



**STATEMENT OF
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**BEFORE THE
SENATE COMMERCE, SCIENCE AND TRANSPORTATION COMMITTEE**

**ON THE
TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL**

May 16, 2006

On behalf of the Transportation Trades Department, AFL-CIO (TTD) I want to thank you for the opportunity to testify this morning on the Transportation Workers Identification Credential (TWIC) and specifically on its application to port, maritime and related workers. TTD consists of 31 member unions, including those that represent thousands of longshore, maritime, rail and other workers who work in and around port facilities and who will be directly affected by the NPRM recently issued by the Transportation Security Administration (TSA) and the Coast Guard.¹ In addition, TTD directly participated in the regulatory proceeding that implemented the threat assessments and background checks for Hazmat truck drivers and continues to work with our aviation unions to address concerns that have been raised in that mode of transportation. And finally, we understand that TSA has an interest in eventually extending the TWIC program to other modes of transportation and thus our unions not directly covered by the NPRM have a vested interest in this issue. So again, thank for the opportunity to share our views and concerns.

At the outset, let me state clearly that no one wants to secure our nation's ports and other transportation assets more than the men and women represented by our affiliated unions. Our members are on the front-lines and they will be the ones first affected in the event that a terrorist attack is carried out using or attacking our nation's transportation system. We also understand that access control procedures, including the use of tamper-resistant identification cards, is part of this effort and we support initiatives to identify and bar individuals who pose a terrorism security risk from working in security-sensitive transportation jobs.

With that said, any TWIC program must strike the right balance – it must enhance the security of our transportation system, but must also preserve the legitimate rights of workers and not unduly infringe on the free flow of commerce. In short, the TWIC program must provide workers with basic due process rights, including a meaningful

¹ Attached is a complete list of TTD affiliated unions.

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appeal and waiver process, ensure that privacy rights are respected, not force workers to pay the costs of this mandate and focus on identifying true security risks and not unjustly punishing someone twice for a bad decision made years ago.

On this point, I want to acknowledge the work of this Committee in passing Section 70105 of the Maritime Transportation Security Act (MTSA) that establishes the requirements and limits for a maritime transportation security card. While not a perfect compromise, there are important protections and limitations included in this provision, and it is noteworthy that the Committee has tried to strengthen these protections since passage of the MTSA in 2002. With last week's NPRM, and the Coast Guard's earlier notice that it will check names against the terrorist watch list, the Department is in the beginning stages of implementing the TWIC maritime program required by Congress shortly after 9/11.

We are still in the process of reviewing and analyzing this voluminous proposal, and we will submit a more comprehensive response to the TSA and the Coast Guard as requested in the notice. I would like to take the opportunity this morning to highlight some of our initial concerns and reactions to the proposal and to offer some suggestions for improvement.

There is little doubt that TSA and the Coast Guard had a challenging task in drafting this NPRM and implementing the Hazmat program as required by the USA Patriot Act. We do appreciate the fact that in many regards the NPRM follows the mandates of Section 70105 and otherwise attempts to put forth a reasonable and workable program. Unfortunately, there are many areas, too many in our opinion, where TSA and the Coast Guard have fallen short in both fulfilling the mandates of Section 70105 and generally striking the right balance between security and fairness for workers. These two objectives are not inconsistent. To the contrary, a workable, reasonable and fair TWIC program will only enhance transportation security, and we see no reason why this proposed rule cannot be altered to better achieve this objective.

Disqualifying Offenses

We remain concerned that that the list of felony offenses that will disqualify a worker from holding a maritime TWIC is too broad, vague and not adequately focused on eliminating true security risks. Section 70105 is clear – for felony convictions, an individual may not be denied a security card unless the individual has been convicted within the past seven years or released from incarceration in the last five, of a felony “that the Secretary believes could cause the individual to be a terrorism security risk to the United States.” We maintain that some of the broad descriptions of disqualifying offenses listed in Section 49 CFR 1572.103 go beyond this mandate and this limitation.

Again, in looking at criminal records, the Secretary may only deny a card to someone who could pose a terrorism security risk. By way of example, the NPRM says that all felonies involving dishonesty, fraud or misrepresentation make an individual at least an initial terrorism security risk. If a worker is convicted of a felony in writing bad checks,

that would appear to qualify as a crime of “dishonestly or fraud.” While we understand why a financial institution may not want to hire that person, we simply do not understand how that makes the individual a terrorism security risk unqualified to work in a port. Simply put, there needs to be a clearer nexus between terrorism security and the crimes that will disqualify an individual from holding a maritime TWIC.

The TSA and the Coast Guard note in the NPRM that they are adopting the disqualifying offenses currently in place for the Hazmat program. While we agree that the two programs should be as similar as possible, it must be remembered that the Hazmat program and the maritime TWIC program are governed by two different statutes. Specifically, Section 1012 of the USA Patriot Act (codified at 49 U.S.C. 5308(a)) grants TSA broader discretion in deciding what crimes will disqualify someone from the industry and how far back the criminal record should be examined. Section 70105(c) places more limits on the Secretary for the maritime program – only those crimes that make someone a terrorism security risk to the United States should be included. In fact, during consideration of the Hazmat background check program, TTD specifically asked TSA to adopt a list of criminal offenses that in reality was consistent with the MTSA standard. While TSA claimed it was adopting such an approach, we continue to believe that the crimes adopted for the Hazmat program and proposed for a maritime TWIC do not in fact meet the standard established by Section 70105.

In response to our calls to limit the list of disqualifying crimes, TSA has often stated that such refinements are unnecessary because a worker can always apply for waiver. While we appreciate the inclusion of a waiver process in Section 70105, and its adoption in the NPRM, it should not be used as excuse to adopt an overly broad list of felonies and allow other problems with the list of disqualifying crimes to go unaddressed.

Deeming someone a terrorism security risk is not a characterization that should be casually rendered and places an obvious burden on a person to overcome that label. While TSA may be able to report that it is granting waivers in the Hazmat program, we do not know how many workers have chosen to not apply for a Hazmat endorsement in the first place because of the long list of disqualifying offenses. Furthermore, TSA will need to review and process the criminal histories of approximately 750,000 port and related workers pursuant to this NPRM on an extremely tight deadline. On top of the other procedural challenges inherent in this program, it makes little sense to overload the waiver process with individuals who should never have been disqualified in the first place.

We are also disappointed that the proposed regulations do not provide for any mechanism for a person to challenge the determination that a particular crime is one described in Section 1572.103. There may be situations where a person is convicted of crime that TSA believes fits into the broad description of the disqualifying offenses, but a legitimate argument could be made to the contrary. To rectify this problem, we intend to ask TSA to allow workers to challenge the characterization of a particular offense either as part of the waiver or appeal process.

Waiver Process and ALJs

As indicated earlier, we worked directly with Members of Congress in the negotiations that led to Section 70105 and the inclusion of a waiver process was a major priority for our member unions. We were therefore pleased that TSA chose to incorporate this waiver into the Hazmat program and it has been offered as part of the NPRM.

However, we remain concerned that the waiver process, as envisioned in the NPRM, requires workers to apply back to the very same agency that determined the individual was a security risk in the first place. Given the high public anxiety over terrorist risks and the insular nature of this process, we are concerned that TSA might reject waivers that are otherwise meritorious.

In an attempt to address this problem, we have asked TSA, on numerous occasions, to allow workers to have their waiver cases heard, at some point in the process, before an Administrative Law Judge (ALJ) at a hearing on the record. This would allow employees to make their case in front of an impartial decision-maker not bound by political pressures or subject to agency interference. In addition, ALJ decisions would establish case precedent that would better define what constitutes a security risk. This would bring a level of fairness and consistency to a system that is central both to employee rights and national security.

Because TSA has rejected our calls for this basic protection, we have been forced to turn to Congress for redress on this point. Fortunately, this Committee has acted and an ALJ provision is included in the pending Coast Guard Reauthorization Conference Report (H.R. 889). While we understand that the Conference Report is being held up for unrelated reasons, it is clear that there is wide and bipartisan support for the introduction of ALJs into the TWIC process, and I want to thank Chairman Stevens and Co-Chairman Inouye for your help on this issue.

For reasons that are quite frankly puzzling, TSA and the Coast Guard have failed to include an ALJ in this NPRM and have simply stated they will alter the proposal if Congress changes the law. While we have every confidence that Congress will act, it is troubling that TSA and the Coast Guard are refusing to include ALJs on a technicality. These agencies clearly have the discretion to include ALJs in the process and their continued resistance to the program gives us some concern regarding how they will implement and incorporate ALJs into the TWIC process. I should note that for the ALJ process to be effective, cases must be heard and decided as expeditiously as possible so that employees are not unjustly barred from returning to work.

Application of Waivers to Subjective Decisions

We are also concerned that the waiver process in the NPRM does not apply to security threat assessments made by TSA for subjective reasons under Section 1572.107. Under this Section, TSA can disqualify someone for criminal offenses that are not on the disqualifying list, if the TSA determines that other convictions are "extensive," if the

conviction is for a “serious” crime, or if the person was imprisoned for over one year. Putting aside our concerns with these broad and subjective criteria, we do not understand how TSA is implementing this without allowing workers to seek waivers as they do for crimes listed in Section 1572.103.

More to the point, Section 70105(c)(2) of the MTSA specifically mandates that TSA afford a waiver for all reasons a worker may be disqualified from holding a transportation security card. We understand that TSA does not afford waivers under the Hazmat program for disqualifications for subjective decisions. While we objected to that decision in the Hazmat proceeding on policy grounds, the case here is different – for the maritime TWIC, a waiver is a statutory right and cannot be denied by TSA at its discretion. We hope and expect TSA to make this change as it finalizes its rule.

National Standard Needed

We are concerned with language in the NPRM that would specifically allow states to impose additional and broader background checks and to do so without any of the protections or limitations included in the federal program. If security threat assessments are needed to enhance our national security, the TSA should adopt and enforce a national standard. It makes little sense for TSA to establish a national program, force workers to pay for this program (over our objections), and then allow local jurisdictions to use national security as an excuse to create yet another security review process.

There simply should not be a difference in what constitutes a security risk based on what state or jurisdiction a port resides in. Furthermore, TSA and the Coast Guard have a stated intent, both articulated in the NPRM and in other documents, to achieve a level of consistency governing threat assessments and transportation credentials. Allowing states to arbitrarily impose different security requirements is inconsistent with this objective and should be reversed. Failing that step, TSA must ensure that due process and privacy rights provided for at the federal level apply to the states. We would note that Congress specifically mandated this for the Hazmat program in the SAFETEA-LU legislation and we would expect TSA to extend this to the maritime side. We will also seek clarification from TSA on how it intends to evaluate and enforce the requirement that states, with separate checks, comply with these statutory due process requirements.

Cost of the TWIC

We are vehemently opposed to the provisions of the NPRM that passes one hundred percent of the costs of this program on to individual workers. The security threat assessments and the background checks mandated in this proposal are considered necessary to enhance the security of our nation’s ports and are part of the overall effort to fight terrorist elements. Given the reality of this national priority, the government, and not individual workers, must absorb the costs of this program.

We understand that the DHS Appropriations Act (P.L. 108-90, Section 520) directs TSA to “charge reasonable fees for providing credentialing and background investigations in

the field of transportation.” We would respectfully ask that Congress lift this appropriations rider and allow the federal government to fund this program in a reasonable manner. We would note that even with the rider in place, nothing requires the costs be absorbed by workers – it simply states that “reasonable fees” be charged. The TWIC card, and the accompanying background check, is essentially a condition of employment and will surely benefit our employers. The port and related facilities will be more secure and access control procedures will be in place through readers and biometric cards. If the federal government refuses to step in and fund this security mandate, employers must be required to fund a program that will directly benefit their operations. It should be remembered that employees will have to go through the time and effort to apply for this card and may incur additional expenses if an appeal and waiver are needed. It is neither fair nor reasonable to ask them to also pay for a security mandate that has broader benefits.

Transportation Security Incident

Under Section 70105(c)(1)(A)(ii) of the MTSA, an individual will be denied a maritime TWIC if he has committed a felony, within the last seven years, that causes “a severe transportation security incident.” The MTSA further defines this term to include a security incident that results in a “transportation service disruption” or an “economic disruption in a particular area.” In both the Hazmat rule and in the maritime TWIC NPRM, TSA has made a “transportation security incident” a permanent disqualifying offense with no waiver opportunities. We have long been concerned with the broad definition of this offense and that it could be interpreted to include a wide range of activities that while disruptive to commerce or transportation, should not permanently disqualify a person from holding a TWIC. We are pleased that Congress, again in the SAFETEA-LU legislation, included a provision that attempts to limit the reach of this provision and TSA has modified its rules accordingly. Nonetheless, we remain concerned that the term could still be misused, and we will urge further clarifications as the process moves forward.

Privacy of Information

As we have consistently stated, maintaining the privacy and confidentiality of the information collected and generated by the TWIC process is crucial. Towards this end and at our request, Section 70105(e) includes a specific mandate that “information obtained by the Attorney General or the Secretary under this section may not be made available to the public, including the individual’s employer.” Consistent with this requirement, information that is gathered from the use of the card, i.e. when the employee enters and leaves a port facility, must not be shared with the employer. The TWIC program was conceived and mandated by Congress to enhance the security of our nation’s seaports. For this effort to succeed, it must remain solely focused on that objective and not be used for any non-security reason. We will continue to work with TSA and the Coast Guard to ensure that this issue is addressed in the final rule.

Application of TWIC to Aviation

As the Committee is well aware, Congress has mandated that workers in the aviation sector undergo separate threat assessments, including a review of criminal histories. I should note that aviation workers are still denied access to a waiver process, rights afforded to Hazmat and maritime employees, and this double-standard should be rectified. Even though these threat assessments are in place, electronic identity cards have yet to be issued by TSA. Given the unique nature of the aviation industry, and the mobility of its workforce, an electronic biometric identification card would allow these employees to move more efficiently through the system and at the same time enhance aviation security. I know the Air Line Pilots Association (ALPA) has a particular interest in pursuing this issue and has specifically offered its assistance to Secretary Chertoff in this regard. We hope that TSA will work with our aviation unions to implement an aviation TWIC card based on the checks that have already been completed on those employees and consistent with the protections and limitations previously articulated.

Custom Problem

Before I close, I want to raise a specific problem for workers who must work in Custom Agency controlled areas. These workers are subject to separate background checks that give individual port directors great leeway in making these threat assessment decisions. In particular, a port director can use a felony conviction to disqualify someone even if that felony was committed well beyond the seven or ten year look-back period that govern maritime or aviation respectively. In fact, there have been several situations where an airport worker, after passing an extensive background check required by the aviation statute, had his or her customs credentials pulled because of a felony conviction older than 10 years. This double-standard makes no sense and has no security-based rationale. As TSA moves forward with efforts to avoid duplication of background checks, this problem and similar issues must be resolved.

Final Thoughts

As stated in the outset, transportation labor has always supported policies that will enhance the security of nation's seaports and our entire transportation system. We understand and recognize that the TWIC program is part of the federal response to terror, and we specifically support its stated purpose of preventing terrorist elements from infiltrating our transportation network. But for this program to be successful, the legitimate rights of workers must be preserved and those that pose no terrorist threat must not be denied their right to work in this industry. We look forward to working with this Committee, the TSA and the Coast Guard to meet this objective and to make improvement to this proposal.

Thank you again for the opportunity to share the views of transportation workers.

TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Airways Systems Specialists (PASS)
Sheet Metal Workers International Association (SMWIA)
Transportation · Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
*United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers International Union (USW)*
United Transportation Union (UTU)