

**Committee on Transportation and Infrastructure**  
**Subcommittee on Railroads, Pipelines, and Hazardous**  
**Materials**

**Fatigue in the Rail Industry**

**February 13, 2007**

Testimony of

**United Transportation Union**

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**Hearing on Fatigue in the Railroad Industry**

**Testimony of James M. Brunkenhoefer, National Legislative Director,  
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My name is James M. Brunkenhoefer, and I am the National Legislative Director of the United Transportation Union (UTU). Accompanying me today is Lawrence M. Mann, attorney for the UTU in this matter. As always, the UTU appreciates the opportunity to present our views to your Subcommittee on rail safety issues. We are pleased to associate ourselves with the Brotherhood of Locomotive Engineers and Trainmen (BLET) in this hearing. Today's hearing is the focus of fatigue, which represents one of the railroad industry's worst safety problems.

**"My mind clicks on an off...I try letting one eyelid close at a time while I prop the other open with my will. My whole body argues dully that nothing, nothing life can attain, is quite so desirable as sleep. My mind is losing resolution and control."** Charles A Lindbergh, The Spirit of St. Louis.

The above could be said for many operating employees working on the nation's rails. One of the most critical railroad safety issues involves the hours of service of rail workers. This covers the maximum number of hours an employee should be

permitted to work each day and each week, amount of undisturbed rest (i.e. calling time), regular scheduling, and being required to remain on trains after the maximum time on duty has been reached. As shown by the studies discussed below, there is an overwhelming body of evidence which demonstrates that fatigue is endemic in the railroad industry. Those who have studied this issue agree that the problem is pervasive, and the industry has not adequately addressed it. Railroad operating crews are typically plagued by chronic fatigue caused primarily by excessive hours of work coupled with inadequate rest time, and by unpredictable and irregular work schedules. The problems experienced by the workers are varied: typically, the employee takes the few free hours he/she has off duty to pay attention to personal and family matters; many experience circadian rhythm problems; employees are forced to work too many successive days without a day off; and others are called to duty sooner than expected. These problems have long been recognized in the industry. Not even the railroads can, with a straight face, dispute the evidence. Safety on the rails depend upon compliance with the safety statutes and regulations and the operating rules of the railroads. We know from the body of evidence that they are often compromised by employees' inability to obtain adequate rest.

The current law is deficient in various ways. It is not limited to the employees' weekly or monthly work hours, restrict the irregularity or unpredictability of on-call work schedules, or restrict commuting distances without compensatory time off.

Extensive night work, irregular work schedules, extended work periods with few or no days off, and the policies and procedures that encompass such practices are permissible within the current law. (See, Coplen, M. and D. Sussman, *Fatigue and Alertness in the U.S. Railroad Industry Part II: Fatigue Research in the Office of Research and Development at the Federal Railroad Administration*(March 2000).

We believe the remedy is to give the FRA authority to regulate fatigue, and at the same time, keeping in effect the statutory protections obtained over the years. Also, we strongly recommend that Congress amend the law to require that waiting for deadhead transportation and deadhead transportation be counted as time on duty, require undisturbed rest(calling time), and mandate the removal of the few remaining sleeping quarters from rail yards.

There have been numerous studies and recommendations regarding hours of service. The time for congressional action is long overdue. Hopefully, your Committee will make the needed changes in the law. We will now summarize for the Committee the agencies that have investigated this problem, and demonstrate to you that fatigue is unfortunately a reality working on the railroads.

It is to be noted that in 1994 Congress granted FRA a limited authority to approve pilot projects, including waivers of the statute, proposed jointly by rail labor and management. This has not proven to be very effective.

## **NTSB**

For many years the NTSB has been concerned about the unpredictable nature of train crew work assignments and its attendant effect on crew fatigue. Although there are some exceptions, the majority of train crews are subject to call with little notice. At the recent hearing on January 30, 2007 before the Subcommittee on Railroads, Pipelines, and Hazardous Materials regarding the reauthorization of the Federal railroad safety program,, Robert L. Sumwalt, III, Vice Chairman of the NTSB testified:

The Safety Board also found that the minimum rest periods prescribed by Federal regulations do not take into account either the rotating work schedules or the accumulated hours spent working and in limbo time. Limbo time, the time when a crew is neither operating the train nor yet released from duty, is most often associated with a crew's travel time to their final release point after the expiration of their 12-hour service limit. The time spent awaiting that transportation can be significant and can lead to very long workdays. For example, in June 2004, over 42 percent of the Union Pacific Railroad train crews in the San Antonio, Texas area spent greater than 12 hours on an assignment, over 24 percent spent greater than 13 hours, and 5 percent (or 760 train crews) spent greater than 15 hours.

Virtually every time the NTSB has testified before Congress in recent years, it has pointed out that fatigue of railroad workers is a major concern in accidents. On February 19, 1991, the Board's Chairman testified:

In both the August 9 and November 7, 1990, railroad accidents in Sugar Valley, Georgia and Corona, California, work/rest cycles of railroad crewmembers is an issue. Crewmember fatigue has been a Safety Board concern in all modes of transportation, and it has been placed on our "Most Wanted" list of safety issues. Through the Board's safety recommendation

follow-up process, and discussions with railroad officials, we will continue to push for safety improvements in this area.

*Hearings on Department of Transportation and Related Agencies Appropriations for 1992, Before the House Subcommittee on the Department of Transportation and Related Agencies Appropriations, Committee on Appropriations, 102nd Cong., 1st Sess. 35 (1991).*

Mr. Kolstad again repeated the NTSB's concerns in testimony June 12, 1991, on *Railroad Safety Programs before the House Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce, 102nd Cong., 1st Sess.*). He stated:

Human performance is still the most important factor in any accident, in any mode of transportation. An operator who is inattentive, for whatever reason, can expect to find himself in an accident sooner or later. Too often, that inattention is caused by fatigue.

Railroad employees, especially train crews, are confronted by very unpredictable and tiring work schedules — a situation that has not changed since the beginning of railroading. The changing nature of railroad operations and competitive factors have increased the relative numbers of crewmembers and other in safety sensitive positions who must work irregular and unpredictable shifts — often on a long term basis.

We have found in accident after accident that workload and work/rest issues have been critical factors.  
(*Hearings, Id.* at 164).

Upon being asked at that hearing by the Subcommittee Chairman, to prioritize the top safety issues, Mr. Kolstad replied:

I would say fatigue and hours of service problems is probably the biggest single problem. That is currently being addressed by a study in the Office of the Secretary at DOT. I know that FRA has got a study underway. But that dearly would be the most significant problem.

I might just mention, Mr. Chairman, that this is not a problem that the railroad industry experiences alone. Fatigue is a problem in all modes of transportation.

Mr. Swift. Is that because of the length of time people will typically have to work?

Mr. Kolstad. It is circadian rhythm problems; it is duty time problems; it is this business of going on duty at 3 a.m. and working until 11 on one day, taking 8 hours of rest, and then going on duty at 7 p.m. the following day and working until 4 in the afternoon, taking 8 hours, and continuing in that process. That simply cannot be sustained with any expectation that human performance is going to continue to be sharp.

Mr. Swift. Yet the schedules of the transportation industry, airlines, railroads, buses, kind of require those kinds of hours.

Mr. Kolstad. In many cases that is true. It seems to be more true in the railroad industry and in the trucking industry.

*(Hearings, Id. at 171).*

Chairman James E. Hall , testifying before your Committee on March 26, 1998 stated "Human fatigue in transportation operations is probably the most widespread safety issue in the transportation industry, and it has been an item on the Safety Board's "Most Wanted" list of transportation safety issues since its inception in 1990."*(Hearings on Reauthorization of the Federal Railroad Administration Before the Subcommittee on Railroads of the Committee on Transportation and Infrastructure, 105th Cong., 2d Sess. 317).* He noted that the Board has been concerned about fatigue in the industry for many years, and needed to be addressed in the hours of service laws. He also stated that "While fatigue remains one of the most perplexing problems to substantiate in accident investigations, the body of scientific evidence collected over the past decade clearly reflect a critical need for adequate rest for those operating the transportation system."*(Id.)*.

An important comparison by Mr. Hall of the hours worked among the transportation modes is telling. He pointed out that under current regulations or rules, a commercial airline pilot can fly up to 100 hours per month. Shipboard personnel on large ships over 100 tons cannot operate more than 240 hours per month. A truck driver can be on duty about 260 hours per month. Locomotive engineers, however, can operate a train up to 432 hours per month, which equates to more than 14 hours a day, each of those 30 days.*(Id. at 318)*. (We recognize that in August, 2005 the Federal motor carrier safety regulations were amended for truck drivers to reduce the total hours per month to 240 hours).

It is irrational that operating crews are permitted to work more than four times longer than an airline pilot, and one and-a-half times longer than a truck driver. To allow an operating railroad crew to work over 400 hours per month is unconscionable.

A summary of some of the more notable NTSB reports of accidents relating to fatigue is presented below. One of the NTSB's earlier findings of fatigue in the railroad industry resulted from a collision of the Penn Central Railroad 35 years ago in 1972. The Board found that the engineer and head brakeman had both fallen asleep.*(NTSB-RAR-73-3)*.

### Texarkana, TX

In a recent train accident report, the Board on October 17, 2006 issued its findings as to the probable cause of an early morning collision in Texarkana, Arkansas which occurred on October 15, 2005. It said the cause was the failure of the crew of the train to remain attentive and alert and thereby able to stop before striking an observable standing train in front of them.(Acc. No. DCA-06-FR-002).

### Macdona, TX

In another decision, on July 6, 2006, the Board determined that crew fatigue caused a train collision near Macdona, Texas. The accident occurred on June 28, 2004, and three persons died from inhalation of chlorine near the surrounding area of a ruptured tank car. The Board said that the unpredictability of the UP's work schedules may have encouraged the crew to delay obtaining rest. It said that during periods of high demand for crews, the additional pressure on crews who have not had full rest can be difficult.

In its Report on the Macdona accident, the Board said:

Contributing to the crewmembers fatigue was their failure to obtain sufficient restorative rest prior to reporting for duty because of their ineffective use of off-duty time Union Pacific Railroad train crew scheduling practices, which inverted the crewmembers work/rest period.  
(NTSB Report RAR-06-03).

In commenting on the accident, then Acting Chairman Mark Rosenker stated:

Get enough sleep--it sounds so simple and yet we continue to see accidents caused by fatigue. How many more tragedies have to occur before employers and employees get the message that being well rested is critical to job performance.

We submit that Mr. Rosenker may not recognize how difficult it is for the rail workers to get the necessary rest. The crew scheduling practices are abominable on some railroads. In addition, an employee, through no fault of his own, may not be adequately rested, but most railroads do not allow the employee to mark off duty under those circumstances. Hopefully, Congress will help us correct the problem.

Wiggins, CO and Newcastle, WY.

The Board pointed out over 20 years ago in its 1985 report on Burlington Northern Railroad collisions in Wiggins, Colorado, and Newcastle, Wyoming (Railroad Accident Report-NTSB/RAR-85/04) that railroad crews are confronted by the most unpredictable work/rest cycles in the transportation industry.

Thompstontown, PA

The effect of sleep deprivation and unpredictable and irregular work/rest cycles were succinctly summarized by the NTSB in the *National Transportation Safety Board Railroad Accident Report, Head-End Collision of Consolidated Rail Corporation Freight Trains UBT-506 And TV-61 Near Thompstontown,*

*Pennsylvania January 14, 1988, NTSB/RAR-89/02 (1989)*. One of the causes of the Thompsonstown accident was unpredictable work/rest cycles of the crew. *NTSB Report* at 54.

In the Report, it explains that workers do not remedy this hazardous condition by making up for lost sleep on their days off, nor do they "adapt" to the irregular work hours. Chronic sleep deprivation results in fatigue, frequent microsleeps or lapses (periods in which workers fall asleep for a short time then awaken spontaneously, unaware that they had been sleeping at all). *NTSB Report*, at 37. The frequency and duration of such lapses increase as the person becomes more chronically sleep-deprived. *Id.* Although the worker will perform his task perfectly both before and after the lapse, he is asleep during it. As a result, the worker will not respond at all to external stimuli unless they are massively sensory in nature, very unusual, or particularly meaningful. *Id.*

Also, workers subject to non-systemic and unpredictable changes in their work schedules are highly susceptible to variation in alertness and consciousness that are associated with their circadian "body-clock," which is typically at its lowest ebb between roughly 1 a.m. and 7 a.m. Employees suffering from the effects of chronic sleep deprivation are more susceptible to environmental conditions which do not promote sleep. Extensive studies have been conducted on operating crews in which, not only single crew members,

Based upon the NTSB's analysis of the Thompsonstown accident and other prior accidents, it concluded:

17. The changing nature of railroad operations and competitive factors have materially increased the relative number of train crewmembers who must work irregular and unpredictable shifts on a long-term basis.

18. Since train crewmembers lack the requisite training to recognize the condition, they may allow themselves to become chronically sleep-deprived and develop physiological problems that impact adversely on their performance. Conrail and the other railroads need to recognize and deal with this probability by modifying their operations to reduce shift irregularity and by instituting educational and intensified medical examination programs. *NTSB Report* at 53.

#### Sugar Valley, GA and Corona, CA

In the NTSB's Report of the Corona, California, accident of November 7, 1990, it demonstrates the hazards in the railroad operations resulting from irregularity and unpredictability of a locomotive crew's work schedule. The Board concluded that both of the locomotive crewmembers had fallen asleep because of acute fatigue, partly resulting from the irregularity and unpredictability of the work schedule. (*National Transportation Safety Board Railroad Accident Report, Atchison, Topeka and Santa Fe Railway Company (ATSF) Freight Trains ATSF 818 and ATSF on 891 on the ATSF Railway Corona, California* (November 7, 1990), RAR-91/03 at p. 45 (July 23, 1991).

In its investigation of the Sugar Valley, Georgia, accident on August 9, 1990 the Board determined that the Norfolk Southern engineer who failed to comply with a stop signal resulting in the accident had reverted to a routine of sleeping at night on his

three days off duty before the accident after having been on his normal night-work and day-rest routine for over three weeks.

#### Willaimsburg Bridge, NY

The Board found that the NYC Transit train operator, who was at the controls of a train involved in the accident on the Williamsburg Bridge on June 5, 1995, had recently changed from a weekend schedule of sleeping at night to his weekday schedule. When there is a change in a person's work/rest cycle, there is a change in the circadian rhythm, which affects fatigue.

Later the same year, in November of 1995, the Safety Board convened the first International Multimodal Symposium on the effects of fatigue on transportation safety. The railroad group concluded that the lack of schedule predictability and regularity were the number one problems for train crews.

#### Kelso, WA

On November 15, 2003 a UP Railroad train collided with a BN train at Kelso, Washington. The Board determined that the UP crew neglected wayside signal indications because the crew was asleep, and concluded that irregular work schedules contributed to the accident.

We could present many more NTSB investigations into fatigue in the rail industry, but the above adequately demonstrate the extent of the problem.

## FEDERAL RAILROAD ADMINISTRATION

At the previously mentioned January 30 hearings before your Subcommittee, FRA Administrator Joseph H. Boardman addressed fatigue. He testified:

Fatigue has long been a fact of life for many railroad operating employees, given their long and often unpredictable work hours and fluctuating schedules. Train crews may legally work an enormous number of hours in a week, month, or year. While commuter train crews often have some predictability in their work schedules, crews of freight trains rarely do. The long hours, irregular work/rest cycles, and lack of regular days off, combined, have a very deleterious effect on employee alertness. Railroads are necessarily 24-hour businesses, and the effects of "circadian rhythms" challenge the alertness of even well-rested employees, particularly in the early morning hours. The hours of service law, originally enacted in 1907 and last substantially amended in 1969, sets certain maximum on-duty periods (generally 12 hours for operating employees) and minimum off-duty periods (generally 8 hours, or if the employee has worked 12 consecutive hours, a 10-hour off-duty period is required). However, the limitations in that law, although ordinarily observed, do not seem adequate to effectively control fatigue.

The FRA's studies on the effects of work schedules on train operations support the conclusion that something must be done to help eliminate fatigue in the rail industry. Its most recent study issued on November 29, 2006, entitled *Validation and Calibration of a Fatigue Assessment Tool for Railroad Work Schedules*, was an attempt to determine if a fatigue model can accurately predict an increased risk of human error contributing to an accident. The study analyzed the 30-day work schedule histories of locomotive crews preceding 1,400 train accidents and found a strong statistical correlation between the crew's estimated level of alertness and the likelihood that they would be involved in an accident caused by

human factors. It found that the relationship is so strong that the level of fatigue associated with some work schedules was equivalent to being awake 21 hours following an 8-hour sleep period the previous day. The study noted that human factor errors are responsible for nearly 40 percent of all train accidents over the past five years, and that fatigue plays a role in one out of four of those accidents.

At the 1998 Hearings before your Subcommittee, FRA Administrator Jolene Moiltoris, in her testimony gave an example to illustrate the seriousness of the fatigue problem in the railroad industry from a transcript of a recorded telephone conversation between a locomotive engineer on a Class I railroad and a crew caller. The call from the railroad crew caller for her to report to duty was approximately 1 a.m.

Engineer: I haven't had any sleep. I'm just going to have to lay off. I haven't had a chance to get any sleep.

Crew caller: So you're telling me that you would probably work unsafe. Engineer: You can lay me off 'personal.' I am tired and 'account fatigue.' However you want to call that.

The crew caller said he could not allow her to lay off on that basis.

Engineer: We are not robots, though ....

Crew caller: I totally agree with you. They are working us 16 hours down here. We're getting . . . we're getting six hours of sleep and coming right back and working 16 more because we're short-handed, too, and I ... I agree with you ....

*Hearings on Reauthorization of the Federal Railroad Administration, Before the House Subcommittee on Railroads of the Committee on Transportation and Infrastructure, 105th Cong. 2d Sess. 792. (Apr. 29, 1998).*

The crew caller expressed some sympathy for her situation, but he told her that she

would be subject to discipline if she did not accept the call.

At the same Hearing, the Administrator summarized the results of two related examples of FRA's studies to help determine the nature of performance decreases that operating employees may experience. In the first study, FRA observed the performance of locomotive engineers on the Research and Locomotive Evaluator Simulator (RALES) facility at the Illinois Institute of Technology. The final report (DOTIFRA/ORD-97-09) is entitled *The Effects of Work Schedule on Train Handling Performance and Sleep of Locomotive Engineers: A Simulator Study*. This study investigated how work schedules affect engineers' train handling performance and vigilance. The report concluded:

Current Federal regulations governing Hours of Service for locomotive engineers allow work schedules that have backwards rotating shift start times and do not allow sufficient sleep. Locomotive engineers who work under such schedules can accumulate a progressive sleep debt over a period of days. The present study demonstrates that schedules which have these characteristics are easily composed ad do, indeed, result in sleep durations which are considerably less than those obtained by the general population. The locomotive engineers in this study, while working on such schedules, reported progressive decreases in subjective alertness across the duration of the study. Moreover, several aspects of job performance, including safety sensitive tasks, degraded during the same time period. This suggests that current Federal regulations governing Hours of Service have the potential to allow work which degrade the job performance of locomotive engineers and reduce the safety of railroad operations.

In a limited second study, FRA, with the participation of the Brotherhood of Locomotive Engineers and major railroads, gathered diaries from 200 locomotive engineers employed by six railroads. The diaries consisted of self-reporting with

respect to quantity and quality of sleep, estimates of alertness at various times while on duty, time on duty, commuting time, and the accuracy of information provided to crews about job-start times. The conclusions from that study were:

On average, engineers participating received almost the same amount of sleep as the general population, which was seven and one-half hours. However, for jobs starting between 10:00 p.m. and 4:00 a.m., sleep averaged less than six hours. This means that the engineers who had had less rest than normal began shifts during a period when lack of alertness would be expected.

Engineers felt they were less alert during the early morning hours, and these periods extended longer than would be expected for scheduled shift work.

Engineers reported that the most important change that could improve their alertness was more accurate information about the time of the next job start (permitting better planning of rest).

The FRA has undertaken a few other studies of the issues related to a railroad worker's irregular work hours, excessive working hours, waiting times etc. See, e.g., J.K. Pollard, *Issues in Locomotive Crew Management and Scheduling*(FRA/RRP-91-06). In another one authored by M. Pollard in 1996, he studied the work/rest diary of 200 locomotive engineers. He found that those who started work between 10 p.m. and 3 a.m. averaged only about 5 hours sleep. In a subsequent study by Thomas, Raslear and Kuehn entitled *The Effects of Work Schedule on Train Handling Performance and Sleep of Locomotive Engineers: A Simulator Study*(DOT/FRA/ORD-97-09), they found that 55 engineers working strictly within the hours of service law accumulated a progressive sleep debt over a period of days. The engineers averaged between 4.6 and 6.1 hours of sleep,

depending upon the amount of time off duty. The engineers reported a progressive decrease in subjective alertness across the duration of the study, and performance of safety sensitive tasks degraded during the same time period. The study concluded that the hours of service law allows work schedules that degrade job performance and reduce the safety of railroad operations. It said that a law that merely allows time for sleep is not sufficient to ensure adequate sleep, prevent fatigue and maintain safe rail operations.

In its 2006 fall edition, the Transportation Law Journal published an article by Sherry, P., Belenky, G. , & Folkark, S, entitled *Hours of Service Regulation in the United States Railroad Industry: Time For a Change*(vol. 33, No. 3, p. 253). In the article Dr. Sherry traces the history of the fatigue problems in the rail industry, including sleep deprivation and fatigue countermeasures. In his conclusions he states:

Railroad carrier companies should develop Comprehensive Fatigue Counter Measures Plans to holistically address and manage fatigue issues in their operations. Furthermore, the maximum number of on-duty hours should remain at twelve hours in a twenty-four hour period. The maximum number of hours at work (on duty and prerelease) should be limited to sixteen, and should include the amount of time preceding release with a minimum of twelve hours undisturbed rest immediately following. It is further recommended that individuals be limited to a maximum number of four consecutive twelve-hour shifts in a one hundred and forty four hour period. Consideration should be given to the practicality and likelihood of actually obtaining sleep, based on considerations of the circadian rhythms of the human body, during the time available. Individuals should be afforded the opportunity to obtain eight hours of sleep in every twenty-four hour period. A minimum of two days off is recommended to recover from extended work

schedules. In order to recover from regular work shifts, there should be at least ten hours off between shifts in order to ensure eight hours of time in bed. Persons who have worked several consecutive midnight shifts will require at least two days off, and may need as many as twelve to sixteen hours off between shifts to recover. At the away-from-home lodging facilities, railroad employees should be permitted shorter recovery times in order to return to their homes.

For further support of the adverse safety effects of irregular work cycle, *see*, *Biological Rhythms, Sleep, and Performance*, by Wilse B. Webb at pp. 59-87, 110-141, 175-204 (John Wiley & Sons 1982); and testimony of Dr. Charles Czeisler at the *Hearings on Shift Work Scheduling and Biological Clocks Before the House Subcommittee on Investigations and Oversight of the Committee on Science and Technology*, 98th Cong., 1st Sess. 176 (1983).

## **TRANSPORTATION RESEARCH BOARD**

At its mid-year meeting on January, 2006 the Transportation Research Board issued a Circular entitled Railroad Operational Safety(No.E-CO85) where it analyzed the issues of fatigue in the rail industry. It is a scholarly analysis, and the Committee is urged to review its findings. One of the presentations at the meeting was by Dr. Goran Kecklund, who has been responsible for many research projects related to sleep, fatigue and safety. At the TRB, he provided results from the Swedish TRAIN project. In doing so, he discussed a number of fatigue countermeasures, including introducing at least 12 hours rest between shifts to avoid serious lack of sleep and critical fatigue; Sleep loss and fatigue should be

compensated with rest and recuperation and not with economic compensation;  
Avoid compressed work hours( i.e., many workdays in succession); Work more  
toward forward rotation of schedules; Education in sleep and fatigue management;  
Rehabilitate risk groups; and Use fatigue modeling.

Another presenter at the conference, was Dr. Frederick C. Gamst. He pointed out what many in the industry know, but rarely openly discuss--the fatiguing schedules of employees yield benefits to the employer because it allows a carrier to have highly flexible and maximal use of operating employees. It also maximizes income because more paid time can be worked. Dr. Gamst presented a succinct summary of many fatigue studies conducted over the years, which adds to the necessity for Congress to now act.

### **ASSOCIATION OF AMERICAN RAILROADS**

We would be remiss if we did not acknowledge that some of the nation's railroads have undertaken limited countermeasures to fatigue. Some of these include allowing the crew to take short naps at certain locations(BNSF, UP,CSX,KCS, CN); upon request, allowing up to a maximum of 18 hours rest(Pilot projects--UP, NS); minimum of 10 hours rest(BNSF, UP, NS, CSX, KCS, Amtk, CN, CP); sites with time windows(UP Pilot program). The problem is that without federal enforcement, any countermeasure can be terminated abruptly without any recourse to the employee.

We have another beef with the AAR on fatigue issues. FRA created a Collision Analysis Working Group (CAWG) to analyze 65 main line train collisions, identify commonalities, and recommend changes to prevent future collisions. Rail management, the UTU, BLET, and the FRA were all equal partners in this exercise. This analysis showed a direct link to fatigue as a contributing factor in many of these collisions and the corresponding loss of situational awareness by the crews. The industry participated in the analysis as an equal partner. The industry also participated in drafting and approved the final language contained in the report as an equal partner, and afterwards demanded that their officers' names be stricken from the final report when senior management learned the involvement of fatigue was mentioned in connection with these collisions. We are thankful that FRA had the courage to remove the railroad officers' names from the report and published this significant work. *See, Collision Analysis Working Group, 65 Main-Track Collisions 1997 Through 2002: Review, Analysis, Findings and Recommendations, CAWG Final Report, FRA (Aug. 2006).*

## **NECESSARY STATUTORY REMEDIES**

### **1. Granting the Secretary authority to regulate fatigue**

We would be agreeable to giving the Secretary regulatory jurisdiction over fatigue in the railroad industry, with a caveat. The existing statutory protections which the railroad workers fought very hard over the years to obtain will not be

repealed. Otherwise, we will be forced to oppose the provision vigorously.

Also, there are a few new provisions which we believe are needed to improve the quality of life for the covered workers, which are discussed below.

## **2. Deadhead Transportation.**

Despite what we deem is clear in the hours of service law, the Supreme Court in Brotherhood of Locomotive Engineers, et.al, v. Atchison, Topeka & Santa Fe RR, 516 U.S. 152(1996) held that time waiting for deadhead transportation is limbo time and therefore neither time on duty nor time off duty. While we believe the Court was wrong in its interpretation, an amendment to the law is now needed to clarify that waiting for deadhead transportation is time on duty. Also, time traveling in deadhead transportation should be time on duty.

In our arguments before the Court, we pointed out at least 4 distinct provisions under the current statute which lead to the only valid conclusion ---that all of the time spent on the trains by the employees covered by the HSA is time on duty, except when the employee is actually traveling in deadhead transportation.

a. Title 49 U.S.C. § 21103(b)(1) states " Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty." The employee is not finally released until he/she reaches the designated terminal. We believe that the FRA used a specious distinction in arguing to the Court that the time while the employee is on the engine awaiting another crew to

relieve it is not time on duty because the employee is "relieved" (even though not finally "released"). Such rationale is not accurate by a simple reading of the language in the statute. Also, the employee is not finally released from duty because there are still obligations imposed on the worker--- at the very least he/she must protect the train from vandals and undesired train movement. The employee is not free to leave the train, and is subject to further orders from the railroad. In fact the crew would be disciplined if he/she were to leave the train unprotected. More significantly, an employee is not finally released from duty until he/she reaches the designated terminal. Unless specifically excluded by the statute, all such time is on duty time.

b. Time on duty shall include interim periods available for rest at other than a designated terminal. 49 U.S.C. § 21103(b)(5). This section makes it clear that such time is still to be counted as time on duty, where the employee is not at a designated terminal. Even if the employee is at a designated terminal, if the relief is less than 4 hours, such time is on duty time. 49 U.S.C. § 21103(6).

c. The time is not time off duty because the employee is not in deadhead transportation, i.e. traveling from duty to point of final release. *See*, 49 U.S.C. § 21103(b)(4).

d. Under 49 U.S.C. § 21103(b)(3), in determining the number of hours an employee is on duty, there shall be counted, in addition to the time actually

engaged in or connected with the movement of any train, all time on duty in other service performed for the railroad. *See also*, 49 C.F.R. § 228.7(a)(5). Therefore, even if the employee is not engaged in or connected with a train movement, the employee is still not finally released and is on duty in other service, such as protecting the train against vandalism. As long as the employee is subject to orders of the employer, he/she should be considered in "other service " and, therefore, "on duty".

#### The Court's Interpretation Is Contrary To The Legislative History

The 1969 amendments to the Hours of Service Act demonstrate Congress' concern with exactly what constituted "time off duty" and "time on duty". Originally, all time within the twenty-four-hour period was considered either "on" or "off" duty, with deadheading time both to and from service generally being "off duty" time. This resulted in flagrant abuses which thwarted the entire purpose of the statute.

"This has resulted in an employee, believe it or not, being assigned to ride 8 hours in deadhead service and not have this time count as time on duty, and then follow it immediately with his official tour of duty, which could run anywhere from 8 to 16 hours, making his total time in railroad service a potential of 24 hours divided between deadheading and nondeadheading time."

116 Cong. Rec. H29,322 (daily ed. Oct. 9, 1969) (Statement of Representative Olsen).

The 1969 amendments changed time on duty (used in computing the maximum 12 hour workday) to include the time that is provided for rest in places

other than the designated terminal, time provided for rest of less than 4 hours at a designated terminal, and time spent by employees going to an assignment or traveling between assignments. Time off duty is also defined, and time spent in deadheading back from a duty assignment is not considered time off duty. Id. at H29,318 (Statement by Representative Staggers). These changes were designed to prevent abuses by ensuring that off duty time is time of "undisturbed rest" and time on duty includes time of deadheading to and between service. Id. at H29,322. (Statement of Representative Olsen). These clarifications were designed to limit the time required in traveling to duty and to get the employees to designated terminals as quickly as possible after duty.

The decision of the Supreme Court promotes just the type of abuses the 1969 and 1978 amendments were designed to remedy.

### **3. Undisturbed rest**

Another unresolved issue under hours of service is the amount of undisturbed rest to which a railroad worker is entitled.

Unless a human being knows in advance what time they must report to work, they can not arrange to be rested and fit for duty. The railroad industry functions on a 24/7 schedule with continuous operations from coast to coast. This is not an excuse for the current position of the railroads holding that their employees do not deserve and are not entitled to advance knowledge of the time

they must appear for their next assignment. Every railroad terminal has an information line commonly referred to as a “lineup” that is intended to advise crews that are subject to call 24/7 regarding their status. Every railroad has “problems” with the accuracy of these “lineups”. The employees must have early and reliable information indicating when they will be required to report for duty

UTU and BLET have voluntarily participated in many different forums on Fatigue, Work Rest issues, and pilot projects designed to help stabilize the work schedules for operating crews. There are a few successful Work Rest projects continuing across the country, but these represent no more than 2% of the affected employees. Railroads have adopted unilateral Availability Policies that set arbitrary guidelines for employee work schedules. One railroad Availability Policy states that employees will be available for service 85% of their time. The average American worker that is expected to work 40 hours each week is available for service about 24% of their time. The railroads expect their employees to be available for work more than 3 times the national average. Despite an Availability Policy in effect, at least two railroads are only permitting one weekend day a month and 1-2 days at most of weekdays off. If the employee requests a day off for sleep, exhaustion, etc. and it exceeds the number he/she is required to under the railroad's calculations, employees have been disciplined and dismissed.

We submit that under the existing law an employee is entitled to undisturbed rest for 8 or 10 hours, depending upon how many hours the person worked before the rest period began. However, the practice on the railroads still is that the employee's rest period is normally interrupted by a telephone call from the railroad at least 2-3 hours before the time he/she is told by the railroad when to report to duty. This obviously interrupts a person's rest. Nevertheless, a court, at the urging of the FRA, has held that calling time is not to be considered time on duty. California State Legislative Board, United Transportation Union v. Mineta, 328 F.3d 605(9th Cir. 2003). Incredibly, the court held that it is o.k. to interrupt the employee once, and that does not interfere with the rest. It said in the opinion that the FRA is not required to accept as controlling a statement in the report of your Committee contained in the legislative history. Therefore, since the FRA disregarded the statement in the report as to the requirement of uninterrupted rest, the court followed FRA's position.

Section 21103(a)(3) states that the employee's off duty time shall be "consecutive". The congressional deliberations clarify the statute's intent that the rest period shall not be interrupted by duty calls [also commonly known as "calling time" in the industry]. S. Rep. No. 91-604, 91st Cong., 1st Sess. 7-8(1969); Cong. Rec. H29321(daily ed. Oct. 9, 1969). To permit the Ninth Circuit's interpretation to stand would undercut the intent of Congress, and continue to contribute to

fatigue for operating railroad workers.

#### **4. Removal of sleeping quarters in yards.**

In 1976 the Congress, amended the Hours of Service Act and allowed railroads to retain then existing sleeping quarters inside rail yards, but that any new or reconstruction of the sleeping quarter must be safely away from the yards. Congress permitted maintenance on the existing facilities, so that it would not be a significant economic burden on the railroads to all of a sudden be required to move all sleeping quarters from the yards. The intent was that these old sleeping quarters would be removed in a reasonable period of time, and replaced by safer conditions. We have been able to prevent major rehabilitation and keep railroads sleeping quarters away from the yards. *See, e.g., United Transportation Union v. Dole*, 797 F.2d 823(10th Cir.1986). Nevertheless, there still remain some sleeping quarters in the yards, and should be removed. We have not been able to attain this result, and Congress' involvement is needed.

#### **CONCLUSION**

We recognize that this testimony is very detailed. However, we believe that the Committee should have a full understanding of the fatigue issues when deliberating on proposed changes to the hours of service laws. We urge you to give the Secretary only limited authority to regulate hours of service. That is, give the Secretary authority to regulate fatigue, and at the same time retain the existing

statutory protections that rail fought for many years to obtain. In addition we are seeking needed changes to deadhead transportation provisions, undisturbed rest, and removal of existing sleeping quarters from the yards.