



**ASSOCIATION OF AMERICAN RAILROADS**  
50 F Street, N.W.  
Washington, D.C. 20001-1564

**Michael J. Rush**  
Associate General Counsel

Phone: (202) 639-2503  
Fax: (202) 639-2868  
E-Mail: [mrush@aar.org](mailto:mrush@aar.org)

April 4, 2008

The Honorable Joseph H. Boardman  
Administrator  
Federal Railroad Administration  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Re: **Docket No. FRA-2006-25267**

Dear Mr. Boardman:

Enclosed is a petition for reconsideration in the above docket.

Respectfully submitted,

Michael J. Rush

BEFORE THE  
FEDERAL RAILROAD ADMINISTRATION

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DOCKET NO. FRA-2006-25267:  
RAILROAD OPERATING RULES: PROGRAM OF  
OPERATIONAL TESTS AND INSPECTIONS;  
RAILROAD OPERATING PRACTICES;  
HANDLING EQUIPMENT, SWITCHES  
AND FIXED DERAILS

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PETITION FOR RECONSIDERATION  
SUBMITTED BY  
THE ASSOCIATION OF AMERICAN RAILROADS

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Pursuant to 49 C.F.R. section 211.29, the Association of American Railroads (AAR),<sup>1</sup> on behalf of itself and its member railroads, submits this petition for reconsideration of the new operating rules regulations promulgated by FRA on February 13, 2008.<sup>2</sup> AAR seeks reconsideration of the following aspects of the new regulations. In addition, because AAR seeks reconsideration of requirements that become effective in ten days, on April 14, 2009, AAR seeks postponement of the new regulations until the issues raised in AAR's petition are resolved.

I. Implementation of the Training Requirements

FRA seemingly underestimates the process required to ensure railroad employees are properly trained on railroad operating rules. The railroads take

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<sup>1</sup>AAR is a trade association whose membership includes freight railroads that operate 72 percent of the line-haul mileage, employ 92 percent of the workers, and account for 95 percent of the freight revenue of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service.

<sup>2</sup>73 Fed. Reg. 8442.

safety and training very seriously and each year spend months preparing training materials, with final training materials typically completed mid to late fall for use in the following year.

Over 100,000 railroad employees must be trained on operating rules, including not only operating employees, but maintenance-of-way and some shop employees as well. Most of these employees are trained during the first half of each calendar year, many during the first quarter, when traditionally there is less demand for railroad services. In fact, with the first quarter of 2008 at an end, close to a majority, if not an actual majority, of railroad employees have received their scheduled training for 2008.

The only way to ensure that such a large number of employees are properly trained is to utilize a carefully structured planning process. It is for this reason that the railroads emphasized during the RSAC process that FRA implement a training schedule consistent with railroad training processes.

AAR understands that FRA originally targeted release of this rule for September or October of 2007. Had the rule been issued during that time period, training on the rule's requirements likely could have been accomplished for 2008 during the employees' normally-scheduled training, although the railroads would have had to make last-minute changes to the training curriculum. Unfortunately, publication of the rule did not take place until February 13. Nevertheless, despite the late publication of the rule, training requirements are effective as early as April 14, 2008.

Training outside the normal training cycle would be very costly. Normally, the training process costs the largest railroads over \$5 million annually. If railroads have to prepare new training materials outside the normal cycle and bring in employees for training a second time, training costs could double. The railroads would incur tens of millions of dollars in additional training costs and lost productivity that could be avoided by the modest postponement in implementation suggested below.

Training outside the normal training cycle could also be counterproductive. The trainers could have a more difficult time effectively conveying information,

possibly leading to errors in implementation of FRA requirements and the railroads' operating rules.

With this background, AAR will address training of existing employees, new employees, and supervisors. In each case, AAR urges FRA to revise its timetable for training, consistent with railroad training processes.

#### A. Training existing employees

Subsection 218.95 requires that existing employees be qualified under the new rules by January 1, 2009. In addition, paragraph 218.97(b)(3) requires that training on the good-faith challenge provisions be conducted as part of the training prescribed by section 217.11. AAR interprets these two requirements as providing that training classes must include training on the good-faith challenge rule starting April 14, 2008, and that all employees must be trained on the good-faith challenge rule, as well as the other aspects of the new regulations governing operating rules, by January 1, 2009.

This schedule is inconsistent with railroad training schedules. A January 1, 2009, deadline would require the preparation of training materials and the actual training of employees outside of the normal cycle. The industry would be faced with the problems resulting from out-of-cycle training noted above, including hastily prepared materials and the additional time employees spend in training away from revenue service, costing the industry tens of millions of dollars.<sup>3</sup>

Additionally, railroad supervisors have not yet been trained on the new rules. Obviously, employee training cannot begin until their supervisors have been trained. Thus, as a practical matter if the training deadline remains January

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<sup>3</sup>Note that the January 1, 2009, deadline is actually inconsistent with FRA's discussion of training in the preamble to the final rule. FRA states that "one full year should be sufficient time for a railroad to modify its operating rules . . . and qualify its employees." 73 Fed. Reg. 8469. The rule does not give the railroads one full year.

1, 2009, there will be no opportunity to train employees during the railroads' "slow" period.<sup>4</sup>

A July 1, 2009, deadline for training would be consistent with railroad training cycles. It would give the railroads sufficient time to prepare training materials and train most of their existing employees during their regular training cycle. Most importantly, postponement of the January 1, 2009, deadline would not be detrimental to safety. The railroads believe they have adequate programs in place today and, it should be noted, those programs comply with Emergency Order 24.

Accordingly, "July 1, 2009" should be substituted for "January 1, 2009," in the first sentence of paragraph 218.95(a)(3) and (a)(4), and "Beginning July 1, 2009," should be inserted at the beginning of paragraph 218.97(b)(3).

#### B. Training new employees

Paragraph 218.95(a)(3) requires that employees subject to this rule that are hired after April 14, 2008, must be trained under the new rules prior to performing their duties. As explained above, railroads normally complete their training materials for the next year mid to late fall of the previous year. Furthermore, supervisors are not trained under the current rules and will not be trained prior to April 14.

Under the railroads' proposal for modifying the training schedule for existing employees, training materials incorporating the new requirements will be completed by January 1, 2009, and supervisors will be trained on the new requirements by that date. Thus, the effective date for new-hire training should be January 1, 2009. Of course, today new employees are instructed under the existing rules before performing their duties and that will continue to be the case.

Consequently, AAR proposes that paragraph 218.95(a)(3) be further amended by substituting "after" for "between April 14, 2008 and," and by deleting

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<sup>4</sup>The impossibility of training employees before their supervisors are trained makes the April 14, 2008, deadline for initiating training on the good-faith challenge provision particularly problematic.

after "2009" the phrase "and all employees thereafter." Section 218.95(a)(3) would then read as follows (additions double underlined, deletions struck through):

(3) *Implementation schedule for employees, generally.* Each employee performing duties subject to the requirements in this subpart shall be initially qualified prior to ~~January~~ July 1, 2009. Employees hired ~~between April 14, 2008 and~~ after January 1, 2009, ~~and all employees thereafter~~ required to perform duties subject to the requirements in this subpart shall be qualified before performing duties subject to the requirements in this subpart.

### C. Supervisor Training

Section 217.9 establishes a July 1, 2008, deadline for the training of railroad officers. Supervisors of operating employees are trained today. However, the July 1 deadline does not give the railroads sufficient time to train supervisors on the new requirements.

As explained above, the railroads do not complete their training materials for the next year before September or October of the current year. The rule requires that railroad supervisors be trained before the completion of the training materials. There is no need for the chaotic rush that would be necessary to train supervisors by July 1, a mere three months away.

Training of supervisors involves more than just learning of the rules. It includes field testing. Leaving aside the normal training cycle, it is unrealistic for FRA to expect that training materials will be prepared and that supervisors will be instructed and tested on the new rules by July 1.

Recordkeeping is particularly problematic. The railroads will want to demonstrate compliance with the supervisor training requirements through written or electronic records and AAR expects that FRA would share that goal. Since this is the first time there will be regulatory training requirements for supervisors, the railroads generally do not have a recordkeeping system in place for regulatory compliance purposes. Regardless of the time needed to prepare training materials and conduct the training, should an FRA inspector question whether a supervisor

has been given adequate training after July 1 and the railroad assert that the training took place before the establishment of a recordkeeping system, FRA and a railroad could be reliant on oral testimony, which could well result in controversial citations.

A six-month postponement of the supervisor training requirement, to January 1, 2009, would be consistent with AAR's suggestion that most of the training for railroad employees take place during the first half of 2009, during the railroads' normal training cycle. Thus, AAR suggests that "January 1, 2009," be substituted for "July 1, 2008," in subsection 217.9(a).

#### D. Establishing a Program of Operational Tests

Subsection 217.9(c) requires that railroads establish a program of operational tests, addressing rules most likely to be implicated in accidents based on periodic reviews. This requirement takes effect July 1. While some railroads have been using formal periodic reviews, others have not. Drafting and implementing a program implementing the specific review requirements of the program will take some time for most railroads.

Most importantly, AAR is unaware of any railroad having a recordkeeping system in place to implement and track compliance with subsection 217.9(c).<sup>5</sup> The railroads likely will establish electronic recordkeeping systems. Establishing this program and instituting a recordkeeping system will take some time. Three months is clearly inadequate.

It makes sense to tie the effective date for the revisions to subsection 217.9 to the implementation date for supervisor training, which AAR suggests above should be January 1, 2009. Subsection 217.9(c) requires management to undertake analyses which require a thorough understanding of railroad operating rules. Accordingly, AAR suggests that "January 1, 2009," be substituted for "July 1, 2009," each place it appears in subsection 217.9.

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<sup>5</sup>These requirements are new for the industry. With respect to establishing a program of operational tests, this rule goes far beyond the requirements of Emergency Order 24.

## II. Shove Lights

Common in the industry is the use of shove lights in rail yards. Shove lights are used at locations where comparatively lengthy shove movements are required to move freight cars onto tracks (“departure” or “forwarding” tracks) to build outbound trains. Shove lights work as follows. The departure track is bonded a specified distance from the end. A member of the train crew shoving the cars to the track is stationed at the entry end of the departure track where the shove light can be observed. When the cars shunt the bonded track, the shove light goes off or changes color, depending on the setup at the location, indicating the cars have reached the bonded track. Knowing the location of the cars on the departure track, the crew can then safely complete the shove without fouling the switch at the far end of the track. At some locations, instead of shove lights radio messages are generated when the cars reach the bonded track.

At each location where shove lights or radios are used, specific operating rules govern their use. For example, employees are instructed on where to position themselves to view shove lights and stopping distances once shove lights indicate equipment is on the departure track.

Arguably, this rule would prohibit the use of shove lights or radios because of the requirement that point protection provided during shoving movements must be equivalent to direct visual determination. Since shove lights or radios technically provide protection only for the length of the bonded track, not the entire length of the departure track, they arguably do not provide the equivalent of direct visual observation.

Shove lights have been used for over thirty years and there is no evidence that their use has caused accidents or injuries. On the other hand, if shove lights and radios were prohibited, there would be an increased risk of injuries. Employees would have to undertake the riding of long shove moves and mount and dismount equipment in circumstances where they do not have to do so today, sometimes in inclement weather conditions and sometimes where clearances are very close. Or employees would have to walk along tracks where they do not have to do so today, again sometimes in inclement weather, increasing the risk of slips and falls or the fouling of adjacent track.

The record does not warrant a prohibition on the use of shove lights or radios. If FRA believes the issue warrants further study, the industry would cooperate, perhaps in collecting safety data. In the meantime, subsection 218.99(e) should be amended by adding a new subsection (5) as follows:

(5) Movements utilizing shove lights or radio signals that protect the end of the track.

Alternatively, FRA could determine that the use of shove lights or radios in combination with operating and safety rules compliance and real time electronic-based inventory control provide a technological equivalent to direct visual observation that the track is clear.

### III. Point Protection for Remote Control Locomotives

Subsection 218.99(c)(2) provides that if technology is relied on to provide pull-out protection by preventing the movement from exceeding the limits of a remote-control zone, the technology must be demonstrated to be failsafe or provide suitable redundancy. This requirement is not objectionable.

However, in the preamble, FRA states that when determining if such technology is acceptable, “49 CFR part 236, subpart H . . . contains appropriate safety analysis principles.”<sup>6</sup> A requirement to use subpart H would be objectionable; it is unnecessary to apply the complex procedures of subpart H. AAR understands that the preamble reference to subpart H was not meant to be a requirement. Rather, the preamble reference was meant to illustrate one way of determining if a technology is acceptable. AAR would appreciate FRA confirming AAR’s understanding of its intent.

### IV. Good-Faith Challenge Procedures

FRA has departed from past precedent and issued a good-faith challenge provision which could unnecessarily interfere with railroad operations. Previously, FRA promulgated good-faith challenge regulations for roadway workers that are clear and easily implemented. The roadway worker regulations

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<sup>6</sup>73 Fed. Reg. 8479.

