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# RAIL SAFETY LEGISLATION

**(110–39)**

## HEARING

BEFORE THE

SUBCOMMITTEE ON

RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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# U.S. House of Representatives
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Washington, DC 20515

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May 4, 2007

**SUMMARY OF SUBJECT MATTER**

**TO:** Members of the Subcommittee on Railroad, Pipelines, and Hazardous Materials

**FROM:** Subcommittee on Railroads, Pipelines, and Hazardous Materials Staff

**SUBJECT:** Hearing on Rail Safety Legislation

### PURPOSE OF HEARING

The Subcommittee on Railroads, Pipelines, and Hazardous Materials is scheduled to meet on Tuesday, May 8, 2007, at 2:00 p.m. to receive testimony on pending rail safety legislation.

### BACKGROUND

The Federal Railroad Administration (FRA) administers the Federal rail safety program, which was last reauthorized in 1994; that authorization expired in 1998. Since the FRA was last reauthorized, the Subcommittee has held 22 hearings on rail safety.

On September 14, 1995, Subcommittee on Railroads held a hearing on the proposed expansion and renewal of rail safety user fees. On March 5 and 6, 1996, the Subcommittee held a hearing on rail safety oversight, focusing on human factors and grade crossing issues. On March 12, 1996, the Subcommittee held a hearing on equipment and FRA regulatory procedures. On March 27, 1996, the Subcommittee held a joint hearing with the Subcommittee on Technology of the Committee on Science on train control devices. On March 26, 1998, the Subcommittee held a hearing on reauthorization of the FRA, focusing on resource requirements, personnel, and budget issues. On April 1, 1998, the Subcommittee held a hearing on safety hardware issues. On April 29, 1998, the Subcommittee held a hearing on human factors issues. On May 20, 1998, the Subcommittee held a hearing on the FRA regulatory process. On July 18, 2000, the Subcommittee held a hearing on implementation of the FRA's grade crossing whistle ban law. On March 29, 2001, the Subcommittee held a hearing on railroad track safety issues. On June 6, 2002, the Subcommittee held a hearing on recent derailments and railroad safety. On June 10, 2003, the Subcommittee held a hearing on new technologies in railroad safety. On April 28, 2005, the Subcommittee held a hearing on new technologies in railroad safety and security. On July 21, 2005, the Subcommittee

held a hearing on railroad grade crossing safety issues. On June 13, 2006, the Subcommittee held a hearing on current issues in rail transportation of hazardous materials. On June 27, 2006, the Subcommittee held a hearing on current FRA safety initiatives. On July 25, 2006, the Subcommittee held a hearing on human factors issues in rail safety. On January 30 and 31, 2007, the Subcommittee held a hearing on reauthorization of the Federal rail safety program. On February 13, 2007, the Subcommittee held a hearing on fatigue. On March 16, 2007, the Subcommittee held a field hearing on the role of human factors in rail accidents.

## PENDING LEGISLATION

On May 1, 2007, Chairman Oberstar and Chairwoman Brown introduced H.R. 2095, the Federal Railroad Safety Improvement Act of 2007. Congressmen Mica and Shuster have circulated a separate proposal for comment, entitled the Federal Railroad Safety Accountability and Improvement Act. On February 12, 2007, the Secretary of Transportation transmitted to Congress the Administration's FRA reauthorization proposal, entitled the Federal Railroad Safety Accountability and Improvement Act.

## OVERVIEW OF RAIL SAFETY

In 2006, there were a total of 13,046 accidents and incidents involving railroads. This total is divided into three components: train accidents, including collisions and derailments; grade crossing accidents; and other incidents, which is defined as any event that caused a death, an injury, or an occupational illness to a railroad employee. Many fatalities in this category are to trespassers.

Since the FRA was last reauthorized, the total number of train accidents, including collisions and derailments, increased from 2,504 in 1994 to 3,325 in 2005. In 2006, the number of train accidents decreased to 2,835.

According to the FRA, the two leading causes of all train accidents are human factors and track defects. In 2006, 1,017 accidents were caused by human factors and 1,032 accidents were caused by track defects. It was the first time that track defects surpassed human factors as the top cause of all train accidents since 2001.

## HUMAN FACTORS

Human factors are responsible for nearly 40 percent of all train accidents, and the FRA reports that fatigue plays a role in approximately one out of four of those accidents. The National Transportation Safety Board's (NTSB) in-depth investigations of accidents have also demonstrated that fatigue is a major factor in transportation accidents. In fact, fatigue has been on the NTSB's Most Wanted list of safety improvements since its inception in 1990. In the late 1980s, following a series of fatigue-related accidents, the NTSB issued three recommendations to the U.S. Department of Transportation (DOT) addressing needed research, education, and revisions to hours-of-service regulations. Between 1989 and 1999, the NTSB issued more than 70 additional recommendations to the DOT, States, industry, and industry associations to reduce the incidence of fatigue-related accidents.

In 1999, the NTSB published a report evaluating the efforts of the DOT to address operator fatigue. According to the NTSB, in response to the three recommendations issued in 1989, the DOT and the modal administrations "acted and responded positively to those addressing research and education; little action, however, has occurred with respect to revising the hours-of-service regulations."

Hours-of-service regulations specify the length of on-duty and off-duty time for operators in transportation. The current hours-of-service regulations vary from mode to mode, and according to the NTSB, "the current railroad hours-of-service laws permit, and many railroad carriers require, the most burdensome fatigue-inducing work schedule of any federally-regulated transportation mode in this country."

According to the NTSB, a commercial airline pilot can work up to 100 hours per month; shipboard personnel, at sea, can work up to 240 hours per month; and a truck driver can be on-duty up to 260 hours per month. Meanwhile, train crews can operate a train up to 432 hours per month. That equates to more than 14 hours a day for each of those 30 days.

The NTSB has recommended on numerous occasions that the FRA establish within two years scientifically based hours-of-service regulations that set limits on hours-of-service, provide predictable work and rest schedules, and consider circadian rhythms and human sleep and rest requirements. However, the FRA is the only modal administration within the DOT whose hours-of-service standards are mandated by Congressional statute and, therefore, may not be adjusted or modified by administrative procedures.

The Hours of Service Act was first enacted in 1907; it was substantially amended in 1969, and amended again in 1976 and 1988. The Act governs maximum time on-duty for all persons engaged in or connected with a movement of a train, including locomotive engineers, conductors, signalmen, and dispatchers. Maintenance-of-way workers (who maintain and repair tracks and other structures), Carmen (who repair and inspect railroad cars), other shop crafts, and contractors who perform signal duties are not covered by the Act and thus have no limits on hours-of-service.

Under current law, train operating crews and railroad signalmen can work 12 consecutive hours with 10 hours of rest. However, if they work less than 12 hours by even one minute, then they are only required to get eight hours of rest. This means that an individual can begin a shift on Monday at 8:00 a.m. and be called for a shift on Tuesday at 4:00 a.m., and a shift on Wednesday at midnight. According to the FRA, this kind of "backward-rotating shift" may continue for weeks, and can wreak havoc on an employee's circadian rhythm, the biological cycle that governs sleeping patterns.

Train dispatchers are under a different hours-of-service regime. Under current law, dispatchers can work a total of nine hours in a 24-hour period in a tower, office, or station that has two or more shifts in a 24-hour period, or a total of 12 hours in a 24-hour period where employed in a one-shift office.

There are two exceptions to these work periods. During emergencies, all of these employees may be required to work up to an additional four hours, for a total of 16 hours of train operating crews and railroad signalmen, and a total of 13 to 16 hours for train dispatchers (limited to three days per week for dispatchers). In addition, signalmen may be called for one or more "trouble calls"

to deal with wayside signal problems or malfunctioning warning devices at grade crossings. Trouble calls can add up to four hours on top of the 12-hour on-duty limit.

Then there is "limbo time," a term used to describe the period of time when a train operating crew's hours-of-service has expired, but the crew has not yet arrived at their point of final release; meaning, the off-duty location or terminal point where they can go home or obtain food and lodging at an away from home terminal. Limbo time also accrues for train operating crews whose trains are stopped on a line of track, frequently due to the expiration of their 12-hour on-duty time limit, before they reach their destination terminal (point of final release). Limbo time accrues for the time the train is stopped until the crew arrives at the final release point, and includes time spent in transportation to their final release point, as well as time spent waiting for transportation to pick them up from their train.

During limbo-time, crewmembers are required to stay awake, alert, and able to respond to any situation and follow the railroad's operating rules. Although time spent in limbo is classified under current law as neither on-duty nor off-duty time, it may be paid time for the crew, and any required minimum rest period does not begin until the limbo period ends, limbo time can and has kept railroad operating crews effectively on-duty for well over 12 hours and, in the case of the Union Pacific engineer involved in the 2004 Macdona, Texas accident, 22 hours (12 hours on-duty and 10 hours of limbo time).

When it comes to time available for rest, train crewmembers are generally called for service approximately two to three hours before their report for duty time. So, if a train crewmember is called to return to duty at the completion of his or her statutory off-duty period, then the duration of uninterrupted off-duty time available for sleep could be as little as five or six hours. However, since the required eight or ten hours of off-duty time includes commuting, leisure, and personal time, the duration of any period available for sleep could be less than that.

## THE MACDONA ACCIDENT

On June 28, 2004, a westbound Union Pacific (UP) freight train traveling on the same main line track as an eastbound BNSF freight train struck the midpoint of the 123-car BNSF train as it was leaving the main line to enter a parallel siding. The accident occurred at the west end of the rail siding at Macdona, Texas, on the UP's San Antonio Service Unit. The collision derailed the four locomotive units and the first 19 cars of the UP train as well as 17 cars of the BNSF train. As a result of the derailment, the 16th car of the UP train, a pressure tank car loaded with liquefied chlorine, was ruptured. Chlorine escaping from the punctured car immediately vaporized into a cloud of chlorine gas that engulfed the accident area to a radius of at least 700 feet. Three persons, including the conductor of the UP train and two local residents, died as a result of chlorine gas inhalation. The UP train engineer, 23 civilians, and six emergency responders were treated for respiratory distress and other injuries. Damages to the rolling stock, track, and signal equipment were estimated at $5.7 million, with environmental cleanup costs estimated at $150,000.

The NTSB determined that the probable cause of the collision was UP train crew fatigue that resulted in the failure of the engineer and conductor to appropriately respond to wayside signals governing the movement of their train. An NTSB review of the UP engineer's work schedule revealed that his time on-duty in the days leading up to the accident ranged from nine hours to more

than 18 hours. Eleven of his work days were longer than 14 hours, with one day totaling 16 hours and eight minutes on-duty, another day totaling 18 hours and 34 minutes on-duty, and another day totaling 22 hours on-duty (12 hours on-duty and 10 hours of limbo time).

Contributing to the crewmembers' fatigue was their failure to obtain sufficient restorative rest prior to reporting for duty because of their ineffective use of off-duty time and UP's train crew scheduling practices, which inverted the crewmembers' work/rest periods. A review of the UP conductor's work schedule showed that in the 10 days prior to the accident he had four days off followed by six consecutive work days leading up to the day of the accident. His duty times for the six work days would have allowed him to continue the nighttime sleep pattern that he had adhered to during the preceding four days off, but the conductor's call for the accident trip shortly after midnight inverted the work/sleep cycle he had developed over the previous 10 days. According to the NTSB, "such a disruption would be expected to produce severe effects for sleepiness and performance."

The NTSB concluded, "The minimum rest periods prescribed by Federal regulations do not take into account either rotating work schedules or the accumulated hours spent working and in limbo time, both of which can affect the ability of an employee to obtain full rest and recuperation between job assignments." The NTSB recommended, among other things, that the FRA require railroads to use scientifically based principles when assigning work schedules for train crewmembers, which consider factors that impact sleep needs, to reduce the effects of fatigue and establish requirements that limit train crewmember limbo time to address fatigue.

The NTSB also stated that it "remains concerned about the safety of railroad operations where backup systems are not available to intervene when, as in this accident, a train crew operates a train improperly or fails to comply with wayside signals. Board accident investigations over the past three decades have shown that the most effective way to prevent train-to-train collisions is through the use of a positive train control (PTC) system that will automatically assume some control of a train when the train crew does not comply with signal indications."

Over the years, the NTSB has issued a series of recommendations on PTC. In fact, PTC has remained on the Board's Most Wanted Transportation Safety Improvements list since 1990. The NTSB concluded that the Macdona, Texas, accident is "another in a long series of railroad accidents that could have been prevented had there been a PTC system in place at the accident location."

## TRACK SAFETY

In 2006, defective track was the leading cause of all train accidents. Prior to that, it was either the leading or second leading cause of all train accidents. A series of recent high-profile accidents have called into question the adequacy of track safety regulations, the railroads' track inspection and maintenance programs, and the FRA's oversight of those programs.

- On March 12, 2007, a CSX train derailed in Oneida, New York. The cause was defective track. It was one of a series of accidents in Upstate New York, and the FRA launched a rail inspection project to check 1,300 miles of CSX track across New York State for flaws that might lead to a train derailment. On April 18, the FRA announced that it had found 78

track defects and one serious violation during the audit. FRA's ongoing review of rail safety in New York has now been expanded to other railroads.

- On April 3, 2005, a westbound Amtrak train derailed on BNSF's tracks in Home Valley, Washington. Thirty passengers sustained minor injuries; 14 of those people were taken to local hospitals. Track and equipment damages, in addition to clearing costs associated with the accident, totaled about $854,000. The NTSB determined that the cause of the accident was BNSF's inadequate response to multiple reports of rough track conditions that were subsequently attributed to excessive concrete crosstie abrasion, which allowed the outer rail to rotate outward and create a wide gage track condition. Contributing to the accident was the FRA's failure to provide adequate track safety standards for concrete crossties.

- On April 6, 2004, an Amtrak train derailed on Canadian National-owned and maintained track near Flora, Mississippi. The entire train derailed, including one locomotive, one baggage car, and eight passenger cars. The derailment resulted in one fatality, three serious injuries, and 43 minor injuries. The equipment costs associated with the accident totaled about $7 million. In its Railroad Accident Report, the NTSB determined that the probable cause of the accident was "the failure of the Canadian National Railway Company to properly maintain and inspect its track, resulting in rail shift and the subsequent derailment of the train, and the Federal Railroad Administration's ineffective oversight to ensure proper maintenance of the track by the railroad."

- On October 16, 2004, a Union Pacific (UP) freight train derailed three locomotives and 11 cars near Pico Rivera, California. Small amounts of hazardous materials were released from the transported cargo. There were no injuries to area residents, the train crew, or the emergency response personnel. UP estimated the monetary damage at $2.7 million. In its Railroad Accident Brief, the NTSB determined "that the probable cause of the derailment was the failure of a pair of insulated joint bars due to fatigue cracking. Contributing to the accident was the lack of an adequate on-the-ground inspection program for identifying cracks in rail joint bars before they grow to critical size."

- On January 18, 2002, a Canadian Pacific freight train derailed 31 of its 112 cars near Minot, North Dakota. Five tank cars carrying anhydrous ammonia, a liquefied compressed gas, catastrophically ruptured, and a vapor plume covered the derailment site and surrounding area. About 11,600 people that occupied the area were affected by the vapor plume. One resident was fatally injured, and 60 to 65 residents of the neighborhood nearest the derailment site were rescued. As a result of the accident, 11 people sustained serious injuries, and 322 people, including the two train crew members, sustained major injuries. Damages exceeded $2 million, and more than $8 million has been spent in environmental remediation.

  In its Railroad Accident Report, the NTSB determined that the probable cause of the derailment was "an ineffective Canadian Pacific Railway inspection and maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint." The NTSB also found that the FRA's requirements regarding rail joint bars in CWR were ineffective and that the FRA's oversight of Canadian Pacific's CWR program was ineffective, because the FRA neither reviewed the

CWR program nor ensured that its track inspectors had copies of the CWR programs to determine if the railroad was in compliance with it.

- On March 17, 2001, a westbound Amtrak train traveling on BNSF tracks derailed near Nodaway, Iowa. As a result of the derailment, 78 people were injured, including one fatal injury. The NTSB determined that the probable cause of the derailment of the Amtrak train was the failure of the rail beneath the train, due to undetected internal defects. BNSF had failed to inspect the rail that it used to replace a defective rail. The replacement rail was also defective. According to the NTSB, contributing to the accident was the BNSF's lack of a comprehensive method for ensuring that replacement rail is free from internal defects.

## GRADE CROSSING SAFETY

There are 243,016 grade crossings in the United States, of which 149,628 or 62 percent are public crossings. Of these public crossings, 63,387 or 42 percent have automatic warning devices.

Since the FRA was reauthorized in 1994, significant progress has been made in reducing collisions and fatalities at grade crossings. From 1994 to 2006, total train miles traveled in the United States increased from 655 million miles to 810 million miles, and the total miles traveled by motor vehicle increased from 2.3 trillion miles to 2.9 trillion miles. During the same period, collisions at the nation's grade crossings have decreased from 4,979 in 1994 to 2,908 in 2006. Fatalities have also decreased from 615 in 1994 to 366 in 2006, and injuries have decreased from 1,961 to 1,006 during the same period.

The Department of Transportation's (DOT) Inspector General reports that this significant decrease was attributable to the Department addressing much of the "low-hanging fruit," that is, working with the states and railroads to close grade crossings, install automatic gates and flashing lights at public crossings with a high probability for collisions, and educate the public about crossing safety. The Department also made progress in implementing safety initiatives included in its 1994 Grade Crossing Safety Action Plan.

A look at more recent statistics, however, show that the sharp decline in grade crossing statistics has leveled-off. From 2002 to 2005, collisions, fatalities, and injuries have both increased and decreased, but on average have remained around 3,000 collisions in recent years. The number of fatalities has remained around 350, and the number of injuries has remained around 1,030. This "leveling-off" combined with the upward trend in train and highway traffic show that more needs to be done to improve grade crossing safety.

Of course, the adequacy of the FRA's grade crossing safety program is dependent on information it receives from the railroads. In July 2004, a series of *New York Times* articles alleged problems with railroad accident reporting, investigations at grade crossings, and several other safety issues. Chairman Oberstar, Chairwoman Brown, and former Senator Ernest Hollings sent a letter to the DOT Inspector General requesting an audit of the FRA's activities to oversee safety on the nation's highway-rail grade crossings.

The Inspector General found that railroads failed to report 21 percent of reportable crossing collisions to the National Response Center (NRC). Railroads are required to report crossing

collisions involving fatalities and/or multiple injuries to passengers or train crew members, and fatalities to motorists or pedestrians involved in grade crossing collisions to the NRC. Reports are to be made within two hours after the accidents, according to FRA and NTSB regulations. Immediate reporting allows the Federal Government to decide whether or not to conduct an investigation shortly after a crossing collision has occurred. The DOT Inspector General's analysis showed that 115, or 21 percent, of 543 reportable grade crossing collisions that occurred between May 1, 2003 and December 31, 2004 were not reported to the NRC. Although the 115 unreported crossing collisions, which resulted in 116 fatalities, were reported to the FRA within 30 to 60 days after the collision, as required, that was too late to allow Federal authorities to promptly decide whether or not to conduct an investigation. In July 2004, the FRA began reconciling its database with the NRC to identify unreported accidents, and in March 2005 began issuing findings of violations to railroads failing to follow reporting requirements.

The Inspector General also found that the Federal Government investigated only a small number of grade crossing collisions and needs to collect and analyze independent information on all crossing collisions. From 2000 through 2004, FRA investigated 47 of 376, or 13 percent, of the most serious crossing collisions that occurred — those resulting in three or more fatalities and/or severe injuries. No Federal investigations were conducted for the remaining 329 crossing collisions. Those collisions resulted in 159 fatalities and 1,024 injuries. FRA officials stated that the National Transportation Safety Board (NTSB) is the lead Federal agency responsible for investigating railroad accidents, not FRA. However, the NTSB tends to investigate only high-profile grade crossing collisions. For example, from 2000 though 2004, the NTSB conducted seven grade crossing collision investigations. Consequently, the Federal Government did not independently investigate most crossing collisions, but rather received information concerning the causes of collisions almost exclusively from the railroads.

The railroads' grade crossing accident reports attributed over 90 percent of the collisions that occurred from 2000 through 2004 to motorists, but FRA did not conduct its own investigations to verify the causes. Independently collecting and analyzing information about grade crossing collisions would substantially improve the FRA's ability to determine the causes of grade crossing collisions and better target collisions that should be investigated further. The collection and analysis of this information is especially important given the limited resources of the FRA's inspection staff. Nationwide, 55 of 421 FRA inspectors are assigned to inspect the 63,387 warning signal systems at grade crossings.

The low-level of FRA inspectors combined with the extensiveness of the U.S. railroad system limits the FRA's ability to investigate each accident or incident and inspect each railroad and mile of track. In 2004, the Federal Aviation Administration (FAA) conducted on-site investigations of 1,392, or 93 percent, of the 1,484 general aviation accidents that the FAA had responsibility for investigating in 2004. Unlike the FRA, however, the FAA has an Office of Accident Investigations staffed with 8 full-time investigators whose mission is to detect unsafe conditions and trends and to coordinate the process for corrective actions. In addition, the FAA uses personnel from other disciplines to conduct investigations, including 2,989 inspectors from its Office of Aviation Safety.

The Inspector General also found that the FRA investigated few accidents (it investigates two-tenths of one percent of all railroad operations, according to the Government Accountability Office) and recommended few findings of violations for critical safety defects identified through inspections. From 2002 through 2004, for example, FRA inspectors identified 7,490 critical safety

defects out of 69,405 total safety defects related to automated grade crossing warning signals. Yet, FRA recommended only 347 critical defects, or about 5 percent, for findings of violations that carry a fine. According to the Inspector General, the FRA's policy of inspectors using their discretion in deciding whether to recommend a violation has resulted in a small number of critical defects recommended for violations. Furthermore, after violations are determined, Federal law allows the FRA to negotiate-down the amount of civil penalties proposed, resulting in the collection of lower penalties, despite the many critical safety defects found. According to the Inspector General, on average, the FRA settles fines with the railroad at about 60 cents on the dollar.

Since the release of the Inspector General report, the FRA has taken a number of actions to improve railroad reporting, investigate the information that is reported, and issue higher penalties for grade crossing violations. The Inspector General has tracked the FRA's progress in this area, and is expected to testify on any further developments in this area. The Inspector General is also expected to discuss a second grade crossing audit, which is scheduled to be released prior to the hearing.

WITNESSES

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**Mr. Dan Pickett**
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Brotherhood of Railroad Signalmen

**Mr. Edward Hamberger**
President and Chief Executive Officer
Association of American Railroads

**Mr. Martin Durbin**
Managing Director, Federal Affairs
American Chemistry Council

# HEARING ON RAIL SAFETY LEGISLATION

**Tuesday, May 8, 2007**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON RAILROADS, PIPELINES AND HAZARDOUS MATERIALS
*Washington, DC.*

The Subcommittee met, pursuant to call, at 2:00 p.m., in Room 2167, Rayburn House Office Building, the Honorable James L. Oberstar [Chairman of the Subcommittee] presiding.

Mr. OBERSTAR. The Subcommittee on Railroads, et cetera, will come to order.

I am substituting today for Subcommittee Chairwoman Corrine Brown who had an emergency and left this morning for Florida to attend to her grandmother who has been taken seriously ill. I know Corrine is a very strong family person and she wants to be there. So the Subcommittee will have to do with the gentleman from Minnesota.

I welcome the gentleman from Pennsylvania, Mr. Shuster, who has a long and abiding interest and very strong interest in railroads in his own district and from his service on the Committee.

I ask unanimous consent at the outset of the hearing for Members of the Full Committee, Mr. Higgins, Mr. Salazar, and Mr. Arcuri to participate in the Subcommittee hearing and to ask questions after the duly constituted Members of the Subcommittee have completed their rounds of questioning.

Is there objection?

Without objection, so ordered.

We are here to consider rail safety legislation including the bill that Subcommittee Chairwoman Brown and I introduced last week. The Administration has its own measure, H.R. 1516, and the Ranking Member of the Full Committee, Mr. Mica, and the Ranking Member of the Subcommittee, Mr. Shuster, have developed their own proposal and circulated it for comment. Of course, any aspects of those proposals are available and focus discussion at the Subcommittee hearing today.

Frankly, safety legislation is long overdue. Congress last authorized the FRA in 1994, authorization that expired in 1998. The Committee on Transportation and Infrastructure has not ignored the issue and over the intervening years has held 22 hearings on rail safety.

One of those I recall was a very pointed, a very harsh hearing with the then Administrator Jolene Molitoris in which in a particu-

larly sharp exchange I said, well, then get about the business of improving rail safety.

And they did. Actions were taken within the Federal Railroad Administration, with the railroads and with the railroad brotherhoods.

In the first four months of this Congress, we have had four hearings on rail safety, one of which was a field hearing in San Antonio. The time has come to take action to move through the Subcommittee and Full Committee process, a rail safety bill.

The Federal Railroad Administration reports the number of train accidents, including collisions and derailments, has gone from 2,504 in 1994 to 3,325 in 2005. Last year, that number was down to 2,835. That is good news. That is improvement, but it has a long way to go.

Forty percent of train accidents, the FRA reports, are the result of human factors. One in four of those results from fatigue.

Fatigue, I have often called the silent killer or put differently by Vince Lombardi when he was coaching the Green Bay Packers, fatigue makes cowards of us all. He didn't mean it in the sense of people who are fearsome or fearful or cowardly but rather, as he said, it makes you lose your timing, lose your sense of direction, lose your sharpness and your perceptiveness.

The NTSB put it differently: "The current railroad hours of service laws permit and many railroad carriers require the burdensome fatigue-inducing work schedule of any Federally regulated transportation mode in this Country."

Comparing the modes is a very revealing exercise. An airline pilot can work up to 100 hours a month. Shipboard personnel at sea can work up to 240 hours a month. A truck driver can be on duty up to 260 hours a month. Train crews can operate a train up to 432 hours a month. That is 14 hours a day, if you go to that number, for 30 days.

There is, I think, widespread agreement—even the railroads will grudgingly acknowledge—that, yes, something ought to be done about hours of service. They certainly disagree with us on what and how far to go. But in consideration that there is 40 years since really substantial changes have been made, we ought to do something.

In previous Congresses, I introduced legislation to strengthen the hours of service laws for the rail sector, and the Association of Railroads resisted it. Their view consistently has been that that ought to be dealt with at the collective bargaining table.

I don't think so. Safety is a matter of public interest. Public interest overrides whatever may, in this arena, be negotiated at the bargaining table.

I recall a visit to one of the paper mills in my district, and some of the younger workers had, not in the collective bargaining agreement but in a verbal agreement with plant management, signed up for four twelve hour days and then a four day weekend.

I asked one of the senior workers, some guy who had been in the plant for 38 years. I said, what do you think about that?

He said, well, I know this. I don't want to be standing alongside one of those guys next to this vat and he does something stupid and I wind up in the vat because he is stretched too thin.

You don't have a right to endanger yourself or anyone else in the workplace.

The legislation that we introduced requires Class I railroads to develop and submit to the Secretary a plan for implementing a positive train control system by 2014. We are not saying do it tomorrow. We are giving them a considerable amount of time.

But that proposal has been on the NTSB's list of most wanted safety improvements since it was developed, since the technology was developed in 1990. Before we scheduled the hearing, I asked NTSB to search their records and provide us information on how many accidents in the past decade would have been prevented with positive train control in place. The answer: 52 such accidents.

There is always the concern by industry, if you make us do this. I have heard it in aviation for years. If you make us do this, it is going to cost a lot of money. We pay a lot more money for fatalities.

We also address track safety in the bill. In 2006, track-related accidents surpassed human factors-related accidents as the leading category of all train accidents. In Oneida, New York, Pico Rivera, California, Home Valley, Washington, Minot, North Dakota, Nodaway, Iowa, they all raise serious concerns about the condition and about the safety of track on the Nation's railways.

On April 18, as a result of the Oneida accident, FRA did an audit of CSX tracks in upstate New York and found 78 track defects and one serious violation.

We need to strengthen safety at the grade crossings, an issue this Committee has dealt with for many, many years. I remember my former colleague from Northwestern Minnesota, Arlen Stangeland, a Republican who advocated for funding out of the Federal Highway Program to separate rail grade crossings. It goes back years.

The DOT Inspector General says the railroads are still not reporting grade crossing collisions and injuries. They are not reporting them sufficiently to the FRA. Twelve railroads, according to the IG, failed to report 139 collisions within 30 days after the end of the month in which the collision occurred, and some were three years late.

The FRA and the States use that information to find the dangerous crossings, to analyze accident trends and to take appropriate action. We have got to have information. That information has to be reported. It has to be available.

The Inspector General says in 2006, FRA found an unusually low number of accidents for grade crossing collisions involving a Class I railroad when the train and/or motor vehicle was traveling in excess of 35 miles per hour. No injuries were reported for 154 collisions. Those grade crossing injuries were down in 2006, but if no injuries were reported for 154 collisions and that was just for one railroad, maybe the actual number went up.

It reminds me of a period in 1985-1986 when the FAA told Congress and told the public that near mid-airs were down. We checked with the NTSB, Mr. Rosenker, and the NTSB at the time said, oh, no, they are up.

We checked with hotline for reporting anonymously and found they were double. Something is wrong here. So we held hearings on the subject of near mid-airs and found there was a vast dis-

parity between what the airlines were reporting and what was happening in the air. So we have the same situation with what is happening on the rails.

The FRA relies on just 421 federal safety inspectors and 160 State inspectors to monitor safety compliance. Our bill will increase the number to at least 800 over the next four years. That is a good start and a better start is these hearings.

I yield to the gentleman from Pennsylvania, Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman. It is good to have you here with us today.

Also, I found out this morning that Chairwoman Brown's grandmother is gravely ill in Florida. So I just want to offer my thoughts and prayers to her and her family. I hope their grandmother has a speedy recovery.

Today's Committee hearing is the fourth hearing we have had on rail safety this year, as the Chairman pointed out. I believe over 20 hearings in the last 10 years.

The message that I get and the facts that I see are that the rail industry is safer than it has ever been when you put it in the context of although there have been increases and decreases in the various accidents but when you look at the significant expansion on the miles that are put and the cargo that is carried. When you put that in context, it is a safer industry today than it was last year and the year before and the year before.

The final statistics of 2006 show that it was the safest year on record in the rail industry. Nationally, accidents decreased 12.4 percent, and Texas led the Nation with 51 fewer train accidents. Accidents caused by human error, the leading cause of all train accidents, declined by over 20 percent in 2006.

But while the rails may be safer than ever, there is still much that we can do and must do. Last week, Chairman Oberstar filed a Rail Safety Reauthorization bill and, as many of you know, I have been circulating my own draft for the past several weeks, trying to get comment and work through to put together a bipartisan piece of legislation which I hope we can and I believe that there is common ground for all of us to work together on a rail safety bill.

As we move ahead with a rail safety bill, one of the most important issues is unfunded mandates. If we impose new costs on the railroads, these costs ultimately are passed to customers and consumers who already are suffering the effects of fuel surcharges and other rate increases.

The rail industry is currently spending about $10 billion a year, providing new track capacity. This is all private capital, and the investors expect a reasonable return. New and unfunded government mandates could sap money from the railroads' infrastructure expansion programs and further increase congestion on our rails.

I have read the Brown-Oberstar bill, and it has some very good points. For example, I agree that we need to make changes in the hours of service law. I also like the idea of developing model State legislation for grade crossing violations.

We have not had much time to discuss the actual text of the rail safety bill, so I am glad that we are having today's hearing. I hope

that we can continue to work together and, in the next few weeks, develop a truly bipartisan rail safety bill.

I am looking forward to this most informative hearing today.

I yield back.

Mr. OBERSTAR. I thank the gentleman for his comments.

Of course, the purpose of introducing the bill is so it will be available. It is a culmination of—a compilation more than a culmination—a compilation of many of the pieces of rail safety legislation I have introduced over past years and certainly it will be available during this hearing, afterwards and then we will continue internal discussions in the Committee and work toward consensus legislation as far as we possibly can.

Do other Members have comments?

Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chair.

You have heard many of my comments before in regard to rail traffic in my area because of the Alameda Corridor East which has extensive and heavy use and will be increasing in the next few years. Currently, there is 150 trains through my district every day. It probably will double, triple with the transfer of the rest of the U.S. goods. Forty, forty-five percent of the Nation's goods go through my area.

The reason I am concerned is I was wondering if FRA can make stronger regulations for rail inspection for the maintenance for the hazmat cars because a lot of what will go through in my district is going to contain hazardous material and it is all highly populated. Los Angeles County has roughly 10 to 12 million residents, depends on who you ask. We have a very, very populated area. So it is a concern in regard to that.

The other concern is the railroads have had an Operation Lifesaver which could help inform and educate children and schools about rail safety, and this was put into effect, I guess, some time back and utilized in one of my schools and then dropped because apparently it operated under volunteer staff. I am wondering whether you feel that FRA would be able to create such a program within FRA to be able to be uniform in educating the general public and children about delivering this lifesaving message of safety in vigilance around the railroads.

Those two questions right off the bat to Mr. Boardman.

Mr. OBERSTAR. We are not in the questioning period.

Mrs. NAPOLITANO. Oh, I am sorry.

Mr. OBERSTAR. We are not at the questioning point.

Mrs. NAPOLITANO. I am trying to get ahead of the game here.

Okay, well, actually in the 2095, there are a lot of provisions that I am very, very happy with, and it does improve a lot of the whistleblower protections, the fatigue and enforcement, et cetera.

Again, because of the heavy use in my district, it is a very big concern, and I certainly want to thank Chairwoman Brown and Chairman Oberstar for putting this piece of legislation together, and I look forward to working with you.

Mr. OBERSTAR. Mr. Cummings?

Mr. CUMMINGS. Thank you very much, Mr. Chairman. Mr. Chairman, I do thank you and Ms. Brown for calling this hearing today.

I think the thing that I am most concerned about is that I want to make sure that we make it happen. Mr. Chairman, as you well know, it has been a while since we last reauthorized the Federal Railroad Administration back in 1994, and that expired. That authorization expired in 1998.

I think that the thing that I am concerned about is the urgency of making it happen. I have read the legislation, your legislation, Mr. Chairman, and it seems to address all the issues in a very practical and reasonable way.

I realize that here on the Hill so often what happens is that folks get into a battle over a lot of the small things but forget the big picture, and the big picture is about safety. I think Mrs. Napolitano, in her zeal to get to the questions, pretty much said a lot of what I feel.

We have got trains going through some very dense areas like the City of Baltimore. When I read that either the number one or number two cause of train accidents is defective tracks and then we look at the situation with regard to how those tracks are inspected and then we think about hazardous materials spilling as a result of a train accident in my city and bringing life as we know it to a halt, I think that this a very urgent matter.

I know, Mr. Chairman, in my working with you as the Chairman of the Subcommittee on the Coast Guard, I know how determined you are to make it happen. We will make it happen, and we will make it happen in a way that is good for the people of our Country, good for the rail industry and good for the passengers and freight haulers in the United States.

Like I said, I will submit a longer statement, Mr. Chairman, but I want to thank you again for your leadership. Thank you and Ms. Brown for producing such a comprehensive bill.

With that, I yield back.

Mr. OBERSTAR. Mr. Higgins?

Mr. HIGGINS. Thank you, Mr. Chairman.

I reluctantly would support an additional regulation of the railroads but for the fact that if industry fails to regulate itself to ensure the safety of its track bed, in this case, the railroad industry, it is the moral obligation of government to regulate.

Despite some figures with respect to improvements and uptick in rail safely, it is not true in all areas of the Country. I represent an area in Buffalo, New York. It is a northeastern region area that is subject to harsh weather and an aging infrastructure. Western New York rose up as a great transportation hub, and the rail network remains extensive and fundamentally important to Buffalo and western New York.

Over the past 10 years, 166 derailments in Erie and Chautauqua County, 73 of which were due to track defect. Over the past three years, 47 derailments, 20 due to track defect. This record is unacceptable. I would submit that if the major rail companies, CSX, fail to regulate their industry to ensure public safety, it is Government's responsibility to do it.

Recent derailments in western New York in December, trains derailed on overpasses in Chateaugay and Buffalo, New York on consecutive days. In April, seven cars spilled coal near Dunkirk, New York.

I asked the Federal Railroad Administration and Administrator Joe Boardman responded, but because of a lack of resources, they were only able to inspect certain areas, not able to do a comprehensive inspection throughout the two county area. The lack of Federal Railroad Administration resources to inspect a two county targeted area is unacceptable.

I am pleased with the legislation that Chairman Oberstar and Chairwoman Brown have introduced that will nearly double the number of inspectors and provide equipment the Federal Railroad Administration needs to conduct inspections in areas, particularly vulnerable areas like Buffalo and western New York.

Thank you, Mr. Chairman, for your leadership on this issue, and I will submit my further remarks into the record.

Mr. OBERSTAR. Without objection, complete remarks will be accepted for the record.

The Chair recognizes the gentleman, Mr. Arcuri.

Mr. ARCURI. Thank you, Mr. Chairman. I would like to thank the Chair and the Ranking Member for giving me an opportunity to sit in on this hearing today.

I would also like to thank our panel for being here including my former constituent, Mr. Boardman. Thank you very much for being here.

I would like to lend my support for the Federal Railroad Safety Improvement Act. This bill will improve the state of our Nation's railroads and help minimize the number of future accidents, collisions and derailments.

This bill will, among other things, ensure tougher requirements are placed on railroads to decrease fatigue among train crews and increase civil and criminal penalties for railroad companies that fail to comply with safety standards.

The bill also provides funding for new track inspection equipment and increases the number of Federal Rail Safety Inspectors on hand that will identify problems and help minimize accidents.

As the Chairman referred to, recently on March 12th, 28 cars of a CSX freight train derailed in Oneida, New York, which borders my district and was a mere two miles from Sherrill, New York, a city in Oneida County which I represent. Several of those cars contained chemicals such as ferric chloride which posed a grave health risk and required many people to be evacuated.

Thankfully, no injuries or fatalities were the consequence of this disaster. However, the safety and comfort of people close to the accident was deeply affected. Additionally, the derailment caused the New York State Thruway, the main east-west thoroughfare in New York, to be shut down for several hours.

My colleague whom we just heard from, Mr. Higgins, who is a bit further down on this line, knows all too well how critical to make sure our freight and passenger railroads are compliant with safety requirements. As he indicated, the numerous derailments in western New York over the last two years and now the Oneida incident is very alarming and raises many red flags about the state of New York's rail infrastructure.

While this concern continues to trouble the people of New York, a private company is seeking to build a 190-mile high voltage line from the town of Marcy in Oneida County down to New Windsor

in Orange County. The company estimates that more than 90 percent of the proposed primary and alternative routes will follow existing right-of-ways, both along railroad tracks and natural gas lines. The transmission line would consist of 135-foot tall towers and be operated with a rated power flow of 1,200 megawatts.

A portion of the proposed route follows the New York Susquehanna and Western Railway right-of-way, a very active rail line which runs through some of the more heavily populated cities and towns in upstate New York.

This is a situation where the safety implications and risks are unknown. Imagine if a derailment occurred and the train struck these high tension lines.

The well being of my constituents and the safety of New York's railways is a top priority for me as a Member of the Transportation Committee. I have already called on the Department of Homeland Security and Transportation to conduct an assessment of the safety and security vulnerabilities of placing high voltage direct current electric transmission lines along active railroad rights-of-way.

However, I want my colleagues to know this is not only a concern for New York State. The Department of Energy recently announced the proposal for two national interest electric transmission corridors designating, affecting 11 States and the District of Columbia. Parts of New York, Virginia and Pennsylvania in particular are faced with the possibility of having more major power line projects forced upon them due to this designation.

As a result, many communities across the County will now have to worry about the safety and security concerns of setting these power lines along railroads that currently are in violation of safety standards. It is an issue that should be of concern to all.

I look forward to working with the Chair and my colleagues to continue to shed light on this troubling development and to ensure that this critical legislation is quickly considered before the Full Committee.

I thank you, and I yield back the balance of my time.

Mr. OBERSTAR. The gentleman from Colorado, Mr. Salazar.

Mr. SALAZAR. I want to thank you, Mr. Chairman. I want to thank you for allowing me to attend this important hearing. While I am not a Member of this Subcommittee, I have a vested interest in the Federal Railroad Safety Improvement Act.

I believe that this bill addresses many important issues that have been ignored for far too long, but I am here today to speak about one provision that authorizes funding for a tunnel to be built in the Transportation Technology Center, an internationally recognized train testing facility. This facility is located in Pueblo, Colorado.

TTC is used by the Federal Railroad Administration to conduct significant research and development on rail safety. TTC offers 48 miles of railroad test track to test rolling stock, track components, signal and safety devices, track structure and vehicle performance. It also has several one of a kind laboratory testing facilities used to evaluate vehicle dynamics, structural characteristics and advanced braking systems.

TTC already operates a world class research and test center offering a wide range of capabilities in railroad and transit research.

For the past two years, I have been working to get funding for the facility for an underground rail station and tunnel. The tunnel will add to the center's capabilities and serve as an invaluable resource as we strive to ensure our Nation's railroads are safe and secure as possible.

Recent events have sadly demonstrated the vulnerability of underground mass transit systems. Safety experts have identified a number of technology and training needs to prevent attacks on tunnels and to lessen the consequences of such attacks.

Technological needs include detection systems, dispersal control and decontamination technologies. The distinctive remote environment of TTC allows such testing and training activities to be carried out at this secure location without disruption of the flow of passenger rail traffic in and out of urban areas.

I applaud Chairman Oberstar and Chairwoman Brown for recognizing the important role of such a tunnel and what it will play in the safety of railways.

Last year, Chairwoman Brown and Chairwoman Johnson and Secretary Mineta and Mr. Petri from this Committee accompanied me for a tour at the TTC center, and I would encourage the Chairman of the Full Committee, Mr. Oberstar, to do as well and other Members. I would sure appreciate if you could see the abilities and the capabilities that we have at this center. It is one of its kind. There is not another one of its kind in the world.

I believe that this bill is long overdue, and I look forward to today's hearing and the witness testimony.

Thank you. I yield back.

Mr. OBERSTAR. I thank the gentleman for his comments, and I certainly do look forward to getting out to view your center and see its operations.

The gentleman from New York, Mr. Nadler, do you have a comment?

Mr. NADLER. Thank you, Mr. Chairman. I would like to thank you and Chairwoman Brown and Ranking Member Shuster for holding this hearing regarding rail safety legislation.

I would also like to welcome Mr. Boardman who was our State Transportation Commissioner in New York under Governor Pataki. For years, he has heard me talk ad infinitum, perhaps ad nauseam, about rail freight issues, so I always look forward to his testimony as Administrator of the FRA.

I have been a long time supporter of preserving this Country's rail infrastructure. We spend tens of billions of dollars every year on highways and aviation, a lesser amount on passenger rail and virtually nothing, virtually no government funding on rail freight. I hope that this Committee will eventually find a way to increase funding for freight rail capital improvements, so that we can increase capacity.

But to do so, we also need to ensure that rail continues to be one of the safest modes of transportation. Although rail is one of the most energy efficient and secure modes of transportation, there were over 2,800 train accidents last year. Most of these accidents were caused by things that are preventable. Over 1,000 were a result of track defects and another 1,000 were caused by human factors, chiefly fatigue.

This Subcommittee has held several hearings over the years on rail safety including three hearings last year and four earlier this year. It seems to me we have held enough hearings and it is time to begin moving legislation.

I am glad that Mr. Oberstar and Ms. Brown have introduced the Federal Railroad Safety Improvement Act, H.R. 2095, to address the main causes of rail accidents. Among other things, the bill includes hours of service reform that is desperately necessary to address fatigue, and it provides funding to double the number of track inspectors and to purchase equipment that can detect track defects.

I look forward to hearing from the witnesses today, particularly as it pertains to this legislation, so that we can finally take adequate action to address rail safety.

Thank you, Mr. Chairman. I yield back.

Mr. OBERSTAR. The gentleman from Iowa, Mr. Boswell.

Mr. BOSWELL. Just very briefly, again, I associate myself with what Mr. Nadler just said.

Just looking over some of the information that has made available to us, when you look at some of the information from the Safety Board which we will hear from here shortly and compare the hours that are required and put upon people that work the rails, it is revealing. It seems to me like this needs some consideration.

I think in terms of what is according to the NTSB, a commercial airline pilot can work up to 100 hours a month jetboard. It says 240. A truck driver can be on duty up to 260. Train crews operate a train up to 432. Now if that would be what they do every day, that would equate to 14 hours a day for 30 days.

So I think this discussion needs to take place and some action is needed. I appreciate the time, and I will yield back and listen to the discussion.

Mr. OBERSTAR. I thank the gentleman.

Now we look forward to testimony from our panel: Mr. Boardman, Mr. Rosenker and Mr. Hyde. I am anxious to hear Mr. Boardman defend the Administration's bill.

**TESTIMONY OF THE HONORABLE JOSEPH BOARDMAN, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION; THE HONORABLE MARK ROSENKER, CHAIRMAN, NATIONAL TRANSPORTATION SAFETY BOARD; KURT W. HYDE, ASSISTANT INSPECTOR GENERAL FOR SURFACE AND MARITIME PROGRAMS, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF TRANSPORTATION**

Mr. BOARDMAN. Before I do that, with the indulgence of the Chair.

Mr. OBERSTAR. Yes.

Mr. BOARDMAN. I would like to correct the record.

Michael, I am still your constituent.

Michael's father, Carmen, and I were good friends. I would like you to know, God rest his soul, that Carmen is no longer with us but was also a member of the Public Transportation Safety Board in New York, a very committed safety individual. So I am glad to be here, Michael.

Thank you for your indulgence.

Mr. Oberstar, Ranking Member Shuster and Members of the Subcommittee, I am pleased to be here today on behalf of the Secretary of Transportation to discuss our proposed rail safety legislation, and I look forward to working with the Committee.

On the Administration's rail safety bill, I also appreciate the fact that you entered that bill for us.

I would like to talk just about two things today in that bill: authorizing the Safety Risk Reduction Program and protecting its confidentiality.

I believe that the strongest argument for the FRA to exist is that it is the FRA which is expected to stand in the shoes of all those people that live, work, or have need of being within the vicinity of a main line railroad track. I believe it is the FRA that is expected to balance an equation that does not have proper third-party risk calculated today.

I believe that railroads have miscalculated that risk equation in not ending main track, track-caused derailments. Railroads must do better, and they can.

Before I came down here from New York two years ago, and since I have been here, I have referenced the work of Ian Savage in a book entitled the Economics of Railroad Safety. It was written at the request and the support of the AAR. It is a good book in helping to understand the many economic issues around railroad safety, but I have decided that it has it wrong when it comes to what is called railroad myopia in the book.

"The nature of the market for safety makes myopic Behavior possible. The costs of preventive effort are borne in the present whereas accident costs including liability to customers and bystanders occur at random times in the future."

The author goes on to argue that really the only two failures that exist out there today are those railroads that are inexperienced, and therefore do not understand what they must do, or the unscrupulous behavior by a railroad that reduces costs for today's gain, gambling that a random event will not occur in their future.

What I find wrong here is that these events do not happen at random times in the future. They happen because trains derail or collide. Nearly three-quarters of the time, it happens as a result of track failure or human failure, and data shows that it is not random. It is predictable.

These events will continue to happen and may happen more frequently unless the railroads embrace a new cost factor in their risk equation that significantly reduces the probability of track-caused, main track derailments and human factor-caused events, especially by fatigued rail employees. The railroads are very aware of these costs, and they could wipe out their business as a result of the lawsuits and damages that occur with main line derailments.

To be fair, they are doing what they believe they need to do to make improvements, but it is not enough because the public does not believe it is enough. Those third parties that live, work, or have occasion to be near a railroad say they want trains to stay on the tracks.

The FRA has worked with industry in developing PTC, electronically controlled pneumatic brakes, continuous welded rail, rail integrity, rail flaw detection, track geometry standards, ground

radar, real time track measurement, automated joint bar inspections, WILD systems, which are wheel impact detectors, and acoustic bearing sensors.

It is about the track, and it is about technology—track that needs to be maintained at higher levels than minimum standards, and technology that needs to be deployed and used on both track infrastructure and equipment to reduce the probability of derailment. Together, they reduce risk.

Some of our railroads today are embracing this risk reduction strategy. Some use the latest available science to improve track and equipment maintenance. But some have been slow to embrace that science, and all can do better.

Human factors cause more than a third of all train accidents, constituting the largest category of train accident causes, and fatigue is at least a contributing factor in one of every four serious, human-factor caused accidents. We believe that fatigued crew members have played an increasing role in railroad accidents over the past decade through poor judgment, miscommunication, inattentiveness, and failure to follow procedures.

Our challenge is to ensure that crew members have adequate opportunity to rest, are free of disorders that can disrupt sleep, and are fully engaged in maintaining alertness.

With your indulgence, 100 years is long enough. It is time to make sure that we have people operating trains that are not subject to cognitive failure that causes catastrophic accidents as a result of fatigue.

Congress created the FRA 40 years ago to ensure railroad safety. Congress needs to delegate, trust, and verify that its creation will end this dangerous problem with both reasonable and enforceable regulations that use the best science available today. It is about time on duty. It is about total time. It is about limbo time and, most importantly, it is about rest time.

With your delegation and support, the FRA will use the latest science in a collaborative fashion with our well respected RSAC process to develop the right solution, and we will update that solution as the science improves or as we find a need to do so without passing a statute. These folks, those folks that live, work, and have occasion to be within the vicinity of a main line railroad track think it is about time.

Thank you.

Mr. OBERSTAR. So do we. Thank you, Mr. Boardman.

Mr. Rosenker?

Mr. ROSENKER. Good afternoon, Chairman Oberstar, Ranking Member Shuster and distinguished Members of the Subcommittee. I would like to thank you for inviting me to testify on rail safety issues that are being considered today in the proposed rail safety legislation and for your continued interest in furthering the safety of our Nation's railways.

Let me begin by addressing the decades long history of fatigue-caused railroad accidents and the frustration we share with the FRA regarding its lack of legislative authority to address the root causes of fatigue.

The earliest railroad accident in which the Board attributed fatigue to the probable cause of the accident was a collision between

two freight trains in Wiggins, Colorado in 1984. Fatigue accidents have continued unabated such as the collision between trains at Anding, Mississippi in 2005 and Macdona, Texas in 2004.

In Anding, both crew members typically worked six days a week, 11 to 12 hours each day. They were working the sixth consecutive day when the accident occurred. In Macdona, we found that the crew members failure to obtain sufficient rest before reporting to duty and the railroad's scheduling practices both contributed to the accident.

Proposals being considered for legislation this year address specific elements of employee fatigue. However, we believe that a comprehensive fatigue management program is needed that considers scientifically-based principles when assigning work schedules; these principles include factors that influence acute and cumulative fatigue, the body's ability to adjust to rotating schedules and the responsibility of employees to get sufficient and timely sleep during their off duty periods.

We believe that the best means to achieve this result is through regulations promulgated by the FRA that can only be modified as industry conditions evolve.

My next topic addresses positive train control systems. Technological solutions, such as positive train control systems, have great potential to prevent serious train accidents by providing safety redundant systems to override mistakes by human operators. PTC has been on the Safety Board's most wanted list of safety improvements for 17 years.

In the past 10 years, the Board has investigated 52 rail accidents including 4 transit accidents where the installation of positive train control would likely have prevented the accident. Although we are encouraged with progress underway by some railroads, we believe that positive train control systems are needed on all railroad systems across the entire United States.

My next topic addresses improperly positioned switches. One of the most serious train accidents occurred in Graniteville, South Carolina in 2005. A train encountered an improperly aligned switch that diverted it from the main track onto an industry track where it struck a parked train. The track through Graniteville was dark territory.

Later in the year, a train encountered a siding at Shepherd, Texas and struck a parked train again in dark territory.

The Safety Board first addressed this issue in 1974 after an accident in Cotulla, Texas. A safety recommendation to the FRA to address the safe train speed in dark territory was later closed as unacceptable.

The Board believes that automatically activated devices are needed to visually or electronically capture the attention of employees involved in switch operations in dark territory and clearly convey the status of the switch. In the absence of automated switch systems that provide train crews with advance notice of switch positions in dark territory, trains should be operated at speeds that will allow them to be safely stopped in advance of misaligned switches.

Additionally, the most expedient and effective means to reduce public risk from highly poisonous gases in train accidents is

through operational measures such as positioning tank cars toward the rear of trains and reducing speeds through populated areas.

Finally, a proposal for Rail Passenger Family Disaster Assistance mirrors the Aviation Disaster Family Assistance Act of 1996. We believe this legislation would be beneficial to victims and their families, following a rail disaster.

The Board, however, has two concerns. The first is clarification of our responsibilities to victims in accidents where the Board is not launching an investigative team and, second, this legislation would present a significant demand on our already stretched resources.

In closing, I would like to acknowledge that in our review of the proposed legislation, many of the Safety Board's previously issued recommendations on rail safety have been addressed, and we appreciate this Committee's interest in our safety concerns.

Mr. Chairman, I would be happy to respond to any questions.

Mr. OBERSTAR. Thank you very much, Mr. Rosenker, for your very frank and straightforward testimony. You know in what high regard I hold the NTSB and have done for many years.

Mr. ROSENKER. Thank you, Mr. Chairman. I appreciate that.

Mr. OBERSTAR. Mr. Hyde, we look forward to your testimony that you have from the Inspector General.

Mr. HYDE. Thank you, sir. Chairman Oberstar, Ranking Member Shuster, and Members of the Subcommittee, thank you for the opportunity to testify today as you consider legislation to reauthorize the Federal Railroad Safety Program.

On May 7, 2007, we released our fourth report on grade crossing safety. We found that FRA can do more to improve grade crossing safety by ensuring compliance with its mandatory reporting requirements for crossing collisions. Additional effort is also needed to address sight obstructions blocking the driver's view of approaching trains.

My testimony today is based on our body of work on grade crossing safety. We have identified five actions that railroads and FRA can take to reduce grade crossing collisions and fatalities. These are areas that you may wish to examine as you evaluate current legislative proposals.

First, compliance with mandatory reporting requirements. Railroads are charged with two distinct reporting requirements when a grade crossing collision occurs. First, an immediate call within two hours to the National Response Center for all serious collisions, to determine whether a Federal investigation at the accident scene is needed. Second, within 30 days of the end of the month in which the collision occurred, the railroad must report every grade crossing collision to FRA.

Timely and accurate reporting of collisions is essential to identifying dangerous crossings and emerging accident trends. More can be done to ensure compliance with both of these reporting requirements.

In November 2005, we reported that railroads had failed to notify NRC immediately in 21 percent of serious collisions; most of these involved fatalities or multiple injuries. Our May 2007 report also cited concerns with another requirement, noting that railroads

failed to report to FRA 139 collisions timely, with some being nearly three years late.

Because FRA did not routinely review grade crossing collision records maintained by the railroads, it does not know whether some 15,000 collisions reported by the railroads between 2001 and 2005 include all collisions that occurred.

FRA has begun reviewing collision records maintained by the railroads. These reviews are intended to determine whether grade crossing collisions are being properly reported. The Subcommittee may wish to require that FRA periodically report the results of these reviews.

Two, increasing FRA involvement in collision investigations. FRA's 385 inspectors cannot physically examine every grade crossing collision. Instead, the Agency relies on railroad self-reporting.

To better evaluate the causes of collisions and railroad compliance with Federal safety regulations, we recommended that FRA broaden its review of railroad-reported information. FRA has just completed a one-year pilot program to collect and analyze independent information. FRA should report the results of the study as soon as possible.

Three, addressing sight obstructions. It is hard to steer clear of a train you can't see, especially at the 76,000 public crossings that do not have automatic warning lights or gates. Obstructions, such as overgrown vegetation as illustrated in my written statement, can significantly reduce visibility. For example, between 2001 and 2005, obstructions were present in 689 collisions in which a total of 87 people died and 242 were injured.

As of this past March, only 13 states had laws regulating sight obstructions, and these varied widely. FRA should work with the Federal Highway Administration to develop model legislation for states in this area.

Four, establishing mandatory inventory reporting requirements. FRA's National Grade Crossing Inventory System identifies grade crossings and the types of warning devices installed. The accuracy and completeness of this inventory are essential because states rely on it to prioritize safety improvements.

Voluntary reporting by railroads and states has not been successful. We found that 36 percent of public grade crossing records have not been updated since 2000. We believe that mandatory reporting should be required.

My final point is requiring action plans for the most dangerous crossings. We have recommended that FRA identify states having the most dangerous crossings—those with the most accidents year after year—and develop with those states, action plans identifying specific solutions for improvement.

In March 2006, FRA completed its first such plan with Louisiana. Officials acted to improve safety at 73 percent of the crossings with more than one collision. FRA is now working with Texas in a similar effort. The Subcommittee may wish to require action in other states with high numbers of grade crossing collisions.

Chairman Oberstar, we will work with FRA as it focuses on these areas to make railroad crossings even safer.

This completes my prepared statement, and I would be happy to respond to any questions from you or the other Members of the Subcommittee.

Mr. OBERSTAR. Thank you very much, Mr. Hyde. We greatly appreciate the work of the Inspector General over many years. In combination with the work of the National Transportation Safety Board, it is an extraordinarily valuable asset for public understanding of the conduct of the affairs and responsibilities of the many modes of the Department of Transportation.

Mr. Rosenker, are you familiar with flight time and duty time in the aviation sector?

Mr. ROSENKER. I am, sir.

Mr. OBERSTAR. Distinguish those two.

Mr. ROSENKER. We are talking about flight time that is actually calculated from the moment that the aircraft pulls away from the gate. That amount would be at a maximum of 100 hours a month that we are talking about.

Mr. OBERSTAR. From the time of release of the brake?

Mr. ROSENKER. Yes, sir.

Mr. OBERSTAR. When does it end?

Mr. ROSENKER. It ends when it comes back to the gate and the brake is put on again.

Mr. OBERSTAR. When the brake is applied.

Mr. ROSENKER. Although 100 hours is authorized a month, it is rare that 121 pilots will reach that. They max out at 1,000 a year, so it would normally be somewhere between 65 and 80 hours a month that they are actually operating the aircraft.

But duty time also would include flight planning and travel to and from their place of domicile where they are going to have rest as well.

Mr. OBERSTAR. Pilots and flight attendants are paid for flight time, but duty time is a more encompassing term, is it not?

Mr. ROSENKER. Yes, sir, it is.

Mr. OBERSTAR. Do you know how long it took us to get legislation enacted to limit flight time?

Mr. ROSENKER. Sir, I don't, but I hope you will be able to give me that answer.

[Laughter.]

Mr. OBERSTAR. Fourteen years, 14 years of attempted rulemaking by the FAA, and then it took an action of Congress to get it done.

Now, Mr. Boardman, your delivered testimony was wonderful. I nominate you for FRA. But your prepared testimony falls way short. On page five, your testimony says: Treating limbo time as on duty time would shift the law from a safety frame of reference to a fair labor standards frame of reference.

Now, I just have to observe that if it was good enough for the Catholic Church to eliminate limbo, then it ought to be good enough for the railroads.

Mr. BOARDMAN. You stole my line.

[Laughter.]

Mr. BOARDMAN. The reason that is there is limbo time comes after the train has stopped. In other words, the brake has been set in connection with the aviation example. So the reason that we

would say that is there is because there is no more operating of the train, Mr. Chairman. So it is not a safety issue.

What we don't want to become, nor do you want us to become, is a labor department that looks to see whether there has been a violation by two minutes or five minutes in a non-duty, non-operating situation, sir.

Mr. OBERSTAR. Isn't there analogy between aviation flight time/duty time and duty time and operating/running time on a railroad?

Mr. BOARDMAN. Is there an analogy?

Mr. OBERSTAR. Isn't there?

Mr. BOARDMAN. Yes, there is an analogy in every one of the modes, surface transportation and aviation, all operations.

Mr. OBERSTAR. In this so-called limbo time, the railroad personnel are subject to order of the railroad, are they not?

Mr. BOARDMAN. They are, yes. That is correct.

Mr. OBERSTAR. You cannot be at rest. I remember doing a job in the neighborhood when I was a kid in high school for I won't mention his name because he was pretty much of a taskmaster. He said, say, Oberstar, while you are resting, why don't you pick up that bag of stuff over here and carry it over there?

You are not resting anymore. If you are under orders, you are sort of always on the edge, aren't you?

Mr. BOARDMAN. I understand. I understand the analogy.

I guess the analogy, sir, that I would make is that as a former truck driver, I was either at the wheel or I was on duty but not at the wheel, not driving. My responsibility when I was not driving certainly was not to let the truck roll away or let something happen of a vandalistic nature, but it wasn't my job or duty at that time to drive, and would it become my responsibility, then I would have to go back on the logbook. So the analogy that I see here, to some extent at least, is that what we have is that the time is similarly done.

I do not know under an emergency situation, and I don't pretend to know the depth that my friends behind me, or lack of friends thereof, that are knowledgeable about the railroads could really tell us about what happens after a person or a crew ends their duty time, whether they are asked to do something else, but I believe that is not the intent.

Mr. OBERSTAR. Your written testimony further suggests replacing the hours of services laws with flexible regulations based on modern scientific understanding of fatigue.

I guess that raises the question of whose modern scientific understanding of fatigue we are going to accept and how flexible those regulations are going to be. As I hear from railroad workers, there is way too much flexibility as it now.

Mr. BOARDMAN. I think what it means, Mr. Chairman, is that as a result of the report that we finalized and published on fatigue, and the understanding that aviation and NASA and all have done about fatigue, is we know much more about the circadian rhythms, and the activity—all the things that are occurring to an individual.

For example, and this is a poor example but it is the one that is coming out of my head right this minute, and that is that you may be able to work longer during daylight and during those hours where you are typically and normally awake and be in a better cog-

nitive state than you can be than if you are working a graveyard or middle of the night kind of an opportunity.

So our expectation is in the RSAC process, which is a very deliberative process I can tell you, that we can work through a lot of those issues to try to resolve them and come to a conclusion of what would a Fatigue Management Plan truly look like and what kind of flexibility makes common sense both for the worker and for the railroad, and that is the kind of flexibility that we are really looking for.

Mr. OBERSTAR. Thank you.

Mr. Rosenker and Mr. Hyde, is there limbo time? Is there a counterpart to limbo time in other modes of transportation?

Have you investigated incidents like the Macdona, Texas situation where they expired their hours of service and then were left to wait for transportation back to point of origin for over 10 hours?

Mr. ROSENKER. I don't believe we have any type of similar characterization of limbo time in any of the other modes.

Mr. OBERSTAR. Mr. Hyde?

Mr. HYDE. Sir, I don't have any information at this time about the other modes that have been audited by my counterparts. I will get back to you on that, though.

Mr. OBERSTAR. Mr. Shuster?

Mr. SHUSTER. Thank you, Mr. Chairman.

Mr. Boardman, in the proposal that we put forth-FE and I want to ask all of you this-FE we have put down 276 hours, which according to my research and according to much of the testimony I have heard and talking to people in industry, it is rare somebody is working 432 hours today. Two hundred and seventy-six hours, is that a reasonable number of hours for somebody in the industry to expect to not go over that time according to what you have seen and your understanding?

Mr. BOARDMAN. I think to answer that I would need to know, I guess, over what period.

Mr. SHUSTER. One month.

Mr. BOARDMAN. What we have found in terms of fatigue is that it is a combination of how many shifts are worked. It is also a combination of how much rest you have had before and so forth, and that again is part of, Mr. Shuster, the flexibility issue in terms of looking at a Fatigue Management Plan rather than just doing it on the basis of the number of hours.

Two hundred and fifty hours a month is 3,000 hours a year. A typical year is 2,000 hours, 2,040 hours on an 8 hour day, 40 hour week. So 276 hours—and I won't do the math fast enough,—is somewhere between 3,000 and 4,000 hours a year in which case everybody is then on overtime and probably working at a greater rate than 10 hours a day for a 6 day week. So it depends on how that time comes.

Mr. SHUSTER. Go ahead, Mr. Rosenker.

Mr. ROSENKER. I would have to agree with the Administrator that our recommendation is such that we believe there needs to be a scientific study and analysis done. There have been a great number of studies done on the aviation side.

There is no silver bullet answer that the maximum is this number of hours if we are going to guarantee that someone is rested

and be able to effectively operate a locomotive, for example. So we would believe that it needs to be studied.

A host of issues are involved. It is a complex issue because of circadian rhythms and the schedules that you can bump up to each other. You may start on a day. The next time you start working, you might be starting to work at an odd hour that takes you overnight. That can change the way you are going to get recuperative sleep, restorative sleep.

So we would like to see a method where, in fact, it is scientifically based, the creation of work schedules, rather than just to say 12 hours is the max and if you get 12 hours here, you can do another 12 hour break. Then, of course, you are alert and able to work. That may not be right.

Mr. SHUSTER. Well, that leads me to the next question. What is a reasonable shift for somebody?

In scientific studies, what have you come up based upon what you have seen? Is it a 10 hour shift? Is it a 12 hour shift and then you need 12 hours, 14 hours rest?

Mr. ROSENKER. Again, sir, I hate to be vague about this, but the reality is depending upon how you end up putting the schedules together. If it is going to be, for example, five or six straight days with the same schedule over and over and over again during a day, you can do it longer than you may be able to do it when you intersperse nights and overnights because at that point you haven't been able to change the circadian rhythm. So it has to be done in a scientific way rather than haphazardly.

Mr. SHUSTER. How far off are we from that scientific method?

We have had folks before us, and it doesn't seem to be a whole lot of consensus. That is what you are saying to me now. We are trying to figure that out.

Mr. ROSENKER. We do know. We do know what the problem is today, and that it is unsatisfactory. It has created an environment where human error can occur and as a result of human error, catastrophic accidents. We have seen it in a number of the investigations that we have made.

I would leave it to the professionals that are regulating this industry to come up with the appropriate science to offer that to the industry.

Mr. SHUSTER. Mr. Boardman, do we have that appropriate science to be able to say 12 hours on in daylight, 10 hours at night, how much rest?

Mr. BOARDMAN. I would like to get your focus off the hours. I say that from the standpoint of the flexibility end of this if you are only doing it by counting the hours.

The hours are important. Don't get me wrong. They are important for two reasons, one, in terms of the total number of hours that you really put out there. The unions understand that, and they also understand that the railroad has to operate its business. So if it cuts the hours too short and they can't get to a reasonable terminal, the railroads have to add a whole lot and reduce their profits and reduce the ability to pay the unions. The unions understand that as well, I think.

The reason that we want to get this to the RSAC for is to get at the flexibilities that you are asking about, that the Chairman is

asking about. In some cases, it could be based on hours. Even the railroads today know that. Some of them run seven days on, three days off, and then seven days on. Other ones have straight picks and the same job every day, and they are off on the weekends. There are a lot of variables.

The difficulty with establishing this based only on the statute is that those variables will be impacted all over, and there wouldn't be an ability. Even though you offer, and I recognize that in your bill, Mr. Chairman, the ability to have Fatigue Management Plans. Without any teeth in it, without the ability for the railroad to manage their employees differently for the future, there won't be an effective tool to be used in the future.

Mr. SHUSTER. Thank you.

I see my time is expired. I am outnumbered up here, so I wonder will I have an opportunity. I have a couple other questions, some other things.

Mr. OBERSTAR. I turned the clock off for the gentleman.

Mr. SHUSTER. I appreciate that.

Mr. OBERSTAR. We are going to have a vote, though, I think momentarily here. I will go to other Members, and then we will break for the vote and then come back.

Mr. SHUSTER. Will there be a second chance?

Mr. OBERSTAR. Of course. Of course.

Mr. SHUSTER. Thank you.

Mr. OBERSTAR. Mr. Nadler?

Mr. NADLER. Thank you, Mr. Chairman.

Commissioner Boardman, the legislation that you have suggested proposed repealing the hours of service statute and replacing it with an FRA regulation.

It took the Federal Motor Carrier Safety Administration from a notice of proposed rulemaking in 1996 until 2003 to issue the final rule, but they were then sued and forced to revise its rule. The next rule finally came out in 2005, and it is being litigated again. So from 1996, we still don't have, 11 years later, a rule.

I find it hard to believe, given the difficulties in such a rulemaking, that the current Administration would be able to issue a final rule by the end of its term in 2008. According to your section by section analysis, you want to run this rule through the Railroad Safety Advisory Committee which has been dealing with fatigue for years with no solution in sight. Then you want to tackle hours of service for one category of employee at a time, again, according to the section by section analysis.

How will you get a final rule out by the end of 2008 under those circumstances?

Mr. BOARDMAN. I think, first of all, we will have a rule right away when we put the statute into effect as a regulation. So the existing statute will become the rule immediately, so there won't be any chaos here. There won't be people not understanding what they are going to do.

Mr. NADLER. Excuse me. You can determine if we say there should be a rule, you can say the existing statute will be the rule without any hearings and everything else?

Mr. BOARDMAN. That is what we are going to have you do. That is our proposal. What you would do is have that become the initial regulation.

Mr. NADLER. Then you would go through the whole process for years to see about revising the rule.

Mr. BOARDMAN. It is not our intention to do it for years. I understand the cut, but I believe that, if we have motivated people—and I think we do—unions and railroads to resolve this issue, then we don't have to wait forever for the RSAC to act. We can pull it back.

Mr. NADLER. Okay, let me ask you a different question. Your bill authorizes a Safety Risk Reduction Program to focus on systemic safety problems. To describe it, you use an example where you say where a traditional enforcement approach would focus on finding cracked joint bars and securing their prompt repair, your approach focuses on systemic issues such as a process of deciding whether to use a joint bar or a weld, the process for restoring joint bars and so forth.

My question is this: The bill bars any part of any record the railroads provide to the FRA or that the FRA obtains through some other means through the Safety Risk Reduction Program from public disclosure. That seems pretty broad since the rails could provide extensive information to the FRA under the guise that it is for the Safety Risk Reduction Program. Why shouldn't the public have the right to that information?

Mr. BOARDMAN. I think that what we are talking about here is when we ask the railroad to go out and look at its hazards, when we are asking them to find the risks and then find a methodology to reduce that risk, that is information that should be protected except for enforcement.

Mr. NADLER. What information should be protected? What the risks are?

Mr. BOARDMAN. When they identify for themselves on their railroads what might be necessary to improve.

Mr. NADLER. All right, let us hone in on that. A railroad, FRA Rail, Inc. identifies that they have a problem with switches. Their switches are somewhat defective, and they have got to improve that.

Why should that be proprietary information? Why shouldn't the public know that?

Mr. BOARDMAN. Understand; one of the criticisms for creating an FRA to begin with was that when you establish minimum standards, then a railroad would maintain something only to a minimum standard.

Mr. NADLER. Would what?

Mr. BOARDMAN. I think when you originally established the FRA, if you establish a minimum standard—

Mr. NADLER. They would only do the minimum.

Mr. BOARDMAN. Then they would only do the minimum standard. To some extent, that is true for some railroads, that if they meet the regulation, it meets the minimum standard. We say it meets the minimum standard. These guys, oversight guys over here come and look at us and say, you need to do more than a minimum standard.

Mr. NADLER. That just argues that you should raise the minimum standard.

Mr. BOARDMAN. Sir, let me finish.

Mr. NADLER. Yes. I am sorry.

Mr. BOARDMAN. So the point here is that we are looking for a railroad today to maintain or operate at much greater than a minimum standard, especially in relation to the amount of weight or activity that there is on the railroad today. Part of what they have to do in order to do that is look at their risks definitely for the future.

Mr. NADLER. I don't understand that argument.

Mr. BOARDMAN. Okay.

Mr. NADLER. Obviously, you want the railroads to operate at a higher than minimum standard. If they are using 286,000 pound equipment, they are to operate at this standard. If they are only using 263, then at that standard. Why don't you simply raise the standards so that if they are operating at the minimum standard you set, that is safe?

Mr. BOARDMAN. Then we will have a new minimum.

Mr. NADLER. That is what I just said.

Mr. BOARDMAN. Right.

Mr. NADLER. Why don't you do that?

Mr. BOARDMAN. Then you have the same problem all over again. There are railroads that would then maintain at that minimum, and there are some of them that don't need to move up to that because they don't have the amount of traffic, the weight that is out there. There is a difference among the railroads themselves, especially the smaller railroads.

We believe, Congressman, and I think it has become an accepted kind of belief that one of the things that has to happen with every industry that is out there today is they need to find out what their hazards are and reduce the risks of those hazards, and this is one way to do that.

Mr. NADLER. Yes, but what I don't understand, and my time is expired, so I won't continue arguing with you.

Mr. BOARDMAN. I am not arguing.

Mr. NADLER. Discussing. If you raise the minimum standard to an adequate amount so they will only maintain the minimum standard, what is wrong with that and why shouldn't all that be public?

Mr. BOARDMAN. I understand.

Mr. NADLER. Thank you. I yield back.

Mr. OBERSTAR. As always, a very lively discussion with Mr. Nadler.

I would like to ask the forbearance of other Members so that Mr. Lipinski could have his time. He is committed to a time certain at the Rules Committee and will have to leave.

Mr. LIPINSKI. Thank you, Mr. Chairman.

It is clear as we are talking in this Congress about climate change and national energy security, rail is an important part of that equation. We need to do what we can to ensure that we do use rail as much as we possibly can. It is important that rail remains efficient. We have to do what we can for rail infrastructure certainly, but rail safety is also an important part of this.

I thank that Chairman Oberstar and Chairwoman Brown for introducing this bill, and I look forward to going through and working out what will work best for continuing to use rail efficiently in this Country. Also, of course, the safety of workers is very critical and the safety of all those who use rail, but also with all the railroad lines going through my district, I know how important safety is in all ways.

I want to focus on one particular issue here, positive train control, and I want to ask Mr. Rosenker, first of all, how long has PTC been on NTSB's list of most wanted transportation safety improvements and why is PTC on the list?

Mr. ROSENKER. It has been, and I happen to have brought a copy of the NTSB's most wanted list, and it has been on our most wanted list since the beginning in 1990, 17 years.

The condition or, if you will, the status of where we are with the FRA on this issue is—we have three statuses: a green, which means it is acceptable and progressing in a timely manner; a yellow, acceptable response, progressing slowly; and a red, unacceptable response. The color is yellow. It is progressing slowly.

We believe it is time to progress in a much faster way, and the provision which is dealt with in Mr. Oberstar's bill is a good provision, we believe, because it puts a date certain. The technology is there. It is a mature technology. Although it is experimental today, in the period of time that the legislation is talking about, significant improvements in the technology will have occurred, and I believe, as a result, significant numbers of derailments and collisions will be avoided.

Mr. LIPINSKI. Do you have any type or sense of measure of how many accidents could possibly be obviated with PTC?

Mr. ROSENKER. We did talk about 10 years that we took a look at this, and we saw 52 that dealt with fatalities, not just injuries but fatalities, and that there were approximately 500 injuries that could have been prevented as well. I think there were 37 fatalities. We could only find data on about half, 29 of the accidents, of the 52 that we believe that we could end up preventing.

This technology is really the future here, and it is not only technology that we believe can do so much for America's railroads but technology in prevention. I must if I can have the moment to compliment NHTSA. They, in fact, recognized the importance of electronic stability control, a relatively simple technology compared to PTC but yet a technology which, when implemented by 2012 in all of the automobiles in our Nation, will begin the process of preventing the deaths, and this is projected between 5,000 and 10,000 people a year.

Technology has a wonderful place in accident prevention. PTC is a place where, in fact, it will do a great deal of good, and we believe it is now time to move forward on this technology.

Mr. LIPINSKI. Thank you, Mr. Rosenker.

Thank you, Mr. Chairman.

Mr. OBERSTAR. I thank the gentleman.

I will go back to Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman.

A question on grade crossings and trespassers, overwhelmingly, the fatalities occur in these two categories and just a couple of

questions on the split jurisdiction between the track which the railroads control and then at the intersection which the State highway departments control. I know there is something like 27 States that currently lack laws regarding the rail crossing.

It seems to be a problem. Can you, Mr. Boardman, talk about what are things that the FRA can do to improve that and is there anything we can do here to improve that situation?

Mr. BOARDMAN. Mr. Miller, if you could put my chart up for me now.

Mr. Shuster, I don't know how well this is going to show up. I kind of brought this along. I think this really kind of tells the story.

It was a little better earlier. Jim or whoever is running it, if you could back it up and make it bigger. Yes, there, that works.

The fatalities are below.

Bring it up. Maybe it isn't going to work here.

The lower line you see headed down is the number of fatalities, and the line that you see kind of going up 45 degrees is the amount of traffic, railroad traffic today. What we are really seeing, when you combine that with what Mr. Rosenker just said about the number of deaths and injuries or deaths that they would actually reduce, I think he said between 5,000 and 10,000 injuries with the stability control, or deaths.

Mr. ROSENKER. Yes.

Mr. BOARDMAN. Deaths. That would be 10 percent, about 10 percent to 20 percent of the number of deaths that there are out there on the highway.

Part of the problem we are having with the state highway departments is that the number is so low in terms of grade crossing accidents, and that is what is really captured in the state DOT books that they put out on their statistics every year. You won't find it separately in here on highway grade crossing accidents because it is in the total number of highway accidents that are out there.

So that number is so low dealing with the state highway departments. Every life is precious, but this particular part of it doesn't rise to the level of need or where they are spending the dollars as what we would like it to be as a railroad agency.

Mr. SHUSTER. Mr. Rosenker, your thoughts on it, what can we do?

I know there has been Operation Lifesaver and, of course, we have some signage. What can we do to stop not only the grade crossings but trespassers?

Mr. ROSENKER. I can suggest, and we always say this when we go to an accident, a horrible accident that involved a grade crossing, grade separation is the simplest answer. Take it out of play. It is not easy to do because it is expensive, but that guarantees the separation between a motor vehicle and a train.

I went to a terrible accident that occurred on Thanksgiving, the eve of Thanksgiving about two years ago in Chicago. Seventeen cars were struck by a metro train. Amazingly, no one died, but this was such an unusual traffic crossing. It was built at such an oblique angle that you didn't really realize you were sitting on tracks

until it was much too late and you were piled up bumper to bumper.

The State and the county finally said when we were so adamant about grade separation because they had fatalities before in the 20 some years that that crossing had been there, that they finally decide to say enough is enough. We are going to separate this grade crossing. They will make a little bridge above it.

That is the ultimate answer, but I recognize with the thousands and thousands that are out there, that is not always possible. So you will have to use other technological capabilities. I think the Administrator talked about some of those.

But education clearly is an important part of that, recognizing you will not win if you are going to try to beat a train. You will lose. You can count on it.

Mr. SHUSTER. Mr. Hyde, more inspectors at the FRA, is that something that would help alleviate the problem and is there any evidence that more inspectors would, in fact, cause the problem to decrease at the crossings?

Mr. HYDE. Well, that can be one solution. I wanted to comment that while the number of grade crossing fatalities certainly is small in comparison to the other modes—the highway fatalities are very high, and I know alcohol impaired driving is extremely high—there are still some low hanging fruit that can be done, that can be attacked. That is one of the things that we want to encourage the FRA to do, that is to go after that low hanging fruit.

One of the elements that FRA can be doing is helping the states create these action plans to address bad grade crossing collisions where there is, for example, multiple collisions at a particular grade crossing. They have done that in Louisiana. There has been success there. The accident or the collision rate has been coming down since they have implemented that plan.

The other thing is that the Department has a very aggressive goal to get the fatalities down overall, and everybody has got to be doing a bit of their part. So we think that the FRA can take some action here.

Mr. SHUSTER. Thank you.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Mr. Boardman?

Mr. BOARDMAN. I was just going to comment on that just very briefly. Thank you.

We have 17 inspectors in the field right now on highway grade crossing, trespasser inspectors, and we are working with those communities. I think Kurt is right, that the kinds of things that we have done in Louisiana, we need to do other places.

We are also working with the commuter railroads, a collision hazard analysis with those commuter railroads, and we are having some good successes working with them, especially in California and Florida.

They are one of the ones, and I am sorry Jerry is gone at this point in time, but they are one of the ones where a lot of the data that is out there is data that needs to be protected, but you can't really have 100 percent mitigation for all of those collisions. You really find that that is the case.

I think Congresswoman Napolitano, when I met with her, identified a tremendous number of at-grade crossings on the Alameda East Corridor that are of a very great difficulty in terms of cost to find a solution to separating the grades and having a community that is satisfied and still keeping the economy moving. This is a very difficult problem.

Mr. SHUSTER. Is that number of inspectors, 17, up, down?

Mr. BOARDMAN. That is up. That is up from last year. It is up one. It is up in the last 10 years by double. It went from 8 to 16, 17.

Mr. SHUSTER. Thank you.

Mr. OBERSTAR. What I have found in my years of oversight of safety is that more inspectors means more safety in pipelines, in aviation, in maritime, the Coast Guard arena.

Mr. Boswell?

Mr. BOSWELL. Mr. Chairman, I got in a little bit late. Did you talk about the deadhead time, the time that is spent in limbo, earlier?

Mr. OBERSTAR. We have had some discussion, but it is a lively subject and worth further discussion.

Mr. BOSWELL. Well, I don't want to overdo it.

Mr. OBERSTAR. I don't think you can.

Mr. BOSWELL. But I just am curious what their comments might be about how to deal with that because it seems to me like that the person is out there and puts in their hours, and then they have got deadhead or wait and so on. Then it counts against them, and they have to go back on duty. Would you talk about that a little bit?

Mr. BOARDMAN. Certainly, Congressman. Let me, at least for my own purposes, define what you have identified.

A crew comes in first in the morning and is transported out to its duty location. That is an on duty time that contributes to the overall total amount of time, whether it is going to be the 8, 10 or 12 hours that they would actually work.

Then they move their train or do whatever their responsibility is to the end, until they outlaw or come out of time which would be, let us, for example, say this case is 12 hours. At that point in time, they may be in a place that they have to be relieved by another crew that will be on its way out to them.

The decision had become that that particular time, while paid for, is limbo time and often times is confused, that it is not paid for. It is paid for. But that is the time that is neither working nor is it a rest time because in the statute you are required to give the proper amount of rest time, which is normally eight hours. It can be 10 hours of rest time, undisturbed rest time.

Then the time that it takes to get that same crew to a terminal or a proper relief point is also time that is not worked, but again it is time that is paid. In many cases, this is where the difficulty comes in in terms of determining whether they have the proper amount of rest time after the duty time. That is really where we are, I think.

Mr. BOSWELL. Well, of course, you know what I am driving at. I think Mr. Oberstar is too. That is fatigue, and that is a contributor to the accidents. So what are we going to do about it?

Mr. BOARDMAN. In our particular proposal, we believe that we should regulate the hours of service and that the statute would come into the FRA as it currently exists and that we would use that as the new regulation and have a process with the RSAC Committee to come up with a new solution that addresses fatigue using the best science available today.

Mr. BOSWELL. I was in a different kind of service one time, and it seemed like we had a lot of that same situation. They called it, in my case, the military. What are we doing for the worker out there that have got to have the pay, got to have the job, and yet he has got to be held responsible? What are we doing for him or her?

Mr. BOARDMAN. I am not sure I understand the question, sir.

Mr. BOSWELL. I am not sure that I have heard a solution.

Mr. BOARDMAN. Okay. We don't regulate their hours of service at this point in time. We have no right to go out and do anything from a regulatory standpoint.

Mr. BOSWELL. But you are concerned about safety.

Mr. BOARDMAN. Yes, sir.

Mr. BOSWELL. So what are you recommending then?

Mr. BOARDMAN. Our bill is that we would want to regulate the hours of service.

Mr. BOSWELL. Mr. Oberstar, maybe you could help me out here a little bit. I don't think I am getting through.

Mr. OBERSTAR. You are not. It is not an illusion. The Administration's bill or proposal is very unfuscatory.

Mr. BOSWELL. Is that French?

Mr. BOARDMAN. Now, you are going to have to help me out here.

[Laughter.]

Mr. BOSWELL. Did you slip a French word in on me there?

Mr. OBERSTAR. [Phrase in foreign language.]

Mr. BOARDMAN. I need help.

[Laughter.]

Mr. OBERSTAR. Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chair. I was just going to ask you, what does that mean?

I just want to thank Mr. Boardman because his staff has been exceedingly helpful when we had derailments, rail derailments in my area, and they were very, very helpful. So thank you for that.

My question relates to the States who can certainly play a very important role in assisting the FRA with ensuring the safety along the rail lines. As you well know, I have a lot of that in my area. Why has the FRA been so reluctant to allow the States to regulate the railroads locally in order to provide a safer environment for their residents?

Do you think Congress should modify the section of the Federal Law to give the States regulatory authority where it does not exist currently, knowing that the National Conference of State Transportation Specialists, the Federal Rail Administration's Association of State Railroad Safety, program managers, the California PUC, public utilities, the National Association of Regulatory Utilities and the California State legislators are all endorsing the proposal to be able to allow States rail regulatory authority?

Now apparently the Federal courts have not allowed the States to preempt Federal law, and that can play havoc. Like anything else, I think we need to take a look at how we should be able to see how they can be helpful, rather than hindering the ability to be able to ensure safety at the local level.

The states argue that their safety regulations are entirely consistent with the FRA's regulations and are not an "undue burden on interstate commerce."

Would you address that, sir?

Mr. BOARDMAN. Yes, ma'am. I appreciate the fact that we are working together to try to resolve some of these issues, and we work very well with California on many of these issues, but we don't see eye to eye on this preemption issue. As a matter of fact, Congresswoman, when I was Commissioner of Transportation in New York, I might have provided some of those arguments myself when I had a particular railroad that I wanted to do something different with.

Mrs. NAPOLITANO. What made you change your mind?

Mr. BOARDMAN. Becoming the Administrator and understanding that it is particularly important to have the same regulations in New York as we have in Pennsylvania that we have in Ohio, just like it is important that the laws generally are the same on the interstate highway system or any of the surface transportation modes.

We need to do a better job; we need to make sure that we are providing the assistance to the States and the regulations necessary for them to hold railroads accountable through and with us, and we have agreements with about 30 States with 160 inspectors that we work well with.

So we prefer that those kinds of relationships grow and that you not have a hodge-podge, because we believe that some States, just like not all States participate with us on a State program. There will be some States that would have no regulation. There would be other States that would have very different regulations. It would be almost impossible for a railroad that is trying to run its train from California to Chicago, or from Chicago on to New York, to be able to understand what those regulations would be.

Mrs. NAPOLITANO. I find that argument a little weak, sir, because there are many regulations that have been implemented that you could argue that different States would take differently.

But I certainly have an opportunity to be able to talk to some of my State regulators, the legislators and the California PUC and others. In my long history, kind of long, being on City Council and being on State, I have dealt with many of those issues before, and let me tell you it is not easy to bring the railroad to the table, even asking CPUC, California Public Utilities Commission, to come in and take a look or listen to the arguments that cities have in regard to some of the problems they have with the railroad going through their communities.

So to say that it would be a hodge-podge, it would help communities tremendously, working with the railroads, of course. I don't mean to sound like I am trying to be condescending to anybody, but working together to be able to find out what is it that we can do to be able to effectively assist the communities in helping the FRA

and working with the railroads to come up with a solution to be able to work better.

Mr. BOARDMAN. I will find a better way to help you, Congresswoman, to get the railroad to the table.

Mrs. NAPOLITANO. Well, the railroads have been very, very receptive in my area because we have had long discussions, especially with Union Pacific. I haven't had an opportunity to sit with the BNSF, but I will do that. I don't have a problem asking them to come to the table. That, I can do.

I think what the communities, and I am not just talking about my own area but many of the areas who do not have the background or the expertise or don't know how to begin the process of being able to speak to them openly and be able to get that information to be able to make it better for the community and for the railroad for that matter.

Mr. BOARDMAN. I understand.

Mrs. NAPOLITANO. Thank you.

Thank you, Mr. Chair.

Mr. OBERSTAR. With Mr. Shuster's indulgence, although we normally come back to the Republican side, Mr. Higgins has been waiting a long time, and I will ask him to take his five minutes. Then we will break for the pending vote.

Mr. HIGGINS. Thank you, Mr. Chairman.

This is on the issue of track inspections to Mr. Boardman. In response to my request last December that your Agency conduct a comprehensive inspection of the integrity of the rail overpasses in Erie and Chautauqua Counties, your office had responded that the Agency lacked the resources to conduct a comprehensive inspection, and thus the investigation was targeted at the two overpasses where the derailments had occurred.

My question is how many more inspectors would your Agency need to conduct a targeted comprehensive two county inspection of the rail overpasses?

Mr. BOARDMAN. Brian, I don't know. Excuse me, Congressman, I don't know right this minute how many it would take. I can look into that.

[Information follows:]

**Insert for the Record**
**Testimony of Joseph H. Boardman, Administrator,**
**U.S. Department of Transportation,**
**before the**
**Subcommittee on Railroads, Pipelines, and Hazardous Materials,**
**Committee on Transportation and Infrastructure,**
**U.S. House of Representatives,**
**May 8, 2007**

**INSERT**

**[Please insert at the end of line 1696 on page 76.]**

My staff has identified that there are 275 bridges carrying railroads over public highways in Erie and Chautauqua Counties, New York—221 in Erie County, and 54 in Chautauqua County. It would take approximately four inspector-days, and two engineer-days, to comprehensively inspect and evaluate each bridge. In other words, to conduct a comprehensive inspection and evaluation of each bridge over a one-year period, my staff estimates that such an effort would require a total of seven to eight inspectors and engineers, combined. Nevertheless, my staff has examined bridges of particular concern, given our resources, to help make sure that they are safe for use in transportation.

I think one of our difficulties at the time is we had a lot of things going on, especially up in the northeast, east Rochester. We had them in Kentucky at the time, Brooks, Kentucky. We were in a situation where for one weekend there in January, I had taken 20 percent of my workforce and did a focused inspection on that railroad. So we were just in a situation that we couldn't look at all of those.

But we have at this time, Congressman, gone through a track inspection process and are continuing that all out, throughout New York State on all of the major railroads and most of the smaller railroads, and we will continue to do that.

Mr. HIGGINS. Is your Agency or the Administration seeking additional sufficient funds to hire additional inspectors to do this?

Mr. BOARDMAN. We asked for approval, I believe, for a few more inspectors, but we have grown as an Agency on inspectors by about 50 inspectors in the last 10 years. That is kind of where we are at this point in time. We put them on as we saw the need in a specific area to improve and strengthen.

Mr. HIGGINS. But wouldn't the Agency welcome the additional inspectors that are called for in the rail safety legislation under the sponsorship of Chairman Oberstar?

Mr. BOARDMAN. Well, there are several things that we would welcome. I mean nobody that is in his right mind would stand around and say I don't want any more resources to do what I need to do, but we think there is a balance that you have to have in terms of not only inspectors but research money. We just put two new rail inspection vehicles on T19 and T20, where we think part of the solution is technology.

So it is a look at using and changing skills for the future, making the railroads do more risk reduction themselves. That is why we are looking at that. It is kind of the concept that we have to have a balanced and full plan.

Mr. HIGGINS. Let me just switch to the issue of enforcement and the imposition of fines for track defect. What is the maximum fine assessed to a railroad for a track defect violation?

Mr. BOARDMAN. I think the maximum that we could charge anybody is $27,000 per occurrence per day, but that would have to be after they didn't do what we told them to do. There is a sequential process.

Mr. HIGGINS. How many fines were issued in 2006?

Mr. BOARDMAN. I could get back to you with that.

Mr. HIGGINS. Okay.

To Mr. Hyde, are enough fines being levied and are fines set at a high enough level to induce railroads to aggressively detect and correct potentially dangerous track defects?

Mr. HYDE. We have just started an audit in that area, looking at the penalties assessed, how they have collected on those penalties and how it correlates to the violations that were issued.

One of the things that we noted that when we were looking at the reporting conditions for grade crossing collisions, for example, reporting to the NRC, we found that one in five serious grade crossing collisions were not reported and that we encouraged FRA to begin issuing violations. They have started doing that. In the past two years, I think they have issued 17 violations in that area.

In addition, with the other reporting requirement, they have started doing reviews of the railroads. We would have to look and see whether they have, in fact, started issuing violations for those failures to report to FRA, but I do know that the FRA has been proposing to increase the size of the fine for that type of violation.

Mr. HIGGINS. Okay, my time is almost up. Thank you, Mr. Chairman.

Mr. OBERSTAR. We have a couple of minutes.

Mr. Diaz-Balart?

Mr. DIAZ-BALART. Thank you, Mr. Chairman. I am fine. I may have something when we come back.

Mr. OBERSTAR. We will recess for the pending vote and additional votes and return as soon as we possibly can. I hope within 15, 20 minutes.

I just want to put Mr. Rosenker on notice and also Mr. Boardman and Mr. Hyde to address the issue of monitoring railroad radio communications similar to the voice recorder in aircraft as a matter that I would like to explore further, and Mr. Shuster, I am sure, has further questions.

The Committee will stand in recess.

[Recess.]

Mr. OBERSTAR. The Subcommittee will resume the hearing.

When we broke, I said I want to pursue a matter among several items in the Administration bill authorizing the monitoring of railroad radio communications. In Mr. Boardman's testimony, he made some very pertinent observations that FRA is allowed to monitor radio communications only in the presence of an authorized sender or receiver, a railroad employee, and yet when railroad employees know that FRA is present, they tend to be on their best safety behavior, a keen observation.

But there are limits proposed by FRA to recording of communications, and they appear to parallel those of the cockpit voice recorder in aviation. In aviation accidents, the recording, the voice communication is not released except under very rare circumstances but maintained for investigatory purposes and for purpose of improving safety in the future.

Mr. Rosenker, what are your thoughts about the proposal if you have had the opportunity to review it?

Mr. ROSENKER. We would be in favor of two phases of the area. First, the area of potential monitoring on a random basis of communications, we believe would be quite helpful to understand what is really happening, what is being communicated on the railroad.

Secondly, a device similar to what we have in the cockpit voice recorder would be extremely helpful and, again, should be treated exactly like the way we treat cockpit voice recorders in aviation. Transcripts after an accident only, after an accident would be potentially released and examined in the docket. The actual voice recording itself would be held without the ability to be used other than in the party examination for forensic purposes.

Mr. OBERSTAR. It is in the Administration bill. It is also in the bill that I have introduced. I think those safeguards can be a very useful safety tool.

Lufthansa, in the late eighties, 1988, 1989, did an experiment with its flight deck crews of having a television monitor in the

cockpit to help pilots understand when they call out an action, whether they actually did what they called out. The flight deck crews were surprised on viewing the video afterwards to see that there were several missteps. It helped them immensely, but they, as U.S. pilots, resisted having a permanent video camera in the flight deck.

Let us see. There were some other points that I wanted to pursue.

The railroads would say that the provision in my introduced bill that would allow train crews and signalmen 24 hours consecutive off duty within a 7 day period should be extended to require 24 consecutive hours off duty within an 8 day period. I wonder if you have any basis for or whether there is a basis for judgment one way or the other in light of your accident investigation of the event in Anding, Mississippi, where there were a number of consecutive days on duty that affected work performance.

Mr. ROSENKER. Well, Chairman, again, I want to applaud the Congress and particularly your Committee for the great work that it has done in preparing this legislation.

As I said earlier in my testimony and even in response, I believe, to the Ranking Member, there is no silver bullet answer to say this will guarantee a 24 hour separation from the last time of duty to the time you come back, that that will guarantee that fatigue will not exist and an engineer or crewman will come fully rested and ready to work.

We would believe that it is best left to a scientific analysis from study before we would say that is the answer. The concept of recognition of fatigue and the amount of hours of service which is described in your legislation is a great, great first step forward, but I hate to hang my hat on it and say that is the answer until the science which we have recommended to the Administrator, the analysis, the study of fatigue itself in this community, we believe would provide us the best evidence to make good fatigue management decisions in scheduling.

Mr. OBERSTAR. The constant refrain and insistence on science when it comes from this Administration, I am highly skeptical. They want science. They look to study global climate change until we are all inundated by the flood and then say, oh, my goodness, that last scientific report wasn't quite good enough.

In stress in air traffic controllers, in the late seventies, there were 27 different studies of stress. Each time the study was completed and submitted to the FAA, they found a reason to reject it. Finally, the major study that was so comprehensive that could not be avoided, they didn't do anything.

Now I have been on panels with Mark Rosekind of NASA AIMS and William Dement of Stanford on several occasions. I think they are top fatigue specialists and authorities in the world, and they would not support what the railroads are proposing and what their current practice is. They would more come down and decide of the recommendations of the NTSB.

Mr. Boardman, how much more study do we need?

Mr. BOARDMAN. We don't think you need any more study. We think that we have a report that tells us the kinds of things on our fatigue report that are important.

Mr. OBERSTAR. That is refreshing to hear. We don't need any more study. Go ahead.

Mr. BOARDMAN. Well, my researchers might say, wait a minute. But I think we are ready at this point in time to get to business, and that is why we are proposing what we are proposing.

Mr. OBERSTAR. Mr. Shuster?

Mr. SHUSTER. Thank you, Mr. Chairman.

Talking about studies, I know that years ago the debate on airbags, and I forget her name. Joan Clayborn?

Mr. OBERSTAR. Joan Claybrook.

Mr. SHUSTER. Right. She pushed for them, and then later on here in the past couple of years she came out and said that maybe it wasn't the right thing or maybe we did it the wrong way. So I think on both sides of the political spectrum, people push for something and then all of a sudden, years later, oops, maybe we did the wrong thing.

I certainly don't want to debate you on global warming here today, but as I start to learn more and more about it and the percent of the carbon put in the atmosphere, it is very, very small, what we put in through our cars and our trains and power plants, but anyways, that is for another time.

Mr. OBERSTAR. We could have lovely debate on that one.

Mr. SHUSTER. Technology and study, positive train control, I know there are some operations out there that are employing it. The law, I think, says 2014, it is to be deployed. Where are we in the study of it and what is your view and what is the potential benefit as far as safety goes?

Mr. BOARDMAN. Well, we stopped the study that was going forward or that we were doing in Illinois, figuring that we had gotten what we needed out of it at that point in time. I think we have approved the ETMS system for the BNSF Railroad, and they are out beginning to employ it. It is the product safety plan that we really were looking for.

But we have the other railroads that have the way that they want to do positive train control, and they are making their judgments right now in terms of how do they deploy this, how do they do it in a rapid enough fashion in the areas that they know they need it and that they can afford it from a standpoint of the competitive environment that they are in.

You know I can't take Mark's little most wanted list and color it green at this point in time because he makes those decisions, but I think what he is trying to say is that we are pleased that we are actually making some progress here. We are also pleased, and we see the industry as doing that and embracing it and moving forward.

Mr. SHUSTER. Is 2014 a reasonable amount of time?

Mr. BOARDMAN. I don't know. I don't have an answer to that.

Mr. SHUSTER. Mr. Rosenker?

Mr. ROSENKER. Ranking Member Shuster, we do believe that 2014 is a reasonable implementation date. The technologies are there. It is a decision on which systems do you wish to use.

I am reminded of the time when there were discussions of many years ago when I was involved in high definition, the creation of high definition televison. There were 41 proponents that said they

had the answer of what high definition television was going to be for the United States and not just the United States but the world. As the systems began to compete with each other for who was going to have the better system, we realized none of them had the ultimate answer.

The system came about with what they call the Grand Alliance. About 10 companies got together, the best of all of the systems out there, to create what we now know as high definition television, and the system originally may have come out at a very expensive figure, perhaps two, three, four, five thousand dollars for these televisions. Today, you will buy them for $699.

I am not suggesting that you are going to get it that cheap in positive train control. But the one thing about technology we do know: The technologies get better. The technologies get more reliable. They get smaller, and they get cheaper as we evolve through the future of these technologies.

We have to make a decision in saying it is now time to do something about positive train control. It will be a device that, in fact, will save lives. It will begin the process of assisting humans when they may do the wrong thing for whatever reasons, whether it is distraction, whether it is fatigue, whether it is lack of training. Whatever it is, positive train control will help and begin to stop the train and brake the train at the appropriate times if, in fact, it is not being done by the crew.

Mr. SHUSTER. How many systems are out there that you know of?

Mr. ROSENKER. Oh, there are a number of systems. I know BNSF has one. I think the Alaska Railways is experimenting with one. Amtrak has a form of it on the northeastern corridor. These are good systems.

I don't want to be the decision-maker on which system is best. That is for the industry to decide.

Mr. SHUSTER. Right.

Mr. ROSENKER. But it is time to say it has now evolved. It is mature enough that you can begin to use it, and it will get better. These things are scalable in many cases. There will be newer and more interesting applications of positive train control as we get into the future as we have seen with other technologies.

Mr. SHUSTER. Thank you.

Mr. OBERSTAR. Mr. Boardman, we have been, in the many weeks of developing this legislation and years previously of creating its predecessors, given to understand that the six-year time for implementation was the time that those in the industry and your associates, current and preceding, said that is about the time it would take to actually implement such a move. You said you didn't know when.

Mr. BOARDMAN. I just don't know right this minute, Mr. Chairman. I can go back and look and see.

I guess, is it going to be just areas right now that are signal territory? Are we talking about non-signaled territory as well? I don't know.

Mr. OBERSTAR. I don't think we would legislate where. I think we would give regulatory flexibility to apply such a rule in the highest need and highest incident areas.

Mr. BOARDMAN. I promise you an answer. I just don't have it today.

Mr. OBERSTAR. That would be useful.

The wonderful thing of the NTSB, Mr. Rosenker, and I have described it over years, is that it is normative. You do have to be somewhat sensitive to what it costs to implement what the Board recommends, but your job is not to do benefit-cost analyses. The railroads claim that the costs of implementing positive train control is too high in comparison to benefits.

Thank goodness we have the Board, and we also have the Inspector General's Office. The Federal Railroad Administration has to do the implementation. It is like the Corps of Engineers when they have to go out and do analysis on a project. They say, well, yes, it would provide flood control, but the cost is way greater than the one house that it protect, for example.

But this argument about cost is not new. Let me go back to the predecessor Committee on Railroads in a hearing they had in 1969. Mr. Thomas Goodfellow was President of the Association of American Railroads, and he said: "In these difficult circumstances, to add to already severe inflationary pressures by imposing costly restraints on hours of service of railroad operating employees would clearly be contrary not only to the interest of the railroads but to the national interest as well."

My God, we have heard this all over again and again. Thank heavens, I have been here long enough to have heard most of it.

[Laughter.]

Mr. OBERSTAR. Does the gentlewoman from California have anything further?

Mrs. NAPOLITANO. Mr. Chair, I totally agree with you because I hear those arguments in many other areas also.

But I would like to just comment briefly on the issue of the joint bar simply because that was one of the areas that caused an accident in my immediate area and the fact that there was no technology that could see through the epoxy to be able to determine whether there was indeed danger. Come to find out, after the report finally came to me about a year and a half later, there had a prior crack that had not been detected over and above the one that really caused the accident.

So I would hope that there would be enough funding and support to be able to get the research and development one, so that this kind of an accident in the future can be prevented.

Thank God, there was no loss of life or injury. There was loss of property. But, in essence, the laws need to also protect the people, not just the railroads.

So I would appreciate any information that can be forthcoming because they have talked about welding the bars. They have gone in and done a whole bunch of infrastructure repair by taking off the bars and putting cement bars. My concern at this point is just on a common sense basis. If you replace wooden ties with concrete bars and you have an excessive amount of traffic, how long before that concrete starts breaking up?

I am talking about research and development. How long did they actually go through and determine that this was the best, cheapest or whatever economic way to deal with that?

While you may know the answer, my constituents certainly don't, and I certainly would want to know and have the information to be able to give to them to ameliorate a little bit of the concern they might have over the safety of their area.

Mr. BOARDMAN. I understand. I think it was a general concept of what we need to do in terms of research and improvement. We have an automated joint bar detection program that is underway. It is actually now being marketed, and we have some railroads that are beginning to purchase that equipment and deploy it. It is also being improved as we go along, and we are well aware of the NTSB wanting us to even move further in terms of, especially, plug rail and figuring out how we are going to be able to improve that as well.

So those are areas that we are spending time on, spending resources on, and we hope to have even a better future in the automated detection system.

Mrs. NAPOLITANO. Is there any plan to be able to oversee how many of those joint bars will actually be checked for cracks as this equipment?

The railroads have an option to buy it or not to buy it, right?

Mr. BOARDMAN. That is correct. We are encouraging them to do that. They still have an obligation to get out and look for cracks in those joint bars themselves, but this is a technology that allows them to do it quicker and we think better in the end, and that will be good for the entire industry.

Mrs. NAPOLITANO. Thank you, Mr. Chair, for your indulgence.

Mr. OBERSTAR. Mr. Brown is here, and I acknowledge the gentleman from South Carolina.

Mr. BROWN. Thank you, Mr. Chairman, and thank you gentlemen for coming and sharing this information with us.

Mr. Boardman, in examining the Federal Railroad Administration's web site, I noticed that the Administration had already developed the National Rail Safety Action Plan which includes action items and deadlines. Can you talk a little bit about how this plan compares to the plan called for as part of H.R. 2095?

Mr. BOARDMAN. The plan—thank you, Congressman—is a plan that will be strengthened by the kinds of things that are being talked about in the bill. In fact, one of the key elements of this Rail Safety Action Plan is making sure that we are using the proper data to determine where we need to apply our resources, whether it be inspector resources or in any of our regions across the Country.

So we are supportive of taking that Rail Safety Action Plan and accelerating our research as the Congresswoman over here talked about in terms of what is important, especially in the area right now of hazardous material tank car inspections and focusing our inspections for the future. We will make those improvements. Thank you.

Mr. BROWN. Okay, thank you very much.

My next question is to Chairman Rosenker. Grade crossings come under many different jurisdictions. From a safety expert's point of view, what are some of the challenges this situation brings when it comes to ensuring that a single crossing meets safety standards?

Mr. ROSENKER. Sir, I talked earlier about the best solution. Unfortunately, the best solution is not possible throughout the United States. The best solution, of course, is grade separation. Where we can do that, we heartily recommend that, and we can guarantee at that point you won't have a grade crossing problem.

Next to that, technology and also education. We have worked closely with the Administrator. This is a combined railroad/highway issue. I wish I had the silver bullet for the answer.

There are too many people that are dying annually at these grade crossings. Too many of them believe they can throw the dice and win. I said it earlier. I will say it again. No one wins against a train. Unfortunately, I have seen some horrible results of folks that have tried to throw the dice and lose.

The only thing I can suggest is what Operation Lifesaver is doing and more enforcement from the States and local authorities. As a highway issue, I believe we will go a long way, but technology will also have to play a significant role.

Mr. HYDE. Congressman, if I can add to that, that is true. There is not any one single magic bullet. There are a number of different challenges at these grade crossings. You can even put in the automatic gates, and I have seen videos where cars go around those gates.

But you have to use a multiprong approach in order to ensure better safety at these grade crossings. Having the education, doing driver education, we have seen data out there where a number of the accidents that are occurring, the collisions that are occurring are in the 18 to 25 year old range. There is also information out there that many of the accidents are caused by male drivers, so you have to target your education to that cohort in order to change their behaviors.

Mr. BROWN. Thank you.

Thank you, Mr. Chairman.

Mr. OBERSTAR. On that score, I would simply observe that on our Committee inquiry in Europe, meetings with the European economic community on the Open Skies Agreement, euro control and European Safety Agency, we traveled from Brussels to Paris on the TGV the day after it set the world speed record. Not the same train, we did the Thalys, not the main line TGV, but this was not shabby. This was 185 miles an hour.

With an opportunity to be in the cab with the locomotive engineer, I asked, do you have any people who fancy challenging the train?

He said, oh, yes, along about our late runs, 11:00 at night, we are doing 185 miles an hour, and there is always some fool who wants to try to outrace the train.

Now, there are no crossings. When they get up to 100 miles an hour, they lose control of the car and then fatalities result. So madness is not confined to the United States.

[Laughter.]

Mr. BOARDMAN. Mr. Chairman, are you saying they are mad in France?

Mr. OBERSTAR. Belgium.

Mr. BOARDMAN. Oh, Belgium, sorry.

Mr. OBERSTAR. And France.

Mr. BOARDMAN. I didn't know with the most recent election in France.

Mr. SHUSTER. I thought they stepped in the right direction in the last election.

Mr. OBERSTAR. It was quite a step in the right direction, yes, depending on who you are and which party you are in France.

[Laughter.]

Mr. SHUSTER. I wanted to make a point about the technology and the positive train control, and I looked back to the airbag. When I go back in history, I am always on shaky ground, talking to the transportation historian or with the transportation historian next to me. But as I recall in 1979, there was a big fight over the airbag, and I believe at that time it failed. Eventually, though, the Federal Government passed a law and put in place a timeline to put airbags into cars.

What really caused the airbag to put in the car in mass numbers was that Lee Iacocca of Chrysler decided or saw or identified the marketplace would accept an airbag. So he used it as a marketing tool and helped to save the company by putting airbags in cars. Today, people don't have to have the side airbags, but they purchase them because of the safety involved in them, and it comes down to companies, people, all look at the cost-benefit of a technology.

I think we certainly want to be as safe as we can out there, but companies and people don't want to spend money on technology that may work or may not work.

I think that if we open this debate up, and again I am new to this Committee, so I may not have the parties right, but I think there was a debate that occurred over the last couple of years in this industry and some wanted positive train control because they could go down to one man crews. When you look at it from their side, they could increase their capacity greatly. Buy more locomotives without having to find hundreds of thousands of new people. If companies can do those things, then they are more apt to say, okay, we will take the risk.

But there were some that didn't want that to happen for various reasons, whether they were other companies or whether it was labor. They were concerned about that.

I think when we are talking about technology, we need to make sure here in Congress where we are pushing forward solutions but not burdening industries, companies with what we think may work and instead look at the cost-benefit analysis. If we are going to mandate that companies do certain things, if people have to buy airbags, then we have to decide whether the government should foot some of that bill.

But if we let the market work and let the process go forward, I think at the end of the day private industry, businesses will purchase those technologies, and things will get better for all of us involved when you deploy that type of technology.

Mr. OBERSTAR. The gentleman makes a very thoughtful observation. In that 1969 testimony that I cited, the President of the AAR referenced tax credits that were made available by Congress to stimulate some of the safety initiatives, and I think that is entirely

appropriate. Wherever we can submit it, we ought to do that. We ought to provide such assistance.

I also remember the debate in aviation in 1985 and 1986 and 1987 about aircraft coming too close to each other, near mid-airs, near misses in the air, and no one knew how near was near until we finally pushed FAA to make a definition, 500 feet. At 500 feet, you can just about see what the guy is eating in the other airplane.

Then the argument was: Oh, TCAS. No, this TCAS 1 is not good. We have to wait for TCAS 2 which will tell you to move up and down in addition to moving to the left or to the right.

Then two airplanes collided over Cerritos, California, and there were fatalities.

It was a Member of our Committee, Ron Packard, who represented that district, who came to me and said, we have to legislate. We have to require the FAA to install traffic collision avoidance systems and mode C transponders aboard airplanes and use them—from a right conservative Member of Congress.

I said, you introduce the bill, and we will hold further hearings on it.

We did, and we moved that bill through the Subcommittee and the Full Committee. Passed the House. Passed the Senate. All the whining from the airlines went away because they knew if they didn't, people in droves were going to be reluctant to get on board airplanes. So, yes, there is a consumer choice at the end of all of this.

You have all been very forthcoming and patient. There are many other questions that I would like to pursue as we could probably do this better in a roundtable than at the hearing table. So we hold you excused and thank you for your testimony.

Mr. BOARDMAN. Thank you, sir.

Mr. SHUSTER. Thank you, Mr. Chairman, Ranking Member, distinguished Members.

Mr. OBERSTAR. Our next panel waiting anxiously for their turn at bat: Mr. Hamberger, President and Chief Executive Officer of the Association of American Railroads, familiar to this Committee room, having worked in it once and having testified here many times; Mr. Ed Wytkind, also a frequent witness and voice at our hearings, President of the Transportation Trades Department of the AFL-CIO; Mr. John Tolman, Vice President and National Legislative Representative for the Brotherhood of Locomotive Engineers and Trainmen, the International Brotherhood of Teamsters; Mr. James Brunkenhoefer, National Legislative Director of the United Transportation Union; and Dan Picket, International President, Brotherhood of Railroad Signalmen; Martin Durbin, Managing Director, Federal Affairs, American Chemistry Council, welcome.

Oh, yes, I want a copy of that photograph taken of Mr. Hamberger and Mr. Wytkind that close together. That may be the last time.

Mr. HAMBERGER. We have broken bread together on several occasions in a polite way.

Mr. OBERSTAR. Mr. Hamberger, you are first.

**TESTIMONY OF EDWARD WYTKIND, PRESIDENT, TRANSPORTATION TRADES DEPARTMENT, AFL-CIO; JOHN TOLMAN, VICE PRESIDENT AND NATIONAL LEGISLATIVE REPRESENTATIVE, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; JAMES BRUNKENHOEFER, NATIONAL LEGISLATIVE DIRECTOR, UNITED TRANSPORTATION UNION; DAN PICKETT, INTERNATIONAL PRESIDENT, BROTHERHOOD OF RAILROAD SIGNALMEN; EDWARD HAMBERGER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, ASSOCIATION OF AMERICAN RAILROADS; MARTIN DURBIN, MANAGING DIRECTOR, FEDERAL AFFAIRS, AMERICAN CHEMISTRY COUNCIL**

Mr. HAMBERGER. Thank you, Mr. Chairman, Mr. Shuster, Congresswoman Napolitano. Thank you so much for the opportunity to be here. On behalf of the Association of American Railroads, I would like to thank you for the opportunity to address rail safety and specifically, Mr. Chairman, the bill that you and Chairwoman Brown introduced.

The views contained in my statement also represent those of the American Short Line and Regional Railroad Association, and I would like to submit for the record a letter from that association's president, General Richard Timmons, in which he endorses my testimony and emphasizes five provisions of particular concern to smaller records.

Mr. OBERSTAR. Without objection, that letter will be received for the record.

Mr. HAMBERGER. Thank you, sir.

We recognize that the primary purpose of H.R. 2095 is to improve safety, and the railroads wholeheartedly share that goal.

Let me start out by pointing out that the rail industry's safety record is excellent and getting better. Since 1980, railroads reduced their overall train accident rate by 69 percent, their rate of employee casualties by 81 percent, and their highway rail grade crossing incident rate by 76 percent. The employee casualty rate and the grade crossing incident rate in 2006 were at their lowest levels ever while the train accident rate was just fractionally higher than the record set a few years ago.

I would emphasize that we believe that the accident rate is the best metric rather than the raw numbers of accidents since the rate reflects the growth in traffic which we have experienced in the past few years.

I also want to express strong support for the provision that authorizes funding for the design, development and construction of a tunnel testing facility at TTCI in Pueblo, Colorado, as Mr. Salazar mentioned earlier today.

While my written statement goes into detail on a great number of issues, I would like to focus on two areas here today, Hours of Service and technology.

Obviously, a primary focal point of H.R. 2095 is fatigue. As I noted in my testimony before this Committee in February, it is not in the railroads' best interest to have employees who are too tired to perform their duties properly. Consequently, individual railroads are pursuing a variety of fatigue countermeasures based on what

they have found to be most effective for their particular operating environments.

Combating fatigue, of course, is a shared responsibility. Just as employers need to provide an environment that allows employees to obtain the necessary rest during off duty hours, employees themselves must set aside time when off duty to obtain the rest they need.

Generally speaking, railroads support provisions in the legislation prohibiting train and engine employees from working unless they have had at least 10 hours off duty, up from 8 hours, and those 10 hours should be uninterrupted as called for in the legislation.

The provision eliminating limbo time, however—that is time spent after a crew has reached its 12 hour limit and is awaiting transportation or being transported—is another matter. We believe that it would impose intractable scheduling problems for the railroads. Let me underscore that railroads do not intend for their employees to get caught in limbo time. It is not part of the operating plan.

What happens is in the very nature of railroad operations, trains can be subject to unplanned events, a grade crossing accident, for example, a washout, a hotbox detector indicating that a car needs to be set out of service. All of that requires time and can prevent a train from reaching its scheduled destination within its crew's allotted 12 hours. Under this legislative provision, that could cause a violation of the Hours of Service Act through no fault of the railroad.

We believe there is a better way to combat any cumulative sleep deficit that may occur as a result of limbo time. First, any employee who works 12 consecutive hours on duty and then at least one hour of limbo time should receive, under our suggestion, 14 consecutive hours of off duty time. That goes to the issue of what the limbo time concern is, and that is fatigue. You don't want to have a cumulative sleep deficit. Let us have 14 hours off.

Second, train and engine service employees should be subject to a new monthly maximum on duty time of 276 hours. That compares to the 260 hours that the trucking industry has, but we believe that even though limbo time is not on duty time, that it should count toward that 276 hour limit.

These measures would significantly reduce the maximum monthly time for train and engine employees from the 432 you mentioned, Mr. Chairman, and we believe it would strike a balance between fatigue concerns and the 24/7 reality of railroad operations.

The legislation also prohibits railroads from requiring signal employees to perform emergency work more than three days in any seven consecutive days. There are occasions when this limitation would cause significant harm to rail operations and actually to the greater good.

Hurricane Katrina is a vivid example of this. After that storm, signal workers performed herculean tasks in getting the rail system up and running again. Had this provision been in place at that point, the railroads' ability to respond to the storm would have been severely diminished and service restoration would have taken far longer.

A similar situation is occurring even as we speak in Kansas and other midwestern States hit by tornados this past weekend. We believe the concerns raised by the BRS both at the February hearing and here today can be addressed by more tightly defining what is an emergency versus routine service without placing handcuffs on the industry in these kinds of situations.

Finally, in the Hours of Service area, we believe that these recommendations are sound recommendations, but in the alternative we would also support a transfer of all hours of service to the FRA with reliance on the FRA's professional judgment as is the case with FMCSA and the trucking industry.

I know I am running over, Mr. Chairman, but I ask.

Mr. OBERSTAR. Finish your statement.

Mr. HAMBERGER. Thank you, sir.

The railroad industry shares the goal of the legislation to develop and employ effective technology, and let me just move quickly into that area of positive train control. We believe that the deadline imposed in the legislation is, in fact, too rigid.

We are developing and testing advanced train control systems that can help prevent accidents by automatically stopping or slowing the trains before they encounter a dangerous situation, but those systems are indeed very complex. At the minimum, they must include reliable technology to inform dispatchers of a train's precise location, a means to warn the operator of the train of the potential problem and a means to take action, that is, override the individual in the cab if necessary and independent of the train operator to prevent an accident from occurring.

We are committed to using advanced train control technology. The tremendous complexities involved in those systems and the need for interoperability across the system argue for flexibility instead of a rigid schedule. We would recommend an approach in which the railroads would submit their implementation plans as called for in your legislation to the FRA with the FRA then reporting back to Congress on what they believe might be an appropriate timeframe, and at that time perhaps a firmer implementation schedule could be established.

Finally, we are concerned about a provision in the legislation mandating regulations with respect to the misaligned switches in non-signaled territory. We have gone through the FRA accident data, and last year there were three accidents attributable to switch positions not in alignment that we believe this provision is meant to address, three accidents.

Morever, the FRA is already addressing this through an emergency order issued in 2005 and a rulemaking that will supercede that emergency order.

As General Timmons points out in his letter, this provision would be beyond the resources of many short line railroads to implement and would produce a strong incentive to remove many of those switches to the detriment of customers.

Let me just reiterate that safety is our top priority. We believe that shows through our improving safety record. We are committed to working with you and others in Congress and our employees and customers to ensure that rail safety continues to improve.

Thank you and thank you for indulgence in allowing me to run over time.

Mr. OBERSTAR. Your complete statement will appear in the record.

Mr. HAMBERGER. Thank you.

Mr. OBERSTAR. Mr. Wytkind?

Mr. WYTKIND. Thank you, Mr. Chairman and Mr. Shuster for having transportation labor present its views on the important issues facing the Nation and this Congress about the safety of rail transportation.

I want to thank you, Chairman Oberstar, and of course Chairwoman Brown for making passage of this bill such a top priority. I have already testified once before the Committee not long after the new Congress began its business, and we are certainly pleased to see such aggressive actions being taken by this Committee to address a long overdue rewrite of Federal rail safety programs.

Let me say up front that the Federal Railroad Safety Improvement Act represents a historic step forward in improving the safety of our rail system and its workforce. We strongly endorse the Oberstar-Brown bill, and we strongly urge its adoption without any further delay. We also appreciate the fact that the Committee is seeking the input of rail workers in this Country and their unions in trying to address many issues in the rail safety arena that have been largely ignored over the last several years.

Second, we applaud the Committee for moving forward with this bill despite the opposition of the railroad industry which has grown accustomed to stopping any meaningful attempts to pass rail safety reform legislation. Make no mistake about it; we will see and have seen in the submitted testimony fancy charts and a lot of spin about government data, and we will be impressed, I am sure, with all the myriad programs that the railroads are running.

But, ultimately, the railroads are truly dismissing most of what is in the Oberstar-Brown bill. In the end, they will talk about working with the Committee but will probably spend most of their time trying to derail a comprehensive rewrite of rail safety laws in this Country. We hope the Congress says no to those political attempts by the railroad industry.

Let us hope that the facts about safety hazards in this industry that have been well documented just today, the facts about this industry's safety culture, the facts about tired, poorly trained and harassed and intimidated employees, and the fact that we still haven't addressed rail safety since the last rewrite in 1998 will far outweigh the rail lobby's political reach into the Congress in trying to stymie efforts to pass rail safety legislation.

Third, fatigue in the rail industry has reached a crisis. The AAR seems to devote about seven pages of its testimony to tell you why most of the measures in the bill shouldn't be adopted, yet they claim that flexibility is their goal and safety is their objective but do not see any value, from what I can tell at least—I tried to read it carefully—in moving forward with a legislative measure that attempts to address fatigue in a responsible way.

We wonder why the railroad CEOs and the senior management do not understand the point that it is not good business to run a

company with fatigued workers, especially in a business like railroading that clearly affects public safety.

Clearly, Congress has the responsibility to act on the fatigue concerns being raised by the operating unions and by the signalmen union, which we will hear from momentarily, before yet another accident results in this Country from sleep-deprived employees.

Fourth, training is sorely lacking in the rail industry, and Congress must speak forcefully on this safety issue. It is appalling that so many workers are receiving such substandard training in an industry that prides itself on running 24/7, a safe, state of the art rail system. It is equally appalling to read the rail lobby's response to the training requirements in H.R. 2095. They are "redundant" and unnecessary.

The workers are telling me that they are not receiving the kind of training they need and that there is a brain drain going on among the workforce because veteran employees, which are more and more relied on to train the younger workers in the workforce, are retiring and we are losing a lot of institutional knowledge. So the recurrent training portion of a training regime is much needed.

Moreover, since the September 11th attacks, I have testified probably a dozen times since that horrific day, calling on Congress to require true mandatory training for rail workers in this industry in dealing with the security risk that we now face in this Country as a result of 9/11. I think it is inexcusable that so many of the workers in this industry are not being trained for security risks.

Fifth, Congress does need to beef up the Federal rail inspector force. One of the facts that was left out in the exchange with the panel about hiring more inspectors and about the levying of fines is that the average fine is $39.00 across the whole rail industry which is less than a parking ticket in the District of Columbia, and a parking ticket doesn't risk anybody's life.

So I think there needs to be serious consideration to dealing with that fact. You have got to create the right incentives for railroads to operate safely, and a rule infraction shouldn't just cost $39.00.

Let me provide some focused discussion on the whistleblower issue as well because we think workers continue to routinely face management intimidation and harassment. For too long we have seen reports about the culture of intimidation and harassment that is pervasive in the industry. When faced with an injury or safety or security risk, rail workers are being discouraged by managers. This is not hyperbole. It is happening.

I reject categorically the industry's claim that there is no compelling case for enhancing whistleblower protections. One documented case after another show a management culture of harassing and intimidating and suppressing employees on the job when they are trying to report injuries and other events, and they use heavy-handed tactics, often illegal, to disguise the facts.

The stories are appalling. We have cases that we have documented and that have been given to this Committee, one after another of management obsessed with making medical incidents and injuries non-reportable, even pushing them not to take prescription drugs when they have been told they need prescription drugs, delaying medical treatment for injured employees, underreporting injuries, forcing employees to wait often two hours for a supervisor

to arrive at an accident scene on the job before that person can be transported for medical treatment.

Just this morning, I read about a case where an employee with a cut in his back requiring stitches, due to company policy, was forced to wait for a supervisor to drive 89 miles from a different part of Michigan to that location before he could leave to receive medical attention. This is just plain wrong, and I don't really understand how the AAR and its member carriers can defend this kind of regime.

The Committee must act before this culture results in silencing workers who would otherwise speak out about safety hazards and, God forbid, pointing out about safety and security hazards in the event of a terrorist wanting to do harm on our Nation's railroads.

Section 301 sends a very clear message, and I will wrap up, to management: If you suppress accident and injury report, if you willfully harass and intimidate employees, if you deploy policies designed to suppress rather than foster an environment in which workers can speak out about safety and security risks or report and get treatment for injuries, you will be held responsible and you will pay a price.

We think that is the right thing to do. We urge the Committee to move on this legislation, and we hope to have an opportunity to work with you on any questions that you have and on any further enhancements in this bill that we can be of assistance on.

Thank you.

Mr. OBERSTAR. Thank you very much, Mr. Wytkind, for your testimony.

Mr. Tolman?

Mr. TOLMAN. Good afternoon, Mr. Chairman, Ranking Member Shuster and Congresswoman Napolitano.

On behalf of the Brotherhood of Maintenance of Way Employees, the Brotherhood of Locomotive Engineers and Trainmen and the Teamsters Rail Conference as well as my colleague here with the United Transportation Union, with whom the Rail Conference has submitted extensive testimony, I want to begin by also thanking the Committee for addressing many issues in this legislation that are of vital importance to our members.

I especially want to thank Chairman Oberstar and Chairwoman Brown for introducing this legislation and bringing these issues forward after 13 years. This is the most significant piece of rail legislation in more than a decade.

I want to first address the hours of service issue which we are pleased to see bipartisan support to resolve these outstanding issues and the hours of service issues legislatively rather than in regulatory process. We fully support the changes made in Chairman Oberstar's and Chairwoman Brown's legislation, H.R. 2095. By amending the Hours of Service Act, this bill addresses one of the most pressing issues in our industry, and that is fatigue.

There are three factors that we believe are responsible for the vast majority of operating crew fatigue. One is the uncertainty that crews face with respect to advance warning when they will be required to work. The approach to this problem is to amend the Hours of Service Act and to require a minimum time off duty to be undisturbed, and we fully support this approach.

A second major factor that aggravates fatigue is the industry's manipulation of the Hours of Service Act by leaving crews stranded by unconscionable lengths of time as a result of the Supreme Court's 1996 limbo time decision.

On February 13th of this year, we presented detailed testimony on this subject, so I won't burden the proceedings by repeating those facts. It is clear that our concerns have been taken into consideration in a bipartisan way which we deeply appreciate.

A third major factor is work time. There is a bipartisan proposal to reduce the threshold for requiring 10 hours off duty which we support and applaud. We also support the notion that crews should have mandatory time off after performing covered service for seven or eight consecutive days.

On behalf of the BMWED members of the Rail Conference, we wish to express our appreciation and strong support for the proposed amendment concerning employee sleeping quarters. We also support the hours of service amendments proposed by the Chairman for signaling and dispatching service employees and urge their adoption.

Also, we would like to applaud the inclusion of strong whistleblower protections in H.R. 2095. The Teamster Rail Conference supports the inclusion of whistleblower protection in this legislation. Railroad workers cannot and should not be subject to dismissal when they provide information regarding unsafe issues to the government agencies responsible for promoting safety and enforcing safety laws and regulations. Strong whistleblower protections for rail workers are needed to stop employers from harassing and intimidating employees who speak out about safety and security issues.

I can tell you that every Class I railroad has been reported for engaging in harassment. In testimony, we cite a report done by FRA entitled "An Examination of Railroad Yard Worker Safety" done in July of 2002 which talks about the commonplace culture in the railroad industry of harassment and intimidation. The incidents, frankly, involve attempts by management to have crews skirt the Federal safety regulations, often rudely berating an engineer or trainman who objects to train makeup by telling the crew to shut up and get your train out of town.

We strongly support those provisions in H.R. 2095 that address several recommendations made by the National Transportation Safety Board in the wake of the tragic accident of Graniteville, South Carolina, which resulted in the death of a BLET member, Chris Seeling, and eight others when a tank car containing chlorine was breached, releasing a deadly cloud of chorine gas.

The NTSB has been concerned since at least 1974 about the issue of non-signaled track or dark territory. The Graniteville accident was caused by a misaligned switch in dark territory. Forty percent of our Nation's railroads are in dark territory without switch position detectors to help prevent accidents like Graniteville.

Finally, one of the most outrageous abuses that occur in the rail industry is the interference by carriers in the medical care of injured workers.

This outrageous behavior is meant to discourage injured workers from reporting their injuries and trying to recover damages caused by carrier negligence. H.R. 2095 outlaws the interference, and we fully support this provision.

Once again, Mr. Chairman, thank you for the opportunity, and I will be willing to answer any questions.

Mr. OBERSTAR. Thank you very much, Mr. Tolman, for your testimony.

Mr. Brunkenhoefer?

Mr. BRUNKENHOEFER. Yes, sir. I had always thought that I would be responsible for protecting my members sometimes from themselves because they are not trained, some of the times from management. I have an instance here where I think is an example of the necessity to have some regulation in training.

Recently in a hump yard in east St. Louis which is a very busy location on the railroad, we had an employee who said he did not feel he was comfortable operating remote control and told the supervisor. The supervisor disregarded his concern and told him to use the equipment and go to work. Then he assigns a student or a trainee for him to teach how to operate the equipment. Then in the process of that day, they put two trains together and caused a collision.

Now what kind of supervisor would do this? The trainee's father.

Now if the father won't protect him, then I think that we do have a responsibility to appeal to other people to say let us don't let these inexperienced people who don't know what they are doing out there, injuring themselves and causing accidents.

If that wasn't bad enough, then after the unfortunate accident, the supervisor had both crews in and told them that there better not be any injuries involved or they would lose their jobs.

I have an instance here of limbo time. A crew in Iowa dies on the Hours of Service Act. That means they have to stop working after 12 hours. The train master gets a crew from the terminal, brings them out to the train that has died and replaces the crew.

Then the train master tells the crew that is new that the conductor of the new crew is not to ride the train. He is to drive the crew that has already been on duty 12 hours, so that the engineer is now operating alone. But if that is not bad enough, he is told to stop at the stations that the train would still have switching to do, park the car with the crew in the car and go into the yard, do the switching. When they were completing with the switching of that terminal, to get back in the car, go to the next station and switch the cars because the crew was on limbo time and it didn't matter.

Harassment and intimidation, it is, I think the word is endemic throughout the industry. It is not so much the protection of being able to involve the government. That is good, but the language that you have needs to be strengthened. Injuries are not reported.

One of the things you brought up, Mr. Chairman, involved the FAA in many instances and how thorough investigations have shown that the information was not correct. Our injury reports start with the employee who fills out a form who hands it to a supervisor who fills out a form and that then becomes the basis for the data that at the Federal Railroad Administration. So if the su-

pervisor can convince the employee not to make the report, then it didn't happen.

We have enormous amount of information of where if you fill that form out, you will be disciplined. You will be disciplined. It is real.

What I have here is a deposition. I would prefer that we not give this to the Committee. I am not out to attack anybody. I am out to report instances that have taken place.

This is an attorney asking a train master: Have you ever been to a hospital as a train master and spoken with an injured worker's doctor for the purpose of trying to convince him not to prescribe medication?

There is an objection by the attorney. At the end of the objection, the train master said: Yes.

Why? You did that so it wouldn't be an FRA reportable, didn't you?

The answer was yes.

Okay, the company's attorney is representing the employee, I mean representing the train master in the deposition. This employee that was a supervisor wasn't fired, wasn't demoted. He was promoted and is now the manager of safety of that Class I railroad. They have a total disregarded interest about let us play it the right way.

We need to prevent the carriers from using a threat of discipline to discourage people from reporting injuries. We need to stop the harassment and intimidation of employees after they are injured.

An employee should not be required to return from the emergency room to go back into the yard under medication and painful to reenact the accident, so that the supervisor can say: You are lying because it couldn't have happened that way. You are not doing it as you have described to me, and so I am going to remove you from service or hold you out of service because while you were reenacting it, it is not coming out the same way as you told us.

Can you imagine we are bringing people from hospitals to railroad yards to reenact accidents? Employees are in pain. They are under medication. They shouldn't be required to do this.

Every accident that we have that results in a carrier using discipline should be investigated by the Federal Railroad Administration to assure that that carrier is not using discipline or the threat of discipline to prevent reporting.

To change the subject, in the training section, it is very well written, and its says that each craft should be trained. We need to add the word class. Some of the crafts are described as classes. We have a class of engine service that has the craft of engineer. We have a class of train service that has a conductor, a brakeman and a switchman.

So in order that we don't come back here in a few years and try to get an amendment, it would be easier to put into the training and qualifications point, craft and class.

Ms. Napolitano hit on something. We need to allow the States to have a freer hand. The Federal Railroad Administration says that when we get local safety hazards relieved. Right up I-5 in this little town called Dunsmuir, there was an accident many years ago, about a half a dozen, of where there was a derailment. The city de-

cided that they wanted to slow the trains down around a specific curve.

So the California PUC passed one regulation about one curve, one curve. This railroad took the PUC to court and had it ruled it was preempted by the Federal Railroad Administration, that the city or the State could not do this because there were other curves in the United States just like this one.

We also look at 2095 as not the final word on fatigue. It is the first word on fatigue. It is the start, and we have to start some place. In the document as drafted, we have in there language that will allow for rulemaking to build on the fatigue situation.

One quick caveat off to the side, one of the questions came up, and I think, Mr. Shuster, you talked about the marketplace and PTC. I don't want to spend a lot of time there, but I hope whatever comes down is common.

The engineer goes on duty on the Burlington Northern and goes 50 miles, goes onto the Union Pacific for 40 miles, goes back onto the Burlington Northern and may end up on the CSX. You will have the operator continually change from one program or one I like this because it is mine to the next one I like this because it is mine. Then they have to make the decisions and calculations they have to do in safety, I think is wrong. So I hope whatever comes out in PTC that it will be something that will be interchangeable on all railroads.

Also, both of you have been blessed with excellent staff people. I have enjoyed working with them. They don't always agree with me. I think something needs to be done about that immediately. They keep telling me that they have to do what you want, but we have been very blessed to work with both of them.

Thank you.

Mr. OBERSTAR. Thank you, Mr. Brunkenhoefer.

Dan Pickett?

Mr. PICKETT. Thank you, Mr. Chairman. I would like to thank the Chairman and the Members of the Committee for introducing H.R. 2095 and for holding this hearing.

Railroad signalmen install, test and maintain and repair the signal systems that the railroads utilize to direct train movements. Signalmen also install and maintain grade crossing signal systems used at highway rail grade crossings.

The BRS has always made safety our number one priority. A safe rail network is an efficient network, and this bill is the first step to improving rail safety and therefore improving the efficiency of the railroad.

For too long, fatigue-related errors in the rail industries have contributed to rail worker injuries and death. The fatigue management plans proposed in this bill will correct many of those issues that lead to our employees being so fatigued.

The reforms to the Hours of Service Act contained in this bill long overdue. Increasing consecutive hours of rest from eight to ten hours has long been advocated by the BRS. This bill prohibits railroad employers from communicating with signal employees during their rest time, something that happens all too numerous times today.

Doing away with the limbo time and having a straight-up hours of service law is long overdue.

The bill will also place all workers doing signal work under the Hours of Service Act. This has long been needed.

Today, the BRS has long advocated the need for a required toll free number at grade crossings. The establishment of a toll free notification number will allow the public to provide more timely reports of highway rail grade crossing signal malfunctions.

While there has been much advancement in the signal system technology at highway rail grade crossings, even the most high tech equipment is rendered useless if the traveling public does not obey the warnings they receive. Enforcement of laws and penalties that come from noncompliance are critical in order to increase safety at highway rail grade crossings.

By conducting audits in the timeframes contained within this legislation, the FRA and the industry can ensure that they are getting all of the correct data relating to highway rail grade crossing accidents and incidents.

It is and has been the position of the BRS that the FRA is understaffed. This bill will increase the number of FRA inspectors that are needed to ensure proper accident/incident reporting.

This bill provides language that will require within 12 months the railroad develop and submit a plan to the Secretary, implementing positive train control systems by December 31st, 2014. The BRS concurs with the requirements of this section, and also I would like to add that we also concur with what Brunkenhoefer said about having a system that works over the entire railroad rather than one railroad versus another.

The BRS agrees with the provisions contained in Title VI Miscellaneous, Section 602 Warning in Non-Signaled Territory. The hardware and software is available today to prevent many, if not all, of the accidents and incidents involving misaligned switches in non-signaled territory. As railroads continue to increase capacity, these types of accidents will likely increase if we do not take any action.

As the complexity of all railroad equipment increases, it is important to make sure that all employees have the necessary training to perform their duties. The BRS praises the provisions regarding minimum training standards in this bill.

The bill provides language to ensure that all injured railroad employees get the proper medical treatment for any on-job injury. An injured employee should not have to worry about reporting an injury, let alone getting the proper treatment for that injury.

Mr. Chairman, H.R. 2095 is a giant step toward improving safety in the Nation's railroads. This bill addresses many issues very important to railroad signalmen. This bill, if passed into law, will improve rail safety across our Nation's railroads. On behalf of the Brotherhood of Railroad Signalmen, I congratulate all who helped to craft this bill.

I appreciate the opportunity to testify before you today, and at this time I will be glad to answer any questions.

Mr. OBERSTAR. Thank you very much, Mr. Pickett. We greatly appreciate your testimony.

Mr. OBERSTAR. Mr. Durbin?

Mr. DURBIN. Thank you, Mr. Chairman.

I am Marty Durbin with the American Chemistry Council. Our members are committed to the safe movement of our products, and we believe H.R. 2095 provides an important framework to improve safety performance for transporting these critical materials. In particular, we support provisions of the bill that seek to implement the NTSB recommendations.

The business of chemistry depends on the Nation's railroads to deliver about 170 million tons of products each year, accounting for more than $5 billion in annual railroad freight revenues, making chemicals the second largest railroad commodity.

Sound engineering and common sense teach us that for rail transportation, hazmat safety is the result of many interrelated factors. The avoidance of accidents and accidental releases of hazardous materials is a primary focus for our member companies, the broader chemistry sector, our transportation partners and emergency responders. Together, we have invested billions of dollars in training, systems, technology and tank car safety.

And H.R. 2095 goes even further by requiring such measures as positive train control, warnings in non-signaled territory and enhanced track inspection. These provisions in addition to the bill's treatment of employee fatigue will significantly enhance rail safety.

Safety performance improvements for hazmat rail shipments is a collaborative process that must involve all relevant stakeholders including rail carriers, shippers, tank car suppliers and government. The ACC is pleased to hold a seat on the Tank Car Committee of the Association of American Railroads. We have long found the committee to be an effective forum for cooperative risk management.

We are concerned, however, that recent actions by our rail partners could jeopardize that history of successful collaboration. Following last year's controversial decision by AAR to approve a new tank car design which was opposed by all the shipper representatives on the committee, FRA expressed its concern that AAR had abandoned a consensus process that "yielded so many significant improvements in the railroad transportation of hazardous materials."

We were grateful for FRA's leadership to bring all stakeholders back together under a collaborative approach toward a new tank car design. AAR wisely delayed implementation of its decision thereby allowing tank car design to be considered through a Federal rulemaking which is progressing on a positive path.

But this collaboration is in jeopardy. For example, under the guise of improving safety, one railroad has announced that it will revise its tariffs to encourage shippers to use a tank car that is not yet available. We are also disappointed that AAR is now pursuing tank car designs for additional chemical products instead of working through the rulemaking process.

Now, in addition, we are aware that the railroads propose to limit their liability resulting from hazmat incidents. While it is in nobody's interest for railroads to be put out of business due to unwarranted lawsuits, we have serious concerns with the proposal.

ACC works with many organizations to help restore fairness to our civil justice system, but we don't believe a party should be re-

lieved of appropriate liability for harms it has caused. Railroads, as well as other stakeholders, should continue to bear liability for their own conduct. A system that shifts liability from the party at fault to other parties serves as a disincentive to improve safety.

So any decision to limit rail hazmat liability, should Congress find such a major change to be in the public interest, must involve input of all stakeholders. If all parties were to agree that some limits need to placed on liability, any resulting proposal must clearly distinguish between accidents and gross negligence and must be strongly tied to ongoing safety performance improvements. Therefore, ACC cannot support the railroads' narrow one-sided liability proposal, and I know other rail customer groups share our concern and will be submitting their own statements.

An important related matter is the common carrier obligation under which railroads are required to transport commodities for their customers. The common carrier obligation is the framework on which the entire national railroad transportation system was founded. Railroads are allowed to operate in the public interest because the Nation depends on safe and reliable delivery of a wide range of products on which we all depend.

ACC and its members recognize that safety requires effective collaboration and, despite the concerns I have cited today, I am also pleased to say that we have a long history of partnership with rail carriers on safety programs. One example is TRANSCAER which helps communities prepare for and respond to possible hazmat transportation incidents.

In addition, ACC's CHEMTREC program, now in its 36th year, shares expertise and experience with emergency responders. Our emergency center in Rosslyn is a 24/7 reminder of our commitment to enhance the safety of every hazmat shipment.

We look forward to working closely with this Committee, the Congress and the Agency and other stakeholders to enhance the safety of rail transportation.

Thank you for allowing the ACC to present its views, and I am glad to answer questions.

Mr. OBERSTAR. We are grateful for your testimony. Thank you very much for being here with us.

Mr. Hamberger, I wrote down with interest your comment about switch out of alignment. You said there were only three in 2006.

Mr. HAMBERGER. There were more switches out of alignment that occurred when the switching itself was occurring at the customer's facility or going into the customer's facility.

What we tried to do was to take a look at those accident codes in the FRA database in dark territory and then try to address the situation where a main line train goes into the siding and then does not realign the switch, so that the next main line train would continue on the main line but instead is shunted into the siding.

I said we believe that that is what this provision is meant to address, that kind of accident. If that is what we are talking about, we have identified three.

Mr. OBERSTAR. The FRA, from their own database, which I asked to be taken down from the infamous internet as you can get every piece of information in the world apparently, they have a very interesting printout which I used in preparing this legislation. In de-

scending order of frequency, the second most frequent incident is switch improperly aligned, and they list 136.

Mr. HAMBERGER. Yes, sir. But, as I say, we tried to get behind that number and those often times are when the work is being done.

Mr. OBERSTAR. You want that number or that category differentiated according to various listings that you just cited a moment ago.

Mr. HAMBERGER. To see whether or not lining up the switch would have prevented that accident, correct.

Mr. OBERSTAR. Mr. Pickett, do you have any comment? You are a signalman.

Mr. PICKETT. We don't keep on dark territory. We don't have any information on dark territory. We are not involved other than a grade crossing in dark territory.

Mr. OBERSTAR. Okay. There also is on page 18 of your testimony, a comment about Section 606 of our bill.

Your quote: "It appears to mandate that railroads transport injured workers to a hospital of the worker's choosing with no limitations on that choice," so forth and so on and then says "A railroad should be able to override the health care provider."

What do you mean override the health care provider? That is an intriguing comment.

Mr. HAMBERGER. As I was trying to point out, there may be occasions where a doctor says to an employee, you are cleared to go back to work, but that employee is on medication that causes drowsiness. In that case, the employee should not be.

Mr. OBERSTAR. You would say the railroads should override the decision to return to work, not override the medication.

Mr. HAMBERGER. That is correct, yes, sir.

Mr. OBERSTAR. That is not clear from your statement.

Mr. HAMBERGER. I apologize for that.

Mr. WYTKIND. Mr. Chairman, it is also not happening that way. The situation that Mr. Hamberger is addressing, it is not when it is being used. It is being used to override doctors. It is being used to force employees to say no, for example, to prescription drugs, so that it is not reportable.

So while it may be a tool that they want to use to help the worker not have to come back to work, it is not a tool they are using for that purpose.

Mr. OBERSTAR. I specifically reference that. Mr. Hamberger, do you want to respond?

What we are concerned about is that the railroads, there have been reports that they have actually intervened in the choice of medication.

Mr. HAMBERGER. Well, I am sitting here, listening to these kinds of reports as well, and I have to say that on behalf of this industry, and I will not be obfuscatory about it. I will say straightforwardly, I reject the idea that there is a culture, an endemic culture of intimidation and harassment, and I say very clearly right here that it is not proper and appropriate to intimidate and harass. It is not proper and appropriate to stop an employee from getting appropriate medical care, and if it does happen it should be punished.

Mr. OBERSTAR. Since your statement says the provision appears to prohibit railroads from overriding the treatment plan and appears to mandate. Suppose you suggest language to us that would protect those concerns.

Mr. HAMBERGER. Thank you.

Mr. OBERSTAR. But without overreaching.

Mr. HAMBERGER. Yes, sir.

Mr. OBERSTAR. I would like to see what your comment would be.

Mr. HAMBERGER. Yes, sir. Thank you. Thank you very much.

Mr. OBERSTAR. In limbo time, what are train crews supposed to do?

Now I raise that question, and I do that against the backdrop of the hours of service legislation that we had several years ago and then in the surface transportation bill when a wide range of trucking interests got engaged in this, became engaged in this issue, including the electric power industry and the movie industry.

They said, oh, my goodness, we have these folks sitting around here for 14 hours. They got up at 7:00. They are on duty at 7:00 in the morning. They have got to drive all the equipment to the site of the movie shoot and unload the truck. Then they have nothing else to do for 12 hours until they load the truck up again, and then they can drive back.

We are not imposing any burden on them. I would call that limbo time. I lost that battle to the movie industry because every Member of Congress thought there was a movie in their back yard or in their district. They thought this would be just fine to have movies made in their districts, and they voted overwhelmingly, 300 something to whatever. We lost that battle, but I am not going to lose it again.

[Laughter.]

Mr. OBERSTAR. As I said earlier, if it is good enough for the Pope to rescind limbo, by golly, then we can deal with it here in this category.

Tell me, Mr. Tolman, what is your experience?

Mr. Wytkind, you cross over a lot of transportation venues including railroads.

Mr. TOLMAN. Mr. Chairman, crews are supposed to remain vigilant and watch out for mechanical failure as well as safety of the train while they are in limbo time. I have traveled across the Nation in the last six months and talked to various members throughout the railroad industry. It is the number one issue of abuse in the industry is limbo time.

You know we submitted recent testimony, and we submitted crews being held out of service. Three-thousand three-hundred and thirty-five [subsequently altered by witness to read: three hundred thirty-five thousand] crews were measured over the past six years, 2001 to 2006, and in that data that we received, I would say that part of limbo time is now part of their scheduling. It would suggest that the part of limbo time is part of their scheduling.

I quote. In their testimony, it says intractable scheduling problems if you deal with limbo time.

I beg to differ. I mean I sincerely beg to differ because they have built this into scheduling. If we took those numbers that I just gave

to you, 150 crews exceeded the hours of service by a minimum of two hours every day for 6 years, every day for 6 years.

One other thing I would like to comment is on the return to work problem of a person that may be on some medical prescription drug. Part 219 of the Federal Railroad Administration regulations would not allow an employee to go back to work if they were under some type of prescription drug. That is covered. That doesn't happen, shouldn't happen and wouldn't in the industry.

One other thing I would like to touch base on is the switching issue. I mean one accident in my eyes is one too many, and I am sure that everybody in this room could agree with that. But, God forbid, if that accident in Graniteville happened 12 hours previously with an elementary school 500 yards from there. I mean God forbid. We wouldn't be sitting here, questioning whether we should put targets there.

Thank you.

Mr. OBERSTAR. Mr. Wytkind?

Mr. WYTKIND. Mr. Chairman, the only thing I would add is I represent 32 unions in the transportation sector in five modes, and the gaming of hours of service, the gaming of how you schedule workers, the ability to extract every possible ounce out of the workers is something that is pervasive throughout the transportation industry.

The problems we have in the railroad industry are severe. This whole limbo time debate, we ought to end this debate. The workers should be protected from the obvious safety hazards that that issue among many others under the fatigue and hours of service debate brings to the industry. I don't really understand how the industry can basically defend this at a safety hearing.

It is one thing to argue that they need flexibility and they need to run 24/7 railroads. We are not disputing the fact that they run large nationwide 24 hour operations, but there is nothing incompatible about flexibility and efficiency and safety on the other hand. I think you can do both, and it can be achieved, and the measures in your legislation ought to be enacted.

Mr. OBERSTAR. Mr. Shuster?

Mr. SHUSTER. Thank you, Mr. Chairman.

The one thing that I have learned since coming to this Subcommittee is that the railroad companies and labor and the unions are similar to Republicans and Democrats. You are not all one monolithic group. You don't necessarily all speak with one voice.

I think it is important to find compromise here and come together, whether we are talking about, well, I know right now presently you have got about 50 percent of the workforce has agreed to a labor contract and 50 percent are still negotiating. We have got one rail company that isn't real hot on positive train control and another that wants it. So within both sides of this issue, people are disagreeing.

I think that there is some compromise here, and I think that talking about limbo time and worker safety and hours of service. I looked at what the Chairman's bill and Ms. Brown's bill says, and quite frankly I think my numbers, according to what I see but again not necessarily the way you view it, is it is safer. I am giving

you more rest time than the Chairman's bill on the same amount of work.

But that being said, safety is critical to all of us. I think everybody in this room, whether it is the folks in the rail industry, the companies, the AAR, labor unions, myself who drives on roads, my wife and kids who drive on roads and cross railroad tracks. We have got to make sure that we are as safe as we possibly can be.

I will ask it to Mr. Wytkind and Mr. Tolman and Mr. Broken Rail. I don't think I can still pronounce your name. Besides, I want to know what you are running for as you are complimenting both our staffs. And Mr. Pickett.

Mr. BRUNKENHOEFER. I am trying to borrow money.

[Laughter.]

Mr. SHUSTER. The Chairman's bill is 12 hours of work, 10 hours of rest. Mine, that we have introduced or we put out there at least, is 12 hours of work, 14 hours of rest. Can you comment on that?

What is the best mode?

Going back to, which we are going to get to that, the FRA, that you have said is a starting point for fatigue study and which I want to talk about that. But tell me, based upon your view, how many hours of work and how many hours of rest, uninterrupted rest, is the optimal?

Mr. BRUNKENHOEFER. Most of America works 21 and three-quarters days a month, 22 days a month. Under 272 hours in a 22 day month, that is 12 hours and 30 minutes.

We already have a 12 hour law. So we start off with that number of the premise that we are going to have a built-in 30 minutes a day or we are going to have to work more than 5 days a week. And so, I think that the cumulative time should be significantly lower than the 272.

As far as the 14 hours, I know that Altoona is a delightful city. I have visited it.

But if you live in Tucson, you may not be considered getting rest if you are spending 14 hours in Yuma, that when a crew gets to the other end of the railroad, they strongly want to go home to be with their wives and families. What the 14 hours appears to do is to punish the crew for a mistake that management made of being unable to run the train. It would probably cause them to lose additional turns in a month by the way they turn. They want their time at home, not at the other end of the railroad.

So I think that it is well intentioned, but if you are 14 hours stuck at the wrong place, it is not going to release the stress that you have to deal with on a daily basis.

Mr. SHUSTER. And 10 hours is better, is a shorter period of time? It allows them to get home. Is that what you are saying?

Mr. TOLMAN. I guess I will try to answer it. I think the most important thing in the industry, and we have heard various testimony, is that there is no one silver bullet that resolves the fatigue issue in most modes. But in my eyes there is one silver bullet, and it is in the Chairman's bill, and that is elimination of limbo time. That addresses the primary issue. Fourteen versus ten, I think Mr. Brunkenhoefer answered it correct, that our members and anybody in their right mind don't want to lay over for 14 hours at an away from home terminal versus being home in their own bed.

Another way to look at it is if you give the opportunity of employee empowerment, and that would be giving the employees—trainmen, conductors, engineers—the opportunity to take leave when they are exhausted, when their rest is up, that would be the right approach.

Fourteen versus ten, I think ten is the answer. I embrace the Chairman's legislation.

Mr. SHUSTER. Because, again, if you are in Altoona and you are going from Harrisburg to Pittsburgh, those runs are a lot shorter than if you are out west somewhere. So no matter what the time is, you can't necessarily guarantee, especially when you have got these long, long runs, that somebody is going to be in the right place at the right time. Truckers have that problem. Airline pilots have that problem.

Mr. PICKETT. Mr. Shuster, if I could address.

Mr. SHUSTER. Yes, sir.

Mr. PICKETT. For the signalmen, we have got it completely different. We could go home at 3:00 this afternoon if that completes our shift. We are on call 24/7.

Under the current regs, what Tolman said is correct. If we had the opportunity to say, hey, I can't go out now. But we could possibly be called out at 11:00 tonight if it was at 3:00 we finished our shift, completely rested and ready for 12 more hours in 24 hours. There is no way.

Also, you could even get two or three calls during that night if you were called out right after your shift as long as you didn't exceed the four hours and clear trouble, and then you would only have the eight hours rest.

So we see a big advantage in the 10 hours. We would like to see more done on the fact that let the individual be empowered to mark off without repercussion of marking off when he feels that he is tired.

Mr. SHUSTER. Limbo time, we have it down to propose one hour of limbo time in case things occur. A tire gets flat on a van on the way home, things like that happen, and that is unforeseen things. That one hour limbo time, that is something that is going to cause fatigue. It is going to cause great safety concerns.

Yes, Mr. Tolman.

Mr. TOLMAN. That is, I guess, a misuse of limbo time. Right now, the FRA has a regulation that provides for relief on certain issues that are under the definition of an emergency.

It is kind of misleading testimony that would say that limbo time won't address the Hurricane Katrina. There is already a change in the law that would address Hurricane Katrina, that the FRA can immediately amend the regs in order to address the Hurricane Katrina issues. It is not correct use.

Obviously, if there is an act of God—a hurricane, tornado, whatever—there is a regulation that provides for emergency relief on the hours of service.

Mr. HAMBERGER. Since I have been called misleading, if I might just jump in there, Mr. Shuster.

Mr. SHUSTER. Sure.

Mr. HAMBERGER. It is unclear to me, and if that is what the Chairman means and if that is the interpretation of Mr. Tolman.

It is unclear based on the draft legislation whether the exercise of that kind of regulatory authority by the FRA would still exist under this legislation. It is a key matter that we need to continue to discuss as we go forward.

Mr. SHUSTER. Rest is the key. Rest, uninterrupted rest, that is the key, right. Everybody agrees on that.

Well, then it becomes a question, and I said this before. How are we going to ensure that that guy or that gal goes home and actually rests for 10 hours? What are we prepared to do?

Last time I talked about the sleep police. Are we going to have bed checks?

It becomes a concern. If getting that rest is so critical for improving safety, then how are we going to ensure? How are you going to ensure that they are going to take that rest?

I know people out there who have second jobs at part time. Is that something that we say because it is such a great concern, because safety is hand, that we deny people to be able to have a second job? Is that something that you are prepared to put forward?

How do you ensure they are going to get that rest?

Mr. BRUNKENHOEFER. First, it is never going to happen if we don't give them the chance. And so, if we build a system that says you can't even a chance at getting your rest.

Mr. SHUSTER. Right, that is what this is all about.

Mr. BRUNKENHOEFER. Then it doesn't matter what your personal responsibility is.

As Mrs. Napolitano's district is where you have got the backup on I-5 and you are two hours getting home and two hours getting back to work and you have eight hours off and you are supposed to eat, sleep and bathe in the four hours that are left. It doesn't matter what the personal provides.

Mr. SHUSTER. But that is what this is all about. We are going to move forward. So what happens if we are able to craft a deal?

How do we ensure that those folks are getting the proper rest?

Mr. BRUNKENHOEFER. There is either a longer notification that says 10 hours from now you are going on duty, and I don't think that is unreasonable, or that people have assigned starting times and know when you are going to go to work.

So what we live in is that we never know. If I call the crew dispatcher and I call up and I say, when does it look like I am going to out. They say, Mr. Brunkenhoefer, it looks like you are going to get out in eight hours from now. That means you are going to get out at 2:00 a.m. So I better hurry up and go to bed.

The phone don't ring at 2:00 a.m. The phone don't ring 4:00, 6:00, 8:00, 12:00. Now I have worn out the bed. I am going to wake up, okay. I may be awake for 10 or 12 hours now that the phone call comes. Then I am 12 hours on duty. Then I build a limbo time on that, and then I go out and get on I-5 or the Pennsylvania Turnpike after I have been up 25 or 30 hours.

And so, eventually at some portion out there, maybe that is something the positive train control will do, is we will have a better prediction or a better window to get to the solution.

Mr. SHUSTER. That is going to ensure that everybody gets eight hours of sleep?

Mr. BRUNKENHOEFER. No. It is like today you know that you are going to probably be back here tomorrow morning at 8:00 a.m. So you have an oportunity to choose if you want to go to sleep at 9:00, 10:00, 11:00 or stay out all night.

Mr. SHUSTER. That is the point I am trying to make. If somebody decides that they are going to stay out all night or work a second job or do whatever, that is going to create a safety problem also.

Look, I have put forward a proposal that I think is decent. I have heard a couple of people say that is reasonable. There needs to be some compromise. I have said that from the beginning.

But how do we ensure that people are going to be responsible?[AFTER 6:00 P.M.]

Mr. BRUNKENHOEFER. First of all, you have got to give them the opportunity.

Mr. SHUSTER. That is what we are trying to do.

Mr. WYTKIND. Mr. Shuster, if I could just for a minute, I don't think you can make sure of anything.

I remember in the debate about the trucking industry's rewrite of the hours of service was that it got mired in litigation and other public disputes. The solution to the rewrite of the trucking hours of service was not to let some of corporate America, which they did attempt to do including Wal-Mart, to allow drivers to work longer hours behind the wheels which was certainly not conducive to creating the environment that you are referring to which is trying to make sure that workers get their rest period.

I think Mr. Brunkenhoefer and Mr. Tolman have both raised some very important points in their answers which is if you create an environment where you are guaranteed a certain amount of rest time, where you are guaranteed a cap on your number of hours, where you eliminate limbo time, where you eliminate the ability to call someone three hours into their sleep like they do regularly, those are the environments you can create to hopefully eliminate many of the fatigue problems in the industry.

You are not going to eliminate it altogether, and you are not going to regulate behavior. I can't promise you today that if you enact this bill tomorrow, every rail worker in this Country is going to show up to work 100 percent rested. There is no way you could ever do that.

But what I think you can do is create an environment that gives us a chance to have these workers get adequate rest at home, so when they show up at work, it is reliable time. The call comes at the right time. When they are told it is 2:00 a.m., it is 2:00 a.m., not 12:00 p.m. the next day.

I think those are issues that need to be dealt with both in the regulatory process and in the legislative process and in the way that labor and management conduct their affairs with one another.

Mr. SHUSTER. Sure. Labor and management, that brings up another point. When you start to talk about allowing the Federal Railroad Administration to basically have an open checkbook as we talked about this is a starting point on fatigue studies. My concern is we are going to have a bureaucrat in Washington determining what should be happening in labor negotiations and with management as to who is working, what is the hours of service instead of

just leaving it wide open to the Federal Rail Administrator to decide that he is going to change it, that he is going to increase it.

Mr. WYTKIND. Well, but that is not the point I am making. Mr. Tolman wants to respond.

When I say labor and management, there is responsible behavior that management can have in the conduct of its affairs with its employees. That has nothing to do with collective bargaining. It has everything to do with responsibly running your company and making sure your workers aren't exposed to safety risks.

My reference to labor and management has nothing to do with collective bargaining. I think this matter needs to be dealt with through public policy in the public policy arena because the carriers are not willing to do this without Congress telling them they shall.

Mr. SHUSTER. That is what we have laid out to put it forward.

Mr. WYTKIND. Right.

Mr. SHUSTER. Again, I want to come to some resolution, but at the same time I think you are absolutely right. You can't guarantee. You can't guarantee anything, whether if we set up a regimen of time and then who is going to make sure that everybody is doing the responsible thing, getting the proper rest. I guess that is my point.

When we try to regulate or over-regulate, at the end of the day, it is not going to be perfect. It is not necessarily going to give us all the outcomes that we think it is.

Mr. HAMBERGER. If I could just respond to something. I don't want to jump in here but if I could.

Mr. Broken Rail mentioned that the employees are being punished for the mistakes management made. Management made no mistake when the hotbox detector goes off and that car has to be set out and they are out in the middle of, as he said, Yuma somewhere and it takes a while to get somebody out there to relieve that crew at the end of their 12 hours.

But, yet, under the provision that would eliminate that, eliminate limbo time and make that an hours of service violation, that is a $100,000 fine because the hotbox detector went off. Somehow that doesn't seem quite equitable. There is no mistake that management made.

The concern has got to be fatigue and sleep deprivation and sleep debt. That is why we are suggesting that when that does happen, that there be a 14 hour period, whether it is at Yuma where you don't want to be, as Mr. Broken Rail said, or you are home in Tucson, wherever it was. It is a 14 hour window where you can be given the opportunity, as they both just said. Set up the environment, as they both just called for, to have that rest.

It is not a mistake management made. There are times that something happens. If they hadn't stopped and taken out that car that had the hotbox, there would have been an accident.

Mr. SHUSTER. Thank you, Mr. Chairman.

Mr. OBERSTAR. The gentleman has pursued a very important line of questioning.

The people we are talking about here—locomotive engineers, signalmen, maintenance away personnel—are safety professionals.

There are safety professionals on a flight deck in an aircraft. There are safety professionals in the cabin, the flight attendants.

My father was chairman of the safety committee of the Godfrey underground mine for 26 years when he worked there. He worked rotating shifts. We didn't have a whole lot to live on, but he didn't take a second job. When he came home, he went to bed. He got rest because he knew he had to be on the job.

And so, he was alert that fateful morning when the main tubers that the mining company insisted be put in the shaft where they were working, in the drift as they were called in the underground, and he heard the timbers cracking. He took his two partners and threw them out the mouth of the drift while the whole shaft collapsed in around him and stopped right here at his shoulders.

Safety professionals don't risk their own lives.

But I would suggest that in response to the gentleman's concern, that we include a provision in this legislation that would require rest counseling. Have counseling for workers. We are going to put this provision in. We are going to limit hours of service, and then let us make sure that everybody is covered by and gets some counseling. When you go home, you get some rest now.

I don't think we have to counsel people to do that, but I think the gentleman's point about maybe there is some temptation to go take a second job. I think folks in this sector are pretty well paid. They don't need a second job, but there might be temptation to do that. Let us put a provision in there that requires it.

Mrs. Napolitano?

At this point, I am going to ask Mrs. Napolitano to take the Chair as I have another transportation commitment elsewhere. I regret to leave.

But before I do, I just want to observe on the airbags. In the seventies, the National Highway Traffic Safety Administration issued a performance-based standard, not a technology-based standard. The companies went out and got the lowest cost airbags and installed them. Some of them were defective. Some were way overpowered. After hundreds of children were injured and a great many killed, Congress stepped in and said, fix this, and did by moderating and modulating the airbags for the individuals.

Mr. Hamberger, the Association of American Railroads has on its web page that just came to my attention, commentary on not the subject of this hearing but the legislation I have introduced to deal with competition. It has a very intriguing character, and I just want to know which one of these I am.

[Laughter.]

Mr. HAMBERGER. I can't see it.

There are a number of folks in town right now, Mr. Chairman, trying to drive support for that bill, and we felt it necessary to get our view out as well.

Mr. OBERSTAR. Let us not call it reregulation. You call it whatever you want. It is your web site, and you can call it whatever you want, but this is extending the benefits of deregulation.

Mr. SHUSTER. I think you are the guy on top there. Wasn't there one guy on top?

Mr. OBERSTAR. The one guy on top there, yes, he has got his hand up in the air.

Mrs. NAPOLITANO. [Presiding.] Thank you, Mr. Chair.

I believe it was my turn, so I will take it and then pass it on.

I was listening with great intensity to some of the finer points brought out about the average fine for a railroad for certain infractions being as low as $39.00, and I am thinking that is an invitation to just pay the fine.

There is a concern even in my district of the elected officials at the local level, that they feel there is just not enough emphasis being put on the seriousness of the infraction and how we are dealing with it or not dealing with it, I should say. That is just a statement that I thought I would make because that caught my ear.

One of the things that I did find out when we were doing some of the research for the derailments within my jurisdiction and just outside my jurisdiction was that the accidents within the yard, confined within the rail yard, were not being reported, and that could be a cause for concern because some of those could conceivably have impact on whether the equipment is failing, on sleep deprivation, a number of other things, not just necessarily the fact that there have been accidents within the yard.

I would hope that that is part of what we are going to start looking at is that we are honest in being able to report and being able to then to determine what it is that we need to do, whether it is training, counseling to the employees about sleeping, whatever it is. But then you have identified because in the end not only does the rail image suffer because of the derailments, but there are people's lives at stake besides the cargo that they are carrying.

Rather than just arbitrarily say you are doing this wrong, let us work together to be able to find out how we can address this, so that we do address things that we know are happening and are not being taken care of.

Training for supervisors, I am hearing. Well, personally, I had heard about the type of training some of the employees were not getting, but as I am listening to the testimony from some of the organizations, that the supervisors are giving instructions that might be contrary to the efforts being put forth by the railroad and saying we do not do this. Whether or not you have considered doing some training for the supervisors to ensure that whatever policy is out there, that it is carried out with the intent fully to not only protect the company but protect the employee and their integrity.

Mr. HAMBERGER. Yes, Madam Chair, those kinds of training programs indeed do exist, and there are several different kinds of training out there, one of which Mr. Wytkind referred to in the security area. While we believe—and we have had this discussion before this Committee in the past—that we are indeed providing security training. It is a security training module put together by the National Transportation Institute of Rutgers University, approved by the Department of Homeland Security.

There is a provision in the House-passed security bill that will mandate a training module, a training provision in security. So I am hoping that in future hearings we can have that one set aside.

With respect to training for the individual job that an employee holds, those kinds of training modules, it is my understanding, for example, with the UTU that those are put together in conjunction with the unions to make sure that the training is accurate. For the

BLE, it is a training program that the FRA, we have to submit to the FRA.

So, yes, there is that kind of a commitment to training because, as you point out and Mr. Broken Rail pointed out, there is in fact a new level, a new wave of people coming into the industry. We have to make sure that they understand the safety rules. We have to make sure that they are trained. I think the fact that in 2006 that we had the lowest accident rate in history indicates that we must be doing the job right.

Mrs. NAPOLITANO. I am glad to hear that because at some of the hearings that we had in Los Angeles, it was brought to my attention that the extent of the training was limited to handing an employee a video or sitting them through to a video and giving them a booklet. The statement was made that you were lucky if you got a trained engineer to work with. This was something that kind of horrified me because that is putting a lot at stake, a lot.

Mr. LaTourette?

Mr. LATOURETTE. Thank you very much, Madam Chairwoman.

I am sorry that the Chairman left, and I will tell him this personally. I hope we don't spend a lot of money in this bill on sleep counseling because anybody that doesn't belong to a fraternity that can't figure out that they need to get a good night's rest, I really think is a waste of time and exercise.

I want to talk about an issue that came up a couple of weeks ago, and then I want to get to this issue of limbo time as well. Mr. Hamberger, I want to start with you and, Mr. Durbin, I don't want you to feel ignored down there, so I am going to include you as well.

When we did the rail security bill of maybe a month ago that came out of Homeland Security, sort of air-dropped in that bill was a provision removing the Federal preemption for the Nation's railroads. My understanding is that it had something to do with Minot, North Dakota. We had a hearing on this last year. I don't think it had anything to do with Minot, North Dakota. I think it had to do with the American Association of Justice which used to be the American Trial Lawyers Association.

Mr. Hamberger, I will start with you and just ask you what you think that removal of Federal preemption would do to affect the Nation's railroads, one, and if you can just tell us, give us a little update on where the Minot, North Dakota stuff is, litigation.

Mr. HAMBERGER. Let me start with that update if I can, Mr. LaTourette. Indeed, there was an accident in Minot, North Dakota, in 2002, a derailment. An anhydrous ammonia tank car breached. One person was killed. Many were injured. The district court ruled that the FRA preemption prohibited a lawsuit from going forward.

We believe that that should not be the case, that that was an improper assessment of what FRA preemption means. We have legislative language that we have presented to the Committee staff. We presented it to the Department of Homeland Security staff when we found about the amendment that was going to be on the floor at 2:00 in the afternoon. We found out about it at 9:00 that morning in the technical corrections amendment offered by the Chair. It was impossible at that point to get that accepted.

We are talking to the Homeland Security conferees about taking language that will make sure that where there is a violation of the Federal Railroad Administration rules or guidance, that that does not extend to a preemption of being able to get into court. But what it does do is say that there will not be a patchwork quilt around the Country of various safety regulations, that there should in fact be because we are a network.

I am pleased to say that many of the cases in Minot are being settled. The named case, in fact, settled last week. Negotiation are ongoing, and the circuit court was supposed to hold oral arguments next week. I believe that has been postponed.

So I am hoping that that can be resolved and that the sympathy engendered and real sympathy for the citizens of Minot who were not given the opportunity to go to court will not drive Congress to go beyond fixing that narrow problem as you so eloquently put it.

Mr. LATOURETTE. I appreciate that. My time is brief. Let me just say I thought that the district court was wrong, but I thought that that provision was trying to kill an ant with a sledgehammer, and I hope that it is resolved.

Mr. HAMBERGER. I wish I had said it that way.

Mr. LATOURETTE. Well, it would have been shorter.

[Laughter.]

Mr. LATOURETTE. Mr. Durbin, has your group at all looked into what it would do to your ability to ship chemicals or hazardous materials?

Mr. DURBIN. We have, Mr. LaTourette, and we would agree with AAR's interpretation here. I think, again, it was a narrow language that intended to fix that one issue, but our concern as well is that it would have a much worse effect on the overall preemption issues.

Mr. LATOURETTE. I just thought it was nutty.

Mr. Pickett, I would go to you. I hope that in the Oberstar-Brown bill, that we can work together as Republicans and Democrats and come up with a bipartisan agreement on this limbo time and hours of service and everything else.

I wrote down, Mr. Pickett, that you said let the employee be empowered, I think you said. I couldn't agree with you more. I am the lead sponsor on a mandatory overtime for nurses. Just like truck drivers, just like people who operate the trains, I don't want some tired nurse taking care of me if she doesn't feel or he doesn't feel that they want to work that mandatory overtime and that they need their rest. I think the employee is in the best position to make that determination.

I have to tell you that I visited with some of your members at the Collinwood Yard, the one that CSX operates, and they have a view. What I am worried about when we have inflexibility rather than flexibility, when we don't empower employees and come to some agreement based upon whether you are in Yuma, Arizona or wherever else, Pennsylvania or things of that nature, when we have a one size fits all, I don't think you are empowering the employees.

So one of your guys said, come on out in the yard, and he threw a switch. He said, now that I have thrown that switch, I am on the clock.

But he said, you know what, if I want to work some overtime, if I want to work a little bit more to feed my family and take advantage of that, I should have the opportunity to do that. I know when I am tired. I know when I am not tired.

You don't think so, Mr. Brunkenhoefer, that this guy didn't know when he was tired?

Mr. BRUNKENHOEFER. We have worked with NTSB and a lot of other people. It is like taking drugs. You feel fine.

Mr. LATOURETTE. Sure.

Mr. BRUNKENHOEFER. But you don't know that your judgment is impaired. So people who work beyond a certain extent are not judgments, as much as their intentions are, of their ability to be able to perform.

I feel real good. I am going to drive on to Erie or to Buffalo, but when I go through Ashtabula from Collinwood, I had already been up 24 hours, but I felt fine when I left.

Mr. LATOURETTE. Yes, but that is kind of an extreme example. You are right. Some people feel they are invincible. When I was 21 years old, I felt I could do a lot more than I can now at 52 years old.

But if an employee says, you know what, I am feeling pretty good, and I think I can work 10 hours today as opposed to 8 hours a day, I think they are capable of making that judgment. I think that there does come a point when they are not able to make that judgment, and that is when hours of service and limbo time and other things have to come in and come into play.

I would hope. I know that everybody is excited about the Oberstar bill, but I would hope that we could resolve this in a way that builds more flexibility in, that makes the railroads safer, protects workers' rights, protects their sleep, gives them the opportunity to get the rest they need to do their job but also recognizes that not every train route is the same, not every employee is the same, not every job is the same.

I worry about the direction of the current bill, and I hope that the Chairman will work with Mr. Shuster and others, and we can come up with a product that everybody is proud of.

I thank you.

Mrs. NAPOLITANO. Thank you.

Mr. PICKETT. I would like to respond.

Mr. LATOURETTE. Sure.

Mr. PICKETT. I also do support the hours of service. We have worked on it since 1976 when we became part of it, and I do support it.

I think that there are times, though, that the people don't get the adequate rest that they should be allowed. That is what I meant. To empower them to mark off without being jeopardized or being hurt by saying, hey, I didn't go to bed tonight like I should have. I didn't go to bed at 3:00. I didn't know I was going to get called out at 11:00 tonight.

Mr. LATOURETTE. If the Chair will indulge me, I agree with that 100 percent, and that is the whole purpose behind the nurse mandatory overtime. That person is subject. Not Mr. Brunkenhoefer's analogy of driving 24 hours, and I hope when you have been up 24

hours, you please stay out of Ashtabula County, Mr. Brunkenhoefer.

But I do think that that employee should have the opportunity—that is what I am talking about—to say, you know what, I am beat, I am beat, so that we empower you.

That employee, I do think, within certain reasonable standards has the opportunity to say, you know what, I can go another couple of hours today to feed my family. That is where I worry that when we become inflexible in our rules, we don't completely empower the employee the way that we want to.

I would invite you to talk to the guys in the Collinwood Yard because they don't necessarily agree with that position.

Thank you.

Mr. TOLMAN. Mr. LaTourette, if I can also, please.

Mr. LATOURETTE. If the Chairman will let you, you can talk all day.

Mr. TOLMAN. Madam Chairman?

Mrs. NAPOLITANO. I think my Ranking Member here is getting a little antsy but go ahead.

Mr. TOLMAN. Thank you.

You know, it brings up a great point. Yes, we should be working together and cooperating, but for the last 12 years we have had that 45 U.S.C. 2108 [subsequently altered by witness to read: 45 U.S.C. 21108] section of the Hours of Service Act, which has provided both labor and management the opportunity to cooperate, to introduce pilot programs. Nothing has happened. There is no cooperation.

Hence, that is why the legislation in front us, 2095, is the right direction. It is the only direction.

Mr. HAMBERGER. Cooperation would extend to the seniority districts of your members who voted down 10 hours of rest at their away facility because they were more interested in getting back home than having 10 hours of rest. It goes both ways.

Mr. TOLMAN. Yes, it does.

Mrs. NAPOLITANO. Okay, gentleman, thank you very much.

The last question that I have is to Mr. Durbin. We kind of left you alone, so I don't want to make you feel neglected.

Mr. DURBIN. I appreciate it.

Mrs. NAPOLITANO. The railroads have a proposal to limit their liability resulting from hazardous material accidents or incidents, whichever, and their proposal requires chemical shippers to cover part of the liability in the event of hazardous material spills. Did the railroads involve you in the development of the proposal and what do your members think of it and which members support or oppose the proposal?

I will tell you I have had chemical spills in my area, and it is not a very nice thing to happen.

Mr. DURBIN. Mrs. Napolitano, as I mentioned in our testimony, we were not consulted as far as putting together the proposal that AAR has circulated. Now they have shared it with us, the completed version, and we have shared that with our members. The very clear answer back, as I mentioned in my testimony, was very clear concerns about the proposal as it is being one-sided.

Again, I think that this is a proposal that if we are going to go down this road, it has got to include all the different players, all the different stakeholders that are involved in the safe movement of hazardous materials. Again, should it be decided that this is a good way to go as far as limiting liability for any of the players in that chain, we need to make clear that there is a distinction between accidents and negligence and again to make sure that the liability is spread across all the different players.

Mr. HAMBERGER. If I might just end on a more civil note, Mrs. Napolitano, we did indeed share it with the ACC, with the Fertilizer Institute. We tried at one point to try to come up with a joint proposal with the Fertilizer Institute but did not come to resolution on that. So we thought it was important to get out our views. We did indeed share it. I sent it to Jack Gerard and to their counsel.

Obviously, something like this is not going to go forward without the full participation of everybody in that supply chain, and so we look forward to being able to sit down and talk to ACC as well.

Mrs. NAPOLITANO. That would be tremendous, especially if there are shipments of ammonia and things that could harm the environment that are very critical in many areas.

Mr. HAMBERGER. Absolutely.

Mrs. NAPOLITANO. Well, with that, I thank the Ranking Member and the witnesses for their valuable testimony and for your indulgence.

Again, Members of the Committee may have additional questions for the witnesses, and we ask you to respond to these in writing. The record will be held open for 14 days for these responses.

Unless there is further business, the Subcommittee is adjourned. Thank you very much.

[Whereupon, at 6:28 p.m., the Subcommittee was adjourned.]

**Statement by Congressman Jerry F. Costello**
**Committee on Transportation and Infrastructure**
**Subcommittee on Railroads**
**HR 2095, the Federal Railroad Safety Improvement Act of 2007**
**May 8, 2007**

Thank you, Madame Chairwoman. I am pleased to be here today as we evaluate HR 2095, the Federal Railroad Safety Improvement Act of 2007.

I would like to thank you and Chairman Oberstar for working with me to include Section 606 of this bill, which provides for prompt medical treatment to railroad workers. This is an important safety and quality of life issue for rail workers and I am pleased we were able to address it in this legislation.

In addition, as I have said in previous hearings, in my congressional district, we recently had a grade crossing accident. On November 20, 2006, in Marissa, IL, three people were killed and one was severely injured when a train struck an SUV at the South Main Street railroad crossing.

I am pleased to see strong provisions on grade crossings to improve safety by requiring regular reporting of current information on grade crossings to the FRA to enable all states to determine where to best dedicate their resources for grade crossing improvements.

HR 2095 would also require better railroad accident reporting and investigations at grade crossings by requiring the FRA to conduct an audit of all Class I railroads at least once every two years and all non-Class I railroads at least once every five years to ensure that all grade crossing accidents and incidents are reported to the national accident database.

Madame Chairwoman, HR 2095 is a good bill that improves safety for all railroad workers and communities that have rail traffic. With that, I welcome our witnesses and look forward to their testimony.

STATEMENT OF
CONGRESSMAN ELIJAH E. CUMMINGS

SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS
HEARING ON
"RAIL SAFETY LEGISLATION"

MAY 8, 2007
2:00 P.M.
2167 RAYBURN HOUSE OFFICE BUILDING

The Subcommittee convenes today to consider rail safety legislation, including H.R. 2095, which Chairman Oberstar and Chairwoman Brown introduced last week. This legislation is long overdue and I applaud the leadership that Chairman Oberstar and Chairwoman Brown have brought to this issue.

By any measure, railroads are an essential part of our national transportation network. According to the U.S. Department of Transportation and the Association of American Railroads, in 2004, nearly 98,000 miles of Class I freight railroad were

operated in the United States and more than 162,000 people were employed by railroads.

In that same year, North American railroads originated nearly 40 million carloads of freight carrying more than 40 percent of our domestic freight by total weight.

Despite their critical role in our national transportation network, however, Congress last reauthorized the Federal Railroad Administration in 1994. That 4-year authorization expired in 1998.

Since that time, the railroad industry has changed dramatically – and, for a variety of reasons, human factors have become the single largest cause of train accidents, accounting for more than 1,200 accidents in 2005.

During the nearly 10 years from 1998 until the end of the 109th Congress, however, Congress did not move decisively to respond to these troubling trends in rail safety. Although many hearings were held, no comprehensive legislation was developed to respond to the challenges that industry changes brought to safety practices in the rail industry.

Now, we have a situation in which Amtrak and the commuter railroads – which operate on lines owned by freight railroads – are moving more passengers and freight at a time when an increasing number of railroad workers are retiring, leaving new hires with a steep learning curve at a time of growing congestion on the rail networks.

These developments will have a significant impact on the safety both of rail workers and of the traveling public and they require a revitalized safety regime that will meet the safety challenges of this new era in rail transportation.

I believe H.R. 2095 takes the steps needed to put in place the safety regime that will bring common sense solutions to the major safety problems plaguing the rail industry.

The Subcommittee has a very ambitious agenda this session, but we simply cannot move on to deal with the other policy challenges created by the growth in the passenger and freight rail industry without creating a strong foundation of safety in the rail industry.

I again applaud Chairman Oberstar and Chairwoman Brown for their leadership and for convening today's hearing and I yield back the balance of my time.

**Congressman Nick Lampson**
**Opening Statement**
**Rail Safety Reauthorization**
**May 8, 2007**

Thank you Mr. Chairman.

I am pleased to be here today to hear from our distinguished speakers on the issue of Rail Safety.

This has been a long time coming. Most of the provisions in existing law have not been altered in 100 years, and the rest have not been changed in 40. This important bill will highlight safety as the top priority in the rail industry as has been done in several other modes of transportation. In addition it will take steps to limit employee fatigue, ensure safety at grade crossings and modify the way rail safety is enforced.

Rail safety is extremely important in my district outside of Houston, Texas. Houston, as you know, is home to most of our nation's petrochemical industry, and its second largest port. There is an overabundance of containers carrying hazardous materials on the tracks through some of the most densely populated areas in my district. The safety of the people living in these areas depends on the assurance of quality track and alert workers. This bill will address both of these issues.

Again, I would like to thank our speakers for being here today. I look forward to hearing your testimony.

**STATEMENT OF**
**THE HONORABLE JAMES L. OBERSTAR**
**SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS**
**HEARING ON**
**"RAIL SAFETY LEGISLATION"**
**MAY 8, 2007**

I am pleased to be here today to consider rail safety legislation, including H.R. 2095, which Chairwoman Brown and I introduced last week. The Administration has its own bill, H.R. 1516, that it transmitted to Congress, and Congressmen Mica and Shuster have circulated their own proposal for comment. I look forward to hearing from the witnesses on these and other proposals.

This legislation is long overdue. Congress last reauthorized the FRA in 1994; that authorization expired in 1998. Since 1994, the Committee on Transportation and Infrastructure has held 22 hearings on rail safety. In the first four months of the 110th Congress alone, we have held four hearings on rail safety, including one field hearing in San Antonio, Texas. It is time that we move a rail safety bill.

According to the FRA, the total number of train accidents, including collisions and derailments, increased from 2,504 in 1994 to 3,325 in 2005. In 2006, the number of train accidents decreased to 2,835.

Although I am encouraged by improvements in the 2006 rail safety statistics, I believe we still have a long way to go. Serious accidents resulting in fatalities, injuries, and environmental damages continue to occur.

According to the FRA, about 40 percent of all train accidents are the result of human factors; one in four of those accidents result from fatigue. Fatigue is sometimes called the "silent killer." It works its way into every action that a pilot, driver, or railroad engineer takes. It weakens the senses, slows reaction times, and makes it impossible for a person to function.

According to the National Transportation Safety Board (NTSB), "the current railroad hours-of-service laws permit, and many railroad carriers require, the most burdensome fatigue-inducing work schedule of any federally-regulated transportation mode in this country." A comparison of the modes is revealing. A commercial airline pilot can work up to 100 hours per month; shipboard personnel, at sea, can work up to 240 hours per month; a truck driver can be on duty up to 260 hours per month; and train crews can operate a train up to 432 hours per month. That equates to more than 14 hours a day for each of those 30 days.

Despite widespread agreement that the hours-of-service law is antiquated and in need of updating, it has been almost 40 years since substantial changes to the law have been made. In previous Congresses, I introduced legislation to strengthen hours-of-service. The railroads fought against it, stating that hours of service should be dealt with at the collective bargaining table but I believe that the safety of railroad workers and the safety of the general public, which all too often are the victims in these train accidents, should not be relegated to a negotiation between management and labor. I again introduced legislation that strengthens hours-of-service and reduces rail worker fatigue.

The legislation also requires all Class I railroads to develop and submit to the Secretary for review and approval a plan for implementing a positive train control system (PTC) by December 31, 2014. Implementation of PTC has been on the NTSB's list of most wanted safety improvements

since it was developed in 1990. Prior to this hearing, I asked the NTSB to search through their records and tell me how many accidents in the past decade would have been prevented if PTC systems were in place; they came up with 52 rail accidents. I understand that some in Congress are concerned that implementing PTC could be expensive to the rail industry. Those same Members have stated that the costs outweigh the benefits but I believe that lives that would have been saved in those 52 rail accidents are the best justification for implementing PTC.

The legislation also addresses track safety. In 2006, track-related accidents surpassed human factors-related accidents as the leading category of all train accidents. Recent accidents in Oneida, New York, Pico Rivera, California, Home Valley, Washington, Minot, North Dakota, and Nodaway, Iowa, raise serious concerns about the condition and safety of track on our Nation's railways. On April 18, as a result of the accident in Oneida, the FRA conducted an audit of CSX tracks in upstate New York and found 78 track defects and one serious violation. I look forward to speaking with the FRA Administrator about the audit and what the FRA is doing to strengthen track safety.

We also need to strengthen safety at our nation's grade crossings. In particular, we need to make sure we are receiving accurate information about grade crossing safety. According to the DOT Inspector General, railroads are still not reporting grade crossing collisions and injuries to the FRA: 12 railroads failed to report 139 collisions to the FRA within 30 days after the end of the month in which the collision occurred – with some being reported nearly three years late. Although these numbers do not seem large, the FRA and the states use this information to identify dangerous crossings and analyze emerging accident trends. I just mentioned that the FRA's statistics have shown a decrease in rail accidents in 2006, but if the railroads are not reporting those accidents, then we have the wrong information. A perfect example: according to the Inspector General, in 2006, FRA officials found an unusually low number of injuries reported for grade crossing collisions

involving one Class I railroad when the train and/or motor vehicle were traveling in excess of 35 miles per hour – no injuries were reported for 154 collisions. We know from the FRA that grade crossing injuries went down in 2006, but if no injuries were reported for 154 collisions – and that was just for one railroad – then it is possible that the number actually went up; we just don't know about it. Further, the Inspector General found that FRA issued only one safety violation to this railroad for failing to have an adequate procedure in place for determining the extent of injuries to highway users involved in grade crossing collisions.

Clearly, we also need to look at enforcement. The Inspector General's audit found that the Federal Government investigates only a small number of grade crossing collisions. From 2000 through 2004, the FRA investigated just 13 percent of the most serious crossing collisions that occurred — those resulting in three or more fatalities and/or severe injuries. For those that were investigated, the FRA issued few citations. [The FRA issued only one citation to the railroad that failed to report injuries for 154 collisions in 2006.] Compare this to the Federal Aviation Administration (FAA): In 2004, the FAA conducted on-site investigations of 1,392, or 93 percent, of the 1,484 general aviation accidents that the FAA had responsibility for investigating in 2004. Unlike the FRA, however, the FAA has an Office of Accident Investigations staffed with 8 full-time investigators whose mission is to detect unsafe conditions and trends and to coordinate the process for corrective actions. In addition, the FAA uses personnel from other disciplines to conduct investigations, including 2,989 inspectors from its Office of Aviation Safety.

Currently, the FRA relies on just 421 Federal safety inspectors and 160 State safety inspectors to monitor the railroad's compliance with federally mandated safety standards. My bill will increase the number of Federal safety inspectors to at least 800 by fiscal year 2011.

I look forward to exploring these issues further with the witnesses and working with my colleagues as we move this legislation forward.

**Statement for the Record for Congressman Walz**
**Railroads, Pipelines and Hazardous Materials Subcommittee hearing on "Rail Safety Legislation"**
**May 8, 2007**

Mr. Chairman, Ranking Member Shuster, I want to thank you for holding this hearing today on such an important topic.

Federal rail safety legislation is long overdue and I fully support the intent behind H.R 2095, which Chairwoman Brown and Chairman Oberstar introduced last week.

Minnesota's railroads move millions of tons of freight per year that would otherwise be moved by truck, resulting in less pollution and highway damage. I have heard from many residents of southern Minnesota who tell me that it is crucial that this legislation strengthen the current railroad hours-of service laws and relieve the current fatigue-inducing schedule of train crews.

Track and grade crossing safety are equally important issues. Reporting requirements for track related and grade crossing accidents should be strengthened and enforced. Grade crossing collisions and injuries are not being reported to the Federal Railroad Administration (FRA) either at all or in a manner timely enough to analyze emerging accident trends. Collisions and injuries can be prevented by strengthening safety at grade crossings and mitigating track-related accidents.

By increasing the number of Federal safety inspectors, we can begin to strongly address the railroad's compliance with federally mandated safety standards.

We are here today to listen to testimony about how to improve rail safety. I look forward to working with my colleagues on this legislation.

Thank you again, Mr. Chairman, for holding this hearing.

**Written Statement of**
**Joseph H. Boardman,**
**Administrator,**
**Federal Railroad Administration,**
**U.S. Department of Transportation**
**before**
**the Subcommittee on Railroads, Pipelines, and Hazardous Materials,**
**Committee on Transportation and Infrastructure,**
**U.S. House of Representatives**

**May 8, 2007**

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**May 8, 2007**

Chairwoman Brown, Ranking Member Shuster, and other Members of the Subcommittee, I am very pleased to be here today, on behalf of the Secretary of Transportation, to discuss proposed rail safety legislation.

In February, the Administration presented its rail safety reauthorization bill, the Federal Railroad Safety Accountability and Improvement Act. In March, House Committee Chairman Oberstar introduced the Administration bill, by request, for himself and Ranking Member Mica and the leaders of this Subcommittee. I would like to express the Federal Railroad Administration's (FRA) sincere appreciation to you and your colleagues for this assistance. Also in March, Senator Lautenberg, Chairman of the Senate Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security, introduced the Administration bill, by request, for himself and Senator Smith, Ranking Member of the Subcommittee, for which we are very grateful. The Administration bill has been designated as H.R. 1516 and S. 918, respectively.

In addition to proposing to reauthorize FRA's important safety mission, this bill calls for important—and in some cases historic—substantive changes in the rail safety laws that we expect will materially improve safety. These changes would significantly enhance FRA's wide-ranging efforts to implement the National Rail Safety Action Plan, which I will discuss below, and I look forward to working with you to help secure their enactment.

FRA also appreciates the efforts of the Committee in developing its rail safety reauthorization proposals in H.R. 2095, The Federal Railroad Safety Improvement Act of 2007. I look forward to working with you on these proposals as the legislative process moves forward.

## THE NATIONAL RAIL SAFETY ACTION PLAN

As detailed in the appendix to my testimony, the railroad industry's overall safety record has improved dramatically over the past few decades, and most safety trends are

moving in the right direction. However, serious train accidents still occur, and the train accident rate has not shown substantive improvement in recent years. Moreover, several major freight and passenger train accidents in 2004 and 2005 (such as those at Macdona, Texas; Graniteville, South Carolina; and Glendale, California) raised specific concerns about railroad safety issues deserving government and industry attention.

As a result of these concerns, in May 2005, the U.S. Department of Transportation (DOT) and FRA, as the agency charged with carrying out the Federal railroad safety laws, initiated the National Rail Safety Action Plan (Action Plan), a comprehensive and methodical approach to address critical safety issues facing the railroad industry. The Action Plan's goals broadly stated are:

- Target the most frequent, highest-risk causes of train accidents;
- Focus FRA's oversight and inspection resources on areas of greatest concern; and
- Accelerate research efforts that have the potential to mitigate the largest risks.

As I have previously testified, the causes of train accidents are generally grouped into five categories: human factors; track and structures; equipment; signal and train control; and miscellaneous. From 2002 through 2006, the vast majority of train accidents resulted from human factor causes or track causes. Accordingly, human factors and track have been our primary focus to bring about further improvements in the train accident rate. Overall, the Action Plan includes initiatives intended to:

- Reduce train accidents caused by human factors;
- Address fatigue;
- Improve track safety;
- Enhance hazardous materials safety and emergency preparedness;
- Strengthen FRA's safety compliance program; and
- Improve highway-rail grade crossing safety.

In testimony before this Subcommittee in January, February, and March, FRA has detailed the substantial progress made in fulfilling Action Plan objectives, and the improvements that have been made. I will be glad to provide further updates to the Subcommittee concerning our ongoing safety initiatives. Given the topic of this hearing, however, I will focus my testimony on the Administration's safety bill and how we believe it will advance the Action Plan and FRA's overall safety program.

## THE ADMINISTRATION'S RAIL SAFETY BILL

The Administration's rail safety reauthorization bill, the Federal Railroad Safety Accountability and Improvement Act, would reauthorize appropriations for FRA to carry out its rail safety mission for four years. FRA has made a full copy of the proposal

available on our web site at http://www.fra.dot.gov/us/content/48, including the supporting analysis for each section. Let me take this opportunity to discuss the major provisions of the Administration bill and how they will further FRA's safety efforts.

**A. Authorizes Safety Risk Reduction Program and Protects Confidentiality of Risk Analyses Produced**

In order to enhance the accountability of railroads in assuming full responsibility for their own safety, the bill would authorize appropriations for the addition of a safety risk reduction program to supplement FRA's current safety activities and seeks Congressional endorsement of this pilot program. Since rail-related accidents, injuries, and deaths are already at low levels, FRA needs to augment our traditional behavior-based and design-specification-based regulations with a robust safety risk reduction program to drive down those key measures of risk at a reasonable cost and in a practical manner.

In the safety context, a risk reduction program is intended to make sure that the systems by which railroads operate and maintain their properties are adequate to meet or exceed safety objectives. FRA continues to place greater emphasis on developing models of how railroads can systematically evaluate safety risks, in order to hold railroads more accountable for improving the safety of their operations, including implementing plans to eliminate or reduce the chance for workers to make mistakes that can lead to accidents or close calls. A safety risk reduction program could unify previous voluntary efforts in the human factors arena while extending similar techniques to management of risk in other arenas such as track safety.

To encourage railroads to produce thorough, as opposed to superficial, risk analyses, a companion provision in the bill would bar public disclosure by FRA of records required under the safety risk reduction program, except for Federal law enforcement purposes. Also in order to promote the preparation of serious risk analyses by railroads, the provision would forbid discovery by private litigants in civil litigation for damages of any information compiled or collected under the program, and would forbid admission into evidence of the same information in civil litigation by private parties for damages.

FRA is mindful that any restriction of public access to information may be controversial and requires careful scrutiny. However, we are convinced that assuring confidentiality is essential to promote full disclosure by the railroads and their employees to make such programs meaningful and bring about tangible improvements in safety.

**B. Grants Rulemaking Authority over Hours of Service**

Human factors cause more than a third of all train accidents, constituting the largest category of train accident causes. Fatigue is at least a contributing factor in one of

every four serious human factor train accidents. We believe that fatigued crewmembers have played an increasing role in railroad accidents over the past decade through poor judgment, miscommunication, inattentiveness, and failure to follow procedures. Our challenge is to ensure that crewmembers have adequate opportunity to rest, are free of disorders that can disrupt sleep, and are fully engaged in maintaining alertness.

The Subcommittee has recognized the deleterious effect that fatigue has on the safety of railroad operations, convening a hearing in February focused solely on this widespread problem. However, as I testified at that hearing, the statutory provisions that govern the hours of service of railroad train crews, dispatchers, and signal maintainers are antiquated—essentially a century old—and inadequate to address present realities. For example, under those laws, train crews may work eight hours on duty and eight hours off duty perpetually. Engineers and conductors often work 60 to 70 hours a week, and may be called to work during the day or night, which disrupts sleep patterns and reduces their ability to function.

Moreover, those laws contain no substantive rulemaking authority. The lack of regulatory authority over duty hours—authority that other DOT agencies have with respect to their modes of transportation—has precluded FRA from making use of scientific learning on this issue of sleep-wake cycles and fatigue-induced performance failures. Behavioral science has progressed to the point that computer models can accurately predict the likely effect of given sleep and rest patterns on employee performance. The models provide useful guidance to aid employee scheduling, and FRA published a validation report of one such model in 2006, as I testified in February. However, only the Union Pacific Railroad Company is making use of a sleep model to evaluate its own crew scheduling practices. Most railroads have yet to integrate use of such models in their operations and have refrained from making public commitments to use this capability in the future.

Further, over the past 15 years, the history of attempts by rail labor and management to improve fatigue management has not been marked by sustained progress, in part because rail labor organizations have a duty of fair representation that many of their members construe to include as maximizing earnings. Less hours worked is understood as less pay. There is, therefore, a market failure in connection with maximizing income that does not adequately protect the public or the safety interests of the employees themselves. Government needs to set an appropriate standard that ensures employees an adequate opportunity for rest, and labor and management should be free to work out the details regarding how that standard will be met through collective bargaining.

Madam Chairwoman, we recognize that the Committee will consider specific amendments to the law that might mitigate fatigue. Although FRA understands the frustrations that this issue has produced and the temptation to provide early relief, we believe that sincere attempts at short-term relief can also create constraints that may limit

the ability to provide optimal solutions downstream. Treating limbo time as on-duty time, for instance, would shift the law from a safety frame of reference to a "fair labor standards" frame of reference, force carriers to reduce the length of many assignments to avoid the possibility of "violations" under circumstances where safety could not be seriously compromised, and ensure that any further reforms would be very costly indeed. Hours of service issues are surprisingly complicated, and they need to be considered within the overall context of fatigue prevention and management. FRA is committed to progress in this area, but we need the regulatory authority to do it.

So we will continue to urge that the hours of service laws be replaced with flexible regulations based on a modern, scientific understanding of fatigue. Today, I am here asking for your support for legislation that will permit us to put into action what we have learned. The Administration bill first proposes to sunset the hours of service laws, but retain their protections as interim regulations embodying their substantive provisions. Next, the proposal calls for FRA, as the Secretary's delegate, to review the problem of fatigue with the assistance of the Railroad Safety Advisory Committee, and to develop as necessary new, science-based requirements that can help us reduce human factor-caused accidents and casualties. We believe revised "benchmark" limits are needed on work hours, and requirements for rest periods, to provide simple guidance for fixed schedules, where that will suffice.

The bill would also authorize FRA to permit railroads to comply with an approved fatigue management plan as an alternative to complying with the "benchmark" limits" in the regulations. With the tools now available, we will be able to recognize fatigue management approaches that include careful evaluation of a wide variety of more flexible work schedules by validated techniques. In fact, we believe most safety-critical railroad employees would be protected by performance-based fatigue management programs that will enhance safety while holding down costs.

For public and employee safety, it is time to make a long-overdue change and provide us the rulemaking authority necessary to reform the hours of service laws and more effectively address the major cause of far too many train accidents.

**C. Promotes Highway-Rail Grade Crossing Safety**

Deaths in highway-rail grade crossing accidents are the second-leading category of fatalities associated with railroading, causing more than a third of all rail-related fatalities. (Trespasser fatalities are the leading category.) The number of grade crossing deaths has declined substantially and steadily in recent years. However, the growth in rail and motor vehicle traffic continues to present challenges. The bill seeks to prevent highway-rail grade crossing collisions and make crossings safer through two main provisions.

*1. Requires Reports by Railroads and States to DOT on the Characteristics of Highway-Rail Grade Crossings*

Currently, reporting to the DOT National Crossing Inventory is strictly voluntary. The bill would require that railroads and States provide the Secretary with current information regarding the country's approximately 280,000 highway-rail grade crossings. Mandatory reporting would make this unique national database more up to date and complete, which would help (i) States rank their crossings by risk and channel resources to the most dangerous crossings first, and (ii) DOT and transportation researchers identify the most promising ways to reduce crossing casualties. The bill would therefore require initial reports on all previously unreported crossings and periodic updates on all crossings. We appreciate action by the leadership of the Committee to include a very similar provision in H.R. 2095.

*2. Fosters Introduction of New Technology to Improve Safety at Public Highway-Rail Grade Crossings*

Fewer than half of the 140,000 public highway-rail grade crossings have active warning devices, which are expensive to install and maintain. Perversely, improvements at one crossing are often cited in tort actions to prove the inadequacy of protections at another crossing. Under the Administration bill, if the Secretary has approved a new technology to provide advance warning to highway users at a grade crossing, the Secretary's determination preempts any State law concerning the adequacy of the technology in providing the warning. FRA believes that this proposal would help encourage the creation and deployment of new, cost-effective technology at the Nation's approximately 80,000 public grade crossings that still lack active warning devices.

**D. Expands FRA's Authority to Disqualify Individuals Unfit for Safety-Sensitive Service**

Another provision of the bill would expand FRA's existing disqualification authority to cover individuals who are unfit for safety-sensitive service in the railroad industry because of a violation of the Hazardous Materials Regulations related to transporting hazardous material by rail. Currently, FRA may disqualify an individual only for a violation of the rail safety laws or regulations, not the Hazardous Materials Regulations, even though violation of the Hazardous Materials Regulations may involve a greater potential accident risk or consequence (in the event of an accident). This proposal would logically extend our disqualification authority over railroad employees and complement current initiatives to strengthen FRA's safety compliance program.

**E. Protects Rail Safety Regulations from Legal Attack on the Ground that They Affect Security and Repeals Statutory Requirement for DHS to Consult with DOT when Issuing Security Rules that Affect Rail Safety**

The bill would also bar legal challenges to DOT safety regulations on the basis that they affect rail security. Rail safety and security are intertwined, and part of the justification for certain DOT regulations is that they enhance rail security. The bill would clarify the scope of the Secretary's safety jurisdiction and help deter or quickly rebuff any challenge that DOT has exceeded its statutory authority in issuing such regulations.

Of course, the U.S. Department of Homeland Security (DHS) would continue to exercise primary responsibility for the promulgation of rail security regulations. In this regard, the bill would repeal the statutory provision that, when issuing security rules that affect rail safety, DHS must consult with DOT. We believe the provision is unnecessary and confusing in light of other statutes, executive orders, and existing inter-Departmental cooperation under the DOT-DHS Memorandum of Understanding and its related annexes on rail security.

**F. Clarifies the Secretary's Authority to Issue Temporary Waivers of Rail Safety Regulations Related to Emergencies**

The bill would clarify that FRA, as the Secretary's delegate, may grant a temporary waiver without prior notice and an opportunity for public comment and hearing, if the waiver is directly related to an emergency event or needed to aid in recovery efforts and it is in the public interest and consistent with railroad safety. While FRA's normal practice is to set aside time for public comment and hearing on waiver petitions, this appreciably slows down issuance of waivers necessary for emergency response and recovery efforts. Yet granting a waiver without such procedures risks legal challenge. The provision would free FRA from this dilemma and allow the agency to support emergency response and recovery efforts by dispensing with prior notice and an opportunity for comment and hearing, and by otherwise expediting the process for granting waivers. Further, the relief granted would be temporary (a maximum of nine months), and the normal waiver procedures would have to be followed to extend the temporary relief granted should doing so be necessary.

**G. Authorizes the Monitoring of Railroad Radio Communications**

Currently, FRA is permitted to monitor railroad radio communications only in the presence of an authorized sender or receiver, such as a railroad employee. Yet, when railroad employees know that FRA is present, they tend to be on their best safety behavior. Therefore, FRA cannot be sure whether the level of compliance observed is normal, and we are less able to identify what are, under ordinary circumstances, the most frequent and serious instances of noncompliance. Access to candid communications off site would yield a truer picture of compliance levels.

The bill would address this concern by letting FRA safety inspectors monitor and record railroads' radio communications over their dedicated frequencies outside of the presence of railroad personnel for the purpose of accident prevention (including accident investigation) and, with certain exceptions, to use the information received. The exceptions would be that the information (1) may generally not be used as direct evidence in any administrative or judicial proceeding, and (2) may not be released under the Freedom of Information Act. The information may, however, be used as background material for further investigation. Nor should there be concern that the information communicated is personal information. Railroad operating rules and procedures already require that all radio communications relate to railroad operations and prohibit railroad employees from using the radio for personal use.

As FRA's objective of accident prevention is ordinarily fulfilled daily by conducting safety inspections of railroad operations and enforcing the rail safety laws, monitoring of radio communications would not only help achieve that objective, but would greatly improve the efficiency of those inspections, the accuracy of the results, and the effective deployment of FRA's limited inspection resources based on those more accurate results.

We appreciate inclusion of a similar provision on radio monitoring in H.R. 2095, and look forward to working with the Committee on this matter.

**H. Clarifies and Relaxes the Existing Statutory Provision on Moving Certain Defective Equipment for Repair**

Finally, I would like to mention that the bill would amend a complicated statutory provision that states the conditions for hauling a railroad car or locomotive with a safety appliance or power brake defect for repair without civil penalty liability, including the requirement that equipment be back-hauled to the nearest available repair point. Back hauls required by statute can be both unsafe (because of the hazards related to switching a car out of one train and into another train), and inefficient (because the car is stopped from moving toward its destination and forced to go to a different place that is physically closer than the next forward point for repair). The proposal would allow the equipment to be moved to the next forward point of repair under clear regulatory safeguards for moving defective equipment that are more consistent with the movement-for-repair provisions applicable to vehicles with other types of defects, such as Freight Car Safety Standards defects.

Further, the bill would also define some key statutory terms and then provide FRA, as the Secretary's delegate, with rulemaking authority to define others. Currently, FRA may provide only guidance on the meaning of these terms, and this has contributed to an atmosphere of uncertainty about the requirements of the statute in day-to-day application. For example, FRA has received many complaints over the years that cars

have been hauled past a repair point that FRA does not consider to be a repair point. This proposal would, therefore, help dispel such uncertainty and promote understanding and compliance with the provisions governing the safe movement of equipment with a safety appliance or power brake defect.

I would like to emphasize that, while all of the provisions I have discussed are among the major provisions of the bill, there are other significant provisions I have not mentioned today that will also enhance rail safety. These include providing FRA rail security officers with greater access to Federal, State, and local law enforcement databases, officer-protection warning systems, and communications for the purpose of performing the Administrator's civil and administrative duties to promote safety, including security, and for other purposes authorized by law. All of these provisions are set forth in the bill the Secretary presented in February, and I would be glad to discuss any of them in detail with you.

**III. Conclusion**

FRA's approach to enhancing the safety of rail transportation is multifaceted. FRA personnel strive daily to implement the comprehensive initiatives for safety assurance and hazard mitigation under the National Rail Safety Action Plan to make rail operations safer for the public and the rail transportation industry.

The Administration's Federal Railroad Safety Accountability and Improvement Act would enable FRA not only to continue these efforts but to enhance safety in many other ways: such as by allowing FRA (1) to launch a safety risk reduction program that will make railroads more accountable for their safety performance; (2) to issue scientifically sound rules on hours of service that will reduce the fatigue of safety-critical employees; (3) to get vital, up-to-date data on all highway-rail crossings; (4) to foster the development of new crossing-safety technology; (5) to disqualify railroad personnel from safety-sensitive service based on their violation of the Hazardous Materials Regulations; (6) to protect rail safety regulations from legal challenge on the ground that they affect security and eliminate unnecessarily confusing statutory language; (7) to issue temporary waivers of rail safety regulations related to emergencies and emergency response efforts, without legal challenge on notice and comment grounds; (8) to monitor railroad radio communication to enhance FRA's compliance and accident prevention efforts; and (9) to make provisions for moving equipment with a safety appliance or power brake defect clearer and more consistent with similar FRA provisions.

I look forward to working with the Subcommittee and the Committee as a whole to bring about the enactment of these and the other provisions of the Administration's bill, and to help make our Nation's railroad system ever safer. Thank you.

**APPENDIX**

## The Railroad Industry's Safety Record

The railroad industry's overall safety record is very positive, and most safety trends are moving in the right direction. While not even a single death or injury is acceptable, progress is continually being made in the effort to improve railroad safety. This improvement is demonstrated by an analysis of the Federal Railroad Administration's (FRA) database of railroad reports of accidents and incidents that have occurred over the nearly three decades from 1978 through 2006. See 49 CFR part 225. (The worst year for rail safety in recent decades was 1978, and 2006 is the last complete year for which preliminary data are available.) Between 1978 and 2006, the total number of rail-related accidents and incidents has fallen from 90,653 to 12,940, an all-time low representing a decline of 86 percent. Between 1978 and 2006, total rail-related fatalities have declined from 1,646 to 913, a reduction of 44 percent. From 1978 to 2006, total employee cases (fatal and nonfatal) have dropped from 65,193 to 5,065, the record low; this represents a decline of 92 percent. In the same period, total employee deaths have fallen from 122 in 1978 to 16 in 2006, a decrease of 87 percent.

Contributing to this generally improving safety record has been a 74-percent decline in train accidents since 1978 (a total of 2,864 train accidents in 2006, compared to 10,991 in 1978), even though rail traffic has increased. (Total train-miles were up by 8.5 percent from 1978 to 2006.) In addition, the year 2006 saw only 28 train accidents out of the 2,834 reported in which a hazardous material was released, with a total of only 69 hazardous material cars releasing some amount of product, despite about 1.7 million movements of hazardous materials by rail.

In other words, over the last almost three decades, the number and rate of train accidents, total deaths arising from rail operations, employee fatalities and injuries, and hazardous materials releases all have fallen dramatically. In most categories, these improvements have been most rapid in the 1980s, and tapered off in the late 1990s. Causes of the improvements have included a much more profitable economic climate for freight railroads following deregulation in 1980 under the Staggers Act (which led to substantially greater investment in plant and equipment), enhanced safety awareness and safety program implementation on the part of railroads and their employees, and FRA's safety monitoring and standard setting (most of FRA's safety rules were issued during this period). In addition, rail remains an extremely safe mode of transportation for passengers. Since 1978, more than 11.2 billion passengers have traveled by rail, based on reports filed with FRA each month. The number of rail passengers has steadily increased over the years, and since 2000 has averaged more than 500 million per year. Although 12 passengers died in train collisions and derailments in 2005, none did in 2006. On a passenger-mile basis, with an average about 15.5 billion passenger-miles per year since the year 2000, rail travel is about as safe as scheduled airlines and intercity bus transportation and is far safer than private motor vehicle travel. Rail passenger accidents–while always to be avoided–have a very high passenger survival rate.

As indicated previously, not all of the major safety indicators are positive. Grade crossing and rail trespasser incidents continue to cause a large proportion of the deaths associated with railroading. Grade crossing and rail trespassing deaths accounted for 97 percent of the 913 total rail-related deaths in 2006. In recent years, rail trespasser deaths have replaced grade crossing fatalities as the largest category of rail-related deaths. In 2006, 525 persons died while on railroad property without authorization, and 365 persons lost their lives in grade crossing accidents. Further, significant train accidents continue to occur, and the train accident rate per million train-miles has not declined at an acceptable pace in recent years. It actually rose slightly in 2003 and 2004 (to 4.05 and 4.38, respectively) compared to that in 2002 (3.76), although it dropped in 2005 (to 4.1) and 2006 (to 3.54).

The causes of train accidents are generally grouped into five categories: human factors; track and structures; equipment; signal and train control; and miscellaneous. The great majority of train accidents are caused by human factors and track. In recent years, most of the serious events involving train collisions or derailments resulting in release of hazardous material, or harm to rail passengers, have resulted from human factor or track causes. Accordingly, the National Rail Safety Action Plan makes human factors and track the major target areas for improving the train accident rate.

Testimony of

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Before the
Subcommittee on Railroads, Pipelines, and Hazardous Materials
of the
Committee on Transportation and Infrastructure

*"Rail Safety Legislation"*

May 8, 2007

Mr. Chairman, thank you for asking ACC to testify on a subject of great importance both to the chemistry sector I represent and the nation at large. And thank you too for this opportunity to share our members' views on H.R. 2095, the Federal Railroad Safety Improvement Act of 2007.

I am Marty Durbin, Managing Director of Federal Legislative Affairs with the American Chemistry Council ("ACC"). ACC is the trade association representing the companies that make the chemicals that are essential to the products that we need and use everyday. Our members are committed to the safe movement of our products, and we believe HR 2095 provides an important framework to spur continued improvement in safety performance throughout the chain of stakeholders responsible for transporting these critical materials. In particular, we support the provisions of the bill that seek to implement the recommendations of the National Transportation Safety Board.

Products supplied by the chemistry sector are essential in manufacturing, agriculture, energy, transportation, technology, communications, health, education, defense, and virtually every aspect of our lives. Basic industrial chemicals are the raw materials for thousands of other products including plastics, water treatment chemicals, detergents, pharmaceuticals and agricultural chemicals. These applications include medicines and medical technologies that save our lives, computers that expand our horizons, foods we eat, water we drink, cars we drive, homes in which we live, and clothes we wear.

Our $635 billion dollar industry employs more than 850,000 people in all 50 states, and accounts for 10 percent of all US merchandise exports. In fact, more than 96% of all manufactured goods are directly touched by chemistry. The business of chemistry depends on the nation's railroads to deliver approximately 170 million tons of products each year, accounting for more than $5 billion in annual railroad freight revenues, making chemicals the second-largest railroad commodity, behind only coal, in terms of volume, and third-largest revenue contributor to rail revenues, behind only coal and intermodal.

Chemicals – including those classified as hazardous chemicals – are essential for the life of the nation, and Congress wisely established a comprehensive, national hazardous material transportation system administered by the U.S. Department of Transportation ("DOT"). The goal of that system is to ensure that chemicals and other hazardous materials are delivered safely and reliably. The goal is not to prevent their movement to those customers who rely on them.

Turning specifically to the subject of today's hearing, I want to emphasize that rail transportation is critical to ACC's membership and to all of the industries and people who depend on us and our products. While there have been tragic hazardous materials rail incidents in the past few years, rail remains one of the safest means to ship hazardous materials. And ACC's member companies are committed to continuous safety improvement – not only in the transportation of our products, but in all aspects of our business.

Through ACC's Responsible Care® initiative, member companies are committed to a set of goals and guidelines that go above and beyond federal regulation on health, safety, security and the environment. Our commitment to continuous safety improvement naturally includes transportation.

**Safety Requires a Holistic Approach**

Hazardous materials transportation safety – *the avoidance of accidents and accidental releases of hazardous materials* – is a primary focus for ACC, our member companies, the broader chemistry sector, our transportation partners and the emergency responders with whom we work every day. Together, we have invested billions of dollars in training, systems, technology and tank car safety and we will continue to do so. A commitment to safety is good business.

Experience, engineering science and common sense teach us that for rail transportation, hazardous materials safety is the result of many interrelated factors including:

- Overall safety of rail operations, including track conditions and the condition of the associated rail infrastructure such as signaling ("dark territory").

- Placement of tank cars within trains, and their coupling to other cars.

- Training, supervision and staffing of train crews and those responsible for loading and unloading materials to ensure operational safety.

- Ongoing inspections of equipment.

- Proper use of appropriate cars for the movement of specific hazardous materials.

- Design and construction of tank cars.

I would note that HR 2095 includes provisions for implementation of measures such as positive train control, warnings in non-signaled territory and enhanced requirements for track inspection. These proposed requirements, in addition to the bill's treatment of concerns surrounding employee fatigue, have potential for significantly enhancing rail safety.

**Collaboration – Key to Success**

Safety performance improvements for hazardous materials rail shipments is a collaborative process that must involve all relevant stakeholders, including rail carriers, shippers, tank car suppliers and government.

ACC is pleased to hold a seat on the Tank Car Committee ("TCC") of the Association of American Railroads ("AAR"). Among its many functions, TCC has a mandate from DOT to evaluate tank car design and specifications to address safety performance. Throughout its history ACC has found TCC to be an effective forum in which this

important risk-management factor has been addressed in a collaborative and purposeful manner. We are concerned, however, that recent actions by our rail partners could jeopardize this long history of successful collaboration.

Following last year's controversial decision by the TCC to approve a new tank car design – a decision opposed by all shipper representatives on the TCC – the Federal Railroad Administration expressed its concern that the committee had abandoned the consensus process that had "yielded so many significant improvements in the railroad transportation of hazardous materials." ACC was encouraged by and grateful for FRA's leadership effort to bring all of the stakeholders back together under a collaborative approach toward a new tank car design. AAR wisely chose to delay implementation of its decision, thereby allowing a new tank car design to be considered through FRA with a federal rulemaking process. The rulemaking process is progressing on a positive path. Currently, initial inputs are being collected through a comprehensive test and analysis program. FRA has told the industry to expect a NPRM very soon. We look forward to continuing to collaborate with FRA to assure this rulemaking results in a sound regulation.

There are troubling signs, however, that this agreement to collaborate is in jeopardy. We are very concerned, for example, that one railroad has informed our members and others that it will revise its tariffs (freight rates) to "encourage" shippers to use a tank car that is not yet available – under the guise of improving safety. We are also surprised to see AAR's TCC once again pursuing new tank car designs for additional chemical products instead of working through the ongoing FRA rulemaking process.

**Liability Concerns**

ACC is aware that the railroads have developed a proposal to limit their liability resulting from hazardous materials incidents. While we agree it is not in our interest, or the nation's, for railroad companies to be put out of business due to unwarranted lawsuits, ACC has serious concerns with the proposal being circulated.

First, let me be clear that while ACC works with other organizations to restore balance and fairness to our civil justice system, we don't believe a party should be relieved of its appropriate liability for harms it has caused. Railroads, as well as hazardous materials shippers and other stakeholders should continue to bear liability for their own conduct. Lessening that responsibility would have undesirable consequences. Specifically, a system that shifts liability from the party at fault to other parties serves as a disincentive to improve safety.

Any decision to limit liability – should Congress find such a major change to be in the public interest – must involve the input of all relevant stakeholders in the rail transportation of hazardous materials. In addition, if it were to be decided by all parties that some form of limits need to be placed on liability, any resulting proposal must clearly distinguish between accidents and gross negligence and must be strongly tied to ongoing safety performance improvements. Therefore, ACC cannot support the narrow, one-sided liability proposal currently being circulated by the railroads.

An important related matter is the "common carrier obligation," under which railroads are required to transport commodities – whether or not hazardous – for their customers. The Interstate Commerce Clause of the Constitution grants power to the Congress to write the laws that govern our nation's commerce. Congress recognized the common carrier obligation as the framework on which the entire national railroad transportation system was founded. [49 US Code, Subsection 11101(a).] And it remains crucial today. As part of their charter, railroads are permitted to operate in the public interest because the nation depends on safe and reliable service in the delivery of a wide range of products on which we all depend.

**ACC – America's Chemical Resource and Partner**

ACC and our member companies are proud to be both resources and partners to our communities, the railroads, local jurisdictions and the emergency response community.

In the 1980s, ACC members, the railroads and other stakeholders developed TRANSCAER® (**Trans**portation **C**ommunity **A**wareness **E**mergency **R**esponse), a voluntary national outreach effort that helps communities prepare for and respond to possible hazardous material transportation incidents.

TRANSCAER "sponsor" organizations provide monetary resources and in-kind contributions. TRANSCAER Sponsors and Partners include: American Chemistry Council, Association of American Railroads, Chemical Educational Foundation, CHEMTREC®, National Tank Truck Carriers, Inc. and The Chlorine Institute. The U.S. Department of Energy, Environmental Management Office of Transportation is a TRANSCAER Partner. In 2005, TRANSCAER held over 200 events across the nation reaching over 8,500 attendees.

Emergency response is one of the most critical components of hazardous material transportation safety and security. Swift and appropriate response to accidents or other incidents will save lives not only of the public but of the responders themselves.

ACC's CHEMTREC (**Chem**ical **Tr**ansportation **E**mergency **C**enter) program, now in its 36th year, provides a successful blueprint for sharing expertise and experience with today's emergency responders. Located at our headquarters in Arlington, CHEMTREC is recognized by DOT and other federal agencies as a valuable source of information and expert counsel regarding hazardous materials incidents. When a chemical incident takes place, responders contact CHEMTREC immediately to determine the best way to handle a wide range of hazardous substances including radioactive materials, infectious substances, biohazards, and hazardous waste. Our state-of-the-art emergency center is a 24/7 reminder of the commitment we make to enhance the safety of every hazardous material shipment, and the people whom it may affect.

I am pleased to report that CHEMTREC has been a behind-the-scenes partner to a variety of government organizations and programs including NASA and the U.S. Army. When chemical spills, leaks or other incidents are involved, CHEMTREC usually gets the call and links the responders with the experts who can help them contain, control and clean-up.

As a further improvement to CHEMTREC's capabilities, CSX Transportation and CHEMTREC have launched a program designed to provide even more information to emergency responders during a rail-related hazardous materials incident. The program provides CHEMTREC's staff of Emergency Service Specialists with direct access to CSXT's Network Operations Workstation (NOW). NOW is a secure system that uses a combination of technologies to graphically identify the location of a train anywhere on CSXT's 21,000- mile network. These tools provide CHEMTREC's staff with a web-based, visual display of the train and its location, the location of rail cars within the train, and the contents of each rail car.

As in my previous appearances before this committee, I'd like to extend an invitation to each of you to visit the CHEMTREC facility at our offices in Arlington, VA.

**The Nation Needs a Safe and Reliable Rail System**

The nation needs a safe and reliable system of hazardous material rail transportation, governed by uniform, national rules. The only way to ensure that this system continually improves is by considering all of the factors that effect rail safety and engaging all of the key stakeholders through a collaborative process.

In addition to testifying in support of HR 2095, we look forward to working closely with this Subcommittee, the Congress, the Department of Transportation and the other private-sector stakeholders to continuously enhance the safety of hazardous material rail transportation.

Thank you for allowing the American Chemistry Council to present its views to the Subcommittee. I would be glad to respond to answer any questions.

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**STATEMENT OF**

**EDWARD R. HAMBERGER**
**PRESIDENT & CHIEF EXECUTIVE OFFICER**
**ASSOCIATION OF AMERICAN RAILROADS**

**BEFORE THE**
**U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

**SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS**

**HEARING ON THE REAUTHORIZATION OF THE FEDERAL RAIL SAFETY PROGRAM**

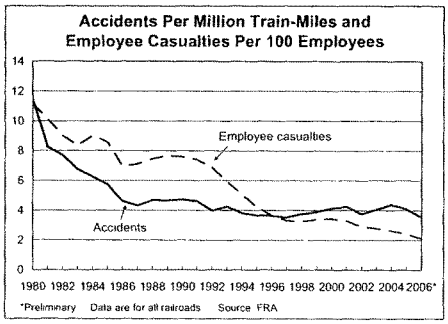
**MAY 8, 2007**

**Association of American Railroads**
**50 F Street NW**
**Washington, DC 20001**
**202-639-2100**

On behalf of the members of the Association of American Railroads (AAR), thank you for the opportunity to address rail safety. AAR members account for the vast majority of freight railroad mileage, employees, and traffic in Canada, Mexico, and the United States. My testimony below will focus on H.R. 2095, the proposed "Federal Railroad Safety Improvement Act of 2007."

**Overview of Rail Safety**

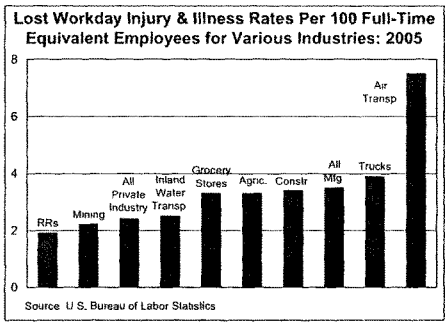
The overall rail industry safety record is excellent, reflecting the extraordinary importance railroads place on the safety of their employees and the communities they serve. According to data from the Federal Railroad Administration (FRA), from 1980-2006 railroads reduced their overall train accident rate by 69 percent, their rate of employee casualties by 81 percent, and their highway-rail grade crossing incident rate by 76 percent.[1] Rail safety continues to improve. The employee casualty rate and the grade crossing incident rate in 2006 were at their lowest levels ever, while the train accident rate was just fractionally higher than the record low set a few years ago.




Decades ago, railroads were among the most dangerous places to work. That's no longer true. Today, more people work in industries with higher employee injury rates than railroads than work in industries with lower employee injury rates than railroads. In fact, according to Department of Labor data, railroads today have lower employee injury rates than

[1] Accident and injury rates are a better indicator of safety improvement than the absolute number of accidents or injuries because the former incorporate units of output (*e.g.*, train-miles or employee-hours).

other modes of transportation and most other major industry groups, including agriculture, construction, manufacturing, and private industry as a whole. Available data also indicate that U.S. railroads have employee injury rates well below those of most major foreign railroads.




Railroads are proud of their safety record, which results from railroads' recognition of their responsibilities regarding safety and the enormous resources they devote to its advancement. At the same time, railroads want rail safety to continue to improve. The rail industry is always willing to work cooperatively with you, other policymakers, the FRA, its employees, and others to find practical, effective ways to make this happen. Railroads recognize that the primary purpose of H.R. 2095 is improving safety. We share that goal.

A commitment to safety that permeates the workplace is critical to promoting safety on a given railroad. Railroads have that commitment. But a healthy balance sheet is important as well. A financially-viable railroad will be in a much better position to invest in safety enhancements (*e.g* , heavier rail, newer freight cars and locomotives, technology R&D, more sophisticated training, and so on) than a financially-weak carrier. The record investments that railroads have made in their infrastructure, equipment, and technology in recent years have made railroads much safer, and these investments were made possible by the moderate improvements in profitability that railroads have enjoyed. Consequently, legislative or regulatory actions that would create significant new spending requirements and/or in any way would unduly restrict rail earnings could have unintended negative safety

consequences in addition to negative capacity, efficiency, and service reliability consequences.

Of course, no budget is unlimited, even for something as important as safety and even for railroads that have experienced financial improvement in recent years. Thus, I respectfully urge you to carefully consider whether particular safety-related mandates and measures are necessary and appropriate. After all, safety will not be advanced if resources are spent wastefully or if unfunded mandates lock up resources that could be better invested elsewhere. Wasteful safety mandates would only increase the cost of rail service (including for those who believe that rail service already costs too much) and drive more traffic to the highways, where the safety record is far less favorable than it is on the rails.

**Fatigue in the Rail Industry**

One of the primary focal points of H.R. 2095 is fatigue. As I noted in testimony to this committee on February 13th of this year, it is not in a railroad's best interest to have employees who are too tired to perform their duties properly. That's why railroads have long partnered with labor to gain a better understanding of fatigue-related issues and find effective, innovative solutions to fatigue-related problems.

Combating fatigue is a shared responsibility. Employers need to provide an environment that allows their employees to obtain necessary rest during off-duty hours, and employees must set aside time when off duty to obtain the rest they need. It is also clear that factors that can result in fatigue are multiple, complex, and frequently intertwined. Therefore, efforts to combat fatigue should be based on sound scientific research, not on anecdotes or isolated events. There is no single, easy solution to fatigue-related problems, especially in an industry that must operate 24 hours per day every day of the year.

Individual railroads are pursuing a variety of fatigue countermeasures, based on what they've found to be most effective for their particular circumstances and the provisions of their collective bargaining agreements. I discussed many of these countermeasures in my February testimony. Not every countermeasure is appropriate for every railroad, or even for different parts of the same railroad, because the effectiveness of various fatigue countermeasures depends on the circumstances unique to each railroad.

Railroads support continued research on ways to fight fatigue and will continue to work with rail labor to find effective solutions to fatigue issues. To that end, railroads are amenable to a careful reexamination of the Hours of Service Act's (HSA) statutory limitations. Generally speaking, railroads do not object to provisions in Section 201 of H.R. 2095 that prohibit train and engine and signal employees from working unless they have had at least ten consecutive hours off duty (up from eight hours under existing law) during the prior 24 hours, and railroads do not object to a requirement that those ten hours should be free of non-emergency phone or page communications from railroads.

Other provisions of Section 201 in H.R. 2095 are more problematic, including the provision on limbo time.

As you know, the HSA limits the number of hours that train crew employees can remain on duty. At times, though, because of unforeseen events, a train may be unable to reach its scheduled (or even a convenient) crew change point within its crew's allotted 12 hours. When this happens, the crew becomes "outlawed" and must immediately stop the train and wait for a new crew to replace it. Transportation of the replacement crew to the train, and of the outlawed crew from the train to a designated location where it is released from duty[2], is called "deadhead" transportation. Deadhead transportation is typically provided by other rail

[2] For example, to a terminal or a place of lodging.

personnel or by private contractors hired by railroads for this purpose. Deadhead time is not counted as on-duty time in either the airline or motor carrier industries.

The time a crew spends waiting to be taken to a duty assignment, and the time it spends being transported to the duty assignment, count as time on duty. However, time that outlawed crews spend waiting for deadhead transportation, and the time they spend being transported to where they are released from duty, count as neither time on duty nor time off duty. Instead, this time is considered "limbo time." During limbo time, the train crew has been relieved of and will not perform safety-sensitive duties. Employees' off-duty rest time begins only after they are released from duty. Rail employees are paid for limbo time. I discussed limbo time in some length in my February testimony.

Classification of limbo time as on-duty time, as called for in H.R. 2095, would impose intractable scheduling problems on railroads. Limbo time generally results from unforeseen circumstances. If time spent deadheading from a duty site were counted as on-duty time, a violation of the HSA would be all but assured if anything unforeseen happened. Countless actions as varied (and from a railroad's point of view, virtually unavoidable) as a grade crossing accident that delayed a train, a blown tire on a van carrying a train crew back to its release-from-duty site, or a sudden track washout would mean a violation of the HSA.

Although limbo time does not contribute to employee fatigue during the immediate work assignment, railroads are aware of concerns that it could play a role in creating a cumulative sleep deficit. To guard against this possibility, railroads support three changes to current regulations.

First, any employee who works 12 consecutive hours on duty, and then at least one hour of limbo time, would receive at least 14 hours of off-duty time once he or she is released from duty. Second, rail train and engine employees would be subject to a new monthly

maximum 276 hours on duty.[3] Third, even though limbo time is not on-duty time, it would be included in those 276 hours. Hours beyond this new maximum, which is consistent with permissible hours for other modes of transportation, would be a violation of the HSA. (Today a rail employee could theoretically work 432 hours per month and still be in compliance with the HSA.[4])

Together, these three measures not only significantly reduce the maximum on-duty time for train and engine employees under current law, but they also strike a balance between the concerns that limbo time contributes to fatigue and the realities of the unpredictability of railroad operations.

The above proposal is the railroad industry's preferred approach. Failing use of this approach, railroads would support a transfer of the hours of service authority to the FRA, with reliance on FRA's professional judgment.

Another provision in Section 201 mandates that train and engine and signal employees cannot work unless they have had at least 24 consecutive hours off duty during the previous seven days. This limit is arbitrary and inconsistent with railroad work schedules, particularly for employees assigned short hauls and who work in terminals. Generally speaking, the limit would be appropriate if extended one more day, to require 24 consecutive hours off duty in a period of eight consecutive days.

Even then, though, an exception is needed for signal employees. To enable signal employees to finish their work at far-away sites without having to commute multiple times, railroads and signal employees historically have agreed to modified work schedules — for

[3] KCS and CN do not agree with this position, and Amtrak abstains on the issue

[4] In fact, though, we know of no cases where this has occurred The vast majority of railroad workers are on duty each month for periods comparable to most other U.S. workers Some 83 percent of these rail workers are on duty less than 200 hours per month and more than 95 percent are on duty less than 250 hours per month.

example, eight consecutive work days (ten hours each day) followed by six consecutive days off. These work schedules are permitted under the HSA, are contained in collective bargaining agreements with signal employees, and result in much less total off-duty travel time for employees working a substantial distance from home. This work schedule for signal workers does not compromise safety and should be allowed.

Although schedules like this are permitted by the HSA, they are not permitted by Federal Motor Carrier Safety Administration (FMCSA) hours-of-service regulations, which apply to the many railroad signal employees who drive commercial vehicles to perform their duties. Several years ago, railroads and rail labor (through the Brotherhood of Railroad Signalmen) petitioned FMCSA to allow the HSA to take precedence over FMCSA's hours of service requirements. To date, FMCSA has refused. This problem can be rectified if it is made clear statutorily that hours of service requirements for rail signal employees under the HSA shall not be subject to hours of service restrictions imposed by another government agency.

Another provision in Section 201 prohibits railroads from invoking the emergency work provision for signal employees for "routine repairs, maintenance, or inspection." (Under the HSA, signal workers are permitted to work more hours during emergencies than they can during non-emergencies.) Presumably, the purpose of this provision is to prevent railroads from "gaming the system" by invoking the emergency work provision when an emergency does not exist. The railroads do not object to statutory language ensuring the provision is only invoked when appropriate.

Similarly, Section 201 also prohibits railroads from requiring signal employees to perform emergency work more than three days in any seven consecutive days. The nature of rail operations is such that, occasionally, railroads encounter emergencies when this limitation

would cause significant harm to rail operations and the greater good. Hurricane Katrina is a vivid and extreme example of an emergency. After that storm, signal workers performed Herculean tasks in getting the rail system up and running again. Had this provision been in place then, railroads' ability to respond to the storm would have been severely diminished and service restoration would have taken far longer. The same considerations would apply to more frequently occurring weather- and non-weather related emergencies.

Simply prohibiting railroads from invoking the emergency work provision for signal workers when no emergency exists would address concerns that railroads can "game the system." The three-days-in-seven provision, however, is superfluous and would do more harm than good.

Section 203 of H.R. 2095 requires railroads to submit fatigue management plans to the FRA for its review and approval. Railroads do not object to the preparation of a fatigue management plan *per se* — as I noted earlier, all major railroads already engage in a variety of efforts to combat fatigue, and will continue with these efforts. Rather, railroads are concerned that Section 203 as written is unreasonably broad, rigid, and does not require that such fatigue management plans be fact-based and science-based. We suggest these modifications:

- Rather than applying to all employees, as H.R. 2095 proposes, fatigue management plans should apply only to employees who are subject to the Hours of Service Act.
- Rather than requiring FRA approval, fatigue management plans should be filed with the FRA. The FRA should have the authority to disapprove elements of the plan, but absent FRA action the plan should become effective 30 days after filing. This point is important because innovation in combating fatigue should not be stifled, and waiting for approval could delay the implementation of plans. This process is also consistent with procedures for approval of railroad engineer certification programs.
- The requirement in Section 203 that "every condition on the railroad carrier's property" be addressed in the plan is impossibly vague and broad. For example, it could conceivably be used to prohibit night-time operations on a railroad.

- Railroads do not oppose the imposition of fatigue management plans on contractor employees doing work which, if done by a railroad employee, would be subject to a railroad's fatigue management plan, but the contractor — not the railroad — must be responsible for compliance. Railroads can make contractor employees follow railroad rules while working on railroad projects, but railroads lack the ability to police contractors' overall labor policies and employee hours. If policymakers determine that any group of non-railroad employees should be subject to an hours of service limitations, policymakers should address the issue with those groups directly, not indirectly through railroads.

Finally, a fatigue-related provision of H.R. 2095 prohibits rail employees' sleeping quarters from being located in the vicinity of switching operations. This proposal is unneeded. Under current law, the construction or reconstruction of any sleeping quarters in the vicinity of switching operations cannot take place without FRA approval, which will not happen if interior noise levels will exceed 55 decibels. In addition, the FRA considers whether hazardous materials are switched nearby. Thus, the issue of whether employees will have an environment in which to rest is already addressed.

**Positive Train Control and Railroad Switches**

Section 601 of H.R. 2095 requires Class I railroads to submit to the DOT for approval plans for implementing positive train control by December 31, 2014.

Class I railroads are now developing and testing train control systems that can help prevent accidents by automatically stopping or slowing trains before they encounter a dangerous situation. Through predictive enforcement, train control technologies, in certain circumstances, could significantly reduce the incidence of train accidents caused by human error, especially train collisions and derailments due to excessive speed.

Train control systems are extremely complex. At a minimum, they must include reliable technology to inform dispatchers and operators of a train's precise location; a means to warn operators of actual or potential problems (*e.g.*, excessive speed); and a means to take action, if necessary, independent of the train operator (*e.g.*, stop a train before it reaches the

physical limits of its operating authority or allowed speed). Some systems will also include additional features, such as expanding the ability to monitor the position of hand-operated switches. Perhaps the most critical element is sophisticated software capable of accommodating all of the variables associated with rail operations. When successfully implemented, these enhanced train control capabilities will enable trains to operate more safely than trains operate today.

Major railroads are engaged in various projects to test elements of this new technology. For example, BNSF has done extensive and successful pilot testing of its version of train control (Electronic Train Management System – ETMS) in Illinois and elsewhere. BNSF recently received final approval from the FRA to implement the technology on lines elsewhere on its system. Train control projects in progress on other railroads promise to provide similar or enhanced functionality and safety benefits. These include CSX's Communications-Based Train Management (CBTM) system, Norfolk Southern's Optimized Train Control (OTC) system, and Union Pacific's Communications-Based Train Control (CBTC) system.

Railroads are committed to the development and implementation of advanced train control technology where it makes sense to do so (*e.g.* high density main lines, rather than low density branch lines or yards) and at a pace that can be justified by available funds. Because there are so many variables involved, and because railroads are still investigating different train control systems and the advantages and disadvantages they offer, railroads believe that a rigid deadline, like that contained in H.R. 2095, is too rigid. Railroads recognize that 2014 (the deadline called for in the legislation) is some years away, but the tremendous costs and complexities involved in train control systems argue for flexibility, not rigidity, both in time and operational functionality. Railroads favor a commitment to provide

the FRA with an implementation plan regarding train control within 12 months, with the FRA reporting to Congress. Perhaps at that point a firmer implementation timetable could be established.

Provisions in H.R. 2095 regarding train control also mandate regulations requiring on main lines in non-signaled territory a system that would stop a train in advance of a misaligned switch, automatic switch-position indicators, or an operating policy that trains be operated at speeds that will allow trains to be stopped in advance of misaligned switches. Depending on the definition of "main line" and other factors, there are potentially tens of thousands of switches in non-signaled territory — often on low speed trackage — that would be affected by such a mandate.

Railroads realize that the rationale for this provision is protection again accidents caused by misaligned switches. However, on January 10, 2005, the FRA issued a safety advisory that directed all railroads to review their operating rules and take certain other actions necessary to help ensure that train crews who operate hand-operated main track switches in non-signaled territory restore the switches to their proper position after use. In October 2005, the FRA issued an emergency order mandating that railroads retrain and periodically test employees on switch operating procedures and increase communication among crew members regarding the position of the switch. The FRA has also issued a notice of proposed rulemaking that will supersede the emergency order. We expect a final rule to be promulgated in the near future. Thus, the FRA has already addressed the issue of improperly set manual switches in non-signaled territory. There is no reason to believe that these FRA actions will not achieve the goals behind the switch-related provisions of H.R. 2095.

Based on our analysis of FRA safety data, in 2006 there were three accidents attributable to switch problems this provision is meant to address. Over the past ten years,

there have been an average of four to five per year. Based on our understanding of available technology, the cost to equip each of the tens of thousands of switches potentially covered by the mandates in H.R. 2095 could be in the tens of thousands of dollars per switch — a truly enormous amount. That's not to say that railroads do not recognize and deeply regret tragic accidents attributable to improperly lined switches. However, as alluded to earlier, safety is best advanced when resources are spent to produce the highest safety benefits.

Finally, a track safety requirement of H.R. 2095 apparently would require railroads to have a track service failure rate of less than 0.1 per track mile per year. Such a regulatory requirement is well beyond what any major railroad has ever met over their entire systems. As written, this provision should be deleted. However, railroads are in favor of performance standards in lieu of inflexible command and control regulations and would be willing to work with the committee and FRA on a feasible standard.

**Protection of Employees and Witnesses From Intimidation**

Railroads reject the use of harassment and intimidation against their employees.

Section 301 of H.R. 2095 purports to protect employees when they are notifying the FRA of an injury or illness, providing accident or incident information to a public official, cooperating with a safety investigation, reporting hours of duty, or reporting a hazardous condition. While the current provision protects employees refusing to work if they reasonably conclude that a hazardous condition exists, this section expands the protection to include supervisors who refuse to authorize work.

While rail employees currently have the opportunity to pursue claims of harassment and intimidation under the Railway Labor Act, H.R. 2095 permits an employee to seek relief from the Department of Labor (DOL). In addition to the DOL remedy, under H.R. 2095 the employee is also permitted to seek redress through federal court without regard to what DOL

decided; redress through state courts; and redress through collective bargaining grievance procedures. In other words, this section provides four separate remedies, all of which are independent of each other and all of which can be sought for a single incident. H.R. 2095 authorizes punitive damages up to 10 times the amount of compensatory damages (up from a limit of $20,000 under current law) and authorizes criminal penalties for persons who violate this section. Finally, H.R. 2095's provisions regarding protection of employees and witnesses explicitly do not preempt state law.

These provisions are inappropriate for several reasons. First, FRA regulations already prohibit a railroad from taking action "calculated to discourage or prevent [an employee] from...reporting [an] accident, injury, or illness." Current law also already prohibits railroads from discriminating against employees who refuse to work because of hazardous conditions or who complain about a matter relating to federal safety regulation. Second, railroads have in place internal prohibitions against intimidation and harassment. Third, there has been no showing whatsoever of a compelling need for these protections. Fourth, as written, these provisions could impede accident investigations which are essential to determining if existing rail procedures need to be addressed.

Moreover, there is no justification to subject railroads to a law that is radically different in all significant respects — coverage, enforcement, and sanctions — than what is applicable to the rest of U.S. industry, including other transportation modes. There is no evidence that existing dispute resolution procedures do not work, or that authorizing the DOL (which has no expertise in rail matters) to resolve disputes would somehow advance safety.

Similarly, there is no basis either to broaden the eligibility for or to lift the current $20,000 cap on punitive damages, a form of damages unavailable under comparable statutes for other industries (including motor carriers). Finally, railroads strongly oppose proposals to

impose new criminal sanctions, which not only far exceed those applicable to other industries, but would be unduly harsh and subject to abuse.

Overall, the changes in this section would encourage more confrontation and conflict between management and labor while failing to promote safer rail operations. Railroads agree that action calculated to prevent an employee from reporting an injury, or discharge, discipline, or in any way discriminate against an employee for notifying DOT of an injury or illness or cooperating with an accident investigation, is unwarranted. But H.R. 2095 as written goes far beyond this.

Finally, a word about the desirability of national regulatory uniformity is appropriate here. Railroads could not operate effectively as a national system under a patchwork of laws and standards from 50 different states and thousands of localities. That's why federal law has long preempted various state and local laws. Preemption ensures that interstate commerce and interstate transportation are not stopped at the door of a local or regional jurisdiction, and that similar issues are treated consistently nationwide. Forcing railroads to adhere to state-specific laws and regulations would degrade the national rail network and should be avoided — especially in areas, like safety, where railroads are already subject to comprehensive national regulation.

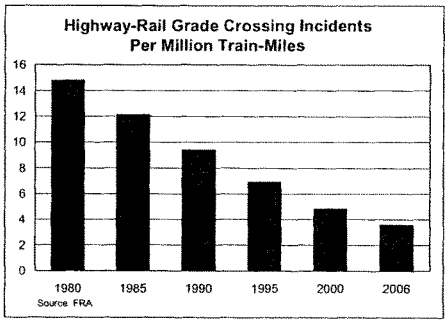
**Highway-Rail Grade Crossings**

Collisions at grade crossings, along with incidents involving trespassers on railroad rights-of-way, are critical safety problems. In 2006, these two categories accounted for 97 percent of rail-related fatalities. Although these incidents usually arise from factors that are largely outside of railroad control[5], and even though highway-rail crossing warning devices

[5] A June 2004 report by the U.S. DOT's Office of Inspector General (OIG) confirmed that motorist behavior causes the vast majority of grade crossing accidents. According to the OIG report, "Risky driver behavior or poor judgment accounted for 31,035 or 94 percent of public grade crossing accidents" from 1994-2003. The

are properly considered motor vehicle warning devices there for the benefit of motorists, not trains, railroads are committed to efforts aimed at further reducing the frequency of crossing and trespasser incidents.

Much success has already been achieved. In 1980, according to FRA data, 10,611 grade crossing collisions resulted in 833 fatalities and 3,890 injuries. According to preliminary data, 2,908 collisions in 2006 (down 73 percent) involved 366 fatalities (down 56 percent) and 1,006 injuries (down 74 percent). The rate of grade-crossing collisions per million train-miles fell 76 percent from 1980 through 2006, and has fallen every year since 1978. And because total exposure (train-miles multiplied by motor vehicle-miles) has risen sharply over time, the reduction in crossing incidents and casualties per unit of exposure has been even higher.




The Section 130 program, a national highway safety program created by the Highway Safety Act of 1973 and expanded most recently in SAFETEA-LU, is a major reason for the impressive grade crossing safety gains. Under the program, funds are apportioned to states each year for the installation of new active warning devices such as lights and gates, upgrading existing devices, and replacing or improving grade crossing surfaces. The rail industry commends and thanks the members of this committee and others in Congress for their support of this critical program.

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remaining accidents included such circumstances as vehicles stuck, stalled, or abandoned at crossings.

Railroads continue to work hard to improve grade-crossing safety, including cooperating with state agencies to install and upgrade grade crossing warning devices and signals (and bearing the cost of maintaining those devices); helping to fund the closure of unneeded or redundant crossings; and supporting the national Operation Lifesaver grade crossing and pedestrian safety program. Railroads spend more than $250 million annually to improve, operate, and maintain grade crossings.

Class I railroads support a program to provide the public with telephone numbers, posted at public grade crossings and at private crossings open to unrestricted public access (as declared in writing to the railroad by the holder of the crossing right), that can be called in the event of grade-crossing emergencies. We also commend this committee for including in H.R. 2095 a requirement for the development of model legislation that provides for penalties for violations of grade crossing laws, which occurs far too often — and often with tragic results.

Railroads have programs in place to control vegetation on their property near crossings because they agree that motorists' sight lines should not be obstructed. If Congress decides that there should be a federal requirement for clearing vegetation for this purpose, then the federal requirement should preempt state or local laws so that there is national uniformity. Any federal requirement should also specify a required clearance distance (rather than simply call for "reasonable" clearance). Of course, railroads have limited ability to address vegetation at private crossings and on private land adjacent to railroad rights-of-way.

**Enforcement**

To implement its safety responsibilities, the FRA uses numerous strategies, including the use of field inspections to monitor compliance with pertinent regulations and, where deemed appropriate by FRA safety personnel, the imposition of civil penalties or even stronger actions imposed against railroads for non-compliance.

As noted in a February 2004 report by the Congressional Research Service, the FRA "now complements its traditional enforcement approach with a much broader strategy that seeks to promote overall railroad safety, improve labor/industry relationships affecting safety, and strengthen commitments to safety by all involved parties."[6] According to CRS, as part of that process, the FRA "seeks to determine the root causes of system wide safety problems and eliminate those through a partnership involving railroad managers and employees who are directly affected by safety challenges."

Railroads believe that a partnership under which labor and management, in conjunction with the FRA and others, work collaboratively on safety issues, is far more likely to succeed in actually advancing rail safety than a punitive, adversarial system.

Unfortunately, the huge and unjustified expansion of maximum civil and criminal penalties in H.R. 2095 for safety violations (from $10,000 to $100,000) would promote a top-down, overly-prescriptive, excessively-adversarial system. Like the proposed changes in penalties for harassment and intimidation discussed earlier, changes in this section would encourage more confrontation and conflict between management and labor while failing to promote safer rail operations. The proposed higher civil penalties are also disproportionate. By comparison, the maximum civil penalty for a violation of a motor carrier safety requirement is $5,000.

Railroads do not see a need for an increase in the number of FRA inspectors. However, funding for these inspectors, and FRA funding in general, should be obtained through general appropriations rather than reimposing "user fees" on railroads. FRA fees would be a form of tax that other industries do not pay. Firms whose safety is regulated by

[6] Congressional Research Service, "Federal Railroad Safety Program and Reauthorization Issues," CRS Issue Brief, February 25, 2004.

OSHA do not pay fees to that agency. Equity demands that railroads not pay fees to the FRA to cover the FRA's safety regulation.

**Other Provisions in H.R. 2095**

Railroads have comments regarding various other provisions of H.R. 2095:

- Railroads strongly support the provision in Title I that authorizes funding for the design, development, and construction of a Facility for Underground Rail Station and Tunnel at the Transportation Technology Center in Pueblo, Colorado. As the legislation notes, this facility would be used to test and evaluate the vulnerabilities of rail tunnels, to mitigate and remediate the consequences of accidents and incidents in tunnels, and to provide a realistic scenario for training emergency responders.

- Section 605 requires "minimum training standards for each craft of railroad employees" to show that employees have adequate "knowledge of and ability to comply with" federal railroad safety laws and regulations and railroad rules and procedures. Railroads agree that a well-trained work force is essential to safe and efficient railroad operations. After all, "human factors" (*i.e.*, human error) is the cause of more rail accidents than any other single factor, and in most (if not all) of these accidents, the employee(s) involved broke a rule or set of rules.

  However, railroads already have procedures in place, including ongoing training programs overseen by the FRA, to ensure that their workforce is adequately trained. A new rigid federal program would be redundant and is unnecessary, since railroads already have all the incentive they need to make sure their workers have the skills necessary to perform their jobs properly.

- Section 606 prohibits railroads from denying, delaying, or interfering with the medical treatment given to employees. With all due respect, railroads strongly object to the claim that they intentionally withhold, or seek the withholding of, necessary medical treatment or first aid from their employees. This should not happen, and we don't believe it does.

  That said, railroads have concerns regarding Section 606. For example, as written it appears to mandate that railroads transport injured workers to a hospital of the worker's choosing, with no limitations on that choice. As written, the provision also appears to prohibit railroads from overriding the treatment plan provided by the employee's health care provider. But there may be times when overriding a treatment plan might be necessary for safety purposes. For example, a physician might clear an employee to return to work while taking medication that could interfere with the employee's job function. In such cases, and others like it, a railroad should be able to override the health care provider.

  The issue of medical treatment is already adequately covered by railroads' FRA-mandated internal control plans. Like some other provisions in H.R. 2095, this provision does not truly advance rail safety, but does unnecessarily throw another

obstacle in the way of collaborative labor-management relations. Railroads respectfully urge this committee to rethink this provision.

- H.R. 2095 would require the certification of conductors. A certification requirement would be burdensome without accomplishing any safety objective. Certification is not necessary to ensure conductors are appropriately trained.

- A provision of H.R. 2095 apparently requires railroads to provide breathing apparatus to train crews on trains carrying toxic-inhalation hazards (TIH). It is unclear what this section requires and how the myriad complexities involved would be handled — *e.g.*, there are many types of apparatus, different types protect against different kinds of chemicals, many types have "fit" issues due to facial hair, and so on.

- H.R. 2095 would give DOT the authority to issue emergency orders to encompass instances where there is imminent danger of significant harm to the environment. While we are unclear what problem this provision is meant to address, it should be pointed out that DOT has limited environmental expertise and there is no evidence of a shortcoming in the environmental laws justifying this provision.

- H.R. 2095 requires DOT to issue regulations addressing concrete crossties and specifies the elements that must be addressed. FRA track rules already contain performance requirements that apply to concrete ties. It would appear that some of the specified elements in the proposed legislation are not appropriate for regulation, even if further regulation of concrete crossties is appropriate. We suggest that a better approach would be to require DOT to examine this issue and report to Congress on the need for regulation of concrete crossties.

**Conclusion**

Thank you for the opportunity to testify on this critical topic. The rail industry applauds the dedication of this committee to advancing the cause of rail industry safety, and we are committed to working with you, others in Congress, the FRA, our customers, our employees, and others to ensure that rail safety continues to improve.

**Before the Transportation and Infrastructure Committee**
**Subcommittee on Railroads, Pipelines, and Hazardous Materials**
**U.S. House of Representatives**

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# Opportunities To Further Improve Railroad Safety

**Statement of**
**Kurt W. Hyde**
**Assistant Inspector General**
**for Surface and Maritime Programs**
**U.S. Department of Transportation**

Chairwoman Brown, Ranking Member Shuster, and Members of the Subcommittee:

We appreciate the opportunity to testify today as you consider legislation to reauthorize the Federal Railroad Safety Program. We commend this Subcommittee for its continued work in improving railroad safety. Improvements in safety are important because railroads transport people and freight over 790 million train miles annually—by way of 173,000 miles of track—and affect the lives of millions of Americans. Railroads employ about 232,000 workers and transport about 42 percent of the nation's freight. This industry will grow substantially in the future. The Department estimates that, between 1998 and 2020, the amount of freight transported by rail will increase by about 50 percent.

As we reported in our Fiscal Year 2007 Top Management Challenges issued to the Department, the Federal Railroad Administration (FRA) must continue implementing its safety initiatives since train accidents are on the rise overall. As the FRA Administrator noted before this Subcommittee in January 2007, the rail industry's safety record has improved, but a significant number of train accidents continue to occur and the train accident rate has not shown substantive improvement in recent years.

Chairwoman Brown, our testimony today will draw from the body of work we conducted over the last several years on grade crossing safety. At your request and the request of Representative James L. Oberstar and Senator Daniel K. Inouye, we conducted our most recent audit in response to congressional concerns about safety on the Nation's nearly 240,000 grade crossings. Yesterday, we released to the public our audit report that recommends steps FRA can take to better ensure compliance with mandatory reporting requirements and to address sight obstructions at grade crossings.[1] Our work on grade crossing safety also includes audit reports in 2005, 2004, and 1999 and testimony at several hearings, including the Inspector General's testimony in January of this year before this Subcommittee. Taken together, our reports and testimonies represent a comprehensive assessment of grade crossing safety issues and resulted in recommendations for further enhancements to rail safety. FRA has responded positively to the recommendations in our reports on grade crossing safety. See Attachment 1 for a list of our grade crossing safety reports and testimonies.

FRA has also taken several actions to improve rail safety overall. For example, in February 2005, we recommended that FRA submit to the Secretary a comprehensive plan for implementing a fully functioning program that makes

[1] OIG Report No. MH-2007-044, "The Federal Railroad Administration Can Improve Highway-Rail Grade Crossing Safety By Ensuring Compliance With Accident Reporting Requirements and Addressing Sight Obstructions," May 3, 2007. OIG reports can be accessed on our website at *www.oig.dot.gov.*

meaningful use of analysis of available safety, inspection, and enforcement data.[2] To this end, FRA instituted the National Inspection Plan, an inspection and allocation program that uses predictive indicators to assist FRA in allocating inspection and enforcement activities within a given region by railroad and by state. This is a step in the right direction, but since the plan was implemented only in March 2006, it is too soon to tell exactly how effective these measures will be in the long term.

In May 2005, then Secretary Norman Mineta announced the National Rail Safety Action Plan. This plan outlined FRA's strategy for focusing oversight and inspection resources on areas of greatest concern, targeting the most frequent and highest risk causes of train accidents, and accelerating research with the best potential to mitigate such risks. In addition to the actions in the plan, FRA reports that its inspectors conduct thousands of inspections each year and engage in a range of educational outreach activities on railroad safety issues.

Despite FRA's efforts and recent improvements in the safety record of the rail industry, serious train accidents continue to occur. The collision rate in recent years has not slowed markedly. Train accidents increased by 31 percent overall between 1995 and 2005. Further, while the industry's record for transporting hazardous materials has been good, nearly 1.7 million carloads of hazardous materials[3] are transported by rail in the United States each year. The catastrophic consequences that can arise due to the release of hazardous materials from rail cars are a significant threat to safety. From 2003 through 2006, the railroads reported 145 rail incidents that involved hazardous materials, resulting in 19 fatalities and 423 injuries. These incidents resulted in the evacuation of 17,384 people from their homes and businesses, caused at least $17 million in track damages, and resulted in about $71 million in equipment damages.

Grade crossing safety is central to rail safety; that is, enhancements to this one vulnerable area can have a tremendous, positive impact on overall rail safety. The second highest percentage of rail-related *fatalities*—42 percent from 1995 through 2005—is due to collisions at grade crossings.[4] During this 10-year period, collisions and fatalities at grade crossings were significantly reduced, by 34 percent and 38 percent, respectively. Most recently, however, these numbers have increased. From 2003 to 2005, collisions rose by 2 percent and the number of fatalities jumped by 7 percent.

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[2] Memorandum to the Acting Federal Railroad Administrator, "Safety-Related Findings and Recommendations," February 16, 2005.

[3] The Department of Transportation has classified about 3,500 materials as hazardous, ranging from mild irritants to those that are poisonous and radioactive.

[4] Trespassing fatalities is the leading category of rail-related fatalities for that period, accounting for 52 percent. Our 1999 report discusses the challenge of reducing trespassing fatalities.

Today, I would like to discuss five actions that railroads and FRA can take to reduce grade crossing collisions and fatalities. These are areas on which you may wish to focus as you evaluate current legislative proposals.

## 1. Ensuring Compliance With Mandatory Reporting Requirements

Railroads are charged with two distinct reporting requirements when a grade crossing collision occurs. First, an immediate call to the National Response Center (NRC[5]) is required for all serious[6] grade crossing collisions. (The National Transportation Safety Board defines "immediate" as within 2 hours.) This call helps FRA determine whether a Federal investigation is needed at the accident scene. Second, within 30 days of the end of the month in which collisions occurred, the railroad is required to report *every* grade crossing collision to FRA—not just the collisions that are deemed "serious." More can be done to ensure compliance with both of these reporting requirements.

Between May 1, 2003 and December 31, 2004, railroads failed to notify NRC immediately in 115 of 543 reportable grade crossing collisions (21 percent) as required; most of these involved fatalities or multiple injuries. Although these unreported crossing collisions, which resulted in a total of 116 deaths, were reported to FRA within 30 to 60 days after the collisions, that was too late to allow Federal authorities to promptly decide whether or not to conduct an investigation. In March 2005, FRA officials began issuing violations to railroads that failed to follow FRA's criteria for reporting grade crossing collisions to NRC. This enforcement effort needs to be sustained to ensure that railroads properly report all grade crossing collisions involving a fatality, serious injury, or substantial property damage.

As stated in our report released yesterday, 12 railroads failed to report 139 collisions to FRA as required within 30 days after the end of the month in which the collision occurred—with some being reported nearly 3 years late. These collisions, which occurred between 1999 and 2004, resulted in 2 fatalities and 20 injuries, as ultimately reported by the railroads. While these numbers may not seem large, it is unknown how many additional unreported collisions exist. Because FRA did not routinely review grade crossing collision records maintained by the railroads to ensure compliance with these requirements, it does not know whether the 15,416 grade crossing collisions reported by railroads between 2001 and 2005 included all collisions that occurred during those years.

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[5] Part of the Department of Homeland Security, NRC is the Federal Government's 24-hour point of contact for environmental discharges. In addition, through agreements, NRC notifies FRA and other Federal agencies of train accidents and grade crossing collisions.

[6] FRA's criteria for immediately reporting grade crossing collisions to NRC—"serious" collisions—include those with one fatality or five injuries, as well as other criteria.

Accurate, timely, and complete reporting of grade crossing collisions serves the important purpose of identifying safety problems so appropriate corrective actions can be taken. Further, by ensuring that every grade crossing collision is reported on time, FRA and states will have access to critical data for identifying dangerous grade crossings and emerging accident trends. Complete information on grade crossing collisions is also essential for state transportation officials who must decide where to spend Federal funds set aside annually for crossing safety improvements. Under the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) for Fiscal Years 2005 through 2009, states can spend $220 million each year for grade crossing safety improvements, such as automatic gates and flashing lights and hazard elimination projects.[7]

When previously unreported grade crossing collisions are reported to FRA, states have better information to use in making decisions. For example, after written reports for five unreported grade crossing collisions in Iowa were submitted to FRA, the Iowa Department of Transportation used the information provided by the railroads as the basis for allocating funds for safety improvements at two grade crossings. If those unreported collisions had not been identified, it is likely that safety improvements would not have been made to these two dangerous crossings.

In our recent report, we recommended that FRA strengthen safety oversight by ensuring that the railroads comply with mandatory requirements to report each grade crossing collision to FRA's accident reporting system by:

a. Developing and implementing an action plan for conducting periodic reviews of the grade crossing collision records maintained by each railroad, including promptly notifying the responsible railroads when unreported collisions are identified.

b. Testing random samples of the railroads' grade crossing collision reports to determine whether the information is accurate, timely, and complete, including comparing such reports to those generated by local law enforcement agencies.

c. Issuing a violation and assessing a civil penalty *each* time a railroad fails to submit a grade crossing collision report in accordance with Federal requirements, on a consistent basis. Moreover, FRA should assess higher civil penalties against each railroad that repeatedly fails to report crossing collisions.

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[7] States are also authorized to spend these funds on hazard elimination projects, such as crossing closures.

In response to our report, FRA stated that it had begun to implement an action plan for conducting cyclical reviews of highway-rail grade crossing accident reporting by the major railroads. These reviews are intended to determine whether grade crossing collisions are being properly reported. FRA also agreed to make obligatory the submission of violation reports for each detected violation that is a clear-cut failure to report.[8] It will be important for FRA to follow through on its commitments, as planned. You may want to consider directing FRA to report annually on its cyclical reviews, including the number of reviews planned, the number completed, and the overall results of the reviews.

## 2. Increasing FRA's Involvement in Grade Crossing Collision Investigations

With a current inspector workforce of 385, FRA has limited capability to investigate approximately 3,000 grade crossing collisions that occur each year. Instead, it places heavy reliance on railroad self-reporting. As we recommended in our November 2005 audit report, FRA needs to broaden its review of such reports with independent information. FRA uses accident reports received from the railroads to evaluate the circumstances, probable causes, and responsible parties for most grade crossing collisions. A variety of sources, such as police reports, event recorder data, and eyewitness accounts, could be used to provide additional insight. This should help boost public confidence in that accident data are being obtained from sources other than just the railroad(s) involved.

FRA increased the number of grade crossing collision investigations during the last 2 years. However, FRA still investigates less than 1 percent of all grade crossing collisions, a fact that highlights the need for independent verification of railroad-supplied information. The need for this increased involvement is shown by the fact that, on average, one person dies and three people are injured in the United States every day in grade crossing collisions.

To better evaluate the causes of collisions and railroads' compliance with Federal safety regulations, we recommended that FRA use a pilot program to collect and analyze independent information on crossing collisions from railroads and local or state law enforcement agencies. FRA concurred with our 2005 recommendation and implemented a 1-year pilot study comprising one state from each of its eight regions. The objective of this study was to assess the benefits and costs of analyzing information from independent sources on crossing collisions, such as police reports and locomotive event recorder data, to resolve conflicts. While the

[8] A clear-cut failure to report is defined by FRA as one that does not involve any question with regard to interpretation of the regulation or sufficiency of the facts constituting the alleged failure.

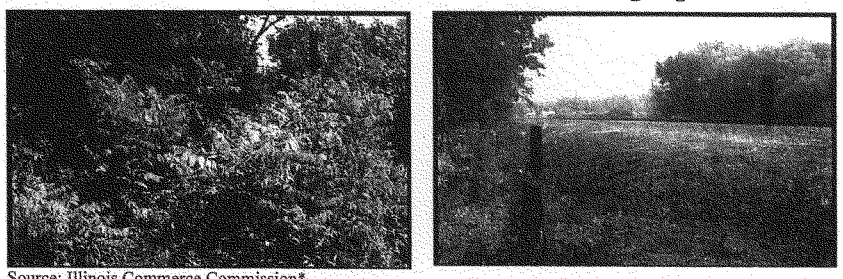
pilot study was scheduled for completion last month, FRA has yet to issue the results. FRA should report the results of the study as soon as possible and provide a copy of its report to this Subcommittee.

### 3. Addressing Sight Obstructions at Grade Crossings Without Automated Warning Devices

Active warning devices—such as automatic gates and flashing lights—call attention to approaching trains at some grade crossings. However, 76,000 public grade crossings are equipped only with passive warnings, such as crossbucks, stop signs, and pavement markings that advise motorists of the presence of the crossing, but don't warn them when a train is approaching. For these passive grade crossings, greater attention is needed to ensure that motorists have a full view of approaching trains so that they can determine when it is safe to cross. Sight obstructions such as overgrown vegetation contribute to grade crossing collisions. As illustrated in Figure 1, vegetation growth at grade crossings can significantly reduce a motorist's ability to see the track and approaching trains. From 2001 through 2005, railroads submitted 689 collision reports to FRA that documented such obstructions—242 people were injured in these collisions and 87 died.

***Figure 1. Photographs of Highway Users' Line of Sight at a Grade Crossing Before and After Vegetation Was Cleared***

**Highway Users' View Before Clearing Vegetation** | **Highway Users' View After Clearing Vegetation**



Source: Illinois Commerce Commission*

*The State of Illinois requires every rail carrier to remove all brush, shrubbery, and trees from its right-of-way for a distance of at least 500 feet in either direction of a grade crossing.

Currently, FRA regulations only require the railroads to address vegetation growth at public crossings and only to the extent that the vegetation reduces the visibility of road signs and signals. FRA regulations do not address other types of sight

obstructions, such as permanent structures, standing railroad equipment, and topography. As of March of this year, only 13 states had laws or regulations addressing all types of sight obstructions. These laws vary widely, with mandated sight distances ranging from 40 feet along the railroad property line to as much as 1,500 feet in both directions along the railroad right-of-way.

For the 37 states that lack laws or regulations for addressing sight obstructions at grade crossings that are not protected with automated warning devices, more needs to be done. Immediate safety benefits could be achieved if laws were established to address all types of sight obstructions, such as structures that block highway users' views of approaching trains and overgrown vegetation.

FRA agreed to play a constructive role as part of the larger intermodal and intergovernmental grade crossing team in response to our recommendation to develop model legislation. Such legislation is needed for states to improve safety by addressing sight obstructions at grade crossings that are equipped solely with signs, pavement markings, and other passive warnings. However, in responding to our recommendation, FRA also stated that it ". . . does not have general authority or responsibility for grade crossing safety." The Subcommittee should consider whether it wishes to strengthen FRA's role with respect to grade crossing safety.

### 4. Establishing Reporting Requirements for FRA's National Grade Crossing Inventory System

The accuracy and completeness of FRA's national grade crossing inventory, particularly the identification of all public grade crossings and the types of warning devices in place, can be improved through the establishment of mandatory reporting requirements for railroads and states. This action is needed to better monitor and improve high-risk crossings. In our June 2004 report on the Highway-Rail Grade Crossing Safety Program, we recommended that FRA establish mandatory reporting requirements through rulemaking or legislation to improve the accuracy and completeness of its national grade crossing inventory data. These data are used by state officials to develop priority lists of public crossings that need safety improvements because they have a high probability of collisions. However, mandatory reporting requirements have not been established. Our analysis of FRA's national grade crossing inventory system found that 36 percent of public grade crossing records have not been updated since 2000.

Mandatory reporting is even more important under SAFETEA-LU, which changed the apportionment procedures. SAFETEA-LU requires that 50 percent of the $220 million authorized be apportioned to the states for grade crossing safety improvements based on a ratio of the number of public grade crossings in a state to the number of public crossings nationwide. Our 2004 audit report stated that

targeting safety strategies on state and public grade crossings that continue to have the most collisions is key to further reducing collisions and fatalities.

Voluntary reporting of grade crossing inventory information has not been successful. To ensure that accurate and complete inventory data are available for use in making decisions about grade crossing safety improvements, the Subcommittee may wish to consider directing FRA and the Federal Highway Administration to establish and enforce mandatory reporting requirements for railroads and states.

### 5. Requiring States With the Most Dangerous Grade Crossings to Develop Action Plans

In our June 2004 report, we recommended that FRA identify states having the most grade crossing accidents year after year—particularly at crossings that have experienced multiple accidents—and develop, with these states, an action plan identifying specific solutions for improvement. Attachment 2 to our testimony today is a map of the United States showing the number of collisions and fatalities at grade crossings, by state, in 2005.

In March 2006, FRA completed the first plan to improve dangerous grade crossings in Louisiana. The railroads operate in 57 of Louisiana's 64 parishes on 3,000 rail miles and motorists drive over more than 6,000 public and private crossings. As part of Louisiana's action plan, FRA's grade crossing data were analyzed to identify public crossings with multiple collisions from 1999 through 2004. The resulting action plan focused chiefly on crossings located near the intersection of two roadways. This focus was supported by data showing that 97 percent of the collisions at multi-collision crossings occurred near highway intersections. For 130 of the 177 crossings with multiple collisions, Louisiana transportation officials took actions to ensure that flashing lights, gates, or crossing closures were installed.

FRA's efforts in Louisiana and its similar ongoing work with Texas are steps in the right direction. Continued action is warranted to identify and address the most dangerous grade crossings in the states with the most grade crossing collisions. Congress may want to consider requiring FRA to increase this level of effort by conducting similar projects in other states with high numbers of grade crossing collisions.

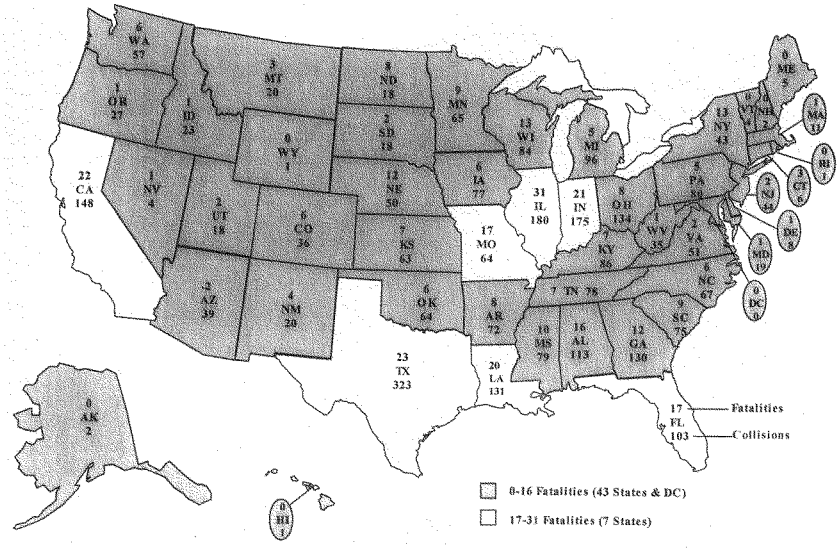
Madam Chair, this concludes my statement. I would be pleased to respond to any questions that you or other members of the Subcommittee may have at this time.

## ATTACHMENT 1. OFFICE OF INSPECTOR GENERAL GRADE CROSSING SAFETY WORK PRODUCTS

1. OIG Report No. MH-2007-044, "The Federal Railroad Administration Can Improve Highway-Rail Grade Crossing Safety By Ensuring Compliance With Accident Reporting Requirements and Addressing Sight Obstructions," May 3, 2007
2. OIG Testimony, CC-2007-018, "Reauthorization of the Federal Railroad Safety Program," January 30, 2007
3. OIG Report No. MH-2006-016, "Audit of Oversight of Highway-Rail Grade Crossing Accident Reporting, Investigations, and Safety Regulations," November 28, 2005
4. OIG Testimony, CC-2005-060, "Highway-Railroad Grade Crossing Safety Issues," July 21, 2005
5. OIG Memorandum "Safety-Related Findings and Recommendations," February 16, 2005
6. OIG Report No. MH-2004-065, "Highway-Rail Grade Crossing Safety Program," June 16, 2004
7. OIG Report No. RT-1999-140, "Rail-Highway Grade Crossing Safety," September 30, 1999.

OIG reports and testimony statements can be accessed on the OIG website at *www.oig.dot.gov*.

## ATTACHMENT 2. U. S. MAP OF THE NUMBER OF REPORTED COLLISIONS AND FATALITIES AT GRADE CROSSINGS, BY STATE, IN 2005




Source: OIG analysis of FRA data

May 8, 2007

**U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON TRANSPORTATION and INFRASTRUCTURE**
**SUBCOMMITTEE ON**
**RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS**

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**HEARING ON**
**RAIL SAFETY LEGISLATION**

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**TESTIMONY OF W. DAN PICKETT**
**INTERNATIONAL PRESIDENT**
**BROTHERHOOD OF RAILROAD SIGNALMEN**

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Good Afternoon. I would like to thank Madame Chair Corrine Brown and members of the Subcommittee. It is an honor for me to testify today on the recent passage of H.R. 2095, The Federal Railroad Safety Improvement Act of 2007.

My name is Dan Pickett, and I am the International President of the Brotherhood of Railroad Signalmen. The Brotherhood of Railroad Signalmen (BRS), is a labor organization with headquarters at 917 Shenandoah Shores Road, Front Royal, Virginia, 22630-6418. The BRS, founded in 1901, represents approximately 10,000 members working for railroads across the United States and Canada. Signalmen install, maintain and repair the signal systems that railroads utilize to direct train movements. Signalmen also install and maintain the grade crossing signal systems used at highway-railroad intersections, which play a vital role in ensuring the safety of highway travelers.

Madame Chair, I commend both you and Transportation and Infrastructure Committee Chairman James Oberstar for introducing this bill. This bill is long overdue. The BRS has always made the safety of our members, as well as the members of all the other rail crafts, our number one priority. A safe rail network is an efficient rail network, and this bill is the first step to improve that network.

The BRS has long advocated the reform of the Hours of Service Act. Title II of this bill, Employee Fatigue, will provide those reforms if passed into law. For too long, fatigue-related errors in the rail industry have contributed to rail worker injuries and deaths. This bill will correct many of the issues that lead to employee fatigue. The reforms to the Hours of Service Act contained in this bill are long overdue. Increasing the consecutive hours of rest from 8 hours to 10 hours has long been advocated by the Brotherhood of Railroad Signalmen. In addition, this bill prohibits railroad employers from communicating with signal employees by cell phone, pager or any other manner during rest time. Along with Fatigue Management Plans, the BRS believes that this legislation will reduce accidents and incidents related to employee fatigue.

The Federal Railroad Safety Improvement Act contains provisions that have been long overdue in Title III, Protection of Employees and Witnesses. It is unfortunate that in our industry there still remain railroad managers who resort to harassing and intimidating employees in order to get those employees to either perform unsafe tasks or not report hazardous conditions they encounter during their duties. The Federal Railroad Safety Improvement Act seeks to correct those situations by strengthening whistleblower protections.

Employees want to go to work and perform their duties in a safe manner and come home to their families in the same condition when they last left them. When an employee speaks up about an unsafe procedure, he knows that his comments will not be well received and they will bring unwanted focus on him. But employees do speak up, and when they do they need the protections provided in this section so they do not have to suffer job loss or any lesser evil for trying to perform their duties safely and correctly.

The BRS has long advocated the need for improved safety legislation for highway-rail grade crossings. Title IV of H.R. 2095 provides for the establishment of a required toll-free number which will aid the railroads in complying with 49CFR234, *Grade Crossing Signal System Safety*, Subpart C - *Response to Reports of Warning System Malfunction*, Section 103, *Timely Response to Report of Malfunction*. The establishment of the toll-free notification number will allow the public to provide more timely reports of highway-rail grade crossing signal malfunctions, which in turn allows a quicker response time to these reports, and ultimately will reduce accidents and incidents at these crossings.

In addition, this bill provides language that will develop criminal and civil penalties for grade crossing violations. While there have been many advancements in grade crossing signal system technology that provides protection for the traveling public at highway-rail grade crossings, even the most high-tech equipment is useless if the traveling public does not obey the warnings they receive. Enforcement of laws and the penalties that come with non-compliance are critical in order to increase safety at highway-rail grade crossings and reduce accidents and incidents to the traveling public who traverse these intersections along with the train crews who pilot the trains.

The BRS is a long time advocate of maintaining an up-to-date highway-rail grade crossing inventory. The BRS commends the language contained in Title IV, Grade Crossings, Section 405, Accident and Incident Reporting. By conducting audits in the time frames contained within the legislation, the FRA and the rail industry can ensure that they are getting all of the requisite data relating to highway-rail grade crossing accidents and incidents so that any decisions that are based on that information and any conclusions drawn by that data will then be accomplished with viable up-to-date data.

It is and has been the position of the BRS that the FRA is understaffed. Lacking the requisite number of inspectors prevents the FRA from ensuring compliance with federal regulations throughout the rail industry. This bill will increase the number of inspectors that are needed to ensure proper accident incident reporting.

In Title VI, Miscellaneous, Section 601, Positive Train Control Systems, the suggested language requires that within 12 months, the railroads develop and submit a plan to the Secretary implementing Positive Train Control (PTC) Systems by December 31, 2014. The BRS concurs with the requirements of this section. The time has come for the implementation of PTC systems in order to prevent many of the accidents/incidents that are occurring today. The Federal Railroad Safety Improvement Act of 2007, if passed into law will implement this long overdue requirement.

In addition, the BRS agrees with the provisions contained in Title VI, Miscellaneous, Section 602, Warning in Nonsignaled Territory. The hardware and software is available today to prevent many, if not all of the accidents/incidents involving misaligned switches in nonsignaled territory. It is critical that we as an industry make every effort to

prevent these tragic accidents. As railroads continue to increase capacity, these types of accidents will likely increase if we do not take any action.

As the complexity of all railroad equipment increases, it is important to make sure that all employees have the necessary training to perform their duties. For signal employees it is critical to be properly trained in order to perform the required installation, maintenance and repair of signal equipment. That is why the BRS praises the provisions contained in Title VI, Miscellaneous, Section 605, Minimum Training Standards.

While there have been improvements in the treatment of injured railroad employees, the Federal Railroad Safety Improvement Act of 2007 provides language to ensure that all injured railroad employees get the proper medical treatment for any on-the-job injuries. No employee starts their day thinking this is the day they will get hurt or die. However, injures occur, and when they do, the injured employee should not have to worry about reporting the injury, let alone getting the proper treatment for the injury. That is why the language contained in Title VI, Miscellaneous, Section 606, Prompt Medical Attention, will address this issue if the bill is passed into law.

**Conclusion**

Madame Chair, H.R. 2095, The Federal Railroad Safety Improvement Act of 2007, is a giant step toward improving safety on the nation's railroads. This bill addresses many issues that are important to Railroad Signalmen. Issues such as reorganizing the Federal Railroad Administration, addressing employee fatigue, providing for the protection of employees and witness of accidents/incidents, grade crossing issues, and enforcing regulations are only a first step. This bill, if passed into law, will improve rail safety across our nation.

On behalf of the Brotherhood of Railroad Signalmen, I congratulate all who helped craft this bill, and I appreciate this opportunity to testify before this subcommittee today. At this time I would be glad to answer any questions.

Respectfully submitted,

W. Dan Pickett
International President

**Testimony of Mark V. Rosenker, Chairman**
**National Transportation Safety Board**
**Before the**
**U.S. House of Representatives**
**Committee on Transportation and Infrastructure**
**Subcommittee on Railroads, Pipelines and Hazardous Materials**
**Rail Safety Legislation**
**May 8, 2007**

Good afternoon Chairwoman Brown, Ranking Member Shuster, and Members of the Subcommittee. My name is Mark Rosenker, Chairman of the National Transportation Safety Board. Madame Chairwoman, I would like to take this opportunity to thank you, the Members of the Subcommittee, and staff for inviting the Safety Board to testify today on several rail safety issues that are being considered in proposed rail safety legislation and for your continued interest in furthering the safety of our Nation's railways.

The Safety Board is concerned about several rail safety issues that are being considered by this Subcommittee, including train crew fatigue; the lack of positive train control systems to prevent train collisions, overspeed derailments, and improper switch positions in non-signaled (dark) territory.

**Train Crew Fatigue**

I would like to begin with the decades long history of fatigue-caused railroad accidents that the Safety Board has investigated, the equally long history of safety recommendations that we have made to address the problem, and the frustration we share with the Federal Railroad Administration (FRA) -- regarding its lack of legislative authority -- to address the root causes of fatigue through scientifically based principles of workload and fatigue management.

We have investigated more than a dozen railroad accidents in which we believe train crew fatigue played a contributing role. The earliest railroad accident investigation in which the Board attributed the probable cause to fatigue was a collision between two freight trains at Wiggins, Colorado, in 1984. About a week later, two more freight trains collided near Newcastle, Wyoming. Again, the Board found that the probable cause was that the crew of the striking train had fallen asleep and had failed to comply with restrictive signals.

Since 1984, fatigue-related train accidents have continued, such as the collisions between two freight trains at Anding, Mississippi, in 2005 and at Macdona, Texas, in 2004. In Anding, the northbound train crew failed to comply with wayside signals requiring them to stop, and their train hit a southbound train head-on killing all four crewmembers. The Safety Board examined the work/rest cycles of the northbound train crews and found that both the engineer and conductor had worked about 11 ½ hours per night and had been sleeping about 5 ½ hours per night for the 3 days immediately before the accident. Both crewmembers typically worked 6

days a week, most often going on duty between 12:00 a.m. and 1:00 a.m., and were usually on duty for 11 to 12 hours. They were working their sixth consecutive day when the accident occurred in Anding. Getting a repeatedly insufficient amount of sleep on a regular basis can impair human performance and alertness, and the crewmembers' short sleep periods likely allowed them to develop a cumulative sleep loss or sleep debt.

In the Macdona accident investigation, the Safety Board found that both crewmembers did not obtain sufficient restorative rest before reporting for duty because of their ineffective use of off-duty time, and that the Union Pacific Railroad's train crew scheduling practices inverted the crewmembers' work/rest periods; both of which contributed to the accident. Work as a train crewmember entails an unpredictable job schedule that can make it difficult for employees to effectively balance their personal and work lives. We found that the unpredictability of Union Pacific train crewmembers' work schedules may have encouraged them to delay obtaining rest in the hope that they would not be called to work until later on the day of the accident.

Fatigue related accidents have occurred across all regions of the country. Every major railroad has had at least one fatigue-caused accident. Moreover, no type of railroad operation is immune from the effects of fatigue. Although the majority of fatigue accidents that we have investigated involve freight operations, our investigation case files contain fatigue accidents involving long-distance passenger trains, commuter trains, light rail operations, and even subway trains.

The work schedules of rail crewmembers permit repetitive 12-hour days that lead to cumulative fatigue or sleep debt. When the workers' commute, limbo time and family/personal responsibilities are factored into their daily schedules; the conditions for exceedingly long days that lead to acute fatigue are evident. The relatively short mandatory periods of time off currently in place do not afford the opportunity for fully restorative sleep.

Just as our accident history has identified the problem of fatigue in railroad accidents, the Safety Board's recommendation history has identified actions that we think could address the problem. In the past two decades, the Safety Board has issued 34 recommendations concerning railroad employee fatigue. The FRA received 8, the others have gone to rail carriers and operating unions. The Board has recommended that the railroad companies reduce the irregularity and unpredictability of crewmember's work/rest schedules and provide education and counseling to help them avoid sleep deprivation. And, we have asked all rail carriers to develop policies that would allow an employee to report off duty, without penalty, when they are impaired by lack of sleep.

The laws, rules, and regulations governing this aspect of transportation safety in the railroad industry fail to address the problem. The Railroad Hours of Service Act allows railroad operating employees to work 11 hours 59 minutes, and after only 8 hours off duty return back to work. An employee who works the full 12 hours, just one more minute, would get 10 hours off duty before being allowed to return to work. And, under the current law these employees are permitted to repeat that arduous work-rest cycle an unlimited number of times. The Railroad Hours of Service Act does not take into account either rotating work schedules or the accumulated hours spent working in limbo time, which can be substantial--adding additional

hours to the workday. The Railroad Hours of Service Act also does not take into account the significant effects of the human circadian rhythm upon a crewmember's level of alertness.

The Macdona accident again prompted the Safety Board to issue new recommendations to FRA: R-06-14 to require railroads to use scientifically based principles when assigning work schedules, and R-06-15 to establish requirements that limit train crewmembers limbo time.

FRA's October 24, 2006 response to the Board on these recent recommendations again stated that FRA lacks rulemaking authority over duty hours. This precludes the FRA from making use of almost a century of rigorous scientific research on the issue of sleep-wake cycles and fatigue-induced performance failures to try to reduce fatigue-related accidents. The FRA response letter further stated " the FRA supports efforts to address the fatigue experienced by railroad operating employees, and acknowledges that the existing hours-of-service is not designed to address the causes of fatigue." The FRA has subsequently sought legislative authority to enact hours-of- service regulations.

The Board strongly believes that the FRA needs authority to regulate crewmember work scheduling practices and work limits, and the Safety Board supports statutory change that would provide the FRA that authority.

Proposals being considered for rail safety legislation this year include elements that address certain aspects of employee fatigue: at least 10 hours of undisturbed off-duty time with no contact during the period; at least 24 consecutive hours of rest in a 7-day consecutive work period; at least 48 hours off-duty after 7 consecutive 8-hour workdays; and eliminating limbo time or requiring an additional 4 hours of undisturbed off-duty time when limbo time exceeds an hour. The Safety Board believes that a comprehensive fatigue management program is needed that considers scientifically based principles when assigning work schedules, including factors that influence acute and cumulative fatigue, the body's ability to adjust to rotating schedules, and the responsibility of employees to get sufficient and timely sleep during off-duty periods. Although some of these elements may have a positive effect on improving training crews' adequate rest, without a comprehensive program, the Safety Board does not believe that train crew fatigue will be adequately addressed. We further believe that the best means to achieve this result is through regulations promulgated by the FRA that can be modified as industry conditions evolve.

**Positive Train Control**

Technological solutions, such as positive train control systems, have great potential to reduce the number of serious train accidents by providing safety redundant systems to protect against human performance failures. As a consequence, positive train control has been on the Safety Board's list of Most Wanted transportation safety improvements for 17 years.

In the past 10 years, the Safety Board has investigated 52 rail accidents, including 4 transit accidents, where the installation of a positive train control system would likely have prevented the accident. These include 5 accidents in 2005: Graniteville, South Carolina; Anding, Mississippi; Shepherd, Texas; Chicago, Illinois; and Texarkana, Arkansas.

The objective of positive train control is to prevent train collisions and over-speed accidents by requiring automatic control systems to override mistakes by human operators. This issue was highlighted in 2002 when a freight train and a commuter train collided head-on in Placentia, California, a high-speed corridor where commuter and intercity passenger trains operate. As a result of the Placentia accident, the Safety Board reiterated Safety Recommendation R-01-6 to the FRA to facilitate actions necessary for development and implementation of positive train control systems that include collision avoidance, and require implementation of positive train control systems on main line tracks, establishing priority requirements for high-risk corridors such as those where commuter and intercity passenger railroads operate. The FRA published a final rule in the Federal Register titled "Standards for Development and Use of Processor-Based Signal and Train Control Systems," which became effective on June 6, 2005. As a result of FRA's responsiveness, Safety Recommendation R-01-6 is classified "Open—Acceptable Response."

We are pleased to note that today, several railroads are moving to develop positive train control systems. For example, in January of this year, the FRA approved a BNSF Railway project for its Electronic Train Management System (ETMS), an overlay technology that augments an existing train control method. The ETMS system includes an in-cab electronic display screen that will first warn of a problem and then automatically engage the train's braking system if the locomotive engineer fails to act appropriately. The FRA action allows BNSF to implement ETMS on 35 specific freight lines in 17 states.

The Union Pacific Railroad (UP) is working on a communication-based train control system pilot project that will enforce stop signals, dark territory authority limits, and speed restrictions. Field tests are scheduled to be conducted on two test beds and will cover about 333 miles of track. UP began installing test equipment on locomotives in September 2006.

Although we are encouraged with progress underway by some railroads, we note that positive train control systems are needed on railroad systems across the entire United States. The Safety Board believes that positive train control systems should be required.

**Improperly Positioned Switches**

One of the most serious hazardous materials train accidents in recent years occurred in Graniteville, South Carolina, on January 6, 2005, after a Norfolk Southern Railway Company freight train, while traveling 47 mph, encountered an improperly positioned switch that diverted the train from the main line onto an industry track, where it struck an unoccupied parked train. The track through Graniteville was non-signaled (dark) territory. Nine people died as a result of chlorine gas inhalation after a tank car was punctured during the accident.

The investigation found that the improperly lined switch had most recently been used by the crew of a local train about 8 hours before the accident. The crew had lined the switch for an industry track in order to place two cars at a local plant and then park their train. No crewmember remembered relining the switch for the main line before they boarded a taxi and returned to the terminal. The Safety Board concluded that the local train crew failed to reline the

main line switch for one or more of the following reasons: (1) the task of relining the switch was functionally isolated from other tasks the crew was performing, (2) the crewmembers were rushing to complete their work and secure their train before reaching their hours-of-service limits, (3) the crew had achieved their main objective of switching cars and were focused on the next task of securing their equipment and going off duty, and (4) the switch was not visible to the crew as they worked, leaving them without a visual reminder to reline the switch.

On September 15, 2005, a UP train entered a siding in Shepherd, Texas, at approximately 37 mph and struck a parked train, killing one crewmember. There were no wayside signals to govern the train movements or protect the train from an interruption in the continuity of the track, such as an open switch. Consequently, strict compliance with the operating rules was necessary to protect one train from another. The probable cause of this accident was the failure of a previous crew to return a main track switch to the normal position after they had secured the train on the siding and departed the area.

The Safety Board was concerned as early as 1974 about the issue of train speeds in areas not under a form of centralized traffic control. As a result of its investigation of an accident in Cotulla, Texas, involving a misaligned switch in non-signaled territory, the Board recommended that the FRA determine and assess the current risks of train accidents involving misaligned switches, collisions, broken rail, and other route obstructions on main track where automatic block signal systems do not exist, and to promulgate regulations that detail the major risks and controls assumed, set guidelines for safe operations below the maximum operating speed, and assign responsibility to the carrier for safe operations. Because the FRA's actions did not satisfy the Safety Board's intent that new regulations specify circumstances that were required when trains operated below the allowable maximum speed, Safety Recommendation R-74-26 was classified "Closed—Unacceptable Action."

Measures beyond additional operating rules, forms, or penalties are needed to ensure that accidents, such as the one in Graniteville, South Carolina, do not recur. On December 12, 2005, the Safety Board issued Safety Recommendation R-05-14 to the FRA to require that, along main lines in non-signaled territory, railroads install an automatically activated device, independent of the switch banner, that will, visually or electronically, compellingly capture the attention of employees involved with switch operations and clearly convey the status of the switch both in day and in darkness. In a letter dated June 30, 2006, the FRA acknowledged that additional actions are needed to protect the safety of trains in dark territory and that over time, positive train control will serve this function. However, it noted concern that any system that requires power at the switch location will involve significant costs simply because of the number of switches involved. The letter advises that the FRA has initiated a project to evaluate a system that it believes will be able to detect and report switch point gapping for switches on main line tracks located within dark territories as an alternate action.

The Safety Board also recommended that the FRA require railroads, in non-signaled 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 speeds that will allow them to be safely stopped in advance of misaligned switches (R-05-15). In its June 30, 2006, letter, the FRA states that it does not believe the recommendation is feasible for

operational and economic reasons and may also increase the risk of derailments. The FRA hastened to add that there are undoubtedly certain situations where requiring trains to approach switches prepared to stop would be practical and an appropriate safety response and that railroads should consider this option as they conduct risk assessments of their hazardous materials routes. However, the FRA states that it is not aware of any means to describe how this strategy could be applied in a safe and cost-effective manner. The FRA requested that the Safety Board classify the safety recommendation as "Closed—Reconsidered."

Finally, the Safety Board believes that modeling accident forces and applying fracture toughness standards, as recommended in the Minot, North Dakota, accident report, will improve the crashworthiness of tank cars transporting hazardous materials. However, because of the time that it will take to design and construct improved tank cars, the Board believes that the most expedient and effective means to reduce the public risk from the release of highly poisonous gases in train accidents is for railroads to implement operational measures that will minimize the vulnerability of tank cars transporting these products. For example, in Graniteville, the chlorine tank car that was punctured was in the ninth position of 42 freight cars in the train; the front 16 freight cars derailed. In Macdona, the punctured chlorine tank car was in the 16th position of 74 freight cars in the train; the front 19 cars in this train derailed. Following the Graniteville accident, the Board recommended that the FRA require railroads to implement operating measures, such as positioning tank cars toward the rear of trains and reducing speeds through populated areas to minimize impact forces from accidents and reduce the vulnerability of tank cars transporting chlorine, anhydrous ammonia, and other liquefied gases designated as poisonous by inhalation (R-05-16). In its response of October 24, 2006, the FRA stated that it believes that placing toxic inhalation hazard cars at the rear of a train would do little to protect them from damage and that slowing trains could have a negative impact on operations. However it would continue to examine the issue.

**Rail Passenger Disaster Family Assistance**

A proposal for Rail Passenger Disaster Family Assistance mirrors the Aviation Disaster Family Assistance Act of 1996, which makes the Board responsible for coordinating assistance to families after major aviation accidents. The Aviation Disaster Family Assistance Act has been tremendously successful, the "gold standard" in family assistance. This has been because of the Board's commitment to assisting victims and their family members, the significant cooperation and support of the aviation industry, and support of all of our federal partners and the non-profit community. We believe this proposed legislation would be beneficial to victims and their families, providing the needed coordination and support following a rail disaster.

However, the Board has two concerns regarding this proposed legislation. The first is clarification of the Board's responsibilities to victims in accidents where the Board is not launching an investigative team. If we are required to provide information about the accident investigation we have to be in a position to have timely access to that information. Second, this legislation would present a significant demand for additional resources. This would include staff to assist rail carriers in their preparedness efforts and to handle the accident launch responsibilities. Currently the Office of Transportation Disaster Assistance has a staff of four. A major aviation accident is challenging for such a small team. With the addition of rail

responsibilities and the possibility of a rail accident and aviation accident occurring simultaneously, it would be necessary to have additional staff handle all of the demands.

Finally, the Safety Board also recognizes that proposed rail safety legislation addresses several safety issues previously addressed in safety recommendations issued by the Board. These issues include requirements for toll-free numbers at grade crossings so that malfunctions of signals, crossing gates, or disabled vehicles can be reported; to require ultrasonic or other appropriate inspection of rail used to replace removed defective rail; to develop and implement regulations for all classes of track for concrete ties; and to provide emergency breathing apparatus for all crewmembers on freight trains carrying hazardous materials that would pose an inhalation hazard in the event of an unintentional release.

Madame Chairwoman, that completes my statement, and I will be happy to respond to questions at the appropriate time.

**STATEMENT OF**
**EDWARD WYTKIND, PRESIDENT**
**TRANSPORTATION TRADES DEPARTMENT, AFL-CIO**

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**HOUSE SUBCOMMITTEE ON RAILROADS,**
**PIPELINES, AND HAZARDOUS MATERIALS**
**ON**
**REAUTHORIZATION OF THE FEDERAL RAIL SAFETY PROGRAM**

**May 8, 2007**

Chairwoman Brown, Ranking Member Shuster and members of the Subcommittee, thank you for the opportunity to testify today. As you know, the Transportation Trades Department, AFL-CIO (TTD) consists of 32 member unions in all modes of transportation, including those that represent the hundreds of thousands of rail workers in the freight, passenger and commuter rail sectors. Collectively, these workers operate and maintain our nation's rail system and equipment and are critical to the safe and efficient movement of goods and people throughout our country. Commerce as we know it would come to an immediate standstill, if it were not for their dedication and professionalism. Yet for more than a decade the safety concerns of rail workers have been ignored in the legislative process as the railroad lobby has stonewalled every attempt to update our rail safety laws. It is long-past time to move meaningful rail safety legislation.

Madam Chair, it is a pleasure to be back before this Subcommittee. In the two months that have elapsed since I testified before you to outline the rail safety objectives of our member rail unions, we are pleased that significant strides have been made. In sum, we believe the Federal Railroad Safety Improvement Act represents an historic step forward for the safety of railroad workers, rail passengers and, indeed, all those who rely on or live near railroad operations. We thank you and Chairman Oberstar for crafting this legislation and for listening to the concerns of railroad workers who know the dangers of this industry first-hand. We appreciate the fact that you understand the wealth of knowledge and experience that rank-and-file members can bring to the debate about how to improve the safety – and efficiency – of our rail system and we are pleased that you have made us partners in this effort. We look forward to continued collaboration with you, the Ranking Member and this Committee as this process moves forward.

My rail labor colleagues on the panel today will provide a detailed assessment of the current rail safety proposals so I will not reiterate all those comments here. I do, however, want to make mention of a few specific areas of concern that we have advocated for years and place the need for rail safety authorization in some context for the Subcommittee.

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As we talk about rail safety initiatives, it is important to recognize that we are not dealing with an industry that can claim it does not have the resources to comply with common-sense safety directives. The freight railroads have pocketed $25 billion in profits over the past six years according to their own annual reports. Yet, this same railroad industry has effectively blocked rail safety legislation since the last reauthorization bill expired in 1998.

The railroad industry can never be safe if employees are intimidated and harassed when they report accidents, injuries and safety problems. Our members continue to face retribution, harassment and intimidation for reporting accidents and potential safety and security problems. As I have reported to this Committee before, there is a pervasive culture in the railroad industry that tamps down reporting. In railroads' quest for Harriman safety awards and glowing safety reports, in reality, safety is compromised. Workers are routinely forced into "team" reporting where groups of workers are rewarded for filing no injury reports in a given time period. This means that when a worker severs a finger, for example, he may forego treatment or face pressure from his team – a convenient way for management to use co-workers to do their intimidating for them. Safety measures in the railroad industry are based on FRA's data collection from accident and incident reports. Since workers are so soundly and routinely discouraged from actually submitting reports, the FRA's data is inherently flawed. Likewise, rules, regulations, penalties and fines that are based on accident and incident reports are misaligned as well.

Workers should not have to choose between job security and the security and safety of the rail transportation system – yet that is what is happening today. The stories I hear from members are shocking – yet they are commonplace. Members injured on the job are denied medical care until company representatives arrive on the scene and then convinced by the injured worker they need urgent care. They are accompanied to the hospital or doctor by supervisors. Supervisors "remind" injured workers that taking a prescription drug would make the case reportable to the FRA. One of our member unions has supplied this Subcommittee with reams of paper documenting harassment and intimidation of workers with respect to accident and injury reporting. It is a pervasive problem in the industry that has gone unchecked for too long and must be addressed by Congress.

Strong whistleblower language is key to improving rail safety. Clearly, if Congress can find the will to protect those who report financial security problems as it did in the Sarbanes-Oxley Act, the same should be expected for rail workers. We were disappointed that the Administration failed to recognize the need for whistleblower protections for workers, but are pleased that the Oberstar-Brown bill includes strong whistleblower provisions. We also believe the section in H.R. 2095 assuring injured workers of prompt medical attention is important, and we support its inclusion in the bill.

It is well documented that fatigue is a factor in many rail accidents. The catastrophe in Macdona, Texas should have been a wake up call. According to the National Transportation Safety Board (NTSB), the probable cause of that accident was train crew fatigue. And at the core of the issue were Union Pacific's train crew scheduling practices. With record profits and an overloaded system, it is unconscionable that the railroad industry refuses to hire the workers

they need and instead make employees work dangerously long hours. Workers often put in 12-hour days, then have to wait on their train "in limbo" for up to six more hours until a replacement crew arrives, and then must return to work 10 hours later (or face retribution from their employer). As the Brotherhood of Railroad Signalmen (BRS) will tell you, workers who maintain railroad signals can actually be forced to work 20 hours in a 24 hour period. Just as you wouldn't want an airline pilot or bus driver operating on two hours of sleep, no one should want a train barreling through town with a similarly fatigued crew.

We are pleased that you, Madam Chair, and Chairman Oberstar have addressed this issue head-on in H.R. 2095. The fatigue proposal in H.R. 2095 is critical to improving rail safety. I would venture to say that when this bill becomes law, the number of accidents and incidents will drop dramatically based on the fatigue provisions alone. Mr. Shuster has proposed a rail safety plan as well. And while we don't believe the fatigue provisions go far enough, we appreciate your willingness to listen to the concerns of rail workers and their unions. We are pleased that you want to address the fatigue issue, and we look forward to working with you throughout this process.

H.R. 2095 also includes an important training measure. The current training structure for rail workers is woefully inadequate. For both operating and on-board crafts as well as maintenance workers, training is largely left to peer-to-peer training. As the workforce retires, critical "institutional" knowledge is lost. Coupled with limited classroom training and virtually no on-the-job training requirements, workers are entering the field with very little experience and little oversight. This is hardly a recipe for safe and stable operations. Not surprisingly, the Administration's bill did not address the need for a better trained and more prepared workforce. Despite the industry's claim that it will need to hire 80,000 more workers just to maintain the current movement of freight, it continues to ask its workers to do more with less.

Section 605 of H.R. 2095 provides for minimum training standards. We believe this is an essential piece of the reauthorization proposal and I want to thank you for including it.

Similarly, we are pleased the bill includes a certification requirement for conductors. We believe certification provides important qualification standards for rail workers and contend this section should be expanded to cover future Carmen as well as include dispatchers and other workers who perform safety-sensitive functions.

Section 508 of H.R. 2095 requires an increase in the number of rail safety inspectors. As this Subcommittee heard at the hearing in January, there are myriad problems with safety oversight by the FRA. As the GAO has stated in testimony before this Subcommittee, because the number of FRA and state inspectors is small relative to the size of railroad operations, FRA inspections can only cover 0.2 percent of railroad operations.[1] When safety problems are found during that very small number of inspections (about 3 percent in 2005), the FRA does not measure the extent to which the identified safety problems have been corrected.[2] As I mentioned before, rail

[1] Reauthorization of the Federal Rail Safety Program: Hearing Before the House Subcommittee on Railroads, Pipelines, and Hazardous Materials, 110th Cong. (2007) (statement of Katherine Siggerud, Director, Physical Infrastructure Issues, Government Accountability Office)
[2] *Id.*

companies are making money hand over fist, and even the GAO states that it is not clear whether the number of civil penalties issued, or their amounts, are having the desired effect in improving compliance.[3]

I want to add that we wholeheartedly endorse the provisions in H.R. 2095 related to track safety and signaling dark territory. The NTSB has been clear in its recommendations in this area and until the railroads commit to install adequate signal technology throughout the entire rail system, these measures are vital. BRS President Pickett will speak more thoroughly on that subject.

Speaking more broadly, we are pleased the bill clarifies that the primary responsibility of the FRA is to promote rail safety. We further applaud the reporting requirements in Section 103 which will provide important measurements and help set benchmarks for improved safety throughout the industry. We have long called for increased penalties for safety violations and are pleased the Oberstar-Brown bill increases the maximum penalties for railroads' dereliction of their safety responsibilities. It is unconscionable that the average fine for safety violations is $39; parking tickets can be double that amount and no one's life is put in danger when the time on a parking meter expires.

Finally, we hope this Committee will recognize the need to address the issue of safe cross-border transportation in the rail sector. As U.S. industries continue their drive to outsource American jobs and cut costs, we must remember the safety implications of such actions. Train inspections currently performed by U.S. rail workers play an important role in ensuring the safe and secure movement of U.S. cross-border operations. We hope this Committee will consider making a strong statement in the reauthorization bill to prohibit rail carriers from waiving U.S. inspection mandates (and outsourcing them to Mexico) or other safety requirements in cross-border operations.

Madam Chair, we look forward to working with you and Chairman Oberstar as the Committee prepares to move legislation that will make our railroad industry safer. I thank you for this opportunity to testify, and I will be happy to answer any questions.

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[3] *Id.*

**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**

**May 8, 2007**

**House of Representatives Committee on Transportation and Infrastructure**
**Subcommittee on Railroads, Pipelines, and Hazardous Materials**

**Hearing on Railroad Safety Authorization**

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

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.

**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



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