

**Before the Subcommittee on Railroads, Pipelines, and Hazardous Materials,
Committee on Transportation and Infrastructure
U.S. House of Representatives**

Testimony of Rick Inclima, Director of Safety for the Brotherhood of Maintenance of Way Employes Division/Teamsters (BMWED), presented before the hearing held on April 7, 2011, on the topic of *“Railroad and Hazardous Materials Transportation Programs: Reforms And Improvements To Reduce Regulatory Burdens”*.

Good morning Chairman Shuster, Ranking Member Brown, and members of the Subcommittee. My name is Rick Inclima. I am Director of Safety for the BMWED. Mr. Chairman, thank you for holding this hearing and for inviting us to present testimony on rail safety issues which affect every man, woman, and child in this great country. I will be pleased to address any questions you may have today or subsequent to this hearing.

Our 35,000 members are stakeholders who maintain the right of way on railroads throughout the United States. Our members have a vested interest in these proceedings because they work in close proximity to the hazardous and ultra-hazardous materials that are transported by rail throughout the United States. As such, they are often the first to discover or witness unintended releases of hazardous materials or respond to derailments that may involve hazardous materials. BMWED members also perform critical safety-sensitive track and infrastructure maintenance, inspection, and repair functions necessary to prevent derailments and hazmat rail emergencies.

The title of today’s hearing assumes that there is a way to reduce an assumed unfair regulatory burden by making “reforms” and merely asks the rhetorical question of how to eliminate unfair regulation. The framing of the question brings to mind the old adage, ‘if you ask easy questions, you should expect easy answers.’ It is easy to say that the regulated community would rather not be regulated, but to conclude that regulations are unnecessary or that current railroad regulations are excessively burdensome is not borne out by the facts.

More than 5,000 American workers are killed every year in on the job accidents nationwide. In 2010, 20 railroad employees lost their lives in the line on duty, and another 4,312 employees on duty suffered reportable injuries. Last year, there were 2,009 highway grade crossing accidents where 261 persons were killed and another 828 injured. There were 839 casualties to trespassers including 450 trespasser fatalities. Additionally, there were 21 train accidents that resulted in a 37 rail cars releasing hazardous materials, requiring the evacuation of 1,752 persons. Based on our experience, we know that reducing the current levels of railroad and hazmat regulation will not improve these statistics, improve safety, or create jobs. Regulations and compliance with the innovative provisions of the Rail Safety Improvement Act of 2008 (RSIA) are

necessary to protect workers and the public.

Some things in life are a given. The swallows return to San Juan Capistrano annually on the same date. Cicadas engage in noisy rituals every seven years. And railroads complain about too much regulation. A simple Google™ search demonstrates that which is obvious: the railroads constantly complain about being regulated. These complaints started at least as early as 1914 and are repeated on a consistent basis by railroads and their associations to whomever will listen.

The truth is that passage of the Staggers Rail Act of 1980, which deregulated the industry, eliminated any factual basis to verify railroad management complaints based on economics. The carrier's complaints stem from their single-minded urge to unilaterally dictate the treatment of the public, shippers, and rail workers.

History, however, shows that railroad regulation is directly proportional to the failures of railroads to behave in ways that society demands. The most contemporary example is the recent congressional directive in the Federal rail safety law, 49 U.S.C. § 20109, to protect railroad employees who are safety whistleblowers. The need for their protection was proven by years of intimidation and abuse of rail workers, with a resultant danger extending to shippers and the general public. The necessity of statutory protection has been verified by reports from the National Transportation Safety Board ("NTSB"), the Federal Railroad Administration ("FRA"), the U.S. Government Accountability Office ("GAO"), and the DOT's Inspector-General along with a legion of court cases. These safety whistleblower protections are absolutely necessary to improve the safety culture of the industry and allow workers to raise safety issues and concerns without fear of discipline or dismissal. These critical protections must be continued and strengthened in order to further rail safety.

Despite the call to reduce/eliminate regulation, the Congress should know that the regulatory sky is not falling, that carrier complaints are largely unsupported, and that regulation has not adversely affected the industry's bottom line. Indeed, the very safety improvements the railroads routinely boast about result from, and are proportional to, the regulations implemented by FRA and Congressional statutes.

The Rail Safety Advisory Committee (RSAC)

The Rail Safety Advisory Committee was created in 1996 to develop a consensus by all interested parties for rulemakings by the Federal Railroad Administration (FRA). It has been very successful in mitigating any regulatory burdens upon the railroad industry. Rail industry stakeholders, including railroad management and railroad labor, have agreed to almost every regulation issued by FRA since RSAC was established. It must be recognized that FRA is involved with all of the interested parties at every step of the RSAC process. Therefore, the final rules which have been adopted by FRA, overwhelmingly include the consensus-based recommendations of the RSAC.

The railroad industry has benefited from the laws and regulations adopted by the FRA through the RSAC. In a publication from Association of American Railroads' (AAR) Policy and Economics Department dated June 2010, it states "2009 was the safest year ever for U.S. railroads, breaking the safety record set in 2008. From 1980 to 2009, the train accident rate fell 75 percent, the rail employee injury rate fell 82 percent, and the grade crossing collision rate fell 81 percent—setting new record lows in each category." This type of information is consistently repeated in congressional hearings by the AAR. See, e.g., Testimony of Edward R. Hamberger, President & Chief Executive Officer, Association of American Railroads, Before the House Committee on Transportation and Infrastructure, *Hearing on the Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroad's*(Oct. 25, 2007). Safety has improved over the years because of direct involvement of employees and employee representatives in the governance of the rail safety programs and the development of FRA regulations. We encourage the Subcommittee to support the RSAC process in its upcoming railroad safety deliberations.

DOT-OSHA Jurisdiction

For the safety of rail workers and the public, it is vitally important to maintain the current shared jurisdiction between the Department of Labor Occupational Safety and Health Administration (OSHA) and the Department of Transportation (DOT) over hazmat employees' protection.

Under current law, DOT and DOL share responsibility for hazmat employee safety. DOT regulations deal primarily with the requirements for the safe transportation of hazardous materials. DOT's expertise is transportation, and their regulations address such critical areas as container and tank car design, packaging, labeling, placards, shipping papers, placement in train or on vehicle, and emergency response information for hazardous commodities. Through these regulations, DOT addresses requirements for maintaining the integrity of the container and safe handling of the hazardous commodity in transit. The DOT regulatory philosophy is sound: By regulating the integrity of the hazardous materials container and the safe handling of same in transit, there is a reasonable expectation that there will be no release and no exposure. Where there is no release and no exposure, workers and the public are not at risk from the hazardous materials being transported.

However, despite best efforts to protect the integrity of hazardous materials containers in transit, accidents do happen and containers do release their contents. As evidenced above, 37 railcars released hazardous materials in 21 separate rail accidents in 2010. Once a hazmat container is breached or otherwise releases its contents, the DOT has no regulations or expertise in how to actually protect rail workers or emergency responders. This is where DOT jurisdiction gives way to the worker protections of DOL/OSHA.

DOL/OSHA has both the expertise and the comprehensive regulations necessary to protect rail workers and emergency responders from the safety and health risks associated with unintended releases of hazardous materials. OSHA regulations address the initiation

of the emergency response sequence and have requirements for personal protective equipment such as respiratory protection, chemical protective clothing, eye protection, hearing protection, monitoring of fire and explosion hazards, medical surveillance, hazard communication, evacuation, emergency response plans, incident command, etc.

This is the interplay of the complementary jurisdiction between DOL/OSHA and DOT. One complements the other. DOT regulations are written to prevent, to the extent humanly possible, the hazardous material from escaping the container. Thankfully, more than 99.9% of the time, the regulations serve their intended purpose and the commodity reaches its destination by rail safely and without incident. This is a tribute to both an appropriate level of regulatory oversight by DOT and the skills and dedication of the industry's professional workforce. But once a release occurs, it is the DOL/OSHA regulations, which are written to protect the lives and health of workers, which must continue to govern.

The issue of shared jurisdiction has long been established between FRA and OSHA. On July 15, 1976, the FRA published a notice of proposed rulemaking (41 FR 29153) concerning the issuance of railroad occupational safety and health standards under the authority of the Federal Railroad Safety Act of 1970 (84 Stat. 971; 45 U.S.C. 421 et seq). After reviewing the comments submitted to the docket, and upon reconsideration of the proper role for FRA in the general area of occupational safety and health, FRA determined that the proposed standard should not be issued. As a result, FRA withdrew its notice of proposed rulemaking with respect to railroad occupational safety and health standards. "FRA had determined that it should not attempt to regulate at this time in an area already covered by regulations issued by the Department of Labor (Labor). The March 14, 1998, termination notice explained the respective jurisdiction of FRA and DOL/OSHA in a policy statement. That policy statement continues to guide the shared jurisdictional authority between FRA and OSHA, a policy which has served the safety need of the railroad industry and its employees for over 30+ years. See *Federal Register*, Vol. 43, No. 50 – Tuesday, March 14, 1978.

It is crucial that all hazmat employees be protected with the most effective health and safety standards and training possible. To simply eliminate the role of OSHA in this vital area would have a severe adverse affect on transportation workers and emergency responders. This in turn increases the risk to workers and the public. The existing law and current complementary jurisdiction between DOT and DOL should not be changed. The status quo works very well. There is no overlap and there is no duplicity of regulation. DOT does what it knows best, and DOL does what it knows best. It would be an ironic mockery of regulatory reform to eliminate or curtail the role of OSHA in safeguarding worker safety and health by forcing DOT to expend considerable sums of taxpayer dollars to hire and train personnel, develop requisite skills and expertise, and promulgate rules to fill the resultant regulatory void.

DOT Hazmat Instruction Training Grants

The National Labor College (NLC) in Silver Spring, MD has been providing rail workers

with comprehensive quality hazardous materials training for 20 years. Since its inception, the Rail Workers Hazardous Materials Training Program has provided hazmat training to approximately 28,000 rail workers from 49 states and the District of Columbia. This program continues to be funded by non-DOT government grants and private grant sources.

To further the vital work of this nationally recognized program, in 2008, the DOT awarded the NLC a Hazardous Materials Instructor Training (HMIT) grant to train hazmat instructors. Under this competitive grant award, 221 DOT HMIT regional trainers received instructor training, with 44 receiving advanced training under the DOT HMIT Advanced Trainer Program. In turn, these regional trainers delivered quality hazardous materials training to 2,643 rail workers back at their home terminals and local work locations.

The goal of the DOT HMIT program is to develop and sustain a model training program for all rail workers involved in the transportation of hazardous materials by:

- Building a cadre of skilled peer trainers to deliver hazardous materials training, to become safety and health activists, and to serve as worksite resources;
- Providing rail workers with the skills and knowledge necessary to protect themselves, the community, and the environment and by minimizing the risk that hazardous substances will be inadvertently released into the air, water, or soil during rail transportation;
- Employing a variety of training delivery methods to increase access to training beyond the traditional classroom to rail workers unable to participate in onsite training; and,
- Providing outreach to traditionally underserved populations (Native American, Hispanic) of rail workers.

The trainers developed through the DOT HMIT program have been instrumental in delivering quality training to rail workers at their home terminals and work locations. Eighty-four percent of the Advanced Trainer Program trainees reported delivering training to their peers, 42 percent reported training delivery to mixed groups of front-line rail workers and railroad management, and some trainees have also delivered hazmat awareness training in their communities to firefighters, EMT's, and members of the general public. Rail program staff and experienced peer trainers/mentors are available to assist in coordinating training efforts of the regional peer trainers, provide instructional materials, resource information and materials, and to assist in providing joint instruction.

The DOT HMIT grant program is not funded through federal tax dollars and does not add to the federal deficit. The program is funded by hazmat registration fees collected under the DOT Hazardous Materials Regulations from covered entities who offer or transport hazardous materials. We implore the Subcommittee to continue its support for this highly successful and nationally recognized worker training program for the safety of the industry, its workers and the American public.

Hazardous Materials Regulations

Comprehensive hazardous materials regulations are necessary to protect the public. You might think that the railroads would disagree on the grounds that railroads carry hazardous materials safely and therefore less regulation is justified. Think again.

The railroads under oath have stated to regulators that these cargoes are too dangerous for them to carry safely given their cost/benefit analysis. Let me quote from a case known as *In Re Classification Ratings On Chemicals, Conrail*, 3 I.C.C. 2d 331 (Dec. 19, 1986).

“Following the chemical disaster in Bhopal, India in 1984, Conrail and Union Pacific Railroad Company initiated several programs to review transportation regulations and operating procedures for these commodities. They contracted with an independent consulting firm Karch & Associates, Inc. specializing in toxicology and risk assessment, to prepare a list of ultra-hazardous materials...” “Conrail contends that a catastrophic occurrence from transporting these commodities would economically cripple the carrier and thus affect its ability to provide common carrier service. It submits that its risk factors are compounded because it operates through one of the most populated areas in the country. Given these facts, Conrail argues that it has a duty to take all reasonable precautions to protect the public interest and its own corporate and financial integrity. It contends that the Supplement 20 flag out (a refusal to carry these cargoes) is such a reasonable precaution.”

Perhaps you are thinking, ‘well, that was 25 years ago, things are different now.’ Think again.

The Union Pacific Railroad petitioned the STB for relief from its common carrier obligation to carry long distance chlorine, not even one of the 400 ultra-hazardous cargoes of the Karch study, on the grounds of the lack of a cost/benefit given the safety hazards under the current regulatory structures. See, Finance Docket No. 35219-STB-2009-0035. The Union Pacific admitted that “... the risk of potential exposure from long distance shipments of chlorine is unnecessary”

The solutions proposed by the railroads are that either they be allowed not to carry such cargoes or they want a Price-Anderson law passed so that they are not financially responsible for the damages arising from such accidents. The railroads themselves have never advocated that less regulation is the solution for these problems. The concept of less regulation arises purely from the idea that the cost of complying with regulation is less important than increasing profits, and that the risk of death, injury, and property damage should be borne by the workers, worker’s families, shippers, and the public --- anyone other than the shareholders of the railroads.

A rollback of hazardous materials regulation and/or FRA safety regulation will dramatically increase the risk from rail transportation of these inherently hazardous

materials. Unilateral elimination of current regulations for the purpose of reducing regulatory burden will result in avoidable catastrophes.

Dark Territory

About 40% of all mainline Class I carrier track is dark territory, areas where there are no electronic signals to control the location, speed, and direction of trains, monitor the integrity of the rail, or verify the position of switches. In dark territory a misaligned switch virtually guarantees a rail accident and only luck determines the scope of the resultant disaster. Dark territory also aggravates the 'single key problem.' Most railroad mainline switches can be opened by the same switch key. When a switch is opened or misaligned in dark territory, there are no electronic means for detection. Railroad switch keys can be purchased on the internet for less than \$1.00 and are in wide circulation among ex-employees and rail hobbyists. Even counterfeit keys open the switches. As a result, persons with malicious intent can unlock a switch in dark territory without detection, causing mayhem, death, and destruction. This is a guaranteed path to lethal accidents, a prediction that the BMWED and others including the NTSB have made for years; so rolling back statutes requiring switch monitoring technology is clearly not in the public interest. The deaths at Graniteville, S.C. proved this point all too graphically.

High Speed Rail, Intercity Passenger Rail and Expansion of Commuter Rail

A. INTERCITY PASSENGER RAIL SERVICE MUST BE DONE BY RAIL CARRIERS USING RAILROAD WORKERS

The expansion of Inter-City Passenger Rail and development of High Speed Passenger Rail, as provided for and encouraged in the Passenger Rail Investment and Improvement Act of 2008, was a long time coming and we were pleased that the last Congress and the Administration recognized that rail is an under-utilized resource that can be used to provide safe, efficient, effective and environmentally sound passenger transportation. But, it is important to recognize that safe and effective passenger rail transportation depends on highly skilled, professional railroad workers, many of whom are federally certified to perform various forms of railroad work.

Railroad work involves unique skills and training and sometimes special certifications. Consequently railroad work on the major freight railroads, Amtrak and the major commuter lines is performed by railroad workers in the traditional crafts recognized by the NMB. Professional railroad employees have a proven record of accomplishment of successful work on joint-owned commuter rail systems. Furthermore, professional railroad employees were responsible for the operating, dispatching, construction, rehabilitation and upgrading of freight lines used in commuter passenger service throughout the United States and especially in the Northeast. Railroad workers operate and maintain the major commuter rail systems -MBTA, MetroNorth, LIRR, NJ Transit, SEPTA, METRA.

For the same reasons, work on new High Speed Rail operations and expanded Inter City Passenger Rail operations should be done by railroad workers. Certainly the persons who do work for the highest speed passenger operations (whether train movements and control, track and signal work, equipment work or administrative work) should be no less skilled and no less qualified than the persons who do such work involved with the movement of commodities. The ability of entities that do work connected to High Speed Rail operations to hire qualified employees to perform that work will depend on those entities being rail carriers because rail workers will not accept jobs with entities that are not rail carriers since railroad workers who leave carrier employment lose substantial, vested Railroad Retirement benefits, and the rights and protections provided under other Federal Railroad laws.

There are some who want to enter the railroad industry and to perform work on railroad lines, but who seek their own economic advantage by attempting to perform railroad work without being "rail carriers" under the Federal railroad laws and by using workers who do not have the rights and benefits mandated by the Federal railroad laws. This race to the bottom must be resisted.

While certain small commuter railroads have engaged in the "unbundling" of railroad work among multiple contractors who are not rail carriers, this unfortunate practice is not followed on any of the major freight railroads, major commuter railroads or Amtrak. All of those entities recognize that integrated railroad operations in a single carrier operator employing railroad workers to perform traditional railroad work is the safest and most effective and efficient method of railroad operations. That same approach should be used for High Speed Rail and expanded Inter City Passenger Rail operations; the unbundled model should be rejected. Multiple non-rail carrier entities simply cannot provide the most skilled and fully certified rail workers. Additionally, safety is compromised in such a model. When one entity is responsible for overall operations it has a much greater incentive to operate as safely as possible and to get quickly to the cause of an accident when one occurs in order to prevent a recurrence. When multiple entities are involved in separate aspects of rail operations, there are incentives for each of them to focus only on its own responsibilities and to rely on someone else to do what is necessary in overlapping areas. And when there is an accident it is likely that the contractors responsible for train movements, the signal system, the track and the maintenance of the equipment will blame each other. That incentive is eliminated when one entity is responsible for the entire operation.

As the Federal government encourages and helps fund the promotion of High Speed Rail and expansion of Inter City Passenger rail transportation, it should make sure that it is providing real rail transportation that employs real rail workers, not "knock-off" rail transportation that utilizes imitation rail workers. To the extent that Amtrak is used to provide new service, such service will be real rail service using real rail workers; but whoever provides the new service must be rail carriers who employ workers covered by the Federal railroad laws. Talk of "privatizing" the Northeast Corridor or Intercity Passenger rail service ignores recent history. The current private freight railroads once provided passenger service too. Freight and passenger service were not separated,

passenger service was part of the common carrier obligation. However, the freight railroads were dramatically losing money on the passenger service and could not continue to provide that service. Amtrak was created because the private sector could not provide passenger rail service; the freights were relieved of their common carrier obligations for passenger service in return for allowing Amtrak to operate on their lines.

The PRIIA requires that Federal High Speed Rail and Intercity Passenger Rail grants must be conditioned on requirements that operators on federally improved rail infrastructure will be rail carriers under the Interstate Commerce Act and all statutes that adopt that definition of rail carrier, including the Railway Labor Act, Railroad Retirement Act and Railroad Unemployment Insurance Act. A rail line, the right of way, the signal system and the shops necessary for maintenance of locomotives and rail cars are all components of rail infrastructure and work on and for those components must be performed by railroad workers. The PRIIA also provides that collective bargaining agreements applicable on a railroad whose right of way is being used will remain in full force and effect; and that the rights, privileges and benefits of railroad workers be preserved. This is a mandate that the employees who perform work related to High Speed Rail and Intercity Passenger Rail supported by Federal funds must be railroad workers covered by the RLA, RRRRA, RUIA and FELA. This mandate must be continued.

B. RAILROAD WORK, INCLUDING OPERATIONS AND INFRASTRUCTURE IMPROVEMENTS ON EXISTING RAILROAD LINES AND SIGNAL SYSTEMS AND OTHER FACILITIES MUST BE PERFORMED CONSISTENT WITH EXISTING COLLECTIVE BARGAINING AGREEMENTS

Virtually all of the work and operations envisioned by various plans to expand intercity passenger rail work and for high speed rail service will be done on track, structures and/or rights-of-way, using signal systems and other facilities and structures of existing rail carriers-either freight railroads or Amtrak. Those carriers, and the track, rights of way, signal systems, facilities and structures they own, are covered by collective bargaining agreements between the carriers and the various rail unions that provide covered employees with rights to perform work within the scope of those agreements, and that may regulate the use of contractors to perform such work. Congress and the Administration should ensure that long standing rail collective bargaining agreements are protected and that those who seek their own profit will not be able to do so by undercutting or undermining those agreements. Indeed, these are binding contracts between the railroads and rail unions that have been in effect for decades and they are entitled to due respect as intercity passenger rail service and high speed rail service is expanded. The freight railroads and Amtrak are statutorily obligated to comply with their agreements with the rail unions; federal funds should not be allowed to be used to facilitate evasion of those agreements and federal programs should not encourage others to negate or undermine those agreements.

C. BUY AMERICAN REQUIREMENTS SHOULD BE CONTINUED

The PRIIA states that DOT may not approve a grant for a High Speed Rail or Inter City

Passenger Rail project unless “the steel, iron, and manufactured goods used in the project are produced in the United States.” This is an important requirement and a basic premise of federal funding for rail projects: to create jobs for Americans. Strong Buy American requirements are essential to development of High Speed Rail and expansion of Inter City Passenger Rail.

D. WHEN STATES, STATE AGENCIES AND OTHER STATE ENTITIES ACQUIRE RAILROAD LINES THAT WILL STILL BE USED FOR INTERSTATE RAIL TRANSPORTATION THOSE ACQUISITIONS SHOULD BE GOVERNED BY THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT AND ALL WORK ON AND FOR THOSE LINES SHOULD BE DONE BY RAIL CARRIERS USING RAILROAD WORKERS

The Interstate Commerce Commission Termination Act gives the Surface Transportation Board jurisdiction over transportation between states and within states “as part of the interstate rail network,” by rail carriers, and over their “routes, services and facilities.” 49 U.S.C. §10501 (a)(2) and (b)(1). The STB’s jurisdiction includes “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.” 49 U.S.C. §10501(b)(2). Its jurisdiction “is exclusive” and the remedies the ICA provide “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. §10501(b). While the ICA now exempts provision of mass transportation service by local government authorities and their contractors from STB regulation, it does not exempt non-mass transportation activities from STB regulation, and certainly does not exempt state and local governments from STB jurisdiction over acquisitions of portions of the interstate rail system. Additionally the ICCTA expressly states (49 U.S.C. §10501(c)(3)) that the other railroad laws that use the ICA definitions still apply to local governments; so even with respect to mass transportation activities, a local government authority or its contractor is subject to the federal railroad laws applicable to railroad workers such as the RLA, FELA and Railroad Retirement.

The ICCTA expressly provides that a person that is not already a carrier may not construct or acquire a railroad line without STB approval (49 U.S.C. §10901(a)), and a rail carrier may abandon a rail line or discontinue service on a line only with STB approval. 49 U.S.C. §10903(a)(1). The Act defines “Railroad” as including the road used by a rail carrier as well as track, roadbed, bridges, switches, and spurs used or necessary for transportation; and “transportation” includes locomotives, cars and equipment “related to movement of passengers or property or both by rail”, as well as services related to that movement. Section 10102(6) and (9). Since “railroad” is defined as all of the physical assets that constitute a railroad, and since a railroad line is simply a portion of a railroad; if “railroad” is defined as including track, switches, spurs, and roadbed, a “railroad line” is necessarily comprised of track, switches, spurs, and roadbed. Accordingly, when any person (including a State entity) acquires a railroad line that is part of the interstate rail system that will continue to be used for interstate rail transportation, that acquisition may be accomplished only after STB approval under

Section 10901, or pursuant to STB exemption from such approval (where the STB still has jurisdiction over the line and the transaction). Under Board rules, a State entity that acquires a railroad line and assumes responsibility for the line is a carrier, unless it contracts with a carrier or carriers for it or them to perform all railroad responsibilities. While Section 10502 of the Act allows the STB to exempt a transaction from prior Board approval (subject to a petition to revoke the exemption), the transaction and the acquiring entity are still subject to Board jurisdiction.

Despite the language of Section 10901, in recent years the STB has allowed acquisitions of railroad lines to go forward without Board approval or exemption under Section 10901. In these transactions states and other public authorities buy active rail lines from freight railroads but the freight railroads retain permanent, exclusive "operating easements" for freight operations on the lines. So these lines are still used by the freight railroads for interstate freight transportation, but the public entities begin commuter rail operations as intra-state operations with non-rail carrier operators, and non-rail carrier companies doing locomotive and equipment maintenance, dispatching and maintenance of the line and its signal systems, even though the line is still being used by the freight railroad (and sometimes Amtrak) for interstate rail transportation. Typically, the public entity brings in an independent contractor or contractors to perform the railroad work. In these arrangements, the operator and/or other contractors used to maintain the line and signal system used by the commuter operator and the freight railroad, and to maintain the commuter rail trains, are not carriers and their employees are not railroad employees; they are not covered by RLA, FELA or Railroad Retirement.

Under ICCTA, STB has no jurisdiction over a public entity owning/operating an intra-state line used only for intrastate transportation. But the STB has jurisdiction over transfer of a portion of a railroad that is within one state by is still used for interstate traffic. Section 10901. The STB has devised a process to negate its own jurisdiction and authority over pieces of the interstate rail system used for interstate rail transportation. Under this process, application for the transfer of the line is filed with STB under Section 10901, but dismissal is sought on the basis that there is no real transaction since the selling freight carrier retains an "operating easement" for continued freight service over the line. STB then dismisses the application based on its decision in *State of Maine* 8 I.C.C.2d 835, 1991 WL 84430 (I.C.C.) and subsequent cases. A railroad line is then acquired by the State without STB approval or exemption, and the Board cannot regulate the State's use or maintenance of the line or its future disposition of the line. Additionally, public entities use Federal Transit Act funds to acquire and/or modify and upgrade the lines for commuter passenger operations, but freight employees are not covered by "13(c)" protections so the employees affected by the transfers have no protection at all, even though Federal funds are used to acquire and/or substantially upgrade the lines.

The *State of Maine* line of cases is based on the made-up standard that States and State entities that acquire the physical assets of railroad lines are not actually acquiring railroad lines because they are not acquiring the freight service operating rights. There is no statutory support for this. States that acquire rail lines that are part of the interstate rail

system and will continue to be used for interstate rail service require STB authorization or exemption for the acquisitions under Section 10901. This line of cases is predicated on a definition of "railroad line" that is at odds with the ICCTA. Since Railroad is defined in the Act as the physical assets of a railroad, and a "railroad line" is a portion of a railroad, it is contrary to the Act for someone to acquire the physical assets of "railroad line" without STB approval or exemption on the premise that there has been no acquisition of a railroad line, just acquisition of the physical assets of the railroad line.

These sorts of transactions are not only contrary to the Act, they raise a number of problems for the interstate rail system, for railroad workers and for safe and effective rail operations, such as:

1. What responsibility will the public owner have for line? What regulation and oversight will apply to the line? Who will the commuter rail operator be? Will it be a railroad? Will its employees be covered by railroad statutes?
2. What happens to employees? What rights do they have? They would want to follow their work, but there is no mechanism for them to do so. Also if the work goes to non-rail contractors then employees won't want to go because they will lose railroad retirement rights by severing their "present connection" with the industry. The employees will not have "13(c)" rights even if federal transit money is used because the DOT takes the position that freight workers are not transit workers so if they are affected by a line conveyance accomplished with transit money, the freight workers will not be protected.
3. Contractors cannot hire qualified, professional, licensed/certified railroad employees. Safety suffers because the line is not operated by skilled, professional railroad workers.
4. Other safety issues-Freight, Amtrak and commuter trains will run on same line, but who is ultimately responsible for the line? What happens in the event of an incident or other safety problem -- who is responsible and who has incentive to improve safety? The line is part of interstate operations, but ownership of line is not with a rail carrier and federal railroad statutes are not applicable. When a single carrier operator is responsible for train movements; maintenance of the track, right of way and signal system, and maintenance of the locomotives and rail carriers, it has a powerful incentive to maintain safe, efficient and quality operations because all responsibility ultimately runs to that carrier. But under the model where there is one contractor for train movements, another for maintenance of way, one for signal work, another for maintenance of locomotives and cars, one for railroad clerical work, and another for dispatching, there are real incentives for each to minimize its responsibility and leave concerns to the other contractors. In the event of an accident, one can easily imagine the operator whose engineer was driving the train blaming the signal contractor, or the maintenance of equipment operator who inspected the air brakes; or one or more of them blaming the maintenance of way contractor for poor track maintenance, or all of them might

pointing their fingers at each other. Instead of determining what went wrong to prevent a recurrence, there will be a blame-game and years of litigation.

5. What is the long term impact on Railroad Retirement system? As employees are pulled out of the system, as "railroads" are being run without railroad workers, there will be lesser contributions to the RR Retirement fund.

6. Federal monies are being used to deprive railroad employees of rights and benefits.

7. Balkanization of the rail system: After World War I, the ICA was amended and the ICC was given more powers because the war made it apparent that the country had a patchwork rail system; existing patterns of ownership, connections and responsibility were not conducive to an effective and efficient national system. When entities that own right of way and trackage in the middle of the interstate rail system are not carriers, when the STB has no authority over the entities that own track used in heavy interstate freight and intercity passenger movements, when a state agency that owns a line of railroad could walk away from the line with the STB powerless to act, there is danger to our rail system. Our rails system suffers when rail lines cease to be owned by responsible carriers subject to STB oversight and regulation, and where interstate passenger rail operations become a mere hodgepodge of unrelated entities who do not care about a unified whole.

However, the STB has reaffirmed the reasoning of *State of Maine* line of cases noting that the rule is of longstanding (over 60 decisions-all of which were *ex parte*, none of which actually adjudicated the issue of STB jurisdiction), and because the policy expressed in those cases was deemed to encourage development of commuter rail systems (without regard for the many problems with this approach just outlined). Regardless of whether the Board's reasoning is good policy, it is contrary to the language of the Act. However, the Court of Appeals for the D.C. Circuit recently affirmed the Board's approach, concluding that "railroad line" is not defined in the Act (though "railroad" is), that there was substantial body of Board decisions applying this approach (albeit *ex parte* decisions) and the Board is due deference in its interpretation of the statute. These decisions make it all the more necessary that legislation be enacted to ensure that the STB will continue to have jurisdiction over lines of railroad that are used for interstate rail transportation, that such lines are not conveyed without STB approval or exemption from approval under Section 10901, and that the railroad work on such railroad lines will be performed by rail carriers using railroad workers covered by the Federal railroad laws.

Risk Reduction Programs

The railroads have complained about the Risk Reduction Program ("RRP") regulations not yet written but required by Congress through its mandates of the RSIA. The complaint itself reflects an endemic lack of interest by the carriers in employee

participation in rail safety matters. The entire point of the Risk Reduction Program was to approach rail safety by trying to reach another historic non-regulatory driven approach such as exemplified by the Railway Labor Act ("RLA"). The real meaning of the carriers' complaint is that it considers there to be an inadequate cost benefit to prevent horrendous loss of life and property in otherwise preventable accidents. The carriers make no pretense about preferring a safety system whose central theory is that oppressive discipline can be used to deter accidents that modern engineering and cognitive/behavioral psychological systems surely can avoid. To improve rail safety, Congress must insist on genuine risk reduction through joint labor/management cooperation with minimal government involvement such as that contemplated in Section 103 of the Rail Safety Improvement Act of 2008.

Crane Safety

OSHA recently published extensive revisions to the 29 CFR 1926 Construction Crane Standards. The Final Rule exempted on-track cranes from certain provisions of the construction crane rule, but not all. Additionally, cranes and hoisting equipment operating alongside the railroad right-of-way conducting maintenance of way (MW) work were not exempted from any provisions of the 1926 construction crane standards at all. Both BMWED and AAR are in agreement that traditional MW work utilizing cranes and other hoisting equipment is not construction work such as that contemplated by 29 CFR 1926. The OSHA General Industry crane regulations at 29 CFR 1910.180 have applied to cranes and other hoisting equipment conducting MW work for many years, and the FRA has acknowledged this fact in the preamble to the FRA final rule published July 28, 2003, on roadway maintenance machines (49, CFR 214, Subpart D).

Compounding this regulatory overlap problem between OSHA General Industry Standards and OSHA Construction Standards with regard to cranes and hoisting equipment performing traditional MW work is that 22 states have their own OSHA State Plans. So even if Federal OSHA affirms that traditional MW track maintenance work is not construction covered by the provision of 1926, but rather covered by the General Industry Crane Standard 1910.180, the rail industry and its workers will still have 22 states that have authority to make contrary decisions under their own OSHA state plans.

The 1926 crane operation and operator certification and licensing standards are very costly and burdensome for the railroads and BMWED members, and would require the railroads to train and certify railroad MW crane operators to qualify on cranes that they would never operate.

This is an area where both BMWED and the carriers seem to be in agreement with regard to excessive regulatory burden. BMWED believes this is a matter that can and should be addressed in the RSAC process and which has a high likelihood of success.

Conclusion:

Railroad regulatory review has been constant and effective through the RSAC process. RSAC is the consummate public/private partnership, which each party responsible for the costs associated with their participation in the process. Any carrier complaint of burdensome or ineffective regulation can and should continue to be forwarded to the FRA and assigned to RSAC for review and consideration by the appropriate combination of subject matter experts from railroads, labor and government. There is no reason to believe that this process will be any less effective in the future, particularly in light of the Risk Reduction Program mandated by Congress and other areas of progress.

The DOT, through the FRA and the RSAC, has made every effort not to unduly burden operating railroads through excessive regulation. If the FRA has erred in this regard, it has consistently been on the side of under-regulating. The RSIA was a Congressional declaration of that fact. Railroads may complain about being over-regulated, but the facts belie that complaint. FRA regulations are sufficiently flexible, are subject to frequent and comprehensive review through the RSAC, and contain liberal waiver provisions that render carrier complaints about over-regulation largely moot.

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
Truth in Testimony Disclosure

Pursuant to clause 2(g)(5) of House Rule XI, in the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include: (1) a curriculum vitae; and (2) a disclosure of the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by the witness or by an entity represented by the witness. Such statements, with appropriate redaction to protect the privacy of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

(1) Name: Richard A. Inclima

(2) Other than yourself, name of entity you are representing:
Brotherhood of Maintenance of Way Employees Division (BMWED)

(3) Are you testifying on behalf of an entity other than a Government (federal, state, local) entity?

YES X **If yes, please provide the information requested below and attach your curriculum vitae.**

NO

(4) Please list the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by you or by the entity you are representing:

NONE

Rick J. McLean

4/5/11

Signature

Date

Biography

RICK INCLIMA, BMWED DIRECTOR OF SAFETY

Rick Inclima is Director of Safety for the Brotherhood of Maintenance of Way Employees Division of the Teamsters Rail Conference (BMWED) in Washington, DC. He is a voting member of the Rail Safety Advisory Committee and BMWED's primary representative on regulatory and safety matters before the Federal Railroad Administration (FRA), the Occupational Safety and Health Administration (OSHA), and the National Transportation Safety Board (NTSB). In June 2010, he was appointed by the Secretary of Transportation to serve as a member of the Federal Transit Administration's (FTA) Transit Rail Advisory Committee for Safety (TRACS).

He began his railroad career in 1975 as a trackman for the Penn Central Railroad in New Haven, CT. He transferred to Amtrak in 1976 and worked in the Northeast Corridor (NEC) until accepting a full time position with the BMWED National Union in 1991. A welder by trade, he was awarded a track welder position in 1977. Thereafter, was promoted to welder foreman in 1978, a position he held for most of his 15 years with Amtrak. He also worked as a machine operator, track foreman and track inspector during his railroad career and was an active member of the Labor/Management Safety Committee at Amtrak.

Rick was elected Secretary-Treasurer and Local Chairman for BMWED Lodge 1718 in 1984, and thereafter elected as Secretary-Treasurer and Vice General Chairman of the Northeast System Federation-BMWED, positions he held until accepting his full-time appointment with the National Union. Subsequent to his appointment with the National Union, he returned to school and graduated from Antioch University with honors in 1998, earning a B.A. in Labor Studies. He is an instructor with the Railworkers' Hazardous Materials Training Program at the National Labor College in Silver Spring, MD. He was also a contributing author to "The Cyber Union Handbook, Transforming Labor Through Computer Technology," edited by Arthur B. Shostak, May 2002 (M.E. Sharpe, publisher). Rick may be contacted via e-mail at [REDACTED]