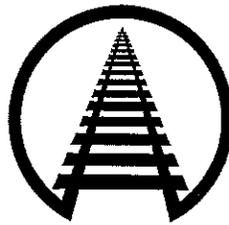


**STATEMENT OF**  
**EDWARD R. HAMBERGER**  
**PRESIDENT & CHIEF EXECUTIVE OFFICER**  
**ASSOCIATION OF AMERICAN RAILROADS**



**BEFORE THE**  
**U.S. HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**  
**SUBCOMMITTEE ON RAILROADS, PIPELINES, AND**  
**HAZARDOUS MATERIALS**

**HEARING ON THE REAUTHORIZATION**  
**OF THE FEDERAL RAIL SAFETY PROGRAM**

**MAY 8, 2007**

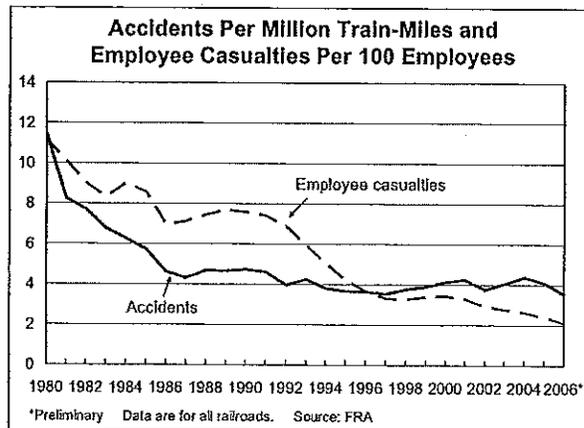
**Association of American Railroads**  
**50 F Street NW**  
**Washington, DC 20001**  
**202-639-2100**

On behalf of the members of the Association of American Railroads (AAR), thank you for the opportunity to address rail safety. AAR members account for the vast majority of freight railroad mileage, employees, and traffic in Canada, Mexico, and the United States. My testimony below will focus on H.R. 2095, the proposed "Federal Railroad Safety Improvement Act of 2007."

### Overview of Rail Safety

The overall rail industry safety record is excellent, reflecting the extraordinary importance railroads place on the safety of their employees and the communities they serve. According to data from the Federal Railroad Administration (FRA), from 1980-2006 railroads reduced their overall train accident rate by

69 percent, their rate of employee casualties by 81 percent, and their highway-rail grade crossing incident rate by 76 percent.<sup>1</sup> Rail safety continues to improve. The employee casualty rate and the grade crossing incident rate in 2006 were at their lowest levels ever, while the

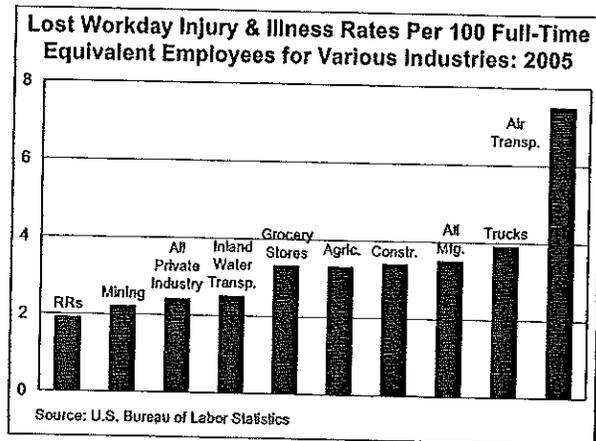


train accident rate was just fractionally higher than the record low set a few years ago.

Decades ago, railroads were among the most dangerous places to work. That's no longer true. Today, more people work in industries with higher employee injury rates than railroads than work in industries with lower employee injury rates than railroads. In fact, according to Department of Labor data, railroads today have lower employee injury rates than

<sup>1</sup> Accident and injury rates are a better indicator of safety improvement than the absolute number of accidents or injuries because the former incorporate units of output (e.g., train-miles or employee-hours).

other modes of transportation and most other major industry groups, including agriculture, construction, manufacturing, and private industry as a whole. Available data also indicate that U.S. railroads have employee injury rates well below those of most major foreign railroads.



Railroads are proud of their safety record, which results from railroads' recognition of their responsibilities regarding safety and the enormous resources they devote to its advancement. At the same time, railroads want rail safety to continue to improve. The rail industry is always willing to work cooperatively with you, other policymakers, the FRA, its employees, and others to find practical, effective ways to make this happen. Railroads recognize that the primary purpose of H.R. 2095 is improving safety. We share that goal.

A commitment to safety that permeates the workplace is critical to promoting safety on a given railroad. Railroads have that commitment. But a healthy balance sheet is important as well. A financially-viable railroad will be in a much better position to invest in safety enhancements (e.g., heavier rail, newer freight cars and locomotives, technology R&D, more sophisticated training, and so on) than a financially-weak carrier. The record investments that railroads have made in their infrastructure, equipment, and technology in recent years have made railroads much safer, and these investments were made possible by the moderate improvements in profitability that railroads have enjoyed. Consequently, legislative or regulatory actions that would create significant new spending requirements and/or in any way would unduly restrict rail earnings could have unintended negative safety

consequences in addition to negative capacity, efficiency, and service reliability consequences.

Of course, no budget is unlimited, even for something as important as safety and even for railroads that have experienced financial improvement in recent years. Thus, I respectfully urge you to carefully consider whether particular safety-related mandates and measures are necessary and appropriate. After all, safety will not be advanced if resources are spent wastefully or if unfunded mandates lock up resources that could be better invested elsewhere. Wasteful safety mandates would only increase the cost of rail service (including for those who believe that rail service already costs too much) and drive more traffic to the highways, where the safety record is far less favorable than it is on the rails.

### **Fatigue in the Rail Industry**

One of the primary focal points of H.R. 2095 is fatigue. As I noted in testimony to this committee on February 13<sup>th</sup> of this year, it is not in a railroad's best interest to have employees who are too tired to perform their duties properly. That's why railroads have long partnered with labor to gain a better understanding of fatigue-related issues and find effective, innovative solutions to fatigue-related problems.

Combating fatigue is a shared responsibility. Employers need to provide an environment that allows their employees to obtain necessary rest during off-duty hours, and employees must set aside time when off duty to obtain the rest they need. It is also clear that factors that can result in fatigue are multiple, complex, and frequently intertwined. Therefore, efforts to combat fatigue should be based on sound scientific research, not on anecdotes or isolated events. There is no single, easy solution to fatigue-related problems, especially in an industry that must operate 24 hours per day every day of the year.

Individual railroads are pursuing a variety of fatigue countermeasures, based on what they've found to be most effective for their particular circumstances and the provisions of their collective bargaining agreements. I discussed many of these countermeasures in my February testimony. Not every countermeasure is appropriate for every railroad, or even for different parts of the same railroad, because the effectiveness of various fatigue countermeasures depends on the circumstances unique to each railroad.

Railroads support continued research on ways to fight fatigue and will continue to work with rail labor to find effective solutions to fatigue issues. To that end, railroads are amenable to a careful reexamination of the Hours of Service Act's (HSA) statutory limitations. Generally speaking, railroads do not object to provisions in Section 201 of H.R. 2095 that prohibit train and engine and signal employees from working unless they have had at least ten consecutive hours off duty (up from eight hours under existing law) during the prior 24 hours, and railroads do not object to a requirement that those ten hours should be free of non-emergency phone or page communications from railroads.

Other provisions of Section 201 in H.R. 2095 are more problematic, including the provision on limbo time.

As you know, the HSA limits the number of hours that train crew employees can remain on duty. At times, though, because of unforeseen events, a train may be unable to reach its scheduled (or even a convenient) crew change point within its crew's allotted 12 hours. When this happens, the crew becomes "outlawed" and must immediately stop the train and wait for a new crew to replace it. Transportation of the replacement crew to the train, and of the outlawed crew from the train to a designated location where it is released from duty<sup>2</sup>, is called "deadhead" transportation. Deadhead transportation is typically provided by other rail

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<sup>2</sup> For example, to a terminal or a place of lodging.

personnel or by private contractors hired by railroads for this purpose. Deadhead time is not counted as on-duty time in either the airline or motor carrier industries.

The time a crew spends waiting to be taken to a duty assignment, and the time it spends being transported to the duty assignment, count as time on duty. However, time that outlawed crews spend waiting for deadhead transportation, and the time they spend being transported to where they are released from duty, count as neither time on duty nor time off duty. Instead, this time is considered "limbo time." During limbo time, the train crew has been relieved of and will not perform safety-sensitive duties. Employees' off-duty rest time begins only after they are released from duty. Rail employees are paid for limbo time. I discussed limbo time in some length in my February testimony.

Classification of limbo time as on-duty time, as called for in H.R. 2095, would impose intractable scheduling problems on railroads. Limbo time generally results from unforeseen circumstances. If time spent deadheading from a duty site were counted as on-duty time, a violation of the HSA would be all but assured if anything unforeseen happened. Countless actions as varied (and from a railroad's point of view, virtually unavoidable) as a grade crossing accident that delayed a train, a blown tire on a van carrying a train crew back to its release-from-duty site, or a sudden track washout would mean a violation of the HSA.

Although limbo time does not contribute to employee fatigue during the immediate work assignment, railroads are aware of concerns that it could play a role in creating a cumulative sleep deficit. To guard against this possibility, railroads support three changes to current regulations.

First, any employee who works 12 consecutive hours on duty, and then at least one hour of limbo time, would receive at least 14 hours of off-duty time once he or she is released from duty. Second, rail train and engine employees would be subject to a new monthly

maximum 276 hours on duty.<sup>3</sup> Third, even though limbo time is not on-duty time, it would be included in those 276 hours. Hours beyond this new maximum, which is consistent with permissible hours for other modes of transportation, would be a violation of the HSA. (Today a rail employee could theoretically work 432 hours per month and still be in compliance with the HSA.<sup>4</sup>)

Together, these three measures not only significantly reduce the maximum on-duty time for train and engine employees under current law, but they also strike a balance between the concerns that limbo time contributes to fatigue and the realities of the unpredictability of railroad operations.

The above proposal is the railroad industry's preferred approach. Failing use of this approach, railroads would support a transfer of the hours of service authority to the FRA, with reliance on FRA's professional judgment.

Another provision in Section 201 mandates that train and engine and signal employees cannot work unless they have had at least 24 consecutive hours off duty during the previous seven days. This limit is arbitrary and inconsistent with railroad work schedules, particularly for employees assigned short hauls and who work in terminals. Generally speaking, the limit would be appropriate if extended one more day, to require 24 consecutive hours off duty in a period of eight consecutive days.

Even then, though, an exception is needed for signal employees. To enable signal employees to finish their work at far-away sites without having to commute multiple times, railroads and signal employees historically have agreed to modified work schedules — for

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<sup>3</sup> KCS and CN do not agree with this position, and Amtrak abstains on the issue.

<sup>4</sup> In fact, though, we know of no cases where this has occurred. The vast majority of railroad workers are on duty each month for periods comparable to most other U.S. workers. Some 83 percent of these rail workers are on duty less than 200 hours per month and more than 95 percent are on duty less than 250 hours per month.

example, eight consecutive work days (ten hours each day) followed by six consecutive days off. These work schedules are permitted under the HSA, are contained in collective bargaining agreements with signal employees, and result in much less total off-duty travel time for employees working a substantial distance from home. This work schedule for signal workers does not compromise safety and should be allowed.

Although schedules like this are permitted by the HSA, they are not permitted by Federal Motor Carrier Safety Administration (FMCSA) hours-of-service regulations, which apply to the many railroad signal employees who drive commercial vehicles to perform their duties. Several years ago, railroads and rail labor (through the Brotherhood of Railroad Signalmen) petitioned FMCSA to allow the HSA to take precedence over FMCSA's hours of service requirements. To date, FMCSA has refused. This problem can be rectified if it is made clear statutorily that hours of service requirements for rail signal employees under the HSA shall not be subject to hours of service restrictions imposed by another government agency.

Another provision in Section 201 prohibits railroads from invoking the emergency work provision for signal employees for "routine repairs, maintenance, or inspection." (Under the HSA, signal workers are permitted to work more hours during emergencies than they can during non-emergencies.) Presumably, the purpose of this provision is to prevent railroads from "gaming the system" by invoking the emergency work provision when an emergency does not exist. The railroads do not object to statutory language ensuring the provision is only invoked when appropriate.

Similarly, Section 201 also prohibits railroads from requiring signal employees to perform emergency work more than three days in any seven consecutive days. The nature of rail operations is such that, occasionally, railroads encounter emergencies when this limitation

would cause significant harm to rail operations and the greater good. Hurricane Katrina is a vivid and extreme example of an emergency. After that storm, signal workers performed Herculean tasks in getting the rail system up and running again. Had this provision been in place then, railroads' ability to respond to the storm would have been severely diminished and service restoration would have taken far longer. The same considerations would apply to more frequently occurring weather- and non-weather related emergencies.

Simply prohibiting railroads from invoking the emergency work provision for signal workers when no emergency exists would address concerns that railroads can "game the system." The three-days-in-seven provision, however, is superfluous and would do more harm than good.

Section 203 of H.R. 2095 requires railroads to submit fatigue management plans to the FRA for its review and approval. Railroads do not object to the preparation of a fatigue management plan *per se* — as I noted earlier, all major railroads already engage in a variety of efforts to combat fatigue, and will continue with these efforts. Rather, railroads are concerned that Section 203 as written is unreasonably broad, rigid, and does not require that such fatigue management plans be fact-based and science-based. We suggest these modifications:

- Rather than applying to all employees, as H.R. 2095 proposes, fatigue management plans should apply only to employees who are subject to the Hours of Service Act.
- Rather than requiring FRA approval, fatigue management plans should be filed with the FRA. The FRA should have the authority to disapprove elements of the plan, but absent FRA action the plan should become effective 30 days after filing. This point is important because innovation in combating fatigue should not be stifled, and waiting for approval could delay the implementation of plans. This process is also consistent with procedures for approval of railroad engineer certification programs.
- The requirement in Section 203 that "every condition on the railroad carrier's property" be addressed in the plan is impossibly vague and broad. For example, it could conceivably be used to prohibit night-time operations on a railroad.

- Railroads do not oppose the imposition of fatigue management plans on contractor employees doing work which, if done by a railroad employee, would be subject to a railroad's fatigue management plan, but the contractor — not the railroad — must be responsible for compliance. Railroads can make contractor employees follow railroad rules while working on railroad projects, but railroads lack the ability to police contractors' overall labor policies and employee hours. If policymakers determine that any group of non-railroad employees should be subject to an hours of service limitations, policymakers should address the issue with those groups directly, not indirectly through railroads.

Finally, a fatigue-related provision of H.R. 2095 prohibits rail employees' sleeping quarters from being located in the vicinity of switching operations. This proposal is unneeded. Under current law, the construction or reconstruction of any sleeping quarters in the vicinity of switching operations cannot take place without FRA approval, which will not happen if interior noise levels will exceed 55 decibels. In addition, the FRA considers whether hazardous materials are switched nearby. Thus, the issue of whether employees will have an environment in which to rest is already addressed.

### **Positive Train Control and Railroad Switches**

Section 601 of H.R. 2095 requires Class I railroads to submit to the DOT for approval plans for implementing positive train control by December 31, 2014.

Class I railroads are now developing and testing train control systems that can help prevent accidents by automatically stopping or slowing trains before they encounter a dangerous situation. Through predictive enforcement, train control technologies, in certain circumstances, could significantly reduce the incidence of train accidents caused by human error, especially train collisions and derailments due to excessive speed.

Train control systems are extremely complex. At a minimum, they must include reliable technology to inform dispatchers and operators of a train's precise location; a means to warn operators of actual or potential problems (*e.g.*, excessive speed); and a means to take action, if necessary, independent of the train operator (*e.g.*, stop a train before it reaches the

physical limits of its operating authority or allowed speed). Some systems will also include additional features, such as expanding the ability to monitor the position of hand-operated switches. Perhaps the most critical element is sophisticated software capable of accommodating all of the variables associated with rail operations. When successfully implemented, these enhanced train control capabilities will enable trains to operate more safely than trains operate today.

Major railroads are engaged in various projects to test elements of this new technology. For example, BNSF has done extensive and successful pilot testing of its version of train control (Electronic Train Management System – ETMS) in Illinois and elsewhere. BNSF recently received final approval from the FRA to implement the technology on lines elsewhere on its system. Train control projects in progress on other railroads promise to provide similar or enhanced functionality and safety benefits. These include CSX’s Communications-Based Train Management (CBTM) system, Norfolk Southern’s Optimized Train Control (OTC) system, and Union Pacific’s Communications-Based Train Control (CBTC) system.

Railroads are committed to the development and implementation of advanced train control technology where it makes sense to do so (*e.g.* high density main lines, rather than low density branch lines or yards) and at a pace that can be justified by available funds. Because there are so many variables involved, and because railroads are still investigating different train control systems and the advantages and disadvantages they offer, railroads believe that a rigid deadline, like that contained in H.R. 2095, is too rigid. Railroads recognize that 2014 (the deadline called for in the legislation) is some years away, but the tremendous costs and complexities involved in train control systems argue for flexibility, not rigidity, both in time and operational functionality. Railroads favor a commitment to provide

the FRA with an implementation plan regarding train control within 12 months, with the FRA reporting to Congress. Perhaps at that point a firmer implementation timetable could be established.

Provisions in H.R. 2095 regarding train control also mandate regulations requiring on main lines in non-signaled territory a system that would stop a train in advance of a misaligned switch, automatic switch-position indicators, or an operating policy that trains be operated at speeds that will allow trains to be stopped in advance of misaligned switches. Depending on the definition of “main line” and other factors, there are potentially tens of thousands of switches in non-signaled territory — often on low speed trackage — that would be affected by such a mandate.

Railroads realize that the rationale for this provision is protection against accidents caused by misaligned switches. However, on January 10, 2005, the FRA issued a safety advisory that directed all railroads to review their operating rules and take certain other actions necessary to help ensure that train crews who operate hand-operated main track switches in non-signaled territory restore the switches to their proper position after use. In October 2005, the FRA issued an emergency order mandating that railroads retrain and periodically test employees on switch operating procedures and increase communication among crew members regarding the position of the switch. The FRA has also issued a notice of proposed rulemaking that will supersede the emergency order. We expect a final rule to be promulgated in the near future. Thus, the FRA has already addressed the issue of improperly set manual switches in non-signaled territory. There is no reason to believe that these FRA actions will not achieve the goals behind the switch-related provisions of H.R. 2095.

Based on our analysis of FRA safety data, in 2006 there were three accidents attributable to switch problems this provision is meant to address. Over the past ten years,

there have been an average of four to five per year. Based on our understanding of available technology, the cost to equip each of the tens of thousands of switches potentially covered by the mandates in H.R. 2095 could be in the tens of thousands of dollars per switch — a truly enormous amount. That's not to say that railroads do not recognize and deeply regret tragic accidents attributable to improperly lined switches. However, as alluded to earlier, safety is best advanced when resources are spent to produce the highest safety benefits.

Finally, a track safety requirement of H.R. 2095 apparently would require railroads to have a track service failure rate of less than 0.1 per track mile per year. Such a regulatory requirement is well beyond what any major railroad has ever met over their entire systems. As written, this provision should be deleted. However, railroads are in favor of performance standards in lieu of inflexible command and control regulations and would be willing to work with the committee and FRA on a feasible standard.

#### **Protection of Employees and Witnesses From Intimidation**

Railroads reject the use of harassment and intimidation against their employees.

Section 301 of H.R. 2095 purports to protect employees when they are notifying the FRA of an injury or illness, providing accident or incident information to a public official, cooperating with a safety investigation, reporting hours of duty, or reporting a hazardous condition. While the current provision protects employees refusing to work if they reasonably conclude that a hazardous condition exists, this section expands the protection to include supervisors who refuse to authorize work.

While rail employees currently have the opportunity to pursue claims of harassment and intimidation under the Railway Labor Act, H.R. 2095 permits an employee to seek relief from the Department of Labor (DOL). In addition to the DOL remedy, under H.R. 2095 the employee is also permitted to seek redress through federal court without regard to what DOL

decided; redress through state courts; and redress through collective bargaining grievance procedures. In other words, this section provides four separate remedies, all of which are independent of each other and all of which can be sought for a single incident. H.R. 2095 authorizes punitive damages up to 10 times the amount of compensatory damages (up from a limit of \$20,000 under current law) and authorizes criminal penalties for persons who violate this section. Finally, H.R. 2095's provisions regarding protection of employees and witnesses explicitly do not preempt state law.

These provisions are inappropriate for several reasons. First, FRA regulations already prohibit a railroad from taking action "calculated to discourage or prevent [an employee] from...reporting [an] accident, injury, or illness." Current law also already prohibits railroads from discriminating against employees who refuse to work because of hazardous conditions or who complain about a matter relating to federal safety regulation. Second, railroads have in place internal prohibitions against intimidation and harassment. Third, there has been no showing whatsoever of a compelling need for these protections. Fourth, as written, these provisions could impede accident investigations which are essential to determining if existing rail procedures need to be addressed.

Moreover, there is no justification to subject railroads to a law that is radically different in all significant respects — coverage, enforcement, and sanctions — than what is applicable to the rest of U.S. industry, including other transportation modes. There is no evidence that existing dispute resolution procedures do not work, or that authorizing the DOL (which has no expertise in rail matters) to resolve disputes would somehow advance safety.

Similarly, there is no basis either to broaden the eligibility for or to lift the current \$20,000 cap on punitive damages, a form of damages unavailable under comparable statutes for other industries (including motor carriers). Finally, railroads strongly oppose proposals to

impose new criminal sanctions, which not only far exceed those applicable to other industries, but would be unduly harsh and subject to abuse.

Overall, the changes in this section would encourage more confrontation and conflict between management and labor while failing to promote safer rail operations. Railroads agree that action calculated to prevent an employee from reporting an injury, or discharge, discipline, or in any way discriminate against an employee for notifying DOT of an injury or illness or cooperating with an accident investigation, is unwarranted. But H.R. 2095 as written goes far beyond this.

Finally, a word about the desirability of national regulatory uniformity is appropriate here. Railroads could not operate effectively as a national system under a patchwork of laws and standards from 50 different states and thousands of localities. That's why federal law has long preempted various state and local laws. Preemption ensures that interstate commerce and interstate transportation are not stopped at the door of a local or regional jurisdiction, and that similar issues are treated consistently nationwide. Forcing railroads to adhere to state-specific laws and regulations would degrade the national rail network and should be avoided — especially in areas, like safety, where railroads are already subject to comprehensive national regulation.

### **Highway-Rail Grade Crossings**

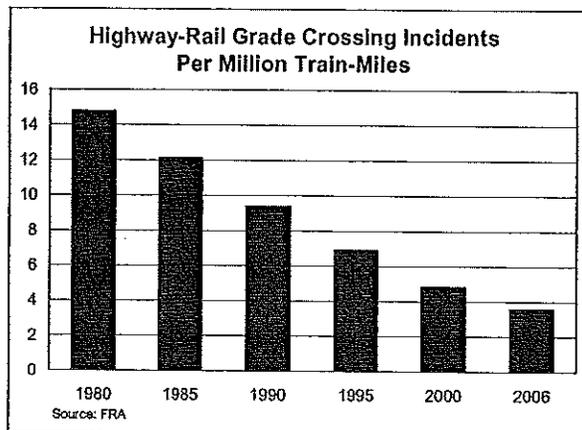
Collisions at grade crossings, along with incidents involving trespassers on railroad rights-of-way, are critical safety problems. In 2006, these two categories accounted for 97 percent of rail-related fatalities. Although these incidents usually arise from factors that are largely outside of railroad control<sup>5</sup>, and even though highway-rail crossing warning devices

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<sup>5</sup> A June 2004 report by the U.S. DOT's Office of Inspector General (OIG) confirmed that motorist behavior causes the vast majority of grade crossing accidents. According to the OIG report, "Risky driver behavior or poor judgment accounted for 31,035 or 94 percent of public grade crossing accidents" from 1994-2003. The

are properly considered motor vehicle warning devices there for the benefit of motorists, not trains, railroads are committed to efforts aimed at further reducing the frequency of crossing and trespasser incidents.

Much success has already been achieved. In 1980, according to FRA data, 10,611 grade crossing collisions resulted in 833 fatalities and 3,890 injuries. According to preliminary data, 2,908 collisions in 2006 (down 73 percent) involved 366 fatalities (down 56 percent) and 1,006 injuries (down 74 percent). The rate of grade-crossing collisions per million train-miles fell 76 percent from 1980 through 2006,



and has fallen every year since 1978. And because total exposure (train-miles multiplied by motor vehicle-miles) has risen sharply over time, the reduction in crossing incidents and casualties per unit of exposure has been even higher.

The Section 130 program, a national highway safety program created by the Highway Safety Act of 1973 and expanded most recently in SAFETEA-LU, is a major reason for the impressive grade crossing safety gains. Under the program, funds are apportioned to states each year for the installation of new active warning devices such as lights and gates, upgrading existing devices, and replacing or improving grade crossing surfaces. The rail industry commends and thanks the members of this committee and others in Congress for their support of this critical program.

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remaining accidents included such circumstances as vehicles stuck, stalled, or abandoned at crossings.

Railroads continue to work hard to improve grade-crossing safety, including cooperating with state agencies to install and upgrade grade crossing warning devices and signals (and bearing the cost of maintaining those devices); helping to fund the closure of unneeded or redundant crossings; and supporting the national Operation Lifesaver grade crossing and pedestrian safety program. Railroads spend more than \$250 million annually to improve, operate, and maintain grade crossings.

Class I railroads support a program to provide the public with telephone numbers, posted at public grade crossings and at private crossings open to unrestricted public access (as declared in writing to the railroad by the holder of the crossing right), that can be called in the event of grade-crossing emergencies. We also commend this committee for including in H.R. 2095 a requirement for the development of model legislation that provides for penalties for violations of grade crossing laws, which occurs far too often — and often with tragic results.

Railroads have programs in place to control vegetation on their property near crossings because they agree that motorists' sight lines should not be obstructed. If Congress decides that there should be a federal requirement for clearing vegetation for this purpose, then the federal requirement should preempt state or local laws so that there is national uniformity. Any federal requirement should also specify a required clearance distance (rather than simply call for "reasonable" clearance). Of course, railroads have limited ability to address vegetation at private crossings and on private land adjacent to railroad rights-of-way.

### **Enforcement**

To implement its safety responsibilities, the FRA uses numerous strategies, including the use of field inspections to monitor compliance with pertinent regulations and, where deemed appropriate by FRA safety personnel, the imposition of civil penalties or even stronger actions imposed against railroads for non-compliance.

As noted in a February 2004 report by the Congressional Research Service, the FRA “now complements its traditional enforcement approach with a much broader strategy that seeks to promote overall railroad safety, improve labor/industry relationships affecting safety, and strengthen commitments to safety by all involved parties.”<sup>6</sup> According to CRS, as part of that process, the FRA “seeks to determine the root causes of system wide safety problems and eliminate those through a partnership involving railroad managers and employees who are directly affected by safety challenges.”

Railroads believe that a partnership under which labor and management, in conjunction with the FRA and others, work collaboratively on safety issues, is far more likely to succeed in actually advancing rail safety than a punitive, adversarial system.

Unfortunately, the huge and unjustified expansion of maximum civil and criminal penalties in H.R. 2095 for safety violations (from \$10,000 to \$100,000) would promote a top-down, overly-prescriptive, excessively-adversarial system. Like the proposed changes in penalties for harassment and intimidation discussed earlier, changes in this section would encourage more confrontation and conflict between management and labor while failing to promote safer rail operations. The proposed higher civil penalties are also disproportionate. By comparison, the maximum civil penalty for a violation of a motor carrier safety requirement is \$5,000.

Railroads do not see a need for an increase in the number of FRA inspectors.

However, funding for these inspectors, and FRA funding in general, should be obtained through general appropriations rather than reimposing “user fees” on railroads. FRA fees would be a form of tax that other industries do not pay. Firms whose safety is regulated by

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<sup>6</sup> Congressional Research Service, “Federal Railroad Safety Program and Reauthorization Issues,” CRS Issue Brief, February 25, 2004.

OSHA do not pay fees to that agency. Equity demands that railroads not pay fees to the FRA to cover the FRA's safety regulation.

### Other Provisions in H.R. 2095

Railroads have comments regarding various other provisions of H.R. 2095:

- Railroads strongly support the provision in Title I that authorizes funding for the design, development, and construction of a Facility for Underground Rail Station and Tunnel at the Transportation Technology Center in Pueblo, Colorado. As the legislation notes, this facility would be used to test and evaluate the vulnerabilities of rail tunnels, to mitigate and remediate the consequences of accidents and incidents in tunnels, and to provide a realistic scenario for training emergency responders.
- Section 605 requires "minimum training standards for each craft of railroad employees" to show that employees have adequate "knowledge of and ability to comply with" federal railroad safety laws and regulations and railroad rules and procedures. Railroads agree that a well-trained work force is essential to safe and efficient railroad operations. After all, "human factors" (*i.e.*, human error) is the cause of more rail accidents than any other single factor, and in most (if not all) of these accidents, the employee(s) involved broke a rule or set of rules.

However, railroads already have procedures in place, including ongoing training programs overseen by the FRA, to ensure that their workforce is adequately trained. A new rigid federal program would be redundant and is unnecessary, since railroads already have all the incentive they need to make sure their workers have the skills necessary to perform their jobs properly.

- Section 606 prohibits railroads from denying, delaying, or interfering with the medical treatment given to employees. With all due respect, railroads strongly object to the claim that they intentionally withhold, or seek the withholding of, necessary medical treatment or first aid from their employees. This should not happen, and we don't believe it does.

That said, railroads have concerns regarding Section 606. For example, as written it appears to mandate that railroads transport injured workers to a hospital of the worker's choosing, with no limitations on that choice. As written, the provision also appears to prohibit railroads from overriding the treatment plan provided by the employee's health care provider. But there may be times when overriding a treatment plan might be necessary for safety purposes. For example, a physician might clear an employee to return to work while taking medication that could interfere with the employee's job function. In such cases, and others like it, a railroad should be able to override the health care provider.

The issue of medical treatment is already adequately covered by railroads' FRA-mandated internal control plans. Like some other provisions in H.R. 2095, this provision does not truly advance rail safety, but does unnecessarily throw another

obstacle in the way of collaborative labor-management relations. Railroads respectfully urge this committee to rethink this provision.

- H.R. 2095 would require the certification of conductors. A certification requirement would be burdensome without accomplishing any safety objective. Certification is not necessary to ensure conductors are appropriately trained.
- A provision of H.R. 2095 apparently requires railroads to provide breathing apparatus to train crews on trains carrying toxic-inhalation hazards (TIH). It is unclear what this section requires and how the myriad complexities involved would be handled — *e.g.*, there are many types of apparatus, different types protect against different kinds of chemicals, many types have “fit” issues due to facial hair, and so on.
- H.R. 2095 would give DOT the authority to issue emergency orders to encompass instances where there is imminent danger of significant harm to the environment. While we are unclear what problem this provision is meant to address, it should be pointed out that DOT has limited environmental expertise and there is no evidence of a shortcoming in the environmental laws justifying this provision.
- H.R. 2095 requires DOT to issue regulations addressing concrete crossties and specifies the elements that must be addressed. FRA track rules already contain performance requirements that apply to concrete ties. It would appear that some of the specified elements in the proposed legislation are not appropriate for regulation, even if further regulation of concrete crossties is appropriate. We suggest that a better approach would be to require DOT to examine this issue and report to Congress on the need for regulation of concrete crossties.

## Conclusion

Thank you for the opportunity to testify on this critical topic. The rail industry applauds the dedication of this committee to advancing the cause of rail industry safety, and we are committed to working with you, others in Congress, the FRA, our customers, our employees, and others to ensure that rail safety continues to improve.