

IN THE  
**Supreme Court of the United States**

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MELVIN AMMONS AND DARRIN RILEY,  
*Petitioners,*

v.

WISCONSIN CENTRAL, LTD.,  
*Respondent.*

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**On Petition for a Writ of Certiorari to the  
Illinois Supreme Court**

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**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF  
AND BRIEF *AMICI CURIAE* BY THE SHEET METAL, AIR,  
RAIL TRANSPORTATION WORKERS-TRANSPORTATION  
DIVISION, THE BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS AND TRAINMEN, AND THE ACADEMY OF  
RAIL LABOR ATTORNEYS IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI**

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**MOTION FOR LEAVE TO FILE BRIEF AS  
*AMICI CURIAE* IN SUPPORT OF  
PETITIONERS**

Pursuant to United States Supreme Court Rule 37.2(b), the Sheet Metal, Air, Rail Transportation Workers-Transportation Division (“SMART-TD”), the Brotherhood of Locomotive Engineers and Trainmen (“BLET”), and the Academy of Rail Labor Attorneys (“ARLA”) move this Court for leave to file an *amici curiae* brief in support of Petitioners. The Petitioners, through counsel, gave their consent. The Respondent, Wisconsin Central, Ltd., after timely notice to its counsel of the intention to file this brief, stated that it would not consent.

The said *amici* represent an overwhelming majority of railroad employees who will be directly impacted by a decision of this Court whether to allow railroads to seek property damages from their employees involved in railroad accidents. We submit, as shown by the attached brief, that there are no other entities, and the railroad workers who they represent, more directly impacted by such a decision. SMART-TD and BLET are collective bargaining representatives of locomotive engineers, conductors and other train service employees, and ARLA is an organization of trial attorneys that represent railroad employees in Federal Employers’ Liability Act cases. The *amici*, because of their representation of the interests of railroad employees and specifically the employees’ interests in safe working conditions, are uniquely positioned to explain to the Court the importance of the present case not only for Petitioners but also for all railroad employees and the industry.

For the above reasons, *amici* respectfully request that this Court accept and file the attached brief *amici curiae* in support of Petitioners.

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**INTERESTS OF *AMICI CURIAE***

The Sheetmetal, Air, Rail Transportation Workers (“SMART-TD”) is the duly recognized collective bargaining representative under the Railway Labor Act (“RLA”) for the craft or class of conductors and other train service employees employed by freight, passenger and commuter rail carriers operating in the United States. SMART represents more than 100,000 employees in the railroad industry.\*

The Brotherhood of Locomotive Engineers and Trainmen (“BLET”) is the duly recognized collective bargaining representative under the RLA for the crafts or classes of locomotive engineers, conductors

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\*Pursuant to this Court’s Rule 37.2, *amici curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. The Petitioners, through counsel, gave their consent. The Respondent, Wisconsin Central, Ltd., after timely notice to its counsel of the intention to file this brief, stated that it would not consent.

and other train service employees employed by freight, passenger and commuter rail carriers operating in the United States. BLET represents more than 57,000 employees in the railroad industry.

The crafts or classes of employees represented by SMART-TD and BLET comprise the crews who operate trains in the United States and are among those persons who are affected by this matter.

The Academy of Rail Labor Attorneys (“ARLA”) is a professional association with members nationwide who represent railroad employees and their families in personal injury and wrongful death cases under the Federal Employers’ Liability Act (“FELA”). 45 U.S.C. §§ 51-60. The members of ARLA represent an overwhelming majority of employees seeking recovery under the FELA. ARLA’s primary purpose is the recovery of damages for those railroad employees represented by its members, and ancillary to that purpose, the promotion of rail safety for railroad employees and the general public.

The vast majority of railroad employees impacted by this case are represented by the *amici*. The interests common to the *amici* in this matter are the preservation of a statute that provides compensatory relief for a railroad worker’s injury or death and as such an economic incentive for railroads to operate safely.

## SUMMARY OF ARGUMENT

This case is of tremendous importance to the *amici* and the railroad employees who they represent. This is the most important railroad safety related certiorari petition considered by the Court since the petition in *CSX Transportation, Inc. v. McBride*, 564 U.S. 685 (2011). No tactic by the railroads has more potential for destroying employees’ rights—the exclusive reme-

dial recourse available to railroad employees—under the Federal Employers’ Liability Act (“FELA” or the “Act”) than allowing a railroad to seek property damages from an employee arising out of an accident.

The FELA prohibits a railroad from utilizing “any device whatsoever” to exempt itself from liability. 45 U.S.C. §55. In enacting FELA in 1906, Congress intended to preclude common law evasions (e.g., modified contributory negligence defense and fellow servant rule) or the contracting-out of liability by the railroads. FELA, Pub. L. No. 59-219, § 2, 34 Stat. 232 (1906) (reenacted in amended form and codified at 45 U.S.C. § 53 (1982)); 40 Cong. Rec. 4608 (1906) (discussion about shifting the burden to railroads with respect to common law defenses); and H. R. Rep. No. 2335, 59th Cong., 1st Sess. 5 (1906) (discussion with respect to contracting-out of liability).

In revising FELA in 1908, Congress reinforced that intended preclusion with the addition of the words, “any device whatsoever,” and the explicit preclusion of the contributory negligence defense in favor of the comparative negligence standard, among other common law preclusions. Pub. L. No. 60-100, § 3, 35 Stat. 65, 66 (1908) (codified at 45 U.S.C. § 53 (1982)); 42 Cong. Rec. 1347 (1908). In its shifting of the cost of human overhead of railroading from employees to their railroad employers in the 1908 FELA, and its amendments in 1910 (liberal judicial jurisdiction provision) and 1939 (preclusion of assumption of risk defense), Congress’ “twin objectives of providing effective relief to railroad workers injured or killed because of their employer’s negligence and giving railroads an economic incentive to improve the safety of this nation’s railroads” was met. FELA, Pub. L. No. 61-117, sec. 1, § 6, 36 Stat. 291, 291 (1910) (codified at 45 U.S.C. § 56 (1982)); FELA,

Pub. L. No. 76-382, sec. 1, § 4, 53 Stat. 1404, 1404 (1939) (codified at 45 U.S.C. § 54 (1982)); and William P. Murphy, *Sidetracking the FELA: The Railroads' Property Damage Claims*. 69 Minn. L. Rev. 349 (1985).

For more than a century, this Court has protected the interests of railroad employees in FELA cases, consistent with the broad, remedial purposes of the statute. *See, e.g., Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1 (1911); *Jamison v. Encarnacion*, 281 U.S. 635 (1930); *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532 (1994); *CSX Transportation, Inc., v. McBride*, *supra*. The decision of the Supreme Court of Illinois, and the federal circuit court decisions on which the Illinois decision relies, violate those purposes.

It is common knowledge that property damages in a train accident can be an enormous cost, considering the equipment and infrastructure involved. That the amount of reportable property damages in railroad accidents is likely to be into the millions of dollars—Respondent has claimed the damages in the accident at issue were in excess of one million dollars (\$1,000,000)—a railroad will not be able to recover its damages from its employees (Pet. Br. 13). The inescapable conclusion, then, is the property damage claim is a pretext for the railroad to grind an employee's FELA claim into dust and to dissuade other employees from filing FELA claims and/or to participate in the claims of other employees. That this is the Respondent's agenda is further indicted in its failure to file any claim, including a property damages claim, against the dispatcher who negligently directed Petitioners' and their train onto the track.

If this Court allows the Supreme Court of Illinois decision, and associated federal circuit court decisions, to remain standing, and the Respondent prevails on its property damages claims, the more than likely re-

course for the Petitioners will be declare bankruptcy. It was not the intention of Congress in enacting FELA, with the inclusion of “any device whatsoever,” that by the device of a claim for property damages, a railroad may avoid financial liability for its negligence, collect damages from an employee or drive an employee to bankruptcy, and whether it be the collection of damages or employee bankruptcy, dissuade other employees from filing FELA claims. Further, that Congress explicitly stated its intention that FELA was to persuade railroads to operate safely and improve safety, it could not have been the intention of Congress that railroads have a device to avoid that incentive.

## ARGUMENT

### I. TO ALLOW A RAILROAD TO RECOVER PROPERTY DAMAGES FROM EMPLOYEES AS THE RESULT OF AN ACCIDENT WILL CREATE A POTENTIAL CATASTROPHE IN THE RAILROAD INDUSTRY BECAUSE OF THE LIKELIHOOD THAT THE EMPLOYEES WILL BE DISSUADED FROM FILING FELA CLAIMS.

The FELA prohibits a railroad from utilizing “any device whatsoever” for the purpose or intent to prevent an employee from seeking redress under the Act. *supra*. The attempt by Respondent in the present matter is such a device.

Potential property damages in a train accident can be enormous. The Federal Railroad Administration (“FRA”) publishes reportable damages in railroad accidents.<sup>1</sup> In 2019, the 1,311 derailments on the na-

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<sup>1</sup> <https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/TrainAccidentDamage.aspx>

tion's railroads resulted in \$237,591,324 in property damage. Twelve rear end collisions resulted in \$5,595,535 in damages to property.<sup>2</sup>

Based upon FRA statistics, during the calendar years 2016-2019, there were 7,320 railroad accidents,<sup>3</sup> excluding grade crossing accidents. During the same period, FRA reported 8,628 railroad-highway grade crossing accidents.<sup>4</sup> Derailments and collisions com-

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<sup>2</sup> Some specific examples are illustrative of damages in railroad accidents. On December 12, 2019, fifteen Canadian National Railroad cars, including 5 hazardous materials cars, derailed in Detroit, MI, totaling property damage of \$273, 194. (Accident Report No. 1021157). On September 10, 2019, fourteen Union Pacific Railroad cars derailed at Dupo, Illinois. (UP Railroad accident Report No. 0919MA023). Three tank cars carrying methyl isobutyl ketone ruptured resulting in a large fire, resulting in \$606, 065 in property damages. On July 1, 2019, twenty-two cars derailed at Elgin, NV on the Union Pacific Railroad, resulting in property damage of \$2,801,390. (UP Railroad Accident Report No. 719RM012). Some examples in other years demonstrate the extent of potential damage to property. A run away freight train accident on July 6, 2013, in the town of Lac-Megantic, Quebec, resulted in a fire and explosion of multiple tank cars. The train originated in the U.S. ((<https://www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054r/es.html>). More than 30 buildings were destroyed and all but three of the remaining downtown buildings had to be demolished. And 53 vehicles were destroyed. The estimated damage to the town exceeded \$25 million. Multiple millions of dollars occurred to the train and tracks. On December 18, 2017, an Amtrak train derailed near Dupont, WA resulting in \$25.4 million property damage. Ten passenger cars derailed with three falling upon an interstate highway hitting multiple cars. The above represents just a few of the thousands of accidents occurring on the nation's railroads annually.

<sup>3</sup> <https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/TrainAccidentsFYCYWithRates.aspx>

<sup>4</sup> <https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/gxrtally1.aspx>

prise the large majority of such accidents. Railroads contend that the introduction of positive train control technology (“PTC”) will reduce many accidents. However, PTC is only mandated for approximately 60 thousand miles of the 140,810 track miles in the country.<sup>5</sup> Additionally, PTC does not protect against grade crossing collisions, some rear end collisions between trains, roll-outs, low speed collisions, broken rails, wash-outs, or equipment left fouling the main track.

The physical forces involved in a railroad accident are tremendous. Some freight trains exceed 3 miles in length. *See, Rail Safety: Freight Trains Are Getting Longer, and Additional Information Is Needed to Assess Their Impact*, U.S. Government Accountability Office, GAO-19-443 (May 2019). Such trains weigh more than 30,000 tons. The cost of an average freight diesel locomotive is up to \$2,000,000 and an electric locomotive up to \$6,000,000<sup>6</sup>, a tank car can range up to \$250,000<sup>7</sup>, and a typical freight car costs between \$100,000 to \$150,000.<sup>8</sup> It has been estimated that most freight trains having a length exceeding one mile would have a value of more than \$150,000,000 including the equipment and lading, weighing more than 18,000 tons.<sup>9</sup> A freight locomotive weighs between 100 to 225 tons, and a typical freight car weighs approximately 30 tons and can carry lading up to an additional 130 tons. *Id.*

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<sup>5</sup> *See, Positive Train Control(PTC) Overview and Policy Issues*, Congressional Research Service, at 1,6 (Sept. 4, 2018).

<sup>6</sup> <https://worldwiderails.com/how-much-do-locomotives-cost/>

<sup>7</sup> <https://www.ble-t.org/pr/news/headline.asp?id=7799>

<sup>8</sup> <https://www.freightwaves.com/news/economics-of-railcars-are-complex>

<sup>9</sup> <https://www.survivaltechshop.com/train-weight>

The present accident resulted in substantial property damages, no different from the other collision related railroad accidents. The resultant damages according to the Respondent, totaled \$1,500,000 (Pet. Br. 13). In light of the enormous damages associated with a railroad accident, if the Court was to allow property damages claims, the likely result would be that railroads will file property damages claims in every FELA matter whether there is a real possibility or not of prevailing on the claim. In the short term, employees who venture FELA claims may prevail on their claims and be made whole, if a railroad does not prevail on its property damages claims. In other cases, railroads will prevail, more than likely forcing employees to declare bankruptcy. This is precisely the sort of “delusive remedy” countenanced against in the Court’s decision in *Urie v. Thompson*, 337 U.S. 163, 168 (1949).

According to the U.S. Bureau of Labor Statistics, in May 2019, prior to the COVID-19 pandemic, there were 45,710 railroad conductors and yardmasters, having a median wage of \$65,990, with the top 10% receiving \$98,110. During the same period, there were 35,520 locomotive engineers with a median salary of \$67,090, with the top 10% receiving \$101,060.

When compared to the enormity of reportable property damages in railroad accidents, the inescapable conclusion is that employees will not be able pay property damages.

The long-term effect of allowing property damages claims is more sobering. Railroad employees will be witness to the plights of their co-workers, and will not file a claim to seek recompense for life-altering injuries, or for that matter assist another employee with their FELA claim, for fear of a railroad’s property dam-

ages claim. Employees would be forced to forgo the sole remedy they have with respect to their injuries or the remedy for their families in the event of their death.

Congress' objective was that FELA be a remedial statute for employees, not railroads. *Consolidated Rail Corporation v. Gottshall*, *supra*, 512 U.S. at 542-543 (Congress' intention in enacting FELA was "humanitarian," with "remedial goal[s]," in mind.) The allowance for property damage claims is contrary to the "any device whatsoever" provision of FELA and the intent of Congress in enacting the statute. For more than a century, this Court has protected the interests of employees in FELA cases consistent with the broad, remedial purposes of the statute. *See, Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 614 (1912). This Court recognized "[t]he evident purpose of Congress was to enlarge the scope of section [5 of the FELA] and to make it more comprehensive by a generic, rather than a specific, description." *Id.*, at 611. In *Duncan v. Thompson*, 315 U.S. 1 (1942), this Court reasoned that because the plaintiff's "straitened circumstances" made the probability of paying back the amount "negligible," and bringing a FELA claim "would be taken away from him." *Id.*, at 7. In *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958), this Court recognized the remedial and humanitarian purpose of the Act to be interpreted in protecting the employee.

This Court, consistent with its precedent and the intent of Congress that FELA be a remedial statute for employees, not railroads, should grant certiorari in this matter and clarify for state and federal courts the common law claim of property damages is a device prohibited under FELA.

## II. TO ALLOW FOR PROPERTY DAMAGES WOULD JEOPARDIZE SAFETY IN THE RAILROAD INDUSTRY AND DISCOURAGE ANY IMPROVEMENTS.

Congress' purpose in enacting FELA was to shift the cost of the "human overhead" of railroading from the injured employees to their railroad employers. *Tiller v. Atlantic Coast Line RR Co.*, 318 U.S. 54, 58 (1943). By doing so, Congress intended FELA "to stimulate carriers to greater diligence for the safety of their employees." *Jameson v. Encarnacion, supra*, 281 U.S. at 640.

Allowing railroads to offset their FELA liability by shifting these losses back to the employees through property damage claims frustrates that Congressional design and jeopardizes the safety of the nation's rail system.

## CONCLUSION

The Court should grant the petition and restore the balance that Congress created.

Respectfully Submitted,

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