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**BEFORE THE HOUSE ENERGY AND COMMERCE COMMITTEE
SUBCOMMITTEE ON TRANSPORTATION, TOURISM
AND HAZARDOUS MATERIALS**

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Mr. Chairman and members of the Subcommittee, the problem of substance abuse is as old as human history and as current as today's newspapers. It requires special attention in any transportation industry, because we continue to rely to a significant extent on the fitness of employees to ensure the safe transportation of passengers and freight. The Federal Railroad Administration has been at the forefront of contemporary efforts to address the control of alcohol and drug use through peer prevention, through policies that encourage early treatment of those with substance abuse problems, and through application of chemical testing technologies to detect and deter misuse of alcohol and drugs.

By enacting the Federal Railroad Safety Act of 1970 and the Rail Safety Improvement Act of 1988, the Congress has provided the basic statutory authority that the FRA needs to fashion and implement solutions to the problem of alcohol and drugs on the railroad. Since 1983, FRA has been actively engaged in almost continuous rulemaking in this area, developing in a building-block fashion the regulatory tools that will be needed for the

future and tailoring its regulations to the circumstances of the railroad industry.

Implemented beginning on February 10, 1986, FRA's current regulations have withstood the test of litigation brought by the rail unions. On March 21 of this year, the Supreme Court ruled that those regulations are constitutional, culminating a three-year legal battle during which all of the plaintiffs' claims were rejected.

The regulations have worked in practice. Precise comparisons of the extent of the problem before and after implementation of the regulations are not possible, due to the absence of good data on pre-implementation prevalence and accident rates, particularly for drugs. However, virtually all observers in the industry agree that progress is being made to change attitudes, identify those who need help, and remove from sensitive functions those who will not accept help. FRA has worked hard to deal with start-up problems. Most railroad supervisors and employees understand the rules well and are applying them as intended. Problems do occur, but we could hardly expect otherwise given the complexity of the issue we are trying to address and the history of railroad labor-management relations.

Efforts to encourage voluntary action have also paid off. Operation Red Block is in full effect on Union Pacific and CSX Transportation and has gained important footholds on Conrail and Amtrak. The Burlington Northern has its own Operation Stop, and some of the commuter authorities have begun to see the value of concerted labor-management action in this area. Some unions on other railroads have also signed Red Block agreements. Under this Administration, FRA will continue to press for the implementation of peer prevention programs.

It is important to note, however, that pockets of resistance exist in rail labor ranks as well as management ranks. Further, peer concern is not something that can be legislated or regulated. We can encourage peer concern by creating structures within which it can be expressed, as FRA has done with its requirement that railroads institute voluntary referral and co-worker report policies, but requiring that railroads "have a program" conforming to Federal standards would only ensure that employees do not view it as their own. The legislated "success" of the concept could be the cause of its failure.

On November 14, 1988, former Secretary Burnley announced the issuance of anti-drug programs for all transportation modes, including random testing and a drug-free rule for safety-sensitive railroad employees. This Administration strongly

supports the implementation of random testing. Random drug testing can provide the strongest deterrent effect of any form of testing, because --

- Abusers know it is not in their power to avoid testing by appearing functional;
- Unlike scheduled testing, there is no ability to evade detection through short-term abstinence; and
- In the mind of the potential user, the chance of detection is ever-present.

The initiatives of last November included the issuance of Transportation Workplace Drug Testing Procedures, which were derived from the Department of Health and Human Services Guidelines for Federal Workplace Drug Testing Programs. This means that collection procedures will be strengthened, laboratories will be certified, and quality control will be enhanced, to the benefit of employees and transportation safety. The Department is currently working on resolution of one final round of comments on those procedures, which are designed to fit the circumstances of a wide range of transportation employers. It is important to note that the Transportation Workplace Drug Testing Procedures also provide explicit guidance on key procedural points to facilitate drug testing in transportation industries.

With continued hard work toward implementation, and with successful outcomes in the early phases of litigation on the random testing rule, random testing of railroad employees can begin following disposition of any outstanding petitions or comments in the area of test procedures.

It is against this background that I address the legislation introduced by the Chairman of this Subcommittee and the ranking minority member. H.R. 1208 is a comprehensive and very detailed bill that clearly evidences the concern of the sponsors and this Subcommittee with the alcohol and drug problem. Let me first say that we welcome the interest of the Subcommittee and recognize its support for strong alcohol and drug countermeasures. We also welcome a congressional declaration expressly supporting the use of random testing where necessary to achieve safety. It is clear from the votes in both Houses of the last Congress that this support does exist.

However, we oppose enactment of H.R. 1208 as currently drafted. In contrast to the broad mandate of the Federal Railroad Safety Act, under which we have developed the current regulations, this bill is very detailed and prescriptive; and its provisions vary in very significant detail from existing regulations. Its enactment at this time would both disrupt current implementation and increase the risk of further litigation.

Rather than advancing the day when strengthened testing procedures and random testing can be implemented, the legislation would cause further delays occasioned by additional rulemaking and inevitable conflicts over allegedly ambiguous statutory language. Rather than allowing latitude to adjust regulatory burdens in light of current safety needs, this legislation would set in concrete a wide range of testing mandates that in some contexts could far exceed actual safety needs.

Among our most serious objections to the bill are the following:

1. The bill would insulate from discipline substance abusers who, prior to the passage of the legislation, had received treatment through employee assistance programs, had been fired and reinstated on a leniency basis, or who had used a bypass right following an in-service rule violation. That is very dangerous, since it would invite relapses among the thousands of railroad employees who are struggling to maintain their sobriety in the life-long process of recovery.
2. The bill would mandate an opportunity for rehabilitation for any employee testing positive, regardless of circumstances, a point I will address below.
3. The bill would mandate a regime of confidentiality so rigid that not even the FRA would be able to determine

whether the requirements of the legislation are being fulfilled.

4. The bill would deny FRA regulatory flexibility on a broad range of issues. For instance, there is no allowance under the bill for the exclusion of very small railroads operating individual trains over their own track at very low speed and at very limited risk to the public.
5. The bill contains no transition provisions and imposes requirements for testing that are exclusive. Thus, current testing as approved by the Supreme Court would cease on passage of the legislation. There would ensue an extended period of extensive rulemaking followed, very likely, by still more litigation.
6. The bill mandates testing without consideration of cost effectiveness. For instance, testing with periodic physical examinations is required even though aggressive random testing is clearly more cost effective in producing deterrence.
7. The bill mandates systems of safeguards for testing that would freeze the science and the administrative practice of early 1988 into positive Federal law while adding elements of uncertain derivation, meaning, and purpose. This would limit the Department's ability to respond to changes in drug abuse patterns and learn from experience in testing programs. The bill does not take into account the Transportation Workplace Drug Testing Procedures,

which now provide an initial model for adapting the safeguards of the HHS Guidelines to the regulated industry.

8. The legislation would dismantle FRA's post-accident testing program, leaving in its place a railroad-administered system apparently based exclusively on urine testing. Railroad supervisors would decide whether their own personnel were arguably responsible for the cause of the accident and thus subject to testing. Testing would be excused entirely if logistics could not be handled within eight hours of the event. Once again, FRA and the NTSB would be left to conduct accident investigations without full toxicology.
9. Broad criminal provisions of the bill would make persons culpable for honest mistakes and unnecessarily create further litigation risks for the regulatory program.

We will shortly provide for the record a section-by-section analysis detailing our concerns with the bill's provisions. Let me **just discuss** further one example each of a policy difference and a technical problem that we see in the bill.

We have a fundamental policy difference with respect to when an employee should be provided an opportunity for treatment or abatement of his substance abuse problem. FRA's rule endeavors to encourage early referral for treatment, either through self-

referral, co-worker referral or some other appropriate channel, before the employee is involved in an accident or is caught in a random test. The encouragement is given by providing special protections not necessarily available to an employee who refuses help and is detected through testing. In addition to encouraging early referrals for treatment, the rule permits company policies to include stern sanctions that increase the deterrent effect of random testing. This does not mean that the first offender cannot be rehabilitated, of course. Company policies typically allow reinstatement after discipline and successful completion of treatment. But the employee returns to work after lost time and lost wages, and not as a matter of right. This kind of intervention has a better chance of breaking down the barriers of denial that are central to the psychology of the substance abuser and promoting long-term recovery.

Although we believe as a matter of Federal policy that sanctions should apply to the abuser who waits to be caught through testing, FRA has recognized that leniency may be appropriate where employee organizations have voluntarily assumed an active role in prevention and intervention. Under the current rule, a number of companies have signed Operation Red Block "companion agreements" that protect the first offender's job as a matter of right if the person successfully completes treatment, subject to a one-year probationary period.

Although these agreements detract to some extent from the deterrent effect of measures designed to detect unauthorized use of alcohol and drugs, management's undertaking is supported by mutual consideration from the employee side of the table. Where, as here, our objective is to change human behavior, it is important to enlist as many allies as possible.

Here is our point of difference: if legislation guarantees an opportunity for rehabilitation after a positive test, safety suffers. Where the railroad does not have Operation Red Block or an equivalent program, the incentive for early referral would be eliminated, employees would have fewer inducements to sign Operation Red Block agreements, and the deterrent effect of random testing would be undercut without a compensating increase in peer prevention. Where Operation Red Block already exists, employees may feel that their undertaking is no longer supported by mutual consideration flowing from the railroad, although they may continue their efforts out of simple concern for co-workers. The net outcome would be a reduction in safety.

Let me also comment on one rather technical matter. We need, and have, a strong post-accident testing program which the bill would seriously weaken. FRA currently tests for alcohol as well as drugs through its mandatory post-accident testing program. This program utilizes blood and urine but is limited

to fewer than 200 of the most significant accidents each year, including all train accidents involving fatalities, damage to railroad property of \$500,000 or more, or release of hazardous materials accompanied by an evacuation or injury from product. For major train accidents, we require that all employees involved be tested. As the Supreme Court recognized in its recent opinion, it is often not possible to determine cause immediately; and the railroad supervisor responding to the scene may have reasons not to inquire into human failure. It is not practical to attempt to get uniform, post-accident toxicological data by relying on the railroad supervisor, as would H.R. 1208, to decide when to test and by using only urine as the fluid for analysis. The more serious the accident, the less able and willing the supervisor will be to make the determinations required by the bill. Without blood analysis, we would lose both the only information we have about alcohol involvements and the most meaningful information we have regarding drug involvements.

In conclusion, we believe that detailed legislation restructuring the FRA alcohol and drug program would be counterproductive in the short term and could restrict our ability to make appropriate adjustments over the long term, as safety needs change and further experience is gained.

The season for weighing options and designing programs is past. If we go back now, time will be wasted; and those who oppose active regulation will try to place new barriers in our path. Now is the time to finish the task at hand, so that we can realize the benefits to public and employee safety that a complete system of countermeasures can yield.

However, we recognize that there may be issues growing out of our regulatory efforts that may warrant further legislation. For example, the provision of H.R. 1208 which would treat time spent in testing as "limbo time" under the Hours of Service Act -- that is, neither on-duty nor off-duty time -- would help to avoid disruption of railroad operations and improve the efficiency with which random testing can be implemented. We would also welcome a formal Congressional policy statement, whether approved as a concurrent resolution or enacted as positive law, reaffirming support for use of random testing to protect the safety of rail transportation.

Thank you for the opportunity to present the Department's views on this important issue.