



April 11, 2008

Brotherhood of Railroad Signalmen
W. Dan Pickett
President

Brotherhood of Maintenance of Way Employees Division-IBT
Freddie N. Simpson
President

United Transportation Union
Malcolm B. Futhey
President

American Train Dispatchers Association
F. Leo McCann
President

Brotherhood of Locomotive Engineers and Trainmen
Edward W. Rodzwicz
President

Brotherhood Railway Carmen Division-TCU
Richard A. Johnson
President

Docket Clerk
DOT Central Docket Management Facility
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue, Southeast
Washington, DC 20590

Re: FRA-2006-25267

Dear Docket Clerk:

Enclosed herewith please find our response to the Petition for Reconsideration filed by the Association of American Railroads on April 4, 2008, in the above-referenced matter, which we are filing jointly. FRA's most serious consideration is greatly appreciated.

Respectfully submitted,

F. Leo McCann
ATDA President

Edward W. Rodzwicz
BLET President

Freddie N. Simpson
BMWED President

Richard A. Johnson
BRC President

W. Dan Pickett
BRS President

Malcolm B. Futhey
UTU President

enclosure

**BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION**

In the Matter of:

Docket No. FRA-2006-25267

**Railroad Operating Rules: Program of Operational Tests and Inspections;
Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails**

**RESPONSE OF ATDA, BLET, BMWED, BRC, BRS, AND UTU TO
PETITION FOR RECONSIDERATION BY
ASSOCIATION OF AMERICAN RAILROADS**

I. INTRODUCTION

On February 13, 2008, the Federal Railroad Administration (“FRA”) published a Final Rule in this matter, which became effective on April 14, 2008, federalizing operating procedures pertaining to handling of switches and fixed derails, point protection during shoving movements, and leaving cars in the foul (collectively, “Subpart F” because the Final Rule created Subpart F of Part 218 of Title 49 of the Code of Federal Regulations). 73 FR 8442. On April 4, 2008, the Association of American Railroads (“AAR”) filed a Petition for Reconsideration in the above-referenced matter, in which AAR sought a variety of changes to and clarifications concerning the Final Rule. *See* FRA-2006-25267-0025.1 (“Petition”).

This response to AAR’s Petition is jointly filed by: the American Train Dispatchers Association (“ATDA”); the Brotherhood of Locomotive Engineers and Trainmen, a division of the Rail Conference of the International Brotherhood of Teamsters (“BLET”); the Brotherhood of Maintenance of Way Employees Division of the Rail Conference of the International Brotherhood of Teamsters (“BMWED”); the Brotherhood of Railway Carmen Division of the Transportation•Communications International Union (“BRC”); the Brotherhood of Railroad Signalmen (“BRS”); and the United Transportation Union (“UTU”) (hereinafter collectively referred to as “Petitioners”). We file in our capacity as representatives of over 140,000 railroad workers engaged in train and engine service, train dispatching operations, equipment inspection, maintenance and repair, roadway worker activities, and signal construction, maintenance and repair. This matter is one of significant concern for our membership, and some of AAR’s proposals would materially impact our membership. Accordingly, we respectfully request that FRA address those AAR issues to which we respond herein with due consideration for our position, as set forth below.

II. AAR REQUESTS FOR RECONSIDERATION THAT SHOULD BE DENIED

We are compelled to comment on three of the issues raised in AAR's Petition. AAR seeks an absolute exception from the point protection requirements of Section 218.99(e) for movements utilizing "shove lights." Likewise, AAR requests that FRA lower the safety standard that must be met for "pull-out protection" for remote control locomotive movements. Lastly, AAR proposes the elimination of the Good Faith Challenge procedures set forth in Section 218.97 or, in the alternative, rendering them totally ineffectual. Each of these requests for reconsideration — if granted — would significantly undermine both the intent of the Final Rule and the level of safety that the Final Rule was intended to promote.

A. Shove Lights.

In this Final Rule, FRA uses the value of Section 218.99(b)(3)(i) "... point protection shall be provided by a crewmember or other qualified employee by ... visually determining that the track is clear" as the cornerstone of its discussion of point protection. Labor fully supported this value throughout the discussions in the Working Group and strongly agrees with FRA's comments in the preamble:

In addition, this final rule's required determination that the track is clear prior to initiating the shoving or pushing movement should substantially reduce the likelihood of any collisions.

73 FR 8476.

The continued use of shove lights in the same manner as they are utilized today is faithful to this core safety principle only if the system provides a reliable determination that the track is clear. A shove light system can do so only up to the physical limits of the electronic protection circuits. For this reason, FRA requires that — in the absence of circuitry on the entire track — "a visual determination is made that the track is clear to the beginning of the circuited section of the track." Id. To provide otherwise would be contrary to the intent of the point protection requirement.

With or without electronic shove light circuits, a visual determination that the track is clear is already a part of every safe switching process in use today. Railroads use a variety of techniques today to make that visual determination from simply looking at the track to riding the locomotive from one end to the other in poor lighting conditions or inclement weather. If railroads would like to use an electronic equivalent to comply with these common sense practices by adding additional indicator circuits, this Final Rule provides that option.

Weakening the requirement for a visual determination simply because there are a few feet of electronic circuitry at the end of the track is unwarranted and unsafe. The existing language in the Final Rule addressing the use of shove lights allows the continuation of existing practices and requires no additional action or circuits. This AAR petition requesting a different value for required point protection in tracks that have only a short distance of indicator circuits should be rejected because the language contained in the Final Rule provides an appropriate balance between safety and efficiency.

B. Point Protection for Remote Control Locomotives.

AAR concedes that Section 218.99(c)(2) requires that any technology relied upon, whether primarily or as a safeguard, to provide pull-out protection by preventing the movement from exceeding the limits of a remote control zone, shall be demonstrated either to be fail-safe or to provide suitable redundancy to prevent unsafe failure. Petition at p. 8. AAR also notes FRA's reference to Subpart H of Part 236 in the Preamble to the Final Rule, but requests that FRA "confirm[] AAR's understanding" that the reference to Subpart H was for illustrative purposes only. The context of FRA's reference — in the Section-by-Section Analysis for Section 218.99 — is as follows:

Paragraph (c)(2) adds another requirement for remote control movements that was suggested in the preamble of the NPRM, but was not part of the proposed regulatory text. At the end of the section-by-section analysis for this section in the NPRM, FRA raised concerns regarding the reliance on technology used to contain remote control operations within zones, where remote control operators cannot directly observe the far end of the pull-out movement. Such technology is used to prevent incursions into other rail operations. The NPRM noted that "[a]lthough the rule text does not contain language on this point, FRA requests comment on whether such technology should be required to fail safe in design or at least include redundant safeguards." FRA did not receive any comments on this issue and has decided to act to address the concern. The safety concern is that without a specific requirement some railroads might try to implement technology that is not demonstrated to be safe and therefore provides a false sense of protection to remote control crews. Without some kind of standard for concluding that the technology has either been demonstrated to be failsafe or demonstrated to provide suitable redundancy to prevent unsafe failure, a remote control crew could unreasonably conclude that the technology is safe enough to stop a movement when such reliance is unfounded. Given this inevitable reliance, failsafe or redundant technology is required to prevent collisions and derailments at the perimeter of these zones. The pull-out protection technology would not likely be relied upon as the typical method of stopping the movement from leaving the zone, but might be used to expedite a movement where the crew would ordinarily be slowed down by having to count cars and estimate the length of the movement in relation to the configuration of the facility. When determining whether the technology, such as transponders backed up by a global positioning system (GPS) with a facility database is acceptable, FRA finds that 49 CFR part 236, subpart H and the corresponding appendix C to part 236 ("Safety Assurance Criteria and Processes") contains appropriate safety analysis principles.

73 FR 8479.¹

¹ We respectfully point out that FRA is in error in stating that no comments were received in response to the NPRM concerning this issue. BLET specifically responded to FRA's request for comments on this subject as follows:

BLET believes that certain electronic technologies used to "fence" remote control zones can be adapted to provide some sort of signaling that could qualify as equivalent to human point protection. Those technologies should at least be fail-safe, and the rule should specifically so state. Further, to the extent that any of these technologies are not currently in use, they meet the definitional criteria for processor-based

The purpose of 49 CFR Part 236, Subpart H is to promote the safe operation of processor-based signal and train control systems, subsystems, and components that are safety-critical. Because the safety of developing technologies must be considered paramount, these requirements should not be considered overly complex or burdensome. Roadway workers, train crewmembers, and the public trust these systems with their lives.

A system that replaces the human factor in checking that a switch is properly lined or a track is clear, has the potential to make the rail environment safer. However, to arrive at that potential, the development, implementation, and maintenance of any such systems must include the appropriate technical and risk assessment and should be guided by the safety principles contained in 49 CFR Part 236, Subpart H.

Subpart H is a carefully crafted product that came together after years of development by the RSAC stakeholders. However, Subpart H cannot fulfill its role in maintaining and enhancing railroad industry safety unless it is considered a cornerstone of our next generation technologies. It is our concern that AAR's request on this issue may result in the erosion of the strong foundation Subpart H provides.

We reiterate the position set forth in BLET's NPRM comments that remote control zone pull-out protection technology is, by definition, a train control system. If it is a processor-based system and otherwise meets the requirements of Part 236, Subpart H, it is covered by that rule, whether FRA explicitly states so in Section 218.99 or not. Our understanding of the Preamble reference is that it applies to those technologies that do not meet the Subpart H threshold, which still must be demonstrated to be fail-safe or to provide suitable redundancy to prevent unsafe failure. Otherwise stated, if a particular technology is not subject to the requirements of Subpart H, it must be demonstrated to be fail-safe or to provide suitable redundancy to prevent unsafe failure and Subpart H **may** be used for purposes of demonstration. However, if the technology is within the scope of Subpart H, then it **must** comply with the Subpart H requirements.

C. Good Faith Challenge Procedures.

AAR's Petition continues its frontal assault on the requirement that railroad workers subject to Subpart F be protected by means of a Good Faith Challenge ("GFC") process. As we stated in our Petition for Reconsideration, the GFC was the single most contentious and controversial issue discussed by the Working Group, which was recognized by FRA in the Preamble to the Final Rule. AAR insists, yet again, that a GFC is unnecessary, claiming

FRA does not need to have a regulatory good-faith challenge procedure to afford an employee the ability to refuse to work because the employee is being asked to violate a federal regulation. Employees have statutory protection against retaliation for refusing to comply with a directive to violate a federal regulation. In light of the statutory protection, it is puzzling why FRA is promulgating a regulation which has the potential to inter-

signal and train control systems and, indeed, should be subject to Part 236, Subpart H.

See FRA-2006-25267-0013 at p. 27.

fere significantly with railroad operations. Actually, there is no apparent justification for *any* good-faith challenge regulation.

Petition at pp. 9–10 (footnote omitted) (emphasis supplied).

AAR’s argument misconstrues both the Final Rule and the law. Contrary to AAR’s claim, the GFC requirements set forth in Section 218.97 in no way “afford an employee the ability to refuse to work.” Rather, the GFC provides recourse only when a worker makes a good faith determination that the directive(s) he/she has received would cause violation of either a provision of Subpart F or an operating rule implementing a Subpart F requirement. 49 CFR § 218.97(a).

At that point, performance of the challenged task is temporarily suspended only for the worker who made the challenge, unless another worker given the same directive during the pendency of the challenge makes a separate challenge. 49 CFR §§ 218.97(c)(2), 218.97(c)(4). The railroad has an explicit right to require any worker who makes a challenge to perform tasks unrelated to the challenge until it is resolved. 49 CFR § 218.97(c)(3). Furthermore, if the challenge is not resolved by the worker and the supervisor who issued the initial directive — and the mandatory review process does not support the challenge or provide an alternative means of completing the task — the worker may be required to perform the task as originally directed and has no right “to refuse to work.” 49 CFR § 218.97(d)(2).

AAR’s argument is premised on last year’s amendment of the Federal Rail Safety Act that provides, in part, that a railroad “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 ... refus[al] to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security.” 49 U.S.C. § 20109(a)(2). However, this provision addresses only the potential consequence of a willful violation of a FRA regulation, not of an associated operating rule, and pertains only to disciplinary and other employment-related sanctions imposed by a railroad.

Someone who willfully violates a federal rail safety statute or a FRA regulation also faces one of two possible forms of enforcement from FRA itself. Subpart D of 49 CFR Part 209 provides a process for FRA to identify “railroad employees, including managers and supervisors, and agents of railroads who have demonstrated their unfitness to perform the safety-sensitive functions described in § 209.303 by violating any rule, regulation, order or standard prescribed by FRA.” 49 CFR § 209.301(b). Those “who evidence such unfitness may be disqualified, under specified terms and conditions, temporarily or permanently, from performing such safety-sensitive functions.” Id.

FRA also may impose a civil penalty upon anyone found to have willfully violated many of its regulations, including Subpart F.² In pursuing this avenue of remedy, however, FRA is constrained by another provision of federal law:

² On March 31, 2008, we jointly petitioned for reconsideration of this aspect of the Final Rule, which petition currently is pending. *See* FRA-2006-25267-0024.1.

49 U.S.C. § 21304. Willfulness requirement for penalties against individuals

A civil penalty under this subchapter may be imposed against an individual only for a willful violation. *An individual is deemed not to have committed a willful violation if the individual was following the direct order of a railroad carrier official or supervisor under protest communicated to the official or supervisor. The individual is entitled to document the protest.*

(emphasis added)

Even though this legal protection has existed for nearly a decade and a half, almost no railroads have codified this protection in their operating rules and practices. The GFC process, generally, serves as a vehicle by which a railroad worker who has determined in good faith that he/she is being ordered to violate either a Subpart F requirement or an operating rule that implements a Subpart F requirement with the opportunity to avoid the potential for a civil penalty for willfully violating the Final Rule. Furthermore, Section 218.97(d)(3) — at long last — mandates creation of a mechanism by which the worker can “document the protest” to participate in such a violation, as FRA expressly noted in its Section-by-Section Analysis of the Final Rule. *See* 73 FR 8474. Thus, Section 218.97 affords a means by which a railroad worker can insulate himself/herself from individual liability for a FRA-imposed civil penalty; a subject not addressed by 49 U.S.C. Section 20109.

AAR’s position also is self-contradictory in at least one material respect. On the one hand — AAR contends — there is no “record” establishing either that some railroad supervisors permit occasional violations of FRA regulations and associated operating rules or that they direct workers under their jurisdiction to engage in violative conduct. Petition at p. 10. At the same time, AAR complains that the GFC requirements are “intrusive” and would “unnecessarily burden[] railroad operations.” Id.

First of all, there could be no record of such managerial conduct prior to April 14 of this year, because the Subpart F procedures had not been “federalized” until that date. Therefore, there could have been no exercise of 49 U.S.C. § 21304 rights that would lead to the creation of such a record. Moreover, if — as AAR implies — the asserted lack of a “record” means that supervisors neither permit, nor encourage, nor direct a violation of FRA regulations and/or associated operating rules, then there will be no burden whatsoever to railroad operations, because there would be no basis for a GFC.

Indeed, the only way the GFC process included in the Final Rule could possibly prove to be a burden to railroad operations is if either (1) the operating rules associated with the Subpart F practices are so vague as to undermine the intent of the applicable regulation, or (2) supervisors attempt to cajole or coerce their subordinates to “shortcut” clear and narrowly-drawn operating rules as a means of artificially increasing productivity. Under either of these scenarios, there could be a sufficient number of GFCs to burden operations; however, this would be — in our view — a **necessary** burden in order for the safety goals of Subpart F to be realized.

Alternatively, AAR argues, FRA should simply substitute the Roadway Worker GFC provisions set forth at 49 CFR Sections 214.311 and 214.313 in place of Section 218.97. There are two important reasons FRA should not do so. One is the fact that the vast majority of indus-

try representatives who participated in the RSAC Railroad Operating Rules Working Group have been hostile to the GFC concept since it first was proposed, and AAR continues to argue in its Petition that there should be no provision whatsoever. This starkly contrasts with the fact that the GFC process included in Part 214 was consensus-based. Given the composition of the Working Group, the continuing rancor and intransigence on the part of most industry representatives underscores the command and control philosophy of railroad supervision as it pertains to the Subpart F operating procedures, as well as the absolute need for a clearly defined GFC process.

The other reason is that the difference in purpose for the promulgation of Part 214 and Subpart F justify the modestly more defined GFC set forth in Section 218.97. When FRA published the 1996 Final Rule pertaining to Part 214, FRA stated that it was “issuing rules *for the protection of railroad employees* working on or near railroad tracks.” 61 FR 65959 (emphasis added). However, when FRA published the Final Rule with respect to Subpart F, it stated one primary intent as being “establish[ing] *greater accountability on the part of railroad ... employees* for compliance with those railroad operating rules that are responsible for approximately half of the train accidents related to human factors.” 73 FR 8442 (emphasis added).

Thus, Part 214 was intended to be protective in nature, while Subpart F was meant to provide FRA with additional punitive tools that apply to individual workers. Given the 49 U.S.C. Section 21304 limitations on FRA’s ability to impose civil penalties, it is both appropriate and necessary that the Subpart F GFC process be harmonized with railroad workers’ rights under Section 21304. In this circumstance, AAR’s proposed alternative clearly is insufficient, and we most strongly urge FRA to reject AAR’s request with respect to GFC in its entirety.

III. CONCLUSION


First, concerning AAR’s request pertaining to shove lights, we believe the Final Rule is both consistent with the current industry best practice and provides a level of safety equivalent to that provided by visual observation. AAR seeks to institutionalize a practice that is dangerous and will, in our opinion, lead to an increase of accidents, incidents and injuries; and is contrary to the intent of the Final Rule.

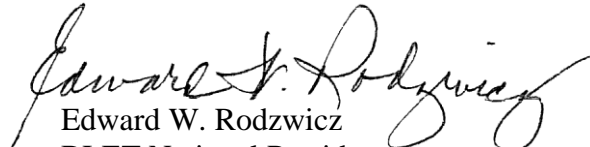
Further, regarding AAR’s position concerning remote control locomotive point protection, we incorporate by reference herein the position of the BLET taken in response to FRA’s request for comments on this subject in the NPRM. *See* FRA-2006-25267-0013 at p. 27. The independent application of Part 236, Subpart H cannot be thwarted via interpretation of the preamble to a rule addressing a different subject. Accordingly, any remote control locomotive point protection technology that falls within the scope of Subpart H must meet its requirements.


Finally, with respect to AAR’s contentions on the subject of the Good Faith Challenge process set forth in Section 218.97, AAR’s reliance on the amendments to 49 U.S.C. Section 20109 are misplaced. Moreover, AAR’s proposal that the current Good Faith Challenge procedures included in FRA’s Roadway Worker Protection Rule be substituted for Section 218.97 fails to account for both the different purposes of the two rules and the requirements of 49 U.S.C. Section 21304.

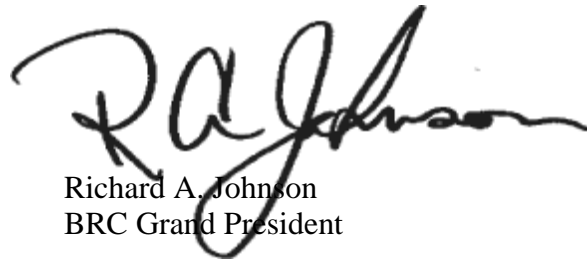
Petitioners most sincerely appreciate FRA's commitment to ensuring the safety of our members and of all railroad workers. Moreover, we commend FRA's efforts via the RSAC process in this and other important matters. For the reasons stated herein, we respectfully request that FRA deny AAR's requests as to those issues we have addressed.


Respectfully submitted,


F. Leo McCann
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