



**SUBMITTED TO THE  
OFFICE OF THE PRESIDENT-ELECT  
TRANSPORTATION TRANSITION TEAM**

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**TRANSPORTATION TRANSITION ISSUES PAPER  
DECEMBER 23, 2008**

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**SUBMITTED BY  
THE RAIL CONFERENCE OF THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**





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## EXECUTIVE SUMMARY

### INTRODUCTION

The Rail Conference of the International Brotherhood of Teamsters (Rail Conference) consists of the memberships of the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the Brotherhood of Maintenance of Way Employees Division (BMWED), two autonomous divisions within the larger Teamsters union. Collectively, the Rail Conference represents almost one half of the organized railroad workers in the United States. We respectfully submit the following report and proposal regarding policy initiatives that we believe should be implemented at the Federal Railroad Administration; and the Surface Transportation Board. Our report begins with an Executive Summary and is followed by the full report.

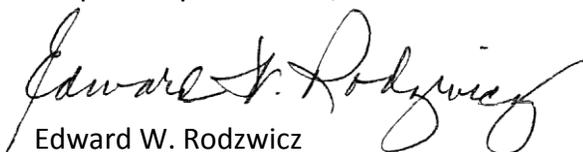
This report focuses on the agencies mentioned above because their actions have an immediate impact on the working lives of Rail Conference rank and file members.

The Federal Railroad Administration is involved in all aspects of railroad safety. The Rail Safety Improvement Act of 2008, places the agency's Administrator in the forefront of promulgating new regulations in a host of areas. Additionally, the Administrator must oversee the operations of the Rail Safety Advisory Committees, which are labor-management committees which attempt to negotiate new safety rules and regulations in the industry. In addition to the safety responsibility for the Administration, the Administrator also must oversee the infrastructure grant programs, Amtrak capital expenditures and supervise the Office of Chief Counsel.

Finally, the Surface Transportation Board, while much diminished in authority compared to its predecessor, the Interstate Commerce Commission, has exclusive and plenary authority over rail mergers. These mergers, and the employee protective conditions administered by the Board, can have a substantial impact on the livelihoods of rail workers.

The Rail Conference also acknowledges that the actions of the National Transportation Safety Board, the Federal Transit Administration and the Railroad Retirement Board affect our members as well. We have concentrated on the above three agencies because of their abilities to immediately affect the working lives of railroaders.

Respectfully submitted,



Edward W. Rodzicz  
BLET National President



Freddie N. Simpson  
BMWED National Division President



### Federal Railroad Administration

The Rail Safety Act of 2008 (Pub. L. 110-432) confers upon the Administrator of the Federal Railroad Administration (FRA) the authority to promulgate regulations addressing areas integrally related to railroad operations such as railroad track, signal systems, railroad communications and train control systems, rolling stock and safety appliances, operating practices, drug and alcohol testing, railroad accident/incident reporting, roadway worker protection, and locomotive engineer certification. Additionally, the Administrator supervises the Deputy Administrator, the Office of Chief Counsel and is responsible for oversight of federal grant programs, Amtrak capital spending plans and research and development of improved safety technology in the rail industry. The choice for Administrator will have a profound impact on the working lives of all members of the Rail Conference.

The Rail Conference submits that the Administrator of the FRA should follow and implement the following policy initiatives:

- Strengthen and support the Railway Safety Advisory Committee (RSAC) process. The Rail Safety Act of 2008 will require additional regulations to those already under development in the RSAC process;
- Expand the risk reduction program begun by former Administrator Joseph Boardman and Deputy Administrator for Safety Jo Strang that proposes to eliminate the current “command and control” safety culture prevalent on the nation’s railroads;
- Ensure that any adoption of positive train control technologies provides at least the same level of safety achieved today, and ensure that adoption of any new technologies is based upon a sound methodological approach and verifiable data;
- Ensure that infrastructure grants are provided first to rail carriers with the best safety records, thereby favoring those carriers that actually seek a safer work environment;
- Ensure that the railroad industry’s proposed outsourcing of locomotive and car inspections to Mexico is prohibited;
- Ensure that implementation of the new random drug testing requirements of the Rail Safety Act of 2008 do not destroy the 20 years of voluntary agreements and procedures established by labor and management to deal with this very issue;
- Seek to establish better relations and coordinate activities with the Occupational Safety and Health Administration whenever possible; and
- Promulgate regulations governing security training for railroad workers that should have been issued no later than February 2008.



### Surface Transportation Board

The Rail Conference submits the Surface Transportation Board (STB) has been an agency searching for its *raison d'être* since Congress created it in 1996 and abolished the Interstate Commerce Commission. Over the past 20 years, the STB has given a green light to every railroad merger and acquisition presented to it for final decision. Additionally, the STB has continued a policy first established by the former Interstate Commerce Commission of deeming the sale of rail lines to public transportation authorities as outside the Board's jurisdiction; thereby reducing the Federal oversight of the status of the nation's rail infrastructure. Finally, the Rail Conference notes that the STB has functioned largely as a facilitator of the railroad industry's policy initiatives. One recent STB Chairman, Linda Morgan, resigned her position to become head of the transportation law practice at Covington & Burling which represents the Union Pacific Railroad. Ms. Morgan also is a director of the Canadian Pacific Railroad. The STB is not seen as an honest broker by the Rail Conference.



## RAIL CONFERENCE DOT TRANSITION ISSUES PAPER

### FEDERAL RAILROAD ADMINISTRATION

The Federal Railroad Safety Act of 1970 (FRSA) grants the Secretary of Transportation rulemaking authority over all aspects of railroad safety and confers all powers necessary to detect and penalize violations of any rail safety law or regulation. The FRSA has been amended numerous times in the nearly four decades since its enactment, most recently on October 16, 2008, when President Bush signed into law the Rail Safety Improvement Act of 2008 (Pub. L. 110–432). This authority subsequently was delegated to the Administrator of the Federal Railroad Administration (FRA). *See* 49 U.S.C. § 103.

Pursuant to its statutory authority, FRA promulgates and enforces regulations addressing areas integrally related to railroad operations such as railroad track, signal systems, railroad communications and train control systems, rolling stock and safety appliances, operating practices, drug and alcohol testing, railroad accident/incident reporting, roadway worker protection, and locomotive engineer certification. These and other FRA regulations directly affect the personal safety and operational conduct of virtually all members of the Teamsters Rail Conference.<sup>1</sup>

The FRA Administrator is responsible for overseeing all aspects of FRA operations, and directly supervises, among others, the Deputy Administrator and the Office of Chief Counsel. This responsibility includes managing safety programs and regulatory initiatives; enforcement of FRA safety regulations; development and implementation of national freight and passenger rail policy, including awarding infrastructure grants and loans; direct oversight of Amtrak; and oversight of research and development activities pertaining to rail safety and rail technology.

The Administrator also has broad authority to direct FRA policy with regard to interpretation and enforcement of FRA regulations; prioritization of subjects for rulemaking; granting or denial of petitions for waivers from compliance with FRA regulations and petitions for emergency orders; the imposition of civil penalties against railroads and individual railroad employees; and the overall application of FRA standards and regulations as they apply to railroad contractors and contractor employees. The Deputy Administrator assists in fulfilling these obligations and oversees day-to-day FRA operations.

The Office of Chief Counsel — the legal arm of the agency — advises the Administrator on virtually all matters and wields substantial influence in the operation and policy determinations

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<sup>1</sup> The railroad industry and railroad workers also are subject to a number of regulations promulgated by the Occupational Safety and Health Administration (OSHA), which apply — according to their terms — to those hazards not otherwise rooted in, or closely related to, railroad operations.



of FRA. Under the Administrator, the Office of Chief Counsel develops and drafts the agency's safety regulations, assesses civil penalties for violations of the rail safety statutes and FRA safety regulations, and provides other legal support for FRA's programs. Because the Office of Chief Counsel is not subordinate to FRA's Office of Safety, we believe it is positioned to wield far too much influence in the policy determinations and regulatory interpretations of the FRA. The Teamsters Rail Conference strongly urges the appointment of a strong-minded and principled FRA Administrator willing to rein in the Office of Chief Counsel, an office which has become the *de facto* decision maker within the FRA on far too many occasions during the Bush Administration.<sup>2</sup>

We further believe that it is time to address an anomalous situation concerning the FRA that bears on the Chief Counsel issue. Specifically, at the present time the following four positions are designated as Schedule C positions:

- Administrator;
- Deputy Administrator;
- Senior Public Affairs Officer; and
- Senior Legislative Affairs Officer.

The position of FRA Chief Counsel is not designated as a Schedule C position. This contrasts sharply with the structure of the other modal agencies within the Department of Transportation (DOT). The position of Chief Counsel is designated as a Schedule C position in all of these agencies. We strongly urge the Obama Administration to remove the Schedule C designation from either the Senior Public Affairs Officer or the Senior Legislative Affairs Officer, and to instead designate the position of FRA Chief Counsel as a Schedule C position.

This restructuring will serve two important purposes. First, it will align the structure of the FRA with those of the other DOT modal agencies. Second, realignment is — we believe — a necessary step in addressing the difficulties outlined above.

There are two other overarching issues that we believe require immediate attention. One is the fact that the Bush Administration rescinded the FRA's independent rule-making authority during its tenure. In practical terms, the railroad industry's safety regulator was — for the first time in its 30+ year history — and is barred from initiating any sort of safety-related initiative without the permission of both the Secretary of Transportation and the Office of Management and

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<sup>2</sup> In this regard, we note with approval that this problem abated appreciably during the tenure of Administrator Joseph H. Boardman, who recently left FRA to become President and Chief Executive Officer of Amtrak. Nonetheless, this improvement was a function of Administrator Boardman's willingness to "buck" the institution of the Office of Chief Counsel, in our view.



Budget. FRA's historical authority should be restored as a part of the process of staffing the agency.

The other — and equally important to us — is the issue of funding for FRA. The enactment of the Rail Safety Improvement Act of 2008 on October 16 has the potential to be a watershed rail safety event of generational proportions. Giant strides were made in reauthorizing FRA and positioning the railroad industry's safety regulator for the 21<sup>st</sup> Century. Among the safety enhancements is a substantial increase in the number of FRA personnel for safety inspection and other purposes. Unfortunately, the Continuing Resolution under which FRA currently is operating will not permit the agency to retain even its current size, much less expand in the manner Congress has directed. We strongly urge the Obama Administration to take a leadership role in ensuring that FRA's appropriations match its authorization in the current and future fiscal years.

In light of the fact that we represent nearly half of the organized U.S. railroad workforce, it is imperative that the Teamsters Rail Conference take a leadership role in identifying and evaluating viable candidates for the positions of FRA Administrator, Deputy Administrator, and Chief Counsel. Successful candidates must share our safety values and goals, and must be willing to stand up to powerful special interests within the railroad industry in several key areas.

Pursuant to the Federal Advisory Committee Act (5 U.S.C. App. II) a significant proportion of rail safety rulemaking is considered by the FRA-sponsored Railroad Safety Advisory Committee (RSAC). This consensus-based group — comprised of more than three dozen railroad, labor, shipper, governmental, and public interest organizations — has, during its twelve years of work, been instrumental in revising outdated regulations, shepherding new technology into the industry, and creating a scientific basis for dealing with human factors issues.

The new FRA leadership must be committed to continuing and strengthening the RSAC process, which has several active rulemakings currently in progress. This is critical, in light of numerous additional rulemakings mandated or authorized by the Rail Safety Improvement Act of 2008, which include the following matters that directly affect Teamsters Rail Conference members:

- railroad safety risk reduction programs;
- implementation of positive train control technology and systems;
- overhauling current Hours of Service reporting requirements;
- Hours of Service for intercity passenger and commuter railroad workers;
- Hours of Service for freight railroad workers;
- various aspects of highway-rail grade crossing safety;



- minimum training standards;
- certification of conductors;
- track and bridge inspection and standards;
- locomotive cab environment;
- development of other rail safety technologies;
- exposure of railroad workers to nuclear radiation;
- alcohol and controlled-substance testing of maintenance of way workers;
- locomotive-based emergency escape breathing apparatus; and
- railroad camp cars.<sup>3</sup>

In August of 2008, Administrator Joseph Boardman and Associate Administrator for Safety Jo Strang launched an industry-wide risk reduction program initiative. A central element of this initiative is to replace the “command and control” culture that has existed in the railroad industry since the post-Civil War days with a modern, scientific human factors approach similar to the successful program in the aviation industry. The new FRA leadership must be committed to carrying out this initiative and to actively encouraging the negotiation of safety agreements between rail labor and management to replace the unilateral “command and control” safety culture now rightfully criticized by the FRA.

At the same time, the railroad industry is in the early stages of a technological revolution with respect to signal and train control systems, brake systems, and other freight and passenger equipment safety enhancements. The new FRA leadership must hold fast on existing regulatory requirements that new systems provide at least the equivalent level of safety as current technologies, and must resist permitting the creation of performance standards that are not fully supported by rigorous risk analysis and testing, and backed by appropriate data.

With regard to railroad infrastructure, the policy of the new FRA leadership should be to condition loans and grants on the recipient railroad maintaining an adequate safety record. As overseers of national passenger rail policy, the new FRA leadership should keenly understand

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<sup>3</sup> This final item provides an excellent example of untoward power in the hands of the railroad industry. Camp cars, which typically provide an occupant less space than that mandated for federal prisoners, are used to house maintenance of way workers when they are away from their headquarters. They are a throwback to the first half of the 20<sup>th</sup> Century, and all Class I railroads but one stopped using them decades ago. Despite an overwhelming House of Representatives vote to outlaw the barbaric conditions to which our members are subjected, the lone holdout railroad persuaded the House and Senate conferees to dilute the House action to permit current conditions to prevail for another 14½ months, after which yet-to-be-written regulations will take effect that permits the continued use of camp cars in perpetuity.



the importance of additional high speed rail corridors and actively support the development of such corridors. Furthermore, the new FRA leadership must support a healthy and vibrant Amtrak, and take no actions to impede timely appropriation of the funds called for in the Amtrak reauthorization legislation signed into law in August of 2008.

Finally, the new FRA leadership should actively collaborate with other federal agencies to foster increased safety for railroad workers:

- We fully support the call by the International Brotherhood of Teamsters for the Secretary of Transportation to cancel the illegal cross-border trucking pilot program involving Mexico. On two occasions during the Bush Administration, Teamsters Rail Conference affiliates intervened to stop the attempted outsourcing of locomotive, freight car, and train brake inspections to Mexico. Despite the fact that the proposal would have used outdated and mistranslated regulations — and would have relied upon inspectors whose training could not be documented — it created serious tension between the policy and the safety arms at FRA. The new leadership of the Department of Transportation (DOT), including the FRA, must ensure that safety does not take a back seat to either operational convenience or foreign trade ideology.
- The new FRA leadership also must advocate that DOT refrain from taking actions with regard to the workplace control of drugs and alcohol that undermine the joint FRA–labor–management efforts of more than two decades, which have served as an example for the entire transportation industry. Recent changes to DOT regulations requiring mandatory direct observation of urine specimen collection and a “strip search” of donors, which the Teamsters Rail Conference is challenging on constitutional and legal grounds, is just the most recent example of such damaging activity.
- Section 1517 of the Implementing Recommendations of the 9/11 Commission Act of 2007 required that the Secretary of Homeland Security promulgate regulations governing security training for railroad workers no later than six months after August 3, 2007. *See* 121 Stat. 439. To date, the Secretary has yet to publish even a Notice of Proposed Rulemaking. The new FRA leadership should redouble the agency’s efforts to prod the Secretary to comply with this statutory mandate.
- In order to promote the safety and health of Teamsters Rail Conference members, the new FRA leadership must also make coordination and cooperation with OSHA a priority. Currently, coordination between OSHA and FRA appears to us to be virtually non-existent, and there seems to be an absence of formal, high-level cooperation between the administrators of these two agencies. As a result, our members often are not



afforded the full complement of regulatory safety protection and enforcement action they are entitled to under law.

Despite eight years of seemingly deliberate ineptitude throughout the Executive Branch, the Teamsters Rail Conference has enjoyed a strong, collaborative relationship with the FRA, particularly during last few years. This is the result of FRA having a cadre of dedicated safety professionals, and supporting programs and policies designed to value the input of all stakeholders and to work toward consensus. It is vitally important to us that the new FRA leadership build on this strong foundation, and be prepared to work actively with other agencies that will experience a reawakening in the Obama Administration.



## SURFACE TRANSPORTATION BOARD

Any set of policy prescriptions for the Surface Transportation Board cannot be understood without reviewing the origins of this agency and its relationships with Rail Labor for almost 100 years. Without a brief summary of the history of the Board, any policy prescriptions will lack context and may appear unnecessary or quixotic. What follows is a brief history of the agency, the current problems the Rail Conference confronts with each it and the Rail Conference's policy prescriptions to make the agency work in the interests of working men and women employed in the railroad industry.

The Surface Transportation Board, known as the "Surf Board" within the industry, was created by the awkwardly, but accurately, named Interstate Commerce Commission Termination Act of 1995. The Surf Board houses the residual railroad and motor vehicle regulatory authority remaining after Congress eliminated the Interstate Commerce Commission after 108 years of operation. While the Surf Board has little to do compared to the ICC in its heyday, the Surf Board's authority still reflects a Congressional purpose first expressed in 1920 – a transportation policy that favors railroad mergers through a review process that stands outside of the nation's antitrust laws. The policy complements a regulatory policy traced to the Staggers Act of 1980 which favors large railroads shedding branch and secondary lines to putative noncarrier entities that will operate short line railroads on the acquired lines. Finally, the ICC and now the Surf Board has continued a policy that treats railroad line sales to public entities as outside the jurisdiction of the Board.

The Transportation Act of 1920 charged the ICC with creating a national plan for the consolidation of railroads into financially strong systems. Railroads were permitted to engage in voluntary consolidations and mergers provided that the transaction did not contravene the ICC's plan. Any such consolidation, either voluntary or pursuant to ICC order, and any stock purchase of one carrier by another was expressly "relieved from the operation of the 'antitrust laws,' as designated in [the Clayton Act], and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."<sup>4</sup> This section is called the "cramdown" provision of the Interstate Commerce Act and continues in present form at 49 U.S.C. §11321(a).

In 1940, Congress amended the Interstate Commerce Act to permit the voluntary consolidation of rail carriers on whatever terms the ICC deemed appropriate. Coupled with this new found authority in rail mergers, Congress also required that the ICC impose protections for the benefit of employees harmed by such mergers. These protective benefits, most recently codified in the

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<sup>4</sup> Former Section 5(8) of the Interstate Commerce Act of 1920.



*New York Dock Conditions* in 1979, provide income stabilization and relocation benefits to rail employees who are adversely affected by an approved transaction. These conditions were first imposed by the ICC in 1934 as a “just and reasonable” condition of its approval of a merger that was consistent with the public interest. The Supreme Court ratified the ICC’s discretionary authority five years later, observing that rail mergers provided economic benefits to stockholders from efficiencies obtained at the expense of rail employees.<sup>5</sup> The Court reasoned that it certainly was in the public interest for the stockholders to share some of those economic benefits, for a limited period of time, with those employee adversely affected by the merger. The conditions also provide for negotiation, and mandatory arbitration if necessary, of agreements integrating the merged carriers’ workforces. Beginning in the mid-1980’s, the ICC and later the Surf Board used the cramdown provisions of the Interstate Commerce Act to authorize the forced arbitration of changes in collective bargaining agreements during railroad merger proceedings.

Beginning in the early 1980’s, the ICC began to use an obscure part of the Interstate Commerce Act, Section 10901 — formerly used, if at all, to deal with applications to construct new lines of railroad — to authorize the sale of existing rail lines to entities that would become rail carriers upon acquisitions of those lines. Under Section 10901, the ICC’s imposition of “employee protective conditions,” which provide income stabilization and relocation benefits to employees harmed by railroad mergers and line sales, was discretionary. The ICC created a class exemption applicable to those transactions that permitted them to go into effect seven days after the parties filed notice that they would engage in the transaction. Employee protective conditions were imposed in but a handful of literally hundreds of such transactions. In 1995, Congress removed the Surf Board’s discretionary authority to impose protections, and expressly forbade the imposition of any employee protective conditions in such transactions.

In 1991, the ICC held that the sale of a line of railroad to the Department of Transportation of the State of Maine was outside its jurisdiction. *Maine, DOT—Acq. Exemption--- Maine Central R. Co.*, 8 I.C.C.2d 835 (1991). Since then, the ICC and Surf Board have held that a rail carrier’s sale of line of railroad to a state agency does not trigger its jurisdiction provided that the selling carrier retains an “easement” to provide freight service over the line. Because these sales are not within the jurisdiction of the Surf Board, no employee protective conditions are available for the rail carrier’s employees who are harmed by the sale, nor is there any Federal record that such a transfer occurred.

The Rail Conference presently has little interaction with the Surf Board. In 2001, the BMWED and BLET entered into a voluntary agreement with the major Class 1 rail carriers, except for

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<sup>5</sup> *U.S. v. Lowden*, 308 U.S. 225 (1939).



Canadian National, which provides for the manner in which workforces will be integrated in the case of rail mergers and the manner in which changes, if any, may be made to existing collective bargaining agreements. The *quid pro quo* for that agreement was a pledge by the unions to oppose anything other than a “clean” reauthorization of the Surf Board.

While the number of Section 10901 transactions has slowed, the short line industry is evolving. The number of short line operators continues to consolidate as Genesee and Wyoming, Rail America, and Watco Companies continue to acquire short lines previously operated by others. The Surf Board has indicated no interest in revisiting its oversight of those transactions.

Finally, since the *State of Maine* decision, various public transportation agencies have moved forward to acquire rail lines for use in rail commuter operations. Given that the Surf Board has held that it has no jurisdiction over these transactions, struggles over the impact of such arrangements on railroad workers have moved to state legislatures, which undermines the ability to implement a national rail policy.

The Rail Conference finds the Surf Board to be an agency searching for a reason for existence. The failure of the Board, or Congress for that matter, to deal with the cramdown issue led to the 2001 voluntary agreement with the rail carriers containing the *quid pro quo* regarding labor support for a *status quo* reauthorization of the Board. For nearly 30 years the ICC and Surf Board have functioned solely for the benefit of rail carriers. Indeed the most shocking example of this was the former Chairman of the Surf Board, Linda Morgan, a Democratic appointee, who left the Board to become head of the transportation law practice at Covington & Burling (Union Pacific’s major law firm) and also sits on the Board of Directors of Canadian Pacific Railroad.