



# Brotherhood of Locomotive Engineers and Trainmen

*A Division of the Rail Conference — International Brotherhood of Teamsters*

## NATIONAL LEGISLATIVE OFFICE

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### JOHN P. TOLMAN

*Vice President and  
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May 11, 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-2006-25564

Dear Docket Clerk:

On July 21, 2006, Union Pacific Railroad Company (“UP” or “Petitioner”) petitioned the Federal Railroad Administration (“FRA”) for a waiver from compliance with portions of the requirements of 49 CFR Sections 229.21 and 232.207 for certain trains. *See* DOT DMS FRA-2006-25564-1 (“Petition”) at p. 1. On November 13, 2006, UP and FRA met to review UP’s proposed test plan, which had been drafted in connection with the Petition, after which FRA prepared a Memorandum summarizing the meeting for filing in this docket. FRA-2006-25564-3.

At that meeting, Petitioner provided FRA with a copy of its 17-page draft Test Plan, which it described as a “near final” plan. *Id.* at p. 1. The Memorandum also notes that there was considerable discussion regarding what would constitute a “suspected” defect, such as one identified by the wayside brake performance detector, and that of a “verified” defect, presumably identified during a Section 232.207 test/inspection, which would require that the car(s) be set out of the train at the nearest point where the repair could be made, rather than transporting the car to the maintenance facility at the assigned destination. *Id.* Lastly, the Memorandum noted UP’s representation that a follow-up meeting — at which the final Test Plan would be presented — would “likely” be held in early December 2006. *Id.* at p. 2.

On February 2, 2007, UP amended its petition by withdrawing its request for waiver from compliance with the requirements of Section 229.21, and advised that a “detailed test plan” concerning the Section 232.207 waiver request would be forwarded separately. *See* FRA-2006-25564-4. Petitioner’s test plan (“Test Plan”) was filed in the docket on February 15, 2007. *See*

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FRA-2006-25564-5. On March 28, 2007, FRA published notice of the filing of UP's petition, soliciting comments thereon from interested parties. *See* FRA-2006-25564-6, 72 FR 14640.

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 UP. Consequently, the instant petition would have a significant impact upon our members. For the reasons set forth below, BLET opposes granting the requested relief.

The federal regulation from which Petitioner seeks relief is 49 CFR § 232.207, which is entitled "Class IA brake tests — 1,000 mile inspection." Generally, the rule prescribes that all trains — other than those designated as "extended haul trains" pursuant to 49 CFR § 232.213 — must receive a Class IA brake test no less frequently than every 1,000 miles at a location designated by the railroad. The Class IA brake test consists of the following elements:

- a leakage test (49 CFR § 232.207(b)(1));
- a physical examination of each car during some portion of the test to examine and observe the functioning of all moving parts of the brake system (49 CFR § 232.207(b)(2));
- fully charging the brake system (49 CFR § 232.207(b)(3));
- a determination that the brakes on each car applies in response to a 20-psi brake pipe reduction, which application must remain until a release is initiated by the controlling locomotive, provided, however, that a car initially failing this test may remain in the train if it passes a retest<sup>1</sup> (49 CFR § 232.207(b)(4));
- the brake rigging on each car must be properly secured and may not bind or foul or otherwise adversely affect the operation of the brake system (49 CFR § 232.207(b)(5)); and
- all parts of the brake equipment must be properly secured (49 CFR § 232.207(b)(6)).

Petitioner proposes that its waiver cover coal trains operating over routes from the South Powder River Basin coal mines to Pleasant Prairie, Wisconsin, and White Bluff, Arkansas. Test Plan at p. 4. At present, Pleasant Prairie trains operate a round trip that does not exceed 2,369 miles, and are inspected pursuant to 49 CFR Section 232.207. Id. at p. 9. White Bluff trains operate a round trip that does not exceed 2,647 miles, and are inspected pursuant to 49 CFR Section 232.213, consistent with the designation of White Bluff trains as "extended haul trains."<sup>2</sup> Id. at p. 10.

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<sup>1</sup> A car that fails the retest must be handled in accordance with Section 232.15, if applicable.

<sup>2</sup> Since Petitioner does not seek relief from Section 232.213 with respect to the White Bluff trains, it is our expectation that Petitioner will, if relief from Section 232.207 is granted, rescind its "extended haul train" designation with respect to the White Bluff trains in order to bring them under the waiver.

The instant Petition is nothing less than a frontal assault upon the Part 232 brake test and inspection regimen. Accordingly, we will address the policy implications of the Petition first. Simply stated, Petitioner seeks relief from its regulatory obligation to timely conduct periodic brake inspections on trains and, therewith, the obligation to repair defective conditions discovered during those inspections. Petitioner makes abundantly clear — throughout its pleadings — that its goal is to continue to operate these trains until it chooses to repair cars with defective braking systems, based upon operational convenience and regardless of FRA safety regulations.

For example, Petitioner complains that the current Sections 232.207 and 232.213 requirements “are sometimes imposed at undesirable locations that significantly impede train operations.” Id. at p. 1. However, responsibility for any perceived locational undesirability lies squarely at Petitioner’s feet, because it is Petitioner — not FRA — who designates where 1,000-mile and 1,500-mile inspections are performed. *See* 49 CFR §§ 232.207(c), 232.213(a)(1)(iv).

Petitioner similarly asserts that current “standards inadvertently limit reliability by the requirements to address every defect at the time it is discovered.” Test Plan at p. 1. However, the “reliability” to which Petitioner refers is its claimed reliability of service (*i.e.*, delays caused by cars with defective brakes); equipment reliability cannot logically be compromised by a requirement that a Part 232 defect be repaired at the time it is discovered. It is not FRA’s role, nor is it the purpose of Part 232, to facilitate operation of trains with defective brakes; rather, the duty is to ensure that trains do not operate unless minimum braking safety is maintained.

Most telling are the following passages from Petitioner’s Test Plan:

Exceedingly higher levels of safety and reliability can only be attained by modifying the paradigm for equipment and infrastructure maintenance by expanding the operational procedures to include performance measures in holistic systems.

\* \* \*

It is Union Pacific’s position that the current method of visually inspecting freight cars, and thereby trains, for determining the effectiveness of braking is not a performance based assessment. ... Many of the brakes that do not apply the as-designed force to the wheel will pass the Class 1 or 1A inspection because it is based only on motion of the brake system components and not braking horsepower.

Id. at pp. 1, 3.

In the plainest language, Petitioner announces its goal of replacing current FRA regulation for these classes of trains — and, presumably, as a jumping off point for all trains in the future —

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with a performance standard of its own design. This is a curious reversal of position, compared with where the industry stood when Part 232 was overhauled a little over five years ago.

At that time, the Association of American Railroads (“AAR”), of which Petitioner is a member, objected to FRA’s proposed inclusion of the phrase “a brake that is capable of producing its required designed retarding force” in the definition of “effective brake,” because it created “an unquantifiable and unidentifiable standard.” 67 FR 17563 (April 10, 2002). At AAR’s behest, FRA abandoned the notion of a performance standard by

inserting the word “nominally” prior to the phrase “designed retarding force” [in the definition of “effective brake”] in order to provide an allowance for any degradation in a brake system’s designed retarding force that results due to normal wear and age. FRA’s intent was not to consider retarding force reductions that occur due to normal use of a brake system or component. The definition is intended to capture those readily identifiable brake system problems that are not specifically addressed by other definitions contained in the final rule that result in a brake system or brake component not producing the retarding force it is designed to provide.

Id.

Now, however, Petitioner seeks to impose its own performance standard, which is neither quantified nor identified anywhere in the Test Plan, as far as we can tell. The test plan includes a number of temperature metrics and other metrics by which Petitioner claims a train’s real-time performance can be compared to a standard that will identify potential problems. *See Test Plan, passim.* However, Petitioner concedes that the validity of these metrics is based upon an “*assumption* ... that cars producing suspect stopping force will have colder wheels when compared to the other adjacent cars’ wheels.” Id. at p. 1 (emphasis added). We have not been able to find — anywhere in the Test Plan — a correlation between temperature ranges among adjacent cars and their retarding forces, whether in absolute or relative terms.

Furthermore, Petitioner seeks to dilute the 100% operability standard contained in Sections 232.207 and 232.213 by requesting permission to eliminate the physical inspection tasks included in Section 232.207(b) whenever “95% of the cars have surpassed the requirements for properly performing brakes.” Id. at p. 8. The only FRA-permitted deviation from the 100% standard of which we are aware appears in a waiver recently granted for purposes of a pilot project involving an Electronically-Controlled Pneumatic (“ECP”) brake system, where a 95% standard was approved. *See* FRA-2006-26435-18.

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However, ECP braking command execution is far superior to the conventional braking command execution for the trains subject to this Petition and, therefore, the latitude granted in the ECP case cannot be applied here. To the contrary, the rationale by which the ECP waiver petition was decided can lead to no other conclusion than that a 95% standard for a conventional braking system is indefensible.

At some point FRA may be inclined to consider whether a suitable brake performance standard can be developed as a potential alternative to or substitute for current Part 232 standards. However, we firmly believe that the waiver process is not an appropriate venue for such consideration, particularly when — as here — the petitioner seeks to utilize a self-serving standard that is undefined. Accordingly, we strongly urge FRA to deny the Petition for policy reasons.

Without retreating from the above, there are several other reasons FRA should deny the instant Petition, all of which relate to the fact that Petitioner cannot demonstrate its proposed Test Plan — or any modification thereof — will provide a level of safety equivalent to current levels under Section 232.207/232.213 if the Petition is granted. First, we would point out that the “monitoring system” Petitioner proposes to use to replace the 1,000-mile and 1,500-mile inspections is comprised of unregulated wayside detection technologies that were designed and installed for other purposes. They currently are in use, and are located where found, solely in the exercise of managerial discretion, and their repair and maintenance is not subject to FRA oversight.

Earlier this year, we commented in another matter that involved a different railroad’s plan to use wayside detection technologies, in part, as a substitute for the testing of extended haul trains required by Section 232.213, objecting that these wayside devices are not subject to FRA regulation and that there are no requirements to continue using and maintaining them. Further, we asserted that any conclusion that these detectors provide an equivalent level of safety to Section 232.213 inspections and tests is a “dubious proposition.” In ruling on that petition, the Railroad Safety Board noted that

FRA agrees with this assertion and specifically notes that its decision to grant this waiver is not predicated on a finding that the wayside detectors noted to be in use ... provide a safety benefit equivalent to the safety of inspections and tests mandated in § 232.213.

*See* FRA-2006-24812-10 at p. 2.<sup>3</sup> We believe FRA’s finding in the cited case is dispositive here, and provides more than a sufficient basis for denying the instant Petition.

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<sup>3</sup> Unlike the present Petition to eliminate performing visual brake inspections altogether, the petitioner in the cited case sought merely to move the 1,500-mile test to a location marginally beyond the limit specified in Section 232.213.

Further, there are a substantial number of defects uncovered by the current inspection regimen that will not be timely discovered under the inspection regimen proposed by Petitioner. The Test Plan indicates that, during the first 11 months of last year, nearly one in four defects found — and over 36% of those on White Bluff trains — were discovered at locations other than those that would serve as the “designated origin” under the Plan, which is the **only** location where the visual inspection elements of a brake test would be performed. Test Plan at p. 7.

Petitioner proposes that FRA take a leap of faith that this substantial number of defects will timely be discovered by its unregulated monitoring technologies, applying an undefined and unquantified standard. At the same time, however, Petitioner posits that the benefits of its system “outweigh the benefits that are currently realized by the combination of Class 1 and Class 1A visual inspections ... will be proven out by the decrease in the number of cars with indicated brake performance failures.” Id. at p. 3.

In our view, the only way this is possible is if the substantial number of defects that were not discovered at the designated origin are not discovered at all. This will produce a diminution, not an enhancement, of safety. Indeed, the conclusion that the Petition seeks to do nothing more than relieve Petitioner of its regulatory duty to detect and repair defects on a timely basis is underscored by Petitioner’s stated intention that cars with problems identified by the monitoring technologies will be “*future bad-ordered at the destination or spare location.*” Id. (emphasis added). In other words, Petitioner proposes to defer repairs to a place and time that is operationally convenient.

Lastly, Petitioner claims relief is necessary because “the use of the defect tracking system to drive maintenance has been impeded by the business conflict that exists between the maintenance tasks and the desired movement of trains, especially at intermediate locations.” Id. This argument is nothing more than a red herring. In a different setting, FRA restated the following general policy, which is equally applicable to the instant matter:

In reaching the decision to deny the waiver petition, the Safety Board noted the importance of uniform and consistent regulation, the fact that the FRA regulations in question establish minimum standards, and that railroads are free to adopt and enforce additional or more stringent requirements that are not inconsistent with the regulations. Accordingly, FRA noted that a great deal of scheduling flexibility is already provided in the regulations. Further, the Safety Board noted that the purpose of the requirements ... is to ensure timely testing and inspection of safety-critical devices at regular intervals in order to ensure that those devices are able to perform their intended functions and, if they are not, that they are removed from service ....

*See* FRA-2006-25630-3 (citations omitted).

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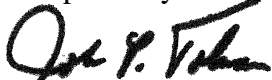
To the extent a “business conflict” currently “exists between the maintenance tasks and the desired movement of trains, especially at intermediate locations,” the conflict is a function of the requirements of Part 232, and places Petitioner in no better or worse a position than any other railroad. Furthermore, the only way this “conflict” can be resolved in favor of “the desired movement of trains” is if detection of defects, repair of defects, or both are deferred. Granting the Petition to resolve the current “business conflict” in the way Petitioner seeks would erode the uniformity and consistency of regulation in the short term, and undermine the safety benefits of Part 232 in the long term, as competing railroads claiming similar “business conflicts” would file similar petitions seeking, once again, to level the playing field.

Petitioner’s other point — that “the use of the defect tracking system to drive maintenance” creates a “business conflict” in the absence of the regulatory relief requested — is pure fantasy. Part 232 sets forth a minimum standard, and explicitly “does not restrict a railroad from adopting or enforcing additional or more stringent requirements not inconsistent [there]with ....” 49 CFR § 232.1(a). Moreover, what Sections 232.207 and 232.213 establish are **inspection and repair** standards, not **maintenance** standards.

Petitioner currently has the ability to use the data generated by its monitoring technology to adjust maintenance schedules totally independent of the inspection and repair requirements set forth in Sections 232.207 and 232.213. Indeed, to the extent a discovered condition does not rise to the level of a Part 232 defect, Petitioner can either address it whenever it chooses, or not address it at all. This may be a sound business decision, to the degree that it permits Petitioner to optimize car fleet utilization. It may even have a safety benefit, to the extent a Part 232 defect might occasionally be detected earlier than the next scheduled test and inspection, although it is far from clear in the Test Plan that this will occur.

However, what Petitioner’s monitoring technology cannot do is provide a level of safety equivalent to that currently afforded by Sections 232.207 and 232.213. Accordingly, and for all the reasons stated herein, the BLET respectfully requests that FRA deny the Petition in this matter.

Respectfully submitted,



Vice President and National Legislative Representative

cc: Grady C. Cothen, Jr., Esquire, FRA Deputy Associate Administrator for Safety Standards  
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