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“HOURS OF SERVICE ACT”

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There are many new changes to the Hours of Service Act. I have prepared an extensive overview of the changes in the Act for your reference. I have also included the FRA's most recent interpretations of the Act as well. I suggest you keep this handy for future reference.

HOURS OF SERVICE ACT

The Hours of Service Act was dramatically changed by the Rail Safety Improvement Act. The Hours of Service Act was originally enacted in 1907 to promote the safety of the workers and the public by limiting the hours a person engaged in movement of a train could remain on duty. Initially the law allowed for a 16 hour day, which was lowered to 14 hours in 1969 and to 12 hours in 1971. In response to numerous and longstanding complaints that crews were not getting adequate rest and several bad accidents which were caused in part by crew fatigue, the law was changed.

The 2008 changes are as follows:[1] <#_ftn1>

1. TY&E crews are still limited to a 12 hour work day
 - a. Crews must have 10 hours undisturbed rest in a 24 hour period[2] <#_ftn2>
2. Monthly cap:
 - a. TY&E crews are limited to 276 hours per calendar month
 - b. This includes time waiting on a ride
 - c. Time deadheading

- d. Any other time any type of mandatory service is performed for the carrier
- e. The 276 cap begins each month at 12:01AM
- f. An employee who goes to work on September 30, 2010 with 270 hours of service could report at 6PM and work 12 hours as the last 6 hours would count towards October's cap.
- g. It is the carrier's responsibility to see that this provision is adhered to and thus the carrier is subject to fine if the employee is allowed to exceed the cap

3. Rest:

- a. Crews are entitled to 10 hours of undisturbed rest after every tour of duty. This does mean 10 hours of undisturbed rest if the person is on duty 12 hours, but rather 10 hours of undisturbed rest after a trip or tour of duty
 - i. Undisturbed rest means the employee cannot be called by the railroad for any reason, such as to give them information as to when he/she might get out or that he/she has been bumped
 - ii. Should the railroad call and disturb the employee (by any method including texting) the mandatory 10 hour rest period begins again.
 - iii. Should the employee call the railroad during the mandatory rest period the railroad can take the call and/or return the call, but the conversation is limited to the matter about which the employee called.
- b. Note – 10 hours is mandatory and can be neither changed nor altered

c. If the total consecutive period of service exceeds 12 hours, the person is entitled to additional undistributed rest of that which exceeds the 12 hours.

i. Example: If the employee is on duty 12 hours and then deadheads for 2 hours, the employee would be entitled to 12 hours of undisturbed rest.

4. Limbo time:

a. Limbo time is the time spent being deadheaded after being on duty for 12 hours

b. The new law prohibits an employee from spending over 30 hours a month in limbo time

c. There is an exception to this limit in cases of major equipment failure

5. Limit on consecutive work days:

a. Crews are limited to 6 consecutive work days

i. A work day is a calendar day, not a 24 hour period

b. The one exception is if the 6th consecutive work day ends at the away from home terminal. In that case the employee may work the 7th day to return home

c. After 6 consecutive work days the employee must have 48 hours off duty at the home terminal

d. After working 7 consecutive work days the employee must have 72 hours off duty at the home terminal

e. During the 48 and 72 hours of rest, the employee may perform no service for the carrier

f. The 48 and 72 periods of rest are not considered periods of undisturbed rest and therefore the carrier could contact the

employee

g. The law allows for the Union and a Carrier to make agreements to modify these rules

h. If an employee is called and released before actually going on duty, a new day for consecutive days is not started, even if the employee has already arrived at the on duty location.

However, if the employee is called and then released after going on duty, a consecutive day begins.

i. If an employee works 5 consecutive days and then deadheads to the home terminal on the 6th day, the employee has not worked 6 consecutive days as the deadhead is neither on duty nor off duty time. Thus, the 48 hour rest rule would not be triggered.

j. An extra board employee must actually work to trigger consecutive days. Thus, an extra man who protects the board for 6 consecutive days but actually only works 2 days, does not trigger the 48 hour rest period.

k. An employee who works 6 consecutive days and on the 6th days works into the away from home terminal, will not be considered to have worked 7 consecutive days if he/she has a full calendar day off duty (not just 24 hours off) at the away from home terminal and thus would not invoke the 72 hour rest rule. However, upon return to the home terminal the employee would be entitled to 48 hours rest as he/she had worked 6 consecutive days.

l. An employee works 6 consecutive days and on the 6th day works into the away from home terminal. On the 7th consecutive

day the employee is deadheaded to the home terminal. Under this scenario the employee will be considered to have worked the 7th day and will be entitled to and required to take 72 hours rest at the home terminal.

THE VERBATIM CHANGES TO THE HOURS OF SERVICE ACT LAW

(a) General--Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may neither require nor allow a train employee to remain or go on duty--

(1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or

(2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

(b) Determining time on duty.--In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time the employee is engaged in or connected with the movement of a train is time on duty.

(3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.

(4) Time spent in deadhead transportation to a duty assignment

is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.

(5) An interim period available for rest at a place other than a designated terminal is time on duty.

(6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.

(7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:

(A) a casualty.

(B) a track obstruction.

(C) an act of God.

(D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee when that employee left the designated terminal.

(c) Emergencies.--A train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. In this subsection, an emergency ends when the track is cleared and the railroad line is open for traffic.

(a) In general.--Except as provided in subsection (d) of this section, a railroad carrier and its officers and agents may not require or allow a

train employee to--

(1) remain on duty, go on duty, wait for deadhead transportation, be in deadhead transportation from a duty assignment to the place of final release, or be in any other mandatory service for the carrier in any calendar month where the employee has spent a total of 276 hours--

(A) on duty;

(B) waiting for deadhead transportation, or in deadhead transportation from a duty assignment to the place of final release; or

(C) in any other mandatory service for the carrier;

(2) remain or go on duty for a period in excess of 12 consecutive hours;

(3) remain or go on duty unless that employee has had at least 10 consecutive hours off duty during the prior 24 hours; or

(4) remain or go on duty after that employee has initiated an on-duty period each day for--

(A) 6 consecutive days, unless that employee has had at least 48 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier except that--

(i) an employee may work a seventh consecutive day if that employee completed his or her final period of on-duty time on his or her sixth consecutive day at a terminal other than his or her home terminal; and

(ii) any employee who works a seventh consecutive day pursuant to subparagraph (i) shall have at least 72

consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier; or

(B) except as provided in subparagraph (A), 7 consecutive days, unless that employee has had at least 72 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier, if--

(i) for a period of 18 months following the date of enactment of the Rail Safety Improvement Act of 2008, an existing collective bargaining agreement expressly provides for such a schedule or, following the expiration of 18 months after the date of enactment of the Rail Safety Improvement Act of 2008, collective bargaining agreements entered into during such period expressly provide for such a schedule;

(ii) such a schedule is provided for by a pilot program authorized by a collective bargaining agreement; or

(iii) such a schedule is provided for by a pilot program under section 21108 of this chapter related to employees' work and rest cycles.

The Secretary may waive paragraph (4), consistent with the procedural requirements of section 20103, if a collective bargaining agreement provides a different arrangement and such an arrangement is in the public interest and consistent with railroad

safety.

(c) Limbo time limitation and additional rest requirement.--

(1) A railroad carrier may not require or allow an employee--

(A) to exceed a total of 40 hours per calendar month spent--

(i) waiting for deadhead transportation; or

(ii) in deadhead transportation from a duty assignment to the place of final release, following a period of 12 consecutive hours on duty that is neither time on duty nor time off duty, not including interim rest periods, during the period from the date of enactment of the Rail Safety Improvement Act of 2008 to one year after such date of enactment; and

(B) to exceed a total of 30 hours per calendar month spent--

(i) waiting for deadhead transportation; or

(ii) in deadhead transportation from a duty assignment to the place of final release, following a period of 12 consecutive hours on duty that is neither time on duty nor time off duty, not including interim rest periods, during the period beginning one year after the date of enactment of the Rail Safety Improvement Act of 2008 except that the Secretary may further limit the monthly limitation pursuant to regulations prescribed under section 21109.

(2) The limitations in paragraph (1) shall apply unless the train carrying the employee is directly delayed by--

- (A) a casualty;
- (B) an accident;
- (C) an act of God;
- (D) a derailment;
- (E) a major equipment failure that prevents the train from advancing; or
- (F) a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.

(3) Each railroad carrier shall report to the Secretary, in accordance with procedures established by the Secretary, each instance where an employee subject to this section spends time waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release in excess of the requirements of paragraph (1).

(4) If--

- (A) the time spent waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release that is not time on duty, plus
- (B) the time on duty, exceeds 12 consecutive hours, the railroad carrier and its officers and agents shall provide the employee with additional time off duty equal to the number of hours by which such sum exceeds 12 hours.

(d) Communication during time off duty.--During a train employee's

minimum off-duty period of 10 consecutive hours, as provided under subsection (a) or during an interim period of at least 4 consecutive hours available for rest under subsection (b)(7) or during additional off-duty hours under subsection (c)(4), a railroad carrier, and its officers and agents, shall not communicate with the train employee by telephone, by pager, or in any other manner that could reasonably be expected to disrupt the employee's rest. Nothing in this subsection shall prohibit communication necessary to notify an employee of an emergency situation, as defined by the Secretary. The Secretary may waive the requirements of this paragraph for commuter or intercity passenger railroads if the Secretary determines that such a waiver will not reduce safety and is necessary to maintain such railroads' efficient operations and on-time performance of its trains.

FRA INTERPRETATIONS OF THE HOURS OF SERVICE ACT

1. Rule classes- attending a mandatory rules class is considered time on duty, even though the employee may have an option of several different classes to attend. If the rules class is a mandatory condition of employment, the time spent in the class is on duty.[3]

<#_ftn3>

2. Investigations: When an employee is instructed to attend a hearing as a company witness, the time spent at the hearing is on duty time. Employees who voluntarily attend at the request of the Local Chairman or the charged employee are not considered on duty. The Local Chairman is not on duty when acting solely in the capacity

as the representative at the hearing.[4] <#_ftn4>

3. Familiarization trips: Time spent making a familiarization trip is counted as on duty time.[5] <#_ftn5>

4. Physical exams: Time spent at a mandatory physical exam is counted as on duty time.[6] <#_ftn6>

5. Providing information – accidents: If a crew is explicitly required by a railroad official 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. 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.[7] <#_ftn7>

6. Deadheading from a duty assignment in a privately owned vehicle: If the 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, the activity is considered commingled service and on duty time. However, if the railroad offers rest or transportation and the employee elects to drive his/her own vehicle in lieu of rest or a ride, the railroad would be in compliance with the Act.[8] <#_ftn8>

7. Staying with a train after tie up: Staying a train after tie up waiting on a ride is considered limbo time and thus is not on duty time. However, if the employee is required to perform any duty, such as

protecting the train against vandalism, observing passing trains for any defects or unsafe conditions, flagging, shutting down locomotives, checking fluid levels, or communicating train consist information via radio the time is considered on duty time. Simply staying on the train with the potential of maybe having to perform some work activity is not considered on duty time.[9] <#_ftn9>

8. Travel and eating at the away from home terminal:
 - a. If the travel time from the point of final release to the lodging facility is less than 30 minutes, the time spent does not count as on duty time.
 - b. If the travel time from the lodging facility to the on duty location (after rest) is less than 30 minutes, the time spent is not considered on duty time.
 - c. If the time spent traveling from the point of final release to the lodging facility or time spent traveling from the lodging facility to the on duty location is in excess of 30 minutes, the time spent traveling is considered on duty time.
 - d. Time spent waiting on a room, if in excess of thirty minutes counts as on duty time. Thus, if an employee is transported for 15 minutes and has to wait for 45 minutes for a room after arrival at the lodging facility a total of 1 hour would be counted as on duty time, commingled service.
 - e. Should a crew be released from duty at their final release point (away from home terminal) and then the crew of its own volition decide to eat before being transported to their final lodging point, the time spent eating is considered “discretionary”

and not on duty time.[10] <#_ftn10>

9. Drug testing and the Hours of Service:
 - a. Random testing: Hours of Service must be adhered to. Thus, if during a random test the Hours of Service expires, the testing must be stopped even if this involves a shy bladder issue.
 - b. However, if the employee is involved in a direct observation test because of an irregularity in the test, such as specimen temperature, then FRA would require the Hours of Service Act to be exceeded to complete the test.
 - c. Because of the unpredictability of mandatory post accident, reasonable suspicion or Federal reasonable cause testing a carrier must require an employee to exceed the Hours of Service to complete the testing.
 - d. FRA permits exceeding the Hours of Service if reasonable cause testing is being conducted under the company's own authority but the thresholds which could trigger a Federal reasonable cause test would have been met.[11] <#_ftn11>
 - e. Time spent deadheading to the final release point after taking a drug test is considered limbo time.[12] <#_ftn12>

ENFORCEMENT OF THE ACT

The Federal Railroad Administration is the only agency with enforcement authority of this Act. Thus, if there is a violation, the FRA is the agency that brings about enforcement proceedings. Violations of the Act may bring about a fine to the railroad.

One should not typically refuse to perform service that exceeds the law, as the rule in the industry is to comply now and grieve later.

However, the provisions of the 9/11 Commissions Act of 2007 clearly provide that an employee can refuse to violate or assist in the violation of a Federal law. Thus, one could lawfully refuse to violate the Hours of Service with impunity. The better recourse would be to remind the manager that instructions to violate the Hours of Service will cause the railroad to be fined, not the employee and to further demand a written order to exceed the Law. Typically, action will cause the offending officer to change his instruction.

Finally, the 9/11 Commissions Act of 2007 also specifically provides that it is unlawful to take any type of retaliatory action against an employee who accurately reports their hours of service: A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done-- to accurately report hours on duty pursuant to chapter 211.[13] <#_ftn13>

Thus, a suggestion by a manager that an employee's time on duty not be accurate, such as not reporting transportation time to lodging in excess of 30 minutes at the away from home terminal as on duty time, is a violation of both the Hours of Service Act and 49 U.S.C. 201099(a)(7).



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[1] <#_ftnref1> The following changes do not apply to commuter and intercity passenger railroad train employees. 49 U.S.C. 201102

[2] <#_ftnref2> FRA's interim interpretation of this provision means 10 hours of undisturbed rest in the prior 24 hour period. Under the old law an employee had to have 8 hours rest in the past 24 hours, which began when the employee reported for duty. Thus if the employee reported for duty at 3PM he/she must have had 8 hours rest in the 24 hours prior to 3PM. Under the new law and FRA's interim interpretation "no train employee or signal employee may be required or permitted to go or remain on duty unless that employee had received at least 10 consecutive hours of rest within any of the 24 hour periods prior to any of the moments in question (i.e., any instant that the employee goes or remains on duty during the duty tour), rather than the one 24 hour period prior to the one moment that the employee commences the duty tour." See FRA's interim policy statement on the new Act, 4910-06-P; Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as amended.

[3] <#_ftnref3> See FRA's interpretation OP-04-04 of February 3, 2004, which is generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[4] <#_ftnref4> See FRA's interpretation OP-04-04 of February 3, 2004, which is generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[5] <#_ftnref5> See FRA's interpretation OP-04-04 of February 3, 2004, which is generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[6] <#_ftnref6> See FRA's interpretation OP-04-04 of February 3, 2004, which is generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[7] <#_ftnref7> See FRA's interpretation OP-04-04 of February 3, 2004, which is generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[8] <#_ftnref8> See FRA's interpretation OP-04-04 of February 3, 2004, which is generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[9] <#_ftnref9> *Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe R.R.*, 516 U.S. 152 (1996). Also see FRA interpretation OP-04-30 dated February 3, 2004 generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[10] <#_ftnref10> See FRA's interpretation regarding Suitable Food and Lodging at Designated Terminals, OP-04-03 dated February 3, 2004 generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[11] <#_ftnref11> See FRA's Alcohol/Drug compliance manual, section 2.3; Part 219 which is available at www.fra.dot.gov

[12] <#_ftnref12> See FRA's interpretation "Deadheading following urine collections" OP-04-02 dated February 3, 2004 which is generally available at <http://www.fra.dot.gov/Pages/1470.shtml>

[13] <#_ftnref13> 49 U.S.C. 20109(a)(7)