

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA-2009-0043:
HOURS OF SERVICE OF RAILROAD EMPLOYEES;
SUBSTANTIVE REGULATIONS FOR TRAIN
EMPLOYEES PROVIDING COMMUTER AND
INTERCITY RAIL PASSENGER TRANSPORTATION;
CONFORMING AMENDMENTS TO
RECORDKEEPING REQUIREMENTS

PETITION FOR RECONSIDERATION
SUBMITTED BY THE
ASSOCIATION OF AMERICAN RAILROADS
AND THE
AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

Pursuant to 49 C.F.R. Part 211, the Association of American Railroads (AAR) and the American Public Transportation Association (APTA),¹ on their own behalf and on behalf of their member railroads, submit the following petition for reconsideration of FRA's final rule amending the hours of service (HOS) requirements for employees providing passenger service.² AAR and APTA seek to change the threshold score for work schedules when using the Fatigue Audit InterDyne™ Model (FAID) from 72 to 90. AAR and APTA also seek clarification

¹ AAR is a trade association whose membership includes freight railroads that operate 68 percent of the line-haul mileage, employ 89 percent of the workers, and account for 93 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. APTA is a non-profit international trade association of 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than 90 percent of Americans who use public transportation are served by APTA member transit systems.

² 76 Fed. Reg. 50,360 (Aug. 12, 2011).

that these requirements do not apply to trains transporting passengers as part of the business of conducting a railroad, as well as an explanation of FRA's statement in the preamble to the final rule concerning the handling of special events.

I. The Limitations Of Fatigue Models

In the preambles to the NPRM and the final rule, FRA discusses its desire to use a scientific basis for HOS requirements and the use of fatigue modeling to accomplish that goal. AAR and APTA agree that it is desirable to base HOS requirements on sound science. Fatigue modeling is an important step to achieving that objective.

FRA, however, has failed to recognize the limitations regarding the current scientific knowledge of fatigue. Fatigue models are imprecise and cannot accurately assess the performance of any particular individual. In its comments on the NPRM, AAR cited scientific literature stating that fatigue models cannot predict fatigue on the basis of work-rest data alone and that the models by themselves cannot be used to manage fatigue-related risk.³

Through RSAC, AAR and APTA agreed to the use of fatigue models on the basis that the regulatory scheme agreed to would not be unduly burdensome for the railroad industry. Recognizing FRA's desire to use fatigue models, there was no point objecting to their use if the regulatory outcome was not unduly restrictive.

As promulgated, FRA's rule would unduly burden the railroad industry and its employees by arbitrarily designating work schedules as presenting an unacceptable risk of an accident due to fatigue. It is for this reason that AAR and APTA petition for reconsideration.

II. The FAID and FAST Models Must Yield Consistent Results

FRA has "validated" two fatigue models, the Fatigue Avoidance Scheduling Tool ModelTM (FAST) and FAID. Both of these models are proprietary models.

The regulatory scheme is premised on establishing thresholds for each model. Scores below the threshold, in the case of FAST, or above the threshold, in the case of FAID, indicate that "safety may be compromised," to use the rule's language, by fatigue. Work schedules exceeding the applicable threshold must be mitigated, if feasible.

³ AAR comments, p. 2.

The problem with this structure is the thresholds established by FRA. In the NPRM, FRA used a FAST threshold of 70 and a FAID threshold of 60. In its comments on the NPRM, AAR noted that these thresholds would yield inconsistent results. Schedules that pass FAST would fail FAID.

Based on an analysis by Dr. Patrick Sherry of the University of Denver's National Center for Intermodal Transportation, AAR and APTA proposed a FAID threshold of 90. Dr. Sherry's analysis showed that if a FAST threshold of 70 and a FAID threshold of 90 were used, there would be more consistency between the FAST and FAID results.

In selecting a FAID threshold of 72, FRA stated that there is no need to be concerned with the correlation between FAID and FAST in examining the acceptability of schedules: "FRA does not believe the statistical comparison of individual scores is an appropriate basis for establishing a FAID threshold."⁴ AAR and APTA vigorously disagree, especially since the final rule requires the analysis of individual schedules.

Plainly, it is illogical for an individual schedule to be acceptable under one validated model and unacceptable under another validated model. The regulatory outcome of a particular schedule should not depend on which fatigue model is chosen. AAR and APTA, as RSAC members, acceded to the use of modeling for passenger HOS restrictions because the FAID and FAST models can be applied to the aggregate work schedules of employees providing passenger service without unnecessarily restricting the working hours of those employees and because AAR and APTA understood the thresholds would be selected to avoid inconsistent results.⁵

The lack of correlation calls into question the scientific validity of applying fatigue modeling to railroad schedules, at least in the way in which it is done in the final rule. Any scheme in which the validity of a particular schedule depends on the regulatory option selected is arbitrary and should be unacceptable to FRA.

AAR and APTA do not disagree with FRA's efforts to develop a scientific approach to developing an HOS program for passenger operations. However, FRA's HOS regulations should account for the limitations of fatigue modeling. Illogical results are unacceptable.

⁴ 76 Fed. Reg. 50,378.

⁵ FRA properly cautioned against drawing any conclusion about the appropriateness of applying fatigue modeling to freight operations. 76 Fed. Reg. 50,377.

AAR and APTA are also disappointed at the approach FRA took to the data submitted by the railroad industry showing the disparity between FAID and FAST under the NPRM. Regarding the schedules examined by the railroads, FRA said:

The analysis attached to the AAR and APTA comments looked at 101 work schedules from “some of the largest railroads” involved in passenger service. It is not clear why that number of schedules was chosen, nor why the specific schedules were chosen for analysis. This suggests that the 101 work schedules are a convenience sample, rather than a random sample of work schedules, which means that these schedules may not be representative of the rail passenger service industry.⁶

AAR and APTA would have appreciated an opportunity to discuss with FRA the analysis that the industry undertook and the extent to which there is a disparity between the way schedules are treated under FAST and FAID. The analysis was undertaken with rigor. The sample was a random sample, covering shifts throughout the day.

Consequently, AAR and APTA petition FRA to adopt a fatigue threshold of 90 for FAID. A threshold of 90 would provide a greater consistency of results and would not adversely affect safety.

III. FRA’s Assessment of the Costs of the Rule

AAR and APTA are disappointed at FRA’s assessment of the costs of the rule. It ignores the information submitted by APTA showing that the licensing cost of FAST is much higher than the cost for FAID. In fact, when the members of the RSAC working group asked FRA to provide the model to publicly owned railroads at no cost, FRA stated that it could not, as the cost of a license would be “hundreds of thousands of dollars.” FRA says it is free to disregard this cost because FAST has already been developed and thus the licensing fee represents “transfer payments . . . in excess of the costs of” developing FAST, not the cost to society.⁷

While FRA may be correct that the licensing costs are just transfer costs which do not bear on the costs and benefits of the rule from a societal perspective, it is unconscionable to ignore the costs to the railroad industry, particularly commuter railroads with budgets stretched thin. In any event, FRA’s approach is

⁶ 76 Fed. Reg, 50,378.

⁷ 76 Fed. Reg. 50,378.

inconsistent with Executive Order 13563. President Obama instructed agencies to avoid rules that are “excessively burdensome.” Clearly, structuring the rule so that a more expensive model is preferable to a cheaper model for no objective reason is “excessively burdensome.”

IV. FRA should Clarify that Employees Transporting Passengers for Business Purposes are not Covered by this Rule

There is ambiguity with respect to railroads transporting business cars containing railroad personnel, labor representatives, or customers. Business cars are frequently handled by pool freight crews and are at times added to freight trains. In its comments on the NPRM, AAR sought an exemption for non-scheduled passenger service, citing Santa trains or occasional steam trains. FRA rejected AAR’s suggestions.

In seeking an exemption for non-scheduled passenger service, AAR did not specifically cite trains where passengers might be transported for railroad business purposes, such as railroad employees, labor representatives, or customers. Rejecting the analogy of work trains for the types of trains cited by AAR, FRA observed that Congress included tourist, scenic, excursion, and historic railroads within the scope of the provision mandating the promulgation of this rule. In FRA’s view, there is a parallel between these railroads and the type of passenger service cited in AAR’s comments.⁸

In the case of the transportation of railroad employees, labor representatives, or customers for railroad business purposes, the analogy to work trains is apt and FRA should exempt such transportation. While these individuals literally are “passengers,” so, too, are freight crews and every individual aboard every train. Train crews transporting “passengers” for railroad business purposes should not be subject to this rule. AAR and APTA suggest inserting clarifying language in either section 228.401 or the definition of train employee engaged in passenger service in subsection 228.403(c).

V. FRA should Clarify its Discussion of Special Events

In the preamble to the final rule, FRA observed that there are circumstances where a railroad does not have advance notice of special events and compliance

⁸ See 76 Fed. Reg. 50,380.

with the requirements will be problematic. FRA states that it will address these situations on a "case-by-case basis."⁹

In addition to special events, there are also other circumstances in which there are last minute scheduling adjustments. For example, a blizzard might cause an unanticipated extension of a shift. AAR would presume that such an event would not cause a schedule that would otherwise qualify as a type 1 assignment to be classified as a type 2 assignment or result in a violation of other requirements such as the consecutive hours on duty or consecutive days on duty limitations.

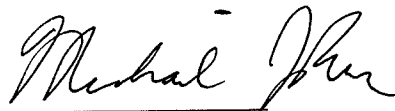
However, AAR and APTA do not understand how FRA's case-by-case approach will work. Are the railroads to file with FRA? How? Is the filing after-the-fact? Surely, more guidance would be appropriate.

For the reasons stated in this petition, FRA should adopt a threshold score of 90 for FAID instead of 72 and clarify the applicability of this rule. Thank you for considering this petition.

Respectfully submitted,



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October 5, 2011

⁹ 76 Fed. Reg. 50,388.