



U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

VIA E-MAIL ONLY

September 20, 2021

Mr. Michael J. Rush
Senior Vice President
Safety and Operations
Association of American Railroads
mrush@aar.org

Re: Request for Extension of Relief due to COVID-19, Docket Number FRA-2020-0059

Dear Mr. Rush:

In a letter dated August 11, 2021,¹ the Association of American Railroads (AAR), on behalf of its member railroads,² requested that the Federal Railroad Administration (FRA) extend a portion of the conditional relief previously granted in Docket Number FRA-2020-0059 related to the coronavirus disease 2019 (COVID-19) pandemic. Specifically, AAR asked FRA to extend the relief previously granted from certain provisions of 49 CFR Parts 228, 240, and 242, as well as certain recurrent training requirements found in several FRA safety regulations.³ As discussed more fully below, FRA is granting in part and denying in part AAR's request. In sum, FRA is: (1) denying AAR's request to extend the existing relief from §§ 240.223 and 242.209, 240.231 and 242.301, 240.127(c)(5), 240.405(c) and 242.505(c), and the relief previously granted from the deadlines to complete certain recurrent/refresher training requirements; (2) extending the relief from certain deadlines under Parts 240 and 242 governing the locomotive engineer and conductor recertification processes; and (3) with certain modifications, extending the relief previously granted from the requirements of §§ 228.5 and 228.203(a)(1).

In support of its request for extension, AAR notes that both the March 2020 Presidential declaration of a national emergency related to COVID-19 and the FRA Administrator's own emergency declaration are still in effect. AAR also asserts that the Centers for Disease Control and Prevention's (CDC) finding that the COVID-19 B.1.617.2 ("Delta") variant is more contagious than previous versions of the virus and CDC's data showing recent increases in

¹ <https://www.regulations.gov/document/FRA-2020-0059-0019>.

² AAR petitions on behalf of its membership, including the Class I railroads, the Genesee and Wyoming railroads, Pan Am Railways, and the National Railroad Passenger Corporation (Amtrak).

³ AAR specifically noted that it was not requesting renewal of the existing relief from the operational testing requirements of 49 CFR § 217.9 and related sections that FRA granted in its September 18, 2020, letter in this docket. FRA's September 18, 2020, letter is available at <https://www.regulations.gov/document/FRA-2020-0059-0004>.

positive COVID-19 tests and hospitalizations shows that the COVID-19 pandemic has “taken a turn for the worse,” and “could last for an indeterminate length of time.” Further, AAR notes that some railroads have recently reported an increase in the number of positive COVID-19 employee tests and asserts that renewal of “key components of the present COVID-19 relief will allow [railroads] to continue to ensure the safety of their workforce as the pandemic resurges.” Citing recent safety statistics, AAR further asserts that the existing relief that has been in place since March 2020 has not adversely impacted railroad safety.

At the outset, FRA notes that to help prevent the spread of COVID-19 in the railroad industry, the agency granted the existing relief in this docket approximately one year ago to support railroads’ ability to operate consistent with CDC’s recommendations for social distancing and limiting the touching of common surfaces. Although COVID-19 remains at pandemic levels in the United States, and variants of the virus have emerged which have proven to spread more easily and quickly than initial strains of the virus, actions to mitigate the spread of the virus have been taken by Federal, State, and local governments, private industries, and members of the public. For example, over the past year, vaccines have been developed to protect against COVID-19, and over one-half the adult population in the United States has now been fully vaccinated against the virus. Consistent with CDC guidance and other government mandates,⁴ private industries have adopted requirements for employees to wear masks in certain situations. Additionally, industries, including the rail industry, have adopted voluntary measures such as enhanced cleaning and sanitizing practices to help protect employees and the general public from further spread of COVID-19.⁵ Nonetheless, COVID-19 remains a pressing threat to the public health throughout the United States and within the railroad industry. Data submitted to FRA shows, over the past several months, a consistent rise in the number of railroad employees reporting having contracted COVID-19. For example, recent data indicates that approximately 1,500 railroad employees report, as of September 4, 2021, having COVID-19, close to the approximately 1,900 employees reported at the previous peak in January of 2021.⁶

FRA considered AAR’s request for renewal under the provisions of 49 CFR § 211.41, and published notice of AAR’s request in the *Federal Register* on August 25, 2021.⁷ The Transportation Division of the International Association of Sheet Metal, Air Rail, and Transportation Workers (SMART-TD),⁸ and Rob Cunningham, General Chairman for the Brotherhood of Locomotive Engineers and Trainmen for BNSF Railway,⁹ filed comments objecting to AAR’s request for relief. Both comments asserted that extension of the relief was not necessary, that railroads have not used the existing relief for COVID-19 purposes, and that extending such relief would not aid railroad safety. Specifically, BLET Chairman Cunningham states that “[m]any of the items the AAR have requested to be extended have not been applied to benefit the health and wellbeing of the employees.” SMART-TD explains that as

⁴ See, e.g., FRA Emergency Order No. 32, *Emergency Order Requiring Face Mask Use in Railroad Operations*, 86 FR 11,888 (Mar. 1, 2021).

⁵ See, e.g., <https://www.aar.org/campaigns/freight-railroads-covid-19/>.

⁶ Workbook: COVID-19 Weekly Railroad Reports (dot.gov) (Dashboard Report is available at: <https://explore.dot.gov/views/COVID-19WeeklyRailroadReports/IllnessandUtilization?:isGuestRedirectFromVizportal=y&:embed=y#1>).

⁷ <https://www.regulations.gov/document/FRA-2020-0059-0020>.

⁸ <https://www.regulations.gov/comment/FRA-2020-0059-0023>.

⁹ <https://www.regulations.gov/comment/FRA-2020-0059-0022>.

“vaccinations are now available in the United States, and that CDC guidelines have changed as a result, [] portions of [AAR’s petition are rendered] out of date and unwarranted, even with the presence of the Delta Variant.” Similarly, SMART-TD takes issue with AAR’s statement that railroads’ safety performance has not been impacted during the waiver period, citing numerous employee fatalities, injuries, and accidents. Finally, SMART-TD alleges the railroads’ manpower shortages may have caused operational issues, but such shortages were not due to pandemic causes.

FRA understands and shares many of SMART-TD’s and Chairman Cunningham’s concerns. As discussed in more detail below, FRA’s oversight of the existing relief revealed that some railroads used the relief from §§ 240.231 and 242.301 for reasons other than challenges presented by COVID-19. FRA took appropriate action to ensure the railroads involved stopped that practice and, in this letter, FRA is denying further relief from those regulatory requirements. Further, although FRA recognizes the many challenges COVID-19 presents for any employer, including a railroad, responsible for training large numbers of employees, FRA agrees with SMART-TD’s comment that training is the foundation of a safe work environment in the railroad industry. Although FRA believes that relief from the identified recurrent/refresher training requirements was justified at the outset of the pandemic, given the ongoing nature of the pandemic, the widespread vaccination of the adult U.S. population (including railroad employees), and the known mitigating measures that are now routinely implemented in group settings to protect against the spread of the virus (e.g., requiring individuals to wear masks in group settings, enhanced cleaning and sanitation practices), FRA finds that continuing the existing relief is no longer necessary. Accordingly, FRA is denying that aspect of AAR’s request for continued relief.

FRA also understands and shares SMART-TD’s concern with the accidents referenced in footnote 1 of SMART-TD’s comments. FRA is taking action to work with all stakeholders to address the underlying causes of those accidents. FRA notes, however, that none of those accidents were in any way related to the relief granted in this docket. Accordingly, FRA does not find those accidents to be grounds for denying AAR’s request to extend the existing relief in this docket.

After considering AAR’s request, public comments received, the ongoing COVID-19 pandemic and related CDC guidance, as well as individual AAR member railroads’ use of the relief granted in this docket to date, as outlined below, FRA is granting in part and denying in part AAR’s request. In sum, FRA is: (1) denying AAR’s request to extend the existing relief from §§ 240.223 and 242.209, 240.231 and 242.301, 240.127(c)(5), 240.405(c) and 242.505(c), and the relief previously granted from the deadlines to complete certain recurrent/refresher training requirements; (2) extending the relief from certain deadlines under Parts 240 and 242 governing the locomotive engineer and conductor recertification processes; and (3) with certain modifications, extending the relief previously granted from the requirements of §§ 228.5 and 228.203(a)(1).

Relief Denied

As noted above, FRA is denying AAR’s request to extend the existing relief from the following regulatory sections: §§ 240.223 and 242.209, 240.231 and 242.301, 240.127(c)(5), and

240.405(c) and 242.505(c). FRA notes that 49 CFR §§ 240.223 and 242.209 require certified locomotive engineers and conductors to carry their certifications with them while on duty. FRA notes that, to date, no AAR member railroad has reported utilizing this relief.¹⁰ Additionally, FRA finds that extending the relief is unnecessary to support CDC's recommendations for social distancing and limiting the touching of common surfaces. FRA is therefore denying this aspect of AAR's request.

With regard to AAR's request to extend the previously granted relief from §§ 240.231 and 242.301, FRA notes that it conditioned this relief on 10 separate conditions designed to ensure that railroads would only utilize this relief when no territorial qualified engineer or conductor was available and then, only to support CDC's recommendations for social distancing. FRA notes that only two AAR member railroads have reported utilizing this relief, but, to date, numerous concerns have been raised by individual railroad employees and labor organizations¹¹ about the railroads' implementation of this relief. FRA's investigation of these concerns revealed that in numerous instances the railroads were utilizing this relief not to facilitate social distancing, but instead, out of administrative convenience. FRA further notes that in AAR's request for continued relief from these regulatory requirements AAR did not explain its rationale for the continued need for this relief. Accordingly, given the clear use of this grant of regulatory relief for reasons other than those related to COVID-19, and the concerns raised by railroad employees and labor organizations, FRA finds that extending the existing relief from §§ 240.231 and 242.301 is not justified. FRA is therefore denying this aspect of AAR's request.

The existing relief from § 240.127(c)(5) in this docket allows railroads, under certain conditions, to use locomotive event recorder downloads to meet the requirements for periodic locomotive engineer skills rides to support the recertification of locomotive engineers. To date, one AAR member railroad has reported exercising this relief on a limited basis. FRA notes that labor organizations have previously expressed disagreement with this relief,¹² and although FRA believes that the relief was justified at the outset of the pandemic, FRA finds that given the ongoing nature of the pandemic, relief from the 36-month certification deadline for locomotive engineers as discussed below (i.e., the relief from § 240.127(c)(1)) provides railroads and their employees sufficient flexibility. Accordingly, given the limited use of this relief to date and the concerns previously raised by labor organizations, FRA finds that extending the existing relief from § 240.127(c)(5) is not justified. FRA is therefore denying this aspect of AAR's request.

The existing relief from §§ 240.405(c) and 242.505(c) in this docket extends the 60-day deadline for railroads to respond to petitions submitted to the Locomotive Engineer Review Board and Operating Crew Review Board. FRA notes that to date, no railroad has reported

¹⁰ The existing waiver includes a reporting requirement, which requires any railroad utilizing any aspect of the waiver to provide the date of occurrence, anticipated duration, and conditions necessitating the use of the waiver, among other things. See <https://www.regulations.gov/document/FRA-2020-0059-0004> at 3-4.

¹¹ <https://www.regulations.gov/comment/FRA-2020-0059-0023>. SMART-TD notes that "knowledge of physical characteristics is paramount to safe train operations" and "to permit a railroad to operate a train otherwise is a blatant disregard for safety and a risk to the integrity of this nation's environment, public, railroad workforce, and infrastructure, especially when a sufficient workforce exists." Additionally, SMART-TD explains that only two railroads report having used the relief, and both were cited by FRA for failure to comply.

¹² <https://www.regulations.gov/comment/FRA-2020-0002-0061>.

using this relief. As such, FRA finds that it is not necessary to extend the relief. FRA is therefore denying this aspect of AAR's request.

FRA previously granted AAR member railroads limited relief from the recurrent/refresher training intervals of 14 different CFR parts (Parts 213, 214, 217, 218, 220, 227, 228, 229, 232, 236, 238, 239, 240, and 242). FRA based this regulatory relief on the need to comply with COVID-19 directives and guidance, particularly related to social distancing, and noting that in response to the COVID-19 pandemic, railroads initially suspended traditional classroom training and testing to protect the health and safety of railroad employees and the public.

Outside of the continuing education requirements of Parts 240 and 242 applicable to certified locomotive engineers and conductors (§§ 240.123(b) and 242.119(i)), railroads have not reported significant use of this relief. FRA finds that this relief was justified at the outset of the pandemic, but given the importance of ensuring railroad employees are properly and timely trained, FRA finds that continuing the existing relief is not justified. Accordingly, FRA is denying AAR's request to extend this relief. FRA acknowledges that providing all employees with the training required under FRA's regulations, while complying with CDC recommendations for social distancing, does present challenges. FRA expects that railroads will appropriately adjust their training processes and procedures to ensure compliance with CDC recommendations and timely completion of all training requirements. If an individual railroad finds that accomplishing required training while complying with CDC recommendations is not possible (e.g., if a railroad does not have sufficient physical classroom space to conduct the required training or is unable to implement small group trainings or other appropriate changes), that individual railroad may petition FRA for relief from the relevant training requirement or timeline.

Relief Extended and Applicable Conditions

After considering AAR's request to extend the existing relief in this docket, FRA finds that it is in the public interest and consistent with railroad safety to extend the relief previously granted from certain deadlines under Parts 240 and 242. FRA also finds that with certain modifications, extending the relief previously granted from the requirements of §§ 228.5 and 228.203(a)(1) is justified.

Accordingly, FRA grants the relief as outlined below, subject to the General Conditions listed below and the specific conditions listed under each subject heading.

General Conditions of Relief

1. The relief granted in this letter is provided to support railroads' ability to operate consistent with the CDC's recommendations for social distancing and limiting the touching of common surfaces. Railroads that find it necessary to utilize the regulatory relief provided by this letter must document the basis on which they concluded that availing themselves of the relief was necessary.
2. Any railroad utilizing any aspect of this waiver is required to report weekly to FRA the following information:

- a. Railroad;
- b. Location (Territory/Subdivision/Yard); and
- c. List of each individual waiver utilized in this location, including the following information:
 - i. Date of occurrence;
 - ii. Anticipated duration; and
 - iii. Conditions necessitating the use of the waiver.

Railroads using this waiver must report this information through AAR, which must integrate this information and provide it in Microsoft Excel format via e-mail to FRA (karl.alexy@dot.gov) on the Friday following the week being reported.

Quick Tie-Ups Under Part 228

FRA agrees that continued relief from §§ 228.5 and 228.203(a)(1)'s restrictions on the use of quick tie-up procedures is consistent with the CDC's recommendations for continued social distancing. The previously granted relief from these requirements was designed to allow railroads to use verbal quick tie-up procedures whenever possible. Providing this flexibility allows employees to avoid having to re-enter terminal facilities at the end of their on-duty period, thus avoiding unnecessary contact with other employees from different shifts and/or jobs in the terminal facility and reducing an employee's need to work at a computer in a terminal facility from two times per shift to one time per shift. FRA finds that continuing this relief is justified, but notes that its oversight of railroads' exercise of this relief has demonstrated that in some instances, railroads lack sufficient resources (personnel and logistical systems) to ensure that every railroad employee is able to tie-up in a timely manner. Accordingly, FRA is revising the conditions applicable to this grant of relief to make clear that a railroad allowing employees to use quick tie-up procedures must have a system in place (including adequate personnel and logistical set up) that ensures employees can tie-up in a timely and efficient manner. Therefore, FRA grants continued relief from §§ 228.5 and 228.203(a)(1)(ii), subject to the following conditions:

1. For any duty tour 12 hours or more, the railroad requires the employee to provide only limited information, not to exceed the following: board placement time; relieved location, date, and time; final release location, date, and time; contact information for the employee during the statutory off-duty period; request for rest in addition to the statutory minimum, if provided by collective bargaining agreement or local practice;
2. Any employee who conducts a verbal quick tie-up must, at the beginning of the next duty tour, complete and certify the hours of service record for the previous duty tour; and
3. The railroad has adequate personnel and a functioning logistics system in place enabling employees to immediately contact designated supervisors or crew management officials of the railroad to provide tie-up information in a timely manner.

Locomotive Engineer and Conductor Certification (Parts 240 and 242)

FRA finds that with the certain exceptions discussed above, continuing to extend the 36-month certification deadlines specified in Parts 240 and 242 for both locomotive engineers and conductors to 48 months is justified. FRA agrees that several of the tasks required by Parts 240 and 242 for a railroad to make recertification decisions continue to present social distancing challenges and concerns, and likely will continue to do so as long as the need for social distancing remains. FRA finds that continuing to extend the recertification time limits up to an additional year (i.e., 48 months instead of 36 months) should relieve some of the challenges involved with ensuring recertification candidates can access the required medical clinics and other facilities necessary to complete the recertification process. FRA notes that for the duration of this waiver, railroads have reported using this relief sparingly and have provided FRA monthly lists of the certified employees affected enabling FRA to provide effective oversight. Accordingly, consistent with the existing relief in this docket, FRA is granting AAR's request to extend the deadlines of Part 240 and 242 for any locomotive engineer or conductor whose recertification becomes due during the duration of this waiver, subject to the following conditions and limitations:

1. The 36-month certification period of §§ 240.217(c)(1) and 242.201(c)(1) may be extended for up to an additional 12 months for any locomotive engineer or conductor currently certified under Parts 240 or 242, whose certification becomes due during the duration of this waiver.
2. A railroad extending an employee's certification beyond 36 months in accordance with condition 1, must maintain a continuously updated list of the certified employees affected and each affected employee's certification record must be marked to show the extension of that individual's certification period under this waiver.
4. By the 15th of each month, any railroad that utilized this relief during the previous month must submit to FRA the list of the certified employees affected maintained under condition 2. The list must be submitted by e-mail in Microsoft Excel file format to FRA's Operating Practices Staff Director (christian.holt@dot.gov).

The relief granted in this letter expires three months after the rescission or expiration of the President's declaration of a national emergency concerning the COVID-19 pandemic.¹³

FRA reserves the right to amend or revoke this waiver upon receipt of information pertaining to the safety of railroad operations, or in the event of non-compliance with any condition of this waiver (including the conditions of this waiver requiring reporting to FRA). FRA notes that if a railroad fails to accurately report its use of the relief provided in this waiver, FRA reserves the right to take enforcement action for violation of the underlying substantive regulation waived. FRA also reserves the right to reopen any docket and reconsider any decision made, based upon its own initiative or based upon information or comments otherwise received.

¹³ On February 24, 2021, President Biden issued a notice that he was continuing the national emergency declared in Proclamation 9994 concerning the COVID-19 pandemic. 86 FR 11599 (Feb. 26, 2021).

Given the nature of the ongoing COVID-19 pandemic, FRA recognizes that individual railroads may face unique challenges in complying with specific requirements of FRA's regulations not waived in this letter. If a railroad encounters such a situation (e.g., a situation where the effects of a localized COVID-19 outbreak impedes the railroad's ability to comply with certain FRA regulations), a railroad may file for emergency relief in FRA's calendar year 2021 emergency relief docket (Docket Number FRA-2021-0001). In accordance with FRA's Rules of Practice, for FRA to consider any such request on an emergency basis, such a request must explain how the petition relates to the COVID-19 pandemic, and to the extent practicable, contain the information required under § 211.9.¹⁴

FRA looks forward to continuing to work with you to help ensure the continued safety of railroad operations during this national emergency. If you have questions, I can be reached at 202-493-6282, or at karl.alexey@dot.gov.

Sincerely,

Karl Alexy
Associate Administrator for Railroad Safety
Chief Safety Officer

¹⁴ 49 CFR 211.45.