No. 20-807

IN THE

Supreme Court of the United States

BRADLEY LEDURE,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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The LIA provides that a railroad "may use or allow to be used a locomotive . . . on its railroad line only when the locomotive" is "in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1). The plain meaning of "use" is "put to a purpose" or "employ." A railroad that sets a locomotive upon an interstate journey "uses" that locomotive, even if it is temporarily stopped or powered down partway through the trip. And a railroad "allows" a locomotive to be "used" when it makes the locomotive available to haul a train or otherwise perform a purpose.

More than a century of this Court's decisions confirm that reading, holding repeatedly that rail vehicles are in use whenever they are available for travel on the line – even if temporarily stopped, awaiting inspection, or not yet part of a fully assembled train. Consistent with the plain meaning of "use or allow to be used," this Court has suggested that rail vehicles are out of use when they have reached places dedicated to repair or storage.

Respondent's argument conflicts with the statute's plain language and this Court's cases. Respondent seeks to add words to the statute by limiting "use" of an unsafe locomotive only when it *hauls other railcars*, and by ignoring the words "allow to be used" and "on its line." Those contortions are inconsistent with the statutory text and Congress's purposes in providing remedies to injured rail workers. And respondent's effort to distinguish this Court's past decisions based on a supposed difference between locomotives and other railcars finds no support in the statute, the Court's decisions, or the practicalities of railroad operation. Even under respondent's various tests, the locomotive here was in use.

ARGUMENT

I. UP5683 WAS "USE[D]" OR "ALLOW[ED] TO BE USED" UNDER THE LIA

A. Under The LIA's Plain Meaning, Locomotives Are In Use Or Allowed To Be Used When They Are Stopped Mid-Journey

1. The LIA does not define the terms "use" or "allow to be used." Accordingly, the plain meaning of those terms governs. *See Smith v. United States*, 508 U.S. 223, 228 (1993). There is no dispute that the word "use" means "put to a purpose," "convert to one's service," or "employ." Pet. Br. 13; U.S. Br. 11; Resp. Br. 17-18. That meaning was well-established prior to enactment of the LIA and its predecessor safety statutes. *See Astor v. Merritt*, 111 U.S. 202, 213 (1884) ("[i]n use" defined as "in employment"); U.S. Br. 11. Therefore, a railroad "uses" a locomotive when it puts the locomotive to a purpose or employs it.

The ordinary meaning of "use" "is 'expansive' and extends even to situations where" something is not used for its "intended purpose." *Smith*, 508 U.S. at 229-31 (quoting *United States v. Long*, 905 F.2d 1572, 1576-77 (D.C. Cir. 1990) (Thomas, J.)). A gun can be "used" to shoot, but also to trade for drugs. *Id.* at 229-30. Likewise, a locomotive can haul railcars, but also serve as a backup power source or a link in the braking and hydraulics systems of an assembled train. It also is "used" by the railroad when it redeploys to a location to serve those functions on a different train. Nothing in the LIA or the ordinary meaning of "use" limits that term solely to hauling cars.

The phrase "allow to be used" also sweeps broadly. A railroad allows a locomotive to be used if it permits the locomotive to serve a purpose. Allowing a locomotive to redeploy to another location is permitting its

use. So is allowing a locomotive connected in a train to supply additional power if conditions require it.

2. The structure and context of the LIA and the SAA support that plain meaning. The SAA's safe-harbor provision in particular confirms that a locomotive need not actively be hauling to be "used."

The SAA provides that a defective "vehicle" – which includes "locomotive[s]" by definition, 49 U.S.C. § 20301(a) – "may be moved" to the nearest repair facility "when necessary to make repairs, without a [civil] penalty being imposed." *Id.* § 20303(a). (Railroads remain liable for employee injuries during such movement.[1]) This safe harbor embodies the balance Congress struck between not penalizing railroads for moving defective locomotives to places of repair while ensuring liability when workers sustain injuries during such movement. If "use" were limited to hauling cars, the safe-harbor provision would serve no function: defective locomotives towed while powered down or operated without hauling other railcars when moved to repair depots would not be in "use" under respondent's reading, thereby rendering superfluous the safe harbor.

The LIA's drafting history further reveals a longstanding trend toward simplicity and promoting employee safety. The original LIA required that a railroad use a locomotive "in moving interstate or foreign traffic." *See* Pet. Br. 7. Congress removed that language from the statute in 1924 because it added undue complexity and prevented effective enforcement of the law due to evidentiary difficulties. *See* H.R. Rep. No. 68-490, at 4 (1924). Congress later

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[1] *See* 49 U.S.C. § 20303(c); *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 43 (1916).

struck language relating to locomotives being in "active service" as "surplus" to further simplify the statute. *See* H.R. Rep. No. 103-180, at 99 (1993). Throughout those changes, Congress preserved the broad meaning of "use."

3. Respondent contends (at 19) that "use" must mean to use a locomotive "for its intended purpose of moving other equipment through self-propulsion." But the LIA includes no such limitation. The statute applies to locomotives that are "use[d]" or "allow[ed] to be used," with no particular purpose or manner of use specified.

Even if respondent's interpretation of "use" were correct, respondent's argument still would fail because it does not address the "allow to be used" clause. If "use" means only hauling other equipment, then "allow to be used" means making available or permitting a locomotive to be deployed to haul other equipment. By making UP5683 available to haul other equipment had LeDure determined that the reconstituted train needed additional power, respondent made available that locomotive for use. JA26-27; Pet. Br. 23. The locomotive therefore was "allow[ed] to be used."

Respondent tries (at 29-30) to resist this plain reading by arguing that "no court" has adopted this "novel" interpretation of "allow[ed] to be used." But courts have not construed "allow[ed] to be used" because no court ever has adopted respondent's atextual and restrictive interpretation of "use."[2] Under the ordinary meanings of "use" and "allow to be used," a standing

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[2] Courts have adopted petitioner's interpretation of "use." *See*, *e.g.*, *Edwards v. CSX Transp., Inc.*, 821 F.3d 758, 762 (6th Cir. 2016) ("And a locomotive is 'in use' almost any time it is not stopped for repair.") (citing, *e.g.*, *Wright v. Arkansas & Missouri R.R. Co.*, 574 F.3d 612, 620-22 (8th Cir. 2009)).

locomotive in the same position as UP5683 is clearly within the LIA's ambit.

4. Respondent's structural argument fares no better. Respondent argues (at 30) that the statutory structure requires that locomotives be considered out of "use" without already being at a repair facility because compliance otherwise would be "impossible" – a railroad would violate the LIA whenever it moved defective locomotives to repair facilities. This argument ignores Congress's express choice to relieve railroads of civil penalties when they move defective locomotives and other rail vehicles to places of repair, but not to relieve railroads of liability to workers who get injured by noncompliant equipment in connection with such movements. Congress could have overridden *Brady v. Terminal Railroad Ass'n of St. Louis*, 303 U.S. 10 (1938), and *Urie v. Thompson*, 337 U.S. 163 (1949), in the many subsequent enactments, including the 1994 codification of the Acts, but chose not to do so. That legislative judgment to impose liability on railroads for workers' injuries is fully consistent with the long history of rail-safety legislation. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43 (1994).[3]

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[3] The safe harbor against civil penalties for using rail vehicles that are in defective condition on railroad lines also disproves respondent's argument (at 22, 37) that "Congress never included any equivalent safe harbor" in the LIA. Although the safe-harbor provision of 49 U.S.C. § 20303(a) is nominally codified within the SAA, it applies to all "vehicles" (including locomotives, 49 U.S.C. § 20301(a)), and it extinguishes liability that would apply under 49 U.S.C. § 21302, the provision that creates civil penalties for *both* the SAA and the LIA. Congress had no need to enact a new LIA-specific safe harbor when Section 20303(a) provided the

Respondent also cites regulations as supposed support for its statutory structure argument, but those regulations *undermine* its case. In particular, respondent cites 49 C.F.R. § 229.9, which establishes conditions under which railroads may move "dead" locomotives, and argues (at 24) that "such agency-sanctioned movements would violate the statute if dead locomotives were in 'use' within the meaning of the LIA." But that regulation mandates that the locomotives be "safe to move" before this provision can apply, meaning it is entirely in accord with the LIA's plain text. 49 C.F.R. § 229.9(a)(1)(i); *see id.* § 229.9(c) (carrier must ensure that movement is "safely made"). Indeed, the FRA expressly recognized when promulgating Section 229.9 that locomotives subject to this regulation "*remain in use* until the [defects] are repaired or otherwise corrected." Final Rule, Railroad Locomotive Safety Standards and Locomotive Inspection, 45 Fed. Reg. 21,092, 21,094 (Mar. 31, 1980) (emphasis added). That regulatory approach both is consistent with the LIA's terms and confirms that moving dead locomotives is a form of use.[4]

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same coverage. In any event, the FRA has addressed any perceived statutory gap through regulations. *See* 49 C.F.R. § 229.9; U.S. Br. 30 & n.4.

[4] Respondent also invokes (at 23-25) various regulations requiring the repair of defects "before" a locomotive is used again, to argue that compliance is impossible if the locomotive is still in "use" when it is not yet in repair facilities. This supposed impossibility rests on a misreading of the LIA and its regulations: the regulations set out how a carrier can safely transport a locomotive to a place of repair, i.e., to "use" a locomotive with a particular defect in a way that is safe and complies with the LIA. *See* 49 C.F.R. § 229.9.

B. This Court's Precedents Show That Locomotives Are In Use Even When Stopped, Uncoupled, On Side Tracks, Or Awaiting Inspection

1. For more than a century, this Court has recognized that the identical term "use" in the SAA does not require vehicles to be in any particular service. It consistently has reached that conclusion since it first interpreted "use" in the SAA in *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904). There, an "empty" dining car was left alone on a sidetrack, to be picked up by a separate train. This Court held that the car still was in "use": it was only partway through an assigned journey and was "regularly" sent on such trips. *Id.* at 22.[5]

Subsequent cases similarly held that vehicles remain in "use" even when stationary, mid-journey, not part of prepared trains, and not at a dedicated place of repair. *See, e.g.*, *Delk v. St. Louis & S.F.R.R. Co.*, 220 U.S. 580, 583-85 (1911) (railcar remained in use while waiting for a repair piece on a "dead track" mid-journey); *Great N. Ry. Co. v. Otos*, 239 U.S. 349 (1915) (defective railcar not yet moved to repair track remained in use); *Rigsby*, *supra* (railcar remained in use while stopped on the way to repair facility); *Chicago Great W.R.R. Co. v. Schendel*, 267 U.S. 287 (1925) (railcar remained in use though intended to be left on sidetrack); *Brady*, *supra* (railcar remained in use while temporarily stopped on sidetrack during

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[5] Respondent tries (at 33) to minimize *Johnson* by arguing that the "hard question" in that case was "whether the car was engaged in *interstate commerce*." But the Court was deciding whether the car was "used in moving interstate traffic," so, if the dining car was not in "use," the interstate commerce determination would have been unnecessary. *Johnson*, 196 U.S. at 21-22.

inspection). Indeed, this Court never has found that the use of a rail vehicle ceased unless it had reached a repair or maintenance facility.

This Court also has stated that "the same principles apply in an action under the [LIA] as in one under the [SAA]." *Tipton v. Atchison, T. & S.F. Ry. Co.*, 298 U.S. 141, 151 (1936). It applied that equivalence in *Lilly v. Grand Trunk Western Railroad Co.*, 317 U.S. 481 (1943). There, an employee slipped on ice that had formed on the outside of a stationary tender that was waiting to be refilled with water. Although this Court did not expressly define the scope of "use," its conclusion that the LIA applied necessarily encompassed that the tender was in "use" or "allow[ed] to be used." Together, those cases show that, in both the SAA and the LIA, vehicles remain in "use" throughout all steps incidental or essential to their travel.

2. Respondent concedes (at 3) that, as to railcars, "'use' continues even when they are temporarily motionless or uncoupled." That concession is fatal to respondent's case because Congress evinced no intent for the meaning of "use" to be different whether the object is an empty, uncoupled railcar or a "dead" locomotive. An empty railcar is not serving its "primary" purpose of transporting freight, but, as this Court has recognized and as respondent concedes, it remains in use even when motionless. *See*, *e.g.*, *Johnson*, 196 U.S. at 22. "[W]hether cars are empty or loaded, the danger to employees is practically the same," so that factor does not determine whether railcars are in use. *Id.* at 21-22. That logic applies equally to locomotives whether they are moving or stopped, and powered on or powered off.

Respondent attempts (at 35) to save its case by arguing that functional differences between freight

cars and locomotives require that identical statutory language in the LIA and the SAA have different meanings. Under this argument, the SAA's phrase "use or allow to be used" encompasses passive, stationary vehicles, but the LIA's identical phrase does not. Resp. Br. 35; AAR Br. 19 ("[A] motionless locomotive that is being prepared for use, and therefore not in use for purposes of the LIA, may be in use for the purpose of the SAA."). Nothing in the statutory text supports that interpretation. To the contrary, the statutes' drafting history confirms Congress intentionally imported SAA language into the LIA and amended the LIA over time to align even more closely with the SAA. *See Sekhar v. United States*, 570 U.S. 729, 733 (2013) (when statutory text "is obviously transplanted from . . . other legislation, it brings the old soil with it").

Indeed, as respondent concedes (at 5-6), the SAA *always* has applied to *both* locomotives and railcars. Respondent does not explain why text that applied to locomotives in the SAA would take on a different meaning when applied to locomotives in the LIA. Its text-based theories require adding words to the statute to support this supposed alternative meaning. *See*, *e.g.*, Resp. Br. 4 (arguing LIA requires locomotives to be "'safe to operate' *as such* 'without unnecessary danger of personal injury,'" which requires adding "as such").

Later, though, respondent reverses course and acknowledges by omission that "use" cannot have a different, locomotive-specific meaning in the LIA as compared to the SAA. In attempting to distinguish *Lilly*, respondent observes (at 38) that *Lilly* involved a tender rather than a locomotive and argues that, whereas a tender can be in "use" under the LIA when stationary, a locomotive cannot. Respondent's

incoherent position, then, is that, whereas "use" in the SAA may include *any* stationary rail vehicles (both railcars and locomotives), "use" in the LIA may include *some* stationary vehicles (tenders) *but not* stationary locomotives. The word "use" does not bear respondent's multiple contortions.

In any event, respondent mischaracterizes *Lilly*. Under respondent's theory, a tender's "purpose" is to provide fuel to a locomotive; so, under respondent's logic, a tender *en route* to a refueling destination is *not* in "use" because its function is the refueling operation and not the act of traveling to that location. But respondent concedes (at 38-39) that a tender is in "use" while both moving on the railroad's lines and stationary for refueling operations. Accordingly, its attempt to limit the meaning of "use" for locomotives only in their hauling capacity lacks merit. Congress did not intend for the "use" of rail vehicles under the safety statutes to begin and end based on whether their primary functions occurred while mobile or stationary; while loaded or empty; or while hauling or being repositioned. Yet respondent's theory is that LIA protections switch on and off for vehicles on the railroad's line multiple times per day and journey.

The supposed distinction between locomotives and railcars also collapses as a matter of railroad operation. Respondent characterizes (at 4, 21-23) powered-down locomotives as "transported passively," but ignores that even powered-down locomotives still serve a purpose in trains: they remain connected and integral to the train's air-brake system; they also couple the powered-on locomotive to the remaining

railcars and locomotives in the train.[6] Indeed, as this case illustrates, employees still must perform tasks on both the exterior and the interior of powered-down locomotives, underscoring the need for safety rules. App. 2, 8; JA25-27.

Respondent's analogy in support of its proposed distinction is unpersuasive. Respondent argues (at 3) that a U-Haul trailer remains in use when stopped overnight but the car hauling it does not. Ordinary usage belies that contention: if a family member asks about the car, the answer is "Your sister is using it to move to college," not "Your sister was using the car earlier today, but she's not using it now because it's parked at a hotel 250 miles away." In ordinary language, the car is in "use" throughout the entire journey.[7]

3. Respondent also argues (at 21-25) that a locomotive is not in use until after it has been inspected. The FRA mandates different forms of inspection, including major inspections by the FRA when the locomotive is out of use as well as daily inspections by railroad crews while the locomotive is in use. *See* 49 U.S.C. § 20702(a)(2); 49 C.F.R. § 229.21.

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[6] Union Pacific's operating rules instruct that, "[o]n AC locomotives, dynamic brakes and wheel slip protection are still operative with either traction motors or a truck cut out." System Special Instructions Item 4 note (eff. June 1, 2018), https://www.up.com/ert/ssi.pdf.

[7] Likewise, respondent's attempt to distinguish the government's taxi company illustration fails because it ignores the statutory language. Resp. Br. 28; U.S. Br. 12. Even parked taxis are in "use" if they cannot be deployed at that time for private car service. In any event, they are certainly "allow[ed] to be used" when demand increases.

For the daily inspections, FRA regulations require inspections of "each locomotive in use." 49 C.F.R. § 229.21. If, as respondent argues, a locomotive does not come into use until after it is inspected, then the regulation leaves an unintended gap: a worker injured by defective equipment during an inspection would not have a strict liability remedy provided by Congress. *See* 45 U.S.C. §§ 53, 54a. And proving negligence could be all but impossible, because the difficulty of identifying notice of a foreseeable risk is one reason why this Court recognized negligence *per se* under FELA. *See Urie*, 337 U.S. at 189 (the safety statutes are "supplemental" to FELA, "having the purpose and effect of facilitating employee recovery, not of restricting such recovery or making it impossible").[8] That approach would invite abuse by railroads, allowing them to immunize themselves from LIA safety

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[8] Respondent cites three court of appeals cases for the proposition that vehicles do not come "back" into service until they have passed inspections. Resp. Br. 35-36 (citing *Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 289-90 (4th Cir. 1999), *Wright*, 574 F.3d at 621-22, and *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991)). But those cases are distinguishable because LeDure's train never went out of service. Moreover, those trains had not been released by mechanical crews to the distinct transportation crews at the time of injury. Withholding the vehicle from its transportation crew strongly suggests that the vehicle was not "allow[ed] to be used." By contrast, LeDure's train was stopped temporarily to change transportation crewmembers, UP5683 was still running and had not been turned over to a mechanical crew, and LeDure was injured while walking along a passageway on the locomotive to perform his transportation duties. UP5683 never was withheld from its transportation crew. JA25-27, 33, 109.

standards by willfully failing to inspect their locomotives. Pet. Br. 34-35.[9]

C. Respondent's Proposed Tests For "Use" Do Not Comport With The Statute

In addition to its main position that a locomotive is in "use" only when hauling other railcars, respondent offers at least three other (largely contradictory) tests of what "use" should mean. Each is unpersuasive.

Respondent asserts (at 15) that a locomotive is in use "only when it is moving under its own power in active service." This unduly narrow framing lacks textual support. Indeed, it ignores that Congress *removed* the movement requirement from the LIA in 1924. It also would require employees to bear the risks of unsafe conditions on stationary locomotives – even though employees may perform a significant amount of work in and on a stationary locomotive

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[9] Respondent's reliance (at 30-31) on the FRA's "out-of-use" credit is misplaced. The FRA mandates various interval-based testing, such as annual testing within every 368 days and "periodic assessments" within every 184 days. *E.g.*, 49 C.F.R. §§ 229.23(b), 229.27(a). Those intervals may be extended "[w]hen a locomotive is out of use for 30 or more consecutive days." *Id.* § 229.33. The FRA then specifies that, if a locomotive's *sole* movement during a 30-day window is to a repair facility, *see id.* § 229.9, that will not count as a "use" "for purposes of determining the period of the out-of-use credit," *id.* § 229.33. The movement to a repair site thus *would* qualify as a "use" under the LIA's text but would not prevent an extension of the assessment intervals. Contrary to respondent's assertion (at 31), that is not a "flagrant violation of the letter and the spirit" of the LIA. It is a common-sense scheduling accommodation to railroads that removes what otherwise would be a disincentive to bring defective locomotives to repair facilities. Respondent's suggestion (at 12 n.5) that freight trains do not run on fixed schedules, where true, only heightens the importance of those trains operating safely so they are safe when crews enter them.

before it can move. The LIA requires that locomotives be "safe to operate." 49 U.S.C. § 20701(1). Implicitly, that condition must exist *before* movement begins. It makes no sense to construe the LIA as applying only when movement is under way.

Respondent also asserts (at 23 n.7) that "a locomotive may be in 'use' when it is imminently ready for movement, even if not currently moving." Putting aside the facial inconsistency with respondent's prior theory, this framing also contradicts respondent's argument that a locomotive's "hauling" function is controlling. Whether movement is "imminent" has nothing to do with whether a locomotive is hauling a train. And, here, a reasonable inference from the record is that, when petitioner was injured, UP5683 was intended to move imminently as part of its interstate journey. JA109, 112.

Respondent next suggests that a locomotive is in use "only when presently engaged in active service." Resp. Br. 16; *accord id*. at 25 ("[A] railroad 'uses' a locomotive only when it actively employs it to perform tasks."). But Congress removed the term "active service" from the statute's operative version. *See* Act of July 5, 1994, Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 885. In any event, although LIA applicability does not depend on the on/off status of locomotives, UP5683 still was powered on from its journey from Chicago to Salem, where it would couple to another on-rail vehicle and connect electrical and air-braking systems. JA30, 111.

D. UP5683 Was In Use Or Allowed To Be Used At The Time Of Petitioner's Injury

In light of the LIA's plain meaning and this Court's precedents, the statute applied to UP5683 at the time

of LeDure's injury because Union Pacific was using it and allowing it to be used.

First, UP5683 still was powered on when LeDure entered it. JA30, 111. Whatever the outer limits of "use" might be, a locomotive is certainly in use when powered on. Respondent tries to deflect this fact by claiming it comes from "self-serving" testimony, but respondent points to *no* evidence suggesting that UP5683 was powered off when it arrived from Chicago and when LeDure was injured.[10] In any event, even a powered-off locomotive on a dead run couples the vehicles in front of it to those behind it, has power running through it to other vehicles, and can perform braking functions if needed. JA61.

Second, although LeDure planned to power off UP5683 to conserve fuel, that was a discretionary choice; he could have kept it powered on to haul the train had he decided its power was needed. And, even once powered off, UP5683 still would have been used for air braking and coupling the train, and its power could have been restarted during transport if necessary. JA26-27, 30, 111; Pet. Br. 23. At the very least, then, UP5683 was "allow[ed] to be used." Respondent offers no counterargument to this point.

Third, UP5683 was partway through an assigned journey from Chicago to Dexter. Getting a vehicle to its destination is a "use" of that vehicle under the plain meaning of that word and under this Court's

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[10] Respondent also argues (at 10) that the second locomotive was powered off. The second locomotive's status is immaterial, but, in any event, the record supports an inference that it was powered on as well: LeDure had to tag it and ensure it was shut down. JA30. The testimony on which respondent relies that the second locomotive "was shut down" is ambiguous as to whether that was before or after LeDure worked on it. *Id.*

precedents. Pet. Br. 22. Respondent concedes as much. Resp. Br. 16 ("locomotives (like other cars) were 'use[d]' or 'haul[ed]' as rail vehicles even when moving dead") (brackets in original).

Respondent tries to avoid this conclusion by suggesting (at 45) that UP5683 may have had two separate itineraries, one from Chicago to Salem and another from Salem to Dexter. But nothing in the record supports that suggestion. UP5683 was in Salem for only about five hours before continuing on to Dexter. JA59-60, 108-09.[11] The most reasonable inference from the record is that UP5683 had a single travel itinerary from Chicago to Dexter.

In any event, whether the two legs were on separate "itineraries" should not matter given the short interval between them. If that were enough to take a locomotive outside of the LIA's scope, railroads could simply list their trains' itineraries one stop at a time to avoid complying with the LIA between legs. Nothing in the statute supports such evasive tactics. The locomotive had a job: get to Dexter. It was employed in that purpose from when it left Chicago until it arrived in Dexter. That plainly is a "use" of the locomotive.

Fourth, UP5683 was on an "active track" at all relevant times. That placement demonstrates a purpose

[11] The evidence also suggests that the planned stop was shorter than five hours. Respondent's counsel admitted below that the planned departure was only about "an hour" after UP5683's arrival. C.A. App. 42. And part of the time in Salem was spent waiting for an opening in traffic when respondent gave priority to a "hotshot Z train." JA60.

for the locomotive to continue traveling – meaning it was in "use."[12]

Respondent suggests incorrectly (at 44) that its failure to inspect UP5683 is evidence the locomotive was not in use. But LeDure's role was not to perform a daily inspection; it was to work on the locomotive. Respondent's apparent failure to conduct an inspection does not remove the locomotive from the LIA and applicable regulations; it just represents a separate violation of the regulations. *See supra* pp. 11-13.

II. APPLYING THE LIA TO STOPPED LOCOMOTIVES ADVANCES CONGRESS'S POLICY GOALS

A. The SAA, LIA, and FELA "protect[] . . . employees and others by requiring the use of safe equipment," *Lilly*, 317 U.S. at 486, and affording broad relief to injured workers in accordance with their humanitarian purposes, *see Urie*, 337 U.S. at 180. Stopped locomotives pose substantial risks to employee safety. Railroad workers must do a significant amount of work on stopped vehicles, and most locomotive-related injuries occur on stopped locomotives. Pet. Br. 40-41. Removing such vehicles from the LIA's scope would create an enormous gap in the regulatory and safety scheme. *Id.*

B. Respondent does not contest that its construction of the statute creates that gap. Instead, it argues (at 40) that FELA's general negligence standard renders unnecessary the LIA's specific safety requirements. Its sole justification is that "a non-operating

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[12] Respondent asserts (at 27) that locomotives often are "stored" out on tracks, but UP5683's short stop in Salem was not "storage" as only a few railcars were to be switched in/out of the train before the journey to Dexter resumed.

locomotive is . . . no different than a freight car" and therefore requires no special protections. *Id.* But, unlike with most freight cars, railroad transportation employees have to walk on locomotive passageways and enter cabs as part of their daily duties, including to shut down and tag non-operating locomotives.[13] Respondent offers no persuasive reason why those locomotives should be safe when employees turn them on, but not when employees turn them off.

C. Respondent also advances five policy arguments that do not withstand scrutiny.

First, respondent argues (at 40) that applying the LIA and the resulting strict liability standard would be unfair because "Union Pacific had no way to know of the purported spot of oil on the exterior walkway." But respondent cannot credibly make that argument given its failure to inspect UP5683 the day before (as FRA regulations required). One purpose of the strict liability regime is to encourage railroads to perform the necessary inspections to ensure their locomotives are safe.

Second, respondent argues (at 40-42) that many parked locomotives "that no one intends to move" would require inspection if the term "use" were interpreted broadly. If the railroad is "allow[ing]" those parked locomotives "to be used," then they are within the scope of the LIA's plain language, independent of any policy judgment. Those parked locomotives benefit the railroad by being available for service; the tradeoff for the railroad is responsibility for worker safety.

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[13] *See, e.g.*, Union Pacific, Air Brake and Train Handling Rules § 31.8.7 (eff. Jan. 20, 2012), https://pdf4pro.com/cdn/air-brake-and-train-handling-rules-rgpcops-net-87525.pdf.

Third, respondent complains (at 28, 42) that taking a locomotive to a dedicated place of repair is too burdensome or that it is too hard to tell whether a locomotive has reached such a place. But railroads have options other than repair facilities. In some instances, they "blue flag" locomotives on the tracks, power them down, withdraw their transportation crews, and dispatch mechanical crews to clearly remove them from use and establish a dedicated place of repair where the locomotive is located.[14]

Fourth, respondent argues (at 42) without evidentiary support that applying the LIA to stopped locomotives will encourage fraudulent "slip-and-fall" claims.[15] But such injury claims have been recognized for decades, and roughly half of all injuries sustained by rail workers occur on stopped vehicles. *See* Union Br. 20-21.

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[14] Blue flags are signaling mechanisms used to indicate that a train or vehicle is under repair. Blue flags generally indicate that the flagged train or vehicle may not be moved and that other trains may not come within a certain safety radius of the flagged train. *See* 49 C.F.R. §§ 218.21-218.30. Blue flags alone do not necessarily remove a vehicle from use (indeed, idling locomotives departing imminently can be blue-flagged), but a blue-flagged locomotive under the exclusive control of the mechanical department in a "locomotive servicing track area" may be out of use. *Id.* § 218.29.

[15] To the extent respondent attempts to cast aspersions on LeDure's claim, it is undisputed that LeDure's injuries required *multiple* surgeries. JA97-99. Respondent argues (at 11 n.4) that LeDure settled a claim for work-related injuries more than 30 years ago. LeDure disclosed his prior injury and subsequent improvement in his condition to respondent before he was hired, and most of his work with respondent was as an engineer, a lighter job than the one he had held with the prior employer (conductor). JA63-65.

Fifth, respondent claims (at 43) that petitioner's position will result in "unavoidable" "massive non-compliance." That argument once again ignores the statutory and regulatory safe harbors. *See* 49 U.S.C. § 20303(a); 49 C.F.R. § 229.9. Congress and the FRA already have offered railroads a means to avoid civil penalties for supposedly "unavoidable" non-compliance.[16] The tradeoff Congress made, however, was to ensure a remedy for rail workers injured in those situations, which this Court long has recognized. *See Rigsby*, 241 U.S. at 42-43.

Respondent's *amicus* asserts another unpersuasive policy argument: that strict liability is inefficient because it does not minimize the total costs of accidents plus prevention. Chamber of Commerce Br. 5-6. But Congress already made that policy decision: it enacted the FELA, LIA, and SAA for "humanitarian purposes" and to shift those costs "from employees to their employers." *Gottshall*, 512 U.S. 542-43. The "efficiency" and "cost minimization" of not compensating injured rail workers was a vestige of nineteenth century law that Congress changed long ago. The system of strict liability for violations of safety regulations – which respondent has not questioned in this case and which has been settled for decades – is particularly appropriate in the railroad industry. Proving exactly who is responsible for a given regulatory violation is nearly impossible. Strict liability provides

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[16] Respondent elsewhere argues (at 2, 47) that noncompliance with the "slipping hazards" regulation is unavoidable because locomotives will have "water" on them "every time it rains." But the same unavoidable noncompliance would arise even under respondent's interpretation of "use." This is an argument against the specific regulation, not the scope of "use." In any event, there is no history of the FRA finding regulatory violations from ordinary rainwater.

a remedy for the injured worker and an incentive for the railroad to inspect and maintain its vehicles.

III. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO MISCONSTRUE 49 C.F.R. § 229.119

Respondent asks (at 46-47) the Court to reach a question different from the one on which it granted certiorari: whether respondent violated 49 C.F.R. § 229.119(c), the regulation requiring floors and passageways to be free from slipping hazards. Respondent argues that exterior walkways are not "floors" and that the "spot of oil" on UP5683 was not large enough to violate the regulation.

The Court should decline respondent's invitation. Respondent cites no authority supporting its interpretation that the site of LeDure's injury was not a floor or "passageway" under § 229.119(c). The lower courts overwhelmingly agree that they are (just one district court has held otherwise). *See* Pl.'s Response in Opp. to Def.'s Mot. for Summary Judgment on Pl.'s First Am. Compl. at 11-14, *LeDure v. Union Pac. R.R. Co.*, No. 3:17-cv-737, ECF No. 55 (S.D. Ill. Nov. 29, 2018) (describing cases). As to the amount of oil, the FRA guidance cited by respondent (at 47) stands only for the unobjectionable proposition that not all oil is a violation; oil on a side panel that does not pose a slipping hazard, for example, may not violate § 229.119(c). Oil on a passageway floor that creates a slipping hazard – as in this case – violates § 229.119(c).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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