No. 10-879

IN THE
Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,
Petitioners,
v.
RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

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

BRIEF FOR AMICUS CURIAE ACADEMY OF RAIL LABOR ATTORNEYS IN SUPPORT OF PETITIONERS

JOHN D. ROVEN
Counsel of Record
HECTOR L. SANDOVAL
ROVEN-KAPLAN, L.L.P.
2190 N. Loop West, Ste 410
Houston, Texas 77018
Counsel for Amicus Curiae
(jroven@rovenlaw.com)

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INTEREST OF AMICUS CURIAE[1]

The Academy of Rail Labor Attorneys ("ARLA") is a national organization of trial and labor lawyers specializing in FELA and related railroad litigation. Members represent both union and non-union rail employees and contractors, whose remedies if injured on the job, often include those under the Federal Employers' Liability Act in addition to those available under the parameters of state tort law. ARLA's genesis occurred, in substantial part, from our members representation and advocacy of locomotive mechanics, such as Petitioners' decedent, a retired Machinist.

ARLA is uniquely qualified to speak to the question presented in this case. Our members have represented and litigated the majority of the steam era occupational disease claims that manifested long after exposure occurred. We continue to do so today; one hundred years after the passage of the Locomotive Inspection Act.

STATEMENT OF THE CASE

ARLA adopts the statement of the Petitioners.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3 (a), counsel for the amicus represents that all parties have consented to the filing of this brief. Letters reflecting their consent are on file with the Clerk.

SUMMARY OF THE ARGUMENT

In *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), this Court found state legislation of locomotive parts "used on a highway of interstate commerce" preempted for infringing on the regulatory field occupied by the Locomotive Inspection Act (LIA). The Court below found Petitioners' state remedies for mesothelioma, caused by contact with asbestos in a locomotive repair facility, prohibited by *Napier*. ARLA contends that this result was error, for three reasons:

First; when LIA was enacted and *Napier* written, remedies for such injuries had been reserved to the States; and in passing LIA Congress intentionally excluded manufacturers from federal regulation. This included Respondent Viad's predecessor Baldwin, who appeared before Congress in 1910. Railroad repairmen, who worked to maintain safe locomotives for the benefit of those who operated them "on the railroad's line", were granted no right of action under LIA. Thus, Petitioner's state law claims cannot infringe upon, or otherwise impact, a federal act that governed neither the rights of Petitioner's decedent, nor the conduct of Respondents.

Second; LIA provided the railroad industry with freedom to innovate. Asbestos was neither required nor banned on locomotives. Before *Napier*, this Court ruled that lawsuits for actual locomotive defects are valid, whether addressed by an agency regulation or not; while lawsuits asserting the need for extra or additional locomotive equipment are forbidden. This

principle was affirmed, not displaced, by *Napier*.

Third; the post *Napier* decisions of this Court have upheld the States' continuing role to provide remedies when FELA doesn't govern the rights of the parties. In such cases, when LIA by definition applies (ie; with an "on the line" injury) then LIA provides the standard of care and state law provides the cause of action. Where LIA is inapplicable (i.e. in an "off the line" injury) state law provides both the cause of action and the standard of care.

In Part IV, ARLA spotlights the consequences of the decision below. Total "sweeping" preemption of state law would eradicate many state causes of action of last recourse, leaving the injured who continue to depend on them without any remedy.

ARGUMENT

I. CONGRESS NEVER INTENDED TO FORECLOSE STATE TORT REMEDIES FOR LOCOMOTIVE-BASED INJURIES

A. The Safety Appliance Act "Sprang from the Principle of the Common Law".

The Locomotive Inspection Act of 1911 was not written on a blank slate. Understanding Congress' intent in passing it requires a step back to 1893 when LIA's "sister statute", the Safety Appliance Act ("SAA") became law.

SAA was Congress' first foray into a decentralized industry, enacted when the states oversaw all rail equipment within their borders. *See,*

e.g., New York, New Haven & Hartford Railroad. Co. v. New York, 165 U.S. 628 (1897) (upholding state regulation of passenger car heating against Commerce Clause challenge). Consistent with the high duty of common carriers, railroads were held to the standard of ordinary and reasonable care in the operation and maintenance of their equipment. *See, e.g., Richmond & Danville Railroad Co. v. Elliott*, 149 U.S. 266, 271 (1893). (boiler explosion case).

Enacted primarily to mandate use of automatic couplers to protect switchmen working between cars, the act focused on requiring certain safety appliances and was narrowly drawn for that purpose. *See Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 608 (1926). In addition to automatic couplers, requirements included grab irons, ladders and walkways on any car "moving in interstate commerce".[2] The 1903 Amendment extended coverage to all locomotives and cars "whether the particular cars at the time were employed in such commerce or not". *Southern Railway Co. v. United States*, 222 U.S. 20, 27 (1911).

The Interstate Commerce Commission was authorized to levy penalties against railroads "hauling or permitting to be hauled or *used* on its line, any car found in violation" of the act or its regulations (former 45 U.S.C. §6).[3] Though SAA is

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[2] Act of 1903, ch. 976, 32 Stat. 943.

[3] SAA's penalty provision along with much of SAA, was repealed when the Transportation Code was re-codified in title 49 in 1994. The FRA now possesses general authority to levy fines under 49 U.S.C. §21302.

narrow in scope, it is broadly applied; every locomotive and car remains subject to its requirement.

Aside from its regulatory function, SAA established a national standard of care applicable in all tort actions. "[E]ven without FELA [this] has never been doubted." *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916). Yet, like LIA to follow, SAA created no federal cause of action for its violation. *Moore v. Chesapeake and Ohio Ry. Co.*, 291 U.S. 205 (1934). In non-FELA cases, state law defines all claims and defenses "because the right to recover damages sprang from the principle of the common law and was left to be enforced accordingly". *Tipton v. Atchison, Topeka & Santa Fe Ry. Co.*, 298 U.S. 141, 150-151 (1936) (citations omitted). SAA modified the common law "in only one aspect, by withdrawing the defense of assumption of risk". *Id.* at 146.[4] That modification was held binding on the states in SAA injury cases even prior to FELA. *Schlemmer v. Buffalo R. & P. Ry. Co.*, 205 U.S. 1 (1907).

After FELA, state law claims for relief were routinely plead in the alternative; the frequent interchange of cars between railroads often placed liability for statutory violations on a non-employer railroad; against whom the plaintiff possessed no FELA rights. *See, e.g., Brady v. Terminal Railroad Assn.*, 303 U.S. 10 (1938).

SAA was designed to function in tandem with

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[4] Former 45 U.S.C. §8 prohibits the defense in any case brought by a railroad employee

state law, not to displace it. As the first safety statute, SAA endures, but its modest scope reflects the limited federal ambition it serves.

B. After FELA, Tort Remedies for Off Line Locomotive Injuries Were Reserved to the States.

The SAA, having predated FELA by a decade, was clearly within contemplation of the Congress that passed FELA. *Brady,* 303 U.S. 10, 12 (1938). In 1906, Congress enacted the *first* Federal Employers' Liability Act, governing the liabilities of *"every common carrier engaged in trade or commerce...* for all damages which may result from the negligence of its officers, agents or employees". Act of 1906, ch. 3073, §1, 34 Stat. 232.

This Act was held unconstitutional in *Employers' Liability Act Cases*: *Howard v. Illinois Central Railroad Co., et al,* 207 U.S. 463 (1908); as exceeding the commerce clause power by regulating "without qualification or restriction... the business in which the railroads or their employees might be engaged at the time of injury. *Id.*, 207 U.S. 498.

> ...[T]ake a railroad engaged in interstate commerce, having a purely local branch operated wholly within a State. *Take again the same road having shops for repairs and it may be for construction work*...as the Act thus includes many subjects *wholly beyond the power to regulate commerce* and

> depends for its sanction upon that authority, it results that the act is repugnant to the Constitution. (*Id.*, emphasis added).

Rejecting the argument that "one who is engaged in interstate commerce thereby submits all his business concerns to the regulatory powers of Congress," the Court found that such contention... "would destroy the authority of the States... which, from the beginning have been and must continue to be under their control, so long as the Constitution endures".

Congress re-enacted FELA in the next session, but limited it to injuries occurring in interstate commerce: ...every common carrier *by railroad while engaging in interstate commerce...* shall be liable in damages to any person suffering injury *"while he is employed by such carrier in interstate commerce"*. Act of 1908, ch. 149, 35 Stat. 65. (emphasis added).

Second FELA survived challenge in Second *Employers' Liability Act Cases*: *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1 (1912). Justice Van Devanter (author of *Employers' Liability Act Cases) found* none of the infirmities that had plagued its predecessor "because unlike (first FELA) it deals only with the liability of a carrier...for injuries sustained by its employees while engaged in interstate commerce". *Id.*, 223 U.S. 51-52. As to the injuries within its coverage, FELA displaced state law because "now that Congress has acted, the laws of the States, *in so far as they cover the same field*, are superceded". *Id.*, at 55. (emphasis

added).

The scope of FELA's coverage proved to be a persistent subject on the Court's docket until 1939 when Congress erased the "intrastate-interstate" distinction. Until then, FELA was available only to employees actually connected with the movement of goods over rails.[5] *Illinois Central Railroad Co. v. Behrens*, 233 U.S. 473, 478 (1914) ("it is clear that Congress intended to confine its action to injuries...in which the employee is engaged is a part of interstate commerce").[6]

A "test" announced in *Shanks v. Delaware, Lackawana & Western Railroad Co.* 239 U.S. 556 (1916), narrowed the inquiry "...[I]s the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically part of it?" *Id.*, at 558. This essentially disqualified locomotive repairmen from FELA coverage. *Id.*, at 559-560. *See Industrial Accident Commission of the State California, et al v. Davis,* 259 U.S.182 (1922) (repairman injured while "drilling and tapping a boiler" not under FELA). *See also, Chicago & Eastern Illinois Railroad Co. v. Industrial Commission of Illinois*, 284 U.S. 296

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[5] In 1939 hearings, Congress discussed the Court's treatment of *Employer's Liability Act Cases* in *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) as providing impetus for Congressional action to amend the act.

[6] When FELA was passed in 1908 Congress, there were no State Workman's Compensation laws yet in place. Congress therefore, knew that "uncovered" employees would file common law actions for redress of "intrastate" injuries. *See New York Central Railroad Co. v. Winfield*, 244 U.S. 147, 165 (1917).

(1931) (injury on machine loading coal onto locomotive was not under FELA). *See also, Philadelphia & Reading Railway Co. v. Polk*, 256 U.S. 332, 334 (1921) (burden of proof to establish FELA coverage is on worker asserting it).

Prior to 1916, over 200 cases were appealed on FELA's intrastate-interstate distinction. From 1917 to 1933, forty-three Supreme Court opinions were devoted to the subject.[7] State law and FELA remedies were deemed mutually exclusive in *Wabash Railroad Co. v. Hayes*, 234 U.S. 86 (1914) and in *New York Central Railroad Co. v. Winfield,* 244 U.S. 147 (1917) negligence was deemed an essential element of proof in FELA. Injuries coming under FELA, but not caused by railroad negligence, were not eligible for state remedies. This generated more litigation as railroads began asserting FELA as the exclusive remedy, when to their advantage. "(This) case is one of a peculiar class where we have frequently been obliged to give special consideration to the facts to protect interstate carriers against unwarranted judgments...". *Atchison, Topeka & Santa Fe Ry. Co. v. Saxon*, 284 U.S. 458, 459 (1932).

In *Southern Railway,* this Court upheld Congress' power to regulate objects of commerce (i.e.,trains) operating wholly within the borders of a state, yet issues of liability and compensation occurring within those borders remained subject to state control, beyond federal intervention. The right of a state to

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[7] Lester P. Shoene & Frank Watson, *Workman's Compensation on Interstate Railways,* XLVII Harv. L.Rev. 389, 398 (1934).

redress "intrastate" injuries was therefore considered sacrosanct "so long as the Constitution endures".[8] *Employers' Liability Act Cases*, 207 U.S. at 503. With this dual standard firmly in place, Congress enacted LIA.

C. LIA Excluded Locomotive Manufacturers and Locomotive Mechanics From Coverage.

1. Sellers of Locomotives Were Intentionally Excluded From LIA.

Within two years of FELA's passage, another measure "for the protection of employees", a Boiler Inspection Bill, was introduced in the Sixty-first Congress.[9] Responding to public outcry over boiler explosions, the Bill proposed penalties for both noncompliant "common carriers" and "sellers" of locomotive boilers. Viad's predecessor, the Baldwin Locomotive Works, then the world's largest

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[8] The analytical divide between the two decisions was discussed extensively. "While the SAA is clearly distinguishable in legal theory (from FELA) a layman would find it difficult to understand why one injured as the result of a defective breakbeam could constitutionally recover under federal law while one injured by reason of some other defect in the car could not, in the absence of the interstate commerce element. Lester P. Shoene & Frank Watson, *Workman's Compensation on Interstate Railways*, XLVII Harv. L.Rev. 398, 411 (1934).

[9] Senate Bill 236 was originally filed as an amendment to the Safety Appliance Act. *See* S. Rep. No. 889 (1910); 61st Congress, 2nd Session.

locomotive builder,[10]sent a product designer to testify before the House. After assuring the Committee that the builder used only the finest materials in construction, he asserted that "the proposed bill in some respects falls so far short of the present practice that if it were made law, it might encourage lax methods".[11]

When passed, the penalty provision covered only "common carriers"; meaning "railroads", to the exclusion of others.[12] *Edwards v. Pacific Fruit Express Co.* 390 U.S. 538, 540 (1968). Congress therefore considered but excluded "sellers" from LIA; and while this Court is reluctant to draw inferences from congressional failure to act, it has refused to read into an act that which Congress has considered and discarded. *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Develop.*, 461 U.S. 190, 220 (1983).

The exclusion of "sellers" from LIA's ambit spotlights the question of whether manufacturers, unregulated by a federal act, should receive

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[10] Samual Matthews Vauclain,, *Steaming Up!: The Autobiography of Samuel Vauclain*, Intro., pg. 7(Brewer Warren, N.Y. 1930). Vauclain was an official of Baldwin from 1883 until 1929 and retired as President.

[11] H.R. Comm. on Interstate and Foreign Commerce, Hearings on Bills Affecting Interstate Commerce, 61st Cong. 316-319 (Jan. 29, 1910). Testimony of William J. Austin, representing the Baldwin Locomotive Works.

[12] Former 45 U.S.C. §34, now subsumed in 49 U.S.C. §21302. P.L. 103-272 §1(e), 108 Stat. 892, as amended July 5, 1994. *See* fn. 3.

immunity that regulated entities do not enjoy. Since the 1800s, railroads have litigated state law damage suits for locomotive defects.[13]

Before 1992, when LIA's penalty provision was amended to capture non-railroads, the Interstate Commerce Commission (ICC) and the Federal Railroad Administration (FRA) possessed no power to penalize "sellers" of locomotives,[14]and LIA's current jurisdictional statute (49 U.S.C. § 20701) continues to cover only railroad carriers. In short, "nothing about the structure of the LIA indicates that in passing it, Congress intended to bring railroad manufacturers within its regulatory net". *Lorencie v. SEPTA*, 34 F. Supp. 2d. 929, 933-934 (E.D. Pa. 1998).

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[13] Examples of pre-LIA boiler defect cases against railroads include *St. Clair, Madison; St. Louis Belt Ry. Co. v. Henckell,* 12 Ill. App. 54 (Ill. App. 4th Dist. 1906); (scalding case) and *Penna & N.Y. Canal & R.R. Co. v. Mason, et al;* 109 Pa. 296 (Pa. 1885); (exploding locomotive claim brought under state law by two employees). Post LIA boiler defect cases include *La Casse v. New Orleans T. & M.R. Co.* 64 So. 1012 (La. 1914) (employee injured in explosion, but not in interstate commerce, brought state law claim)

[14] 49 U.S.C. §21302 (now part of the Federal Rail Safety Act) formerly 45 U.S.C. § 34, as amended Sept. 3, 1997, Pub L- 102-365, 106 Stat 972, by ("Rail Safety Enforcement and Review Act") applied the provision to "owners, manufactures, lessors, and lessees of railroad equipment and facilities". This amendment was short-lived. It was never re-enacted after revision and re-codification of the 1994 transportation code. *Brief for Petitioners*, pg. 30.

2. Railroad Mechanics Were Excluded From LIA's Coverage.

Two competing theories of LIA regulation were debated by Congress. The first involved direct government inspection by up to 300 federal boiler inspectors. This would have "presumably relieved the carrier for liability from faulty inspection".[15] The second allowed railroads to privately inspect and report their findings to ICC. The first theory was abandoned before House-Senate reconciliation.[16]

As enacted, LIA adopted the "inspect, repair and report" approach. The Act regulated steam locomotives "moving in interstate or foreign traffic" and defined "employees" to include only "persons actually engaged in or connected with the movement of a train". Act of 1911, ch. 103, §§1-2, 36 Stat. 913. (former 45 U.S.C. §22). LIA's jurisdictional provision provided:

> "[I]t shall be unlawful for any common carrier, its officers or agents, subject to this Act to *use any locomotive engine*

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[15] S. 236 was introduced on 3/22/09. A House Bill was introduced on 5/17/09. H.R. 9786, with others to follow. After extensive hearings, scientific submissions and amendments, the Mann revisions to the Senate Bill were substantially adopted by amendment in the Senate under S. 6702. S. Rep. No. 1974, 61st Congress, 3rd Sess., pg. 3 (1911); Report of Committee, and Foreign Commerce: "*History of the Proposed Legislation*".

[16] *Id.* Statement of Mr. Mann, Chairman of the House Committee on Interstate and Foreign Commerce, p. 46.

> propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act."[17]

A 1915 amendment extended LIA to "all of the parts and appurtenances" of the locomotive.[18] A 1924 Amendment altered the interstate commerce requirement, aligning it with SAA; all operating locomotives, even those functioning wholly within a state, would thereafter be covered.[19] The jurisdictional "in use" requirement was not, and has never been, amended. Mechanical employees whose injuries were not covered under FELA by the *Shanks* doctrine, were also intentionally placed outside the remedies LIA provides for "on the line" injuries.

Notwithstanding FELA's 1939 amendments, LIA's exclusion of locomotive mechanics remains.

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[17] Act of 1911, ch. 103, §2, 36 Stat. 913. Former 45 U.S.C. §23

[18] Act of 1915, ch. 169, §1, 38 Stat. 1192. Former 45 U.S.C. §23.

[19] Act of 1924. Ch. 355, §1, 43 Stat. 659. Former 45 U.S.C. §22.

Only those injured when a locomotive is "in use on the line" may claim a statutory violation. *See, e.g., Brady,* 303 U.S. 10, 13 (1938). To apply LIA otherwise would extend the legislation "beyond the articulated intent of Congress". *Lyle v. Atchinson Topeka & Santa Fe Ry. Co.,* 177 F.2d 221, 222-23 (7th Cir. 1949). The requirement is not satisfied by the mere movement of a locomotive or its placement outside the repair facility. Instead, a locomotive must function in a train to come under LIA. *United States v. Northern Pacific Railway Co.,* 254 U.S. 251, 254 (1920). Locomotives switching or reassembling cars in rail yards are not "in use on the line" of a railroad. *Id.*

LIA and FELA are read *in pari materia. Urie v. Thompson,* 337 U.S. 163, 189 (1940). The safety statutes (LIA/SAA) are substantially, if not in form, amendments to the [FELA] (*Id.*); and "cannot be regarded as statutes wholly separate and independent of [FELA]". *Id.,* at 189.[20] Prior to *Kernan v. American Dredging Co.* 355 U.S. 426 (1958), they were the only statutes recognized as "enacted for the safety of employees," under FELA's §3.[21]

LIA was Congress' last significant railroad safety enactment until the Federal Rail Safety Act of 1970

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[20] This Court has always treated the safety statues as intimately connected by history, construction and as reciprocally authoritative. *See, e.g, Kernan,* 355 U.S. 426 (1957); *Harlan J., dissenting* at 443, 444; 1915

[21] FELA's §3 (now 45 U.S.C. §54) relieves employees of comparative fault in the event of statutory violations.

(FRSA)[22] ; which was designed to "promote safety in every area of railroad operations". While drafting FRSA, Congress recognized that LIA/SAA were neither comprehensive nor applicable to the broad field of railroad safety.[23]

During the period of Mr. Corson's exposure, LIA excluded his mechanical work from its protection, and respondents from its penalties.[24] No precedent exists for a manufacturer, unregulated by a federal act, to enjoy immunity from the state tort claims of plaintiffs who possess no federal right of action under that act.

3. The "In Use" Requirement Pervades Railroad Safety Regulation.

In 1922, ICC responded to a Senate request for an update on LIA's effectiveness and commented on the nature of the act: "it is the *use of a locomotive* not found to be in proper condition and safe to operate, and *not the condition itself*, which is a violation of the

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[22] 49 U.S.C. §20701, et. seq.

[23] S. Rep. No. 91-619, 91st Cong., 1st Sess. pg. 29 (1969). Appendix A: Report of the Task Force on Railroad Safety to the Secretary of Transportation. LIA/SAA recognized as limited acts meeting "only certain types of hazards".

[24] Beginning in 1947 until 1974, Mr. Corson was employed as a machinist repairing and maintaining locomotives in railroad maintenance facilities. JA42.

law". 73 I.C.C. 761, 763 (1922).[25] Indeed, civil penalties may be levied only for each non-compliant "use" of a locomotive. *United States v. Long Island Railroad Co.*, 4 F.2d. 750 (E.D. N.Y. 1925). Similarly, with SAA, "if the railroad does in fact *use cars* which do not comply...it violates the plain prohibition of the law". *Chicago, B.&Q. Ry. Co. v. United States*, 220 U.S. 559, 575 (1911). The ICC's fundamental grant of authority under LIA was to "prescribe the rules and regulations by which *fitness for service* should be determined". *Napier*, 272 U.S. 605, 612 (1926) (emphasis added).

After passage of the OSHA law in 1970,[26] FRA acknowledged its lack of expertise in locomotive repair facilities, and ceded that jurisdiction.

> If FRA were to address all occupational safety and health issues which arise in the *railroad yards, shops* and associated offices, the agency would be forced to develop a staff and field capability which would, to an extent, already duplicate the capability already possessed by OSHA...FRA recognizes that OSHA is not currently precluded from exercising jurisdiction with respect to conditions not rooted in *railroad operations*....43 Fed. Reg. 50 (March 19,

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[25] Inspection of Locomotive Boilers: *Report of the Commission to the Senate in Response to Senate Resolution No. 327*, August 3, (calendar day August 7) 1922.

[26] 29 U.S.C. §§ 651-678

1978), (emphasis added).

See also, Southern Railway Co. v. OSHA, 539 F.2d. 335, 338, (4th Cir. 1976).(FRA does not "purport to regulate the occupational health and safety aspects of railroad offices or shop or repair facilities"); and *Southern Pacific Transportation Co. v. Usery, et al.,* 539 F.2d. 386 (5th Cir. 1976). (same).

Respondents insist that "in use" speaks only to the railroads' duty of care, while the act's preemptive effect emanates instead from the FRA's "exclusive power to regulate". RFPC, Supp. Brief in opposition to certiorari, p.8. However; this Court has ruled that the same facts that support a civil penalty will also support a violation in a personal injury case. *See Chicago, B.&Q. Ry. Co.*, 220 U.S. 559, 576-77, citing with approval *United States v. Atchison, Topeka & Santa Fe Ry. Co.,* 163 F. 517 (8th Cir. 1908) (Van Devanter, J.). The government agrees that LIA's "in use" requirement applies equally in a private tort case or a civil enforcement action. Brief for U.S., pg. 15.[27] This is because both types of proceedings are of a civil nature; in actions to recover penalties the government need only establish its case by a preponderance of the evidence. *Johnson v. Southern Pacific Co.,* 196 U.S. 1 (1904).

"In use" permeates the FRA's regulatory view. Agency authority to investigate accidents applies to those occurring "on the railroad line of a railroad

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[27] The United States filed its brief supporting certiorari in *Crane v. Atwell,* No. 10-272 (Filed May 2011)

carrier". 49 U.S.C. §20902".[28] The government's position is clearly correct, and an agency's interpretation of its own functions is entitled to weight. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). This is particularly so when it is coherent and consistent. *Wyeth v. Levine*, 129 S.Ct. 1187, 1201 (2009).

In sum, LIA was designed to expand the protection of train crews and the liability of railroads who violate the act. It would make little sense to construe LIA as Congress' chosen means of extinguishing the liability of unregulated manufacturers, or to read into LIA an intention to deprive railroads of their state law contribution or indemnity rights against third parties who share responsibility for injuries. *See, e.g., Norfolk and Western Railway v. Ayers*, 538 U.S. 135 (2003).

II. LIA "LEFT TO THE CARRIERS" THE FREEDOM TO INNOVATE.

In the Spring of 1911, with railroads submitting LIA inspection plans, ICC enacted a short set of rules, the first one stating: "The railroad company will be held responsible for the general design and construction of the locomotive boilers under its

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[28] Former 45 U.S.C. §38. The statute also permits investigations of malfunctions and accidents caused by defective signal systems which are, obviously "on the line" of a railroad. 49 U.S.C. §20505.

control".[29] This provision carried out Congress' intention; *i.e.*, that "the carriers were left free to determine how their boilers should be kept in proper condition for use without unnecessary danger." *Baltimore & O. Railroad Co. v. Groeger,* 266 U.S. 521, 529 (1925). With freedom, however, came responsibility for equipment choice.

In its first look at LIA, the Court upheld a plaintiff verdict in a boiler explosion death case. *Great Northern Ry. Co. v. Donaldson,* 246 U.S. 121 (1918). The railroad argued on appeal for exoneration as a matter of law because the boiler in question had "passed inspection". The Court disagreed: "we find nothing (in LIA) to warrant the conclusion that there is no liability for an unsafe locomotive because some particular feature of construction...(was not) disapproved by the federal boiler inspector." *Id.* at 128.

Donaldson's rationale dovetailed with LIA's concept of carrier self-inspection and freedom of equipment choice, within the bounds of the act. Under §5, railroads filed their own rules subject to "such modification as the Commission requires (becoming) obligatory upon such carrier." Act of 1911, Ch. 103, 36 Stat. 913; former 45 U.S.C. §5.

Substantive rule making under §6, mandating or requiring specific features, would require more. To mandate equipment, the ICC would have to render

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[29] Rule 1: Rules and Instructions for Inspection and Tests of Locomotive Boilers and their Appurtenances. Interstate Commerce Commission Bureau of Locomotive Inspector, June 2, 1911. Codified in the first printing of C.F.R at 49 C.F.R. 91.1 (6/1/38)

quasi-jurisdictional findings consistent with the Act's §2 command. (i.e. that such was needed to prevent "unnecessary peril to life and limb") per LIA §2. *United States v. Baltimore & O. Railroad Co., et al.*, 293 U.S. 454 (1935). Agency fact finding and judicial review became the norm.[30]

The railroad supply industry flourished. Vendors advertised new products in the annual Locomotive Cyclopedia.[31] In addition to a variety of locomotive styles, thousands of component and replacement parts were offered with new inventions spawning a burgeoning marketplace of equipment. This innovation, no doubt, was aided by the Court's decision in *Southern Railway Co. v. Lunsford*, which held that "experimental devices" which "(did) not increase the peril" and were not "integral or

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[30] Following the *Napier* decision, ICC decided *Railroad Commission of Wisconsin v. Aberdeen & Rockfish Railroad Co., et al*, 142 I.C.C. 199 (1928). Amendments to BIA Rule 116 permitted, *inter alia*, allowance of locomotive window coverings, to be regarded as "minimum requirements". *Id.*, at 210.

[31] *See, e.g.*, Locomotive Cyclopedia of American Practice, Eleventh Ed. 1941. Edited for the Association of American Railroads-Mech. Division by Simmons-Boardman Publishing Co. N.Y. The "Forward" contains an "historical" stating that the Cyclopedia traced its roots to the "Railroad Gazette" of the early century, but was reformatted in 1922 to provide "editorial and manufacturers data (being) grouped in major sections, these sections to be subdivided into chapters treating the various phases of locomotive construction and repair". p.5. The companion Cyclopedia for railcars was The Car Builders Cyclopedia. It was relied on extensively by the Court in *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. 318, 321 (1956).

essential" parts of "completed locomotives" would not be considered "parts or appurtenances" to support a statutory violation. 297 U.S. 398, 401-402 (1936). To find otherwise, the Court said, "would hinder commendable efforts to better conditions".[32]

ICC Rules 15 and 16 required that inspection of the boilers' exterior was required whenever the "jacket and lagging" were removed every 5 years.[33] "Lagging" was "a covering laid on the outside of the boiler and cylinder to protect (against) loss of heat...usually composed of magnesia and asbestos and applied in sections made to fit the curvature of the boiler...wood formerly was used."[34]

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[32] The device in *Lunsford* was known as "Wright's Little Watchmen"; an after-market option which would set air brakes in the rear of the train if the locomotive derailed. It was not alleged to have caused the derailment. 297 U.S. at 400.

[33] *See* fn. 29, supra. Original codification of Rules 15 and 16 are in 49 C.F.R. 91.1 (First Edition, 6/1/38)

[34] Locomotive Cyclopedia of American Practice. Eleventh Ed., supra, p. 56. "Dictionary of Locomotive Terms", "lagging".

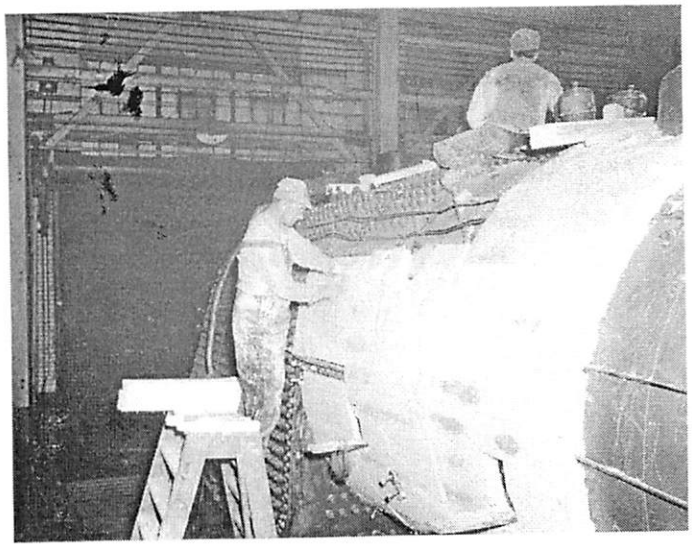

FIGURE 2. Installation of asbestos lagging to steam locomotive. [35]

Fiberglass,[36] aluminum foil insulation,[37] and asbestos containing insulations[38] were available.

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[35] T.F. Mancuso, Mesothelioma Among Railroad Workers in the United States; Vol. 643, *Annals of the N.Y. Academy of Sciences*. 333, 335 (1991). Petitioner's decedent testified regarding the dusty conditions that were created as he and other craftsmen removed asbestos insulation from the boiler during disassembly and repair of locomotives. JA56-59, 60-70

[36] See fn. 34, p. 383. Advertisement for Gustin Bacon. Fiberglass Locomotive Lagging and Pipe Covering.

[37] See fn. 34, p. 504. Advertisement for Alcoa "Aluminum Jacket & Insulation" sold to Pennsylvania Railroad.

[38] Johns-Manville Corp. N.Y. , "Johns-Manville Service to Railroads", pg. 4. Description of Johns-Manville magnesia "Locomotive Boiler and Air Pump Lagging" with photo of installation methods, 1922.

No regulatory compulsion to use or not use asbestos in locomotives applied because no particular form of insulation was ever required or prohibited by the government. For such an unlikely mandate to have issued, ICC would have had to marshal the expertise regarding asbestos hazards sufficient to permit agency findings that could have withstood judicial review. *United States v. Baltimore & O. Railroad Co., et al.*, 293 U.S. 454 (1935)

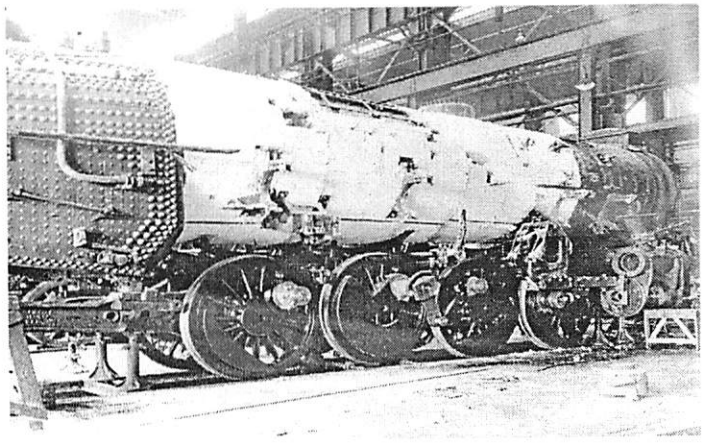

Figure 3. Asbestos lagging applied to locomotive.[39]

In 1996, FRA reported that "the two primary locomotive manufacturers stopped using asbestos in the 1970's"...and have policy statements now prohibiting it in locomotive construction.[40] The industry's decision to stop using asbestos was self imposed; no doubt a response to societal demands.

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[39] See fn. 35, pg. 336.

[40] See Brief for Petitioners; pg. 10; fn. 12.

But it was not based on any standard or mandate; and as this Court has stated "[The absence of a federal standard cannot impliedly extinguish state law. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995).

A thriving market in locomotive construction and repair continues today. The locomotive safety standards[41] encourage innovation. This accounts for the proliferation of contract repair shops, locomotive rebuilders, and parts suppliers now advertising in the July, 2011 40th Annual Car and Locomotive Repair Directory.[42]

III. THE ABSENCE OF A FEDERAL REGULATION REQUIRING OR BANNING A LOCOMOTIVE PART DOES NOT EXTINGUISH STATE TORT REMEDIES FOR PERSONS ACTUALLY INJURED BY THAT PART.

A. *Groeger* Established the Parameters of an LIA Claim in 1925.

With industry freedom of choice came questions of responsibility. From 1923-25, over 3000 serious accidents from locomotive part failures were reported

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[41] 49 C.F.R. §229.1, et seq.

[42] 40th Annual Car & Locomotive Repair Directory". Railway Age, July, 2011: Supplement; G1-G31.

by the ICC.[43] In *Groeger*, this Court considered a boiler explosion case in which the trial court's instructions tracked the plaintiffs theory; i.e. that the lack of a safety feature, (one not required by ICC), could support a finding of liability. 266 U.S. 521, 529(1925).[44] This Court reversed..."[I]t is not for Courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their boilers are kept...(because) inventions are occurring frequently *and there are many devices to accomplish the same purpose*". *Id.*, at 530. On remand, the jury could consider the merits of the feature but only "in determining the essential and ultimate question; i.e. whether the boiler was in the condition required by the Act". *Id.*, at 531.

Groeger's paradigm has governed for nearly a century. The desirability of "extra" or additional locomotive devices, not specified by ICC/FRA, is not a matter "to be left to the varying and uncertain opinions of juries"; but injuries caused by actual defects will support actions alleging a violation. *Id.*, at 531. In other words, "if the (agency)...has specified what is a 'proper construction and safe to operate', then neither a court nor jury can say otherwise". *Satterlee v. St. Louis-San Francisco Ry. Co.*, 82 S.W.2d. 69 (Mo. 1935) (citing *Mahutga v. Minneapolis, St. Paul & S.S.M Ry. Co.*, 234 N.W.

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[43] 40th Annual Report of the Interstate Commerce Commission. 12/1/26. Table II, p. 73. Gov. Printing Office.

[44] The plaintiff blamed the absence of "fusible plugs"; pop valves which functioned as a warning device against excessive boiler pressure. *Groeger*, 266 U.S. at 522.

474, 476 (Minn. 1931), *and see Marshall v. Burlington Northern, Inc.*, 720 F.2d. 1149 (9th Cir. 1983) (motorist alleged need for brighter headlight than required by LIA regulations; claim preempted)[45]. However, once a part is chosen and actually installed, its defect constitutes a violation. *See, e.g., Herold v. Burlington Northern, Inc.* 761 F.2d. 1241 (8th Cir. 1985)(rotating beacon not required by FRA, but actually installed by railroad), (distinguishing *Marshall*, supra); and, *Engvall v. Soo Line Railroad Co.*, 632 N.W.2d. 560 (Minn. 2001) (*Groeger's* paradigm permits state law indemnity claim against locomotive builder for defective part installed but not covered by FRA rule).

B. The *Napier* Decision Did Not Alter *Groeger's* Application.

Based on a broad reading of *Napier*, 272 U.S. 605 (1926), the court below found that LIA preempts all state remedies for locomotive-based injures. Equating Mr. Corson's mesothelioma case with the state legislation forbidden in *Napier*, the Third Circuit found that LIA preempts a "broad field relating to the health and safety of railroad workers including requirements governing the design and construction of locomotives". *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d. 392, 397 (3rd Cir. 2010).

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[45] *See* Brief for Petitioners, pg. 50, cases cited; These "additional requirement vs. actual defects" cases form a continuing doctrine in LIA litigation.

This is off the mark because "[LIA/SAA] cannot be regarded as statutes wholly separate from and independent of the (FELA)". *Urie,* 337 U.S. 163 at 189 (1949). When *Napier* was written, locomotive mechanical injuries were not covered by FELA , no less LIA which had defined "employee" to exclude repair shop workers (former 45 U.S.C. §22).

Equating a state law injury claim with a state "legislative requirement" is a step this Court has been slow to take absent a compelling reason. *See, e.g., Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238 (1984) (state tort claim for radiation poisoning not preempted although the subject of nuclear safety has been previously found subject to federal regime).[46] Remedies are not *per se* "regulations"; the fact that federal law governs many aspects of motor vehicle design, without more, does not prohibit states from providing remedies in vehicular collision cases. Dissenting from *Winfield,* nine years earlier, Justice Brandeis agreed:

> "The subject of compensation for accidents is one peculiarly appropriate for state legislation...the field of compensation injuries appears to be one in which uniformity is **not** desirable, or at least not essential to the public welfare". *Winfield,* 244 U.S. at 169 (1917). Brandeis, J. dissent.

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[46] *Pacific Gas & Electric Co., et al. v. State Energy Resources Conservation and Development Commission, et al.* 461 U.S. 190 (1983)

Petitioner's state law injury claims are not LIA "requirements" in any event. LIA is a remedial statute having the purpose and effect of "facilitating employee recovery, not of restricting such recovery or making it impossible". *Urie*, 337 U.S. at 189:

> ...(LIA/SAA) would take on highly incongruous character if, at the very time they were expediting employee recovery under the Employer's Liability Act by substituting the comparatively light burden of proving violation of their prohibitions for the heavier one of proving negligence, they were also contracting the scope of compensable injuries and to that extent defeating recovery altogether. *Urie,* 337 U.S. at 190.

History, congressional intent and regulatory context compel the conclusion that the issue resolved in *Napier* was precisely defined by that Court: "*it is whether the (LIA)* has occupied the field of *regulating* locomotive equipment used on a highway of interstate commerce, *so as to preclude state legislation*". 272 U.S. at 611. The circuit court erred in over reading *Napier,* and by then applying its erroneous interpretation to negate the presumption against preemption that always applies in rail safety cases. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

C. The Post *Napier* Decisions of this Court Defined the Limits of *Napier's* "Field".

In *Moore*, 291 U.S. 205 (1934) the Court upheld a Kentucky tort statute[47] paralleling "with almost literal exactness the provisions of [FELA]". 291 U.S. at 212. Finding the state statute *in pari materia* with FELA/SAA, there was "no anomaly in enforcing the state law with this defined content". *Id.*, at 213. In *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), the court rejected a preemption claim, by upholding a pre-employment agreement requiring the employee to seek his intrastate safety statute remedies through workman's compensation. "(The acts) do not create, prescribe, measure or govern the enforcement of, the liability arising from the breach. *They do not extend to the field occupied by the state compensation act".* 292 U.S. at 61-62. *See also, Painesville & Eastern R. v. Meredith*, 292 U.S. 589, 598 (1934) (LIA/SAA standard of care extended to motorists injuries, with the "validity of (such) cause of action left to state law"); and *Tipton*, 298 U.S. 141, 151 (1936) (state may compel workman's compensation in lieu of state common law SAA action); *citing with approval; Walton v. Southern Pacific Co.*, 48 P.2d. 108 (Cal. App. 1st) (1935) "correctly holding that the same principles apply in an action under the (LIA)"; and, *Crane v. Cedar*

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[47] Ky. Employers Liability Act; Carroll's Ky. Statutes, 1930 §§ 820 b-1, 820 b-2, 820 b-3.

Rapids & I. C. Ry. Co., 395 U.S. 164, 166-167(1969), reaffirming this line of cases.

The Court's *Moore-Crane* decisions demonstrate that *Napier's* "preemptive field" never reached state tort remedies at all; certainly not those alleging LIA/SAA violations.[48] Could state tort remedies for locomotive defects which are not LIA violations be preempted under *Napier*?

Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U.S. 471 (1937) provides clarity. In *Scarlett*, this Court reversed the California Supreme Court's affirmance of a ruling allowing an SAA violation to go to the jury. *See Scarlett v. Atchison, Topeka & Santa Fe Ry. Co.*, 60 P.2d. 462 (Cal. 1936). Plaintiff fell while descending a ladder which was an SAA appliance; yet his injury was actually caused by slipping from a "brace rod" which was not an SAA appliance. The ladder was not alleged defective.[49] This Court, citing *Napier*, reversed: "the railway... having strictly complied with the (ladder) regulation has discharged its full duty so far as (SAA) is concerned." *Scarlett*, 300 U.S. at 473:

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[48] In state court, Mr. Corson's LIA violation claims were dismissed because such claims were not permitted "while in the [repair] shops. Brief for Petitioners, pg. 12. The Circuit Court later ruled that the *Moore-Crane* line of cases had "no impact" because the plaintiffs "are not asserting liability under BIA" *Id., at pg. 14.*

[49] Although this Court's opinion does not specifically identify the case as an "intrastate" injury case, it had to have been. The court below stated that plaintiff had waived his claim of "common law negligence" *Scarlett*, 60 P.2d. at 467.

> "The right of recovery, if any, must therefore rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. *The law to be applied to that situation is the common law rule of negligence and not the inflexible rule of the (SAA).* (emphasis added) *Id.*, at 475.

Had *the Scarlett* plaintiff been injured by asbestos on a "not in use" locomotive, the remedy would remain "the common law rule of negligence". In harmony with the principles of *Groeger*, the *Scarlett* Court relied on *Napier* to strike the SAA claim as one calling for "additional requirements", yet upheld the common law as the proper vehicle for recovery in such cases. *Id.*

D. State Law Provides the Remedy for Those Injured on Locomotives Not "In Use" Under LIA.

SAA's coverage is "specific" while LIA's coverage is of the entire locomotive. *Napier*, 272 U.S. at 611. This distinction does not diminish the teaching or applicability of *Scarlett* now. An LIA violation may be based on a defect and injury not contemplated by a specific agency rule. *Urie*, 337 U.S. at 189 (1940)(inhalation of silica particles). Thus, the only locomotive injuries which cannot state an LIA violation, are those occurring on locomotives not "in use".

State law remedies for non-FELA causes of action, including the Kentucky statute approved in *Moore,* are inherently "not repugnant" to the LIA/SAA. *Gilvary*, 292 U.S. at 62. Indeed the state law negligence relief approved in *Scarlett* did not offend *Napier* even though a jury would have been required to evaluate "the near proximity of the ladder to the rod" (the ladder being an SAA device) under common law principles. *Scarlett*, 300 U.S. 474-475.

In fact, state tort claims for "not in use" locomotive defects have always existed. The San Antonio roundhouse explosion of 1912 was an early example.[50] One year after LIA's passage, a locomotive being pressure tested in a Texas roundhouse exploded causing massive destruction.

Two reported cases involved a landowner and pedestrian who were grievously injured, both were tried under state law. *Galveston H. & S.A. Ry. Co. v. Perez*, 182 S.W. 419 (Tex. App. 1916) (verdict affirmed for pedestrian under doctrine of *res ipsa loquitor*), *McGraw v. Galveston H. & S.A. Ry. Co.* (182 S.W. 417) (Tex.App., 1916) (fall injuries tried under state law negligence). *See also, La Casse v. New Orleans T. & M.R. Co.*, 64 So. 1012 (La. 1914) (boiler explosion for "not in use" locomotive tried under state negligence theory), and *Wingo v. Celotex,*

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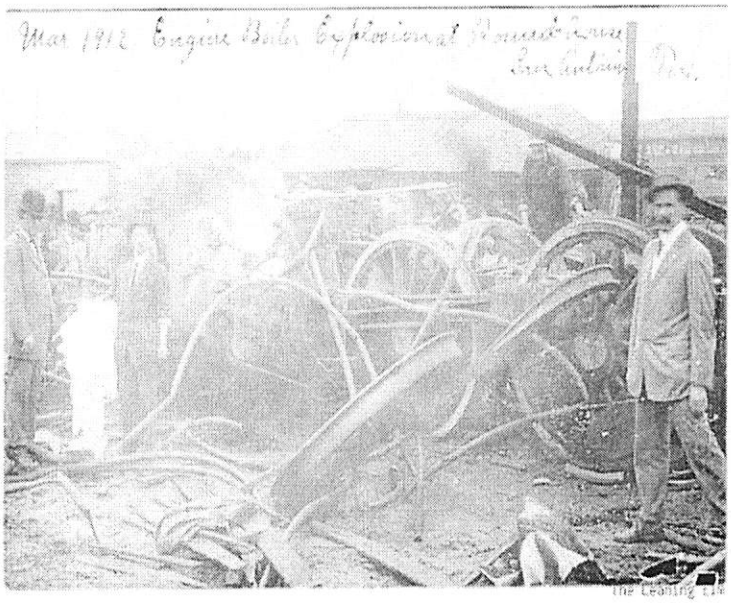
[50] On March 18, 1912, one year after LIA's passage the worst boiler explosion in U.S. history occurred. A steam locomotive in San Antonio exploded, killing 26 with 50 more injured and 10 unaccounted for. *Explosion in San Antonio, Texas March 18, 1912*, State Library and Archives Commission, *available at*: http://www.tsl.state.tx.us/exhibits/railroad/fight/explosion.html.

et al 834 F.2d. 375 (4th Cir. 1987) (state law indemnity action by railroad after FELA verdict for Machinist exposed to asbestos).



Similarly, cases are brought under state law alleging defects that *would have* constituted SAA violations but for inability to meet the "in use" requirement. This includes a Third Circuit decision, *Patton v. Baltimore & Ohio R. Co.*, 197 F.2d. 732 (3rd Cir., 1952) never discussed by the *Kurns* court.[51] In *Patton*, a non-FELA plant worker was killed by a runaway car with an SAA defect. The plaintiff could not demonstrate that the car was "in use" on the

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[51] *Patton* was discussed extensively in *David W. Louisell and Kenneth M. Anderson*: The *Safety Appliance Act and the FELA:* A Plea for Clarification, Vol. 18, Law and Contemp. Probs., 281, 255-86 (1953).

railroads line at the time of injury. *Id.*, at 741. The proper remedy, as in *Scarlett*, was found to be "that of negligence actionable at common law". *Id.*, at 741-742. *See also, Risberg v. Duluth M. & I.R. Ry. Co.*, 47 N.W.2d. 113 (Minn. 1951) (car with SAA defect not "in use", thus common law negligence must be proven).

State law remedies for defective locomotive parts are reported in the *corpus juris* for a century. The preemption of state law when a "not in use" locomotive causes injury would now create a remedial void and simultaneously place the entire railroad supply industry in a rose garden of immunity. For example, such preemption would suddenly leave non-FELA rail yard contractors without recourse. *See United States v. Northern Pacific, supra*, 254 U.S. 254 (1920) (locomotive moving in switching yard but not in a train formation is not "in use").

The post *Napier* decisions of this Court demonstrate no inclination to extend *Napier's* holding to preempt remedies for injuries actually caused by defective parts, whether such injuries occurred while the locomotive was "in use on the line" or not.

IV. "SWEEPING FIELD PREEMPTION" WOULD DISPLACE EXISTING REMEDIES.

The insidious nature of occupational lung disease was described by this Court over 60 years ago in a FELA case that spawned the "discovery rule" for federal statutes of limitations: *Urie*, 337 U.S. at 169

(1949) (silicosis case).[52] FELA provides the exclusive remedy for railroad workers suing railroads, but the right of those workers to implead responsible third parties, as well as the railroad's derivative rights, are matters that have always been left to state law. *Lee v. Central Georgia Ry. Co.*, 252 U.S. 109 (1920) and *Engvall; supra*, 632 N.W.2d. 560 (indemnity claim against manufacturer for locomotive part causing injury to employee).

Blanket preemption of state law would eliminate the only potential remedy in this case. Petitioners' FELA claim was dismissed on summary judgment for lack of proof or negligence,[53] but beyond the facts of this particular case are recurring examples of traditional state causes of action which would be extinguished under the Third Circuit's rationale.

A. "Take Home" Exposure Cases

In *CSX Transp. Inc. v. Williams*, 608 S.E.2d. 208 (Ga. 2005), the Georgia Supreme Court, answering a certified question, found that the railroad, as a landowner, owed no duty to the families of its workers to warn of potential hazards from second hand contact with asbestos impregnated work

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[52] In *Ayers*, 538 U.S. 135 (2003) it was noted that the latency period for asbestos related disease is "generally 20-40 years from exposure". 538 U.S. at 142, fn. 4.

[53] JA99; Order Granting Soo Line Railroad's Motion for Summary Judgment.

clothes.[54] This "no duty" rule is the majority position among states having decided the issue.[55] However; the duty of product manufacturers to warn derives from principles of strict liability, and because family members of railroad workers have no independent FELA rights, manufacturers remain their final source of potential relief. "Sweeping preemption" of state law would extinguish those claims, creating immunity for asbestos product manufacturers as well.

B. Plant Railroad Injuries

The definition of "common carrier" is an historically narrow one. *Edwards*, 390 U.S. 538 (1968). Entities including express carriers, inter-urban transit systems and plant railroads do not come under FELA.[56] FRA's regulations do not apply

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[54] "Take Home" mesothelioma cases among the families of railroad workers have been reported. *Perez v. Southern Pacific*, 883 P.2d 424, (Az. App. 2nd 1993).

[55] Other "take home" exposure decisions finding "no duty" for landowners include, *Widera v. Ettco Wire and Cable Corp.*, 204 A.D. 2d. 306 (N.Y. A.D. 2 Dept. 1994) and *Holmes v. Pneumo Abex*, L.L.C., 2011 Ill. App. LEXIS 653 (Ill. App. 4th Dist. 2011) (citing nine similar decisions). Ill. App. LEXIS 653, p. 10. Immunity of premises owners in toxic take home cases is also achieved by statute. *See Boley v. Goodyear Tire and Rubber*, 929 N.E.2d. 448 (Ohio, 2010) (Ohio statute bans claims against property owners but relief may be sought against "product" manufacturers. 929 N.E.2d. at 454 (O'Conner, J., concurring)

[56] In *Edwards* the court observed that Congress considered, but refused to expand FELA coverage to such entities in the

to rail operations confined to an industrial installation. 49 C.F.R. 209, App. A at 40-41 (1999). Yet, in cases such as *Forrester v. American DieselElectric, Inc.*, 255 F.3d. 1205 (9th Cir. 2001), *Napier* has been applied to preempt state remedies anyway.

In *Forrester* a scrap yard worker suffered an amputation from a locomotive crane without a backup warning. Aware of the fact that locomotive cranes were excluded from FRA safety standards, and that FRA did not regulate such worksites, the *Forrester* Court nevertheless dismissed the case: "[We are] troubled that our refusal (to limit *Napier*) might afford locomotive crane manufacturers broad immunity from tort liability...(but) the force of the sweeping preemption rule under *Napier* remains unimpaired (citation omitted) and, in any event...the rule is too well established to permit such a qualification by a lessor court". 255 F. 3d. at 1210; (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) for the proposition that the Supreme Court retains the prerogative of overruling its own precedent). Others have voiced similar reluctance. *See, e.g., In Re: West Virginia Asbestos Litigation,* 592 S.E.2d. 818 (W.Va.App. 2003) (agreeing that the "specter of innocent plaintiffs left without a remedy should be avoided" yet still finding preemption under *Napier). Id.*, at 822.

1939 Amendments. 390 U.S. at 541, fn. 3, 4.

C. Employees of Bankrupt Railroads

Preemption of state remedies will leave former employees of bankrupt railroads without remedy. In *In Re: Erie Lackawanna Inc.; Erie Lackawanna Ry. Co. v. Henning, et. al.*, 803 F.2d. 881 (6th Cir. 1986), *cert. denied, Consolidated Rail v. Erie Lackawanna, Inc.*, 481 U.S. 1070 (1987), former employees of a bankrupt railroad were diagnosed with asbestos diseases after that railroad was discharged from bankruptcy. 803 F. 2d. at 883[57]. Classifying the discharge order as a "hybrid liquidation - reorganization". (*Id.*, at 884.) the Court upheld an injunction preventing the retirees from suing the reorganized entity. Finding such claims unfair to the stockholders, the Court suggested..."[the retirees] are not without remedy for the alleged injuries...(they) are free to bring suit *against the asbestos manufacturers and installers". Id.*, at 885.[58] Yet now,

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[57] Because these employees were covered under FELA at the time of employment, no state workman's compensation benefits were, or are, available to them in retirement.

[58] In the mid-1960s the Erie Lackawana was listed by Fortune Magazine as the 26th largest transportation company with 15,188 employees. "The 50 Largest Transportation Companies." FORTUNE June 1967; 222. Its bankruptcy in 1972 was one of eight such filing major Eastern Corridor carriers, resulting in a "national rail crises" first addressed by the Court in *Regional Rail Reorganization Cases*, 419 U.S. 102, 108 (1974). The railroad is long gone but the successorship dispute is still alive. *See*, e.g., *Conrail v. Ray*, 632 F. 3d 1279 (D.C. Cir. 2011) (affirming denial of declaratory judgment action which would have prohibited asbestos plaintiffs from using Conrail under common law successorship theory, but not reaching merits..

the Third Circuit forecloses that option based on a breathtaking expansion of field preemption; one never intended by Congress, never envisioned by the *Napier* court, and far outside this Court's established principles.

V. CONCLUSION

For the reasons stated, and for those set forth in Petitioners' Brief the Circuit Court's affirmance of the District Court's grant of summary judgment should be reversed.

Respectfully Submitted,

JOHN D. ROVEN
Counsel of Record
HECTOR L. SANDOVAL
Roven-Kaplan, LLP
2190 N. Loop W., Ste 410
Houston, Texas 77018
Counsel for Amicus Curiae
Academy of Rail Labor Attorneys
(jroven@rovenlaw.com)