



Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference — International Brotherhood of Teamsters

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Vice President and

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January 4, 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-2006-25274

Dear Docket Clerk:

On December 5, 2006, the Federal Railroad Administration (“FRA”) published a Proposed Rule revising the schedules of civil monetary penalties (“CMPs”) for violations of federal railroad safety law or FRA safety regulation, which was assigned the above-referenced docket number. 71 FR 70590. FRA further advised that its proposed amendments would not be promulgated until after comments had been received from the regulated community. 71 FR 70591.

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 all Class I railroads. BLET also represents operating and other employees on numerous Class II and Class III railroads. Consequently, FRA’s Proposed Rule would have a significant impact upon our members. For the reasons set forth below, BLET respectfully requests that FRA reconsider this matter and make no revisions to civil penalty schedules at this time.

One reason cited by FRA for its proposed revisions is that “[t]he Inflation Act requires only that the minimum, maximum and aggravated maximum civil penalty for a violation be adjusted, not that the guideline penalty amounts for a specific type of violation be adjusted; therefore, FRA has not adjusted the line-item guideline penalties found in the Schedules in conjunction with its adjustments of the minimum, maximum and aggravated maximum civil penalties.” *Id.* at 70590-91. This rationale invites one to infer that the relationship between line-item penalty amounts and minima, maxima, and aggravated maxima has been disturbed by operation of the

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Inflation Act and, further, that FRA's intent is to restore this relationship. As will be seen below, just the opposite is occurring with respect to a significant number of line-item penalties.

Indeed, FRA proposes to undertake a vast reconfiguration of current civil penalty schedules. Essentially, FRA has created a probability matrix for the projected negative outcome of violation of a particular regulation, and assigned a fixed dollar value to each category in the matrix. Id. at 70591-92. We have carefully examined and considered FRA's approach and, unfortunately, find it wanting in at least three specific respects.

First, FRA notes that — in developing the matrix — it “concentrated on the degrees of likelihood that an accident/incident will occur or that graver consequences will occur as a result of the failure to comply with the particular section or subsection of the safety regulations.” 71 FR 70592. Consequently, “FRA not only increased the penalty amounts in some instances, but also reduced the penalty amounts for some sections or subsections where it determined that a violation of the particular regulation constituted less of a safety risk.” Id.

While we will address specific proposed line-item changes in greater detail below, suffice it to say for now that we strongly disagree that it is appropriate to use outcomes to the significant degree FRA proposes. Numerous provisions facilitate enforcement activities, while many others provide railroad workers with due process and other safeguards in those areas where their private lives are subject to scrutiny to a much higher degree than the typical worker. The revised civil penalties proposed by FRA for these types of provisions are particularly troubling.

Further, FRA states that the resulting line-item penalty amounts “reflect FRA's determination, based on safety data and industry knowledge, of how likely the violation of a particular section or subsection is to result in a rail equipment accident/incident or other type of accident/incident.” Id. Specifically cited are data that purport to show common operating rule violations that FRA claims forms a consistent thread among human factor caused accidents, which FRA has used as the basis for a separate Notice of Proposed Rulemaking (“NPRM”) that would federalize three industry operating procedures. Id. at 70593.

We commented extensively on the questionable validity and reliability of this data in our response to the NPRM. *See* FRA-2006-25267-13 at pp. 2-9. By way of summary here, we would reiterate two points. One is that the human factor causation in all cases was determined solely by the railroad, and there generally was little or no FRA auditing of the data; moreover, FRA reporting requirements do not permit, much less facilitate, a full root cause analysis that would identify contributing factors much beyond the last human to commit an error.

The other is that FRA's conclusion that the data indicate a lack of discipline by workers fails to pass analytical muster for three reasons: (1) accident/incident rates for main track have been ei-

ther declining or stagnant for more than three decades, with the 2006 rate at the end of July being the lowest rate recorded; (2) each “spike” in yard accident rates occurred contemporaneous with significant operating changes brought about by mergers or the introduction of new technology and was followed by an almost as steep decline; and (3) the 2006 yard accident rate by the end of July was in its second year of decline, and was the lowest since 1997. In other words, the instant Proposed Rule suffers from the same infirmity as the railroad operating rules NPRM: a disproportionate level of attention and accountability is focused on the last act or omission in the chain of events that leads to accidents and incidents.

Finally, we believe that the direction proposed by FRA would completely undermine ongoing efforts to identify, categorize and analyze precursor errors as a proactive means of accident prevention. In its railroad operating rules NPRM, FRA acknowledged that the potential for individual liability for civil penalties provides an “adverse incentive” that prevents most close-call reporting.¹ 71 FR 60379. Additionally, FRA specifically solicited “comment on whether programs similar to [the Federal Aviation Administration’s Aviation Safety Action Program and Aviation Safety Reporting Program] could be adopted by FRA to avoid adverse incentives.” *Id.*

In response, we underscored our support of pilot programs such as the Confidential Close Call Reporting System (“C³RS”). *See* FRA-2006-25267-13 at pp. 32-34. We also stated that “FRA is absolutely on point with its concern over reluctance to report unsafe conditions, for fear of individual liability sanctions,” and cautioned that “[t]his is yet another reason to act with the greatest degree of caution in expanding FRA enforcement powers over individuals.” *Id.* at p. 34.

The vast majority of proposed revisions to civil penalties that would apply in cases of individual liability starkly contradict the enlightened approach a broad close call self-reporting system entails, because FRA seeks to dramatically increase such penalties. Moreover, the Proposed Rule would send a confusing and mixed message to the railroad industry workforce, particularly because a majority of railroad managers and executives subscribe to neither root cause analysis as

¹ For example, shortly after midnight on the morning of September 15, 2005, a Union Pacific Railroad freight train struck another Union Pacific freight train on the siding at Shepherd, Texas, fatally injuring the locomotive engineer on the standing train, who was part of a relief crew. According to the National Transportation Safety Board (“NTSB”), the conductor of the crew that had been relieved realized that he had left his switch key in the switch lock at Shepherd approximately 25-30 minutes prior to the accident; rather than radio the train dispatcher to warn that the switch might be misaligned, the conductor instead insisted that the crew be returned to Shepherd. NTSB/RAB-06/01 at p. 2. NTSB found it was “likely” that the accident was caused by a misaligned switch, which the relieved crew had failed to restore to the normal position. *Id.* The existence of potential individual civil liability and the threat of railroad discipline up to and including dismissal in such situations have historically made it most unlikely that railroad workers would “turn themselves in,” and FRA’s proposed changes to a number of line-item civil penalties would only aggravate this problem.

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an appropriate accident investigation tool nor immunity from adverse consequences for close call self-reporting. Indeed, it has been our experience that FRA's support for C³RS — and its role as honest broker at all levels of the program — has been the key element in persuading rank-and-file BLET members to consider the program, despite their well-founded distrust of the railroad for which they work. We are deeply concerned that the instant Proposed Rule will prove to be a serious self-inflicted wound for FRA in this regard.

That said we will turn now to a number of examples demonstrating that the Proposed Rule would produce an unjustified impact for, if not bizarre results on, BLET members and other railroad workers. In so doing, we wish to stress three points at the outset. First, because our intent is to portray how FRA's flawed methodology produces unwarranted changes to the civil penalty structure by pointing to a few of the most egregious examples, our failure to cite a specific part, subpart or section should not be construed as BLET concurrence with FRA's proposals concerning that part, subpart or section. Second, other labor organizations have far greater expertise than we do in the interpretation and application of some of the parts included in our comments, and we incorporate by reference any additional comments they offer on these subjects. And, third, in no way should any of our examples be construed as suggesting that any railroad may be more predisposed to violate any FRA regulation if the civil penalty is reduced.

FRA's proposed changes to the civil penalty structure for Part 214 are biased against roadway workers and draconian in nature. For example, the individual liability sanction for a roadway worker's failure to use fall protection would be increased by 340%, while the railroad's penalty for willfully failing to test the fall protection system would be increased by only 50%.² The proposed changes to Section 214.313 are outrageous; particularly extreme are the \$11,000 CMPs for failing to "follow the on-track safety rules of the railroad" as prescribed by paragraph (a) and for failing to lodge a good faith challenge pursuant to paragraph (d). While many other individual liability CMPs for this part would be doubled, tripled, or even quintupled, the CMP for a railroad's willful failure to include training provisions in its roadway worker protection program would be **reduced** by ten percent.

Under FRA's proposed changes to the Part 218 schedule, the CMP for a utility employee performing functions other than those enumerated in Section 218.22(c)(5) would increase 87½%, and the CMPs for violation of Sections 218.24(a)(1) and (b) would jump 125%. However, the

² FRA states that line-item penalty amounts represent the "CMP that FRA will ordinarily assess for the violation" and are published "to inform members of the regulated community of the amount that they are likely to be assessed for a given violation." 71 FR 70590. While not binding, these amounts are the starting point in all cases except those "where a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals, or has caused death or injury," in which case the statutory maximum penalty of \$27,000 may be imposed. *Id.* at 70591.

CMP for a railroad's willful violation of the Sections 218.35(a) and (b) would be **reduced** by 40%.

The disproportionate impact of the Proposed Rule on the Part 219 schedule is especially stunning. CMPs for employees who unlawfully refuse to participate in testing, who fail to remain available, or who tamper with specimens increase by 120%. However, the CMP for a railroad who willfully and unlawfully requires an employee to execute a waiver of rights increases by only 50%, and the CMP for willful coercion in obtaining a specimen is **reduced** by two-thirds.

The CMP for willful violations of the Section 219.23(d) through (f) pertaining to educational programs and materials would be **reduced** by 37½%, and reductions for willful violations of Sections 219.201(c)(1)(ii), 219.203(b)(1), 219.203(d), 219.205(b), 219.207(a)(1), and 219.211(c) range from ten to fifty percent. CMPs for a railroad's willful failure to meet random testing criteria, and for not spreading testing throughout the day and year, also are **reduced** by fifty percent.

With respect to the Section 219.701(a) duty to comply with Part 40 testing procedures when conducting testing pursuant to Subparts B, D, F and G, FRA proposes to **reduce** the ordinary CMP by 70% and the CMP for willful violations by two-thirds. The CMP for a willful failure to submit accurate and timely alcohol and drug MIS reports would be **reduced** by 10%, and CMPs for failure to include required data in an alcohol MIS report would be **reduced** by 40% for an ordinary violation and 50% for a willful violation.

Under FRA's proposed changes to the Part 220 schedule, the CMP for a railroad's willful failure to provide a radio-equipped locomotive would increase by 29.4% and the CMP for a similar willful failure with respect to a roadway work group would rise 20%. However, individual liability CMPs for railroad workers who fail to comply with the thirteen Subpart B communication procedures set forth in Sections 220.27 through 220.61 would increase by 20% (two sections), 46.7% (two sections), 50%, 80%, 120% (two sections), 125%, 275% (two sections), and 350% (two sections).

With respect to what FRA terms "Level E" violations, FRA notes that "noncompliance ... undercuts the effectiveness of the Federal railroad safety program, and could compromise the safety of rail operations." 71 FR 70591. Despite this acknowledgement, FRA proposes to **reduce** CMPs for violation of the Section 225.13 requirements governing late reports of accidents/incidents by 40% for ordinary violations and by 50% for willful violations.

The treatment of the Part 229 schedule is of particular interest to us, because that part governs locomotive safety standards. FRA proposes to **reduce** CMPs for failure to adjust maintenance practices for event recorders — data from which are routinely used by railroads to discipline,

dismiss, and revoke the certification of locomotive engineers — to maintain a full-functionality rate of 90% of locomotives inbound for periodic inspection by 18¾% for ordinary violations and by 43¾% for willful violations.

Even more galling is FRA's apparent decision to flush enforcement of locomotive sanitation requirements down the drain. FRA proposes to **reduce** the CMP for a railroad's willful failure to provide a toilet-equipped locomotive in the lead by twenty-five percent. Similarly, FRA proposes to **reduce** CMPs for commuter, switching, transfer, Class III, and tourist railroads, and in control cabs under the "ready access to railroad-provided sanitation facilities" exception provided in Section 229.137(b)(1) by 40% for ordinary violations and by 50% for willful violations. FRA also would **reduce** CMPs for non-compliant toilets under Section 229.137(b)(2) by 40% for ordinary violations and by 55% for willful violations, and CMPs for the "shall be present ... and shall operate" requirements set forth in Section 229.139(b) would be **reduced** by 40% for ordinary violations and by 50% for willful violations. Lastly, CMPs for the Section 229.139(c) requirement that sanitation compartments "shall be sanitary" also would be **reduced** 40% for ordinary violations and by 50% for willful violations, and it appears that all CMPs for violation of the Subpart D design requirements — including crashworthiness design standards — would be eliminated.

With respect to FRA's signal and train control system rules, the Proposed Rule would **reduce** the CMP for a railroad's violation of the 15-day "clear failure" reporting requirement prescribed in Section 233.7 by 40% for both ordinary and willful violations. Also **reduced** by 40% would be the CMPs for all violations of the Part 235.5 requirement that an application be filed with FRA whenever a block signal system, interlocking, traffic control system, automatic train stop, train control, or cab signal system is discontinued, decreased in limits, or modified.

Willful violation of the Section 236.18 requirements pertaining to software management control plans would be reduced by 25% under FRA's Proposed Rule. The individual liability CMP for violation of the Section 236.568 requirement that the lower speed be maintained whenever a cab signal authorizes a speed different from that authorized by a roadway signal would increase by 125%. However, many of the CMPs for violations involving the requirements of Subpart H of Part 236 would be reduced, including the following: §§ 236.913(c) and 236.915(a) — field testing / operation without authorization or approval — by 15% for ordinary violations and by 45% for willful violations; § 236.917(a) — failure to maintain records as required — by 13.3% for ordinary violations and by 40% for willful violations; and §§ 236.917(b) and 236.917(c) — failure to report inconsistency / take prompt countermeasures — by 35% for ordinary violations and by 55% for willful violations.

Great disparity also is evident in FRA's proposals for the Part 240 schedule. Individual liability CMPs for violation of a locomotive engineer's duty to furnish data on prior safety conduct as

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motor vehicle operator pursuant to Section 240.111 would increase from 25% to two-thirds. The CMP for violation of the Section 240.113 requirement to furnish data on prior safety conduct as an employee of a different railroad also would increase by 25%. The CMP for failure of a locomotive engineer to notify the railroad of deterioration in vision or hearing, as required by Section 240.121(f), would be increased by fifty percent.

FRA also proposes to increase the individual liability CMP by 37½% when a locomotive engineer fails to (1) notify his/her employing railroad of lack of qualifications over joint operations territory, (2) notify the railroad of certification limitations, or (3) notify one railroad of a denial or revocation by another concurrently certifying railroad. However, FRA proposes to **reduce** the CMP for a railroad that allows an uncertified person to operate non-traditional locomotives, by 10%, or allows an uncertified person to operate a locomotive, by 25%. In revocation matters, FRA proposes to **reduce** the CMP by 10% when a railroad willfully fails to (1) notify a locomotive engineer of the pending revocation, (2) provide a hearing opportunity, or (3) conducts untimely revocation procedures.

With respect to Part 241, FRA's United States locational requirement for dispatching of U.S. rail operations, FRA proposes to **reduce** the ordinary violation CMP by more than 13.3% and the willful violation CMP by over 22.2% for (1) requiring or permitting extraterritorial dispatching of a railroad operation, (2) conducting a railroad operation that is extraterritorially dispatched, or (3) requiring or permitting track to be used for the conduct of a railroad operation that is extraterritorially dispatched. And FRA proposes to **reduce** the ordinary violation CMP by 40% and the willful violation CMP by 50% for violation of the requirement that FRA be notified of extraterritorial dispatching in an emergency situation.

In closing, we would remind FRA that the majority of the regulated areas identified above are the product of negotiated rulemaking, through the Railroad Safety Advisory Committee, over the past decade. BLET has invested substantial time and resources to this process, and there is much to which we point proudly, from enhanced safety via roadway worker protection, locomotive crashworthiness standards, and safe and clean toilets, to properly maintained event recorders, to due process safeguards for the locomotive engineer certification process, to the introduction and implementation of next-generation signal and train control technology. We do not believe it is an unfair characterization to state that FRA's Proposed Rule — although well-intended — sends a signal that the goals of the BLET and of Rail Labor in the RSAC process are less important to FRA today, at least from an enforcement standpoint.

One glaring omission from the Proposed Rule was any discussion of how current CMP levels have served to enhance compliance with FRA regulations. To us, this is at least an important a question as what potential outcomes could ensue if a violation was to occur. That absence may well be why railroads appear to be handled with kid gloves, relative to individual workers, in this

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Proposed Rule. In any event, for the reasons stated herein we respectfully request that FRA reconsider this matter and make no revisions to civil penalty schedules at this time.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jose P. Vohra". The signature is written in a cursive style with a large initial "J".

Vice President and National Legislative Representative

cc: Thomas A. Pontolillo, Director of Regulatory Affairs