



Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference — International Brotherhood of Teamsters

NATIONAL LEGISLATIVE OFFICE

25 Louisiana Avenue, NW, Room A-704 • Washington, DC 20001
Phone: (202) 624-8776 • Fax: (202) 624-3086 • tolman@ble-t.org

JOHN P. TOLMAN

Vice President and

National Legislative Representative

January 21, 2007

Docket Clerk
DOT Central Docket Management Facility
Room PL-401
400 7th Street, SW (Plaza Level)
Washington, DC 20590-0001

Re: Docket No. FRA-2006-24812

Dear Docket Clerk:

On April 6, 2006, BNSF Railway (“BNSF”) petitioned the Federal Railroad Administration (“FRA”) for a temporary waiver from compliance with the requirements of 49 CFR Section 232.213. *See* DOT DMS FRA-2006-24812-1. On July 14, 2006, FRA granted the waiver for the temporary period requested by BNSF. *See* FRA-2006-24812-3. On November 17, 2006, BNSF revised its petition by requesting that the waiver be made permanent. *See* FRA-2006-24812-4.

These comments are submitted by the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters (“BLET”), which is the duly designated and recognized collective bargaining representative for the craft or class of Locomotive Engineer employed on BNSF. Consequently, BNSF’s petition would have a significant impact upon our members. For the reasons set forth below, BLET opposes granting the requested relief.

The rule from which BNSF seeks relief provides that a train designated by a railroad as an “extended haul train” may be moved up to, but not exceeding 1,500 miles between brake tests and inspections. 49 CFR § 232.213(a). An extended haul train may proceed up to an additional 1,000 miles if it receives a Class I brake test, and may move further than 1,000 additional miles if a Part 215 freight car inspection is provided and non-complying cars are either removed or repaired. 49 CFR § 232.213(a)(8).

In the original petition, BNSF limited its request to “thirteen specified trains,” which would “receive an extended haul inspection slightly in excess of the 1500 mile point.” FRA-2006-24812-1 at p. 1. BNSF also stated that “records would be kept on any defects encountered during inspec-

tions or cars set out on line.” Id. The excessive mileage indicated on the accompanying designation document ranged from 9 miles to 65 miles per train. Id. at p. 2. BNSF provided the following rationale for its request:

This request is critical given the increased rate of demand for coal by the utility industry. Accommodating BNSF’s request to perform the extended haul inspections slightly in excess of the 1500 mile point *for a period of six months* will significantly improve our ability to transport coal without any degradation to the safe operation of the trains listed in the attachment.

Id. at p. 1 (emphasis added).

At the time the original petition was filed, we were concerned that the waiver was not in the public safety interest or in the interest of BLET members. However, because the request was driven by a shift to coal by public utilities — in response to skyrocketing oil prices driving gasoline toward \$3.00 per gallon — and because the waiver was to be for a very short duration, we withheld our objections at that time. FRA granted the temporary waiver by letter dated July 14, 2006, specifying that the waiver period would end on December 31, 2006. FRA-2006-24812-3.

On November 17, 2006, BNSF filed a second petition, requesting that the temporary waiver be made permanent. *See* FRA-2006-24812-4 at p. 1. The trains that are the subject of the petition transport coal from the Powder River Basin (“PRB”) to Alabama Power Company’s Plant Miller at Palos, Alabama, and Georgia Power Company’s Plant Scherer near Juliette, Georgia, and then return, empty, to PRB. Id. at p. 3.

In addition to initial terminal brake tests, these trains receive a Section 232.213 test as follows: eastbound Plant Miller trains at Lincoln, Nebraska; westbound Plant Miller trains at Alliance, Nebraska; and all Plant Scherer trains at Lincoln. Id. at pp. 3-4. BNSF proposes to conduct all these inspections “at BNSF’s *new* Donkey Creek Yard in Wyoming.” Id. at p. 4 (emphasis added). BNSF further states as follows:

The round trip for both routes is about 3100 miles. Consequently, BNSF seeks to move unit coal trains over the 1500 mile inspection limit by only 50 miles each way on the average, a mere three percent increase in distance.

Id.

As grounds for its request, BNSF claims that “unprecedented demand for coal ... exceeds BNSF’s current capacity to deliver it timely,” and that “if the inspection points at Alliance and Lincoln were eliminated, BNSF would save approximately twelve hours per train set, per cycle.”

Id. at pp. 4, 5. Lastly, BNSF requested expedited approval, to become effective prior to the expiration of the temporary waiver. Id. at p. 6.

We will address the procedural issue first. BNSF misrepresents FRA's Rules of Practice when it claims that "a waiver petition should be filed at least three months before the proposed effective date, *except that a waiver can be granted sooner for good cause.*" Id. (emphasis added). In fact, FRA requires that a "petition for waiver must be submitted at least 3 months before the proposed effective date, *unless good cause is shown for not doing so.*" 49 CFR § 211.7(a) (emphasis added).

We can discern no substantive difference between the original petition, seeking temporary relief for a period of six months, and the subsequent petition seeking to make said temporary relief permanent. Indeed, BNSF provided no explanation whatsoever why what it considered to be a temporary problem in April became a permanent issue a little over seven months later, although it did provide some additional, if contradictory, details.¹ BNSF has made no showing of any change in the situation that casts its claimed problem in a different light. Consequently, there is no good cause for BNSF's failure to submit its petition at least three months before the proposed effective date, and is entitled to no expedited consideration whatsoever.

Before turning to the merits of BNSF's petition, we also are compelled to comment on two significant public policy questions raised by this matter, both of which can be fairly characterized as an attempt to "strong-arm" FRA into granting the relief being requested. First, and assuming *arguendo* that BNSF's claim of delays at Lincoln and Alliance are legitimate and provide a valid basis for relief, we are compelled to ask why capital resources that could have been devoted to alleviating the problem were used, instead, to construct the *new* Donkey Creek Yard in Wyoming, when BNSF knew, or should have known, that Section 232.213 inspections could not legitimately be performed there, absent a waiver from FRA.

The responsible course of action would have been for BNSF to secure the waiver, if it is appropriate and warranted, prior to moving ahead with Donkey Creek Yard. Instead, BNSF moved ahead with the project first, thereby confronting FRA with what essentially is a fait accompli and placing FRA in a somewhat untenable position. However, it is our firm opinion that BNSF acted at its own risk by putting the cart before the horse in this case.

Second, BNSF's "two-step" — filing a seemingly innocuous petition for a temporary waiver in response to a spike in the demand for coal, followed by a demand to make the waiver permanent as soon as the dust settles — borders on abuse of process, to be charitable. To be certain, had we suspected when the original petition was filed that something more was afoot than a temporary solution to address a temporary correction in the coal market, we would have opposed the peti-

¹ We will address errors and contradictory information contained in the petitions below.

tion for the reasons that follow, to the extent the original petition provided sufficient information. BNSF's manipulation of the process will inevitably cause us to view every temporary waiver petition it files in the future with skepticism, with the result that we almost certainly will intervene in matters we otherwise would have let pass without opposition.

Furthermore, we are concerned that BNSF's devious handling of this matter may produce a result it otherwise could not have obtained. There is an inherent tension in FRA's dual roles of safety regulator and coordinator of program development for the industry. Each petition considered by the Safety Board necessarily involves balancing the interests of safety and industry performance to some degree and the balance can easily shift in favor of performance, even if only slightly, when a temporary waiver to address a temporary condition is the issue.

We fear that BNSF's "bait and switch" tactic with this petition is intended to place FRA in a corner, to the detriment of safety and regulatory consistency. BNSF can argue with a straight face that FRA cannot deny making the waiver permanent, based on performance during the period in which it was temporary. From this, BNSF and every other railroad can make a similar argument for operations that resemble the service subject to the waiver request. If this stratagem succeeds, there is no end to the mischief railroads can play with FRA regulations. We believe it is appropriate for FRA to deny the petition on either or both public policy grounds.

On the merits, we believe FRA should deny the petition because BNSF has failed to satisfy its burden of proof in several respects. First, BNSF's factual information as to the scope of the waiver is contradictory. In the initial petition — seeking temporary relief — BNSF stated that the waiver was sought for "thirteen specified trains." FRA-2006-24812-1 at p. 1. In the petition now being considered BNSF made reference to "60 to 62 ... train sets," which is not, in and of itself, contradictory. FRA-2006-24812-4 at p. 3. However, later in the petition, BNSF refers to "27 trains currently operating under the waiver." Id. at p. 6. Since 27 is not a multiple of 13 (assuming that each "train" referred to in the initial petition was an east/west set, it is impossible to precisely define the scope of relief.

Second, BNSF relies heavily on the following argument:

The round trip for both routes is about 3100 miles. Consequently, BNSF seeks to move unit coal trains over the 1500 mile inspection limit by only 50 miles each way on the average, a mere three percent increase in distance.

Id. at p. 4.

The trigger for a Section 232.213 test is movement up to, but not exceeding, 1,500 miles. 49 CFR § 232.213(a). The test is not based upon a round trip movement up to, but not exceeding, 3,000 miles. Under BNSF's rationale, a train could travel 1,501 miles via one route from

point to point, and travel 1,599 miles via the return route, and still would experience “a mere three percent increase in distance,” even though both would require a Section 232.213 test and one of the trains would travel nearly 6% more than the permissible limit. Mathematical sophistry cannot substitute for evidence, particularly when an artificial standard is applied.

Third, BNSF claims an “unprecedented demand for coal” has created delays. FRA-2006-24812-4 at p. 4. However and as previously noted, the original petition tied this increased demand to utilities responding to increases in oil prices, and BNSF represented that the issue would be resolved in six months’ time. Now, with not a scintilla of evidence, BNSF represents that this temporary increase in demand has become irreversible and provides a basis for a permanent waiver. At the same time, however, oil prices have dropped to a level not seen in over a year and a half, and in some places gasoline dips below \$2.00 per gallon.² BNSF’s proof on this question falls far short of that required to justify a permanent waiver.

Fourth, BNSF is mistaken, if not disingenuous, when it claims that “if the inspection points at Alliance and Lincoln were eliminated, BNSF would save approximately twelve hours per train set, per cycle.” FRA-2006-24812-4 at p. 5. As previously noted, the six Plant Miller trains receive their Section 232.213 inspection at Lincoln when loaded and heading east, and at Alliance when empty and headed west. Id. at p. 3. The seven Plant Scherer trains receive their Section 232.213 inspections at Lincoln, regardless of their direction or whether they are empty or loaded. Id. at p. 4.

According to BNSF, the time it takes to inspect each empty train set is “approximately twelve hours,” regardless of the location of the inspection. Id. at pp. 4-5. Inspection time for each loaded train set at Lincoln is “approximately four hours.” Id. at p. 5. From these statements, it is clear that the extra time results from managerial prioritization: BNSF has made an operational decision that places empty trains at the end of the inspection queue, causing empty trains to idle for three times as long as loaded trains, regardless of whether the inspections are taking place in Lincoln or in Alliance.

Managerial convenience provides no basis whatsoever for regulatory relief. The very prioritization of inspections that created this problem, itself, was the outcome of another managerial decision with respect to the size of mechanical forces. Simply stated, the “problem” is one created by BNSF and is the result of its staffing and train prioritizing policies. It is not FRA’s duty to toss safety regulations overboard simply because a railroad has chosen to short-staff its facilities, causing delays to trains.

² See, e.g., “Oil plunges as supplies rise: Price nears \$50 as inventories build faster than expected,” published online at <http://www.msnbc.msn.com/id/12400801/>; gasoline price survey of January 16, 2007, published online at <http://www.cleveland.com/gasprices/>.

Moreover, BNSF states that the inspection time at Donkey Creek “is only about four hours.” Id. From this, it is clear that granting the waiver will not result in any reduction in time for loaded trains. Additionally, the most time that will be saved by moving the inspections to Donkey Creek is eight hours. Consequently, all of the savings and other benefits claimed by BNSF have been inflated by at least fifty percent.

Fifth, BNSF claims that safety will not be diminished because “there are many wayside detectors, such as truck performance detectors, wheel impact detectors, acoustic bearing detectors, and hot box detectors” that “use various methods to detect problems with the running gear and alert the train crew to stop the train before any problems occur.” Id. at pp. 5-6. To the best of our knowledge, such devices are neither required by nor subject to FRA regulation; these devices are in use, and are located where found, in the exercise of managerial discretion.

We strongly oppose the substitution of railroad policy for affirmative FRA regulation. Even if these detectors provided an equivalent level of safety to the Section 232.213 test — a dubious proposition — BNSF is not required to continue to use and maintain them. Worse still, BNSF cannot guarantee that they will be used and maintained, because the subject trains operate a significant portion of their route over another railroad’s trackage.

In order to view BNSF’s petition in its proper context, a brief review of this history of this issue is in order. When FRA was founded the maximum operating distance between brake tests and mechanical inspections was 500 miles. In 1982, FRA doubled that distance to 1,000 miles. In 1992, Congress mandated that FRA review its power brake rules and “revise such rules based on such safety data as may be presented during that review.” Pub. L. No. 102–365, § 7, codified at 49 U.S.C. § 20141.

As part of that process, the Association of American Railroads (“AAR”) proposed that trains be permitted to travel up to 3,600 miles between brake inspections. 63 FR 48304. In 1994, FRA proposed the “extended haul” train concept, whereby certain trains could operate up to 1,500 miles between brake and mechanical inspections, and adjusted the proposal its 1998 Notice of Proposed Rulemaking (“NPRM”) in response to industry objections. Id.

AAR continued to object to the 1,500-mile threshold, proposing in response to FRA’s 1998 NPRM that the threshold be set at 2,000 miles essentially for reasons of managerial convenience. 66 FR 4121. FRA responded by easing the process by which a train could be designated as “extended haul,” but stood firm on the 1,500-mile standard, stating that

In FRA’s view, the extended haul provisions contained in the NPRM and retained in this final rule constitute a completely new inspection regimen. The provisions related to the operation of extended haul trains contain stringent inspection requirements, both brake and mechanical, by highly qualified inspectors and establish stringent requirements

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whenever cars are added to or removed from such trains. The extended haul train requirements also contain a means to assess the safety of such operations by requiring that records be maintained of the defective conditions that develop on these trains while en route.

Id. However, the industry has continued to push the issue, even after FRA promulgated its Final Rule in 2001:

AAR again raises concerns regarding the viability of the provisions contained in this section of the final rule. AAR continues to assert that the 1,500-mile limitation placed on extended haul trains provides little benefit to the industry. AAR reasserts its request to extend the mileage limitation contained in this section of the final rule. FRA believes that the preamble to the final rule fully addresses the mileage limitation concerns raised by AAR and provides a complete discussion of FRA's rationale for limiting the distance these train are permitted to travel between brake inspection. *See* 66 FR 4119–21, 4174–75. FRA sees no need to reiterate that discussion in this document. Moreover, FRA continues to believe that AAR's concerns regarding the viability of the provisions contained in this section of the final rule are misplaced and inaccurate.

67 FR 17575–76.

Section 232.213(a)(7) requires each railroad that operates extended haul trains to maintain a record of all defective, inoperative, or ineffective brakes as well as any conditions not in compliance with Part 215 or Part 231 discovered at anytime during the movement of the train. Significantly, BNSF has provided no documentary evidence with respect to performance of these trains during the temporary waiver period. The only inference that can be drawn from the absence of these records is that they would not tend to support extending the waiver.

Lastly, we strongly object to BNSF's request that the waiver be made permanent. There are compelling reasons for regulatory uniformity to the maximum extent possible, and BNSF has made no showing that it should follow a different standard from the rest of the industry. Indeed, the rationale offered by BNSF weighs heavily against a permanent waiver, the cause of which BNSF claims lies with the current state of the coal market.

BNSF concedes that shifting the Section 232.213 inspections for eastbound loaded coal trains would change nothing; therefore, they should have been excluded from even the original, temporary waiver request. Further, overlooking BNSF's decision to delay empty trains, BNSF should be required to produce documentation establishing the elimination of the extra eight hour delay during the period of the temporary waiver before any extension thereof could properly be considered. Finally, any legitimate relief would have to be tied to continuing demand for coal that exceptionally high.

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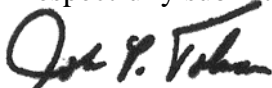
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Satisfaction of the above conditions should be what is necessary to waive a requirement as vital as Section 232.213 for any significant length of time. FRA should strongly resist what we view as just the latest salvo — albeit very sneakily advanced — in the industry's 15-year attack against FRA's extended haul train concept.

Respectfully submitted,



Vice President and National Legislative Representative

cc: All BNSF General Chairmen
All BNSF State Legislative Board Chairmen
Thomas A. Pontolillo, Director of Regulatory Affairs