Cong., 1st Sess., 178-80 (1991); *The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of American Railroads: Hearing Before the House Committee on Transportation and Infrastructure*, 110th Cong., 1st Sess., 238, 243-46 (Oct. 25, 2007) (Statement of Edward Hamberger, President and Chief Executive Officer, Association of American Railroads).

Petitioner perfunctorily asserts that congressional inaction on amendments to incorporate a proximate cause standard in the FELA does not support the Seventh Circuit's decision in this matter. *See* Petitioner's Brief at 51-52. However, as shown above, Congress has been anything but inactive on questions of rail safety and what rights and remedies should be available to railroad workers who are injured during the course of their employment. Indeed, in recent years the Congress has again *broadened* the available remedies in order to counter the industry's proven harassment and intimidation of injured railroad

workers.[4] In enacting the *Implementing Recommendations of The 9/11 Commission Act of 2007*, Congress made it unlawful for a "railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, [to] discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done . . . to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." P.L. 110-53 at §1521, 121 Stat. 444-445 (Aug. 3, 2007) (codified at 49 U.S.C. § 20109(a)(4)).

Following the above hearing in 2007, Congress broadened even further the legal protections afforded to injured railroad workers. First, it prohibited railroads from "deny[ing], delay[ing], or interfer[ing] with the medical or first aid treatment of an employee who is injured during the course of employment" and required that, upon request, the railroad must "promptly arrange to have the injured employee transported to the nearest hospital where the employee can

[4] In this regard, Petitioner's citation of the Racketeer Influenced and Corrupt Organizations Act (RICO) as a model for liberally construing the FELA as a remedial statute is repugnant and shameful, but typical of the industry's attitude toward its workforce and their health and safety.

receive safe and appropriate medical care." P.L. 110-432 at § 419, 122 Stat. 4892 (Oct. 16, 2008) (codified at 49 U.S.C. § 20109(c)(1)). Second, Congress made it unlawful for a railroad to "discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician," and went on to define "the term 'discipline' [as] mean[ing] to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of a reprimand on an employee's record." *Id*., at 122 Stat. 4892-93 (codified at 49 U.S.C. § 20109(c)(2)).[5]

These newly broadened protections already have resulted in numerous findings by the Occupational Safety and Health Administration (OSHA) – the federal agency charged with enforcing 49 U.S.C. § 20109 – that railroads continue to violate these laws. *See*, *e.g.*, *Araujo v. New Jersey Transit Corp.,* Case No. 2-2140-08-013 (Apr. 6, 2010) (railroad ordered to pay $569,586.45 in damages, restore all fringe benefits lost, and expunge employee's discipline record); *Anderson v. National Railroad Passenger Corp.*, Case No. 2009-FRS-00003 (Aug. 26, 2010) (railroad ordered to pay $162,266.67 in damages, plus "reasonable attorney's fees and costs, including expert

[5] These new legal rights also are intended to address the fact that "rail carriers joined together and challenged" state laws providing similar rights in Illinois and Minnesota, which the railroads succeeded in having struck down on the basis of federal preemption. *See* H.R. Rep. No. 110-84 at xiii.

witness fees," and expunge employee's discipline record); *Helm v. Burlington Northern and Santa Fe Railway Co.*, Case No. 7-5880-10-044 (Dec. 3, 2010) (railroad ordered to pay $95,096.30 in damages and to expunge employee's discipline record).

Under these contemporary circumstances, it cannot be seriously disputed that the intent of Congress is anything other than to afford broad statutory protections to railroad workers when they are injured on the job. The FELA continues to be the cornerstone of that broad, remedial protection scheme. This Court has construed the FELA's "whole or in part" standard as "simple and direct" and has held that consideration "of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purpose." *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949). Moreover, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1982). For over one hundred years, the Congress has given the railroad industry the opportunity to engage in self-regulation in regard to its safety record and has found that the industry has miserably failed to do so. Thus, Congress has had to periodically affirm each action taken by it to reduce accidents and the employment-related injuries and deaths of railroad workers, and take additional steps in its scheme of promoting safety. This Court should not take any step in the interpretation of the FELA to

introduce a new causation standard which assuredly will serve to reduce the safety efficacy of the FELA.

C. Public Policy Considerations Support Continuation of the FELA's Relaxed Causation Standard.

Public policy considerations are as relevant in determining rail safety matters as they are in rail-management labor cases, such as drug use in both juridical and arbitral cases. In this regard, the continuing value and force of the FELA, as well as its judicial construction and application, to act as a powerful incentive to reduce accidents and injuries to the rail worker population is brought into question by the industry's proposed elimination of the relaxed causation standard for liability. However, that ability to do so continues to be fully supported by the past history of FELA and by contemporary casualty data.

In 1996, the General Accounting Office (GAO) published a report detailing its comprehensive study of FELA, which was undertaken at the request of the Chairwoman of the Subcommittee of Railroads of the House Transportation and Infrastructure Committee. *See* GAO/RCED-96-199. GAO reported that, between 1990 and 1994 – a period in which railroad employment declined 9.8% from 296,000 to 267,000 – the number of FELA claims dropped nearly 31%, from 17,398 to 12,025, reflecting a reduction in the workforce. *Id*. at 14.

More recently, a chart included in an October 23, 2007 Briefing Memorandum prepared by the Republican Staff, Oversight and Investigations for the Subcommittee on Railroads, Pipelines and Hazardous Materials for Republican Members of the House of Representatives Committee on Transportation and Infrastructure for use at an October 25, 2007 hearing on the impact or railroad injury, accident, and discipline policies on the safety of America's railroads ("T&I Briefing Memorandum") indicated that the number of non-fatal casualties among railroad workers for the first six months of the year had declined over 40%, from 4,824 in 1998 to 2,877 in 2007. *See* T&I Briefing Memorandum at 2, which may be found at http://republicans.transporation.house.gov/Media/File/110th/Info/FullCommittee/10-25-07–hearing-memo.pdf, accessed Feb. 15, 2011. Furthermore, the number of reported railroad worker injuries per 200,000 hours worked had dropped from 3.69 in 1996 to 2.02 in 2007, a decrease of just under 45%. *Id.* at 3.

Data accumulated by the FRA – the agency charged with oversight of rail safety (49 U.S.C. §1.49(m)) – generally supports the GAO conclusions.[6] However, the FRA statistics also establish that railroad employment continues to be exceptionally hazardous. Despite the decrease in the number of casualties, data regarding fatalities shows a troubling trend.

---

[6] The FRA data herein was accessed on January 4, 2011 from the public online database maintained at http://safetydata.fra.dot.gov/officeofsafety/ and covers the period from 1975 through 2009. Full year statistics for 2010 are not yet available.

For example, fatalities constitute a significantly higher percentage of casualties (fatalities plus injuries) at present than during any period covered by FRA's data. In 2008, fatalities comprised nearly 0.52% of all casualties, as compared to less than 0.14% in 1981. Moreover, four of the five highest fatality percentages occurred during the most recent six years for which FRA has full-year data (2004-2009), while four of the five lowest fatality percentages occurred during the first seven years in which FRA kept data (1975-1981). Fatalities for the first ten months of 2010 comprised nearly 0.53% of all casualties; a trend that would make it the highest percentage since the FRA began recording such data in 1975. The average fatality percentage for the period from 1975 through 1981 was 0.18%, while from 2004 through 2009 the average fatality percentage was 0.39%, more than twice as high.

Moreover, the impact of fatalities is disproportionate and is most heavily borne by the operating crafts employed in train and engine service. For the STB employment data used herein, which FRA also uses in compiling its casualty data, *see* http://www.stb.dot.gov/econdata.nsf/dc81d49e325f550a852566210062addf?/openview, accessed Jan. 17, 2011. For FRA's entire reporting period, fatalities to train and engine service employees comprised 54.76% of all fatalities, which is a significantly higher proportion than the number of Class I railroad workers in those crafts expressed as a percentage of all Class I railroad workers. For the past thirteen years for which data

are available, the exorbitant share of fatalities inflicted upon train and engine service employees is as follows:

Year	Pct. of Workforce	Pct. of Fatalities
1997	36.32%	56.76%
1998	38.50%	59.26%
1999	38.68%	67.74%
2000	39.39%	62.50%
2001	39.64%	63.64%
2002	39.45%	45.00%
2003	40.27%	68.42%
2004	42.23%	80.00%
2005	43.29%	72.00%
2006	43.67%	43.75%
2007	43.20%	58.82%
2008	42.49%	61.54%
2009	39.85%	62.50%

Railroad workers in the maintenance of way and structures group is similarly victimized, and in more years than not during this period the percentage of those workers who sustained fatal injuries exceeded that group's proportion of the population of Class I railroad workers. In other words, death on the job continues to be a very real risk for the more than three in five railroad workers classified in these two groups.

Moving beyond the railroad industry, a comparison of fatality rates between FRA data and that published by OSHA underscores the unique hazards inherent in railroad employment. The rates of railroad industry fatal work injuries and national fatal

work injuries for the last four years for which data have been compiled are as follows:[7]

Year	FRA fatality rate	OSHA fatality rate
2006	6.6	4.2
2007	7.0	4.0
2008	10.9	3.7
2009	7.4	3.3

It should be noted that the OSHA data for 2009 are preliminary, and the FRA fatality rate for the first ten months of 2010 was 10.4. Thus, despite the improvements, the incidence of fatal injuries in the railroad industry remains disturbingly higher than in the American workplace as a whole.

Unfortunately, no similar apples to apples comparison can be made regarding workplace injuries. While fatalities cannot go unreported, it is a sad fact that reporting of railroad workplace injuries can be,

---

[7] *See* http://www.bls.gov/iif/oshwc/cfoi/cfch0008.pdf at p. 2, accessed Jan. 6, 2011. The rates shown represent fatal work injuries per 100,000 full-time equivalent workers. Each is calculated as an Hours-Based Rate, which equals the number of fatal work injuries divided by the total hours worked by all employees, which quotient is then multiplied by 200,000,000 where 200,000,000 represents the base for 100,000 full-time equivalent workers working 40 hours per week, 50 weeks per year. The total hours worked figures for the OSHA data are for civilians, 16 years of age and older, from the Current Population Survey. Sources: FRA data, *supra* note 6; U.S. Bureau of Labor Statistics; U.S. Department of Labor; Current Population Survey; Census of Fatal Occupational Injuries; U.S. Census Bureau; and U.S. Department of Defense, 2010.

and frequently is, suppressed by rail employers. FRA's regulation governing reporting, classification, and investigation of railroad accidents and incidents requires that railroads adopt and comply with Internal Control Plans intended to minimize, if not eliminate altogether, harassment and intimidation related to the suppression of and retaliation against injury reporting. *See* 49 C.F.R. § 225.33. However, the civil penalties that could be imposed for violation of the anti-harassment and anti-intimidation provisions of FRA's rule are $2,500 per violation and $5,000 per willful violation. *Id.* at App. A. This is a paltry sum when compared to the potential FELA liability a railroad faces when a railroad worker is injured on the job.

Indeed, the aforementioned October 25, 2007 congressional hearing was conducted as a direct result of the failure of FRA's anti-harassment and anti-intimidation regulation. In its Memorandum providing a summary of the subject matter of the hearing, the Oversight and Investigations Majority Staff of the House Committee on Transportation and Infrastructure indicated that it possessed "hundreds of reports from rail employees . . . suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job injuries." H.R. Rep. No. 110-84, 110th Cong., 1st Sess. (2007), at v. The Memorandum also noted that FRA's regulation, promulgated in 1996, was triggered by a 1989 GAO investigation that "found systematic underreporting and inaccurate reporting of injury and accident data by the railroads

it audited. *Id.* at vi. The GAO investigation disclosed that "FRA investigated *less than two-tenths of one percent* of all accidents and incidents involving railroads" and the summary noted that "in those few instances where violations were found, Federal law allows the FRA to negotiate-down the amount of civil penalties, and this is a common practice." *Id.* (emphasis supplied).

The Memorandum further stated that FRA's Associate Administrator for Safety acknowledged "that supervisory pressure on employees to not report injuries is a significant issue," and that enforcement efforts were lacking because "FRA simply does not have the resources to investigate the extent of the 'harassment' issue." *Id.* at vii. The Memorandum went on to note that an investigation of one Class I railroad by FRA, which had been completed earlier that year, disclosed that the railroad "frequently harasses and intimidates employees and found numerous violations of Federal law." *Id.*

The Memorandum identified several methods used by railroads to chill reporting of injuries, including: targeting injured employees for increased monitoring and testing; supervisors discouraging employees from filing accident reports; supervisors attempting to influence medical care rendered to injured employees in an attempt to either inject doubt into the workplace nexus for the injury or to reduce the medical treatment rendered the worker to a level below which reporting to FRA is not required; using so-called "light duty" programs to subvert the FRA

reporting trigger based on lost work time; discipline-based "availability" policies; and tying supervisors' performance evaluations and bonuses to reduced injury rates. *Id.* at viii-x. The industry uniformly defended its unlawful activities by claiming that FELA's negligence-based standard had created an "adversarial labor-management relationship." *Id.* at xi. As we have shown, the adversarial relationship dates back over a century, which the railroads have relentlessly prosecuted ever since.

Thus, because of rampant harassment and intimidation of railroad workers who attempt to report workplace injuries, which FRA has been unequipped and unable to control, any attempt to correlate railroad injury rates with workplace injury rates generally would be speculative. Nonetheless, there is no evidentiary basis for concluding anything other than that there is a continuing need for the remedial purposes of FELA, whether the risk is one of injury or of death to a railroad worker.

Under the described contemporary circumstances, the legislative history of FELA, more than seventy years of congressional consideration of proposals to either introduce a proximate cause standard or repeal the Act in its entirety, and the fact and data driven recent actions of the Congress to broaden remedial protection for railroad workers who are injured on the job all militate most strongly against Petitioner's arguments that "proximate cause" should replace "resulting in whole or in part" and the relaxed standard devised by the Congress. The complementary tort

system of the FELA was laid by Congress as the cornerstone needed to enforce the railroad safety scheme; in other words, to put some teeth into it. As the Rail Labor Coalition has established from the current situation, this complementary tort system should be retained. FRA is a resource starved agency unable to prevent accidents. The industry itself has been delegated or allowed to assume much of the responsibility to regulate itself and has used that delegation, not to enhance the reduction of accidents and elimination of injuries and death, but to circumvent the process of enforcement. The FELA tort system, as presently constituted, is needed to serve as an independent monitor of industry's activities to insure those activities are taken with promoting safety in mind.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

HAROLD A. ROSS
Counsel for Brotherhood
of Locomotive Engineers
and Trainmen
1370 Ontario St., Mezzanine
Cleveland, Ohio 44113
(216) 241-2630
haross1@ble-t.org
Counsel of Record

February 25, 2011