



Transportation Trades Department, AFL-CIO

February 20, 2024

Mr. Karl Alexy
Associate Administrator for Railroad Safety & Chief Safety Officer
Federal Railroad Administration
1200 New Jersey Avenue SE
Washington DC, 20590

**RE: Petition for Waiver of Compliance
Docket No. FRA-2016-0086**

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 BNSF Railway Company's petition to make permanent its existing waiver from certain provisions of the Federal railroad safety regulations contained at 49 CFR parts 232 (Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-Of-Train Devices), and 229 (Railroad Locomotive Safety Standards). Canadian National Railway Company (CN) and Union Pacific Railroad (UP) are also requesting relief under the existing waiver. TTD consists of 37 affiliated unions representing the totality of rail labor, including freight rail employees.¹ For the reasons outlined below, we ask that the FRA deny this petition. In addition, we endorse the comments filed in this docket by our affiliates, the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART-TD).

The existing waiver allows BNSF, CPKC, and CSX to test extending the air flow method (AFM) test intervals from 92 days to 184 days on locomotives equipped with the New York Air Brake (NYAB) CCB-II and Fastbrake air brake systems. The most recent petition requests that the relief granted under the existing waiver be extended to CN and UP. In addition, BNSF is requesting that this relief be made permanent.

Regulatory Waivers Are Not and Cannot Be Granted on a Permanent Basis

In 2018, the Association of American Railroads (AAR) submitted the following comments to the FRA regarding automation in the railroad industry:

AAR strongly encourages DOT to create regulatory certainty regarding long-standing waivers whose value has been proven through successful implementation by making the waivers permanent via rule.

¹ Attached is a complete list of TTD's affiliated unions.

Many of these existing waivers promote the use of technology to improve safety. Further, FRA should issue waivers of indefinite duration and provide procedure (sic) for expedited conversion of time-limited waivers to permanent where equivalent or better level of safety is established.²

The rail industry has made it clear that it views waivers as a way to permanently evade safety regulations, without the full review afforded by a proposal to permanently change the Code of Federal Regulations (CFR). A proposed rule change would provide public notice, opportunity for comment, and – if finalized – would be publicly viewable easily in the CFR. In contrast, a permanent waiver would only be viewable in a docket with no note in the CFR to indicate that not every railroad was subject to the same rules. This would create ambiguity and prevent the public from easily accessing and understanding the operating and safety standards applicable to each railroad.

Further, the standard waiver process includes a number of important safeguards including periodic reviews. Removing the periodic review and renewal components of safety waivers would deprive the public of critical transparency and reporting structures. Often, the reporting that is required as part of waiver renewal is the most accurate information that is available about rail safety for a specific geographic area. If the railroad no longer had to provide this information in a publicly available docket, the public would be deprived of the opportunity to regularly review the ongoing safety and necessity of the waiver in question.

As BNSF and other carriers are keenly aware, requests for permanent waivers are akin to seeking permanent changes to regulations and only serve to circumvent the proper regulatory process. Allowing railroads to obtain permanent waivers would arbitrarily and capriciously remove transparency, accountability, and opportunity for public comment, likely violating the Administrative Procedures Act (APA).³

Waivers granted by the FRA should always provide an expiration date that allows the waiver to be reviewed on a regular basis to ensure the waiver is still necessary and that the railroad is continuing to abide by all relevant safety and reporting requirements. This waiver is especially illustrative of this point. In 2022, the FRA found issues with BNSF locomotives operating under the 184-day AFM waiver that were not aligned with the periodic inspection required under 49 CFR 229.⁴ These issues caused at least a six-month suspension of the waiver. Given BNSF's overall struggle to conduct basic maintenance of their locomotives and their lack of workers to complete the required periodic locomotive inspections, TTD and our affiliates have no confidence that BNSF has actually fixed the issues that led to the suspension of this waiver in 2022. Extending and making permanent a waiver that BNSF has struggled to comply with is not in the public interest and contrary to safety. For these reasons, Rail Labor strongly urges FRA to deny BNSF's attempt to 1) extend this waiver and 2) secure a permanent waiver.

Safety Issues in the Class I Rail Industry

BNSF's petition to make its waiver permanent also comes at a time of widespread safety issues in the freight rail industry. These safety issues contribute to more than 1,000 freight rail derailments a year – nearly three a day. According to data from the FRA, the accident and incident rate has gotten worse over the last decade at the four biggest Class I railroads. BNSF's total rate of accidents/incidents per million train miles increased from 7.314 in

² <https://www.regulations.gov/comment/FRA-2018-0027-3256>, page 9

³ 5 U.S. Code § 706 (2)

⁴ <https://www.regulations.gov/document/FRA-2016-0086-0025>, Page 1

2013 to 7.901 in 2022 while its rate of yard accident/incidents per million yard switching miles increased from 16.615 in 2013 to 18.191 in 2022.⁵

Last year's high-profile disaster in East Palestine, Ohio, where an undetected overheated wheel bearing on a Norfolk Southern (NS) train caused a catastrophic derailment, is an important reminder that safety inspections, including air brake inspections, are a critical safeguard necessary to protect workers and surrounding communities. The National Transportation Safety Board (NTSB)'s hearing on the derailment last June highlighted the lack of inspections that the rail cars in that train received, with most of the rail cars in that train consist not receiving a full mechanical inspection before being added to the train. In a post-derailment inspection, the FRA found defects in 25% of the 77 cars it reviewed and a full inspection performed by a Qualified Mechanical Inspector would have detected those defects, if they had been given the opportunity.⁶

Conclusion

BNSF, CN, and UP's request to waive these important existing safety regulations regarding brake inspections flies in the face of the FRA's sharpened focus on mechanical safety in the freight rail industry following the event in East Palestine.⁷ Safety regulations exist for a reason, and they are often created after a catastrophe demonstrates the precise need for regulations and the consequence of operating without such safety rules. The East Palestine derailment is a tragic reminder of the need for strong safety rules and robust enforcement of those rules by the FRA.

In the wake of the East Palestine derailment, the FRA must scrutinize previously granted safety waivers to ensure that those waivers actually increase, not decrease, safety. This waiver reduces the standard of air brake inspections, and by extension compromises safety. We therefore respectfully request that the FRA deny this petition, including both BNSF's request to extend and make permanent their existing waiver and CN's and UP's request to gain the same relief that BNSF has currently under the existing waiver.

We appreciate the opportunity to comment on this petition and look forward to working with the FRA in the future.

Sincerely,



Greg Regan
President

⁵ <https://safetydata.fra.dot.gov/officeofsafety/publicsite/query/TenYearAccidentIncidentOverview.aspx>

⁶ <https://www.trains.com/trn/news-reviews/news-wire/ntsb-east-palestine-hearing-focuses-on-role-of-car-inspection-wayside-detectors/>

⁷ <https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/31/fact-sheet-one-year-after-train-derailment-biden-harris-administration-continues-to-support-people-in-east-palestine-ohio-and-nearby-communities-and-hold-norfolk-southern-accountable/>