

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

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VIA ELECTRONIC AND FIRST-CLASS MAIL

September 14, 2020

All General Chairmen
All State Legislative Board Chairmen

Re: Circular Letter Nos. GC-2020-20; SLBC-2020-11

Dear Sirs and Brothers:

This provides an update on Federal Railroad Administration (“FRA”) COVID–19 waiver renewals, changes to the docketing of relief granted by the Agency, and related subjects. Until recently, FRA has docketed all requests and grants for regulatory relief related to the COVID–19 pandemic in Docket No. FRA-2020-0002, which is the Emergency Relief Docket for this year. However, FRA recently opened Docket No. FRA-2020-0059 in response to a request by the Association of American Railroads (“AAR”) for longer-term relief than the 60-day period permissible under the Emergency Relief Docket rules. The implications of the opening of this second docket are set forth below.

On September 4, 2020 the AAR filed comments with FRA regarding AAR’s request to expand the application of certain COVID–19 waivers granted by FRA. In its request for an extension of the granted waiver requests on July 10, AAR also included elements that, in its view, were part of the original waiver request, but that FRA had not spelled out in the granting of the prior waivers. FRA provided the requested certification-related relief with two conditions. First, the relief is limited to situations where all other recertification requirements have been fulfilled (e.g., vision and hearing screening). Second, the waivers are limited to situations where a locomotive engineer’s or a conductor’s recertification becomes due during the waiver period.

FRA agreed to the 60-day extension and stated the following:

“FRA agrees with AAR’s recognition of the anticipated continued need to practice social distancing for a considerable period of time. FRA notes, however, that relief issued under FRA’s emergency waiver authority is limited to 60 days before it must be renewed. *See* 49 CFR § 211.45(j)(3).

“Accordingly, with this letter, FRA is renewing the existing relief detailed in its May 22, 2020, letter to AAR for 60 days, subject to the same terms and conditions of that letter.”

See FRA-2020-0020-0093.

FRA also found that the other changes AAR had requested amounted, not to an extension of relief from the regulation, but a new request. On this subject, FRA stated the following:

“Concurrent with this decision, however, FRA is instituting a separate waiver proceeding under 49 CFR § 211.41 to evaluate the AAR’s request for relief on a more long-term basis. That request is assigned Docket Number FRA-2020-0059. FRA will consider AAR’s request for modification of the relief related to § 240.127(c)(5) in that separate waiver proceeding. FRA notes, however, that under this existing relief, when a railroad uses an event recorder download to meet the requirements for a periodic locomotive engineer skills ride to support the recertification of a locomotive engineers, a railroad must utilize a scoring system compliant with 49 CFR § 240.211.”

Id.

As noted above, the original emergency COVID–19 relief was provided in Docket No. FRA-2020-0002. FRA created the separate FRA-2020-0059 docket. in response to AAR’s complaint that the 60-day limitation on emergency relief and FRA’s scoring system condition impede “the ability of railroads to use event recorder data to comply with” 49 C.F.R. § 240.127(c)(5). This provision regulates how a rail carrier must perform performance skill evaluations (“check rides”) onboard the locomotive or using a Type I or Type II simulator. The COVID–19 outbreak and social distancing guidelines from the CDC make complying with certain parts of 6-foot separation guidelines impossible. In essence, FRA’s response called out AAR for including what amounts to making a new request in the guise of a request for an extension of the existing waiver. However, FRA cured its own, valid procedural objection by simply assigning a new docket number for AAR to file the same request.

Another condition of FRA’s response to the COVID–19 waiver requests was that all carriers must provide FRA with a spreadsheet of each waiver use by railroad and location. The carriers have been providing a spreadsheet to FRA, and FRA has been compiling the data, including weekly updates, in the FRA-2020-0002 docket for the duration that the waivers have been in effect.

A problem that is evident, in even a cursory examination of the spreadsheets, is how sparse they are in their content. The FRA has included data from all Class I, short line, and passenger / commuter railroads. It strains credulity to accept that the data posted to the online docket provide a complete accounting of the instances the rail carriers have availed themselves of FRA’s waiver grants. Indeed, what was posted to the docket for the week ending August 29 as reflecting COVID–19 waiver use throughout the entire industry fit on a single 8½” x 11” sheet of paper. However, this problem is exactly what should be expected when rail carriers are allowed to regulate themselves. We are providing notice of this shortcoming so that you can keep an eye out for instances when a carrier invokes the use of a waiver but fails to document that use. This is an

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attempt to try to ensure that waivers that have been allowed for COVID-19 related issues are not invoked for other purposes.

I also want to make you aware of a serious diminution of transparency that is being widely implemented by the Trump Administration, which will make the tracking of regulatory compliance significantly more difficult. As you may know, the Federal Document Management System (“FDMS”) has provided public access to all federal regulatory activities via the regulations.gov website for many years. Users of the website have been able to register for email updates—on a daily, weekly or monthly basis—whenever a chosen docket was updated by, for example, publication of a notice in the Federal Register or the filing of comments by an interested party.

For the past several months, beta testing has been ongoing for a new, supposedly more “user-friendly” regulations.gov portal. Last week it was announced that, effective on October 1, 2020, concurrent with the new federal fiscal year, the email notification function is being discontinued. While FDMS claims that this is only a temporary interruption, no information was provided indicating when, or under what conditions, it will be restored.

Vital rail safety information will become scarcer and, absent manually checking the website daily for changes in the myriad of dockets of interest, more difficult to obtain as a result of these modifications. It is important to understand that these changes are not a defect, but an intended function of the new system. This abandonment of transparency places the public and stakeholders like rail labor unions in the dark with regard to waiver requests and FRA decisions regarding those requests. And it comes on the heels of other informational and transparency problems with FRA’s E-library that occurred last year, resulting in published papers on a variety of human factors topics being no longer retrievable or moved without a clear way to find them.

Related to the above, I am disappointed to report that FRA also has taken control of the Railroader’s Guide to Healthy Sleep website, citing supposed security concerns. Because the website was created by a third party, with funding from Harvard Medical School, we were optimistic that it would provide a fatigue-mitigation tool that BLET members would embrace as it functions beyond the control of the carriers and FRA. Sadly, we are concerned that the site will lose credibility among the membership if it is viewed as just another way that FRA or the carriers can obtain information about them. Once again, it seems the appearance of doing something about fatigue has trumped actually doing something about this scourge.

Despite these setbacks, we will continue to aggressively monitor safety compliance by the nation’s railroads. However, we ask that you help us pierce the deliberate opaqueness created by the FRA and the other federal agencies—at the behest of the White House—by monitoring operations being conducted under waivers on your property, and by reporting irregularities you discover to the National Legislative Office.

Trusting you will find this informative, and with warmest personal regards, I remain

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Fraternally yours,



National President

cc: E. L. Pruitt, First Vice President
S. J. Bruno, National Secretary-Treasurer
All Advisory Board Members
V. G. Verna, Director of Regulatory Affairs