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COMMITTEE ON HOMELAND SECURITY

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RAIL AND PUBLIC TRANSPORTATION SECURITY ACT OF 2007

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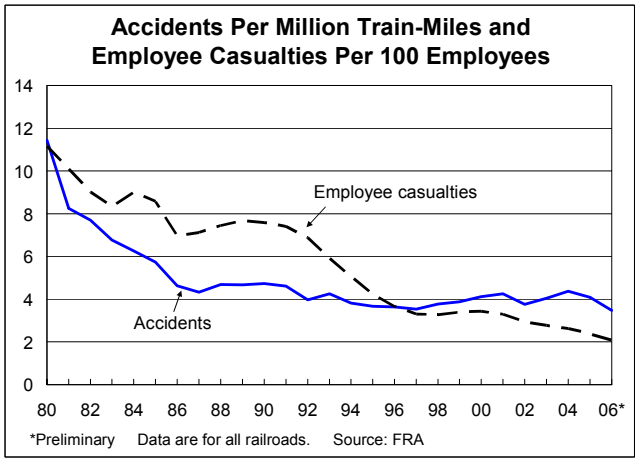
On behalf of the members of the Association of American Railroads (AAR), thank you for the opportunity to discuss freight railroad security in general and the Rail and Public Transportation Security Act of 2007 in particular. AAR members account for the vast majority of rail mileage, employees, and revenue in Canada, Mexico, and the United States.

Unlike U.S. passenger railroads and transit systems, U.S. freight railroads are, with minor exceptions, privately owned and operated, and they rely almost exclusively on their own earnings to fund their operations. Freight railroads move approximately 40 percent of our nation's freight (measured in ton-miles) — everything from lumber to vegetables, coal to orange juice, grain to automobiles, and chemicals to scrap iron — and connect businesses with each other across the country and with markets overseas.

From 1980 through 2006, Class I railroads spent more than $370 billion — more than 40 cents out of every revenue dollar — on capital expenditures and maintenance expenses related to infrastructure and equipment. Non-Class I carriers had billions of dollars of additional spending. These massive, privately-funded expenditures help ensure that railroads can meet our current and future freight transportation demands safely and cost effectively.

As the Federal Railroad Administration (FRA) noted in congressional testimony a few weeks ago, "The railroads have an outstanding record in moving all goods safely." Indeed, nothing is more important for railroads than the safety and security of their operations. For railroads, safety and security are interconnected: a safer workplace will tend to be a more secure workplace, and a more secure workplace will tend to be a safer workplace. And railroads have become much safer. According to FRA data, railroads reduced their overall train accident rate by 70 percent from 1980-2006, and their rate of employee casualties by 81 percent. Railroads have lower employee injury rates than other modes of transportation and most other major industry groups, including agriculture, construction, manufacturing, and private industry as a whole.



We should also be encouraged by the continuing improvements in rail safety. Based on preliminary data, 2006 was the safest year ever for railroads by the three most commonly-cited rail safety measures: the train accident rate, the employee casualty rate, and the grade crossing collision rate all reached record lows.

Freight railroads are justifiably proud of these accomplishments. At the same time, though, railroads want rail safety and security to continue to improve, and they are always willing to work cooperatively with members of this committee, others in Congress, the Department of Homeland Security (DHS), the Department of Transportation (DOT), the FRA, rail employees, and others to find practical, effective ways to make this happen.

To that end, we appreciate this committee's interest in rail security. Below I will describe the many ways that U.S. freight railroads have addressed security in the post 9-11

era, provide our views on various provisions of the Rail and Public Transportation Security Act of 2007, and offer suggestions on how rail security can be further improved.

The Aftermath of September 11

Almost immediately after the 9/11 attacks, the AAR Board of Directors established a Railroad Security Task Force. The overarching goals of this task force were to 1) help ensure the safety of rail employees and the communities in which railroads operate; 2) protect the viability of national and regional economic activity; and 3) ensure that railroads can continue to play their vital role in support of our military.

Over the next several months, the task force conducted a comprehensive risk analysis of the freight rail industry. Using intelligence community "best practices," five critical action teams (consisting of more than 150 experienced railroad, customer, and intelligence personnel) examined and prioritized railroad assets, vulnerabilities, and threats. Separate critical action teams covered information technology and communications; physical infrastructure; operational security; hazardous materials; and military traffic needs. Freight railroads also cooperated fully with a separate team covering passenger rail security.

The end result of these analyses was the creation of the industry's Terrorism Risk Analysis and Security Management Plan, a comprehensive, intelligence-driven, priority-based blueprint of actions designed to enhance freight railroad security. The plan was adopted by the AAR in December 2001 and remains in effect today.

As a result of the plan, freight railroads quickly enacted more than 50 permanent security-enhancing countermeasures. For example, access to key rail facilities and information has been restricted, and cyber-security procedures and techniques have been strengthened. In addition, the plan defines four progressively higher security alert levels and details a series of actions to be taken at each level:

Alert Level 1 is "New Normal Day-to-Day Operations." It exists when a general threat of possible terrorist activity exists, but warrants only a routine security posture. Actions in effect at this level include conducting security training and awareness activities; restricting certain information to a need-to-know basis; restricting the ability of unauthorized persons to trace certain sensitive materials; and periodically confirming that security systems are working as intended.

Alert Level 2 (the level in effect today) is "Heightened Security Awareness." It applies when there is a general non-specific threat of possible terrorist activity involving railroad personnel or facilities. Additional actions in effect at this level include security and awareness briefings as part of daily job briefings; content inspections of cars and containers for cause; and spot content inspections of motor vehicles on railroad property.

Alert Level 3 means there is "a credible threat of an attack on the United States or railroad industry." Examples of Level 3 actions include further restricting physical access and increasing security vigilance at control centers, communications hubs, and other designated facilities, and requesting National Guard security for critical assets.

Alert Level 4 applies when a confirmed threat against the rail industry exists, an attack against a railroad has occurred, an attack in the United States causing mass casualties has occurred, or other imminent actions create grave concerns about the safety of rail operations.

Security actions taken at this level include stopping non-mission-essential contractor services with access to critical facilities and systems; increasing vigilance and scrutiny of railcars and equipment during mechanical inspections to look for unusual items; and continuous guard presence at designated facilities and structures.

Alert Levels 3 and 4 can be declared industry-wide for a short period of time or, if intelligence has identified that terrorist action against a specific location or operation is imminent, for a particular geographic area (*e.g.*, the Midwest) or subset of rail traffic (*e.g.*, hazardous materials).

The rail security plan is not simply something that has been put in a binder on a shelf to be taken down and dusted off once in a while. Rather, it is a robust and dynamic paradigm for railroad operations that has been in effect for more than five years; it is evaluated and modified, as necessary, on an ongoing basis; and it has substantially raised the baseline of railroad security. Railroads took this action without waiting for legislation or a regulatory regime to tell them to do so.

Indeed, railroads are a model for other industries in their approach to improving security. As a former FRA administrator noted regarding rail efforts at enhancing security, "I can say how impressed I am by the scope of the analysis, the sophistication of the analytical framework, and the manner in which rail carriers have devoted substantial resources — both funding and senior leadership — to the completion of this important task. They've done remarkable work." And a former Secretary of the U.S. Department of Health and Human Services has noted that "The anti-terrorist measures the railway industry has taken…have added and will continue to add to the safety of our citizens, the delivery of vital goods and the ability of our men and women in uniform to carry our battle to the enemy."

Access to pertinent intelligence information is a critical element of the railroad security plan. Congress should ensure that DHS is routinely communicating relevant intelligence to the railroad industry through the Railway Alert Network (RAN), a secure 24/7 communications network operated by the AAR at the Secret level that links federal security personnel with railroad operations centers. Through the RAN, railroads and the intelligence community can share information to maintain situational awareness and immediately institute appropriate alert levels.

Railroad industry security requires constant communication with the Transportation Security Administration (TSA) and elsewhere within DHS, the Department of Defense (DOD), the DOT, the FBI's National Joint Terrorism Task Force (NJTTF), state and local law enforcement, and others. A railroad police officer and railroad analysts who hold Top Secret clearances work with government intelligence analysts at NJTTF and at DHS to help evaluate intelligence and serve as subject matter experts.

Communication is also enhanced by the Surface Transportation Information Sharing and Analysis Center (ST-ISAC), which was established by the AAR at the request of the DOT. The ST-ISAC collects, analyzes, and distributes security information from worldwide resources to help protect vital information technology systems and physical assets from attack. It operates 24/7 at the Top Secret level.

Rail security efforts strongly benefit from the fact that major railroads have their own police forces. Safety and security would be enhanced if police officers of one railroad were

permitted to exercise law enforcement powers on the property of another railroad. This flexibility could prove especially valuable in the event of a national security threat involving an individual railroad.

Notwithstanding rail industry efforts, there can be no 100 percent guarantee against terrorist assaults, including assaults involving hazardous materials (hazmat) on railroads. If such an incident occurs, railroads have well-established programs and procedures that would be invoked that are designed to respond to and minimize the impact of such incidents.

In this regard, emergency response efforts are critical. Railroads help communities develop and evaluate hazmat emergency response plans. Through their own efforts and the Transportation Community Awareness and Emergency Response Program (TRANSCAER), they provide basic training for more than 20,000 emergency responders each year.

In addition, more than 20 years ago, the AAR established the Emergency Response Training Center (ERTC), a world-class training facility that is part of the Transportation Technology Center, Inc. (TTCI) in Pueblo, Colorado. The ERTC has provided in-depth hazmat emergency response training to more than 38,000 emergency responders and railroad and chemical industry professionals from all over the country and abroad. The ERTC is providing basic railroad safety and security training for 100 rail security inspectors hired by the TSA, and this summer ERTC will be training NJTTF personnel.

The ERTC is considered by many to be the "graduate school" of hazmat training because of its focus on comprehensive, hands-on training using actual rail equipment. TTCI boasts a collection of around 70 rail freight cars (including tank cars), some 15 rail passenger cars, 25 highway cargo tanks, van trailers, and intermodal containers, as well as computer work stations equipped with the latest emergency response software. TTCI is currently developing a Passenger Railcar Security and Integrity Training Facility to test the effectiveness of various response and remediation techniques in mitigating incidents involving passenger trains. This facility focuses on chemical, biological, radiological, nuclear, or explosive incidents and other activities associated with potential terrorist events.

Many members of Congress have had the opportunity to visit TTCI in person. I'm pleased to offer all members of this committee an open invitation to visit the facility to gain first-hand knowledge of its capabilities. On April 11, 2007, we plan to conduct a tank car test crash as part of an evaluation of tank car safety. This committee might want to consider scheduling a field visit to TTCI to view this demonstration.

The Rail and Public Transportation Security Act of 2007

As I noted earlier, railroads appreciate your interests in addressing rail security. As you consider specific legislation, though, we respectfully urge you to consider the extensive steps railroads have already taken to make our freight railroads more secure. We also hope you remain mindful of the need to establish a proper balance between efforts to enhance security, on the one hand, and allowing the free flow of goods that is critical to our societal and economic health, on the other.

We also urge you to remember that any railroad security regime must take into consideration the nature of rail operations. Our freight railroads form a vast, overwhelmingly open system designed to move goods efficiently and cost-effectively throughout North America. By its nature, the system cannot be "closed." Moreover, in order to survive for

more than 170 years, as they have, railroads have had to learn to be resourceful, flexible, and productive. Sudden disruptions brought about by weather, grade crossing accidents, rockslides, equipment failures, and countless other contingencies are a fact of life for railroads. I can think of no other industry that faces these kinds of disruptions as routinely, and typically handles them as well, as railroads do.

Consequently, this committee should keep in mind the impressive capabilities railroads have honed over the years in responding to unusual circumstances. We especially urge you to refrain from transferring key operational decision-making authority to a federal bureaucracy. Doing so would make it much more difficult for railroads to respond to and recover from challenges related to safety and security.[1]

Regarding specific rail-related provisions of the Rail and Public Transportation Security Act of 2007:

- Section 3 calls for the Department of Homeland Security (DHS) to develop and implement a national strategy for rail and public transportation security. Railroads support this provision, particularly with respect to the mandate to develop a strategy to research and develop new technologies for securing rail transportation.

- Section 5 requires DHS to issue regulations requiring railroads to conduct vulnerability assessments and prepare security plans. As discussed earlier, the rail industry is already well beyond the assessment stage. The legislation should make clear that DHS should review and may accept the security assessments and plans railroads already have in place to meet the requirements of this section.

  Section 5 also calls for the identification of a security coordinator "to require immediate communications from appropriate federal officials. AAR's members already maintain safety/security offices that are open around the clock, and the AAR maintains a 24/7 security emergency line.

  Section 5 also requires plans for locating shipments of railroad cars transporting "extremely hazardous materials or nuclear waste" that are "lost or stolen." With all due respect, the loss or theft of tank cars is not a problem in our industry. Railroads, at the request of the TSA, have agreed to provide movement data on all rail cars carrying toxic inhalation hazards (TIH).

- Section 6 requires DHS to develop a strategic information sharing plan to ensure the development of tactical and strategic intelligence pertaining to threats and vulnerabilities for dissemination to appropriate stakeholders. We support appropriate sharing of information. However, there should be clear and unequivocal protections to ensure that strategic information does not fall into the hands of those who would harm us.

- Section 7 establishes a program for making grants to both passenger and freight railroads for infrastructure protection. We strongly support this provision, particularly

[1] The way railroads addressed the disruptions caused by Hurricane Katrina is illustrative of this point. Railroads prepared for the storm, assessed damage, and had most of their lines back in operation in the region in a matter of a few days. Again, rail industry preparation and response efforts were a model for everyone else.

the inclusion of "overtime reimbursement for additional security personnel during periods of heightened security" as an eligible security improvement.

- Section 11 requires DHS to develop a security training program for railroad workers and to issue guidance on such training to railroads. I address employee security training more fully below. It is important to note, though, that freight and passenger railroad environments are very different, and some elements of the employee security training program recommended in the bill (*e.g.*, element 5 on evacuation procedures) may be appropriate for passenger railroads but are not appropriate for freight railroads. Moreover, some elements of the bill (*e.g.*, element 1 on determining the seriousness of a threat) would require freight railroad employees to put themselves in harm's way, which contradicts existing freight railroad policies and procedures.

- Section 12 requires DHS to develop a program for conducting security exercises, including live exercises at railroad facilities. The railroad industry conducts regular table top exercises to ensure maximum continued effectiveness of its security plan. Railroads are concerned that live government exercises, if unannounced and not carefully coordinated with the railroads involved, could result in fatalities or injuries. To guard against this, we recommend that the provision be modified to require DHS to coordinate such exercises with railroads to ensure the proper safety of all participants in the exercises while on railroad property.

- Section 13 requires DHS to establish a research and development program for projects related to rail security. The AAR strongly supports this provision. On February 13, 2007, AAR offered testimony at a hearing of this Committee's Subcommittee on Appropriations. That testimony included a list of R&D projects that, if appropriately funded, would significantly enhance rail security. I attach this list as Appendix 1 at the end of this testimony.

  Earlier in this testimony, I discussed the facilities available at the Transportation Technology Center, Inc., including the Emergency Response Training Center. Many of the projects outlined and recommended in the Rail and Public Transportation Security Act of 2007, and many other projects that are not mentioned but have important safety and security benefits, are already underway at TTCI. We urge you to utilize this unique and invaluable resource.

  We also strongly support the provision that would make TTCI a member of the National Domestic Preparedness Consortium (NDPC), a group of premier institutions that develop, test, and deliver training to state and local emergency responders. Today, a facility specifically targeted at emergency response training for freight and passenger railroad environments is notably absent from the NDPC. Including TTCI in the NDPC offers a unique opportunity to improve our nation's ability to prevent, minimize, and respond to potential rail-related terrorist attacks.

- Section 14 calls for new whistleblower protections, under the Department of Labor, designed to shield rail employees from retaliation for certain conduct involving issues related to homeland security.

  Railroads do not object to equitable whistleblower protections for rail workers, but they do not believe that there should be one set of rules for whistleblowing on safety

matters and a different set of rules for whistleblowing on security matters. The Federal Railroad Safety Act already has a whistleblower provision (49 U.S.C, Section 20109), and any expansion of rail employee whistleblower protections to include security should be undertaken within the context of Section 20109. Creating a new, separate system under the aegis of the Department of Labor is both unnecessary and potentially confusing, since situations could develop that could be handled under either Section 20109 or the Department of Labor.

With respect to Section 14, if the government invokes a states secrets privilege in a case where a railroad employee has filed a claim against a railroad, the railroad should not be precluded from presenting its justifications for any action taken against that employee, and the railroad should be able to obtain a judgment based on the justifications the railroad is able to provide.

- Section 15 would increase the number of non-aviation TSA inspectors from 100 to "at least 600" by the end of 2010. Railroads welcome the provisions specifying minimum qualifications for such inspectors and for requiring a clear delineation of responsibilities between TSA inspectors, FRA inspectors, state and local law enforcement, and railroad police. We are not convinced, however, that such an inspection workforce is necessary in the freight railroad environment, or that the new TSA inspectors would not simply duplicate the work currently performed by FRA inspectors. Railroads would prefer to see the limited resources available for rail security applied to the physical protection of personnel, critical assets, and the public.
- Section 16 establishes a National Transportation Security Center of Excellence (NTSCE) at an institution of higher education to conduct research and education and develop professional rail security training. We would hope that the work of the NTSCE and of other institutions associated with it would be integrated with the work underway at TTCI in Pueblo, Colorado so as not to duplicate efforts.

Railroads respectfully suggest that a number of other additional legislative provisions would enhance railroad security:

- Address the "bet the company" risk railroads must assume because of their common-carrier obligation to carry highly-hazardous materials, especially "toxic inhalation hazards" (TIH).
- Encourage rapid development and implementation of "inherently safer technologies" as substitutes for highly-hazardous materials, especially TIH.
- Ensure that any technology that is mandated to track and locate rail cars carrying hazmat and/or to identify actual or imminent hazmat release is fully proven, functional, reliable, and cost effective, and does not impede or endanger existing railroad systems.
- Make expenses mandated by the government (including mandates that result from high-risk corridor assessments) eligible for critical infrastructure protection grants.

- Allow police officers of one railroad to exercise law enforcement powers on the property of another railroad.[2]
- Engage the expertise and experience of rail industry personnel as significant domestic intelligence assets.

Many of the additional steps railroads recommend pertain to hazardous materials. Appendix 2 of this testimony contains an excerpt of AAR testimony offered on February 13, 2007, to this Committee's Subcommittee on Appropriations that discusses the hazmat issue in far more detail.

Rail Employee Security Training

Railroad security efforts depend a great deal on the efforts of railroads' dedicated and highly-professional employees — including engineers and conductors aboard trains; maintenance of way crews, inspectors, and signalmen working along railroad rights-of-way; railroad police officers; and others. They are the "eyes and ears" in the industry's security efforts, and we should all be grateful for their vigilance and care.

The freight rail industry trains its employees to be vigilant, to report suspicious objects and activities, and to keep out of harm's way. The training has encompassed topics such as what to do when an employee sees a stranger or suspicious activity on rail property; to whom an anomaly should be reported; the need to keep information about train movements and cargos confidential; and the need to keep rail property secure and safe.

With 9/11, it became clear to railroads, as it did to firms in other industries, that security awareness would have to take on new importance. In response, Class I railroads soon thereafter provided a training video and/or printed materials to all employees — in most cases mailing the materials to employees' homes — that could be characterized as "Security Awareness 101." In the materials, the railroads expressed to their employees three fundamental expectations that to this day remain cornerstones of rail employees' responsibilities regarding security: don't put yourself in danger; report suspicious activities on or around railroad property; and don't divulge sensitive information about rail operations to others.

Over time, freight railroads began to incorporate security issues in a more formal fashion — for example, as part of employees' periodic FRA-mandated safety rules recertification, as part of new-hire training, and as part of new manager training. Many railroads have incorporated security issues into employees' manual of standard operating practices. Moreover, all railroads are compliant with U.S. DOT-mandated HM-232 security training for employees who handle hazardous materials.

More recently, railroads concluded that rail security would be enhanced if rail employee security training was more uniform across railroads through use of a standardized curriculum, and railroads have made that harmonization a reality.

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[2] Such a measure was contained in legislation (H.R. 2351) introduced in the 109th Congress sponsored by Rep. James Oberstar, chairman of the House Transportation and Infrastructure Committee, and is included in S. 184 (the "Surface Transportation and Rail Security Act of 2007"), which is now included in S. 4 (the "Improving America's Security by Implementing Unfinished Recommendations of the 9/11 Commission Act of 2007").

Much has been done in collaboration with the National Transit Institute (NTI) at Rutgers University. NTI was established under the Intermodal Surface Transportation Efficiency Act of 1991 to develop, promote, and deliver training and education programs for the public transit industry. Freight railroads are fortunate to have been able to take advantage of NTI's success in promoting safety and security in public transit to develop an interactive, uniform security awareness curriculum for freight railroad employees.

The standardized curriculum has four modules: *What is Security*; *Vulnerability, Risk, and Threat*; *What to Look For*; and *Employees' Role in Reducing Risk*. The goal of the standardized curriculum is to provide rail employees with an understanding of their role and responsibility in system security, and how to implement their companies' procedures upon detection of suspicious objects or activities.

For example, one module of the curriculum focuses on what system security entails in a general sense — *i.e.*, the use of operating and management policies and procedures to reduce security vulnerabilities to the lowest practical level, as well as a process focusing on preventing all levels of crime against people and property. Under a system security approach, rail employees are taught to realize that they and their duties are part of a larger, extensive system and that system security begins with the employee. To that end, employees are encouraged to be observant and to be familiar with their companies' policies and procedures in the event of a threat or incident.

Another module of the curriculum covers how to identify suspicious or dangerous activities. In the case of suspicious individuals, the focus is on behavior — specifically, where the person is, when he or she is there, and what he or she is doing. Railroads know that their employees know their daily work area better than anyone and are in the best position to determine if something looks wrong or is out of place. Thus, employee training emphasizes being familiar with the work area; observing and reporting suspicious activities and objects; reporting missing or malfunctioning equipment; and, if appropriate and endorsed by railroad policies, approaching and engaging persons to resolve or confirm suspicions. Rail employees are not to approach threatening people; try to intervene in dangerous activities; or pick up, touch, or move suspicious objects. They are expected to withdraw from dangerous environments and situations and are expected to report dangerous situations immediately.

As part of the standardized curriculum, employees are also trained how to react to threats, which may take the form of perceived suspicious activity, suspicious and/or out-of-place objects or vehicles, evidence of tampering with equipment, phone calls or other warnings, or other circumstances. Again, railroads do not expect their employees to "play the hero" by potentially putting themselves in harm's way. Instead, they are expected to follow their company's policies and procedures, inform the appropriate authority of the situation, move to a safe location, and wait for further instructions.

We submitted our employee security training program both to DHS and to FRA for review and comment in February 2006. TSA reviewed the rail industry's training program, and advised us that it is "relevant and up-to-date" and is "helpful" in "rais[ing] the baseline of security-related knowledge." Recently, TSA inspectors surveyed 2,600 railroad employees and determined that 80 percent of the employees have a medium or high level of security awareness.

Class I railroads will complete security training for front-line workers (security personnel, dispatchers, train operators, other on-board employees, maintenance and maintenance support personnel, and bridge tenders) by the end of this year. Going forward, rail employee security training is being documented and records of it are being maintained.

As the information noted above makes clear, railroads treat very seriously their obligations in regard to security and have made sustained, earnest efforts to provide their employees with the tools and training they need to react appropriately when security-related issues arise. Moreover, railroads are not standing still in this regard. Through their efforts with NTI and others, railroads are continually refining their training efforts to improve their usefulness and effectiveness. Railroads are also always open to reasonable, constructive suggestions on how employee security training can be improved.

Criminal Background Checks

The legislation before you now includes a provision on criminal background checks that would apply to all covered transportation providers — railroads, public transportation providers, and over-the road bus operators. This provision is unwarranted, excessively broad in scope, and an intrusion into the rights of the industry to protect its workforce and property from convicted criminals. It is a reaction to a limited situation involving employees of railroad contractors that is already being appropriately addressed. Moreover, the legislation actually conflicts with the parameters prescribed by the regulatory regime set up for the U.S. government's transportation worker identification credentials (TWIC).

On February 16, 2007, I testified before this Committee's Subcommittee on Transportation Security and Infrastructure Protection. In that testimony, I noted that railroads have an obligation to their employees, their customers, the communities they serve, and their shareholders to keep their personnel, their operations, and facilities as safe and secure as possible. Railroads take this obligation, which has taken on a new dimension in the post-9/11 world, very seriously. Like all other industries, railroads employ a variety of risk management tools to achieve this goal. One such tool is the use of criminal background checks of prospective employees and contractors seeking access to railroad property.

For any firm, the basic purpose of a criminal background check is to reduce the likelihood that a prospective employee will engage in workplace crime. Even when a conviction is not directly related to the potential duties of a position (*e.g.*, a conviction for embezzlement by an applicant for an auditing position), the conviction may be considered an indication that a necessary personal qualification (integrity, reliability, self control, etc.) is missing. Convictions of particular concern to railroads include crimes against persons, crimes involving weapons, crimes involving theft or fraud, and crimes involving drugs or alcohol.

There are also important liability considerations behind criminal background investigations. These include protection against lawsuits for "negligent hiring" and "negligent retention." Courts have ruled that employers can be held liable for the damaging actions of their employees, if, based on the employee's previous actions, he or she should have been disqualified for the position. Similar liability can arise from the actions of contractors and employees of contractors.

The above points all hold true for railroads. In addition, railroads face a growing body of requirements and recommended "best practices" related to homeland security that directly

or indirectly call for criminal background checks for persons with access to rail property. These requirements and recommended practices emanate from DHS or one of its agencies, such as the TSA, the Coast Guard, or the U.S. Customs and Border Protection (CBP); from the DOT or one of its agencies, such as the Federal Motor Carrier Safety Administration or the Pipeline and Hazardous Materials Safety Administration; or from another government entity. Appendix 3 lists several examples.

A few years ago, the railroads determined that not all contractors working on railroad property were conducting background checks on their employees. To help close this gap, a nationally-recognized background investigation firm, eVerifile, was retained to create an industry-wide program known as e-RailSafe. The e-RailSafe program provides background checks and credentialing for the employees of contractors who need access to the property of Class I freight railroads.

The e-RailSafe program began in late 2005. To date, four of the seven Class I railroads are participating. Others have signed contracts with e-Verifile but have not yet initiated the program.

As I noted in my testimony on February 16th, when contacted by the Committee about some of the confusion surrounding the e-RailSafe program, we moved swiftly to clarify the rationale for the program and to provide a robust and responsive appeals process for contractor employees who were denied credentials due to their criminal backgrounds. A more complete description of the program and the appeals process is included in Appendix 4. Let me reiterate today that the background checks done by the railroad industry are conducted for a wide variety of basic, common sense reasons. As private property owners, we have a right — and an obligation — to safeguard our personnel and property from persons with criminal backgrounds. If those background checks also help meet the recommended practices of the Department of Homeland Security, then all the better. But we strongly oppose the legislation before you that would severely constrain the ability of the railroads to protect its workforce and property.

Among our concerns with the provision are the following:

- It would apply not only to the employees of contractors, but to all employees of transportation providers.
- The provision is retroactive to background checks performed since June 23, 2006.
- The waiver and appeals process requires an "independent decision-maker" with the ability to order reinstatement or provide other remedies. This is an intrusion into the rights of private companies to determine who it employs and who it allows on its property. As far as we are aware, no other U.S. industries are bound by a similar federal mandate.
- The disqualifiers specified are different than what is required by the DHS under its TWIC program. For example, while there are 11 permanent disqualifiers required by the TWIC, including murder, the legislation before you only includes treason, espionage and sedition.
- The timeframes for the disqualifiers in the legislation before you are also different from the TWIC. For example, this legislation would disqualify an applicant for

credentials if he or she had a felony conviction within the last 6 years. A person applying for a TWIC card is disqualified if he or she has had a felony conviction within the last 7 years. This legislation would disqualify an applicant for credentials if he or she has been incarcerated within the last 4 years. A person applying for a TWIC card is disqualified if he or she has been incarcerated within the last 5 years.

- As we have testified previously, our background checks do *not* use the same disqualifiers as does the U.S. government when it is considering an applicant for the issuance of security credentials. Our purposes are different.
- This legislation, for example, does not include the crimes of theft, drug use, or drunk driving as disqualifiers. In fact, the legislation would actually prevent a railroad from firing its own employees or denying property access to a contractor's employees found guilty of such offenses. The omission of drug use and drunk driving is particularly surprising given the stringent drug and alcohol testing program the federal government requires for railroad employees.

In short, this provision is a wholesale federal intrusion into the rights of private property owners to determine whom they can employ or have access to their property. We believe that the measures we are undertaking address this committee's concern that a process exist to give contractor employees a robust right of appeal.

Conclusion

U.S. freight railroads are proud of the success they achieved in keeping our nation's vital rail transport link open following the September 11, 2001 terrorist attacks. Since then, railroads have taken many steps to increase the security of our nation's rail network, including the development of a comprehensive security management plan that incorporates four progressively severe alert levels. Railroads will continue to work with this committee, others in Congress, federal agencies, and all other relevant parties to further enhance the safety and security of our nation's railroads and the communities they serve.

Appendix 1: Railroad Security Research and Development Program

Freight and passenger railroad security would be enhanced if funding were provided for research and development and other projects, including the following:

- *Automated inspections of rail cars* – Build on existing "machine vision" and other technologies to develop tools to identify unknown objects (*e.g.*, explosive devices) and substances (*e.g.*, chemical or radioactive agents) on freight and passenger rail cars.
- *Communications-based train control* – Further enhance train control systems to protect passengers, trains, and/or hazardous cargo from unsafe use.
- *Emergency bridge replacement* – Test and develop ways to rapidly replace large railroad bridges damaged by terrorist acts in order to maintain the fluidity of the rail network, minimize economic disruptions, and enhance mobility.
- *Sealing rail cars* – Develop technologies to automatically seal leaks or breaches on railroad tank cars.
- *Tampering resistance and detection* – Test and develop ways to increase the resistance of critical rail infrastructure and equipment to tampering and identify track and equipment that has been subject to tampering efforts.
- *Right-of-way integrity monitoring* – Develop a comprehensive system to ensure that railroad rights-of-way are unobstructed and intact prior to the approach of a train, especially on routes with high-density passenger operations or hazmat movements.
- *Bridge and tunnel inspections* – Develop infrared, machine vision, or other technologies to automatically monitor the integrity of bridges and tunnels and the presence of unauthorized personnel and equipment.
- *Signal system security at turnouts* – Test and develop ways to verify that rail switches and turnouts are properly set and secure.
- *Computer security* – develop new technical standards governing security for railroad computer systems and ways to mitigate damages in the event of a cyber attack. The logical focal point of this R&D effort would be Railinc, a subsidiary of the AAR located in Cary, North Carolina, that focuses on rail-related information technology.
- *National transportation security research consortium* – Create a steering committee of government and industry security and operations experts to evaluate proposed projects and technologies related to rail security and identify those with the most promise. TTCI could act as program manager for such an endeavor.
- *National railroad emergency operations center* – Develop a single database and location from which all emergency responders could receive information vital. Currently, such information must be obtained from several different sources.
- *Rail infrastructure test and training facility* – Create a new facility at TTCI that includes mock-ups of bridges, tunnels, and underground stations, to simulate responses to fires, noxious gases, explosions, and other incidents, and to test new technologies for detection, containment, and treatments.

Appendix 2: Hazardous Materials Movements by Rail

Each year, 1.7 to 1.8 million carloads of hazardous materials (hazmat) are transported by rail in the United States, with two-thirds moving in tank cars. "Toxic inhalation hazards" (TIH) — gases or liquids, such as chlorine and anhydrous ammonia, that are especially hazardous if released — are a subset of hazardous materials and are a major (though not exclusive) focus of hazmat-related rail safety efforts. In each of the past couple of years, railroads have transported just over 100,000 carloads of TIH, virtually all in tank cars.

Railroads recognize and deeply regret the occurrence of a few tragic accidents involving hazardous materials over the past couple of years. Nevertheless, the rail hazmat safety record is extremely favorable. In 2005, 99.997 percent of rail hazmat shipments reached their final destination without a release caused by an accident. Railroads reduced hazmat accident rates by 86 percent from 1980 through 2005.

Still, no one disputes that efforts should be made to increase hazmat safety and security where practical. Railroads understand this better than anyone. Today, the federal government, through the railroads' common carrier obligation, requires railroads to transport these materials, whether railroads want to or not. And while accidents involving highly-hazardous materials on railroads are exceedingly rare, history demonstrates that railroads can suffer multi-billion dollar judgments, even for accidents where no one gets hurt and the railroads do nothing wrong. In essence, the transport of highly-hazardous materials is a "bet the business" public service that the government makes railroads perform.

Railroads face these huge risks for a tiny fraction of their business. In 2005, railroads moved just over 100,000 TIH carloads and nearly 37 million total carloads. Thus, shipments of TIH constituted only about 0.3 percent of all rail carloads. The revenue that highly-hazardous materials generate does not come close to covering the potential liability to railroads associated with this traffic. Moreover, the insurance industry is unwilling to fully insure railroads against the multi-billion dollar risks associated with highly-hazardous shipments. And even though TIH accounts for a tiny fraction of rail carloads, it contributes approximately 50 percent to the rapidly-rising overall cost of railroad insurance.

For all these reasons, the current environment for the rail transportation of highly-hazardous materials, especially TIH, is untenable. This leads to our recommendation that Congress should limit railroads' liability for carrying hazardous materials, perhaps modeled after the Price-Anderson Act.

In the meantime, railroads support prompt, bold actions by all stakeholders to reduce the risks associated with hazmat transport. Railroads themselves are taking the lead:

- In December 2006, an industry committee approved a new standard for chlorine and anhydrous ammonia tank cars that will significantly reduce the risk of a release. (Anhydrous ammonia and chlorine combined account for around 80 percent of rail TIH movements.) The standard will be phased in beginning in 2008.[3]

[3] The delay in implementation is due to an FRA request.

- As noted earlier, railroads help communities develop and evaluate emergency response plans; provide training for more than 20,000 emergency responders each year through their own efforts and the Transportation Community Awareness and Emergency Response Program (TRANSCAER); and support Operation Respond, a nonprofit institute that develops technological tools and training for emergency response professionals.
- Railroads work closely with chemical manufacturers in the Chemical Transportation Emergency Center (Chemtrec), a 24/7 resource that coordinates and communicates critical information for use by emergency responders in mitigating hazmat incidents.
- Upon request, railroads provide local emergency response agencies with, at a minimum, a list of the top 25 hazardous materials transported through their communities. The list helps responders prioritize emergency response plans.
- For trains and routes carrying a substantial amount of highly-hazardous materials, railroads utilize special operating procedures to enhance safety.
- Railroads participate in a variety of R&D efforts to enhance tank car and hazmat safety. For example, the Tank Car Safety Research and Test Project (which is funded by railroads, tank car builders, and tank car owners) analyzes accidents involving tank cars to help identify the causes of tank car releases and prevent future occurrences.
- In addition to implementing their Terrorism Risk Analysis and Security Management Plan, railroads are working with DHS and the DOT to identify opportunities to reduce exposure to terrorism on rail property.
- Railroads offer hazmat awareness training to all employees who are involved in hazmat transportation. Employees responsible for emergency hazmat response efforts receive far more in-depth training.
- Railroads are pursuing a variety of technological advancements to enhance rail safety, including hazmat safety.
- Railroads are working with TIH manufacturers, consumers, and the government to explore the use of coordinated routing arrangements to reduce the mileage and time in transit of TIH movements.

Manufacturers and consumers of hazardous materials should take a number of steps to help ensure hazmat safety.

First, concerted efforts should be made to encourage development and utilization of "inherently safer technologies," which involve the substitution of less-hazardous materials for highly-hazardous materials, especially TIH, in manufacturing and other processes. As noted in a recent report by the National Research Council (part of the National Academy of Sciences), "the most desirable solution to preventing chemical releases is to reduce or eliminate the hazard where possible, not to control it." Ways this can be achieved include "modifying processes where possible to minimize the amount of hazardous material used"

and "[replacing] a hazardous substance with a less hazardous substitute."[4] In a similar vein, in a January 2006 report, the Government Accountability Office (GAO) recommended that the Department of Homeland Security "work with EPA to study the advantages and disadvantages of substituting safer chemicals and processes at some chemical facilities."[5]

One real-world example of product substitution occurred at the Blue Plains wastewater treatment facility just a few miles from the U.S. Capitol. Like many wastewater treatment facilities, Blue Plains used chlorine to disinfect water. Not long after 9/11, the facility switched to sodium hypochlorite, a safer alternative.

Railroads recognize that the use of TIH cannot be immediately halted. However, over the medium to long term, product substitution would go a long way in reducing hazmat risks.

Second, manufacturers and receivers of TIH, in conjunction with railroads and the federal government, should continue to explore the use of "coordination projects" to allow TIH consumers to source their needs from closer suppliers. For manufacturers and users, this could involve "swaps." For example, if a chlorine user contracts with a chlorine supplier located 600 miles away, but another supplier is located 300 miles away, the supplier located 600 miles away might agree to allow the closer shipper to supply the user.

Third, hazmat consumers and manufacturers should support efforts aimed at increasing tank car safety and reliability. Recently, for example, the FRA, Dow Chemical, Union Pacific, and the Union Tank Car Company announced a collaborative partnership to design and implement a next-generation railroad tank car. (TTCI has been selected to support testing and developments initiatives related to this project.)

The government too has a key role to play. First, if the government requires railroads to transport highly-hazardous materials (via their common carrier obligation), it must address the "bet the company" risk this obligation forces railroads to assume.

Second, the government should help facilitate the "coordinated routing arrangements" and "coordination projects" mentioned earlier.

Third, the government should encourage the rapid development and use of "inherently safer technologies" to replace TIH and other highly-hazardous materials.

Fourth, the government should reject proposals that would allow state or local authorities to ban hazmat movements through their jurisdictions. Bans would not eliminate risks. Instead, bans would shift risks from one place to another and from one population to another. In doing so, bans could foreclose routes that are optimal in terms of overall safety, security, and efficiency and force railroads to use less direct, less safe routes. The result would likely be an *increase* in exposure to hazmat release and *reduced* safety and security.[6]

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[4] *Terrorism and the Chemical Infrastructure: Protecting People and Reducing Vulnerabilities*, National Research Council – Board on Chemical Sciences and Technology, May 2006, p. 106.

[5] *Homeland Security: DHS is Taking Steps to Enhance Security at Chemical Facilities, but Additional Authority is Needed*, Government Accountability Office, January 2006, p. 7.

[6] It has been estimated, for example, that a ban on hazmat transport through the District of Columbia would result in some 2 million additional hazmat car-miles as carriers had to use circuitous alternative routes.

If hazmat transport were banned in one jurisdiction, other jurisdictions would want to follow suit. Already, numerous cities across the country are considering hazmat bans. An integrated, effective national network requires uniform standards that apply nationwide. If policymakers determine that hazmat movements should be banned, they should be banned nationwide, not locality-by-locality.

Finally, the government should reject proposals that would force railroads to provide local authorities advance notification of hazmat movements through their jurisdictions because hazmat prenotification would not accomplish the goals of those seeking it. Upon request, railroads already notify communities of, at a minimum, the top 25 hazardous commodities likely to be transported through their area. Railroads also provide training for hazmat emergency responders in many of the communities they serve, and already have procedures in place to assist local authorities if a hazmat incident occurs. Thus, information obtained by local authorities through a pre-notification system would not improve their ability to respond to hazmat incidents in any meaningful way.

Moreover, at any one time, thousands of carloads of hazmat are moving by rail throughout the country, constantly leaving one jurisdiction and entering another. The vast majority of these carloads do not — and due to the nature of rail operations, cannot be made to — follow a rigid, predetermined schedule. The sheer quantity and transitory nature of these movements would make a workable prenotification system extremely difficult and costly to implement for railroads and local officials alike. That's why the fire chief of Rialto, California, commented, "You'd have to have an army of people to stay current on what's coming through. I think it wouldn't be almost overwhelming. It would be overwhelming." The greater the number of persons to be notified, the greater the difficulty and cost.

In the event of a hazmat incident, train consists are available to emergency responders, and railroads, at TSA request, have agreed to provide movement data on all TIH cars.

Finally, pre-notification would vastly increase the accessibility of hazmat location information. Making this information more accessible could increase vulnerability to terrorist attack by magnifying the possibility that the information could fall into the wrong hands.

Appendix 3: Legislative and Regulatory Requirements and Recommended "Best Practices" Related to Homeland Security That Directly or Indirectly Call for Criminal Background Checks for Persons With Access to Railroad Property

- On June 23, 2006, DHS and DOT released their *Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard Materials*. "Establishing procedures for background checks and safety and security training for contractor employees with unmonitored access to company-designated critical infrastructure" was one of the recommended voluntary best practices for the rail industry in this report. On February 12, 2007, DHS and DOT released a supplement that affirmed this guidance.

- DOT regulations (Title 49, Part 1572) require that employees who perform locomotive servicing or track maintenance and are required to operate motor vehicles that contain a certain minimum amount of hazardous materials must have a hazardous materials endorsement (HME) on their commercial driver's license. To obtain an HME, a criminal background check must be performed.

- Railroad employees who require access to port facilities are required to hold transportation worker identification credentials (TWIC), a credentialing process required by DHS. Eventually, DHS plans to require a TWIC card for all transportation workers, including contractors, whose job may require unescorted access to a secure area or transportation industry. TWIC credentialing includes a criminal background check.

- The Customs-Trade Partnership Against Terrorism (C-TPAT) program, a part of the SAFE Ports of 2006 Act that was signed into law in October 2006, is a voluntary government-business initiative to strengthen and improve overall international supply chain and U.S. border security. C-TPAT gives strong emphasis to background checks for rail employees, contractors, and others who have access to rail facilities.

  Under C-TPAT's minimum security criteria for railroads, "background checks and investigations shall be conducted for current and prospective employees as appropriate and as required by foreign, federal, state and local regulations. ... Once employed, periodic checks and reinvestigations should be performed based on cause and/or the sensitivity of the employee's position." Rail carriers "should strongly encourage that contract service providers and shippers commit to C-TPAT security recommendations." Moreover, the Supply Chain Security Best Practices states that "Temporary employees, vendors, and contractors ... are subject to the same background investigations required of the Company's permanent employees."

- Regulations governing the transport of hazardous materials (49 CFR, Part 172.802) require carriers of certain hazardous materials to develop and implement security plans. These plans must address personnel security by implementing measures to confirm information provided by job applicants for positions that involve access to and handling of hazardous materials covered by the security plan.

Appendix 4: The E-RailSafe Appeals Process

The e-RailSafe program is an initiative developed by the Class I freight railroads to safeguard railroad personnel, assets and customer shipments. The program was developed by U.S. and Canadian railroads in partnership with e-Verifile.com, Inc. Railroads electing to use e-RailSafe are requiring contractors doing or seeking to do business with them to obtain credentials for their employees through the e-RailSafe program, a web-based service at www.erailsafe.com. The program provides testing, background checks, and badges for current contractor employees and future applicants. The website provides answers to frequently asked questions and will soon include a description of the appeals process.

Enrolling in e-RailSafe

Contractors log into the website and input basic information into the e-RailSafe system about the employees they wish to be issued credentials for work on railroad property. When the applicant completes his or her log on, a nationwide background investigation is triggered. While not all railroads use the same criteria, in general an applicant can be denied access to railroad property if he or she has had a felony conviction within the last seven years or has been in prison within the last five years on a felony conviction. A history of misdemeanors for crimes of concern may also trigger a denial of property access. After the investigation is complete, the applicant is approved or denied access onto railroad property. If approved, a credential is sent to the contractor to disburse to his or her employee.

Applicants Denied Access to Railroad Property

An applicant denied access to railroad property through the e-RailSafe credentialing program will be directly informed of the decision by correspondence from e-RailSafe. That letter will also include a description of the appeals process available to the applicant. E-RailSafe will also inform the applicant's employer that credentials have been denied to the applicant and provide appeal guidance to the contractor. Both the contractor company and the contractor employee can appeal directly to e-RailSafe.

An applicant will have 15 working days from the date posted on the letter received from e-RailSafe to appeal the decision. If the applicant requires additional time to gather documentation, the applicant can notify e-RailSafe of his or her intention to appeal and is afforded an additional 15 working days to submit his or her appeal and supporting documentation. The appeal should include the following:

- Individual's name
- Contractor company's name
- Mailing address
- E-Mail address
- Daytime telephone
- Justification for Appeal (brief explanation)

Once e-RailSafe receives the appeal and supporting documentation, e-RailSafe must forward the applicant's appeal to the appropriate railroad within 24 hours for expedited review.

The railroad must render a decision on the appeal no later than 10 working days from the date of receipt from e-RailSafe of the applicant's appeal. The appeals boards within each railroad will include at a minimum a person from the railroad police, human resources and legal departments. The decision on the appeal will be communicated back to e-RailSafe by the railroad. E-RailSafe will promptly notify the applicant as well as the applicant's employer of the decision on the appeal.