

# BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

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**DENNIS R. PIERCE**  
National President



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## VIA ELECTRONIC AND FIRST-CLASS MAIL

January 4, 2013

All Advisory Board Members  
All General Chairmen  
All State Legislative Board Chairmen

Re: Circular Letters No. AB-2013-01; GC 2013-01; SLBC-2013-01

Dear Sirs and Brothers:

Enclosed herewith for your information and files please find a copy of a file provided by Texas State Legislative Board Chairman T. D. Briggs, relative to his successful prosecution of Union Pacific Railroad's violations of the hours of service laws as interpreted in Federal Railroad Administration Technical Bulletin OP-04-30. All General Chairmen and all State Legislative Board Chairmen are asked to disseminate the enclosed to their Local Chairmen and Division Legislative Representatives, respectively.

Wishing you all the best in the New Year, and with warmest personal regards, I remain

Fraternally yours,

National President

encl.

cc: E. L. Pruitt, First Vice President (w/encl.)  
W. C. Walpert, National Secretary-Treasurer (w/encl.)  
J. P. Tolman, Vice President and National Legislative Representative (w/encl.)  
V. G. Verna, Director of Regulatory Affairs (w/encl.)



## Brotherhood of Locomotive Engineers and Trainmen Texas State Legislative Board

A Division of The Rail Conference - International Brotherhood of Teamsters

7083 Baker Blvd., Richland Hills, Texas 76118

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**TERRY D. BRIGGS**

Chairman

April 25, 2012

To: Division Legislative Representatives – Texas

CC: Division Secretary Treasurers, General Chairmen

Dear Brothers and Sisters,

Enclosed you will find a letter from FRA Region Five Administrator, Bonnie Murphy, informing the TSLB of the completion of investigation. This investigation was undertaken in response to our formal request, filed by letter dated January 26, 2012. A copy of the TSLB request for investigation, with supporting documentation (redacted), is also enclosed.

Administrator Murphy advises the TSLB that FRA found our allegations to be valid in three of the five incidents we reported. Accordingly, FRA is issuing violations to UP for failing to comply with the Hours of Service Act in regard to the three incidents which FRA lists. Additionally, FRA discussed these incidents with UP management during an Hours of Service Audit conducted at UP headquarters in Omaha, Nebraska. FRA also states that UP acknowledged the problem and is implementing certain corrective actions.

In filing the complaints, the TSLB relied on two, longstanding, FRA Hours of Service Act Interpretations, detailed in FRA Technical Bulletins, OP-04-29 and OP-04-30. As you will note, FRA cites OP-04-30 (copy also enclosed) as the guiding document in making the determination that violations did occur. Evidently FRA did not agree with our assertion that OP-04-29 is also applicable in the reported incidents.

In OP-04-30, FRA clearly instructs that time spent waiting on deadhead transportation, and deadheading to the point of final release, is limbo time. However, FRA further instructs that the waiting time constitutes limbo time *only* if the crew is merely awaiting its deadhead transportation.

FRA found that three of the incidents we reported were violations. In each of the three cases, UP delayed providing deadhead transportation for the outlawed engineer until after a relief crew became available. The purposeful delay resulted in the outlawed engineer waiting longer than the amount of time it would ordinarily take for available deadhead transportation to arrive at his location. During this period of time, the outlawed engineer was waiting for a relief crew instead of merely waiting for deadhead transportation. It makes no difference whether or not the train is secured.

Just to be clear, it is *not* a violation of the Hours of Service Act to remain on board the train, after the hours of service has expired, merely waiting on deadhead transportation. Additionally, it is *not* automatically a violation just because the relief crew arrives in the same vehicle used to transport the outlawed crew to their point of final release. Again, it makes no difference whether or not the train is secured.

Additionally, after the expiration of the hours of service, it is *not* a violation for a train crew member to voluntarily use the radio to arrange for deadhead transportation or to direct a crew van to their location. However, if the railroad carrier *requires* such communication, then the action is at the behest of the carrier and could be considered covered service. These incidents should be reported to the Division Legislative Representative to be forwarded to this office to determine if a violation has occurred.

Regarding the incident of December 9, 2011; clearly this incident falls into the same category as the incidents FRA found to be violations. However, during the FRA investigation, the local crew van company stated that a crew van was dispatched to the train in question, but because the van driver did not see a crew on board the train, the driver left without picking up the crew. The van company has no records to support this claim therefore FRA was unable to establish a time frame that would support, or refute, a finding that a violation occurred.

Please share this information with all Division members and post as necessary. Also, please report any excessive wait for transportation after the expiration of the hours of service to your Division Legislative Representative. Continued monitoring of this issue will help ensure our members are deadheaded in a timely manner.

Please direct any additional questions to this office.

Faternally,

  
Terry Briggs, Chairman

Enclosures (3)



U.S. Department  
of Transportation  
**Federal Railroad  
Administration**

Region V

RECEIVED MAR 29 2012

4100 International Plaza  
Suite 450  
Fort Worth, TX 76109 - 4820

March 27, 2012

Mr. Terry D. Briggs  
Chairman, Texas State Legislative Board  
Brotherhood of Locomotive Engineers and Trainmen  
7083 Baker Blvd.  
Richland Hills, Texas 76118

File No.: H2012-UP-5-017545

Dear Mr. Briggs,

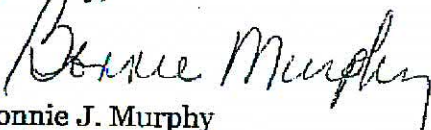
This is in reference to your letter dated January 26, 2012, alleging that Union Pacific Railroad (UP) crews are incurring excessive limbo hours when trains arrive at the Fort Worth Terminal area. You provided several specific instances of crews waiting egregious amounts of time to be transported from their train to their final release points.

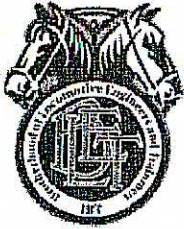
The Federal Railroad Administration (FRA) has now completed its investigation of the allegations contained in your complaint. The investigation revealed your allegations were valid in some of the examples you provided. The Fort Worth General Superintendent acknowledged the problem and indicated UP was implementing several changes to help facilitate the movement of trains through the Fort Worth Terminal due to the Tower 55 and the Baird Subdivision projects. This issue was also discussed at Omaha during the Part 228, Hours of Service Audit that was being conducted at the time of this complaint investigation. UP has reinstituted the Ney Yard Command Center to closely monitor crew activities.

FRA's Technical Bulletin, OP-04-30, provides guidance when a crew is required to remain on a train at the behest of the carrier when transportation is available. FRA considers this time as covered service. As a result of FRA's findings, violations are being issued to UP for failing to comply with the Hours of Service Law (HSL) in regard to the cases involving: Engineer on MMUFW-11 on April 12, 2011; Engineer on WDNWEZ-30 on November 03, 2011 and Engineer on LBS48-26 on October 28, 2011.

FRA will continue to monitor UP's operations for compliance. Please advise this office if you have any further information about this subject. Thank you for your continued interest in safety.

Sincerely,

  
Bonnie J. Murphy  
Regional Administrator



## Brotherhood of Locomotive Engineers and Trainmen Texas State Legislative Board

A Division of The Rail Conference - International Brotherhood of Teamsters

7083 Baker Blvd., Richland Hills, Texas 76118  
Phone: (817) 285-7668 Cell: (903) 456-2949  
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**TERRY D. BRIGGS**  
Chairman

January 26, 2012

Bonnie Murphy, Administrator  
Federal Railroad Administration, Region Five  
4100 International Plaza, Suite 450  
Fort Worth, TX 76109

Delivered via electronic and U.S. mail:

Dear Administrator Murphy:

The Texas State Legislative Board (TSLB) is a subordinate subdivision of the Brotherhood of Locomotive Engineers and Trainmen. The TSLB represents the interests of more than 3,000 train operating personnel in Texas in regulatory, legislative, and safety related matters. The board's area of interest includes the Federal Hours of Service Act.

This letter will serve as our formal request for investigation into the Union Pacific practices which unnecessary delay the arrival of deadhead transportation for train crews who have reached their hours of service limits (HOS) on line of road.

The unnecessary delay (excessive limbo time) is created when train crews, having reached their HOS limitation, instead of being transported in a timely manner to their point of final release, are made to wait on board their train until a relief crew arrives at their location. Only after the relief crew arrives at their location is the outlawed crew allowed to begin their deadhead to their point of final release, utilizing the same crew van used to transport the relief crew.

If the relief crew arrived at the outlawed crew's location in a timely manner, there would be no violation. However, often times the relief crew is not even called to go on duty until a time *after* the expiration of the train crew's HOS. This sets up a situation in which the outlawed crew is waiting for the relief crew, instead of merely waiting for their deadhead transportation.

Even if the relief crew is on duty, they must make their preparations to depart their on-duty location, and then deadhead to the outlawed train crew's location. The period of time the outlawed crew spends waiting on the relief crew, in excess of the amount of time it would ordinarily take for deadhead transportation to travel to the outlawed crew's location, is unnecessary delay.

It is our opinion that UP employs this practice for several operational considerations. One consideration is, since the relief crew arrives at the outlawed train's location in the same vehicle used to transport the

outlawed crew to their point of final release, only one crew van is needed. Additionally, unless specifically instructed otherwise, train crews are not allowed to secure their train prior to the expiration of their HOS. In this situation, if deadhead transportation were to arrive at the train, the outlawed train crew on board would not be free to leave their train. UP is aware that this would constitute a violation of the HOS<sup>1</sup>. However, the UP practice of instructing the outlawed crew to wait for the arrival of a relief crew ensures that a relief crew takes charge of the train, therefore avoiding the violation. Yet another consideration is the considerable time required to release hand brakes on a train. Because the train is often unsecured, considerable delay, before the relief crew can get underway, is avoided.

Although these practices may or may not reach the level of an actual violation of the HOS law, we believe they are certainly inconsistent with longstanding FRA policy and HOS interpretations.

In Operating Practices Technical Bulletin OP-04-29<sup>2</sup>, dated February 3, 2004, FRA states:

*"The railroad should exercise "due diligence" in the transporting of employees from the relieved point on line-of-road to the Final Release point. While transporting employees via a circuitous route would not, in and of itself, subject railroads to violations of the Federal hours of service laws, and would therefore not subject the railroads to the imposition of civil penalties, FRA expects the railroads to employ due diligence in order to provide the most suitable means and route available. While certain situations may warrant a circuitous route, the railroad officials should favor reducing the effects of fatigue on employees instead of only considering railroad operating conveniences."*

According to the above, railroads are expected to employ due diligence to avoid unnecessary delay to a train crew *while* deadheading to the point of final release, after the expiration of their HOS. Our instant request for investigation is regarding unnecessary delay to a train crew *before* deadheading to the point of final release actually commences. Although we recognize the distinction between the two situations, we nonetheless urge FRA to consider the premise to be the same in both examples. That is, the railroad must employ due diligence to avoid unnecessary delay in the train crew reaching the point of final release *regardless* of when unnecessary delay may occur.

Additionally, within a terminal (Fort Worth for example), after the expiration of a train crew's HOS, we consider *any* delay in providing transportation to the point of final release to be unacceptable. Crew vans, not to mention managers, are on duty 24 hours a day, seven days a week. Additionally, hostlers, switch crews and even other train crews can be utilized to provide HOS relief in a timely manner if UP management exercised due diligence and chose to do so. Instead, too often, train crews who have exceeded their HOS within the terminal are left on board to "babysit" their unsecured train. In these instances the outlawed crews are not allowed to secure their train prior to the expiration of their HOS

<sup>1</sup> "...should FRA receive credible evidence that crewmembers whose maximum duty hours had already expired under the HSL actually performed service for the railroad during the waiting period, we will likely take appropriate enforcement action. In addition, if FRA determines that waiting crewmembers were not free to leave a train when their deadhead vehicle arrived, we will conclude that they were apparently not "awaiting deadhead transportation," and were instead on duty performing service for the railroad." - FRA OP-04-30 - Awaiting Deadhead Transportation - Smith, Daniel C., November 21, 2001, letter to Union Pacific.

<sup>2</sup> The TSLB is aware that Technical Bulletin OP-04-29 has been temporarily withdrawn for modification as a result of the RSIA 2008 amendments to the Federal hours of service law. However, we are confident that FRA policy regarding "due diligence" remains in effect while modifications are considered.

and are also instructed to wait on board for a relief crew. We believe these practices, considered together, could be found to be a violation of the HOS.

We have documented several incidents which have occurred within the UP Fort Worth, Texas terminal. Additionally, we documented one incident that happened in Miller Yard, Dallas, Texas and one incident that occurred on the line of road on a train enroute to McAlester, Oklahoma.

We believe these five incidents, which are attached, represent only a fraction of similar incidents happening every day on the UP. However, we believe they do provide ample evidence to show that UP has repeatedly ignored long standing FRA policy as stated above.

The TSLB respectfully requests that FRA investigate these specific incidents to determine whether UP has unnecessarily delayed deadhead transportation for crews who have exceeded their HOS. If this question is answered in the affirmative, we further request a determination as to whether the unnecessary delay constitutes a violation of the HOS law or FRA policy.

Just to be clear, it is our desire to ensure train crews, who have exceeded their HOS, are relieved promptly to allow them to reach their point of final release without undue delay. If FRA determines that the best procedures to use to achieve this goal is some action other than actually citing UP for HOS violations, the TSLB would fully support that decision.

As always, we stand ready to work with FRA and the UP in order to ensure our members have a safe workplace. Please keep our office updated of any finding and/or actions taken and if any additional information is needed, please let us know.

Sincerely,

Terry Briggs, Chairman

Cc: Warren Dent, General Chairman – UP Southern Region

Attachments (2)

Attachment (1)

April 12, 2011 - Union Pacific engineer, [REDACTED], went on duty on 04/12/11 at 16:45 on train MMUFW-11 enroute to Fort Worth. Engineer [REDACTED] arrived at MP247, which is within the Fort Worth terminal, at 03:45. At approximately 04:20 engineer [REDACTED] asked the terminal train dispatcher (TTD) if he should secure his train. The TTD advised that a hostler was enroute to provide relief. Later the TTD advised engineer [REDACTED] that the hostler had been sent elsewhere and that they (management) no longer wanted train crews to secure trains within the terminal. The relief crew arrived at the train at approximately 09:25. Engineer [REDACTED] deadheaded to his point of final release in the (now available) crew van and went off duty at 09:45. Engineer [REDACTED] was made to wait on his train 4 hours 45 minutes after the expiration of his HOS even though crew vans are always available within the terminal. In addition, there are hostlers and switch crews on duty, at all times, that could have relieved engineer [REDACTED] in a timely manner. This incident was reported on the UP safety "hotline".

November 3, 2011 - Union Pacific engineer, [REDACTED], went on duty on 11/03/11 at 00:28 on train WDNWEZ-30 enroute to Fort Worth. Two hours and then again one hour prior to the expiration of the HOS engineer [REDACTED] notified the train dispatcher that his HOS would expire at 12:28. The train dispatcher instructed engineer [REDACTED] to stop his train at Roanoke, Texas where a relief crew would meet them to take charge of the train. Engineer [REDACTED] arrived at Roanoke at approximately 11:45 with sufficient time remaining to secure his train before the expiration of his HOS. However, engineer [REDACTED] was not instructed to do so. At 12:28 engineer [REDACTED] called the train dispatcher to inquire when the relief crew would arrive. The train dispatcher informed engineer [REDACTED] the relief crew would go on duty at 13:15. The relief crew arrived at Roanoke at 14:30. Engineer [REDACTED] deadheaded to his final release point in the (now available) crew van and tied up at 16:30. The train dispatcher was made aware well in advance what time engineer [REDACTED] HOS would expire. The train dispatcher should have instructed engineer [REDACTED] to secure his train and dispatched a crew van to Roanoke which would have allowed Engineer [REDACTED] to immediately begin his deadhead to his point of final release. Instead the train dispatcher made engineer [REDACTED] wait, unnecessarily, for two hours until the relief crew arrived.

December 9, 2011 - Union Pacific engineer, [REDACTED], went on duty on 12/09/11 at 15:00 at Fort Worth to "dog catch" (provide HOS relief) train LBS48-8 enroute Dallas to Fort Worth. After boarding the train, the engineer operated the train to MP245, which is located within the Fort Worth terminal. Engineer [REDACTED] received no further instructions from the terminal train dispatcher and remained on board the unsecured train until a relief crew arrived at 14:30 on December 10. This resulted in the engineer waiting from the time his HOS limitation expired at 03:00 until the relief crew arrived at 14:30. Engineer [REDACTED] deadheaded to his final release point in the (now available) crew van and finally tied up at 15:15 after having been on duty for 24 hours and 15 minutes. Engineer [REDACTED] was made to wait on board his train for an egregious period of 11 hours and 30 minutes after the expiration of his HOS. This was unnecessary because there are always crew vans available within the terminal. In addition, there are hostlers and switch crews on duty, at all times, that could have relieved engineer [REDACTED] in a timely manner.

Attachment (2)

October 28, 2011 - Union Pacific engineer [REDACTED] went on duty on 12/28/11 at an unknown time on train LBS48-26. Engineer [REDACTED] was on his train in Miller Yard in Dallas, Texas waiting to depart enroute to Fort Worth. At this point he had approximately four hours left before the expiration of his HOS. He was instructed to remain on board his train and to be ready to depart. Management is known to depart trains from Miller Yard on short notice regardless of the train crew's remaining on-duty time. Engineer [REDACTED] did not depart but was made to wait on board his train for more than one hour and 30 minutes after the expiration of his hours of service until a relief crew arrived. Engineer [REDACTED] reports that a yard crew van, a shuttle crew van and a manager in his vehicle were all in the vicinity of his train. In spite of the fact that transportation was available to take engineer [REDACTED] to his point of final release, which was only one mile away, he was made to wait, unnecessarily, for 1 hour and 30 minutes after the expiration of his HOS, for a relief crew to arrive.

December 14, 2011 - Union Pacific engineer, [REDACTED], went on duty on 12/14/11 at 17:20 at Fort Worth enroute to McAlester, OK on train GSBENI-12. When the engineer was nearing his HOS limitation the train dispatcher instructed him to "take the train as far as you can and a relief crew will get you." This resulted in the engineer [REDACTED], after stopping his train due to HOS limitation, having to wait for 35 minutes for the relief crew to arrive at his location. The dispatcher's instructions also ensured that the train crew would not have sufficient time to secure their train prior to the expiration of their HOS. After the relief crew arrived, engineer [REDACTED] was instructed deadhead in the (now available) crew van to the point of final release. Since the dispatcher was aware that the train crew did not have sufficient time to reach their destination, the dispatcher should have positioned the relief crew at a location to relieve the engineer in a timely manner rather than allowing the unnecessary delay of 35 minutes waiting on the relief crew.



U.S. Department  
of Transportation

Federal Railroad  
Administration

# Memorandum

Date: February 3, 2004

Reply to Attn of: OP-04-30

Subject: Hours of Service Interpretation - Awaiting Deadhead Transportation

Original Signed By:  
From: Edward W. Pritchard  
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

Attached is the Federal Railroad Administration's Assistant Chief Counsel for Safety, Daniel C. Smith's November 21, 2001, letter to the Union Pacific Railroad Company. The letter contains FRA's application of the Federal hours of service laws concerning train service employees who are awaiting deadhead transportation to carry them to their point of final release. Mr. Smith's letter also becomes the basis for this bulletin.

FRA Inspectors are to utilize the contents of this letter as guidance in their inspection and compliance-assurance efforts. It must be understood that enforcement actions involving recommendations for the assessment of civil penalties by FRA's Office of Chief Counsel cannot be initiated against a railroad or an individual based solely upon information contained in this bulletin. Civil penalty recommendations to FRA's Office of Chief Counsel must reference one or more of the following:

1. A statutory provision of the Federal hours of service laws (i.e., 49 U.S.C. Sections 21101 - 21108), wherein the "plain meaning" of the words of the provision establish the basis for the alleged violation;
2. An interpretation published in Appendix A to 49 CFR Part 228; or
3. Prior correspondence to that railroad or individual, wherein FRA explained the basis for its interpretation that the conduct in question constitutes a violation of the Federal hours of service laws.

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Robert Opal, Esq.  
General Attorney - Law Department  
Union Pacific Railroad Company  
1416 Dodge Street, Room 830  
Omaha, Nebraska 68179

November 21, 2001

Dear Mr. Opal:

Thank you for responding to my letters concerning the Federal Railroad Administration's (FRA) review of the Union Pacific Railroad Company's (UP) operating rules and special instructions relating to time spent by employees required to stay with their trains while awaiting deadhead transportation. FRA has been attempting to determine how to properly account for such time under the Federal hours of service laws ("HSL," See generally 49 U.S.C. chapter 211, formerly known as the Hours of Service Act). In initiating this inquiry, FRA noted that UP train crews are subject to special instructions concerning securement of standing trains in grade territory, and sought to determine whether the employees while waiting on trains are providing service by taking measures to protect their trains from unexpected movement or are actually free of all responsibilities during the waiting period.

For the reasons explained below, we have concluded that UP employees, even where the grade territory instructions apply, are not performing service and are in limbo time (neither on duty nor off duty) while merely waiting on or with their trains for deadhead transportation. However, employees who are required or permitted to perform any particular duties while awaiting deadhead transportation are on duty. Moreover, if employees waiting on or with their train are required to remain on or with it even after their deadhead transportation arrives, they are not awaiting deadhead transportation but are instead performing service for the railroad.

**The HSL and Case Law Concerning Time Spent Awaiting Deadhead Transportation**

Under the HSL, the time of an employee whose duties are subject to those laws is divided among three categories: on duty, off duty, and limbo time. Time spent actually engaged in or connected with the movement of a train is time on duty, as is time spent performing any other service for the railroad during the same 24-hour period. 49 U.S.C. Section 21103(b)(2) and (b)(3). Time spent in deadhead transportation to a duty assignment is also time on duty, but time spent in deadhead transportation to the point of final release is limbo time. 49 U.S.C. Section 21103(b)(4).

In the case of Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe R.R., 516 U.S. 152 (1996), the United States Supreme Court held that all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release, when no additional services are required of railroad carrier employees, shall be classified as limbo time for HSL purposes. The Court rejected the notion that an employee is on duty during this period merely because he or she may potentially be required to perform services while awaiting transportation. However, if an employee is required to perform service of any kind during that period, he or she will be considered as on duty until all such service is completed.<sup>1</sup> Of course, where a railroad's operating rules clearly relieve the employee of all duties during the waiting period and no duties are specifically assigned, the waiting time is not computed as either time on duty or time off duty.

#### **Union Pacific's Operating Rules and Special Instructions for Grade Territory**

Rule 1.17 of the Fourth Edition of the General Code of Operating Rules (GCOR), effective April 2, 2000, requires employees to remain on duty unless and until their train is properly protected (if it is located on main track) from other equipment and properly secured against unexpected movement. UP applies GCOR to its operations. In relevant part, GCOR Rule 1.17 provides as follows:

##### **B. Exceeding the Law**

Employees must not exceed the hours of service law without proper authority. However, they must not leave trains, engines, or cars on the main track without proper protection. Employees must secure trains properly and, if possible, before they exceed the hours of service. Except as provided by this paragraph, employees are then relieved of all duties.

GCOR Rule 1.17 apparently requires that before crewmembers awaiting the arrival of deadhead transportation are relieved of all responsibilities, they must perform two very specific duties. The train crew (or train dispatcher) must ensure the "proper protection" of the train by taking all necessary steps to prevent a following or opposing train, car, or locomotive from colliding with the standing train, and must "properly secure" the train by performing the necessary tie-up procedures.

(Continued on next page)

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<sup>1</sup>Appendix A to 49 C.F.R. Part 228 contains specific examples of activities that will return a crewmember to duty during the waiting period; these activities include protecting the train against vandalism, observing passing trains for any defects or unsafe conditions, flagging, shutting down locomotives, checking fluid levels, or communicating train consist information via radio.

In addition to GCOR Rule 1.17, certain UP special instructions applicable to areas where there are particularly steep grades require waiting crewmembers to "attend" the train unless and until they place their train on a track equipped with permanent derails or maintenance-of-way employees separate a rail on the descending direction in advance of the train to create a temporary derail. For example, in pertinent part, SI-14 Special Instructions for the Yuma Subdivision impose the following grade securement restrictions:

Do not tie up and leave a train unattended between Garnet and Loma Linda X-over unless:

1. The track the train is tied up on has derail protection; or
2. One of the rails on the descending direction in advance of the trains is separated by M of W which will create a temporary derail.

Union Pacific Railroad Los Angeles Area Timetable #1 at page 6. The SI-14 Special Instructions for the Mojave Subdivision contain identical grade securement restrictions for trains operating between Slover and Hiland and between Tehachapi and Ilmon. Timetable #1 at page 15.

### **Discussion and Analysis**

As set forth in my previous correspondence, FRA's initial conclusion was that, read together, GCOR Rule 1.17 and the UP timetable instructions applicable to grade territory required employees to remain on duty to protect the train against unanticipated movement until a relief crew arrives, unless derail protection has been provided. We based that understanding on the assumption that, by requiring the crew to "attend" the train in the absence of derail securement, the special instructions required employees to continuously perform specific duties, such as observing for warning signs of movement, to protect their train against unanticipated movement. Since GCOR Rule 1.17 says employees are relieved of all responsibilities only when their train is secured, and since the special instructions seemed to require continuous activity in the form of attending the train in order to provide securement in the absence of derails, we preliminarily concluded that employees attending a train in grade territory were on duty.

In your letter of December 12, 2000, you argued that train employees who "attend" a train are not performing service, but merely remain ready to do so should the need arise. You stressed that "attending a train" merely involves a requirement to "stay with" the train and a contingent responsibility to perform service if required. In your words, "[t]he crew does not have to search, inspect or actively observe anything." You concluded that crewmembers return to duty only if they perform a contingent service (e.g., stopping a train that begins to roll away while stopped on a steep grade).

In your letter of March 30, 2001, you asserted that when crewmembers are attending a standing train at a heavy grade location they are not required to inspect the train or "actively do anything unless the train begins to move." In response to my question, you specifically stated that the crew is not required to check for warning signs that a train is about to move unexpectedly. You also indicated that the crew must act in the event of unexpected movement in order to stop the train from rolling away. Moreover, you indicated that a crew would face railroad discipline if a runaway train resulted from the crew ignoring unexpected movement of the train or failing to respond appropriately.

Based on your representations, as we understand the railroad's application of GCOR Rule 1.17 and its special instructions, UP train crewmembers awaiting deadhead transportation, even in grade territory, are required to stay with their trains but are relieved of all responsibilities unless and until they return to duty by taking action to stop a train that has started to move or perform another contingent task. The United Transportation Union, although offered the opportunity, has not offered any reason to believe that employees have specific duties to perform as a part of attending a train while awaiting deadhead transportation.

Even in the absence of specific duties to perform, the mere act of waiting to perform a contingent duty is generally time on duty under the HSL, since all time between reporting for duty and the final or interim release is ordinarily time on duty. For example, an employee who reports for duty at the assigned time but must wait while his or her locomotive is being prepared for service is on duty from the time of reporting until released. However, the statutory provision on time spent deadheading to the point of final release is an exception to the general rule of what constitutes time on duty, and the BLE v. ATSF case makes clear that time spent awaiting deadhead transportation to the point of final release is limbo time even though the duty to perform additional service may arise. Although contingent duties may arise during the deadhead transportation and waiting time, the employee is not merely waiting to perform a contingent duty during such times. While the need to actually perform contingent duties during the waiting period may be more likely in heavy grade territory, the absence of specific responsibilities during this period makes it impossible to distinguish a crew awaiting deadhead transportation in grade territory from a crew awaiting transportation in other territory. In either situation, a contingent duty may arise, causing the crew to perform specific services, but this possibility does not change the limbo time to time on duty.

FRA will apply the HSL in accordance with how UP is applying its rules and instructions. That is, as a general rule, assuming that the employees in fact perform no apparent service while awaiting deadhead transportation, FRA will treat the train crew's waiting time, even where the crew is required to attend the train in grade territory, as limbo time. This conclusion is consistent with the Supreme Court's holding in BLE v. ATSF. The fact that an employee is required to stay with the train while waiting does not in itself indicate the employee is providing service, assuming the employee is free to leave the train when transportation arrives.

On the other hand, FRA will consider crewmembers who perform an assigned task during the waiting period (e.g., monitoring gauges on a locomotive under the explicit instructions of the train dispatcher)—regardless of whether they have otherwise been relieved of responsibility for their train pursuant to the railroad's own operating rules or special instructions—as on duty under the HSL until those duties have been completed. If the additional duty period results in the employee's having exceeded his or her maximum on-duty period, FRA will consider taking enforcement action under the HSL.<sup>2</sup> Whenever FRA investigates an allegation that a crewmember performed duty during the waiting period, we will look beyond the boilerplate written instructions to train crews, and determine if the employee was required to do anything functionally other than remain available to return to duty. Should FRA find that an employee was in fact relieved of all responsibilities while attending the train, merely remained ready to act had the train unexpectedly moved, and was permitted to depart when deadhead transportation arrived, we will conclude that the employee was in limbo status.

Of course, the situation where a train crew is not free to leave its train when its deadhead transportation arrives is different from a situation in which the crew is free to depart even in the absence of a relief crew. Your March 30 letter offered no direct response to the request in my February 22 letter for an explanation as to "why, if the employees are truly relieved of all responsibilities while waiting for deadhead transportation, they are not free to leave the train unattended upon arrival of the deadhead vehicle." Instead, you stated that since the deadhead transportation for an expired crew would normally be the same vehicle that arrived with the relief crew, this situation would not arise. However, we believe it is important for you to understand our position in case this should occur on UP.

The fact that the crew is not free to leave the train unattended even when transportation arrives is an indication that the employees must be doing more than merely sitting on the train awaiting transportation. The requirement to stay with the train becomes, at that point, a requirement to remain in the service of the railroad for the possibility of contingent duties, and that waiting time, unlike time merely spent awaiting deadhead transportation, is time on duty. While we are willing to accept UP's position that merely attending a train while awaiting deadhead transportation entails no actual service, we cannot possibly consider time spent attending a train as part of deadhead transportation if the crew cannot begin deadheading when its transportation arrives.

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<sup>2</sup> If the reason for the excess service involved a truly exceptional situation (i.e., a bona fide emergency), and the railroad proved to FRA that it employed due diligence to avoid or limit the excess service, the provisions of the HSL would not apply and FRA would not assess a civil penalty for a violation of the HSL. See 49 U.S.C. Sections 21102 and 21103; Appendix A to 49 C.F.R. Part 228. However, the railroad would still be required to report the excess service to FRA in accordance with 49 C.F.R. Part 228. See 49 C.F.R. 22819.

Moreover, there is no rationale for considering time as limbo time unless it is part of deadheading from the duty assignment. In BLE v. ATSF, the Court said the "issue is how to classify the time the outlawed crew spends *waiting for the deadhead transportation to arrive*." 516 U.S. at 155 (emphasis added). The Court frequently repeats that it is looking only at "time spent waiting for deadhead transportation" (*id.* At 157, 159, 160) and ultimately states the issue as "how to treat the time spent waiting for deadhead transportation when no additional services are required" (*id.* At 161). Therefore, BLE v. ATSF finds waiting time to constitute limbo time under the HSL only if the crew is merely awaiting its transportation; implicit in the Court's holding is that time spent waiting on a train for any other purpose is "additional service." The Court's insistence that the crew actually be waiting for deadhead transportation is based on the statutory nature of limbo time, which is confined to "time spent in deadhead transportation from a duty assignment to the place of final release." 29 U.S.C. Section 21103(b)(4). The Court concluded that "time spent waiting for deadhead transportation is of the same character as the time spent in the deadhead transportation itself." BLE v. ATSF at 157. However, there is no basis for considering time spent sitting on a train during which the crew is not simply awaiting deadhead transportation as a part of deadhead transportation, so it cannot be limbo time. Nor is there any basis to consider time spent by a crew on its train as time off duty, since it is not time that is available for rest at a point of final or interim release. Accordingly, time spent by a train crew on or with its train will be considered time on duty if that crew is not free to leave the train when transportation arrives.

### Conclusion

FRA appreciates the input you have provided to us concerning proper application of the HSL in the context of your operating rules and timetable special instructions. Based upon our dialogue, FRA has concluded that if a railroad requires a train crew, even in grade territory, to attend its train by simply staying with it while awaiting deadhead transportation, if the railroad does not require or permit the crew to perform any service, and if the crew is free to leave the train as soon as its deadhead transportation arrives, the train crew's waiting time counts as limbo time. However, should FRA receive credible evidence that crewmembers whose maximum duty hours had already expired under the HSL actually performed service for the railroad during the waiting period, we will likely take appropriate enforcement action. In addition, if FRA determines that waiting crewmembers were not free to leave a train when their deadhead vehicle arrived, we will conclude that they were apparently not "awaiting deadhead transportation," and were instead on duty performing service for the railroad.

Although requiring employees to attend their trains while awaiting deadhead transportation in grade territory may not violate the HSL, employees on many railroads are still being required to spend inordinate amounts of time awaiting transportation after the expiration of their duty hours. We strongly urge UP to continue to work with its employees to find ways to minimize these waiting times and get crews to their final release points quickly. Please feel free to call me (202) 493-6030 if you would like to discuss this matter further.

Signed by Daniel C. Smith, Assistant Chief Counsel for Safety