ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

ARB Case No. 12-048

In the Matter of

CHRISTOPHER BALA,

Complainant,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent,

BRIEF OF COMPLAINANT CHRISTOPHER BALA

CHARLES C. GOETSCH, ESQ.
CAHILL, GOETSCH & PERRY, P.C.
43 Trumbull Street
New Haven, CT 06510
(203) 777-1000
Attorney for Complainant
CHRISTOPHER BALA

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I. INTRODUCTION

Affirming the ALJ's Decision in this case will fulfill the purpose of the Federal Rail Safety Act by protecting the safety of railroad workers and the public. Accordingly, the Complainant Chris Bala submits this brief in opposition to Respondent Port Authority Trans Hudson Corporation's (PATH) petition to reverse the February 10, 2012 Decision and Order (D&O) of Administrative Law Judge Theresa C. Timlin finding that PATH violated the Federal Rail Safety Act (FRSA), 49 U.S.C. 20109.

For the reasons set forth below, Complainant Bala respectfully submits that the D&O should be affirmed because the ALJ's findings are supported by the substantial evidence and because the ALJ's interpretation of FRSA section (c)(2) is consistent with the canons of statutory construction, the overriding purpose of the FRSA, and the express intent of Congress to protect the safety of passengers and employees affected by the operations of our nation's airlines, interstate trucking, and railroads.

II. PROCEEDINGS BELOW

On June 2, 2009, Christopher Bala filed a Federal Rail Safety Act whistleblower complaint with the U.S. Department of Labor, alleging that PATH violated Section (c)(2) of the FRSA when it disciplined him for engaging in the protected activity of following the orders of his treating physician. 49 U.S.C. 20109(c)(2). OSHA's Office of Whistleblower Protection investigated the complaint, and on May 5, 2010, the Region 2 Regional Administrator for OSHA, acting on behalf of the Secretary of Labor, issued a Decision and Order finding PATH violated the FRSA.

PATH objected to OSHA's decision, and an evidentiary hearing was held before Administrative Law Judge Theresa C. Timlin on November 19, 2010, in Cherry Hill, New Jersey. On February 10, 2012, Judge Timlin issued a detailed Decision and Order (D&O) finding that PATH violated the FRSA by disciplining Bala for following the order of his treating physician. Judge Timlin ordered the following make whole remedies: expungement of Bala's records; three days salary of $1,101.00, plus interest; and payment of litigation costs and reasonable attorney's fees. PATH filed a timely petition for review with the Administrative Review Board (ARB), the ARB accepted the petition for review, and this briefing followed.

III. STATEMENT OF ISSUES

A. Whether section (c)(2) protects all medically impaired railroad employees who follow their doctor's orders not to work.

B. Whether substantial evidence supports the ALJ's findings that Bala engaged in (c)(2) protected activity, that PATH was aware of that activity, and that it was a contributing factor in PATH's decision to take a disciplinary action against him.

IV. STANDARD OF REVIEW

The ARB reviews an ALJ's factual determinations under the substantial evidence standard, 29 CFR 1982.110(b). In the recent words of the ARB:

> Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." An ALJ's factual findings are entitled to respect and should be upheld when supported by

> substantial evidence, even if we "would justifiably have made a different choice had the matter been before [us] de novo."

Menendez v. Halliburton, Inc., ARB Nos. 09-002,09-003 at p.9 (September 13, 2011). The ARB reviews an ALJ's conclusions of law de novo. *Id.*

Here, the ALJ provided a detailed summary of all the testimony and documents, and then made findings of fact supported by that evidence. The ARB will uphold an ALJ's findings if it is supported by substantial evidence, and a party cannot overturn an ALJ's findings by ignoring the testimony and documents cited by the ALJ in support of those findings. Despite this, PATH's brief is notable for an absence of any demonstration that the actual evidence cited by ALJ Timlin somehow does not support her findings.

V. FACTS

The ALJ found, and the substantial evidence supports, the following facts.

The Respondent PATH operates a commuter railroad between New Jersey and New York carrying 250,000 passengers per day, and as such is a railroad carrier subject to the prohibitions of the Federal Rail Safety Act. 49 U.S.C. 20102 and 49 U.S.C. 20109. Trial Transcript 201-202 [hereafter, "Trs." refer to trial transcript pages, and "JX" refers to exhibits].

The Complainant Chris Bala is 41 years old, and is married with two children. Trs. 13. For over 20 years he has worked as a signalman in the PATH Signal Department responsible for the proper installation, maintenance, and repair of track

signals. Trs. 14-15. The safety of multiple commuter trains simultaneously moving over PATH's network of tracks depends on the integrity of the signal system: in the words of PATH's Superintendent, signalmen "employees are responsible for the life safety of train operations, and if we're not able to perform that duty safely and reliably and efficiently, then I think it's more than an inconvenience, it could be a tragedy." Trs. 223. The Federal Rail Administration (FRA) accordingly designates Bala as a "safety-related railroad employee." 49 USC 20102(4)(A) and 49 USC 21101(3). Because fatigue can impair the safe performance of such employees, the FRA imposes strict limits on the consecutive hours of service they can work to ensure they are sufficiently rested and alert when performing their safety sensitive duties. *Id.* As an employee of PATH, Bala is entitled to all the protections of the FRSA. 49 U.S.C. 20109.

While at home moving boxes on June 22, 2008, Bala experienced a sharp stabbing pain in his lower back that he realized would not allow him to perform work that night. Trs. 34-35. He called PATH to report that he could not come in to work that night, and the next morning he went to his physician, Dr. Thomas Lozowski. Trs. 35. Dr. Lozowski examined him and gave him a note ordering him to stay out of work at least until July 30th. Trs. 36; JX 26.

Also on the morning of June 23rd, Bala called his immediate PATH Signal Department Supervisor, Brian Hodgekinson, and informed him of Dr. Lozowski's orders not to work. Trs. 36. Hodgekinson ordered Bala to come in that day and be examined by PATH's Medical Department, known as the Office of Medical Services (OMS). Trs. 36-37; JX 24.

Bala complied and went in to be examined by PATH's in-house doctor at OMS, Dr. Rhonda Whitley. Bala gave Dr. Whitley Dr. Lozowski's note ordering him not to return to work until July 30, 2008. Trs. 37; 161; 167; JX 26. After evaluating Bala, Dr. Whitley concurred with the treating doctor's note and filled out a PATH OMS disposition form confirming Bala was not fit for work and should remain off work. Trs. 37-39; JX 25. Bala then hand-delivered that OMS disposition form to the office of the top manager in the PATH Signal Department, Superintendent Frederick Childs. Trs. 14; 38-39; 228; 160-161; JX 25.

In the weeks that followed OMS continued to evaluate Bala, approving spinal surgery on his low back in September of 2008 and his subsequent return to work in November of 2008 after the surgery. Trs. 46-47; 116.

Meanwhile, on July 14, 2008, Superintendent Childs issued a letter to Bala notifying him that he was being charged with a violation of PATH's Attendance Policy and ordering him to attend a hearing. JX 8; Trs. 6-7; 41. Superintendent Childs admitted that the charge letter was triggered by Bala's absence from work that started on June 23, 2008. Trs. 49; 115-116; JX 8.

On January 8, 2009, PATH conducted a full disciplinary hearing on the Attendance Policy violation charge triggered by Bala's absence beginning June 23, 2008. Trs. 47-48; JX9. Because Superintendent Childs was going to testify at the Hearing in support of the disciplinary charge, Childs directed his immediate assistant, Manager Radomir Bulayev, to be the hearing officer. Trs. 48; 176-177. At such railroad hearings, the manager designated as hearing officer functions as judge, prosecutor, and

jury, determining what evidence is admissible, introducing the evidence against the employee, questioning the witnesses on behalf of the railroad, and then deciding whether the employee is guilty as charged. Trs. 48-49; 175-176. Superintendent Childs was the only witness at Bala's Hearing, and Bulayev questioned Childs on behalf of PATH. Trs. 48-49; 178-179. On January 28, 2009, Bulayev declared Bala guilty as charged and imposed a six day suspension, three days to be served and three more held over his head for one year. Trs. 51; 184; JX 10.

Bala served the three days unpaid suspension, and then for one year he was "very worried" because if he went out sick he would have to serve the additional three days unpaid suspension. Trs. 49-50; 52. He described "how stressed out I was about it, and having to deal with reliving another chance of a termination for something that I didn't do wrong. I had my family on the line, my benefits, my health benefits, my mortgage, everything that I own was on the line again." Trs. 53. Due to the discipline and the resulting FRSA proceeding, Bala incurred $2,840 in lost wages. Trs. 52.

Superintendent Childs is responsible for compliance with all applicable regulations and laws that apply to his Signal Department employees. Trs. 107 & 109. Childs is aware that absences falling under the Family Medical Leave Act are protected from discipline and are not considered attendance absences. Trs. 114; 200. Employees can call in as late as two hours before a shift starts to report they are taking a FMLA absence. Trs. 236-237. When an employee takes a FMLA absence the Railroad must make arrangements to cover that job, and Childs admitted that fact does not prevent employees from exercising their federal statutory right to take a FMLA absence. Trs.

223-224. Nor does the fact the Railroad must make alternative arrangements to cover a job mean the employee is not protected from discipline for taking a FMLA absence. Trs. 224.

At the direction of OMS, FMLA absences are coded in the payroll system in order to alert Childs's Department they cannot be used for attendance discipline purposes. Trs. 114-115; 237-238. However, unlike for FMLA absences, PATH has no payroll code to confirm an absence is pursuant to the orders of a treating physician. Trs. 115; 238.

Dr. Whitley confirmed that when an employee brings in a note from their treating doctor ordering them not to work, OMS keeps a copy of that note in the OMS file but does nothing to let the employee's Department know that the absence is due to the orders of a treating physician. Trs. 122-123; 163. Dr. Whitley also confirmed that OMS is able to ask an employee to provide them with a medical authorization authorizing OMS to release any medical information to the employee's Department, but chooses not to do so. Trs. 164-166.

PATH OMS doctor Dr. Whitley confirmed that as of June 23, 2008, she knew Bala was not fit for work and would be off work because he was following the orders of his treating physician. Trs.124-125; JX 25. And as of June 23, 2008, Bala's Supervisor Hodgekinson and Superintendent knew he was not working pursuant to doctor's orders: on June 23rd Bala told Supervisor Hodgekinson of his treating doctor's orders not to work until July 30th, and Hodgekinson communicated that information to Superintendent Childs by email, confirming "the long duration of anticipated absence." Trs. 36; JX 24. Childs admitted he has the discretion to withdraw a disciplinary charge at any point in

time, but did not do so any time after the July 14, 2008 disciplinary charge letter or the actual disciplinary hearing on January 8, 2009. Trs. 225.

VI. ARGUMENT

A. Section (c)(2) Protects All Medically Impaired Railroad Employees Who Follow Their Doctor's Orders Not to Work

The ALJ's finding that the scope of FRSA Section (c)(2) is not limited to employees injured on duty is consistent with the canons of statutory construction, the overriding purpose of the FRSA, and the express intent of Congress to protect the safety of passengers and employees affected by the operations of our nation's airlines, interstate trucks, and railroads.

1. The Canons of Statutory Construction and the Purpose of the FRSA

Congress is acutely aware that the operations of our nation's railroads affects the safety of everyone: employees, passengers, contractors, drivers at railroad crossings, and the schools, homes, and work places in countless communities through which freight trains haul toxic chemicals capable of poisoning thousands. It is obvious that a railroad employee responsible for performing a safety-sensitive job who is forced to report to work in a medically impaired condition in order to avoid attendance discipline is needlessly threatening the safety of himself, his co-workers, and the public.

And in fact Congress declared that the overriding purpose of the Federal Rail Safety Act is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. 20101. In enacting the FRSA, Congress

stated its intent that "employees should not be forced to choose between their lives and their livelihoods." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 1980, at 3. *Bala* D&O at 11. The interpretation of section (c)(2) argued by PATH and the American Association of Railroads (AAR) would undercut the overriding purpose of the FRSA while violating the fundamental canons of statutory construction.

The ARB recently confirmed the first step for interpreting the meaning of a statute:

> It is fundamental that statutory construction begins with the statute itself. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *see also K. Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011). *See* Singer & Singer, 2A Statutes and Statutory Construction, Section 46:1 (7th Ed.). "If the statute's meaning is plain and unambiguous, there is no need for further inquiry and the plain language of the statute will control its interpretation." *Luckie v. United Parcel*, ARN Nos. 05-026, -054; ALJ No. 2003-STA-039 (ARB June 29, 2007) (citing *United States v. Fisher*, 289 U.S. F.3d 1329, 1338 (11th Cir. 2002).

Mercier v. Union Pacific Railroad Co., ARB No. 09-121, ALJ No. 2008-FRS-004, and *Koger v. Norfolk Southern Railway Co.*, ARB No. 09-101, ALJ No. 2008-FRS-001 (September 29, 2011), at 6. ALJ Timlin applied that cardinal canon of statutory construction to the language of section (c)(2), and concluded:

> Thus, section 20109(C)(2), by forbidding "discipline . . . for following orders or a treatment plan of a treating physician" would seem to plainly and unambiguously prohibit Respondent from suspending an employee for calling out sick pursuant to orders from a treating physician that the employee is not fit for duty.

Bala D&O at 10. PATH and the AAR acknowledge the plain language of (c)(2) includes all employees. But they argue that the unconditional language of (c)(2) should be narrowed so that only employees "injured during the course of employment" are protected. They argue that the phrase "injured during the course of employment" should be read into (c)(2) because that phrase was used by Congress in (c)(1). PATH Brief at 16, AAR Amicus Brief at 5-6. They ask the ARB to accomplish this by assuming that Congress intended to include that qualifying phrase in (c)(2), but simply neglected to do so. They argue such an interpretation would be consistent with what they claim is the FRSA's sole purpose, namely to only protect employees with work-related injuries.[1]

However, in the words of ALJ Timlin:

> Respondent's argument runs contrary to another important canon of statutory construction, which is that when "Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and

[1] PATH argues that the title of section (c) (*i.e.*, "prompt medical attention") dictates the meaning of the actual text. But the title of a section carries no weight and cannot be used to alter the plain meaning of the language in the text: "headings and titles are not meant to take the place of the detailed provisions of the text. . . . the title of a statute and the heading of a section cannot limit the plain meaning of the text. . . . they cannot undo or limit that which the text makes plain." *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 528-29 (1947); *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, __ U.S. __, __ 128 S.Ct. 2326, 2336 (2008).

> purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983). Therefore, when Congress included the phrase "during the course of employment" with regard to emergency medical care in subsection (c)(1), but omitted the phrase with regard to treatment plans in subsection (c)(2), it acted purposely, and did not intend to limit the protection only to treatment plans involving on-the-job injuries.

Bala D&O at 11. Further proof that Congress purposely omitted the qualifying phrase "injured during the course of employment" from the text of (c)(2) is provided by the Illinois and Minnesota statutes cited by PATH. PATH Brief at 10-15. PATH claims section (c)(2) was inspired by those two state laws. However, *both* statutes included the phrase "injured during employment" to limit their scope to only injured employees, and Congress consciously chose to omit that qualifying phrase from the text of (c)(2). If Congress had intended to limit the application of (c)(2) to only injured employees, it would have repeated the qualifying language of the Illinois and Minnesota statutes. The fact Congress omitted that qualifying phrase confirms Congress rejected any such limitation for the scope of (c)(2).

Moreover, ALJ Timlin pointed out how PATH's narrow reading of (c)(2) would subvert the intent of Congress that railroad employees "not be forced to choose between their lives and livelihood" and would undermine the stated purpose of the FRSA to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *Bala* D&O at 11. The plain meaning of (c)(2) does this by protecting "sick or injured workers from returning to duty while their impairment poses a threat to the safety of railroad passengers and fellow employees." *Id.*

The ARB stresses that "A party who asks the court to ignore the plain language of a statute must show that it is manifest that the legislature could not possibly have meant what it said in the language, or the natural reading of the statute would lead to an absurd result." *Mercier, supra*, at 6 n.1. PATH and AAR make no such showing. There is no ambiguity in the text of (c)(2), and the plain all-inclusive meaning of the word "employee" must be applied to fulfill the purpose of the FRSA.

Section (c)(1) and (c)(2) address different situations. Section (c)(1) ensures that employees who incur a work-related injury receive prompt first aid or medical treatment at "the nearest hospital." But (c)(2) is much broader. By its express terms, it protects from discipline any employee who chooses to follow a treating doctor's order not to work rather than reporting to work in an unfit condition. Congress chose to omit any limitations on the word "employee" in (c)(2) because it did not want medically impaired railroad employees needlessly jeopardizing the safety of themselves, their co-workers, and the public. This is fully consistent with the underlying purpose of the FRSA and with the FRSA's protection of the entire spectrum of activities affecting rail safety.

PATH and the AAR both acknowledge that the plain language of (c)(2) must be interpreted in light of the full context of the FRSA. The overriding purpose of the FRSA is "promote safety in every area of railroad operations and reduce railroad-related accidents," but the Railroad's narrow interpretation of (c)(2) would defeat that purpose by forcing workers to perform safety-sensitive duties in an impaired condition, solely to avoid being disciplined for absenteeism. It would force employees to do exactly what

Congress stated they should not be forced to do: "to choose between their lives and their livelihoods," to choose between discipline and jeopardizing the safety of the public.

2. The Protections of FRSA Section 20109 Are Not Limited to Employees Who Report Injuries

The scope of the FRSA is not limited to employees with work-related injuries, nor is the scope of Section 20109 itself limited to work-related injuries.

The broad all-inclusive scope of the FRSA's Section 20109 protections is clear from the list of activities Congress specified as protected: providing information regarding "a violation of any Federal law, rule, or regulation relating to railroad safety" or "waste or abuse of Federal grants or other public funds intended to be used for railroad safety;" refusing "to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety;" "to file a complaint or testify in "a proceeding related to the enforcement of this part;" "to cooperate with a safety investigation by" the DOT or NTSB; "to accurately report hours on duty pursuant to" the Hours of Service statute; "reporting in good faith a hazardous safety condition;" "refusing to work when confronted with a hazardous safety condition related to the performance of the employee's duties;" "refusing to authorize the use of any safety-related equipment, track, or structures" the employee believes is in a "hazardous safety condition;" or "for following orders or a treatment plan of a treating physician." 49 U.S.C. 20109(a), (b), and (c).

Out of the dozen activities specifically named by Congress as protected, only two concern employees with a work-related injury: notifying the railroad of a work related

injury under (a)(4), and requesting first aid or medical treatment for a work related injury under (c)(1). The dozen other activities do not concern work-related injuries at all. But the named activities all share a common function: namely, to promote and ensure the safety of every aspect of railroad operations. And in fact if those FRSA protected activities are not protected from disciplinary actions, the safety of everyone affected by rail operations is needlessly put at risk.

No one, least of all Congress, wants a locomotive engineer operating a train loaded with passengers or toxic chemicals, or a signalman repairing the mainline signals, or a dispatcher controlling the movement of multiple trains on common tracks, or a shop worker responsible for ensuring the integrity of train brakes, to be working in a medically impaired condition. Congress thus enacted (c)(2) to give all employees the right to remain off work pursuant to their treating doctor's orders, while also giving railroads the right to keep employees from returning to work who do not meet the railroad's "medical standards for fitness for duty." The common denominator is that Congress does not want railroad employees working unless and until they are medically fit to perform their duties, and the plain language of (c)(2) accomplishes that goal.

And adopting PATH's and the AAR's narrow interpretation of section (c)(2) would lead to an alarmingly absurd result. If section (c)(2) only applies to employees with work-related injuries, then the authority of railroads under (c)(2) to refuse "to permit an employee to return to work following medical treatment" pursuant to its "medical standards for fitness for duty" also is limited to that narrow class of employee. But rail safety requires that railroads have the authority to bar any employee from returning to

work who is medically unfit. It matters not why an employee is medically unfit, be it from illness, disease, off-duty injury, or on-duty injury. Consistent with its concern for ensuring safe rail operations, in (c)(2) Congress granted railroads the authority to bar any such medically unfit workers, not just the narrow class of employees with a work-related injury. Congress's use of the straightforward, unlimited, all-inclusive term "employee" in (c)(2) is fully consistent with Section 20109's broad application to all employees, and avoids such an absurd result.

3. The Legislative History of the FRSA Is Not Limited to (c)(1)

The legislative history of the FRSA is not limited to references to (c)(1)'s concern with emergency medical treatment for on-the-job injuries. Yet PATH and the AAR argue as if it is. In fact, the legislative history confirms Congress's overriding concern with ensuring the fitness of all railroad employees to perform their duties.

On October 25, 2007 (after the enactment of Section 20109 in August 2007 and before the subsection (c) amendment to the FRSA in October 2008) FRA Administrator Joseph H. Boardman testified before Congress regarding, *inter alia*, the impact of railroad discipline on the safety of America's railroads. The FRA Administrator stressed for Congress that:

> From 2002 to 2006, the vast majority of train accidents resulted from human factor causes or track causes. Accordingly, human factors and track have been our primary focus to bring about further improvements in the train accident rate. Overall, the Action Plan includes initiatives intended to: Reduce train accidents caused by human factors; Address fatigue.

Statement of Boardman Before the Committee on Transportation and Infrastructure, U.S. House of Representatives, October 25, 2007, at page 4. Supp. App. A. This concern about human factors was confirmed by the Committee on Transportation's Summary of Legislative Oversight Activities, January 2, 2009 at p. 220: "The FRA reports that human factors are responsible for nearly 40 percent of all train accidents, and a new study confirms that fatigue plays a role in approximately one out of four of those accidents." Supp. App. B.

The "primary focus" of Congress to enact broad legislation protecting against human factors is reflected in its Reports. For example, House Report No. 110-336 included provisions addressing track safety and human factors such as employee fatigue, as well as the unlimited language of section (c)(2) protecting all employees who follow a treating physician's order not to perform their railroad jobs. Supp. App. C. It is obvious that a medical or physical condition that impairs a railroad employee's ability to perform his or her job is a "human factor" that can cause train accidents. When such a condition is confirmed by an employee's treating physician and the employee follows his doctor's orders not to work in that condition, (c)(2) protects that employee from any resulting discipline.

Section (c)(2) was enacted by Congress on October 16, 2008. The legislative history in September and October 2008 leading up to that enactment is further confirmation of the intent of Congress to ensure the fitness of all railroad employees. On September 29, 2008, Senators Lautenberg and Carter stressed:

> It is critical that we bring our safety laws into the 21st century for travelers, for the rail workers, and our country's railroads. . . . Our bill updates the hours of service laws to ensure that train crews and signal workers get sufficient rest to remain alert and reduce fatigue. . . . this legislation is going to save lives. It is going to save money. It is going to provide a much better situation for people who are running and operating trains, people who are traveling on trains, and for those of us who are driving around in our cars, trucks, and vans, trying to get across a rail crossing.

Senate Proceedings of 110th Congress, Second Session, 154 Cong. Rec. S10033 and 100041 (Sept. 29, 2008). Supp. App. D. And on October 1, 2008, Senator Boxer stated:

> Mr. President, I rise today to address the railroad safety legislation, H.Res. 1492 providing for agreement by the House of Representatives to the Senate amendment to the bill, H.R. 2095, with an amendment. First, I must emphasize the importance of strengthening our safeguards for railroads, to protect the lives and safety of our citizens. We have just been reminded of how critical it is for us to pay attention to this issue by the tragedy in my home State of California on September 12, 2008. On that day, a Metrolink train crashed head on into a Union Pacific freight train in Chatsworth, northwest of downtown Los Angeles, killing 25 people and injuring at least 135 in the most deadly commuter rail accident in modern California history, and one of the worst rail accidents in recent U.S. history. The families of all those killed or injured in that accident are in our thoughts and our prayers.

154 Cong. Rec. S10283-01 (Oct.1, 2008). App. E. The legislative history confirms that emergency medical treatment was a small part of Congress's broad focus on ensuring the fitness for duty of railroad employees.

4. Section (c)(2) Is Consistent with Congress's Protection of Everyone Affected by Interstate Transportation Industries

The American Association of Railroads speaks for the railroad industry. AAR Amicus Brief at 1. And the AAR's Amicus Brief demonstrates the callous indifference of rail management toward the profoundly important safety issues at stake in this case.

The AAR makes statements that simply are not true: "employees in no other industry enjoy such a right" to not work when medically impaired; such a right "is not necessary to further any policy under" the FRSA; and there is "no relationship between absences arising from non-workplace injuries and illnesses and the FRSA regulatory scheme of which Section 20109 is a part." AAR Brief at 2.

In fact, employees in the trucking and airline industries have rights not to work when medically impaired or unfit. The Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105, protects truck drivers from discipline when they refuse to work because the operation of the vehicle would violate a regulation, standard, or order of the United Sates related to commercial motor vehicle safety or health. 49 U.S.C. 31105(a)(1)(B). And federal motor carrier regulations prohibit a driver from operating a commercial motor vehicle when "the driver's ability or alertness is so impaired or so likely to become impaired through fatigue, illness, or other cause, as to make it unsafe for him or her to begin or continue to operate the motor vehicle." 49 CFR 392.3. Based on this authority, the ARB repeatedly has found that disciplining truck drivers for not working when they are medically impaired violates STAA, even when the medical

condition is not work-related. *See, e.g., Ciotti v. Sysco Foods*, ARB No. 98-103 (July 8, 1998), and *Johnson v. Roadway Express*, ARB No. 99-111 (Mar. 29, 2000).

Although AIR21, 49 U.S.C. 42121, does not explicitly protect work refusals, the ARB has interpreted AIR21's prohibition on retaliation against employees who provide information regarding "any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety" as protecting pilots who refuse to fly because they are ill or fatigued. *See, e.g., Douglas v. Sky West,* ARB No. 08-070 (Sept. 30, 2009). And FAA regulations allow pilots to declare themselves unfit to fly due to fatigue or illness. *See, e.g., Rooks v. Planet Airways*, ARB No. 04-092 (June 29, 2006); *Furland v. American Airlines,* ARB No. 09-102 (July 27, 2011).

Section (c)(2) of the FRSA merely brings the railroad industry in line with the airline and trucking industries, codifying for railroad workers the protections in place for pilots and truck drivers. Passengers whose life and limb depend on the error-free operation of trains do not care if a railroad employee is impaired by a workplace injury, an injury at home, an illness, or a disease. They want every railroad worker to feel free to decline safety-sensitive duties so that no one's life or limb is needlessly put at risk. The same goes for plane passengers at the mercy of airline pilots and passengers in cars on the interstate at the mercy of tractor trailer truck drivers. Congress has responded by enacting statutes and authorizing regulations that protect those employees when their treating physicians confirm they are not medically fit to perform their duties.

Given the stated purpose of the FRSA "to promote safety in every aspect of railroad operations and avoid injuries," for the AAR now to argue that discipline trumps safety is truly troubling. It was the railroad industry's elevation of discipline over safety that prompted Congress to enact the FRSA in the first place. For the sake of enforcing "attendance policies" that have no safety function or regulatory basis, PATH and the AAR would place at needless risk the lives and safety of the millions of people affected by the operation of railroads. Every railroad professes that "safety is the most important factor" in everything it does, but the narrow interpretation of section (c)(2) advanced by the railroad industry here directly contradicts that fundamental principle. [2]

Despite the hand wringing of PATH and the AAR, the broad scope of (c)(2) mandated by its plain language does not "eradicate" the attendance policies of railroads. PATH Brief at 17. It merely prohibits the use of attendance policies to discipline employees who follow their treating doctor's order not to perform their job in a medically unfit condition. And it only protects absences ordered by a treating physician, not absences for any other reason.

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[2] Every railroad has a set of safety rules employees must follow upon pain of discipline. For example, PATH's Book of Safety Rules states: "N.2 The safety of customers and employees is, at all times, to be considered of first importance. All employees are required to exercise constant care to prevent injury to themselves and other person as well as damage to property. In all cases of doubt they must take the safe course."; N.3. "Employees shall utilize safe work practices to avoid injury to themselves and others."; and N.5. "Employees must report at once any unsafe work condition that may endanger themselves or others." Supp. App. F. Each railroad has its own variations on such rules. Also, it is worth noting that when employees notify their railroad they are medically unfit to perform their duties, they are engaging in another form of FRSA protected activity, namely reporting a "hazardous safety condition." 49 U.S.C. 20109(b)(1)(A). That protected activity is not limited to employees with work-related injuries. It applies to any and all employees, whatever the cause of their medical unfitness may be.

The AAR's assertion that (c)(2) will unduly interfere with the ability of railroads to operate is belied by the fact that railroads have adjusted to the protected absences under the Family Medical Leave Act, 29 U.S.C. 2601 *et seq.,* another federal statute prohibiting railroads from disciplining employees whose absences are covered by its scope. Congress mandated that any absence covered by the FMLA is protected from discipline. And every railroad complies with that FMLA mandate, regardless of its attendance policies. The FRSA is no different. The trains will not stop running if every medically unfit employee who follows a treating doctor's orders not to work is protected from discipline. In fact, the trains will run safer.

B. The ALJ's Finding That All the FRSA Elements Were Present Is Supported by Substantial Evidence

1. The Railroad Was Aware Bala Engaged in the Protected Activity of Following the Order of His Treating Physician Not To Work

The evidence showed that on June 23, 2008, Bala called Supervisor Hodgekinson and told him of Dr. Lozowski's order that he remain out of work until July 30th, and that Supervisor Hodgekinson communicated that information to Superintendent Childs via email. Trs. 36; JX 24. This information was further confirmed by Dr. Whitley's own note ordering Bala not to work that was hand-delivered to Childs at 11:40 A.M. on June 23rd. Trs. 37-39; 160-161; 228; JX 25.

In its Brief, PATH simply ignores the evidence that Childs was aware Bala was following a treating doctor's order to remain out of work. PATH Brief at 19-20. Instead,

PATH argues that because Bala did not disclose all the details of his medical condition and treatment, he "did not produce any evidence that he was following the orders or treatment plan of a treating physician." But as ALJ Timlin pointed out, the statute "does not require that an employee make his or her employer aware of all the details of the medical treatment or compliance with the plan. Once the employer has been advised that a medical provider has deemed an employee too ill or injured to work, the employer is aware that it would be unsafe to require the employee to report to work." *Bala* D&O at 12.

PATH's argument that Childs was not "the decision-maker who carried out" the adverse action also disregards the evidence and misapprehends the applicable law. The record established that as of June 23rd Childs was aware Bala was following a treating doctor's order to remain out of work. It was Childs who initiated the disciplinary process by charging Bala with violating the Attendance Policy based on that June 23rd absence. And Childs confirmed the charge letter was precipitated by the June 23rd absence. Trs. 49; 115-116; JX 8. Because he was the only witness testifying against Bala, Childs could not serve as the Hearing Officer, so Childs directed his immediate assistant, Bulayev, to serve as the Hearing Officer in his stead. Childs admitted that in his capacity as General Superintendent he had the discretion to withdraw the disciplinary charge at any point in time. Trs. 225. And it was Childs's decision not to withdraw the charge--combined with his testimony against Bala at the Hearing--that resulted in the January 28, 2009 suspension of Bala. Trs. 225.

The United States Supreme Court recently rejected the notion that a retaliation claim requires proof that a single "decision-maker" knew of the protected activity. *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011). The ARB has incorporated *Staub* into its retaliation analysis, *Bobreski v. J. Givoo Consultants, Inc.,* ARB No. 09-057, ALJ No. 2008-ERA-3 (June 24, 2011):

> A recent Supreme Court case, *Staub v. Proctor*, provides a good example of cases where improper influence occurs early in the decision-making chain and then unlawfully influences an allegedly neutral and unknowing final decision-maker. In *Staub,* the Court held that an employer may be held liable for the discriminatory actions of a lower level supervisor who influences the decision to take adverse action by a higher level supervisor who lacks discriminatory animus.

Bobreski, supra, at 16. Here, of course, we do not have a lower level supervisor initiating a disciplinary action decided by an impartial higher level supervisor. Here, we have a knowing *higher* level supervisor (Childs) initiating the disciplinary process, selecting his immediately lower level assistant (Bulayev) to serve as the Hearing Officer in his stead, and then influencing his own assistant by being the only witness testifying against Bala at the Hearing. And the disciplinary Hearing only went forward because Childs--despite being aware Bala was following a treating doctor's orders--consciously decided not to exercise his discretion to withdraw the charge.

Staub confirms that if the protected activity was a "contributing factor" in the employer's decision to take the adverse action, it is not necessary to prove the final decision-maker acted with retaliatory animus. And in fact it is axiomatic in whistleblower

cases that proof of retaliatory animus in the individuals taking the adverse action is not required: a contributing factor is

> any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. . . . though evidence of a retaliatory motive would still suffice to establish a violation of [Complainant's] rights . . . a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action: "Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1989) (accompanying S. 508).

Marano v. Dept. of Justice, 2 F.3d 1137, 1140-1141 (Fed. Cir. 1993). *See also, Klopfenstein v. PCC Flow Techs. Holdings, Inc.,* No. 04-149, 2006 WL 3246904, at *13 (ARB May 31, 2006), and the Department of Labor's FRSA Interim Final Rule Summary incorporating *Marano's* and *Kopfenstein's* explanation of the meaning of "contributory factor." 75 Fed. Reg. No. 168 (August 31, 2010) at Section 1982.104. Because Childs admitted the disciplinary charge was only triggered by Bala's June 23rd absence, there is no dispute the suspension decided and imposed on Bala in January 2009 was "based on" Bala's protected activity of following his doctor's order to remain off work. Trs. 49; 115-116; JX8.

2. The Railroad's Adverse Action Occurred After the October 2008 Enactment of Section (c)(2)

Engaging in a protected activity does not in and of itself trigger a FRSA violation, nor does a railroad's knowledge of that protected activity. A FRSA violation is only triggered when a railroad takes an adverse action that is based on a protected activity (*i.e.,* the protected activity was a "contributing factor" to the adverse action).

Section (c)(2) was enacted into law on October 16, 2008. Here, the adverse action that triggered the (c)(2) violation was a disciplinary suspension. The railroad did not decide to take that adverse action until after the January 8, 2009 Hearing and did not actually impose that discipline until January 28, 2009, long after the (c)(2) amendment in October 2008. There is no question the decision to take the adverse action and the actual implementation of the adverse action occurred three months after section (c)(2) became law. This case simply does not depend on the retroactive application of section (c)(2) to adverse actions that occurred prior to October 2008.

3. Bala's Protected Activity Was A Contributing Factor

As noted above, Childs admitted under oath that it was Bala's June 23rd absence that triggered the letter charging Bala with violation of the Absence Attendance Policy. Trs. 115-116. The charge letter itself so states, and Childs so testified at the January 8, 2009 Hearing. Trs. 49; JX 8. As ALJ Timlin noted, even assuming Bala's June 23rd "absence did violate PATH's attendance policy, his absence was nonetheless ordered by OMS and his treating physician" and accordingly she found that Bala's "decision to follow the orders of OMS and his treating physician contributed to Respondent's

decision" to initiate the disciplinary proceedings that culminated in the January 2009 decision to suspend Bala. *Bala* D&O at 13. This finding is supported by substantial evidence, and PATH points to no evidence contradicting it.

Similarly, there is a complete absence of any evidence (much less "clear and convincing evidence") that PATH would have disciplined Bala even if he had not followed his doctor's June 23rd order to remain out of work. ALJ Timlin found that PATH "put forth no evidence or argument indicating that PATH was preparing to discipline Complainant prior to his absence on June 23, 2008." *Bala* D&O at 14. And in fact the only evidence was that PATH was *not* planning to discipline Bala for attendance prior to June 23rd. Childs himself confirmed this:

> Q. Now, isn't it true that under the general guidelines for employee absenteeism on PATH that there was no cause for even a warning letter to be issued to Mr. Bala based on his absences in '06, '07, '08, up to June of '08, isn't that true?
>
> A. Based on a strict reading of those frequencies of those general guidelines and that particular record for those particular years, that's probably true.

ALJ Trial Transcript 224-225. The substantial evidence showed that Bala's June 23rd absence was the trigger for the disciplinary charge, and that PATH failed to prove by any evidence (much less clear and convincing evidence) that the June 23rd absence had nothing whatsoever to do with the filing of the attendance discipline charges that resulted in PATH's January 2009 decision to suspend Bala.

C. Railway Labor Act Arbitration Awards Have No Force or Effect on FRSA Actions

The ARB has made it clear that awards issued by Railway Labor Act arbitrators have no force or effect on FRSA whistleblower protection actions:

> Under the Railway Labor Act, the National Railroad Adjustment Board has jurisdiction to issue a final decision in "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements." 45 U.S.C. Section 153(h)(1). The 2007 Amendments [i.e. Section 20109 of the FRSA] stripped the National Railroad Adjustment Board of authority to resolve whistleblower complaints under 49 U.S.C. Section 20109 and transferred that authority to the Labor Department.

Mercier v. Union Pacific Railroad Co., ARB No. 09-121, ALJ No. 2008-FRS-004, and *Koger v. Norfolk Southern Railway Co.,* ARB No. 09-101, ALJ No. 2008-FRS-001 (September 29, 2011), at 5. The ARB stressed that the Section 20109 amendment reflected "Congress's intent that railroad employees not be limited in pursuing their rights under the whistleblower statute despite also enforcing their contractual rights in arbitration" and concluded "we hold that by pursuing arbitration *Mercier* did not waive any rights or remedies that the FRSA affords him, including the right to pursue a whistleblower complaint under its provisions." *Id.* at 8 & 9.

Thus, even if Bala's discipline here resulted in a RLA arbitration award upholding that discipline under PATH's attendance discipline policy, such an award would have no force or effect on his FRSA whistleblower complaint. If a RLA arbitration award regarding Bala's own attendance discipline carries no weight here, unrelated RLA

arbitration awards handed down prior to the enactment of FRSA Section 20109 carry even less, and play no part in the decision of this case.

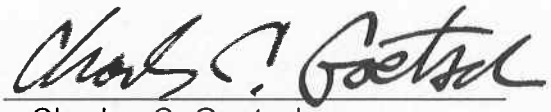
All the awards cited by PATH and the AAR occurred prior to October 2008, and Congress was fully aware of them when it enacted section (c)(2). In fact, it is precisely because such arbitration awards were not protecting medically impaired rail workers from discipline that Congress felt compelled to enact section (c)(2). By doing so, Congress brought the railroad industry in line with the airline and trucking industries, where safety trumps discipline.

VII. CONCLUSION

For all the reasons set forth above and in the amicus briefs of the United States Department of Labor and the National Whistleblowers Center, the Complainant Chris Bala respectfully requests that the Court affirm in full the February 10, 2012 Decision and Order of Administrative Law Judge Timlin.

Pursuant to the ALJ Decision and Order, the Complainant filed a Petition for Fees and Costs with the ALJ, but jurisdiction of this matter was transferred to the ARB prior to any decision on that Petition. Accordingly, the Complainant respectfully requests that the ARB invite a supplemental petition incorporating the fees for both the ALJ and ARB phases of this case so the entire amount of attorney fees can be decided without the necessity of another round of ALJ and ARB proceedings.

RESPECTFULLY SUBMITTED
FOR THE CLAIMANT, CHRISTOPHER BALA

BY: 

Charles C. Goetsch
Cahill, Goetsch & Perry, P.C.
43 Trumbull Street
New Haven, CT 06510
Tel: (203) 777-1000 / Fax: (203) 865-5904

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent to the following persons on the 7th day of June 2012:

By Fax and Federal Express
Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-5220
Washington, D.C. 20210
Tel: (202) 693-6200
Fax: (202) 693-6220

By Fax and Federal Express
James M. Begley, Esq.
Kathleen M. Collins, Esq.
Port Authority Trans-Hudson Corporation
225 Park Avenue South, 13th Floor
New York, NY 10003
Tel: (212) 435-3430
Fax: (212) 435-3834

By Fax and Regular Mail:
Regional Solicitor
U.S. Department of Labor
201 Varick Street, Room 983
New York, NY 10014
Tel: (464) 264-3650
Fax: (646) 264-2660

By Fax and Regular Mail:
Regional Administrator
Region 2
201 Varick Street, Room 670
New York, NY 10014
Tel: (212) 337-2378
Fax: (212) 337-2371

By Fax and Regular Mail:
Directorate of Enforcement Programs
U.S. Department of Labor/OSHA
200 Constitution Avenue, NW
Room N-3119, FPB
Washington, DC 20210
Tel: (202) 693-2100
Fax: (202) 693-1681

By Fax and Regular Mail:
Hon. Stephen L. Purcell
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, N.W.
Suite 400
Washington, DC 20001-8001
Tel: (202) 693-7300
Fax: (202) 693-7365

By Electronic Mail and Regular Mail
Richard R. Renner, Esq.
Legal Director
National Whistleblowers Center
3233 P St. NW
Washington, DC 20007
Tel: 202-342-6980, Ext. 112
Fax: 202-342-6984
rr@kkc.com

By Fax and Regular Mail:
Hon. Theresa C. Timlin
Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002
Tel: 856) 486-3800
Fax: (856) 486-3806

By Electronic Mail and Regular Mail
Megan Guenther, Esq.
Office of the Solicitor
United States Department of Labor
200 Constitution Avenue, NW
Room N-2716, FPB
Washington, DC 20210
Tel: (202) 693-5586
Fax: (202) 693-5689
guenther.megan@dol.gov

By Electronic Mail and Regular Mail
Christopher Bala
35 Commodore Drive
Brick, NJ 08777
Tel: 732-575-9224
chrisbala@comcast.net

Charles C. Goetsch

Brief of Complainant Christopher Bala

Supplemental Appendix

A. Boardman Statement

B. January 2, 2009 Summary of Legislative Oversight

C. H.R. Rep. No. 110-336

D. Sen. Proceedings 110th Congress, S10033, 10041

E. Sen. Proceedings 110th Congress, S10283-01

F. PATH Safety Rule N 2, N,3, and N5

Appendix A

Boardman Statement

Written Statement of
Joseph H. Boardman,
Administrator
Federal Railroad Administration
U.S. Department of Transportation
before the
Committee on Transportation and Infrastructure
U.S. House of Representatives

October 25, 2007

Federal Railroad Administration
1120 Vermont Avenue, N.W.
Washington, D.C. 20590

(202) 493-6014

Written Statement of Joseph H. Boardman,
Administrator,
Federal Railroad Administration,
U.S. Department of Transportation,
before the
Committee on Transportation and Infrastructure,
U.S. House of Representatives

October 25, 2007

Chairman Oberstar, Ranking Member Mica, and other members of the Committee, I am very pleased to be here today, representing Secretary of Transportation Mary E. Peters, to discuss "The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads". The Federal Railroad Administration's (FRA) statutory mission and primary focus are to promote the safety of America's freight and passenger railroads, including protecting the employees who keep them running.

My testimony today will focus on harassment and intimidation of, and retaliation against, railroad employees who report or attempt to report on-duty injuries. As I begin this testimony, I want to emphasize that, in the vast majority of instances, employees promptly report injuries to their supervisors on the railroad, and those supervisors make sure that employees receive proper medical attention and that the injuries are correctly reported to the FRA. When they are not, late reports are filed and penalties are levied. Most of the time, the system works; and it usually works without our intervention. But careful and seasoned students of railroad economics know that the system works most of the time through the good will and integrity of individuals. Railroads, supervisors and employees are under pressure to show good results – the absence of injuries – and that is a reality that everyone in the industry lives with daily.

The underlying motivators driving harassment and intimidation are varied and powerful, and deeply engrained in railroad culture. FRA is working hard to combat harassment and intimidation within FRA's jurisdiction, not only through regulatory enforcement actions, but through efforts to effect positive culture change in the railroad industry.

FRA appreciates the efforts of the Committee in addressing this issue and in developing FRA's rail safety reauthorization proposals in H.R. 2095, The Federal Railroad Safety Improvement Act of 2007. I look forward to working with you on these proposals as the legislative process moves forward.

I. FRA's Railroad Safety Program

FRA is the agency within the U.S. Department of Transportation (DOT) charged with carrying out the Federal railroad safety laws. These laws provide FRA, as the

Secretary's delegate, with very broad authority over every area of railroad safety. In exercising that authority, the agency has issued and enforces a wide range of safety regulations covering a railroad network that employs more than 232,000 workers, moves more than 42 percent of all intercity freight, and provides passenger rail service to about 550 million riders each year.

FRA's regulations address such topics as accident reporting, track, passenger equipment, locomotives, freight cars, power brakes, locomotive event recorders, signal and train control systems, maintenance of active warning devices at highway-rail grade crossings, alcohol and drug testing, protection of roadway workers, operating rules and practices, locomotive engineer certification, positive train control, the use of locomotive horns at grade crossings, and many other subject areas. This body of regulations is based upon knowledge and experience acquired over more than a century of railroading in America. FRA currently has active rulemaking projects on a number of important safety topics, and is continually examining existing regulations to ascertain whether updates or amendments are necessary or desirable. FRA also enforces the Hazardous Materials Regulations, promulgated by DOT's Pipeline and Hazardous Materials Safety Administration, especially as they pertain to rail transportation.

FRA has an authorized inspection staff of about 400 persons Nation-wide, distributed across its eight regions. In addition, 165 inspectors are employed by 28 States that participate in FRA's State participation program who are authorized to perform inspections for compliance with the Federal rail safety laws. Each inspector is an expert in one of five safety disciplines: Track; Signal and Train Control; Motive Power and Equipment; Operating Practices; or Hazardous Materials. FRA also has 18 full-time highway-rail grade crossing safety and trespass prevention specialist positions in the field; these specialists focus on these critically important issues, which account for the overwhelming number of railroad-related deaths. Every year FRA's inspectors conduct tens of thousands of inspections, investigate hundreds of complaints of specific alleged violations of safety laws and regulations, develop recommendations for thousands of enforcement actions, perform full investigations of more than 100 of the most serious railroad accidents, and engage in a range of educational outreach activities on railroad safety issues, including educating the public about highway-rail grade crossing safety and the dangers of trespassing on railroad property. FRA also works closely with DOT's Federal Highway Administration and Federal Motor Carrier Safety Administration to improve highway-rail crossing safety and with DOT's Federal Transit Administration to improve commuter rail safety.

FRA carefully monitors the railroad industry's safety performance, and uses the National Inspection Plan and extensive data gathered through routine oversight to guide the agency's accident prevention efforts. FRA strives to continually make better use of the wealth of available data to achieve the agency's strategic goals. FRA, often in coordination with DOT's Research and Innovative Technology Administration, also sponsors collaborative research with the railroad industry to develop and introduce innovative technologies to improve railroad safety. Finally, under the leadership of the

U.S. Department of Homeland Security, FRA plays an active role in supporting Federal efforts to secure the Nation's railroad transportation system.

II. The National Rail Safety Action Plan

As detailed in the appendix to my testimony, the railroad industry's overall safety record has improved dramatically over the past few decades, and most safety trends are moving in the right direction. However, serious train accidents still occur; and, as we assessed this situation in early 2005, the train accident rate had stagnated.

As a result of these concerns, in May 2005, the U.S. Department of Transportation (DOT) and FRA, as the agency charged with carrying out the Federal railroad safety laws, initiated the National Rail Safety Action Plan (Action Plan), a comprehensive and methodical approach to address critical safety issues facing the railroad industry. The Action Plan's goals broadly stated are:

- Target the most frequent, highest-risk causes of train accidents;
- Focus FRA's oversight and inspection resources on areas of greatest concern; and
- Accelerate research efforts that have the potential to mitigate the largest risks.

As I have previously testified, the causes of train accidents are generally grouped into five categories: human factors; track and structures; equipment; signal and train control; and miscellaneous. From 2002 through 2006, the vast majority of train accidents resulted from human factor causes or track causes. Accordingly, human factors and track have been our primary focus to bring about further improvements in the train accident rate. Overall, the Action Plan includes initiatives intended to:

- Reduce train accidents caused by human factors;
- Address fatigue;
- Improve track safety;
- Enhance hazardous materials safety and emergency preparedness;
- Strengthen FRA's safety compliance program; and
- Improve highway-rail grade crossing safety.

In testimony before this Committee and the Subcommittee on Railroads, Pipelines, and Hazardous Materials, FRA has detailed the substantial progress made in attaining Action Plan objectives, and the improvements that have been made. We are encouraged that human factor accident/incident rates have been in decline during 2006 and the current period.

Safety begins with good rules, good training and supportive technology. It is supported by firm expectations with respect to rules compliance and by systems of accountability that ensure expectations are met. FRA will continue to press for the basic

accountability that says, "we will follow the rules and we will report our failures honestly."

My basic message to you today is that, while we can hold individuals accountable to some extent, whether they are managers or employees, or FRA officials, in the end we will do best if we can find ways of moving beyond mere accountability and towards collective responsibility for outcomes that rests on mutual respect for one another as colleagues.

So let's talk about the most elemental feature of safety programs—the collection of data on accident injuries and other forms of societal loss. Let's talk about why, when the system of disincentives is wrongly aligned, railroads and their employees have great difficulty as an industry getting it righted.

III. Accident/Incident Reporting

A. Statutory Background

Laws governing the monthly reporting by railroads of "all collisions, derailments, or other railroad accidents resulting in death or injury to any person or damage to equipment or roadbed" date back to 1910, when the Accidents Reports Act was enacted.[1] In 1994, the Accidents Reports Act, along with other early railroad safety statutes was recodified at 49 U.S.C. 20901. This testimony refers to the current, recodified version of the Accidents Reports Act (49 U.S.C. § 20901).

Currently, each railroad carrier is required to file a monthly report with the Secretary of Transportation, under oath, listing "all accidents and incidents resulting in injury or death to an individual or damage to equipment or a roadbed arising from the carrier's operations during the month."[2] The carrier is required to describe the nature, cause, and circumstances of each accident or incident included in the report.[3] The Secretary's enforcement authority under the Act includes the power to impose civil and criminal penalties.[4] The penalty for a violation ranges from $550 to $27,000.[5] The Act does not address harassment and intimidation of railroad employees.

Both the Accident Reports Act and the Federal Railroad Safety Act of 1970,[6] confer broad powers on the Secretary of Transportation to implement the provisions of the Accident Reports Act, including the authority to issue regulations and investigate

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[1] The Act of May 6, 1910, ch. 208, 36 Stat. 350 (1910), as amended, Pub. L. No. 86-762, § 1, 74 Stat. 903 (Sept. 13, 1960) (codified at 49 U.S.C. § 20901) ("Accident Reports Act" or "the Act").
[2] 49 U.S.C. § 20901(a).
[3] Id.
[4] See 49 U.S.C. §§ 21302, 21304, 21311.
[5] See 69 Fed. Reg. 30591-92 (2004).
[6] Pub. L. No. 91-458, § 208, 84 Stat. 974-975. As a result of recodification, the provisions of law contained in the Federal Railroad Safety Act of 1970 are now set forth in 49 U.S.C. chapters 201 and 213.

accidents or incidents resulting in serious injury to an individual or to railroad property.[7] These functions have been delegated to the FRA Administrator.[8]

B. FRA's Accident Reporting Regulations in General

FRA's accident reporting regulations, set forth at 49 C.F.R. Part 225 (Part 225) require that each railroad submit monthly reports to FRA summarizing collisions, derailments, and certain other accidents and incidents involving damages above a periodically revised dollar threshold, certain injuries to passengers and other persons, as well as certain occupational injuries to and illnesses of railroad employees.[9]

The reporting requirements of Part 225 concerning an employee injury are triggered, generally, when an event involving the operation of a railroad results in an employee dying, requiring medical treatment (beyond first aid), missing at least one day of work, being placed on restricted work activity or receiving a job transfer, or losing consciousness due to the injury.[10] The regulations also require that railroads keep records of so-called "accountable injuries."[11] These injuries are defined as "any condition, not otherwise reportable, of a railroad worker . . . which condition causes or requires the worker to be examined or treated by a qualified health care professional."[12]

C. Anti-Harassment Provision

FRA's current accident reporting regulations prohibit railroad actions calculated to discourage or prevent proper medical treatment or reporting of an accident/incident to FRA. While other actions by a railroad or railroad official may constitute harassment or intimidation, it is important to note that only actions calculated to prevent medical attention or accident reporting are violations of FRA's regulations.

FRA issued the anti-harassment provision of its accident reporting regulations after a notice-and-comment rulemaking proceeding that addressed the quality of information that FRA received relating to railroad accidents and incidents, as well as illnesses, injuries, and deaths of railroad employees, passengers, and other persons on railroad property. In pertinent part, this rulemaking required railroads to adopt internal control procedures to ensure accurate reporting of accidents, fatalities, injuries, illnesses,

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[7] See 49 U.S.C. §§ 20103, 20107, 20901, & 20902. During the 1994 recodification of the transportation laws, Congress repealed but did not recodify the text of 45 U.S.C. § 42, which authorized the Secretary "to prescribe such rules and regulations and such forms for making the reports hereinbefore provided as are necessary to implement and effectuate the purposes of [the Accident Reports Act]." Congress concluded that this section was unnecessary, provided that the Secretary prescribes rules, regulations, and forms to carry out the requirements of the Accident Reports Act under the authority of 49 U.S.C. §§ 20103 and 322(a). See H.R. Rep. No. 103-180, 502, 584 (1993); reprinted in 1994 U.S.C.C.A.N. 1319, 1401.

[8] See 49 U.S.C. § 103(c)(1); 49 C.F.R. § 1.49(c)(11), (m).

[9] See 49 C.F.R. § 225.11; 72 Fed. Reg. 1184 (2007); see also 49 C.F.R. §§ 225.5 (definition of "accident/incident") and 225.19.

[10] See 49 C.F.R. § 225.19(d); see also 49 C.F.R. § 225.5 (definition of "accident/incident").

[11] 49 C.F.R. § 225.25(a).

[12] 49 C.F.R. § 225.5.

and highway-rail grade crossing accidents.[13] In the notice of proposed rulemaking (NPRM), FRA noted that its ability to develop inspection strategies and measure comparable trends of railroad safety is dependent upon the accuracy of railroad injury and accident data.[14]

FRA also noted that the proposed rule was an outgrowth of a General Accounting Office (GAO) study that had reviewed FRA's safety programs to determine if they were sufficient to "protect railroad employees and the general public from injuries associated with train accidents."[15] Based upon its review of FRA's railroad injury and accident reporting data, GAO had concluded that the audited railroads were violating FRA's accident reporting regulations by under-reporting and inaccurately reporting injuries and accidents.[16] As a result of these findings, GAO made several recommendations, including that FRA require railroads to establish injury and accident reporting internal control procedures.[17]

Rail labor testified during the rulemaking proceeding that intimidation and harassment of railroad employees exists and manifests itself as follows:

> First, due to the railroads' desire to reduce the number of reportable injuries and illnesses, many railroad employees are reluctant to seek needed medical attention for fear of possible discipline or retaliation by their employer. Second, many employees who are injured on the job fail to report their injury to the railroad within the prescribed time period because, at the time the injury was incurred, they believed it was minor or insignificant. If and when the injury worsens, the employee is reluctant to report the injury because he or she may be subject to investigation or discipline, or both, for reporting late. Third, other employees request medical treatment that would render the injury or illness nonreportable to FRA, such as requesting that they be given nonprescription medication, because of intimidation or harassment by the employer.[18]

FRA's final rule (effective January 1, 1997) amended the railroad accident reporting regulations in several ways in order to enhance the quality of the injury and accident data relied upon by FRA in carrying out its rail safety programs.[19] Among other things, FRA adopted an Internal Control Plan (ICP) requirement mandating that each railroad develop, adopt, and comply with an ICP in order to "ensure that complete, reliable, and accurate data is obtained, maintained, and disclosed by the railroads."[20]

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[13] See 59 Fed. Reg. 42,880, 42,880, col. 1 (1994); 61 Fed. Reg. 30,940, 30,940, col. 1 (1996).
[14] 59 Fed. Reg. at 42,880, col. 3.
[15] 59 Fed. Reg. at 42,881, col. 1.
[16] Id.
[17] Id., col. 2.
[18] 61 Fed. Reg. 67,477, 67,479, cols. 1-2 (1996).
[19] 61 Fed. Reg. at 30,940.
[20] Id. at 30,943, col. 1.

In the final rule, FRA stated that "many railroad employees fail to disclose their injuries to the railroad or fail to accept reportable treatment from a physician because they wish to avoid potential harassment from management or possible discipline that is sometimes associated with the reporting of such injuries."[21] Accordingly, the regulation requires that each ICP include a policy statement that not only declares the railroad's commitment to complete and accurate reporting, but also

> to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation.[22]

FRA also provided that a railroad failing to adopt an ICP is subject to the assessment of a civil penalty and that any individual who willfully causes a violation of or noncompliance with any provision of Part 225, including the anti-harassment provision, may also face civil penalties.[23] In addition, FRA stressed that criminal penalties, including imprisonment, may be imposed upon any individual who knowingly and willfully makes a false entry in a report required by the accident reporting regulations.[24]

IV. Other Legal Protections Relevant to Allegations of Harassment or Intimidation.

Discriminating against an employee for (among other things) notifying, or attempting to notify, the railroad carrier or FRA of a work-related personal injury or work-related illness of an employee is prohibited under 49 U.S.C. 20109, as amended by section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.[25] The employee's whistleblower rights are enforced under the procedures set forth in 49 U.S.C. 42121(b) by the Department of Labor (DOL). FRA and DOL have already begun the process of coordination with respect to the administration of this new Executive Branch function.

V. Legislative Proposals to Address Harassment and Intimidation.

Section 606 of H.R. 2095 would prohibit a railroad from denying, delaying, or interfering with the medical or first aid treatment of an employee who is injured on the job. If an injured employee requests transportation to a hospital, the railroad is required

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[21] Id., col. 2.
[22] 61 Fed. Reg. at 30,943, col. 3; see 49 C.F.R. § 225.33(a)(1).
[23] 61 Fed. Reg. at 30,944, col. 2; see 49 C.F.R. § 225.29; 49 C.F.R. pt. 225, app. A.
[24] 61 Fed. Reg. at 30,944, cols. 2-3.
[25] Pub. L. 110-53, § 1521, 121 Stat. 266 (Aug. 3, 2007) (codified at 49 U.S.C. § 20109).

to promptly arrange to have the injured employee transported to the nearest medically appropriate hospital. Section 606 also prohibits a railroad or other person covered under the statute from disciplining, threatening, or threatening to discipline an employee for requesting medical treatment, or for following orders or a treatment plan of a treating physician.

VI. Harassment of Employees and Safety Culture in the U.S. Railroad Industry

A. Influences on Company and Worker Behavior

The issue of harassment and intimidation occurs against a much broader background than the rather narrow scope within which FRA works to promote full reporting of accidents and incidents. In addition to the personal animosity sometimes encountered in any workplace, that background includes the possible effects of other Federal laws such as the Federal Employers' Liability Act,[26] the Railroad Unemployment Insurance Act,[27] and the Railway Labor Act (RLA),[28] which govern recovery for personal injuries, compensation for lost time, resolution of labor disputes, tort law in general, and bonuses and other rewards for avoiding injuries. All of those well-intended things have the unintended consequence of motivating people to find ways to avoid reporting injuries because significant financial consequences attend the reporting of injuries.

Rail labor relationships are complex and often involve conflicts. These conflicts are for the most part subject to the jurisdiction of the courts and RLA boards of adjustment. Employer actions that are perceived as harassment or intimidation may result from personal hostility or dislike, retaliation for actions taken by the employee, possibly including actions taken as a member or leader of a labor organization, normal discipline, normal investigations intended to identify how and why an injury occurred so recurrences can be prevented, ordinary investigative techniques intended to protect the corporation from what may be perceived as the potential for inappropriate claims, and even actions intended to mitigate damages for injuries that have already occurred.

Personal injuries, or the potential for such injuries and associated risk to the employee and liability to the company, may be involved to a greater or lesser degree in many of these conflicts. With the discrete exceptions of actions calculated to prevent proper medical attention or reporting of an accident/incident to the FRA, these are matters clearly outside the responsibility of the FRA and clearly beyond the ability of the FRA to prevent or remediate. Even where obstruction of proper medical care or an attempt to prevent required accident/incident reporting is involved in a case of harassment or intimidation, FRA's role is to promote future compliance with FRA's reporting requirements set forth in Part 225, rather than to provide a specific remedy for the employee.

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[26] 45 U.S.C. § 51 et seq.
[27] 45 U.S.C. § 351 et. seq.
[28] 45 U.S.C. § 151 et. seq.

As noted above, the Congress, through Public Law 110-53, has amended 49 U.S.C. § 20109 to provide a broader remedy that is personal to the railroad employee, and administered by the U.S. Department of Labor, for discrimination related to the employee's action in reporting an accident or safety violation or taking other specified actions. This provision provides significant protections against alleged actions of the sort that prompted this hearing. FRA has already begun working with the Department of Labor to ensure that our respective activities are well coordinated.

B. Impact on Railroad Safety

A safety culture that reacts to accidents and injuries by assigning blame to "bad actors" discourages full examination of the conditions and circumstances that lead to accidents and injuries.

Moreover, the quality of the injury and accident data relied upon by FRA in carrying out its rail safety programs is compromised.

C. Changing to a "Culture of Risk Reduction"

A culture of risk reduction uses precursor data in a collaborative, non-punitive way to reduce the risk of future accidents, and FRA believes it to be the most cost-effective way to significantly improve railroad safety. In order to create a culture of risk reduction, FRA is working to establish programs that will encourage employees to fully disclose information regarding precursors to accidents, or near accidents, without fear of blame. Such programs will allow FRA to gain a more complete picture of how and why accidents occur, and thus identify and reduce risks before accidents occur.

To date, two FRA-led demonstration projects in cooperation with the Union Pacific Railroad Company (UP) have been launched in an effort to support a positive change in safety culture in the railroad industry: the Close Call Confidential Reporting System (C3RS) and Clear Signal for Action (CSA) program.

C3RS aims to reduce the number of human factor accidents by cooperatively obtaining railroad employees' own reports on "close calls" (near accidents), analyzing the reports and getting at the causes of the near accidents that involved human factors so that, having been identified, the causes can be eliminated or reduced. This project is pertinent to this hearing for at least two reasons. First, the project collects the precursor data on a voluntary and confidential basis, so that data on the near accidents flows freely from employees without fear of discipline. Second, the project has identified various aspects of railroad culture as having an impact on safety. The pilot location has been on-line since February 1, 2007, so no firm conclusions may be drawn yet.

CSA is a peer-to-peer observation, feedback, and communication process that identifies and helps correct systemic safety issues. Both projects shield employees from discipline when errors or at-risk behaviors are reported or observed. Both projects are

designed to collect information, find sources of risk, and take corrective actions to reduce risks and proactively prevent accidents. Both projects are being conducted with UP and require coordination, communication and cooperation between labor, management, and government to achieve results, thereby discouraging blame and replacing blame with ways to proactively and cooperatively improve safety.

Additionally, FRA intends to launch a comprehensive Risk Reduction Program to stimulate the development of new industry efforts designed to proactively collect, manage, and respond to safety-critical risks before accidents or unsafe conditions occur. This initiative will aim to reduce accidents and injuries, and build strong safety cultures, by developing innovative methods, processes, and technologies to identify and correct individual and systemic contributing factors using "upstream" predictive data, helping to augment FRA's traditional behavior-based and design-specification-based regulations. This is analogous in many ways to a company having both a quality control program and a quality assurance program; both are needed to produce the best products in today's competitive environment. By having more of a safety focus up front before an accident or injury occurs, FRA believes that railroad employees and managers will work in a more cooperative way, without the punitive concerns that can follow actual occurrences. FRA believes that this will engender greater trust, reduce the atmosphere of conflict, and promote positive safety changes. Consequently, while continuing to strengthen its regulatory enforcement program, FRA will also include strong collaboration and partnership with the industry in pilot risk reduction demonstration projects.

FRA's 2008 appropriation request funds key elements of the Risk Reduction Program including risk reduction projects, such as close calls, as well as projects which use precursor data, such as collision hazard analysis or other high-level system safety programs. Additionally, the Administration has asked that language (from H.R. 1516) protecting certain information generated in carrying out risk reduction programs be added to H.R. 2095 so that a full and careful analysis of hazards is possible. Without this protection of companies' risk assessments, efforts to conduct meaningful risk assessments and bring about real risk reduction will fail. FRA is hopeful that these types of projects will demonstrate that the railroad industry is capable of changing the nature of the discussion of safety to one that is positive and open, much as the aviation industry did with the near miss program. FRA believes that, to reach our goal of zero injuries and fatalities, these efforts are necessary.

VII. FRA Enforcement Activities

The FRA enforces compliance with the accident/incident reporting regulations, including the provisions against harassment and intimidation, through a variety of means, including regular inspections, audits and complaint investigations. Instances of non-compliance are documented and civil penalties actions are recommended to the Chief Counsel's office as appropriate.

Since the beginning of FY 03, FRA and participating State inspectors have

conducted 13,993 inspections to assess industry compliance with FRA's accident/incident reporting regulations. These inspections resulted in the discovery of 15,364 alleged acts of non-compliance with these regulations by the Nation's railroads. As a result of these findings, FRA's Office of Safety recommended that appropriate enforcement action be taken by the Chief Counsel's office in 2,139 of these cases. As is standard practice, if the Chief Counsel's office accepts the recommendation and initiates enforcement action, the railroad or individual cited will have the opportunity to present mitigating information or information refuting the alleged violations before further action is taken.

Each of the seven "Class I"[29] railroads and Amtrak is audited by an FRA headquarters-led team of inspectors on a rotating basis every three years. These audits are comprehensive and involve an extensive review of each railroad's accident/incident recordkeeping and reporting records and practices for all reportable groups of accidents/incidents: highway-rail grade crossing; rail equipment; and death, injury, and occupational illness.[30] As part of the comprehensive audit, FRA also reviews the adequacy of each railroad's ICP, and each of its 11 required components.[31] Audits of the more than 600 shortline railroads, regional railroads and commuter railroads are conducted by FRA Regional office-led teams of inspectors.

Each allegation of harassment and intimidation received by FRA from railroad employees is assigned to one of FRA's eight regional offices and investigated by a local inspector. In investigating complaints from railroad employees alleging they were subjected to harassment and/or intimidation, FRA's Office of Safety recommends that appropriate enforcement action be taken by the Chief Counsel's office, after finding that managers did harass and/or intimidate injured employees. Again, as is standard practice, when the Chief Counsel's Office accepts the recommendation and initiates enforcement action, the railroad or individual cited has the opportunity to present mitigating information or information refuting the alleged violations before further action is taken. FRA is vigorous in its enforcement of these actions.

VIII. Conclusion

Harassment and intimidation calculated to avoid reporting of employee on-duty injuries create barriers to proper medical care and potentially threaten the integrity of FRA's safety data. But, more fundamentally, this conduct is symptomatic of an atmosphere of conflict that makes positive safety change very difficult.

Although courage shown by organizations and individuals provides a very important defense against falsification of safety data, we also recognize that it is important to address both the symptoms of the underlying malady and its causes. We address the symptoms through aggressive actions on complaints, regular audits of accident/incident data, and civil penalty actions where warranted. We seek to address the

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[29] Carriers having annual carrier operating revenues of $250 million more after applying railroad revenue deflator formula. See 49 C.F.R. § 1201 General Instruction 1.1.

[30] See 49 C.F.R. § 225.19

[31] See 49 C.F.R. § 225.33.

underlying causes through safety programs that provide a counterweight to forces motivating people to underreport injuries. FRA will remain aggressive in its efforts to promote accountability and will seek to plant the seeds of cooperative programs that may help reduce risk while engendering greater trust.

We look forward to further discussions with the Committee on reauthorization of the Federal railroad safety program, to bring about the enactment of the Administration's railroad safety bill, and to increase the accuracy of the data relied upon by FRA in carrying out its rail safety program by reducing injury-related harassment and intimidation of railroad employees to make our Nation's railroad system even safer. Thank you.

Attachment

APPENDIX

The Railroad Industry's Safety Record

The railroad industry's overall safety record is generally positive, and most safety trends are moving in the right direction. While not even a single death or injury is acceptable, progress is continually being made in the effort to improve railroad safety. An analysis of FRA's database of railroad reports of accidents and incidents that have occurred over the nearly three decades from 1978 through 2006 dramatically demonstrates this improvement.[32] (The worst year for rail safety in recent decades was 1978, and 2006 is the last complete year for which preliminary data are available.) Between 1978 and 2006, the total number of rail-related accidents and incidents has fallen from 90,653 to 13,237, an all-time low representing a decline of 85 percent. Between 1978 and 2006, total rail-related fatalities have declined from 1,646 to 909, a reduction of 45 percent. From 1978 to 2006, total employee cases (fatal and nonfatal) have dropped from 65,193 to 5,193, a decline of 92 percent; the record low was 5,065. In the same period, total employee deaths have fallen from 122 in 1978 to 16 in 2006, a decrease of 87 percent.

Contributing to this generally improving safety record has been a 74-percent decline in train accidents since 1978 (a total of 2,925 train accidents in 2006, compared to 10,991 in 1978), even though rail traffic has increased. (From 1978 to 2006, overall train-miles (including passenger and smaller freight carriers) were up by 7.8 percent, but train-miles for Class I railroads have increased 29.9 percent. Additionally, Class I railroad ton-miles were up by 106.5 percent.) Further, the year 2006 saw only 28 train accidents out of the 2,925 reported in which a hazardous material was released, with a total of only 69 hazardous material cars releasing some amount of product, despite about 1.7 million shipments of hazardous materials by rail.

In other words, over the last almost three decades, the number and rate of train accidents, total deaths arising from rail operations, employee fatalities and injuries, and hazardous materials releases all have fallen dramatically. In most categories, these improvements have been most rapid in the 1980s, and tapered off in the late 1990s. Causes of the improvements have included a much more profitable economic climate for freight railroads following deregulation in 1980 under the Staggers Act (which led to substantially greater investment in plant and equipment), enhanced safety awareness and safety program implementation on the part of railroads and their employees, and FRA's safety monitoring and standard setting. (Most of FRA's safety rules were issued during this period.)

In addition, rail remains an extremely safe mode of transportation for passengers. Since 1978, more than 11.2 billion passengers have traveled by rail, based on reports

[32] See 49 C.F.R. Part 225.

filed with FRA each month. The number of rail passengers has steadily increased over the years, and since 2000 has averaged more than 500 million per year. Although 12 passengers died in train collisions and derailments in 2005, none did in 2006. On a passenger-mile basis, with an average about 15.5 billion passenger-miles per year since the year 2000, rail travel is about as safe as scheduled airlines and intercity bus transportation and is far safer than private motor vehicle travel. Rail passenger accidents–while always to be avoided–have a very high passenger survival rate.

As indicated previously, not all of the major safety indicators are positive. Grade crossing collisions and railroad trespassing cause virtually all of the deaths associated with railroading. Taken together, grade crossing and rail trespassing deaths accounted for 97 percent of the 909 total rail-related deaths in 2006. In recent years, grade crossing deaths were the greatest single group of rail-related deaths; in 1978, for example, 1,064 people died in grade crossing accidents, compared to 403 who died in rail trespass incidents. Since 1997, rail trespasser deaths have replaced grade crossing fatalities as the largest category of rail-related deaths; in 2006, 369 persons lost their lives in grade crossing accidents, and 517 persons died while on railroad property without authorization. Further, significant train accidents continue to occur, and the train accident rate per million train-miles has not declined at an acceptable pace in recent years. After increasing to 4.39 in 2004, the train accident rate declined to 4.11 in 2005 and 3.61 in 2006. The latter is near the all-time low despite significant increases in the volume of train traffic.

The causes of train accidents (e.g., derailments and train-to-train collisions) are generally grouped into five categories: human factors; track and structures; equipment; signal and train control; and miscellaneous. The great majority of train accidents are caused by human factors and track. In recent years, most of the serious events involving train collisions or derailments resulting in release of hazardous material, or harm to rail passengers, have resulted from human factor or track causes. Accordingly, FRA's National Rail Safety Action Plan, initiated in May 2005, focuses heavily on human factors and track as the major target areas for improving the train accident rate.

Appendix B

January 2, 2009 Summary of Legislative Oversight

Union Calendar No. 609

110th Congress, 2d Session - - - - - - - - - - - - - - House Report 110-936

(110-177)

SUMMARY

OF

LEGISLATIVE AND OVERSIGHT ACTIVITIES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION
CONVENED JANUARY 4, 2007
ADJOURNED DECEMBER 19, 2007

SECOND SESSION
CONVENED JANUARY 3, 2008
ADJOURNED JANUARY 3, 2009

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

JANUARY 2, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

has deteriorated in recent years and urged the Subcommittee to reauthorize the FRA in order to improve rail safety. He also urged the Subcommittee to adopt legislation that improved whistleblower protections; mandated minimum training standards, and methods to ensure that training programs are appropriate and effective; revise the hours of service statute to ensure workers obtain adequate rest; eliminate limbo time; and adopt new rail safety technologies. The President of the Teamsters Rail Conference testified that any reauthorization should include increased employee protections; address rail worker fatigue by counting limbo time as time on duty; require ten-hour calling times to ensure proper rest; ensure appropriate staffing; address dark territory; and eliminate camp cars. Finally, the American Association for Justice testified that the Subcommittee should adopt an amendment to clarify the preemption clause in the Federal Rail Safety Act ("FRSA"), making it clear that any uniform standards established by the FRA pursuant to the FRSA are minimum standards.

FATIGUE IN THE RAIL INDUSTRY

On February 13, 2007, the Subcommittee held a hearing on fatigue in the rail industry.

The FRA reports that human factors are responsible for nearly 40 percent of all train accidents, and a new study confirms that fatigue plays a role in approximately one out of four of those accidents.

The hours of service law, which was originally enacted in 1907, and substantially amended in 1969, deals only with acute fatigue, not with cumulative fatigue. The law permits working 11 hours and 59 minutes followed by eight hours off duty and another 11 hours and 59 minutes on duty, perpetually. This kind of "backward-rotating shift" can wreak havoc on an employee's circadian rhythm.

In addition, the law does not address "limbo time", which is the time when a crew's working assignment was finished and they are waiting for transport back to their homes. During limbo time, crewmembers are required to stay awake, alert, and able to respond to any situation and follow the railroad's operating rules, which means that crews are regularly on the job for 15 to 20 hours at a time.

On numerous occasions, the Department of Transportation ("DOT") has formally submitted legislation to reform the hours of service law, supplement it with fatigue management requirements, or authorize the FRA to prescribe regulations on fatigue in light of current scientific knowledge. Currently, the statute contains no substantive rulemaking authority over duty hours. The FRA's lack of regulatory authority over duty hours, unique to FRA among all the safety regulatory agencies in the Department, precludes FRA from making use of almost a century of scientific learning on the issue of sleep-wake cycles and fatigue-induced performance failures. Despite the need for reform to address fatigue, no action has been taken.

At the hearing, the Administrator of the FRA testified that the Department of Transportation should have the regulatory authority to replace the hours of service laws with scientifically-based regula-

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Appendix C

H.R. Rep. No. 110-336

H.R. REP. 110-336, H.R. Rep. No. 336, 110TH Cong., 1ST Sess. 2007, 2008 U.S.C.C.A.N. 2142, 2007 WL 2745328
P.L. 110-432, **2142 FEDERAL RAILROAD SAFETY IMPROVEMENT ACT OF 2007
DATES OF CONSIDERATION AND PASSAGE
House: October 17, 2007
Senate: August 1, 2008
Cong. Record Vol. 154 (2008)
House Report (Transportation and Infrastructure Committee)
No. 110-336, September 19, 2007
[To accompany H.R. 2095]

HOUSE REPORT NO. 110–336
September 19, 2007

*1 Mr. Oberstar, from the Committee on Transportation and Infrastructure, submitted the following

REPORT

[To accompany H.R. 2095]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 2095) to amend title 49, United States Code, to prevent railroad fatalities, injuries, and hazardous materials releases, to authorize the Federal Railroad Safety Administration, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

**0 The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.–This Act may be cited as the "Federal Railroad Safety Improvement Act of 2007".

(b) Table of Contents.–The table of contents for this Act is as follows:

For purposes of this Act, the terms "railroad" and "railroad carrier" have the meaning given those terms in section 20102 of title 49, United States Code.

TITLE I–FEDERAL RAILROAD SAFETY ADMINISTRATION

SEC. 101. ESTABLISHMENT OF FEDERAL RAILROAD SAFETY ADMINISTRATION.

(a) Amendment.–Section 103 of title 49, United States Code, is amended to read as follows:

"S 103. Federal Railroad Safety Administration

"(a) In General.–The Federal Railroad Safety Administration (in this section referred to as the 'Administration') shall be an administration in the Department of Transportation. To carry out all railroad safety laws of the United States, the Administration shall be divided on a geographical basis into at least 8 safety offices. The Secretary of Transportation shall be responsible for enforcing those laws and for ensuring that those laws are uniformly administered and enforced among the safety offices.

"(b) Safety as Highest Priority.–In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

"(c) Administrator.–The head of the Administration shall be the Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be an individual with professional experience in railroad safety, hazardous materials safety, or other transportation safety. The Administrator shall report directly to the Secretary of Transportation.

*3 "(d) Deputy Administrator.–The Administration shall have a Deputy Administrator who shall be appointed by the Secretary. The Deputy Administrator shall carry out duties and powers prescribed by the Administrator.

"(e) Chief Safety Officer.–The Administration shall have an Associate Administrator for Railroad Safety appointed in the competitive service by the Secretary. The Associate Administrator shall be the Chief Safety Officer of the Administration. The Associate Administrator shall carry out the duties and powers prescribed by the Administrator.

"(f) Duties and Powers of the Administrator.–The Administrator shall carry out–

"(1) duties and powers related to railroad safety vested in the Secretary by section 20134(c) and chapters 203 through 211 of this title, and by chapter 213 of this title for carrying out chapters 203 through 211; and

"(2) other duties and powers prescribed by the Secretary.

"(g) Limitation.–A duty or power specified in subsection (f)(1) may be transferred to another part of the Department of Transportation or another Federal Government entity only when specifically provided by law. A decision of the Administrator in carrying out the duties or powers of the Administration and involving notice and hearing required by law is administratively final.

"(h) Authorities.–Subject to the provisions of subtitle I of title 40 and title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), the Secretary of Transportation may make, enter into, and perform such contracts, grants, leases, cooperative agreements, and other similar transactions with Federal or other public agencies (including State and local governments) and private organizations and persons, and make such payments, by way of advance or reimbursement, as the Secretary may determine to be necessary or appropriate to carry out functions at the Administration. The authority of the Secretary granted by this subsection shall be carried out by the Administrator. Notwithstanding any other provision of this chapter, no authority to enter into contracts or to make payments under this subsection shall be effective, except as provided for in appropriations Acts.".

(b) References and Conforming Amendments.–(1) All references in Federal law to the Federal Railroad Administration shall be deemed to be references to the Federal Railroad Safety Administration.

(2) The item relating to section 103 in the table of sections of chapter 1 of title 49, United States Code, is amended to read as follows:

"103. Federal Railroad Safety Administration.".

(a) Safety Goals.–In conjunction with existing federally required strategic planning efforts, the Secretary of Transportation shall develop a long-term strategy for improving railroad safety. The strategy shall include an annual plan and schedule for achieving, at a minimum, the following goals:

(1) Reducing the number and rates of accidents, injuries, and fatalities involving railroads.

(2) Improving the consistency and effectiveness of enforcement and compliance programs.

(3) Identifying and targeting enforcement at, and safety improvements to, high-risk highway-rail grade crossings.

(4) Improving research efforts to enhance and promote railroad safety and performance.

(b) Resource Needs.–The strategy and annual plans shall include estimates of the funds and staff resources needed to accomplish each activity. Such estimates shall also include the staff skills and training needed for timely and effective accomplishment of each goal.

(c) Submission With the President's Budget.–The Secretary of Transportation shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate the strategy and annual plan at the same time as the President's budget submission.

(d) Achievement of Goals.–

(1) Progress assessment.–No less frequently than semiannually, the Secretary of Transportation and the Administrator of the Federal Railroad Safety Administration shall assess the progress of the Administration toward achieving the strategic goals described in subsection (a). The Secretary and the Administrator shall convey their assessment to the employees of the Federal Railroad Safety Administration and shall identify any deficiencies that should be remediated before the next progress assessment.

*4 (2) Report to congress.–The Secretary shall transmit a report annually to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the performance of the Federal Railroad Safety Administration relative to the goals of the railroad safety strategy and annual plans under subsection (a).

SEC. 103. REPORTS.

(a) Reports by the Inspector General.–Not later than 30 days after the date of enactment of this Act, the Inspector General of the Department of Transportation shall submit to the Secretary of Transportation and the Administrator of the Federal Railroad Safety Administration a report containing the following:

(1) A list of each statutory mandate regarding railroad safety that has not been implemented.

(2) A list of each open safety recommendation made by the National Transportation Safety Board or the Inspector General regarding railroad safety.

(b) Reports by the Secretary.–

(1) Statutory mandates.–Not later than 90 days after the date of enactment of this Act, and every 180 days thereafter until each of the mandates referred to in subsection (a)(1) has been implemented, the Secretary of Transportation shall transmit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the specific actions taken to implement such mandates.

(2) NTSB and inspector general recommendations.–Not later than January 1st of each year, the Secretary of Transportation shall transmit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report containing each recommendation referred to in subsection (a)(2), a copy of the Department of Transportation response to each such recommendation, and a progress report on implementing each such recommendation.

SEC. 104. RULEMAKING PROCESS.

(a) Amendment.–Subchapter I of chapter 201 of title 49, United States Code, is amended by inserting after section 20115 the following new section:

"S 20116. Rulemaking process

"No rule or order issued by the Secretary under this part shall be effective if it incorporates by reference a code, rule, standard, requirement, or practice issued by an association or other entity that is not an agency of the Federal Government, unless that reference is to a particular code, rule, standard, requirement, or practice adopted before the date on which the rule is issued by the Secretary, and unless the date on which the code, rule, standard, requirement, or practice was adopted is specifically cited in the rule.".

(b) Table of Sections Amendment.–The table of sections of subchapter I of chapter 201 of title 49, United States Code, is amended by adding after the item relating to section 20115 the following new item:

"20116. Rulemaking process.".

Section 20117(a) of title 49, United States Code, is amended to read as follows:

"(a) In General.–(1) There are authorized to be appropriated to the Secretary of Transportation to carry out this part and to carry out responsibilities under chapter 51 as delegated or authorized by the Secretary--

"(A) $230,000,000 for fiscal year 2008;

"(B) $260,000,000 for fiscal year 2009;

"(C) $295,000,000 for fiscal year 2010; and

"(D) $335,000,000 for fiscal year 2011.

"(2) With amounts appropriated pursuant to paragraph (1), the Secretary shall purchase 6 Gage Restraint Measurement System vehicles and 5 track geometry vehicles to enable the deployment of 1 Gage Restraint Measurement System vehicle and 1 track geometry vehicle in each region.

"(3) There are authorized to be appropriated to the Secretary $18,000,000 for the period encompassing fiscal years 2008 through 2011 to design, develop, and construct the Facility for Underground Rail Station and Tunnel at the Transportation Technology Center in Pueblo, Colorado. The facility shall be used to test and evaluate the vulnerabilities of above-ground and underground rail tunnels to prevent accidents and incidents in such tunnels, to mitigate and remediate the consequences of any such accidents or incidents, and to provide a realistic scenario for training emergency responders.

*5 "(4) Such sums as may be necessary from the amount appropriated pursuant to paragraph (1) for each of the fiscal years 2008 through 2011 shall be made available to the Secretary for personnel in regional offices and in Washington, D.C., whose duties primarily involve rail security.".

TITLE II–EMPLOYEE FATIGUE

SEC. 201. HOURS OF SERVICE REFORM.

(a) Definitions.–Section 21101(4) of title 49, United States Code, is amended by striking "employed by a railroad carrier".

(b) Limitation on Duty Hours of Signal Employees.–Section 21104 of title 49, United States Code, is amended–

(1) by amending subsection (a) to read as follows:

"(a) General.–Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a signal employee, and a railroad contractor and its officers and agents may not require or allow a signal employee, to remain or go on duty–

"(1) unless that employee has had at least 10 consecutive hours off duty during the prior 24 hours;

"(2) for a period in excess of 12 consecutive hours; or

"(3) unless that employee has had at least one period of at least 24 consecutive hours off duty in the past 7 consecutive days.

The Secretary may waive paragraph (3) if a collective bargaining agreement provides a different arrangement and such arrangement provides an equivalent level of safety.";

(2) in subsection (b)(3) by striking ", except that up to one hour of that time spent returning from the final trouble call of a period of continuous or broken service is time off duty";

(3) in subsection (c)–

(A) by inserting "for not more than 3 days during a period of 7 consecutive days" after "24 consecutive hours"; and

(B) by adding at the end the following: "A signal employee may not be allowed to remain or go on duty under the emergency authority provided under this subsection to conduct routine repairs, routine maintenance, or routine inspection of signal systems.";

(4) by adding at the end the following new subsections:

"(d) Communication During Time Off Duty.–During a signal employee's minimum off-duty period of 10 consecutive hours, as provided under subsection (a), a railroad carrier, and its managers, supervisors, officers, and agents, shall not communicate with the signal employee by telephone, by pager, or in any other manner that could disrupt the employee's rest. Nothing in this subsection shall prohibit communication necessary to notify an employee of an emergency situation posing potential risks to the employee's safety or health.

"(e) Exclusivity.–The hours of service, duty hours, and rest periods of signal employees shall be governed exclusively by this chapter. Signal employees operating motor vehicles shall not be subject to any hours of service rules, duty hours, or rest period rules promulgated by any Federal authority, including the Federal Motor Carrier Safety Administration, other than the Federal Railroad Safety Administration.".

(c) Limitation on Duty Hours of Train Employees.–Section 21103 of title 49, United States Code, is amended–

(1) by amending subsection (a) to read as follows:

"(a) General.–Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty–

"(1) unless that employee has had at least 10 consecutive hours off duty during the prior 24 hours;

"(2) for a period in excess of 12 consecutive hours; or

"(3) unless that employee has had at least one period of at least 24 consecutive hours off duty in the past 7 consecutive days.

The Secretary may waive paragraph (3) if a collective bargaining agreement provides a different arrangement and such arrangement provides an equivalent level of safety.";

(2) by amending subsection (b)(4) to read as follows:

"(4)(A)(i) Except as provided in clauses (ii) and (iii), time spent in deadhead transportation to a duty assignment, time spent waiting for deadhead transportation, and time spent in deadhead transportation from a duty assignment to a place of final release is time on duty.

***6** "(ii) Time spent waiting for deadhead transportation and time spent in deadhead transportation from a duty assignment to a place of final release is neither time on duty nor time off duty in situations involving delays in the operations of the railroad carrier, when the delays were caused by any of the following:

"(I) A casualty.

"(II) An accident.

"(III) A track obstruction.

"(IV) An act of God.

"(V) A weather event causing a delay.

"(VI) A snowstorm.

"(VII) A landslide.

"(VIII) A track or bridge washout.

"(IX) A derailment.

"(X) A major equipment failure which prevents a train from advancing.

"(XI) Other delay from a cause unknown or unforeseeable to a railroad carrier and its officers and agents in charge of the employee when the employee left a designated terminal.

"(iii) In addition to any time qualifying as neither on duty nor off duty under clause (ii), at the election of the railroad carrier, time spent waiting for deadhead transportation and time spent in deadhead transportation to the place of final release may be treated as neither time on duty nor time off duty, subject to the following limitations:

"(I) Not more than 40 hours a month may be elected by the railroad carrier, for an employee, during the period from the date of enactment of the Federal Railroad Safety Improvement Act of 2007 to one year after such date of enactment.

"(II) Not more than 30 hours a month may be elected by the railroad carrier, for an employee, during the period beginning one year after the date of enactment of the Federal Railroad Safety Improvement Act of 2007 and ending two years after such date of enactment.

"(III) Not more than 10 hours a month may be elected by the railroad carrier, for an employee, during the period beginning two years after the date of enactment of the Federal Railroad Safety Improvement Act of 2007.

"(B) Each railroad carrier shall report to the Secretary of Transportation, in accordance with procedures contained in 49 CFR 228.19, each instance within 30 days after the calendar month in which the instance occurs that a member of a train or engine crew or other employee engaged in or connected with the movement of any train, including a hostler, exceeds 12 consecutive hours, including–

"(i) time on duty; and

"(ii) time spent waiting for deadhead transportation and the time spent in deadhead transportation from a duty assignment to the place of final release, that is not time on duty.

"(C) If–

"(i) the time spent waiting for deadhead transportation, and the time spent in deadhead transportation from a duty assignment to the place of final release, that is not time on duty; plus

"(ii) the time on duty,

exceeds 12 consecutive hours, the railroad carrier and its officers and agents shall provide the train employee with additional time off duty equal to the number of hours that such sum exceeds 12 hours."; and

(3) by adding at the end the following new subsection:

"(d) Communication During Time Off Duty.–During a train employee's minimum off-duty period of 10 consecutive hours, as provided under subsection (a), or during an interim period of at least 4 consecutive hours available for rest under subsection (b)(7), a railroad carrier, and its managers, supervisors, officers, and agents, shall not communicate with the train employee by telephone, by pager, or in any other manner that could disrupt the employee's rest. Nothing in this subsection shall prohibit communication necessary to notify an employee of an emergency situation posing potential risks to the employee's safety or health.".

SEC. 202. EMPLOYEE SLEEPING QUARTERS.

Section 21106 of title 49, United States Code, is amended–

(1) by inserting "(a) In General.–" before "A railroad carrier"; and

(2) by adding at the end the following new subsection:

"(b) Camp Cars.–Effective 12 months after the date of enactment of this subsection, a railroad carrier and its officers and agents may not provide sleeping quarters through the use of camp cars, as defined in Appendix C to *7 part 228 of title 49 of the Code of Federal Regulations, for employees and any individuals employed to maintain the right of way of a railroad carrier.".

SEC. 203. FATIGUE MANAGEMENT PLANS.

(a) Amendment.–Chapter 211 of title 49, United States Code, is amended by adding at the end the following new section:

"S 21109. Fatigue management plans

"(a) Plan Submission.–

"(1) Requirement.–Each railroad carrier shall submit to the Secretary of Transportation, and update at least once every 2 years, a fatigue management plan that is designed to reduce the fatigue experienced by railroad employees and to reduce the likelihood of accidents and injuries caused by fatigue. The plan shall address the safety effects of fatigue on all employees performing safety sensitive functions, including employees not covered by this chapter. The plan shall be submitted not later than 1 year after the date of the enactment of this section, or not later than 45 days prior to commencing operations, whichever is later.

"(2) Contents of plan.–The fatigue management plan shall–

"(A) identify and prioritize all situations that pose a risk for safety that may be affected by fatigue;

"(B) include the railroad carrier's–

"(i) rationale for including and not including each element described in subsection (b)(2) in the plan;

"(ii) analysis supporting each element included in the plan; and

"(iii) explanations for how each element in the plan will reduce the risk associated with fatigue;

"(C) describe how every condition on the railroad carrier's property, and every type of employee, that is likely to be affected by fatigue is addressed in the plan; and

"(D) include the name, title, address, and telephone number of the primary person to be contacted with regard to review of the plan.

"(3) Approval.–(A) The Secretary shall review each proposed plan and approve or disapprove such plan based on whether the requirements of this section are sufficiently and appropriately addressed and the proposals are adequately justified in the plan.

"(B) If the proposed plan is not approved, the Secretary shall notify the affected railroad carrier as to the specific points in which the proposed plan is deficient, and the railroad carrier shall correct all deficiencies within 30 days following receipt of written notice from the Secretary. If a railroad carrier does not submit a plan (or, when directed by the Secretary, an amended plan), or if a railroad carrier's amended plan is not approved by the Secretary, the Secretary shall prescribe a fatigue management plan for the railroad carrier.

"(4) Employee participation.–(A) Each affected railroad carrier shall consult with, and employ good faith and use its best efforts to reach agreement by consensus with, all of its directly affected employee groups on the contents of the fatigue management plan, and, except as provided in subparagraph (C), shall jointly with such groups submit the plan to the Secretary.

"(B) In the event that labor organizations represent classes or crafts of directly affected employees of the railroad carrier, the railroad carrier shall consult with these organizations in drafting the plan. The Secretary may provide technical assistance and guidance to such parties in the drafting of the plan.

"(C) If the railroad carrier and its directly affected employees (including any labor organization representing a class or craft of directly affected employees of the railroad carrier) cannot reach consensus on the proposed contents of the plan, then–

"(i) the railroad carrier shall file the plan with the Secretary; and

"(ii) directly affected employees and labor organizations representing a class or craft of directly affected employees may, at their option, file a statement with the Secretary explaining their views on the plan on which consensus was not reached.

"(b) Elements of the Fatigue Management Plan.–

"(1) Consideration of varying circumstances.–Each plan filed with the Secretary under the procedures of subsection (a) shall take into account the varying circumstances of operations by the railroad carrier on different parts of its system, and shall prescribe appropriate fatigue countermeasures to address those varying circumstances.

"(2) Issues affecting all employees performing safety sensitive functions.–The railroad carrier shall consider the need to include in its fatigue management plan elements addressing each of the following issues:

*8 "(A) Education and training on the physiological and human factors that affect fatigue, as well as strategies to counter fatigue, based on current and evolving scientific and medical research and literature.

"(B) Opportunities for identification, diagnosis, and treatment of any medical condition that may affect alertness or fatigue, including sleep disorders.

"(C) Effects on employee fatigue of emergency response involving both short-term emergency situations, including derailments, and long-term emergency situations, including natural disasters.

"(D) Scheduling practices involving train lineups and calling times, including work/rest cycles for shift workers and on-call employees that permit employees to compensate for cumulative sleep loss by guaranteeing a minimum number of consecutive days off (exclusive of time off due to illness or injury).

"(E) Minimizing the incidence of fatigue that occurs as a result of working at times when the natural circadian rhythm increases fatigue.

"(F) Alertness strategies, such as policies on napping, to address acute sleepiness and fatigue while an employee is on duty.

"(G) Opportunities to obtain restful sleep at lodging facilities, including sleeping quarters provided by the railroad carrier.

"(H) In connection with the scheduling of a duty call, increasing the number of consecutive hours of rest off duty, during which an employee receives no communication from the employing railroad carrier or its managers, supervisors, officers, or agents.

"(I) Avoiding abrupt changes in rest cycles for employees returning to duty after an extended absence due to circumstances such as illness or injury.

"(J) Additional elements as the Secretary considers appropriate.

"(c) Compliance and Enforcement.–

"(1) Compliance requirement.–Effective upon approval or prescription of a fatigue management plan, compliance with that fatigue management plan becomes mandatory and enforceable by the Secretary.

"(2) Effective date.–A fatigue management plan may include effective dates later than the date of approval of the plan, and may include different effective dates for different parts of the plan.

"(3) Audits.–To enforce this section, the Secretary may conduct inspections and periodic audits of a railroad carrier's compliance with its fatigue management plan.

"(d) Definition.–For purposes of this section the term 'directly affected employees' means employees, including employees of an independent contractor or subcontractor, to whose hours of service the terms of a fatigue management plan specifically apply.".

(b) Table of Sections Amendment.–The table of sections for chapter 211 of title 49, United States Code, is amended by adding at the end the following new item:

"21109. Fatigue management plans.".

(a) Amendment.–Chapter 211 of title 49, United States Code, as amended by this Act, is further amended by adding at the end the following new section:

"S 21110. Regulatory authority

"The Secretary of Transportation may by regulation–

"(1) reduce the maximum hours an employee may be required or allowed to go or remain on duty to a level less than the level established under this chapter, based on scientific and medical research; or

"(2) increase the minimum hours an employee may be required or allowed to rest to a level greater than the level established under this chapter, based on scientific and medical research.".

(b) Table of Sections Amendment.–The table of sections for chapter 211 of title 49, United States Code, is amended by adding at the end the following new item:

"21110. Regulatory authority.".

Section 21303(c) of title 49, United States Code, is amended by striking "officers and agents" and inserting "managers, supervisors, officers, and agents".

***9** TITLE III–PROTECTION OF EMPLOYEES AND WITNESSES

SEC. 301. EMPLOYEE PROTECTIONS.

Section 20109 of title 49, United States Code, is amended to read as follows:

"S 20109. Employee protections

"(a) Protected Actions.–A railroad carrier engaged in interstate or foreign commerce, and an officer or employee of such a railroad carrier, shall not by threat, intimidation, or otherwise attempt to prevent an employee from, or discharge, discipline, or in any way discriminate against an employee for–

"(1) filing a complaint or bringing or causing to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety, chapter 51 or 57 of this title;

"(2) testifying in a proceeding described in paragraph (1);

"(3) notifying, or attempting to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

"(4) cooperating with a safety investigation by the Secretary of Transportation or the National Transportation Safety Board;

"(5) furnishing information to the Secretary of Transportation, the National Transportation Safety Board, or any other public official as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

"(6) accurately reporting hours of duty pursuant to chapter 211.

"(b) Hazardous Conditions.–(1) A railroad carrier engaged in interstate or foreign commerce, and an officer or employee of such a railroad carrier, shall not by threat, intimidation, or otherwise attempt to prevent an employee from, or discharge, discipline, or in any way discriminate against an employee for–

"(A) reporting a hazardous condition;

"(B) refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

"(C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous condition, if the conditions described in paragraph (2) exist.

"(2) A refusal is protected under paragraph (1)(B) and (C) if–

"(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

"(B) the employee reasonably concludes that–

"(i) the hazardous condition presents an imminent danger of death or serious injury; and

"(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

"(C) the employee, where possible, has notified the carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

"(3) This subsection does not apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

"(c) Enforcement Action.–

"(1) In general.–An employee who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.

"(2) Procedure.–

"(A) In general.–An action under this section shall be governed under the rules and procedures set forth in section 42121(b).

"(B) Exception.–Notification made under section 42121(b)(1) shall be made to the person named in the complaint and to the person's employer.

"(C) Burdens of proof.–An action brought under this section shall be governed by the legal burdens of proof set forth in section 42121(b).

"(D) Statute of limitations.–An action under this section shall be commenced not later than 1 year after the date on which the violation occurs.

***10** "(3) De novo review.–If the Secretary of Labor has not issued a final decision within 180 days after the filing of the complaint (or, in the event that a final order or decision is issued by the Secretary of Labor, whether within the 180-day period or thereafter, then, not later than 90 days after such an order or decision is issued), the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

"(d) Remedies.–

"(1) In general.–An employee prevailing in any action under this section shall be entitled to all relief necessary to make the covered individual whole.

"(2) Damages.–Relief in an action under this section shall include–

"(A) reinstatement with the same seniority status that the covered individual would have had, but for the discrimination;

"(B) the amount of any back pay, with interest; and

"(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

"(3) Possible relief.–Relief may also include punitive damages in an amount not to exceed 10 times the amount of any compensatory damages awarded under this section.

"(e) Criminal Penalties.–

"(1) In general.–It shall be unlawful for any railroad carrier to commit an act prohibited by subsection (a). Any person who willfully violates this section by terminating or retaliating against any such covered individual who makes a claim under this section shall be fined under title 18, United States Code, imprisoned not more than 1 year, or both.

"(2) Reporting requirement.–

"(A) In general.–The Attorney General shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate an annual report on the enforcement of paragraph (1).

"(B) Contents.–Each such report shall–

"(i) identify each case in which formal charges under paragraph (1) were brought;

"(ii) describe the status or disposition of each such case; and

"(iii) in any actions under subsection (c)(1) in which the employee was the prevailing party or the substantially prevailing party, indicate whether or not any formal charges under paragraph (1) of this subsection have been brought and, if not, the reasons therefor.

"(f) No Preemption.–Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

"(g) Rights Retained by Covered Individual.–Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any covered individual under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.".

TITLE IV–GRADE CROSSINGS

SEC. 401. TOLL-FREE NUMBER TO REPORT GRADE CROSSING PROBLEMS.

Section 20152 of title 49, United States Code, is amended to read as follows:

"S 20152. Emergency notification of grade crossing problems

"Not later than 18 months after the date of enactment of the Federal Railroad Safety Improvement Act of 2007, the Secretary of Transportation shall require each railroad carrier to–

"(1) establish and maintain a toll-free telephone service, for rights-of-way over which it dispatches trains, to directly receive calls reporting–

"(A) malfunctions of signals, crossing gates, and other devices to promote safety at the grade crossing of railroad tracks on those rights-of-way and public or private roads; and

"(B) disabled vehicles blocking railroad tracks at such grade crossings;

***11** "(2) upon receiving a report of a malfunction or disabled vehicle pursuant to paragraph (1), immediately contact trains operating near the grade crossing to warn them of the malfunction or disabled vehicle;

"(3) upon receiving a report of a malfunction or disabled vehicle pursuant to paragraph (1), and after contacting trains pursuant to paragraph (2), contact, as necessary, appropriate public safety officials having jurisdiction over the grade crossing to provide them with the information necessary for them to direct traffic, assist in the removal of the disabled vehicle, or carry out other activities appropriate to responding to the hazardous circumstance; and

"(4) ensure the placement at each grade crossing on rights-of-way that it owns of appropriately located signs, on which shall appear, at a minimum–

"(A) a toll-free telephone number to be used for placing calls described in paragraph (1) to the railroad carrier dispatching trains on that right-of-way;

"(B) an explanation of the purpose of that toll-free number as described in paragraph (1); and

"(C) the grade crossing number assigned for that crossing by the National Highway-Rail Crossing Inventory established by the Department of Transportation.

The Secretary of Transportation shall implement this section through appropriate regulations.".

SEC. 402. ROADWAY USER SIGHT DISTANCE AT HIGHWAY-RAIL GRADE CROSSINGS.

(a) In General.–Subchapter II of chapter 201 of title 49, United States Code, is amended by adding at the end the following new section:

"S 20156. Roadway user sight distance at highway-rail grade crossings

"(a) In General.–Not later than 18 months after the date of enactment of the Federal Railroad Safety Improvement Act of 2007, the Secretary of Transportation shall prescribe regulations that require each railroad carrier to remove from its rights-

for rail seat abrasion; concrete crosstie pad wear limits; missing or broken rail fasteners; loss of appropriate toeload pressure; improper fastener configurations; and excessive lateral rail movement.

Section 604. Certification of conductors

This section adds section 20160 to title 49, United States Code. Section 20160 requires the Secretary, within 18 months of the date of enactment, to prescribe **2165 regulations and issue orders to establish a program requiring the certification of train conductors. In prescribing such regulations, the Secretary must require that conductors on passenger trains be trained in security, first aid, and emergency preparedness.

Section 605. Minimum training standards

This section adds section 20161 to title 49, United States Code. Section 20161 requires the Secretary, within 180 days of enactment, *47 to establish minimum training standards for each class and craft of railroad employees and develop a minimum training curriculum, and ongoing training criteria, testing, and skills evaluation measures to ensure that railroad employees charged with the inspection of track or railroad equipment are qualified to assess railroad compliance with Federal standards to identify defective conditions and initiative immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, or injury. The section also requires railroad carriers to submit their training and qualification programs to the Federal Railroad Safety Administration for review and approval.

Section 606. Prompt medical attention

This section adds section 20162 to title 49, United States Code. Section 20162 prohibits a railroad carrier from denying, delaying, or interfering with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad must promptly arrange to have the injured employee transported to the nearest medically appropriate hospital. This section further prohibits a railroad carrier from disciplining, or threatening to discipline, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician. For purposes of this section, "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Section 607. Emergency escape breathing apparatus

This section adds section 20163 to title 49, United States Code. Section 20163 requires the Secretary, within 18 months of enactment, to prescribe regulations that require the railroads to provide emergency breathing apparatus for all crewmembers on freight trains carrying hazardous materials that would pose an inhalation hazard in the event of unintentional release and to provide such crewmembers with appropriate training for using the breathing apparatus.

**2166 Section 608. Locomotive cab environment

This section requires the Secretary, within 12 months of the date of enactment, to transmit a report to Congress on the effects of the locomotive cab environment on the safety, health, and performance of train crews.

Section 609. Tunnel information

This section requires each railroad carrier, with respect to each of its 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 Inhalation Hazardous materials per year, to maintain for at least two years historical documentation of structural inspection and maintenance activities for such tunnels, including information on the methods of ingress and egress into and out of the tunnels, the types of cargos typically transported through the tunnels, and schematics or blueprints for the tunnels, when available. Upon request, *48 railroad carriers are also required to provide periodic briefings to the government of the local jurisdictions in which the tunnels are located, including updates whenever a repair or rehabilitation project substantially

Appendix D

Sen. Proceedings 110th Congress, S10033, 10041

154 Cong. Rec. S10031-02, 2008 WL 4390318
**1 Congressional Record --- Senate
Proceedings and Debates of the 110th Congress, Second Session
Monday, September 29, 2008

*S10031 FEDERAL RAILROAD SAFETY IMPROVEMENT ACT OF 2007

The ACTING PRESIDENT pro tempore.

Under the previous order, the Senate will resume consideration of the House message to accompany H.R. 2095, which the clerk will report.

The legislative clerk read as follows:

Message from the House of Representatives to accompany H.R. 2095, entitled an Act to amend title 49, United States Code, to prevent railroad fatalities, injuries, and hazardous materials releases, to authorize the Federal Railroad Safety Administration, and for other purposes.

Pending:

Reid amendment No. 5677 (to the motion to concur in the amendment of the House of Representatives to the amendment of the Senate to the bill), to establish the enactment date.

Reid amendment No. 5678 (to amendment No. 5677), of a perfecting nature.

The ACTING PRESIDENT pro tempore.

Under the previous order, the time until 12:15 will be controlled by the Republican leader, and the time from 12:15 until 12:30 will be controlled by the majority leader.

The Senator from Texas is recognized.

Mrs. HUTCHISON.

Mr. President, I rise to talk about the rail safety and Amtrak authorization bill. This is a bill that I think will move forward a major alternative option for our passengers and for the mobility of our country-Amtrak.

Most people think of Amtrak as the Northeast corridor, and going from Boston all the way through New York and Washington and on down through Florida. That is a very important route. In fact, that route has more than 2,600 trains operating every day. So it is a major part of our transportation infrastructure in what is called the Northeast corridor.

However, we have a national system for Amtrak as well. It is a national system that goes, of course, down the east coast, as I mentioned, but it also goes down the west coast. It goes all the way up and down the west coast. It has lines that go across the top of our country, across the bottom of our country east to west, and right down the middle, what is called the Texas Eagle, which goes from Chicago, down through St. Louis, down into Texas, and across to San Antonio, where it meets the Sunset Limited, which goes from California to Florida.

So we have the skeleton of a national system. It is a system we must preserve. It is a system that has become more and more of an option as gasoline prices have increased. We saw how many people went to train use after 9/11, when the aviation industry was shut down. It is something we must support and keep.

Now we are increasing ridership every year. During fiscal year 2007, 25.8 million passengers, representing the fifth straight fiscal year of record ridership, boarded Amtrak. Ridership is up 7 percent more over this time last year, as people have gone to the trains because of the high gasoline prices.

**2 This bill authorizes $2.6 billion annually over 5 years. It authorizes that amount. In Congress we authorize, and then the appropriations come later on an annual basis. And $2.6 billion would be the ceiling for the next 5 years for Amtrak. But to put this in perspective, when we are talking about alternatives in our transportation system, we have authorized, in SAFETEA-LU, the highway authorization bill, $40 billion. The FAA bill, introduced in this Congress, proposes to invest $17 billion annually in aviation. Last year we passed a Water Resources Development Act authorizing $23 billion over the next 2 years.

We are talking about $13 billion over 5 years-$2.6 billion each year, which is the very least of the authorizations of any of our transportation systems. If included with the number of passengers served by our aviation industry, in 2007, Amtrak would rank eighth in the number of passengers served, with a market share of right at 4 percent. There are nearly twice as many passengers on an Amtrak train as on a domestic airline flight.

So we have crafted a bill-and I have to tell you honestly, this is not my bill. Actually, it started with Trent Lott. Senator

Lautenberg on the majority side now has continued to be a leader in this field. I support the bill

Frank Lautenberg and Trent Lott negotiated because it is right for our country. I have always said, for me, Amtrak is national or nothing.

There was a time in this Congress when nobody ever talked national. They only talked about saving the Northeast corridor. Of course, that is the rail line that is owned by Amtrak. The other rail lines mostly are not separated, although I would like to see that changed. But we are using freight rail, and we are at the behest of the freight rail lines. So it is not as efficient. But it is very important we keep those relationships and work toward having the separate lines on those rail rights of way. Today, we are talking about a national system.

There was a time when we only talked about the Northeast corridor. *S10032 But many of us who are on the national lines, who have been supportive of the Northeast corridor, said: Wait a minute. We cannot create a stepchild in the rest of the country. If my taxpayers in Texas and Trent Lott's taxpayers-now

Thad Cochran's and

Roger Wicker's taxpayers-are subsidizing Amtrak in the Northeast corridor, we want to have a chance at the national system because it has so much potential to work with States and cities to use mass transit systems that feed into the national system, and it will help all of us with mobility. In fact, all of those who support the Northeast corridor have been very supportive also of the national system.

We have had a partnership in Congress for the last 10 years that I have been here to make sure we are making Amtrak financially responsible with the least amount of Federal help of any of the transportation modes. Highways are $40 billion a year. We are $2.6 billion a year. So we have a bill that has been crafted, I think, in the very most responsible way. I recommend it, and I appreciate very much the opportunity to take this bill as we have crafted it, with a lot of give and take, and recommend to the Congress and the Senate we pass it today.

**3 Mr. President, I wish to yield up to 5 minutes to the distinguished senior Senator from the Acting President pro tempore's home Commonwealth of Virginia, one who I have to say has been a longtime supporter of Amtrak and has been such a leader in this Congress. This is his last term in Congress. He has decided not to seek reelection. He is someone who has been a leader not only on Amtrak but certainly on our military affairs for our country, the man whom we call the squire, the senior Senator from Virginia.

The ACTING PRESIDENT pro tempore.

The senior Senator from Virginia.

Mr. WARNER.

Mr. President, I thank my long-time friend and colleague in the Senate, the Senator from Texas. For so many reasons she is a real leader on our team, on the team of leadership.

But how many times, if I might ask the Senator from Texas, have you taken this bill to the floor of the Senate on behalf of Amtrak, rail safety, Metro? Would you mind telling us how many times?

Mrs. HUTCHISON.

I say to Senator

Warner, thank you. It is my pleasure to have supported Amtrak from the day I walked in the door 15 years ago. I think the partnership between the Northeast corridor supporters of Amtrak and the rest of the country supporters has created a much stronger system. We are seeing that in the ridership. I think if we make the commitment to Amtrak we make to the other modes of transportation, it will be better for our whole country and give more options to the people of our country.

Mr. WARNER.

Mr. President, I recognize that great contribution, but I wanted it a part of the

Record.

I say to my long-time friend, Mr. Lautenberg, the distinguished senior Senator from New Jersey, I hope in your remarks you will recite how many times you have gone to the floor on behalf of people seeking the needs of not only Amtrak but the rail safety and the Metro funds which are in this bill this time.

These two Senators have been the engine on this very important piece of legislation. The distinguished Acting President pro tempore and I are proud to represent Virginia, one of the beneficiaries of this system. But I have also tried through my many years in the Senate to have a voice for the District of Columbia.

This Amtrak as well as the Metro funds in here are the pulse beat, the arteries which feed the Nation's Capital. Some 40 to 50 of the various Government agencies serving our Nation are accessed with Amtrak. I say to my colleagues in the Senate, all 100 Senators-all 100 Senators-have staff members and the families of staff, and ourselves, who very often utilize the Metro system and indeed access part of the Amtrak system. This is a 10-year funding for the Metro for capital improvement and operating.

Mrs. HUTCHISON.

Mr. President, will the Senator yield?

Mr. WARNER.

Yes.

Mrs. HUTCHISON.

Mr. President, I wish to say on that point, the distinguished senior Senator from Virginia has mentioned how important the Metro part of it is. I think he has represented so well the interests of all the people who live and work in Virginia, Maryland, and the District of Columbia.

**4 It also applies, I would expand, to the visitors to our capital because the rail line on Amtrak that goes from Baltimore Airport to the District, our capital, and from Washington National Airport to our capital, has been so helped by having this kind of service from Amtrak at National Airport or Baltimore to be able to get on that train and come visit our capital. That is a mode of transportation that is used by the millions of visitors who come to visit our capital.

This is part of the mobility we provide to people who bring their families here. It is the most efficient and least costly way to get into the District to show children the opportunity to see our capital. I appreciate the senior Senator from Virginia pointing out that this is part of our responsibility.

The ACTING PRESIDENT pro tempore.

The Senator from Virginia.

Mr. WARNER.

Mr. President, I wish to add that this system, the Metro system, is a feeder to the Amtrak. It was started in 1960 under President Eisenhower. Each year, the Congress has been a supporter of this system. But key to this-and I compliment my colleagues in the House, Congressmen

Moran and

Davis-are the matching funds from each State, so the portion of authorization we seek for Metro in this would be matched by the several States and the District of Columbia.

Mr. President, I intend to cast a "yea" vote on cloture on the motion to concur with the House amendment to the Railway Safety-Amtrak bill. I believe this legislative package is critical for so many reasons.

Of highest importance to me, though, is a much-needed authorization of $1.5 billion over 10 years for the Washington Metropolitan Area Transit Authority, WMATA, the Metro system that probably brought a majority of our staffers to work this morning.

WMATA has been one of the Washington, DC, metro area's most successful partnerships with the Federal Government.

In 1960, President Eisenhower signed legislation to provide for the development of a regional rail system for the Nation's Capital and to support the Federal Government. Since 1960, Congress has continually reaffirmed the Federal Government's commitment to Metro by passing periodic reauthorizing bills.

Over half of Metro's riders at peak times are Federal employees and contractors, and a large percentage of these riders are Virginia residents.

Based on Metro's 2007 Rail Ridership Survey, approximately 40 percent of respondents identified themselves as Federal workers who ride Metrorail to work. 39 percent of that group identified themselves as Virginia residents.

We are talking about thousands of cars taken off the major roadways each day because of our area's Metro system.

Metro's record riderships have occurred during historic events where people from all over the country flock to the Nation's Capital to honor their Federal Government: President Reagan's funeral, Fourth of July celebrations, Presidential inaugurations. In addition, the Metro system proved indispensable to the Federal Government and the Nation's Capital generally in the aftermath of the terrorist attacks of September 11, 2001.

**5 Over 50 Federal agencies in the National Capital Region are located adjacent to Metro stations. Federal agencies rely on WMATA to get their employees to and from the workplace year-round, in all types of weather.

As I mentioned, the Railway Safety-Amtrak bill includes $1.5 billion in Federal Transit Authority funding over 10 years for capital and preventative maintenance projects for WMATA. This language was added by voice vote to the Amtrak bill by my delegation mate, Congressman TOM DAVIS, as a floor amendment during the House's Amtrak debate over the summer.

These dollars will be matched by the Commonwealth of Virginia, Washington, DC, and the State of Maryland.

This critical investment will help provide for much-needed improvements to this stressed transit system. Projects such as station and facility rehabilitation and tunnel repairs will be undertaken. ***S10033**

These funds will also allow WMATA to add new rail cars and buses to help congestion during peak hours.

This critical legislation, which would authorize much-needed Federal funding, contingent on State and local dedicated matches, recognizes how vital Metro is to the region and the Federal Government.

Such legislation is integral to the well-being of the area's transportation system, as we struggle to address traffic congestion, skyrocketing gas prices, global climate change, and the local quality-of-life concerns.

From its inception, the Federal Government has played a significant role in funding the construction and operation of the Metrorail system. I hope this Congress will continue to show that support.

I ask my colleagues to join me in voting "yes" for WMATA today.

Mr. LAUTENBERG.

Mr. President, I rise today to ask my colleagues to join me in voting for cloture on this important rail safety and Amtrak reauthorization bill. I am pleased to be doing this with the distinguished Senator from Texas, Mrs. Hutchison, and am particularly delighted to have the chance to share in the twilight area of the distinguished career of the senior Senator from Virginia on this issue.

John Warner and I have been friends for many years. We both had some military experience in World War II, and Senator

Warner went on to Korea to continue his duty. We are grateful for not only his duty in the military but his service to the country. Senator

Warner is a man with balance and sensitivity. It doesn't mean he always agrees, and when he doesn't, you know that. He is not hesitant to let you know that he disagrees, but he always does it as a gentleman and always with a courtly touch, if I might say.

So I am pleased to be here and to have his interests in taking care of the District of Columbia, the State of Virginia, and the State of Maryland in terms of having the kind of rail service that is essential now.

The ACTING PRESIDENT pro tempore.

The Senator from Virginia.

Mr. WARNER.

Mr. President, if the Senator would yield, I would just express my appreciation and thanks to the Senator from New Jersey. After 30 years in the Senate, much of that time has been spent working with him on a wide range of issues, many of them international issues of great importance. But I am always happy to come back to the fundamentals of what makes this institution work, and that is our staff and employees and others who are dependent upon this system. I thank the Senator.

Mrs. HUTCHISON.

****6** Mr. President, I ask unanimous consent that I be given 2 minutes for Senator

DeMint. I overlooked his coming to the floor. It is my fault. I ask unanimous consent for 2 additional minutes and also to give the other side 2 additional minutes.

The ACTING PRESIDENT pro tempore.

Is there objection?

Without objection, it is so ordered.

The Senator from New Jersey is recognized.

Mr. LAUTENBERG.

Mr. President, when we look at railroads and the role they serve in our country, it is interesting to see that we are now fighting for having better rail service when we are practically overwhelmed with demand for it. However, on an average day in America, two people are killed and more than 24 injured in railroad-related accidents.

The recent Metrolink collision in Chatsworth, CA, that killed 25 people and injured 135 serves as a tragic reminder that we must act to protect the millions of passengers who ride trains each day in this country. Yet Federal rail safety programs have not been reauthorized since 1994. Some railroad employees are working under laws that date back over a century ago. It is critical that we bring our safety laws into the 21st century for travelers, for the rail workers, and our country's railroads.

Under the leadership of Senator

Inouye and the Commerce Committee, working in a bipartisan fashion, we held two hearings to gain input from the administration, large and small railroads, and rail workers. We were very careful with that. The bill we put together was reported out of committee unanimously. It passed then unanimously on the Senate floor last month.

The bill before us today continues an agreement between the Senate Commerce Committee leaders and our counterparts in the House which also passed a rail safety bill. It requires new lifesaving technologies such as positive train control, also called PTC systems. Federal accident investigators say this technology could have made a difference in this month's California crash.

Our bill updates the hours of service laws to ensure that train crews and signal workers get sufficient rest to remain alert and reduce fatigue.

It gives the Federal Railroad Administration the tools to better oversee the safety of the rail industry, including more inspectors and higher penalties for violations of Federal safety laws. In all, the rail safety improvements in this bill are long overdue for workers, for the industry, and for Federal regulators.

In addition to the rail safety legislation, this bill reauthorizes Amtrak for the first time since 1997. As with rail safety, the Senate has passed legislation on this already in this Congress by an overwhelming bipartisan vote on the Senate floor last October. I coauthored that bill with Senator Lott, and it reflects our shared vision for expanding the use of passenger trains in the United States. We held several hearings on this bill and received input from Amtrak, freight railroads, the States, and rail labor.

**7 Since we were blocked from going to conference and reconciling the differences with the House Amtrak bill, we worked out a bipartisan, bicameral agreement with our House counterparts. This portion of the bill before us today substantially changes our Federal policy toward passenger rail travel. It provides the funding that Amtrak needs to succeed as a real option for travelers. Included in this funding is a new $2 billion grant program for States to pursue passenger rail projects. In all, this bill would authorize over $2.5 billion each year for Amtrak, but it includes the States also for the next 5 years. I say "includes the States also" because it gives the States an opportunity to establish their own rail corridors that have so much interest now. This level of funding will allow more passenger trains to serve more travelers, will create infrastructure-related jobs in America, and will allow Amtrak to make long-term growth plans.

With this investment also comes more accountability. Our bill contains significant reforms, many called for by Senators who have not always supported Federal funding for Amtrak. These reforms will require the railroad to improve its efficiency and management by mandating a new financial accounting system, requiring States to pay for those Amtrak services they get, and considering passenger trains run by freight railroads. Our bill also allows private firms to submit proposals to build new high-speed lines where there is interest, which allows for a full public discussion of this potential.

Both the rail safety and the Amtrak portions of this bill are needed and long overdue. Since we last passed rail safety legislation, more than 9,000 people have been killed and more than 100,000 have been injured in train-related incidents. Think about that. Here we are, we are having a little battle about this, when we can be saving lives, making people more comfortable in their travel, and making rail service more reliable.

Since we last passed Amtrak legislation, gas prices, everyone has noticed, have tripled, highways have gotten more crowded, and we have suffered two of the worst years ever for flight delays. The House took up this bill and passed it on a bipartisan voice vote last week. Now the Senate needs to invoke cloture, pass this bill, and send it to the President for his signature.

I ask that all Senators let us proceed to this question and help travelers, the rail workers, States, and the American railroad and supply companies in this critical industry.

Mr. President, what is the time situation please?

The ACTING PRESIDENT pro tempore.

With the additional time granted, the majority now has 7 minutes 10 seconds, and the minority has 2 minutes.

Mr. LAUTENBERG.

Mr. President, our bill will result in a substantially safer railroad industry. In recognition of this, the Association of American Railroads and many railroad labor *S10034 unions together strongly support our bill.

**8 Our bill will expand the resources of the Federal Railroad Administration, the agency which regulates railroads for safety. It has provisions which would authorize 200 more inspectors and raise the maximum amounts for civil penalties that the agency can levy for violations of our safety laws. These violations can cost up to $100,000 each.

Too often it takes a catastrophe to get people around here to focus on severe gaps in our laws. Regrettably, earlier this month, America experienced that kind of tragedy. The accident took place in Chatsworth, CA. That train collision was only a

couple of weeks ago-September 12, 2008. The devastation we see here, including the loss of life and the number of injuries, is unacceptable if we can do anything about it, and we can.

We also owe it to the residents in communities such as Graniteville, SC. This was January 6, 2005. They had nine fatalities. We want to make sure these things don't happen again. In 2005, we had over 5,400 people evacuated from the area surrounding the accident to avoid the fog of deadly chlorine. Had this accident happened any later that morning, the consequences would have been much worse. Factory workers would have been at work in nearby mills and schoolchildren would have been in the nearby schools. So we owe it to the memory of those people to pledge that wherever we can avoid this kind of thing happening, we must do it.

We also owe it to the people of Luther, OK, who last month watched this massive fireball erupt after a train derailed and caused ethanol tanks to explode. Look at that picture. You can't see the train. That is what happened. We have to be better prepared to prevent these things from happening.

These are not trivial improvements we are talking about today in this legislation. I hope we can quickly finish our work on this bill and get sent to the President's desk for enactment, so that we can avoid the kinds of tragedies that we know are possible.

Mr. WEBB.

Mr. President, I rise today in support of the Federal Railroad Safety Improvement Act, H.R. 2095, which reauthorizes our Federal passenger rail program and contains a provision that would provide much needed funding for the Washington Metropolitan Area Transit Authority, WMATA.

I am a proud original cosponsor of the Amtrak reauthorization legislation, which seeks to improve the safety, efficiency, and reliability of our Nation's largest passenger rail service provider. With increasing traffic congestion on our Nation's roadways, it is time to invest in long-term and diversified infrastructure projects that improve passenger rail service. I have long stated my belief that America has been seriously neglecting its infrastructure, and I am pleased that this bill puts us on the path to making a renewed investment in passenger rail service. Notably, the bill before us today authorizes $13 billion for Amtrak over 5 years and includes $1.5 billion to develop high speed rail corridors throughout the United States, including the Southeast corridor which will connect Washington, DC, to Charlotte, NC.

**9 However, most importantly the legislation before us includes a bill that many of us in the Maryland and Virginia delegations have long been pushing for a long time. I want to thank Chairman

Lautenberg and his staff for working with me and my colleagues to include the National Capital Transportation Amendments Act of 2007, S.1446.

In short, the Metro funding provision would authorize $1.5 billion over 10 years for Metro to finance capital and preventive maintenance projects for the Metrorail system. The Federal funding would share the funding burden with the States because the money would be contingent on the District of Columbia, Maryland, and Virginia jointly matching the Federal contribution toward Washington Metro's capital projects.

Appropriate funding for the Metro system is critically important to our Federal workforce, the millions of tourists who visit our Nation's Capital area, as well as the millions of people who live around Washington, DC. I have worked diligently with my Senate and House colleagues over the past 2 years to pass this legislation, and I ask my colleagues to help secure passage of this provision in the Amtrak authorization bill.

Metrorail and Metrobus ridership continue to grow as more than 1 million riders on average per weekday choose Metro as their preferred mode of transit for traveling around the National Capital Region. As the price of gasoline has soared, more people are turning to Metro as their primary mode of transportation. I would note that in fiscal year 2008, there were 215 million trips taken on Metrorail, which is the highest yearly total ever. This represents an increase of 4 percent over last year. In fact, 31 out of 34 of Metrorail top ridership days have occurred since April of this year. On Metrobus, there were 133 million trips taken, an increase of 1.4 million relative to 2007, and also the highest yearly total ever. New funding authorized in this legislation would provide the necessary resources to increase bus and rail capacity and meet forecasted ridership demands before the system and region become totally mired in congestion.

The Federal role in supporting Metro is clear, with a long track record to draw upon. Washington Metro began building the rail system in 1969 with Federal funding authorized under the National Capital Transportation Act of 1969. On two separate occasions, Congress has authorized additional funding for Metro construction and capital improvements. According to a 2006 Government Accountability Office report:

154 Cong. Rec. S10039-03, 2008 WL 4390323
**1 Congressional Record --- Senate
Proceedings and Debates of the 110th Congress, Second Session
Monday, September 29, 2008

*S10039 FEDERAL RAILROAD SAFETY IMPROVEMENT ACT OF 2007-CONTINUED

Mr. CARDIN.

Mr. President, I am very pleased that the Senate stands poised to approve H.R. 2095, a bill that provides for a new generation of rail safety improvements, the reauthorization of Amtrak, and the critical Federal funding for the Washington Metro system.

All three elements of this legislation are essential to bringing America's rail into the 21st century. There are many reasons we need to do that. We need to do that because it is important for quality of life, we need to do that because it is good for our environment, we need to do that for energy security, we need to do it because it should be an important priority for our Nation.

Now we are ready to move forward. I wished to focus my comments on title VI, which is the National Capital Transportation Amendments, a section that incorporates legislation I sponsored to reinvest in the Washington Metro system.

At the outset, I wish to thank my cosponsors, Senators

Mikulski, Warner, and

Webb. This has been a bipartisan regional effort, where we have worked together in an effort to come up with the right proposal.

I noticed a little earlier today that Congressman

Tom Davis of Virginia was on our floor. I wish to acknowledge his hard work on this legislation. He was critically important in getting this legislation through and the strategies in order to be able to accomplish an opportunity to finally vote on this legislation.

Along with my colleagues from Maryland and Virginia, Congressman

Hoyer was very instrumental, and others. Our collective thanks also go to the chairman and ranking member of the Homeland Security and Government Affairs Committee, Mr. Lieberman and Ms. Collins. They were very helpful in moving forward on this bill. I would like to thank also the Commerce Committee, Senator

Inouye and Senator

Stevens and Senator

Smith for accommodating the strategies so we could actually vote and pass the bill during this session.

A final word of thanks goes to Senator

Lautenberg. He has been the champion on Amtrak. He has been the real champion to keep us focused on modernizing Amtrak and how important passenger rail is to our Nation. I wish to thank him for his persistence and for being able to marshal this bill through the Congress of the United States.

The record on the interest of the Federal Government in the Washington metropolitan area and transit goes back to 1952, when Congress directed the National Capital Regional Planning Council to prepare a plan for the movement of goods and people. That plan became the basis for the National Capital Transportation Act of 1960, which clearly states the Federal interests. From that legislation I quote:

**2 That Congress finds that an improved transportation system of the Nation's capital region is essential to the continued and effective performance of the functions of the Government of the United States.

In 1966, Congress created the Washington Metropolitan Area Transit Authority, WMATA, to plan, construct, finance, and operate a rapid rail system for the region. By any measure, Metro has succeeded beyond anyone's expectations. Metro is the second-busiest rapid rail transit system in the Nation, carrying the equivalent of the combined subway ridership of BART in San Francisco, MARTA in Atlanta, and SEPTA in Philadelphia. Metrobus is the fifth most heavily used bus system in the Nation. In all, the Metro system moves 1.2 million passengers a day. In the fiscal year which ended 3 months ago, 215 million trips were taken on Metrorail. That is 7 million more than in 2007.

In fact, 22 of the 25 Metrorail top ridership days have occurred since April of this year. And 133 million trips were taken on Metrobus in fiscal year 2008, which is the highest year total ever, an increase of 1.4 million relative to 2007.

But let me get to the Federal Government for one moment, our responsibility. Federal facilities are located within footsteps of 35 of the Metrorail's 86 stations; that is by design. Nearly *S10040 half the Metrorail rush hour riders are Federal employees, nearly 50 percent during peak time are Federal employees.

Approximately 10 percent of Metro's riders use the Metrorail stations at the Pentagon, Capitol South or Union Station. In other words, 10 percent of the ridership is directly related to the Capitol and the Pentagon, obviously our responsibility, serving the military, serving the Congress.

GSA's location policy is to site Federal facilities in close proximity to Metro stations. It is in their RFP. They put it there. They want it to be within walking distances of the Metro. Metrobus is available at virtually every Federal facility. Every weekday, 34,000 bus passengers either arrive or depart from the Pentagon.

Metro is now a mature system and showing signs of age. That is no surprise; 60 percent of Metro's system is now more than 20 years old. The average age of our bus facilities is 60 years. It is time we invest in modernization of these facilities. Today we act to protect the substantial investment the Federal Government and the region have made in an asset designed to serve the Federal workforce and the national capital region.

Metro is the only major public transportation in the country without a substantial dedicated source of funding. The need to address the shortcoming is urgent. That is what this legislation is about. The legislation we, hopefully, will pass will put WMATA on firm footing. The legislation authorizes $1.5 billion in Federal funds over 10 years. For every Federal dollar, Metro's funding partners in Maryland, Virginia, the District of Columbia will put up an equal match from dedicated funding sources. We finally get the dedicated funding sources Metro needs.

**3 The bill contains important financial safeguards. It establishes an Office of Inspector General for WMATA and expands the board of directors to include Federal Government appointees.

Also included in the bill is a provision that will improve cell phone coverage within the Metro subway system. I am sure that is going to make some of my colleagues happy that their cell phones will work on the Metro. Within 1 year, the 20 busiest rail station platforms will be required to have cell phone access. That requirement will go systemwide within 4 years.

WMATA can charge licensed wireless providers for access. This is a classic win-win situation, providing customers with enhanced service, giving riders an extra level of security in the event of a national or regional emergency, and giving the Transit Authority a much-needed revenue flow.

We have a great opportunity today to advance passenger rail service and safety in America, and transit in the Nation's Capital. Today, the Senate is taking a major step in putting Metro back on track. That is good for Washington, that is good for America and I thank my colleagues and I urge them to support the final passage of this legislation.

Mr. WARNER.

Would the Senator yield?

Mr. CARDIN.

I would be happy to yield to Senator

Warner, who has been the real champion on this issue. I mentioned earlier in my remarks the tremendous leadership that Senator

Warner provided in not only supporting this legislation and what he has done as far as regional issues in Washington but figuring a strategy so we could reach this moment. I congratulate him.

Mr. WARNER.

I was simply going to rise to say that the portion of the legislation we voted upon relating to the Metro is derivative of your regulation which you, and I was privileged to be a cosponsor, Senator

Webb was a cosponsor, Senator

Mikulski, the four of us put in. So although it may not be the exact bill number, it is, in fact, building on the foundation you laid.

I thank you very much for that, as do all our colleagues, every one of whom have people who utilize this system, the whole Federal Government.

But the important thing is, the District of Columbia can look to the Senators from Maryland, Virginia, and indeed the Members of the Congress and the House of Representatives, from time to time, to serve its interests. This is one which is very important, if not vital, to our Nation's Capital. I compliment the Senator for his leadership. As I leave the Senate, whatever modest mantle I have in this area, I convey to you and to Senator

Webb and Senator

Mikulski.

Mr. CARDIN.

Senator, you have been an inspiration to all of us on these issues and a model for how we should work together on regional issues. I congratulate you for a great record in the Senate.

Mr. WARNER.

Thank you. I have been a lucky man.

The PRESIDING OFFICER.

The Senator from Delaware is recognized.

TRIBUTE TO JOHN WARNER

Mr. CARPER.

**4 I say to my leader, from my days as a naval flight officer, how privileged I have been having served in Southeast Asia, to serve under his leadership when he was Secretary of the Navy and I was a young naval flight officer, pleased to serve under his leadership then, and delighted to be able to follow his leadership here again today on the important legislation we have been voting and debating here.

I wish to comment on what Senator

Cardin said. You provided an example for us. You provided an example for us how we are supposed to treat other people. You treat other people the way you wish to be treated. You are an embodiment of the Golden Rule.

If you look in the Bible, it talks about the two great commandments. The second one is to love they neighbor as thyself; treat other people the way you want to be treated. You certainly embody that. I, personally, am going to miss you. I know a lot of others are as well.

You talk about passing the mantle to Senator

Cardin. Your mantle is so heavy, it is amazing to me you can even walk around, all you have done and all you have accomplished.

But you are the best. It has been an honor to serve with you, again, here in this capacity.

Mr. WARNER.

Mr. President, I thank my good friend and colleague from Delaware. You mentioned naval aviation. It requires an extraordinary person to go into that program to fly those aircraft. I believe yours was a P-2; was it not?

Mr. CARPER.

It was a P-3.

Mr. WARNER.

I remember that airplane. It flew many missions. Your primary mission was watching the Soviets, I repeat the Soviet Navy, and its submarines operating off the shore and was vital to our security, to track and know where those submarines were because they had missile armaments which could inflict great harm on this country.

So I commend you, sir, for your service and I humbly thank you for your remarks.

Mr. CARPER.

Mr. President, I would like to talk a little bit about the legislation Senator

Warner, Senator

Cardin, Senator

Lautenberg, and others have crafted. It has been described as legislation that will accomplish three things: One, to eventually provide better transit service for folks in this part of the country, to help-whether you happen to work here, live here or visit here, the opportunity in years ahead, to get out of our cars, trucks and vans, leave them wherever they are, at home, in the parking lot or at work and take transit.

It will help the quality of our air. It will help reduce congestion in this part of our country. It will reduce our reliance on foreign oil. It works on all different kinds of levels.

I know Senator

Warner has done good work, along with Senators

Cardin and

Mikulski and Senator

Webb. I also wished to say to Senator

Lautenberg how much I appreciate his leadership in crafting the legislation, the Amtrak legislation, the rail safety legislation that is before us today.

**5 On the rail safety legislation, this is the first time in 10 years that we have actually come back and taken up a major reform of rail safety. The legislation provides some money-about $1.5 billion-for rail safety programs over the next 5 years.

The best thing it does is with respect to something called positive train control systems. A terrible accident, a commuter train and freight train accident out in California earlier this month, could have been prevented had those trains been fitted with-especially, the commuter rail train-a positive train control system. This legislation requires the installation of that kind of system in all trains by the year 2015. I would argue that it should be *S10041 sooner. My hope is it will be in a number of trains before that date, but it should be on all trains by that date. In the situation in California, apparently the engineer may have been text messaging and missed a stop signal, ran the stop signal and ran right into a freight train, killed a lot of people, including him. Had we had this positive train control system in place, all that damage and heartache would have been spared.

Another major provision of this legislation on the rail safety side deals with hours of service. I used to think we flew a lot of hours. I spent a lot of time when I was on Active Duty in the Navy. People who work on trains spend a lot of time operating the trains as well. Currently, they are able to work up to 400 hours per month. Under current law, they are allowed to work up to 400 hundred hours per month compared to about 100 hours for commercial airline pilots. This legislation drops that limit by about a third, down to around 275 hours per month. That is still a lot of hours to work in a month but better than what they had been working with for years.

The last piece I want to mention on rail safety deals with the highway-rail grade crossing. This is a case where you don't have a rail overpass or a road going under a railroad bridge but a situation where you have the rail and the highway meeting at the same level. This legislation requires the 10 States with the most highway-rail grade crossing collisions to develop plans to address the problem within a year of enactment. It also requires each railroad to submit information to an inventory of highway-rail crossings, including information about warning devices and signage.

In short, this legislation is going to save lives. It is going to save money. It is going to provide a much better situation for people who are running and operating trains, people who are traveling on trains, and for those of us who are driving around in our cars, trucks, and vans, trying to get across a rail crossing.

Next I would like to turn to Amtrak, an issue that is near and dear to my heart. In our State, we have a lot of folks who take the train. Amtrak has a train station in Wilmington, DE, and that train station is about the 11th or 12th busiest in the country. A lot of people depend on Amtrak in my State, as they do up and down the Northeast corridor.

**6 I used to serve on the Amtrak board of directors when I was Governor of Delaware. I rode Amtrak as a passenger. As someone who represents a State where we do a lot of repairs on locomotives, we do a lot of the repair work on the passenger and dining cars and so forth, I wanted to talk in sort of broad terms about this legislation.

Mr. President, what is the situation with the time?

The PRESIDING OFFICER.

The Senate has an order to recess at 1:30.

Mr. CARPER.

In that case, we better recess. I will have the opportunity later to pick up my remarks and talk about the Amtrak provisions in this bill.

I thank the Chair.

End of Document

Appendix E

Sen. Proceedings 110th Congress, S10283-01

154 Cong. Rec. S10283-01, 2008 WL 4425678
**1 Congressional Record --- Senate
Proceedings and Debates of the 110th Congress, Second Session
Wednesday, October 1, 2008

*S10283 FEDERAL RAILROAD SAFETY IMPROVEMENT ACT OF 2007

The PRESIDING OFFICER.

The Senate will now resume consideration of the House message on H.R. 2095, which the clerk will report.

The bill clerk read as follows:

Message from the House of Representatives to accompany H.R. 2095, entitled an Act to amend title 49, United States Code, to prevent railroad fatalities, injuries, and hazardous materials releases, to authorize the Federal Railroad Safety Administration, and for other purposes.

Pending:

Reid amendment No. 5677 (to the motion to concur in the amendment of the House of Representatives to the amendment of the Senate to the bill), to establish the enactment date.

Reid amendment No. 5678 (to amendment No. 5677), of a perfecting nature.

The PRESIDING OFFICER.

There will be 15 minutes for the majority and 15 minutes for the minority.

The Senator from Texas is recognized.

Mrs. HUTCHISON.

Mr. President, I wanted to make sure everyone knows we have 30 minutes allocated for Amtrak, and then the majority leader, Senator

Reid, also intends to go back, before the vote starts, and use his leader time at his discretion.

I rise to talk about the Amtrak reauthorization bill which will be the first vote tonight. I start out by thanking my colleague, Senator

Smith from Oregon, for all of the good work he has done on the rail safety portion of this bill; also Senator

Lautenberg, the majority member who has worked so hard on the Amtrak portion; and Senators INOUYE and Senator

Stevens, the chairman and ranking member of our committee during most of the negotiations on this big, very important bill.

I think we have come to a very good position on Amtrak and on rail safety, and the legislation before us combines these two important bills that were written with separate subcommittees. I have worked on rail safety since I came to the Senate in 2004 when Union Pacific was going through a rash of accidents. The Department of Transportation initiated a compliance review at the request of myself and all the members of the Texas Congressional delegation.

The rail safety component of this legislation will reduce driver fatigue by ensuring that train employees receive adequate rest between shifts. The recent accident in California has led many to call for the implementation of new safety technologies on trains. Our legislation requires the Department of Transportation to develop a plan for implementation of positive train control systems on trains by the end of 2015.

I urge my colleagues to vote in favor of this very important bipartisan legislation.

FINANCIAL BAILOUT

**2 Mr. President, the later votes we will take tonight are on another major piece of legislation. We have been hearing the debate on it all afternoon, really for the last 2 weeks. I want to start by saying that stabilizing our economy is the most important responsibility our Congress has right now. I did not vote for the Fannie Mae, Freddie Mac bailout. I did not. I did not vote for that because I did not think there was enough taxpayer protection, nor were there limits on executive compensation packages.

When Secretary Paulson came before us last week and said he wanted to have the power to spend up to $700 billion, I would not have supported that package, because, again, there were not enough taxpayer protections, there were not enough limits on executive compensation, and there was not enough oversight.

before the accident. With this kind of cell phone use while an active engineer on a Metrolink train right around the time of an accident, you can see the kind of problem it is. There is no second set of eyes on this train. So this National Transportation Safety Board press release this afternoon is a revelation.

**7 This cannot be happening on other trains. A great deal of our track in California is single track. It has both freight and passenger rail on it, sometimes in opposite directions. To have an engineer in an hour and 15 minutes sending or being part of 45 text messages on a cell phone is not what an operating engineer should be doing on a train.

I thank the chairman. He has done a great job. My pal Senator

Hutchison has done a great job. This is a bill that will stand the test of time. It is an important bill for Amtrak, for the rail administration, and for rail safety and positive train controls.

I thank them all for their work and yield the floor.

The PRESIDING OFFICER.

The Senator from Texas has 4 minutes remaining.

Mrs. HUTCHISON.

Mr. President, is there time left on the majority side?

The PRESIDING OFFICER.

A minute and a half on the majority side.

The Senator from New Jersey.

Mr. LAUTENBERG.

Mr. President, again, I rise to reiterate the fact that this is a chance to make a huge difference in the way we travel in this country. We know you cannot get there from here if you get on the roads, whether they be major highways or streets. Airplanes are ever more delinquent in their ability to deliver service on time. So this is a chance for everybody to step up and declare we are going to have a refined, up-to-date, modern system that enables us to carry the passenger load that is available for us.

I ask my colleagues to vote for this legislation and hope we will see its passage very shortly.

Mr. President, I yield any time remaining.

The PRESIDING OFFICER.

The Senator from Texas.

Mrs. HUTCHISON.

Mr. President, I want to reiterate something the Senator from California mentioned, and that is, the rail safety part of this bill is actually a bill that was negotiated separately from the Amtrak bill. We put them together because time was of the essence. After that terrible crash in California, I think it spurred us to be *S10286 able to put these together and go forward. The positive train control that will be required for every rail carrier by the year 2015 is going to also have a major impact on safety and stop the crashes that are preventable that we have seen in the past. So I think there are a number of rail safety issues that are so important here that can make a difference.

At this time, Mr. President, I wish to yield up to 2 minutes to the Senator from Virginia.

The PRESIDING OFFICER.

The Senator from Virginia.

Mr. WARNER.

Mr. President, I thank my good friend and colleague from Texas. And I thank my good friend, the senior Senator from New Jersey, for his gracious remarks. I also commend the cooperation of both of these managers, together with Senators WEBB, CARDIN, and MIKULSKI, in bringing together in this bill the lifeline of the Metro system in the Nation's Capital. We are a region, and we speak for the District of Columbia, as spokesmen tonight, and for the States of Maryland and Virginia, all of which are essential partners in this system which supports this institution, the Congress.

RAILROAD SAFETY

Mrs. BOXER.

**8 Mr. President, I rise today to address the railroad safety legislation, H. Res. 1492 providing for agreement by the House of Representatives to the Senate amendment to the bill, H.R. 2095, with an amendment. First, I must emphasize the importance of strengthening our safeguards for railroads, to protect the lives and safety of our citizens. We have just been reminded of how critical it is for us to pay attention to this issue by the tragedy in my home State of California on September 12, 2008.

On that day, a Metrolink train crashed head on into a Union Pacific freight train in Chatsworth, northwest of downtown Los Angeles, killing 25 people and injuring at least 135 in the most deadly commuter rail accident in modern California history, and one of the worst rail accidents in recent U.S. history. The families of all of those killed or injured in that accident are in our thoughts and our prayers.

I also would like to enter into a colloquy one aspect in this legislation, the provisions entitled the "Clean Railroads Act of 2008," with my good friend, Senator LAUTENBERG, the distinguished chairman of the Commerce, Science, and Transportation Committee's Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security, and the lead author of this legislation.

Mr. Chairman, this legislation makes clear that any solid waste rail transfer facility must comply with all applicable Federal and State requirements, both substantive and procedural, including judicial and administrative orders and fines, respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar solid waste management facility, as defined under the Solid Waste Disposal Act, or SWDA, that is not owned or operated by or on behalf of a rail carrier. There is an exception in section 604 of this bill, which creates a new section 10909 of title 49 of the United States Code allowing the Surface Transportation Board to issue a land-use exemption for a solid waste rail transfer facility operated by or on behalf of a rail carrier if the Board finds that a State, local, or municipal requirement affecting the siting of such facility meets certain specific criteria.

For these purposes, the bill defines several terms, including "commercial and retail waste," "construction and demolition debris," "household waste," " industrial waste," "institutional waste," "municipal solid waste," and "solid waste." The bill explicitly excludes hazardous waste regulated under subtitle C of the SWDA, mining or oil and gas waste from being covered under this law and leaves in place the structure under which these substances are currently regulated.

Mr. Chairman, is my understanding correct that, by clarifying that any solid waste rail transfer facility must comply with all applicable Federal and State requirements, both substantive and procedural, in the same manner as any other solid waste management facility as defined under the SWDA, and by expressly excluding such hazardous waste, and mining or oil and gas waste, from this law, that this legislation ensures that the Environmental Protection Agency's and States' authorities dealing with hazardous waste, mining or oil and gas wastes are not impacted by this law or by the jurisdiction of the Surface Transportation Board?

Mr. LAUTENBERG.

**9 Mr. President, the distinguished Chairman of the Committee on Environment and Public Works, and my colleague as a senior member of the Committee on Commerce, Science, and Transportation, is correct. This legislation ensures that solid waste rail transfer facilities must fully comply with the substantive and procedural requirements in State and Federal environmental and public health and safety laws, including all permitting requirements, and generally allows the Surface Transportation Board to issue land-use exemptions so that the Board may continue to be the single agency to guide our country's policies concerning the placement of railroad facilities, which enables a unified national rail system and promotes energy-efficient interstate rail transportation. In addition, the distinguished chairman is correct that the legislation does not diminish the authority of the Environmental Protection Agency or the States with respect to hazardous wastes, mining or oil and gas wastes. This legislation also does not affect in any way the application of the statutory definition of solid waste under the SWDA. This legislation also does not intend to affect any preexisting authority to respond to imminent hazards under Sections 7002 and 7003 of the RCRA. Lastly, this bill ensures that solid waste rail transfer facilities, as defined in this legislation, obtain the State permits that any other similar solid waste management facility is required to obtain and comply in full with State law, as described in Sections 603 and 604 of Division A of the bill, and this bill affirms the States' traditional police powers to require rail carriers to comply with State and local environmental, public health, and public safety standards as described in Section 605 of Division A.

Mr. LEVIN.

Mr. President, I support H.R. 2095, the Amtrak reauthorization bill, which was passed by the House of Representatives and is expected to pass the Senate today. I believe the economic strength of our Nation and the State of Michigan is dependent on our transportation infrastructure. Reliable passenger rail service is an important component of that infrastructure.

I have been a strong supporter of Amtrak and have voted repeatedly to give Amtrak the funds it needs to continue to operate safely and effectively. I am a cosponsor of the Passenger Rail Investment & Improvement Act which reauthorizes and increases funding for Amtrak, the national passenger rail system. A version of that bill is included in the package we are voting on today.

Appendix F

PATH Safety Rule N2, N3, and N5

PORT AUTHORITY
TRANS-HUDSON CORPORATION

BOOK OF RULES

Amended Through 1/1/00

2. All articles found on PATH property must be turned in promptly to the Train Dispatcher/Terminal Supervisor at the nearest terminal or to the PATH Police Desk at Journal Square. A proper receipt must be issued.
3. Employees handling, collecting or disbursing moneys or refunds belonging to PATH must do so in a manner that will prevent loss. They will be held strictly accountable for such funds and any irregularities or shortage may result in discipline and/or prosecution under the law.
4. Property furnished by PATH for use by employees must be returned immediately upon demand to their supervisor or to the proper officer upon leaving PATH service. PATH reserves the right to withhold from wages due, the value of any property not returned.
5. Inquiries from News media should be referred to an immediate supervisor.
6. Relatives of PATH and Port Authority employees shall not be given preference or special consideration in the conduct of recruitment, filling promotional opportunities, compensation or working conditions and responsibilities. PATH will be guided by Port Authority policy AP20-1.13 in pursuing this policy.
7. Employees are required to disclose all relationships with other employees at the time of hire, or when such occur subsequent to hire, to their Division Superintendent.
8. In the course of any investigation, inquiry or other proceeding where it could reasonably be construed that such relationship could compromise their integrity, employees must report any relationship to subjects or principals involved to their Superintendent and exclude themselves from any involvement in same.

N. Safety Rules

1. Employees must know and comply with all PATH Safety Rules, the PATH Emergency Preparedness Plan and the specific safety rules of their Division or occupation.

2. The safety of customers and employees is, at all times, to be considered of first importance. All employees are required to exercise constant care to prevent injury to themselves and other persons as well as damage to property. In all cases of doubt they must take the safe course.
3. Employees shall utilize safe work practices to avoid injury to themselves and others.
4. Tools, materials, machines, chairs or other devices that are provided for employees' use must be inspected by the employee prior to use to ensure that they are in proper working condition. Defective equipment must be reported to the supervisor/foreman.
5. Employees must report at once any unsafe work condition that may endanger themselves or others.
6. Employees must use the proper safety equipment while performing their duties. Dust masks, respirators, goggles, hearing protection, rubber and cloth gloves, flashlights, disposable suits, respirators and other personal protective equipment are provided, and must be worn for prescribed work efforts. Failure to do so will result in disciplinary action.

   Reflective safety vests are to be worn at all times when walking or working on or adjacent to track .

   Maintenance employees are required to wear hard-hats at all times except in locker rooms, office areas, vehicles and designated walkways and areas. Transportation Division employees are required to wear hard-hats while working around maintenance equipment or within construction areas. Hard-hats must not be defaced or be punctured as this will impair the dielectric and impact protection that the hard-hat provides.

   Maintenance personnel and contractors are required to wear protective eyewear while on duty except in locker rooms, office areas, vehicles and designated areas. Specific jobs require additional eye protection such as goggles, face shields and/or welding lenses. Prescription glasses

RESPECTFULLY SUBMITTED
FOR THE CLAIMANT, CHRISTOPHER BALA

BY: 

Charles C. Goetsch
Cahill, Goetsch & Perry, P.C.
43 Trumbull Street
New Haven, CT 06510
Tel: (203) 777-1000 / Fax: (203) 865-5904

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent to the following persons on the 7th day of June 2012:

By Fax and Federal Express
Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-5220
Washington, D.C. 20210
Tel: (202) 693-6200
Fax: (202) 693-6220

By Fax and Federal Express
James M. Begley, Esq.
Kathleen M. Collins, Esq.
Port Authority Trans-Hudson Corporation
225 Park Avenue South, 13th Floor
New York, NY 10003
Tel: (212) 435-3430
Fax: (212) 435-3834

By Fax and Regular Mail:
Regional Solicitor
U.S. Department of Labor
201 Varick Street, Room 983
New York, NY 10014
Tel: (464) 264-3650
Fax: (646) 264-2660

By Fax and Regular Mail:
Regional Administrator
Region 2
201 Varick Street, Room 670
New York, NY 10014
Tel: (212) 337-2378
Fax: (212) 337-2371

By Fax and Regular Mail:
Directorate of Enforcement Programs
U.S. Department of Labor/OSHA
200 Constitution Avenue, NW
Room N-3119, FPB
Washington, DC 20210
Tel: (202) 693-2100
Fax: (202) 693-1681

By Fax and Regular Mail:
Hon. Stephen L. Purcell
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, N.W.
Suite 400
Washington, DC 20001-8001
Tel: (202) 693-7300
Fax: (202) 693-7365

By Electronic Mail and Regular Mail
Richard R. Renner, Esq.
Legal Director
National Whistleblowers Center
3233 P St. NW
Washington, DC 20007
Tel: 202-342-6980, Ext. 112
Fax: 202-342-6984
rr@kkc.com

By Fax and Regular Mail:
Hon. Theresa C. Timlin
Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002
Tel: 856) 486-3800
Fax: (856) 486-3806

By Electronic Mail and Regular Mail
Megan Guenther, Esq.
Office of the Solicitor
United States Department of Labor
200 Constitution Avenue, NW
Room N-2716, FPB
Washington, DC 20210
Tel: (202) 693-5586
Fax: (202) 693-5689
guenther.megan@dol.gov

By Electronic Mail and Regular Mail
Christopher Bala
35 Commodore Drive
Brick, NJ 08777
Tel: 732-575-9224
chrisbala@comcast.net

Charles C. Goetsch