FEDERAL RAILROAD ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION

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

FEDERAL RAILROAD ADMINISTRATION'S RESPONSE TO:

THE PETITION FOR RECONSIDERATION OF THE FINAL RULE 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
ASSOCATION

Background

On June 10, 2016, the Federal Railroad Administration (FRA) published a final rule expanding the scope of its drug and alcohol regulation (49 CFR part 219) to cover maintenance of way (MOW) employees and incorporating retrospective regulatory review-based amendments. See 81 FR 37894. On August 9, 2016, the American Public Transportation Association (APTA), the American Short Line and Regional Railroad Association (ASLRRA), the Association of American Railroads (AAR), and the National Railroad Construction, and Maintenance Association (NRC) jointly filed a Petition for Reconsideration (Petition) seeking: (1) a one-year extension of the rule's effective date from June 12, 2017 to June 12, 2018;[1] (2) removal of section 219.609(c), which holds a railroad responsible for the random testing compliance of any contractors and volunteers

[1] By letter dated September 16, 2016, AAR clarified it is not requesting an extension of the rule's effective date and stated it had been assured by each Class I railroad they will meet the June 12, 2017 deadline.

it uses who are not under its own testing plan; and (3) review of small business considerations by the Office of Advocacy of the Small Business Administration (SBA).[2]

FRA Response to Petition for Reconsideration

Request for one-year extension of implementation deadline

The Petition requests that FRA extend the implementation date of the rule from June 12, 2017, to June 12, 2018, to allow additional time to establish programs to implement the rule and train employees subject to the rule. As examples, the Petition cites the need to train newly covered MOW employees on part 219 requirements, and to train MOW supervisors on the signs and symptoms of alcohol and drug influence, as required by § 219.11(g). The Petition also asserts MOW contractors would need an additional year to negotiate and implement contacts with service agents to create and establish new part 219 programs.

Based on its review of the Petition and the current state of railroad workplace testing, FRA has decided not to extend the rule's effective date of June 12, 2017. As stated in AAR's September 16, 2016 letter to FRA and concurred with by BNSF, all Class I railroads assured AAR they can meet the June 12, 2017 deadline. Moreover, while contractors will be establishing initial training and implementation programs, there is a wide variety of FRA and service agency resources available to help them meet the June 2017 deadline.

With few exceptions, railroads currently subject to part 219 contract with service agents to perform the specimen collections, laboratory analyses, Medical Review Officer

[2] The comment period on the Petition closed on September 13, 2016. On September 19, 2016, BNSF Railway (BNSF) filed a late comment to the Petition. In its comment, BNSF stated it was confident it would meet the June 12, 2017 deadline, and supported the Petition's request to remove § 219.609(c).

reviews, Drug and Alcohol Counselor evaluations, and other services required by part 219. Both large and small railroads often rely on training programs developed by other railroads or service agents to train their supervisors on signs and symptoms and on post-accident testing criteria. Small railroads with few employees subject to random testing usually hire consortia which, by combining employees from multiple railroads, can establish and implement testing pools of sufficient size to meet FRA's random testing requirements. MOW contractors who use these existing resources should be able to establish their own programs by June 12, 2017.

In addition, FRA will make available on its website a model contractor random testing plan that will simplify the random testing program approval process for contractors. A contractor who qualifies to use the plan will be required only to input its own information before submitting the plan to FRA. Similarly, many small railroads have met FRA's plan approval requirements by downloading and submitting individualized versions of FRA's model small railroad random testing plan.

For the reasons stated above, the Petition's request to extend the implementation deadline is denied.

Removal of § 219.609(c)

The Petition requests that FRA remove § 219.609(c). Section 219.609(c) holds a railroad accountable for ensuring any regulated service contractor it uses who is in a non-railroad random testing program complies with part 219. Citing § 219.9(c), which allows a railroad to assign responsibility for part 219 compliance by contract, the Petition asserts that if a railroad's contract with a contractor makes the contractor responsible for its own part 219 compliance, FRA should only hold the contractor responsible if FRA finds the

contractor's random testing program is non-compliant. The Petition contends § 219.609(c) is completely inconsistent with § 219.9(c) and railroads should not be placed in the position of "policing" their contractors to ensure compliance.

A service agent is an independent contractor that performs part 219 functions for a railroad. In its drug and alcohol program audits, FRA frequently finds service agent errors, such as a collector using the wrong testing form, or a Medical Review Officer failing to conduct an adequate donor interview. In such cases, FRA has held the railroad responsible for the actions of the service agent.

A MOW contractor is an independent contractor that performs roadway worker functions that could, and often are, performed by railroad employees. A railroad that chooses to hire a MOW contractor, rather than an employee, to perform roadway worker functions, cannot avoid its responsibility for compliance by doing so. As with service agents, FRA will hold the railroad responsible for the actions of the MOW contractor.

Furthermore, § 219.621(c) clarifies that a "railroad is primarily responsible for compliance with the random alcohol and drug testing of this subpart, but FRA reserves the right to bring an action for noncompliance against the railroad, its service agents, its contractors, and/or its employees." This policy is consistent with § 40.355(o) of the Department of Transportation (DOT) Workplace Testing Procedures (49 CFR part 40, which part 219 cross-references), which holds the actual employer accountable to, and subject to enforcement action by, DOT for any instances of service agent non-compliance. Accordingly, FRA has decided not to remove § 219.609(c).

Nonetheless, in enforcing part 219, FRA may indeed choose to pursue an enforcement action against a contractor instead of its hiring railroad. However, FRA's

exercise of enforcement discretion does not mean a railroad can avoid its responsibility to oversee a contractor's random testing plan, or contract away its responsibility for compliance with this part.

For the reasons stated above, FRA is denying the Petition's request to remove 49 C.F.R. § 219.609(c).

SBA Office of Advocacy Review of Petition

The Petition requests that FRA involve the SBA Office of Advocacy in the review of the Petition. In support, the Petition raises three points.

First, the Petition states that for all rules expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)) to assess the impact of the rules on small businesses and to consider less burdensome alternatives. However, under the RFA, FRA did assess the impact of the final rule on small businesses and certified that the rule will not have a significant economic impact on a substantial number of small entities. See 81 FR 37915-37917.[3] FRA also considered less burdensome alternatives. See Section 10 of the Regulatory Impact Analysis at section 10. For example, in response to comments received to the Notice of Proposed Rulemaking, FRA adopted less burdensome alternatives, such as changing the definition of an MOW employee and removing a requirement for peer support programs.

Second, the Petition cites Executive Order 13272, which requires federal agencies to notify the SBA's Office of Advocacy of any proposed rules expected to have a

[3] FRA recognizes the final rule's table of contents identified the Regulatory Flexibility Assessment as "Final" (81 FR 37894), while the section heading identified the Regulatory Flexibility Assessment as "Initial" (81 FR 37915). Use of "Initial" in the section heading was an inadvertent typographical error that does not affect the substance of the assessment supporting the final rule.

significant economic impact on a substantial number of small entities, and to give appropriate consideration to any Office of Advocacy comments on a proposed or final rule. FRA was not required to notify the Office of Advocacy for this rulemaking. FRA determined and certified there was no significant economic impact on a substantial number of small entities. Moreover, the Office of Management and Budget (OMB) determined this rule was non-significant, and FRA received no comments on either the proposed or final rule from the Office of Advocacy.

Third, the Petition states that both Executive Order 13272 and the RFA require FRA 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 changes made to the proposed rule as a result of the comments. As noted above, because OMB determined the rule to be non-significant, the Office of Advocacy did not submit comments on the proposed or the final rule. Therefore, there was nothing for FRA to respond to.

Because the final rule is not significant and because FRA addressed comments raised during the proposed rule stage of the regulatory process, FRA is denying Petitioners' request that FRA involve the SBA Office of Advocacy in the review of the Petition.

On behalf of FRA, I thank you for your partnership, and for all of the efforts each of your associations will take in advancing implementation of this rule. Please do not hesitate to contact Gerald Powers, Drug and Alcohol Program Manager, at (202) 493-6313 if you need any assistance or have any further questions.

Sincerely,

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Sarah Feinberg
Administrator