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Docket Operations Facility
 U. S. Department of Transportation
 1200 New Jersey Avenue, SE, W12-140
 Washington, DC 20590

Re: Risk Reduction Program ANPRM, Docket No. FRA-2009-0038

**Comments of the
 American Train Dispatchers Association (ATDA)
 Brotherhood of Locomotive Engineers and Trainmen (BLET/IBT)
 Brotherhood of Maintenance of Way Employees Division (BMWED/IBT)
 Brotherhood of Railroad Signalmen (BRS)
 Transport Workers Union of America (TWU)
 Transportation Communications Union (TCU)
 United Transportation Union (UTU)**

The seven railroad labor organizations (“Labor Organizations”) identified above are the collective bargaining representatives of a significant majority of railroad industry workers engaged in train operations, train dispatching, and track, signal and mechanical maintenance, inspection, testing, and repair. The Labor Organizations and their collective membership have a vested interest in the evaluation and management of safety risks as a means to reduce the consequences and rates of railroad accidents, incidents, injuries and fatalities through Risk Reduction Programs (“RRPs”) mandated under Section 103 of the Rail Safety Improvement Act of 2008 (“RSIA”).

The Labor Organizations are filing these joint comments in response to the Federal Railroad Administration’s (“FRA”) Advance Public Notice of Proposed Rulemaking (“ANPRM”) published in the Federal Register on Dec. 8, 2010. *See* 75 Fed. Reg. 76345, *et seq.* The order of these comments is not intended to reflect any sequential priorities of the Labor Organizations. The Labor Organizations are purposely not addressing every item in the ANPRM and are not waiving objections to unaddressed items at a later date.

- I. It is imperative that the FRA address a fundamental misunderstanding of the participatory role of Rail Labor in the Congressionally mandated dynamics of railroad risk reduction, Section 103 of the RSIA.**

To achieve true and sustainable risk reduction and a proactive safety culture, it is critical that

FRA focus on the clear mandate of Section 103(g)(1):

“(g) CONSENSUS.—

(1) IN GENERAL. — Each railroad carrier required to submit a railroad safety risk reduction program under subsection (a) shall consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.”

A. Congress rejected the previous pattern of FRA enforcement of railroad safety decisions because it was inadequate to protect the public.

Congress, alarmed by safety concerns arising from a series of rail accidents and the reports of various agencies held extensive hearings to get to the root causes of the problems and to craft legislative solutions. Congress refused to permit railroads to unilaterally decide issues of safety because it would not be in the public interest. Congress concluded that the previous method of safety enforcement (FRA supervision of railroad compliance) also failed to meet minimum requirements to protect the public and further improve railroad safety.

B. Congress required the active participation of employee labor organizations representing a class or craft of directly affected employees in creating RRP.

Congress, following the recommendations of safety experts from both inside and outside the railroad industry, recognized that significant improvements in rail safety could only occur with the active participation of the workers themselves, through their collective bargaining representatives. As a result, when Congress enacted Section 103 of the Rail Safety Improvement Act of 2008, Public Law 110–432, 122 Stat. 4854 (Oct. 16, 2008) (codified at 49 U.S.C. 20156), it included a directive that the Secretary of Transportation issue a regulation by October 16, 2012, requiring all Class I railroads and others to develop a Risk Reduction Program. Congress mandated that railroads negotiate with their rail labor unions using “good faith and best efforts” to reach consensus over the contents of the RRP.

C. The ANPRM undermines the decision made by Congress that Rail Labor must perform a significant role if risk reduction in the railroad industry is to be achieved.

The FRA’s definition in its ANPRM of a required RRP implies that what will be submitted will be a unilaterally created RRP by each Class 1 carrier, instead of a consensus agreement of rail carriers and Rail Labor. See Sec. I, 75 Fed. Reg. 76345. The ANPRM treats the requirement of collaboration and agreement with employee labor organizations as an ancillary aspect of the RRP building process instead of being **the most critical aspect of the entire process.**

This characterization is troubling because prior to the issuance of the ANPRM, the Rail Labor community raised this particular matter directly to the attention of the FRA after passage of the RSIA. The Labor Organizations again express their concern that, absent FRA enforcement of the

Congressional mandate, rail carriers will engage in their usual practice of unilateral dictation and implementation of safety practices. Absent clear direction from FRA at the onset of the RRP development process, carriers will be free to ignore the consensus mandate of the RSIA, waiting instead until after the actual FRA RRP regulations are issued and then, without sufficient time for productive collaborative work, dictate a ‘take it or leave it’ approach to Rail Labor, thereby stymieing Congressional intent and leaving the public and rail employees still at risk for avoidable rail tragedies. The Rail Labor community raised the same issues when the BAA concept proposals were authorized by the FRA in 2009 that actually provided public funds to underwrite the initiatives that the carriers unilaterally might wish to take. The BAA similarly provided no platform for significant early labor participation. In both situations, the FRA was unresponsive to overtures from the Rail Labor community to be a significant part of, and an early participant in, the RRP process as mandated by Congress.

The framing of the ANPRM reinforces the devaluation of the significant contribution that employee labor organizations can and will make if FRA complies with and supports the collaborative mandates of Section 103. FRA must reframe its approach to RRP to be inclusive of employee labor organizations early in the process. The Labor Organizations are ready, willing, and able to contribute to the contents of each carrier’s RRP as required by Congress.

At a minimum, the following must be part of a detailed, collaborative effort between the Labor Organizations and the carriers, irrespective of the role of the FRA in the interim stages prior to approval of submitted Risk Reduction Program Plans (“RRPPs”):

- Risk Based Hazard Analysis must include each Labor Organization’s input and participation;
- Technology Implementation Plans must include each Labor Organization’s input and participation;
- Fatigue Management Plans must include each Labor Organization’s input and participation;
- Railroad analysis of safety risk must include each Labor Organization’s input and participation. The safety risk analysis should not be subject to blanket FOIA protection; however, the Labor Organizations would consider, in good faith, certain appropriate limits on disclosure where such promote safety and employee participation in RRP;
- Risk Reduction Plans should not be subject to blanket protection from disclosure; however, the Labor Organizations would consider, in good faith, certain appropriate limits on disclosure where such promote safety and employee participation in RRP;
- Risk Reduction Plan development must support and emphasize: commitment from all stakeholders; non-punitive participation; systematic and objective data gathering; joint analysis of data; joint problem solving; and joint consensus-based corrective actions.

The following language should be included in the regulations to implement the significant role for Rail Labor mandated by Congress:

“The Secretary finds that the consensus requirements in §20156 (g) (2) are an intentional departure from prior rail safety law structure, and are a critical element to achieve necessary reform of rail safety culture and field practices. Although Congress did not specify when this process was required to commence, the Secretary finds that the statutory times and purposes are best served by commencing the consultation process as early as possible. Accordingly, all covered carriers and rail labor organizations shall respond promptly to any reasonable request by the other to meet and consult at any time after the effective date of the passage of the RSIA as to any matters in any way related to RRP. The organizations and carriers must not unreasonably refuse to meet and confer. The Secretary finds that the duty to consult in good faith means to ‘exercise all reasonable efforts’ to reach a consensus agreement on matters involved, as interpreted by the case of *Chicago and Northwestern Railway Company v. United Transportation Union*, 402 U.S. 570 (1971). The phrase ‘and use its best efforts to reach agreement with’ shall be interpreted to mean application of vigorous, persistent and conciliatory efforts to a higher degree and standard than the more modestly phrased requirement in the RLA, referring to ‘every reasonable effort.’ 45 U.S.C. § 152 (First). The Secretary expects carriers to submit consensus based RRP’s for approval.”

II. Advance Notice of Proposed Rulemaking

RRP Requirements and Implementation

The language of the ANPRM addressing RRP Requirements and Implementation raises a variety of important issues, but that list should be broadened to include additional critically important safety concerns, including but not limited to:

- risks posed by joint operations;
- risks posed by joint operations with passenger and commuter trains;
- risks related to joint transportation modes with non-railroad carriers;
- shippers;
- security risks;
- contractors and subcontractors to railroads;
- specific contents of cargoes;
- high risk location of certain cargoes and routes;
- improved FRA coordination;
- National Transportation Safety Board recommendations;
- improved state rail regulatory procedures;
- timing and deadlines for negotiating with rail labor;
- incorporation of modern cognitive and behavioral science concepts into railroad safety programs;
- disclosure of all carrier bonus, incentive, and compensation systems that reward

management employees for meeting or exceeding safety related goals, targets, benchmarks, or milestones;

- disclosure of policies and data related to waiver and discipline practices that in any way discourage accurate reporting of accidents, incidents, injuries, or close calls; and
- incorporation of railroad contractor and subcontractor safety within each carrier's RRP and RRPP.

The Labor Organizations support a broad based approach to the design of the various RRP elements, which should be scientifically-based and data-driven. Although the presence of contractors on a railroad and the nature of joint operations introduce a level of complexity to RRP development, implementation and execution, contractors and joint operations are commonplace and, particularly on the Class I railroads, these carriers have successfully accommodated such complexity in complying with the requirements of other FRA regulations. RRP's should not be accorded second-class status in this regard.

The records maintenance requirements should be at least six years. FRA's proposal that railroads be required to develop and submit a risk-based hazard analysis and an RRPP for approval six months after the publication of the final rule, and to fully implement the RRP six months after the hazard analysis and the RRPP have been approved by the FRA, is problematic unless the final rule is published prior to April 16, 2012.

Additionally, the Labor Organizations believe that the "good faith challenge" provisions set forth in 49 C.F.R. § 218.97, §214.313(d) and §214.503(a) incorporate risk reduction principles because they empower individual workers to require adherence to federal regulations and safety and operating rules. Indeed, whenever the FRA's Railroad Safety Advisory Committee considered the issue of good faith challenge, the Labor Organizations strongly advocated for a broad challenge provision. We believe that good faith challenge rights facilitate rules compliance and operational safety. Good faith challenge rights should be broadened and included in the RRP regulation.

General Request for Information

While our comments on the subjects raised by FRA are equally applicable in the larger context, this singular point is also worth making. The Rail Organizations view the RRP process as a unitary endeavor. It is inappropriate to mechanistically require that each component or element of a RRPP meet or exceed some arbitrary, pre-determined cost/benefit formula. It may be that an individual component or element that, in and of itself, is costlier than the specific benefit provided thereby, produces a more optimal safety outcome because of the synergy of the RRP as a whole. Such a component or element should not be excluded from a RRP due to excessive, unjustified, or unnecessary cost.

It appears that the FRA has given insufficient thought as to who constitutes the "public" from which it seeks input. The obvious answer is that the FRA should identify stakeholders as it normally does which, in this situation, would include but not be limited to:

- Appropriate state and local government entities in which rail lines are or will be situated;
- Educational institutions which are involved in studies of transportation, environmental, safety, logistics, and related fields;
- Appropriate public associations with interests in those same fields identified above;
- Commercial and non-profit entities which provide investigatory or ‘think-tank’ services; and
- Key entities who have testified before Congress on these issues and who have filed public comments for the record.

Identifying Railroads With an Inadequate Safety Record

There are additional data elements, in addition to those identified in the ANRPM, that directly lend themselves to valid statistical measurement of the quality of a carrier’s management and safety performance. These include, but are not limited to:

1. Number of disciplinary charges filed for rule violations in the preceding 5 years, normalized as a percentage of craft employees employed.
2. Number of whistleblower cases (§20109) filed by employees since October 2008, normalized as a percentage of craft employees employed.
3. Number of employee dismissals in the preceding 5 years, normalized as a percentage of craft employees employed.
4. Number of FRA reportable accidents and injuries in the preceding 5 years, normalized as a percentage of craft employees employed.
5. Number of FRA accountable accidents and injuries in the preceding 5 years, normalized as a percentage of craft employees employed.
6. Carriers that have “Excepted Track” AND carry placarded hazardous materials OR non-placarded military munitions.
7. Number of track miles of “dark territory” (excluding yards), normalized as a percentage of total track miles.
8. Turnover rate of employees and source of new employees (prior employees of other carriers with a known history).
9. Number of grade crossings (both public and private) on territory, and how many are protected by active warning devices, broken down by type of active devices (i.e., flashing lights only, lights and bells only, lights, bell and gates, etc).
10. Number of meet and confer sessions related to safety which were requested by Rail Labor or rail management, the number agreed to, and the results of those meet and confer discussions.
11. The position of the carrier in the Class 2 and 3 ranking lists of the FRA for reportable accidents, injuries, or incidents and the extent to which those are subject to being aggregated by common management or holding company status.
12. Relative frequency and total of number of occurrences of track being taken out of service due to defects or slow ordered due to track defects.
13. Evidence of misrepresentation of safety records, creation of false or altered safety records and improperly influenced safety data origination.

14. Retaliation, intimidation, and over-all culture, attitude, policy toward safety reporting by employees.
15. Responsiveness to employee reports of risks, hazards, defects, practices, injuries, near-misses, and safety complaints.
16. Consistency and transparency of safety policy and rule enforcement; over-use of arbitrary discipline, favoritism of employees who are willing to cut corners, and related subjects.
17. “Safety incentive” programs and policies that create “peer pressure” within work groups not to report injuries in order to “preserve” the incentive prize for the larger group.
18. Contractor data on rules compliance, safety audits, and accidents/injuries.

In addition to the above, FRA must consider a carrier’s past response to risks, hazards, defects, near misses, and safety complaints reported by employees. Does the carrier have a history of ignoring them until an incident occurs followed by a short-lived period of frenzied compliance activity, or do they take a pro-active and non-punitive approach to such reports and take timely and appropriate corrective action?

FRA must also consider the effectiveness of operating rules and practices in risk reduction. Does a company have rules which are intended to prevent a particular type of accident or injury but actually, in custom and practice, allows those rules to be selectively bypassed (e.g., to speed up work or perform work with insufficient manpower and equipment in violation of carrier rules/practices) so that non-compliance becomes acceptable and routine – i.e., a PRACTICE contrary to the rule(s)? Such would be a sure sign of a railroad saying one thing but doing another – and that is the most insidious form of poor safety practice and process.

FRA should also consider the correlation between FELA filed cases, §20109 filed cases, and FRA filed accident, injury, and incident reports to reveal concentrations of safety issues.

As part of the RRP process, FRA should audit all carriers including those performing well, to evaluate the effectiveness of their safety and training programs and in particular risk reduction and safety culture programs. FRA should require RRP’s to effectively remove the specter of harassment and intimidation in favor of programs designed to be non-punitive and based upon root-cause analysis and prevention of reoccurrence. Indeed, special attention should be given to carriers who have entered into voluntary safety agreements with their employees to glean the “best practices” from those voluntary and cooperative agreements.

Conversely, FRA should pay particular attention to railroads that regularly intimidate employees to cut corners, hold formal hearings and discipline employees whenever accidents or injuries are reported, coerce employees to participate in editing or other falsifications/omissions in safety data and accident/incident/injury reports and/or who have terminated previously negotiated safety agreements with their employees. FRA’s analysis in this regard must also consider the impact of bonuses and incentives offered to mid-level and frontline managers to improve productivity and reduce reportable injuries.

To assist FRA in determining the extent of employee harassment and intimidation, the Labor Organizations believe there is no substitute for interviewing employees actually doing the work. This could and should be done scientifically by mail survey, supplemented by FRA-conducted employee interviews without management present, so that employees may speak freely. FRA must prohibit any information gathered in the interview process from being attributed to any particular employee or group of employees. Such information shall only be permitted to be reported to the railroad by FRA in aggregate and in a format which assures the confidentiality of employees. The Labor Organizations also strongly suggest that the FRA survey, and the FRA interview process and questions, be uniform from railroad to railroad, so direct comparisons between railroads and various programs can be made.

These assessments will necessarily include class II and III railroads, and there are significant differences in management, policy and culture on such railroads. However, given the relatively small work forces, particularly among the class III railroads, it would not be overly difficult or burdensome to quickly get a good sense of employee perceptions regarding safety and risk and what they are based upon.

Finally, the Labor Organizations believe the statutory mandate that RRPs be required on “each railroad carrier that is a Class I railroad, a railroad carrier that has inadequate safety performance (as determined by the Secretary), or a railroad carrier that provides intercity rail passenger or commuter rail passenger transportation” is susceptible to no interpretation other than its plain meaning. *See* 49 U.S.C. § 20156(a)(1). Accordingly, the regulation should exempt no railroad — other than plant railroads, which currently are exempt from FRA regulation so long as they operate within the plant or on immediately adjacent leased tracks, provided movement involves only cars destined for or coming from the plant — from the scope of the rule.

Contractors and Subcontractors to Railroads

Contractors and subcontractors to railroads must be addressed in each carrier’s Risk Reduction Plan, risk analysis, and Risk Reduction Program Plan. Contractors and subcontractors to railroads must adhere to the carrier’s RRP and RRPP, affirm in writing to the carrier and FRA that their employees have been trained, and remain in compliance just as if they were regular employees of the company. Should the contractor or a subcontractor providing “safety related employees” to a railroad fail to comply with the carrier’s RRP and RRPP, its work within the industry must be discontinued until they demonstrate both the commitment and ability to operate in full compliance.

Contractors and subcontractors should be incorporated into a railroad’s RRP to the same extent that the railroad’s own employees who perform the same work would be subject to the RRP. How such incorporation would occur would depend upon the size of the contracted workforce and the type and scope of the work performed. With respect to whether only contractors who perform safety-sensitive functions for the railroad should be incorporated into a RRP, the most consistent safety outcome would be to require incorporation of any contractor function that would be included in the RRP if the same work/function was performed by an employee of the railroad. The railroad should be responsible for having in place a binding document

memorializing which elements of the RRP would be administered by the contractor, and the contractor and the employing railroad must assure compliance.

Risk-Based Hazard Analysis

The ANPRM recites the RSIA requirement that each railroad develop and implement an RRP that “systematically evaluates railroad safety risks on its system”¹ and then asks “How can a risk-based hazard analysis accomplish this mandate?” This is a peculiar question to ask given the clear Congressional mandate. The question implies that such ordinary and typical hazard analysis cannot be readily accomplished in the rail industry. The science of risk-based hazard analysis is well established and has been effectively utilized for many years across a host of industries, including some even within the railroad industry.

The Labor Organizations agree with the experts that the key to effective hazard analysis within the railroad industry requires broadening the usual FRA/carrier focus to include scientifically-based data collection and analysis; with the inclusion and active participation of affected employee labor organizations in the process.

Basic research can link the chain of risk and hazard causation from track inspection to track defects to derailments to cargo types to geographic issues to susceptibility of damage based on demographics. This chain of causation also highlights the criticality of having Rail Labor participate in risk reduction plan strategies because the actual workers know the reality of what occurs in the real world.

For risks related to infrastructure and equipment the RRP should outline a robust program of inspection, repair and maintenance, along with appropriate training of those responsible for said inspection, repair and maintenance. For risks related to human factors, including management structure and operating rules and practices, RRP efforts should focus on removing systemic obstacles to safety improvement, and non-punitive remediation rather than discipline when the inevitable human errors occur. A focus on the behavioral, rather than the systemic, will not produce an effective RRP because behavioral modification approaches attempt to correct flaws in the safety system by addressing the symptoms rather than correcting the underlying condition. Moreover, such an approach requires that every time a particular safety hazard is encountered, the modified behavior is necessary to prevent an accident.

Given that all humans inevitably make mistakes or errors, addressing the problem by correcting the systemic flaw or eliminating the hazard, removes the human element. For example, merely issuing a directive to avoid a close clearance in a yard or not foul a track, or simply telling employees to avoid close clearances or not foul a track, attempts to address the problem by only modifying the employees’ behavior. Removing or eliminating the hazard is far more effective. Success will be demonstrated by data establishing reductions in both accidents/incidents and precursor events. Safety culture will be improved to the extent the RRP is properly designed and

¹ See § 20156 (a)(1)(A)

executed, thereby creating a feedback loop supported by reductions in unsafe outcomes that are realized.

Fatigue Management Plans

Of utmost safety concern for operating employees is the totally unpredictable work schedules that are the major source of fatigue among the operating crafts. The ANPRM mandates that the required Fatigue Management Plans should include elements addressing “Employee education and training on the physiological and human factors that affect fatigue, as well as strategies to reduce or mitigate the effects of fatigue, based on the most current scientific and medical research and literature.” As the scientific community has documented with over 40 years of fatigue research, a human being cannot possibly be rested to work safely unless that human being knows when they must report for service.

Operating employees working in “unassigned service” require proper rest periods in advance of performing safety critical service. The current safety culture in the rail industry is significantly affected by the various availability policies. Often, safety critical employees are forced to report for service even when fatigued or face disciplinary hearings and loss of employment. FRA has all the science and data needed to take strong action to eliminate fatigue as a safety issue in rail operations. The Labor Organizations encourage FRA to use the RRP as a mechanism to effectively mitigate/eliminate fatigue among railroad workers.

In the Hours of Service Interpretations prepared and distributed by FRA on June 26, 2009, FRA stated: “It appears that this interpretation would also best address the acute fatigue of employees working at different times of day and night, by ensuring that their best opportunity for rest, free from interruptions by the railroad, comes just prior to their going back on duty, so that they are well rested when they go to work, and better able to remain reasonably so throughout the duty tour.”²

FRA acknowledges that the 10 hours of mandated rest applied immediately preceding required service is the strongest fatigue mitigation tool available and will virtually eliminate acute fatigue as a safety issue for operating employees. We encourage FRA to take immediate action to implement this requirement and to require ten hours of advance notification for all operating employees not otherwise on assignments with defined start times in each carrier’s fatigue management plan.

The rail industry has spent large amounts of money purchasing and creating software programs to avoid creating predictable work schedules for operating employees. The industry has even created their own vernacular, using such terms as “dropped turns” and “paper deadheads” as justification for unpredictable schedules and the calling of fatigued safety critical employees for service.

² Federal Railroad Administration Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as amended, 74 Fed. Reg. 30665, 30671 (June, 26, 2009)

FRA and industry stakeholders know the solution to acute and cumulative fatigue for operating employees is the “Ten Hour Call.” The Labor Organizations urge FRA to act to require ten hours of prior notification as part of the RRP.

For BMWED, fatigue is as much an issue as it is for any other railroad employee. Indeed, about half of the BMWED’s membership performs service in traveling gangs that require the employees to be away from home for periods of time. Those employees not only do not sleep at home each night; they are deprived of the companionship of their families for extended periods of time. These stresses add to the fatigue BMWED members already obtain from the strenuous nature of the work they perform. Although the work performed by BMWED members generally does not fall within the criteria of “covered service” as defined under the Hours of Service regulations (49 CFR §228.5), maintenance of way (MW) employees are considered “safety-related employees” covered within the scope of 49 U.S.C. 20156(f)(1). A fatigue management plan for maintenance of way employees must address cumulative fatigue from both regular assignments and inadequate lodging and meal arrangements that run the gamut from multi-occupant “camp cars” to carrier provided double and, at times, single occupancy hotel/motel lodging to simple cash per diem payments to employees where the carrier takes no responsibility for the meals and lodging obtained by the employees. Additionally, FRA must consider fatigue caused by a MW employee’s short-term or sustained response to emergency situations such as derailments, natural disasters, and other intensive working conditions.

Cumulative fatigue for a large percentage of maintenance of way employees can be exacerbated if the employee’s commute home is of several hundred miles or more on rest days. These commutes are the product of work rules pushed by carriers in collective bargaining and before Presidential Emergency Boards that greatly extended the areas that gangs may operate over. Railroad RRPs must mitigate these long commutes at the beginning and end of the work period for regional and system production gangs. Railroad RRPs should immediately implement single occupancy accommodations for MW employees on traveling gangs in order to provide such employees an opportunity to obtain restful sleep at carrier-provided lodging facilities. Regularly scheduled meal times must also be addressed in RRPs and adhered to as a means to reduce cumulative fatigue among MW employees.

Camp cars, a vestige of the past on every major railroad except Norfolk Southern (NS), should be outlawed as a means to house MW employees on company property. NS camp cars have multiple-occupancy lodging “spaces” and a “commissary car” where meals of dubious quality are provided. Camp car accommodations also isolate the employees lodged in them from interaction with people in surrounding towns and cities. Sharing overnight accommodations, shower facilities and bathroom facilities with multiple unrelated individuals does not provide an opportunity for MW employees to obtain restful sleep. The Labor Organizations must note that such accommodations cannot be used to house covered employees under the Hours of Service Act. However, fatigue does not discriminate between “covered” and “non-covered” employees; therefore a lodging arrangement prohibited for one group of safety related employees must be prohibited for the other in the interests of safety. The Labor Organizations believe that the Norfolk Southern RRP should specifically set a reasonable date for the elimination of camp cars, except for their use in limited emergency situations such as exceptional natural disasters.

MW fatigue caused by a MW employee's short-term or sustained response to emergency situations such as derailments, weather events, natural disasters, and other intensive working conditions must also be addressed in each carrier's RRP. Each RRP should provide detailed plans for the mitigation of fatigue during emergency situations. Such detailed plans must assure MW employees access to healthful and nourishing food, clean and readily available drinking water, access to bathroom facilities, and access to lodging for appropriate rest after a maximum number of hours on duty.

Technology Implementation Plans

Similarly, Technology Implementation Plans (TIPs) must be subject to the good faith and best effort provisions of §103(g). This would include joint labor/management analysis of the safety impact, feasibility and effectiveness of technology and under what conditions such technology shall be implemented to maximize risk reduction.

RRPs must fully analyze and eliminate problems associated with electronic authorities. Such problems include, but are not limited to, miscommunication or misinterpretation of electronic authorities, employee training, computer "crashes," corruption of electronic authorities, security of electronic authorities, and possible misidentification of employees and/or unauthorized use. Remote authorities, where the train dispatcher or control operator is not directly involved in the decision logic or authority issuance, should not be allowed at any time under the RRP. TIPs must also address how roadway maintenance machines and highrail vehicles will be made "visual" to PTC systems on PTC-equipped territory and to the signal system on non-PTC equipped signalized territory.

For railroad employees in general, the application of available technology in the rail industry has been marked by poor or non-existent training standards, and inconsistent training of employees from one carrier to another. In cases such as the use of remote control locomotives, the absence of governing regulations further exacerbates problems related to the implementation of the technology. One of the basic tenets of risk reduction is adequate training of workers on the tools and equipment they will use. With Positive Train Control coming in the next few years with an incremental implementation strategy, TIPs must improve the level of training for the users of technology.

For Signalman, the lack of training combined with the rapidly evolving technologies in highway-rail grade crossings and signal systems prior to installation poses a significant risk to the safety of rail employees and the public. Signal employees are typically required to install and maintain these new technologies without initially being trained on anything other than the equipment's basic operation (e.g., turning the equipment on and off). Without proper training, a signalman is subject to reading a complex equipment manual which is often several hundred pages in length in order to maintain and troubleshoot the equipment. Not only does this practice take valuable time away from the signalman when performing maintenance, but also when troubleshooting. The Signalman is required to quickly search through the manual, possibly overlooking key elements, while attempting to restore the equipment to working order. TIPs must improve the level of training for those who install and maintain new and evolving technologies.

This extends to implementing new technologies and equipment in rail traffic control systems as well. The introduction of such changes as a *fait accompli* without the prior consultation with the employees directly affected creates situations where *ad hoc* emergency overrides must be undertaken to avoid accidents. Train dispatching employees have already experienced such situations on at least one carrier. Such overrides can be avoided when these systems are tested with dispatcher involvement prior to implementation.

Finally, the safety impact of automated track inspection technologies and their appropriate use must also be addressed in the TIP. Automated track inspections should be used only as a supplement to the current requirements for visual track inspections under Part 213. Automated track inspection technology should not be allowed as a substitute for safety-critical visual track inspections performed in accordance with 49 CFR 213.233. Automated track inspection technology should also not be leveraged as a means to weaken the remedial actions required under the provisions of the Track Safety Standards, 49 CFR Part 213.

Associated with these types of implementation problems are those carriers and owners of railroads who claim not to be carriers that interpose their concepts of technical advances in the name of public safety without discussion either with the FRA or Rail Labor. These potentially well-intentioned acts derail efforts to collaboratively and effectively solve problems and often exacerbate them. Any implementation of new technological strategies needs to take into account this particular problem to assure uniformity, efficiency, and the most effective solutions to common problems.

Bad Data: Garbage In, Garbage Out

The Labor Organizations are concerned about the effect of bad data and incomplete or inaccurate data to the process and goals of risk reduction. These concerns are based upon the fundamental reality that this RRP program, like all such safety programs, is necessarily based on data, and data has been shown over time, especially within in the rail industry to be consistently unreliable. GAO, OMB and other studies dating from at least 1989 have documented gross under-reporting of both injuries and lost time, due to injuries. See, e.g., GAO/RCED-89-109 “Railroad Safety-FRA Needs to Correct Deficiencies in Reporting Injuries and Accidents” April 1989, and House Subcommittee on Transportation and Infrastructure, “Review of Injury Reporting Practices in the Railroad Industry” Oct. 25, 2007.

FRA has acknowledged that the lack of a severity index in the current Harriman Award criteria is a contributing factor in the harassment of rail employees that report on-duty injury. In his April 14, 2003 letter to the Association of American Railroads, former FRA Administrator Allan Rutter stated: “...Those meetings resulted in a proposal to base the safety awards on a severity index that would give greater recognition to those railroads that were most successful in preventing serious injuries and fatalities. A severity index was devised that would separate the employee on duty casualties reported by the railroads into three levels of severity.” Eight years later, the Harriman Award criteria still remains unchanged. The Labor Organizations believe that any hope of a cooperative risk reduction program and an improved safety culture should

include a more realistic safety awards system and the elimination of the current award-based incentive to harass an injured employee who reports, or attempts to report, a non life threatening injury.

The consistent criticism of FRA data-driven awards such as the Harriman is largely because the current system tends to award carriers who are carrying out the most radical programs of retaliation against accident/injury reporting which, of course, drives the statistics on reported accidents, incidents, injuries, and close calls down, certainly in the near term. The Labor Organizations have every reason to believe that there are safety and security issues that employees dare not discuss with carriers or even FRA, due to the extreme retaliatory atmosphere which exists within the industry today. The Labor Organizations encourage FRA to continue to pursue the direction identified in Administrator Rutter's April 14, 2003 letter to AAR.

To further rectify the suppression of accident/injury reporting, the proposed regulations must directly extend the confidentiality coverage discussed in Section E of the ANPRM, *Protection of Confidential Information*, to protect employees who provide safety or security information. This would include confidentiality of employees providing information to FRA, DOT, carriers, labor organizations, survey takers, consultants, and contractors performing RRP and RRPP functions.

Nothing in the new RRP regulations can be accomplished effectively in the absence of accurate data. The Secretary is granted broad statutory authority under Sec. 20118(a) to take all actions regarding confidentiality as necessary to effectuate the purposes and intent of the RSIA. This power includes both capacity to extend and establish confidentiality protections, and to initiate exception or limitations to such confidentiality where needed.

The "safety cultures" of the carriers, geared as they have been to an almost exclusively punishment-based structure, has created an atmosphere of fear and suppression which must be overcome in order to allow employees full participation and openness. Front line rail employees are the sole source of PRIMARY data, as opposed to secondary information.

Without real and credible confidentiality protection for employees in RRP as well as aggressive and credible whistleblower protection up front, the Secretary can hardly expect to accomplish anything beyond the usual pattern of the past. Short-term, surface level changes at the upper levels of management rarely trickle down to change anything where activities on the ground are concerned.

The RRP regulation should therefore contain an acknowledgement that FRA perceives serious deficiencies in the accuracy and reliability of safety data due to the existence of traditional and deeply imbedded safety cultures which permit overt or covert retaliation, intimidation, suppression of negative safety information, and dysfunctional abuse inherent to punishment-based safety programs. All initiatives and evaluations of safety success/failure are necessarily data-driven. With the existing data highly suspect and future data likely to be suspect as well, FRA must implement reforms to address those data issues in conjunction with RRP adoptions.

Training

The context of training and training materials will be unique to each railroad's RRPP. Training issues will necessarily be based upon RRP and RRPP content, so the specific issues related to training should be addressed within the collaborative consensus-based process of Section 103(g). The Labor Organizations generally support annual training to reinforce the importance and commitment of all parties to risk reduction, facilitate knowledge transfer and understanding of the RRP and RRPP among all levels of the carrier, and allow for annual assessment of the program based upon employees' perceptions and self-critical evaluation of the program that should be part of any training and evaluation.

Initial training should be completed within 90 days of implementation. Recurrent training should be afforded annually in some cases, and perhaps at the same frequency as other FRA-mandated training in other cases. We believe that the content and frequency of training for each class and craft of employees is best addressed in the context of the "good faith and best efforts" consultation required under Section 103 (g) of the RSIA.

Approval by FRA/Recordkeeping/Evaluation of RRP

The Labor Organizations suggest that all RRP and RRPPs be submitted for approval within six months of the effective date of the final rule and presupposes that the covered carriers have been actively meeting and conferring with Rail Labor in the consultation process well before that time.

Except for record retention requirements in other statutes or regulations that may be greater, all RRP-related documents and data should be retained for six years. This is critical in order to maintain context and to consider changes to the RRPP over time. Record retention burden would be negligible provided that railroads are permitted to retain such documents and data electronically. Data records must be retained in a format that facilitates analysis.

FRA tracks accident/incident data in five general causation categories: equipment; human factors; signal; track; and miscellaneous. Moreover, the agency's regulatory efforts typically target unsafe conditions based on the frequency with which a particular category, or subcategory, appears in the accident/incident data. Therefore, it is appropriate to utilize a similar methodology in determining the adequacy of a particular railroad's safety record, as well as in reviewing its RRP for compliance with statutory requirements.

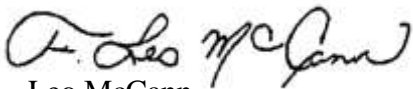
Any evaluation method must be robust enough to measure whenever the industry as a whole may be failing to address legitimate safety problems. If all railroads have failed to address a certain aspect of safety equally, or ignored it altogether, the industry average would be such that an individual railroad's performance would not deviate from the average. In this circumstance, using only the industry average could camouflage serious safety concerns. We believe it is FRA's mission to move the industry as a whole in a safer direction. To do that it must insist that the average or industry standard improve over time, as well as the safety performance of individual railroads.

Public Meetings

There should be, at minimum, three public hearings related to this ANPRM in the following locations: one in Washington DC, one in the Midwest, and one in the West. Additional public meetings should also be held at locations convenient for receiving comments from participants in the various C³RS pilot programs and the CAB and STEEL programs. Efforts should be made to accommodate not only live testimony, but lively exchanges of views of stakeholder representatives. Advanced notice of these hearings should be at least forty-five (45) days and ample time should be allotted to all key stakeholders participating in the public hearing(s).

The Labor Organizations appreciate this opportunity to provide these comments to the Advance Notice of Proposed Rulemaking in FRA Docket No. FRA-2009-0038.

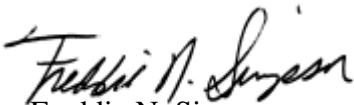
Respectfully submitted,



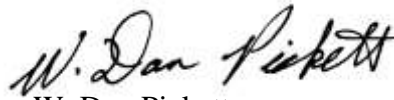
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President, ATDA



Dennis Pierce
National President, BLET/IBT



Freddie N. Simpson
President, BMWED/IBT



W. Dan Pickett
President, BRS



Gary E. Maslanka
International Vice President, TWU



Richard A. Johnson
General President, Carmen Division/TCU



Mike Futhey
International President, UTU