

June 6, 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-2006-25764**

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 mechanical inspections associated with a train entering the United States at Calexico, California 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. For the reasons outlined below, we ask that the FRA deny UP's petition to extend its waiver.

This requested waiver is similar to ones that UP requested earlier this year covering three other locations on the border: Nogales, Arizona; Laredo, Texas; and Eagle Pass, Texas. TTD filed comments opposing those waiver requests.<sup>1</sup> This waiver request touches on the same concerns regarding cross-border train operations.

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.<sup>2</sup> 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.

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<sup>1</sup> <https://www.regulations.gov/comment/FRA-2001-8697-0023>

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

**Transportation Trades Department, AFL-CIO**

815 Black Lives Matter Plaza, NW / 4<sup>th</sup> Floor / Washington DC 20006

Tel: 202.628.9262 / Fax: 202.628.0391 / [www.ttd.org](http://www.ttd.org)

Greg Regan, President / Shari Semelsberger, Secretary-Treasurer



Existing regulations require carriers to perform a rigorous Class I brake inspection at the border when crossing into the United States.<sup>3</sup> 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.

TTD's concerns over ensuring the proper execution and timeliness of Class I brake inspections is enhanced by recent high-profile derailments in East Palestine, Ohio and New Castle, Pennsylvania where overheated wheel bearings were not caught in time by the existing inspection procedures and apparatuses to prevent the derailments. The waiver that UP seeks to extend in this petition allows their trains to operate at least up to 5.5 miles from the border without the required mechanical inspections and up to 10 miles without a full Class I brake test. UP's request to waive these important existing safety regulations regarding mechanical and brake inspections contradicts the heightened focus of the FRA on ensuring that rail inspections are being done properly and in a timely manner.

Of further concern is the existence of Department of Transportation (DOT) regulations that allow foreign-based railroad workers to operate up to 10 miles into the United States without being subject to any drug and alcohol testing.<sup>4</sup> 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 Mexico-based labs that are not certified by the U.S. Department of Health and Human Services (HHS) under the National Laboratory Certification Program, like U.S. labs, would be faulty.<sup>5</sup> 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.

The waiver that UP is requesting to extend was originally filed in 2006 and granted by the FRA in December 2007. These actions happened prior to the 2008 Railroad Safety Improvement Act, which reflected Congressional concerns about the lack of safety 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

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<sup>3</sup> 49 CFR 232.205, 49 CFR 215

<sup>4</sup> 49 CFR 219.3(d)(i)

<sup>5</sup> 49 CFR 40.81

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.

Lastly, TTD notes its concern with the FRA's decision on May 2nd to unilaterally extend UP's waiver by 90 days because UP did not file this petition in time for the FRA to consider the petition before the waiver expired.<sup>6</sup> It does not serve the FRA's mission as the federal rail safety regulator to cover for the railroads when they don't file waiver requests on time. This extension marks another instance in a recent troubling sequence of events where the FRA has unilaterally extended a waiver because a railroad failed to file a petition in time for the FRA to consider it before the waiver expired.<sup>7</sup>

In this case, the FRA on May 2, 2023 unilaterally extended UP's waiver by 90 days until July 30, 2023<sup>8</sup>, despite UP not complying with the FRA's own specific conditions in its May 2, 2018 letter that granted the waiver.<sup>9</sup>

In that May 2, 2018 letter granting UP's waiver request, the FRA said the following (emphasis added):<sup>10</sup>

This waiver expires 5 years from the date of this letter. At the conclusion of the 5-year period, FRA reserves the right to extend the waiver if conditions warrant, **and if UP has made a written request for an extension at least 6 months prior to the expiration date.**

UP's waiver was scheduled to expire May 2, 2023. That means to be in compliance with the May 2, 2018 letter, UP needed to submit a request for an extension of the waiver to the FRA on or before November 2, 2022. UP did not submit a request to the FRA for an extension until February 24, 2023.<sup>11</sup>

TTD is disturbed about UP's flagrant disregard for existing waiver requirements. It not only disregarded the FRA's specific conditions regarding extending this waiver, but it did so for the other three cross border location waivers as well.<sup>12</sup> FRA has repeatedly reminded UP that the FRA retains enforcement authority under 49 U.S.C § 20111 for noncompliance with any condition of

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<sup>6</sup> 49 CFR 40.81

<sup>7</sup> <https://www.regulations.gov/document/FRA-2006-25764-0026>

<sup>8</sup> <https://www.regulations.gov/document/FRA-2006-25764-0029>

<sup>9</sup> <https://www.regulations.gov/document/FRA-2006-25764-0026>

<sup>10</sup>Id. page 3

<sup>11</sup> <https://www.regulations.gov/document/FRA-2006-25764-0027>

<sup>12</sup> Supra 1

this waiver or applicable Federal regulations.<sup>13</sup> Despite this reminder of the importance of fully adhering to waiver requirements, UP has repeatedly failed to file its extension requests in time.

It is clear from UP's actions that it plans to continue pursuing cross-border operations.<sup>14</sup> 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. 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.

To this end, the FRA must act to rein 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. TTD vehemently objects to the FRA Office of Railroad Safety repeatedly and unilaterally granting extensions of waivers that contradict the conditions the FRA itself set forth.

For these reasons, we ask the FRA to immediately deny UP's petition on the grounds that UP failed to comply with the waiver conditions in FRA's May 2, 2018 letter when the railroad submitted this request. 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,



Greg Regan  
President

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<sup>13</sup> <https://www.regulations.gov/document/FRA-2001-8697-0015>

<sup>14</sup> <https://www.trains.com/trn/news-reviews/news-wire/cn-joins-up-and-ferromex-for-new-cross-border-intermodal-service/>