



# 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*

*National Legislative Representative*

August 30, 2007

Docket Clerk  
DOT Central Docket Management Facility  
West Building Ground Floor, Room W12-140  
1200 New Jersey Avenue, Southeast  
Washington, DC 20590

Re: Docket No. FRA-2007-28454

Dear Docket Clerk:

On May 29, 2007, Union Pacific Railroad Company (“UP” or “Petitioner”) petitioned the Federal Railroad Administration (“FRA”) for a waiver from compliance with the requirements of 49 CFR Section 232.305(b)(2). *See* DOT DMS FRA-2007-28545-1 (“Petition”). On July 17, 2007, FRA published notice of the filing of UP’s petition, soliciting comments thereon from interested parties. *See* FRA-2007-28454-3.

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 rule from which UP seeks relief requires railroads to perform a single-car air brake test on each car any time it is placed on a shop or repair track and it has not received such a test in the preceding twelve (12) months. Section 232.305 sets forth several circumstances that trigger a single-car brake test. The trigger identified by UP in its petition is that which would require testing most frequently. Therefore, UP bears a heavy burden of proving that the relief, if granted, would not result in the diminution of safety; the record before the Safety Board establishes that UP has failed to do so.

The Railroad Safety Board should deny the Petition for several reasons. First, the Petition fails to comply with the requirements of FRA’s Rules of Practice. In order for the Safety Board to

grant a petition for waiver of a safety rule, said petition must both comply with the requirements of Section 211.9 **and** be justified. 49 CFR § 211.41(c). Accordingly, either failure to comply with the requirements of Section 211.9 or lack of justification provides an independent basis to deny such a petition. 49 CFR § 211.41(d). FRA's Rules of Practice, in pertinent part, provide as follows:

**§ 211.9 Content of rulemaking and waiver petitions.**

Each petition for rulemaking or waiver must:

(a) Set forth the text or substance of the rule, regulation, standard or amendment proposed, or specify the rule, regulation or standard that the petitioner seeks to have repealed or waived, as the case may be;

(b) Explain the interest of the petitioner, and the need for the action requested; *in the case of a petition for waiver, explain the nature and extent of the relief sought, and identify and describe the persons, equipment, installations and locations to be covered by the waiver;*

(c) Contain sufficient information to support the action sought including an evaluation of anticipated impacts of the action sought; each evaluation shall include an estimate of resulting costs to the private sector, to consumers, and to Federal, State and local governments as well as an evaluation of resulting benefits, quantified to the extent practicable. *Each petition pertaining to safety regulations must also contain relevant safety data.*

49 CFR § 211.9 (emphasis added).

UP's Petition fails to conform to the procedural requirements set forth in Section 211.9 in two respects. First, the "extent of the relief sought" and the "equipment, installations and locations to be covered by the waiver" are unclear. One place in UP's Petition states that it is "performing repairs to cars in-train on selected trains" throughout the system. Petition at p. 1. UP later states that the "majority of these trains are in coal service." Id. However, on its face, UP's request is for relief from Section 232.305(b)(2) in all circumstances, not merely for the "selected trains" for which in-train repairs are being performed, or for the coal trains that are a subset thereof.

Second, UP has failed to comply with the Section 211.9(c) requirement that a "petition pertaining to safety regulations must also contain relevant safety data." The only mention of safety in the Petition is in the final sentence, which simply states that "[t]he requested waiver will have no adverse effect on the safety of operations. Id. at p. 2. This conclusory statement is supported by no relevant safety data or other evidence whatsoever.

For example, if single-car brake tests conducted pursuant to Section 232.305(b)(2) afforded no safety benefit because no defects were discovered during such testing, UP could have included with its petition evidence documenting same. Since UP did not provide data establishing the efficacy of Section 232.305(b)(2) testing, the Safety Board must infer that the data — if made

available — would establish that the testing provides a demonstrable safety benefit. In any event, UP's failure to comply with Section 211.9 should compel the Safety Board to deny the Petition.

Granting UP's Petition also would be contrary to public policy. On numerous occasions, FRA has restated its general policy, which is equally applicable in the instant matter, concerning the "importance of uniform and consistent regulation." *See e.g.*, FRA-2006-25630-3 (citations omitted). The triggers for single-car brake tests — developed by FRA's Railroad Safety Advisory Committee ("RSAC"), with Petitioner as a full participant — provide the basis for a uniform and consistent regulation, arrived at by consensus. We are becoming increasingly concerned by the tendency of some railroads to participate vigorously in the RSAC process, enjoy in the short term the benefits of compromises that were made during consensus rulemakings, and then returning later seeking to reap a windfall by obtaining waivers of the standards to which they agreed as part of the compromise.

In point of fact, the relief requested by Petitioner is directly contrary to the express purpose of the regulation. In the Final Rule and Response to Petitions for Reconsideration published on August 1, 2001, FRA stated the following regarding the definition of a shop or repair track:

The purpose of this stringent requirement was to prevent railroads from avoiding periodic testing of the brake system by regularly performing major repairs on trackage designated or regularly used to conduct minor repairs. ... FRA believes that this restriction is sufficiently stringent to ensure that railroads do not divert cars to "expediter" tracks to avoid conducting single car air brake tests. By eliminating any temporary advantage to avoidance of the requirement, this formulation will also tend to promote the completion of heavier repairs under conditions where appropriate arrangements are provided to reduce the risk of injury to workers.

66 FR 39684.

FRA also underscored the importance of the single-car brake test in response to industry attempts to water down the standard:

FRA continues to believe that the single car air brake test is critical to ensuring the safe and proper operation of the brake equipment on the nation's fleet of freight cars. With the elimination of time-based cleaning, oiling, and testing of air brake systems, the single car air brake test has become the sole method by which air brake equipment on freight cars is periodically tested to identify potential problems before they result in the brake's becoming inoperative. Therefore, FRA continues to believe that specific and determinable limits must be placed on the manner and frequency of performing this test.

66 FR 39685. The Petition plainly is contrary to these well-founded determinations.

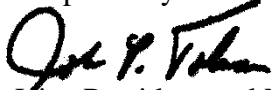
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Furthermore, we endorse and agree with the position espoused by the Brotherhood of Railway Carmen Division of the Transportation•Communications International Union (“BRC”) in this matter. *See* FRA-2007-28454-4. Specifically, the single-car brake test is an integral part of the safe operation of trains, because these tests check for inoperative air brakes and evaluate the sensitivity of the valves. Such tests and evaluations enhance the performance of the cars and can prevent unintended emergency application of the brakes.

Additionally, and as BRC points out, FRA’s regulation already provides UP with alternatives: UP may employ an alternative testing procedure approved by FRA pursuant to Section 232.17; or UP may introduce a modified procedure approved in accordance with the provisions set forth in Section 232.307.<sup>1</sup> 49 CFR § 232.305(a). Indeed, FRA crafted Section 232.307 in “recogni[tion] that the industry may find it necessary to modify the single car air brake test procedures from time to time in order to address new equipment or utilize new technology.” 66 FR 39685. Therefore, if UP had a *bona fide* operational need for relief in conjunction with single-car brake tests for cars in trains undergoing in-train repairs or the subset of coal trains, the rule already affords options. That UP has availed itself of neither exposes the Petition as being driven by operational convenience, with no thought as to the potential safety impact.

In closing, the Petition is deficient and fails to comply with FRA’s Rules of Practice. This, alone, is sufficient ground for the Safety Board to deny the Petition. Moreover, Petitioner has utterly failed to demonstrate (1) that the relief already afforded by the rule is insufficient, (2) that further relief is justified, or (3) that granting the requested relief will not result in a diminution of safety. Accordingly, the Safety Board also has more than ample grounds to deny the Petition on its merits. We strongly urge that the instant Petition be denied.

Respectfully submitted,



Vice President and National Legislative Representative

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<sup>1</sup> Indeed, as BRC correctly points out, the requirements of Section 232.307 parallel, in many ways, the requirements of Section 211.9, particularly regarding the identification of equipment, locations, data and analysis. FRA-2007-28454-4 at pp. 4-6. As with UP’s failure to provide data in support of its request under Section 211.9, Petitioner has left the Safety Board with no choice but to infer that UP could not satisfy its burden of proof regarding a modified procedure if it fully complied with all the requirements of Section 232.307.

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cc: Grady C. Cothen, Jr., Esquire, FRA Deputy Associate Administrator for Safety Standards  
and Program Development  
All UP General Chairmen  
All UP State Legislative Board Chairmen  
Thomas A. Pontolillo, Director of Regulatory Affairs