The following are the submissions Teamsters Canada Rail Conference ("TCRC") in respect of Bill C-49 *An Act to amend the Canada Transportation Act and other Acts respecting transportation and to make related and consequential amendments to other Acts*, also known as the *Transportation Modernization Act* ("TMA").

Introduction

The TCRC is the largest rail industry trade union in Canada, representing over 16,000 employees including all of the running trades employees at Canadian National Railways, Canadian Pacific Railway, VIA Rail and dozens of smaller rail lines and commuter rail operations.

Bill C-49 proposes a number of significant amendments to certain transportation statutes, including but not limited to the *Canada Transportation Act* ("CTA"), the *Railway Safety Act* ("RSA"), and the *Canadian Transportation Accident Investigation and Safety Board Act* ("CTAISBA").

One of the stated goals of Bill C-49 is to increase safety in the railway industry. The TCRC wishes to make clear at the outset that it is fully committed to safe and efficient railway operations. The TCRC recognizes that railway safety is a matter of considerable importance to the broader public and essential to its members.

However, the TCRC cannot and will not condone a legislative initiative that completely disregards its members’ privacy rights for questionable and unproven public benefit. The TCRC is deeply troubled by Bill C-49’s introduction of mandatory Locomotive Voice and Video Recording ("LVVR") instruments on board Canadian rail carriers, which would allow railway employers to subject their employees to constant scrutiny via video and audio surveillance.

As the TCRC has stated throughout the consultation process leading up to the introduction of Bill C-49, we support the use of LVVR technology for the purposes of providing the Transportation Safety Board of Canada ("the TSB") with on-board recordings to use in post-incident investigations. The TCRC takes no issue with the implementation of this type of “black box” recording device that is standard in the aviation industry.

However, it is the TCRC’s firm position that such a recording device, if implemented in the railway industry, ought to have the same legislative protections as “black box” recorders under the CTAINSBA. Namely, the recordings should only be accessed and used by the TSB, not employers or other third parties. The TCRC believes that this is the only way to protect its members’ ability to engage in open communication in the course of their work and also to protect their privacy rights.

The TCRC believes that Bill C-49’s proposed implementation of mandatory LVVR technology in the railway industry is wholly contrary to the law as well as our shared Canadian values. We strongly urge the House of Commons and the Senate to reject Bill C-49 in its current form.
The Proposed Implementation of Mandatory LVVR Instrumentation under Bill C-49

Bill C-49 would require major Canadian railway companies to install and operate LVVR instrumentation in accordance with certain prescribed regulations, which have not yet been introduced. A railway company's failure to install and operate the LVVR instrumentation in accordance with the regulations would be a prosecutable offence under the new legislation.

Unlike “black box” recordings in the aviation industry, which can only be accessed and used by the TSB in post-incident investigations, the LVVR recordings on rail carriers would be accessible by railway companies, railway safety inspectors and the Minister of Transportation for a variety of uses.

A railway company would be able access and use the LVVR recordings in at least three circumstances under the proposed legislation. First, they could access the recordings to aid in an internal post-incident investigation for incidents that are reported to but not investigated by the TSB to determine the “causes and contributing factors” for the incident in question. The definition of an "incident", or what would constitute such in this scenario, would be left to the discretion of the railway companies. Second, they could randomly select LVVR recordings for use in their Safety Management System (“SMS”) analyses. Third, any recordings that have been accessed in the first or second manner could be used “to address a prescribed threat to the safety of railway operations”. The forthcoming regulations will presumably define what constitutes a “prescribed threat” justifying this third use of the recordings.

Bill C-49 would specifically exempt railway companies from the statutory limitations under the Personal Information Protection and Electronic Documents Act (“PIPEDA”) and similar provincial legislation relating to the collection, use, disclosure and retention of its employees’ personal information in the course of the permitted uses of LVVR recordings outlined above.

Bill C-49 would also grant the Minister of Transportation (“the Minister”) and railway safety inspectors access to and use of LVVR recordings in certain circumstances. Like railway companies, they could access and use the recordings to determine the causes and contributing factors of an incident that was reported to but not investigated by the TSB. The Minister and railway safety inspectors could also use any of recordings to ensure compliance with the TMA, and the Minister alone could use the recordings to develop policies.

The Minister and railway safety inspectors could further use any of the recordings obtained for a permitted use to “address a threat to the safety of railway operations”. Notably, the Minister and railway safety inspectors are not limited to threats prescribed
under the regulations, as would be the case with railway companies. Rather, it appears to be within their discretion to determine what a “threat” requiring action may be.

Bill C-49 states that any recordings that are accessed by railway companies, the Minister, or railway safety inspectors to address a threat to the safety of railway operations are admissible in “any proceedings that may result from that use”. This would presumably include disciplinary investigations and proceedings against railway employees.

Bill C-49 further states that the information in LVVR recordings will be subject to privilege under the CTAISBA (i.e. exclusive access and use by the TSB) unless the use and/or communication of such information is expressly authorized by the TMA or its regulations. In other words, LVVR recordings will be treated like “black box” recordings, which are not accessible to any party other than the TSB, unless subject to an express use under the provisions of the TMA.

However, Bill C-49 would also change the scope of privilege that attaches to on-board recordings under section 28 of the CTAISBA. Under the new subsection 28(5.1) of the CTAISBA, the TSB could share on-board recordings with persons who are expressly authorized to use and communicate such information under the the Aeronautics Act, the National Energy Board Act, the Railway Safety Act or the Canada Shipping Act, 2001. Thus it appears that the proposed change to the privilege clause in the CTAISBA would allow the TSB to share the on-board recordings that it uses in the course of post-incident investigations with railway companies, the Minister and railway safety inspectors, which could then be used for the express purposes set out in the TMA.

The Provisions Regarding LVVR Instrumentation Under Bill C-49 Are Contrary to the Recommendations Made by the Transportation Safety Board

In May 2015, the TSB Canada launched an investigation into the use of LVVR technology aboard rail carriers. Transport Canada and key rail stakeholders, including the TCRC, participated in the study. Shortly before the release of the TSB’s final report, the Chair of the TSB, Kathy Fox, made clear that the TSB endorsed the use of LVVR instrumentation “in the context of a pro-active, non-punitive safety management system” (Emphasis added. “Opening Remarks at the TSB Safety Summit, 22 April, 2016).

The TSB’s final report was released on September 10, 2016, entitled Expanding The Use of Locomotive Voice and Video Recorders in Canada. The conclusions in this report were intended to formulate the basis for the proposed legislation regarding LVVR technology in the railway industry.

The TSB fully canvassed the issues of employees’ privacy rights in its final report and made the following concluding remarks on the issue of balance between employee privacy and safety management at page 58:
There are two poles of safety management—one of assigning blame and using discipline to stop unsafe behaviour and one of trust, in which it is perceived that employees make mistakes because of the system that they work in. How companies currently navigate these poles depends on their safety culture—the extent to which a just culture has been implemented.

There was no disagreement that LVVR can lead to safety benefits, that privacy rights would need to be considered by the Privacy Commissioner, and that successful deployment of LVVR technology will require limiting it to appropriate, safety-beneficial uses. There was agreement that a minimum technology standard would provide a useful starting point for companies to implement LVVR and to enhance the technology to meet their needs and capabilities. It was also noted that as there is a range of safety cultures across operators, there is a range of needs for legislative protection. Joint development of protocols among the concerned parties, clear limits on access and use, and a just culture as a prerequisite are all approaches that might enable parties to reconcile their different perspectives on the appropriate use of LVVR.

[Emphasis Added]

With respect, the TCRC submits that the proposed implementation of LVVR technology under Bill C-49 paid no heed to the TSB’s recommendations regarding the safeguarding of employees’ privacy rights. The proposed legislation does not limit the use of LVVR recordings to “safety-beneficial uses”, nor does it provide any legislative protection or joint protocols regarding limits on issues of access and use. In fact, the legislation expressly permits punitive uses of LVR recordings, which is directly contrary to the TSB’s evidence-based recommendations.

The TCRC urges the Government to revise the proposed LVVR provisions in Bill C-49 in a manner that strikes an appropriate balance between employees’ privacy rights and safety considerations.

The Proposed Implementation of LVVR Instrumentation Under Bill C-49 Is Contrary to Law

It is the TCRC’s position that the provisions of Bill C-49 relating to the implementation of LVVR instrumentation and the permitted access and use of LVVR recordings are contrary to the well-established jurisprudence regarding employees’ privacy rights.

The Courts, including the Supreme Court of Canada, and labour arbitrators have repeatedly affirmed that employees have a legitimate expectation of privacy in the workplace. Workers do not forfeit their right to privacy simply by virtue of the
employment relationship. There are clear limits to employers’ access to and use of employees’ personal information, particularly where such information strikes at the “biographical core” of a person. This includes a person’s image and communications with his or her colleagues.

In order to introduce a policy or practice that is invasive of employees’ privacy, employers are required to demonstrate that they have exhausted all other reasonably available means of achieving their objectives prior to introducing such privacy-invasive measures. *Doman Forest Products Ltd. v. International Woodworkers Local 1-357* 13 L.A.C. (4th) 275 is often cited in support of this leading principle.

In the labour arbitration context, where surveillance of employees at work is involved, the practice will normally be found to be unreasonable unless the company can show clear and convincing evidence of necessity. Where employers have engaged in the filming of employees while at work, arbitrators have found that the loss of privacy is disproportionate to the benefit gained, particularly where there is real-time monitoring, or the monitors are readily visible and being used to watch employees while they work.

The prevailing legal test regarding the reasonableness of electronic monitoring in the workplace is derived from the seminal case of *Eastmond v Canadian Pacific Railway* 2004 FC 852 (“*Eastmond*”). This case dealt with a complaint filed with the Office of the Privacy Commissioner of Canada under PIPEDA against Canadian Pacific Railway regarding the installation of video surveillance equipment without employees’ consent. The Federal Court set out a 4-part test to assess the legality of workplace surveillance:

1. Was the measure demonstrably necessary to meet a specific need?
2. Was it likely to be effective in meeting that need?
3. Was the loss of privacy to the people being filmed proportional to the benefit gained?
4. Was there a way to achieve the same end that would have been less invasive of privacy?

The reasonableness test developed in the *Eastmond* case is widely used by courts and labour arbitrators to evaluate various privacy-intrusive measures in the workplace.

The right to privacy is also enshrined in section 8 of the *Canadian Charter of Rights and Freedoms*, which protects Canadians against unreasonable search and seizures (“the Charter”). The Supreme Court of Canada confirmed that an employees’ reasonable expectation of privacy in the workplace is subject to protection under section 8 of the *Charter* in *R v Cole* 2012 SCC 53.

The TCRC submits that the proposed implementation of LVVR instrumentation on board rail carriers is entirely contrary to the accepted jurisprudence regarding surveillance in the workplace as well as section 8 of the *Charter* as it allows employers unreasonable access to and use of surveillance recordings without any regard for employees’ legitimate privacy expectation of privacy in the workplace.
Under Bill C-49, railway employees would be subject to continuous video and audio surveillance during their working hours. Every single detail of their day to day movements, utterances and interactions would be captured and recorded. Furthermore, the recordings of their personal information could be used against them in criminal proceedings as well as disciplinary proceedings. The net effect of the LVVR implementation under Bill C-49 would be to subject employees to “Big Brother” style surveillance: employees will know that they are being watched at all times and anything they say or do could potentially be used against them at a later date.

We cannot emphasize how damaging this form of surveillance will be to open communication among railway employees, which is essential to the safe operation of the rail carriers. Railway workers must be able to feel secure in expressing themselves to one another without fear of retribution. For example, if a worker suspects that he may have made a mistake in the course of operations, he needs to be able to express this to his co-workers aboard the train without worrying that this communication could pose a risk to his job security. Faced with such a conundrum, the employee may simply decide to keep quiet, even if doing so could create a safety hazard to the rail operations. The Railway Safety Act review of 2007 singled out CN as instilling a "culture of fear" amongst their employees. The same management team, which were criticized for creating the culture of fear in 2007 at CN, took control of CP in 2012. If you examine the history of labour relations between this management team and their employees, it would further validate this point. Another spin off effect of granting access of LVVR to the rail companies is the profoundly negative and far reaching impact on labour relations for the future. An impasse that we are currently striving to correct.

It is evident to the TCRC that the Government has utterly failed to recognize the unintended consequences that such a “chilling effect” could have on the safety of railway operations. Open communications are absolutely essential to safe railway operations and must be protected at all costs. The On Board Train Regulations state 8.3 All protection equipment (a) shall be designed to protect the person from the hazard for which it is provided; and (b) shall not in itself create a hazard.

Moreover, it appears to the TCRC that the Government took no steps to strike a balance between workers’ privacy rights and its ostensible objective of railway safety. There is not a single provision in Bill C-49 that attempts to safeguard employees’ privacy in any manner. In fact, the legislation engages in the wholesale dismissal of employees’ statutory privacy rights pursuant to PIPEDA and similar provincial legislation under Bill C-49. The PIPEDA exemption in particular will effectively eliminate the authority that the Privacy Commissioner of Canada exercises over railway companies with respect to LVVR technology. The TCRC submits that there is no reason to completely obliterate the protections for employees under PIPEDA when the statute specifically provides the collection, use, and disclosure of personal information for purposes that a “reasonable person” would consider appropriate in the circumstances (see section 5(3)). The concept that access to LVVR for employers will increase safety in the rail industry has no basis in fact, it relies on conjecture and ill-conceived notions of the workplace. The
conjecture and preconceived notions referred to are largely opinions from people with little to no experience in the actual day to day operation of trains.

The TCRC further submits that the provisions in Bill C-49 relating to the admissibility of LVVR recordings in legal proceedings will open the door to legal challenges pursuant to s. 8 of the Charter. As confirmed by the Supreme Court of Canada, employees cannot be subjected to unreasonable search and seizures. In the TCRC’s submission, the continuous recording of employees’ private information, which can then be used against them in both criminal and disciplinary proceedings, will inevitably result in a host of section 8 legal challenges.

Finally, the TCRC notes that the provisions in Bill C-49 regarding LVVR technology are inconsistent with international legal norms. The European Union has not taken any formal approach to the introduction or LVVR technology. In the United States, the Fixing America’s Surface Transportation Act was made law in December 2015, which provides for the implementation of LVVR technology and use of such by railway operators in certain limited circumstances. However, the use of in-cab audio or image recordings in a retaliatory manner against employees is expressly prohibited. If the Canadian Government passes Bill C-49, railway workers in Canada will be subject to a far more intrusive LVVR regime than their counterparts in similar democratic nations.

The Bill C-49 Provisions on Access and Use of LVVR Recordings Under Bill C-49 Are Unnecessary, Overbroad and Punitive

The TCRC is deeply disappointed that the Government chose to propose an extraordinarily invasive and punitive means of attempting to achieve its goal of railway safety without considering less intrusive alternatives. It would seem that this Government would be willing to sacrifice the privacy rights of our membership for the optics of safety enhancement rather than addressing the grave safety concerns that the TCRC has brought to their attention repeatedly.

To begin, the TCRC notes that it has already successfully negotiated agreements on the use of LVVR technology with certain railway companies. The TCRC and Via Rail entered into a Letter of Understanding (“Via Rail LOU”) regarding the use of LVVR technology, which provides that the LVVR recordings will be treated as “black box” on-board recordings that may only be accessed and used by the TSB for the purposes of post-incident investigation. A copy of the Via Rail LOU is enclosed.

The language in the Via Rail LOU was subsequently awarded to TCRC in respect of its members at Canadian Pacific Railway Company in an interest arbitration award by George Adams dated December 7, 2015. A copy of this award is enclosed.

The TCRC representatives for the Locomotive Engineers also negotiated a letter of understanding with Canadian National Railway regarding the use of LVVR technology. This letter confirmed that inward-facing LVVR technology would not be utilized until expressly authorized by law, and in such an event, the parties will meet to discuss the terms and conditions regarding the use of such technology.
The TCRC submits that the Government is attempting to legislate the broadest possible use of LVVR technology in the railway industry without any regard to the jointly negotiated agreements that are already in place. With respect, it is the TCRC’s position that issue of employers’ access to and use of LVVR recordings in the railway industry is fundamentally an employment-related matter that ought to be left to the parties at the bargaining table. The Government has simply granted railway companies carte blanche with respect to LVVR recordings without giving their employees’ representatives an opportunity to negotiate protections for their privacy rights.

Furthermore, the TCRC submits that railway companies currently have a multitude of tools available to them to ensure safe railway operations. One such tool is Wi-Tronix technology, which is capable of monitoring all operator controls and actions including speed, throttle control, braking functions, whistle, horn and headlight functions and GPS location. The major railways have access to and/or already utilize this technology. This monitoring equipment sends data in real time via wireless technology to any computer or smart phone set up to monitor the data. The software applications that accompany these components contain track information and speed restrictions and continuously analyze the data received comparing it to the stored information and sends out email alerts when a violation of the programmed parameters is detected.

Wi-Tronix technology is capable of detecting the use of electronic devices in the locomotive cab that transmit or receive over mobile phone frequency bands and send real-time alerts on possible violations of mobile phone policies.

For all of its significant monitoring capabilities, Wi-Tronix technology does not pose the same kind of invasive, intrusive surveillance that LVVR systems will impose upon railway employees.

Moreover, railway companies can and do engage in real-time safety and efficiency testing in the normal course of railway operations on a regular basis. This type of testing can be used for pro-active safety management and analysis, training, and behaviour modification purposes. The benefit of this method is to allow railway employees an opportunity to correct themselves and demonstrate the appropriate behaviour in real time. Furthermore, disciplinary investigations, where warranted, are typically conducted shortly after the incident at issue in order to ensure fairness to the employee subject to investigation.

In the TCRC’s submission, the Government has failed to provide adequate justification for the broad access and use of LVVR technology that it proposes in Bill C-49. The railway companies already have access to the information that they need to develop and undertake fulsome safety analyses of their operations. If there are concerns about deterrence of particular unsafe behaviours, they can engage in safety and efficiency testing to address these issues and undertake investigations where necessary.

The TCRC submits that allowing employers access to LVVR recordings will not provide any safety benefit that cannot already be provided through the present technology and
testing methods. Rather, providing employers with this kind of broad access to information will simply foster the use of scare tactics, retribution and unnecessary punishment of railway employees.

Bill C-49 Fails to Provide for Appropriate Accountability and Oversight

The TCRC is very concerned that the provisions regarding access and use of LVVR recordings in Bill C-49 are ripe for abuse.

To start, there is no oversight mechanism in the legislation to ensure that railway companies do not access LVVR recordings for impermissible uses. If an employer accesses the recordings for an improper purpose, such as “checking in” on employees for no particular reason, who is going to know? As trade unions like TCRC will not have access to the LVVR technology and management systems, they will not be in a position to police the railway companies on issues of access and use. Likewise, the Privacy Commissioner of Canada will not be able to exercise appropriate oversight because of the PIPEDA exemptions in the legislation. The TCRC submits that this lack of oversight will inevitably result in misuse and abuse of the LVVR instrumentation.

The TCRC also submits that the provisions in Bill C-49 that allow employers, the Minister and railway safety inspectors to “address a threat to the safety of railway operations” are seriously problematic. There are no limitations in terms of what these parties can do to “address a threat”. If, for example, a railway safety inspector reviews a recording that she believes to show unsafe behaviour, can she share it with the railway company? And if so, can the railway company then use the recording to form the basis of disciplinary action against employees? The TCRC believes that the provisions as presently drafted will allow LVVR recordings to freely change hands between the Minister, railway safety inspectors and railway companies, to the great detriment of railway employees, who will simply not be in a position to determine whether the recording at issue was initially accessed in a legal manner.

The TCRC submits that Bill C-49 does not provide adequate accountability and oversight of the access and use of its members’ personal information, contrary to the law.

TCRC’s Recommendations Regarding Bill C-49

The TCRC maintains its position that the only appropriate and beneficial use of LVVR technology is for post-incident investigations by the TSB, with full privilege attaching to LVVR recordings pursuant to section 28 of the CTA/SBA. The TCRC submits that this is the least privacy-intrusive means of implementing LVVR technology while providing, arguably, the only safety benefits.

The TCRC submits that in no circumstances should railway companies be allowed to access and use LVVR recordings for disciplinary purposes. The reason for this is threefold. First, as explained above, the disciplinary use of LVVR recordings will have a dramatic chilling effect on employees’ communications in the course of rail operations, which will in turn compromise rail safety. Second, disciplinary use of LVVR recordings is
not a necessary component of a successful pro-active safety management regime. The punitive use of LVVR technology will only serve to intimidate employees and destroy employee morale. Finally, the ability to use LVVR recordings for disciplinary purposes will encourage the misuse of LVVR technology by railway employers, which will in turn lead to widespread employee privacy violations. The TCRC urges the Government to revise Bill C-49 to ensure that employees' personal information will not be used against them in a punitive manner.

The TCRC further recommends that Bill C-49 be revised to ensure that there is appropriate accountability and oversight mechanisms in place with respect to the access and use of employees' personal information through LVVR technology. It is simply unacceptable for the Government to dismiss the robust statutory privacy protections for employees' personal information with zero accountability for those who are given broad access and use of such. The TCRC urges the Government to address these concerns in a manner that will provide concrete assurance to its members that their privacy rights will not be trampled with impunity.

The TCRC reserves its right to make further submissions and objections to the proposed implementation of LVVR surveillance technology under Bill C-49 as is necessary to defend its members’ rights under the law.

Your immediate attention to this matter is appreciated and expected, and your prompt reply awaited.

ALL OF WHICH IS RESPECTFULLY SUBMITTED