June 14, 2022

1. Crew Size

No freight train used in connection with the movement of freight may be operated unless it has a crew consisting of a least 2 certified persons.

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

2. Hours of Service Amendments

(In 2008, Congress enacted some hours of service improvements. *See,* Pub. L.110-432, §108. However, the railroads still abuse the law and changes are necessary to create a safe operating environment.)

a. Railroads shall provide all freight service assignments without defined start times with at least 10 hours prior notice calling time.

b. All freight service assignments with defined start times will be covered by the same hours of service provisions that now apply to passenger and commuter rail.

c. All yardmaster assignments shall be covered service under the freight employee's hours of service provisions. (Yardmasters are safety sensitive employees, and, in the interests of safety, should not be forced to work excessive hours.)

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

(Numerous times, after working 12 hours, crews have been required to wait for,and/or be in, deadhead service, for more than 8 hours. This creates a serious fatigue issue.)

e. No amount of time off duty at the away from home terminal will reset the calendar clock of job starts, and the employee shall not be required to take mandatory rest days at the away from home terminal.

(This is another issue of abuse by railroads. Many crews have been forced to remain at the away from home terminals for multiple days, and the railroads treated the stays as mandatory rest days.)

f. Interim release periods require notification to the crew before going off duty. If the crew is not notified, the 10 hours uninterrupted rest will apply.

(The current practice by many railroads is not informing an employee how long an interim rest period will be. The result is that the employeesare unable to obtain reasonable rest.)

g. A railroad shall provide hot nutritious food 24 hours a day at the sleeping quarters for a particular crew at the away from home designated terminal, and at a release location which is available for rest for a particular crew. If such food is not provided on a railroad's premises, a restaurant whichprovides such food shall not be located more than 5 minutes normal walking distance from the employee's sleeping quarters or other rest facility. Fast food establishments shall not satisfy the requirements of this subsection.

(Having hot nutritious food available for railroad employees as been a seriousproblem for a number of years because of FRA failing to enforce the current statutory requirement. For example, the FRA has allowed the railroads to provide canned, prepackaged, and frozen fast -foods to be in compliance withthe requirement for "suitable food". *See,* April 29, 1991, FRA interpretations of Hours of Service law.

3. Repeal of Conrail law

The outdated law covering Conrail and the ability of a few states to regulatecrew size needs to be repealed.

(In the Rail Safety Improvement Act of 2008, Congress required FRA to conduct a study on the impact of repealing the Conrail law, that prohibit states in which Conrail operated to issue state rail safety laws or regulations covering crew size. The Secretary issued a report to Congress on May 26, 2011 which concluded "…the purpose for which Section 711[ie., 49 U.S.C.§797j] was enacted was met a number of years ago and Section 711 shouldbe repealed." Of course, if the crew size law is adopted, this amendment will be unnecessary.)

4. State Walkways

No state law or regulation covering walkways in rail yards shall be preempted or precluded until such time as the FRA issues a regulationcovering such walkways.

(Approximately half of the States have various regulations or laws covering walkways in railroad yards. The problem is that, as admitted by the Association of American Railroads, slips, trips, and falls are the largest cause of injuries in rail yards. When a state attempts to adopt or enforce regulations covering the size of ballasts used in walkways, the railroads usually file a lawsuit claiming federal preemption (*See, Norfolk Southern Ry.Co. v. Box,* 556 F.3d 571 (7th Cir. 2009); *CSX Transportation, Inc. v. Miller,* 858 A. 2d 1025 (Md. App. 2006), even though there are no FRA regulations covering walkways. The cost of litigation is expensive, and states should be able to regulate areas where there is no federal regulation subsuming the subject matter.)

5. AMTRAK Negligence

Notwithstanding agreements with the railroads, AMTRAK shall not be liable for damages in a claim arising out of an accident or incident unlessit is negligent in causing damages.

(Under current law, Amtrak has agreements with railroads over which it operates that it will pay for all damages in a lawsuit involving injury or death,even though it may not be responsible for any negligence. For example, if an Amtrak train derails on another railroad's tracks, and it is

caused by defectiverail, Amtrak still must pay all of the damages, and so the public indirectly foots the bill. This arrangement has cost Amtrak millions of dollars, which could be more effectively used to improve its infrastructure, cars and locomotives. Also, it would mean less funds that Congress would need to appropriate to Amtrak. On September 25, 2021, an AMTRAK train derailed in Montana, killing 3 persons and injuring more than 50 persons. The primary cause of the derailment was defective track, which is the responsibility of the BNSF Railroad. Because of the current arrangements with freight railroads, AMTRAK will be responsible for all of the damages, even though it is completely innocent.)

6. Cost/benefit Analysis

Where Congress mandates that a regulation be adopted, no cost/benefit analysis will be required.

(Under a mandate from the OMB, each FRA regulation must be accompanied by a cost/benefit analysis. This is very time consuming, but moreover, if Congress mandates that a regulation be adopted, there is no legal reason for the cost/benefit analysis. Congress, in addressing a safety need, has already considered the cost/benefit consequences.)

7. Union representatives allowed on railroad property.

All union officials shall be allowed onto railroad property to assist in inspecting for safety hazards. Railroad employees, including union officials, shall be allowed to use their personal cameras or other electronic devices to identify alleged safety hazards, including any FRA violations of a regulation.

(In 2019, SMART-TD filed a petition with FRA to require railroads to allow union officers onto railroad property for purposes of inspecting for safety hazards. The FRA is yet to respond to the petition. Many railroads prohibit worker representatives from going onto railroad property to inspect for safety problems. The collective bargaining representative for each craft of railroad worker, and the state director for each such craft, should be permitted to monitor the safety practices and operations on each railroad. And each person should be authorized to carry out such inspections, including the taking of photographs, examinations, and investigations on railroad property, as may benecessary to determine compliance with

applicable safety laws and regulations, as well as any safety hazard that may result in injury or death to arailroad employee. A GAO report in 2013 determined that the Federal Railroad Administration inspectors are able to inspect less than 1% of railroad operations.)

8. Recording Devices on Locomotives.

a. **The FRA regulations shall require that the recording systems on locomotives shall be operational only during the time when a train is moving.**

b. **The information collected by the recordings may not be used in FRA enforcement proceedings, and they shall not be used for disciplinary action by a railroad.**

(On Dec. 4, 2015, Congress enacted the FAST Act, Pub. L. 114-94. Section 11411 (49 U.S.C. §20168) required the FRA to promulgate inward and outward facing cameras on passenger trains. On July 24, 2019, 84 Fed. Reg. 35712, FRA issued a NPRM. To date, no regulation has been finally adopted. Therefore, railroads are free to install such cameras on all trains without complying with a FRA regulation. Most locomotives, both freight and passenger, are currently equipped with the cameras. There is no restriction in the current law prohibiting railroads from recording the employees on the locomotive while the train is on a siding and not moving. The FAST Act prohibits railroads from retaliating against employees based on information gathered by the cameras, but that will only become effective once a regulation is adopted.)

9. Close Call Reporting

The Secretary shall promulgate a rule requiring railroads to participate in a close call reporting system.

(The program is voluntary and currently there are only 15 railroads participating in close call reporting, primarily passenger railroads and shortlines. No Class 1 railroad is participating. It allows an employee to report a safety issue relating to a close call which prevented an accident. The participants evaluate an issue and make recommendations for corrective action. Employees are not retaliated against for being involved in a close call, if he/she reports the incident. As there are fewer reportable accidents, accident data becomes less valuable in determining the sources of risk. Also, when safe outcomes

occur, no one notices. Nearly all transportation incidents are preceded by a chain of events,any one of which might have prevented the accident if it had gone another way. In many cases, operators are aware of these "close calls, and may have information that could prevent future accidents. Railroads can reduce risks before an accident by analyzing close calls. When railroads analyze individual close-call events as a group, they can identify safety risks and develop solutions to them. Close call reports can also provide important safety information to the FRA so that it can more effectively share important safety information with other carriers, and develop safety and enforcement tools to address any widespread safety problems.)

10. State Statutes

a. A state statute or regulation does not need to directly contribute to the enforcement of a federal railroad safety regulation for 45 U.S.C.§54a to apply.

("A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under Chapter 201 of Title 49 or by a State or a State agency that is participating in investigative and surveillance activities under Section 20105 of Title 49, is deemed a statute under Sections 53 and 54 of this title." 45 U.S.C. §54a. A technical change is necessary because of court decisions holding that a state regulation is not covered by this section unless the regulation directly contributes to the enforcement of a federal safety regulation. *See, Fletcher v. Chicago Rail Link*, 568 F. 3d 638 (7th Cir. 2008); *Immel v. UP RR,*2019 WL 3997088 (D. Colo. 2019)*; But see, Winckler v.BNSF Rwy. Co.,* 2012 WL 7177239 (Ariz. Super., Jan. 12, 2012).

b. Title 49 U.S.C.§20106 should be amended by deleting "(1) is necessary to eliminate or reduce an essentially local safety hazard."

(Some courts have ruled that a state law was not "local" because the safety issue could occur elsewhere in the U.S. Other courts conclude that a state law is not local if it "can be" addressed in national standards. *See, e.g., Union Pacific Railroad v. California Public Utilities Commission*, 346 F. 3d 851, 860 (9th Cir. 2003). That is not what Congress intended in 1970 when it enacted the Federal Railroad Safety Act.)

11. FRA Enforcement

A fine shall be imposed for every discovered defect that is a violation of a regulation. No longer shall the Secretary allow a railroad to correct the violation before a fine is considered.

(FRA typically imposes very small fines on railroads for violations. Moreover,the railroads are first given a chance to correct the violation before FRA considers imposing a fine. Only if the violation is not corrected will FRA even consider imposing a fine. For many years, the FRA has been the focus of criticism by various sources for its poor job of administering railroad safety.
These include the Congress, NTSB, GAO, Inspector General of the DOT, and the nation's railroad workers. The primary reason for the above is the historical failure of the FRA to enforce the railroad safety laws under its jurisdiction. *See, e.g.*, H.R. Rep. No. 110-336, 110th Cong., 1st Sess. 2007); H.R. Rep. No. 94-240, 94th Cong., 1st Sess. 5 (1975); Sen. Rep. No. 95-865, 95th Cong. 2d Sess. 1-2(1978); Sen. Rep. No. 96-785, 96th Cong. 2d Sess. 3 (1980); *Hearings Beforethe Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce on H.R. 10,556,* 95th Cong., 2d. Sess. 87-89 (March 15 and 16, 1978); H.R. Rep. No 95-1176, 95th Cong., 2d Sess. 16-20 (1978); GAO Rep. No. 14-85 (Dec. 9, 2013); *The Federal Approach to Rail Safety Inspection and Enforcement: Time for Change,* CED-82-51, pp. i, iii, 17-18 (Apr. 19, 1982); GAO Rep. No. RCED-89-109 (Apr. 1989); NTSB Rep.No. NTSB/HZM-87/01 (Sept. 29, 1987); NTSB Rep. No. NTSB/RAR-89/04 (July 6, 1989); *FRA's Oversight of hazardous Materials Shipments Lacks Comprehensive Risk Evaluation and Focus on Deterrence,* DOT Inspector General Rep. No. ST-2016-020 (Feb. 24, 2016). In a 60 Minutes interview on CBS, Sep. 20, 2017, the Chairman of the NTSB stated that FRA had failed to act on many of the Safety Board recommendations, and that FRA is too lenient and needs to step up to theplate and regulate.

The point to the above is that FRA has generally avoided citing violations in in a wide range of circumstances.)

12. Seniority

A railroad employee who is offered a job at the NTSB, the FRA, or the STB shall not be required to forego his/her seniority on the railroad.

Also, an employee of the NTSB, the FRA, or the STB who has previously worked on arailroad, shall have the right to return to railroad employment with all seniority retained.

(On March 26, 1982, the Chief Counsel of FRA ruled that its safety inspectors must relinquish their seniority rights with their former railroad employer. This has created a void in FRA obtaining many qualified union employees for FRA positions. This is unfair because railroad management employees hired by FRA do not have seniority rights, and can easily return to their prior railroad employment without detriment to their prior employment. FRA is not harmed in any way by not forcing its union employees to relinquish their rights. In 1982, the House approved an amendment protecting seniority. However, an attempt to obtain approval of a consent amendment in the Senate was not approved because of an objection by one Senator.)

13. Whistleblower amendments

1. A representative of an employee who is claiming a whistleblower violation shall be considered a protected employee in the railroad whistleblower law. Subsection (a)(3) should be amended as follows:
"(3) to file a complaint, assist in filing of a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicableto railroad safety or security, chapter 51 or 57 of this title, or to provide information in a resulting investigation or to testify in such proceeding."

(There are situations where union officials assist employees in whistleblower cases. Some railroads have punished such officials in such cases. An example on the BNSF Railroad is relevant. A local chairman of the SMART union was fired bythe railroad because he assisted the whistleblower by providing BNSF locomotive inspection/repair documents in lawsuit to prove his member did encounter an unsafe locomotive.)

2. Neither a retaliatory motive, intentional retaliation, nor animus of a railroad supervisor shall be relevant in determining a contributing factor inthe railroad whistleblower law.

(The courts are significantly split as to whether an employee in a railroad

whistleblower case must show that the official who sanctioned the employee had aretaliatory motive, intentional retaliation, or animus against the employee. The courts which hold that an employee must either prove animus, retaliatory motive, or intentional retaliation: *Blackorby v. BNSF RR*, 849 F. 3d 716 (8th Cir. 2017); *Kuduk v. BNSF RR,* 768 F. 3d 786 (8th Cir. 2014); *Armstrong v. BNSF RR,* 2018 WL 457521 (7th Cir. 2018).

The courts that do not require that an employee establish either of the above elements to establish a contributing factor: *Araujo v. NJ Transit*, 708 F. 3d 152 (3dCir. 2013); *Marano v. Dept. of Justice,* 2 F. 3d 1137 (Fed. Cir. 1993); *Coppinger- Martin v. Solis*, 627 F. 3d 745 (9th Cir. 2010)

The whistleblower law provides that a railroad may not discharge or in any way discriminate against an employee for engaging in a protected activity. 49 U.S.C.§20109(a). It provides that any whistleblower action is governed by the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, which is set forth at 49 U.S.C. §42121(b). One ofthe factors a whistleblower must prove under that statute is that the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. 49 U.S.C. §42121(b)(2)(B)(iii).

The Department of Labor has pointed out that Congress's adoption of a comparatively lower contributory factor standard reflects congressional intent to promote effective enforcement of the Act by making it easier for employees to prove causation. A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. *Williams v. Domino's Pizza,* ARB 09-092, ALJ 2008-STA-052, slip op. 5(ARB Jan. 31, 2011). The contributing factor standard was "intended to overrule existing case law, which required that a complainant prove that his protected activity was a 'significant,' 'motivating,' 'substantial, or 'predominant factor' in a personnel action." *Allen v. Stewart Entertainment, Inc.,* ARB No. 06-081, ALJ Nos. 2004-SOX-060, -062; slip op. 17 (ARB July 27, 2006). Therefore, a complainant need not show that the protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason may be true, is only one of the reasons for its conduct and another contributing factor is the complainant's protected activity. *Walker v. American Airlines, Inc.,* ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. 18 (ARB Mar. 30, 2007).

As noted in a congressional report, "Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." S. Rep. No. 413, 100th Cong. 2d

Sess.16 (1988). Further, the legislative history shows that Congress was concerned that some railroad supervisors intimidated employees from reporting injuries to the FRA, in part, because their compensation depended on low numbers of reportable injuries within the supervisory area. *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads,* Hearings Before the House Committee on Transportation and Infrastructure, 110 Cong. Oct. 22, 2007). ("House Hearings"). As the Chairman of the Committee noted at the hearings that there was significant under reporting of injuries by employees because employees frequently report that there was a common practice of harassment of those who do report incidents, and/or being hurt of the job. House Hearings, 6-7. He noted that there was a floodgate of reports of harassment where employees were cautioned by managers not to file an injury report in order to avoid future problems or disciplinary action. House Hearings, 8. Obviously, if employees were required to prove retaliatory motive, intentional retaliation, or animus, then the intent of Congress would be greatly diminished.

The Conference Report adopting the railroad whistleblower law made it clear "The intent of this provision is to ensure that employees can report their concerns without the fear of possible retaliation or discrimination form employers." *Implementing Recommendations of the 9/11 Commission Act of* 2007, H.R. Conf. Rep. No. 110-259, 110th Cong., 1st Sess. July 25, 2007.

3. Proximate cause shall not be relevant in determining a contributingfactor pursuant to subsection (d)(2)(A)(i).

(Some courts and the ARB have erroneously concluded that proximate cause is a relevant factor in determining a "contributing factor" under the railroad whistleblower law. *See, Thorstenson v. BNSF Railway Co.,* 2019 DOL Ad. Rev. Bd. LEXIS 100, *10-12 (ARB Nov. 25, 2019) (an employee "must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event."; *Koziara v. BNSF Railway. Co.*,840 F. 3d 873, 877 (7th Cir. 2016) (dismissing the case because the district court "failed to distinguish between causation and proximate causation."). As with another railroad safety law (FELA),and the whistleblower law (49 U.S.C. 20109(a)), the causation duty is "in whole or in part" which has been interpreted by the Supreme Court as "even the slightest", not proximate cause. *See, CSX Transportation, Inc. v. McBride,* 564 U.S. 685(2011)("played any part, even the slightest, in producing the injury"). However,as noted above, some courts and the DOL have ignored this latter standard that should be followed.) Moreover, it is directly contrary to the Supreme Court's decision in *Bostock v.*

Clayton County, 140 S. Ct. 1731 (2020). There, the Court reaffirmed that the "but for" causation standard—not the more demanding proximate cause standard—applies to employment discrimination cases under statutes that contain the words "because of" or "due to" causation language.)

Suggested amendment for paragraphs 2 and 3:

Subsection (d)(2)(A)(i) is amended by adding the following at the end:

"Provided, neither a retaliatory motive, intentional retaliation, nor animus of a railroad supervisor shall be relevant in determining a contributing factor in the railroad whistleblower law. Provided further,proximate cause shall not be relevant in determining a contributing factor."

4. Once an employee has engaged in a protected activity under the whistleblower law, alleged violations of a railroad's policy, rule, or condition of employment shall not be a relevant defense.

In 20109 (a), after "or about to be done", add the following:

"to engage in one or more of the protected activities in subsections (a), (b) and (c). For the purposes of this section, the term "discrimination" shall include disparate treatment resulting from an employee's protected activity, including taking adverse action against an employee based in whole or in part on information the railroad carrier discoversonly as a result of the employee engaging in a protected activity.";

And in (h) add the following at the end: "and also may not be denied by the disparate application of any carrier policies, rules, or conditions of employment to an employee who engages in any of the protected activities in subsections (a), (b), or (c)."

(This problem has been highlighted by a recent decision in *Yowell v. ARB,* 993 F. 3d 418, 422-429 (5th Cir. 2912), where the court of appeals held that a railroad could terminate an employ for merely filing a late injury report. The court said "The protected activity provision cannot be interpreted to shield an employee fromproper disciplinary action when the employee breaches a valid, established, and unchallenged work rule, an no legal legerdemain can make it

otherwise." *Id.* at 427-428. The fallacy of such decision is that railroads typically require that all injuries be "reported immediately" or "promptly". The dictionary definition of "immediately" is: "at once, instantly, without any intervening time." the definition of "prompt" is "done without delay; immediate." So, a railroad that requires all injuries be reported "immediately" or "promptly" can fire an employee who reports it more than one minute later. And what about injuries with a natural lag time between a work incident and the emergence of symptoms that alerts the employee to the fact he has been injured? Such a stringent reporting requirement defeats the overriding purpose of 20109.)

5. Whistleblower Subpoena Power

The Secretary of Labor shall have subpoena power to assist in the investigation of whistleblower complaints under 49 U.S.C. §20109.

(The Secretary of Labor's position is that unless the statute specifically authorizes subpoena power, it does not exist. *See, e.g.,* Stephen Smith, *Due Process and the Subpoena Power in Federal Environmental, Health, and Safety Whistleblower Proceedings,* 32 U. of San Francisco L. Rev. 533-560 (1998). The railroad whistleblower law does not contain authority for DOL toissue a subpoena. *See,* the testimony of Richard Fairfax, Director of OSHA Enforcement Programs, before the House Committee on Homeland Security on March 6, 2007, where he stated: "If necessary, subpoenas may be obtainedfor testimony or records when conducting an investigation under §11(c) or AHERA. The other whistleblower provisions do not authorize subpoenas." *See also,* OSHA Whistleblower Investigations Manual (Chapter 3, VI. F.1 at pg. 3-19.). For a full investigation, a subpoena is necessary when parties refuse to produce records.)

14. Mexican Trains

Railroad crews reporting for duty in Mexico shall be prohibited from operating trains within the United States. Additionally, all tests and inspections of trains entering into the U.S. from Mexico shall be performed in the U.S. by U.S. railroad employees.

(On October 26, 2016, the Kansas City Southern Rwy. Co. submitted to FRA a plan to allow Mexican crews to operate trains within the U.S.

Without any formal notice to the public, the prior administration granted the plan in 2017. It should be noted that Chairman DeFazio and 27 other members of Congress had submitted a letter to the Secretary protesting the petition. An appeal was filed by SMART-TD and BLET challenging the FRA decision. On August 8, 2020, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion vacating the FRA's decision. (*Brotherhood of Locomotive Engineers and Trainmen, et. al. v. Federal Railroad Administration, et. al.*, No. 18-1235). Following the decision, the railroad submitted another plan, which was approved by the prior administration on October 9, 2020.That decision is also on appeal.

One other issue is involved. The FRA is allowing Mexican crews to perform inspections in Mexico before a train enters the U.S. These trains are not overseen by FRA inspectors. In fact, FRA inspectors are prohibited from entering Mexico to observe compliance with FRA regulations. Moreover, these Mexican crews are not subject to the U.S. requirements for drug and alcohol testing. All of this, of course, impacts the safety of U.S. citizens in the proximity of where these operations are being conducted. It should be recognized that permitting Mexican crews to operate within the U.S. eliminates U.S. union employees' jobs.)

15. Lighting in Railroad Yards

All railroad yards shall have lighting that meets or exceeds current guidelines for illumination established by the American Railway Engineering and Maintenance-of-Way Association.

(Many railroads have poor lighting in their rail yards. The AAR has acknowledged in a RSAC Working Group that slips, trips, and falls are the largest cause of accidents in railroad yards. Having the AREMA standard incorporated into law is appropriate. That organization is comprised of all of the major railroads, but the standards therein are not mandatory.)

16. Train Length

No railroad operating on any main track or branch line shall run, or permit to be run, on any part of a main track or branch line, any freight or work train which exceeds___feet in length.

(Many trains now exceed two miles in length and transport hazardous materials. This creates many safety problems, mechanical and logistical, such as the inability to maintain adequate brake pipe pressure, which is needed so a train can safely slow and stop. As trains lengthen, incidences of them breaking apart are far more frequent, and a crewmember cannot observe and monitor an entire two-mile-long train by looking out of the window. When a conductor is required to walk a long train, often on uneven terrain and during all weather conditions, the portable radios often times lose contact with the engineer in the lead locomotive. A train's two-way telemetry device and distributive locomotives lose contact with the lead locomotive. One such incident caused a runaway train on the Union Pacific in October 2018 killing two crewmembers. The track had PTC active at the time. When a train is too long, and there is a loss of communication with the rear of the train, the locomotive engineer cannot activate the brakes at the rear of the train. Most importantly, when a long train becomes disabled where it blocks a crossing, it is far more difficult to uncouple the train to open crossings. On April 25, 2017, the National Legislative Director of SMART-TD wrote to the Administrator of the FRA expressing specific safety concerns about railroads operating excessively long trains. He sought an emergency order to limit the length of trains. FRA responded on March 7, 2018, that the railroads are operating the longer trains "in an attempt to enhance service delivery and operational efficiencies." The response by FRA did not acknowledge the safety problems inherent in such operations. On January 15, 2019, Grady Cothen, a former Associate Administrator for Safety at FRA, gave a presentation at the Transportation Research Board Annual Meeting on the serious safety problems inherent in operations of long trains. FRA has not taken any affirmative action as a result of the presentation. Congress must step in and mandate that the length of trains be limited.)

17. Blocked Crossings

A railroad shall not block a railroad-highway grade crossing more than 10 minutes. If this occurs, the train crew shall promptly make a separation of the train to open the said crossing.

(Congress should prevent railroads from blocking crossings after a certain lengthof time. Some courts have ruled that states do not have authority to regulate this issue. *See, CSX Transportation, Inc. v. City of Plymouth*, 283 F. 3d 812 (6th Cir. 2002). This is particularly a problem, because of railroads

using much longer trains. Crossings blocked by extra-long trains present more than a simple inconvenience to drivers. They present legitimate dangers to the lives of the public by potentially obstructing emergency vehicle traffic which then may have to go miles out of their way, especially in rural areas, to respond to a fire, accident or medical crisis. Relating to train length, the FRA has stated that blocked crossings is one of the largest complaints received from congressional members. This can easily be corrected by requiring that the train crew promptly make a separation of the train after a short time period.)

18. Electronic Devices

Notwithstanding any rule, regulation, or order to the contrary, an operating employee shall be permitted to use his/her electronic devices at any time after a train has stopped at a siding.

(Current regulations prohibit the use of electronic devices if it would interfere with railroad operations of when a train is moving. 49 C.F.R.§§220.301-.315. However, most railroads prohibit the use of a personal telephone even if the train is sitting at a siding while the crew is awaiting further instructions. There are many times when a train is sitting at a siding for hours at a time.)

19. Sovereign Immunity

A railroad owned or operated by a State or other governmental entity shall, as a condition of being a recipient of federal funds, agree immediately thereafter the receipt of such funds to waive any defense of sovereign immunity in a cause of action for damages brought against such railroads alleging a violation of a railroad safety law or regulation.

(The most recent example of this problem is the situation in New Jersey, where the state-owned railroad argued that it could not be held liable for a railroad FELA or whistleblower claim because of sovereign immunity. *See, Robinson v. New Jersey Transit Rail Operations, Inc.*, 2019 WL 4082947, 776Fed. Appx. 99 (3d Cir. 2019. The railroad workers were forced to seek legislation to have NJT waive the defense of sovereign immunity.)

20. Walkways and Preemption

No state law or regulation covering walkways for railroad employees shall be preempted or precluded until such time as the FRA promulgates a regulation which substantially subsumes the subject matter.

(One of the most litigated issues in the railroad industry is whether states walkway rules are preempted by FRA's track regulations. *See, Norfolk Southern Ry. Co. v. Box,* 556 F.3d 571 (7th Cir. 2009). The extensive litigation costs here can be corrected only by federal legislation.)

21. Discipline in a Certification or Decertification Proceeding

In a certification or decertification proceeding against a railroad employee, ifthe FRA issues a final order in favor of an employee, a railroad shall be prohibited from attempting to discipline such employee for any alleged acts which may have arisen from the accident or incident involved in the certification or decertification proceeding.

(This issue is another one which can only be corrected by federal legislation. If the FRA issues an order favorable to the employee in a certification matter, the railroads should be prohibited from further disciplining the employee.)

22. Damages against an employees

Suggested amendment: A railroad shall be prohibited from seeking damages from an employee for matters arising out of a railroad accident or incident. The law should be maderetroactive to the date of the incident at Joliet, Illinois, on December 13, 2014.[1]

(The Federal Employers Liability Act was enacted in 1908. Not until recently did the railroads file lawsuits against employees for damages to railroad equipment. Some courts have ruled that a railroad could seek damages against anemployee arising out of an accident. *See Norfolk Southern Rwy. Co. v. Tobergete and Hall*, Civil Action No. 5:18-207-

[1] The amendment needs to be broad enough to cover accidents in cases where employees are not injured. For example, there have been derailments and crossing accidents where employees were not injured. Therefore, no FELA claim would be forthcoming.

KKC (E.D. KY). In this case,the railroad is seeking $3,770,420.65. In another decision, *Ammons v. Wisconsin Central, LTD,* 124 N.E. 3d 1(S. Ct. Ill. 2019), cert. denied,10/5/2020, the appellate court upheld a lower court decision that a railroad could seek property damages against an employee arising out of an accident in Joliet, Illinois. In this Illinois case, the railroad contends that it sustained property damages in excess of one million dollars as a result of thecollision. The case has been remanded back to the Illinois circuit court for discovery and preparation for trial.

There are only a handful of other cases relating to the same issue. *See Nordgren v. Burlington* Northern RR, 101 F. 3d 1246 (8th Cir. 1996); *Schendel v. Duluth, Missabe, et. al., RR,* 2014 WL 5365131 (MN. Dist. Ct.) (RR seeking $2 million); *Mancini v. CSX Transp., Inc*., 2010 U.S. Dist. LEXIS 75724 (N.D. N.Y. 2010); *Norfolk Southern Rwy. v. Paul Murphy, et. al.*, 3-03-cv-665 (N.D. Ind. 2003); *Kansas City Southern RR. v. Morgan*, No. 94-5016-cv-sw-8(W.D. MO. 1994); *See also* Michael Beethe, *Railroads Suing Injured Employees: Should the Federal Employers' Liability Act Allow Railroads To Recover From Injured Railroad Workers For Property Damages?*, University of Missouri-Kansas City L. Rev. 232 (Winter 1996).

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

As was done in 2007 regarding the fatal accident in Minot, ND, Congress made the right to recover retroactive. *See* 49 U.S.C. 20106(b)(2); Pub. L. 110–53, title XV, § 1528, Aug. 3, 2007, 121 Stat. 453. Since there is a history when Congress granted retroactivity in railroad accidents where justice demands it, this clearly should be done here.

23. Accident reporting

Amend the Accident Reports Act (49 U.S.C.§§20901-20903) to require the Secretary to investigate the accuracy of all accident/incident data submitted byrailroads pursuant to the law by comparing such data with claims filed by or on behalf of employees for medical payments or reimbursement, and railroad unemployment benefits.

(There has been a long history of railroads falsely reporting accidents/incidents.Over a century ago, Congress noted that railroads inaccurately reported rail accidents. Very little has changed over the years. On May 1, 1989, the GAO issued a report on its investigation of railroads underreporting injuries and accidents. The GAO selected 5 railroads to audit -- CSX, Union Pacific (UP), Amtrak, Chicago & North Western (C&NW), and Chicago Central & Pacific (CC&P) railroads. It reviewed the data for the calendar year 1987 on those railroads and determined that the injury and accident data base is unreliable because of serious underreporting. In summary the GAO found as follows:

-- Lost work days associated with employee injuries, which is an FRA measure of injury severity, were underestimated by about269 percent at the four railroads whose records were audited.
The largest gap was at UP (361 percent); the lowest was at C&NW (222 percent).

-- FRA data reflected only 57 percent of the actual number of severe injuries, defined by FRA as 10 or more lost work days, at three of the railroads surveyed. Only C&NW reported severe injuries correctly.

-- The railroads underreported by 52% the amount of property damage sustained in 171 accidents. Notably, CSX understateddamages by 69%. Only C&NW closely reported all injuries, off by only 4%.

-- Amtrak, CSX and UP did not report 61 of 521 or 12% of the injuries that met FRA's reporting criteria. Only C&NW correctly reported all injuries.

- The CSX, UP & Amtrak collectively underreported railroad accidents by 10%. Significantly, CSX underreported accidentsby almost 43%. Only C&NW correctly reported all accidents.

In 2007, hearings before the House Committee on Transportation and Infrastructure, the Committee received evidence that accidents, incidents, and injuries were being underreported; and, that on some railroads, employees were pressured not to report injuries. At the hearings, the GAO,the NTSB, and the DOT noted that inaccurate reporting compromised rail safety.

In 2012, the State of California Department of Transportation conducted a study of highway-rail grade crossing accidents. (Rep. No. CA13-1732). The report stated that there were significant problems that undermined the reliability of the data, including the inaccurate accident/incident databases.)

24. Electronic Controlled Brakes

Congress shall mandate that all trains which transport hazardous material in tank cars shall be equipped with electronic controlled brakes.

(ECP brakes are capable of slowing and stopping trains twice as fast as conventional brakes. Requiring the use of ECP brakes is one of the greatest safety advancements that can be made in the railroad industry. The regulatory oversight regarding ECP brakes has been tortured. On Oct. 16, 2008, FRA issued a rule that addressed the maintenance and operation requirements for ECP brake systems. 73 Fed. Reg. 61512. It did not mandate that ECP brakes be adopted. At that time FRA stated "FRA continues to believe that ECP brakes provide numerous safety and business benefits over conventional brake systems. ECP brake technology provides simultaneous and graduated application and release of brakes on all rail cars within a train, resulting in shorter stopping distances." Such system is clearly more effective in emergency situations. The FAST Act required DOT to determine whether ECP brakes were justified based on costs and benefits. Pub. L. 114- 94, §7311 (Dec. 4, 2015). On May 8, 2015, FRA issued a rulemaking that would have required installation of ECP brakes on certain tank cars. 80 Fed. Reg. 26644.

Once the prior administration took office, it concluded that ECP brakes were not cost effective. On September 25, 2018, DOT repealed the regulation. 83 Fed. Reg. 48393. Also, it should be noted that the GAO, in 2016, recommended that DOT acknowledge uncertainty in its revised economic analysis of ECP brakes, and collect data on railroads' use of the systems. *Train Braking: Dot's Rulemaking on Electronically Controlled Pneumatic Brakes Could Benefit from Additional Data and Transparency*, GAO-17-122 (Oct. 2016). One fact cannot be denied by the railroads—ECP brakes on trains can save lives.)

25. Proper Train Make-up

The FRA shall be required to issue regulations covering proper train make-up.

(For many years, improper distribution of loaded and empty freight cars (*i.e.*, when a railroad couples empty cars in the front of a consist and loaded cars on the rear) has caused countless derailments. In-train forces from the rear cause unsafe train handling and result in derailments when a train slows. These forces break equipment, cause rails to turn over or cause cars to climb the rails. Heavier freight cars and longer trains create more of these forces. In 1994, Congress required the Secretary to study existing practices regarding the placement of cars on trains, with particular attention to the placement of cars that carry hazardous materials, and the FRA concluded that no new regulations were needed. We believe that conclusion is outdated, particularly with the current use of longer trains. Over the years, too many derailments could have been prevented by proper train make-up. The Association of American Railroads has a Train Make-Up Manual, which provides guidelines on train make-up. These are not enforceable and are violated constantly. Congress should address this issue by requiring FRA to promulgate regulations mandating proper train make-up.)

26. Trespassing

a. **Railroads should be required to erect fencing along railroad tracks incongested areas.**

b. **The FRA shall be required to hire at least 10 trespass prevention managersto assist state and local governments to develop site-specific mitigation plans.**

(The history of fencing requirements reflects strong opposition from the railroad industry and little regulatory involvement. As early as 1972, the FRA first sought legislation for funding of fencing along the Northeast Corridor between Washington, D.C. and Boston. Fencing along the corridor in metropolitan areas has been completed, and, on information and belief, there have been few pedestrian casualties along the corridor since fencing was installed. In the same year, the NTSB recommended that the FRA "Promulgate regulations requiring fences or other means to discourage trespassing on railroad tracks and right-of- way."(NTSB Recommendation R-72-14, 3/29/72). Based upon a study by FRA in1984, it concluded that trespasser accident records since 1975 did not show a concentration of trespasser fatalities which would warrant requiring fencing. However, a 1978 study found that 85% of trespasser fatalities occurred at unfenced locations. (Pelletier, A. Deaths among railroad trespassers: the role ofalcohol in fatal injuries. Journal of the American Medical Association, vol. 277,pp. 1064-1066 (1997).

In 1987 Congress became concerned about this problem. The House Committee on Interstate and Foreign Commerce proposed fencing of rail yards, and it was adopted by the House. (*See*, Cong. Record, H11750, Dec. 18,1987). However, because of intense lobbying by the railroad industry, the measure was not enacted into law.

On March 24-25, 2015, the NTSB conducted a public forum on the dangers of railroad trespassers, and on October 30, 2018 the Federal Railroad Administration conducted a similar forum. Fencing was one of the recommendations offered at both forums.)

27. Assaults

In order to reduce the number and severity of assaults, railroad and bus employees shall be protected from assaults, and each railroad shall include in its risk reduction program a program to reduce assaults on railroad employees.

(On railroads and bus lines, assaults upon employees are continuing problem. There have been many brutal attacks of employees by passengers and trespassers, including incidents where employees have been shot and stabbed. Something needs to be done to help protect theworkers. In Section 3022 of the 2015 FAST Act (Pub. L. 114-94), Congress mandated that the Secretary of Transportation conduct a review within 90 days after its enactment regarding the protection from assault of rail and bus operators, and to issue a notice of proposed rulemaking on protecting public transportation operators from the risk

of assault. The prior administration issued a very weak regulation covering assaults on busses. It only alerted transit agencies to the need to address the risk of transit operator assault when identified through the processes required under the Public Transportation Agency Safety Plan (PTASP) regulation. 83 Fed. Reg. 34418 (July 19, 2018). In cases where transit agencies discover a risk of operator assault, the regulation requires agencies, as part of their processes, to develop methods or processes to identify mitigations or strategies necessary as a result of the agency's safety risk assessment. The transit regulation needs improvement, and FRA should be required to protect employees from assaults. The latest tragedy occurred on October 4, 2021, in Tucson, Arizona, where a DEA agent and two officers were injured in an AMTRAK train shooting. There were 137 passengers and11 crew members on the train.)

Suggested amendment:

(a). **No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard a train,or any individual on the train;**

(b). **A crewmember on a train shall have the authority to remove from the train any person who violates subsection (a), and such individual shall be prohibited from re-boarding a passenger train for a period of time as determined by the railroad of not less than 30 days and up to being banned for life. The railroad shall notify the Secretary of such determination, whichshall be published in the Federal Register;**

(c). **Each passenger railroad shall provide its crews with training on how to deal with unruly passengers, including de-escalation of issues which may occur in subsection (a);**

(d). **A person who violates subsection (a) shall be liable for a civil penalty tothe U.S. government of not more than $35,000, as determined by the Secretary.**

(e). **A notice of this statute shall be placed on each train ticket, or at arailroad's discretion, prominently placed in each passenger car.**

(f)(1). Any person adversely affected or aggrieved by a decision

issued pursuant to this section may seek review of the decision by submitting it in writing within 30 days of such decision to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue, SE, Washington, D.C. 20590.

(2). Pursuant to any such application, an oral hearing will be held if found necessary or desirable by the Administrator, which hearing shall be conducted pursuant to 49 C.F.R. §211.25.

(3). Any person adversely affected or aggrieved by a final decision of the Secretary may obtain review in the United States court of appeals for the circuit in which the violation allegedly occurred, or the circuit in which the complainant resided on the date of such alleged violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final decision of the railroad or Secretary. The review shall conform to chapter 7 of title 5, U.S. Code. The commencement of proceedings under this paragraph shall not, unless ordered by the court, operate as a stay of the decision of the railroad or the Secretary.

28. Defective Air Brake Valves

The FRA should be required to have railroads remove all New York AirBrake valves identified as DB-10.

(The New York air brake valve DB-10 is defective and dangerous. During cold weather, the said valves are not operating correctly, and the defective valves prevent a separated train from having an emergency brake application.Obviously, this could lead to a very catastrophic situation. On one railroad, the crews are instructed to draw the train down to zero brake pipe pressure before a train is separated to set out a bad ordered car. This circumvents the process by which crews are able to determine if the train will make an emergency application. There have been a number of near misses from being unable to apply the emergency brake. On December 20, 2019, SMART-TD filed a petition for an emergencyorder to have these bakes removed from all freight trains. The prior administration denied the request on October 6, 2020.)

29. Speed Signs

The FRA shall issue a regulation that mandates uniform warning signs inadvance of a permanent speed restriction.

(On January 12, 2016, SMART-TD and BLET petitioned the FRA for a rulemaking that would mandate uniform warning signs in advance of a permanent speed restriction. On April 7, 2016 FRA presented the issue to RASC, which was accepted for consideration by a working group. Task No. 16-01. In the background need for the rule, FRA pointed out "Although many railroads do post speed restriction signage, some railroads have elected not toutilize such signage or use a variety of signs in limited circumstances and varying locations. This may present an issue for operating crews operating in unfamiliar territory or in extreme weather conditions as it may be difficult for the operating crews to determine the exact location of a speed restriction. Where mile posts are used to identify speed restrictions in conjunction with train orders, missing or obscured mile posts could result in operating crews overlooking the restriction entirely." Some railroads have in place speed signs, but the working group was never created by FRA to discuss this safetyissue.)

30. Safe Handholds on Tank Cars.

Railroads should be required to construct and maintain safe handholds on tank cars.

(There have been too many injuries and deaths of operating crews being forced to ride upon tank cars during switching operations. The handholds are not located for safe protections against crews falling from such cars during theswitching. The crewperson is forced to swing back and forth during the slack action in switching operations. In November, 2020, a crew member in Kentucky was jolted off a tank car, which resulted in a double amputation. In December, 2020, in Mississippi, a crew member fell from a tank car during switching, resulting in a double amputation and death. These types of incidents can be easily corrected by placing safe handholds on all tank cars.)

31. Emergency Escape Breathing Apparatus

All railroads shall provide emergency escape breathing apparatus with respiratory protection for all crewmembers in locomotives transporting hazardous materials.

(In 2008, Congress mandated in the Rail Safety Improvement Act, Pub. L. 110-432, §413, that **"**Not later than 18 months, the Secretary shall prescribe regulations that require railroads to provide emergency escape breathing apparatus with respiratory protection for all crewmembers in locomotive cabs carrying materials that would pose an inhalation hazard, and to provide crewmembers with proper training for using the apparatus." The FRA failed to comply with this command, and in December 2016, merely issued a Guidance Document entitled *Federal Railroad Administration Guidance for Developing an Atmosphere-Supplying Emergency Escape Breathing Apparatus Program.*)

32. Hair Testing

Hair testing shall be prohibited in the railroad industry.

(Because of pressure from the American Trucking Association, the prior administration issued a NPRM to mandate hair testing of transportation employees. *See,* 85 Fed. Reg. 56108 (Sept. 10, 2020). There are a number of reasons why this should be prohibited. There are issues of validity and disparate impacts on certain classes of persons. Most importantly, there is a propensity of African-Americans and Latin Americans to have disproportionately higher false positive rates because of the nature of their hair and certain hair products being used. Also, the procedure for differentiating between a positive test based upon a hair follicle vs a contaminant on the follicle is problematic. Hair tests could possibly detect substances use up to two months, having no effect on the employee's safety at work.)

33. Railroad User Fees

Congress shall require the FRA to impose user fees on the railroads.

(This issue has a long history. In the prior administration's 2021 Federal budget proposal, it sought a user fee upon the railroads, stating:

"Railroads benefit directly and indirectly from the Federal Government's efforts to ensure high safety standards through the Federal Railroad Administration's rail safety inspectors and activities, and it is appropriate forrailroads, like other regulated industries, to partially fund Federal safety efforts.

Justification:
The Budget proposes to reinstate the Railroad Safety User Fee, which was originally authorized by the Congress in 1990 and implemented by the FederalRailroad Administration between 1991 and 1995. However, the Congress repealed the provision for this fee in September 1995. Reinstatement of this user fee would support the Federal Government's cost for rail safety inspectorsand rail safety activities, and would help balance costs funded by taxpayers and those borne by the railroad operators that benefit directly and indirectly from the program. This model is not unique in the Department of Transportation; for example, the Pipeline and Hazardous Materials Safety Administration partially offsets its safety regulation activities with fees on oil and gas pipeline operators.")

34. Use of Drones

Railroads shall be prohibited from retaliating against employees for information obtained by the use of drones. Such image recording data obtained shall be used only for purposes of gaining safety information.

(Many railroads are currently using drones recording information for surveillance and to retaliate against their employees. The use of the drones in railroad yards are a major distraction to the employees, and results in them not fully focusing their eyes on the train operations. This creates a serious safety issue. Injuries in railroad yards are among the largest cause of incidents. Railroads contend that drone technology increases efficiency, but that should not be at the expense of the employees. The FAA has regulated drone use (14 C.F.R. Part 107) which applies to the railroads requirement for a license.)

35. Risk Reduction Regulation

The Risk Reduction regulation shall be withdrawn by FRA.

(In the 2008 legislation, Congress required FRA to issue a risk reduction rule. The concept of a risk reduction regulation is supported by labor. However, the FRA colluded with the railroads and promulgated a deficient rule. There are various violations of law contained in the rule.These include:

1. Title 49 U.S.C. §20119(a) requires FRA to conduct a study to

evaluate whether it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to withhold certain documents from discovery or admission into evidence in a lawsuit for damages involving personal injury or wrongful death against a railroad.To conduct the study, FRA contracted with Baker Botts, a law firm which had been representing railroads since the late 1800's. Even a cursory investigation by FRA would have discovered that, throughout the years, the law firm has represented railroads in various situations, including FELA litigation, and lawsuits against railroad unions.

2. The Final Rule sets forth a performance-based regulation. *See,* 85 Fed. Reg. at 9272-73, 9296, 9289, 9308, 9310. FRA's justification for such rule is that it would provide a railroad flexibility to tailor the RRP requirements to its specific operations. *Id.,* at 9272-73. FRA states that "…RRP requires a railroad to engage in self-analysis that a railroad willconduct in conjunction with the railroad's directly affected employees and FRA oversight." *Id.,* at 9273. Performance-based standards depend on the ability of government agencies to monitor performance, and reliable and appropriate information about performance may sometimes be difficult if not impossible to obtain. The problem with FRA's support for performance-based requirements in the Final Rule is its lack of adequate oversight and monitoring of the railroads. Historically, FRA's poor administration of the railroad safety laws has been the subject of much criticism. Also, it is a reason Congress required FRA to issue regulations covering various safety issues prior to the RSIA. *See,* 49 U.S.C. §§ 20131-20153.

3. The FRA has a duty to utilize the highest degree of safety in administering the railroad safety laws. In the regulation, all of the information a railroad compiles or collects solely to plan, implement, or evaluate a RRP is prohibited from being discovered, admitted into evidence, or used for other purposes in a personal injury lawsuit. 49 C.F.R. §271.11. We believe that this section violates 49 U.S.C.§103(c). Such limitation will be detrimental to the railroad employees and the public because it will allow railroads to hide known unsafe conditions, reducing the rights of individuals injured in railroad accidents. The public interest in full disclosure of all hazards and risks greatly outweighs the potential that a railroad might hide its knowledgeof safety hazards. Ensuring that railroads

are subject to scrutiny is essential to safety, and the possibility of disclosure creates an incentivefor railroads to mitigate hazards more quickly.

4. Each RRP shall contain a fatigue management plan. 49 U.S.C. §20156(d)(2). The FRA did not require a fatigue management plan inthe Final Rule. *See,* 85 Fed. Reg. 9262, 9266 (Feb. 18, 2020).

5. Title 49 U.S.C. § 103(c) mandates that the Administration [FRA in this instance] "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 safetyin railroad transportation." The final rule sets only a "minimum" requirement. *See,* 49 C.F.R.§ 271.1.

6. The law required FRA to issue the rule in 4 years. It took almost 12 years before the final rule was issued.

(The regulation was challenged by SMART-TD and BLET inthe U.S. Court of Appeals for the District of Columbia Circuit. The court ruled in favor of the FRA.)

36. Brake Testing

The FRA's rulemaking 0n December 11, 2020, covering brake standards shall be vacated.

(On December 11, 2020, the prior administration gave the railroads a Christmas present by issuing a regulation liberalizing the brake inspection requirements. 85 Fed. Reg. 80544. Among the various changes, it extended the brake test requirement if a train is off air from 4 hours to 24 hours; liberalizing blue flag protection for utility employees while replacing batteries; lowered theheight of the end of train device from 48 inches to 40 inches; in a Class I test, increased the air flow measure from 60 cubic feet per minute to 90 CFM; gives railroads more flexibility to conduct Class IA tests on long haul trains; eliminated the time interval or 368 days for testing and calibrating an end of train device; relaxation of current maintenance practices and operating requirements in 232.717(b), including the ''cleaned, repaired, lubricated, and tested'' periodic inspection requirements for 26–C

and D–22 brake valves; incorporated by reference some AAR standards; etc.

The regulation is defective. The rulemaking was initiated in 2019, and was not completed within 1 year as required by 49 U.S.C. §20103(b). Also, the rule violates 49 U.S.C. §103(c), which requires FRA to utilize the highest degree of safety in its regulations. The rulemaking was initiated by AAR to "relax" the rule covering brake tests, and the rule amends parts 221 and 218,both of which are minimum regs.)

37. Amendment to ICCTA preemption

Title 49 U.S. Code §10501(b)(2) is amended by adding the following at the end:

"Provided, however, neither the Federal nor State laws or regulations governing railroad safety are preempted by this section."

(The preemption section of the ICCTA states "Except as otherwise provided in this part, the remedies under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C.§10501(b)(2).The Surface Transportation Board has exclusive jurisdiction over "(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules(including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located , entirely within one State…" 49 U.S.C. §10501(b).
Some courts have ruled that where a state law somehow impacts the economics of a railroad's operations, a state law is preempted by the ICCTA. *See, e.g., Friberg v.Kansas City Southern Ry. Co.*, 267 F. 3d 439 (5th Cir. 2001); *State of Kansas v .BNSF Ry. Co.*, 432 P. 3d 77 (Kan. App. 2018); However, Congress intended for the above provisions to coexist with the Federal Railroad Safety Act. There is absolutely nothing in the legislative history of the ICCTA to suggest that the STB should supplant the Federal or State's authority over rail safety.There is more reasoned authority that the ICCTA does not preempt state railroad safety laws. *See, Tyrrell v. Norfolk Southern Ry.,*248 F. 3d 517 (6th Cir. 2001). In that case both the FRA and the STB filed *amicus* briefs stating that the

FRSA, not the ICCTA, is the appropriate statute to determine safety preemption. The court said "state safety law that is saved under FRSA if it tangentially touches upon an economic area regulated under the ICCTA." *Id.* at 522-523. Further, the court said:

> While the STB must adhere to federal policies encouraging "safe and suitable working conditions in the railroad industry," the ICCTA and its legislative history contains no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety. 49 U.S.C. $ 10101(11). Rather, the agencies' complementary exercise of their statutoryauthority accurately reflects Congress's intent for the ICCTA and FRSA tobe construed *in pari materia*. For example, while recognizing their joint responsibility for promoting rail safety in their 1998 Safety Integration Planrulemaking, the FRA exercised primary authority over rail safety matters under 49 U.S.C. § 20101 et seq., while the STB handled economic regulation and environmental impact assessment.

Id. at 523.

The administrative rulings of FRA and STB are equally instructive that the ICCTA has not vested preemptive jurisdiction for safety matters in the STB.

As both the FRA and the STB recognized in a joint rulemaking:

> ...both FRA and STB are vested with authority to ensure safetyin the railroad industry. Each agency, however, recognizes the other agency's expertise in regulating the industry. FRA has expertise in the safety of all facets of railroad operations.
> Concurrently, the Board has expertise in economic regulationand assessment of environmental impacts in the railroad industry. Together, the agencies appreciate that their unique experience and oversight of the railroads complement each other's interest in promoting a safe and viable industry.

63 Fed. Reg. 72,225(Dec.31, 1998).

The brief of the STB in *Tyrrell* states that the lower court's ruling in favor of the railroad would "...undermine the primary authority of the Federal

RailroadAdministration (FRA) (or states where the FRA has no Federal standards) to regulate railroad safety under FRSA". STB Brief at 3.

ln *Petition of Paducah & Louisville Railway Inc., supra,* the FRA addressed the effect of the ICCTA preemption on its jurisdiction. While FRA found that the STB had exclusive jurisdiction on the matter at issue (access to arailroad bridge), the FRA order emphasized that the ICCTA preemption was limited to "non-safety" matters:

"Congress conferred on the STB and its predecessor (the ICC) exclusive administrative jurisdiction over the non-safety aspects of the operations of thenation's interstate rail system." Order at 5.
….
"the very hallmark of rail regulation has been the exclusive nature of the administrative jurisdiction over non-safety rail operations and practices which Congress had entrusted to the Interstate Commerce Commission ("Commission") and which has been expanded and now reposes in the [Surface Transportation] Board." Order at 6.
….
"...delegation to the Commission (and now exclusively to the [Surface Transportation] Board) of all regulatory power over the economic affairs and the non-safety operating practices of railroads." Order at 6-7.

“At the time that it was established just a few years ago, Congress made itabundantly clear that the [Surface Transportation] Board was to be its sole delegatee of power to regulate non-safety rail matters." Order at 7.
….

“The enactment of the ICCTA with its unambiguous language preempting all other federal laws which encroach on the exclusive administrative expertise of the [Surface Transportation] Board in non-safety rail regulatory matters alone isdispositive of the issue..." Order at 18.

"Congress' unambiguously expressed intent in 49 U.S.C. § 10501(b) to centralizenon-safety rail regulation as part of its efforts to facilitate uniformity in the administration of legislation designed to achieve its deregulatory goals. Clearly, inSection 10501(b), Congress bestowed exclusive administrative jurisdiction over the non-safety aspects of rail operations on the [Surface Transportation] Board with no exceptions." Order at 19.

Similarly, the STB's orders have delineated the extent of its jurisdiction to emphasize that the ICCTA did not preempt federal safety laws. In *Borough of Riverdale,* STB Finance Docket No. 33466(Sept.9, L999), the STB stated:

"Our view [is] that not all state and local regulations that affect railroads arepreempted ...state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety." Decision at 6.

It should be noted that none of the cases holding that states are preempted discussed the positions of either the FRA or the STB.

The point is that Congress,in order to prevent additional costly litigation, needs to address this issue.)

37. Sleeping Quarters Amendment

The sleeping quarters law shall be amended to clarify that the safety of sleeping quarters applies to those either owned and operated by a railroad, or to those privately owned sleeping quarters contracted by railroads.

(In 1976 Congress adopted a sleeping quarters provision to provide sleeping quarters for railroad workers that "are clean, safe, and sanitary". Pub. L. No. 94-348. *See,* H. Rep. No. 94-1166, 94th Cong., 2d Sess. 5, 11-12 (1976). The section is currently codified at 49 U.S.C. §21106.The problem is that the law applies only to company owned or leased sleeping quarters. *See, California State Legislative Board, United Transportation Union v. Mineta,* 400 F.3d 760 (9th Cir. 2005). Today, railroad employees are housed almost entirely in sleeping quarters that are privately owned. The railroads have entered into contracts with the private owners to permit employees to sleep in those facilities. It is rare for railroads to own or lease sleeping quarters. Therefore, the protections afforded by 49 U.S.C. §21106 should be provided to employees who are required to sleep in private facilities.)

38. A violation of an OSHA regulation shall be negligence *per se*.

(Courts agree that OSHA regulations are admissible as evidence of negligence. Unlike a violation of a railroad safety law or regulation (*See,*45

U.S.C. § 54a), many cases hold that a violation of an OSHA regulation is only evidence of a standard of care. However, the courts are divided as to whether such violation constitutes negligence *per se*. *See, e.g., Albrecht v. B&O Railroad Company*,808 F. 2d 329,332 (4th Cir. 1987); *Pratico v. Portland Terminal Co.,* 783 F.2d 255, 265-67 (1st Cir. 1985); *Ries v. National RR Passenger Corp.,* 960 F. 2d 1156, 1165 (3d Cir. 1992); *Robertson v. Burlington Northern RR,* 32 F. 3d 408 (9th Cir. 1994).
Railroad employees are subjected to injuries in situations where there are no federal railroad statutes or regulations covering the incident. Therefore, if OSHA applies, it should be given the same effect as a violation of a railroad safety law or regulation.)

- Voluntary safety reporting programs such as the Aviation Safety Action Program (ASAP) are a collaboration between the regulator (FAA), employer, and employee representatives designed to identify hazards and unsafe conditions in the National Airspace System (NAS) so that corrective action can be taken to eliminate or reduce the hazard or unsafe condition.
- This non-punitive, voluntary, collaborative approach has proven effective in identifying and correcting potential threats to aviation safety.
- The objective of an ASAP is to encourage employees of air carriers, repair stations, or other entities to voluntarily report safety information that may be critical to identifying potential precursors to accidents.
- The Federal Aviation Administration (FAA) has determined that identifying these precursors is essential to further reducing the already low accident rate.
- Aviation safety is well served by incentives that encourage entities to establish programs to identify and correct their own instances of noncompliance while investing in the prevention of recurrences.
- The FAA's policy of forgoing enforcement actions when one of these entities detects violations, discloses the violations to the FAA, and takes prompt corrective action to ensure that the same or similar violations do not recur is designed to foster safe operating practices, encourage compliance with FAA regulations, and promote the development and maturation of effective Internal Evaluation Programs (IEP) and Safety Management Systems (SMS).

For more detailed information, here is FAA resources.
https://www.faa.gov/about/initiatives/asap/policy

TESTIMONY OF

JEREMY FERGUSON
PRESIDENT
SMART – TRANSPORTATION DIVISION

BEFORE THE

SURFACE TRANSPORTATON BOARD

HEARING ON

RAIL SERVICE PROBLEMS AND RECOVERY EFFORTS INVOLVING CLASS I RAILROADS

APRIL 26, 2022

Chairman Oberman - members of the Board – thank you for the opportunity to testify today and for the opportunity to bring to light the devastating effects Precision Scheduled Railroading has had on America's Class I railroad workers and their existing, former, and potential customer bases.

My name is Jeremy Ferguson and I am the president of SMART Transportation Division, which is the largest railroad union in the United States - representing almost 40,000 freight railroad employees. Our members work in the operating crafts of certified conductor, locomotive engineer, yardmaster, yard foreman, switchman, utility employee, trainman, and many others. It is with absolute pride and honor that I present these remarks on their behalf, as they have been essential workers on the front lines throughout the entirety of the pandemic and supply chain crisis, in which their only reward has been becoming victims of the carriers' tactics under Precision Scheduled Railroading – otherwise known as PSR.

As President, my number one priority is the safety of my members, and my second priority is job security for them. Job security comes in the form of the shippers' satisfaction with our service. Unfortunately, these priorities have been jeopardized by the railroads' PSR initiatives which, in turn, are having a subsequent, dire effect on the shippers we serve. As professionals it is painful to watch our shippers get bad service or no service at all, much higher rates, destroyed product and equipment and in some cases having to resort to shipping by truck whenever possible. That is why I am here today. I want to make our voice heard that we stand with the shippers who want our professional service to keep the supply chain open and to keep this country's economy moving. Both my members and the shippers deserve fair treatment and better conditions to fix this alarming situation we find ourselves in.

Just 6 years ago, before PSR, the railroads were operating with a robust workforce and an ample supply of locomotives and equipment. They were enjoying the fruits of the safest, most productive era in railroading history – which was borne and brought by the *two-person crew*. The ebbs and flows of the nation's supply chain proved little challenge, as the extra-boards (additional employee availability boards for those that may not be familiar with this term) were adequately staffed, the locomotives were plentiful, yards were open, track space was common across all systems, and trains were sized for the territory in which they were to operate. Additionally, inspections were being performed by the craft designated to do them, and the industry goal was "always take the safest course."

Fast forward to today, and that has all now been sacrificed by the railroads' insatiable appetite and longing to perform for Wall Street. Thousands of men and women have been laid off with reckless abandon while no consideration has been given to the service that has ultimately been forsaken. All that is known to us and our members, at this point, is that the railroads are dead-set on achieving the lowest operating ratio attainable – and at any cost.

Railroading, once revered as one of the best, most coveted blue-collar jobs in the world, is now hemorrhaging employees at unprecedented rates because of the abusive work environments PSR has created. Later, the railroads will stand here and testify to this Board that they are doing everything in their power to right-size their employee headcounts – most of these changes, ironically, have occurred since the announcement of this hearing. They will tell tale of incentives

and bonuses to entice new workers, and they will allude to a lucrative atmosphere in which anyone would be happy to work. But I will warn you to be wary, as it is nothing more than smoke and mirrors; an illusion designed to lead you to believe that they are doing everything in their power to hold up their end of the bargain and an effort to satisfy enquiring minds in the hopes that this will all just go away; that the bad publicity will just disappear; and that no regulation or federal action will need to be taken to prevent this from ever happening again.

The truth is, employees are leaving the industry faster than the railroads can hire – and who can blame them? Take for example BNSF's most recent absenteeism policy known as "Hi-Viz," which was unilaterally imposed upon its employees on February 1st of this year. The policy only allows for a worker to have one day off a month and penalizes them for sick time or for needing to take care of their family when a medical emergency arises. It also assesses discipline, or, at the very least, disincentivizes our members from utilizing family medical leave and receiving necessary rest. BLET President Pierce and myself personally warned the BNSF not to implement this policy. We were at the national negotiating table discussing many issues concerning availability and proper time off. The BNSF would not heed our warning and haphazardly proceeded, forcing our hand to vote our respective membership to strike. Did we want to shut down a railroad and compromise a supply chain in crisis? Absolutely not, but we had no other legal option left to save them from themselves. Unfortunately, the federal courts ordered a Temporary Restraining Order and prevented strike action by the unions.

As of today's count, BNSF has lost more than 1,000 employees due to voluntary, mid-career resignations over their new attendance policy. By failing to listen to Labor, they have jeopardized the supply chain in a far greater way, and one that will take years to recover from. All of this so they could exploit the conductors and engineers they currently had, instead of hiring more in accordance with our long-standing agreements. For the record, BNSF is not the only railroad losing employees at record rates due to harsh attendance policies and manpower shortages, one exasperating the other in a never-ending spiral to the bottom. BNSF just, currently, appears to be the worst with the data we have been able to collect. **SEE EXHIBIT__**

By cutting to the bone, the carriers have increased their profitability and spent billions in stock buybacks, while the men and women who serve in their employment are forced to decide between sleep and/or spending time with their children. My members go to work exhausted because the railroads afford them no other option. Under PSR, they now spend exorbitant amounts of time at their away-from-home terminal, only to be called to work with the absolute bare minimum rest the law allows when at home. Quality of life is given absolutely no consideration, and now, because of PSR, only two choices exist for rail labor: work – or be fired.

If the railroads are serious about fixing their crew shortage issues, they would be at the national negotiating table, negotiating in good faith for a quick resolution to the ongoing round. Instead, they are delaying the process at every opportunity - making ridiculous proposals for wage concessions and reductions in H&W benefits, all while companies like Wal-Mart are making agreements to pay their truck drivers $110K a year with improved H&W benefits just to keep their own supply chain open. Our wages as railroaders are definitely disproportionate to profits the carriers are currently enjoying, and they fail to recognize this fact.

Unsurprisingly, the railroads will try to compare their circumstances to the rest of the labor market. They will want you to believe that their difficulties are the same as other companies and that the "great resignation" is somehow applicable to their woefully deficient headcounts. They will do their best to deflect the realities that approximately 30% of rail employees were furloughed at the advent of PSR by placing blame on a pandemic that, in all honesty, had little to no effect on railroad fluidity. In fact, if anything, the pandemic provided an opportunity for their corporate greed to run rampant.

To the outsider, the railroads' fixation on the bottom-line was out of focus, seeming as if they were taking the necessary steps to protect their own interests. The truth is, however, that an opportunity to make further reductions presented itself, and the carriers took full advantage. At no time was an actual plan evident. COVID provided the cover for more cuts to be made, and they took it. Had the pandemic been the honest rationale, then plans and procedures to bring people back at the conclusion of it would have been established, and an adequate number of employees would have been kept active in anticipation of an increase in service. To this point, all Class I carriers have long standing agreements with our Union to keep employees available during periods or seasons of reduced traffic. These agreements benefit both parties and ensure a quicker, smoother return to peak service. However, the carriers refused to enact any of the provisions of these agreements and instead chose the cheapest course.

As a result, the furloughs grew deeper and the separation from service got longer. Employees that were once readily available for work were now losing their qualifications, and in some instances, their certifications, because of the length and depth of the railroads' cuts. Hope grew dim, and people needed work to provide for their families. The railroads did nothing about it. Now hardly anyone wants to return to the railroads from furlough.

For those that are fortunate enough to still be working, the service issues are very real. There is no doubt that I represent the hardest working, most dedicated employees in the railroad industry. The men and women that belong to our Union take pride in their work and the customers that they serve. They understand providing a service for the railroads' customer base is what keeps their employer in business and is what provides them with the finances and benefits they earn. Their number one priority outside of working safe is getting the right product to its proper destination as quickly as possible. Unbelievably, which is why we're all here – the railroads are preventing them from doing just that.

It is not a surprise that the National Grain and Feed Association filed a complaint, and it is not a surprise that the other shippers here today have followed suit. PSR has not only restricted the number of locomotives and employees in service, but it has also limited the shipments available to the customers it services. Because the railroads are trying to do more-with-less, they are dictating the terms for the cars that they will provide and the products they will carry, regardless of what the shipper's needs might be. In fact, for the precision in Precision Scheduled Railroading to work, it's not about the customers at all, but rather about internal metrics that meet self-serving goals focused strictly on operating ratios, which is the only way these extremely low operating ratios can be achieved.

Daily, our folks are being told to bypass customers and to do everything in their power to get the train yarded, instead of getting the cars to their destinations. This comes as no surprise, however, when you consider that front-line managers are no longer rewarded via company bonuses for service and productivity, but rather for saving the company money – cutting their way to profits. When faced with possible overtime for a product to be delivered or preventing the extra hourly pay, the railroads choose the latter every time. We literally have examples of cars directly passing a shipper five times before finally being delivered – among others, just so they can show the train being yarded on time and meeting their own internal PSR goals.

Our working members are also now tasked with operating trains so excessive in length that it is impossible for more than one train to move because the territory doesn't have passing sidings or alternate trackage for the two to meet. The solution – stop all other trains until the very long train has traversed from point A to point B. The congestion this causes is wreaking havoc on our ability to service customers; unnecessarily extending the hours the train crews are on duty; and causing more trains to have to be recrewed on the line-of-road because the crews have met or exceeded their maximum hours-of-service permitted by law. The cascading effect is an inefficient railroad that masks its own recrews so as not to bring attention to their own insufficiencies when it comes to moving trains.
But long trains are not the only impediment that rail workers face. Train velocities are slowing because the railroads are purposefully slowing them. In an effort to save on fuel costs (which is guised as reducing emissions), the Class I carriers are instructing their train crews to not exceed forty miles-per-hour. We have examples with us here today wherein you can see the instructions written on the train's work order. The directive is to limit the amount of horsepower or throttle used once the train achieves forty miles-per-hour. In other words, once the speed recorder shows forty, the engineer is to immediately place the throttle in idle or eliminate all powered effort.

Again, later in this hearing the railroads will attempt to sell you a bill of goods and lead you to believe that all of this has been changed. I assure you, it has not. Please bear in mind that changes did not occur until the announcement of this hearing, and that the railroads have other mechanisms at their disposal that will allow them to slow a train without the manual or verbal instructions. Locomotive software, known as Trip Optimizer or Leader, is an energy management system that is notorious for slowing freight. By simply manipulating some of the algorithms, or even keeping it as is for that matter, the trains will continue to be slowed. Yet again, this has an adverse effect on the supply chain, as train crews commonly exhaust their hours-of-service-limits, additional crews are required to move the train, overall, less crews are available for the system – as a whole, and the trains do not operate as intended.

Looking to the future under PSR, the horizon doesn't get any brighter. In a panic, to stop this PR nightmare from happening, the railroads have finally conceded that an extraordinary workforce shortage exists. A deficiency that was created by their own greed. But a PSR railroad is not like a traditional railroad. Training is expensive, cumbersome, and time consuming, all red flags when you're performing for Wall Street. The result – training programs that possess sub-par standards and hurried educational practices. Take Norfolk Southern for example; within the last six months, NS has slashed their program from eighteen weeks to six. The other railroads are following suit. This not only jeopardizes the safety of a recently promoted conductor, but it also jeopardizes his or her fellow co-workers, and every community and industry they encounter.

By not providing a full and enriching training experience, not only are the railroads endangering themselves and the public, but they're also forsaking industry knowledge or know-how to provide adequate service to the railroads' customers. Safe and efficient train operation takes time and investment, two things PSR does not allow.

The other issue here is that the trainees are realizing the woefully deficient programs, and they are quitting before the training program ever has a chance to be completed. I regularly receive reports of new-hire classes, some as many as 25, only being able to retain one or two, because the others quit before promotion. The railroads have a problem. They have created a dangerous, hostile work environment under PSR that no one wants to work under. This is compounded when realizing that individuals are not interested in hiring as a conductor wherein the carriers have active campaigns engaged to greatly reduce or eliminate the craft from the industry, and it's my members and this nation's shippers that have to suffer.

Members of the Board, it is impossible for me to depict, in its entirety, the breadth of PSR and just how harmful it is to this nation's supply chain, as it has far too many tentacles. There is not one area of the railroad that it has not harmed. Managers have been eliminated. Tracks have been sold or removed. And yards have been closed. It is not a coincidence that we are in a supply chain crisis, and it is not a coincidence that we are on the precipice of a supply chain collapse.

I have three expert witnesses here with me today that are current, active ballast-level employees and officers in our Union. They live and work the realities daily, and they have just some of the granular stories and examples of how PSR is compromising the supply chain and hamstringing the shippers and associations that are or will be here before you. It is them who will give credence to the shell game that PSR really is, and it is them who will highlight how and where the business model is truly hidden.

The railroads are going to attempt to persuade you into believing that things are trending in the right direction – that a new day has dawned. Their message will be positive, and their data will look promising. They will want you to buy into the argument that no other entity is better suited to correct their wrongdoings than themselves. They will lead you to believe that regulation and oversight is not needed, and that it will somehow be more harmful than good. Again, I say, do not let them sway you. Their data is deceiving.

A PSR railroad cannot, and does not, move freight in an efficient and effective manner. So, what do you do when you cannot meet the demands of your customers? You hide the facts, and you manipulate the data. Because yards have been closed, trains sit idle on the line of road for hours, sometimes days - that data isn't reflected, at least not wholly. Why? Because they hide it. Despite thousands of locomotives resting in storage, consists sit without power because there is none available – delaying shippers' products. That data isn't reflected. Why? Because they hide it. Cars are shown as having been delivered, when in reality they're still on the train or even in the yard. That data isn't reflected. Why? Because they hide it. As for the specifics, my three witnesses are going to give you some insight into how they are hiding it and just how often.

Members of the Board, action is warranted, and regulation is necessary. If left unbridled, there is nothing preventing PSR in its current form from continuing and/or from ever happening again (should it stop momentarily as a result of this hearing). Checks and balances are desperately needed in the railroad industry, and common carrier obligations must be enforced. Carriers should not have the ability, much less the freedom to furlough employees and store locomotives disproportionate to service demand. They should not be permitted to close yards, or a portion thereof, without an appropriate review process, and they should not be permitted to implement or impose a policy that results in an inordinate number of resignations – from any craft.

I ask you to please heed the warnings of my members and the shippers that are beholden to the railroads' services. If action is not taken, Wall Street and outside investors will continue to pressure the industry to make further cuts until their pockets are filled and their interests in railroading profitability ceases. The Board has the authority to intervene, and its intervention is warranted.

Thank you for the opportunity to testify here today, and I look forward to working with the Board to help develop regulations and mandates that will resolve and prevent these serious problems from ever threatening the integrity of our national supply chain again.

Effective February 1, 2022

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Effective February 1, 2022
New Hi-Viz Attendance Program is placed into service and replaces information previously contained in the following System General Notices:
- TY&E Failure to Take Notification
- TYE Earned Rest
- Guidelines for TYE and Yardmaster Attendance
- TY&E Time Off

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BNSF Hi-Viz Guidelines for TYE and Yardmasters

Hi-Viz Guidelines is a tally system that:

- Sets a clear standard for full-time employment.
- Allows employees to easily, accurately and contemporaneously determine where they stand in comparison to BNSF's attendance standard.
- Provides employees with an opportunity to improve their standing through regular/steady attendance.

1. Assessment of Points

Subject to the Point Schedule below, employees begin with 30 points and points are deducted for various incidents of non-attendance including both full and/or partial day absences.

a) Point deductions are determined based on the type of service the employee is in at the time of the unavailable event.

b) Unavailable time is associated with the day the event began.

c) Unavailable time is measured in 24-hour increments.

d) High Impact Day (HID) point values apply if:

- For unassigned service: The unavailable event occurs on the day of the HID, or the unavailable event occurs prior to the HID and employee is not marked up by 0600 on the HID.
- For assigned service: The employee misses their assigned shift on the HID. If the assigned service does not include specific start times, then HID applies if the

unavailable event occurs on the day of the HID, or the unavailable event occurs prior to the HID and employee is not marked up by 0600 on the HID.

e) Any unavailable event that begins or ends within 48 hours of a VAC, PLD, UNB, FML, CLD event, or within 24 hours of an SRS event, and does not have an intervening work event will be charged an additional 2 points for Unassigned Service and an additional 3 points for Assigned Service regardless of day of week. This is referred to as a Conjunction Penalty.

- EMC/LOC/NOS are the exception; they will continue to be charged according to Point Schedule

f) Handling results each time the employee exhausts their points.

g) Each employee has electronic access to their point record.

- Any addition or deduction in points is reflected in this record.

Point Schedule

Incident	Unassigned Service				Assigned Service	
	Point Value				Point Value	
	M-TH	FR-SA	SU	HID	MO-SU	HID
Unavailable Event	-2	-4	-3	-7	-7	-10
EMC (Missed Call) / LOC (Layoff on Call)	-15	-15	-15	-20	-15	-20
NOS (No Show)	-20	-20	-20	-25	-20	-25

Unavailable Events include: **LOS** (Sick), **LOP** (Personal Business), **SIF** (Sickness in Family), **FEM** (Family Emergency), **LOF** (Fatigue), **LXU** (Failure to take Notification), **LFT** (Failure to Tie Up), **LOA** (Layoff Active Board / Away Terminal or After Start of Shift), **LOD** (Layoff Dressed & Ready to Work)

2. Good Attendance Credits

a) An employee is awarded a Good Attendance Credit (worth 4 points) for any 14-day period they are marked up and available to work without an unavailable event and in which they are not otherwise absent from work. Example: An employee remains available between March 1 and March 14, they will receive a Good Attendance Credit on March 15. If they continue to remain available between March 15 through March 28, they would earn another credit on March 29.

b) Good Attendance Credits are earned for any 14-day period if the employee:

i. Has no Unavailable events, NOS, EMC, or LOC.

ii. Has not otherwise been absent for any reason, apart from the paid leaves listed below:
- Training/Rules (CBT/RUL/LAH/ERC/DRT/CRN)
- LET (Engineer Training)
- LIT (working lite Duty)
- Company business (LCB)
- Layoff for jury duty (LOJ)
- Death in family (DIF)
- CIR (Critical incident report)
- Military leave/NGD with supporting LES/orders

iii. Has no absences/leave other than those listed in 2.b.ii (e.g. does not have FML/PFM, FUR, LAM, MED, MEV, LOI, HFS, LAB, R79, PLD, SUA/SUT, UNB, VAC, etc.).

iv. Has no bump board time > 2 hours after taking notification.

c) An employee's point total cannot be greater than 30.

3. Discipline (10-day, 20-day and Dismissal)

a) When an employee exhausts their points (balance reaches or falls below zero), they are subject to discipline.

b) Each time an employee exhausts their points, their point total will be reset at 15.

c) The following discipline matrix applies when an employee violates Hi-Viz. The first Hi-Viz infraction will result in a 10-day suspension with a 12-month review period. A second Hi-Viz infraction will result in a 20-day suspension with a 24-month review period. Finally, if an employee has a third Hi-Viz infraction, they are subject to dismissal. If an employee remains Hi-Viz discipline free during their review period, then their Hi-Viz progression is reset.

Hi-Viz Guideline Record	Result
First infraction	10-day suspension
Second infraction	20-day suspension
Third infraction	Employee may be dismissed

d) In accordance with BNSF's Policy for Employee Performance Accountability, where the Hi-Viz Guidelines provide for an imposition of a Suspension, a supervisor has the discretion to impose an Actual or Record Suspension.

e) In addition to the discipline matrix above, dismissal may occur if an employee has either (1) two active Hi-Viz Guidelines violations and an active Level S violation, or (2) five rule violations of any kind in a 12-month period (which may include any combination of Standard, Serious and Hi-Viz Guidelines violations).

f) Maintaining a positive point balance does not preclude the company from challenging an employee's full-time status requirement based on another reasonable standard.

4. Initial Placement in Discipline Process

Employees with active discipline for BNSF Attendance Guidelines at the time of the cut-over to the new Hi-Viz Guidelines will be considered to have already received the equivalent Discipline Step.

Hi-Viz Guidelines are not intended to assess points for use of any legally protected leaves such as FMLA (Family and Medical Leave Act) or other leave of absences that are properly certified and/or documented. But as noted above, there are only 6 types of absence that allow for the good attendance credit referenced in Section 2 above.

BNSF leadership should consider all relevant information when using the Guidelines. In every case, they should apply the Guidelines with consistency and common sense.

NOTE: Being unaware of your point total is not an excuse for exhausting your points.

TYE Time Off

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A. Laying Off on Call

Employees MUST NOT lay off on call.

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B. Emergency Lay Off

Lay off code "FEM," Family Emergency, is defined as a lay off code for an emergency involving an employee or their family. An "emergency" under this code is an unforeseen circumstance that requires immediate action and is of such seriousness and magnitude that the employee must immediately absent themself from duty and no other layoff code governs the situation, e.g. DIF, LOS, SIF, etc. Employees must use the layoff code that most appropriately describes the reason for the absence and may not use "FEM" as an excuse to be absent from duty for reasons other than those that can accurately be described as an emergency. Use of code "FEM" will be closely monitored.

Once granted authorization for layoff code "FEM," the employee must contact their supervisor within 24 hours to provide reason for the FEM. Misuse will result in corrective action against the offender and review of the code "FEM" as an unrestricted emergency code.

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C. Bereavement Leave and DIF Layoff Codes

Train, yard and engine employees who unfortunately suffer the loss of a family member covered by Bereavement Pay agreements can use the layoff code DIF (Death in Family) in the Workforce System to mark off. Employees will be automatically marked up from DIF at the expiration of the approved time off.

Family members who are covered by all the Bereavement Pay agreements include brother, sister, parent, child (including a legally adopted child), spouse and spouse's parents. Based on the location and craft of the employee's current assignment, additional family members covered may include grandchildren, half and stepbrothers, sisters and stepchildren. Refer to the agreement covering the employee's area or visit the Labor Relations' website under the TYE Payroll Services link.

The Bereavement Pay agreements provide for 3-day's pay at the agreed to pay rate. The employee need not have stood for work on 1 or more of the days to receive payment, and all 3 days qualified for bereavement pay will not count as an absence under the Hi-Viz Guidelines.

Employees claiming bereavement leave should use CA Code 05 on a special claim and send the obituary notice with the special claim ticket number to TYE Payroll Services via email at FINDLTYEBereavementPay@BNSF.com or fax to 785-676-5186 or 8-676-5186.

BNSF understands a person may lose a family member not covered by the Bereavement Pay agreements. The DIF code should not be used in these cases, but the code FEM (Family Emergency) is available for immediate layoffs. Documentation must be maintained that explains the absence in the event the employee is required to provide the information to their supervisor. The supervisor may also help schedule additional time off through use of alternate codes such as LOP (Layoff Personal), PLD (Personal Leave Day), or a Leave of Absence if applicable.

Employees who lay off DIF, but do not send the supporting documentation to TYE Payroll Services will be considered unavailable for duty and handled in accordance with the Hi-Viz Guidelines.

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D. Pre-Approved Lay Off System

The following enhancements have been made to the pre-approved lay off system. The supervisor should be contacted if there are any questions.

- In the 30-day period between day 90 and day 60, BNSF will accept and hold all requests for PLD and SDV only. On the 60th day prior to the layoff date TSS will distribute the allocation of days according to seniority.

- Requests 60 days in advance and less, employees can be approved for up to four unpaid personal days (identified by layoff code LOP). Employees are still able to request all of their PLD and SDV days. When calculating LOP days, any portion of a calendar day is considered one day.

- Once approved, individuals can move an LOP, SDV, or PLD up or back one calendar day. The employee can request this change of start day within 48 hours of requested start time.

- Employees may request a single day of vacation or a personal leave day between 60 and 90 days in advance of the day it would be taken. For example, on September 8, an employee could request a day off that he/she plans to take November 7. The employee will be able to check if the request has been approved 60 days in advance or at 0001 September 9. Employees can request as many vacation or personal leave days as they have currently available to them.

Bidding and sliding process

Employees can enter a pre-approval layoff request for a single day or multiple days. If a multiple day request is entered, the request cannot be submitted until the whole request is within the request window. None of the days will be considered for approval until the entire request is within the approval window as the program will not address (approve/deny) until the last calendar day of the multi-day request.

Employees desiring high demand days off are encouraged to enter their requests one day at a time so that each day will be considered as it reaches the approval date. For example, an employee makes a three-day request for PLD. All 3 days have to be within the 90-day window before the request can be entered into the system.

At 60 days prior to day one of the request, the first day of the request will not be considered for approval because portions of a three-day request cannot be approved. All 3 days of the request must be within the 60-day window for any of it to be considered. Entering single days at a time eliminates the possibility of an allocation being full before a multiple day request will be taken into consideration.

Assigned employees cannot slide their requests as they already have assigned rest days. The slide function was designed for unassigned service where start times are not known in advance.

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E. Lay Off Process for Military Personnel

Two distinct lay off codes have been established which apply to military service. It is important to use the appropriate lay off code to distinguish between these two types of military service, as these codes ultimately drive benefit and pay eligibility.

NGD = This code should be used only for National Guard, Drill, Training or State Emergencies.

Note: NGD leaves greater than 10 days must be covered by a leave of absence.

MLV = This code should be used for all other military service including:
Global War on Terror (Operation Iraqi Freedom, Operation Noble Eagle and Operation Enduring Freedom), enlistment into the military, or any other military service or training (other than National Guard).

Note: Military leaves greater than 10 days must be covered by a leave of absence.

Benefit Coverage

Employees who wish to retain coverage under the BNSF program while on leave will continue to pay the monthly contribution. Contribution will be taken out of any make whole payments received from BNSF while on leave. Otherwise, these contributions are required to be caught up upon return.

Compensation

Employees should send paperwork supporting Military Pay claims and any questions regarding pay for Military leaves to FINDLTYEMilitary@BNSF.com.

Note: Employees who wish to earn Good Attendance Credit must submit their LES or training documentation no later than 60 calendar days after their return to work from leave.

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F. Jury Duty

BNSF and the Labor Organizations representing BNSF employees support employees summoned to perform their civic duties in the form of Jury Duty by providing negotiated agreements for compensation for time lost to employees who are summoned for Jury Duty. The collective bargaining agreements will govern any dispute as to compensation for Jury Duty. However, the following guidelines are provided to minimize such disputes and provide for prompt and proper payment of valid Jury Duty claims. In the event of a dispute, BNSF and the appropriate Labor Organization will work to resolve the matter.

Employees instructed to report for Jury Duty at a specific date and time are authorized to mark off for Jury Duty to make sure they are rested and available for Jury Duty. They are also expected to make an effort to perform their normal duties whenever reasonably possible.

Employees subject to certain call-in or “stand by” notification procedures used by some courts will remain marked up except in circumstances where protecting service will obviously jeopardize such notification.

If there are questions about the ability to protect service, the employee should consult with a designated supervisor before marking off and jointly set up a strategy to ensure compliance with the court's instructions and to protect their assignment when reasonably possible.

Employees will be expected to mark up immediately upon release from the courts or, if on call, immediately after receiving notification they will not have to report to the court.

To validate qualification and provide the proper documentation with the claim:

Qualifies for Jury Duty Lost Wages:

- Reporting at a specific location and time for jury selection and/or Jury Duty when an actual loss of wages occurs.

- Reporting for Jury Duty conflicts with the employee's ability to obtain rest under the Hours of Service Act before or after the Jury Duty. Booking additional rest does not apply to Jury Duty.

- Extra board personnel who mark off for 24 hours or less will receive the equivalent of a day's guarantee if the trip missed is not completed prior to the mark up.

Does Not Qualify for Jury Duty Lost Wages:

- Jury Duty that occurs on a rest day or other periods of scheduled or unscheduled time off when no loss of wages occurs.

- Layoffs when courts are not in session. Examples include weekends and major holidays.

- Any days over the 60-day maximum. The Agreements provide for a maximum of 60 days in any calendar year.

- Failure to follow supervisor's recommendations for protecting service or reporting at the court without specific instructions to do so.

Supporting Documentation for Jury Duty Claims:

- The following information must be included on the Jury Duty claim:

    - Date(s) scheduled for Jury Duty
    - Location
    - Time scheduled to report
    - Time released for each day
    - Lost trip information.

- The following documents should be sent to TYE Payroll Services via email at FINDLTYEJuryDutyPay@BNSF.com or fax to 785-676-5186 or 8-676-5186.

    - A copy of the Jury Duty notice
    - The Court's reporting instructions.
    - A copy of the Court receipt for amount paid while performing Jury Duty which will be deducted from the lost wage payment. Note: If payment is delayed or there is no

payment for that day from the Court, authorization must be obtained from the supervisor for payment of lost wages.

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G. Lay Off Fatigue (LOF)

BNSF wants to ensure that everyone is rested and prepared to work safely. Employees who are fatigued as a result of working numerous trips in a row or working consecutive long trips can use the LOF to take 24 hours off for rest. The LOF code may not be used for any other purpose and employees who misuse the LOF code will be subject to discipline under the Policy for Employee Performance Accountability. For example, this code may not be used to extend rest days, vacation, or other layoffs. An LOF counts as an unavailable day under the Hi-Viz Guidelines.

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H. Lay Off/Mark Up for Outlying Assignments

Following a layoff, employees assigned to outlying positions must mark-up prior to the tie-up of their regular assignment in order to release the extra board employee covering their position. If an assigned employee fails to mark-up prior the tie-up of their regular assignment, the extra board employee will be held to protect the assignment's next tour of duty and the regular employee will be charged an unavailable day (LOP) under the Hi-Viz Guidelines. This does not apply going into the rest days of the assignment.

Example: Employee Smith fails to mark-up from a one-day sick layoff prior to the tie-up of their assignment and, as a result, ends up missing two days of their assignment. Employee Smith will be charged points for two assigned days under the Hi-Viz Guidelines.

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I. High-Impact Days

BNSF has the responsibility to provide our customers with reliable service every day, including High-Impact Days. High-Impact Days are days that have historically reflected higher train crew absenteeism and more missed opportunities to meet customer expectations. Those days are currently identified as: New Year's Day, Super Bowl Sunday, Easter Sunday, Mother's Day, Memorial Day, Father's Day, Independence Day, Labor Day, Halloween, Thanksgiving Day, Day after Thanksgiving, Christmas Eve, Christmas Day, and New Year's Eve.

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J. Failure to Take Notification

An employee is required to accept notification when their assignment has changed (displaced, forced, cut, awarded a successful bid, etc.). Employees is then afforded their bump board time based on the applicable CBA. An employee who has not accepted notification upon first attempt will be placed in an LXX status until notification is accepted.

- Employees whose **last inbound assignment upon tie up** was "other than assigned service," the employee will have 10 hours to accept notification for all future bid/bump events which occur prior to their next work event. Employees who do not accept notification within 10 hours will have all time pending notification for that event count as unavailable time, and points will be deducted using Unassigned Service Point Value.

  - 0 to 10 hours - no exception
  - >10 hours - points will be deducted according to the Hi-Viz Guidelines

- Employees in assigned service that are bumped or cut from their assignment while on duty are considered "other than assigned service" upon tie up.

- Being on a rest day does not exempt an employee from accepting change notification of an assignment.

Example: an employee out-bounds on an assigned 05/02-yard job; however, the employee is bumped while on duty, takes notification upon tie up and is placed on the bump board. The employee's inbound status is "other than assigned service" account being placed on the bump board.

Example of pending notification: An extra board employee is "rested" and available for call at 1300. Upon the employee becoming rested, the Crew Office attempts to notify employee of a displacement (bump) at 1301. The employee does not respond to the notification. The Crew Office continues to attempt notification every 2 hours. If the employee has not taken notification by 2301, the Hi-Viz system will recognize this employee as having more than 10 hours of avoiding notification and mark the employee with an unavailability event. The crew office will continue to attempt notification to this employee and the attendance system will continue to account for time in which the employee has made themself unavailable.

Hi-Viz Attendance Program
Frequently Asked Questions

NOTE: LOS is used throughout FAQ's, but the same handling applies for any unavailable event.

GENERAL

Who's impacted?
All BNSF scheduled TYE employees and yardmasters are impacted by this change to Hi-Viz.

How does the new system work?
Employees start with 30 points. Point accrual is capped at 30 and any employee exhausts all their points they are subject to discipline. Points are deducted for times an employee makes themselves unavailable, including both full and/or partial day absences. The amount of points deducted depends on the day of the week, type of service (assigned/unassigned) and type of layoff event (EMC, LOS, LOP, SIF, etc.). Likewise, employees are able to earn points through consistent and reliable attendance. A more detailed breakdown of the events that cause points to be deducted or added is included in the points schedule in the System General Notice.
More information is also available at Hi-Viz Resources.

Why are we making this change?
Given the increasing demand for more consistent and reliable service, BNSF must improve crew availability to remain competitive in the industry, and the new Hi-Viz program helps us by incentivizing consistent and reliable attendance. Additionally, we've heard the complaints from employees about challenges with board lineups and that the current TYE attendance program, established 20 years ago, can be complicated. We also know the lack of visibility related to where they stand relative to attendance can be frustrating. Hi-Viz improves that experience and reduces unscheduled layoffs that disrupt board lineups.

How do I see my current point balance?
One of the best features of the Hi-Viz Guidelines is that you have real-time access to your point standing in Workforce Hub. You can see your current balance as well as any point deduction or point credit. Additionally, you're able to reference the point matrix and know exactly how much a layoff will "cost" prior to beginning that layoff.

Please note that Internet Explorer is being phased out and is not compatible with Hi-Viz. Employees are encouraged to use Chrome when viewing their Hi-Viz point balance.

HOW POINT DEDUCTIONS WORK

How do we define "assigned service" compared with unassigned service?
Assigned service is considered any assignment in any type of service that has access to rest. These include, but are not limited to:

- *5/2*
- *6/1, 6/2, 6/3, 3/4, 4/3,14/1*
- *4/2 Earned Rest*
- *PWS*
- *PNW Triangle*

If I LOS at 9:00 AM and then mark up at 16:00 then LOS again at 21:01 on the same day; am I going to be charged for two LOS events for that day?
Yes, you are charged points (based on day of week and type of service) for both events.

If I am working in unassigned service and I work, inbound, and then LOS on the same day, do I still get charged for the LOS even though I worked that day?
Yes, a LOS results in a point deduction regardless of whether you worked within the same day.

If I lay off on a Thursday and mark back up late on a Friday will I be deducted points for both days?
Layoff are charged based on the day the layoff begins (in this case – Thursday). If the layoff exceeds 24 hours, then a new charge begins for the next 24-hour period and so on. So, if your layoff is less than 24 hours you are only charged for a Thursday layoff. However, if the layoff is 40 hours, then you are charged for both Thursday and Friday.

Is there a penalty point charge for layoffs connected to a VAC, PLD, UNB, FML, SRS, or CLD?
Yes, any unavailable time that begins or ends within 48 hours of a VAC, PLD, UNB, FML, CLD event, or within 24 hours of an SRS event, and does not have an intervening work event will be charged an additional 2 points for Unassigned Service and an additional 3 points for Assigned Service regardless of day of week. This is referred to as a conjunction penalty. EMC/LOC/NOS are the exception; they will continue to be charged according to Point Schedule.

Does a Conjunction Penalty apply to days taken in conjunction with assigned Rest Days?
Conjunction penalty does not apply to layoffs next to assigned rest days or RSIA rest. However, it does apply to any layoffs within 24hrs following end of Smart Rest.

If I LOS on both sides of a vacation day, do I get a penalty point deduction twice?
Yes, you lose points for the LOS prior to and the LOS after. And because the layoff is in conjunction with a vacation day, there is a penalty point deduction.

Example: LOS on Monday, Vacation on Tuesday, LOS on Wednesday. In this example, you would be charged a total of 8 points if you are in unassigned service (2 points for each LOS, and an addition 2 penalty points for each LOS) and 20 points if you are working in assigned service (10 total points for each LOS – the initial 7 plus the penalty points).

If I LOS on Tuesday before a VAC starting on Friday, can I be charged a conjunction penalty?
Conjunction penalty applies to any unavailable event that begins or ends within 48 hours of a VAC, PLD, UNB, FML, CLD event, or within 24 hours of an SRS event, and does not have an intervening work event. Therefore, if you are not marked up from your Tuesday LOS at least 48hrs before the start of your VAC on Friday then you would be charged a conjunction penalty unless you have an intervening work event.

Example: LOS on Tuesday at 0700, MRU Wednesday at 0659. Vacation starts on Friday at 0001. In this example, because there is less than 48 hours between the Wednesday MRU and the Friday VAC you would be charged conjunction penalty for that LOS. The same would apply if the LOS occurred within 48hrs following the end of the vacation provided there is no work event separating the two.

I am in a 4/2 pool. Will I still get charged points for my rest days if I layoff following them?
No, the only charge is the for the layoff itself.

If I Smart Rest, and then layoff, will I be charged the penalty point deduction?
Yes, any layoffs within 24hrs following end of Smart Rest are charged the higher "penalty" point value.

How many points will I be charged if I change assignments mid-month?
The number of points deducted depends on the day of the week, type of service (assigned/unassigned) and type of layoff event (EMC, LOS, LOP, SIF, etc.) Bump board is considered unassigned service.

Why are the point values different from unassigned and assigned service?
Point values are based on the employee's access to rest days/times.

If I get sick at work and go home will I be charged points and if so, how much?
LOA (Layoff Active Board/Away Terminal or After Start of Shift) is considered an unavailable event and is charged according to the Hi-Viz Guidelines.

If an employee has something like three LOP events directly preceding or following a vacation event, would the conjunction penalty be applied to all those days?
No, only the LOP event that either proceeds for follows the vacation event.

GOOD ATTENDANCE CREDIT

Is the only way to get more points to go a full 14 days without a layoff event?
Yes, you earn a Good Attendance Credit for any 14-day period you are marked up and available to work without an unavailable event and in which you're not otherwise absent from work.

Do I earn Good Attendance Credit if I am on a long term medical or furlough leave? What about if I am on suspension or HFS?
None of these statuses would allow you to earn Good Attendance Credit. You can only earn points back if you are marked up and available to work.

Does observing rest interrupt the 14-day good attendance credit?
Observing rest, whether it's assigned rest days, booked/earned rest, RSIA rest or Smart Rest, does not interrupt the Good Attendance Credit period.

When will I see my good attendance credit in Hi-Viz?
If you earned the Good Attendance Credit (GAC), it will be added to your points within 48 hours from the end of the GAC earning period. GAC is run once daily at 0015, and it will always be updating for those who earned 2 days before.

Example: 6/1 LOS ends on 6/2 at 1300, therefore the good attendance review period would end 14-days later on 6/16 at 1259. The Good Attendance Credit will be applied in Hi-Viz at 0015 on 6/18, with an effective date of 6/16.

What about the 16 calendar days thing? Do I still need to be marked up and available a certain amount of time each month to keep my points?
Regardless of the amount of time you are marked up and available, points for unavailable time are charged the same. However, by remaining available for 14 consecutive days you are eligible for a Good Attendance Credit.

Can you accumulate more than 30 points?
No, points are capped at 30.

How does the consecutive 14-days work to earn the Good Attendance Credit?
Let's share some examples: If an employee remains available between March 1 and March 14, they will receive a Good Attendance Credit on March 15. If they continue to remain available between March 15 through March 28, they would earn another credit on March 29.

Now, if an employee has an unavailable event on March 30, and then comes back to work on April 2, the 14-day period restarts on April 3. They would be eligible to earn a Good Attendance Credit on April 17 if they remained available for the consecutive 14 days.

Say an employee lays off sick on April 6, their 14-day period would restart on April 7. But then they take a vacation day on April 10, their new 14-day period restarts on April 11.

What if I have a death in my family or jury duty?
DIF and LOJ do not carry a point deduction, and these events do not interrupt the 14-day good attendance review period.

FML

Does Union Business (UNB) and/or FML layoff restrict me from earning a Good Attendance Credit?
Yes, both UNB and FML preclude you from earning a Good Attendance Credit.

Can I change a previous layoff to FML to avoid getting charged points?
If you show that your intention was to use FML, and for whatever reason you were unable, that day can be converted to FML after that fact. Please be sure to include comments with your layoff indicating you intended to use of FML and communicate the issue with your supervisor as soon as possible.

What if I apply for FMLA, use it provisionally, and then my application is ultimately denied; will those provisional FML layoffs be changed to LOP?
Yes. If your FMLA application is denied, then any FML layoffs used during the provisional approval period are converted to LOP and points are charged accordingly.

I'm waiting to get approved for FMLA, why am I being charged LOS for my layoffs?
There is a seven-day "pending" period for prior to any points deduction. During this pending period, you should connect with Employee Services team to minimize any FMLA approval delay.

EMC/LOC/NOS/LP/HID

Are EMC/LOC/NOS events folded into Hi-Viz? Meaning there will be no separate investigations or separate discipline for these events?
Yes, because EMC/LOC/NOS unavailable events are handled within the Hi-Viz Guidelines there is no longer a need for separate investigations.

If I "No Show" will I be charged points under Hi-Viz or will that be handled separately?
No Show is considered an unavailable event and is charged according to the Hi-Viz Guidelines Point Schedule.

Is Low Performance folded into Hi-Viz handling as well?
No, Low Performance is a stand-alone process.

What about HID, will there continue to be separate handling for High Impact Days?
At this point, separate reviews will continue. Which means employees with excessive unavailability on HIDs are subject to separate handling.

Is it possible to be charged two HIDs for the same day?
No. Employees can only be charged the higher HID points once per High Impact Day.

What if my layoff begins the day before the HID?
For unassigned service, High Impact Day (HID) point values apply if the unavailable event occurs on the day of the HID, or the unavailable event occurs prior to the HID and employee is not marked up by 0600 on the HID.

Example: HID is on a MONDAY. A layoff on Sunday at 16:00, with an MRU on Monday at 15:59 would be charged as a HID, since the MRU was after 0600 on the HID.

What if I work on a HID and then layoff later that same day?
For assigned service with set start times, High Impact Day (HID) point values apply if the employee misses their assigned shift on the HID. However, If the assigned service does not include specific start times, then HID applies if the unavailable event occurs on the day of the HID, or the unavailable event occurs prior to the HID and employee is not marked up by 0600 on the HID.

Example: HID is on a MONDAY, your shift begins at 07:00 on Monday. A layoff that begins on Monday at 16:00, after you have worked your shift, would not be charged as a HID, as that layoff did not cause you to miss your HID shift.

DISCIPLINE

What happens when I use all my points?
Each time you exhaust your points you are subject to discipline. Your points are immediately reset to 15, regardless of the outcome of discipline or the timing of the investigation notice.

Example: Your current balance is five. While in assigned service you LOS which has a point deduction of seven. You have now exhausted your points and you are subject to discipline. At the same time your point balance is immediately reset to 15.

Does the handling of attendance-related discipline change with Hi-Viz?
BNSF's current three steps of discipline remain for attendance violations (10-day suspension, 20-day suspension, dismissal). The first two times an employee exhausts all their points, they are subject to discipline. The third time an employee exhausts all points, they are subject to dismissal.

What's the review period for Hi-Viz violations?

The first Hi-Viz infraction is a 10-day suspension with a 12-month review period. The second Hi-Viz infraction is a 20-day suspension with a 24-month review period. If an employee remains Hi-Viz discipline free during their review period, then their Hi-Viz progression is reset.

What if I currently have active discipline for attendance?
Employees with active discipline for BNSF Attendance Guidelines on February 1, 2022 (the time of the cut-over to Hi-Viz) will be considered to have already received the equivalent discipline step.

Is discipline for Hi-Viz Guidelines handled separately from other PEPA violations with regard to progression?
Attendance continues to have its own progression. First Hi-Viz discipline event is a 10-day, second instance is a 20-day, third instance could be dismissal. Any attendance discipline is also included in the PEPA progression matrix.

Will I receive a warning if I layoff and that layoff will cause me to exceed my points?
There is no specific warning, however, your running point balance is always available within the WF HUB.

Will I be able to get Alternative Handling or RRE if I violate?
No, RRE / Alt Handling are not offered for Hi-Viz violations including EMC/LOC.

BUMP BOARD

How will bump notifications be treated in Hi-Viz?
Employees who were in unassigned service at the time of their last inbound event are still expected to accept notification within 10 hours of first attempt to notify. Failure to do so, results in an LXU – which is considered an unavailable event. Please refer to Hi-Viz Guidelines and TYE Time Off SGN.

Is time spent on the bump board considered "excluded" time as it was in the prior Attendance Guidelines?
Excluded time is not a factor of the Hi-Viz model and you can still use your contractually provided bump time. However, if you haven't placed to a job within two hours of taking notification of your bump, you are ineligible for the Good Attendance Credit.

OTHER

Is DIF handled the same way?
DIF is not considered an unavailable event, and therefore there is no point deduction. However, DIF will be changed to LOP and reduce your points if documentation substantiating bereavement pay is not submitted to TYE Comp Systems.

What's my point total when I return from a long-term leave of absence or furlough?
Your point total remains unchanged during the time you are on leave/furlough.

Are points reset to 30 after a period of time? Do the 30 points apply to the whole year or is that on a 90-day rolling period?
Everyone will be given 30 points on 2/1/2022. After that, adjustments to the beginning balance come from layoffs and good attendance credits. There is no reset after a specific period of time.

How are military layoffs, like NGD, handled?
Military leave and NGD do not carry a point deduction. Any military or national guard leave that qualifies for BNSF's make-whole pay program *will not interrupt the 14-day good attendance review period. .*

What if my assignment is wrong when I layoff?
Contact your supervisor right way. Your supervisor can work with Workforce Process team to make any necessary corrections and /or point adjustments.

Is it possible to reverse points for SIF/FEM if I provide a Doctor note?
No. However, LOS that are ultimately deemed to be LAM/MED are updated.

Is there no more three-month rolling period?
That's correct. Charges are applied following a seven day "pending" period. The Pending period is intended to be an opportunity for employees to address concerns / corrections with their charges.

Do fatigue mitigation pilots/pools/boards (i.e. 4/2 earned rest, 6/3) that are now assigned service prevent me from sliding my vacation/PL days?
No. You are still able to slide your vacation/PL days in these types of assigned service.