



Memorandum

To: Advisory Board; All General Chairmen; All State Legislative Board Chairmen
Cc: Kathleen N. Policy, Legislative, Political & Regulatory Coordinator
From: Thomas A. Pontolillo, Assistant to the President and Director of Research
Date: June 12, 2008
Re: 49 CFR Part 218, Subpart F

Monday's edition of the Federal Register is scheduled to include the Federal Railroad Administration (FRA) response to several Petitions for Reconsideration of its February 13 Final Rule, which federalized railroad operating practices pertaining to point protection for shoving movements, operating switches and fixed derails, and leaving equipment in the foul. The revised Final Rule becomes effective immediately upon publication, and I have attached a copy of the document submitted by FRA to the Federal Register for your ready reference. The Petitions for Reconsideration were filed by the Association of American Railroads (AAR); the American Public Transportation Association (APTA); and jointly by the ATDA, the BLET, the BMWED, the BRC, the BRS, and the UTU.

The APTA Petition, and one section of the AAR Petition, requested a 6-month extension of the deadline for completion of training on the regulation and associated railroad operating rules, because publication of the original Final Rule occurred too late for the industry to amend its training programs in time to comply with the original training deadline. FRA granted this request, and training now must be completed by July 1, 2009.

The Joint Labor Petition, which was supported by the AFL-CIO's Transportation Trades Division, questioned the need for civil penalties in cases of willful violation of the regulation. We pointed out that human factor accident rates by last year had declined to levels not seen since the mid-1990s, and that the potential for individual liability would suppress self-reporting of inadvertent violations. Despite some complimentary words concerning the argument and the marshaling of data in support, FRA denied the request, stating that "civil penalty sanctions are a statutorily-imposed consequence of regulatory non-compliance," and not driven by accident data. FRA also disagreed that its power to disqualify someone from a safety-sensitive position pursuant to 49 CFR Part 209 was an appropriate alternative to a civil penalty, and reasserted its published position that "FRA would consider self-reporting a strong reason for mitigation of the civil penalty, disqualification order, or other enforcement remedy."

FRA also denied AAR's request for repeal of the Good Faith Challenge (GFC) requirements or, alternatively, replacing the requirements with those in effect for roadway workers. FRA reite-

rated its finding that “there is a need for the good faith challenge regulation.” Moreover, FRA ruled, a more robust process was necessary for these operating procedures because “roadway workers generally share a more cooperative working relationship with their supervisors than operating employees do with yardmasters, trainmasters and their other railroad officer supervisors.” In this regard, attached hereto is a flowchart detailing operation of the GFC process for your reference, use and distribution.

In this regard, FRA also addressed the issue of GFC procedures in joint operations territory, which was not included in the original Final Rule. It is FRA’s position that “railroads who operate in joint operations will need to ensure that its employees know which railroad’s procedures apply and what those procedures require,” and “unless otherwise specified in a railroad’s procedures, the host railroad’s procedures will apply and it will be the host railroad’s obligation to provide review of the alleged non-complying order and to maintain a record when necessary.”

The Final Rule also addressed two other issues raised in the AAR’s Petition. The industry’s request for a broader use of shove lights without point protection, which Labor opposed, was granted in part and denied in part by FRA. Prior to reaching its decision, FRA reviewed procedures and accident/injury data, and observed operations on departure tracks with shove light systems throughout the country. Ultimately, FRA concluded that, under certain circumstances, shove light systems can maintain an acceptable degree of safety, and posed less of a risk of personal injury than someone riding the point.

The revised Final Rule will permit shoving movements without point protection when made in the direction of the circuited end of a designated departure track equipped with a shove light system under certain specified conditions. Section 218.99(e)(5) permits such movements when:

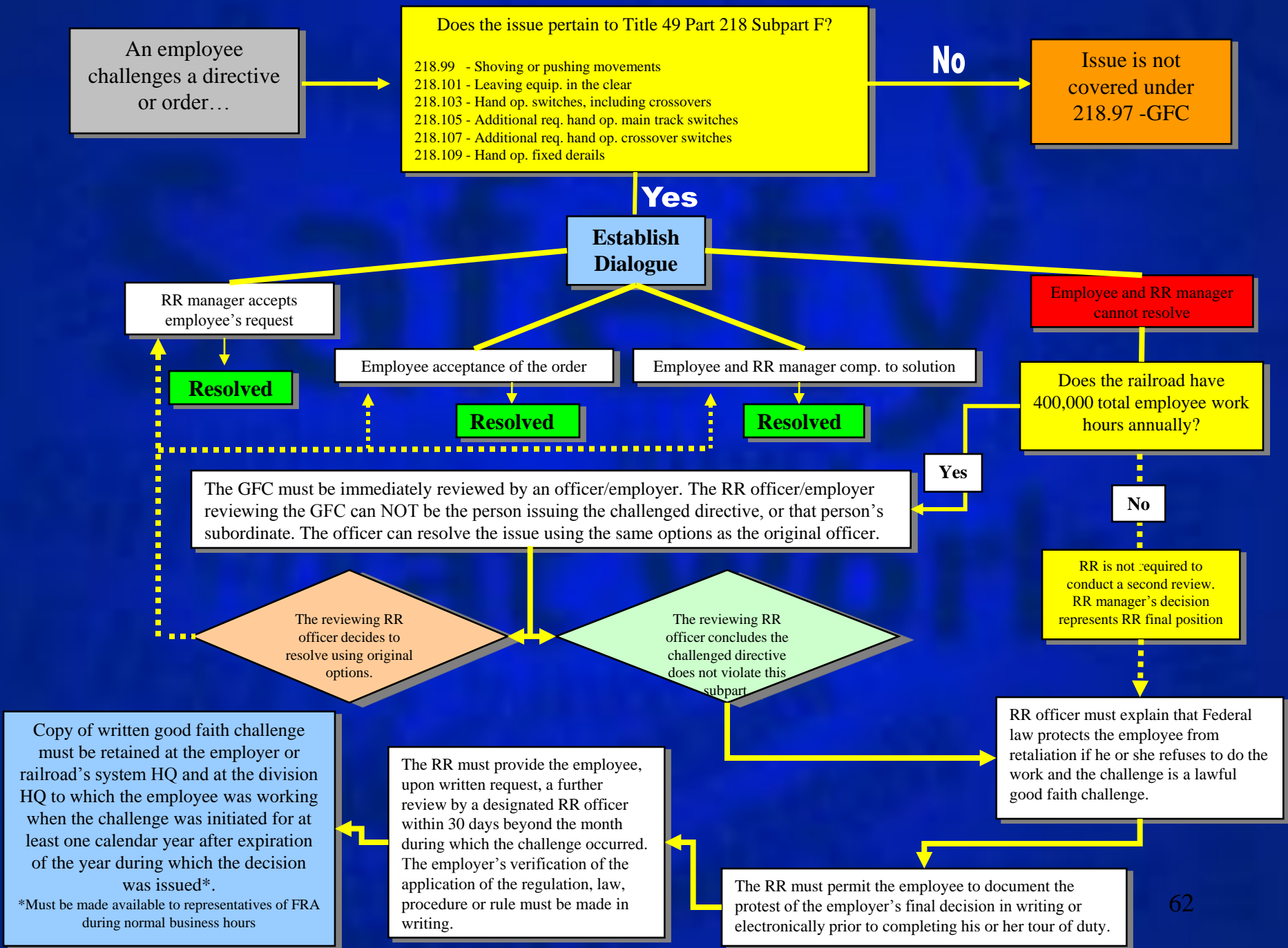
- the shove light system is demonstrated to be failsafe;
- the shove light system is arranged to display a less favorable aspect when the circuited section of the track is occupied;
- written procedures are adopted and complied with that provide for a reliable means of determining track occupancy prior to commencing a shoving or pushing movement;
- the track is designated in writing;
- the track is under the exclusive and continuous control of a yardmaster or other qualified employee;

- the train crewmember or other qualified employee directing the shoving or pushing movement complies with the general movement requirements contained in paragraphs (b)(1) and (b)(2) of this section;
- all remote control shoving or pushing movements comply with the requirements contained in paragraph (c)(1) of this section; and
- the shove light system is continuously illuminated when the circuited section of the track is unoccupied.

However, FRA denied that portion of AAR's petition that requested the inclusion of shove warning systems that rely solely on radio signal warnings because radio signals offer a lower level of safety than a shove light system.

Lastly, FRA addressed the issue raised in AAR's Petition concerning the point protection technology standard for remote control zones (RCZ). Clarifying Preamble language that AAR thought was vague, FRA noted that the citation to 49 CFR Part 236, Subpart H — FRA's standards for processor-based signal and train control systems — was advisory, and declined to modify the Final Rule in the manner proposed by AAR. FRA also denied Labor's request to modify the language to apply 236-H to all RCZ point protection technology not currently in service, holding that this rulemaking was not the appropriate forum for determining the formal applicability of Part 236.

There continue to be a significant number of complaints concerning the adequacy and depth of training being provided to this point. If these problems do not significantly abate in the short term, they should be reported to the National Legislative Office for compilation and handling. Finally, you should be aware that FRA is willing to put on a presentation concerning the new regulation upon request. If your membership in an area is interested in such a presentation, which takes approximately four hours, the FRA Regional Office in your jurisdiction should be contacted for details.



[4910-06P]

**DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration**

49 CFR Parts 217 and 218

[Docket No. FRA-2006-25267]

RIN 2130-AB76

Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule; response to petitions for reconsideration.

SUMMARY: This document responds to four petitions for reconsideration of FRA's final rule which was published on February 13, 2008. The rule mandated certain changes to a railroad's program of operational tests and inspections and mandated new requirements for the handling of equipment, switches, and fixed derails.

DATES: This regulation is effective on [INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Douglas H. Taylor, Staff Director, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE, RRS-11, Mail Stop 25, Washington, D.C. 20590 (telephone 202-493-6255); or Alan H. Nagler, Senior Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE, RCC-11, Mail Stop 10, Washington, D.C. 20590 (telephone 202-493-6038).

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I. Background

On May 18, 2005, the FRA's Railroad Safety Advisory Committee (RSAC) accepted a task statement and agreed to establish the Railroad Operating Rules Working Group (Working Group) whose overall purpose was to recommend to the full committee how to reduce the number of human factor caused train accidents/incidents and related employee injuries. After consideration of the Working Group's recommendations, FRA published a Notice of Proposed Rulemaking (NPRM) on October 12, 2006 to establish greater accountability on the part of railroad management for administration of railroad programs of operational tests and inspections, and greater accountability on the part of railroad supervisors and employees for compliance with those railroad operating rules that are responsible for approximately half of the train accidents related to human factors. See 71 FR 60372. FRA received written comment on the NPRM as well as advice from its Working Group in preparing a final rule, which was published on February 13, 2008. See 73 FR 8442.

Following publication of the final rule, parties filed petitions seeking FRA's reconsideration of the rule's requirements. These petitions principally related to the following subject areas: the implementation dates; shove lights; the need for individual liability and enforcement; good faith challenge procedures; the point protection technology standard for remote control locomotive operations; and FRA's rulemaking authority.

This document responds to all the issues raised in the petitions for reconsideration except the issue pertaining to FRA's rulemaking authority which is being addressed in a separate letter to that specific petitioner. FRA will make that response part of the public

docket related to this proceeding. The amendments contained in this document in response to the petitions for reconsideration generally clarify the requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, and are within the scope of the issues and options discussed, considered, or raised in the NPRM.

The specific issues and recommendations raised by the petitioners, and FRA's response to those petitions, are discussed below. The discussion will aid the regulated community in understanding the requirements of the rule.

II. Major Issues Raised By Petitions

A. Implementation Dates

Petitioner concern: Dates Do Not Provide Sufficient Time To Comply

The Association of American Railroads (AAR) and the American Public Transportation Association (APTA) each submitted a petition for reconsideration requesting delays for the implementation of training and program deadlines found in 49 CFR 217.9 and 218.95. AAR is a trade association whose membership includes freight railroads that operate 72 percent of the line-haul mileage, employ 92 percent of the workers, and account for 95 percent of the freight revenue of all railroads in the United States. AAR's membership also includes passenger railroads that operate intercity passenger trains and provide commuter rail service. APTA's members include commuter railroads. The National Railroad Passenger Corporation (Amtrak) is a member of both AAR and APTA.

AAR and APTA raised similar concerns and requested the same action. Both associations requested that each implementation date contained in 49 CFR 217.9 and 218.95 be extended by six months.

Both petitions for reconsideration explained that railroads will need to overcome certain obstacles to establish a program of operational tests and inspections under 49 CFR 217.9. For example, AAR stated that the recent amendments to this section require each railroad to conduct specific types of periodic reviews and that some railroads have not been using any formal periodic reviews. In addition, those railroads implementing periodic reviews for the first time will need time to craft and implement a carefully thought out and worthwhile program. AAR also pointed out that oversight of the program will require a recordkeeping system that will aid in implementation and tracking compliance and that it is unaware of any railroad having such a recordkeeping system currently in place. Similarly, APTA stated that four months is not enough time for passenger railroads to review accident/incident records, determine which operating rules require particular emphasis in the testing and inspection program, develop the additional testing and inspection procedures, and qualify railroad testing officers on how to properly conduct the tests and inspections. APTA emphasized that passenger railroads are requesting additional time to do the job right rather than just quickly.

Both associations raised concerns with the requirements in § 217.9(b) that pertain to qualifying railroad testing officers and keeping written records documenting each railroad testing officer's qualification. APTA pointed out that the requirements pertaining to railroad testing officers are new, and implied that each railroad would need

to expend additional resources to confirm that each railroad testing officer is qualified and to maintain records supporting each qualification decision. AAR stated that the July 1, 2008 deadline for implementing paragraph (b) is unrealistic because it does not provide a railroad with sufficient time to qualify supervisors on the new requirements. AAR also suggested that many railroads will want to maintain an electronic recordkeeping system for tracking the qualifications of supervisors; and the applicability deadline of July 1, 2008 does not provide sufficient time to establish a new recordkeeping system. AAR also disliked FRA's suggestion that "if a railroad has not previously kept a record of whether an officer is qualified on the operational testing program, that the railroad create a short survey which would allow an officer to acknowledge whether the officer considers himself/herself qualified on the various aspects of the program, as well as qualified (either through experience or prior instruction, training, and examination) on the various types of tests and inspections that the officer may be asked to conduct." 73 FR 8457. AAR asserts that if training took place before the establishment of a recordkeeping system, FRA and a railroad could be reliant on oral testimony, which could well result in controversial enforcement citations. Implied in AAR's concern is that some railroad testing officers may believe they know how to conduct certain tests or inspections, but the officers ability to conduct a particular test or inspection has not been confirmed by the railroad. Consequently, AAR is concerned that a railroad testing officer that exaggerates his or her abilities could potentially subject a railroad to liability if the officer were to conduct an improper test. See § 217.9(b)(1).

Both AAR and APTA are members of RSAC and were told by FRA that the agency's goal was to publish the final rule by the fall of 2007. APTA states that had FRA published the rule in the fall of 2007, its members could have complied with the training in the 2008 training cycle. AAR and APTA both requested that FRA consider that a consequence of publishing the final rule in the first quarter of 2008 was that the vast majority of railroads that typically conduct the bulk of training during the first quarter of the year are now thwarted from doing so. Both associations argued that it would be too difficult to alter training programs by July 1, 2008 pursuant to § 218.95(a) because new training course material is usually developed in the second half of the year. Railroads primarily allocate the first quarter of each year to training employees, but often that training continues into the second quarter. The trainers are typically the same people employed to revise the training programs in the second half of the year. Thus, it would be difficult for the railroads to finish the training already planned for 2008 while revising the training required by the final rule. AAR and APTA also argued that it would be difficult and costly to qualify employees in accordance with 49 CFR part 218, subpart F, by January 1, 2009 because employees are not as available as they are during the first quarter of the year due to personal and business obligations.

FRA's Response

When FRA published the final rule, the agency did not fully appreciate the difficulties most railroads would face in trying to comply with the implementation dates. FRA was under the impression that it was providing a sufficient amount of time for a

railroad to comply and that the implementation dates would not be controversial. FRA understood that by publishing the rule in mid-February, each railroad would need to qualify its employees and supervisors, as well as implement the new and revised programs outside of the railroads regular schedule for such actions. FRA perceived the actions needed for compliance to be not that much different than existing railroad programs relating to operating rules.

Now that FRA has reviewed AAR and APTA's petitions for reconsideration, we agree with the associations that delayed implementation is warranted for the reasons expressed in the petitions. It is important that each railroad effectively qualify its railroad testing officers and implement a meaningful program of tests and inspections under 49 CFR 217.9. The associations are certainly correct that ensuring railroad testing officers are qualified is an important aspect of the revised section and that keeping accurate records of the qualifications of each railroad testing officer is an integral component of that requirement. Thus, FRA is granting AAR and APTA's requests to amend the applicability dates in 49 CFR 217.9, the logistics of which are described in the section-by-section analysis for that section.

FRA also agrees with AAR and APTA's requests to amend the applicability dates in 49 CFR 218.95. The associations' petitions for reconsideration helped FRA understand the full extent of the burden the final rule will place on each railroad. FRA certainly prefers providing each railroad with the additional time it needs to fully implement 49 CFR part 218, subpart F than have a situation where many railroad programs are put together so quickly that the programs contain mistakes or fall short in

some way, or training is rushed to the extent that employees do not fully understand the operating rules and the importance of them. Thus, FRA is granting AAR and APTA's requests to amend the applicability dates in 49 CFR 218.95, the logistics of which are described in the section-by-section analysis for that section.

B. Shove Lights

AAR Petition

AAR's petition requested reconsideration of FRA's decision to exclude shove lights as an acceptable technological alternative to visually protecting the point pursuant to the requirements in 49 CFR 218.99(b)(3)(i) unless either: (1) the track is completely circuited to indicate occupancy; or, (2) a visual determination is made that the track is clear to the beginning of the circuited section of the track. 73 FR 8478. Shove lights are lights that are sequentially circuited on the ends of departure tracks in classification yards to indicate a shoving movement's approach to the opposite end of a track. There are a variety of different shove light arrangements, some using a single aspect/light and others using multiple aspects that have the ability to provide greater information regarding how much room is left in the circuited portion of the track. At some locations, radio messages are generated, instead of lights, to indicate when the cars being shoved have reached the bonded or circuited section of track.

AAR acknowledges that "since shove lights or radios technically provide protection only for the length of the bonded track, not the entire length of the departure track, they arguably do not provide the equivalent of direct visual observation." Despite

this acknowledgment, AAR's petition requests that FRA reconsider the shove light issue as a permitted operational exception under § 218.99(e). AAR makes two arguments in support of permitting shove lights and radio signal arrangements. One argument is that there is no evidence that the use of shove lights has caused accidents or injuries despite having been used for over thirty years. A second argument is that a prohibition on shove lights and radio arrangements creates an increased risk of injuries and thus does not justify the prohibition. AAR attributes the potential for an increase in injuries to the risks employees would need to take to visually determine the departure track is clear. For example, an employee who undertakes the riding of a long shove move or chooses to walk along the track would be at risk of a slip and fall injury due to the need to mount and dismount equipment or the need to walk carefully – especially in inclement weather. Another added risk to riding the shove move or walking the track is the danger posed by the close proximity to other tracks, i.e., close clearances. An employee riding a shove move where there are close clearances is at risk of being struck by equipment on an adjacent track.

Joint Labor Petition Response Opposing AAR's Petition

A joint response to AAR's petition was filed by the presidents of six labor organizations (Joint Labor Petition): the American Train Dispatchers Association (ATDA); the Brotherhood of Locomotive Engineers and Trainmen, a division of the Rail Conference of the International Brotherhood of Teamsters (BLET); the Brotherhood of Maintenance of Way Employees Division of the Rail Conference of the International

Brotherhood of Teamsters (BMWED); the Brotherhood of Railway Carmen Division of the Transportation Communications International Union (BRC); the Brotherhood of Railroad Signalmen (BRS); and the United Transportation Union (UTU). These labor organizations represent over 140,000 railroad workers engaged in train and engine service, train dispatching operations, equipment inspection, maintenance and repair, roadway worker activities, and signal construction, maintenance and repair. The Transportation Trades Department, AFL-CIO (TTD) filed a separate comment in support of the Joint Labor Petition.

The Joint Labor Petition opposes AAR's request for reconsideration of the shove light exception. This opposition is based on the fact that the track, unless completely circuited, will not be determined to be clear. The Joint Labor Petition points out that the final rule permits technology to substitute for a direct visual determination and thus one option is for a railroad to add additional indicator circuits. FRA notes that the Joint Labor Petition did not respond to AAR's assertions that there is no evidence that the use of shove lights has caused accidents or injuries despite having been used for over thirty years and that a prohibition on shove lights and radio arrangements creates an increased risk of injuries that does not justify the prohibition. The Joint Labor Petition argues that AAR seeks to institutionalize a practice that is dangerous and will lead to an increase in accidents, incidents, and injuries, but the response does not elaborate on this conclusion.

FRA's Response

In response to AAR's petition, and after considering the Joint Labor Petition's

comments, FRA has decided to grant AAR's petition for reconsideration in part and deny it in part. FRA agrees to add an operational exception under § 218.99(e)(5) for shoving or pushing movements made in the direction of the circuited end of a designated departure track equipped with a shove light system under certain specified conditions. The operational exception and the specified conditions are described in the section-by-section analysis. Many railroads with existing shove light systems should find that few changes, if any, will be necessary to comply with the requirements for the exception in new paragraph (e)(5).

After publication of the final rule, FRA received feedback that some railroads were disappointed with FRA's position on shove lights. As the issue did not initiate much discussion during the Working Group meetings, FRA had not compiled much information on it. In anticipation that a petition for reconsideration on the shove light issue might be filed, FRA conducted a review of shove light systems utilized by the major railroads.

Between February 25 and March 21, 2008, FRA reviewed procedures and observed operations on departure tracks with shove light systems throughout the country. FRA surveyed the major railroads to find out where shove lights were used and received information that five of the seven major railroads used shove light systems at thirty-four major classification yards in seventeen states. FRA confirmed through inspections that the railroads did not utilize shove light systems at any other major yard. The thirty-four yards contained a total of 356 departure tracks equipped with shove lights. Only seven of the thirty-four yards were found to provide point protection by having the departure

tracks entirely circuited or by using cameras to determine that the track is clear. Thus, FRA focused its attention on whether the remaining twenty-seven yards that did not already meet FRA's new requirement for point protection under § 218.99(b)(3) were safe operations nonetheless.

For instance, FRA conducted a review of accident/incident data that supports AAR's position that departure tracks that use shove light systems are reasonably safe operations. FRA reviewed data for the twenty-seven departure yard operations that utilize shove lights for the twenty-six month period from January 2006 through February 2008. The total number of tracks available for use as departure tracks at these twenty-seven yards is 291. FRA's review included railroad records of all reportable and accountable rail equipment accidents/incidents, and thus FRA's review included minor incidents that would not have met FRA's reportable threshold for an accident/incident. See 49 CFR 225.5 (defining "accident/incident" and "accountable rail equipment accident/incident"); 225.19 (defining the three groups of railroad accidents/incidents that are reportable); and 225.21(i) (requiring that a record of initial rail equipment accidents/incidents be completed and maintained). If FRA's review had included only reportable accidents/incidents, and not accountable rail equipment accidents/incidents, the scope of the review would have been significantly more limited and would not have included derailments and collisions that caused minor damage to track or on-track equipment.

The records revealed that eighteen of the twenty-seven departure yard operations, i.e., 67 percent of the yards, did not have any human factor caused reportable or

accountable rail equipment accidents/incidents during the twenty-six month period, and only one yard had recorded more than two accidents/incidents. Nine departure yard operations recorded a total of nineteen human factor caused reportable or accountable rail equipment accidents/incidents during the review period. Although FRA did not conduct investigations to determine whether the primary cause listed by each railroad is accurate, the records suggest that five of these nineteen accidents/incidents would not have been prevented through compliance with the point protection requirement of § 218.99(b)(3) or any of the requirements in 49 CFR part 218, subpart F; i.e., four accidents/incidents were caused by some form of train handling error and one accident/incident was caused by a remote control operator's failure to hear a radio transmission to stop the movement. In addition, five accidents/incidents were caused by either improperly lining, locking, or latching switches, which are concerns addressed by requirements found in subpart F. Thus, FRA finds that, during the twenty-six month review period, only nine human factor caused reportable or accountable rail equipment accidents/incidents might have been prevented through compliance with point protection requirements rather than relying on shove light systems and attendant procedures.

FRA found fair to good illumination throughout the departure yard tracks, particularly at the entry and departure ends of each track. The circuited portion of the departure tracks ranged from 150 feet to a little over 500 feet, with an average of 360 feet.

At all twenty-seven yards, non-visual procedures were in place that provided yardmasters with a high degree of confidence with respect to the status of any of the

departure tracks. One procedure common to all twenty-seven yards included a “turn-over” report, i.e., a job briefing, given verbally from one yardmaster to the next, based on the information logged on a written turn-over sheet. In addition to the turnover report, at many yards, the yardmaster had access to a computer generated inventory allowing the yardmaster to monitor each car from the moment it arrived onto the receiving yard tracks. Many of these yardmasters were also able to track by computer the movements of each car through the yard complex. Some yardmasters also received information about each transfer job that brought cars from the classification yard to the departure yard. At some yards, railroads instituted standard instructions that required any car cut-off a departing train to be left on the circuited section of the track on which it was to be placed. Thus, if a car was left on the circuited section of track, a person observing the shove light would know that some equipment was left there and would be required to take appropriate action to determine what was left on the departure track prior to initiating a shoving or pushing movement. Meanwhile, other yards maintained similar instructions that any car to be cut-off a departing train must be left as close as possible to the end of the track opposite the circuited end of the departure track without fouling another track. This instruction permitted the person directing the movement to readily observe that the track was not clear and to take appropriate action to protect the shoving or pushing movement.

The descriptions of these different non-visual procedures is not intended to be an exhaustive list of all the types of procedures that have been or could be implemented. FRA is describing these types of procedures because our recent review suggests that having these types of procedures help establish a reliable means of determining track

occupancy. As each departure yard may have its own set of safety concerns and already established procedures, FRA is not requiring that all railroads adopt a particular set of non-visual procedures. However, as these types of procedures contribute to the overall safety record of departure tracks utilizing shove lights, the final rule contains a requirement that the types of procedures which provide for a reliable means of determining track occupancy prior to commencing a shoving or pushing movement must be adopted in writing so that yardmasters and other employees can fully understand the operation. See § 218.99(e)(5)(iii).

FRA's observations revealed that shove light systems can maintain an acceptable degree of safety. Our review suggests that, in addition to the establishment of non-visual procedures, several factors collectively promote a safe operation. For instance, there is a relatively small number of moves onto and off of the departure tracks. Compared to other yard operations, there is typically less danger on departure tracks with shove light systems in that fewer switches are operated in the departure yard and there are no free rolling cars. Furthermore, FRA noticed that each of the twenty-seven departure yards were well supervised by either a yardmaster or other qualified employee.

FRA's observations at the twenty-seven departure yards with shove light systems also revealed that some of the departure tracks evaluated have close clearances that could potentially pose a risk of an accident or injury to a rail employee attempting to make a visual determination that the departure track is clear. FRA found five of the departure yards had at least some tracks with close clearances that pose a significant potential risk of an injury to an employee protecting the point. While some departure yards had tracks

with very good clearances, most tracks were found to have normal clearances – which could still pose injury hazards due to the amount of clearance. Furthermore, it could be difficult for an employee riding the point of the move to see that a derail is applied and that employee could be seriously injured if the movement were to operate over the derail. In addition, FRA noted that departure tracks were generally long yard tracks. The length of the departure tracks is a factor in deciding whether to allow shove light systems to be used in lieu of point protection because employees would probably walk or ride the side of a car to provide point protection and lengthy departure tracks would expose employees to injury risk for a longer period than if the tracks were shorter. In conclusion, FRA’s observations corroborated AAR’s assertion that if employees were required to provide point protection by riding the side of a car or walking along the departure tracks, there would be an increased risk of injuries.

FRA is granting AAR’s petition for reconsideration in part, and will allow a shove light system under certain conditions to substitute for point protection, because the recent accident/incident histories at eighteen out of the twenty-seven major railroad departure yards have been excellent. FRA’s decision is not based on AAR’s concern that employees need to be protected from the dangers posed by protecting the point where there are close clearances. FRA believes that the risks of employees suffering injuries could be avoided greatly if more departure tracks equipped with shove light systems were either completely circuited or had cameras added that could be remotely viewed to determine the track is clear. In fact, FRA found five major railroad departure yards that maintain such cameras and two major railroad departure yards that maintain shove light

systems with completely circuited departure tracks. Although FRA is promulgating an operational exception for shove light systems, we encourage each railroad to consider installing cameras or fully circuiting the departure tracks – especially in departure yards where non-compliance with yard procedures adopted under § 218.99(e)(5)(iii) are found on a regular basis. Meanwhile, FRA has concluded that under certain conditions, a shove light system is a safe operation. Therefore, a railroad may utilize a shove light system, under the conditions specified in § 218.99(e)(5), as an alternative to having a qualified employee make a visual determination that the departure track is clear.

FRA is, however, denying that portion of AAR’s petition that requests the inclusion of shove warning systems that rely solely on radio signal warnings because radio signals offer a lower level of safety to that of a shove light system. One of the essential conditions considered in partially granting AAR’s petition allowing shove light systems to substitute for a qualified employee visually determining the track is clear, is that the shove light system must be demonstrated to be failsafe. Shove warning systems that rely solely on radio signal warnings are not considered failsafe and FRA is skeptical that a system based on radio signals alone can ever be made failsafe.

Radio signal based shove systems are designed to send radio signal warnings when the movement is occupying the circuited track. The radio warning typically states how much room is left in the departure track for the shoving or pushing movement by indicating a number of car lengths. If the shoving or pushing movement has not reached the circuited end of the departure track, the system will be silent. Thus, the train crewmember or other qualified employee listening to the radio and directing the move

will interpret silence to mean the track is clear to continue the shoving or pushing movement. Silence may not always mean that the movement is not occupying the circuited end of the track. For example, the radio may be silent because it is malfunctioning. A radio may be silent if its battery is expired. Also, a person listening to a radio may not hear a radio warning for a variety of reasons including, but not limited to, a weak transmission signal; static; the radio's volume is too low; or, a radio signal is blocked by a competing transmission because it is not broadcast on a dedicated channel. Finally, unlike shove light systems which remain continuously illuminated until the circuited section of track is occupied, FRA observed that the radio signal based shove system does not continuously send radio warnings that help monitor the departure end of the track once the movement has completely occupied the circuited section of track.

FRA might be willing to reconsider this decision or grant a waiver for a shove warning system that relies solely on radio signal warnings if it can be demonstrated to be failsafe. However, given the logistical hurdles of arranging such a system, it would probably be easier to switch to a shove light system or add some kind of light component to the existing radio signal based shove system. As FRA found only one major railroad departure yard that solely used radio signals as a shove system, FRA does not anticipate that this denial decision will have any significant impact on that railroad or on the industry.

C. Individual Liability and Enforcement

1. Petitioner concern: Accident Data Does Not Support Individual Civil Penalties

The Joint Labor Petition requested reconsideration of the willful civil penalties published in the penalty schedule at 49 CFR part 218, app. A and the need for individual liability for willful violations; TTD's comment supported the Joint Labor Petition. The Joint Labor Petition analyzed the accident data showing that there has been a reduction in both the raw number of accidents/incidents and the corresponding rates for the period 2005 through 2007 that exceeded the increase for the period 2000 through 2004. Based on the analysis of that data, the Joint Labor Petition concludes that "[w]hile Petitioners concur that discipline – on the part of both our members and their supervisors – is an essential element in rule compliance, our analysis of FRA's data establishes beyond question that the spikes in the number of human factor accidents/incidents and the frequency with which they occurred were not due to any industry-wide breakdown in rules compliance discipline." Thus, on this first issue, the petition contends that the empirical basis no longer exists for FRA's decision to include individual liability for civil penalties in the final rule.

FRA's Response

The labor filing is a model of railroad safety scholarship, describing in broad strokes the major changes in the industry that, in the view of the writers, may have influenced safety trends. The resulting explanations attempt to fit safety data within a multi-factor analysis and lay the foundation for the requested relief. The history of a major industry is complex; and this proceeding is not the proper venue to agree or disagree about such theorems, however interesting that discussion might be.

Rather, it is necessary to state that the central premise of the joint labor filing is incorrect, because it is not FRA actions that invoke the potential for civil penalty sanctions. Rather, civil penalty sanctions are a statutorily-imposed consequence of regulatory non-compliance. 49 U.S.C. 21301. Labor organizations have been among the more strenuous advocates of strong civil penalties as an answer to non-compliance by railroads and rail contractors, and even if FRA were at liberty to provide blanket immunity from statutory sanctions, there is nothing in the filing to support the conclusion that such sanctions would be less successful in influencing the intentional actions of individual employees than the unintentional or intentional actions of railroads and rail contractors. Indeed, individual employees are already accountable for personal compliance with a significant number of FRA regulations; and FRA is satisfied that the deterrent effect associated with the availability of a monetary sanction is helpful in preventing accidents that might occur through sloth or knowing reckless behavior. FRA has seldom found it necessary to invoke these sanctions against individuals, and in many cases where such action has been taken the targets have been railroad officers, rather than rank and file employees.

Whether or not one subscribes to the proposition that penalties are necessary, giving the subject rules the status of Federal law should without question promote awareness among officers and employees regarding their responsibilities to one another and to the public. The labor filing (at page 5) acknowledges that “a more substantial framework of regulations” (FRA’s phrase) should be helpful in maintaining discipline during the current period of change in the railroad industry. The potential for civil

penalties follows automatically, based on congressional action.

Although FRA agrees with the Joint Labor Petition that the number of human factor incidents has declined over the past few years, we do not agree that this trend diminishes the need for a regulation containing the potential to demand payment of civil money penalties from individuals for willful violations. There are a variety of reasons for the recent downward trend including, but not limited to, FRA's focus on the increase in human factor caused accidents/incidents from 2000 through 2004 in the RSAC and Working Group meetings. By bringing this issue to the railroad industry's attention, railroads have placed increased emphasis on compliance with the operating rules FRA expressed an intention to consider regulating. Focused compliance reviews by FRA and aggressive, direct contacts with responsible railroad operating officers have no doubt contributed to this good result. Historically, FRA has noted previous positive trends after raising a safety concern with the industry, but prior to promulgation of a regulation. These trend lines do not always continue positively, and, without a regulation, FRA would be left with fewer options if accidents/incidents were to suddenly increase. Further, it would be fundamentally wrong to assume that major additional advances in the safety of railroad operations are not achievable. Rules compliance requires clear and unambiguous rules and procedures, common expectations for compliance that are modeled by line supervisors, excellent training, and regular verification that rules and procedures are being followed. This is the foundation for acceptable safety performance, and on that foundation can be built truly outstanding safety performance if the culture of the organization and the processes in place support open and productive communication

to identify hazards, enhance crew performance, and refine work processes. FRA appreciates that this regulation cannot construct the entire edifice, but it can and must provide the foundation.

As FRA has statutory authority to issue penalties against individuals for willful violations, FRA would retain this authority even if it deleted the willful penalties in the schedule of civil penalties (which section 49 U.S.C. 21301(a)(2) directs us to provide) . As FRA explained in its “Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws” found at 49 CFR part 209, app. A, the Rail Safety Improvement Act of 1988 (see 49 U.S.C 21304) made individuals liable for willful violations of the Federal railroad safety statutes that FRA enforces under delegation from the Secretary of Transportation. See 49 CFR 1.49(c), (d), (f), (g), and (m). In that published policy statement, FRA explains how the agency intends to decide if an individual has acted willfully and how it will consider whether enforcement action is warranted against an individual. In the preamble to the final rule, FRA also explained that it did not single this regulation out for individual liability enforcement, but that “[e]ach of FRA’s rail safety regulations permit enforcement against any person who violates a regulatory requirement or causes the violation of any requirement.” 73 FR 8452-53. The publishing of the schedule amounts are merely meant to provide guidance as to FRA’s policy in predictable situations, not to bind FRA from using the full range of penalty authority where extraordinary circumstances warrant it. FRA will continue to exercise appropriate discretion with regard to individual liability enforcement matters as it does in all civil penalty matters cited against railroads.

2. *Petitioner Concern: Individual Liability Produces a Chilling Effect on Safety*

The Joint Labor Petition's second request in this area was that FRA should eliminate the willful civil penalties published in the penalty schedule at 49 CFR part 218, app. A and FRA should not seek civil penalty enforcement against individuals under 49 CFR part 218. The petitioner contends that individual liability produces a chilling effect that will diminish, rather than enhance, safety. The Joint Labor Petition disagreed with FRA's position that an employee would have an incentive to self-report noncompliance because such self-reporting would likely be considered a reason for FRA to exercise its enforcement discretion not to take enforcement action against the individual. Instead, the Joint Labor Petition focused on FRA's statement that "[s]elf-reporting is not . . . a defense to a potential individual liability action, and self-reporting does not absolutely preclude FRA from taking enforcement action against an individual." 73 FR 8453. The Joint Labor Petition concludes that an employee has a disincentive to self-report as the employee is likely to face a railroad disciplinary sanction and an FRA civil penalty.

FRA's Response

In FRA's view, the Joint Labor Petition did not acknowledge FRA's caveat that "FRA would consider self-reporting a strong reason for mitigation of the civil penalty, disqualification order, or other enforcement remedy." 73 FR 8453. The flip side of that argument is also true in that FRA would consider the failure to self-report non-compliance immediately after the non-compliance is discovered to be an aggravating factor justifying a higher penalty or longer period of disqualification. In the preamble,

FRA emphasized that when each railroad instructs its employees on its operating rules, it should emphasize this incentive to self-report. FRA continues to encourage each railroad to reconsider its own discipline policy so that it does not discourage self-reporting of inadvertent noncompliance. For example, FRA continues to fund and promote the Confidential Close Call Reporting System Demonstration Project, which permits participating employees to self-report certain types of non-compliance without fear of railroad discipline or FRA enforcement. FRA believes that by encouraging self-reporting, an analysis of the data may reveal the identification of accident precursors or suggest ways to reduce the likelihood of future non-complying incidents that have the potential to cause accidents/incidents.

FRA also expects that most individuals would self-report because it is the safe course of action. An individual who chooses not to self-report after realizing he or she failed to comply with an important operating rule is likely to be putting him or her self, or colleagues, at risk of serious injury or death. Thus, FRA would expect that individuals who discover their own non-compliance would find the risks associated with choosing not to self-report far worse than the potential of being disciplined or fined for failing to comply, especially if the risk of a more severe disciplinary action or greater penalty is likely for a violation discovered and not immediately reported.

The Joint Labor Petition also raised the issue that an innocent employee could be held liable for a civil penalty under the final rule if the employee was the last person recorded as handling a switch that was later found misaligned. The petition explained that it might be possible, on some railroads, for a roadway worker to manipulate main

track switches in non-signaled territory without track authority or permission from the train dispatcher or control operator. The petition stated that FRA could end up enforcing a civil penalty against the wrong individual, and thus FRA should not cite individuals for civil penalties. FRA's response is that this issue raises an evidentiary proof matter and a concern FRA will need to address on a case-by-case basis. However, FRA does not view this issue as a reason to completely forgo the agency's statutory authority to cite individuals for civil penalties.

In the conclusion section of the Joint Labor Petition, the petition suggests that FRA forgo the agency's statutory authority to cite individuals for civil penalties in favor of FRA's disqualification procedures. See 49 CFR part 209, subpart D. The petition argued that disqualifying an individual from performing safety sensitive service is a "more than sufficient means available to enforce [part 218,] subpart F" and that "there is neither a sound basis, nor a public interest, in the creation of individual liability for civil penalties." We disagree. These are two different enforcement mechanisms and there may be instances where a disqualification is not warranted, and the less drastic response of a reasonable civil penalty is more appropriate. For instance, there may be instances where a person has a long work history of complying with operating rules but is found to have committed a willful violation one time. In these instances, it is likely more appropriate to demand a one-time civil penalty and allow the person to continue working in safety sensitive service than to initiate disqualification proceedings. In other circumstances, a person with or without a good history of compliance may be found to have committed a willful violation but there are aggravating circumstances that suggest

the more extreme penalty of disqualification is unwarranted. Thus, in order to permit FRA to consider the appropriate enforcement mechanism and to provide maximum flexibility in its enforcement actions, FRA is denying the Joint Labor Petition's requests to eliminate the willful civil penalties published in the penalty schedule at 49 CFR part 218, app. A and for FRA to pledge not to seek civil penalty enforcement against individuals under 49 CFR part 218, subpart F.

D. Good Faith Challenge

1. Request to Eliminate Provision

AAR's petition for reconsideration requests that FRA reconsider the need for any good faith challenge regulation. See 49 CFR 218.97. According to AAR, employees have statutory protection under 49 U.S.C. 20109 against retaliation for refusing to comply with a directive to violate a Federal regulation and thus it is puzzling why FRA is promulgating a regulation which has the potential to interfere significantly with railroad operations. In addition, AAR objects to a good faith challenge regulation because the final rule did not adequately create a record for suspecting that employees have been, or will be, asked to engage in tasks that violate Federal regulations or these types of railroad operating rules. The Joint Labor Petition and TTD's comment disagreed with AAR's position on this issue.

FRA's Position

FRA disagrees with AAR and finds that there is a need for the good faith

challenge regulation. The driving force for much of the final rule was the data showing significant increases in human factor caused accidents, and the high number of violations FRA found when it conducted inspections and investigations related to certain human factor cause codes. Prior to the effective date of the final rule, each railroad maintained similar operating rules governing the safe operation of shoving or pushing movements, leaving cars out to foul, and handling switches and fixed derails; meanwhile, over the first five years of this decade, human factor caused accidents accounted for 38 percent of all train accidents, and, in 2004, violations of the operating rules required in 49 CFR part 218, subpart F accounted for nearly 48 percent of all human factor accidents.

Considering the mandatory nature of these railroad operating rules, it seems that there has been a high disregard for them either intentionally or unintentionally. Although we agree that FRA did not cite to specific examples of intentional non-compliance with railroad operating rules, FRA is aware of the pressure to occasionally shortcut an operating rule in order to maintain or increase production. FRA's awareness is derived from inspections and investigations, as well as shared experiences from FRA personnel who have previously worked for one or more railroads. The good faith challenge procedures are intended to empower employees who choose to abide by the railroad's operating rules but are either intentionally or unintentionally given a non-complying directive. The procedures are necessary to ensure that employees may challenge potentially non-complying directives immediately while the statutory protections in 49 U.S.C. 20109 primarily protect an employee from retaliation for refusing to comply with non-complying directives. Thus, the good faith challenge regulation has a different purpose

than the statutory protections.

2. *Request to Amend Provision*

In the alternative, AAR's petition for reconsideration requests that FRA amend the good faith challenge procedures required by 49 CFR 218.97 so that they more closely resemble the roadway worker good faith challenge provisions. AAR states that FRA has departed from past precedent by issuing good faith challenge procedures that are different from those required for roadway workers. In AAR's view, the roadway worker regulations are clear and easily implemented, while the procedures in § 218.97 are complex and could result in delaying railroad operations. For example, AAR states that there may be situations when a supervisor and employee cannot resolve a challenge, and a suitable railroad officer is not available to provide for immediate review under paragraph (d)(1). (It appears that AAR might also be asking FRA to reconsider or make an exception to the immediate review required in paragraph (d)(1) for any railroad regardless of size). The Joint Labor Petition disagreed with AAR's position on this issue.

FRA's Response

FRA acknowledges that when it first began discussing this issue with the RSAC Working Group, FRA suggested that good faith challenge procedures similar to those promulgated for roadway workers might be appropriate. Discussions within the Working Group, especially with members representing labor organizations, revealed that roadway workers generally share a more cooperative working relationship with their supervisors

than operating employees do with yardmasters, trainmasters and their other railroad officer supervisors. A supervisor of roadway workers is likely to be out at the work site and may share in the danger if the work gang is not adequately protected because the group failed to comply with a rule. A railroad officer supervising operating employees will likely not be at risk of injury to himself/herself through the issuance of a non-complying order but may be putting the operating employees executing the order, or other employees in the vicinity of the operation, in peril. For these reasons, a different approach, permitting a good faith challenge, is necessary.

With regard to the request that FRA should eliminate the requirement for immediate review under § 218.97(d)(1), FRA is denying the request. Any railroad with 400,000 or more total employee work hours annually should employ at least one railroad officer who can be on call in case a challenge requires immediate review. Each railroad should consider whether to address in its program the issues of who can be contacted and what protocol should be followed if the person issuing the challenged directive has difficulty finding an officer suitable for immediate review. FRA suggests that AAR ask its members to voluntarily keep track of problems associated with implementing the good faith challenge procedures so that it can be raised as a future task for the RSAC or in a future petition for rulemaking.

3. Implementation in Joint Operations

After publication of the final rule, FRA met with labor organizations and railroad associations to discuss issues related to implementation. During those meetings, several

parties raised the fact that the rule does not address how the good faith challenge is required to be implemented in joint operations territory. For example, FRA has been asked what happens if employees from Railroad #1 are directed to perform a shoving or pushing movement in a yard on Railroad #2 and the employees believe they are being asked to violate a rule because the point is not being properly protected. FRA has been asked which railroad's good faith challenge procedures apply, and if Railroad #2's procedures apply, then are Railroad #1's employees required to be trained on Railroad #2's procedures.

FRA's Response

FRA acknowledges that the rule is silent on these issues. Generally, we would expect that the host railroad, i.e., Railroad #2 in the example, would want to maintain control of challenges made on its property and would therefore provide all reviews required. Although we expect quite a bit of uniformity among railroads, railroads who operate in joint operations will need to ensure that its employees know which railroad's procedures apply and what those procedures require. Meanwhile, as the rule is silent on this issue, we would not object to railroads engaged in joint operations making other arrangements as long as those arrangements are explained to its employees during the required training and provided for in its procedures. In conclusion, unless otherwise specified in a railroad's procedures, the host railroad's procedures will apply and it will be the host railroad's obligation to provide review of the alleged non-complying order and to maintain a record when necessary.

E. The Point Protection Technology Standard For Remote Control Zones

Requests for Clarification

AAR's petition explains that § 218.99(c)(2) provides that if technology is relied on to provide pull-out protection by preventing the movement from exceeding the limits of a remote control zone, the technology must be demonstrated to be failsafe or provide suitable redundancy. AAR does not object to the regulatory text. Instead, AAR's petition for reconsideration raises the question of whether a particular discussion in the preamble regarding the point protection technology standard for remote control zones is intended to be a requirement.

AAR is concerned that the preamble language will be read as a requirement. The preamble states that “[w]hen determining whether the technology, such as transponders backed up by a global positioning system (GPS) with a facility database is acceptable, FRA finds that 49 CFR part 236, subpart H and the corresponding appendix C to part 236 (“Safety Assurance Criteria and Processes”) contains appropriate safety analysis principles.” 73 FR 8479. AAR requests confirmation that the preamble reference to the safety analysis principles is meant to illustrate one way of determining if a technology is acceptable and the citation to part 236 is not meant to be a requirement. (Presumably, if FRA disagrees with AAR's understanding, AAR's petition is meant to request an amendment to this section as AAR implies that it objects to this reference if it is a requirement.).

The Joint Labor Petition responded to AAR's petition. First, the Joint Labor Petition points out that the final rule preamble contained an error when it stated that no

comments were received in response to the NPRM concerning this issue. BLET specifically responded to FRA's request for comments by recommending that (1) the technologies used to "fence" remote control zones should be at least fail-safe and (2) to the extent that any of these technologies are not currently in use, they should be required to meet the criteria for processor-based signal and train control systems found in 49 CFR part 236, subpart H. The Joint Labor Petition reiterated BLET's recommendations and stated that remote control zone pull-out protection technology is, by definition, a train control system.

FRA's Response

FRA agrees with AAR that the preamble language reference to 49 CFR part 236, subpart H is intended to illustrate one way of determining if a technology is acceptable and the citation to part 236 is not meant to be a requirement.

In response to the Joint Labor Petition, FRA offers the following clarification. First, FRA wishes to thank BLET for reminding FRA that BLET had commented on the NPRM preamble language. Second, although FRA has provided that remote control zone pull-out protection technology must be demonstrated to be failsafe or provide suitable redundancy to prevent unsafe failure, a result consistent with the general approach of 49 CFR part 236, subpart H, FRA does not believe that this is the appropriate forum within which to determine the formal applicability of part 236. Although pullout protection arrangements are provided to restrict the movement of rolling equipment, they are not employed to authorize to control train movements; accordingly, using traditional

interpretations they would not fall within the concept of a train control system. Nor do they resemble in function block signal systems. FRA is aware of views of some that a variety of innovative technologies that perform functions analogous to traditional signal and train control systems should be regulated under part 236; however, FRA strongly believes that such issues should not be addressed piecemeal. Accordingly, FRA declines in this forum to assert the applicability of part 236 to systems used to prevent shoving movements from exceeding the intended boundaries

Based on the discussion contained above, FRA is not amending the regulatory text as suggested in either AAR's petition or the Joint Labor Petition.

III. Section-by-Section Analysis

PART 217– [AMENDED]

217.9 Program of Operational Tests and Inspections; Recordkeeping

FRA is amending four paragraphs of this section to delay certain applicability dates. In the preamble section titled "Implementation Dates," FRA explains the basis for amending each of these compliance deadlines. In summary, FRA considered the petitions which suggested that, due to the routine most railroads use to schedule training during the first quarter of each calendar year, many railroads might have rushed through implementation merely to meet the deadline without regard for the program's likely effectiveness. FRA is amending the applicability dates in this section because we would

prefer to provide each railroad with a reasonable opportunity to come into compliance with an effective amended program of operational tests and inspections, rather than to have compliance that is technically timely but ineffective.

The introductory text of paragraph (b) is amended to make the requirements contained in this paragraph (b) applicable beginning January 1, 2009. As the applicability date was previously July 1, 2008, the amendment extends the deadline for compliance by six months.

Paragraph (c)(1) requires the program to provide for operational testing and inspection under the various operating conditions on the railroad. The applicability date of this paragraph has been amended, so that on or after January 1, 2009, each railroad shall be required to amend its program to “address with particular emphasis those operating rules that cause or are likely to cause the most accidents or incidents, such as those accidents or incidents identified in the quarterly reviews, six month reviews, and the annual summaries as required under paragraphs (e) and (f) of this section, as applicable.” As the applicability date was previously July 1, 2008, the amendment extends the deadline for compliance by six months.

Paragraph (c)(6) requires the program show the railroad’s designation of an officer to manage the program at each level of responsibility (division or system, as applicable). The applicability date of this paragraph has been amended, so that compliance with it is not required until January 1, 2009. As the applicability date was previously July 1, 2008, the amendment extends the deadline for compliance by six months.

Paragraph (e) requires each railroad to do reviews of its program of operational tests and inspections at certain specified periodic intervals. There are two applicability dates in introductory paragraph (e) and both dates have been amended to provide railroads with additional time to comply. Introductory paragraph (e) is amended so that the requirements in paragraph (e) apply to each Class I railroad and the National Railroad Passenger Corporation beginning April 1, 2009, and to all other railroads subject to this paragraph beginning July 1, 2009. Thus, each Class I railroad and the National Railroad Passenger Corporation are being provided an additional ten months to comply with the requirements in paragraph (e) and all other railroads subject to this paragraph are being provided an additional six months to comply.

PART 218– [AMENDED]

218.93 Definitions

A definition of *departure track* is added to this section because this term is used in added paragraph (e)(5) to § 218.99. A departure track is a track located in a classification yard where rolling equipment is placed and made ready for an outgoing train movement. Thus, a departure track is typically the last type of track that cars will be on in the yard before the cars are completely assembled as a train and ready to leave the confines of the classification yard. The “classification yard” is a term used to describe the greater yard area that contains, but is not limited to, run-through tracks, van yard tracks that are used for trailers on flat cars or containers on flat cars (tofc/cofc), car

repair tracks, locomotive servicing tracks, repair-in-place (rip) tracks, receiving tracks, bowl or classification tracks, and departure tracks. Some railroads have added shove light systems to departure tracks to aid train crews shoving or pushing large cuts of cars onto departure tracks; i.e., a person observing the shove light will be notified when the circuited end of the track is occupied without actually viewing the circuited end of the track.

218.95 Instruction, Training, and Examination

Paragraph (a) requires that each railroad maintain a written program that will qualify its employees for compliance with operating rules implementing the requirements of this subpart to the extent these requirements are pertinent to the employee's duties. FRA is amending this paragraph to require establishment and continued maintenance of the program beginning no later than January 1, 2009. As the applicability date was previously July 1, 2008, the amendment extends the deadline for compliance by six months.

Paragraphs (a)(3) and (a)(4) are also being amended to provide additional time to implement this subpart. Paragraph (a)(3) is amended to require that each employee performing duties subject to the requirements in this subpart shall be initially qualified prior to July 1, 2009. As the applicability date for paragraph (a)(3) was previously January 1, 2009, the amendment extends the deadline for compliance by six months. Paragraph (a)(3) is also amended by eliminating the requirement that "employees hired between April 14, 2008 and January 1, 2009, and all employees thereafter required to

perform duties subject to the requirements in this subpart shall be qualified before performing duties subject to the requirements in this subpart.” The elimination of this requirement follows from the decision to delay implementation of the program in paragraph (a) to January 1, 2009. The program implementation date is being delayed so that railroads will have time to adequately prepare a written program of training. As FRA has accepted AAR and APTA’s reasons for delaying implementation of the program, it seems logical to provide railroads additional time to train both the employees hired prior to the effective date of the rule as well as the newly hired employees.

Similarly, the applicability date in paragraph (a)(4) is amended to require that, beginning July 1, 2009, no employee shall perform work requiring compliance with the operating rules implementing the requirements of this subpart unless qualified on these rules within the previous three years. As the applicability date for paragraph (a)(4) was previously January 1, 2009, the amendment extends the deadline for compliance by six months. Thus, as of July 1, 2009, each employee performing work subject to this subpart is required to be qualified regardless of when the employee was hired.

218.99 Shoving or Pushing Movements

Paragraph (e)(5) is added to permit each railroad the option of using a shove light system in lieu of point protection under 49 CFR 218.99(b)(3), as long as certain specified conditions are met. In section II. B. of the preamble, titled “Shove Lights,” FRA explains why it is permitting railroads to choose this option. In summary, FRA reviewed initial rail equipment accident/incident records over a recent twenty-six month

period that suggested railroads have safely conducted shoving or pushing movements on departure tracks that utilize shove light systems without a point protection requirement. FRA conducted observations of 34 locations where shove light or radio systems were in operation and found that certain best practices increased the likelihood that the operation could be conducted safely. FRA has promulgated the best practices into requirements that allow a railroad to exercise this operational exception. In addition, FRA has determined that systems based on radio signals alone are not as safe as those that contain a visual display. Consequently, the operational exception uses the term “shove light system” which is intended to descriptively exclude the use of a radio system that does not utilize a light.

Paragraph (e)(5)(i) requires that the shove light system is demonstrated to be failsafe. The safety concern is that, without a specific requirement, some railroads might try to implement technology that is not demonstrated to be safe and therefore provides a false sense of protection to rail employees. Fortunately, most shove light arrangements appear to utilize traditional signal circuits which by design fail safe. (For analogous requirements applicable to track circuits and occupancy display in block signal territory see, e.g., 49 CFR 236.5, 236.51.) Although the present rule in no way dictates the technology employed, it does require that it be failsafe in operation. (For principles pertinent to evaluating innovative detection technologies see Appendix C to part 236.) In order to demonstrate that the system is failsafe, FRA would expect that when the system is not working properly it would produce the least favorable aspect – indicating that the movement should immediately be stopped or, if not yet begun, not started.

Paragraph (e)(5)(ii) requires that the shove light system be arranged to display a less favorable aspect when the circuited section of the track is occupied. If the shove light system has only a single light, the light will turn off, i.e., go dark, when the circuited section of the track is occupied. If the shove light system has multiple lights or a single light with the ability to display multiple aspects or colors, the light will turn from a favorable aspect to a less favorable aspect when the circuit is first occupied, and later turn to a more restrictive aspect as the circuited track reaches full occupancy. Of course, shove light systems with multiple lights may simply go from a favorable aspect, e.g., green, to a less favorable aspect, e.g., red, in order to meet the requirement of this paragraph.

Paragraph (e)(5)(iii) requires that written procedures be adopted and complied with that provide for a reliable means of determining track occupancy prior to commencing a shoving or pushing movement. The preamble section titled “Shove Lights” contains a description of various procedures many railroads have already established for departure tracks within departure yards equipped with shove light systems. The establishment of procedures is a way to create a uniform method of leaving a car or cut of cars on a departure track safely, thus permitting the yardmaster or next crew entering to know that the entire length of a particular departure track is not clear. Some railroads may choose to institute procedures that aid in tracking cars, either in writing, computer inventory, GPS tracking, or other electronic tracking. FRA is not requiring that all railroads must adopt and comply with a particular set of procedures. However, FRA believes these types of procedures contribute to the overall safety record

of departure tracks utilizing shove lights and that such procedures must be established in writing so that all employees working in the departure yard can be expected to fully understand the operation. When FRA conducts inspections of these departure yards, we intend to review these procedures to ensure that any particular procedure, or lack thereof, does not create an undue safety risk and that the departure yard operation utilizing the shove light system is managed in a safe manner.

Paragraph (e)(5)(iv) requires that the departure track be designated in writing. This is an important requirement because it is an exception to providing point protection and it is therefore imperative that employees know specifically on which tracks the exception applies. FRA is promulgating this requirement even though we are unaware of shove light systems being installed on other than designated departure tracks. The requirement in this paragraph is intended to prevent a railroad from installing shove lights on yard tracks that are not departure tracks and attempting to circumvent the point protection requirements under paragraph (b)(3) of this section.

Paragraph (e)(5)(v) requires that the track be under the exclusive and continuous control of a yardmaster or other qualified employee. FRA's recent observations of departure tracks at major railroad classification yards, described above, found that a universal best practice is to have an employee, typically a yardmaster, who controls all movements in and out of the departure tracks. Without such an employee, there would likely not be any person who would be tracking movements into or out of the departure tracks, and there would not be anyone who could reliably relay information to train crewmembers who need to know the status of a particular departure track.

The operational exception in paragraph (e)(5) differs from the other numbered exceptions in paragraph (e) because, although introductory paragraph (e) states that “[a] railroad does not need to comply with paragraphs (b) through (d) of this section in the following circumstances,” the rule excepting shove lights does include some requirements within paragraphs (b) through (d). For instance, paragraph (e)(5)(vi) requires that “[t]he train crewmember or other qualified employee directing the shoving or pushing movement complies with the general movement requirements contained in paragraphs (b)(1) and(b)(2) of this section.” Thus, even though a shove light system may be used, this paragraph requires that employees conduct a proper job briefing under paragraph (b)(1) and that the employee directing the movement not engage in any task unrelated to the oversight of the shoving or pushing movement under paragraph (b)(2). Similarly, paragraph (e)(5)(vii) requires that “[a]ll remote control shoving or pushing movements comply with the requirements contained in paragraph (c)(1) of this section.” Hence, remote control operations utilizing shove lights are not excused from the requirement that either the remote control operator or a crewmember visually determine the direction the equipment moves, and, in the case of a crewmember making the observation, that the operator is promptly informed before continuing the movement.

Paragraph (e)(5)(viii) requires that the shove light system be continuously illuminated when the circuited section of the track is unoccupied. FRA is including this requirement to ensure that the employee observing the shove light is always viewing a lit aspect when the circuited section of the track is unoccupied. To allow otherwise would mean that a shove light system with a single aspect shove light could remain dark until it

lit up when the circuited section of the track is occupied. Such an arrangement would not be failsafe if the light bulb failed. In arranging a failsafe system, railroads that utilize a multiple aspect shove light system will need to address each possible scenario for one or more light bulb or aspect failures. If the system has multiple aspects and a bulb or aspect failed, an employee viewing the shove light should be able to tell that the system is not continuously illuminating a proper aspect. If the system fails to continuously illuminate, the operational exception under paragraph (e)(5) would no longer be available and the movement would be required to stop immediately. Thus, the safest course of action is required when there is a technological failure such as the system fails to continuously illuminate.

IV. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This action has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). The original final rule was determined to be non-significant. Furthermore, the amendments contained in this action are not considered significant because they generally clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule. These amendments, additions, and clarifications will have a minimal net effect on FRA's original analysis of the costs and benefits associated with the final rule.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities.

FRA certifies that this action is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act or Executive Order 13272. Because the amendments contained in this document generally clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, FRA has concluded that there are no substantial economic impacts on small units of government, businesses, or other organizations resulting from this action.

C. Paperwork Reduction Act

The information collection requirements in the agency's response to petitions of reconsideration of this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section - 49 CFR	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours	Total Annual Burden Cost
217.7 - Operating Rules ; Filing and Recordkeeping					
- Filing rules, timetables, and special instructions	1 New Railroad	1 submission	1 hour	1 hour	\$43
- Amendments to operating rules, timetables, and timetable special instructions by Class I, Class II, Amtrak, and Commuter Railroads	55 Railroads	165 amendments	20 minutes	55 hours	\$2,365
- Class III and Other Railroads: Copy of Current Operating Rules, Timetables, and Special Instructions	20 New Railroads	20 submissions	55 minutes	18 hours	\$774
- Class III Railroads: Amendments to operating rules	632 Railroads	1,896 amendment	15 minutes	474 hours	\$20,382
217.9 - Program of Operational Tests					
- Railroad and railroad officer testing responsibilities: Field Training	687 Railroads	4,732 training sessions	8 hours	37,856 hours	\$1,892,800
- Written records of officer testing qualifications	687 Railroads	4,732 records	2 minutes	158 hours	\$0 (Incl.RIA)
- Written program of operational tests/inspections	20 New Railroads	20 programs	9.92 hours	198 hours	\$8,514
- Amendments to operational tests/insp. programs					
- Records of individual tests/inspections	55 Railroads	165 amendments	1.92 hours	317 hours	\$13,631
- Review of tests/inspections/adjustments to the program of operational tests - Quarterly reviews	687 Railroads	9,180,000 rcds.	5 minutes	765,000 hours	\$38,250,000
- Officer designations & Six Month reviews	687 Railroads	37 reviews	1 hour	37 hours	\$0 (Incl.RIA)
- <u>Passenger Railroads</u> : Officer designations & Six-Month reviews	687 Railroads	37 designations +	5 seconds + 1 hour	74 hours	\$0 (Incl.RIA)
- Records retention: Periodic reviews		74 reviews			
- Annual summary on operational tests/inspections - Summary records	20 Railroads	20 designations +34 reviews	5 seconds + 1 hour	34 hours	\$0 (Incl.RIA)
- FRA disapproval of operational testing/insp. program: Railroad response to disapproval	687 Railroads	589 review rcds.	1 minute	10 hours	\$0 (Incl.RIA)
- Amended programs as a result of FRA disapproval	37 Railroads	37 summary rcds.	61 minutes	38 hours	\$1,634
	687 Railroads	20 responses	1 hour	20 hrs.	\$1,460
	687 Railroads	20 amended	30	10 hrs.	\$730

217.11 - Program of Instruction on Operating Rules	687 Railroads	130,000 instr. employees	8 hours	1,040,000 hours	\$52,000,000
- Railroads instruction of employees				160 hours	
- Current copy of employee periodic instruction prog.	20 New Railroads	20 programs	8 hours		\$6,880
- Amendments to current employee instruction prog.	687 Railroads	220 amendments	.92 hour	202 hrs.	\$8,686
218.95 - Instruction, Training, and Examination					
- Records of instruction, training, examination	687 Railroads	98,000 records	5 minutes	8,167 hrs.	\$351,181
- FRA disapproval of program: Railroad responses	687 Railroads	50 submissions	1 hour	50 hours	\$2,150
- Amended programs	687 Railroads	20 amended docs.	30 minutes	10 hours	\$730
218.97 - Good Faith Challenge Procedures	687 Railroads	687 procedures	2 hours	1,374 hours	\$0 (Incl.RIA)
- Copies to employees of good faith procedures	687 Railroads	130,000 copies	6 minutes	13,000 hours	\$0 (Incl.RIA)
- Copies of amendments to good faith procedures	687 Railroads	130,000 copies	3 minutes	6,500 hours	\$0 (Incl.RIA)
- Good faith challenges to railroad directives					
- Resolution of challenges	98,000 Employees	15 challenges	10 minutes	3 hours	\$0 (RIA)
- Direct order to proceed procedures: Immediate review by railroad testing officer/employer	687 Railroads	15 responses	5 minutes	1 hour	\$0 (RIA)
- Documentation of employee protests to direct order	687 Railroads	5 reviews	15 minutes	1 hour	\$0 (RIA)
- Copies of protest documentation	687 Railroads	10 protest docs	15 minutes	3 hrs.	\$0 (RIA)
- Further review by designated railroad officer	687 Railroads	20 copies	1 minute	.33 hour	\$0 (RIA)
- Employee requested written verification decisions	687 Railroads	3 reviews	15 minutes	1 hr.	\$0 (RIA)
	687 Railroads	10 decisions	10 minutes	2 hrs.	\$88
-Recordkeeping/Retention - Copies of written procedures	687 Railroads	760 copies	5 minutes	63 hrs.	\$2,709
-Copies of good faith challenge verification decisions	687 Railroads	20 copies	5 minutes	2 hrs.	\$86

218.99 - Shoving or Pushing Movements					
- Required operating rule compliant with this section	687 Railroads	687 rule modific.	1 hour	687 hours	\$0 (Incl.RIA)
- General Movement Requirements: Job briefings	100,000 RR employees	60,000 briefings	1 min.	1,000 hours	\$50,000
- Point Protection: Visual determination of clear track and corresponding signals or instructions	100,000 RR employees	87,600,000deter/instructions + 87,600,000 signals	1 minute	2,920,000 hrs.	\$128,480,000
- Remote Control Movements: Confirmations by Crew	100,000 RR employees	876,000 confirm.	1 min.	14,600 hrs.	\$642,400
- Remote Control zone, exceptions to point protection: Determination/Communication track is clear	100,000 RR employees	876,000 deter/communication	1 minute	14,600 hrs.	\$642,400
- Operational exceptions:					
- Dispatcher permitted movements that are verified	6,000 RR Dispatchers	30,000 permitted movements	1 minute	500 hrs.	\$22,000
[NEW REQUIREMENTS]					
- Written procedures that are adopted/complied with to determine track occupancy prior to shoving/pushing movement	687 Railroads	41 procedures	30 min.	42 hrs.	\$903
- The track is designated in writing	687 Railroads	41 designated track locations	30 minutes	42 hours	\$903
218.101 - Leaving Equipment in the Clear	687 Railroads	687 amended op. rules	30 minutes	344 hours	\$0 (Incl.RIA)
- Operating Rule that Complies with this section					
218.103 - Hand-Operated Switches and Derails		687 amended op. rules			\$0 (Incl.RIA)
- Operating Rule that Complies with this section	687 Railroads		60 minutes	687 hours	
- Minimum requirements for adequate job briefing	632 Railroads	632 modif rules	60 minutes	632 hours	\$0 (RIA)
- Actual job briefings conducted by employees operating hand-operated main track switches	632 Railroads	1,125,000 brfngs	1 minute	18,750 hrs.	\$825,000
218.105 - Additional Job Briefings for hand-operated main track switches	687 Railroads	60,000 briefings	1 minute	1,000 hours	\$0 (Incl.RIA)
- Exclusive track occupancy: Report of position of main track switches and conveyance of switch position	687 Railroads	100,000 reports + 100,000 convey.	1 minute	3,334 hours	\$0 (RIA)
-Releasing authority limits: Acknowledgments and verbal confirmations of hand-operated main track switches	6,000 RR Dispatchers	60,000 reports + 60,000 confirm.	30 sec. + 5 sec.	583 hours	\$0 (Incl.RIA)
218.109 - Hand-operated fixed derails - Job	687 Railroads	562,500 brfngs	30 seconds	4,688 hours	\$234,400

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202-493-6292 or Ms. Nakia Poston at 202-493-6073, or via e-mail at robert.brogan@dot.gov or nakia.poston@dot.gov

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Any comments should be sent to: The Office of Management and Budget, 725 17th Street, N.W., Washington, D.C. 20503, att: FRA Desk Officer. Comments may also be sent via e-mail to OMB at the following address: oira_submissions@omb.eop.gov

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State

and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the proposed regulation. Where a regulation has Federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This is an action with preemptive effect. Subject to a limited exception for essentially local safety hazards, its requirements will establish a uniform Federal safety standard that must be met, and State requirements covering the same subject are displaced, whether those standards are in the form of State statutes, regulations, local ordinances, or other forms of state law, including State common law. Preemption is addressed in §§ 217.2 and 218.4, both titled “Preemptive effect.” As stated in the corresponding preamble language for §§ 217.2 and 218.4 in the original final rule, section 20106 of Title 49 of the United States Code provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation,

or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. This is consistent with past practice at FRA, and within the Department of Transportation.

FRA has analyzed this action in accordance with the principles and criteria contained in Executive Order 13132. FRA notes that the above factors have been considered throughout the development of this rulemaking both internally and through consultation within the RSAC forum, as described in Section I of this preamble. After the Railroad Operating Rules Working Group failed to reach a consensus recommendation on the NPRM, FRA reported the Working Group's unofficial areas of agreement and disagreement to the RSAC. After publication of the NPRM, FRA permitted the Working Group to meet and discuss the comments received; some consensus on the comments was derived and forwarded to the RSAC where it was ratified as a recommendation to the FRA. The RSAC has as permanent voting members two organizations representing State and local interests: AASHTO and ASRSM. The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative. States and other governments were afforded opportunity to consult by virtue of the NPRM and comment period, and the agency's procedures permitting petitions for reconsideration.

For the foregoing reasons, FRA believes that this action is in accordance with the principles and criteria contained in Executive Order 13132.

E. Environmental Impact

FRA has evaluated this action in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this action is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. 64 FR 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA’s Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

E. Unfunded Mandates Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate

requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) currently \$128,100,000 in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This action would not result in the expenditure, in the aggregate, of \$128,100,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this action in

accordance with Executive Order 13211. FRA has determined that this action is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

H. Public Proceedings

FRA has not provided additional notice and request for public comment prior to making the amendments contained in this rule. FRA concluded that such notice and comment were impractical, unnecessary and contrary to the public interest since FRA is, for the most part, only making minor technical changes in response to requests for reconsideration of issues that were previously the subject of detailed notice and extensive comment in the development of the initial final rule in this proceeding.

Certain of the amendments are so critical to the effective implementation of this rule that the delay that a notice and comment period would cause would clearly be contrary to the public interest in railroad safety. For example, the amendments delaying certain implementation of the rule need to go into effect immediately or some of the implementation dates in the initial final rule would go into effect before the amendments would. If the amendments were not allowed to go into effect immediately, many railroads would be rushing to develop and implement training and testing programs, and the quality of the programs and the training would suffer. In addition, an exemption or relief from a restriction is provided by allowing railroads to utilize existing shove light systems without establishing point protection. If this exemption is not immediately

placed in effect, some railroads may require an employee to ride the side of a car or walk along a departure track equipped with shove lights, thereby increasing the employee's risk of an injury. Under these circumstances, FRA has concluded that the rule may be made effective immediately. 5 U.S.C. 553(d).

I. Privacy Act

Anyone is able to search the electronic form of all comments or petitions for reconsideration received into any of FRA's dockets by the name of the individual submitting the comment or petition for reconsideration (or signing the comment or petition for reconsideration, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you may visit <http://DocketsInfo.dot.gov>.

List of Subjects

49 CFR Part 217

Penalties, Railroad safety, and Reporting and recordkeeping requirements.

49 CFR Part 218

Occupational safety and health , Penalties, Railroad employees, Railroad safety, and Reporting and recordkeeping requirements.

The Final Rule

For the reasons discussed in the preamble, FRA amends parts 217 and 218 of Title 49, Code of Federal Regulations as follows:

PART 217– [AMENDED]

1. The authority citation for part 217 continues to read as follows:

AUTHORITY: 49 U.S.C. 20103, 20107; 28 U.S.C.2461, note; and 49 CFR 1.49.

2. Section 217.9 is amended by revising the introductory text of paragraph (b), paragraphs (c)(1), (c)(6), and the introductory text of paragraph (e) to read as follows:

§ 217.9 Program of operational tests and inspections; recordkeeping.

* * * * *

(b) *Railroad and railroad testing officer responsibilities.* The requirements of this paragraph (b) are applicable beginning January 1, 2009.

* * * * *

(c) * * *

(1) Provide for operational testing and inspection under the various operating conditions on the railroad. As of January 1, 2009, the program shall address with particular emphasis those operating rules that cause or are likely to cause the most accidents or incidents, such as those accidents or incidents identified in the quarterly reviews, six month reviews, and the annual summaries as required under paragraphs (e) and (f) of this section, as applicable;

* * * * *

(6) As of January 1, 2009, identify the officer(s) by name, job title, and, division or system, who shall be responsible for ensuring that the program of operational tests and inspections is properly implemented. The responsibilities of such officer(s) shall include, but not be limited to, ensuring that the railroad's testing officers are directing their efforts in an appropriate manner to reduce accidents/incidents and that all required reviews and summaries are completed. A railroad with divisions shall identify at least one officer at the system headquarters who is responsible for overseeing the entire program and the implementation by each division.

* * * * *

(e) *Reviews of tests and inspections and adjustments to the program of operational tests.* This paragraph (e) shall apply to each Class I railroad and the National Railroad Passenger Corporation beginning April 1, 2009 and to all other railroads subject to this paragraph beginning July 1, 2009.

* * * * *

PART 218– [AMENDED]

3. The authority citation for part 218 continues to read as follows:

AUTHORITY: 49 U.S.C. 20103, 20107; 28 U.S.C.2461, note; and 49 CFR 1.49.

4. Section 218.93 is amended by adding a definition of “departure track” in alphabetical order to read as follows:

§ 218.93 Definitions

* * * * *

Departure track means a track located in a classification yard where rolling equipment is placed and made ready for an outgoing train movement.

* * * * *

5. Section 218.95 is amended by revising the introductory text of paragraph (a), and paragraphs (a)(3) and (a)(4) to read as follows:

§ 218.95 Instruction, training, and examination.

(a) *Program.* Beginning January 1, 2009, each railroad shall maintain a written program of instruction, training, and examination of employees for compliance with operating rules implementing the requirements of this subpart to the extent these requirements are pertinent to the employee's duties. If all requirements of this subpart are satisfied, a railroad may consolidate any portion of the instruction, training or examination required by this subpart with the program of instruction required under § 217.11 of this chapter. An employee who successfully completes all instruction, training, and examination required by this written program shall be considered qualified.

* * * * *

(3) *Implementation schedule for employees, generally.* Each employee performing duties subject to the requirements in this subpart shall be initially qualified prior to July 1, 2009.

(4) Beginning July 1, 2009, no employee shall perform work requiring compliance with the operating rules implementing the requirements of this subpart unless

qualified on these rules within the previous three years.

* * * * *

6. Section 218.99 is amended by adding a new paragraph (e)(5) to read as follows:

§ 218.99 Shoving or pushing movements.

* * * * *

(e) * * *

(5) Shoving or pushing movements made in the direction of the circuited end of a designated departure track equipped with a shove light system, if all of the following conditions are met:

(i) The shove light system is demonstrated to be failsafe;

(ii) The shove light system is arranged to display a less favorable aspect when the circuited section of the track is occupied;

(iii) Written procedures are adopted and complied with that provide for a reliable means of determining track occupancy prior to commencing a shoving or pushing movement;

(iv) The track is designated in writing;

(v) The track is under the exclusive and continuous control of a yardmaster or other qualified employee;

(vi) The train crewmember or other qualified employee directing the shoving or pushing movement complies with the general movement requirements contained in

paragraphs (b)(1) and (b)(2) of this section;

(vii) All remote control shoving or pushing movements comply with the requirements contained in paragraph (c)(1) of this section; and

(viii) The shove light system is continuously illuminated when the circuited section of the track is unoccupied.

Issued in Washington, D.C. on June 10, 2008

/original signed by/

Joseph H. Boardman,

Administrator.