United States House of Representatives

Committee on Transportation and Infrastructure

Subcommittee on Railroads, Pipelines, and Hazardous Materials

Hearing on Railroad Safety Authorization

May 8, 2007

Joint Statement of the Teamsters Rail Conference and the United Transportation Union

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We would like to thank the Committee for the opportunity to present this joint testimony. Rail safety impacts members of both of our organizations, and in fact all railroad workers, and we are working together to improve the conditions for all of our members.

This statement is divided into four sections. The first examines Chairman Oberstar's and Chairwoman Brown's bill, H.R. 2095; the second, the Administration's bill, H.R. 1516; the third, the discussion draft of Congressmen Mica and Shuster. Lastly, we discuss areas not addressed in either of the bills which we consider important to improving safety on the railroads.

I. Chairman Oberstar / Chairwoman Brown Bill, H.R._2095

This is the most comprehensive bill introduced in Congress since the 1976 safety authorization legislation. We support its provisions and urge its adoption by Congress. We have some suggestions which we believe will even improve this bill, and we request that these suggestions be given proper consideration.

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.

TITLE I—FEDERAL RAILROAD SAFETY ADMINISTRATION

Sec. 101. Establishment of Federal Railroad Safety Administration.
This section changes the title of the Federal Railroad Administration to the Federal Railroad Safety Administration. The section makes clear that safety is the highest priority of the FRSA. In some lawsuits throughout the country the railroads

have alleged that national uniformity supersedes local requirements for safety that are addressed in the federal railroad safety laws. This section helps clear up that issue.

Sec. 102. Railroad safety strategy.

This section requires the Secretary to develop a long term strategy for improving railroad safety. There shall be a semiannual assessment of the progress and identification of deficiencies that should be remedied before the next assessment. An annual report shall be made to the congressional committees having rail safety jurisdiction.

Sec. 103. Reports.

A report is required by DOT's Inspector General regarding each railroad safety statutory mandate and each open NTSB recommendation. The Secretary shall respond to the House and Senate Committees regarding the steps taken to implement the said mandates, and shall provide annual progress reports.

Sec. 104. Rulemaking process.

Regarding incorporating non government standards, rules, codes, requirements, or practices, this section makes it clear that they are not effective unless reference is made to the specific standard, etc. and the date on which it was adopted is specifically cited in the rule.

Comment: This is a needed improvement in safety. For example, presently the FRA delegates the authority to approve tank car designs to the AAR. Before any tank car may be used on the railroad system, the AAR Tank Car Committee must approve of its use on the rails. The builder of a tank car must apply for approval of the design, materials and construction, to the AAR for consideration by its Committee on Tank Cars.

Also, the power brake regulations (*See, e.g.,* 49 C.F.R. § 232.7), relating to periodic testing of brakes while cars are in the shop or repair track, requires the tests to be performed in accordance with the AAR Code of Rules.

The problem is that, in the past, the AAR has changed the rules without any official oversight by FRA.

Sec. 105. Authorization of appropriations.

The section provides for a three year authorization as follows:
$230 million for FY 2008; $260 million for FY 2009; and $295 million for FY 2010.

With the funds authorized the FRA shall purchase 6 Gage Restraint Measurement Systems vehicles and 5 track geometry vehicles.

$18 million is specified for an underground rail station and tunnel to be built at the AAR's Pueblo test facility for evaluation of vulnerabilities and to train emergency responders.

TITLE II—EMPLOYEE FATIGUE

Nothing is more important to improving rail safety than the provisions contained in Title II. It sets out necessary conditions aimed at reducing fatigue in the rail industry. The overwhelming evidence has been provided to the committee that fatigue is a paramount concern on the railroads, and it is urgent that Congress address the problem.

Sec. 201. Hours of service reform.

For both signal employees and operating employees, such persons may not remain or go on duty (1) unless they have received 10 consecutive hours off duty during the prior 24 hours; (2) for a period in excess of 12 consecutive hours; and (3) unless they have received at least 24 consecutive hours off duty in the past 7 consecutive days.

For signal employees, this section amends the provision relating to time spent returning from a trouble call by deleting the requirement that up to one hour returning from a trouble call is time off duty. Also, the section provides that in an emergency the signal employee cannot remain or go on duty to conduct routine repairs, maintenance or inspection of signal systems.
In addition, the railroad shall not communicate with the signal employee by telephone, pager or any other manner that could disrupt the rest period.

For train service employees, the consecutive hours off duty and on duty are the same as set out above for the signal employees. In addition, deadhead transportation to duty assignment, waiting for deadhead transportation, and time spent in deadhead transportation is time on duty.

Comment: This section is the most important section in the bill for addressing fatigue. Deadhead transportation has been the source of much litigation, and one of the most abused areas in rail safety, causing serious fatigue for the operating crews. Despite what we deem is clear in the hours of service law, the Supreme Court in Brotherhood of Locomotive Engineers, et.al, v. Atchison, Topeka & Santa Fe RR, 516 U.S. 152 (1996) held that time waiting for deadhead transportation is limbo time and therefore neither time on duty or time off duty. While we believe the Court was wrong in its interpretation, an amendment to the law is now needed to clarify that waiting for deadhead transportation is time on duty. Also, time traveling in

deadhead transportation should be time on duty.

In our arguments before the Court, we pointed out at least four distinct provisions under the current statute which lead to the only valid conclusion—that all of the time spent on the trains by the employees covered by the HSA is time on duty, except when the employee is actually traveling in deadhead transportation.

a. Title 49 U.S.C. § 21103(b)(1) states "Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty." The employee is not finally released until he/she reaches the designated terminal. We believe that the FRA used a specious distinction in arguing to the Court that the time while the employee is on the engine awaiting another crew to relieve it is not time on duty because the employee is "relieved" (even though not finally "released"). Such rationale is not accurate by a simple reading of the language in the statute. Also, the employee is not finally released from duty because there are still obligations imposed on the worker—at the very least he/she must protect the train from vandals and undesired train movement. The employee is not free to leave the train, and is subject to further orders from the railroad. In fact the crew would be disciplined if he/she were to leave the train unprotected. More significantly, an employee is not finally released from duty until he/she reaches the designated terminal. Unless specifically excluded by the statute, all such time is on duty time.

b. Time on duty shall include interim periods available for rest at other than a designated terminal. 49 U.S.C. § 21103(b)(5). This section makes it clear that such time is still to be counted as time on duty, where the employee is not at a designated terminal. Even if the employee is at a designated terminal, if the relief is less than 4 hours, such time is on duty time. 49 U.S.C. § 21103(6).

c. The time is not time off duty because the employee is not in deadhead transportation, i.e. traveling from duty to point of final release. *See,* 49 U.S.C. § 21103(b)(4).

d. Under 49 U.S.C. § 21103(b)(3), in determining the number of hours an employee is on duty, there shall be counted, in addition to the time actually engaged in or connected with the movement of any train, all time on duty in other service performed for the railroad. *See also*, 49 C.F.R. § 228.7(a)(5). Therefore, even if the employee is not engaged in or connected with a train movement, the employee is still not finally released and is on duty in other service, such as protecting the train against vandalism. As long as the employee is subject to orders of the employer, he/she should be considered in "other service" and, therefore, "on duty".

The Court's Interpretation Is Contrary To The Legislative History

The 1969 amendments to the Hours of Service Act demonstrate Congress' concern with exactly what constituted "time off duty" and "time on duty".

Originally, all time within the twenty-four-hour period was considered either "on" or "off" duty, with deadheading time both to and from service generally being "off duty" time. This resulted in flagrant abuses which thwarted the entire purpose of the statute.

> "This has resulted in an employee, believe it or not, being assigned to ride 8 hours in deadhead service and not have this time count as time on duty, and then follow it immediately with his official tour of duty, which could run anywhere from 8 to 16 hours, making his total time in railroad service a potential of 24 hours divided between deadheading and non-deadheading time."

116 Cong. Rec. H. 29,322 (daily ed. Oct. 9, 1969) (Statement of Representative Olsen).

The 1969 amendments changed time on duty (used in computing the maximum 12 hour workday) to include the time that is provided for rest in places other than the designated terminal, time provided for rest of less than four hours at a designated terminal, and time spent by employees going to an assignment or traveling between assignments. Time off duty is also defined, and time spent in deadheading back from a duty assignment is not considered time off duty. Id. at H. 29,318 (Statement by Representative Staggers). These changes were designed to prevent abuses by ensuring that off duty time is time of "undisturbed rest" and time on duty includes time of deadheading to and between service. Id. at H. 29,322. (Statement of Representative Olsen). These clarifications were designed to limit the time required in traveling to duty and to get the employees to designated terminals as quickly as possible after duty.

The decision of the Supreme Court promotes just the type of abuses the 1969 and 1978 amendments were designed to remedy.

Similar to the provision for signal employees, the railroad shall not communicate with the operating employee during the 10 consecutive hours off duty, and during the 4 hours of rest at a non designated terminal.

Comment: Another unresolved issue under hours of service is the amount of undisturbed rest to which a railroad worker is entitled. Unless a human being knows in advance what time they must report to work, they can not arrange to be rested and fit for duty. The railroad industry functions on a 24/7 schedule with continuous operations from coast to coast. This is not an excuse for the current position of the railroads holding that their employees do not deserve and are not entitled to advance knowledge of the time they must appear for their next assignment. Every railroad terminal has an information line commonly referred to as a "lineup" that is intended to advise crews that are subject to call 24/7 regarding their status. Every railroad

has "problems" with the accuracy of these "lineups". The employees must have early and reliable information indicating when they will be required to report for duty

UTU and Rail Conference constituent BLET have voluntarily participated in many different forums on Fatigue, Work Rest issues, and pilot projects designed to help stabilize the work schedules for operating crews. There are a few successful Work Rest projects continuing across the country, but these represent no more than 2% of the affected employees. Railroads have adopted unilateral Availability Policies that set arbitrary guidelines for employee work schedules. One railroad Availability Policy states that employees will be available for service 85% of their time. The average American worker that is expected to work 40 hours each week is available for service about 24% of their time. The railroads expect their employees to be available for work more than 3 times the national average. Despite an Availability Policy in effect, at least two railroads are only permitting one weekend day a month and 1-2 days at most of weekdays off. If the employee requests a day off for sleep, exhaustion, etc. and it exceeds the number he/she is required to under the railroad's calculations, employees have been disciplined and dismissed.

We submit that under the existing law an employee is entitled to undisturbed rest for 8 or 10 hours, depending upon how many hours the person worked before the rest period began. However, the practice on the railroads still is that the employee's rest period is normally interrupted by a telephone call from the railroad at least 2-3 hours before the time he/she is told by the railroad when to report to duty. This obviously interrupts a person's rest. Nevertheless, a court, at the urging of the FRA, has held that calling time is not to be considered time on duty. California State Legislative Board, United Transportation Union v. Mineta, 328 F.3d 605(9th Cir. 2003). Incredibly, the court held that it is o.k. to interrupt the employee once, and that does not interfere with the rest. It said in the opinion that the FRA is not required to accept as controlling a statement in the report of your Committee contained in the legislative history. Therefore, since the FRA disregarded the statement in the report as to the requirement of uninterrupted rest, the court followed FRA's position.

Current section 21103(a)(3) states that the employee's off duty time shall be "consecutive". The congressional deliberations clarify the statute's intent that the rest period shall not be interrupted by duty calls [also commonly known as "calling time" in the industry]. S. Rep. No. 91-604, 91st Cong., 1st Sess. 7-8 (1969); Cong. Rec. H. 29321 (daily ed. Oct. 9, 1969). To permit the Ninth Circuit's interpretation to stand would undercut the intent of Congress, and continue to contribute to fatigue for operating railroad workers.

Sec. 202. Employee sleeping quarters.

This section corrects an abuse by requiring that a railroad may not provide sleeping quarters in the yards.

Comment: In 1976 the Congress, amended the Hours of Service Act and allowed railroads to retain then existing sleeping quarters inside rail yards, but that any new or reconstruction of the sleeping quarter must be safely away from the yards. Congress permitted maintenance on the existing facilities, so that it would not be a significant economic burden on the railroads to all of a sudden be required to move all sleeping quarters from the yards. The intent was that these old sleeping quarters would be removed in a reasonable period of time, and replaced by safer conditions. We have been able to prevent major rehabilitation and keep railroads sleeping quarters away from the yards. *See, e.g.,*United Transportation Union v. Dole, 797 F.2d 823(10th Cir.1986). Nevertheless, there still remain some sleeping quarters in the yards, such as on the Norfolk Southern, where operating employees are required to sleep. In addition, where maintenance of way workers represented by Rail Conference constituent BMWED, they are forced to live in primitive, almost uninhabitable camp cars, and these conditions should be removed.

Sec. 203. Fatigue management plans.

This requires each railroad to consult with the labor organizations to develop a fatigue management plan on such railroad. If both parties cannot agree on such a plan, at their option, each may submit its proposed plan to the Secretary. The plan shall include scheduling practices, work/rest cycles, and guaranteeing consecutive days off. The plan shall also consider circadian rhythm issues, napping policies, lodging facilities, increasing rest by not being interrupted, and avoiding abrupt changes in rest cycles.

Comment: This is an important link to dealing with the overall problem of fatigue.

Sec. 204. Regulatory authority.

The secretary is given authority to reduce the maximum hours on duty or increase the minimum hours an employee may be required or allowed to rest.

It is made clear that independent contractors or subcontractors are covered here.

Sec. 205. Conforming amendment.

This is basically a technical amendment to the hours of service violations which imputes knowledge of a manager or supervisor to the railroad. Currently, it is limited to officers or agents.

TITLE III—PROTECTION OF EMPLOYEES AND WITNESSES

Sec. 301. Employee protections.

This provision is directed to harassment and intimidation of employees assisting in presenting facts regarding violations and accident investigations. A railroad may not threaten, intimidate, discharge, discipline or discriminate against an employee for (1) filing a complaint or enforcement involving railroad safety; (2) testifying regarding a complaint or enforcement; (3) notifying a railroad or the Secretary of a personal injury or work related illness; (4) cooperating with the Secretary or the NTSB in safety investigations; (5) furnishing information relating to accidents or incidents;(6) accurately reporting hours of duty.

In addition, harassment and intimidation is prohibited regarding the (1) reporting of a hazardous condition; (2) refusing to work when confronted by a hazardous condition; and (3) refusing to use safety related equipment, track, or structures, if they are in a hazardous condition.

The refusal (1) shall be made in good faith and the employee reasonably concludes that it presents an imminent danger of death or serious injury; (2) the urgency does not allow sufficient time to eliminate danger without such refusal; and (3) the person notifies the carrier, where possible, that he will not perform the work or authorize use unless the problem is immediately corrected. This does not apply to security personnel.

The enforcement of the anti-harassment or intimidation provision is spelled out in detail. First, if such violation occurs, a complaint may be filed with the Secretary of Labor. The criteria for the procedures are set out at 49 U.S.C. 42121(b). The complainant must show prima facie evidence that any behavior above was a contributing factor to the violation. To overcome the complaint, the employer must show by convincing evidence that its actions were correct.

A complaint must be filed within one year from date of the alleged violation.

If the Secretary of Labor has not issued a final decision within 180 days, or not later than 90 days after a final order, the employee may bring an original action in federal court, and there may be a trial by jury if requested by either party.

There are a number of remedies available: (1) The employee is entitled to all relief necessary to make him/her whole; (2) Damages may include reinstatement with the same seniority, back pay with interest, special damages (including

litigation costs, expert witness fees, and reasonable attorneys fees); and punitive damages not to exceed 10 times the compensatory damages awarded.

In addition, criminal penalties may be imposed. Any person who willfully violates by terminating or retaliating shall be fined under Title 18 and imprisoned up to one year.

The Attorney General shall submit a report to the Congress regarding enforcement under this section.

Nothing herein preempts any safeguards against discrimination in state or federal law or under any collective bargaining agreement.

Comment: We welcome the above provisions which will significantly improve harassment and intimidation relating to matters involving the federal government procedures. However, there are a number of areas which are not addressed. The various crafts have received countless complaints from employees of instances outright harassment and intimidation. Some of these examples include:

- Not reporting an injury or occupational illness soon enough for the carrier;
- Railroads imposing multiple disciplinary hearings and investigations arising out of a single incident or accident;
- Requiring multiple statements to a railroad arising out of a single incident in an attempt to obtain conflicting facts;
- Constantly providing medical records to a railroad, even though no litigation has ensued.
- Being harassed for not authorizing the use of defective equipment;
- Retaliation for reporting, or attempting to report, on-the-job injuries; and
- Supervisors interfering with their medical treatment for on-the-job injuries or work related illnesses in order to avoid making the injury reportable to FRA.

Nothing in the railroad industry is more disruptive and demeaning to an employee than harassment and intimidation he/she continues to experience on many railroads. For example, some carriers use discipline or the threat of it to suppress the reporting of an injury. The current FRA requirements are virtually inadequate prevent this harassment.

A worker who reports or identifies a safety or security risk must be assured that he/she will not face retribution or retaliation from his/her employer. One should not have to choose between doing the right thing on safety or security and risking losing his or her job. Despite the whistleblower protections included in the current law, rail workers and their unions continue to experience employer harassment and intimidation when reporting accidents, injuries and other safety concerns. Indeed, in

an FRA report issued in July 2002 entitled *An Examination of Railroad Yard Workers Safety* (RR02-01), the FRA conducted focus group interviews with certain groups of rail workers. The FRA stated, "Perhaps of most significance, rail labor painted a generally adversarial picture of the safety climate in the rail industry. They felt that harassment and intimidation were commonplace, and were used to pressure employees to not report an injury, to cut corners and to work faster." It is disingenuous for rail carriers and government to ask workers to report problems while at the same time refuse to provide the basic protections needed to ensure that such reporting will not result in employer retribution.

There needs to be effective employee remedies for an expanded number of safety activities. Currently, there are limited protections available under 49 U.S.C. 20109, which is administered under the Railway Labor Act, if an employee is discriminated against or discharged for filing complaints of rail safety violations or testifying in a rail safety proceeding. This procedure has proven to be ineffective in curtailing the harassment and intimidation. The list of protected activities needs greater expansion, and there needs to be effective employee remedies. As for remedies, there are current provisions for compensatory damages and for punitive damages which need to be expanded to remove the cap on liability, and to provide an effective deterrent even when an employee is made whole for any wage loss as a result of retaliation. Additionally, the affected employee should have the option to bring an action for damages in court, rather than the cumbersome procedures under the Railway Labor Act. This certainly would greatly deter anti-safety harassment in the industry. This section adequately deals with these concerns.

TITLE IV—GRADE CROSSINGS

Sec. 401. Toll-free number to report grade crossing problems.

There shall be a toll free number by each railroad so that one can report malfunctions at crossings and vehicles blocking crossings.

The railroad shall immediately notify trains operating near the area to warn of the problem, and contact public safety officials in the area so that they can take appropriate measures.

Sec. 402. Roadway user sight distance at highway-rail grade crossings.

Within 18 months, the Secretary shall issue regulations requiring each railroad to remove from the rights of way at public crossings, and private crossing open to unrestricted public access, grass, shrubbery, brush, trees and other vegetation which may obstruct view of pedestrian or vehicle operator for a reasonable distance and to maintain rights of way free of vegetation.

The Secretary may make allowance for preservation of trees and other ornaments or protective growth where State or local law or policy would otherwise protect from removal, and takes action to abate the hazard by warning devices, signs, reducing speed, etc.

States and local jurisdictions are not preempted from imposing more stringent requirements.

Comment: Some states have requirements for removal of obstructions to a motorist, and the railroads have challenged enforcement on the ground that the states are preempted in this arena. The clarification in this section is necessary.

Sec. 403. Grade crossing signal violations.

In the 1994 safety authorization law, Congress enacted 49 U.S.C. 20151 which required the Secretary to develop model legislation for states regarding trespassing and vandalism. This section adds violations of grade crossing signals.

The evaluation and review shall be completed before April 1, 2008.

Within 18 months, the Secretary shall develop model state legislation for violation of grade crossing signals, which shall include driving (1) around gate; (2) through a flashing signal; (3) through a crossing with a passive warning sign without ensuring it could be safely crossed, and (4) creates a hazard of an accident at the crossing.

Sec. 404. National crossing inventory.

The Secretary is required to issue regulations covering national crossing inventory and to include information regarding warning devices and signs. Periodic updating is mandated.

Sec. 405. Accident and incident reporting.

The Secretary shall conduct an audit of Class I railroads every 2 years and all other classes every 5 years to ensure that all crossing collisions and fatalities are reported to the National accident database.

Sec. 406. Authority to buy promotional items to improve railroad crossing safety and prevent railroad trespass.

This authorizes the FRA to purchase certain items which FRA currently believes it cannot do without authorization.

TITLE V. ENFORCEMENT

Section 501. Enforcement. This section clarifies that the Attorney General may bring a civil action in a district court of the United States to: (1) enjoin a violation of, or to enforce, this part, except for section 20109 of this title, or a railroad safety regulation prescribed or order issued by the Secretary; (2) collect a civil penalty imposed or an amount agreed on in compromise under section 21301 (general railroad safety violations), 21302 (accidents and incident violations), or 21303 (hours-of-service violations) of this title; and (3) to enforce a subpoena, request for admissions, request for production of documents or other tangible things, or request for testimony by deposition.

Comment: As it relates to §20109, (1) of the FRA proposal is that the Attorney General will not seek enforcement under that section. Currently, the Attorney General is not involved in the enforcement of §20109 (a) which covers discrimination resulting from filing complaints and testifying, and (b) refusing to work because of hazardous conditions. Rather, the employee enforces it pursuant to (c). However, the FRA amendment would prevent the Attorney General from enforcing a violation of (e) which covers the disclosure of the worker's name who has provided information to the FRA about violations. Therefore, we oppose (1) of the section which excludes §20109(e).

Section 502. Civil Penalties. This section increases the ceiling for civil penalties for general railroad safety violations, accidents and incident violations, and hours-of-service violations from $10,000 to $100,000, and allows for adjustment for inflation. The minimum remains at $500.

Section 503. Criminal Penalties. The section increases the maximum penalty for failing to file an accident or incident report on time from $500 to $2,500, and the maximum penalty for each day after the due date from $500 to $2,500.

Section 504. Expansion of Emergency Order Authority. This section allows the Secretary to issue emergency rules or restrictions in the event of significant harm to the environment. Current law allows the Secretary to issue emergency rules or restrictions in the event of death or personal injury.

Section 505. Enforcement Transparency. This section requires increased transparency of all enforcement actions taken by the FRSA. Each month, the FRSA will release to the public a report summarizing all enforcement action taken

by the FRSA. This section is modeled after the pipeline bill that was enacted at the end of the 109th Congress.

Section 506. Interfering With or Hampering Safety Investigations.
This section makes it unlawful to knowingly interfere, obstruct or hamper an investigation by the Secretary of Transportation or the NTSB. This also includes attempts to harass, intimidate, mislead or coerce another person with the intent to hinder, mislead, or prevent that person from cooperating with any investigation by the Secretary or the NTSB. Any person found violating this section may be fined or imprisoned for up to two years or both.

Section 507. Railroad Radio Monitoring Authority. This section allows the Secretary to authorize his or her subordinates and agents, such as Federal railroad safety inspectors, to monitor and record railroad radio communications and, with certain exceptions, to use those communications and the information they contain, for the purpose of accident prevention, including, but not limited to, accident investigation. Information obtained through such monitoring and recording would not be admissible into evidence in any administrative or judicial proceeding, with two exceptions. First, the provision would not bar admission in evidence of the intercepted communication in a judicial proceeding for the prosecution of a felony under Federal or State law. Second, the provision would not bar admission of the intercepted communication for impeachment purposes in seven enumerated types of railroad safety proceedings. In addition, information is not subject to publication or disclosure, or search or review in connection therewith, under section 552 of title 5.

Comment: We oppose this section. This section is in the Administration's bill. See, section 303 of H.R. 1516. The concern we have with this section is that such monitoring will likely lead to further intimidation and harassment and is nothing more than another opportunity to find grounds to fine and/or fire an employee. Also, the information obtained could be used for impeachment purposes in various types of rail safety proceedings.

Section 508. Safety Inspectors. This section requires the Secretary to increase the number of Federal rail safety inspectors by about 100 inspectors per year for a total of at least 800 Federal rail safety inspectors by the end of fiscal year 2011.

Comment: There are currently 421 Federal railroad safety inspectors and 160 State inspectors. This section is similar to the Chairman's provision in his 1996 bill, Sec.107.

In 1977 the FRA issued a comprehensive 5-year plan for attacking the safety problems in the rail industry. In the proposal entitled “Safety System Plan, September 1977,” the FRA stated that 800 safety personnel were necessary at the agency. As testified by Mr. Boardman on 1/30 the total inspection staff today is 400. The number of miles of track in operation are greater than in 1977 (173,000 in 1977 and 219,000 today); over 1.6 million locomotives and cars in operation today vs. 1.7 million freight cars and 33,000 locomotives in 1977.

It should be kept in mind that, as noted by the GAO testimony on January 30, FRA today is only able to inspect 0.2% of the railroads operations each year. Also, in a recent report by the GAO entitled RAIL SAFETY “The Federal Railroad Administration is Taking Steps to Better Target its Oversight, but Assessment of Results is Needed to Determine Impact” (Jan. 2007), it stated at p. 57:

> “FRA inspectors cite many defects, but cite comparatively few of these defects as violations warranting enforcement action. Since 1996, FRA inspectors have cited an average of about 4 violations for every 100 defects cited annually. According to FHA officials, inspectors cite relatively few defects as violations warranting enforcement action because FRA’s focused enforcement policy guides inspectors to cite violations only for problems that pose safety risks. In addition, inspectors have discretion in citing a defect or a violation for a given instance of noncompliance—FRA directs inspectors to first seek and obtain the railroads’ voluntary compliance with the rail safety regulations.”

TITLE VI – MISCELLANEOUS PROVISIONS

Section 601. Positive Train Control Systems. This section requires Class I railroads to develop and submit to the Secretary for review and approval a plan for implementing a positive train control system by December 31, 2014. The Secretary must submit a report to Congress no later than December 31, 2011, on the progress of the railroads in implementing the systems.

Section 602. Warning in Nonsignaled Territory. This section implements two NTSB recommendations issued in the Graniteville crash. It requires the railroads to install automatically activated devices, independent of the switch banner, along main lines in non-signaled territory that do not a train speed enforcement system that would stop a train in advance of a misaligned switch. This section also requires the railroads in such nonsignaled territory and in the absence of switch position indicator lights or other automated systems that provide train crews with

advance notice of switch positions, to operate those trains at speed that will allow them to be safety stopped in advance of misaligned switches.

Comment: This provision implements the NTSB recommendation in its report of the Graniteville, SC accident which occurred on Jan.6, 2005, and we support this section.

Section 603. Track Safety. This section requires the Secretary to issue a regulation requiring railroads to manage the rail in their tracks to minimize accidents due to internal rail flaws. At a minimum the regulations must require the railroads to conduct ultrasonic or other appropriate inspections to ensure that rail used to replace defective segments of existing rail is free from internal defects, as recommended by the NTSB; require railroads to perform integrity inspections to manage a service failure rate of less than .1 per track mile; and encourage railroad use of advanced rail defect inspection equipment and similar technologies as part of a comprehensive rail inspection program. The section also requires the Secretary to develop and implement regulations for all classes of track for concrete ties, as recommended by the NTSB.

Section 604. Certification of Conductors. This section requires the Secretary to prescribe regulations to establish a program requiring the certification of train conductors. The section ensures that for passenger trains conductors must be trained in security, first aid, and emergency preparedness.

Comment: In 1988, Congress created an anomaly by requiring FRA to disqualify employees who were not performing work safely. However, it failed to address what should be the minimum "qualification" standards for rail employees. The section extends to conductors and trainmen the requirement for certification. Conductors and trainmen perform significant safety sensitive functions, and should have formal competency requirements, as do engineers. Given the mandate for concrete plans for deployment of Positive Train Control technology, we also believe that train dispatchers, who complete the operational loop with train crews, should be certified.

Section 605. Minimum Training Standards. This section requires the Secretary to establish minimum training standards for each craft of railroad employees. It also requires the railroad carriers to submit their training and qualification programs to the Federal Railroad Safety Administration for approval.

Comment: At the committee's hearing on January 31, the Transportation Trades Department, AFL-CIO witness and the Teamsters Rail Conference witness pointed out the lack of training in the industry. There are some FRA regulations which require training, but the extent of the training is left to each carrier. The problem is that due to the revised railroad retirement law, many early retirements continue to occur. The industry is becoming younger and younger, and at the same time business is booming, which puts pressure on the railroads to place the employees into service without sufficient training.

The lack of appropriate training is a major safety issue facing the rail industry today - and it should be of significant and urgent concern to the Congress. These training deficiencies are not confined just to operating employees, but also include train dispatchers, signal employees, maintenance of way employees, locomotive repair and servicing employees, and track inspectors.

There was a time when trainmen and yardmen in freight and passenger service were naturals for becoming engineers. They possessed an impressive working knowledge of the physical characteristics of the terrain, in-train forces and operating rules and procedures. These veteran operating employees had only to become proficient in applying this knowledge to their new craft while, at the same time, honing their train handling skills. Unfortunately, this is no longer a reality.

As our aging workforce retires, and our railroad business increases dramatically, the railroads have delayed hiring replacements. As a result, they rush new hires through shortened, one-size-fits-all training programs. It is not uncommon on any train, anywhere in America, to find an inexperienced trainman paired with a new engineer. It is very unlikely the trainman received training over the territory he or she is working, or was taught the special problems that exist, and skills required, in regions with temperature extremes, heavy grades or complex operating environments. Most troubling is that it is unlikely either the new trainman or new engineer were provided classroom training where actual application of the operating rules were taught. They needed only to memorize rules - not know how to apply them - in order to graduate. What's more, most veteran employees believe that recurrent training in the railroad industry has become a farce.

Newly hired trainmen should not be required to work unsupervised or or direct the operation of locomotives until they are truly experienced in the trainman craft. This ensures they have become proficient in their train service and have gained needed on-the-job experience before assuming additional demanding duties and responsibilities.

A one year minimum in train service prior to becoming a conductor would improve the quality and competency of railroad operating employees, which equates to safer and more efficient operations.

It also ensures that newly hired employees will have approximately two years of practical railroad experience before they can be expected to operate locomotives without direct supervision.

The attraction and retention of qualified candidates for employment and their training is a major safety issue for all unions in the rail industry. Unfortunately, the rail carriers have attempted to make training of new employees an issue reserved exclusively for collective bargaining, where the carrier's only concern is the cost of the training. The large turnover in new railroad operating department employees has a direct relationship to the lack of experience and proper training in our industry. Many new employees express their frustration at being overwhelmed with the level of responsibility that they have received with poor training and little experience on the job.

Another FRA initiative, the Switching Operations Fatality Analysis (SOFA) found that training and experience were critical safety issues.

The rail industry is absorbing a record number of new employees in every department while operating at maximum capacity because of the record levels of rail traffic. We have attempted to address the inadequate training issues in every forum, and the UTU has made training a key objective in the collective bargaining arena, with very little progress. The railroads have been reluctant to recognize that the adequacy of training is a genuine problem and have not addressed this issue with the unions in a meaningful manner. They have refused to even allow FRA to offer their expertise in training techniques, and have declined labor's offers to establish of cooperative mentoring programs for the critical component of "On the Job Training". The rail industry will have more than 80,000 new employees in the next five years. Unless we can quickly eliminate training as the major safety issue, we can only expect this negative trend in safety analysis to accelerate.

Section 606. Prompt Medical Attention. This section requires a rail carrier to provide rail workers with immediate medical attention when the workers are injured on the job.

Comment: First, the current FRA provision is completely ineffective on prompt medical attention. It provides that a railroad shall have in place an Internal Control Plan which shall include, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting an accident, incident, injury or illness will not be permitted or tolerated and will result in disciplinary action against such person committing the harassment or intimidation. We are unaware of FRA ever enforcing this provision.

This above provision does not cover matters such as allowing the employee to go to the hospital before being forced to give a formal statement to a supervisor or

claim agent, or go to the scene of the accident first with the supervisor; it doesn't require the railroad to provide prompt transportation to the employee; there is no protection regarding harassment; and simply following the plan of a treating physician is not addressed. A recent federal court decision held that an Illinois statute mandating prompt medical attention was preempted in BN/SF, et. al v. Charles Box, et. al., No. 06-3052, C.D.D.C. Ill., 1/18/07. Other states have adopted similar legislation, which is being challenged. A federal amendment is needed to correct this problem.

Section 607. Emergency Escape Breathing Apparatus. This was an NTSB recommendation. It requires railroads to provide emergency breathing apparatus for all crewmembers on freight trains carrying hazardous materials that would pose an inhalation hazard in the event of unintentional release and provide such crewmembers with appropriate training for use of the breathing apparatus.

Section 608. Locomotive Cab Environment. This section requires the Secretary to transmit a report to Congress on the effects of the locomotive cab environment on the safety, health, and performance of train crews.

TITLE VII – RAIL PASSENGER DISASTER FAMILY ASSISTANCE

Section 701. Rail Passenger Disaster Family Assistance. This section contains a bill that was passed by the Committee and subsequently the House in the 108th Congress, H.R. 874. The bill requires the Chairman of the NTSB, as soon as practicable after being notified of a rail passenger accident involving a major loss of life, to: (1) designate and publicize the name and phone number of an NTSB employee who shall be a director of family support services responsible for acting as a point of contact within the Federal Government for the families of passengers involved in a rail passenger accident, and a liaison between the rail passenger carrier and the families; and (2) designate an independent nonprofit organization (with experience in disasters and post-trauma communication with families) which shall have primary responsibility for coordinating the emotional care and support of the families of passengers involved in such accidents.

Comment: This section seeks to provide adequate assistance to families involved in passenger accidents. We request that this be expanded to assist employees involved in all accidents and require a critical incident stress (CIS) plan that would be designed to proactively manage the disruptive factors that an employee usually experiences after and accident/incident. Rapid access to a CIS program following an accident will minimize the duration and severity of the distress upon an employee associated with such an event. We believe the employee involved should be removed from service immediately following an accident, and those involved in

witnessing the event, upon request, shall be relieved as soon as feasible. This is not contained in the section.

The railroads have exhibited a mixed bag in dealing with this problem--some do a decent job, while others act as if no problem exists.

II. THE ADMINISTRATION'S BILL—H.R. 1516

TITLE I–AUTHORIZATION OF APPROPRIATIONS AND ESTABLISHMENT OF SAFETY RISK REDUCTION PROGRAM

Sec. 101. Authorization of appropriations and establishment of safety risk reduction program.

Section 101(f) of the bill earmarks nearly $2.5 million "for a safety risk reduction program to be implemented as part of the railroad safety program[, which] safety risk reduction program shall require each railroad to systematically evaluate safety risks, manage those risks, and implement measures to eliminate or mitigate risks in its processes and procedures [and] shall be undertaken in addition to the current railroad safety program." Section 201(a) would prohibit the disclosure of any information by DOT contained in a safety risk reduction program document or record, and prohibits the use of such documents, records, etc., in any federal or state court proceeding. The information about the program on individual railroads should not be secret, except for national security matters.

Comment: We have long argued for a risk reduction program — from both safety and security standpoints — and this is a victory. Non-disclosure protections are necessary to ensure an honest assessment, but whether the industry could attempt to use this protection to hide information that we may now legitimately obtain remains a concern.

Sec. 102. Protection of railroad safety risk reduction program information.

This section would prevent any disclosure of the information developed by a railroad under the safety risk reduction program. That means, all information compiled or collected in order to identify, evaluate, plan, or implement a railroad safety risk reduction program would be private and not allowed to be discovered or admitted into evidence.

Comment: We think this is a bad idea, because in litigation by a private party for damages, there may be information contained therein relating to negligence that is

critical to the case. A railroad should not be able to hide such fact. The FRA is worried that security information may be disclosed. That information should be protected, and a court on a motion by the railroad can easily prevent such disclosure. No plaintiff would even seek security information. Also, we question why is the FRA getting involved in private litigation.

TITLE II–HIGHWAY-RAIL CROSSING SAFETY

Sec. 201. National crossing inventory.

This is similar to section 404 of Chairman Oberstar's / Chairwoman Brown's bill, H.R. 2095.

Sec. 202. Fostering introduction of new technology to improve safety at highway-rail grade crossings.

Section 202 also deals with grade crossing safety. Numerous findings are stated, including one asserting that FRA regulations establishing performance standards for processor-based signal and train control systems provide a suitable framework for qualification of new or novel technology at highway-rail grade crossings, and FHA's Manual on Uniform Traffic Control Devices provides an appropriate means of determining highway user interface with such new technology. New grade crossing protection technology approved by FRA would preempt any State law concerning the adequacy of the technology in providing warning at the crossing. Moreover, the proposal would create immunity for liability for an accident or incident at a crossing based upon selection of such technology. A carrier also would be immune from liability based upon its failure to properly inspect and maintain such technology, if the carrier has inspected and maintained the technology in accordance with the terms of FRA's approval. Additionally, no party may be found liable for damages for failure to apply such technology at a different grade crossing location.

Comment: The provision which relieves carriers of tort liability at a crossing should be deleted. First, it would preempt any State law concerning the adequacy of technology installed at a crossing. That would include State common law. Also, the FRA has no business being a lackey for the railroads where innocent people are injured or killed because of railroad negligence. This has an impact on FELA also, because the railroads are free from any liability so long as the railroad complies with the regulation, which will be minimum standards.

Sec. 203. Authority to buy promotional items to improve railroad crossing safety and prevent railroad trespass.

This section is the same as section 406 in H.R. 2095.

TITLE III–RULEMAKING, INSPECTION, AND ENFORCEMENT AUTHORITY

Sec. 301. Railroad security.

Section 301 would broaden FRA's authority so that any regulation prescribed or order issued that involved railroad safety is not be subject to challenge on the ground that it impacts security.

Comment: The one concern we have here is that any regulation or order which involves safety could not be challenged because it impacts security.

Sec. 302. Emergency waivers.

Section 302 would modify current requirements mandating hearings pursuant to the Administrative Procedures Act in situations involving a temporary emergency waiver of not more than nine (9) months' duration. FRA could waive the hearing and comment period and grant relief, with the option of holding a hearing after the waiver is granted.

Comment: With the exception of how an emergency is determined, FRA has already promulgated a rule covering this issue. 71 Fed. Reg. 51521 (Aug. 30, 2006). The term emergency is defined as referring to a natural or manmade disaster, such as a hurricane, flood, earthquake, mudslide, forest fire, snowstorm, terrorist act, biological outbreak, release of a dangerous radiological, chemical, explosive, or biological material, or a war-related activity, that poses a risk of death, serious illness, severe injury, or substantial property damage, and may be local, regional, or national in scope. We believe the meaning of emergency should be spelled out.

Sec. 303. Railroad radio monitoring authority and general inspection authority.

This is similar to section 507 of H.R. 2095.

Sec. 304. Authority to disqualify individuals from performing safety-sensitive functions in the railroad industry based on their violation of hazardous material transportation law.

Section 304 broadens FRA's powers to disqualify someone from a safety sensitive position pursuant to 49 CFR Part 209, Subpart D, to include violators of hazardous materials laws and regulations.

Comment: This provision is sound. It is time that some of the supervisors receive sanctions for violating haz mat requirements.

Sec. 305. Technical amendments regarding enforcement by the Attorney General.

See our discussion of sections 501 and 502 of H.R. 2095.

Sec. 306. Unified treatment of families of railroad carriers providing integrated railroad operations.

Section 306 would redefine "railroad carrier" to mean "a person providing railroad transportation, except that upon petition by a group of commonly controlled railroad carriers that the Secretary determines is operating within the United States as a single, integrated rail system, the Secretary may, by order, treat the group of railroad carriers as a single railroad carrier for purposes of one or more provisions of part A, subtitle V. of this title and implementing regulations and orders, subject to any appropriate conditions that the Secretary may impose." It appears that this would provide a vehicle for a mega-shortline holding company to seek a waiver for all its subsidiary units; however, depending upon the size of the subsidiaries, this could also cut the other way and impose a higher standard.

Comment: One of the major problems here is that a railroad which is part of a conglomerate railroad system could hide its failures under the overall umbrella of the integrated group. They should be able to know how each entity operating through its city and town is performing under the safety laws. Also, what if a small railroad under the umbrella treats its employees differently than a major carrier under the umbrella? We should be able to have that carrier's safety information separate and apart from the single entity that the FRA's proposal would allow to ensure that railroads do not manipulate this process to camouflage safety deficiencies.

Sec. 307. Hours of service reform.

Section 307 would repeal the hours of service laws and would be converted into a regulation, which conversion is not subject to judicial review. Thereafter, FRA would have the authority to amend the regulations "to prevent and mitigate fatigue among individuals performing safety-critical duties in train and engine service, signal or train control service, or dispatching service, ***whether or not directly employed by a railroad carrier."*** Hopefully, the bold language would take care of the problem pointed out by the Brotherhood of Railroad Signalmen at the fatigue hearing on February 18 regarding contracting out of work to non covered employees.

The first set of amendments would have to be made under the following procedure:

- FRA will refer to RSAC "the task of developing consensus recommendations on the problem of fatigue experienced by individuals performing any one or more of the following types of service: train and engine service, signal or train control service, or dispatching service";
- that RSAC respond within 3 months whether it is willing to accept the task; and
- that RSAC reach consensus within 24 months, after which FRA may proceed on its own initiative.

The factors that must be considered in this initial procedure are spelled out as follows:

The Secretary shall review the problem of fatigue experienced by individuals performing train and engine service, signal or train control service, and dispatching service or any combination of such types of service and shall consider how the likelihood of accidents and injuries caused by that fatigue can be reduced. The review shall take into account current and evolving scientific knowledge and literature relating to fatigue, and shall include an evaluation of the following:

(A) the varying circumstances of railroad carrier operations and the appropriate fatigue countermeasures to address those varying circumstances, based on current and evolving scientific and medical research on circadian rhythms and human sleep and rest requirements;

(B) the benefits and costs of a revised regulatory program;

(C) ongoing and planned voluntary initiatives by railroad carriers and rail labor organizations to address fatigue management, including the extent to which voluntary activities undertaken by railroad carriers and labor organizations representing their employees are minimizing fatigue and ameliorating its effects and the extent to which such activities are likely to be sustained absent regulatory action;

(D) the extent to which railroad carriers are using valid fatigue risk assessment tools and other methodologies to assist them in making informed decisions on any or all of the subjects described in paragraphs (A)-(C); and

(E) any other matters that the Secretary deems relevant.

* * *

In adopting any amendments under this section for any individuals performing safety-critical duties in a particular service, the Secretary shall prescribe maximum hours of service and such additional requirements as the Secretary deems necessary to provide a reasonable level of fatigue prevention or fatigue mitigation, or both.

Recognizing the diversity of working conditions within the railroad industry and the need for flexibility in applying strategies for fatigue prevention and mitigation, the Secretary may provide by regulation for submission and consideration, with respect to any group of individuals providing service covered by the regulation, of a written fatigue management plan proposed by one or more railroad carriers or other applicable employers. If the Secretary so provides, and if the Secretary determines that the plan would provide a level of safety equal to or better than the level of safety that would be provided by the regulation, the Secretary may authorize and enforce compliance with the plan in lieu of compliance with the regulation.

FRA Hours of Service regulations will not be subject to judicial review. The "sole and exclusive means of review" will be under the Congressional Review Act (5 U.S.C. 801).' FRA also proposes to add a section to the law stating that "shorter hours of service and time on duty of an employee [than those set forth in the applicable FRA regulation] are proper subjects for collective bargaining between a railroad carrier and its employees."

Comment: We oppose this section for the reasons stated in support of H.R. 2095, sections 201-205 dealing with fatigue. There are way too many loopholes for the FRA and the carriers if the FRA proposal were adopted.

Sec. 308. Amendment to the movement-for-repair provision.

FRA proposes to change the current law with respect to movement of equipment with defective safety appliances for repairs. Specifically, definitions for "place at which the repairs can be made" and "nearest" would be added, and a limitation placed on the use of mobile repair trucks.

Comment: We oppose this section. Rail labor and the railroads agreed in the Rail Safety and Service Improvement Act of 1982 that the movement of defective cars should be to the nearest repair point, not the nearest forward repair point. *See, Hearings on Rail Safety and Other Rail Matters Before the Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce,* 97th Cong., 2d Sess., 190 (Apr. 22, 1982). Nothing major has happened in the interim to change the statute. Also, why does the FRA continue to be the front for the railroads?

TITLE IV–MISCELLANEOUS PROVISIONS

Sec. 401. Technical amendments to eliminate unnecessary provisions.

This section would make numerous alleged technical amendments deleting sections which FRA claims are no longer necessary.

Comment: The one possible problem with the amendments in this section is the potential impact on FELA litigation. Many railroads assert that the FRSA preempts the FELA.

Sec. 402. Alternate names for chapters of subtitle V, part A.

Sec. 403. Federal rail security officers' access to criminal history and other law enforcement records, systems, and communications.

This section allows the FRA to gain access to the prior criminal history of an employee (even if it were many years ago).

Comment: Our concern is that it could be used as a pretext to fire an employee.

III. Congressman Mica/Shuster Discussion Draft, H.R.______

Title I. Authorization of Appropriations and Establishment of Safety Risk Reduction Program.

Sec. 101. Authorization of Appropriations and Establishment of Safety Risk Reduction Program.

Comment: Section 101 and 102 are similar to the Administration Bill, H.R. 1516, sections 101 and 102. See our analysis of those sections in H.R. 1516.

Rail labor supports a risk reduction program, but we believe FRA already has the authority to set up such a program under 49 U.S.C. § 20103. The Committee could simply send a letter to the FRA requesting such a program be implemented.

The authorization for appropriations for development of high speed rail wheels, trucks, and suspension systems, and for upgraded and accelerated replacement of hazardous tank cars are areas where the industry should be paying for the improvements, not the taxpayers.

The proposed authorization provides funds for additional security personnel only. Many more FRA safety inspectors are needed. GAO testified at the earlier House safety hearings that the FRA inspects only .2% of the railroad operations each year.

Sec. 102. Protection of Railroad Safety Risk Reduction Program Information.

This section would prevent any disclosure of the information developed by a railroad under the safety risk reduction program. That means all information compiled or collected in order to identify, evaluate, plan, or implement a railroad program would be private and not allowed to be discovered or admitted into evidence.

Comment: We think this is a bad idea, because in litigation by a private party for damages, there may be information contained therein relating to negligence that is critical to the case. A railroad should not be able to hide such facts.

There is no problem with preventing disclosure of any security information prohibited by this section.

Title II Highway-Rail Crossing Safety

Sec. 201. National Crossing Inventory.

See our discussion of section 404 of H.R. 2095.

Sec. 202. Fostering Introduction of New Technology To Improve Safety At Highway Rail Grade Crossings.

Comment: See our discussion of section 202 of H.R. 1516. The provision which relieves a railroad of liability resulting from a crossing accident should be deleted. It would preempt any State common law remedy that occupants of a vehicle may have. Congress should not be the lackey for the railroads where innocent persons are killed or injured because of defective crossings.

Sec. 203 Unsafe Conditions at Grade Crossings.

Comment: We support this. This would improve safety where there is a highway defect. Now, the FHWA has that jurisdiction.

Sec. 204. Authority to Buy Promotional Items To Improve Railroad Crossing Safety and Prevent Railroad Trespass.

We support this provision.

Title III. Rulemaking, Inspection, and Enforcement Authority

Sec. 301. Railroad Security.

See our discussion of section 301 of H.R. 1516.

Sec. 302. Emergency Waivers.

This is not needed. See our discussion of section 302 of the Administration's bill.

Sec. 303. Railroad Radio Monitoring Authority and General Inspection Authority.

This is the same provision as in section 507 of H.R. 2095 and section 303 of H.R. 1516. See our discussion there. We oppose this.

Sec. 304. Disqualifying Individuals From Performing Safety Sensitive Functions.

See our discussion of section 304 of the Administration bill.

Sec. 305. State Actions.

This attempts to address the problem that has resulted from the Minot, North Dakota accident where the courts have ruled that the residents injured cannot recover under state common law. This section is intended to address the Minot issue. We understand an alternative provision was included in the rail security bill. This should be addressed in that bill.

Sec. 306. Technical Amendments Regarding Enforcement by the Attorney General.

See our discussion of sections 501 and 502 of H.R. 2095.

Sec. 307. Unified Treatment of Families Of Railroad Carriers Providing Integrated Railroad Operations.

Comment: One of the problems we see with this provision is that a railroad, which is a part of a conglomerate railroad system, could hide its failures under the overall umbrella of the integrated group. The public should be able to know how each entity which is operating through its community is performing under the safety laws. Moreover, the employees of each entity should be informed how its railroad is performing. Changes may need to be made in the operations of one of the entities, but not parent carrier, and vice versa. Also, what if a small railroad under the umbrella treats its employees differently than a major carrier under the umbrella?

Sec. 308. Hours of Service Reform.

Comment: We appreciate the recognition in this section that fatigue in the railroad system is rampant. Some of these provisions are a valid attempt to deal with the various fatigue issues. However, they do not go far enough. For example, deadhead

time should be time on duty. Without deadhead transportation being counted as time on duty, none of the other proposed improvements will adequately change the existing conditions. Also, the FRA should be given rulemaking authority to increase the off duty time and to reduce the maximum hours on duty; and, sleeping quarters should be removed from the yards.

Lastly, the problem with railroads interrupting one's rest with a phone call has created fatigue issues. Hopefully, it will be spelled out clearly in the Committee Report that a phone call is an interruption of one's rest period.

Sec. 309. Amendment To the Movement-For-Repair Provision.

See our discussion of section 308 of H.R. 1516.

Title IV. Secs. 401-403. Rail Passenger Disaster Family Assistance.

Comment: This is similar to H.R. 874 passed by the House in 2003. Many of the provisions are valid. However, in section 403 there is a limitation on liability of the railroad passenger carrier, except for gross negligence, where certain privacy matters may be violated. We oppose any liability limits.

Title V. Secs. 501-508. Hazardous Materials Risk Insurance And Recovery.

This mirrors the limitations imposed in the nuclear industry pursuant to the Price Anderson Act. It provides three layers of insurance coverage for claimants damaged in hazardous materials accidents.

Comment: We have several problems with the sections. First, the amount of coverage for Class II and Class III railroads is less than for Class I. The damages caused by a hazardous accident are not dependent on the size of a railroad's operations. All carriers should have the same insurance. A LPG tank car explosion will cause just as much damage on a shortline as on a class I railroad.

Also, this would impact FELA litigation, because it would be the exclusive remedy for any claim arising from an incident under any Federal or state statutory or common law. (Sec. 505).

Title VI. Miscellaneous Provisions.

Sec. 601. Federal Rail Security Officers' Access to Criminal History and Other Law Enforcement Records, Systems, and Communications.

See our discussion of Section 403 of the Administration's bill.

Sec. 602. Miscellaneous Technical And Conforming Amendments.

See our discussion of Section 401 of H.R. 1516.

IV. Areas of Safety Not Covered By Any of the Pending Bills

We believe that there are a number of safety problems that have not been addressed by any of the three legislative proposals we have analyzed above. We hope the Committee will consider adding the following areas to its final bill.

ADMINISTRATOR'S QUALIFICATIONS

The FRA Administrator should be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in transportation, transportation regulation, and transportation safety. This is a no-brainer. It is similar to provisions which are contained in the NTSB law and appointees to the Surface Transportation Board.

FINAL AGENCY ACTION

The FRA rarely meets statutory deadlines for issuing regulations, or in responding to petitions by rail labor. One of the clearest examples of this deficiency is pointed out in House Report 102-205 on H.R. 2607. There, the Committee on Energy and Commerce noted that four major rulemakings required to be completed within two years or less by the Rail Safety Improvement Act of 1988 were not completed by the statutory deadline.

> "In the Committee's view, section 23 mandated that the Secretary issue grade crossing signal system regulations within one year and provided the Secretary with discretion only to determine the extent of such regulations."

H.Rep. No. 102-205 at p. 9.

In the 1988 safety law, Congress mandated that the bridge protection standards for maintenance of way employees be issued within one year. The Notice of Proposed Rulemaking was not issued until January 30, 1991, and a hearing was conducted on May 1, 1991.

Regarding petitions filed by rail labor with the FRA, aside from the fact that they are rarely, if ever, granted, FRA historically has not considered them within the one year deadline required by Congress in 1976. *See,* 49 U.S.C.§ 20103(b). An example of this is neglect is that the Brotherhood of Maintenance of Way Employees on May 30, 1990 filed a petition with FRA to require revisions of the Federal Track Safety Standards (FRA Docket No. RST-90-1). FRA did not even conduct a hearing until after the one year deadline had passed.

CONRAIL REGULATION

Section 711 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. § 797j), among other things, prohibits any state from regulating any railroad in the region. This includes 18 states. That section was adopted in 1981 to deal primarily with the full crew laws where Conrail was operating, but the section, as adopted, was much broader to cover all regulation by the states. With Conrail mostly gone, the section has long ago fulfilled its purpose, and should be repealed.
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GRANTS OR LOANS TO RAILROADS

This arises out of the request by the DM & E Railroad for a $2.3 billion loan from FRA. The FRA on January 31, 20007 issued a Record of Decision in the matter, and only perfunctorily dealt with the safety issues. For example, it misled the public in Figure 3-1 regarding train accidents on DM & E. However, the FRA, in showing an improvement in 2006 over 2005, did not bother to point out that the monetary threshold for reporting accidents increased from $6,700 in 2005 to $7,700 in 2006, a 16% increase. Obviously, this is a large reason for the alleged safety improvement.

The railroad over the years has had the worst safety record, or among the worst, compared with any other in the U.S. (If you want stats., let us know). The FRA didn't think this was significant in considering the loan.

TRAINING OF CREWS TRANSPORTING HAZARDOUS MATERIALS

In this day of heightened terror threats, coupled with the necessity for crews to transport more and more spent nuclear fuel, etc., there needs to be a certification that the crews have been properly trained. The railroads are doing a poor job, as noted by several witnesses in their testimony before your committee on January 31.

VENUE

This really is not a lawyer issue; rather it is for the injured citizens in a state, and injured workers. First, when a citizen is injured (like in Minot), the railroad forced the cases into federal court which for many was located a long distance away. Also, we need not tell you how burdened the federal courts calendars are these days. State courts should be available when alleging violations of federal safety regulations. State judges are just as competent as many federal judges to rule on preemption.

Also, regarding operating crews and maintenance of way employees, they travel sometimes hundreds of miles from home in their work. Injuries most often occur many miles from home. The railroads always attempt to have the case tried as far away from the employees' residence as possible, so that it will be inconvenient and expensive for the plaintiff. The employee is treated at his/her

place of residence and should have the option of filing suit where he/she lives, rather than hundreds of miles away. Thousands of motions have been filed by the carriers to have the venue chosen by the plaintiff to be removed to another court.

LOCAL SAFETY HAZARD

The purpose here is to eliminate the "local safety hazard" provision currently in the safety law. This is sought by many of the state public utilities commissions. It is needed because virtually every time a state attempts to regulate an area, the railroads challenge the proposal. Most courts rule federal preemption even though the FRA has not covered the particular problem. By simply eliminating the "local safety hazard" provision, the states still could not regulate if it conflicted with a FRA regulation or was an undue burden on interstate commerce.

ALCOHOL AND CONTROLLED SUBSTANCES TESTING

There are many abuses connected with the testing conducted under the railroads' own testing programs. Therefore, we request that in the event a railroad conducts toxicological testing of its employees under its own program, such testing shall be conducted under the same protocols and procedures of Title 49, C.F.R., Parts 219 and 40. For example, some carriers do not allow a split sample to be retested by the employee.

MEXICAN RAILROADS AND EMPLOYEES

The railroads whose tracks connect with Mexico continue to seek waivers from the FRA regulations to allow Mexican workers make the tests and inspections in Mexico, and/or to allow trains to enter the U.S. without proper inspections on the U.S. side of the border. This should not be allowed for various reasons. Significantly, the U.S. cannot oversee the quality of testing inside Mexico. Also, Mexican engineers entering the U.S. do not have the same qualifications as U.S. certified engineers