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AND HAZARDOUS MATERIALS

HEARING ON
TRANSIT AND RAIL SECURITY

MARCH 7, 2007

TESTIMONY OF

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**United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit
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and Hazardous Materials
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Testimony of John P. Tolman, Vice President
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Good morning, Chairman DeFazio, Chairwoman Brown, Ranking Member Duncan, and Ranking Member Shuster, members of the Subcommittees. My name is John Tolman, and I am Vice President and National Legislative Representative of the Brotherhood of Locomotive Engineers and Trainmen (BLET), which is a division of the Teamsters Rail Conference.

Thank you for inviting me here today to testify on the issue of rail and transit security. On the behalf of the 39,000 members of the BLET — and more than 70,000 Teamsters Rail Conference members — I would like to thank you for your interest in this subject.

The issue of railroad security is of vital concern to all railroad workers, including Teamster Rail Conference members represented by the BLET and the Brotherhood of Maintenance of Way Employees Division (BMWED). The Teamsters Rail Conference is dedicated to improving rail security and safety in America in order to adequately protect rail workers and the communities they serve. Each and every day, we are on the front lines of the nation's transportation system and see the woeful lack of security on our railroads. This lack of security is more than just troubling; it is tragic, because we have seen the damage that can be done by accidents on the railroads and shudder to think of the damage that could be wrought by terrorism or sabotage.

It is frightening to think that there were more than 250 terror attacks on railroads worldwide from 1995 until June of 2005. Since June 2005, we have seen attacks perpetrated in London, and in Mumbai and Dewana, India. In the past 11 years, there has been one successful attempt to attack a railroad in the U.S. and several more attempted attacks. The attack in Hyder, Arizona, on October 9, 1995, killed an Amtrak employee and injured 78 other people. This case was never solved.

The frequency and severity of the attacks on railroads worldwide and here at home demonstrate the urgency for change in the way our rail security system works. However, our current regulations are severely inadequate, and the proposals that are on the table contain gaping holes.

As you know, the Department of Homeland Security and the Transportation Security Administration spend nine dollars per airline passenger on security, but spend only one penny

per rail/mass transit passenger. This is a pittance when compared to the number of riders each day on our nation's rail and mass transit systems.

Each weekday, 11.3 million passengers in 35 metropolitan areas and 22 states use some form of rail or mass transit. These passengers ride on trains that cover over 10,000 miles of commuter and urban rail lines. The very nature of the rail system makes it vulnerable to attack. In addition to the more than 10,000 miles of commuter and urban rail lines, there are 300,000 miles of freight rail lines. These lines are open and easily accessible to the general public.

There are many components that make up the issue of rail security. Today, I would like to discuss four of these issues: training, whistle blower protections, re-routing of hazardous materials and the Transportation Worker Identification Credential program. In addition, I would like to touch the issue of Federal Railroad Safety Act (FRSA) pre-emption of state laws, as well as the recent decision by the staff of the Securities and Exchange Commission (SEC) to allow Norfolk Southern (NS) to exclude a Teamster shareholder proposal calling on NS to disclose its efforts to safeguard the security of its operations and minimize material financial risk arising from terrorist attack and/or other homeland security incidents.

Worker training is one area of grave concern for rail employees, because rail security measures have not been given the attention they deserve. The railroad industry is in the midst of a rapid turnover— fueled by the first wave of retirements of Baby Boomer generation railroad workers — that strains the industry's training programs for all crafts. The industry simply does not devote sufficient resources either to providing initial training for new workers or for periodic recurrent training for more experienced workers. Far too often, training schedules are dictated by the need to deploy new workers in the field, rather than ensuring that those workers, and their more senior co-workers, have the necessary tools to work safely and efficiently.

We believe that the TSA's recent proposals for rail transport of hazardous materials fall short when it comes to the safety of rail employees and the public. Although the proposed rules bring some of the dangers of hazardous materials storage to light, they do not adequately address quality safety, security, and emergency response training for rail employees.

We respectfully request the Congress to pass legislation that will compel rail corporations to train their employees on proper safety and evacuation procedures; the use of appropriate emergency escape apparatus; the special handling of hazardous materials; and the roles and responsibilities of rail employees within the railroad's security plans, including an understanding of the plan's threat level index and notification to employees each time the threat level is changed.

Locomotive engineers, trainmen and track maintenance workers are the true first responders to rail emergencies — the eyes and ears of the industry. They are the first on the scene, and often the last to leave. Yet, the rail corporations do not have quality safety and security training for employees in place. That failure places these first responders in harm's way, and by extension puts the communities served by the railroads in harm's way as well.

Even since 9/11 and the attacks on rail and transit systems overseas, the security training given to rail employees has been minimal, usually comprised of nothing more than a printed brochure or 10-minute videotape. Moreover, 80 percent of our members who participated in a rail security and safety survey said that they had not received any additional security related training since 9/11. Therefore, we would welcome and support legislation that would mandate quality comprehensive security training for rail employees.

The lack of quality training is documented in the Teamsters Rail Conference report “*High Alert: Workers Warn of Security Gaps on Nation’s Railroads.*” This report was based on survey responses gathered over the previous year from more than 4,000 Rail Conference members employed on freight and passenger railroads nationwide. The survey asked rail workers to report the safety and security measures in place on any one workday during the nearly year-long survey period.

The *High Alert* report reveals a shocking inattention to security by the nation’s largest rail corporations. Rail employees have little company-sponsored training on the handling of hazardous materials. The practice of leaving locomotives and other equipment unlocked is far too common. The report’s conclusions are that the nation’s rail system is vulnerable to terrorist attack, and the rail corporations have not taken seriously the safety of their employees and the public. The findings of that report include the following:

- 94% of respondents said that rail yard access was not secure;
- 70% of respondents reported seeing trespassers in the yard; and
- only minimal security training had been provided to employees who have been warned that they could be the targets of a terrorist attack.

Employee training is one of the Rail Conference’s most sought after security provisions. Throughout the country, railroad workers have established that their employers provide little or no specific training for terrorism prevention or response. In the *High Alert* survey, 84% of respondents said that they had not received any additional training in terrorism response or prevention in the 12 months preceding the survey; and 99% said they did not receive training related to the monitoring of nuclear shipments. This lack of training should be of critical concern to citizens who live near rail yards and tracks. The workers who lack this training will often be the first ones to respond to incidents.

The railroad industry also has not adequately trained and integrated its employees into the security plans currently required. Railroad employees remain largely in the dark regarding the carriers’ security plans and — while we can appreciate that certain security information must remain confidential — we believe that employee hazmat and security training must be expanded and improved. Rail employees must know and understand the basic framework of their employer’s security plan, including their roles and limitations within the employer’s overall security plans, how the plan’s threat level matrix is structured, and how notification to employees will be transmitted each time the threat level is changed. Today, rail employees do not have this information. Rail employees are not trained to know and understand the carrier’s threat level

matrix, and they are not notified when the threat level is changed due to either general or specific threats.

Worker training in the handling of hazardous materials has been a particular sore point for the BLET, and for all of Rail Labor. The training provided by the industry is so insufficient that we, long ago, took matters into our own hands. Hazardous materials training programs have been provided under labor sponsorship at the National Labor College, which is located at the George Meany Center in Silver Spring, Maryland.

Our Railway Workers Hazardous Materials Training Program has been a resounding success. The program has, over its fifteen years, continually evolved and expanded to meet the training and competency needs of rail workers that are not met by the railroads. Initially offering only one course, the program now offers five. Training has moved beyond the conventional classroom to include simulation and on-line activities. A core of professionally trained instructors has been replaced with a corps of peer instructors. Because of this program's 16+ years of success, tens of thousands of rail workers are working more safely and in safer environments.

Since the onset of training in April 1991, the union-run program has trained more than 20,000 rail workers. Evolving from an 8-hour program of awareness training only, the National Institute for Environmental Health Sciences (NIEHS)-funded and George Meany Center-sponsored program now offers five courses: a five-day Chemical/Emergency Response training in the classroom; an on-line Emergency Responder Awareness Level 101 course; the OSHA 10-hour General Industry Safety and Health Outreach Program; disaster site training; and the newest addition, a Radioactive Material Transportation Safety Program, which is funded by a separate grant from the U.S. Department of Energy.

The newest program began last summer at the National Labor College, and includes a Modular Emergency Response Radiological Transportation Training (MERRTT) "train the trainer" course. By contrast, we are unaware of any railroad currently conducting training focusing on transportation of spent nuclear fuel and high-level radioactive waste, even though the Department of Energy is expected to begin a 38-year project to transport such waste from DOE sites to storage and disposal facilities as early as next year. The labor hazmat program has trained workers in 49 states and the District of Columbia. We also have fostered the creation of community partnerships that include joint rail worker, fire fighter, EMT, and public safety personnel training in communities throughout the U.S.

The program has a new emphasis on railroad security and disaster response and teaches the five-day students how to serve as skilled support personnel in an incident command emergency setting. Much of the program material is available in Spanish and a comprehensive web site serves both the English and the Spanish-speaking work forces. The five-day program addresses the training requirements of the Department of Transportation's Hazardous Materials Regulations at 49 CFR Part 172, as well as the requirements of OSHA First Responder and Operations Level training under 29 CFR Part 1910.120. Railroads generally do not provide wages or support for workers attending the program. In fact, — and this is most unfortunate —

members sometimes are not allowed time off from work to attend the program, even though the railroad is not paying wages.

The program currently serves eight rail unions,¹ and at least ten crafts,² from major railroads as well as from commuter and short-line railroads. This cross-company, cross-union, cross-craft training has proved invaluable, as one group learns from another. Each union has its own craft-specific tasks and challenges, and prior to this hazmat training program there was little, if any, cross-union training. Hazards and challenges faced by those in the yards may be different than those faced by road train crews, and different still from those who work along the track or in the shops.

Understanding the work of other crafts, the safety and health challenges that each face, and the coordination of each craft's efforts in an emergency, enhances railroad hazardous materials safety and security. A well-trained and knowledgeable workforce is the first line of defense and can prevent a minor incident from becoming a major hazardous materials accident. The eight rail unions have worked together to enhance rail safety by providing comprehensive training to its members and by providing substantial administrative and personnel support to the union-run Railway Workers Hazardous Materials Training Program.

Labor has been able to offer these programs through a combination of federal funds and subsidies from the North American Railway Foundation, which is a private non-profit organization. However, subsidies and contributions are hard to come by. Nonetheless, we take great pride in having trained over 20,000 railroad workers since the program's inception. At the end of the day, though, this represents but a small fraction of the railroad workers who require thorough, in-depth training, and recurrent training.

Railroads boast that their workers are the eyes and ears of the industry, but we frankly feel more like canaries in a mine whose only clue of pending disaster will be when disaster strikes. As workers on the front line, our members will be solely relied upon by passengers, the public, and emergency responders to assist in the first critical moments of any rail emergency. Therefore, comprehensive security and response training for rail employees is an absolute must, and I strongly encourage this committee to address this long-outstanding issue.

Unfortunately, employees are still being intimidated and harassed when they report security problems. Strong whistleblower protections must be a component of any rail security legislation. Railroad workers should not — and cannot — be subjected to dismissal when they provide security threat information to the government.

¹ Brotherhood of Locomotive Engineers and Trainmen (BLET); Brotherhood of Maintenance of Way Employees Division (BMWED); Brotherhood of Railroad Signalmen (BRS); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB); SEIU's National Conference of Firemen & Oilers (NCFO); Transport Workers Union (TWU); Transportation-Communication International Union (TCU); Brotherhood of Railway Carmen; and United Transportation Union (UTU).

² Brakemen, Laborers, Workers from the Building & Bridge Department, Signalmen, Carmen, Switchmen, Conductors, Track Department Workers, Locomotive Engineers, Yardmasters, and Hostlers.

Mandatory re-routing of hazardous materials would further jeopardize these untrained and unprotected employees, along with the general public, in our view. The Rail Conference does not support the mandatory re-routing of hazardous materials. Mandatory re-routing of hazardous materials for safety reasons sounds like a good idea in theory, but it is not a practical solution, except on very rare occasions. Based on our experience, there are several serious flaws with a broad program of mandatory re-routing.

Current conditions in the railroad industry would make it difficult to re-route hazardous materials. 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 simply 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. The areas through which hazardous materials are re-routed may adopt a “not in my back yard” posture against the materials being moved through their area, which is a problem this nation already has concerning long-term storage of spent nuclear fuel and high-level radioactive waste.

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.

Two of the most horrific hazardous materials accidents in recent years happened in non-signalized, or “dark,” territory and were the result of misaligned main track switches.³ There is switch position detection technology available off-the-shelf today that can eliminate this risk altogether, and requiring the use of this technology can realize some of the same goals as re-routing in a more cost effective and less disruptive way.

Similar to re-routing, the Rail Conference believes that the Transportation Worker Identification credentials program is a mixed blessing. The Conference understands the need for

³ The first occurred in Macdona, Texas, on June 28, 2004, resulting in a chlorine gas release that killed three and injured twenty-nine. *See* National Transportation Safety Board Railroad Accident Report No. NTSB/RAR-06/03. The second occurred in Graniteville, South Carolina, on January 6, 2005, resulting in a chlorine gas release that killed nine and injured 544 people, 75 of whom were admitted to the hospital. *See* NTSB Railroad Accident Report No. NTSB/RAR-05/04.

heightened security against terrorist attacks that target America's rail facilities and believes that a limited, properly designed and safeguarded TWIC program — as one element of a comprehensive and integrated anti-terrorist rail security system — could help protect our railroads from attack. Unfortunately, the program established by TSA in conjunction with the Coast Guard proposes a cure that is worse than the illness in some respects.

We strongly disagree with the decision that TWIC disqualifying criteria mirror those imposed by TSA for a Commercial Driver's License Hazardous Materials Endorsement. In order to attain the stated goal of protection against terrorism, there should be a demonstrable nexus between disqualifying crimes and the potential for terrorist activity; instead, the TWIC rule simply presumes that a connection exists between certain types of past criminal activity and future risk of terrorist activity. This is odd, considering that the investigation of the July 2005 London bombers provided evidence that a criminal background could be a contra-indicator of the potential for terrorist activity.

In our view, the appropriate disqualification standard is whether the threat assessment discloses a conviction of a felony that could cause the individual to pose a terrorism security risk to the United States. By contrast, the TWIC rule would trigger a mechanistic review of a worker's criminal record, rather than a genuine threat assessment. We believe that there should not be automatic disqualification for felony convictions for drug distribution, unlawful possession of firearms or fraud, or conspiracy or attempt to commit any of these crimes.

We also have serious reservations concerning commitment to a mental health facility being a disqualifier, which are heightened by the fact that the TWIC language is broad and vague. The railroad industry and rail labor take great pride in having aggressively tackled the problem of substance abuse by workers over the past two decades, and giant strides have been made because of labor-management cooperation. In many cases, the foundation for successful rehabilitation was laid during inpatient treatment at a mental health facility.

To penalize workers who have fought to attain sobriety — using the tools provided and urged by their managers and their unions — is unconscionable. While certain mental illnesses may provide a legitimate basis for requiring a terrorist threat assessment, any security rule that does not explicitly and specifically exclude all drug and/or alcohol rehabilitation commitments from the list of potentially disqualifying conditions is manifestly unfair.

In addition to the fundamental flaws identified above, several other aspects of the rule are cause for serious concern. The past five years have been marked by a government-led erosion of the level of privacy every American expects. On several occasions within recent years, both private employers and governmental agencies have allowed security breaches that have seriously compromised private information concerning millions of citizens.

We see no indication that the TWIC program will be administered in a way that affords greater privacy than we have been forced to endure recently. To the contrary, we have received information that at least a half-dozen railroad workers have lost their jobs as a result of TWIC-related investigations. The rule should specifically prohibit employer access to any information developed under the program, other than eligibility or ineligibility for a TWIC. Furthermore,

there should be an explicit prohibition against TSA and/or USCG sharing any information developed under the program with any other federal agency.

We also believe that the review process does not begin to accord an appropriate level of due process. The terrorist threat assessment should be completely transparent, so that judgments and findings may be appropriately challenged when a worker believes he/she has been improperly denied a TWIC. We also oppose the requirement for “self-reporting” for two reasons. First, it presumes a level of legal sophistication that most workers do not possess, and to that extent will create more problems that it solves. Second, the temporary nature of the TWIC will make all convictions discoverable on a timely basis, whether self-reported or not.

Moreover, threat assessments should not include instances when the disposition of a worker’s arrest is uncertain: the criminal record review will disclose all convictions, and whatever remains either is erroneously on the record or not yet finally adjudicated, at which point the worker remains absolutely entitled to the presumption of innocence. Even more importantly, a worker who is denied a TWIC or whose TWIC is suspended or revoked should have the ability to appeal the decision to an Administrative Law Judge; it is fundamentally unfair for the agency taking an adverse action to have final say over the appeal of that action.

Lastly, we believe that the program imposes excessive costs — in both time and money — upon workers. Locomotive Engineers are the most highly-regulated workers in the railroad industry, with federally-imposed medical, knowledge, conduct, and performance standards. Maintaining these standards requires investments of time and payment of fees that are not insubstantial. A railroad industry TWIC program should meld its administrative requirements with currently existing requirements, and the TWIC should be provided at no cost to any rail worker.

We strongly believe it is inappropriate to charge BLET members — or any railroad or other transportation industry workers, for that matter — any fee in connection with the TWIC program, including a card replacement fee, for three reasons. First, it is the employer’s responsibility to maintain a properly qualified and screened workforce, and the employer should bear all costs associated with the TWIC program as a cost of doing business.

Second, the overriding interest served by the TWIC program is the public interest. Further, the program was conceived and implemented in order to facilitate the work of various governmental security agencies. To the extent that employers are not required to bear all costs associated with the TWIC program, the government should bear the remainder as a reflection of the public and governmental interests served.

Third, even without any out-of-pocket costs, the TWIC program already has proven to be an invasive disruption in the lives of all transportation workers. Indeed, as I said before, more than a half dozen railroad workers already have lost their positions, during the short period since promulgation of the TWIC program’s overly broad requirements. To require transportation workers to pay any sort of fee associated with the credential only adds insult to injury in our view.

I would now like to turn to an issue which was touched upon during a previous hearing before this committee. The issue of pre-emption of state laws by the FRSA is one of grave concern to the Rail Conference. Courts have recently held that the preemption clause in the Federal Railroad Safety Act eliminates all state tort causes of action in any area in which a federal regulation enacted by the FRA pursuant to the FRSA.

The FRSA was enacted in 1970 to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. The Congressional purpose in enacting this legislation was to establish a uniform system of minimum safety standards that would apply across the United States.

In recent years, however, that purpose has been perverted by courts who misapply the doctrine of preemption to deprive Americans grievously injured in railroad accidents of any remedy, even when it is undisputed that the cause of the accident was the railroad’s failure to live up to those minimum federal standards. Now is the time for Congress to step in and let the courts know that they have misinterpreted Congress’ clear intent: that the purpose of the FRSA was and is to set uniform minimum safety standards, and that an expansive application of preemption to deprive accident victims access to state remedies is a misapplication of the law.

The issue is best framed by the Minot, North Dakota derailment cases. On January 18, 2002, 31 cars of a Canadian Pacific Railway train derailed near the city of Minot, North Dakota. The derailment caused seven cars carrying anhydrous ammonia to breach, releasing over 200,000 gallons of the deadly gas. As a result, one man died and hundreds were injured. Among the causes of the derailment was the failure of a so-called temporary joint that had been left in this substandard track for over 20 months. Thus, CP did not comply with the minimum standards set forth by the FRSA.

Nonetheless in *Mehl v. Canadian Pacific Railway*, 417 F. Supp. 2d 1104 (D.N.D. 2006), the Federal District Court in North Dakota dismissed all claims against Canadian Pacific on the basis of federal preemption. The *Mehl* court held that “neither the United States Supreme Court nor the Eighth Circuit requires railroads to prove compliance with federal regulations before allowing preemption of state law claims.” *Id.* at 1116.

Two months after the *Mehl* decision was issued in March 2006, the Eighth Circuit held that regulations promulgated by the Federal Railroad Administration (FRA) pursuant to the FRSA on the issue of track inspection form the basis for original federal question jurisdiction despite the fact that the FRSA provides no cause of action or other remedy for those harmed by the failure of a railroad to comply with those regulations. *Lundeen v. Canadian Pacific Ry*, 447 F.3d 606 (8th Cir. 2006).

We believe that the courts have broadly misconstruing preemption in a way that actually provides railroads with absolute immunity. Preemption is the principle, derived from the Supremacy Clause of the United States Constitution, that a federal law can supersede or supplant any inconsistent state law or regulation. Where preemption occurs, state law on a given subject is invalidated, and the federal law substituted in its place.

This should mean that if FRA has promulgated a federal standard to govern a particular area of railroad operations, that standard is a *minimal standard* of adequacy. Any lesser or conflicting state guideline is preempted, except in exceedingly limited circumstances. Where the FRA has not yet promulgated a federal standard, any pertinent state standard continues in effect. Preemption as used in the context of the FRSA should not and cannot mean that the very existence of the federal standard preempts state tort law remedies for injuries sustained as a result of railroad negligence.

The Rail Conference also is deeply concerned by the recent decision by the staff of the SEC to allow NS to exclude a Teamster shareholder proposal calling on the company to disclose its efforts to safeguard the security of its operations and minimize material financial risk arising from terrorist attack and/or other homeland security incidents.

We strongly believe the Commission's staff failed in its interpretation of "Ordinary Business" when it concurred with the Company's position that homeland security issues are strictly in the purview of management. It is absurd to equate issues such as the ramifications of a hijacking of a freight train carrying toxic or explosive materials with everyday management decisions such as setting shipping charges. It is our strong belief that the safety and security of our nation's rail network is a matter of national policy concern.

There have been more than 250 terrorist attacks on railroads worldwide in the past 12 years. The FBI has warned that our rail system is a likely target for terrorists and still we allow the carriers to keep their security plans in the dark not only to their workers but also their investors and the communities in which they operate.

The fact is that corporations can and do safely disclose information about actions taken to protect their infrastructure and personnel as well as associated costs. We have to look no further than Canada where the Canadian Pacific Railway discloses such information. We should settle for no less.

The Teamsters are appealing the staff's decision. We hope that the United States Congress and this Administration would encourage the Commissioners of the SEC to review and reverse the staff's decision.

The Teamster Rail Conference looks forward to working with this committee and the Congress to address the issues of rail security nationwide. I thank you for the opportunity to testify before you today, and I will try to answer any questions you may have.