Testimony of

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STATEMENT OF
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TESTIFYING ON BEHALF OF THE
ASSOCIATION OF AMERICAN RAILROADS

BEFORE THE
U.S. SENATE
COMMITTEE ON THE JUDICIARY
ON
"ASBESTOS: MIXED DUST AND FELA ISSUES"

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The Association of American Railroads (AAR) is pleased to submit testimony on behalf of the railroad industry on the "Fairness in Asbestos Injury Resolution Act (Act)." AAR will address two issues that are of utmost concern to the railroad industry with respect to this legislation: the treatment of claims under the Federal Employers' Liability Act (FELA), and the need to address the potential for asbestos claimants to circumvent the Act's intent by converting asbestos claims to claims alleging respiratory/pulmonary injury caused by exposure to airborne substances other than asbestos, and thereby continuing to bring claims under the tort system. The first issue is a unique concern of the railroad industry; the second is a concern of many asbestos defendants.

Underlying the Act is an essential, fundamental premise over which there is a broad consensus: that civil lawsuits are no longer an appropriate way to provide compensation to individuals suffering from asbestos-related injuries. In fact, the civil litigation system has created a "crisis" that has been bad for victims of asbestos, bad-and in some cases devastating-for businesses and bad for the nation's economy. The solution offered by the Act would provide those who have been injured by asbestos with quick and sure payment without the need for showing specific defendants to be at fault. A compensation Fund financed by defendants and insurers would replace a system that relies on courtroom battles over theories of product liability or negligence, statutes of limitations, causation, damages and other issues. Compensation from the Fund would be based on sound medical criteria, with the most severely injured receiving the largest payments. The concept behind the Act is to provide compensation to those who are truly ill or injured and to eliminate a system where much of the compensation that is finally paid is siphoned off to transaction costs, primarily attorneys fees, rather than going to the victims of asbestos exposure.

Though railroads did not manufacturer or distribute asbestos, and largely eliminated its use in their operations long ago, they have been named as defendants in numerous lawsuits alleging asbestos-related injuries by the plaintiff. Virtually all of these lawsuits are brought under FELA by current and former employees (historically, largely by former employees). FELA is a federal fault-based statute that was enacted in 1908, at a time before no-fault workers' compensation systems had taken root in this country. FELA covers only railroad employees (and seamen by virtue of the Jones Act). In order to receive compensation for injuries occurring on the job, FELA requires rail workers to sue their employer in state or federal court. Thus, compensation is awarded in a lottery-like manner, with associated litigation costs, and substantial amounts going to lawyers on both sides. The need for both parties to show the other to have been culpable puts unnecessary strain on the relationship between employer and employee.

The Act covers all civil actions seeking recovery for asbestos-related injuries. Civil actions are defined to exclude workers' compensation laws. Under the Act, FELA is not considered to be a workers' compensation law. Thus, claims

brought under FELA would be covered by the Act. There is a good reason for this approach. The no-fault workers' compensation system is an entirely different species from the civil litigation system. Workers' compensation laws are administrative systems, that make payment without regard to fault, based on the claimant's wage loss and degree of disability. On the other hand, FELA is a quintessential civil action. FELA has all the attributes of the state-law tort suits which typically serve as the means of seeking compensation for asbestos-related injuries outside the railroad industry, and is characterized by all the uncertainties and problems of the tort system which the Act seeks to eliminate.

Therefore, any legislation which includes as a guiding principle the transfer of asbestos claims resolution out of the traditional tort system, with its attendant costs, and into a system that will fairly and quickly compensate those who are sick, must cover asbestos claims brought under FELA. There is no justification for leaving railroads as the only asbestos defendants still subject to civil lawsuits. In fact, in a recent FELA cases, the U.S. Supreme Court reiterated that the "elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation." Norfolk & Western Ry. Vv. Ayers, 538 U.S. 135, 166 (2003). Congress recognized this early-on and properly determined that, along with all other lawsuits, FELA actions should be preempted by the Act. That debate is long over, and need not, nor should not, be reopened.

Hoping to retain railroad employers as the sole viable defendants in asbestos lawsuits, rail labor protests FELA's inclusion in the Act, complaining that the Act treats its members unfairly. This is not the case. The Act prohibits all asbestos claimants from bringing a civil lawsuit for an asbestos-related injury. All claimants, including rail claimants, would exchange the right to bring suit for the right to receive compensation from the Fund if they meet the Fund's medical criteria.

Nonetheless, rail labor contends that the Act is unfair because non-railroad asbestos claimants (alleging exposure on the job) would have recourse to the Fund, as well as a remedy under applicable state or federal workers' compensation laws, while rail employees would have recourse only to the Fund. Labor has contended that because they will not have recourse to a workers' compensation remedy, rail workers who suffer a work-related asbestos injury will likely receive less total compensation than other similarly situated non-rail claimants.

A provision was included in a recent draft of the Act that was specifically designed to address this concern. Section 131(b)(4) would have provided an additional payment to rail claimants who could demonstrate that had they been an employee eligible for state workers' compensation, they would have been eligible for an additional payment through workers' compensation. Upon such a showing, rail claimants would be eligible for a payment reflecting the value of that workers' compensation benefit, in addition to the amount they would be entitled to under the Fund. AAR is willing to support this provision as drafted. However, rail labor has rejected this proposal.

Instead, rail labor has insists that, in addition to being entitled to a full payment from the Fund, rail employees asbestos claimants also should be entitled to an adjustment equal to historic FELA asbestos claims payments. As a result, rail claimants would be entitled to two payments as a substitute for tort recoveries. First, they would receive a Fund payment as set forth under section 131(b)(1)-which for seriously ill claimants might be a six and seven figure award. In addition-and, even though the Fund is meant to substitute for all lost tort claims-rail claimants would receive a payment that is calculated to be a surrogate for the FELA award they might have received in the traditional tort system. In addition, some rail claimants would be entitled to a third payment for the same asbestos injury by virtue of their eligibility for an occupational disability benefit under the Railroad Retirement Act, a benefit which now pays approximately $25,000 a year, and which is not available to individuals who are covered by the Social Security system.

AAR believes that a FELA adjustment is unwarranted because it bestows on rail labor the ability to receive two payments in exchange for the right to bring civil lawsuits. While rail labor asserts that FELA is a workers' compensation right which their members should not be required to forego, the fact is that regardless of how many asbestos defendants they may sue in addition to the employing railroad, under the tort system, plaintiffs are entitled to only one full recovery for an injury. This is a fundamental principle in tort law. See RESTATEMENT (SECOND) OF TORTS §885(3) (1979), and one which applies with respect to actions brought under FELA. See In re Asbestos

Litigation, 638 F.Supp. 107, 115 (W.D. Va. 1986)(Restatement of Torts "is the proper measure in a FELA case."); Lucht v. Chesapeake & Ohio Ry., 489 F.Supp. 189, 191 (W.D. Mich. 1980). If a FELA asbestos plaintiff also sues other defendants (e.g., asbestos manufacturers), the plaintiff is not entitled to collect multiple full recoveries. Any settlement with some defendants is offset against a FELA judgment.

For example, in the Ayers case the plaintiffs had also pursued claims against asbestos manufacturers. The trial court reduced the FELA judgments by the amount of the settlements the plaintiffs had received from the manufacturer defendants, an action that was uncontested by the plaintiffs. 538 U.S. at 144. Thus, there absolutely is no principled justification for permitting rail claimants to receive two separate, and cumulative, payments meant to duplicate tort recoveries. The payment from the Fund would fully compensate the rail claimant for all lost tort recoveries, including under FELA. Were rail labor to have its way, it is all the other claimants subject to the Act who would be treated inequitably.

Though the railroads believe as a matter of principle that there is no basis for inclusion of a FELA adjustment in the asbestos legislation, they nevertheless are willing to negotiate with rail labor over this issue in an effort to reach a compromise agreement enabling rail labor to support the legislation. However, the willingness to consider this special adjustment is predicated on the fundamental condition that no additional contribution from railroads be required to fund the special adjustment. Railroads already would be required to contribute to the Fund under Tier VII, Section 203(h). Because FELA claims are practically the only asbestos lawsuits brought against railroads, these Tier VII payments-ten million dollars annually in the case of large railroads-are established to represent the railroads' anticipated prospective payout for FELA asbestos claims. Therefore, if an additional payment were required railroads will have paid more than their fair share: in essence, the substantial payments to be made by railroads under Tier VII would be made solely to cover others defendant's claims. AAR has been assured that inclusion of a special FELA adjustment for rail employees will not require additional payment by the railroads-accordingly, the railroads are willing to negotiate with rail labor in reliance on those assurances.

Several other important elements must be incorporated into any effort to add a FELA adjustment to the Act: (1) the adjustment must reflect only net FELA payout; (2) the special FELA adjustment should be available to rail claimants on the same basis as workers' compensation benefits are available to other Fund claimants; (3) there should be objective medical criteria that must be met before a rail claimant would be entitled to a special FELA adjustment, as well as criteria with respect to the period and duration of railroad employment; and (4) there should be no continuation of FELA suits after enactment of the legislation.

First, in calculating a special FELA adjustment, historical FELA payouts must be adjusted for attorneys fees and other expenses that are paid out of the plaintiff's award. The vast majority of FELA asbestos claimants are represented by attorneys, who typically take, at minimum, a quarter of any settlement or verdict as their fees. The cost of expert witnesses and other litigation expenses further reduces the net amount that the plaintiff receives from any award. These amounts must be deducted when establishing the value of the special FELA adjustment. There is no reason why the Fund should pay rail claimants amounts which previously went into the pockets of FELA plaintiffs lawyers.

Second, regardless of the level of a FELA adjustment, it should be payable under the same conditions that a non-rail claimant would receive workers' compensation benefits. Under section 135(b)(2) of the draft legislation, workers' compensation insurers/employers would not be required to make any additional workers' compensation payments to an asbestos claimant until the amount owed under the workers' compensation statute exceeds the amount of the claimant's award from the Fund. Thus, other claimants only receive workers' compensation benefits to the extent they are greater than the award from the Fund. While this provision may be modified as the legislative process proceeds, any offsets or limits that ultimately apply to a workers' compensation recovery by other asbestos claimants must be applied equally to the special FELA adjustment. In addition, if a rail claimant is entitled to benefits under a workers' compensation law by virtue of employment outside the rail industry, the FELA adjustment payment should be reduced by the amount of the workers' compensation benefit.

Third, the Act establishes medical criteria that must be met in order for a claimant to be entitled to an award from the Fund. Similarly objective medical criteria should be established in order for a rail claimant to be entitled to a special

FELA adjustment award. Otherwise, awarding special FELA adjustments will to become a drawn out and contentious process likely to result in awards to unimpaired claimants.

In addition, specific criteria must be established to determine how long, and for what period of time, a claimant must have worked in rail employment in order to be eligible for the special FELA adjustment. Latency periods are well recognized in asbestos related diseases. It would be unfair to other claimants to award a special FELA adjustment to an employee whose railroad work did not precede by a medically acceptable latency period the development of his asbestos -related disease. Further, a claimant who worked for a minimal amount of time, or after asbestos abatement in rail employment should not be entitled to this special FELA adjustment.

Finally, like all other tort actions, FELA claims must be superceded and preempted upon enactment of the bill. The proposals from rail labor contemplate negotiations over the amount of the special FELA adjustment, and promulgation of regulations after enactment, during which time claimants who worked in railroad employment would retain the right to bring FELA lawsuits. One proposal calls for appointment of a mutually acceptable arbitrator to determine the FELA adjustment benefits if no agreement is reached between rail labor and management. Allowing claimants to continue filing FELA lawsuits simply provides a disincentive for rail labor to agree on the amount of the special FELA adjustment or an acceptable arbitrator. As labor's proposals are structured, claimants can continue to file FELA lawsuits indefinitely, while the Act ostensibly applies to railroads, and the railroads continue to make contributions of millions of dollars each year to the Fund.

With those principles in mind, railroads are willing to work with rail labor, with one important caveat. Railroads are concerned that the Act's elimination of asbestos lawsuits, which is the quid pro quo for payment from the Fund, could be illusory, a concern shared by the business community as a whole. The concern is that while plaintiffs pursue recovery from the Fund, they can simultaneously file lawsuits alleging respiratory injury caused by exposure to substances other than asbestos ("mixed dust"). Certainly, claimants who can prove an asbestos related injury for the purpose of Fund recovery may also suffers from a separate and distinct injury caused by some other exposure, and therefore should be entitled to recover for the separate injury. However, awards from the Fund are designed to constitute a full and fair payment for a specific level of physical injury or impairment, i.e., damage to the claimant's lungs. It is axiomatic that there may be only one recovery for one injury, and claimants should not be permitted to circumvent this principle by alleging different causes of the same injury in different forums.

This is a real, and a very significant, concern. Many of the FELA suits filed against the railroads in which the plaintiff alleges injury from exposure to asbestos also contain allegations of exposure to, or inhalation of, numerous other substances, such a silica and other dusts and fibers. When a railroad settles a FELA asbestos claim today, the railroad generally avoids the potential for multiple seriatim suits for the same injury by obtaining a release for respiratory injury arising from all causes, including asbestos, silica and other fibers, particles and dust. However, when a claimant obtains an award from the Fund, as the Act is currently written, no such releases would be provided to defendants, thus exposing railroads (and all defendants) to the potential for double payment-once to the Fund and again in the lawsuit alleging exposure to other fibers, particles and dust.

Certain members of the FELA plaintiffs' bar actually advised railroads during the pendency of this legislation that if asbestos litigation is precluded through legislation, they simply will refile their inventory of asbestos cases as claims alleging injury caused by exposure to silica or some other substance. Many claimants currently craft their lawsuits so that they can be prosecuted as either asbestos or non-asbestos claims, though the claim seeks compensation for the same injury, by obtaining dual diagnoses.

The proposed legislation represents a fair means of addressing the asbestos lawsuit crisis only if it effectively precludes the continued use of the tort system to seek recovery for injuries that previously were brought as asbestos claims. If claimants can convert their asbestos claims into other claims for the same injury, merely called by a different name, the bill merely saddles American business with only huge financial liabilities to establish the Fund, but no real relief from the litigation crisis. Thus, only legislation that addresses this serious issue in an effective way can be supported by the railroad industry.

In addition to the key points made above, there is a technical matter that the railroads would like to call to the Committee's attention. Section 131(b)(4)(E) states that
Nothing in this Act should in any manner be construed to impact or affect the Act of April 22, 1908 (45 U.S.C. 51 et seq.), commonly known as the Federal Employers' Liability Act. This Act is intended to deal solely with asbestos claims and not any other rights possessed by an employee of the railroad industry.

While AAR understands that this provision is intended only to assure rail labor that there is no intent to modify FELA outside the context of the Act, that is not what it states. The first sentence is not an accurate statement, as the Act does affect, in fact it preempts, FELA claims for asbestos. Thus, the sentence should be preceded by the phrase: "Except as otherwise set forth in this Act . . ." The second sentence could be interpreted to exclude the railroads from any provision which addresses mixed dust claims. This would be an unfair, and presumably unintended, result. Therefore, language should be added to make it clear that it is not intended to exclude railroads from the section(s) of the Act which address the mixed dust issue.

Finally, any provisions of the Act addressing the right to remove cases to federal court must state that, for the purposes of the Act, the FELA non-removal provision (28 U.S.C. 1445(a)) is superceded.