



Statement of Dennis R. Pierce
National President, Brotherhood of Locomotive Engineers and Trainmen
President of the International Brotherhood of Teamsters Rail Conference
Before the House Subcommittee on Railroads, Pipelines and Hazardous Materials
Hearing on
Federal Regulatory Overreach in the Railroad Industry:
Implementing the Rail Safety Improvement Act
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Good morning, Chairman Shuster and Ranking Member Brown. My name is Dennis Pierce and I am the National President of the Brotherhood of Locomotive Engineers and Trainmen; I also am the President of the Rail Conference of the International Brotherhood of Teamsters. My testimony today will encompass the views and concerns of both groups, and my comments today also have been endorsed by the United Transportation Union.

I would like to begin by commending the Subcommittee for holding this hearing and bringing to light some of the difficulties experienced with the implementation of the Rail Safety Improvement Act of 2008. In our view there are a couple of reasons that we've stumbled a bit in rolling out the RSIA. One is that it was a comprehensive, wide-ranging, and far-reaching piece of legislation, which was a function of the fact that Congress had not passed a rail safety act in more than sixteen years.

The other is that at the time of passage several portions of the bill were still being fine-tuned by stakeholders. For example our legislative and regulatory folks were in the midst of adjusting portions of the Hours of Service piece in the bill with Ed Hamberger from the AAR and with the UTU just days before the terrible Chatsworth accident. Of course, that tragedy was a game-changer, and Congress' decision to proceed with the bill that was on the shelf made our efforts — and similar ones — moot.

It has become popular in some quarters to criticize the Federal Railroad Administration for its work in implementing the RSIA. I want to tell you up front that I'm not among FRA's critics in this regard. The FRA was given a massive but imperfect bill. It included an extraordinary number of statutory mandates with short deadlines. Moreover, the agency's resources and personnel were not increased to the level necessary to quickly fulfill the tasks assigned. I can say based on first-hand knowledge because, since enactment of the RSIA, the BLET and the Rail Conference have taken an active leadership role in implementing the legislation, mainly through the auspices of the Rail Safety Advisory Committee — or RSAC — process, which has shepherded nearly every significant safety rulemaking in the railroad industry for the past fifteen years. We have witnessed, first-hand, the diligent and professional efforts by FRA to implement regulations that fulfill the Congressional intent as stated in the RSIA.

My colleague, Mr. Hamberger, and the Association of American Railroads — speaking on behalf of the Class I carriers — have been particularly critical of FRA's rulemaking governing Positive Train Control. Two aspects of the PTC rule they focused on were the baseline identified by FRA, which AAR said was too restrictive because of potential changing traffic patterns, and FRA's decision to not incorporate a broad *de minimis* exemption from the PTC requirement for

poisonous-by-inhalation, or PIH, traffic. The Subcommittee should note that the National Transportation Safety Board fully supported the provisions FRA proposed.

In a letter dated March 5, 2010, which can be found in the PTC docket at FRA-2008-0132-0069 and -0070, NTSB Chair Hersman addressed the baseline issue, stating — and I quote — “the final rule as written provides enough flexibility to railroads either at the time of initial filing or through a request for amendment to subsequently address changes in traffic patterns.” The NTSB also opposed including a *de minimis* formula in the final rule because, quoting again, “some railroads might consider establishing annual PIH car limits on segments of track in order to be exempt from the requirements of implementing a PTC system on that segment.”

But the carriers’ main criticism of the PTC requirement is based on its cost. The industry’s objection is based on a cost/benefit analysis that is based on a standard business case. However, that is a wholly inappropriate metric for evaluating a safety regulation, because health, safety, and environmental regulations “attempt[] to ameliorate the adverse consequences of market activities ... by reducing the attendant social costs.” These regulations “attempt[] to internalize the social costs of production by ensuring that the prices of goods and services reflect the true costs to the society.” See Ashford, Nicholas A., “Alternatives to Cost-Benefit Analysis in Regulatory Decisions,” *Annals of the New York Academy of Sciences* (30 April 1981), 363:130.

Moreover, the industry’s horse left the barn long ago. We, and other rail labor organizations, have appeared repeatedly before this Subcommittee and other committees and subcommittees to inform Congress and the public of the dangers posed by non-signaled “dark territory,” which comprises about 40% of the route miles in the nation. The NTSB has repeatedly urged that railroads install switch position detectors in dark territory, following horrific accidents that claimed many lives, caused mass numbers of injuries, and led to hundreds of billions of dollars in economic loss. Such technology has been affordable and available off the shelf for many years, but the railroads in large part sat on their hands because there was no statutory requirement for them to address this hazard ... now there is one.

And while the industry’s business case may be appealing to some, my support for the statutory PTC requirements and the FRA’s final rule implementing those requirements is of a much more personal nature. If you go to the BLET website and click on the link to our Memorial Page you will find the names of 70 of our members who were killed in the line of duty over the past 19½ years. Nearly 50 of those deaths would have been prevented by PTC. In February of 2008, the Department of Transportation revised its guidance memorandum — entitled “Treatment of Value of Life and Injuries in Preparing Economic Evaluations” — to increase its “best present estimate of the economic value of preventing a human fatality” to \$5.8 million, or nearly \$300 million at current value for the PTC-preventable deaths listed on our website. To me, there is no such thing as federal regulatory overreach when it comes to halting the needless slaughter of our members.

I also want to take this opportunity to bring to the Subcommittee’s attention several other issues of vital interest to our members and all railroad workers as implementation of the RSIA continues. In these matters, too, the carriers are crying “overreach,” when in actuality they seek to do nothing less than thwart the will of Congress.

First and foremost for operating employees is, of course, the hours of service changes contained in the RSIA. It was the intent of Congress — in revising the century-old hours of service laws — to truly address fatigue in the railroad industry. In our organization’s testimony to this Subcommittee on several occasions, we outlined some ways this could be accomplished. Unfortunately, many of these were either excluded from the final bill or became convoluted during the implementation process. Several of our proposals were adopted by this body, but were watered down in conference committee with the Senate. Consequently, fatigue in the industry has not been alleviated by the legislation and, in fact, our members report that the problem has actually gotten worse in some respects since implementation.

As I have travelled around the country over the past two and a half years listening to our members, certain aspects of the hours of service changes have been their number one complaint to me. BLET members tell me — and all my fellow BLET leaders — that the legislation has in many instances done the exact opposite of Congress’s intent; it has increased levels of fatigue. We believe that the legislation has fallen short of its goals because the changes that were made in 2008 focused on slowing the frequency with which train employees worked, along with adding caps for work hours and excess limbo time, rather than being based on specific scientific principles and empirical data.

We have heard countless reports of BLET and UTU members being deliberately stranded at their away from home terminals for artificial reasons and inflated periods of time in order to reset their “start” clock, so that the railroad does not have to provide them with the extended 48-hour rest period at home. This is exacerbated by the requirement that ten hours’ undisturbed time off duty, extended by the amount of any excess limbo time, is required at the away-from-home terminal. The manipulation of on-duty times at away-from-home terminals prevents our members from getting true, restorative rest and spending time with their families, and we believe this is directly contrary to what Congress intended in the legislation. While these abuses and manipulations do not occur in every terminal of every railroad, we believe they are prevalent enough to warrant changes in the law.

From the time of our founding nearly 150 years ago, we have made the safety of our members a top priority, and proactively addressing fatigue remains a core item on our safety agenda. To that end, the BLET and the UTU have worked together to craft technical corrections to the hours of service portion of the RSIA, the purpose of which is to correct some unintended consequences of the implementation of the legislation. For example, a statutory off-duty period at the away-from-home terminal of eight hours’ uninterrupted, extended by the amount of any excess limbo time, is sufficient and will reduce the incentive for railroads to artificially extend off-duty period in order to reset someone’s “start” clock. It also was something that the AAR, the BLET and the UTU had agreed upon prior to Chatsworth.

Labor believes, and the records of this Subcommittee will show, that Congress intended to provide a predictable and defined work/rest period in the RSIA, and to this end our technical corrections are based on sound scientific evidence and simple common sense. They focus on the fatigue that is inherent in unscheduled operations, because the manipulation of off-duty periods at away-from-home terminals is undoing much of what you tried to accomplish. As we have said on numerous occasions, fatigue in unscheduled service is easily managed by (1) requiring a 10-hour call prior to work, instead of requiring 10 undisturbed hours off following a work

assignment, and (2) requiring that crews who outlaw be physically relieved from their trains no later than the expiration of the twelfth hour.

A 10-hour call would provide the ten hours of undisturbed rest immediately prior to performing covered service. It would eliminate nearly all of the uncertainty faced by our members who work in unassigned service. They would know 10 hours prior to going to work — instead of the one and a half to two hours currently standard in the industry — that they are, in fact, going to work that day. The thousands of BLET members I've discussed hours of service with over the past few years all tell us this would be the best solution to fatigue, because it's based on simple common sense. The fact of the matter is that the current system of providing 10 hours' undisturbed time off duty following a work tour is not mitigating fatigue because line-up information has not improved one iota, and our members remained deprived of sufficient reliable information on when to schedule sleep during off-duty periods so they are optimally rested when they return to work.

Regarding limbo time, I would be remiss if I didn't express our appreciation for the excess limbo time caps that were imposed in the RSIA. While the number of complaints we receive on this subject has declined significantly, problems continue. For example, we recently received the 2010 data from one of the Class I operating divisions that was the focus of our 2007 testimony before this Subcommittee. More than a year after the RSIA took effect this division still was experiencing an average of six crews working duty tours longer than thirteen hours every week. Further, our members report that there continue to be significant problems, particularly with the enormous gray area carved out by 49 U.S.C. § 21103(c)(2)(F), which exempts from the cap counting any excess limbo time associated with "a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal." We believe, again, that the cleanest and most direct method of controlling excess limbo time is to require that an outlawed crew be physically relieved from their train prior to the expiration of the twelfth hour.

Now, I have no doubt that Mr. Hamberger will tell you — just as he has told us and the UTU during our discussions on this subject over the years — that a 10-hour call and getting crews off trains by the end of the twelfth hour would create intractable scheduling issues for the railroads. I do not accept the word "can't" in this situation. On the two largest U.S. subsidiaries of Canadian National Railway — the former Illinois Central and the former Grand Trunk Western — the overwhelming majority of train employees either work jobs with a fixed starting time or are on-call for a narrow, four-hour window. This work schedule, alone, has qualified these two railroads for waiver relief from the "6&48" requirement of the Act. Based on these facts, it seems to me that the problem with the other railroads is not that they "can't" adopt these fatigue countermeasures ... it's that they "won't" do so. Therefore, to truly clamp down on fatigue in unassigned service, it is up to Congress to provide the predictable and defined work/rest schedules that the industry continues to refuse to provide.

Speaking of defined work/rest schedules, tremendous success has been achieved by the stakeholders involved in developing regulations to govern passenger and commuter hours of service. The scientific evidence that formed the basis for the passenger/commuter hours of service regulations — based on the actual work schedules of that segment of the industry — showed a much lower potential for fatigue in scheduled service because of the certainty of

knowing when one is required to report for work. These scientific studies also led to the development of a “toolbox” of fatigue countermeasures to further manage the problem. As a result, the passenger/commuter hours of service regulations will be far more effective in mitigating fatigue and far less stringent than the statutory provisions governing freight service.

Parallel to this development, and consistent with the latitude provided in the RSIA, the FRA has granted limited waivers to freight railroads for relief from some of the stricter requirements of the law for scheduled freight assignments — such as yard switching assignments — that do not work into the overnight period. We would urge Congress to amend the hours of service laws to provide that freight assignments with fixed and advertised on-duty times would be subject to the passenger/commuter hours of service regulations. There are three sound reasons why this amendment would be appropriate at this time.

First, we now have a well-developed body of data and evidence — the validity of which is accepted by management, labor, and the FRA — showing a path to appropriate fatigue management for jobs with assigned starting times. Second, a strong economic incentive would be created for freight railroads to better manage their operations by accessing potential increased productivity that could flow from applying these regulations to assigned freight service. And, third, there are far better uses of FRA’s limited resources than to conform hours of service for regular freight assignments to the passenger/commuter regulations on a case-by-case basis via the slow, temporary and expensive waiver process.

Before closing, I want to briefly touch on three other issues where the railroads are crying “federal regulatory overreach” in an effort to neuter statutory mandates that you have required. Section 405 of the RSIA authorized studies of the locomotive cab environment, and empowered FRA to regulate based upon its findings. As part of an ongoing revision of locomotive safety standards, FRA is considering establishing an upper temperature limit in locomotive cabs, which comes some 109 years after Willis Carrier invented the modern air conditioning system and 72 years after Packard first installed an air conditioner in an automobile. I am not going to get into the volumes of data establishing the safety risks posed by excessive workplace heat, but I do want you to know that the carriers continue to resist movement on this important health and safety issue.

Our second issue is related to the first, because in hot weather operating crews in locomotive cabs without functioning air conditioning are forced to open doors and windows to release captured heat from the operating environment. When a crew chooses physical comfort in this way, their security and the security of the train is placed at risk, because there currently is no federal requirement that locomotive cabs be secure from invasion by unauthorized persons. In two security surveys, conducted five years apart by the Teamsters Rail Conference, we documented that fewer than half of respondents, all of whom work for Class I railroads, could secure their locomotive cab.

Last June a CSX conductor was murdered during a locomotive cab invasion and robbery, during which the engineer was shot and wounded. Shortly thereafter I wrote to the Federal Railroad Administrator, requesting that FRA promulgate rules addressing the security of the locomotive operating compartment. After a meeting with Administrator Szabo and his staff in October, FRA also added this issue to the locomotive safety standards rulemaking, which we greatly appreciate.

I also want to update you briefly on an issue of critical concern for our Brothers and Sisters in our Rail Conference affiliate, the Brotherhood of Maintenance of Way Employes Division. As you may recall, we requested that Congress prohibit the continued housing of maintenance of way workers in camp cars, a contemptible practice that has been abandoned by all but one major railroad. The RSIA stopped short of outright abolition, but increased regulatory oversight of this barbaric practice. FRA has an ongoing rulemaking on this subject, but you should know that the single bad actor who refuses to provide 20th Century conditions for its workers has been waging a war against your statute, claiming that the law doesn't limit where camp cars may be placed. But the struggle continues.

Before closing, I want to take the opportunity to raise another issue that the BLET — and, in fact, all of rail labor — feels very strongly about ... and that is Amtrak. For the past 40 years, Amtrak has done a remarkable job efficiently moving our nation's intercity and commuter rail passengers, and keeping the public safe and secure, even though they've only been appropriated enough money to fail. Indeed, setting ridership records has become an annual event for Amtrak, and should be a cause for all of us to celebrate. In our view, Amtrak is synonymous with high speed rail in this country, and should be treated as such as federal programs for high speed rail systems continue to be developed. I also urge, in the strongest terms, that Amtrak be authorized appropriate and full levels of funding in any legislation that comes out of this committee.

Chairman Shuster and Ranking Member Brown, I appreciate the opportunity to address you today. Working together with this Subcommittee and the full Committee over the years, much has been accomplished to enhance rail safety, and I look forward to working with you to make appropriate adjustments in this term. Thank you for allowing me to speak, and I will be happy to answer any questions the Subcommittee may have.