

BEFORE THE DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY OF TRANSPORTATION

DOCKET NO. DOT-OST-2017-0069:
NOTIFICATION OF REGULATORY REVIEW

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (“AAR”), on behalf of itself and its member railroads, submits the following comments in response to the invitation from the Department of Transportation (“DOT”) to the public to provide input on existing rules and other agency actions that are good candidates for repeal, replacement, suspension, or modification.¹

AAR provided comments to DOT via letter to Deputy Secretary Jeffrey Rosen in his capacity as Regulatory Reform Officer on June 21, 2017, regarding the mandates imposed by Executive Order 13,777. We incorporate the specific suggestions made by that letter, provided as an attachment, into this docket as well. Beyond the repeal of the ECP brake rule – the procedure for which is governed by provisions in the FAST Act – we advocated in the letter for a shift in regulatory approach that recognizes the benefits of technology and other significant infrastructure investment made by railroads. The regulatory relief we call for is the license and flexibility to conceive, develop, and deploy innovative technologies and practices where they are effective and efficient, and to be regulated based on our success in achieving safety goals, not by outdated, prescriptive regulations.

These comments supplement our June 2017 letter to Mr. Rosen by adding additional regulations that should be repealed or modified: Federal Railroad Administration (“FRA”) air brake inspection regulations; Federal Aviation Administration (“FAA”) regulations for small unmanned aircraft systems; Federal Motor Carrier Safety Administration (“FMCSA”) hours of service regulations; and the DOT level-boarding rule.

¹ AAR is a trade association whose membership includes freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service. *See* 82 Fed. Reg. 45,750 (Oct. 2, 2017).

I. FRA’s Air Brake Regulations are Outdated and Should be Modernized.

FRA train brake requirements originated from the Power Brake Act of 1958.² Although the regulations have been modified over time, most recently in 2001, they remain very much out of date.³ Air brake technology and the resulting safety and reliability of air brake systems has benefited from many advancements. For example, air leakage on standing trains has been greatly reduced by the use of welded brake piping and fittings and ferrule-clamped air hoses. Grip type fittings, in use when the regulation was issued, no longer have a place in the industry and are restricted in interchange. Most U.S. locomotives are equipped with operable air driers or other system to remove moisture and contaminants from the air supply system. Freight car control valves have also seen continuous improvements since the last regulatory change. Protection from leakage and vibration is now standard. Since 2001, railroads have invested millions of dollars to add automatic drains to compressed air storage tanks, air driers to yard air systems, and oil/contaminant separators to keep the compressed air system clean. Safety has benefited from all of these improvements, as shown by the industry’s record.

However, FRA regulations continue to cost the railroads unnecessary expense, and stifle the railroads’ ability to benefit from these advancements in air brake technology. There are two changes that can be made to bring the air brake regulations into the modern era: modifying the off-air limitation to 24 hours and repealing the restriction on picking up and setting off blocks of cars.

A. Modify the 24-Hour Off-Air Limitation.

Pursuant to FRA regulations at 49 C.F.R. §§ 232.205, 232.209, 232.211, and 232.217, if a car or solid block of cars added to a train has been off-air for four hours or more, it must receive a Class I brake test, regardless of when the car(s) were last tested. Rail cars today can be kept off-air for extended periods of time well beyond four hours without any safety degradation. Recent data from Class I railroad outbound inspection records shows that there is less than a 0.4% probability of a brake defect, and these defects cannot be attributed to time off-air.⁴

Based upon the data, FRA should modify the four-hour off-air restrictions in the regulations to permit a car or block of cars that have been off-air for up to 24 hours to

² 72 Stat, Pub. L. 85-375 (Apr. 11, 1958).

³ 66 Fed. Reg. 4,104 (Jan. 17, 2001).

⁴ The sample size was approximately 2.4 million outbound inspections.

operate without receiving a brake test based solely on time off-air. This change would harmonize U.S. regulations with Canadian regulations, facilitating cross-border operational efficiencies and promoting international commerce. Further, AAR estimates that approximately 92,500 hours of locomotive idling would be eliminated annually by increasing the off-air restriction from four to 24 hours. This results in an annual savings of approximately \$2 million in fuel and a reduction of 1,425 tons of CO² emissions from the air. In addition, the industry expects some reduction in nuisance complaints triggered by idling trains.

B. Repeal the Restriction on Picking Up and Setting Off Cars.

Other outdated regulations at 49 C.F.R. §§ 232.205(a)(2) and 232.213(a)(5) require that a train, and each car in the train, be given a new air brake test if the train's make-up is changed other than by adding a single car or a solid block of cars or removing a single car or solid block of cars. For extended haul trains, only one pick-up and one set-off of cars are permitted *en route*. Such redundant brake tests and limitations on operating flexibility add unnecessary cost and has a negative effect on network fluidity. Nevertheless, FRA placed this restriction in the regulations due to concerns that, if cars are permitted to be moved in and out of a train at will, determining when and where a Class IA brake test must be performed, which is based upon mileage since the previous test, would be impossible.⁵

AAR's member railroads have developed an electronic air brake record system that increases the traceability of rail cars. By using the electronic air brake record system, railroads can now provide the following information about each rail car: the last type of inspection the car received; the location of the last inspection; the date and time of the inspection, the name of the person who performed the inspection; and the number of cars that were inspected at that time. The availability of this information at the car level shows when the railroad must perform the next Class IA brake test, addressing FRA's concerns.

FRA should repeal the restrictions in 49 C.F.R. § 232.205(a)(2) that require a train and each car in the train to receive a Class I brake test if the consist is changed other than by adding a single car or a solid block of cars or removing a single car or solid block of cars; and from the provisions in 49 C.F.R. § 232.213(a)(5) that limit a train designated as an extended haul train to one pick-up and one set-out *en route*, for railroads using the electronic air brake record system. AAR conservatively estimates that this change would

⁵ 66 Fed. Reg. 4,104 at 4167-68 (Jan. 17, 2001).

result in an approximate savings of \$245 million in operation and fuel expenses annually for the Class I railroads.⁶

II. Restrictions on Small Unmanned Aircraft Systems Limit Railroad Use.

Small unmanned aircraft systems (“sUAS”) have the potential to dramatically enhance the safety and security of the nation’s rail network – both freight and passenger. They can be used to safely inspect track and other rail structures (e.g., bridges, tunnels, signal towers, crossings) and secure facilities (e.g., rail yards and stations), where effective human inspection is difficult and/or dangerous. They can be used to investigate accident scenes without exposing emergency responders and railroad personnel to dangerous conditions. The applications are many and still developing.

However, current limitations imposed by the FAA on railroad uses of sUAS limit their utility for many of the applications described above. FAA should repeal the restrictions for railroads from nighttime operations, the visual-line-of-sight requirement, and operations over people.

A. FAA Should Repeal the Nighttime Operation Prohibition for Railroads.

AAR requests an exception to the prohibition in 14 C.F.R. § 107.29 for railroad incident assessment and for other health and safety purposes. Trains run 24 hours a day, and an incident after dark is just as likely as one during daylight hours. Currently, darkness substantially slows the examination and assessment of railroad incident scenes. Use of a sUAS will permit more immediate and continuous assessment of the event, and a quicker and safer response. This is a significant public safety benefit over the *status quo*.

B. FAA Should Repeal the Visual-Line-of-Sight (“VLOS”) Requirement for Railroads.

The visual-line-of-sight requirement in 14 C.F.R. § 107.31 restricts the use of a sUAS in both routine inspection and incident scenarios in which the operator may need to break the visual-line-of-sight temporarily in order to use the aircraft to “see” objects or angles not otherwise possible.⁷ Locating the operator in a single location where he or she

⁶ This estimate is based on an approximate reduction of two percent of railroad operation and fuel costs because the railroads would be able to utilize a more efficient operating plan.

⁷ We note that the agency’s discussion of the proposed rule indicates that “brief moments” in which VLOS is not maintained would not violate the rule, and strongly support this real-world approach. However, we are

is a capable of seeing the aircraft at all times may not be possible, and moving the operator repeatedly around the site of an incident to conduct multiple flights is inefficient and potentially increases risk by increasing the number of flights. In these situations, use of the sUAS – even if out of visual-line-of-sight for some period – enhances safety over the *status quo*.

We believe any collision risk can be appropriately mitigated by permitting out-of-sight operation only if either (a) the aircraft is equipped with and utilizes an effective first-person-view technology approved by FAA; or (b) the aircraft has the ability to monitor surroundings with a combination of camera (even if not full first-person-view), altitude, and position data; the operator immediately ceases operations (hover, land, or return home depending on circumstances) if any of the required capabilities are lost; and any operation outside visual-line-of-sight is over railroad-controlled property. This exception would balance the risk of out-of-sight operation against the benefits to be gained by more effective use.

C. FAA Should Repeal the Operation Over People Prohibition for Railroads.

Application of the prohibition in 14 C.F.R. § 107.39 to a railroad incident investigation may severely restrict use of sUAS in that scenario, eliminating many potential safety benefits to railroad and first response personnel and the public. Furthermore, application of this prohibition to routine inspection operations is not necessary nor practical. At a major derailment, for example, there potentially will be numerous railroad personnel on the scene, as well as first responders and investigators from state and federal agencies. Clearing the area of people before operation of the sUAS will be the preferred approach, but may not be possible in every situation in which the “eyes” of the sUAS are urgently needed to inform response planning. Completely halting other incident response activity for sUAS operations may not be realistic or safe. In addition, operating over railroad personnel may be a practical necessity for certain routine inspection operations, which may need to pass over rail facilities or track where employees necessary for general railroad operations, but not necessarily for sUAS operations, are present. Risks associated with operating over people in these scenarios can be mitigated by requiring all personnel over whom unmanned aircraft may be operated to receive an appropriate sUAS operation and safety briefing before flight is

advocating that the rule permit a longer period of intentional operation outside the line of sight, in certain defined circumstances.

commenced, so that they are informed of the sUAS use and appropriate safety measures they can take.

III. FMCSA Hours of Service Restrictions Impede Railroad Emergency Response Efforts and Should be Repealed.

Certain railroad employees who hold commercial driver’s licenses and operate commercial motor vehicles are subject to the FMCSA hours of service (“HOS”) regulations.⁸ Although there are specific exceptions for railroad signal employees, maintenance of way (“MOW”) and all other railroad employees are subject to FMCSA HOS regulations.⁹ MOW employees typically drive motor vehicles ancillary to work performed on railroad rights-of-way. The work of these employees is crucial when a railroad must coordinate efforts to restore rail service after incidents such as a derailment or grade crossing incident. However, the FMCSA HOS prohibition on driving after a 14-hour period without the required off-duty period inhibits a railroad’s ability to respond expeditiously to these type of emergency situations.¹⁰

As a point of comparison, utility service vehicles are exempt from the FMCSA HOS restrictions.¹¹ A utility service vehicle is defined as any commercial motor vehicle used to repair, maintain or operate any structures or any other physical facility necessary for the delivery of public utility services, including the furnishing of electric, gas, water, sanitary sewer, telephone, and television cable or community antenna service.¹² The work of railroad MOW employees responding to an emergency situation more closely resembles the work of utility employees than long-haul and local-delivery drivers. As is the case for utility employees, the affected railroad employees use vehicles as mobile supply facilities, transporting equipment and parts that are needed for the driver to use at worksites within a region. As is the case with utility workers, these drivers will have unpredictable work hours when needed to address operational emergencies. The work done by these employees supports the railroad’s effort to restore essential interstate commerce as well as, in the event of a grade crossing incident, restoring road and

⁸ 49 C.F.R. Parts 390 and 395.

⁹ 49 C.F.R. § 395.2. This exemption stems from the Rail Safety Improvement Act (“RSIA”), which states that the “hours of service, duty hours, and rest periods of signal employees shall be governed exclusively by this chapter.” 49 U.S.C. § 21104(e). *See also* 49 C.F.R. § 395.1(n).

¹⁰ 49 C.F.R. § 395.3(a)(2), which states in part that a driver may not drive after the end of a 14-consecutive-hour period without first taking 10 consecutive hours off duty. While a railroad may appeal to a local official in the event of an emergency for relief from the regulations, this process is not well-defined nor are any assurances provided that a request made at off-hours would be reviewed in a timely manner. *See* 49 C.F.R. § 390.23.

¹¹ 49 C.F.R. § 395.1(n).

¹² 49 C.F.R. § 395.2. The utility vehicle must be engaged in an activity necessarily related to the ultimate delivery of such public utility services to consumers.

pedestrian access to the public. Repealing the FMCSA HOS restrictions on railroad employees supporting activities to assess damage, repair infrastructure, and restore operations, would aid community relief, facilitate interstate commerce, and enhance employee and public safety.

IV. The DOT Level Boarding Rule Impedes Efforts to Provide Quality Rail Service and Imposes Unnecessary Costs.

The 2011 DOT Level Boarding Rule (“LBR”) generally requires Amtrak to install full-length level-boarding platforms whenever it constructs or “alters” Amtrak-owned or privately-owned platforms, unless there are adjacent “existing freight rail operations.”¹³ Outside the Northeast Corridor, most of Amtrak’s intercity trains operate on tracks privately-owned and controlled by freight railroads.

The LBR, though well-intended, imposes a rigid mandate on Amtrak without regard to service level or implementation cost. For example, full-length level-boarding platforms may be completely unnecessary to achieving accessibility at certain stations, given the ridership and other characteristics of each station. Additionally, Amtrak’s preliminary estimates project that the railroad will need to spend approximately \$40 million in design and construction of full-length level-boarding platforms to comply with the rule’s strict mandates.

AAR and its member railroads, including Amtrak, are committed to ADA compliance, believing that it is not only the law, but also the right thing to do for rail passengers with disabilities and the broader community. Also, Amtrak has a business interest in ADA compliance, as it serves many passengers with disabilities across the country, and for many, rail is their preferred method of transportation. However, the LBR and related DOT guidance documents noted below are unsupported by the ADA and threaten the railroads’ ability to provide quality service to all their customers – passengers and shippers.

A. The LBR Itself Is Contrary to Congressional Intent.

In enacting the ADA, Congress made clear its intent to provide railroads with flexibility and discretion to achieve passenger accessibility using a variety of means based on the circumstances of each station. Congress expressly rejected the notion that these inherently context-dependent accessibility decisions can or should be micromanaged by the government.¹⁴ The language of the ADA plainly gives passenger

¹³ 49 C.F.R. § 37.42, 76 Fed. Reg. 57,924–39 (Sept. 19, 2011).

¹⁴ H.R. Rep. 101-485(IV), 1990 U.S.C.C.A.N. 512, 533, 534.

railroads discretion in achieving accessibility. The ADA only requires that railroads be “accessible to and usable by” passengers with disabilities.¹⁵ The House Report explicitly considered that cars of multiple heights might use a rail station; that high-level platforms might conflict with clearances required for the operation of freight equipment; and that bypass and gauntlet tracks are extremely expensive. Thus, the House Report specifically states it was not the intent to require the movement of tracks, and acknowledged that lifts or mini-high platforms might be the best means of providing accessibility, for both existing and new stations.¹⁶

In a nod to Congress’ determination that flexibility is required, DOT dubbed its LBR as a “performance standard.” However, it is anything but that. Rather than permitting railroads to make case-by-case decisions about which means of accessibility make the most sense at particular stations based on equipment, ridership and operational needs, the LBR imposes a rigid mandate: unless there are “existing freight rail operations” adjacent to the platform, all new or altered platforms must provide level-boarding – regardless of ridership levels, regardless of the nature of the cars and other equipment involved, regardless of the costs and benefits, and regardless of private owners’ (including freight railroads’) property rights and statutory common carrier obligations.¹⁷ This rigid mandate is the opposite of a “performance standard” and contrary to the policy judgment made by Congress when it enacted the ADA.

B. DOT’s Guidance Documents Exacerbate the LBR’s Defects.

A March 9, 2012 DOT Guidance document purports to define “existing freight operations” to include only some of the operations actually conducted by freight railroads, and even then only if those particular activities are sufficiently frequent, and even then only if there is no possibility that the freight traffic could move onto another track via a switch or gauntlet.¹⁸ As such, the guidance effectively negates the rule’s critical exception for platforms with adjacent “existing freight operations.”

This crabbed interpretation of “existing freight operations” fails to recognize that pursuant to freight railroads’ common carrier obligations under 49 U.S.C. §§ 11101 and 10903, even infrequently used or currently unused freight tracks must remain available to

¹⁵ 42 U.S.C. § 12162.

¹⁶ *Id.*

¹⁷ As DOT itself acknowledged in the Preamble to the LBR, DOT has no authority to require freight railroads to permit the construction of level-boarding platforms. *See* 76 Fed. Reg. 57,927 (Sept. 19, 2011) (“The Department does not currently have legal tools” to regulate freight railroads in this area). Amtrak also lacks legal authority to compel freight railroads to permit construction of level-boarding platforms on freight-owned property. The LBR requires Amtrak to do things it does not have the authority to do.

¹⁸ *See* March 9, 2012, Guidance, *What Does the Rule Mean by “Existing Freight Operations?”*

shippers. Likewise, imposing an obligation to essentially isolate tracks for passenger rail by restricting freight traffic to only mainline or other parallel tracks wherever theoretically possible goes beyond defining where freight operations do exist to establishing new rules about where freight operations should exist. This is far outside the scope of DOT's authority. The reality is that efforts by Amtrak to narrow the larger horizontal gaps created by raising platforms to accommodate level-entry boarding could lead to interference with normal freight operations and could present an insurmountable obstacle to the transportation of commercial and military over-dimension freight, contrary to freight railroads' common carrier obligations. This is precisely why the exclusion for platforms with adjacent freight operations was included in the rule.

A May 24, 2012, DOT Guidance asserts that for any track owned and controlled by Amtrak or a public entity receiving federal financial assistance (e.g., state-supported railroad operations), new or altered platforms must provide level-boarding regardless of whether that would conflict with freight operations on the same track.¹⁹ In addition to suffering from the same defects as the March 9, 2012, guidance document (by disregarding the existing statutory obligations of freight railroads), in this guidance document DOT created new substantive legal obligations without having followed the notice and comment requirements of the Administrative Procedure Act.²⁰ A guidance document is supposed to be a non-binding clarification of existing law. The March 9, 2012, guidance document, by contrast, creates an entirely new legal obligation – an obligation that contradicts the LBR itself – requiring certain railroads to provide level-boarding on platforms regardless of the presence of “existing freight rail operations.”

C. The LBR Should be Repealed or Revised and the Related DOT Guidance Documents Repealed.

Repealing the LBR would restore the flexibility that Congress clearly intended when it enacted the ADA, which established a statutory requirement to make passenger trains “readily accessible to and usable by” passengers with disabilities, but gave passenger railroads the discretion and flexibility to determine which accessibility solutions would most appropriately achieve that result in particular circumstances. Alternatively, DOT could revise the LBR to make clear that level-boarding will be required for new and altered platforms only where both: (a) the platform and track are owned and controlled by the operating passenger railroad; and (b) level-boarding platforms adjacent to that track will not interfere with a freight railroad's legal rights and

¹⁹ See May 24, 2012 Guidance, *What Are the Obligations of a Public Entity Receiving Federal Financial Assistance that Owns and Controls Track through a Station?*

²⁰ 5 U.S.C. § 551(4).

obligations (e.g., 49 U.S.C. §§ 11101 and 10903). Either option would preserve rights guaranteed to passengers with disabilities while saving Amtrak an estimated \$40 million in construction and design costs.

Regardless of whether DOT chooses to repeal or revise the LRB, it will need to repeal the March 2012 and May 2012 guidance documents regarding level-entry boarding.

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Thank you for the opportunity to provide comments. The AAR looks forward to working collaboratively with DOT to further the Administration's regulatory improvement objectives.

Respectfully submitted,

A handwritten signature in black ink that reads "Sarah Yurasko". The signature is written in a cursive, flowing style.

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