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Docket Operations Facility  
U. S. Department of Transportation  
1200 New Jersey Avenue, SE, W12-140  
Washington, DC 20590

Re: Study on Protection of Certain Railroad Risk Reduction Data From Discovery or Use in Litigation, Docket No. FRA-2011-0025

**Comments of the  
American Train Dispatchers Association (ATDA)  
Brotherhood of Locomotive Engineers and Trainmen (BLET/IBT)  
Brotherhood of Maintenance of Way Employees Division (BMWED/IBT)  
Brotherhood of Railroad Signalmen (BRS)  
Transport Workers Union of America (TWU)**

The Rail Labor Organizations (“Labor Organizations”) identified above submit these joint comments in response to the Federal Railroad Administration’s (“FRA”) Notice and Request for Public Comment (“Notice”) published in the Federal Register, Vol. 76, No. 89, Monday, May 9, 2011. The Labor Organizations signatory hereto are the collective bargaining representatives for a significant percentage of railroad industry workers engaged in train operations, train dispatching, and track, signal and mechanical maintenance, inspection, testing, and repair. The Labor Organizations and their collective membership have a vested interest in the evaluation and management of safety risks as a means to reduce the consequences and rates of railroad accidents, incidents, injuries and fatalities through Risk Reduction Programs (“RRPs”) mandated

under Section 103 of the Rail Safety Improvement Act of 2008 (“RSIA”).

**Scope of the FRA Request for Comments:**

The FRA is required by 49 U.S.C. § 20119 to conduct a study and subsequently determine whether it is in the public interest to protect railroad risk reduction information from discovery and use in litigation.<sup>1</sup> In response to its statutory mandate, the FRA solicited comments from defined constituencies on the following questions:

- Whether and how railroad safety and railroad risk reduction programs would be impacted if risk reduction information collected for these programs were discoverable and could be used in litigation;
- Whether and how the legal rights of persons injured in railroad accidents would be impacted if railroad risk reduction program information were protected from discovery and use in litigation; and
- Other issues applicable to the protection of railroad risk information from use in litigation.

Rail labor believes that the proper focus on the questions raised by the FRA should be (1) whether government required safety information **should** receive regulatory protection and (2) does the FRA have the power to protect information held by non-governmental entities?

**I. The biased Baker Botts Report is inadequate to support blanket confidentiality of federally required railroad safety data.**

The Notice directed proposed commentators to review the *Report on Federal Safety Programs and Legal Protections for Safety-Related Information* (“Report”) prepared by its contractor, the Washington, D.C law firm of Baker Botts.<sup>2</sup> The value of the Report is

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<sup>1</sup> ‘Railroad risk reduction’ is a term of art and for purposes of these comments refers to the definition contained in the RSIA.

<sup>2</sup> The decision of the FRA to use Baker Botts as its sole contractor for the Report is puzzling. If asked for the name of one law firm in the United States historically known to represent the railroad industry and anti-labor corporate activities, the name of Baker Botts springs to mind. Baker Botts is proud of its roots representing railroads and also advertises its union-

unfortunately compromised because it has major gaps of analysis and is skewed by bias. These weaknesses in the Report are unsurprising, given the pedigree of the law firm that prepared it.<sup>3</sup>

A partial list of its critical flaws include:

- The Report made no effort to explain why the public would be reasonable in finding it important to have access to railroad safety information;
- The Report, in stark contrast, structured its entire report to justify the restriction of information;
- The Report repeatedly quotes the threats by the Association of American Railroads (“AAR”), the unified spokesman for the Class 1 railroad carriers, not to comply with the Rail Safety Improvement Act (“RSIA”) on the grounds that a failure to protect railroad risk reduction safety data is a legitimate reason not to comply with the RRP mandates of the RSIA;<sup>4 5</sup>
- The Report directs the FRA attention solely to the ANPRM replies of the railroads on the issues of confidentiality of information while ignoring rail labor’s thoughtful, unselfish consensus commentary addressing these issues;<sup>6</sup>
- The Report utterly fails to address the bedrock issues related to labor-management information exchanged through the ‘good faith’ and ‘best efforts’ negotiations over the

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busting prowess on its website:

"We are experienced in ... traditional labor relations practice, ... union avoidance training, responding to union organizing campaigns, labor contract negotiations, labor arbitrations, and unfair labor practice and representation cases ... ." <http://www.bakerbotts.com/labor-and-employment-practice-areas/> website link.

See also, William G. Thomas. *Lawyering for the Railroad: Business, Law, and Power in the South*. (Louisiana State University Press, 1999).

<sup>3</sup> The Report is disturbing as it reflects poor decision-making by the FRA’s contracting process and an internal bias favoring railroad carriers.

<sup>4</sup> Baker Botts failed to provide the FRA with legal analysis that such threatened behavior is *per se* unlawful and that the agency has effective legal remedies to stop such refusals or threats.

<sup>5</sup> See, Report at 17-19.

<sup>6</sup> See, Report at 19-22. See also, *FRA Docket 2009-0038 Comments of Rail Labor (2/6/11)*

content of Risk Reduction Programs (“RRP”) required by Section 103(g) of the RSIA;

- The Report exhibits editorial prejudice by suggesting that there are serious questions about the effectiveness of the Congressional remedy to the judicial decisions that wrongly found federal preemption of state tort actions in railroad cases (despite the fact that only two articles make that claim and no reported decisions even refer to it).<sup>7</sup>
- The Report fails to summarize or cite current decisional law concerning the ‘self-critical analysis’ doctrine, and cites no law review discussions;
- The Report fails to discuss the implication of the inter-relation of other federal statutory and regulatory regimes where the confidentiality of data related to safety programs may be expected to arise, such as § 20109 (whistle-blower) and § 209.303 (safety-sensitive employee disqualifications); and
- The Report fails to discuss whether the FRA and DOT have authority to create protection for federally required safety information held by non-governmental entities, regardless of source (in the absence of that power, this discussion is moot).

The Report is useful only as a catalog of other federal regulatory regimes that govern access to federally required safety information.

## **II. The critical path to finding the appropriate balance starts by acknowledging that the law generally presumes that railroad safety documents are available to the public.**

The starting point of any analysis is to ask what is the state of applicable law now? The short answer is that the law generally presumes the availability of safety information that is in the possession of the federal government. Privileges which prevent disclosure of evidence "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

The Freedom of Information Act (“FOIA”) assumes availability of government documents unless its exceptions, strictly construed, mandate such protection.<sup>8</sup> Congress deferred judgment

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<sup>7</sup> See, Report at 10.

<sup>8</sup> “All agencies should adopt a presumption in favor of disclosure, in order to renew their

in the RSIA as to whether additional FOIA protection was needed, preferring to give the FRA discretion in general and mandating a formal study of the issue.

Congress also avoided making a binding policy decision for either openness or secrecy. In 49 U.S.C. § 20118, Congress prohibited disclosure in response to a FOIA request of “any part of any record” submitted or made available to FRA pursuant to a railroad safety risk reduction program or pilot program.<sup>9</sup> That prohibition includes, but is not limited to, a railroad carrier’s analysis of its safety risks and its statement of mitigation measures. 49 U.S.C. §§ 20118-20119. Yet, there are two major exceptions to the prohibition on disclosure under FOIA. The FRA may disclose safety-related information if (1) if disclosure is necessary for law enforcement purposes, or (2) if the Secretary determines that disclosure of “any part of any record comprised of facts otherwise available to the public” is consistent with the confidentiality needed for the safety risk reduction program or pilot program. The FRA also has discretion to “prohibit the public disclosure of risk analyses or risk mitigation analyses” obtained through the RSIA if “the prohibition of public disclosure is necessary to promote railroad safety.”<sup>10</sup>

It is of critical importance to understand that FOIA **only** applies to the release of documents **held by FRA** in response to a FOIA request. The FRA’s discretionary authority does not create a restriction on the use of documents as evidence in adjudications or impact discovery of documents that are held by the railroads. There is no derivative application of FOIA’s

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commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.” Executive Order of President Obama, Federal Register, Vol. 74, No. 15 Monday, January 26, 2009.

<sup>9</sup> See, § 20118(a).

<sup>10</sup> These types of exceptions concern the railroads because of the presumption of availability of these documents to the public, regardless of the issue of whether safety-related reports are inadmissible as evidence at trial versus whether such reports should be protected from discovery.

exemptions to the disclosure of information held by the railroads, despite that fact that the information was prepared to comply with federal regulatory requirements.

State and federal rules of civil procedure provide for broad rights of discovery of existing documents.<sup>11</sup> Litigants employ discovery devices like interrogatories and requests for production of documents and also have traditional subpoena abilities. In cases involving railroads, litigants might use discovery requests or subpoenas to obtain safety-related information from non-parties to railroad litigation such as the FRA. While litigants may try to obtain documents from the FRA using subpoena power, they rarely penetrate the *Touhy Doctrine*<sup>12</sup> shield of the FRA to obtain useful information such as safety-related reports.<sup>13</sup>

There is a wide variety of state and federal matters in which parties may assert a right to obtain safety related documents produced by the railroads in response to federal requirements. These matters may be in litigation, arbitration, legislative hearings, regulatory enforcement actions, regulatory rule-making proceedings, and other such tribunals.

These proceedings are not just initiated by rail shippers, rail labor, or other public entities but often are initiated by the railroads or their associations themselves. For example, when the Union Pacific Railroad recently requested an order from the Surface Transportation Board to

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<sup>11</sup>The Report does correctly recognize that “ ... under Section 20106(b), a railroad may be subject to a State tort action for (1) a violation of a Federal standard of care established by a regulation or order issued by the [federal government]; (2) a failure to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; (3) a violation of a State standard, the subject matter of which has not been covered by a regulation or order of either of the two Secretaries; or allegedly violated its own internal policies); (4) a violation of a State standard that is necessary to eliminate or reduce an essentially local safety ... hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce.”

<sup>12</sup> These requirements arose from the decision in *United States ex rel Touhy v. Ragen*, 340 U.S. 462 (1951).

<sup>13</sup> See 49 C.F.R. Pt. 9 for a review of FRA’s *Touhy Doctrine* regulations.

exempt it from the common carrier duty of hauling chlorine, safety data from the railroad was introduced into the record of the case. *In Re Union Pacific Railroad Company*, STB Finance Docket No. 35219 (June 11, 2009). When other railroads requested the relief from carrying other highly toxic materials such as nuclear materials and potassium cyanide, they introduced highly sensitive safety data from Karch and Gregory. *Classification Ratings of Chemicals*, 3 I.C.C.2d 331 (1986). When the Nuclear Regulatory Commission held hearings on the movement of high-level nuclear waste to Yucca Mountain, the railroads produced highly sensitive safety information.

More typically, there are many lawsuits filed for compensatory damages for injured rail workers and members of the public. In addition, almost any claim for punitive damages will be heavily dependent on the type of information that would be contained in railroad produced safety audits or analysis.<sup>14</sup> Persons injured in railroad accidents/incidents would be adversely affected and perhaps irreparably harmed if such information were protected from discovery.

### **III. It is often in the public interest to have corporate safety data available to scrutiny.**

One of the compelling reasons for having broad discovery of corporate safety documents is to serve as a protection for others similarly situated to the injured party and the public in general. The ability to conduct broad discovery creates public pressure for proper regulation. Even when the agency is well intentioned, there often are budgetary constraints that prevent it from being effective. See, *Smith v. Wash. Metro. Area Transit Auth.*, 290 F.3d 201 (4<sup>th</sup> Cir. 2002) cert. den., 537 U.S. 950 (2002). See also, *Bracco Diagnostics, Inc. v. Amersham Health Inc.*, 2006 U.S. Dist. LEXIS 75359 (D.N.J. 2006) (broad discussion of competing policy interests).

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<sup>14</sup> Of course, railroads often voluntarily produce such audits to show that they should not be held responsible in punitive damages. And, in other cases related to railroad safety, when they think it to be in their economic or political self-interest, railroads produce potentially damaging documents concerning the lack of safety of their carriage of cargoes.

Many courts have analogized the public's interest in maintaining the free flow of information of this type and invocation of the self-critical analysis privilege to Fed. R. Evid. 407 (the 'subsequent remedial measures' rule). The rule provides that when measures are taken after an event that would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence at the event. Fed R. Evid. 407.

Broad discovery of corporate safety documents can be an effective solution. In particular, this has been true in FELA cases.<sup>15</sup> Railroad employees may assert claims for injuries suffered in the workplace under the Federal Employers' Liability Act ("FELA"). 45 U.S.C. Sec. 51. FELA is a fault-based form of work injury compensation enacted in 1908, and creating a civil cause of action for injured rail workers. As was reaffirmed on June 23 by the U.S. Supreme Court in *CSX Transportation v. McBride*, 564 U.S. (2011), Docket No. 10-235, FELA is a remedial statute adopted for beneficent purposes. FELA provides full and just compensation for injuries in which railroad negligence played any part, but also and equally important, FELA is a vital part of the enforcement scheme for a series of regulatory statutes compelling specific safety devices and reforms in the railroad industry. These include the Safety Appliance Acts, 45 U.S.C. §1-16 (1893 -1903), mandating effective braking systems and automatic couplers and the Boiler Inspection Acts, formerly 45 U.S.C. §§22-34, mandating safety equipment and inspection requirements for locomotives. Now re-codified in the FRSA, as 49 U.S.C. §20131-20153, these statutes provided civil penalties and civil liability. (45 U.S.C. 7, 13, 23, 51) These laws expressly provide (45 U.S.C. Sec. 10) that the adoption of administrative civil penalties do not relieve the railroads of their duties and civil liabilities under the Safety Appliances laws.

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<sup>15</sup> Unlike Congress' concern for the impact of confidentiality of rail safety data on FELA rights, an issue that was one of the principal drivers of the Congressional study directive, Baker Botts simply ignored FELA and issues related to it. This important issue deserves discussion that Congress mandated.

The federal courts consistently have held that the entire set of safety laws and civil liability, former 45 U.S.C. Sec. 1-60, are to be construed *in pari materia*, for the purpose of carrying out the compensatory and regulatory purposes of the statutes. See, *Urie v. Thompson*, 377 U.S. 163 (1949); *Great Northern Ry. v. Donaldson*, 246 U.S. 121 (1918); *Holfester v. Long Island R.R.* 360 F.2d 369 (2d Cir. 1966); *Gowins v. Pennsylvania R. Co.* 299 F.2d 431 (6<sup>th</sup> Cir. 1962).

In 1910, Congress also enacted a very simple evidentiary privilege (45 U.S.C. Sec. 41, now 49 U.S.C. Sec. 20903) regarding accident reports by railroads and investigation reports required by the federal government. It stated that neither of those report types or any part of them “shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.” The balance struck under that one section generally allows disclosure of the documents, but prohibits admission of the railroad’s required report or FRA’s conclusions and opinions, in evidence. *Torchia v. Burlington Northern*, 568 P.2d 558 (Mt. 1977); cert. denied 434 U.S. 1035 (1978). The statute allows discovery and admission of objective evidence such as observations, photographs, and measurements. See, e.g. *Hines v. Kelley* 252 S.W. 1033 (Tex. App. 1923).

Under that simple set of principles, basic document production and disclosure of the vast majority of existing railroad accident information and safety data is accessible for use in FELA litigation, crossing cases, and state law negligence actions in state and federal courts across the country. Evidence is the life blood of litigation, and this cohesive set of interdependent regulatory and civil liability laws rely on that flow of information.

However, the Report implies that this existing statute and its functional balance is not restrictive enough. Report at 23-25. The Report urges the secrecy of all statements and data filed in connection with an RRP report under the privilege, (Id. at 23, FN 78). It refers with approval

to other statutory privilege treatment, such as at NASA, for including large amounts of data and safety related information going far beyond actual reports, opinions or critical self-examination conclusions. (Id. at 3). The rail industry plainly wants blanket immunity for all privileged information from discovery, advocating incorporation of a highway administration section that broadly prohibits disclosure and discovery, as well as admission. (Id. at 13). This would seriously compromise the capacity of the aforementioned set of safety and compensation laws to function effectively for either policing carrier safety practices or providing just compensation to employees and the public.

The Report ignores the fact that broad protections for RSIA were already rejected by Congress. The legislative history clearly demonstrates this fact. The final RSIA language enacted in 2008 decisively *rejected and removed* the extremely broad 2007 proposal<sup>16</sup> seen in former Sec. 102 of some early drafts. (S. Rep. No. 110-270 (2007)). The provision adopted as §109 of the Act bears no resemblance to the reckless over-breadth of the former §102. As adopted, §109 provides very specific and limited privileges, in subsections (a) and (b), and some cautiously worded discretion for the Secretary on the subject, in subsection (c) (49 U.S.C. §20118).

Most importantly, the entire exclusionary “proposal” (Baker Botts at 13) was replaced by Congress with a mandate to perform a study—a remarkably empirical approach to what Congress describes as a very open question. The statute begins with the statement that the study is to evaluate whether exclusionary protection is in the public interest. 49 U.S.C. Sec. 20119(a). The term “whether” is neutral, presenting an equal likelihood of the public’s being served or not being served by any evidentiary privilege. The statute specifically dictates that the Secretary “shall”—a mandatory directive—solicit input, not only from the railroads, of course, but also

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<sup>16</sup>I.e., the language so vigorously advocated in the Report (at 13, *inter alia*).

from labor organizations, railroad accident victims and their families, and the general public. *Id.* Clearly Congress wanted narrowly drawn and minimal extensions of any new exclusionary power beyond the very considerable protections already in place at FRA.

There are many other railroad-specific civil proceedings in which requests for this information will continue to be pressed, such as in cases arising under whistle-blower law, 49 U.S.C. §20109, safety sensitive disqualification cases under 49 CFR 209.303, and cases arising under Section 3 of the Railway Labor Act.

Current law holds an important kernel of a source of protective restriction of railroad produced safety analysis. Referred to as the ‘self-critical analysis doctrine’, some federal courts have made decisions on railroad’s claims of ‘privilege’ under this doctrine.<sup>17</sup> Although there have been some marked success of arguments in favor of this doctrine,<sup>18</sup> it has not achieved wide acceptance.<sup>19</sup> However, there appears to be not much doubt that the federal courts would use such a doctrine, not under federal common law, but rather if Congress created it. Whether a federal executive department, agency, or branch could create an effective doctrine of this nature is unknown.

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<sup>17</sup> *Granger v. Nat’l Rd. Passenger Corp.*, 116 F.R.D. 507, 509 (E.D. Pa. 1987).

<sup>18</sup> *Miller v. Praxair, Inc.*, 2007 U.S. Dist. LEXIS 34260 (D.Ct. 2007)(“courts in the Second Circuit have recognized that significant segments of affirmative action plans are protected from discovery under the self-critical analysis privilege”).

<sup>19</sup> See, e.g.: Nicole Wolfe Stout, *Privileges And Immunities Available For Self-Critical Analysis And Reporting: Legal, Practical And Ethical Considerations*, 69 J. Air L. & Com. 561(Summer, 2004); *Union Pacific Rd. Co. v. Mower*, 219 F.3d 1069 (9<sup>th</sup> Cir. 2000) (railroad argument for self-critical analysis privilege rejected); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9<sup>th</sup> Cir. 1992).

**IV. Any additional restrictions of disclosure of information related to RSIA rail risk reduction programs should be narrowly drawn, and should not reduce existing availability.**

There must be an assurance that the quantum of evidence currently available to litigants will not be reduced by any RSIA changes. This minimum principle was clearly stated by the Supreme Court's holding in *Pierce County v. Guillen* 537 U.S. 129 144-146 (2003), limiting even the very broad FHWA privilege provision on grounds that Congress could not have intended to make "plaintiffs worse off than they would have been had the Federal program never existed."

The difficulties lie in distinguishing pre-existing information routinely collected from similar or related information purported to be in response to the new RRP requirements, which would not have existed or been assembled but for the new statute.

The key to the RRP process is the participation of rail labor. See, *Docket No. FRA-2009-0038, Comments of Rail Labor, filed February 6, 2011*. Congress understood this when it mandated that rail carriers are required to negotiate with rail labor not only in "good faith" but also using their "best efforts". This is the first statute ever enacted by Congress that unequivocally requires railroads to bargain with rail labor over safety and reflects its collective wisdom that the role of rail labor is the key to reducing accident rates and making everyone safer. See, 103(g), RSIA.

It is self-evident to rail labor that one of its specific roles is to keep this process honest. After all, the only party that can see the contextual truth about rail safety claims are the workers and their designated representatives who see what is occurring day after day with a stake in the outcome. Much information related to the Section 103(g) bargaining process requires confidentiality, not just of railroad data but also information from workers and their bargaining representatives. Without proper confidentiality guarantees, the bargaining process mandated by

§ 103(g) cannot succeed but with it, it can. Rail labor believes that a blanket protection guaranteeing confidentiality of information exchanged in § 103(g) negotiations is critical to the national interest, to public safety, and to worker protection. It is important to recognize that which the Report ignored: the issue of confidentiality of information is not exclusively the concern of railroad corporations. As emphasized in rail labor's ANPRM comments on RRP:

“To further rectify the suppression of accident/injury reporting, the proposed regulations must directly extend the confidentiality coverage discussed in Section E of the ANPRM, Protection of Confidential Information, to protect employees who provide safety or security information. This would include confidentiality of employees providing information to FRA, DOT, carriers, labor organizations, survey takers, consultants, and contractors performing RRP and RRPP functions.

Nothing in the new RRP regulations can be accomplished effectively in the absence of accurate data. The Secretary is granted broad statutory authority under Sec. 20118(a) to take all actions regarding confidentiality as necessary to effectuate the purposes and intent of the RSIA. This power includes both capacity to extend and establish confidentiality protections, and to initiate exception or limitations to such confidentiality where needed.

The “safety cultures” of the carriers, geared as they have been to an almost exclusively punishment-based structure, has created an atmosphere of fear and suppression which must be overcome in order to allow employees full participation and openness. Front line rail employees are the sole source of PRIMARY data, as opposed to secondary information.

Without real and credible confidentiality protection for employees in RRP as well as aggressive and credible whistleblower protection up front, the Secretary can hardly expect to accomplish anything beyond the usual pattern of the past. Short-term, surface level changes at the upper levels of management rarely trickle down to change anything where activities on the ground are concerned.”

See, FRA-2009-0038-0003 at 14.

The participation of rail labor has been an irreplaceable key in the one notable success story so far among the RSIA-related risk reduction programs: the ‘close call’ pilot projects. There are a number of these pilot projects now, spanning various crafts, carriers and facilities. Several of these are up and running, creating information and experience which can form a basis for further innovation and refinement. These programs have matured over the last three years. It is no coincidence that every one of these programs is a product of FRA-mediated negotiation

between participating carriers and labor organizations, resulting in memoranda of agreement (a form of collective bargaining agreement) and proceed with cooperation and clear understandings between labor and management. Safety literature supports the principle that ‘close call’ reporting is the one best piece of safety information any worksite can acquire.<sup>20</sup>

**V. Government-required safety information should not receive additional regulatory protection from the FRA.**

Rail labor respectfully recommends that the FRA adopt the following approach:

1. Additional FRA-required rail safety information does not need additional secrecy. Existing protections, including, *inter alia*, 49 U.S.C. §20118, 49 U.S.C. §20903, the common law “honest self-examination” evidentiary rule, and other rules have proven to be sufficient. There is no litany of horror stories that can be cited by the FRA or railroads as justification for a new regime of secrecy of documents pertaining to rail safety.
2. Any additional protection should be narrowly drawn to minimize the impact on affected persons and institutions and only in cases of clear proven need on objective standards that do not change from one political regime or leadership to the next.
3. Any new regulatory regime should specifically state that it neither calls for, nor should be construed to compel, any reduction or alteration in the amounts and types of information generated, collected, analyzed, reported, and generally considered subject to discovery and potential (but by no means assured) admissions under existing laws and established practices prevailing at present.
4. The FRA should conduct an assessment and inventory of the varieties and volume of existing railroad data. This refers to accident investigations, safety evaluations, reports of safety committees, and many other varieties, which are and have been routinely collected, frequently produced in discovery, and variously admitted or excluded from evidence.

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<sup>20</sup> See, Kello, Your golden Opportunity: The Near Miss, *Industrial Safety and Hygiene News*, June 2008, Vol. 42 Issue 6, p. 26-28.

This will provide the baseline against which the FRA must evaluate and define the distinguishing features of any new information, which would not have existed but for the new RRP-related programs, and whether it is sensitive enough to require additional protection.

5. The FRA should commission surveys to be taken of mid- and low-level managers, as well as hourly workers and their designated representatives, to determine what protections would be required to provide these key players with the assurances necessary for them to furnish candid and complete information, even where it displays their wrongdoing, that of other managers or hourly employees, or the carrier's wrongdoing. FRA must have its own, empirically gathered data from representative samples, with reasons and detail, in order to make rational decisions.

6. The FRA should solicit additional comments concerning these matters in areas affected by both safety and protracted litigation growing out of major explosions and fires related to train accidents, such as in Graniteville, South Carolina; Macdonia, Texas; Scottsbluff, Nebraska; and Minot, North Dakota.

7. There should be discussions between railroads and their labor organizations under Section 103(g) of the RSIA concerning mutually agreed upon parameters for providing a non-discovery and non-evidentiary rule related to documents provided by railroads during the RSIA 103 (g) negotiations process, akin to an amnesty period related to the disclosure of railroad safety information. This would provide a stimulus for openness by rail carriers and remove disincentives.

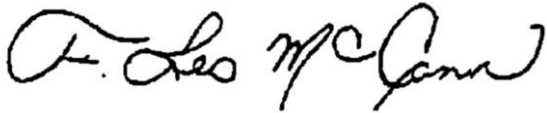
8. The FRA should refrain from any unilateral protection of data from discovery which goes beyond existing protections for data such as evaluative reports, opinions, admissions, or critical self-examination materials. Information not fitting those

categories, merely attached to or included with an RRP proposal (which would be extensive and include large amounts, unavoidably, of information already collected, pre-RSIA) should not be considered information ‘privileged’ from disclosure or discovery.

9. Any railroad request for confidentiality of RRP data should be presented and mutually agreed upon through the “good faith and best efforts” provisions of Section 103(g) of the RSIA.

The Labor Organizations appreciate this opportunity to provide these comments to Docket No. FRA-2011-0025.

Respectfully submitted,



Leo McCann  
President, ATDA



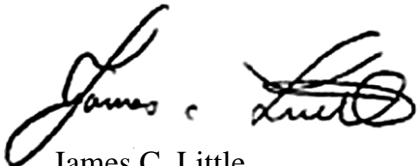
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