Brotherhood of Locomotive Engineers & Trainmen
1370 Ontario Street, Mezzanine
Cleveland, Ohio 44113
Paul T. Sorrow
Acting National President

United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
Malcolm B. Futhey Jr.
International President

U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D. C.
Docket No. 2009-0057, Notice No. 1
Interim Statement of Agency Policy and Interpretation
on the Hours of Service Laws as Amended;

Proposed Interpretation;
Request for Public Comment

COMMENTS OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN AND UNITED TRANSPORTATION UNION WITH RESPECT TO INTERIM POLICIES AND INTERPRETATIONS

These comments are submitted by the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters ("BLET"), which is the duly designated and recognized collective bargaining representative for the craft or class of Locomotive Engineer employed on all Class I railroads, and the United Transportation Union ("UTU"), which is the duly designated and recognized collective bargaining representative for the various train service crafts and classes, hostlers, remote control operators, and yardmasters employed on all Class I railroads. Thus, UTU and BLET are the duly designated and recognized collective bargaining representatives for all train employees on all Class I railroads. BLET and UTU also represent operating and other employees on numerous Class II and Class III railroads. Consequently, the Interim Statement of Agency Policy and Interpretation published by the Federal Railroad Administration ("FRA") has a significant impact upon our members.

Introduction

On June 26, 2009, FRA published the Notice identified above, setting forth its interim statement of agency policy and interpretation concerning the amendments to the hours of service ("HOS") laws made by Section 108 of the Rail Safety Improvement Act of 2008, Pub. L. 110–432 ("RSIA"). 74 Fed. Reg. 30665, et seq. The Notice included numerous interim policies and interpretations that became necessary because of changes to the HOS laws made by the RSIA. Id. at 30671–30677. We have previously commented on those interim policies and interpretations and we appreciate this opportunity to comment on those interim policies and interpretations.

The RSIA provided the first significant amendments to HOS laws governing operating craft employees in nearly 40 years, and has produced the most far reaching effects on hours of service of safety critical railroad workers since enactment of the original Hours of Service Act in 1908. As FRA notes, the RSIA amendments are extraordinarily complex and comprehensive. In spite of a short time for implementation, FRA has consulted with interested stakeholders on these issues through its Railroad Safety Advisory Committee ("RSAC"), which we applaud.

The complexity of the changes to the HOS laws resulting from the RSIA has posed significant problems. Because of this complexity the statute, itself, fails to adequately address a number of important issues that will have a substantial effect on our members. Moreover, FRA has been forced to interpret goals that sometimes are in conflict. For example, in the "Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended" FRA discussed two methods of determining whether an employee has received the statutorily required amount of off duty time.

Congress amended the statutory off-duty period by eliminating the option of eight (8) consecutive hours off duty, and required that the minimum statutory off-duty period be 10 consecutive hours in all cases, except in intercity passenger and commuter service. *See* 49 U.S.C. § 21103(a)(3).[1] On its face, this change did nothing to force FRA to change its longstanding interpretation of how sufficient off-duty time is determined. The inquiry remained "Did the train employee have a statutory off-duty period prior to the scheduled reporting time?" As before, if the answer is "Yes," then the employee may work a full 12 hours.

In determining how many hours a train employee can work within 24 hours of a particular reporting time, FRA has a long-established practice of requiring a "look back" to the 24 hours immediately prior to the reporting time to ascertain whether the employee had the off duty period required by Section 21103(a) ("statutory off-duty period"). If the employee had been afforded a statutory off-duty period, then the employee was permitted to work a full 12 hours starting at the

[1] If the total of the time spent waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release that is not time on duty, plus the time on duty, exceeds 12 consecutive hours, the statutory off-duty period is extended by an equivalent amount of time. 49 U.S.C. § 21103(c)(4).

reporting time. FRA characterizes this evaluation method as the "fresh start" look back and expressed the view that the "fresh start" method may not track the purpose or intent of the new statute.

Congress made another change to the statutory off-duty period, by prohibiting a railroad from communicating with a train employee for the duration of the statutory off-duty period, except to notify an employee of an emergency situation. *See* 49 U.S.C. § 21103(e). This has caused FRA to propose what it terms "continuous lookback," under which someone would be required to have had a statutory off-duty period prior to each minute of a tour of duty.

The continuous look back is an attempt by FRA to determine how long a train employee is permitted to work within a 24-hour period. Prior to the changes made by the RSIA, the applicable provision prohibited requiring or allowing a train employee to remain or go on duty: "(1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty." 49 U.S.C. § 21103(a) (2005 ed.). FRA concedes that the statutory changes made to this provision are inconsequential. They correctly analyze that the language "remain or go on duty" was merely moved from the introductory paragraph of subsection (a) to the beginning of subsection (a)(3).

FRA further acknowledges that "[the continuous look back] would be a significant change from FRA's previously published interpretation" of the same language. 74 Fed. Reg. 30667. Further, FRA rejected such an interpretation for more than 30 years. Id. at 30670, n. 5, citing 42 Fed. Reg. 27594, 27595 (May 31, 1977). We contend that the mere transfer of this language from one paragraph to the next does not trigger a new interpretation of the words. Indeed FRA elaborated that its rationale for the new interpretation flows from its inference as to the intention of Congress:

> Although the "fresh start" approach may have had some merit to simplify planning under the old hours of service laws, it does not appear to track the purpose or intent of the new, more stringent statute.

74 Fed. Reg. 30670.

Impact on Safety

There is little dispute that this provision of the statute is intended to enhance safety by improving the rest provided to the employees covered by the statute. The statute postpones the implementation of new hours of service restrictions on passenger and commuter railroad employees for three (3) years. It requires that any new regulations promulgated for passenger and commuter railroad employees hours of service consider "…scientific and medical research related to fatigue and fatigue abatement." 49 U.S.C. 21109(c).

The best medical evidence available establishes what the labor organizations have known for years: that employees will be most alert just after they wake up. We contend that an employee who sleeps or naps as close to their reporting time as possible, within reason, is the best rested

employee and therefore the safest. That is why for years rail labor unions have tried to increase the amount of notice an employee receives prior to the assignment of duty. This advance notice time is referred to as "call time."

Indeed we urged Congress to require railroads to utilize a ten hour call time for employees without regular reporting times. It is obvious that an employee who is aware that they will be required to report for work in 10 hours is best able to schedule their rest so that they arrive at work in the most alert condition possible.

To our knowledge the minimum call time in the industry is one hour and 15 minutes. The industry has been trending toward increasing call time and now it is far more common for a collective bargaining agreement to require a minimum call time of two (2) hours. The two hour call time was originally negotiated by the parties in consideration of the amount of time an individual needs to address personal matters such as bathing and eating and reasonable commuting time to the on-duty locations, but it dates back to a period in which railroad workers lived much closer to their reporting points than they do today. The organizations have attempted to acquire, with limited degrees of success, longer call times for employees in unassigned service.

A 10 hour call time is the most effective approach to fatigue abatement. In a presentation to the Passenger Hours of Service RSAC Working Group, Steven R. Hursh, Ph.D. confirmed that the Sleep, Activity, Fatigue and Task Effectiveness ("SAFTE") model established that strategic naps are an effective fatigue countermeasure. Dr. Hursh noted that the Fatigue Avoidance Scheduling Tool (FAST) analyzed that a pilot on a 30-hour Stealth Bombing mission could avoid fatigue by planning for and taking a pair of three hour naps during the mission. The result was that the pilot had an 81% effectiveness level at the conclusion of that mission.

Simply being off-duty for any amount of time in no way ensures that the employee will be resting at the optimal time. If an employee does not know when they are going to report for work, they could be awake for hours when the call for duty finally comes. We believe that this is most likely to occur when they are at their home terminal where there are many personal obligations that will demand their attention — something the continuous look back approach will do nothing to address. The law requires 10 hours off-duty between assignments and permits an employee to be on duty for a maximum of 12 hours which leaves only 2 hours of call time available to the railroads in a 24-hour period. Any increase in the call time will decrease the permissible on-duty time and therefore, reduce productivity for the railroad, making it virtually certain that — under FRA's proposed "continuous look back" — the railroads will attempt to change the current practice on many assignments, and only provide the employee with the bare minimum two (2) hours of call time, which will require changing some collective bargaining agreements.

Furthermore, FRA recognized that probable outcome,

> There would be practical challenges associated with the continuous lookback approach, and the utilization of employees could be constrained. First, it would be particularly important that crews be scheduled precisely in order to obtain best use

> of their available time, particularly for extended assignments (*i.e.*, those approaching the maximum 12 hours on duty, or exceeding 12 hours total time on duty when on-duty time is combined with time spent waiting for deadhead transportation or in deadhead transportation to the place of final release). For typical over-the-road assignments, railroads might either have to notify the employee of the time to report 10 or more hours before the time the employee is wanted, so that the last 10 or more hours would be uninterrupted, or else have to call immediately at the conclusion of a known period of rest, providing notice of the next assignment within a short time prior to its beginning. A typical maximum pattern might be a "2-hour" call (*i.e.*, a call from the railroad notifying the employee to report for duty 2 hours later), followed by an on-duty period of 12 consecutive hours. This approach would effectively eliminate the possibility of 12 hours of broken service, because the interim period of release would also occur within the 24-hour period. (For example, with a 2-hour call, 8 hours of work, and 4 hours off, any resumption of work would be barred because following the aggregate period of 14 hours (2+8+4) any "look back" to find a continuous 10-hour period of release within the prior 24 hours would be futile.) By contrast, lesser periods of aggregate service might be plausible (*e.g.*, a call prior to the 10-hour rest period, 5 hours on duty, 4 hours off duty, 5 hours on duty, allowing a total of 10 hours of on-duty time before the 24-hour duty period would have to end, because an instant later the prior 24-hour period would not include a period of 10 consecutive hours off).
>
> Clearly the means by which "pool crews" and "extra board" assignments are managed would need to be altered if the railroad wished to get full use of the employee's allowed 12 hours. To accomplish this, among the options available to the railroad would be to tell the employee when to come back before the employee is released from the previous duty tour, or to notify the employee when he or she is about 10 hours out from the next call. If the projected time is later set back, the railroad would need to notify the employee of the setback up to 10 hours before the new time that the employee would need to report, because those next 10 hours would be the uninterrupted rest.

Id. at 30671. As we show below, this problem is exacerbated if an interim period of release is involved.

It is unlikely that a railroad will grant an employee any more than two hours of call time thereby defeating what FRA earlier identified as the purpose and intent of the new statute. If a railroad employee is provided with the typical 2 hour call, the individual will not be provided with the opportunity to rest immediately prior to his/her on-duty time. When the employees are inevitably provided with that two hours of call time it is impossible for them to acquire any meaningful rest prior to reporting for duty. Clearly, the "continuous look back" approach promotes minimizing call times and may, therefore, eliminate meaningful rest opportunities.

The best way to ensure that the employee is in the most alert condition possible is to provide as much notice (call time) as possible, preferably a ten hour call. When an employee is able to

determine their on-duty time the employee is able to plan their rest. Given enough call time, an employee can acquire the recuperative rest (including a strategic nap) that Dr. Hurst identified in the SAFTE model. Therefore, maximizing call time is an indispensable tool for an individual's fatigue mitigation. The "fresh start look back" approach allows for maximizing call time which increases predictability and the opportunities for meaningful rest. Accordingly, we urge FRA to maintain the existing "fresh start look back" approach and reject the proposed "continuous look back" approach.

Impact on Employees Earning Potential

Obviously, the labor organizations are concerned with their members' ability to continue to earn a reasonable living for themselves and their families. It is axiomatic that the ability of train employees to earn additional income is predicated upon their ability to acquire additional hours of legal availability. The recently enacted HOS law impacted our members' ability to enhance their income in that manner by placing caps on the amount of hours they may work in a given week or a given month. The continuous look back approach would further impact their ability to do so in two ways.

First, as we have previously discussed, by artificially limiting on-duty time if a railroad dares to increase the call time, and secondly, is the negative effect the continuous look back has on the "interim period of release" provision of the act. *See* 49 U. S. C. §21103(b)(7). As FRA correctly analyzed,

> "[The continuous look back] approach would effectively eliminate the possibility of 12 hours of broken service, because the interim period of release would also occur within the 24-hour period. (For example, with a 2-hour call, 8 hours of work, and 4 hours off, any resumption of work would be barred because following the aggregate period of 14 hours (2+8+4) any "look back" to find a continuous 10-hour period of release within the prior 24 hours would be futile.) By contrast, lesser periods of aggregate service might be plausible (*e.g.*, a call prior to the 10-hour rest period, 5 hours on duty, 4 hours off duty, 5 hours on duty, allowing a total of 10 hours of on-duty time before the 24-hour duty period would have to end, because an instant later the prior 24-hour period would not include a period of 10 consecutive hours off)."

Id. at 30671.

Even though the "lesser periods of aggregated service" in FRA's example might be possible, they are only possible for an employee with regularly assigned hours. Even then those employees' ability to take advantage of their full statutorily authorized off-duty hours for purposes of obtaining rest would be reduced by 17 percent. By implementing the continuous look back approach FRA would compel our members to accept an additional 17 percent reduction in earning potential when a railroad utilizes an interim period of release, which is unwarranted. Especially, in light of the fact that the continuous look back guarantees no safety enhancement whatsoever.

In FRA's scenario, the regularly assigned employee is limited to ten (10) hours on duty. Indeed ten is the maximum number of permissible aggregated hours under any scenario that employs an interim period of release when the continuous look back approach is employed. Moreover, as FRA acknowledged, if the typical two hour call time is provided to the unassigned employee, the interim period of release has no useful value at all. It is implausible that Congress let stand a provision in the act that permits the railroads and the employees to extend their window of productivity through the use of the interim period of release and then simultaneously wanted to close that window with the continuous look back approach. We contend that if Congress intended to apply the continuous look back approach they would have simply capped the permissible aggregated hours under an interim period of release at ten (10) hours or eliminated it entirely.

Impact on Employees with Regular Start Times

Every safety critical operating employee must deal with unwanted attempts by the carrier to call them for service other than their assignment, often without regard for the employee's rest status or safety. In this discussion concerning the "continuous look back" provision, a regular start time or at least a minimum 10 hour call will resolve most fatigue issues. Without the requirement for a 10 hour call, the railroads are calling employees not subject to call in an attempt to require that employee to work another assignment.

Employees whose assignments are extra boards or unassigned pool service routinely work "on call" and must manage those unpredictable start times, and also must manage additional calls for service not related to their assignments. Employees on assignments with a regular start time that are not subject to call also frequently are contacted by the carrier in an attempt to call that employee for extra service not connected to their regular assignment. These contacts obviously interrupt and disturb the rest of the employee that is not subject to call and must be considered in any discussion about "continuous look back" and also in the current "fresh start look back" approach.

An employee on a regular assignment with a regular start time of 6:00 a.m. that receives four separate calls from the railroad between 11:00 p.m. and 4:00 a.m. attempting to use that employee on other assignments is not at their best when reporting for their regular assignment. These unsolicited and unwanted calls in attempts to "juggle" employee assignments are an integral part of the fatigue problem today.

Regardless which "look back" provision FRA finally chooses, these constant calls for additional assignments must be significantly restricted. Each attempt to contact an employee must be documented with the time and reason for the call, and calls to employees in the 10 hour period immediately preceding their regular start time must be considered a willful violation.

A 10 hour call time, or a regular start time, or notifying the crew or their next on duty time prior to showing off duty on the previous tour of duty, all would help eliminate this issue by requiring planning and crew scheduling by railroads, a practice that is not occurring today.

Conclusion

Lastly, adoption of the proposed "continuous look back" would make an already complex HOS regimen even more labyrinthine. The current "look back" interpretation provides for three simple methods when determining how much time a train employee may legally be on duty: 12 hours, for duty periods initiated after a statutory off-duty period; an aggregate of 12 hours, for duty periods initiated after an interim period of release; and 12 consecutive hours for duty periods that are not preceded by at least an interim period of release.

In stark contrast to this simple method of calculating how long a train employee may legally be on duty, the proposed "continuous look back" would create an individualized determination for each train employee for every duty tour. Moreover, this individualized determination would have to be recalculated for every minute the train employee is on duty. We submit that two results would follow.

One is that it will be nearly impossible for FRA to enforce the law because an audit of hours of service records necessarily will require FRA to perform each of these calculations for each train employee for each tour of duty, while an audit currently can be performed with no more than a quick glance at on-duty and off-duty times. The other is that there almost certainly will be thousands of inadvertent violations of the law every year — by railroads and employees alike — particularly in the period following implementation of the "continuous look back." We cannot believe this was the intent of Congress.

For all the aforementioned reasons, UTU and BLET respectfully request that FRA reaffirm the long-standing "look back" interpretation, which has served both safety and the industry well, and decline to adopt the proposed "continuous look back."

Respectfully submitted,

Paul T. Sorrow — Acting National President

M. B. Hatney, Jr. — International President