U.S. Department of Transportation
Federal Railroad Administration

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Memorandum

Date: MAY 31 1991

Reply to Attn. of: OP-91-06

Subject: Consolidated Hours of Service Interpretations

FEDERAL RAILROAD ...
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From: Ed English
Director of Office of Safety Enforcement

To: All Regional Operating Practices Specialists

The attached operating practices technical bulletin covers various hours of service interpretations. They are to be used as guidelines for operating practices inspectors and are general in nature.

Please distribute to your inspectors. If you have any questions, contact Jim Schultz at FTS 366-0508.

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Attachment

OP-91-06

U.S. Department
of Transportation

**Federal Railroad
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

APR 29 1991

Mr. W. N. Joplin
Director Public Affairs
Burlington Northern Railroad Company
304 Inverness Way South - Suite 200
Englewood, Colorado 80112

Dear Mr. Joplin:

This will respond to your March 26 request for hours of service interpretations the Federal Railroad Administration (FRA) has issued in regard to the Hours of Service Act.

My staff has summarized various FRA hours of service interpretations below. However, please keep in mind that most of these interpretations are general in nature and specific incidents require investigation on a case by case basis.

CALL AND RELEASE

Because of the many unforeseeable circumstances which can affect railroad operations, a common occurrence involves the so-called "call and release", in which an employee is ordered to report for duty at a specified time and place, and then is subsequently released from that call to duty, while being ordered to be available for a later call to duty.

If an employee is ordered to report for duty at a specified time and place, and then before he leaves his place of rest is advised that the call has been canceled, that employee has not been on-duty under the Act. However, if an employee leaves his place of rest before being notified that the original call to duty has been canceled, his off-duty period has been substantially disrupted. Due to this interruption, we consider the time between the departure from the place of rest and the employee's receipt of notification that the call was canceled to be "limbo" time, i.e., neither on-duty nor off-duty time. Like time spent deadheading from duty, this time was not spent in providing service for the carrier, but was not truly available for rest.

EXAMPLE 1: Facts: An employee is ordered to report for duty at 7:30 a.m. At 7:15 a.m., the employee is notified (at home or lodging provided by the railroad) that the call has been set back to 9:30 a.m.
Determination: The employee has not been on-duty, and may go on-duty at 9:30 a.m., considered as having been fully rested.

In the above example, if the employee had traveled to the reporting point and was notified there at 7:15 a.m. that his 7:30 a.m. call had been canceled, he would be considered as starting a new off-duty period at 7:15 a.m. The time elapsed between his departure from the place of rest and the notification of release from the duty call would be treated as limbo time. Thus, the employee would either be given the minimum off-duty period of 4 hours or would be considered as on-duty from the original reporting time of 7:30 a.m. If the employee in Example 1 is given 4 or more hours off-duty after notification of release from the duty call, he would not have used up any of his 12 hours available to be worked in his next tour of duty.

It should be noted that, in the situation of interrupted rest, a carrier may want to consider the employee as on-duty from the original reporting time in order to avoid a violation for an inadequate off-duty period. That is, carriers often schedule reporting times to coincide exactly with the conclusion of an 8 or 10-hour off-duty period (e.g., if the employee in the example had gone off-duty at 11:30 p.m. needing 8 hours off). In such a case, interrupting this period with limbo time would result in a violation. Therefore, it may be in the carrier's best interest to consider the employee as on-duty from the time of the original call, even when released from that call, if the employee had not had his full 8 or 10 hours off before leaving the place of rest.

EXAMPLE 2: Facts: An employee is ordered to report for duty at 7:30 a.m. At 7:45 a.m., the employee is notified the call has been set back until 9:30 a.m.
Determination: The employee has been on-duty for 15 minutes, and if the employee goes on-duty at 9:30 a.m., the time on-duty shall be computed as starting at 7:30 a.m.

EXAMPLE 3: Facts: The employee is ordered to report for duty at 7:30 a.m. At 7:45 a.m., the employee is notified the call has been set back to 11:45 a.m.
Determination: The employee is considered as having 11 hours 45 minutes on-duty time available before the expiration of the maximum permissible time on-duty.

CANADIAN SERVICE

Questions have been raised of the applicability of the Hours of Service Act to service in Canada or Mexico. The Act is offended at any time a railroad requires or permits an employee "to go, be, or remain on-duty" in violation of the stated requirements.

However, the United States has no jurisdiction to control conduct on foreign soil, as such. Thus, when a train crosses the border and enters Canada or Mexico, its crew ceases to be subject to limitations on service imposed by United States law.

However, when a train enters the United States from Canada or Mexico, the train crew is immediately subject to the Act and all time spent on-duty in Canada is counted in computing the appropriate periods of service and release. For example, if, on entering the United States, an employee had been on-duty for 14 hours, the railroad would immediately become liable for a civil penalty for permitting the employee to remain on-duty within the United States in contravention of the 12-hour limitation.

It is within the power and discretion of the Canadian and Mexican government to provide for railroad safety within its countries, and it would be inappropriate for FRA to address this matter absent some demonstrated impact on railroad safety within the United States.

COMMINGLED SERVICE

Attendance at Rules Classes

The Federal Railroad Administration (FRA) has not changed its position since its published interpretations of the Act in 1977, where we said "It should be remembered that attendance at required rules classes is duty time subject to the provisions of commingling" (49 CFR Part 228, Appendix A (emphasis added)).

When attendance at a rules class fulfills a condition of employment, such attendance is "required." This is true even where employees have the option to attend one of several sessions, and it is immaterial that specific scheduling of such service is left, in part, to the employee (42 Federal Register 27596 May 31, 1977). For example, consider a system that permits an employee to attend any of six sessions within a given period or to attend one final session held for those who missed an earlier one. Whether the employee attends one of the first six or the last one, his attendance fulfills a condition of employment, and his time spent in the class is therefore time on-duty.

One could make a reasonable argument that insofar as safety is concerned, required rules class attendance should be treated differently depending on whether it occurs before or after covered service. However, Congress did not draw such a distinction. Commingled service is defined to include "all time on-duty in other service performed for the common carrier during the 24-hour period involved" (45 U.S.C. 62(b)). This flat statutory language precludes any such disparate treatment for enforcement purposes.

Attendance at Railroad Investigation Hearings

When an employee is required by the railroad to attend a hearing

as a principal under charge, or as a witness on behalf of the railroad, time so spent would be considered as time on-duty under the commingled service provisions of the Act. When an employee and/or union representative voluntarily attends a hearing as a witness on behalf of an employee, such service is not required by the carrier, and therefore, not considered time on-duty under the commingled service provisions.

Under these circumstances, if an employee attends a hearing because he or she is required to do so by the railroad in the same 24-hour period as having performed service subject to the limitations of the Act, the time spent in the hearing is included when computing the total time on-duty. The Act does not distinguish between commingled service performed before covered service and that performed after covered service. If there is less than a 4-hour interval between such a hearing and service performed in the movement of a train, then the time is counted as continuous time.

The Act generally prohibits service in excess of 12 hours, absent an unforeseen event beyond the railroad's control. Required attendance at a disciplinary hearing is clearly foreseeable. Thus, the railroad will be in violation of the Act if it requires or permits such service beyond the time limits prescribed for total time on-duty.

Participation in Railroad Safety Committees

As long as participation in railroad safety committee activities is a voluntary act by an employee, and not a condition of continued employment, such service is not normally considered "covered" under the commingled provisions of the Act. Time occupied in such endeavors, if truly voluntary, is usually done during an employee's discretionary time. As such, since an employee is presumably free to come and go, this activity may be included in "rest time."

Administrative Duties

The FRA has traditionally viewed limited, incidental administrative activities, such as signing time returns or a register upon arrival at an off-duty location, completing wheel reports, turning in waybills or portable radios, or making a brief call to sign-off-duty with the caller once a crew has reached lodging facilities and is about to begin rest, not as covered service. The pretense being, of course, that such activity is so minimal, it does not constitute any real threat to safety so long as paperwork or call-in demands do not become unreasonable, lasting more than a few minutes. However, if such administrative duties consume a substantial amount of time they would constitute on-duty time as commingled service. If, after deadheading and arriving at the point of final release, an

employee performs substantial duties, he is again on-duty. Moreover, since the deadheading time would then have been transportation to a duty assignment, it would also be time on-duty.

This same basic rationale exists in regards to Crew Management Systems and similar systems now in various stages of implementation on a number of railroads. As long as typing into the computer to effect a tie-up time is limited to a few minutes, FRA feels no real safety is compromised. However, should covered employees be required to do detailed entries, or wait for a turn at accessing a machine, then FRA would consider this equal to time on-duty under the Hours of Service Act. Specific instances where excess service resulted, would then be investigated.

Familiarization Trips

An employee who rides a train for the sole purpose of qualifying on the physical characteristics of the railroad is subject to the constraints of the Act if such trips are required as part of the qualification process and are made in the same 24-hour period as covered service. Such time is considered commingled service and must be computed in determining total time on-duty.

Physical Examinations

If an employee is required to report for a physical examination as a condition of continued employment, he would be subject to the commingled service provisions of the Act. The issue of payment for services rendered or contract requirements is not recognized or covered by the Act.

Providing Information Concerning Railroad Accidents

If a train crew is explicitly required by railroad officials to remain on railroad property to provide information regarding an accident, the time spent waiting to give, and giving, such information is "on-duty" time for purposes of the Hours of Service Act. This time would be added to the time spent by the crewmember in train or engine service in computing total time on-duty by that employee.

Deadheading From a Duty Assignment in a Privately-Owned Vehicle

In general, FRA's position is that if a railroad requires an employee to deadhead to a home terminal in a privately-owned vehicle without the opportunity to obtain rest and without the opportunity to be transported (i.e., required the employee to drive his own vehicle), this activity could be considered commingled service. By offering to transport an employee or allow him the opportunity to obtain rest before deadheading back to the home terminal, the railroad would be in compliance even if

the employee elected to drive his own vehicle.

On-board Observations Conducted by Railroad Officials

A common scenario is a railroad official that rides a train for the purpose of performing on-board observations of crewmembers and railroad operations. In general, FRA's position is that the railroad official is acting in a supervisory capacity and therefore not subject to the commingled service provisions. However, if he takes over control of the train by operating the controls of the locomotives, the time spent operating the train would subject him to the 12-hour duty limitations. Likewise, if the railroad official replaces a train crewmember and assumes the normal duties of that crewmember, his role would no longer be considered that of a supervisor and he would become subject to the commingled service provisions of the Act.

DEADHEAD TRANSPORTATION

Deadheading to a Point of Final Release

A railroad's election to interrupt an employee's rest period at one designated terminal in order to place him in deadhead transportation to another designated terminal for the purpose of obtaining his statutory off-duty period, is not prohibited by the Hours of Service Act.

The hours of service regulations state, "Time spent in deadhead transportation by an employee returning from duty to his point of final release may not be counted in computing time off-duty or time on-duty." The "point of final release" is that point where the employee receives the required 8 or 10 hours off-duty period prior to the start of a new 24-hour period. The time spent in deadhead transportation to that point is not computed as time on-duty or time off-duty.

From this, it is apparent that the nature of deadhead transportation is determined by the action of the employee after arrival at the designated terminal. If the employee is required to go on-duty without having had a required 8 or 10 hours off-duty period, then the employee was in deadhead transportation to a duty assignment, and the time so spent is considered time on-duty. On the other hand, if the employee has the required 8 or 10 hours off-duty after arrival at the designated terminal, then the employee was in deadhead transportation to the point of final release, and the time spent is neither time on-duty nor time off-duty.

In instances where a train crew is released from duty on line of road, and is then transported to the point of final release, the time spent between the release from duty and the arrival at the point of final release is neither on- nor off-duty time. When

the crew is transported directly from point of release on line of road to the lodging facility, off-duty time commences on arrival at the lodging facility.

When the crew is released on line of road and is transported to the point of final release, and then transported to the lodging facility, time off-duty commences when the employee arrives at the tie-up point, unless time spent in transportation from the tie-up point to the lodging facility exceeds 30 minutes, in which case off-duty time commences when the employee arrives at the lodging facility.

EXAMPLE 1: Facts: An employee is released at the final tie-up point at the away from home terminal at 9:30 p.m. The lodging facility is located 20 minutes travel time away.
Determination: The off-duty time is computed from 9:30 p.m.

EXAMPLE 2: Facts: An employee is released at the final tie-up point at the away from home terminal at 9:30 p.m. The lodging facility is 45 minutes travel time away.
Determination: The off-duty time is computed from 10:15 p.m.

EXAMPLE 3: Facts: The employee is released at the final tie-up point at the away from terminal at 9:30 p.m. The lodging facility is located 45 minutes travel time away. On arrival at the lodging facility none of the accommodations are readily available, and the employee is not able to obtain lodging until 11:00 p.m.
Determination: The off-duty time is computed from 11:00 p.m.

EXAMPLE 4: Facts: A crew goes on-duty at the home terminal at 7:30 a.m., and is released on line of road at 7:20 p.m., and ordered to wait for transportation to the final tie up point. During the period waiting for transportation, the crew is relieved of all responsibility for the train. The crew arrives at the final tie-up point and finally goes off-duty at 9:00 p.m.
Determination: The off-duty time is computed from 9:00 p.m., and the crew is available for service at 5:00 a.m."

Time Spent Traveling To and From Various Reporting Points

This is to address whether time spent traveling to and from various reporting points within a crew base area with a 50-mile radius should be considered deadheading time under the Hours of Service Act.

FRA's position is that, regardless of any agreement between a railroad and its employees, time spent by an employee traveling to a point of duty assignment other than his regular reporting point constitutes deadheading to duty and, accordingly, time on-duty under the Act. That conclusion applies even where the non-regular reporting point is within an agreed-upon crew base

with a specified diameter (e.g., 100 miles in the Boston area, 60 miles in Philadelphia).

Under the Act, time on-duty includes time spent in deadhead transportation by an employee to a duty assignment; time off-duty does not include time spent in deadhead transportation from a duty assignment to a point of final release. 45 U.S.C. § 61(b)(3)(c). Under the Federal Railroad Administration's interpretation of the statute,

> transit time from the employee's residence to his regular reporting point is not considered deadhead time.
>
> If an employee utilizes personal automobile transportation to a point of duty assignment other than the regular reporting point in lieu of deadhead transportation provided by the carrier, such travel time is considered as deadheading time. However, if the actual travel time from his home to the point of duty assignment exceeds a reasonable travel time from the regular point to the point of duty assignment, then only the latter period is counted. Of course, actual travel time must be reasonable and must not include diversions for personal reasons.

Title 49 CFR Part 228, Appendix A (emphasis added). Thus, as FRA construes the statute, the allowance we make for commuting time in connection with going on or off-duty at a home terminal applies only with respect to travel to or from the employee's regular reporting point, and the employee can have only one regular reporting point.

Our rationale is that an employee's travel time to or from a duty assignment may consume a significant portion of off-duty time; to consider such travel time as time off-duty comports with the statute's safety purpose only with regard to travel to or from a regular reporting point. An employee with a regular reporting point is free to select a residence near to or far from the reporting point and thereby control the amount of off-duty time consumed by travel. Because the statute does not authorize FRA to dictate where an employee must live in relation to his regular reporting point, time spent traveling to and from that point is a matter of employee choice and properly considered time off-duty.

However, where the employee must travel to multiple reporting points, he loses the ability to control his travel time by selecting a residence in proximity to a regular reporting point. If travel to multiple reporting points were treated as commuting time, there would be no limit to the amount of off-duty time that might be consumed in travel to and from duty. We believe such a wide-open system would be unsafe and contrary to Congressional

intent. Accordingly, because this travel to and from points other than the regular reporting point is at the carrier's behest, we treat it as deadheading time. This interpretation has been upheld in a directly analogous case concerning travel to a nonregular reporting point by an extra-board employee. United States vs. Penn Central Transportation Co, 616 F.2d 951 (6th Cir. 1980).

Whether a particular station or one of the other home terminals within the crew base area is to be considered the normal reporting point, each employee can have only one such point. To comply with the Act, the carrier will have to choose between (1) assigning each employee to one regular reporting point and treating travel to and from assignments at other points as deadheading, or (2) assigning no regular reporting point to the employee, and treating travel to and from all duty assignments as deadheading. With respect to service under a particular agreement, the regular reporting point for a class of employees can be changed only by changing the agreement. Of course, depending on the labor agreements on the particular railroad, an employee may be free to bid on other service that has a different regular reporting point.

A regular reporting point should not be confused with a designated home terminal. Under the Act, the designation of terminals is relevant only for the purpose of determining whether any portion of a release at a particular location can be considered time off-duty. Unless one of the statutory exceptions applies, no amount of release time at a non-designated terminal can be considered time off-duty. Railroads and employees are free to designate as many home and away-from-home terminals as they desire.

The concept of reporting points, however, goes to the issue of how to account for time spent traveling to and from the home terminal(s). If travel time to and from any and every home terminal were considered commuting time, there would be no limit on how much of the employee's off-duty period might be consumed by travel. An employee could be required to commute 100 miles one day, 50 miles the next, 200 miles the next, and so on. The round-trip travel time could eat up most of the off-duty period, effectively depriving the employee of a meaningful opportunity for rest. Congress certainly intended no such circumvention of the minimum off-duty periods prescribed in the Act. Accordingly, in issuing its published interpretation of the Act in 1977, FRA made clear that commuting (i.e., travel time considered time off-duty) is limited to travel time "from the employee's residence to his regular reporting point." 49 C.F.R. Part 228, Appendix A. This interpretation has been upheld in United States v. Penn Central Transportation Co., 616 F. 2d 951 (6th Cir. 1980).

As compared to the Penn Central facts, the only new twist posed by the crew base concept is that it purports to place a geographical limit--measured in terms of a radius from a central reporting point--on the points to which an employee can be required to commute without being considered on-duty while traveling. Of course, there is no upward limit on this distance. If Amtrak can have a 30- or 50-mile radius, then it or another railroad could seek to negotiate a radius of 100, 200, or 500 miles. However, Congress evidenced no intent to permit the statutory off-duty periods to, in effect, be modified in private negotiations. Accordingly, FRA cannot accept an assertion that would render meaningless the very notion of time off-duty.

Of course, one can posit a crew base with a radius of one mile or less. There, the argument goes, travel time to any reporting point within the crew base would be only marginally different from travel time to any other such point. Under those circumstances, it could be argued, rigid enforcement of the regular reporting point concept would not produce a safety benefit. We would agree. If faced with application of the concept to such a situation, FRA could avoid an unreasonable result by exercising its enforcement discretion so as to preclude wasteful enforcement actions with no likely safety benefit.

However, such a de minimis situation is not the one that the "regular reporting point" concept was designed to combat, and not the one before us here. A 50-mile radius (as Amtrak uses in Boston) could result in round trip travel of 200 miles for a single tour of duty (i.e., a trip from the employee's home on one edge of the base to a duty assignment on the opposite edge, and return). Such a trip would likely take at least four hours out of a total rest period of eight or ten hours. The numbers are slightly less alarming in the context of Amtrak's 30-mile radius in Philadelphia, but even there the daily potential for unacceptable erosion of the off-duty period is very real.

Thus, a railroad is free to designate all of the home and away-from-home terminals it may be entitled to designate in or under its collective bargaining agreement. However, it must designate one point as the regular reporting point for a particular crew assignment and treat travel time for any employee required to report to a point of duty assignment other than his regular reporting point as deadheading time.

In summary, as construed by this agency, the Hours of Service Act does not permit multiple regular reporting points regardless of any agreement purporting to establish them. Changing the reporting points on a daily basis without accounting for the differences in travel time would subject the employee to the substantial erosion of off-duty time that the "regular reporting point" concept is designed to prevent.

DESIGNATED TERMINALS

Suitable Food and Lodging Interpretations

The Hours of Service Act requires that, in order for a period of interim release to be valid, it must be for a period of 4 or more hours at a designated terminal. The intent of Congress in enacting and amending the designated terminal provision was to assure that railroad employees in train and engine service should be afforded an opportunity for meaningful rest. This provision requires that suitable facilities for food and lodging be available in connection with a release at a designated terminal.

In that connection the apparent basis for references in the legislative history to "suitable facilities for food" was to assure the availability of nutritionally adequate and palatable food which could be consumed with appropriate utensils in a reasonably clean environment.

Another issue is whether it is necessary that facilities for food be available continuously throughout the rest period. The legislative history of the Act nowhere implies such a burden; indeed, it assumes that much of the rest period will be used for sleeping. As long as suitable facilities for food are available when needed for nutritional purposes (i.e., normally at the beginning and end of a rest period), an opportunity for meaningful rest has been provided in keeping with the purposes of the Act. For instance, if a crew reaches its destination at 12 midnight and immediately obtains an adequate meal, with the expectation of obtaining breakfast just before returning to duty at 8 a.m. the next morning, the fact that food is unavailable between 1 a.m. and 7 a.m. would be irrelevant to the fitness of the crew.

The suitability of canned, prepackaged, and frozen fast-foods such as canned soup, cold or microwave sandwiches, and frozen pizza depends on the overall circumstances involved, including the length of the work or rest time during which such items are the only food available. Disputes about the relative desirability of various types of meals, all of which have nutritional value, can best be handled through collective bargaining.

As for transportation to eating facilities, the legislative history suggests that transportation must be furnished if the restaurant is "beyond a reasonable walking distance," and looks to the collective bargaining agreement for a definition of such distance, which should take into consideration time, location, weather, and safety. But that is not to say that the railroad must pay for the transportation - only that it be made available. If, for instance, the railroad provides a taxi, it is a matter of collective bargaining, not railroad safety, as to whether the

railroad or the employee pays the fare.

The Act requires only that suitable facilities for food and lodging be available. The Act does not indicate who must pay for the accommodations. Railroad labor and management may negotiate an agreement for the payment of lodging or meals through the collective bargaining process.

Section 2 of the Act requires that railroad-provided sleeping quarters, including crew quarters, camp or bunk cars, and trailers must afford train and engine service employees an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters. FRA is responsible for the administration of that provision, as well.

Questions have arisen with regard to categorizing time spent deadheading at away-from-home terminals. If, as we construe the Act, Congress did not intend that commuting time be considered time on-duty at home terminals, Congress had similar intent at away-from-home terminals. However, since travel time at away-from-home terminals is usually outside employee control, Congress presumably did not intend such commuting would exceed a reasonable period. Given Congressional silence on what a "reasonable time" might be, FRA was forced to define one. FRA solicited comments from representatives of rail management and labor, and after analysis established 30 minutes as a reasonable "rule of thumb" commute period for away-from-home terminal situations. Therefore, at away-from-home terminals:

- If 30 minutes or less, time spent traveling to lodging after final release or time spent traveling from lodging to duty at the conclusion of rest is considered time off-duty.

- When travel time to lodging from point of final release exceeds 30 minutes, the entire travel time is considered as limbo time (neither time on-duty nor time off-duty). In addition, a travel period from lodging to a duty point that exceeds 30 minutes is considered time on-duty.

Another aspect of the problem deals with time spent awaiting the preparation of accommodations at a lodging facility or time spent awaiting transportation to lodging after final release. Both such situations must be included in "travel to lodging" time computations. The rationale is the same: such time is really not time on-duty, but it is also not time available for rest (except, of course, for the 30-minute commuting allowance discussed above).

The total disappearance of the allowance for commuting time at away-from-home terminals in instances where travel exceeds

30 minutes provides an incentive to minimize such travel which helps ease the effects of cumulative fatigue individuals working irregular schedules frequently encounter.

Should a crew decide to have dinner across the street from their final release point (away-from-home terminal) before being transported to the lodging facility, absent any special circumstances, FRA would typically consider this as a discretionary action by the employees. As such, their rest time would commence at the point they voluntarily left the away-from-home terminal for dinner, in lieu of being transported to the lodging facility to rest.

It should be noted that transporting employees to facilities at some distance from the designated terminal does not violate the Hours of Service Act. A violation occurs in this situation only if the employees are given an inadequate number of consecutive hours off-duty when released at a designated terminal.

RELIEVED BUT NOT RELEASED

When employees are instructed to go off-duty on line of road, and to wait at a specified point for transportation to their point of final release or lodging facility, the time spent for such waiting is neither on- nor off-duty time, provided the employees are not required to perform some other service, such as providing flag protection for the train.

Remaining On a Train After Expiration of Twelve Hours On-Duty

Questions have arisen concerning how the Act applies to employees who are required by railroads to remain on a train after having been on-duty for 12 continuous hours. Under the Act, the time of an employee engaged in train and engine service falls within one of three categories: (1) on-duty time is time between reporting for duty and final release from duty (except time spent deadheading from duty) and includes time spent actually performing service to the railroad, whether in covered service or in commingled service, and time spent deadheading to duty; (2) off-duty time is time actually available for rest, i.e., time coming after the final release from duty, including time spent commuting to and from the employee's regular reporting point; and (3) time spent deadheading from duty to the point of final release ("limbo time"), which as provided in section 1 (b) (3) of the Act, is neither time on-duty nor time off-duty.

Generally, an employee required to remain on a train while awaiting deadhead transportation to a point of final release is neither on nor off-duty; he or she is in a situation that most closely resembles, and is part and parcel of, deadheading from duty. However, if an employee is required to perform service of any kind during that period, he or she is on-duty until all such

service is completed. Thus, the question in each case is whether the employee was required or permitted to provide any actual service to the railroad during the time spent awaiting deadhead transportation.

We are aware of case law suggesting that employees are on-duty while awaiting the arrival of a relief crew even if they perform no duties for the railroad during that period. E.g., Missouri, K. and T. Ry. v. United States, 231 U.S. 112 (1913); and United States v. Pennsylvania R.R., 275 F. Supp. 345 (W.D. Pa. 1967). However, those cases are distinguishable on their facts and/or no longer good law in light of the 1969 amendments to the Act. In Missouri, the Supreme Court rejected the railroad's argument that the train crew was not on-duty during a period in which the "engine was sent off for water and repairs," 231 U.S. at 119. The Court concluded that the employees were "none the less on-duty when inactive. Their duty was to stand and wait." Id. Thus, the case involved a crew's waiting for an engine to be ready after reporting for duty, a situation that FRA would clearly consider to be time on-duty. Although its language is broad, Missouri simply does not address the status of a crew that is not performing service while awaiting deadhead transportation. In fact, the year after Missouri was decided, an appellate court distinguished crewmembers "released from any and every duty in connection with the movement of the [train], and retired to rest upon the train," from a fireman called upon to serve as an engine watchman; only the fireman was considered to have been on-duty. Great Northern Ry. v. United States, 211 F. 309, 311 (9th Cir. 1914).

In Pennsylvania, a district court relied on Missouri in holding that crewmembers awaiting deadhead transportation were on-duty despite the facts that the railroad had expressly relieved them of responsibility at the expiration of their maximum legal duty period and they had performed no subsequent duties. In addition to being an overly broad extension of Missouri, this case is simply no longer on point in light of the 1969 amendments to the Act. Those amendments added, inter alia, a definition (at section 1 (b)(3)) of "time on-duty" that includes time spent deadheading to duty but excludes, from both time on-duty and time off-duty, time spent by an employee in deadhead transportation "from duty to his point of final release." Thus, for the first time, the Act itself recognized that an employee's time may fall between the on-duty and off-duty categories and that not all time between reporting for duty and the final release is time on-duty. It is important to note that, as originally introduced, both bills from which these amendments arose (H.R. 8449) and S. 1938) would have counted all deadhead time (to or from duty) as time on-duty. However, Congress recognized that, provided the employee is given the required 8 or 10 hours off-duty after final release, there is no safety detriment caused by treating deadheading time as neither on nor off-duty. Accordingly,

because the premise of Pennsylvania, i.e., that all time between reporting for duty and final release is time on-duty, was removed by the 1969 amendments, that case no longer provides useful guidance as to the current requirements of the Act.

There is every reason to believe that Congress intended to include time spent awaiting deadhead transportation to the point of final release as part of the deadheading itself. Identical logic supports considering the two periods (awaiting deadhead and deadheading itself) as limbo time. Neither period is truly available for rest, so it cannot be considered time off-duty. Nor is either period one in which actual service (covered or commingled) is performed, so there is no safety rationale for considering it time on-duty. Moreover, if either period were considered time on-duty, the railroads would have no incentive to cease the performance of all duties at the conclusion of the maximum on-duty period. That is, if the railroad would be subject to the same penalty for tying up the crew as it would be if it required the crew to continue in service, one might expect some railroads to simply keep the train moving to the point of final release under the control of employees who had already worked for 12 hours. We believe it is far safer, and more consistent with the intent of Congress, to give the railroads the incentive to relieve the employees of all duties by considering both time awaiting deadhead transportation and time spent deadheading to the final release point as limbo time. That way, the railroad has not committed a safety violation, safety itself is not impaired, and the statutory off-duty period is not encroached upon by periods that are not available for rest.

Performing Service While Awaiting Deadhead Transportation

The situation we have discussed above concerns employees in a status that some railroads described as "relieved, but not released." There, employees are required to stay on their train to await transportation to the point of final release, but are expressly relieved of any duties. However, in some situations the railroad tells the crew to tie up but subsequently requires one or more members to perform service. Any employee required or permitted to perform such duties would, of course, by on-duty until all such duties were completed.

The analysis is easy where the railroad's representative expressly states, when ordering the crew to tie up or thereafter, that certain duties must be performed. It is also easy to analyze the opposite situation, i.e., where the railroad representative expressly relieves the crew of all duties and merely requires them to stay with their train until deadhead transportation arrives.

But difficult questions arise where the dispatcher or other railroad official in charge is not so explicit. If, for example, a dispatcher merely tells the crewmembers to put their train in

a siding and does not tell them they are relieved from duty, and the railroad's operating rules impose general duties such as observing passing trains or protecting the train from vandalism, the employees may not be relieved from duty. These difficult cases will require an examination of the particular railroad's practice concerning how crews are relieved from duty. On one railroad the practice may be to simply tell the crew to tie up, which carries the message that the employees are--unless specifically ordered to perform a particular duty--completely relieved from duty and must merely await transportation. In fact, a railroad may have a standing policy that employees must relieve themselves from duty prior to exceeding their limit of duty hours, so that no specific order to that effect is necessary. On a different railroad, the practice may be that employees are not relieved from general duties such as observing passing trains unless an explicit order relieving them from duty is received.

Thus, sorting out these cases requires knowledge of specific facts from which FRA can determine whether the employees have been relieved of duties or not. If the order or message they receive is not explicit and the railroad has no standing instructions on how to construe an order to tie up the train, FRA may have to consult the railroad's rules to find out what duties the employees might reasonably have been expected to perform, in the absence of specific orders, while awaiting transportation.

Aside from the question of whether the railroad required or permitted certain service, there is the question of what constitutes service. The following was a list of possible duties provided in a letter with a request for clarification from the FRA:

- protecting the train against vandalism
- observing passing trains for any defects or unsafe condition
- flagging
- shutting down locomotives or checking fluid levels
- communicating train consist information via radio
- being "responsible for handling any issue which might arise while the train is not moving"
- doing paperwork
- monitoring engine radios

The first five of these items clearly constitutes duty if required or permitted by the railroad, but the last three beg the question of whether they actually and under all circumstances constitute duty. First, "being responsible for handling any issue which might arise" is vague. If the railroad had issued an order to that effect, that fact would probably be inconsistent with a conclusion that the railroad intended that the employee be relieved of all duties. If, however, the railroad had clearly

relieved the employee but noted that he or she may be put back on-duty should the need arise while awaiting the deadhead transportation, the employee would not be on-duty again unless subsequently told to handle an issue that had arisen.

Second, "doing paperwork" when required or permitted to do so by the railroad is time on-duty in commingled service. However, merely signing time returns, which ordinarily takes no more than a minute and occurs when the crew has reached its lodging and is about to begin its rest, is so minimal that it should not be considered as time spent doing paperwork.

Third, "monitoring engine radios" when required or permitted by the railroad to do so is time on-duty for an employee given that responsibility, but does not include use of the radio initiated by the train crew to attend to such incidental matters as calling a van driver to give the train's location or ascertain how long a wait the crew will have before being picked up. Nor would an employee who chose to listen to radio transmissions after having been relieved of any responsibility to do so be considered as on-duty.

I might also note that, in addition to having to determine whether an activity constituted service and was required or permitted by the railroad, FRA must also weigh the likely compliance impact and litigation risks in deciding whether to assess penalties.

One letter pointed out that there have been unspecified situations in which time spent awaiting deadhead transportation has been counted toward the required off-duty period. Time off-duty begins at the point of final release, not while the employees are sitting on their train. FRA has permitted one very limited exception as a practical matter: if the time between being relieved of duty and arriving at an away-from-home lodging is 30 minutes or less, such period can be included in time off-duty. Our rationale is that, just as time off-duty at a home terminal includes commuting time, so time off-duty at an away-from-home terminal may include a reasonable allowance (30 minutes) for commuting. However, if the crew is not at the lodging within 30 minutes of being relieved from duty, the allowance is lost and the whole period (awaiting deadhead and being deadheaded) is limbo time. This policy gives the railroads the incentive to get the employees off the train and to the lodging quickly, which seems to be a purpose you share.

Claims have been made that crews have been required to stay on their trains as long as 9 hours awaiting transportation. As long as no duties are performed and the full off-duty period is given once the crew arrives at the lodging, these situations are not violations of the Act. Nevertheless, except in the most extreme emergency, such situations are outrageous. I can only point out

emergency, such situations are outrageous. I can only point out that, if FRA had substantive regulatory authority in the hours of service area, a regulation could be written to address that issue. For example, a rational rule might extend the required off-duty period by an hour for any hour spent awaiting transportation. Such a rule would discourage the practice that concerns you and possibly increase safety. However, the rigidity of the Act precludes our even considering such a rule.

I hope this information is helpful in responding to questions from railroad employees. If I can be of further assistance, please contact me.

Sincerely,

Phil Olekszyk

Phil Olekszyk
Deputy Associate Administrator
for Safety