

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON RAILROADS, PIPELINES,
AND HAZARDOUS MATERIALS

HEARING ON
FEDERAL, STATE AND LOCAL ROLES IN RAIL SAFETY

AUGUST 9, 2007

TESTIMONY OF
TIMOTHY L. SMITH, CHAIRMAN
CALIFORNIA STATE LEGISLATIVE BOARD
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,
A DIVISION OF THE RAIL CONFERENCE
OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS



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Thank you and good afternoon, Madame Chairwoman, Mr. Ranking Member, and Members of the Subcommittee. My name is Tim Smith, and I am Chairman of the California State Legislative Board of the Brotherhood of Locomotive Engineers and Trainmen, which is a division of the Teamsters Rail Conference. I also am Vice Chairman of the BLET's National Association of State Legislative Board Chairmen. On behalf of BLET National President Hahs, who is unable to be here today, as well as more than 33,000 active BLET members and over 70,000 active members of the Teamsters Rail Conference, I want to thank you for the opportunity to provide you with our views on federal, state and local roles in rail safety.

I also would like to congratulate you on your choice of venue for this hearing. Norwalk is Congresswoman Grace Napolitano country, and the decision to hold the hearing in this great city is a testament to Representative Napolitano's tenacity on behalf of her constituents concerning matters over which the Subcommittee has jurisdiction. Thank you, Representative Napolitano, for all you do for the BLET and Rail Conference members — and their families — who live in this district.

The subject matter of today's hearing is of particular importance to me, personally. I am fortunate to serve as a BLET official in a state whose economy is so large that if California was an independent nation, it would have the 5th largest economy in the world. This means that issues of rail safety at the state and local level are handled in California on a scale significantly larger than the vast majority of states. Inevitably, this produces tensions and occasional disagreements. Nonetheless, I am convinced that California is a trail-blazer when it comes to rail safety.

My testimony today will focus on three aspects of what we believe are the appropriate federal, state and local roles in rail safety. First, I will address statutory and regulatory responsibilities. Then, I will turn to safety and security of hazardous materials shipments. Finally, I will close with some thoughts concerning pedestrian and highway grade crossings.

With respect to rail safety regulation at the federal, state, and local levels, I want to begin by stating that I am not anti-preemption. Public safety in California is enhanced because of the national uniformity of Federal Railroad Administration (“FRA”) regulations. Californians need not worry, for example, that braking systems on trains arriving from other States may pose a safety hazard, because braking systems on all trains throughout the nation must be maintained to a level that assures safety.

Furthermore, my membership would face a nightmare if each State had full authority to regulate every aspect of rail safety within its borders. Although I am Chairman of the BLET’s California State Legislative Board, a significant percentage of the men and women I represent operate trains beyond the State’s borders. Compliance with numerous different State standards would be so complex as to reduce overall safety. Conversely, uniformity of rail safety regulation enhances safety here in California, as well as throughout the nation.

That being said, the manner in which preemption is currently being enforced is unacceptable. Section 20106 of Title 49 of the United States Code, which is the federal rail safety preemption provision, allows a State to adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety only when it: (1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; and (3) does not unreasonably burden interstate commerce.

The final two conditions in the statute — incompatibility with federal laws and regulations, and burden on interstate commerce — are thresholds that are almost never exceeded by a proposed State or local law or regulation. However, federal judge after federal judge has preempted State and local attempts to regulate rail safety by repeatedly finding that the proposal is not “necessary to eliminate or reduce an essentially local safety hazard.”

In other words, the federal judiciary is imposing its own judgment as to whether a local safety hazard exists, irrespective of the judgment of the State and/or local officials elected or appointed to make such determinations. Indeed, in

one case, a federal judge went so far as to use preemption to deny residents of Minot, North Dakota, a cause of action to recover damages against the Canadian Pacific Railway for its negligence in causing a derailment and toxic hazardous materials release. Perhaps even worse, some courts have ruled that a lack of federal regulation concerning a specific subject also preempts State and local action on that subject.

In response to this increasing judicial activism, the National Association of Regulatory Utility Commissions has adopted a resolution recommending that Congress eliminate the “local safety hazard” clause of Section 20106. We support this change because it restores an appropriate balance among the statutory and regulatory roles of federal, state, and local governments. Eliminating the clause would enable States and localities to regulate rail safety in the interests of their citizens, provided those regulations do not conflict with FRA regulations or impose an undue burden on interstate commerce.

Action to reform preemption is all the more important in our post-911 world. It is true that safety in the railroad industry has increased dramatically in recent years. The industry has set records for the number of train miles operated in 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, Macdonia, Texas, and Graniteville, South Carolina, remind us, even a single accident can have catastrophic consequences. In fact, if the Graniteville accident and chlorine gas release would have occurred 12 hours earlier or later, when the nearby school was filled with children and local businesses were open, an already unacceptable death toll of nine could have been significantly — and horrifyingly — larger.

Moreover — and this is the prospect which haunts us all — such tragedies are no longer solely caused by accidents, as the terrorist attacks on rail and transit facilities in Spain and England in recent years have shown. The Chlorine Institute has reported that a 90-ton tank car, if targeted by an explosive device, could create a toxic cloud 40 miles long and 10 miles wide. Such a toxic plume, according to the U.S. Naval Research Lab, could kill 100,000 people in 30 minutes in a major metropolitan area.

To be frank, our efforts to have rail security addressed at the federal level were ignored or stonewalled by the Republican leadership that controlled Congress until this year. This made it all the more important that we go from state to state, and everywhere we went state officials were more than pleased to sit down with us to fill the gap created by the “do-nothing” leadership of the 108th and 109th Congresses.

Because of the leadership of this Subcommittee, the full Committee and its Chairman, Jim Oberstar, as well as the Homeland Security Committee, under the leadership of Chairman Bennie Thompson, the ball is now rolling on a federal legislative response concerning rail security. In addition, the Pipeline and Hazardous Materials Safety Administration and the Transportation Security Administration have proposed rules to enhance the safety and security of shipment of the most hazardous materials.

We support requiring risk and route analyses on a regular basis, and the development of primary and alternative routes for these materials, as a matter of transportation planning strategy. We further believe that Federal, State and local governments should be in possession of sufficient information concerning times and amounts of shipments so that they all may fulfill public safety obligations better. Coordination is an absolute necessity in times of crisis, as officials of Graniteville, South Carolina, learned when the nearest hazardous materials fire official available during its 2005 crisis was in Augusta, Georgia.

That having been said, we do not believe it is appropriate for States and localities to play a role in routing decisions. Current conditions in the railroad industry would make it difficult to re-route hazardous materials on a significant scale. In many parts of the country during the 19th Century, population growth followed railroad construction; therefore, rail lines, and particularly the older yards and terminals, tend to cluster around major urban areas.

Much of the infrastructure in the industry is at or near capacity, and there are both labor and equipment shortages in many areas. Furthermore, given the nature of train operations and FRA requirements, locomotive engineers and conductors cannot be shifted from route to route in the way that a truck can be diverted from one Interstate highway to another; qualification requirements are territory-specific and exacting. Simply put — there is not enough slack in the system to re-route hazardous materials on a large scale without the system experiencing significant delays and disruption.

The very nature of the system would make it difficult to re-route on such a scale. Due to the limited areas in which railroad tracks run — and depending upon what part of the country is involved — re-routing could add hundreds of miles to a trip. Re-routing on a large scale also could have the unintended consequence of making us less safe, because hazardous materials shipments would be gathered into a small number of designated corridors — creating a security problem by making each of those corridors a more attractive target for a terrorist attack.

Despite those reservations, we do believe there is a role for all three levels of government to play in supporting technologies that assist in tracking shipments, and developing procedures to minimize — to the greatest extent possible — the length of time dangerous shipments may sit unmonitored or in an unattended facility. States perform a vital function in coordinating emergency response to serious incidents, and localities need to tap into available resources to ensure that first responders are appropriately trained and prepared to deal with what is likely to face them, including drilling with train crews with whom they would interact in an emergency.

The final area I want to address today is crossing safety, which has a significant impact on our members. Combined, the state, local and federal governments play a huge role in grade crossing safety. As locomotive engineers and trainmen, grade crossing and pedestrian accidents take a heavy toll on our membership, both physically and emotionally. As you may know, last summer the FRA initiated a safety inquiry concerning the safety of private highway-rail grade crossings. The BLET believes that the complete absence of federal regulation over private railroad grade crossings in the United States endangers both the public and railroad workers.

While accidents and injuries at public highway-rail grade crossings have declined by between one-third and one-half in the past decade, accidents at private crossings have declined by only 10 percent, and the number of injuries in private crossing accidents has actually increased by one percent. This increase is an unfortunate side effect of both the government and the railroads failing to pay appropriate attention to this issue. We are fortunate, however, that to date no catastrophic accidents or incidents have occurred at such crossings. Nonetheless, the risk remains unacceptable. The risks of collision and of derailment mean that train crews and the public may be exposed to injury or death caused by derailed equipment or hazardous materials releases.

The boundaries between public and private crossings are often blurred. There are over 94,000 private highway-rail grade crossings in the United States, many of which are used by more than one individual. A private crossing should be defined as one used by a sole land owner or lessee. Once any other individuals routinely use the crossing, it should no longer be considered a private crossing, but should be deemed a public crossing. We believe it is imperative that any private crossing that serves an industry should be held to the same standards that apply to highway-rail grade crossing signal system requirements. Due to the types and sizes of trucks, and the materials that they carry, the severity of an accident at these crossings would be greater than an accident between an automobile and a train.

The BLET feels that, at a minimum, all crossings should be required to have active warning devices that comply with the Manual for Uniform Traffic Control Devices. Active warning devices can significantly improve the level of safety at these grade crossings. However, we would prefer that FRA prohibit the creation of new private crossings and work toward eliminating as many existing private crossings as possible and we have made that position known to the FRA. If the FRA determines that it wants to allow the creation of new private crossings, then the new private crossings should have active warning devices installed prior to use. If necessary, FRA should request enactment of legislation to address private crossings. Late last month FRA held a public meeting in New York State, where it unveiled a pair of action plans to address the subject of private crossings, and we testified to our preference for the plan that most closely resembled our original comments.

We also want to congratulate the Subcommittee, as well as the full Committee, in taking giant strides regarding grade crossing safety, generally, in H.R. 2095. Crossing safety will, finally, be guided by a comprehensive national strategy and we will support full appropriations to carry out the plan laid out in H.R. 2095. However, there is one more area that needs to be addressed, which is Critical Incident Stress Debriefing (“CISD”) for crews involved in a grade crossing accident.

You cannot imagine the terror a train’s crew experience when their train comes roaring around a curve at full speed and a truck, car, or pedestrian is just ahead. You can’t blow the whistle long enough or loud enough, and your heart creeps up further in your throat with each passing yard as your closing distance races to zero. There are two absolute truisms when it comes to motor vehicles trying to beat trains at a grade crossing: number one is that the train is going to

take much longer to stop than the driver can even imagine, and number two, sadly, is that all ties go to the train.

The crew of a train bearing down on an obstruction on the track has almost no ability to influence the outcome. After the train finally bumps and screeches to a halt, and while the engineer is attempting to come to grips with what has just happened, the train's conductor will be told to go back to the wreckage and report back on the severity of the accident. The emotional toll that is exacted on our members — who are unable to stop these incidents — is often life-altering.

On some railroads, crews who are involved in such an accident — no matter how serious — are “expected” to ignore the trauma they have just suffered and continue operating the train, in some cases after waiting for hours for the coroner to remove the deceased. On other railroads, crews are given the “option” whether to continue or not, although we don't believe the crew is in a position at that moment to make a rational decision.

A handful of railroads have taken a very progressive approach to CISD, while a few are completely uninterested. The majority in the middle deal with the subject to varying degrees. We believe that requiring — or, for that matter, allowing — a crew who has been traumatized by being involved in a fatal grade crossing or pedestrian accident to continue operating their train presents a public safety hazard. A momentary lapse later on down the road caused by a recollection of the accident impact could produce catastrophic results. It is in everyone's interest that these crews receive timely and appropriate relief and treatment, and we are pushing hard for a CISD standard in every forum that is available to us.

As you know, such incidents often result in some form of post-traumatic stress disorder (“PTSD”). PTSD can be prevented or mitigated if individuals receive the counseling and help they need. I would like to take the opportunity today to advocate for the inclusion of CISD in any legislation that deals with highway-rail grade crossing safety. This program should be available to all railroad workers involved in traumatic incidents while on the job.

Legislation that addresses CISD should: (1) require the Secretary of Transportation 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 — as outlined in S. 1889. The BLET has long advocated such programs and has been a priority for our Vice President and National Legislative Representative, John Tolman. Legislation addressing CISD was first introduced at the state level in the mid-1990s, and was enacted in Rhode Island. The BLET is pleased that the Senate addressed the issue in their rail safety legislation, because it benefits all BLET members and does not require us to go from State House to State House.

In our view, the State and local role in crossing safety is relatively simple, especially for a State like California. Full compliance and cooperation with the federal program will result in significant improvement in crossing safety. We also would ask States and localities to take two other steps.

One is to get tough — and I mean really tough — on enforcement against motor vehicle operators who violate laws governing motor vehicle operation over highway-railroad grade crossings. Commercially-licensed drivers are governed by a complex set of regulations with respect to grade crossings, which include the type of cargo being trucked and the sort of crossing involved. The first time a CDL driver violates one of these regulations, he or she loses their driving privilege for a minimum of 60 days; a second violation within a 3-year period results in a 120-day disqualification, and three or more violations within a 3-year period each produce a 1-year disqualification. We believe the frequency of motor vehicle drivers trying to “beat the train” would decline dramatically if similarly harsh punishment was handed out to drivers not covered by these CDL penalties.

The other step is to work even closer with educational projects such as Operation Lifesaver (“OL”). OL has a proven record of effectiveness, not only with respect to grade crossing safety, but also concerning trespasser issues. Every school kid and every driver should know what our members have to face when someone tries to beat a train or uses the railroad for a shortcut, and States and localities can help spread the word by working as closely as possible with OL.

Rail safety is a full-time effort, and there never are too few hands. When government at the federal, state, and local levels fulfill their respective roles, and coordinate their activities so that the whole is greater than the sum of the parts, safety is enhanced for all of our members and all of your constituents. Once again, congratulations for taking the show on the road, and thanks for the opportunity to present you with our views. I will be happy to take any questions you may have at the appropriate time.