



April 10, 2020
(Via online at www.regulations.gov)

Docket Operations Facility
U. S. Department of Transportation
1200 New Jersey Avenue, SE, W12-140
Washington, DC 20590

Re: Docket No. FRA-2020-0002

**Comments of the
American Train Dispatchers Association (ATDA)
Brotherhood of Locomotive Engineers and Trainmen (BLET)
Brotherhood of Maintenance of Way Employees Division (BMWED)
Brotherhood of Railroad Signalmen (BRS)
Brotherhood Railway Carmen Division (TCU)
Sheet Metal, Air, Rail and Transportation (SMART)**

These comments are submitted in response to the March 25, 2020 decision by the Federal Railroad Administration (“FRA”) granting the Association of American Railroads (“AAR”), the American Short Line and Regional Railroad Associations (“ASLRRA”) and the American Public Transportation Association (“APTA”) (collectively “Associations”) dozens of waivers of railroad safety regulations, in response to the Associations’ joint petition for unprecedented regulatory relief during the Coronavirus (“COVID-19”) pandemic. For the most part, these waivers extend various regulatory deadlines for compliance by sixty (60) days.

The railroad Labor Organizations identified above (“Labor Organizations”) are the collective bargaining representatives for the vast majority of railroad industry workers engaged in train operations, train dispatching, signal, maintenance of way and mechanical maintenance, inspection, testing, and repair on passenger and freight railroads throughout the United States. The Labor Organizations and their individual and collective memberships have a direct safety interest in FRA’s decision. The classes or crafts of employees represented by the Labor Organizations include those who will be directly affected by the waiver of the safety regulations discussed in these comments. The Labor Organizations appreciate the opportunity to comment; however, we stress that these comments only summarize our most significant concerns. Between the massive scope of the Associations’ petition (and FRA’s relief), and notice and comment periods normally allowed for waivers being suspended for Emergency Relief Docket matters, we have struggled to provide the below comments even on this expedited timeline.

The Association's initial petition was filed March 21, 2020, and FRA's decision to grant virtually all of the relief requested was published on March 25, 2020, a mere four days later. No one should think that these comments—coming more than two weeks after the initial relief was granted—are moot. FRA has expressly “reserve[d] the right to amend or revoke this waiver upon receipt of information pertaining to the safety of railroad operations, or in the event of non-compliance with any condition of this waiver.” FRA-2020-0002-0025 (“Waiver”) at 16. We believe that several amendments, which we outline below, are appropriate, if not compelled, in the interest of railroad safety.

A hearing has been requested by two members of the Labor Organizations (SMART-TD and BLET). FRA-2020-0002-0028, -0029. The remaining Labor Organizations now join in this request. The depth of public health measures that continue to be imposed already have led to additional requests for further relief by one or more of the Associations. *See, e.g.*, FRA-2020-0002-0030, -0032, -0034, -0036, -0038, -0039, -0047. And we believe it likely that the duration of the pandemic will lead to waivers being extended beyond the 60-day period already granted.

There are several general points the Labor Organizations would like to make first. The blanket nature of both the Association's requests and FRA's response are troubling and appear—on the carriers' part—to be opportunistic at best, reckless and dangerous at worst. The Labor Organizations have, in the past, expressed concerns about granting waivers to non-regulated entities (such as associations) due to a lack of specificity. Granting such waiver requests places FRA in an almost impossible situation when it comes to oversight of the conditions contained in the waiver. In the instant case, over 80 regulations were waived, in some form or fashion, after a mere four days after the petition was filed. FRA is now presented with a “whack-a-mole” problem, because the only circumstance under which the Agency can even become aware of any safety issues arising due to the conditional waiver, is after a problem has already occurred. This allows any number of railroads to engage in *ad hoc* compliance with safety regulations whenever a railroad finds it convenient—or not.

As a general matter, the Labor Organizations understand the rail carriers' novel challenge of trying to comply with the guidance published by the Centers for Disease Control and Prevention (“CDC”) and CDC recommendations for social distancing during the pandemic; indeed, labor and management are in constant communication regarding establishing measures that protect the health of our members, and dealing with the inevitable breakdowns in such measures. We also understand that certain waivers can help to ensure the guidance issued by CDC is followed, and we fully support such waivers. In short, we understand that these are not normal times. However, we want to make a clear point that the employees who are charged with ensuring freight and passenger trains move passengers and goods from point to point must be able to do so with safety rules and regulations as key underpinnings of the rail system.

The Associations have predicated their requests for relief on an unprecedented scale on an “anticipat[ion] that staffing levels will be significantly affected as fewer railroad employees and contractors will be available to perform necessary duties *due to quarantine, illnesses, and isolation directives*.” FRA-2020-0002-0022 at 1 (emphasis added); *see, also, id.* at 2, 3, 5, 8, 9, and 10. FRA acknowledged this concern as the basis for the requested relief. Waiver at 2–3.

Indeed, the first general condition of relief as stated in the March 25 waiver is that “the relief granted in this letter is *generally conditioned on the existence of workforce shortages and other constraints as a direct result of the impacts of the COVID-19 pandemic.*”¹ *Id.* at 3 (emphasis added).

However, Class I Freight railroads have been furloughing operating employees for quite some time before COVID-19 due to their dogmatic adherence to Precision Scheduled Railroading (“PSR”), an operational philosophy that abhors both jobs and safety regulations. As of the end of February, and based on data reported to the U.S. Surface Transportation Board (“STB”) by Class I railroads on Form M-350, the unemployment rates in the six classifications of railroad employees—as compared to September 2016—are as follows:

STB Group	Description	Workforce Reduction	Unemp. Rate
L 100	Executives, officials, and staff assistants	1,569	17.16%
L 200	Professional and administrative	2,527	18.94%
L 300	Maintenance of way and structures	5,575	15.54%
L 400	Maintenance of equipment and stores	6,114	21.62%
L 500	Transportation (other than train and engine)	687	11.44%
L 600	Transportation (train and engine)	8,380	14.01%
Total	All Groups	24,852	16.30%

As a result of the more recent prevalence of excessively long trains—a problem that SMART-TD and BLET has brought to FRA’s attention on numerous occasions—employment on the four largest Class I railroads in STB Group 600, comprised of train and engine service employees, has plummeted even further of late:

Class I Railroad	Compared to	Workforce Reduction	Unemp. Rate
BNSF Railway	December 2018	3,756	19.13%
CSX Transportation, Inc.	May 2017	2,611	26.73%
Norfolk Southern Railway	February 2019	2,970	25.70%
Union Pacific Railroad	November 2018	3,786	20.25%

In addition to the above, we are aware of continuing, and broadening, furloughs nearly across the board on Class I and Class II railroads. Therefore, when the STB releases headcounts for March, which are due on or about April 20, we anticipate that the above unemployment rates will continue to rise sharply. We also believe they will continue to do so in the coming months.

The Labor Organizations do not cite the above data to deny that a legitimate COVID-created workforce shortage can arise. To the contrary, we are aware that service on one of Amtrak’s

¹ Certain elements of relief, as specified in the waiver, have been granted that are not conditioned on COVID-caused shortages and constraints. To the extent necessary, these elements of relief are addressed in the below comments.

long-distance routes that travels through Colorado was interrupted for a few days recently because of insufficient personnel caused by COVID-related quarantines. However, we are deeply concerned of the potential for fabricated shortages that are blamed on COVID, but actually reflect non-COVID-related furloughs.

Therefore, FRA must ensure that all shortages claimed to be the basis for relief from rail safety regulations actually are COVID-related, and that there are no furloughed employees whose recall can cure the shortage. In this regard, General Condition of Relief (“GCR”) No. 2.c.iii of FRA’s waiver already requires each railroad affording itself any of the relief contained in the waiver must report—on a weekly basis, and for each of the railroad’s territories, subdivisions and yards—a “List of manpower shortages or other conditions necessitating the use of the waiver.” Waiver at 3–4.

We urge FRA, in the strongest terms, to exercise vigilant oversight of railroad claims of COVID-related workforce shortages. As an immediate step, FRA should amend GCR No. 2 to require that each railroad include, in its weekly report, the number of currently furloughed employees in each craft or class impacted by a waiver of which the railroad availed itself at a particular location. This amendment should be made retroactive, to encompass all reports filed under the terms of GCR No. 2. FRA also should amend the waiver to require that these reports be provided electronically to the chief executives of the Labor Organizations as well. And, going forward, FRA should prosecute each instance of waiver relief for an asserted COVID-related workforce shortage as a willful violation if the railroad has any currently furloughed employees in a craft or class impacted by the waiver who could have worked at that location if recalled.

Without retreating from the above, there are several specific sections of the conditional waiver granted by FRA that the Labor Organizations would like to address.

Part 213 Track Safety Standards

Preliminarily, we would note—and we would think it is beyond disputing—that the American railroad system is essential for the timely transportation of medical supplies and food, and to otherwise fulfill the various transportation needs of our nation during these troubled times. For these critically necessary goods to be moved to where they are needed the most, the railroad infrastructure must be in the safest condition possible. Never in our nation’s history has this been so imperative. The American people need to know the tracks are safe. If the tracks are not safe, trains could derail, causing undue delay in the transportation of these vital goods needed to sustain life. Furthermore, derailments will result in a surge of people working very closely to one another, thereby precluding any capability to observe CDC-recommended guidelines regarding social distancing to abate the spread of COVID-19 within the “Essential employee” pool, leaving a workforce shortage as a result of the COVID-19 FRA waiver and not of the virus itself.

The Associations have requested temporary relief for their members from the track inspection time interval dependent requirements of § 213.233 for main tracks including sidings as follows:

- Part 213.233(c)

1. The railroad track owner must first determine that no qualified track inspector or qualified contractor and/or manager as defined in § 213.7 is available.
2. When no qualified track inspector or qualified contractor and/or manager as defined in §213.7 is available, the waiver granted frequencies apply to the § 213.233(c) table.

Class of Track	Type of track	Required frequency	Waiver granted frequencies as of March 25, 2020
Excepted track and Class 1, 2, and 3 track	Main track and sidings	Weekly with at least 3 calendar days interval between inspections, or before use, if the track is used less than once a week, or twice weekly with at least 1 calendar day interval between inspections, if the track carries passenger trains or more than 10 million gross tons of traffic during the preceding calendar year.	Every two (2) weeks with at least a six (6) calendar day interval between inspections, or Before use, if the track is used less than once a week, or Weekly with at least a five (5) calendar day interval between inspections, if the track carries passenger trains or more than 10 million gross tons of traffic during the preceding calendar year.
Excepted track and Class 1, 2, and 3 track	Other than main track and sidings	Monthly with at least 20 calendar days interval between inspections.	Every six (6) weeks with at least a 20 calendar day interval between inspections.

Class 4 and 5 track		Twice weekly with at least 1 calendar day interval between inspections.	Weekly with at least a five (5) calendar day interval between inspections.
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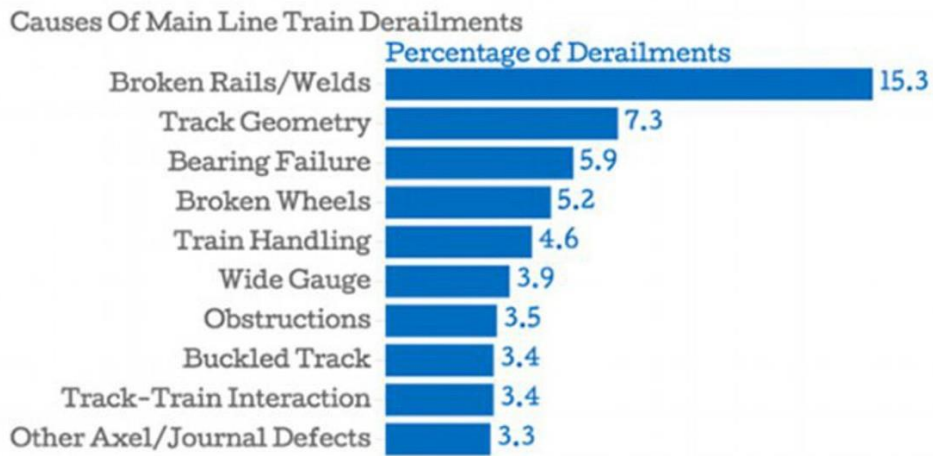
This heavy reduction in manual visual inspections will lead to an increased risk. Any railroad operating at this increased risk factor should be required to lower its track speeds by a **minimum** of one-track class in order to maintain a somewhat similar level of safety as intended by the Track Safety Standards.

3. § 213.234(b) – During periods of significant workforce shortages as a result of COVID-19 rail carriers are permitted to reschedule the regulatory required Automated track inspections for up to 60 days beyond the inspection due date.

Any extension past the regulatory required due date will lead to an increased risk. Any Railroad operating at this increased risk factor should be required to lower its track speeds by a **minimum** of one-track class in order to maintain a somewhat similar level of safety as intended by the Track Safety Standards.

4. § 213.237 - During periods of significant workforce shortages as a result of COVID-19 rail carriers are permitted to reschedule the regulatory required internal rail inspection of for up to 60 days beyond the inspection due date.

This is particularly troubling, as FRA’s own data show broken rails and welds remain more than twice as likely to be the cause of a main line train derailment as any other cause. Any railroad operating at this increased risk factor should be required to lower its track speeds to **10 MPH** in order to maintain a somewhat similar level of safety as intended by the Track Safety Standards.



Made with Chartbuilder

Data: Federal Railroad Administration

5. § 213.9(b), - - During periods of significant workforce shortages as a result of the COVID-19 pandemic that limit the rail carrier’s ability to perform the inspection within a territory, subdivision or area of track within the timeframes required under § 213.9(b), the timeframe to continue Class I speeds is modified as follows:

If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of Part 213. However, if the segment of track does not at least meet the requirements for Class 1 track, operations may continue at Class 1 speeds for a period of not more than 60 days without bringing the track into compliance, under the authority of a person designated under § 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safely continue and subject to any limiting conditions specified by such person.

The ability to operate at below Class 1 speeds for a period of 30 days already exists within the regulation. The Labor Organizations are deeply concerned about the risks associated with doubling the amount of time trains can operate. Therefore, the § 213.9(b) portion of the waiver should be rescinded in its entirety.

The waiver requires that railroad track owners maintain a record of each instance the waivers of §§ 213.233(c), 213.234, 213.237 and 213.9(b) is implemented for a period of one year, and must be submitted to FRA in an Excel file format upon the cessation of the waiver. Waiver at 4–6. The record must contain seven (7) separate items of information needed to track when the inspection was required and when it actually was performed.

Given that these waivers are dependent upon periods of significant workforce shortages as a result of the COVID-19 pandemic, these presumed shortages need to be provable and well

documented. It is important that any railroad utilizing this waiver should be required to confirm a lack of available manpower with the labor organization that represents that class/craft of worker. Furthermore, that communication must be required to be documented along with the rest of the information FRA has required.

Therefore, FRA should take three steps regarding this relief. First, the Agency should add a requirement that the railroad must communicate with the relevant Labor Organization representative(s) prior to availing itself of the relief. Further, FRA should require that the date, time and manner of such communication(s) be included in the record as an eighth item. Finally, and in lieu of the requirement that records be submitted upon the cessation of the waiver, the Agency should require weekly reporting pursuant to GCR No. 2.

Part 217 Railroad Operating Rules

As a general matter, the Labor Organizations do not object to operational testing changes that are meant to satisfy the social distancing guidelines set forth by the CDC. That said, if a railroad does make operational testing program changes, the employees should be notified as to how they can expect to be affected by the changes.

Part 218 Utility Employees

The Associations have requested relief from § 218.22(c)(5) regarding utility employee use so that the utility employee “can perform the same tasks that the train and yard crew members can perform.” *See* FRA-2020-0002-0022 at 3. This is an example of the rail carriers seeking from FRA something that is firmly in the realm of collective bargaining; it is not regulatory in nature, because the carriers are seeking from FRA to create an operating practice whereby the scope of an employee’s work would be governed by regulation without the protections in this section with regard to blue signal protection.

This is a vast departure from past precedent and presents a threatening scenario as a result. Blue flagging a track requires minimal manpower; most of the time, just one person is involved. It does not impose a risk to the spread or contraction of the virus, which is the very reason for the waiver. As the Labor Organizations stated in comments filed in Docket No. FRA-2018-0093 on March 16, 2020 regarding the importance of the safety regulations contained within § 218.22:

[Blue Flag] protection for ground workers is meant to provide an alert to operating crews of the work and movements of employees on the ground on or around the equipment. When a train is properly blue-flagged an engineer is notified of the ongoing work by a blue flag on both ends of the track, one hung on the lead locomotive and a blue “light” on the control stand. These warnings keep the engineer aware that they may not move the train and must keep the train in a stationary position, and also to be aware of the ramifications of the use of train air-controlled slack action. The Labor Organizations object to the proposal to exempt utility employees from blue-flag protection when changing the battery on an end-of-train device (“EOTD”). If the switch behind the train isn’t locked and

another crew is free to line the switch, they could inadvertently line a switch into the train being worked upon, exposing the utility employee to unnecessary risk. It is irrelevant in this situation whether the employee is using tools to change the battery. Moreover, the carriers' argument that employees must carry the EOTD to another location to change a battery is a red herring. The work can be performed under blue flag protection, and if a carrier nonsensically requires moving the EOTD to another location merely to avoid complying with blue flag regulations, then it should suffer the consequences of the inefficiency it has chosen in order to evade the regulation.

FRA-2018-0093-0016 at 3. Here the carriers are being opportunistic because they have wanted this regulation to be permanently waived before COVID-19 was an issue, and application of the regulation is not impacted by any COVID-related workforce shortage. FRA should rescind this portion of the waiver.

Part 228 Hours of Service-Tie Up

The issue of reporting off from other than the off-duty point—such as using a phone to report a tie-up—is not new and has been done in the past with little significance. If train crews who use keyboards in the yard will incur less exposure to the COVID-19 virus by not sharing company facilities, that is all the better during the outbreak stage. The necessary flexibility for allowing different methods appears to already exist within the regulation at § 228.203(a)(1)(ii), which allows the railroads to use it when necessary and without regard to workforce shortages. A potential problem of having employees wait on hold for excessive times to reach a crew dispatcher that ties them up over the phone is a potential problem when it comes to determining when the employee's statutory off-duty period begins. There also may be hours of service concerns specific to different crafts that can arise.

In regard to the waiver of relief from 49 U.S.C. § 21105, imposing limitations on duty hours of dispatching service employees, the Labor Organizations have serious concerns regarding fatigue, particularly cumulative fatigue that could be associated with exceeding the emergency guidelines contained in subsection 21105(d). We realize that the possibility of manpower shortages due to the COVID-19 pandemic could place the railroads in a position where available, rested train dispatchers might become a limited resource; however, every precaution should be taken to avoid placing excessive work demands on individual employees. This should include recalling to service any train dispatcher who may currently retain rights on any roster as a furloughed employee.

Occurrences of train dispatchers exceeding 9 hours in any 24-hour period should only occur when there are no other qualified employees, furloughed or not, available. Likewise, exceeding the limitation of 9 hours on duty for more than 3 days during a 7-day period should be reserved only for instances when no other qualified employees, furloughed or not, are available due to the COVID-19 pandemic. The railroads should not be permitted to employ said waiver for any circumstances other than those associated with workforce shortages caused by the pandemic, and any railroad that does so should be prosecuted for a willful violation of the hours of service laws.

Should a need arise to exceed these limits in any continuing fashion, railroads should be required to attempt to ensure that the burden not fall disproportionately upon any individual Train Dispatcher, and that strict records be kept regarding all instances where individuals exceed the 9-hour provision and the 3 days in 7 provision. Such records should be reported to FRA no less than once per week. FRA should review these reports with the reporting railroad to ensure that no other acceptable alternatives exist.

Part 229 Locomotive Safety Standards

The rail carriers have long sought to do away with periodic and daily locomotive inspection requirements, arguing that computer processors now perform diagnostics that eliminate the need for humans in the field to perform these tasks. In their petition, the Associations ask that the time frequencies specified in 229.21, 229.23, 229.25, 229.27 and 229.29—involving locomotive daily inspections, periodic inspections, annual tests and air-brake system calibration, maintenance and testing—be waived should “resources be excessively reduced during the COVID-19 crisis.” See FRA-2020-0002-0022 at 4.

A plain reading of the above words notes that resources that are excessively reduced *during* the COVID-19 crisis is something quite different from resources that are excessively reduced *because of* the COVID-19 crisis. This is a distinction with a significant difference. A workforce shortage that coincides in time with a pandemic is not necessarily triggered by the pandemic, as the above STB employment data demonstrates. This fact needs to be in the forefront of FRA’s oversight regarding the conditional waiver, and—as we noted in our preliminary general comments—underscores the need for vigilant oversight of all causes of claimed workforce shortages.

Parts 232 Brake System Safety Standards for Freight and other Non-Passenger Railroads, End of Train Devices (“EOT”).

The Associations petitioned for—and FRA granted—waivers compliance with at least two dozen statutory or regulatory requirements governing brake system safety standards. As a general matter, the Labor Organizations reiterate that relief is appropriate only upon a demonstrable showing of workforce shortages that are directly attributable to COVID-related absences that cannot be ameliorated by recalling the tens of thousands of furloughed railroad workers. Within this framework, we have the following additional comments.

FRA was correct in determining that it cannot waive the § 232.15(a) limitation on the movement of defective equipment to the “nearest available location where necessary repairs can be performed” because it is based on a statutory requirement, that the Agency lacks the authority to waive. See 49 U.S.C. § 20303(a). However, FRA’s apparent decision to exercise its enforcement discretion is neither necessary nor prudent.

Additionally, and as previously mentioned regarding that portion of the waiver applicable to Part 218, many of the items of relief requested involve, or expand upon, relief from regulations already being considered in FRA’s Notice of Proposed Rulemaking to codify waivers previously

granted by FRA. *See* FRA-2018-0093. The Labor Organization considers this as another example of industry overreaching, and waivers granted or expanded on March 25 concerning these regulations should be rescinded. To the extent that regulations are waived consistent with this framework, reporting compliance with GCR No. 2, as revised by the Labor Organizations, should be required.

Parts 234-236 – Grade Crossing Safety, Signal Testing Inspection and Maintenance, Train Control Systems

The importance of regular inspections and testing of the nation’s train signal systems cannot be overstated. Regular periodic testing provides assurance that the systems are in proper working order or indicates to the testing employee, usually the signal maintainer, that the system is in need of adjustment or repair. The Associations’ request to extend the time-interval-dependent inspection (and testing), as required by Parts 234 and 236, due to concern over staffing levels is absurd.

The fact is that many Class I railroads represented by AAR have numerous Signalmen furloughed or working in other crafts, as the Labor Organizations have shown. This manpower “shortage” is solely self-made by the Carriers and their PSR business model. Before the Carriers are allowed to use this “emergency declaration,” they should be required bring back all furloughed employees, so that they have the manpower to get tests and inspections done in the required time-interval-dependent limits set forth in Parts 234 and 236; this ensures the traveling public, communities, and all railroad employees are safe.

Communities must be assured that a train carrying hazardous materials is able to travel from point A to point B safely. The traveling public must be confident that the switches are in the proper position, the signal is displaying the proper aspect for the train movement, and when the train goes through a grade crossing the lights will flash and the gates will come down.

The Labor Organizations point to the monthly testing requirements as a **minimum** standard and relaxing this standard by modifying FRA’s interpretation or providing a waiver will have a significant impact on safety. Prior to 2004, virtually all of the nation’s rail carriers were in noncompliance with the minimum standards as they apply to the monthly testing interval. In the extreme, the rail carriers’ misinterpretation permitted monthly inspections on the first day of one month and the last day of the next.

So long as the inspections were completed within the calendar month, no exceptions were taken. This misinterpretation allowed monthly testing intervals to go well beyond a 30-day timeframe. While 60 days between inspections was not the norm, it happened often and monthly testing intervals beyond 30, 40, and even 50 days were common. To address this practice, in 2004 FRA clarified the minimum standard concerning monthly testing frequency and corrected the Carriers’ longstanding misinterpretation of the various regulations in a letter from FRA’s then Chief Counsel, S. Mark Lindsey. With that letter, FRA put the railroads and signal employees on notice that FRA-required monthly tests must be completed within 30 or 31 days of the previous

monthly inspection. FRA also established that this testing frequency is a minimum standard, and the railroads are free to establish testing schedules with more frequent testing intervals.

On October 26, 2009, AAR petitioned FRA seeking a waiver of compliance from certain provisions in Parts 234 and 236. AAR sought relief from the 30- or 31-day time-interval-dependent inspection and test requirement and requested it be extended to 35 days. After a public hearing on April 7, 2010, FRA issued a letter in November 2010 that denied AAR's request. FRA stated in its letter, *"Although FRA appreciates and understands the desire of AAR member railroads to receive additional flexibility in performing the required inspections and tests, after careful consideration of AAR's petition, comments submitted to the docket, as well as evidence presented at the public hearing, the Board has concluded that granting the requested relief to AAR member railroads would not be in the **public interest or consistent with railroad safety**... Accordingly, the FRA denies AAR's request."*

FRA took the stance that tests and inspections were to be performed every 30 days, and subsequently every 90 days, or 180 days, etc., not once a month, a quarter, six months, or one year. Now FRA has essentially allowed the Carriers to go back to the way tests and inspections were performed prior to 2004, after FRA deemed it unsafe to go beyond 30 days, 90 days, six months, and one year.

The Labor Organizations cannot support the waiver to delay time-interval-dependent inspections and tests, and we adamantly disagree with FRA granting this waiver request. This part of the waiver should be rescinded. If FRA declines to rescind this portion of the waiver, the Labor Organizations requests all relief from Parts 234 or 236 taken by a railroad be subject to their proposed modified GCR No. 2, including providing electronically a copy of the reports to the chief executives of the Labor Organizations.

Again, FRA should not consider any manpower shortages at the Carriers until they return-to-service all pre-COVID-19 crisis furloughed employees before any credibility can be given to a worker shortage. If the Associations are certain this pandemic is going to affect railroad staffing levels—and railroad workers are deemed essential employees—then, like the hospitals, the industry must be *"all hands-on deck."* Bring back the skilled and trained railroad employees to help our country fight this pandemic by ensuring trains can travel safely while getting masks, ventilators, and other PPE to emergency personnel without delay; all the while making sure the traveling public and communities are safe, so emergency personnel can focus on fighting the pandemic, not responding to a train derailment or a highway-grade crossing accident.

The Labor Organizations also are disappointed that FRA, in the last part of its letter, gave the Associations unsolicited advice regarding a statute that was never requested in their waiver (*see Waiver* at 15), by indicating that there was flexibility from the Hours of Service requirement for covered employees. In a letter to Southeastern Pennsylvania Transit Authority (SEPTA) on November 16, 2011, the then-FRA Deputy Associate Administrator for Regulatory and Legislative Operations stated that *"FRA does not have the authority to waive the HOS requirements because they are statutory."* The statutory provision in question states as follows:

[49 U.S. Code] § 21104. Limitations on duty hours of signal employees

* * *

(c) EMERGENCIES.—A signal employee 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 that employee is related to the emergency. In this subsection, an emergency ends when the signal system is restored to service. A signal employee may not be allowed to remain or go on duty under the emergency authority provided under this subsection to conduct routine repairs, routine maintenance, or routine inspection of signal systems.

The above statutory provision plainly states that an “emergency” begins when the signal system is not functioning properly and ends when the signal system is restored. It further states that this subsection does not provide an exemption for conducting routine repairs, maintenance, or inspections of the signal system. Therefore, a COVID-caused workforce shortage does not fit the statutory definition of an emergency.

Parts 238.303 and 238.305 Calendar Day Inspection

We incorporate by reference our comments above regarding the agency’s waiving testing and inspection requirements for Part 229. We also note that APTA has already asked FRA for an extension of the waiver, a mere three days after it was granted. *See* FRA-2020-0002-0036. APTA notes that “this extension would only be utilized when there is insufficient manpower to perform inspections when required.” This is understandable at locations where all the people suddenly contract COVID-19 or are exposed to someone who has, and they need to be quarantined. What is concerning to the Labor Organizations is that—absent strict oversight and enforcement—this waiver could be used as some form of precedent to stop performing inspection, testing and maintenance on any schedule that can be relied upon by railroad workers and the public.

Parts 240 and 242 – Locomotive Engineer and Conductor Certification

The Labor Organizations acknowledge that the Associations have a valid point regarding the physical spacing recommendations in order to properly conduct observations. However, we believe that, rather than allowing a review of an event recorder download to satisfy the requirements, FRA should amend the waiver to provide more time for a certified employee to recertify if his or her certification is due for renewal during the COVID-19 crisis. FRA already has granted relief from all manner of date-specific regulations. Examining a 50-mile (or a 2- hour) portion of an event recorder does not provide the context that would be provided to a Designated Supervisor of Locomotive Engineers who is present on a physical skills evaluation ride.

Even more troubling are the conditional waivers FRA has granted from those portions of Parts 240 and 242 that pertain to qualification on the physical characteristics of the territory over

which a train operates. *See* FRA-2020-0002-0025-9, 10. COVID-19 cannot be allowed as a justification to permit locomotive engineers who are not qualified on a territory to rely solely on PTC.

The use of unqualified personnel poses not only a danger to rail employees, it also puts the general public under threat of imminent danger. The Labor Organizations have some reasonable suggestions to make. These suggestions should only be deployed if the workforce is depleted due to COVID-19 and not due to furloughs or any other prerogative.

Specifically, we propose that movements made with an unqualified engineer must not exceed restricted speed. PTC could actually act as a distraction to the engineer in this instance, if the PTC has not been cut out because of the need to travel at restricted speed. There could also be other instances where the PTC needs to be cut out while the train is en route. This would leave a non-qualified locomotive engineer, his fellow crew and the public at a massive safety risk. PTC should not be depended upon to act as a single point of failure as all PTC systems have not yet been certified by the FRA. and some systems have only been conditionally certified. Moreover, interoperability is not dependable as, according to FRA, only 38% of interoperability has been achieved thus far.²

We also propose that movements made with an unqualified conductor must not exceed 50% of the maximum authorized speed for the territory. This includes crews whose members had previously been qualified but whose territorial qualification has lapsed.

The Labor Organizations also believe that a number of other safety redundancies be made mandatory for the duration of the emergency waiver, in all circumstances and at all locations. Wayside signs must be used to mark permanent speed restrictions, both permanent and temporary. Warning signs must be used to notify of speed restrictions, with a two-mile advance warning ahead of the restriction. Under no circumstances may a work authority exist without proper signage that warns crews of approaching track work, men or equipment fouling the track, track defects, slow orders or switches improperly lined. Job aids should be available for use any time an unqualified crew member is assigned to the train. None of these protective measures would violate social distancing recommendations. And, finally, once the emergency has ended, unqualified employees who operated over the territory for the purposes of this waiver remain unqualified.

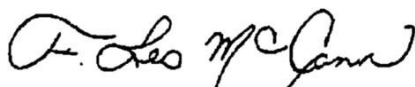
We applaud FRA's attempt to limit relief only to cases that are caused by COVID-related workplace personnel shortages. We have recommended several ways FRA can ensure that the various waivers are used only to that limited extent. However, the Associations have not established a clear causal relationship between many of their requests for regulatory relief and the COVID-19 virus. FRA also appears to provide relief for things that simply happen *during*

²https://eplore.dot.gov/t/FRA/views/PTCImplementationStatusReport/Overview?iframeSizedToWindow=true&:embed=y&:showAppBanner=false&:display_count=no&:showVizHome=no.

the COVID-19 outbreak, and are not *the result of* COVID-related workplace personnel shortages. These should be reconsidered by FRA, and then rescinded as inconsistent with railroad safety.

Once again, we appreciate the opportunity to comment.

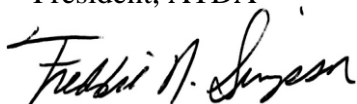
Respectfully submitted,



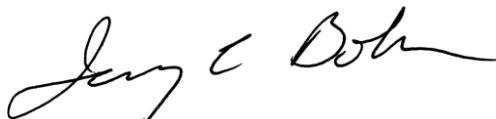
F. Leo McCann
President, ATDA



Dennis R. Pierce
National President, BLET/IBT



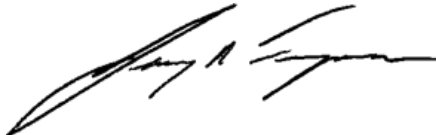
Freddie N. Simpson
President, BMWED/IBT



Jerry C. Boles
President, BRS



Richard A. Johnson
General President, BRC/TCU/IAM



Jeremy R. Ferguson
President, SMART-Transportation Division