

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA-2009-0039
CONTROL OF ALCOHOL AND DRUG USE: COVERAGE OF
MAINTENANCE OF WAY EMPLOYEES, RETROSPECTIVE REGULATORY
REVIEW-BASED AMENDMENTS

PETITION FOR RECONSIDERATION
SUBMITTED BY
THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD
ASSOCIATION,
THE ASSOCIATION OF AMERICAN RAILROADS,
AND
THE NATIONAL RAILROAD CONSTRUCTION AND MAINTENANCE
ASSOCIATION

Pursuant to 49 C.F.R. Part 211, the American Public Transportation Association (“APTA”), the Association of American Railroads (“AAR”), the American Short Line and Regional Railroad Association (“ASLRRA”), and the National Railroad Construction and Maintenance Association (“NRC”), in each case on behalf of themselves and their members (collectively, “Petitioners”), submit the following petition for reconsideration of FRA’s final rule in Docket No. FRA-2009-0039: Control of Alcohol and Drug Use: Coverage of Maintenance of Way (“MOW”) Employees and Retrospective Regulatory Review-Based Amendments.¹ The petitioners seek revision of the effective date, the elimination of 49 C.F.R. § 219.609(c) and request that the Small Business Administration be involved in a review of this petition.²

¹ APTA is a non-profit international trade association of more than 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. ASLRRA is a non-profit trade association that represents the interests of over 500 short line and regional railroad members in legislative and regulatory matters. 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. NRC is a trade association organized specifically to serve the needs of railroad contractors and suppliers, and its membership includes 180 of the nation’s largest rail construction and maintenance contractors, as well as numerous suppliers to the railroad and rail transit construction industry.

² 81 Fed. Reg. 37,894 (June 10, 2016).

The Timeline for Implementation Should be Extended.

To justify the June 2017 effective date, FRA noted in the preamble to the final rule that many MOW employees are already subject to drug and alcohol testing under Federal authority, company authority, or both.³ Additionally, the agency explained that employers who are newly subject to Part 219, such as contractors who provide MOW service to railroads, have service agents (e.g., random testing consortia and third party administrators) readily available to facilitate adoption and compliance with the final rule.

Petitioners request reconsideration of the effective date of the final rule. The rule will necessitate the training of thousands of employees on the new requirements, as well as training supervisors on the signs and symptoms they should monitor under these regulations. The creation of these testing programs will be a new undertaking for many NRC members, and for many contractors this represents an unprecedented increase in their level of direct interaction with the FRA. While many larger contractors are currently in the process of setting up their own Part 219 programs, they still need additional time to establish their internal policies and procedures. The NRC is currently working with its smaller contractor members to identify acceptable consortium options. Additionally, the railroads and contractors will have to negotiate, modify, and implement revised contracts. This process includes insuring that the railroad has properly included all of its contractors' random drug and alcohol testing plans as an addendum to the railroad's plan as required by 49 C.F.R. § 219.609(a).

Considering these factors, the one year timeframe for implementation in the final rule is too aggressive and FRA should extend the effective date an additional year to June 12, 2018.

49 C.F.R. § 219.609(c) Should be Eliminated.

In 49 C.F.R. § 219.609(c), FRA states that if a railroad chooses to use regulated service contractor employees and volunteers who are part of a non-railroad random testing program, the railroad remains responsible for ensuring that the non-railroad program tests the regulated service contractor employees and volunteers according to the requirements of subpart G of Part 219. This section is completely inconsistent with 49 C.F.R. § 219.9(c), which stipulates that railroads and contractors may delineate responsibility for compliance with Part 219 in a contract. Petitioners do not support a regime where a railroad is put in the position of policing its contractors to ensure compliance with the contractors' Part 219 programs, particularly when FRA has given the parties the ability to designate responsibility for compliance via contract. FRA should eliminate section 609(c).

Small Business Considerations Should be Reviewed with the SBA.

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) ("SBREFA") requires regulatory agencies to maintain policies concerning small entities subject to the federal railroad safety laws. These policies apply along with the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) ("RFA"), and the "excessive demand" provisions of the Equal Justice

³ 81 Fed. Reg. at 37,896.

Act (5 U.S.C. 504 (a)(4), and 28 U.S.C. 2412 (d)(1)(D)), to Class III railroads, contractors and hazardous materials shippers meeting the economic criteria established for Class III railroads in 49 CFR 1201.1-1, and commuter railroads.

The RFA, as amended by the SBREFA, gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 13272 requires federal agencies to notify the Small Business Administration (“SBA”) Office of Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities, and to give every appropriate consideration to any comments on a proposed or final rule submitted by the Office of Advocacy. Further, both Executive Order 13272 and the RFA require the agency to include in any final rule the agency’s response to any comments filed by the Office of Advocacy, and a detailed statement of any change made to the proposed rule as a result of the comments.

The petitioners request that FRA involve the SBA Office of Advocacy in the review of this petition.

Respectfully submitted,



Chuck Baker
President
National Railroad Construction
and Maintenance Association
500 New Jersey Ave. NW
Suite 400
Washington, D.C. 20001
(202) 715-2920



Keith T. Borman
Counsel for the American Short Line
and Regional Railroad Association
50 F St., N.W.
Suite 7020
Washington, D.C. 20001
(202) 585-3448



Kathryn D. Kirmayer
Sarah G. Yurasko
Counsel for the Association
of American Railroads
425 Third St., S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2504



James LaRusch
Counsel for the American Public
Transportation Association
1300 I Street NW
Suite 1200 East
Washington, D.C. 20005
(202) 496-4808

August 9, 2016