

BEFORE THE OFFICE OF THE
SECRETARY OF TRANSPORTATION

DOCKET NO. OST-2005-20112:
NOTICE OF REGULATORY REVIEW

INITIAL COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS
AND A REQUEST FOR HEARING TIME

The Association of American Railroads submits these initial comments in response to the Office of the Secretary's (OST) invitation for public participation in its review of Department regulations.¹ AAR also requests that time be allocated to AAR to participate in the public meeting.

AAR fully supports OST's initiative to review the regulations of its various Administrations. AAR believes there are a number of areas where OST input to the regulatory process would be helpful. At the public meeting, AAR would like to focus on three such issues. AAR will address additional issues when submitting its full written comments in April.

The three issues AAR believes can be fruitfully discussed at the public meeting are: 1) the Federal Motor Carrier Safety Administration's (FMCSA) failure to recognize that Congress's hours of service (HOS) requirements for railroad signal employees should supersede FMCSA's HOS requirements; 2) the failure of the Federal Railroad Administration (FRA) to facilitate electronic recordkeeping, in violation of a Congressional mandate; and 3) the need to restructure FRA's requirements for locomotive inspections.

¹70 Fed. Reg. 3761.

FMCSA's HOS Requirements For Railroad Signal Employees Are Inconsistent With Those Established By Congress

Duties of Railroad Signal Employees

Railroad signal employees install and maintain signal systems that direct the movement of trains. Railroad signal employees also maintain grade-crossing warning devices.

Some signal employees work on signal construction gangs, often far from home, sometimes in remote locations. The gangs perform various functions, including the installation of grade-crossing warning devices, the upgrading of signal systems, and maintenance work. Typically, the gangs move from work site to work site, with each site encompassing a broad area. The gangs will work on signals and grade-crossing devices in the work site area and reside in a hotel in that area until the work is done if the site is far from home.

To enable the employees to finish their work at far-away sites without having to commute multiple times, railroads and signal employees historically have agreed to work schedules different than the schedules for most employees. Historically, schedules of eight consecutive work days (ten hours each day) followed by six consecutive days off were common.²

Another unusual aspect of the work schedules of signal employees is that they must work very lengthy days in an emergency, such as a derailment, grade-crossing signal malfunction, or heavy snow storm. Quick action is necessary to ensure trains are operated in a safe environment.

In the course of their work, signal employees drive commercial motor vehicles in a number of different circumstances:

²For a more detailed description of these employees' duties, see the joint petition seeking an FMCSA declaration that the FMCSA HOS requirements do not apply to signal employees, filed with FMCSA by CSX Transportation, Inc., and the Brotherhood of Railroad Signalmen, "Hours of Service of Drivers; Petition for Interpretation or in the Alternative, Application for Exemption," Docket No. FMCSA -01-9332-1(2000).

- signal employees drive CMVs containing equipment and supplies needed to perform their responsibilities;
- signal employees drive CMVs equipped with cranes or booms that enable them to reach elevated signal structures; and
- signal employees drive CMVs when transporting other employees working in their “gangs.”

The time spent driving varies considerably. On most days, signal employees spend a small amount of time driving. Sometimes, but not typically, signal employees drive over five hours, usually when moving from one job site to another.

Conflicting HOS Requirements

Congress has imposed hours of service restrictions on certain railroad employees, including signal employees. Signal employees must be provided at least eight consecutive hours off duty during the previous twenty-four hours; ten consecutive hours off duty after being on duty for twelve consecutive hours; and eight consecutive hours off after being on duty for a total of twelve hours during a twenty-four hour period. Furthermore, an employee is able to work an additional four hours in a twenty-four hour period (up to sixteen hours) in order to respond to an emergency.³

FMCSA has imposed different requirements. FMCSA’s current HOS requirements limit drivers of property-carrying vehicles to driving no more than eleven hours following ten consecutive hours off duty; prohibit driving for any period after a driver has been on duty for fourteen hours following ten consecutive hours off duty; and prohibit driving after an employee has been on duty for seventy hours during eight consecutive days.⁴

³49 U.S.C. § 21104.

⁴49 C.F.R. § 395.3. If the employer does not operate commercial motor vehicles every day of the week, a driver cannot drive after having been on duty for sixty hours for seven consecutive days.

The work schedules providing for eight consecutive ten-hour work days followed by six consecutive days off are permitted by the Congressional HOS restrictions, but not by the FMCSA HOS restrictions. Similarly, under the Congressional HOS program, signal employees are permitted to work extended days when emergencies occur, but there is no comparable provision in the FMCSA HOS scheme.

FMCSA Has Refused To Defer To Congress

With Congress having directly addressed the issue of HOS limitations for signal employees, one would expect that FMCSA would defer to Congress. Unfortunately, that has not been the case. Over four years ago, the railroad industry asked FMCSA to either interpret its HOS regulations as not applying to signal employees or to grant signal employees an exemption from the FMCSA HOS restrictions.⁵ To date, FMCSA has not ruled on the railroads' request.

In seeking comments on railroad industry petitions filed on this issue, FMCSA implied that a lesser standard of fatigue applies to the safety-critical functions performed by signal employees on railroad rights-of-way than to CMV drivers. FMCSA stated that the

language and history of section 21104 reveal no specific intent to protect the public from potential risks associated with the operation of CMVs by railroad signal personnel who are on-duty for many hours. The FMCSA's HOS regulations, on the other hand, are designed to protect all users of the public highways from fatigued CMV drivers (49 CFR Part 395).⁶

⁵CSXT, along with the Brotherhood of Railroad Signalmen, filed a petition and supporting comments, which were placed in Docket No. FMCSA-01-9332. AAR also filed a petition and supporting comments, which were placed in the same docket. In addition, AAR filed comments addressing this issue in FMCSA's rulemaking proceeding revising the HOS requirements, Docket No. FMCSA-1997-2350. These documents are available from DOT's electronic docket management system.

⁶66 Fed. Reg. 28018 (May 21, 2001).

The railroad industry finds it hard to believe that an agency of the U.S. Department of Transportation believes a greater degree of alertness is required for CMV drivers than for employees working on railroad signals. In fact, railroad signal work impacts highway safety since signal employees install and maintain grade-crossing devices.

Logically, Congress' establishment of statutory HOS requirements for railroad employees should be viewed as a recognition of the importance Congress places on ensuring that railroad employees are sufficiently rested. Significantly, Congress did not mandate specific HOS restrictions for CMV drivers.

Unlike the case with the FMCSA regulations, which apply to drivers in a broad range of circumstances, in enacting HOS requirements for signal employees Congress was able to tailor the HOS requirements to the specific circumstances facing them and to take into account necessary safety considerations. The provision enabling extra hours of work is a clear example of balancing safety considerations. Congress believed the need to have signal employees available to fix signals in an emergency warranted an enlargement of the normal maximum workday. Yet, FMCSA has overridden Congress' determination that an emergency provision is necessary.

FMCSA's HOS requirements also are counterproductive in that they encourage extra commuting. Work that can be done at a remote location in one eight-day work period might require two trips to the location if an eight-day period is not permitted. The extra commuting time reduces total time off, which is not desirable either from a safety or a quality-of-life perspective.

The Congressionally-imposed HOS restrictions should take precedence over FMCSA's HOS requirements. FMCSA should take action on the petitions that have been pending since 2000 and defer to Congress.

FRA Has Violated The GPEA By Discriminating Against Electronic Records

The Government Paperwork Elimination Act (GPEA) required the Office of Management and Budget (OMB) to develop procedures for the acceptance of electronic records. By Oct. 21, 2003, OMB was to ensure that agencies provide an

option for the maintenance of records electronically and, where practicable, the use of electronic signatures.⁷

OMB did issue procedures for implementation of GPEA. OMB requires that each agency have a plan for the electronic maintenance of information, including the use of electronic signatures.⁸

With respect to electronic recordkeeping, FRA is firmly mired in the past and has not complied with the GPEA or the OMB mandate. HOS recordkeeping is a perfect example. FRA's regulations only permit paper records because HOS records must be "signed" by the employee whose time on duty is being recorded (or by the ranking crew member, in the case of train crews).⁹ A railroad has to apply for a waiver to keep HOS records electronically.

What makes the waiver process for HOS records particularly burdensome is that FRA has chosen to use the waiver process to impose requirements that do not apply for paper records. The requirements for paper records are straightforward. When keeping paper records, railroads must have records identifying

- the employee;
- the place, date, and beginning and ending times for hours of duty;
- the number of consecutive hours off duty prior to going on duty; and
- the beginning and ending times of periods spent in transportation to and from an assignment, other than personal commuting.¹⁰

⁷49 U.S.C. § 3504 note.

⁸OMB Circular No. A-130, App. II, <http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html>. The agencies were supposed to have the plan by the end of FY 03. AAR informally asked FRA for its plan in the fall of 2004, but as of yet FRA has not fulfilled AAR's request.

⁹49 C.F.R. § 228.9.

¹⁰49 C.F.R. § 228.7.

Contrast the regulatory requirements with the requirements FRA imposes through the waiver process. FRA has required railroads to, *inter alia*,

- develop computer programs capable of measuring and analyzing records to determine compliance with HOS requirements, focusing on issues such as time spent “deadheading” (nonworking travel not including commuting), “commingled” service (service not subject to HOS restrictions), and employee reports of excessive service;
- establish quality-assurance programs consisting of regular and remedial training as determined by FRA and utilizing materials reviewed by FRA; and
- make electronic records accessible to FRA through various field locations.

There are no comparable requirements for paper records.

If FRA were faithful to the GPEA and the OMB mandate, it would impose the same requirements on both electronic and paper recordkeeping systems. The only difference between the two systems would be that paper systems would use handwritten signatures, while electronic recordkeeping systems would need an adequate electronic signature as a substitute.

FRA must eliminate the discriminatory requirements it has imposed on electronic records. The agency should not continue to disregard both Congressional and Administration policy.

Locomotive Inspections

Locomotives are subject to numerous inspection requirements: daily, quarterly, annual, and biennial inspections, along with brake tests. Daily, annual, and biennial inspections trace their origins back to the passage of the Locomotive Boiler Inspection Act in 1911; the quarterly (periodic) inspection was instituted in 1977 as a replacement for a 30-day inspection.

In July 2002, AAR petitioned FRA to institute a performance standard under which the railroads could devise their own inspection programs as long as their overall safety performance met set targets for both accidents and injuries.

Under the railroads' proposal, each railroad would submit a risk management plan containing, *inter alia*, the railroad's inspection and testing requirements, maintenance policies, and employee training program.

In the petition, the railroads observed that huge sums are spent on locomotive inspections. AAR estimated that daily inspections cost Class I railroads at least \$60 million annually and periodic inspections cost Class I railroads approximately \$350 million annually.

The railroads believe it is counterproductive to devote all these resources to locomotive inspections. The number of accidents and injuries attributable to locomotive defects is very small; twenty-six was the largest number of accidents occurring in any year in the ten-year period 1994-2003. The railroads believe that under the proposed performance standard, they can reduce the frequency of inspections while maintaining, if not improving, their excellent safety record.

To FRA's credit, after AAR submitted its petition, FRA did engage in a dialogue with AAR concerning the petition. After initial discussions, AAR submitted a model plan illustrating how a railroad might exercise the flexibility afforded under its petition. Under the model plan, the railroads would substitute semiannual inspections for quarterly inspections and perform inspections on locomotives in departing trains, rather than daily inspections. The plan outlined by AAR provides assurance that locomotives would continue to be operated under very safe conditions.

The concept of a pre-departure inspection in lieu of a daily inspection resembles the program in place in Canada. Transport Canada does not require railroads to perform either a daily or a periodic inspection. Railroads must inspect locomotives placed in trains (or "laid over" for more than eight hours).¹¹

¹¹Transport Canada, Railway Locomotive & Inspection Rules, http://www.tc.gc.ca/railway/Rules/TC_0-13.htm#4, Part I, §§§ 7-9 (Sept. 24, 2002). Locomotives in "captive service" are not subject to these requirements. Rather, the railroads have the freedom to establish their own inspection policies, which must be filed with Transport Canada.

To AAR's chagrin, FRA staff indicated the agency would not approve the performance metric AAR included in its petition. Instead, FRA staff indicated, the agency would look more favorably on a performance standard tied to "precursors" of accidents attributable to locomotive defects.

AAR has investigated FRA's approach, but it seems impractical. The problem is, no one, including FRA, has been able to identify "precursors" to accidents caused by locomotive defects. The number of accidents caused by locomotive defects is so small that from a statistical perspective, they are random events.

If AAR's proposal is unacceptable, DOT and FRA should propose an alternative. The industry's proposal should be attractive because it makes sense to tie regulatory flexibility to the ultimate measure of performance, the accident and injury rates. In any event, DOT should not accept an inspection regime that requires the industry to spend hundreds of millions of dollars annually on inspection requirements that date from an era of less-reliable equipment when there is no reason to believe all the different inspections are still necessary.

AAR appreciates the opportunity OST has given the regulated community to identify problematic regulations. AAR hopes this process leads to a constructive dialogue among OST, its modal agencies, and interested parties.

Respectfully submitted,

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