No. 20-807

IN THE

Supreme Court of the United States

BRADLEY LEDURE,

Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

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

BRIEF OF *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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INTERESTS OF *AMICI CURIAE* [1]

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 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").

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[1] 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. Each of the parties received notice of our intention to file an amicus brief at least 10 days prior to the deadline to file this brief. The Petitioner and Respondent, through counsel, gave their consent to the filing of this Brief.

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

If this Court were to allow the Seventh Circuit decision to stand, there will be continued conflicts between the circuits, creating much uncertainty and unnecessary FELA litigation costs regarding this issue.

The clear intent, encouragement, and dedication of Congress is to the furtherance of the highest degree of safety in railroad transportation." 49 U.S.C. § 103(c). Coupled with the above requirements, all of the railroad safety laws are to be construed in order to accomplish the remedial purpose of railroad safety. Neither of these policies can be accomplished by upholding the restrictive view of the 7th Circuit decision.

If this Court were to restrict the Locomotive Inspection Act ("LIA") (49 U.S.C. § 20701) violations to only locomotives actually moving, then an overwhelming majority of violations imposed by the Federal Railroad Administration ("FRA") under the LIA and the Safety Appliance Acts ("SAA") (49 U.S.C. §§ 20102, 20301-20306) would become a nullity. This Court's

decision in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), should be followed here, because FRA always has been administering those laws without the condition of a movement and without opposition regarding the application of those laws.

Regarding "use" or "used", referenced in the LIA or SAA, with only one exception, none of FRA's 50 plus years of enforcement distinguishes between moving equipment and standing equipment. In its *Motive Power and Equipment Compliance Manual,* Office of Railroad Safety, there is no distinction mentioned.

Also, the Seventh Circuit stated that the plaintiff "must show that the employer had actual or constructive notice of those harmful circumstances" for there to be a violation of the LIA. 962 F. 3d 907, 911. It is established law under the FELA, where there exists a violation of a statute or regulation, it is negligence per se. 45 U.S.C. § 54a. Notice is not an issue in such circumstances.

ARGUMENT

In his Petition, Bradley LeDure has discussed and detailed the conflicts within the circuits regarding the issue presented in this case. Additionally, there are significant nationwide implications of the restrictive Seventh Circuit decision interpreting the Locomotive Inspection Act. If this Court were to allow the Seventh Circuit decision to stand, there will be continued conflicts between the circuits, creating much uncertainty and unnecessary FELA litigation costs regarding this issue.

Congress has made it clear what it expects of railroad safety. The Federal Railroad Safety Act of 1970

("FRSA") (49 U.S.C. §§ 20101-20144, 21301-21304) contains the congressional intent at issue in this case, namely "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and reduce deaths and injuries to persons . . . ." Sec. 101, Pub. L. 91-458, codified at 49 U.S.C. § 20101. Additionally, 49 U.S.C. § 103(c) mandates that the Federal Railroad Administration "shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation." Coupled with the above requirements, all of the railroad safety laws are to be construed in order to accomplish the remedial purpose of railroad safety. *Brady v. Terminal Railroad Association,* 303 U.S. 10, 13-14 (1938). As noted in *Brady,* the locomotive is not "in use" only when it "has reached a place of repair". *Id.* at 13.

Moreover, the FELA was enacted to "shif[t] part of the human overhead of doing business from employees to their employers." *Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 542 (1994). Neither of these policies can be accomplished by the restrictive view of the 7th Circuit decision.

The implications of the 7th Circuit decision are far reaching, as it will impact FELA litigation in a vast range of contexts, and it is not in compliance with the law. The decision has application to more than the Locomotive Inspection Act LIA. It will also impact the SAA which has similar language to the LIA. In this regard, 49 U.S.C. § 20302 states that a railroad carrier "may use or allow to be used on any of its railroad lines . . ." a vehicle, a locomotive or a train and then outlines the safety appliances required for such use. If this Court were to restrict the LIA violations to only loco-

motives actually moving, then an overwhelming majority of violations imposed by the FRA under the LIA and the SAA would become a nullity. Such decision also would directly impact the FRA's freight car regulations in 49 C.F.R. Pt. 215, where the FRA has not imposed a requirement of the movement of a freight car for a violation to exist. This Court's decision in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), should be followed here because the FRA has always administered those laws without the condition of a movement and there has been no opposition regarding their application.

Another error exists in the decision of the court below which will have nationwide consequences if allowed to stand. It states that the plaintiff "must show that the employer had actual or constructive notice of those harmful circumstances." 962 F. 3d 907, 911. It is established law under the FELA that where there exists a violation of a statute or regulation it is negligence *per se*. 45 U.S.C. § 54a. Notice is not an issue in such circumstances.

In FRA's Fiscal Year 2019 Enforcement Report, at p.5, it found 515 inspections in which it recommended a LIA violation, 429 freight car safety standards violations, and in the SAA statutes and regulations, it found 1,642 violations.[2] Notably, in 2019, there were 203,516 defects discovered on Class I railroads (p. 6), and on the Union Pacific Railroad, 50,607 defects were discovered (p. 10). It must be kept in mind that there likely existed numerous more violations. The Government Accountability Office stated, "By FRA's own estimation, its inspectors have the ability to inspect less

[2] https://railroad.dot.gov/elibrary/fiscal-year-2019-enforcement-report

than 1 percent of the federally-regulated railroad system." *RAIL SAFETY: Improved Human Capital Planning Could Address Emerging Safety Oversight Challenges*, Report to Congressional Requesters, December 2013; GAO-14-85 (p. 2).

Regarding "use" or "used," as referenced in the railroad safety requirements, with only one exception, none of FRA's 50 plus years of enforcement distinguishes between moving equipment and standing equipment. In its *Motive Power and Equipment Compliance Manual,* Office of Railroad Safety, there is no distinction mentioned.[3] In only one instance, when there is a movement of a noncomplying locomotive is there a violation. 49 C.F.R. § 229.9. There are 199 other safety requirements for locomotives. *See,* 49 C.F.R. Pt. 229, App. B-Schedule of Civil Penalties. There are 57 freight car safety requirements, and none entail movement. *See*, 49 C.F.R. Pt. 215, App. B-Schedule of Penalties. When added to the safety appliances standards contained in 49 C.F.R. Pt. 231, it cannot be validly argued that movement of a locomotive is a requirement for being in use. In this particular case, 49 C.F.R. § 229.45 requires that all systems and components on a locomotive shall be free of conditions that endanger the safety of the crew, including oil. Additionally, 49 C.F.R. § 229.119(c) requires floors of cabs, passageways, and compartments shall be kept free from oil. The locomotive need not be moving. Crews boarding and traversing a locomotive passageway and compartment is clearly intended to be within the scope of these regulations. Otherwise, their provisions would be rendered meaningless and absurd. Every pre-de-

[3] https://railroads.dot.gove/sites/fra/dot/gov/files/2020-05/MPEComplianceManual2013.pdf. The Manual is used by FRA safety inspectors to enforce FRA's regulations.

parture of a locomotive requires crews to be on board, and many situations arise which place employees in danger even when the locomotive is not in motion.

As an illustrative example, "Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device." 49 C.F.R. § 229.119(a). If a seat back fails once the engineer sits down in preparation for movement, it is negligence *per se.* 45 U.S.C. § 53 and 54a. Under this regulation, the FRA holds the railroad accountable not only when the locomotive is in motion, but also when it is stationary. The rule assures that safety is required at all times when an employee is located on a locomotive.

The 7th Circuit fails to recognize that the word "use" has a meaning more than to employ for some purpose, or put into service. It also includes "to avail oneself of; apply to one's own purposes." (Merriam-Webster definition of use).

Most injuries to employees on locomotives do not occur when a train is moving. Statistics compiled by FRA from railroads' reporting show that between CY 2015-2018, there were 569 injuries to employees in a locomotive standing in the cab or walkways, and during the same period there were 408 injuries while a locomotive was moving.[4] 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 ad-

4 https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/castall 1.aspx.

dressed in the safety regulations. If the narrow interpretation of "in use" by the 7th Circuit is followed here and in the Safety Appliances Act, the adverse safety effect will be even more widespread.

CONCLUSION

This Court should grant the petition.

Respectfully Submitted,

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