



May 10, 2023

John Karl Alexy
Associate Administrator for Railroad Safety
Federal Railroad Administration
1200 New Jersey Avenue SE
Washington, DC 20590

**RE: Petition for Extension of Waiver of Compliance, UP
Docket No. FRA-2001-8697, FRA-2007-28339, FRA-2007-28952**

Dear Mr. Alexy:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to respond to the Federal Railroad Administration's (FRA) notice regarding Union Pacific's (UP) petition to extend its waiver allowing Class I brake tests and other procedures associated with a train entering the United States to be performed at alternate locations instead of immediately at the border. TTD consists of 37 affiliated unions representing the totality of rail labor, including rail workers who operate on these lines.¹ For the reasons outlined below, we ask that the FRA deny UP's petition to extend its waiver. Additionally, we endorse the comments of our affiliate, the Brotherhood of Locomotive Engineers and Trainmen (BLET).

The waivers that UP is requesting cover three locations: Nogales, Arizona; Laredo, Texas; and Eagle Pass, Texas. The Association of American Railroads (AAR) has admitted to allowing Mexico-based train crews to operate trains many miles into the United States, in violation of the statements that UP has offered in this docket.² Allowing Mexico-based crews to operate in the United States fails to comply with U.S. safety standards for crew qualifications and equipment inspections, introducing new and unnecessary risks to rail transportation. Mexico's government agency responsible for regulating rail operations, the Agencia Reguladora del Transporte Ferroviario (ARTF), is still developing its own rail regulations, and its enforcement capability is entirely unproven. UP is simply seizing this opportunity to lower labor costs and avoid its current collective bargaining obligations as it seeks to maximize profit from expanding cross-border operations.

Existing regulations require carriers to perform a rigorous Class I brake inspection at the border when crossing into the United States.³ This inspection is critical to mitigate the lack of confidence in Mexico's safety regulations, and it is the FRA's obligation to ensure that this brake inspection is performed immediately upon entering the country by U.S.-based crews who are held to U.S. safety standards. Delaying this testing and inspection process puts the health and safety of workers and border communities at risk.

Of further concern is the existence of Department of Transportation (DOT) regulations that allow

¹ Attached is a list of TTD's affiliated unions

² <https://www.aar.org/wp-content/uploads/2019/10/AAR-Crew-Interchange-Fact-Sheet.pdf>

³ 49 CFR 232.205, 49 CFR 215

foreign-based railroad workers to operate up to 10 miles into the United States without being subject to any drug and alcohol testing.⁴ At worst, this means trains may travel through communities in the United States with no assurance that the crewmember is not under the influence of drugs or alcohol. Even if ARTF or the carrier claims they are conducting a drug and alcohol testing program, we are concerned that there is no evidence demonstrating that these workers are held to the same testing standards as U.S. transportation workers. For example, any drug and alcohol program that sends specimens to Mexican labs that are not certified by the Department of Health and Human Services (HHS) under the National Laboratory Certification Program, like U.S. labs, would be faulty.⁵ The FRA must prohibit cross-border crews from Mexico as there is not an absolute assurance of a robust and HHS/DOT-approved drug and alcohol testing program. Allowing Mexico-based workers to operate trains into this country without adhering to the highest safety and regulatory requirements threatens the safety of U.S. locomotive engineers and conductors and the communities that these trains operate through.

We are also deeply concerned about UP's flagrant disregard for existing waiver requirements. In this docket, UP has repeatedly failed to request an extension in a timely manner. In 2017, in response to UP filing its waiver extension request late, the FRA reminded UP that the FRA retains enforcement authority under 49 U.S.C § 20111 for noncompliance with any condition of this waiver or applicable Federal regulations.⁶ Despite this reminder of the importance of fully adhering to waiver requirements, in 2022, UP again failed to file its extension request in time. This created a situation where UP's waiver expired during the required public comment period. The Office of Railroad Safety granted UP a six-month extension of the waiver without posting any documentation to that effect in the docket for nearly two weeks after the fact.

In December, TTD requested a formal extension of the comment period, which should have been simple to grant considering the six-month extension to the waiver itself that was granted. However, the FRA declined to formally re-open the comment period and provide a new due date that would allow transparency about the timeline for a general decision.

It is clear from UP's actions that it plans to continue pursuing cross-border operations.⁷ TTD is deeply concerned that UP has not been held accountable for failing to follow the terms of waivers that have already been granted for existing cross-border operations. It would be irresponsible of the FRA to allow UP to continue this pattern of misbehavior, particularly when it is clear that UP plans to expand such operations. UP needs to understand that laws and regulations are not merely suggestions and that following the rules and creating safe working conditions and operating procedures is absolutely non-negotiable. To this end, the FRA must act to reign in UP's callous disregard for existing regulations and waiver requirements while also committing to greater public transparency that enables the public to engage on this matter in a meaningful way.

The waivers that UP is requesting were originally granted in 2001 and 2007, prior to the 2008 Railroad Safety Improvement Act, which reflected Congressional concerns about the lack of safety

⁴ 49 CFR 219.3(d)(i)

⁵ 49 CFR 40.81

⁶ <https://www.regulations.gov/document/FRA-2001-8697-0015>

⁷ <https://www.trains.com/trn/news-reviews/news-wire/cn-joins-up-and-ferromex-for-new-cross-border-intermodal-service/>

for cross border issues. TTD has consistently raised concerns about the safety of railroad cross border operations. While TTD does not oppose reasonable waivers that allow railroads to conduct Class I brake tests at yards within 10 miles of the international border, TTD does strongly oppose allowing Mexico-based crews to operate trains within the United States due to the safety and security issues already discussed. Additionally, TTD is strongly opposed to allowing railroads, as they have requested in the past, to conduct Class I brake tests within Mexico because the inspectors and regulations in Mexico simply are not equivalent to U.S.-based inspectors subject to FRA safety regulations. These issues, while perhaps not directly raised in these dockets, are certain to be raised in the future as UP expands cross-border brake inspections. Additionally, if the FRA fails to send a strong message to UP that safety regulations and waiver requirements will be enforced to the fullest extent, UP will continue trying to chip away at the hard-won safety standards that exist today.

For these reasons, we ask the FRA to immediately deny UP's waiver on the grounds that UP failed to comply with waiver requirements multiple times. If UP wishes to reapply for this waiver, it should be required to submit a plan to demonstrate that it will maintain compliance with waiver requirements.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Regan", written over a circular stamp or mark.

Greg Regan, President