TESTIMONY OF

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BEFORE THE

RAILROADS, PIPELINES AND HAZARDOUS MATERIALS SUBCOMMITTEE

HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

HEARING ON

EXAMINING FREIGHT RAIL SAFETY

JUNE 14, 2022

My name is Jeremy Ferguson, and I am the President of SMART Transportation Division, which is the largest railroad union in the United States – representing almost 40,000 freight railroad employees. Our members work in the operating crafts of certified conductor, certified locomotive engineer, yardmaster, yard foreman, switchman, utility employee, trainman, and many others. It is with absolute pride and honor that I present these remarks on their behalf.

Throughout history, freight railroading has been an inherently dangerous industry. In fact, since its beginning, countless men and women have lost their lives, suffered amputations and/or endured other life-altering injuries - not much has changed today. Sure, the overall numbers may be less, but so are the number of employees. The rates of fatalities are little unchanged, the amputations are still occurring, and workers are still becoming disabled with frightening regularity.

- A cry for rail safety has never been more needed or more appropriate. -

In the field amongst the rail workers, a common safety mantra is heard when referring to injuries and fatalities: o*ne is too many.* Last year it was nine (9). Nine rail workers perished while performing the daily tasks required of them by their Class I railroad employer, with dozens suffering life-altering injuries. Despite all of

the technology and modern-day advancements – the functionality of rail equipment is still crude, the hours are still relentless, and the work environment is still unsafe. Granted, some progress was made over the years, but much, if not most, has been undone with the adoption of a business model called Precision Scheduled Railroading (PSR) which has left the state of railroad safety today is in shambles.

This deterioration began during the prior administration that allowed railroads excessive freedom to forego safety requirements to achieve their PSR driven goals and to satisfy the pressures from their Wall Street investors. Prior to PSR, railroads were enjoying the fruits of the safest, most productive era in railroading history which was borne and brought by the two-person crew.

PSR has led to the railroads significantly reducing service and reducing employment. This in turn has lessened the number of required inspections, as well as the quality of inspections mandated by regulations. To that point, there have been so many carmen inspectors removed that operating crews are now being forced to perform inspections that they are not qualified to conduct, nor are they equipped with the necessary tools to perform the tests.

According to AAR equipment manuals and FRA regulations, there are sixty-six (66) safety points on a railroad car. Many railroads now only allow 1 ½ minutes to inspect each car. Of course, this results in more trains being inadequately inspected and defective cars being transported. Longer, heavier, trains in operation today call for more, not less, attention to inspections and safe equipment.

Since 2015, there has been a 30% reduction of employees. With such a reduction in employment, there should have been a corresponding reduction in employee injuries. But that has not been the case.

Congress has not comprehensively addressed railroad safety since 2008. We acknowledge that Congress, in the Infrastructure Investment and Jobs Act, Pub. L. 117-58, addressed several issues critical to railroad employees. However, many safety problems continue to exist, and amendments are long overdue. The railroad workers have various proposals which are attached for your consideration that would significantly improve safety.[1]

[1] See Attachment A

Safety Statistics

Railroad safety has grown worse since 2020. (See chart below).[2]

	2020	2021
Accidents/Incidents	8,792	9,192
Total Fatalities	746	902
Fatalities at crossings	196	237
Collisions at crossings	1,906	2,131
Employee on duty injuries	2,961	3,054

Derailments were reduced slightly from 1,116 to 1,073, but that is still unacceptable.

A few specifics are illuminating. For example, on Norfolk Southern, during a 7-month period in 2021, five conductors suffered amputations and crushing injuries. Two of these amputations happened to newly marked up new hires who

[2] Source: Table 1.12, https://safetydata.fra.dot.gov

went through the reduced training by NS. One new hire rode a runaway car with no brakes for seven miles. This is a blatant disregard of safety and the wellbeing of their own employees. This is due, in part, because the NS has reduced its training program for operating crews from 18 weeks to 6 weeks. This not only jeopardizes the safety of a recently promoted conductor, but it also jeopardizes his or her fellow co-workers, and every community and industry they encounter.

There are a number of hidden safety issues that the railroads do not report to the public or FRA. For example, my office has received thousands of complaints regarding technological failures, including positive train control failures. Our organization has received reports of 187 PTC failures alone this year. That flies in the face of the railroad argument that PTC is the answer to the elimination of human factor incidents and justification to further reduce crew size. There are likely more that were not reported for fear of retaliation. Also, FRA sponsors a voluntary confidential program allowing railroad carriers and their employees to report close calls. The problem is that no Class 1 railroad is participating. The participants in the program evaluate an issue and make recommendations for corrective action. Employees are not retaliated against for being involved in a close call, if he/she reports the incident. Nearly all

transportation incidents are preceded by a chain of events, one of which might have prevented the accident if it had gone another way. When railroads analyze individual close-call events as a group, safety risks can be identified, and solutions developed. Close call reports can also provide important safety information to the FRA so that it can more effectively share important safety information with other carriers and develop safety and enforcement tools to address any widespread safety problems.) The airlines have a similar program called Aviation Safety Action Program (ASAP) which has contributed to the airlines' stellar safety record.[3]

Another factor in the poor safety record is the fact that the railroads have not put its profits into improving safety. As pointed out by Mr. Martin Oberman, Chairman of the Surface Transportation Board, U.S. railroads have reduced service to customers, raised freight rates, while deriving $191 billion in dividends and stock buybacks since 2010. The railroads paid out $77 billion in dividends during that period. Recently, NS issued a $10 billion buyback of its stock. While the above benefits the railroads stock price, it certainly did not improve safety.

[3] See Attachment B

Precision Scheduled Railroading

Precision Scheduled Railroading is a service model the Class I railroads have adopted, or are adopting, in an effort to streamline operations. They tout it as providing shippers with consistent and reliable service. PSR is the brainchild of Wall Street urging railroads to increase their stock price. Implementing PSR has helped the railroads lower their operating ratio which, in turn, assists investors determine the financial health of a company. The adverse effect of PSR greatly outweighs the increased profits of the railroads. The significant reduction is the number of employees has greatly impacted safe operations, increased fatigue associated with the same demanding work with fewer employees, less training, less inspection of cars, deferred maintenance, improper train make up, and potential safety hazards being glossed over.

One serious safety issue arising now is that yardmasters are required to supervise and monitor yard movements and radio communications of several yards at once, and in some cases across an entire state. As a result, emergency radio communications are being missed, and improper instructions are becoming more common.

The railroads know that they can operate with little oversight by FRA. The current administration is trying to improve this problem, but as a study by the GAO pointed out, the FRA "…estimates that its inspectors have the ability to annually inspect less than 1 percent of the railroad activities covered in regulation." *RAIL SAFETY Improved Human Capital Planning Could Address Emerging Safety Oversight Challenge,* Report to Congressional Requesters, December 2013, GAO-14-85.

I testified at the "Hearing on Urgent Issues in Freight Rail Service" before the Surface Transportation Board on April 26, 2022 and pointed out the many safety problems that have occurred as the result of PSR. My testimony is attached.[4]

NEEDED SAFETY IMPROVEMENTS

Attached to my testimony are the much-needed safety improvements. Some of these include crew size, fatigue and hours of service, close call reporting, train length, blocked crossings, damages against employees, proper train make-up,

[4] See Attachment C

electronic controlled brakes, speed signs, safe handholds on tank cars, union representatives allowed on railroad property to inspect for safety, whistleblower, and Mexican trains. I will discuss some of these.

Crew Size

On March 15, 2016 (81 Fed. Reg. 13918), FRA issued a Notice of proposed Rulemaking covering all crew size issues. On June 15, 2016 (81 Fed. Reg. 39014), FRA noticed an oral hearing on the NPRM. The 0MB did not clear the regulation before the end of the Obama administration. Three years after the NPRM, the prior administration withdrew the proposed regulation. 84 Fed. Reg. 24737. In the withdrawal, the FRA also ruled that states were preempted from issuing such a rule. This was done without any prior notice to the public. On Feb. 23, 2021, the U.S. Court of Appeals for the Ninth Circuit ruled that the FRA decision to preempt the states was improper, and it vacated the regulation withdrawal. *Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers; Brotherhood of Locomotive Engineers and Trainmen v. Federal Railroad Administration,* 988 F. 3d 1170.

It should be noted that President Biden has publicly stated that he supports two-person crews on freight trains. We understand that the FRA is considering promulgating a crew size regulation. However, mandatory legislation is necessary in order to prevent a future Administration's attempt to repeal such regulation.

Fatigue and Hours of Service Amendments

Fatigue continues to be the greatest safety issue in the rail industry. In 2008, Congress enacted some hours of service improvements. *See,* Pub. L.110-432, §108. However, many railroads still abuse the law and changes are necessary to create a safe operating environment. Fatigue can be significantly eliminated by requiring some hours of service changes. All freight service assignments without defined start times should have at least 10 hours prior notice calling time.

All yardmaster assignments should be covered service under the freight employee's hours of service provisions. This craft typically works 16 hours/day. Yardmasters are safety sensitive employees, and, in the interests of safety, should not be forced to work excessive hours.

All deadheads in excess of three hours should be counted as a job start.

Numerous times, after working 12 hours, crews have been required to wait for, and/or be in, deadhead service, for more than 8 hours. This creates a serious fatigue issue. Also, as noted in the STB hearing, it is common for crews to layover between 20 and 30 hours at their away-from-home terminal. Many crews have been forced to remain at the away from home terminals for multiple days, and the railroads treated the stays as mandatory rest days. This is another issue of abuse by railroads. No amount of time off duty at the away from home terminal should reset the calendar clock of job starts, and the employee should not be required to take mandatory rest days at the away from home terminal.

Employees who work road service pools and extra boards are required to be available 24 hours a day, seven days a week for a call for duty with only one and a half to two hours' notice. Obviously, many times, the employee must go to work fatigued, creating a major safety issue. A response from a UP manager to an employee's complaint stated "Please plan to be called anytime. Thanks."(Ex. 8 to BLET testimony at STB hearing). It should not be forgotten that many trains transport hazardous materials, including chlorine

gas, anhydrous ammonia, propane, etc. One full tank car can weigh 131 tons. Obviously, only alert employees should operate such trains.

Current practice by many railroads is not informing an employee how long an interim rest period will be. The result is that the employees are unable to obtain reasonable rest. Interim release periods should require railroads to notify the crew before going off-duty. If the crew is not notified, the 10 hours uninterrupted rest should apply.

Another major problem is lack of nutritious food for employees at their away from home terminal. Having hot nutritious food available for railroad employees has been a serious problem for a number of years because of FRA failing to enforce the current statutory requirement. For example, the FRA has allowed the railroads to provide canned, prepackaged, and frozen fast foods to be in compliance with the requirement for "suitable food". See, April 29, 1991, FRA interpretations of Hours of Service law. A railroad should be required to provide hot nutritious food 24 hours a day at the sleeping quarters for a particular crew at the away from home designated terminal, and at a release location which is available for rest for a particular crew. If such food is not provided on a railroad's premises, a restaurant which provides such food should not be located more than 5 minutes normal

walking distance from the employee's sleeping quarters or other rest facility. Fast food establishments should not satisfy the requirements of this subsection.

Last, but not least, is the practice by some of the major carriers, such as BNSF and CN, to impose draconian attendance policies. Attached is the BNSF Policy and Q&A.[5] As you can observe, it severely limits the ability of employees to being able to mark off duty for such things as medical issues and family emergencies. For example BNSF's most recent absenteeism policy known as "Hi-Viz," which was unilaterally imposed upon its employees on February 1, 2022. The policy only allows for a worker to have one day off a month and penalizes them for sick time or for needing to take care of their family when a medical emergency arises. It also assesses discipline, or, at the very least, disincentivizes our members from utilizing family medical leave and receiving necessary rest. The employees are not even allowed to take time off for FRA required hearing and vision certification requirements. As a result of the PSR, employees are forced to decide between rest or spending time with their family. Members must go to work fatigued because railroads afford them no other option—work or be fired.

[5] See Attachment D & D-1

Long Trains and Blocked Crossings

One of the features of PSR is that many trains now exceed miles in length and transport hazardous materials. As shown at the STB hearing, on CSXT during the 1st Quarter of 2022, a train departing South Schenectady, NY totaled 24,138 feet. A number of the railroad's trains exceeded 20,000 feet. This is typical throughout Class 1 railroads and creates many safety problems, mechanical and logistical, such as the inability to maintain adequate brake pipe pressure, which is needed so a train can safely slow and stop. As trains lengthen, incidences of them breaking apart are far more frequent, and a crewmember cannot observe and monitor an entire two-mile-long train by looking out of the window. Long trains create more air brake problems (especially in cold weather), sticking brakes, flat wheels, more slack action, and couplers and drawbar limits being exceeded, less track time for maintenance, etc. Also, when a conductor is required to walk a long train, many times on uneven terrain and during all weather conditions, the portable radios often times lose contact with the engineer in the lead locomotive. A train's two-way telemetry device and distributive locomotives lose contact with the lead locomotive. One such incident caused a runaway train on the Union Pacific

in October 2018 killing two crewmembers. The track was PTC active at the time. We have daily reports of loss of communications and it's a wonder that we have not had more catastrophic events as a result.

When a train is too long, and there is a loss of communication with the rear of the train, the locomotive engineer cannot activate the brakes at the rear of the train. Most importantly, when a long train becomes disabled where it blocks a crossing, it is far more difficult to uncouple the train to open crossings. On April 25, 2017, the National Legislative Director of SMART-TD wrote to the Administrator of the FRA, expressing specific safety concerns about railroads operating excessively long trains. He sought an emergency order to limit the length of trains. FRA responded on March 7, 2018, that the railroads are operating the longer trains "in an attempt to enhance service delivery and operational efficiencies." The response by FRA did not acknowledge the safety problems inherent in such operations. On May 21, 2021, Grady Cothen, a former Associate Administrator for Safety at FRA, gave a presentation at the Transportation Research Board Annual Meeting on the serious safety problems inherent in operations of long trains. His document is entitled "Management of In-Train Forces: Challenges and Directions". FRA

has not taken any affirmative action as a result of the presentation. Congress must step in and mandate that the length of trains be limited.

An obvious problem with long trains is that in many instances railroad crossings are blocked for long periods of time. This is a major safety concern for emergency vehicles. Congress should prevent railroads from blocking crossings after a certain length of time. Some courts have ruled that states do not have authority to regulate this issue. *See*, *CSX Transportation, Inc. v. City of Plymouth*, 283 F. 3d 812 (6th Cir. 2002). Crossings blocked by extra-long trains present more than a simple inconvenience to drivers. They present legitimate dangers to the lives of the public by potentially obstructing emergency vehicle traffic, which then may have to go miles out of their way, especially in rural areas, to respond to a fire, accident or medical crisis. Relating to train length, the FRA has acknowledged that blocked crossings is one of the largest complaints received from congressional members. This can easily be corrected by requiring that the train crew promptly make a separation of the train after a short time period. In addition, having a Conductor on the train is necessary to be able to do this in a timely manner.

Another reason for the blocked crossings is that railroad sidings, nor yards,

were ever constructed to accommodate these huge trains. As a result, trains must remain on the main tracks for long periods, many times blocking crossings.

We acknowledge that Congress, in the Infrastructure Investment and Jobs Act, requires the FRA to establish s blocked crossing portal to collect information regarding the cause of blocked crossing. (Sec. 22404). Everyone in the industry already knows the cause—it is long trains. Congress needs to substantively address this problem now.

Improper train make-up

For many years, improper distribution of loaded and empty freight cars (*i.e.*, when a railroad attaches empty cars in the front of a consist and loaded cars on the rear) has caused countless derailments. In-train forces from the rear cause unsafe train handling and result in derailments when a train slows. These forces break equipment, cause rails to turn over or cause cars to climb the rails. Heavier freight cars and longer trains create more of these forces.

Over the years, too many derailments could have been prevented by proper train make-up. The CSX derailment in Hyndman, PA, on August 2, 2017,

is a good example. There, 33 cars derailed, including 3 hazardous materials cars which erupted, resulting in a fire. There were 128 loaded cars and 50 empty cars in the train. The NTSB issued a report of the accident, stating that one of the probable causes was "the placement of blocks of empty rail cars at the front of the train consist." (NTSB Acc. Rep. NTSB/RAR-20/04, pgs. vii and 29). The Board pointed out that 90 % of the train's total tonnage was behind the lead 42 cars, resulting in excessive longitudinal and lateral forces exerted on the empty cars.

In 1994, Congress required the Secretary to study existing practices regarding the placement of cars on trains, with particular attention to the placement of cars that carry hazardous materials, and the FRA concluded that no new regulations were needed. We believe that conclusion is outdated, particularly with the current use of longer trains. The quality of train make-up has deteriorated with the advent of longer trains. The Association of American Railroads has a Train Make-Up Manual, which provides guidelines on train make-up. These are not enforceable and are violated constantly. Congress should address this issue by requiring FRA to promulgate regulations mandating proper train make-up.

Damages lawsuits by railroads against employees

The Federal Employers' Liability Act was enacted in 1908, which allows injured rail workers to file claims when railroads are negligent. Not until recent years did the railroads began filing lawsuits against employees for damages to railroad equipment. Some courts have ruled that a railroad could seek damages against anemployee arising out of an accident. *See Norfolk Southern Rwy. Co. v. Tobergete and Hall*, Civil Action No. 5:18-207-KKC (E.D. KY). In this case,the railroad is sought $3,770,420.65. In another decision, *Ammons v. Wisconsin Central, LTD,* 124 N.E. 3d 1(S. Ct. Ill. 2019), cert. denied, Oct. 5, 2020, the appellate court upheld a lower court decision that a railroad could seek property damages against an employee arising out of an accident in Joliet, Illinois. In this Illinois case, the railroad contends that it sustained property damages in excess of one million dollars as a result of the collision. The case has been remanded back to the Illinois circuit court for discovery and preparation for trial.

There are only a handful of other cases relating to the same issue. *See Nordgren v. Burlington* Northern RR, 101 F. 3d 1246 (8th Cir. 1996); *Schendel v. Duluth, Missabe, et. al., RR,* 2014 WL 5365131 (MN. Dist. Ct.) (RR seeking $2

million); *Mancini v. CSX Transp., Inc*., 2010 U.S. Dist. LEXIS 75724 (N.D. N.Y. 2010); *Norfolk Southern Rwy. v. Paul Murphy, et. al.*, 3-03-cv-665 (N.D. Ind. 2003); *Kansas City Southern RR. v. Morgan*, No. 94-5016-cv-sw-8(W.D. MO. 1994); *See also* Michael Beethe, *Railroads Suing Injured Employees: Should the Federal Employers' Liability Act Allow Railroads To Recover From Injured Railroad Workers For Property Damages?,* University of Missouri-Kansas City L. Rev. 232 (Winter 1996).

If allowed to continue, the vast majority of railroad accidents will create a serious financial burden on railroad employees and their families and which will result in numerous bankruptcies. It is common knowledge that potential property damages in a train accident can be enormous, resulting in millions of dollars. When compared to the amount of reportable property damages in railroad accidents, the only valid conclusion is that a railroad will not be able to recover damages from its employees. Because there is no realistic opportunity for a railroad to recover such property damages, a railroad's only intent for seeking such recovery is to thwart an injury claim by the employee.

Recent Supreme Court Decision

On April 28, 2022, the Supreme Court, in a 4-4 decision, upheld a decision of the U.S. Court of Appeals for the 7th Circuit, which held that a locomotive was not "in use" under the Locomotive Inspection Act ("LIA"). 49 U.S.C. §20701. There was no written opinion by the Supreme Court. Justice Barrett took no part in the consideration or decision of this case because she authored the opinion in the court of appeals. The case is entitled *LeDure v. Union Pacific RR.* The 7th Circuit decision is located at 962 F. 3d 907 (7th Cir. 2020). The effect of the ruling is that, going forward, there will be numerous expensive litigation nationwide attempting to determine if the Supreme Court's decision prohibits application of the LIA.

In the *LeDure* case, the conductor, who brought the FELA case, was preparing a group of locomotives for departure, and he slipped and fell while walking along the locomotive walkway. The lower court held that because the locomotive was stationary, was on a side track, and was part of a train still needing to be assembled, it was not *in use* at the time of the fall. The court of appeals upheld the lower court's reasoning and decision.

Evidence demonstrates that a greater number of employees are injured on locomotives not moving, than on moving locomotives. It should not matter if a

locomotive is moving or not. Any employee injured while working on a locomotive should be protected to the same extend as if he/she is injured while the locomotive is moving. Statistics compiled by FRA from railroads' reporting show that between CY 2015-2021, there were 1,660 injuries to employees in a locomotive standing in the cab or walkways, and during the same period there were 388 injuries while a locomotive was moving. *See,* https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/castall 1.aspx. (Table 2.04) Operating crews do more than transport freight across the country. Much work is required prior to any movement. Many crews are assigned to build trains in hundreds of rail yards throughout the country. They board an alight locomotives and rail cars constantly in the yards and are exposed daily to the hazards which the FRA has addressed in the safety regulations.

Congress can put an end to the great expense litigating this issue by eliminating the "in use" requirement under the LIA.

Time requirements imposed upon FRA

Based upon a 2021 court of appeals decision, mandatory time limits Congress has placed upon FRA has limited validity. In *SMART-TD and BLET v. FRA*, the U.S. Court of Appeals for the District of Columbia Circuit, citing a Supreme Court decision, ruled that "If a statute does not specify the consequence for noncompliance with a statutory timing provision, the federal courts will not in the ordinary course impose their own coercive sanction." 10 F. 4th 869, 874 (Aug. 20, 2021).

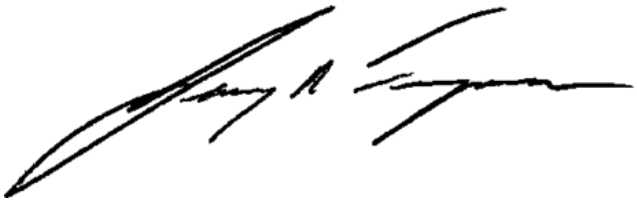
Congress, among other requirements, mandated that FRA promulgate a risk reduction program, including a fatigue management requirement. 49 U.S.C. §20156. Congress requires that FRA must finalize a regulation within 12 months of the notice of proposed rulemaking. 49 U.S.C. 20103(b). In the above case, the final rule was promulgated nine years after the advance notice of proposed rulemaking was issued and five years after the notice of proposed rulemaking was issued. That clearly violated the congressional mandate, but the court, nevertheless, upheld the regulation. The FRA still has not promulgated a final Fatigue Management regulation.

Congress needs to insert a consequence for noncompliance with 49 U.S.C. 20103(b).

There are a number of other needed safety amendments, which are attached to our testimony. We urge you to address each of these issues.

We thank you for your consideration,

Sincerely,



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