BEFORE THE

UNITED STATES SENATE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

SUBCOMMITTEE ON SURFACE TRANSPORTATION AND
MERCHANT MARINE INFRASTRUCTURE, SAFETY AND SECURITY

HEARING ON

THE RAIL SAFETY ENHANCEMENT ACT OF 2007

JULY 26, 2007

TESTIMONY OF

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A DIVISION OF THE RAIL CONFERENCE
OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Thank you, and good afternoon Chairman Lautenberg, Ranking Member Smith, and Members of the Subcommittee.

My name is John Tolman, and I'm Vice President and National Legislative Representative of the Brotherhood of Locomotive Engineers and Trainmen (BLET), which is a Division of the Teamsters Rail Conference. On behalf of more than 33,000 active BLET members and over 70,000 Rail Conference members, I want to express my thanks for the opportunity to inform you of our position concerning rail safety, in general, and the Rail Safety Enhancement Act of 2007, in particular.

As you may know, the BLET has a long and proud history of helping lead the fight to improve safety in the railroad industry. We are charter members of the Federal Railroad Administration's (FRA) Railroad Safety Advisory Committee (RSAC) and have actively participated in every aspect of rail safety regulation for more than a decade. Since June of last year, we have testified before House committees and subcommittees of jurisdiction more than a half dozen times concerning rail safety, generally, as well as on specific issues.

Rail safety has improved significantly in recent years. The industry has set records for the number of train miles operated each of the past two years. In 2006, the rate for human factor accidents on main track was the lowest recorded since FRA began keeping data in 1975. Similarly, last year's rate for human factor accidents on yard track was the lowest it has been since 1997. Nonetheless, as tragedies in Minot, North Dakota, Macdona, Texas, and Graniteville, South Carolina, remind us, even a single accident can have catastrophic consequences.

The need for heightened safety in the railroad industry is underscored by unique factors in these times in which we live. The attacks of September 11, 2001, remind us of the importance of tight security in our transportation infrastructure and in the storage and carriage of hazardous materials. Deterioration of our highway systems and steadily increasing importation of foreign-manufactured goods have combined to stretch the industry to capacity in many places, and neither of these trends are likely to reverse any time soon.

We stand on the threshold of broad application of signal and train control technologies throughout the industry. While these technologies have the potential to significantly enhance safety, they also bring different and, perhaps, unanticipated safety challenges. Concurrent with all these factors is the retirement of the Baby Boomer generation of railroad workers, and the test posed by training and introducing over 80,000 new workers into the industry.

Fortunately, the industry is well poised to face and successfully deal with these challenges. Nearly every major railroad has set a profit record in the past few years. The Class I carriers, as a whole, have enjoyed roughly $25 billion in profits over the past six years, and recently have expended much capital buying back stock.

The attractiveness of investment in railroads is, perhaps, best evidenced by the significant stake in three Class I railroads purchased by Berkshire Hathaway earlier this year, and by the more recent reports of a possible leveraged buyout of Canadian Pacific by a consortium led by Brookfield Asset Management. Consequently, we are in a far different period than the industry

was, for example, in the late 1970s, when even the most routine track maintenance was deferred for dangerous lengths of time because of the industry's financial shape.

Within this context, I want to congratulate you on the work you have done in drafting the Railroad Safety Enhancement Act of 2007. This comprehensive bill reflects an understanding of where the industry is, and where it needs to go over the next decade. It addresses many of the issues we have brought to the Hill, and dovetails nicely with the work undertaken by the House. While I will not comment today on every aspect of the legislation, I do want to discuss several issues that are of vital importance to BLET and Rail Conference members.

With regard to Section 101, I want to point out that the companion portion of the legislation being considered by the House would require that the Federal Railroad Administrator "be an individual with professional experience in railroad safety, hazardous materials safety, or other transportation safety." It has been our experience that FRA fulfills its safety mission much more effectively when such a person is serving as Administrator. Indeed, the qualifications brought to the position by the current Administrator — Joe Boardman — provide, perhaps, the best evidence of the advantage having such a requirement means in terms of safety, and I strongly urge you to consider a similar requirement.

We strongly support the railroad safety and risk reduction strategies set forth in Sections 102–104. The BLET has participated, at every level, in several different types of risk reduction pilot programs in recent years and I can tell you that they can have a significant positive impact on safety. Further, while we understand and support the need for protection of information developed in risk analyses, which is addressed in Section 107 of the bill, we would caution that such protections not be perverted to allow a railroad to "hide" information that currently is properly discoverable through alternative methods or means.

We also support Section 105, dealing with implementation of Positive Train Control (PTC) technology. In our view, an appropriate timetable for implementation will assist the industry in dealing with important issues such as interoperability among technology and equipment, and a consistency in operational philosophy.

I also want to commend you on the proposals for reforming the Hours of Service Act. Section 106 reflects many of the conclusions reached by the House T&I Committee, and also proposes a number of novel enhancements. There is common understanding among government, labor, and management that fatigue poses a significant safety concern, and is at least an underlying factor in far too many accidents. However, that common understanding has yet to produce consensus on what forms fatigue abatement should take.

For example, it is my opinion that introduction of a 10-hour call for duty, with no disruption thereafter, is one of two key elements in combating fatigue. Every crew member who knows at least 10 hours in advance that he or she will be required to report for duty at a time certain would have ample opportunity to ensure they are rested. The current problem experienced by crews receiving unexpected calls for duty and not having an opportunity for rest after the call is completely eliminated. I will address this subject again later in my testimony.

To be sure, the most contentious Hours of Service issue is so-called "limbo time," which is time after a crew's 12 hours have expired and before they arrive at their point of final release, which is neither on-duty nor off-duty time.[1] As you may know, we presented the House Railroad Subcommittee with a multitude of data concerning excessive limbo time, including identifying nearly 335,000 cases of limbo time in excess of two hours on just one Class I railroad from 2001 through 2006. I will not present a detailed recitation of the data here today, although we would be pleased to provide any supporting information you request. Rather than focusing on the aspect of limbo time that increases fatigue among operating crews, I would, instead, like to point out some of the other consequences of limbo time that have been lost in the debate on this issue.

When a crew is abandoned on a train for 4, or 8, or 12 — or 20 — hours, all of the freight being carried by that train also is left in "limbo." Manufacturing that relies on "just-in-time" delivery of parts and supplies is severely disrupted, and the delivery of finished goods and products also is left in "limbo," adversely impacting both retailers and consumers. Moreover, because the locomotives on the train must be kept running so that the train's braking system remains operational, gallon upon gallon of diesel fuel literally goes up in smoke without the train moving an inch, wasting an increasingly expensive and scarce resource and polluting the area where the train idles.

Not only is limbo time bad business for America, it is bad business for the railroad industry itself. As I said earlier, much of the railroad industry is operating at or near full capacity. Record-high fuel prices make fuel-efficient rail freight and rail passenger transportation more attractive, placing additional pressure on capacity. Average freight train velocity industry-wide hovers around 20 miles per hour. Every hour a crew — and its train — spends in "limbo" reduces velocity. Increasing velocity means freeing up locomotives, cars, and crews for more frequent use. An increase in velocity of just two miles per hour is the equivalent of increasing capacity by 10%. If all that capacity was filled by demand the industry currently cannot meet, industry

[1] In this regard, it is both appropriate and necessary for us to respond to the Administration's proposal concerning Hours of Service. Essentially, the Administration seeks to have current law repealed after it is promulgated as a regulation. Thereafter, amendments would be considered by RSAC; if no consensus is reached within 24 months, the Secretary would be authorized to promulgate amendments in a traditional rulemaking process. We believe it is inappropriate to address limbo time in this manner at this time. The present controversy over limbo time stems from the holding of the United States Supreme Court in Brotherhood of Locomotive Engineers, et al. v. Atchison, Topeka & Santa Fe Railroad Co., et al., 516 U.S. 152 (1996), in which the Court construed the 49 USC Section 21103(b)(4) clause stating that "time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty." Specifically, the Court held that the "text, structure, and purposes of the statute persuade us that ***Congress intended*** that time spent waiting for deadhead transportation from a duty site should be limbo time." 516 U.S. at 162 (emphasis added). Since the Court's 1996 ruling, the amount of limbo time crews have been forced to endure has skyrocketed, reaching crisis proportions in recent years. We simply do not believe that Congress intended work tours — albeit not duty tours — in excess of 20 hours to occur dozens of times every year, nor work tours in excess of 14 hours that number in the hundreds of thousands. Congressional intent must be discerned from acts of Congress, not actions of RSAC and/or FRA. Accordingly, we believe it is necessary that Congress act, first, to correct the Court's erroneous construction of the statute, out of fidelity to the 1969 amendments, the judicial interpretation of which created the current problem.

revenues also would rise significantly. Consequently, a dramatic reduction in limbo time is good for railroads, railroad workers, the economy, consumers, and the environment.

Limbo time is one of the issues where stakeholders have widely varying opinions. The industry insists the limbo time is not a factor in fatigue. We, on the other hand, believe the Supreme Court got it wrong in 1996, and further believe that there should be no limbo time, except in the narrow circumstances provided currently in 49 USC Section 21102(a). That being said, we believe the House has laid a foundation for further efforts to resolve this issue, and we look forward to working with you on this matter.

With respect to statutory time off duty, we generally support the approach you have proposed. However, there are some unintended consequences I want to bring to your attention, because they need to be addressed in this process. One issue is the requirement that an employee have at least one period of at least 24 hours off duty every seven days, unless the Secretary provides a waiver because there is a collective bargaining agreement in place with a different arrangement that provides an equivalent level of safety and protection against fatigue.

We would respectfully request that you consider amending this requirement so that the 24-hour period is taken at the employee's home terminal. A sufficient body of study exists establishing that rest taken at the away-from-home terminal — in a hotel where meal options are severely limited — is qualitatively inferior to rest taken at the home terminal. This is not only a quality of life issue for our members: it clearly has safety implications.

The other issue involves the impact of the proposed minimum 10 consecutive hours off duty every 24 hours. It has come to our attention that the proposed language may have some unintended consequences on commuter railroads, where their heaviest service is during the morning and evening rush hours, and a number of assignments work a few hours in the morning, then are released for periods in excess of four hours before working a few more hours in the afternoon and early evening. We continue to study this issue and look forward to working with you on addressing this situation.

One other difference between the Senate and the House versions pertains to communication to a train employee during his/her off-duty period. Your bill would permit the Secretary to waive the prohibition against communications "for commuter or intercity passenger railroads if the Secretary determines that it is necessary to maintain that railroad's efficient operations and on-time performance of its trains." Such communication — which we call a "set-back" or a "respite" in railroad parlance — would be necessary in order to maximize a train employee's hours of service in situations involving a delay to the train they are scheduled to operate.

Such an accommodation makes operational and economic sense. Furthermore, many of our collective bargaining agreements historically have contained similar provisions. Nevertheless, and despite the fact that a "set-back" provides increased time off duty between trips, repeated occurrences severely disrupt a crew's ability to manage its sleep and meal requirements, and would defeat the safety purpose undisturbed rest is intended to serve. For this reason, we believe the legislation should limit the waiver to one "set-back" per trip.

Section 106(d) of the bill would authorize the Secretary to regulate Hours of Service in a way that is broader than the companion provision of the House bill. Specifically, the Secretary would be authorized to issue regulations "to make other changes to the maximum hours or minimum hours an employee or class of employees may be allowed to go or remain on duty, or may be required to rest, that will significantly increase safety."

Read in context, this provision appears to empower the Secretary to authorize duty tours in excess of 12 hours, or to authorize rest periods shorter than those provided in the statute. We would be hard pressed to identify a situation — other than a bona fide emergency — where crews should be on duty longer than 12 hours. Further, other than the limited changes to off-duty periods listed above, we can think of few situations in which shorter off-duty periods would be appropriate. We believe that proposed Section 21109(a)(3) runs counter to the intent of the preceding two subsections.

As I mentioned earlier, we believe a 10-hour call is a key component in fatigue mitigation. Accordingly, we strongly support the pilot project for a "10-hour call" that would be enacted as 49 USC Section 21109(e)(1)(A). Indeed, it is our position that Sections 21103(a)(1)–(a)(2) could remain as currently written if a 10-hour call was instituted industry-wide. Furthermore — and singular to the 10-hour call concept — the contribution to fatigue of unexpected calls for work would be eliminated. We would prefer to see more than one 10-hour call pilot, and believe that the proposed 2-year deadline provides more time than is necessary to develop the program. We also strongly support the "calling window" pilot project that would be enacted as 49 USC Section 21109(e)(1)(B), because similar pilots that have been attempted in the past have proven successful in fatigue mitigation.

With regard to highway-rail grade and pedestrian crossing safety, which is addressed in Title II of the bill, we support your goals and applaud your leadership in addressing this important issue. We will follow Title II with keen interest, because grade crossing and pedestrian accidents take a heavy toll on our membership, both physically and emotionally. In that light, we also would ask that you consider an amendment to (1) require the Secretary to issue regulations requiring railroads to implement an approved critical incident stress debriefing plan that includes counseling, guidance, and appropriate support services, (2) provide that an operating crew involved in a critical incident be relieved of duties immediately, and (3) provide that an employee witnessing a critical incident be relieved of duties as soon as feasible, and upon request.

Concerning Title III, dealing with the FRA, we note that Section 301 is less aggressive — in numbers and implementation schedule — than the House bill, which we support. We are confident that conference will produce authorization for enhancement of FRA's enforcement capabilities. Equally important is that the authorization be supported by the appropriations necessary to realize the legislation's goals.

We are pleased to see that, by proposing Section 303, the Senate favors greater transparency for FRA activities. With regard to enforcement actions, however, I would urge you to consider the proposal by the House in Section 505 of H.R. 2095, which would mandate that reporting be on a monthly, rather than annual, basis. We also very strongly support proposed 49 USC Section 21020(a)(4), requiring annual reporting that quantifies locomotive engineer cer-

tification cases appealed to, and the average length of time required for decisions by, each of the three appellate levels established in 49 CFR Part 240.[2]

I also want to congratulate you, and express our appreciation, for the railroad safety enhancement initiatives proposed in Title IV. With respect to training, which is addressed in Section 401, we can think of no craft or class of railroad worker not impacted or governed in some manner by federal rail safety statutes or regulations, and believe training should be afforded across the board, at least as to those statutes and regulations. Moreover, while we have no desire to require that the industry "reinvent the wheel" or develop duplicative training programs along side of those currently in place, we urge you to ensure that the proposed 49 USC Section 20162(d) exemption not be applied in a way that would permit current training programs to fall below the standards established by the Secretary in promulgating the regulations required by Section 20162(a).

Regarding Section 402, pertaining to certification of certain crafts or classes of employees, we appreciate your acknowledgement of the increasingly complex nature of the railroad workplace. Having said that, however, we believe that at least four crafts or classes of railroad workers should be certified without the necessity of a study and report:

- Train Dispatchers are at the very center of railroad operations, and are responsible for coordinating train movements and track maintenance. The need to certify Train Dispatchers will be heightened as development and implementation of PTC technology continues to move forward.

- Conductors are co-responsible with certified locomotive engineers for the safe movement of trains and for compliance with a wide variety of federal safety statutes and regulations, including those governing movement of hazardous materials. The federalizing of an additional three operating procedures, which currently is in rulemaking, exposes Conductors to even greater potential individual liability for civil penalties than they currently are.

- Signalmen are responsible for the installation, inspection, maintenance, and repair of railroad industry signaling systems, including active grade crossing warning devices. They perform safety-critical work each and every day and are exposed to potential civil liability for violation of FRA regulations similar to the exposure of Locomotive Engineers and Conductors. As with Train Dispatchers, the need to certify Signalmen will only increase as PTC technology matures.

- Carmen, who are subject to FRA regulations governing, and are responsible for, inspection, testing, maintenance, and repair of train brake systems. In recent years the minimum distance between major brake inspections and tests has in-

[2] We similarly support Section 308, pertaining to the updating of FRA's website. The website is of inestimable value to us for research purposes, and FRA is to be lauded for the scope and volume of information and data that is made publicly available. Unfortunately, the website's design is not particularly user-friendly, and we hope Section 308 provides an impetus to overhaul website design. We would support a special appropriation, if one is necessary, to achieve this purpose.

> creased, and the implementation of electronically controlled pneumatic braking systems will increase these distances further, making each inspection and test even more critical than before.

We appreciate your most serious consideration of our position on the subject of certification.

Section 408 proposes to amend current 49 USC Section 20303 requirements limiting movement of defective and insecure vehicles, and is patterned after the Administration's proposal on this subject. Presently, such movement is authorized only to the nearest available place at which repairs can be made. The crux of Section 408 is that "nearest" would be redefined as meaning "the closest in the forward direction of travel." Thus the bill proposes that a car with a defect that is discovered one mile after a train has passed a repair facility be continued in service to the next such facility, even it is 200 miles away or more.

The defects covered by this statute are so serious that the car no longer complies with the requirements of federal law; mere garden-variety defects are not included. We are disappointed that the federal agency responsible for safety oversight of the railroad industry would propose a change that would diminish safety for the sake of a railroad's operational convenience, and we do not support this section.

We are pleased to see that "dark territory" switch position detection is among the technologies addressed in your bill. As you know, dark territory has posed a particular problem and is the subject of National Transportation Safety Board recommendations. However, we prefer the approach proposed in H.R. 2095, which would require protection or an operational alternative. Switch position detection technology already is developed to the point where it is available off the shelf, and will be a component of PTC systems being designed and tested. For the reasons I stated at the beginning of my testimony, there is no valid financial reason why the nation's railroads should be permitted to further delay in adding this vital safety enhancement.

At the same time, I want to congratulate you on the proposals in Section 410 to amend federal law in connection with employee sleeping quarters. Specifically, getting our Rail Conference Brothers and Sisters in the Brotherhood of Maintenance of Way Employes Division out of barbaric camp cars is something that is long overdue. We respectfully request that you also take one more step, and eliminate the 49 USC Section 21106(2) clause grandfathering pre-1976 constructed sleeping quarters located in switching or humping yards.

We also support Title V, which would establish a system to provide assistance to families of those involved in a rail passenger disaster. With regard to the jurisdiction of the Surface Transportation Board over solid waste facilities, we agree with the position of the Association of American Railroads.

Before closing, I also want to briefly touch on a few items that are not presently in the draft legislation you are considering. Section 606 of H.R. 2095 would prohibit a railroad from denying, delaying, or interfering with medical or first treatment needed by a railroad worker who is injured on the job. In addition, the injured worker would have the right to be promptly transported to the nearest medical facility equipped to render the necessary care, and workers would

be protected from retaliatory action triggered by the exercise of these rights. Harassment of injured workers is a serious problem on some railroads, and current FRA regulations covering the subject are wholly inadequate.

Section 608 of H.R. 2095 requires the Secretary to submit a report to the committees of Congress having jurisdiction on the effects of the locomotive cab environment on the safety, health, and performance of train crews. Cab conditions vary widely throughout the industry, despite the establishment of FRA standards governing many aspects of this issue. Conditions that negatively impact a crew's physical well-being or ability to focus attention diminish safety, and they should be identified for consideration of reasonable additional remediation.

We also support the requirement to document inspection and maintenance activities, and other pertinent safety and security information, concerning tunnels which are longer than 1,000 feet and located under a city with a population of 400,000 or greater, or carry five or more scheduled passenger trains per day, or 500 or more carloads of toxic-by-inhalation hazardous materials per year, as proposed by H.R. 2095 Section 609. And we strongly support Section 616 of H.R. 2095, which provides clarification regarding state law causes of action. This is necessary, in our view, to correct an injustice resulting from a misapplication of the preemption provisions contained in 49 USC Section 20106.

Finally, there are three additional items I want to mention briefly that presently are not included in any draft legislation. First, 49 USC Section 20103 should be amended to provide that whenever the Secretary issues a regulation which incorporates a standard of a non-governmental entity, such as the Association of American Railroads, any subsequent changes to such standards shall be subject to rulemaking. Second, 45 USC Section 797j, which pertained to regulation of Conrail prior to the 1996 transaction involving CSX and NS, should be repealed because it no longer has relevance. Thirdly, a section should be added to Title 49 requiring the Secretary to prohibit crews reporting for duty in Mexico from operating trains within the United States, and crews originating in the United States from operating trains into Mexico.

Before closing, I again want to highlight the importance of making significant progress in fatigue abatement, with resolving the limbo time crisis and providing crews with notice to report for work in a manner that allows them to optimize available rest time. We appreciate the steps you have already taken, and look forward to working with you to produce meaningful legislation that will appreciably enhance rail safety.

Once again, I thank you for the opportunity to testify today, and would be pleased to respond to any questions you may have at the appropriate time.