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VIA ELECTRONIC MAIL

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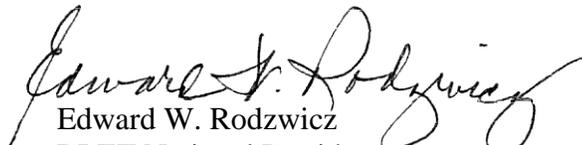
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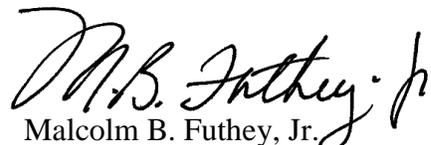
Re: Docket No. FRA-2009-0057

Dear Docket Clerk:

Enclosed herewith please find the Joint Comments of the Brotherhood of Locomotive Engineers and Trainmen and the United Transportation Union with regard to the above-referenced matter. Thank you for promptly docketing these comments.

Sincerely,


Edward W. Rodzwicz
BLET National President


Malcolm B. Futhey, Jr.
UTU 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”) 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 employees¹ 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.

I. 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.² *Id.* at

¹ The term “train employee” means an individual engaged in or connected with the movement of a train, including a hostler. 49 U.S.C. § 21101(5).

² The Notice also included a proposed change of interpretation governing how the determination of whether a statutory off duty period has been provided for a train employee or a signal employee. *Id.* at 30668-30671. We do not address herein FRA’s proposed change of interpretation. Rather, we will address that subject in additional comments to be filed prior to the end of the comment period for that proposed change.

30671–30677. We appreciate the 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 horizon for implementations, FRA has consulted with interested stakeholders on these issues through its Railroad Safety Advisory Committee, which we applaud.

That being said, the complexity of the changes to the HOS laws resulting from the RSIA has posed problems that are significant in some respects. Because of this complexity the statute, itself, fails to adequately address a number of important issues that will almost certainly have a substantial effect on our members. Moreover, FRA has been forced to provide interpretations that must address goals that sometimes are in conflict. It is our sincere hope that these comments will provide a basis for improvement of FRA’s policies and interpretations in a way that is faithful to the intent of Congress. We also encourage FRA to further clarify their stated interpretations in plain language to the maximum extent possible, so there is no room for debate concerning the application of those interpretations.

II. FRA’S INTERIM POLICIES AND INTERPRETATIONS OF THE HOURS OF SERVICE LAWS AS AMENDED BY THE RSIA OF 2008

Much of the Notice addresses issues that fall into one of three categories: RSIA’s prohibition of communication with employees during statutory off-duty periods; RSIA provisions pertaining to mandatory off duty time following the initiation of an on-duty period for a specified number of consecutive days; and the maximum number of hours that may be worked in a calendar month. These Joint BLET–UTU comments concerning FRA’s interpretations are limited to their impact on train employees, as we do not represent railroad workers subject to HOS laws governing safety-critical employees other than train employees. To the extent a particular policy or interpretation on which we comment also applies to signal employees, we defer to the position of the Brotherhood of Railroad Signalmen regarding its application to their members. To the extent a particular policy or interpretation on which we comment also applies to dispatching service employees, we defer to the position of the American Train Dispatchers Association regarding its application to their members.

It also should be noted that we will not comment on each policy and interpretation, because we do not want to unnecessarily burden the record. However, FRA should not conclude that we concur with each of the policies and interpretations upon which we do not comment. For example, there are some policies and interpretations with which we strongly disagree, but we are withholding comment concerning them because FRA’s position has been dictated by the statute itself, and FRA cannot depart from statutory requirements; therefore, comments concerning these subjects would be futile.

A. Questions Related to the Prohibition on Communication with Train Employees and Signal Employees

The Notice addresses eleven (11) separate issues related to the statutory prohibition against a railroad carrier and its officers and agents (collectively “railroad”) communicating with train employees during certain off-duty periods identified in the statute. We urge FRA to revisit three of them as follows.

Since the implementation of these new HOS provisions and the introduction of the concept of undisturbed rest on July 16, 2009, we have learned that many railroads consider this new provision as just another opportunity to manage their workforce, without any penalty other than to restart the statutory off-duty period of an employee who was called by the railroad during his/her period of undisturbed rest. A railroad manager could call an employee that he/she would like to sanction and purposefully interrupt that rest expressly for the purpose of causing that employee to miss an available assignment because the rest cycle must be restarted. We also are aware that at least one railroad has instructed its crew management agents to (1) immediately call an employee that is displaced after going off duty, regardless of the undisturbed rest status, (2) attempt to require that employee to make a seniority move, and (3) then restart that employee’s statutory off-duty period.

Preventing the continuation of such misconduct by railroads was the reason that Congress amended the HOS laws by prohibiting a railroad from contacting a train employee during the statutory off-duty period. *See* 49 U.S.C. § 21103(e). Moreover, such interruptions are contrary to the express interpretation FRA has issued on this subject. A railroad calling an employee during his/her period of uninterrupted rest for the convenience of the railroad is a willful violation of the dictates of the RSIA. FRA not only should require a record of each call that is a willful violation, but also should specify in the revised interpretations document the significant penalty that will be imposed on individuals who persist in this unlawful conduct.

Interim Interpretation IV.A.1 pertains to whether the prohibition on communication with train employees applies to every statutory off-duty period no matter how long the employee worked. 74 Fed. Reg. 30672. We agree with the application of the statute reflected in the interpretation; however, the interpretation as written strays from the statutory language in a way that may prove confusing. Accordingly, we recommend that the interpretation be reworded as follows:

Yes, except for the requirement for 48 or 72 consecutive hours off duty at a train employee’s home terminal. This prohibition on communication applies to every off-duty period of at least 10 hours under 49 U.S.C. 21103(a)(3) or 21104(a)(2) and to any additional time off duty required for a train employee when the sum of on-duty time and limbo time exceeds 12 hours. For train employees it also applies to every lesser off-duty period that qualifies as an interim release.

Interim Interpretation IV.A.8 addresses whether a railroad may call to alert an employee to a delay (set back) or displacement. *Id.* The second sentence of the interpretation states that “[t]he railroad may not call the employee for these purposes during the employee’s 10 hours of uninterrupted rest, without violating the prohibition on communicating with the employees.” However, Interpretation IV.A.7 sets forth the conditions under which a railroad may contact a train employee to fulfill an informational request made by the employee. Therefore, we recommend that

the second sentence of Interpretation IV.A.8 be amended by adding at the end thereof the phrase “unless the employee requested to be contacted for one of these purposes” so that it is consistent with Interpretation IV.A.7.

Interim Interpretation IV.A.10 discusses whether any violation of undisturbed rest should be documented by an electronic record. *Id.* The interpretation fails to specify who is responsible for creating the record and recording the activity. Since the regulatory responsibility for HOS record keeping lies with the railroad, our view is that the railroad should be primarily responsible for documenting violations of undisturbed rest. That being said, the employee should have an opportunity to correct or challenge the railroad’s record, just as he/she does concerning any other aspect of HOS record keeping.

Failing to specify that this is the railroad’s responsibility — or placing the primary burden on the employee — runs counter to the intent of the RSIA. For example, on July 14, 2009, CSX Transportation published System Bulletin 007, which revised Operating Rule R effective concurrently with the RSIA-mandated HOS changes.³ That Bulletin requires, in pertinent part, as follows:

An employee called to report for service, who has not completed their mandatory undisturbed rest, must inform the caller before accepting the duty call.

An employee who has had undisturbed rest period interrupted must immediately notify the crew caller so that the rest period can be reset. The employee must inform the crew caller the following:

- Time rest was interrupted
- Name of person that caused the interruption
- Circumstances that caused the interruption

The primary motivating factor in enacting the undisturbed rest requirement was to bring an end to ceaseless calls from railroads to train employees for unnecessary purposes. Indeed, some railroads have abused their train employees’ off-duty time so severely that FRA has proposed a new interpretation with respect to the “look back” undertaken to determine whether a statutory off-duty period has been afforded. *See* n. 1, *supra*. Moreover, this docket already includes evidence of such abuse by a railroad prior to the enactment of RSIA, which FRA was powerless to address under the prior statutory scheme. *See* FRA-2009-0057-0023.

Placing the primary responsibility for documenting violations of the undisturbed rest requirement on the employee, as System Bulletin 007 does, will only serve to perpetuate the abuse. Absent a disturbance by someone other than a crew caller, a crew caller should **never** call an extra train employee for duty prior to the expiration of the undisturbed period, because the caller’s records should accurately reflect the employee’s most recent release time. If a regularly assigned employee is involved, the crew caller may simply avoid calling the employee during the 10-hour period prior to the next scheduled reporting time; if the employee’s previous release time is

³ It is not our intent to single out CSXT Transportation here. This example is cited because it was the first such notice provided to us. Our expectation is that several, if not most, other railroads intend to take the same approach because of the imprecise direction provided by Interim Interpretation IV.A.10.

known, even more options exist. Thus, the first condition identified in the above excerpt should never arise.

Similarly, placing the onus on the train employee when someone other than a crew caller disturbs the statutory off-duty period only exacerbates the problem. The employee's rest is not only interrupted by the length of time consumed by the interrupting call, it is further disturbed by the length of time it will take for the employee to report the interruption to the crew caller. This also will delay the restarting of the undisturbed period. All the while the employee is prevented from resting and from earning a living, with no real disincentive for the railroad to cease its abusive interruptions. This aspect of the problem — to the extent there is a problem other than total disregard for the employee's need to rest — can be cured by the person who wants to speak with the train employee first contacting the crew caller to determine that person's assignment and status.

Accordingly, we recommend that Interim Interpretation IV.A.10 be revised to place primary responsibility on the railroad for documenting violations of the statutory undisturbed rest requirement. Furthermore, the interpretation should be revised to require railroads to provide a process by which an employee can challenge an incorrectly documented or undocumented interruption.

B. Questions Related to the Requirements Applicable to Train Employees for 48 or 72 Hours off at the Home Terminal

The Notice discusses eight (8) issues related to statutory requirements applicable to train employees for 48 or 72 hours off duty at the home terminal under certain circumstances. We urge FRA to revisit three of them.

Interim Interpretation IV.B.1 sets forth FRA's possible interpretation that the 6 or 7 consecutive days after which an extended off duty period at the home terminal is required will be measured in calendar days, rather than 24-hour periods. 74 Fed. Reg. 30673. FRA acknowledges that "arguments could be made for either interpretation of this language," but bases its calendar day interpretation on its sense that this measurement "should promote administrative simplicity." *Id.* Over two dozen objections to this interpretation have been filed to the docket concerning this interpretation. Upon review and consideration of these comments, and further reflection, we agree that this interpretation is likely to have a substantial adverse impact on a significant number of train employees.

It seldom occurs that someone's off duty time aligns exactly with a calendar day. A train employee will frequently have more than a "day" (*i.e.*, 24 hours) off-duty between duty tours, yet the consecutiveness of work days would not be broken under FRA's interim interpretation. For example, a train employee could initiate an on-duty period on a particular calendar day and then be released from duty at 5:00 a.m. that same calendar day. If the employee did not initiate another on-duty period until 11:55 p.m. the following calendar day, he/she would have 42 hours and 55 minutes off duty, yet the two duty tours are considered consecutive day "starts."

In addition to the current interim interpretation, we ask that FRA consider revising their interpretation of restarting the consecutive day calendar to allow an employee who receives 24 hours off duty at his/her home terminal, but still has job starts on those two consecutive days, to have their consecutive day calendar restarted by the 24-hour off duty period. The statute's language for

calculation of starts refers to days, but it prescribes that rest be measured in hours. As FRA notes, neither interpretation would offend the law. Given the severe effects that will flow from the current interim interpretation, we strongly urge FRA to revise the interpretation by adding a provision that off-duty time equal to or greater than 24 hours constitutes a “day” off, thereby also resetting the “start clock” to zero.

At worst, revising the interpretation may be marginally more difficult to administer than the interim interpretation. For electronic recordkeeping systems, the change would only require adding a subroutine that — after determining that calendar days are consecutive — ascertains whether 24 hours have elapsed between the prior off-duty time and the subsequent on-duty time. If recordkeeping is performed manually, only two additional entries must be reviewed. This minimal difficulty is far outweighed by the scheduling burden imposed on railroads and the severe economic consequences many of our members will face.

Interim Interpretation IV.B.2 deals with the issue of a “call and release” in the context of determining whether an on-duty period has been initiated for purposes of calculating the number of consecutive days during which an on-duty period was initiated. Our understanding of FRA’s interpretation if the release occurs at or after the reporting time — which is a continuation of the pre-RSIA interpretation — is that the railroad has three options:

1. If the employee is required to again report for duty prior to the expiration of four hours after the employee is released from the call, he/she is treated as working a single duty tour and may not continue in covered service past the 12th hour after the initial reporting time.
2. If the employee is required to again report for duty after the expiration of four hours after the employee is released from the call, but less than 10 undisturbed hours after the time of said release, then he/she is treated as having been provided an interim release period and may work 12 hours in the aggregate.
3. If the employee is not required to again report for duty until after another statutory off duty period (i.e., 10 hours undisturbed) has passed, then the time spent in the “busted” call prior to the release has no impact upon how long he/she may work when reporting for duty the second time.

FRA’s interim interpretation states that “if the employee reports for duty at the time that he or she is scheduled to report, and then is released at a time after that, the period from the report time until the release time is time on duty, by which amount of time the time remaining for that employee to work before a statutory off-duty period is required must be reduced, and the employee has initiated an on-duty period for the purpose of the 6- or 7-day limitation.” 74 Fed. Reg. 30673. The call and release options specified above do not conflict with this interpretation if the call and release occurs on any day except the 6th or the 7th day of the work cycle, because a train employee may legally initiate more than one on-duty period on any day of the work cycle other than those two days.

However, a significant problem arises if the call and release occurs on the 6th or the 7th day. Under the first two call and release options, the employee would be working a single tour of duty; in continuous time under Option 1, and in aggregate service under Option 2. However, it is doubt-

ful that either the railroad or the employee will know with certainty, at the time of the release, when the employee will again be required to report.

It appears to us that the interim interpretation means that if a call and release occurs on the 6th or the 7th day the employee must immediately begin the extended off-duty period at the time the release occurs, notwithstanding the fact that the employee could continue that duty tour provided that 10 undisturbed hours do not elapse before he/she is required to again report for duty. Further complicating matters is the fact that a call and release can occur on the 7th consecutive day only at the away-from-home terminal, because (1) this is the only time an employee can work on that day and (2) the extended off duty period must be afforded at the home terminal.

One alternative approach to the interim interpretation would be to hold in abeyance a determination whether a call and release after the reporting time constitutes initiation of an on duty period until it is ascertained when the employee again would be required to report for duty (*i.e.*, to see which of the three options comes into play). This would have no impact on days 1 through 5 of the work cycle, and would be consistent with the law under call and release Options 1 and 2.

However, a different problem arises if this approach is taken and the employee is not needed again until after 10 undisturbed hours have passed, as provided in call and release Option 3. If 10 undisturbed hours pass after the release and the determination is made at that point that an on-duty period was initiated, it may not be possible to “back up” the starting time of the 48- or 72-hour extended off-duty period to the time of the release.

The law provides that an employee must be “unavailable for any service” during the extended off-duty period. 49 U.S.C. §§ 21103(a)(4)(A), 21103(a)(4)(B). Yet, the employee would, in fact, be available for service during this period, as the potential exists that he/she could be required to report, either within four hours after the release to work in continuous service, or after having received an interim period of release, thereby aggregating his/her on duty time with the “busted” call. Therefore, the 48- or 72-hour period, as applicable, may not begin until after the expiration of 10 undisturbed hours and, if that is the case, the actual off-duty period after the “call and release” could be, minimally, 58 or 82 hours, as the case may be.

Another approach would condition whether an on-duty period has been initiated on what information was provided the employee at the time the call was broken. For example, if the employee was given a new reporting time at or before the actual time of the release, and that time was within 10 hours after the release, then it would be clear that Option 1 or Option 2 had been chosen by the carrier. The employee would be able to work the full duty tour, whether in continuous or in aggregate service, and the intent of the interim interpretation would be fulfilled to this extent. The determination would need to be deferred only if the railroad could not or would not provide the new reporting time at or prior to the actual time of the release, or if the railroad communicated its intention not to require the employee to report again until after the expiration of 10 undisturbed hours.

Ultimately, though, this approach also is unsatisfactory, because it is punitive to train employees if call and release Option 3 comes into play on the 6th or the 7th day. In the overwhelming number of cases when a call and release occurs at or after the reporting time, little if any covered service is actually performed, except, perhaps, for a limited amount of administrative duties. An

Option 3 “busted” call under these circumstances would deprive the employee of the ability to earn a day’s pay or the trip’s pay, through no fault of his/her own.

Prior to the changes mandated by RSIA, it was FRA’s interpretation that the three options applied both (1) when a train service employee was notified of a release after his or her arrival at the duty point but before the report-for-duty time, and (2) when notification of the release occurred after the report-for-duty time. *See* Technical Bulletin OP-04-29 at Part A. If notification was provided before the employee departed his/her place of rest the situation was treated as if the call never happened.

The interim interpretation eliminates the distinction whether a train employee whose call is “busted” has left the place of rest or has arrived on the property, so long as notification occurs prior to the report-for-duty time. However, no accommodation whatsoever was made when the release occurs at or after the report-for-duty time. This creates a manifestly unjust situation for our members if they lose a day’s work on a “busted” call in which *de minimis* on duty time occurs, something that we firmly believe was not intended by Congress. Accordingly, we strongly urge FRA to amend Interim Interpretation IV.B.2 to provide that when the release occurs at or after the report-for-duty time, it is an initiation of an on-duty period if and only if the employee later continues that duty tour in continuous or aggregate service. In other words, if the release is followed by a statutory off-duty period, then an initiation of an on-duty period has not occurred.

Interim Interpretation IV.B.3 discusses whether “deadheading from a duty assignment to the home terminal for final release on the 6th or 7th day count[s] as a day that triggers the 48-hour or 72-hour rest period requirement.” 74 Fed. Reg. 30673. Preliminarily, we object to the statement of the issue, because the formulation has caused FRA to render an interpretation that we believe is patently erroneous. The proper statement of the issue is whether

deadheading from a duty assignment to the home terminal for final release on the 6th or 7th day constitutes initiating an on-duty period in determining whether, and for how long, an extended off duty period must be provided upon release at the home terminal.

The statute very explicitly states that triggering of the extended off-duty periods is a function of how many consecutive days a train employee “has *initiated an on-duty period*.” 49 U.S.C. § 21103(a)(4) (emphasis added). Moreover, the statute plainly provides that “time spent in deadhead transportation from a duty assignment to the place of final release is *neither time on duty nor time off duty*.” 49 U.S.C. § 21103(b)(4) (emphasis added). Thus, the law provides the answer to the question, does deadheading from a duty assignment to the home terminal for final release on the 6th or 7th day constitute initiating an on-duty period, and that answer is “No.”

FRA recognizes and acknowledges that this statement of the law underlies its analysis of Scenario 1, which involves deadheading from the away-from-home terminal to the home terminal on the 6th day. 74 Fed. Reg. 30673. By logical extension this also is true if the deadhead occurs on the 2nd through the 5th days. However, FRA retreats from the law in its analysis of Scenario 2, which involves deadheading from the away-from-home terminal to the home terminal on the 7th day. *Id.* at 30673–30674. FRA points to the fact that the statute permits a train employee to “work” a 7th consecutive day if that employee completed his or her final period of on-duty time

on his or her sixth consecutive day at a terminal other than his or her home terminal. 49 U.S.C. § 21103(a)(4)(A).

FRA then asserts that this “work” on the 7th day constitutes a new classification of covered service — encompassing (1) on-duty time, (2) time spent waiting for deadhead transportation from a duty assignment to the place of final release, and (3) time spent in deadhead transportation from a duty assignment to the place of final release — that “count[s] as a day,” meaning that a train employee who deadheads from the away-from-home terminal to the home terminal on the 7th day must have a minimum of 72 hours off duty upon release at the home terminal. There are three problems with this analysis.

First, there is no support whatsoever in the statute for FRA’s interpretation; indeed, FRA’s new definition flies in the face of the clear and unambiguous statutory provisions defining what constitutes a “start” and the legal status of limbo time. Further, FRA suggests that Congress purposefully chose the word “work” — without defining that word — instead of stating that it was permissible for a train employee to “initiate an on-duty period on the 7th consecutive day.” Not only does this contention lack support, we would note that FRA, itself, conceded that construction problems exist in portions of the statute. *See* Interim Interpretation IV.C.1, 74 Fed. Reg. 30675 (addressing the apparent statutory prohibition against deadheading a train employee from the away-from-home terminal to the home terminal if the employee will exceed the 276-hour monthly “cap” during the deadhead trip).

Finally, FRA’s analysis of Scenario 2 produces the following peculiar result:

- Under Scenario 1, if a train employee deadheads from the away-from-home terminal to the home terminal on the 6th consecutive day, the “start clock” is reset to zero, and the employee may again go on duty at the home terminal after receiving a statutory off-duty period.
- Under Scenario 2, if a train employee deadheads from the away-from-home terminal to the home terminal on the 7th consecutive day, he/she must have a minimum of 72 consecutive hours off duty upon release at the home terminal.
- Under Interim Interpretation IV.B.6, if a train employee (1) initiates an on-duty period for 6 consecutive days and completes that on-duty period at the away-from-home terminal, (2) next is off duty for a period of more than 24 hours that includes an entire calendar day, and (3) then initiates another on-duty period (i.e., actually works) that takes him/her back to the home terminal, he/she must have a minimum of 48 consecutive hours off duty upon release at the home terminal. 74 Fed. Reg. 30674.

In other words, FRA’s analysis of Scenario 2 would cause someone who worked less and returned home sooner to have a greater off-duty period than someone who worked more and returned home later. Such a result is inconsistent with the intent of the RSIA. The proper analysis of Scenario 2 would acknowledge that the deadhead trip home is not an initiation of an on-duty period, and would recognize that — having initiated an on-duty period for 6 consecutive days — a train employee under this scenario would be required to be unavailable for duty for a minimum

of 48 consecutive hours following release from duty at the home terminal. We recommend that FRA revise Scenario 2 to reflect our analysis.

C. Questions Related to the 276-Hour Monthly Maximum for Train Employees of Time on Duty, Waiting for or Being in Transportation to Final Release, and in Other Mandatory Service for the Carrier

The Notice also deals with (6) issues related to the 276-hour “cap” governing train employees, which includes time on duty, time spent waiting for or being in transportation to final release, and time spent in other mandatory service for the carrier. There is one area where additional clarification is necessary, in our view.

Interim Interpretation IV.C.6 discusses the requirements of Transportation Security Administration requirements pertaining to documenting the transfer of hazardous materials. 74 Fed. Reg. 30676. Specifically, FRA states that this is an example of “other mandatory service” that is included in the calculation of monthly hours, because “compliance with [the requirements] is a normal part of an employee’s duty tour, which must be completed as part of the duty tour, and the employee does not have discretion in when and where to complete this requirement.” Id.

We fully agree. However, we urge FRA to provide additional clarification that all federal record keeping requirements constitute other mandatory service for each tour of duty and must be completed in a timely manner.

III. OTHER INTERPRETIVE QUESTIONS RELATED TO SECTION 108 OF THE RSIA OF 2008

FRA also offers two interim interpretations concerning other questions related to the RSIA-mandated changes. We have reviewed those interpretations and find them consistent with our understanding of the statute.

IV. REQUEST FOR INTERPRETATION OR CLARIFICATION CONCERNING ISSUES NOT ADDRESSED OR NOT FULLY ADDRESSED IN FRA’S INTERIM STATEMENT OF AGENCY POLICY AND INTERPRETATION

In addition to the above interim interpretations, a number of questions and issues have arisen in our consideration of the Notice, or have been raised by our membership. We respectfully request that FRA consider these questions and issues, and render interpretations as set forth below.

Someone who regularly works as a train employee also works occasional vacancies as a yardmaster, and his/her yardmaster duties including operating power switches and also granting main line track occupancy authority. While working as a yardmaster, is this employee considered a train employee or a dispatching service employee? If he/she is considered a dispatching service employee and such service is rendered on the calendar day after the employee has initiated an on-duty period in each of the preceding five consecutive days, does this duty tour trigger the 48-hour mandatory off-duty period? With the growing complexity of yardmaster assignments, we suggest FRA mandate that all yardmaster and similar positions be covered by hours of service requirements.

Prior to being given a final release at the away-from-home terminal, a train employee is instructed to report for duty ten hours after the time of the final release. Assuming that both the transportation from the point of final release to the lodging facility and the transportation from the lodging facility to the on-duty point require less than 30 minutes each, and further assuming that the room at the lodging is ready at the time the employee arrives, can the return trip from the lodging facility to the on-duty point depart 9’30” after the time of the final release from the initial trip?

Section 21103(c)(1) of the HOS laws imposes certain maxima — or “caps” — on the amount of excess limbo time that is permissible in a calendar month. Section 21103(c)(2) enumerates certain limited exceptions, during which excess limbo time does not apply toward the cap. Section 21103(c)(4) mandates additional time off duty when there is an instance of excess limbo time. If a particular instance of limbo time qualifies for exclusion from the cap by operation of Section 21103(c)(2), does the requirement for additional time off duty still apply?

Interim Interpretation IV.C.5 defines what types of activity constitute “other mandatory service for the carrier,” which counts toward the 276-hour cap. Our understanding is that what is determinative is whether the railroad not only requires the employee to perform the service, but also requires the employee to complete it immediately or to report at an assigned time and place to complete, without any discretion in scheduling on the part of the employee. 74 Fed. Reg. 30675. We request that FRA address two additional scenarios that have been presented to us.

First, we seek confirmation of our understanding concerning rules classes. We read the interim interpretation as saying that if the railroad sets the date, time and location of the class and compels attendance, then the time spent in the class is applied toward the cap. If, however, a railroad’s practice for rules classes is to give an employee the discretion to schedule and complete computer-based rules training, and provides only a deadline date for completion some time in the future, then time spent in the training is not applied toward the cap. Is this understanding correct?

Second, we seek clarification concerning the HOS laws as they pertain to elected part-time BLET and UTU officers. Our understanding is that interactions between these officers and the railroad are not considered “other mandatory service” within the meaning of the law. However, a question has arisen with respect to duties of elected union officers and the undisturbed rest requirements of the law. There are numerous situations involving members (e.g., accidents, incidents, injuries, serious rules violations) when a BLET or UTU officer would want immediate notification by the railroad, even during periods of undisturbed rest, which we believe would constitute activity “at the behest of the employee” as that term is used in 49 C.F.R Section 228.5; as such we do not believe these communications would disturb a statutory off-duty period. Conversely, there also are numerous situations involving members (e.g., manpower issues) when the officer would not want to be disturbed during his/her rest.

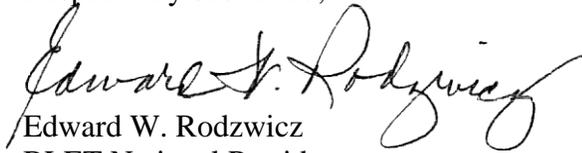
Does the part-time union officer have the opportunity to sign a document and give the railroad the authority to call them during their undisturbed rest for specified reasons? If so, may a part-time union officer — who specifies to the railroad what types of union-related communications he/she desires during periods of undisturbed rest — rely upon Interim Interpretation IV.A.7 if the railroad contacts him/her for union-related issues other than those specifically requested?

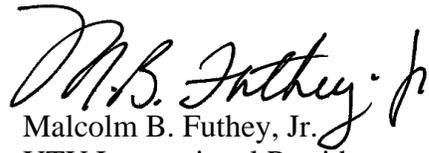
Lastly, there are other aspects of the FRA's interpretations that need to be addressed. For example, currently there exists uncertainty regarding the fines that might be imposed for a violation. We recognize that there are a number of changes in the new law and that Appendix B to Part 228 listing the fines will need a major overhaul. For example a crew caller may contact an employee deliberately to make them un-rested for a pending desirable assignment. Another concern arises from a comment by a supervisor of a major carrier, who advised our general chairmen that even if an employee reaches the 40/30 hours of excess deadhead transportation in a month, the railroad would not alter its method of operation. This railroad apparently believes it will be less expensive to pay the FRA fine than to timely relieve the crews which have reached the excess limbo time limit. Of course, this would be a willful violation, and FRA should impose a fine sufficient to deter such behavior in the future. FRA also should assess civil penalties in cases of rogue conduct by individual railroad officers and agents. There needs to be a clear understanding by everyone exactly what will be considered a violation, and what fine FRA will impose for such violation.

V. Conclusion

We again express our appreciation for having had the opportunity to participate in the implementation of the new HOS laws. We also hope our comments provide for a better application of those laws.

Respectfully submitted,


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