STATEMENT OF
LARRY I. WILLIS, GENERAL COUNSEL
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
HOUSE SUBCOMMITEE ON COAST GUARD AND MARITIME TRANSPORTATION

ON THE
TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL

July 12, 2007

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I want to thank you for the opportunity to testify today on the Transportation Workers Identification Credential (TWIC) and specifically on its application to port, maritime, rail and related workers. TTD consists of 32 member unions, including those that represent thousands of longshore, maritime, rail and other workers who work in and around port facilities and who will be directly affected by the TWIC rule issued earlier this year by the Transportation Security Administration (TSA) and the U.S. Coast Guard.[1] I want to note that Mike Rodriguez, Executive Assistant to the President of the International Organization of Masters, Mates & Pilots, a TTD affiliate, is also testifying this morning and will talk specifically about how the TWIC program will impact workers onboard vessels.

In addition to our work with the TWIC maritime program, TTD directly participated in the regulatory proceeding that implemented the threat assessments and background checks for Hazmat truck drivers. We also are working with our aviation unions to address concerns that have been raised in that mode of transportation. We worked with members of this Committee and the Homeland Security Committee with regards to background checks initiated by Class I railroads through its so-called E-RAILSAFE program.[2] And finally, we understand that TSA has an interest in eventually extending TWIC to other modes of transportation and thus our unions not directly covered by the program today have a vested interest in this issue. So again, thank for the opportunity to share our views and concerns.

Overview

At the outset, let me state clearly that no one wants to secure our nation's ports, vessels and other transportation assets more than the men and women represented by our affiliated unions. Our members are on the front lines and they will be the ones first affected by a terrorist attack on or

---

[1] Attached is a complete list of TTD affiliated unions.
[2] A provision that would provide some protections to workers was included in the House passed version H.R. 1401 and is now the subject of the conference committee reconciling the differences in the 9/11 bill.

using our nation's transportation system. We also understand that access control procedures, including the use of tamper-resistant biometric identification cards, is part of this effort and we support initiatives to identify and bar individuals who pose a terrorism security risk from working in security-sensitive transportation jobs.

With that said, any TWIC program must strike the right balance – it must enhance the security of our transportation system, but must also preserve the legitimate rights of workers and not unduly infringe on the free flow of commerce. In short, the TWIC program must provide workers with basic due process rights, including a meaningful appeal and waiver process. It must ensure that privacy rights are respected, not force workers to pay the costs of this mandate and avoid multiple and duplicative checks and cards.

The TWIC program was originally designed to control access and to identify genuine security risks to our transportation system. It was not designed, at least from our perspective, to unjustly punish someone twice for a bad decision made years ago that had nothing to with terrorism. On this point, I want to acknowledge the work of this Committee in passing Section 70105 of the Maritime Transportation Security Act (MTSA) that first established the requirements and limits for a maritime transportation security card. While not a perfect compromise, there are important protections and limitations included in this provision. In fact, after passage of the MTSA in 2002, these protections have been enhanced by providing workers with access to an Administrative Law Judge (ALJ) to adjudicate waiver and appeal cases.

We appreciate the fact that in many regards the final rule issued by TSA and the Coast Guard follows the mandates of Section 70105 and otherwise attempts to put forth a reasonable and workable program. Unfortunately, as we approach implementation of this long-delayed program, we remain concerned that TWIC could still be used to disqualify individuals who are not terrorism security risks and in other ways place unnecessary burdens on workers. TSA and the Coast Guard must strike the right balance between legitimate security concerns, ensuring that port and maritime facilities remain efficient and providing a fair system for workers. These objectives are not inconsistent. To the contrary, a workable, reasonable and fair TWIC program will only enhance transportation security, and we see no reason why this program cannot be implemented in a manner that will achieve these objectives.

Determining Security Risks

Section 70105 set a standard for what criminal activity will disqualify a worker from holding a maritime TWIC. Specifically, an individual may not be denied a security card unless the individual has been convicted within the past seven years or released from incarceration in the last five, of a felony "that the Secretary believes could cause the individual to be a terrorism security risk to the United States." We support this standard. However, we remain concerned that some of the disqualifying offenses in the TSA rules are too broad, vague and include descriptions of crimes that do not appear to have a direct nexus to identifying terrorism security risks.

As this Committee is aware, the Conference Committee considering the 9/11 implementation legislation is considering whether to accept an amendment offered in the Senate that would codify into statute the TSA offenses that would disqualify a person from holding a TWIC. To the extent that the current list and description of crimes needs refinement, we are opposed to any legislation that would run counter to this objective. I know many on this Committee and in the Homeland Security Committee have expressed concern that the disqualifying crimes proposed by TSA may not be appropriate. At a minimum, there must be an ability to modify these offenses as needed, and some of the language included in the Senate bill that was regulatory in nature should not be codified into statute. Finally, I want to reiterate our opposition to the concept that those charged with a disqualifying crime, but not convicted, should lose their TWIC and thus their job.

In response to our calls to refine the list of disqualifying crimes, TSA has often stated that such refinements are unnecessary because a worker can always apply for waiver. While we appreciate the inclusion of a waiver process in Section 70105, and its adoption in the TWIC rule, it should not be used as excuse to adopt an overly broad list of felonies and allow other problems with the list of disqualifying crimes to go unaddressed.

Deeming someone a terrorism security risk is not a characterization that should be casually rendered and places an obvious burden on a person to overcome that label. While TSA is apparently granting waivers in the Hazmat program, we do not know how many workers have declined to apply for a Hazmat endorsement in the first place because of the long and vague list of disqualifying offenses. Furthermore, TSA will need to review and process the criminal histories of between 750,000 and 1.5 million port and related workers pursuant to this rule on an extremely tight deadline. On top of the other procedural challenges inherent in this program, it makes little sense to overload the waiver process with individuals who should never have been disqualified in the first place.

We are also disappointed that the regulations do not provide a mechanism for a person to challenge the determination that a particular crime is indeed a disqualifying offense. There may be situations where a person is convicted of crime that TSA believes fits into the broad description of the disqualifying offenses, but a legitimate argument could be made to the contrary. To rectify this problem, TSA should allow workers to challenge the characterization of a particular offense either as part of the waiver or appeal process.

Waiver Process and ALJs

When Congress first considered Section 70105 of the MTSA, the inclusion of a waiver process – where workers could demonstrate they were not a security threat even if they had committed a disqualifying crime – was a major priority for our member unions. We were therefore pleased that TSA chose to incorporate this waiver process into the Hazmat program and it has been offered as part of the TWIC program.

However, we were concerned that the waiver process, as envisioned in the proposed rule issued in 2006, required workers to apply back to the very same agency that determined the individual was a security risk in the first place. Given the high public anxiety over terrorist risks and the insular nature of this process, we were concerned that TSA might reject waivers that are otherwise meritorious.

To address this problem, Congress specifically mandated in Section 309 the Coast Guard and Maritime Transportation Act of 2006 (P.L. 109-241) that workers could have their waiver cases heard by an ALJ. I want to thank Members of the Committee, particularly then-Chairman Don Young, Chairman Oberstar, and others for their strong support for that provision that originated in the House bill. It is our hope that this will allow employees to make their case in front of an impartial decision-maker not bound by political pressures or subject to agency interference. In addition, ALJ decisions will establish case precedent that should better define what constitutes a security risk. This would bring a level of fairness and consistency to a system that is central both to employee rights and national security.

But I must say that we are very concerned with recent reports questioning the impartiality and independence of Coast Guard ALJs. I understand that the Subcommittee intends to hold a separate hearing on this issue and to examine these charges in more detail. Let me just say today that Congress specifically provided for ALJ review because it wanted to ensure a level of fairness for workers that are initially deemed a security risk and thus denied a TWIC. If ALJs charged with hearing these cases are found not to provide a true impartial forum, then Congress's intent will be thwarted. And workers will, of course, be denied genuine due process and could unfairly lose their jobs and livelihoods. Congress must ensure that the Coast Guard ALJ program does indeed operate fairly and independently or an alternative forum must be found to hear these cases.

We are also concerned that there be a sufficient number of ALJs available to hear these cases. Clearly, if the program experiences significant delays and workers are not able to obtain final resolution to their cases it would run counter to the intent in creating the ALJ right in the first place. We clearly want to work with this Committee and the Coast Guard to ensure this does not happen.

National Standard Needed

We are concerned that the national TWIC rule would specifically allow states to impose additional and broader background checks and to do so without any of the protections or limitations included in the federal program. If security threat assessments are needed to enhance our national security, the TSA should adopt and enforce a national standard. It makes little sense for TSA to establish a national program, force workers to pay for this program (over our objections), and then allow local jurisdictions to use national security as an excuse to create yet another security review process.

What constitutes a security risk should not be based on what state or jurisdiction a port resides in. Furthermore, TSA and the Coast Guard have a stated intent to achieve a level of consistency governing threat assessments and transportation credentials. Allowing states to arbitrarily

impose different security requirements is inconsistent with this objective and should be reversed. As Mike Rodriguez will explain in more detail, this problem is especially acute for mariners whose jobs take them to several different ports.

Cost of the TWIC

We are vehemently opposed to the provisions of the TWIC rule that passes one hundred percent of the costs of this program on to individual workers. The security threat assessments and the background checks mandated in this proposal are considered necessary to enhance the security of our nation's ports and are part of the overall effort to fight terrorist elements. Given the reality of this national priority, the government, and not individual workers, must absorb the costs of this program.

The TWIC card, and the accompanying background check, is essentially a condition of employment and will surely benefit employers. The port and related facilities will be more secure and access control procedures will be in place. If the federal government refuses to step in and fund this security mandate, employers should fund a program that will directly benefit their operations. Employees will have to spend time and effort to apply for the TWIC and may incur additional expenses if an appeal and waiver are needed. It is neither fair nor reasonable to ask workers to also pay for this security mandate that has broader benefits.

It is also important to note that TSA will apparently force workers to pay for a biometric card but not require owners and operators of maritime facilities and vessels to purchase and install biometric readers at this time. Biometric identification cards cost more than less sophisticated identification. But without the readers in place, these fancy and expensive cards are nothing more than glorified flash passes.[3] In short, the cost, both financial and otherwise, are being imposed solely on workers, but the broad security benefits promised through biometric technology are not going to be realized any time soon. While reports indicate that TSA will issue a rule on readers sometime in 2008, given the history of this program we question when the readers will actually be in place and what technology will eventually be adopted.

Exemption Requests

As this Committee is aware, an amendment was offered during consideration of the Coast Guard bill that would have created a special exemption from the TWIC requirements for employees on board towing vessels. We are opposed to this amendment. The amendment would allow newly hired employees to work on a towing vessel for up to 90 days without even applying for a TWIC so long as that worker passes a drug test and name-based check against the terrorism watch list. Proponents of this amendment paint it as a simple extension of the interim work authority included in the SAFE Ports Act and codified in the final TWIC rule. This is not the case. All other workers covered by the interim work authority would still need to apply for a TWIC – under the proposed amendment, towing vessel operators would be exempted from this requirement. If there are problems with TWIC application procedures then TSA and the Coast

[3] While the Coast Guard states that it will verify TWIC cards with hand-held biometric readers when conducting "spot" inspections, on regular basis workers will present their TWIC cards to security personnel who will only compare the cardholder to his or her photo and inspect the card for evidence of tampering or alteration.

Guard, or even Congress, should address them across the board. Allowing special exemptions for one sector of the industry raises both security and basic fairness questions that have not been adequately addressed by supporters of this amendment. Congress and the Administration have made a policy decision that TWIC and its accompanying background checks are necessary to enhance security. Based on this premise, it makes little sense to exempt a group of 15,000 employees that will essentially create a revolving temporary workforce that has had no comprehensive threat assessment.

Privacy of Information

As we have consistently stated, maintaining the privacy and confidentiality of the information collected and generated by the TWIC process is crucial. Toward this end and at our request, Section 70105(e) includes a specific mandate that "information obtained by the Attorney General or the Secretary under this section may not be made available to the public, including the individual's employer." Consistent with this requirement, information that is gathered from the use of the card, i.e. when the employee enters and leaves a port facility, must not be shared with the employer. The TWIC program was conceived and mandated by Congress to enhance the security of our nation's seaports. For this effort to succeed, it must remain solely focused on that objective and not be used for any non-security reason.

Application of TWIC to Aviation

As the Committee is well aware, Congress has mandated that workers in the aviation sector undergo separate threat assessments, including a review of criminal histories. I should note that aviation workers are still denied access to a waiver process, rights afforded to Hazmat and maritime employees, and this double-standard should be rectified. Even though these threat assessments are in place, electronic identity cards have yet to be issued by TSA. Given the unique nature of the aviation industry, and the mobility of its workforce, an electronic biometric identification card would allow these employees to move more efficiently through the system and at the same time enhance aviation security. We hope that TSA will work with our aviation unions to implement an aviation TWIC card based on the checks that have already been completed on those employees and consistent with the protections and limitations previously articulated.

Conclusion

Transportation labor has always supported policies that will enhance the security of our nation's seaports and the entire transportation system. We understand and recognize that the TWIC program is part of the federal response to terrorism, and we specifically support its stated purpose of preventing terrorist elements from infiltrating our transportation network. But for this program to be successful the legitimate rights of workers must be preserved and those who pose no terrorist threat must not be denied their right to work in this industry. We look forward to working with this Committee, the TSA and the Coast Guard to meet these objectives.

Thank you again for the opportunity to share the views of transportation workers.

TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Airways Systems Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal Workers International Association (SMWIA)
Transportation · Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers International Union (USW)
United Transportation Union (UTU)

November, 2006