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VIA ELECTRONIC AND FIRST-CLASS MAIL

March 16, 2012

All General Chairmen
All State Legislative Board Chairmen

Re: Freight Hours of Service Interpretations

Dear Sirs and Brothers:

On February 29, 2012, the Federal Railroad Administration ("FRA") published a notice in the Federal Register ("Notice") containing the agency's Statement of Agency Policy and Interpretation and Response to Public Comment with respect to changes to the Hours of Service ("HOS") laws made by the Rail Safety Improvement Act of 2008 ("RSIA"). *See* 77 Fed. Reg. 12408–12431. These interpretations pertain to the hours of service statutory provisions that apply to freight service, as passenger/commuter railroad hours of service are governed by Subpart F of 49 C.F.R. Part 228, and are effective May 29, 2012. It should be noted that the June 26, 2009 Interim Statement of Agency Policy and Interpretation remains in effect, except as amended or superseded by the new Statement.[1]

This circular letter is being distributed to provide you with a summary of the new and revised interpretations. Kindly distribute this electronically to the Local Chairmen and Local Division Legislative Representatives under your jurisdiction whose members are affected thereby. Any questions concerning these interpretations — and hours of service requirements, generally — should be posed to Director of Regulatory Affairs V. G. Verna for handling. Preliminarily, I want to point out that FRA's revisions largely respond favorably to the comments and requests we filed in response to the 2009 Statement.[2] This letter will summarize FRA's positions in the order they appear in Section IV of the Notice. Portions of the notice that pertain to HOS subjects

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[1] The notice advises that the Interim Interpretations have been reprinted for ease of reference, and where the interpretation has changed, the text has been replaced with a reference to where in the notice the new answer can be found. 77 Fed. Reg. 12412–12413. Therefore, the notice containing the Interim Interpretations can be archived.

[2] *See* FRA-2009-0057-0044 (on the Interim Interpretations, generally) and FRA-2009-0057-0058 (specifically in response to FRA's request for comments on its "continuous look-back" proposal), which were filed jointly with the United Transportation Union (UTU).

governing signal employees are not addressed in this letter as no BLET members are affected by them.

I. FRA's Proposed "Continuous Look-Back" Interpretation.

As you may recall, FRA's 2009 Notice publishing its Interim Interpretations also invited comment on a proposed "continuous look-back" that would have significantly changed the manner in which a determination is made as to how many hours a train employee is permitted to work. The statute limits train employees to being on duty for no more than 12 hours in a 24-hour period, unless the employee has had a statutory off-duty period during the prior 24-hour period.[3]

Since 1977, FRA interpreted the statute as meaning that the prior 24-hour period ended when an employee reports for a new duty tour. At that instant, FRA looks back at the single 24-hour period before the employee reported for duty to see that the employee had at least 10 consecutive hours off following the prior duty assignment. If so, then the employee may be required or permitted to work a maximum of 12 consecutive hours or a total of 12 hours, in broken service, in the next 24 hours, and must get 10 hours off either after working that 12 hours or at the end of the 24-hour period that began when the employee went on duty, whichever occurs first, before the employee is allowed to go on duty again. If an employee had a duty tour involving broken service, including an interim release of at least 4 hours, but less than the 10 hours required for a statutory minimum off-duty period, between two periods of service within the same duty tour, some or all of the employee's eventual statutory minimum off-duty period would come after the 24-hour period that began when the employee reported for duty. Conversely, under FRA's "continuous look-back" approach, the statutory minimum off-duty period would have to be within each of the floating 24-hour periods not only starting when an employee begins a new duty tour, but also during the employee's duty tour, and ending when the employee is relieved from duty, meaning that upon reporting for duty, the employee would have a maximum of 14 hours within which to work a maximum of 12 hours, before the employee would be required to be finally released to have a statutory minimum off-duty period.

FRA's proposal was opposed by the national units of all Rail Labor Organizations that commented, as well as by the Association of American Railroads ("AAR") and the American Public Transportation Association ("APTA"). Numerous arguments were made against the proposal, including: (1) that Congressional inaction in the face of FRA's long-standing interpretation foreclosed a change now; (2) calls for duty made longer than two hours but less than ten hours prior to reporting time would unfairly reduce the length of time a train employee could work; (3) the use of interim periods of release would become needlessly complicated, if not eliminated

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[3] A statutory off-duty period is at least ten (10) consecutive hours off-duty without interruption by the carrier, unless the preceding duty tour included "excess" limbo time (i.e., limbo time that extended past the 12th hour), in which case the minimum statutory off-duty period is extended by an amount equal to the excess limbo time.

altogether; (4) several other current calling practices would become infeasible; (5) both safety and earnings potential would be compromised, the latter substantially so; and (6) it would be administratively burdensome.

FRA ultimately concluded that adopting the "continuous look-back" approach would cause railroads to "shorten call times as much as practicable in order to maintain flexibility in scheduling crews," leaving train employees "in the same informational deficit as presently exists, but with even less of an opportunity to engage in strategic napping to mitigate fatigue," which "would result in more fatigue for railroad workers … inconsistent with Congress's clear goal of improving railroad safety by reducing fatigue." 77 Fed. Reg. 12416. FRA also concluded that implementing the new approach "would be so difficult as to make the interpretation unjustified in light of its speculative safety benefits," and decided to continue the current interpretation on that basis. *Id.* at 12417. I consider this a significant victory for us.

II. Calculation of Consecutive Days Initiating an On-Duty Period.

FRA has addressed three major aspects of this subject. One is the definition of "day" as it pertains to calculating the number of consecutive "starts" in the application of the so-called "6&1 Rule." The second construes the word "work" as used in the statutory provision pertaining to service performed on the seventh consecutive day. The third interprets how a call-and-release — commonly called a "busted" call — impacts calculation of consecutive day starts. FRA also made a number of miscellaneous clarifications.

A. Calculating "Starts."

The statute prohibits a railroad carrier, its officers and agents from requiring or allowing a train employee to remain or go on duty after that employee has initiated an on-duty period each day for 6 consecutive days, unless that employee has had at least 48 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier, except that an employee may 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, provided that any such employee who works a seventh consecutive day shall have at least 72 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier. 49 U.S.C. § 21103(a)(4)(A). In the Interim Interpretations, FRA defined the "day" in the consecutive-days limitation to be a calendar day, on the basis that such an interpretation would be administratively simpler.

The Notice states that experience with the application of this definition and public comments thereon show that the "calendar day" interpretation was more complicated and provided less protection against fatigue than originally anticipated. As a result, FRA has revised its interpretation of "day" in the context of the "consecutive-days" limitation to refer to the 24-hour period following an employee's final release from duty. Under this revised interpretation, if an employee does

not initiate an on-duty period within 24 hours of the employee's final release from the previous duty tour, this will count as a "day" in which the employee did not initiate an on-duty period, and the string of consecutive days will be broken. In making this change, FRA acknowledged our position regarding the issue, and noted that the original interpretation provided carriers with an incentive to manipulate calling times to deprive train employees of the extended 48- and 72-hour off-duty periods. 77 Fed. Reg. 12418. This, too, is a victory for us as we were granted the relief we requested. I recommend that the general chairmen who have secured waivers for a 6&1 schedule evaluate the conditions attached to their waiver to assure that the application of the new 24-hour day for tracking starts does not affect their members ability to work the schedule permitted by the waiver.

B. Definition of "Work" on a Seventh Day.

FRA acknowledged that a "source of confusion" in the Interim Interpretations was its definition of "work" in the "consecutive-days" limitation's allowance that an employee may "work" on a seventh consecutive day in certain circumstances. Consistent with the joint BLET/UTU request, FRA has revised this interpretation by clearly stating that "work" for the "consecutive-days" limitation means "initiate an on-duty period." FRA also conceded that its earlier definition of "work" also led to confusion about how stand-alone deadhead transportation (i.e., deadhead transportation that is both preceded by and followed by a statutory off-duty period) would be treated with respect to the initiation of an on-duty period. The Notice clarifies that a stand-alone deadhead is not time on duty, and is not the initiation of an on-duty period. Therefore, a day in which an employee is in deadhead transportation but does not engage in any covered service with which the deadhead can commingle will not be counted as part of the series of consecutive days, and will break that series (i.e., reset the start clock).

C. Call and Release, or "Busted" Calls.

As you may recall, FRA's pre-RSIA interpretation of HOS laws as to "busted" calls turned on the point at which the release occurred: (1) if the employee was released before leaving his/her home or place of lodging the call was treated as never having occurred; (2) an employee released after arriving at the on-duty point but prior to the on-duty time would have his/her commuting time commingled with the subsequent covered service; and (3) if the release occurred after the on-duty time then the time spent on duty counted in the application of the law. FRA's 2009 Interim Interpretation simplified the prior interpretation by treating all releases occurring prior to the on-duty time as having no HOS implications whatsoever.

When the call is busted after the on-duty time, there are three different HOS scenarios that could play out after the fact under both the pre-RSIA and the post-RSIA interpretations. First, if the employee is required to perform covered service without at least a 4-hour undisturbed break, that employee may only work 12 hours from the reporting time of the original call. Second, if the employee was required to report back to work after having had at least a 4-hour undisturbed break — but less than 10 hours' undisturbed — then the time from the original reporting time to

the release would commingle with the subsequent covered service. And, third, if the employee received a statutory off-duty period after the release, then he/she would be able to work the full 12 hours upon returning.

The joint BLET/UTU comments pointed out the potential for an unfair earnings outcome when this occurs on the sixth or seventh day because of the triggering of the extended off-duty period at the home terminal. We posited that it would be "doubtful 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" and, therefore, the railroad most likely would place the employee into the extended off-duty period automatically upon release, even though the employee would receive far less than a day's pay for the busted call. After reviewing several possible ways of addressing the problem, we concluded by urging FRA to amend its Interim Interpretation on this question "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."

Admittedly, our proposal was a very long shot, as it is inconsistent with the statutory language. However, we wanted to see what FRA would be willing to do to address the situation. FRA's response is as follows:

> The unions are correct that the language of Sec. 21103(a)(4) could be read to prohibit a railroad from requiring or allowing an employee to return to work after an early release on his or her sixth consecutive day of initiating an on-duty period, unless the employee has had 48 consecutive hours off duty unavailable for any service for any railroad carrier. If FRA were to take a very literal reading of Sec. 21103(a)(4), then if a train employee is immediately released after initiating an on-duty period for a sixth consecutive day, the train employee would not be allowed to return to duty until the 48-hour rest requirement had been fulfilled. FRA believes that this is obviously not the proper reading of the statute.
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> As was noted above, Sec. 21103(b)(1), which defines time on duty generally, provides that "[*t*]*ime on duty* * * * ends when the employee is finally released from duty." (Emphasis added.) In addition, Sec. 21103(a)(4)(A)(i) allows an employee to "work a seventh 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." This would not be possible if the 48 hours off duty were required immediately after the initiation of an on-duty period on the sixth consecutive day. The plain language of the statute clearly permits an employee to perform service on his or her sixth consecutive day, demonstrating that the very literal interpretation is flawed. As demonstrated by Congress's treatment of the provision, the other statutory language, and the interpretation of all commenters, the restriction of Sec. 21103(a)(4) does not apply until the employee is finally released from duty; that is, an employee may continue to perform covered service until the end of the relevant duty tour, including any periods of interim release (because, during an interim release, the employee is not "finally" released from duty). Having es-

> tablished when the extended-rest requirement is activated, an employee subject to an early release may return to work without violating Sec. 21103(a)(4) so long as he or she has not "finally" been released from duty. If the employee returns to work, whether in a single period of time on duty or after an interim release period, that employee has not been "finally" released from duty and, therefore, is not yet subject to the extended-rest requirement. When the employee is finally released from duty, the employee must be given the statutory minimum off-duty period (normally, 10 consecutive hours) as well as the extended-rest period, both of which will begin to run concurrently.
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> With respect to the request for an exception for employees who perform little covered service after reporting for duty, these employees will continue to be considered to have initiated an on-duty period, even if they did not perform any substantial amount of covered service within that period. Time on duty begins when an employee reports for duty; therefore, when an employee reports for a covered service assignment as a train employee, he or she has reported for duty, thus initiating an on-duty period, even if he or she does not perform any additional covered service in that on-duty period. Accordingly, the amount of covered service performed within the period is irrelevant for determining whether the employee initiated an on-duty period.

77 Fed. Reg. 12420–12421 (footnote omitted). While I don't take issue with FRA's reading of the statute, I continue to believe that some carriers will take the easy way out in the vast majority of cases and simply release someone whose call has been busted and place them into the extended off-duty period. Ultimately, I think the best we can do with this interpretation is to advise our local chairmen that they should be on the lookout for subsequent assignments that the released employee could have covered, in whole or in part, that report for duty less than 10 hours after the release, and pursue time claims for lost earnings.

D. Miscellaneous Clarifications.

The Notice also provides the following miscellaneous clarifications related to calculation of "starts," none of which conflict with guidance we have provided since 2009:

- A train employee's performance of "other mandatory service for the carrier" can count as an initiation of an on-duty period if it commingles with subsequent covered service.

- A train employee who is permitted to initiate an on-duty period for 7 consecutive days pursuant to 49 C.F.R. § 21103(a)(4)(B) — but actually initiates an on-duty period for 6 consecutive days only — is entitled to 48 hours off duty at the home terminal.

In addition to the above, the Notice advises that because of the way the statute is worded, "starts" are not accumulated among multiple carriers for whom someone could be employed, nor are hours tracked for purposes of the 276-hour monthly cap aggregated. Thus, someone theoretically could work an endless chain of 5 days for one railroad, followed by 2 days for another railroad, so long as the cumulative hours applicable to the 276-hour monthly cap do not reach the

maximum. The only exception to this rule occurs when an employee initiates an on-duty period for either railroad on 6 or 7 consecutive days; in that event, the employee may not perform any service for either railroad for 48 or 72 hours, as applicable. In this circumstance, it is the employee's responsibility to notify both railroads that this situation has occurred, and a failure to do so exposes the employee to liability for a civil penalty.

III. Prohibition on Communication during Statutory Off-Duty Periods.

FRA's Notice discusses two different aspects of this issue. One is a clarification on which off-duty periods must be free from carrier-initiated communication. The other discusses the extent to which a train employee may provide advance permission to a railroad to communicate with him/her. The Notice also addressed other forms of communication than telephone.

A. When Off-Duty Time Must Be "Undisturbed."

The Notice explains that, because the statutory communications prohibition applies only to statutory off-duty periods (i.e., the 10-hour period, extended as necessary when the preceding duty tour includes "excess" limbo time) and interim periods of release of 4 hours or more, railroads are free to otherwise communicate with train employees so long as there is sufficient undisturbed time off duty to complete the appropriate type of off-duty period. Thus, a violation of the prohibition does not occur unless a disruptive communication prevents an employee from having sufficient rest to avoid excess service. For example, if a railroad interrupted an employee's rest, but restarted the rest period and provided a full statutory off-duty period after the interruption before the employee was next called to report for duty, there would be no violation, because the employee had 10 hours uninterrupted rest between duty tours. This clarification is consistent with our understanding of the law.

FRA also identified tensions that arose over an employee's ability to contact the railroad and establishing a time to report during a statutory off-duty period. FRA has resolved this issue by clearly stating that employees may call a railroad for any purpose during rest periods required to be free from disruptive communication, including calling to establish a time to report for work. In this situation the railroad also is permitted to call the employee back, at the employee's request, provided the only issue that is discussed is the issue raised by the employee in his/her call to the railroad. This interpretation is consistent with the position taken in the joint BLET/UTU comments.

Further, in response to our pointing out an apparent contradiction in the Interim Interpretations between the above and a question related to setting back an employee's reporting time, FRA has clarified that such a call does not violate the law so long as the employee otherwise has 10 undisturbed hours off-duty in the 24 hours preceding the revised reporting time. FRA has clearly identified the parameters of permissible contact — and spelled out the proper application of the law — as follows:

... the time spent in calls that do not interrupt the off-duty period as described above will not be time off duty and may commingle with a prior or subsequent duty tour if the content of the call is service for the railroad carrier. For instance, a call from an employee discussing the circumstances of the on-duty injury of one of his or her crewmembers is considered service for the railroad carrier, and therefore is service that is not time off duty and may commingle with a prior or subsequent duty tour. *See* Federal Railroad Administration, Hours of Service Interpretations, Operating Practices Technical Bulletin OP–04–29 (Feb. 3, 2004). To avoid having the time spent on the call commingling and therefore becoming time on duty, the employee must have a statutory minimum off-duty period between the call and any time on duty.

FRA has historically recognized that some types of communication between a railroad and an employee are "at the behest of the railroad" and are therefore properly considered to be service for the carrier that is not time off duty. In recognition of the realities of railroad operations and the desirability of maximizing the employee's ability to know his or her next reporting time and therefore that employee's ability to plan his or her rest during the off-duty period, FRA has also provided an exception from this general rule for calls to establish or delay an employee's time to report. In enforcing the new prohibition on communication by the railroad with train employees and signal employees during certain of their off-duty periods, FRA will continue to abide by this longstanding interpretation, if the calls are initiated by the employee, and any call made by the railroad is in return of a call made by the employee, as requested by the employee and limited to the terms of the employee's request. While the establishment of a time to report for duty is service, FRA will extend its prior interpretation so that such communications are permitted and do not interrupt an off-duty period when the calls are initiated by the employee, and any call made by the railroad is in return of a call made by the employee, as requested by the employee and limited to the terms of the employee's request. As a result, employees may call a railroad during their statutory minimum off-duty period to establish or delay a time to report, and railroads may return these calls, if an employee requests a return call and the return call is limited to any terms established by the employee as to the time and the content of the call, and that contact will not be considered to have interrupted the rest period or to require that it be restarted, provided that the time at which the employee is required to report is after the required period of uninterrupted rest.

This interpretation, which FRA has articulated in part and communicated in correspondence already, allows employees to have greater predictability as to when they will go to work, and a greater opportunity to plan their off-duty time to obtain adequate rest and handle other personal tasks and activities. Employees are able to take assignments when their statutory minimum off-duty period will have been completed at or prior to the report time, even if they would not have been fully rested at the time of the call to report. Conversely, in some cases, employees may be able to schedule themselves for an assignment that will allow them some additional time off duty to obtain additional rest or attend to personal activities. However, this interpretation should not be read as allowing any railroad to adopt a policy that requires employees to call the railroad, or requires employees to grant the railroad permission to call the employee during the statutory off-duty period. Employees who do not call the railroad, and do not choose to receive communication

> from the railroad, during the period of uninterrupted rest, must not be called by the railroad to establish a report time until after 10 hours of uninterrupted rest, and the employee must not be disciplined or otherwise penalized for that decision.
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> FRA is aware that, having provided employees with an avenue for receiving information relating to their time to report during their statutory minimum off-duty period, there may be instances where a railroad, or an individual railroad manager, may seek to require that the employee contact the railroad during his or her statutory off-duty period to obtain the employee's next assignment. In circumstances where a railroad discriminates against an employee for refusing to violate a railroad safety law by failing to report after a disruption of rest caused the employee to not have a statutory minimum off-duty period, that action could constitute a violation of 49 U.S.C. 20109, enforced by the U.S. Department of Labor. Where credible evidence indicates that a railroad disrupted an employee's statutory minimum off-duty period without the employee having initiated the communication and requested a return call and yet allowed the employee to report, without restarting the rest period and providing the required uninterrupted rest, FRA will consider appropriate enforcement action. FRA expects that railroads will not attempt to coerce employees into authorizing communications that disrupted an employee's rest. Where evidence shows that a railroad made prohibited communications to an employee, because the employee did not initiate the communication, FRA may consider appropriate enforcement action under 49 U.S.C. 21103 and 21104. Employees must report unauthorized communications as an activity on their hours of service record for the duty tour following the communication. 49 CFR 228.11(b)(9).

77 Fed. Reg. 12424–12425.

B. An Employee Granting the Railroad Advance Permission to Communicate During an Otherwise "Undisturbed" Off-Duty Period.

We also proposed that FRA "permit an employee to preemptively grant his or her employing railroad the authorization to contact the employee on certain matters." *Id.* at 12425. This request was primarily intended to afford our local chairmen and working general chairmen an opportunity to establish parameters for off-duty communications related to the duties of elected union office. Unfortunately, FRA chose to interpret the law in an extraordinarily narrow fashion, responding that because "communication by the railroad is only allowed in response to ***specific communication*** initiated by the employee, an employee may not consent in advance to communication from the railroad." *Id.* (emphasis added) FRA went on to state that "railroads are not required under the statute to communicate with their employees during the period of uninterrupted rest," and that if "a railroad concludes that it is too burdensome to determine in each instance the specific times within which an employee has requested a return call, and any limitations on the subject matter of the call, that railroad may decide simply not to contact any train employees … during their statutory minimum off-duty periods or periods of interim release." *Id.*

C. Other Forms of Communication.

Because the statutory prohibition applies to "communication," and not phone calls specifically, the Notice confirms that it applies to all forms of communication. However, because employees are permitted to initiate a communication, means of providing information that can be accessed at the employee's option — such as a railroad Web site or e-mail or text messages sent to a railroad-provided phone — do not violate the prohibition so long each employee retains the sole discretion whether or not to check for such messages during his/her statutory off-duty period.

IV. Monthly Limitation of 276 Hours.

FRA has provided additional interpretive guidance regarding several issues related to this subject. The first addresses classification of time spent in fulfilling a federal recordkeeping requirement. The second pertains to the "freedom to schedule" exception to the 276-hour monthly "cap" for other mandatory service. The third responds to an attempt by the AAR to impose individual liability upon train employees in certain cap-related situations.

A. Time Spent in Fulfilling Federal Recordkeeping Requirements.

In explaining various types of "other mandatory service" that counts toward the 276-hour monthly cap, FRA's Interim Interpretations cited completion of hazardous materials records as falling within the "other mandatory service" classification. BLET and UTU requested that FRA confirm that the mention of hazardous materials records was merely as an example and that, in fact, all time spent in fulfilling federal recordkeeping requirements constitutes "other mandatory service" for HOS purposes. The Notice confirms that our understanding is correct. 77 Fed. Reg. 12426.

B. "Freedom to Schedule" and the 276-Hour Monthly Cap.

BLET and UTU also asked whether "attendance at a rules class can avoid being considered as other mandatory service for the carrier if the employee is given the discretion on when to schedule and complete the training and the railroad simply provides a deadline date for completion of the training." *Id.* FRA confirmed that this proposed interpretation "is consistent with FRA's position taken in the Interim Interpretations, and remains FRA's interpretation: if an employee has the opportunity to schedule such training at a time that is convenient for him or her, then the time spent training in these circumstances would not be counted for the purposes of the 276-hour limitation." *Id.* However, the exclusion of such time from the computation applies only when the time period is both preceded and followed by a statutory off-duty period; the Notice clearly states that if these activities are not separated from covered service by a statutory off-duty period, the time spent in them will commingle, become time on duty, and count toward the monthly limitation. *Id.*

C. The 276-Hour Cap and Individual Liability.

Finally, FRA responded to a request by the AAR concerning a subject that AAR believed was not sufficiently addressed in the Interim Interpretations. Specifically, AAR asked FRA to construe the law in a way that treats "an employee accepting a full duty-tour after completing an hours of service record for a prior duty tour showing that the employee does not have sufficient hours for another full duty tour as deliberately misrepresenting the employee's availability," thereby exposing the employee to liability for a civil penalty. FRA declined to do so because: (1) recordkeeping regulations allow railroads to keep data related to the limitations on consecutive days, monthly service, and limbo time in a separate administrative ledger, rather than tracking the information daily on the record for each individual duty tour; (2) an employee who refuses to report for duty when called to do so could be subjected to discipline by the railroad, if, for example, the employee incorrectly calculates or misunderstands the application of the provision to his or her current sequence of consecutive days, and believes that the statute prohibits the employee from reporting for duty; (3) an employee's sole duty under the law is "to provide accurate information to railroads regarding their service'" and (4) "simply reporting for duty is insufficient to demonstrate that an employee 'deliberately misrepresented his or her availability.'" 77 Fed. Reg. 12423.

V. Miscellaneous Issues.

In addition to these topics, FRA also addressed several other issues raised in comments filed in response to publication of the Interim Interpretations. They are: (1) application of the HOS laws to employees working in crafts not typically associated with statutory HOS requirements; (2) commuting time at the away-from-home terminal when an employee is ordered to report on his/her rest; and (3) the scope of the statutory exceptions regarding "excess" limbo time.

A. Application of the Definitions Contained in the HOS Laws.

The Notice includes a discussion of the function-based interpretation of which employees are covered by the HOS laws. As has long been the case, only employees who perform the functions described in the "definitions" section of the statute are covered thereunder. This may or may not include employees who are described as "yardmasters" or "mechanical employees," and depends solely upon whether a particular employee performs service identified in 49 U.S.C. § 21101. 77 Fed. Reg. 12427.

B. Commuting During Off-Duty Periods.

The Notice also restated the long-standing interpretation that time spent commuting is time off duty, and accordingly an employee may commute during the uninterrupted rest period. In response to BLET/UTU comments seeking clarification of how commuting time relates at an away-from-home terminal when an employee is instructed — before being released — to report on his/her rest, FRA said the following:

> FRA allows a 30-minute period for commuting at the away-from-home terminal, from an employee's point of final release to railroad-provided lodging, that will not be considered a deadhead, but rather, commuting time that is part of the statutory off-duty period, provided that the travel time is 30 minutes or less, including any time the employee spends waiting for transportation at the point of release or for a room upon arrival at the lodging location. *See* Federal Railroad Administration, Hours of Service Interpretations, Operating Practice Technical Bulletin OP–04–03 (Feb. 3, 2004). The hypothetical situation presented in the comment involves a train employee, finally released at the away-from-home terminal, being instructed to report 10 hours after the time of final release with no further communication from the railroad. In the hypothetical, the travel time to the railroad-provided lodging is less than 30 minutes, and the room for the employee is ready at the time the employee arrives. FRA sees no reason to depart from the prior interpretation of this situation. Accordingly, travel time of 30 minutes or less to railroad-provided lodging will be considered commuting, not deadheading, and therefore the employee's final release time will be established before the employee is transported to lodging. Similarly, in this hypothetical, an employee may depart for his or her reporting point in order to arrive at the reporting point 10 hours after his or her final release, so long as the travel time from the place of railroad-provided lodging to the reporting point is 30 minutes or less and so long as there is no additional communication from the railroad which interrupts the employee's off-duty period. Commuting time is considered part of the statutory off-duty period.

Id. at 12428.

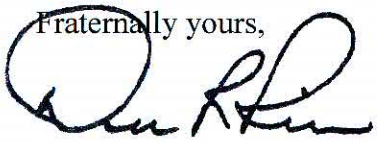
C. Application of "Excess" Limbo Time Statutory Exceptions.

There is a statutory limit of 30 excess limbo time hours per month. 49 U.S.C. § 21103(c)(1)(B). However, an exception exists for excess limbo time hours caused by casualty, accident, act of God, derailment, major equipment failure preventing the train from advancing, or other delays caused by a source unknown and unforeseeable to the railroad carrier or its officer or agent in charge of the employee when the employee left a terminal. 49 U.S.C. § 21103(c)(2). The BLET/UTU joint comments asked whether these exceptions also applied to the 49 U.S.C. § 21103(c)(4) requirement that undisturbed off-duty time be extended beyond the statutory minimum of 10 hours by an amount of time equal to the excess limbo time in the preceding duty tour, if any. FRA has confirmed that — because the § 21103(c)(2) exception specifically cites to § 21103(c)(1), it cannot be applied to the § 21103(c)(4) requirement that the minimum statutory off-duty period be increased. *Id.*

As indicated at the beginning of this letter, we generally fared well with respect to the revised interpretations, because in almost every case FRA agreed with the position we espoused in our joint comments with the UTU. FRA's Notice, at footnote 11, promises "a separate future publication in which FRA adopts several new interim interpretations and requests comment on the new interim interpretations." We will continue to monitor developments and draft appropriate comments at the proper time.

Trusting you will find this informative and helpful, and with warmest personal regards, I remain

Fraternally yours,



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