FEDERAL RAILROAD ADMINISTRATION

OFFICE OF RAILROAD SAFETY

Hours of Service Compliance Manual
Freight Operations

December 2013

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INTRODUCTION AND PURPOSE

INTRODUCTION

The Federal Hours of Service Act was enacted by Congress on March 4, 1907, to promote the safety of employees and travelers on railroads by limiting the hours of service of railroad employees. The Hours of Service Act was amended several times, and in 1994, it was recodified and is now found at Title 49 United States Code (U.S.C.) Chapter 211, Sections 21101–21109. The Federal Railroad Administration (FRA) and others now refer to it as the hours of service laws (HSL).

The most significant changes to the HSL resulted from the Rail Safety Improvement Act of 2008 (RSIA). Most of the changes were to § 21103, Limitations on duty hours of train employees, and include a monthly time limit on all service performed for a railroad and time spent waiting for or in deadhead transportation from duty to a point of final release after the 12-hour point in a consecutive service duty tour. The new provisions also restrict a train employee to 6 or 7 consecutive days of initiating on-duty periods followed by 48 or 72 consecutive hours off duty, and also require a minimum statutory off-duty period of 10 hours. Several other important changes to the HSL that resulted from the RSIA are included and explained in this manual.

In addition to changing some provisions and adding several more, the HSL, as amended by the RSIA, gave FRA the authority to create regulations governing the hours of service of train employees of commuter and intercity passenger railroad carriers. FRA published its final hours of service rules for train employees working in commuter or intercity passenger rail operations on August 12, 2011. The final rule became effective on October 15, 2011, and can be found at Title 49 Code of Federal Regulations (CFR) Part 228, Subpart F. A separate compliance manual exists specifically for commuter and intercity passenger rail operations.

PURPOSE OF THE HOURS OF SERVICE COMPLIANCE MANUAL

This manual provides clarification on hours of service requirements found in the HSL, Title 49 CFR Part 228, Hours of Service Recordkeeping, and FRA hours of service interpretations and policies. Because of the amount of guidance that exists to address the complexity of hours of service requirements, along with the diversity of railroad operations, it is necessary to provide comprehensive guidance and consolidate the majority of this information into one manual to ensure standardized application and compliance.

This manual is not intended to be the primary reference document for hours of service requirements; the HSL, Title 49 CFR Part 228, FRA Operating Practices Technical Bulletins, and official FRA letters addressing hours of service issues will remain the primary reference documents when dealing with Federal hours of service requirements. This manual also is not intended to apply to intercity passenger and commuter rail operations; a separate compliance manual exists to address the different hours of service requirements for those types of operations.

In this manual, citations for primary and secondary documents are abbreviated and placed in parentheses. For instance, Federal Register is cited as “FR” and Title 49 U.S.C. Chapter 211 is

cited as "HSL" with the appropriate section added. The exact titles for these documents are provided in the References section of this manual. Most of these documents are included as appendices to this manual. There is one additional relevant document in the appendices as well.

Because of the variety of rail operations, some situations that exist in the rail industry may not be addressed in this manual. If these cases are found and the correct application of hours of service requirements is not clear, contact FRA for clarification.

PART I: TRAIN EMPLOYEES

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Chapter 1: Train employee requirements

COVERED SERVICE

- "Train employee" means an individual engaged in or connected with the movement of a train, including a hostler. (HSL § 21101(5))
- "Covered service for train employees" refers to the actual assembling or operation of trains. Employees who perform this type of service commonly include locomotive engineers, firemen, conductors, trainmen, switchmen, switch tenders (unless their duties come under the provisions of the law pertaining to dispatching service employees), and hostlers. (49 CFR Part 228, Appendix A)
- Both inside and outside hostlers are considered to be connected with the movement of trains. Previously, only outside hostlers were covered. See Chapter 7, *Hostlers*. (49 CFR Part 228, Appendix A, OP-04-26, OP-04-27)
- Any other employee who is actually engaged in or connected with the movement of any train is also covered, regardless of his or her job title. See Chapter 7.

TIME ON DUTY

Reporting for duty

- Time on duty begins when an employee **reports for duty** and ends when the employee is **finally released** from duty. (HSL § 21103(b))
- **"Reports for duty"** means that an employee presents himself or herself at the location established by the railroad at the time the railroad established for the employee to be present and ready to perform covered service. (49 CFR § 228.5)
    - **"Report for duty time"** for a train employee means the actual time that the employee is required to be present at a reporting point and prepared to start a covered service assignment. (49 CFR § 228.5)
    - **"On-duty time"** means the actual time that an employee reports for duty to begin a covered service assignment. (49 CFR § 228.5)

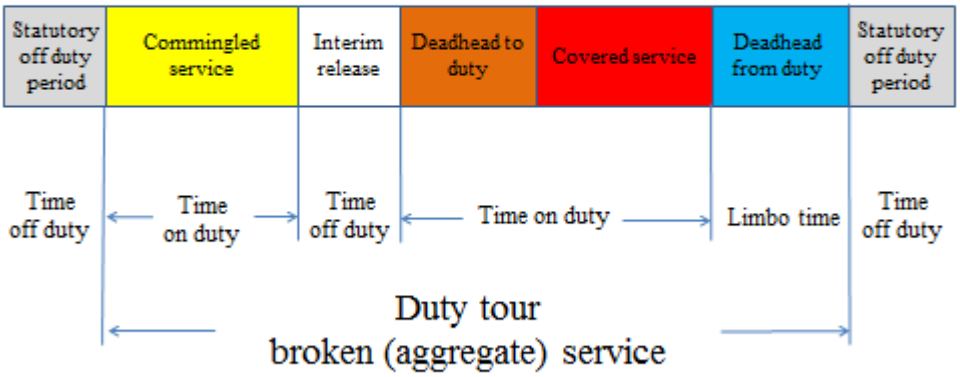
Explanation: When a railroad instructs an employee to **report for a covered service assignment** (train, yard job, hostler job, etc.), the act of reporting for that assignment, at the location and time directed by the railroad, establishes the beginning of covered service, even when no actual covered service is performed. If an employee is required to report for a non-covered service assignment, time on duty will begin to accrue only if the employee reports for a covered service assignment or if the employee actually performs covered service. A common example is when a train employee is called to deadhead to a train (combined service). In this case, the employee initially reports for a deadhead and then reports for duty when he or she arrives at the location of the covered service assignment (train).

Activities that count as duty as defined by the HSL § 21103(b)

- Time the employee is engaged in or connected with the movement of a train is time on duty.
- Time spent performing any other service for the railroad without this service being separated from covered service by a statutory off-duty period before and after the service is time on duty and is commonly referred to as commingled service.
- Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty (limbo time).
- An interim period of rest of less than 4 hours at a designated terminal, or for any amount of time at a non-designated terminal, is time on duty.

  Note: When an **emergency** exists, time spent off duty of 4 or more hours at a non-designated terminal with adequate food and lodging may be considered time off duty.

Train employee time periods

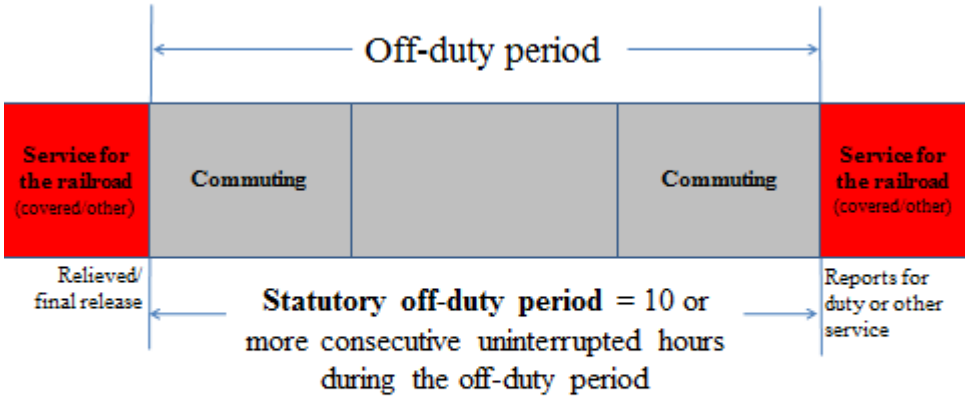


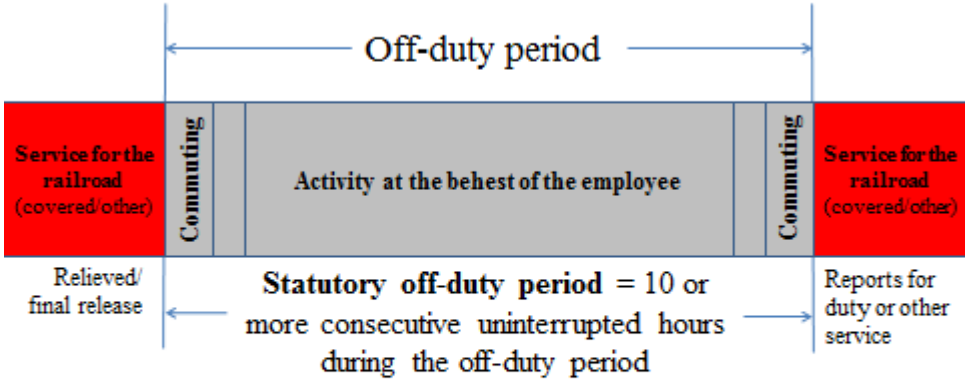
OFF-DUTY PERIODS

- An employee must be released at a designated terminal to be considered off duty, except in the case of an emergency. See Chapter 5, *Designated terminals.*

Statutory off-duty period

- Minimum 10 consecutive hours off duty. (HSL § 21103(a)(3))
- Time spent waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release (limbo time), plus time on duty, that exceeds 12 hours for the duty tour must be added to an employee's statutory off-duty period. (HSL § 21103(c)(4))
- During a train employee's statutory off-duty period, a railroad carrier, its officers, and its agents must not communicate with the train employee by telephone, pager, or in any other way that could reasonably be expected to disrupt the employee's rest. See Chapter 3, *Communication during the off-duty period*. (HSL § 21103(e))





Interim period of release

- An off-duty period of at least 4 hours, but less than a statutory off-duty period, at a designated terminal is considered a qualifying interim release that temporarily suspends the accumulation of time on duty, but does not end a duty tour.
- During a train employee's interim period of release, a railroad carrier, its officers, and its agents must not communicate with the train employee by telephone, pager, or in any other way that could reasonably be expected to disrupt the employee's rest. See Chapter 3, *Communication during the off-duty period*. (HSL § 21103(e))
    - To qualify as an interim release, the employee must have at a minimum 4 consecutive hours of time free from communication with the railroad.
- A release at a **non-designated** terminal, regardless of its length, counts as time on duty.
    - A release at a non-designated terminal may count as time off duty if adequate food and lodging are available and the employee is prevented from getting to his or her designated terminal because of a casualty, a track obstruction, an act of God, a derailment, or a major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad when that employee left the designated terminal.
- A railroad is **not** required to notify an employee of an interim release, but FRA regards the practice of regularly calling employees to report back after an interim release without prior notification as poor crew management with possible fatigue implications.

Explanation: Interim release applies only to train employees. A qualifying interim release is considered as off duty for purposes of computing the total time on duty within a duty tour. However, qualifying interim release periods are included in the accumulation of time under the

24-hour time limit for broken or aggregated service. Qualifying interim releases are never considered part of a statutory off-duty period. See Chapter 2, *Duty tour*. (49 CFR § 228.5)

TIME LIMITATIONS

Time on duty

- After receiving a statutory off-duty period, a train employee is available for a total of 12 hours of time on duty in a 24-hour period.
- A train employee cannot be required or allowed to perform duty after he or she has accumulated a total of 12 hours of time on duty in a duty tour.
- A train employee cannot be required or allowed to perform duty after the 24-hour point in a duty tour.
- After an employee reaches either 12 hours of time on duty or the 24-hour point in a duty tour, that employee must receive a statutory off-duty period (at least 10 hours off duty) before returning to perform service for the railroad.

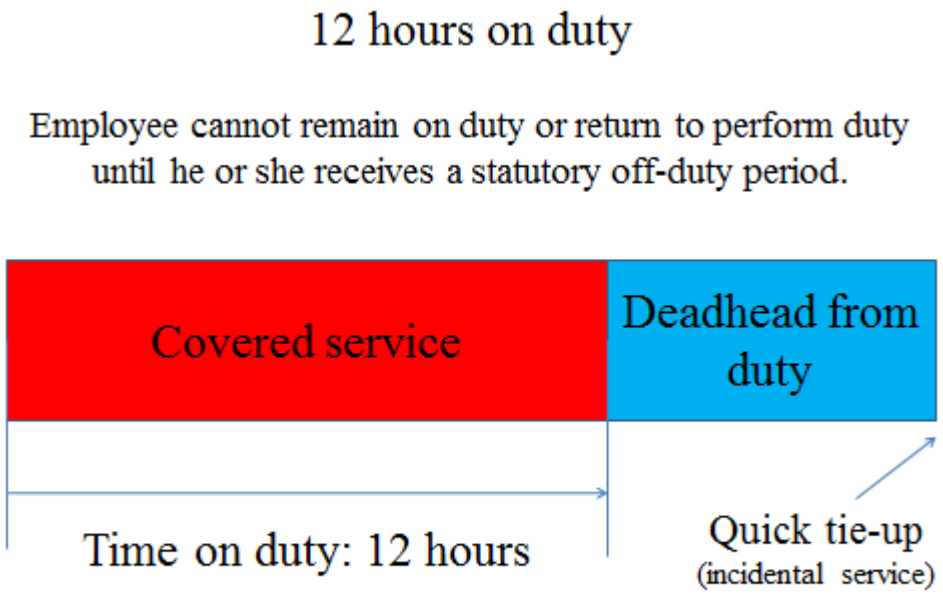
Activities after 12 hours of time on duty or the 24-hour point in a duty tour

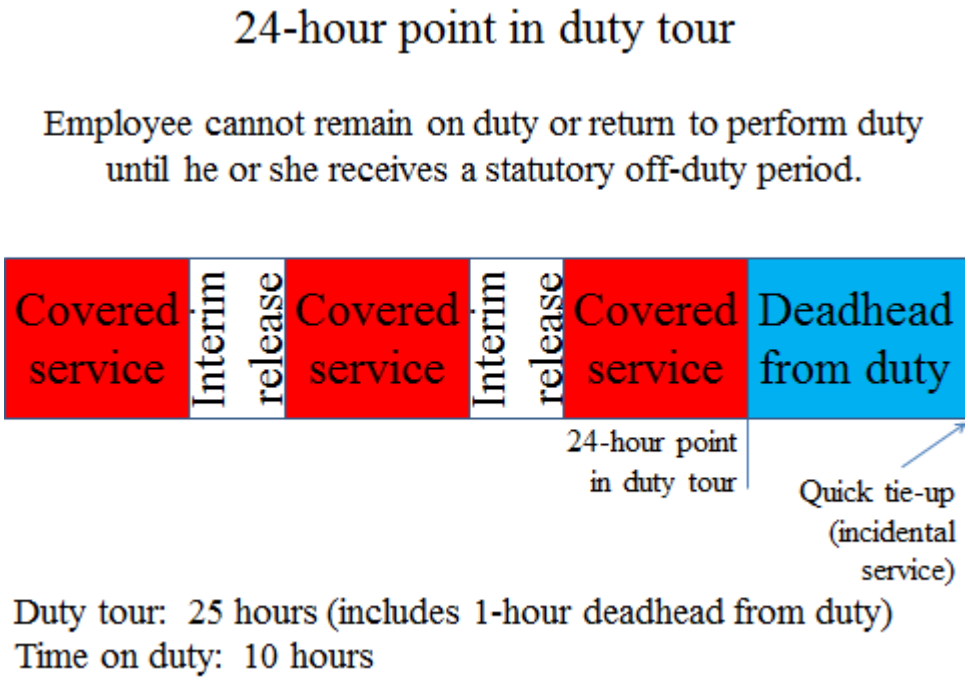
- **Waiting for and in deadhead transportation from duty** to a point of final release is the only allowable railroad-required activity after an employee has 12 hours of time on duty, or after the 24-hour point in a duty tour. See Chapter 4, *Deadhead from duty to a point of final release.*
- A train crew is **not** waiting for deadhead transportation when:
  - Transportation has **not** been ordered for the crew, or transportation is available but the crew is required to remain with the train.
    - In these circumstances, the crew is considered to be monitoring the train (which is commingled service), not waiting for deadhead transportation, and this time will count as time on duty.
- **Alcohol and drug testing**
  - Railroad alcohol and drug testing (not required by Federal regulations) is considered activity at the behest of the railroad and will result in excess service when performed after 12 hours of time on duty in a duty tour. (Alcohol/Drug Manual)
  - FRA normally recommends a civil penalty when excess service occurs during FRA **random** drug and alcohol testing.
  - FRA does **not** normally recommend a civil penalty when excess service occurs during:
    - FRA postaccident.
    - FRA reasonable suspicion.

  - FRA reasonable cause or railroad reasonable cause that would have met the criteria for testing under FRA authority.

- Railroads must report excess service when it occurs as a result of required alcohol and drug testing, and use due diligence to avoid or minimize the excess service. (Alcohol/Drug Manual)

- **Incidental service** involves a train crew providing limited, but necessary, information to the railroad after the expiration of the 12-hour duty limitation.
  - FRA recognizes that a certain amount of information must be exchanged for the benefit of both the employee and the railroad.
  - FRA has traditionally exercised its prosecutorial discretion to allow a limited amount of incidental service such as brief tie-ups, placing paperwork in an inbox, or plugging a laptop computer into a receptacle and hitting a send button.
  - A quick tie-up may be performed by calling or faxing information to a crew caller, or by completing a quick tie-up on a computer. An employee is limited to providing the following information during a quick tie-up. (49 CFR § 228.5)
    - 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, where applicable.
    - Basic payroll information, related only to the duty tour being tied up.
    - Employee certification.





Consecutive day limitation—initiating on-duty periods

- After initiating an on-duty period, each day, for 6 consecutive days, a train employee is required to have 48 consecutive hours off duty at his or her home terminal, unavailable

for **any service** for **any railroad**, before **returning to perform covered service** as a train employee in freight operations**.** (HSL § 21103(a)(4))

- If an employee is released at his or her away from home terminal on the sixth consecutive day, he or she may initiate an on-duty period on the seventh consecutive day, but must receive 72 consecutive hours off duty at the home terminal, unavailable for any service for any railroad, before returning to perform covered service as a train employee in freight operations.
  - The initiation of an on-duty period is the beginning time of a duty tour. See Chapter 2, *Duty tour*.
  - The term "start" is commonly used to define a consecutive day, using five starts to mean the initiation of an on-duty period, each day, for 5 consecutive days. As it relates to this provision, an on-duty period is a duty tour, not an individual covered service assignment.
  - After initiating an on-duty period, each day, for 6 or 7 consecutive days, an employee is prohibited from performing covered service as a train employee (freight operations) until receiving 48 or 72 consecutive hours off duty at his or her home terminal, unavailable for any service for any railroad.
    - An employee who has initiated an on-duty period on 6 or 7 consecutive days may return to perform non-covered service for the railroad before the completion of the 48 or 72 consecutive hours off duty, but the 48- or 72-hour off-duty period must be restarted after the non-covered service.
    - An employee may perform covered service or non-covered service for a secondary railroad before the completion of a required 48- or 72-hour off-duty period required by the primary railroad. In these cases, the employee must report such service to the primary railroad and have his or her rest period reset with the required off-duty period of 48 or 72 consecutive hours beginning at the end of the service performed for the secondary railroad.
  - If an employee is finally released at an away from home terminal on his or her sixth consecutive day of initiating on-duty periods, he or she may initiate an on-duty period on the seventh consecutive day, but must receive 72 consecutive hours off duty at the home terminal, unavailable for any service for any railroad, before returning to perform covered service as a train employee in freight operations, subject to the following conditions. (FR Vol. 78, No. 185)
    - In this case, the employee will have to initiate the on-duty period within the 24-hour period following the employee's final release at the away from home terminal.
    - After the 24-hour period, an employee is prohibited from initiating an on-duty period as a train employee in freight operations until he or she has 48 consecutive hours off duty at his or her home terminal unavailable for any service for any railroad.

- If an employee initiates on-duty periods for 6 consecutive days, and then initiates an on-duty period after the end of what would have been the seventh consecutive day, he or she must receive 72 consecutive hours off duty at the home terminal. This would constitute non-compliance with the hours of service laws (HSL) and FRA may take enforcement actions.

Passenger train employees, dispatching service employees, and signal employees

- The initiation of an on-duty period by train employees engaged in commuter or intercity rail passenger transportation (49 CFR Part 228 Subpart F), counts equally as the initiation of an on-duty period by a train employee in freight operations. (FR Vol. 78, No. 185)
  - To determine a train employee's availability based on the number of consecutive days of initiating on-duty periods under the HSL § 21103(a)(4), the initiation of an on-duty period in passenger service, or a combination of passenger and freight service duty tours, will apply.
    - If a train employee engaged in commuter or intercity rail passenger transportation, or in any combination of freight and passenger service, initiates an on-duty period each day for 6 consecutive days (with a day defined as a 24-hour period), he or she must have 48 consecutive hours off duty, unavailable for any service for any railroad, at the home terminal before performing covered service as a train employee in freight operations covered by the HSL § 21103.
    - If a train employee engaged in commuter or intercity rail passenger transportation, or in any combination of freight and passenger service, initiates an on-duty period each day for 7 consecutive days, he or she must have 72 consecutive hours off duty, unavailable for any service for any railroad, at the home terminal before performing covered service as a train employee in freight operations covered by the HSL § 21103.

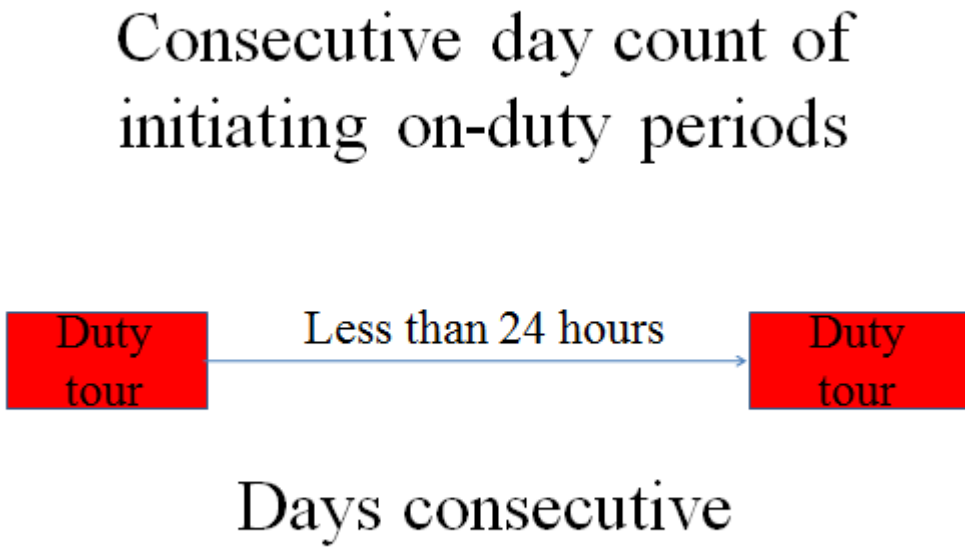
  Note: When a train employee triggers the rest requirements of the HSL § 21103(a)(4), these rest requirements will only restrict an employee from performing covered service as a train employee in freight operations. After triggering the rest requirements of the HSL § 21103(a)(4), a train employee's ability to perform covered service as a passenger train employee will be determined by the requirements of Title 49 Code of Federal Regulations § 228.405(a)(3), which restrict the number of consecutive days initiating on-duty periods for train employees engaged in commuter and intercity rail passenger transportation.

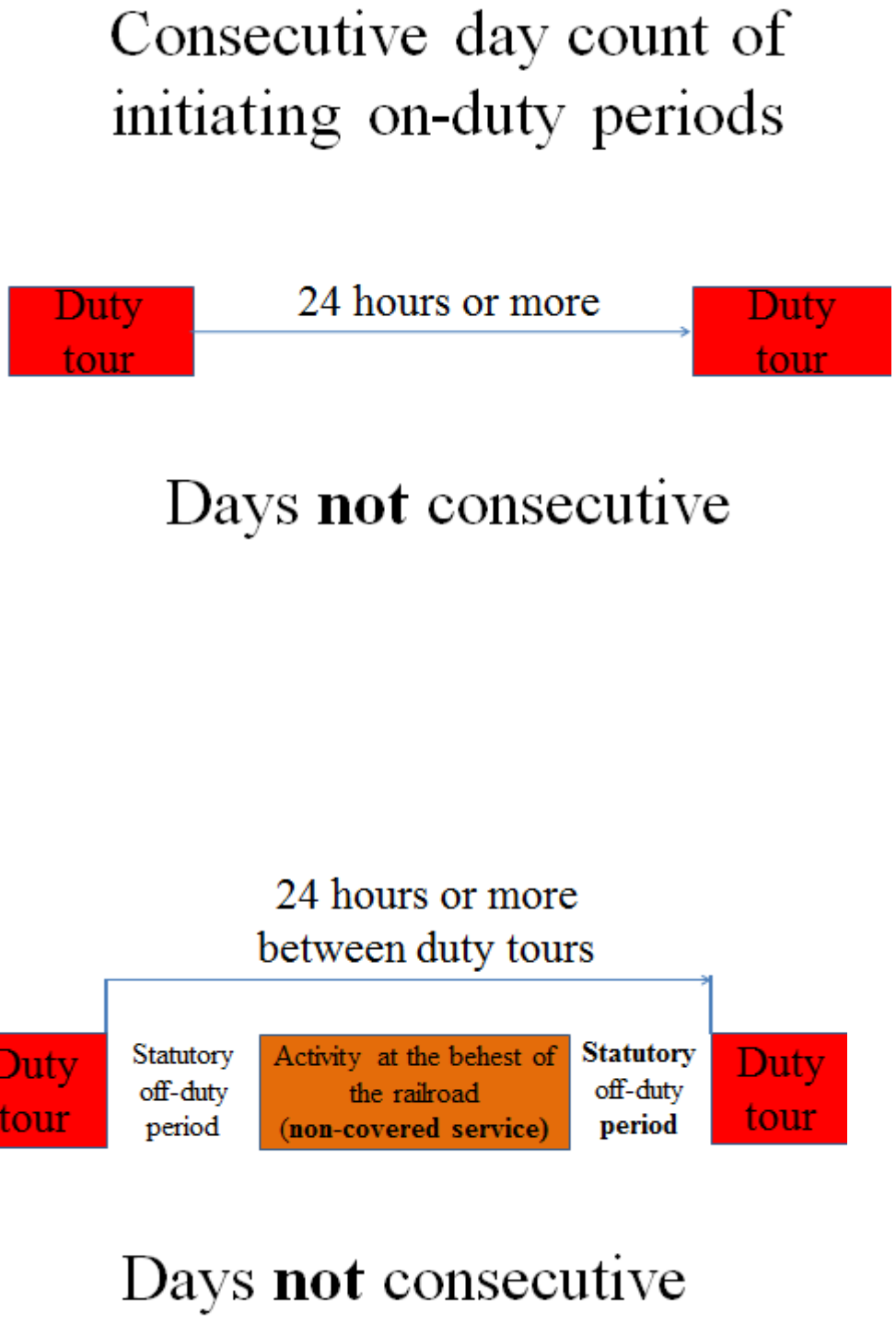
- An employee performing covered service as a dispatching service employee under the HSL § 21105, or a signal employee under the HSL § 21104, alone during a duty tour, will **not** count as an initiation of an on-duty period when considering the consecutive day count under the HSL § 21103(a)(4). (FR Vol. 78, No. 185)
- If an employee performs covered service as a train employee (freight or passenger operations) and covered service as either a signal employee, a dispatching service

employee, or a combination of both during a duty tour, the duty tour will count as an initiation of an on-duty period under the HSL § 21103(a)(4).

Definition of a day, as it relates to the consecutive day count

- A "day" for the purpose of determining the initiation of an on-duty period for a consecutive day under the HSL § 21103(a)(4), is the 24-hour period following a train employee's final release. (FR Vol. 77, No. 40)





276-hour monthly maximum performing service for a railroad

- If an employee performs covered service as a train employee at any time during a calendar month, then all service performed for the railroad during that month is limited to a total of 276 hours. (HSL § 21103(a)(1), and FR Vol. 77, No. 40)
  - Service for the railroad includes:
    - Covered service as a train employee, dispatcher, and signal maintainer.
    - Deadhead to duty.
    - Deadhead from duty to a point of final release.
    - Commingled service.
    - Any other activity at the behest of the railroad.
- Once an employee is at or over 276 hours for a calendar month, he or she **cannot perform any service** for the railroad for the remainder of that calendar month.
- The 276-hour monthly total of service performed for a railroad resets at midnight on the first day of each calendar month.
- If a railroad employee who rarely performs train employee covered service performs covered service as a train employee, he or she must:
  - Make a good faith effort to calculate and document all time spent performing service for the railroad up to the point when he or she performed train employee covered service.
  - Account for and document all service performed for the railroad after performing train employee covered service for the remainder of that month.

    Note: The railroad must keep records of all service performed for the railroad during the calendar month by this employee and provide FRA with a copy of the monthly total when requested.
- If a railroad employee, other than a train employee, is expected by the railroad to frequently perform train employee covered service, he or she must:
  - Account for and document all service performed for the railroad during a calendar month.

    Note: The railroad must keep records of all service performed for the railroad during the calendar month by this employee and provide FRA with a copy of the monthly total when requested.

30-hour monthly limitation—waiting for and in deadhead transportation from duty

- When added, if time on duty and limbo time for a single duty tour is over 12 hours, the time over 12 hours that is spent waiting for or in deadhead transportation from duty to a point of final release must be applied to the 30-hour monthly maximum. (HSL § 21103(c) and FR Vol. 77, No. 40)

- When an employee has reached or exceeded the 30-hour maximum in a calendar month, he or she may continue to perform covered service as a train employee, but any duty tour resulting in additional time added to the 30-hour maximum may result in FRA taking enforcement actions.
- This provision will not apply when an employee is directly delayed due to a casualty, an accident, an act of God, a derailment, a major equipment failure that prevents the train from advancing, or a delay resulting from a cause unknown and unforeseeable.

Deadhead from duty to a point of final release

Time added to 30-hour limbo cap = 1 hour

Covered service		Deadhead from duty
On duty: 0800	Relieved: 1900	Released: 2100
Total time on duty = 11 hours		Limbo time = 2 hours

Only time spent waiting for or in deadhead transportation from duty to a point of final release over 12 hours is added to the 30-hour monthly maximum.

Deadhead from duty to a point of final release

Time added to 30-hour limbo cap = 1 hour

Covered service	Interim release (5 hours)	Covered service	Deadhead from duty
On duty: 0500		Relieved: 2100	Released: 2300
Total time on duty = 11 hours			Limbo time = 2 hours

18-hour duty tour

(Time on duty = 11 hours, limbo time = 2 hours, time off duty = 5 hours)

When determining limbo time over 12 hours for a broken duty tour, add only time on duty and limbo time from the duty tour. Only the limbo time occurring after the 12-hour point from the addition of these two times is added to the 30-hour monthly maximum.

TRAIN EMPLOYEES PERFORMING DISPATCHER COVERED SERVICE

- An employee performing covered service as a train employee **does not** come under the hours of service laws (HSL) for dispatching service employees when he or she receives, transmits, or delivers orders pertaining to or affecting the movement of his or her **own train.** (49 CFR 228, Appendix A, and OP-04-27)
- An employee performing covered service as a train employee **does** come under the HSL for dispatching service employees when he or she receives, transmits, or delivers orders pertaining to or affecting the movement of a train**, other than his or her own train.** (49 CFR 228, Appendix A, and OP-04-27)
  - When an employee performs covered service as both a train employee and a dispatcher, the more restrictive provisions of each section of the HSL will apply to all on-duty and off-duty periods during such aggregate time. (FR Vol. 78, No. 185)
    - The most common example is when one train crew relays main track authority from the dispatcher to another train crew. The act of relaying main track authority to another train crew constitutes covered service as a dispatcher.
    - In these cases, the train employee relaying the order is subject to the dispatching service "one shift" provision and is limited to 12 hours of time on duty in a 24-hour period consistent with § 21105 of the HSL. See Chapter 10. (OP-04-27)
    - In such cases, the performance of train employee covered service will still result in the initiation of an on-duty period as a train employee and count as a consecutive day. (FR Vol. 78, No. 185)

TRAIN EMPLOYEES FROM FOREIGN COUNTRIES

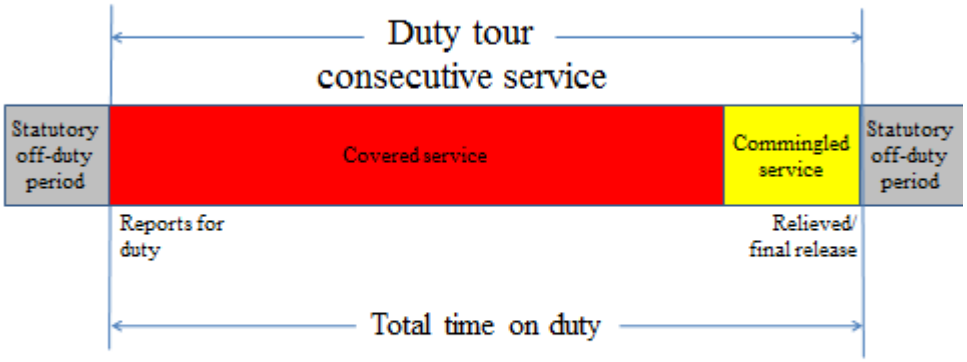
- FRA has no direct jurisdiction to control conduct on foreign soil. Thus, when a train crosses the border and enters Canada or Mexico, its crew ceases to be subject to the limitations on service imposed by U.S. law. (FR Vol. 42, No. 104)
- When a train enters the United States from Canada or Mexico, the train crew is immediately subject to the HSL, and all time spent in Canada or Mexico for the current duty tour is counted in computing the appropriate periods of time on duty, time off duty, and limbo time under the HSL.
    - For example, if upon entering the U.S., a train employee had been on duty for 14 hours, the railroad immediately becomes liable for a civil penalty for requiring or allowing the employee to remain on duty within the U.S. in excess of the 12-hour limitation.
- It is within the power and discretion of the Canadian and Mexican Governments to provide for railroad safety within their countries, and it would be inappropriate for FRA to address this matter without some demonstrated impact on railroad safety within the United States.

PART I: TRAIN EMPLOYEES

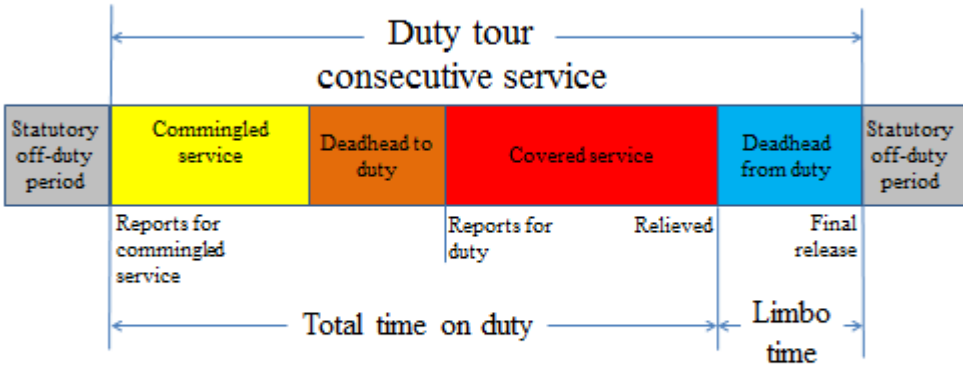
Chapter 2: Duty tours and commingled service

DUTY TOUR

- A duty tour **only exists** if a train employee **reports for duty** (reports for a covered service assignment) or **performs covered service** (engaged in or connected with the movement of a train). See Chapter 1, *Reporting for duty*.
- A duty tour must include covered service and may include commingled service, deadheads to duty, deadheads from duty, and all off-duty periods that do not qualify as statutory off-duty periods. (49 CFR § 228.5)
- A duty tour begins when a train employee reports for a covered service assignment, commingled service, or a deadhead to duty at the end of an off-duty period that, at a minimum, includes a statutory off-duty period.
- One or more qualifying interim periods of release are counted as time off duty, but part of a duty tour. Interim releases allow an employee's 12 hours of time on duty to be spread over a 24-hour period.
- Release time within a duty tour can establish the beginning of an interim release, or the end of an assignment when that assignment is followed by a covered service assignment, commingled service, or a deadhead to duty.
- Relieved time establishes the ending of either covered service or commingled service, and it exists for the single purpose of identifying the beginning of time spent waiting for or in deadhead transportation from duty to a point of final release (limbo time), when applicable.
- Final release establishes the end of a duty tour and the beginning of an off-duty period that includes a statutory off-duty period.



Note: The beginning of a duty tour represents the initiation of an on-duty period, as it relates to an employee's consecutive day count.



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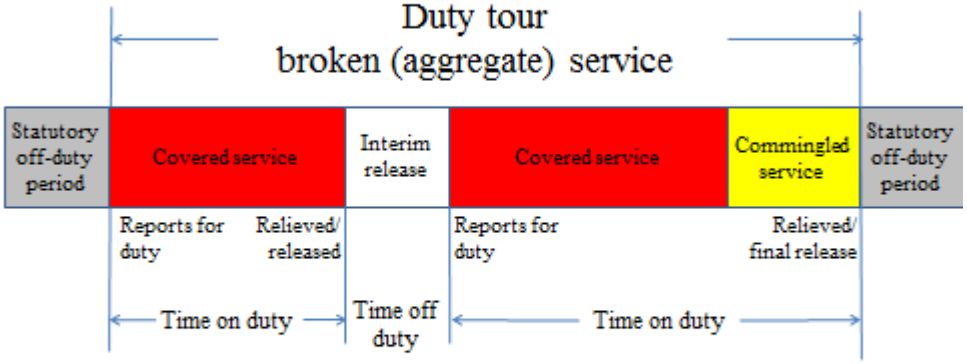

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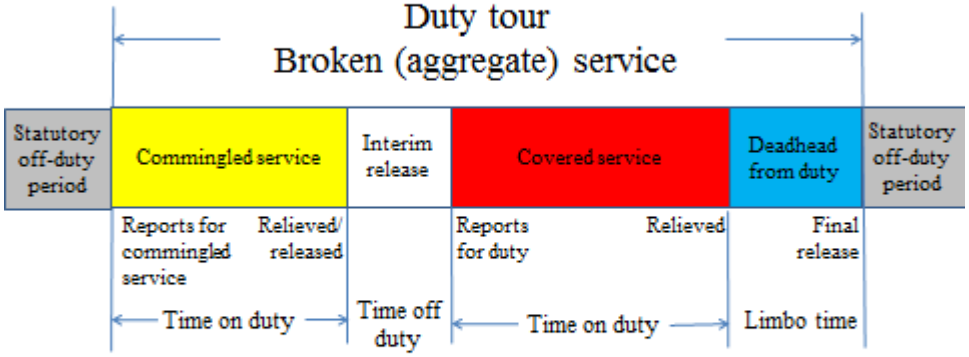


Note: The beginning of a duty tour represents the initiation of an on-duty period, as it relates to an employee's consecutive day count.

COMMINGLED SERVICE

- Commingled service for a train employee means any non-covered service at the behest of the railroad and performed for the railroad that is not separated from covered service by a qualifying statutory off-duty period. Such commingled service is counted as time on duty. See Chapter 9, *Examples 13 and 14*. (HSL § 21103(b)(3) and 49 CFR § 228.5)
- The presence or absence of monetary compensation does not determine whether an activity can commingle, becoming time on duty.
- The law does not distinguish treatment of situations in which non-covered service follows, rather than precedes, covered service. The limitations on total time on duty apply in both cases.
- Training, for both students and instructors, may be either commingled service or covered service, depending on the nature of training.
    - Training, where the student and instructor are actually engaged in or connected with the movement of a train, including the actual assembling of a train, is covered service.
    - Training, where the student and instructor are **not** engaged in or connected with the movement of a train, is considered activity at the behest of the railroad and can commingle with covered service.
- The following activities will commingle if not separated from covered service by a statutory off-duty period. (OP-04-04)
    - Attendance at rules classes.
    - Attendance at railroad investigations, if required by the railroad.
    - Familiarization trips.
    - Physical examinations.
    - Providing information concerning railroad accidents or injuries.
    - Deadheading from a duty assignment when allowed or required to drive the deadhead vehicle.
    - Onboard observations conducted by railroad officials.
    - Any other activity at the behest of the railroad, such as managerial tasks, administrative tasks, or maintenance activities.

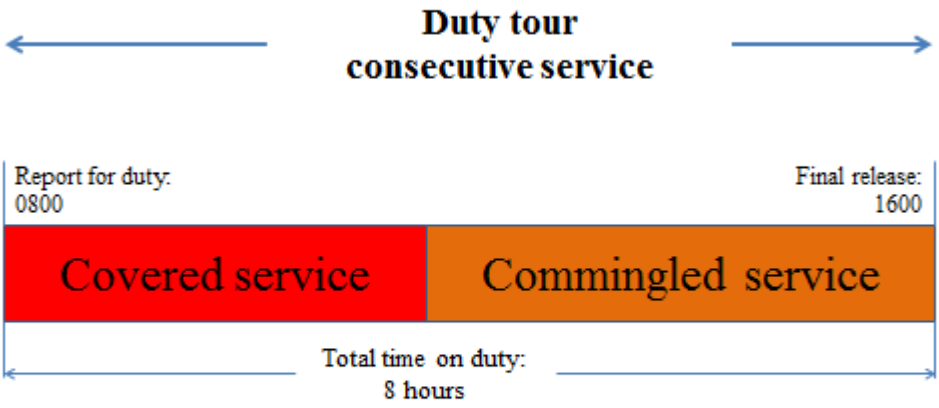
Explanation: Commingled service includes all non-covered mandatory activities that can commingle with covered service. For an "other" activity to commingle, i.e., count as time on duty, it must be (1) activity at the behest of the railroad and (2) part of a duty tour that includes covered service. When these two requirements are present, the "other" activity is said to commingle with covered service and time spent performing commingled service becomes part of the total time on duty for the duty tour.

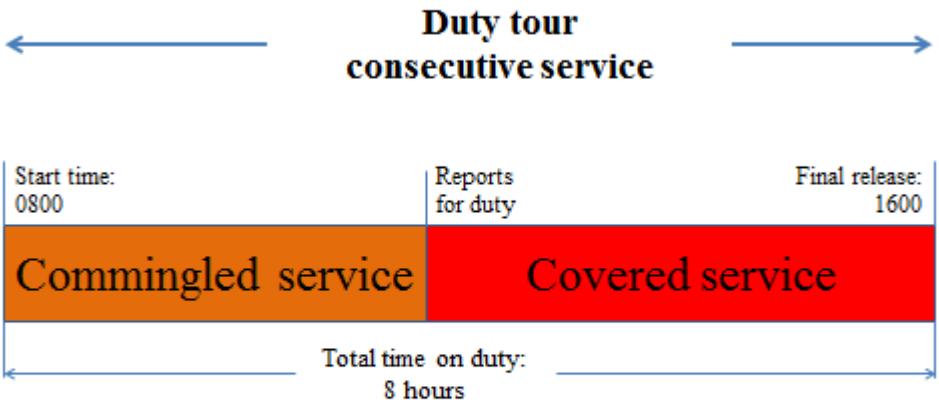
Activities that may commingle in some instances may not commingle in others. If an activity cannot commingle with covered service because it is separated from covered service by a

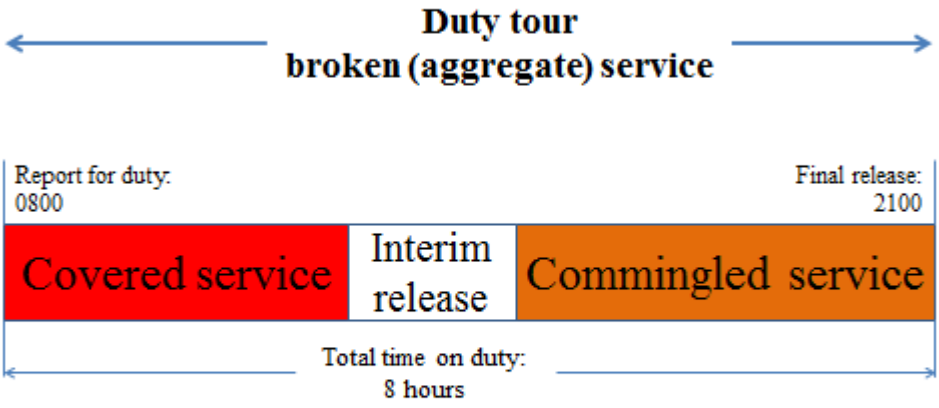
statutory off-duty period, it is treated as limbo time, neither time on duty nor time off duty, for hours of service purposes, and counts as part of an employee's 276-hour monthly maximum limitation on performing service for the railroad.

- **Not** commingled service: Activity at the behest of the employee refers to time spent by an employee in a railroad-related activity that is not required by the railroad as a condition of employment, in which the employee voluntarily participates. Such activities will not commingle and time spent in those activities will count as time off duty. The following activities are considered activities at the behest of the employee. (OP-04-04)
  - Attendance at railroad investigations, if representing, or testifying on behalf of an employee.
  - Participation in railroad safety committees, if voluntary.

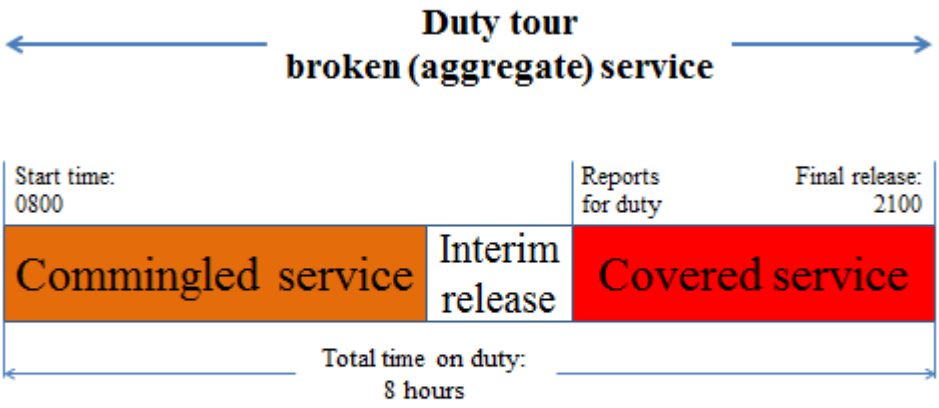
  Note: Jury duty is not a railroad-related activity and cannot commingle with covered service.







Note: In a duty tour, time off duty of at least 4 hours, but less than a statutory off-duty period, counts as an interim period of release and time off duty.



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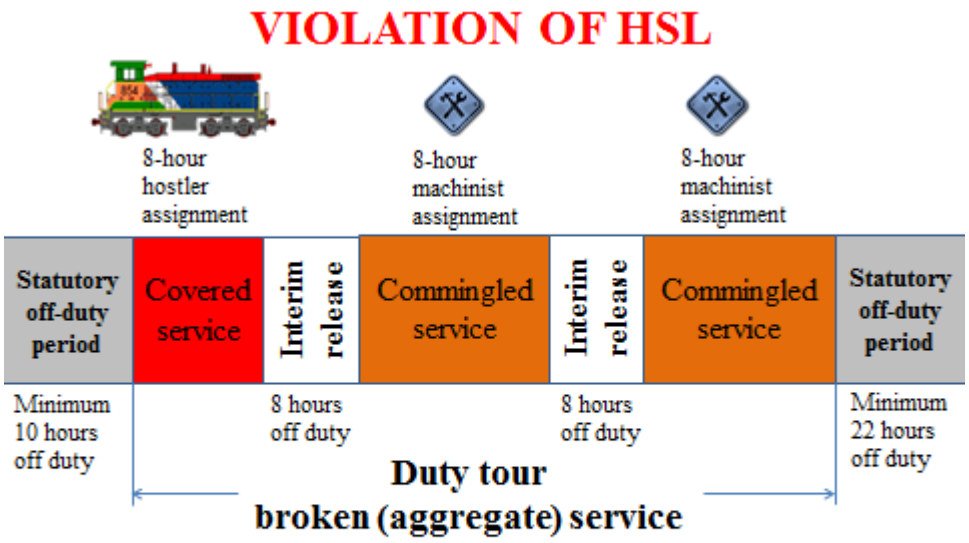
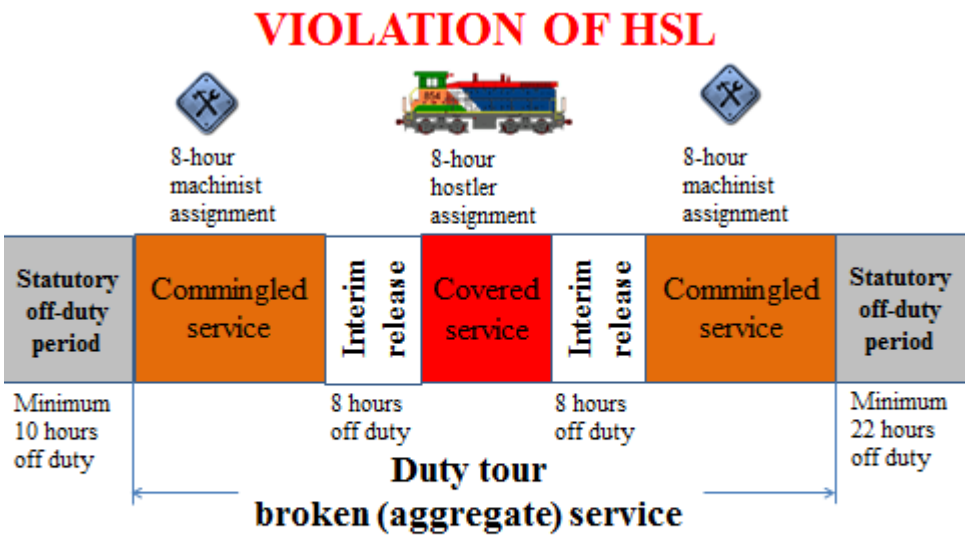


This example represents five 8-hour shifts in a mechanical facility. Because **no** statutory off-duty period exists between covered service and machinist duties, the machinist duties commingle, becoming time on duty. The result is a 40-hour duty tour with a total time on duty of 24 hours. This example constitutes a **violation of the HSL**.



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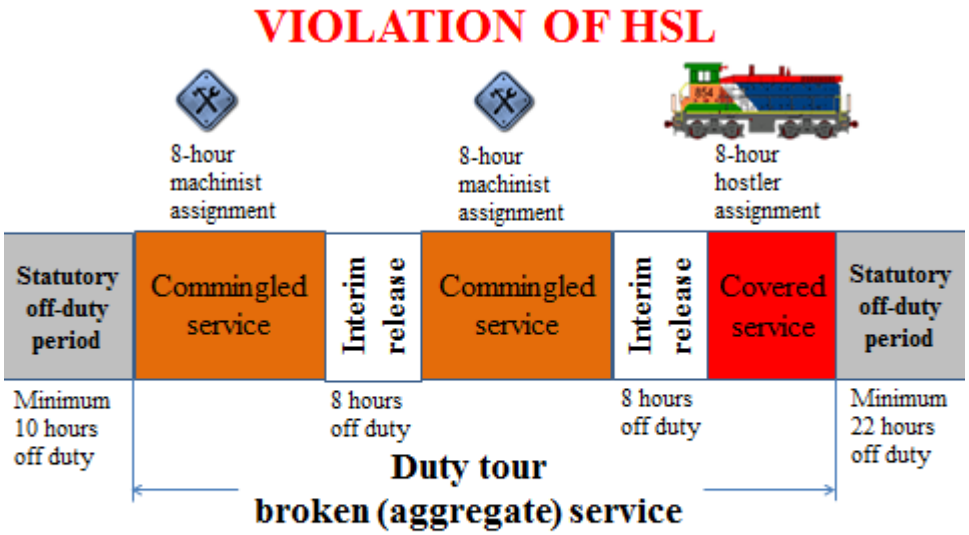

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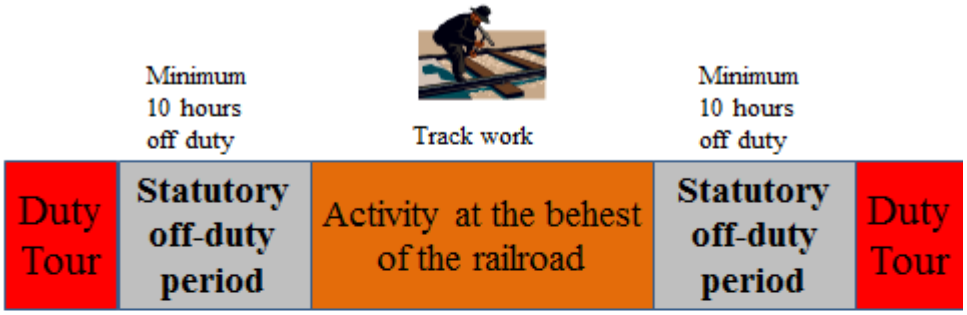


Because a statutory off-duty period exists before and after the "activity at the behest of the railroad", it cannot commingle with either duty tour and is not commingled service.

In these circumstances, the activity at the behest of the railroad is neither time on duty nor time off duty (limbo time), and will only count toward the employee's 276-hour monthly limit of performing service for the railroad.

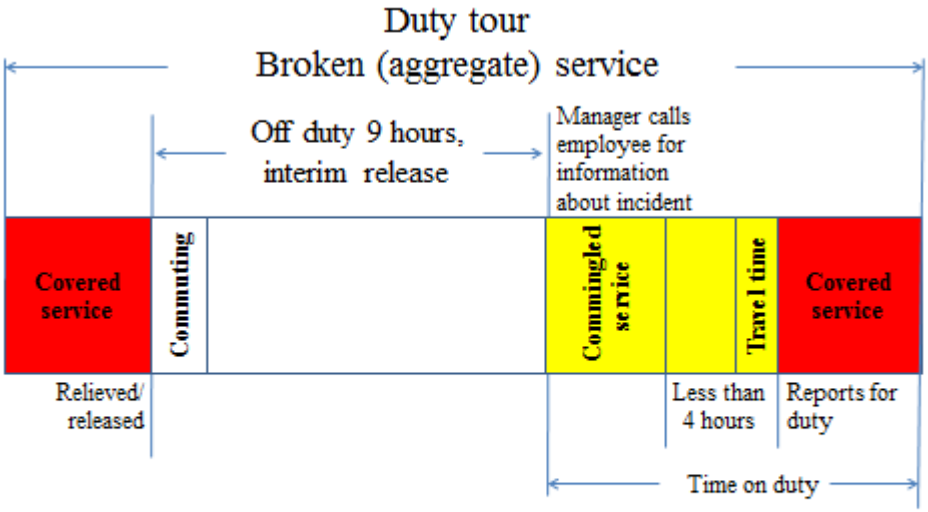
PART I: TRAIN EMPLOYEES

Chapter 3: Communication during off-duty periods and call and release

COMMUNICATION DURING THE OFF-DUTY PERIOD

Before the completion of a statutory off-duty period or a 4-hour interim period of release

- When a railroad or its agents communicate with an employee in a manner that disrupts the employee's rest, the accumulated time toward the statutory off-duty period or interim period of release has been broken and must begin over after the completion of the communication. (FR Vol. 77, No. 40)
- The following types of communication will not disrupt a statutory off-duty period, or an interim period of release, if the employee is not required to receive or respond to the information during a statutory off-duty period or interim period of release. (FR Vol. 77, No. 40)
    - Emails or text messages to a railroad-provided cell phone or email account.
    - Employee-initiated communication during the off-duty period, as long as the communication does not rise to the level of activity at the behest of the railroad. See Chapter 2, *Commingled service*.
    - Employee-requested return call from the railroad. Only applies to a current off-duty period, and the communication is limited to the time and subject matter requested by the employee.
- Calls made by the employee to determine board placement, train lineup, or pay issues are considered activities at the behest of the employee and do not disrupt the off-duty period.



The off-duty period was interrupted before the completion of a statutory off-duty period, but will count as an interim release. Because the employee received less than 4 hours off duty after the commingled service and before reporting, that time becomes time on duty.

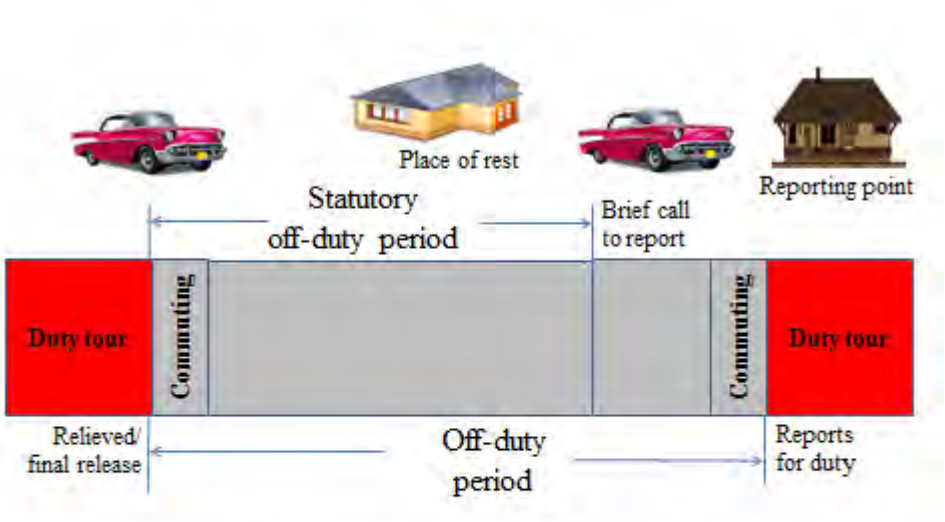
After the completion of a statutory off-duty period or a 4-hour interim period of release

- A **brief call to report** and a **brief call to release** are considered activity at the behest of the railroad, but are **treated as incidental** events by FRA. Therefore, the time spent communicating during these calls is not treated as an activity that can commingle with future duty tours. (OP-04-29)
  - When a railroad issues an employee several calls to report and several calls to release during a single off-duty period, FRA will consider the amount and frequency of the calls to determine if a material disruption occurred.
- Other calls at the behest of the railroad, except brief calls to report or release, will be considered on a case-by-case basis to determine the impact on the off-duty period.
- Calls made by the railroad or the employee that **do not** require the employee to perform service at the behest of the railroad will be considered incidental and not a material disruption of the off-duty period. Examples are notification of a seniority displacement or notification of a bulletin-awarded assignment.
- Calls made by the employee to determine board placement, train lineup, or pay issues are considered activities at the behest of the employee and do not disrupt the off-duty period.

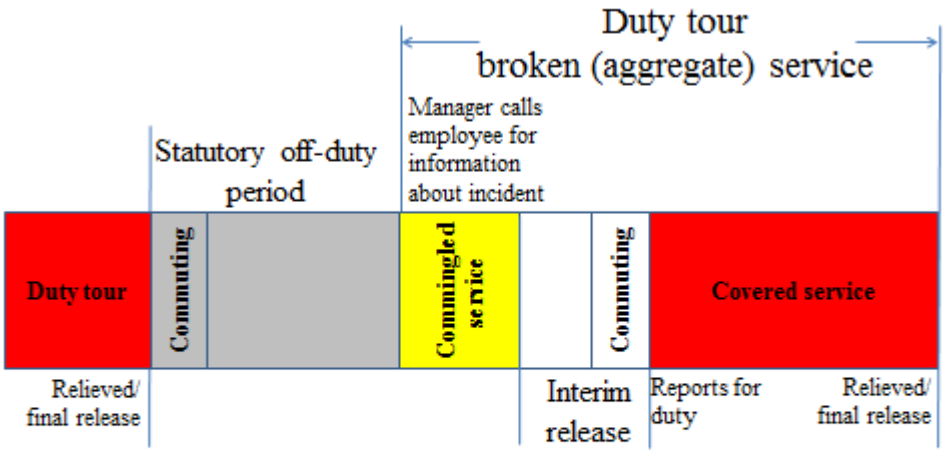
Explanation: The hours of service laws (HSL) require a minimum statutory off-duty period for train employees to provide them with an opportunity to secure meaningful rest.

Train employee statutory off-duty periods reset an employee's maximum allowable time available for duty to 12 hours in a 24-hour period. The HSL prohibit the railroad and its officers and agents from communicating with the employee during a statutory off-duty period or an interim period of release in a manner that can reasonably be expected to interrupt the employee's rest.

In other instances, a call initiated by a representative of a railroad during any part of an employee's off-duty period for the purpose of gathering information from the employee is considered activity at the behest of the railroad. As such, the time spent by the employee providing information to the railroad during these calls can commingle with a previous or future duty tour. The activity at the behest of the railroad resulting from the call cannot commingle if a statutory off-duty period is provided before and after the call.



After a statutory off-duty period, a brief call to report is considered incidental and not a disruption of the off-duty period.



Time spent in the discussion with the manager becomes time on duty when the employee reports for duty. Time off duty after commingled service of at least 4 hours, but less than a statutory off-duty period, counts as an interim period of release.

CALL AND RELEASE

- A call and release involves a railroad issuing a train employee a report time, then releasing the employee from the requirement to report before the report time. Call and release is known by other names, such as "busted call" and "set back." (OP-04-29)

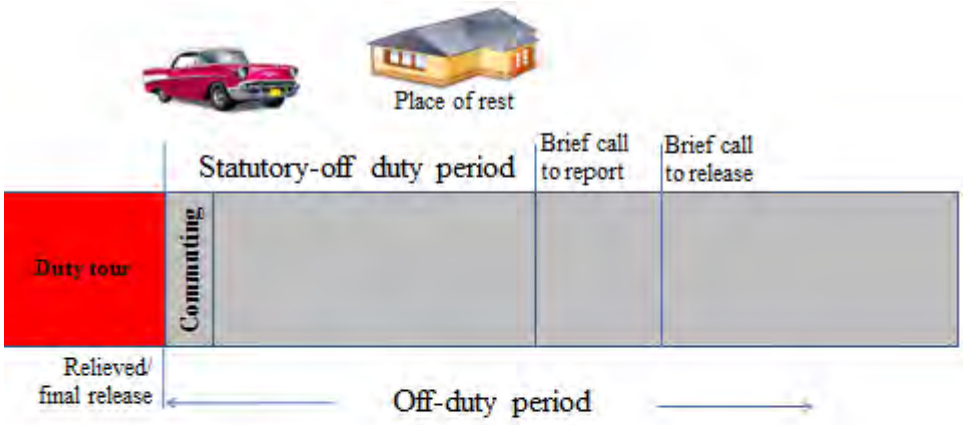
  Note: A call and release can only occur before the issued report time. A release occurring at or after the report time is an early release from the assignment, **not** a call and release.

Before departing the place of rest

- If a train employee receives a call and release before departing his or her place of rest, and after the completion of a statutory off-duty period, FRA will generally view this call as incidental and not a material disruption of the employee's off-duty period.

  Note: Any call initiated by a railroad to an employee before the completion of a statutory off-duty period, or a 4-hour interim period of release, may be considered an interruption of an employee's statutory off-duty period or interim period of release. See Chapter 3, *Communication during the off-duty period*. After the completion of a statutory off-duty

period or an interim period of release of at least 4 hours, a brief call to release will not interrupt the off-duty period, if it comes before the employee departing his or her place of rest. (HSL § 21103(e))

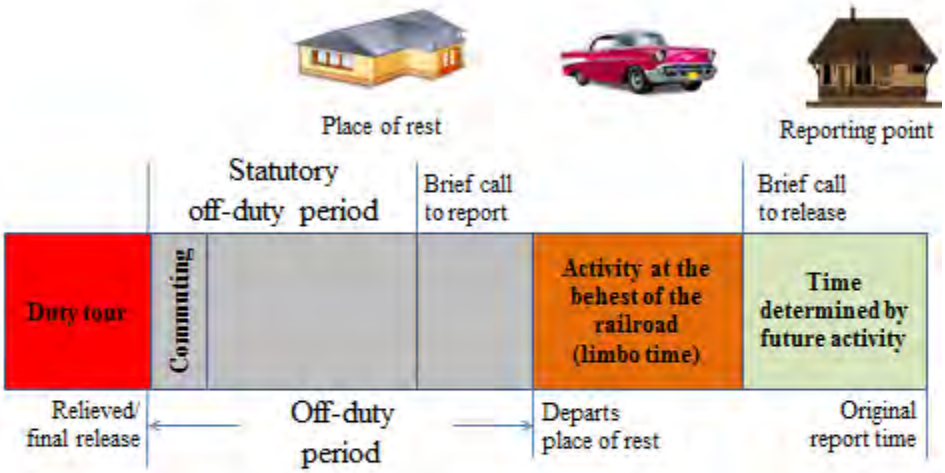


After a statutory off-duty period and before the employee departs the location of rest, a brief call to report and a brief call to release are considered incidental and not a disruption of the off-duty period.

After departing the place of rest

- If the railroad changes the report time or releases the employee from his or her original report time after the employee has departed his or her place of rest, but before the report time, FRA will view the travel time to the report location as limbo time (neither time on duty nor time off duty).
  - If the employee reports back for duty before the completion of a statutory off-duty period, the following apply:
    - If the employee reports back for duty before the completion of an interim period of release, the initial travel time (limbo time) and the time off duty less than 4 hours become time on duty.
    - If an employee reports back for duty after the completion of an interim period of release, the initial travel time (limbo time) becomes time on duty, and the interim period of release (4 or more hours) counts as time off duty.
  - If the employee reports back for duty after the completion of a statutory off-duty period, the travel time (limbo time) will not commingle and remains limbo time, but still must be added to the employee's 276-hour monthly maximum limitation on all service for the railroad.

- If all or part of the travel time occurs during the employee's statutory off-duty period, FRA may view the travel time as a deadhead from duty to a point of final release (limbo time), because without a statutory off-duty period separating it from the previous duty tour, it becomes part of the previous duty tour.



If an employee receives a statutory off-duty period after being released, the travel time **to** the reporting point remains limbo time. If the employee reports back for duty with less than a statutory off-duty period, the travel time will commingle, and become time on duty.

Allowing the employee to report for duty

- If a railroad plans to recall an employee before the completion of a statutory off-duty period, it may want to allow the employee to report for duty and cause his or her travel time to become commuting, which is time off duty.
  - When the employee reports for duty, he or she has initiated an on-duty period that will count as a consecutive day.
  - In cases where an employee is released at or shortly after the report for duty time, he or she must include that time as part of an hours of duty record required by Title 49 Code of Federal Regulations § 228.11.

Note: Railroads using electronic hours of duty recordkeeping systems **cannot** delete an employee's record after that employee reports for duty. (49 CFR § 228.203)

PART I: TRAIN EMPLOYEES

Chapter 4: Travel time

TRAVEL TIME TO AND FROM WORK

Reporting points

- A reporting point is a precise physical location where an employee reports for duty to begin or restart a duty tour.
- Reporting points are further defined as "regular" and "other than regular." Any reporting point that is not an employee's regular reporting point is an other than regular reporting point.

Regular reporting points

- All train employees may have only **one** regular reporting point. A regular reporting point is the permanent on-duty location of the employee's **regular assignment** that is established by a bulletin award, forced assignment, or seniority placement. (OP-04-29)
  - Regular reporting points may change, but they must change through a bulletin award, forced assignment, or seniority placement that establishes the employee as an incumbent on a job or run, rather than on a temporary assignment.
- Temporary assignments—1 day or multiple days
  - Extra-board (or extra-list) employees typically work temporary 1-day assignments. If the reporting point for a 1-day temporary assignment is different from the regular reporting point for that extra-board, the employee must account for and report a deadhead to and from the other than regular reporting point.
  - Multiple-day temporary assignments usually result from employees taking hold-downs on assignments or an extra-board employee covering jobs at an away from home terminal (AFHT). Again, if the reporting point of the temporary assignment is different from the employee's regular reporting point, based on his or her permanent or regular assignment, the employee must account for and report a deadhead for travel to and from the other than regular reporting point.

If the temporary assignment is located at an AFHT, the employee must account for and report a deadhead to and from the other than regular reporting point at the AFHT and apply travel time rules for travel between the on- and off-duty location and lodging at the AFHT.

- FRA **may** treat multiple reporting points as a single regular reporting point, if the following conditions exist. (FR Vol. 74, No. 100)
  - There is no negative effect on fatigue.
    - FRA will take into account the distance between the multiple locations, traffic patterns (for example, rural versus urban), and other relevant factors when determining the effect on fatigue.
    - Railroads must contact FRA if they want to consider multiple locations in excess of 5 miles from each other as a single regular reporting point.

- There is an applicable collective bargaining agreement when train employees are represented by a labor union.

Explanation: Reporting points are employee specific. Each employee may have only one regular reporting point. An employee assigned to a specific job has the location of the job as his or her regular reporting point. For train employees assigned to an extra-board, the railroad-assigned location of the extra-board is that employee's regular reporting point. The assigned location of the extra-board must be precise; it cannot be a geographical area.

For train employees, reporting points should not be confused with designated terminals. Designated terminals apply to train employees, are job or run oriented, and refer to the terminal (city or area) where employees may properly be released for a statutory off-duty period. A designated terminal may contain multiple reporting points within it for different employees, although each employee can have only one regular reporting point. (OP-04-29)

Note: An extra-board employee may report to multiple on-duty locations other than his or her regular reporting point. In these instances, travel time to the extra-board's assigned regular reporting point is considered commuting time. Travel time to and from an other than regular reporting point is considered deadheading, and must be accounted for and reported.

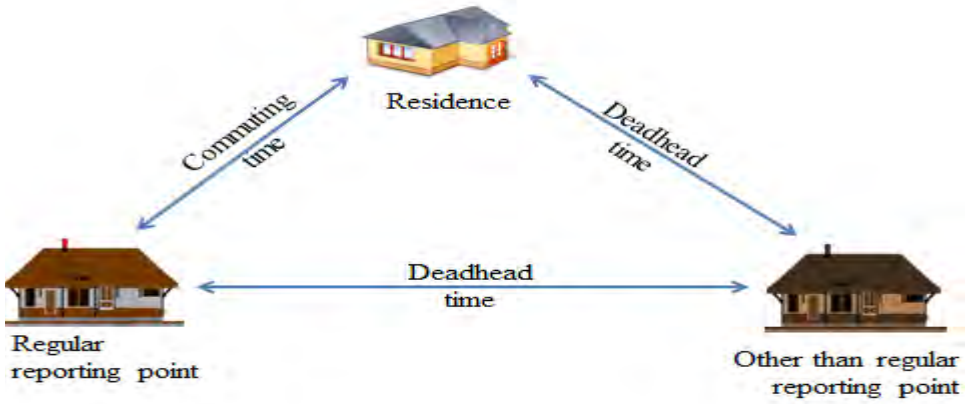
Commuting

Home terminal

- Travel time between an employee's residence and his or her regular reporting point is **not** considered deadhead time whether to or from duty. Such travel time is considered commuting and **counts as time off duty.** (49 CFR Part 228, Appendix A, and OP-04-29)
- In certain instances, time spent by an employee in railroad-provided or authorized transportation between his or her release location or reporting point and railroad-provided lodging at an AFHT is also considered commuting and **counts as time off duty.**

Explanation: Commuting is employee travel time that is considered part of the off-duty period. Since an employee is free to live wherever he or she chooses, the railroad is not penalized by the distance and travel time to and from the employee's regular reporting point. However, the same employee's travel time to an **other than regular reporting point** will require a portion or all of the travel time to be considered deadheading.

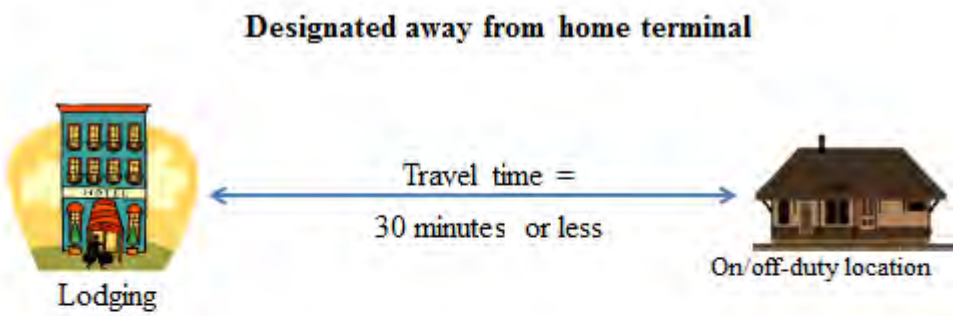
Note: At the **home terminal**, time spent commuting may count as part of the statutory off-duty period or an interim period of release.



Away from home terminal

- An employee is not always free to select lodging at the AFHT and cannot control travel time in railroad-provided or authorized transportation between the release point and the lodging facility. As such, time limits have been placed on commuting at the AFHT.
- FRA allows 30 minutes for commuting at the AFHT for travel between the release or on-duty location and the lodging facility.
- One-way travel time of **30 minutes or less**, including delays associated with transportation and lodging availability, will be considered commuting and **count as time off duty.**

Note: The time a crew is delayed for personal reasons, such as stopping to buy items at a store or stopping to eat at a restaurant, will **not** count toward the 30-minute allowance.



Travel time of 30 minutes or less in railroad-provided transportation at the away from home terminal to and from lodging is considered **commuting** and counts as **time off duty.**

Note: Time spent waiting for transportation or a room counts as part of the 30-minute travel-time allowance.

Deadheading

Other than regular reporting point

Travel to an other than regular reporting point from an employee's home

- Travel time **to** an other than regular reporting point **from** an employee's home (voluntary or not), is a deadhead to duty and counts as **time on duty.** See Chapter 9, *Examples 9, 10, and 11*.
- Reported travel time is determined by comparing the actual travel time from the employee's home to the other than regular reporting point with the estimated travel time from the employee's regular reporting point to the other than regular reporting point, and reporting the lesser of the two times as a deadhead to duty. (49 CFR Part 228, Appendix A, and OP-04-29)

Note: In this application, a reasonable estimate of the travel time under existing conditions (considering weather and time of day) must be used when estimating the travel time from the employee's regular reporting point to the other than regular reporting point. Collective bargaining times used for pay purposes must not be used in this application. (OP-04-29)

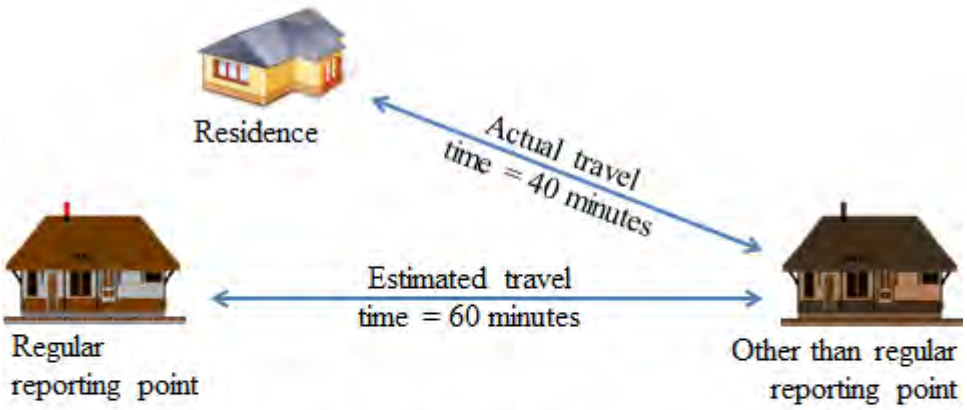
Travel from an other than regular reporting point to an employee's home

- Travel time from an **other than regular reporting point** to an employee's **home** is a deadhead as duty and counts as **time on duty** if the employee is **required** to drive the deadhead vehicle. See Chapter 9, *Example 10.*

- Travel time from an other than regular reporting point to an employee's home is a deadhead from duty to a point of final release and counts as neither time on duty nor time off duty (limbo time). This applies in cases where the railroad offers the employee lodging at an AFHT or offers to provide the employee transportation, but the employee voluntarily drives his or her vehicle home. See Chapter 9, *Examples 9 and 12.*
- Reported travel time is determined by comparing the actual travel time from the other than regular reporting point to the employee's home with the estimated travel time from the employee's regular reporting point to the other than regular reporting point, and reporting the lesser of the two times as a deadhead (49 CFR Part 228, Appendix A, and OP-04-29)

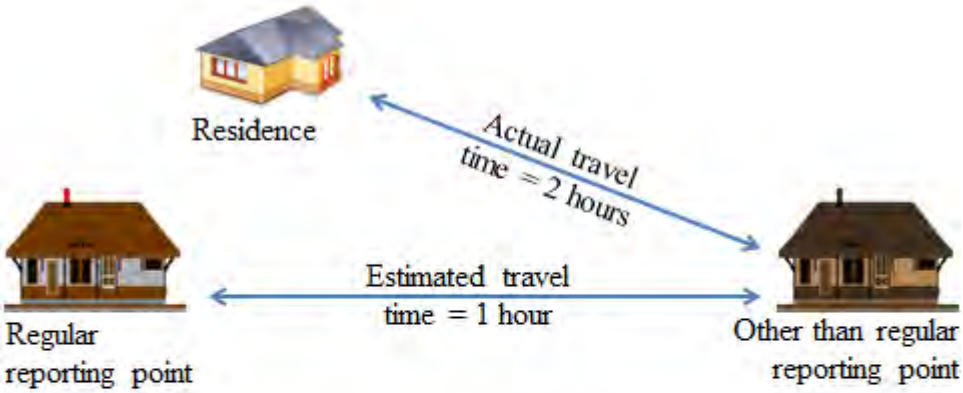
Note: In this application, a reasonable estimate of the travel time under existing conditions (considering weather and time of day) should be used when estimating the travel time from the employee's regular reporting point to the other than regular reporting point. Collective bargaining times used for pay purposes must not be used in this application. (OP-04-29)

Note: This application applies to any other than regular reporting point, within and outside of an employee's designated home terminal.



Employee must report a 40-minute **deadhead to duty** for travel to the other than regular reporting point and a 40-minute **deadhead from duty** for travel from the other than regular reporting point to his or her home.

Note: If the employee is **required to drive** to the other than regular reporting point, the return trip home must be reported as a **deadhead as duty** and counts as time on duty.



Employee must report a 1-hour **deadhead to duty** for travel to the other than regular reporting point and a 1-hour **deadhead from duty** for travel from the other than regular reporting point to his or her home.

Note: If the employee is **required to drive** to the other than regular reporting point, the return trip home must be reported as a **deadhead as duty** and counts as time on duty.

Away from home terminal

- FRA allows 30 minutes for commuting at the AFHT for travel between the release or on-duty location and lodging facility. (OP-04-29)

Travel **to** the on-duty location **from** lodging at the AFHT

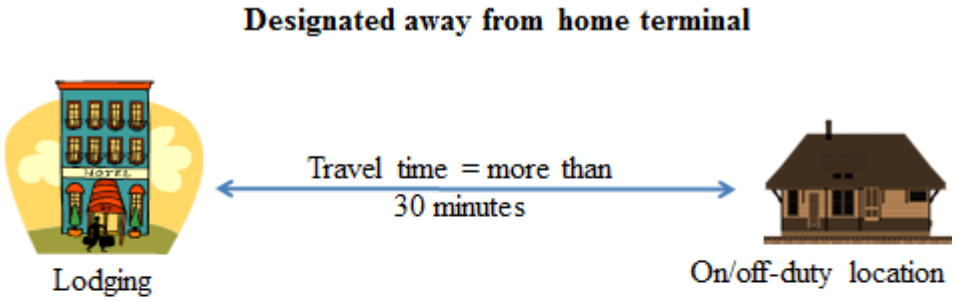
- One-way travel time greater than 30 minutes, including delays associated with transportation, will be considered as a deadhead **to** duty and counts as time on duty.

Note: The time a crew is delayed for personal reasons, such as stopping to buy items at a store or stopping to eat at a restaurant, will **not** count toward the 30-minute allowance.

Travel **from** the release location **to** lodging at the AFHT

- One-way travel time greater than 30 minutes, including delays associated with transportation and lodging availability, will be considered as a deadhead **from** duty to a point of final release and counts as neither time on duty nor time off duty (limbo time).

Note: The time a crew is delayed for personal reasons, such as stopping to buy items at a store, or stopping to eat at a restaurant, will **not** count toward the 30-minute allowance. When an employee exceeds the 30-minute allowance traveling to lodging, he or she must contact the railroad and give an updated release time.



Travel time **greater than 30 minutes** to and from lodging in railroad-provided transportation at the away from home terminal is considered **deadheading.** The deadhead to lodging can be considered a **deadhead from duty to a point of final release** and counts as **limbo time**. The deadhead from lodging to the reporting point is considered a **deadhead to duty** and counts as **time on duty**.

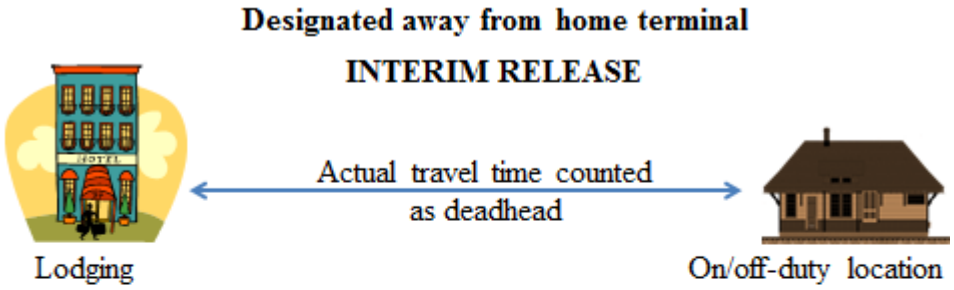
Note: Time spent waiting for transportation or a room counts as part of the 30-minute travel-time allowance.

Interim release at away from home terminal

Travel between the on-duty or off-duty location and lodging

- When transportation is required, all interim releases will begin when the employee arrives at the location of food and/or lodging and will end when transportation is available to begin the return trip to the on-duty location. See Chapter 9, *Example 7.* (OP-04-28)
- A qualifying interim period of release at the AFHT must be a minimum of 4 hours from the time the employee receives a room at the lodging facility to the time that he or she is required to be available to begin the return trip back to the on-duty location.
- Time spent waiting for transportation, the actual travel time to lodging, and time spent waiting for a room, will count as neither time on duty nor time off duty (limbo time).
- Time spent waiting for transportation, and the actual travel time to the on-duty location, is deadheading to duty and counts as time on duty.

Note: Arbitrary or average times charged to these periods for pay or other purposes must not be used in the calculation. The 30-minute commute time allowance at the AFHT does not apply to situations where the crew receives an interim period of release.



Travel time in railroad provided transportation at the away from home terminal to and from lodging for an interim release is considered **deadheading**.

- Travel time to lodging counts as **limbo time** (deadhead from duty).
- Travel time from lodging counts as **time on duty** (deadhead to duty).

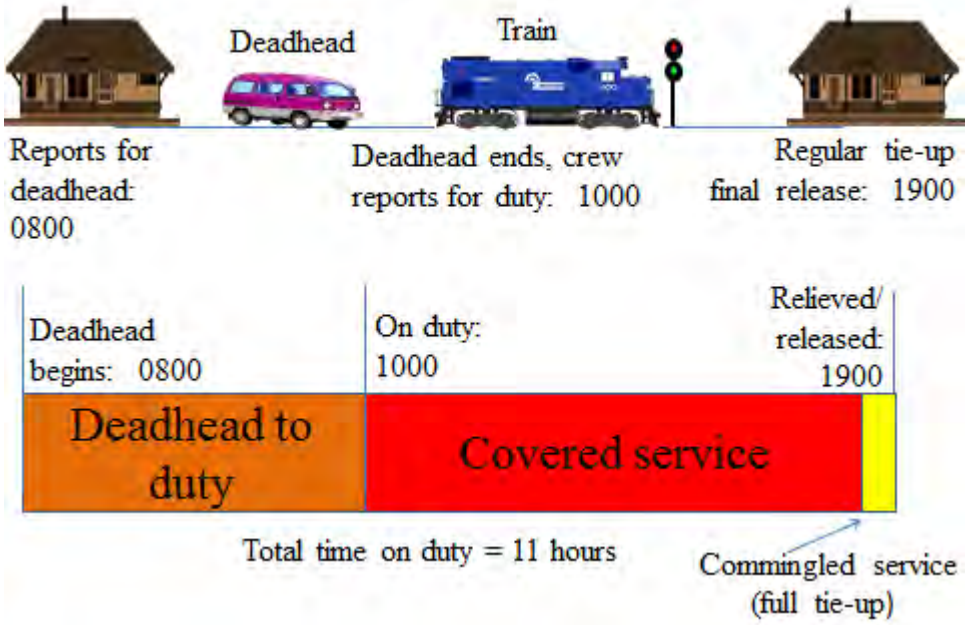
Note: Time spent waiting for transportation or a room counts as part of the travel time.

TRAVEL TIME DURING WORK

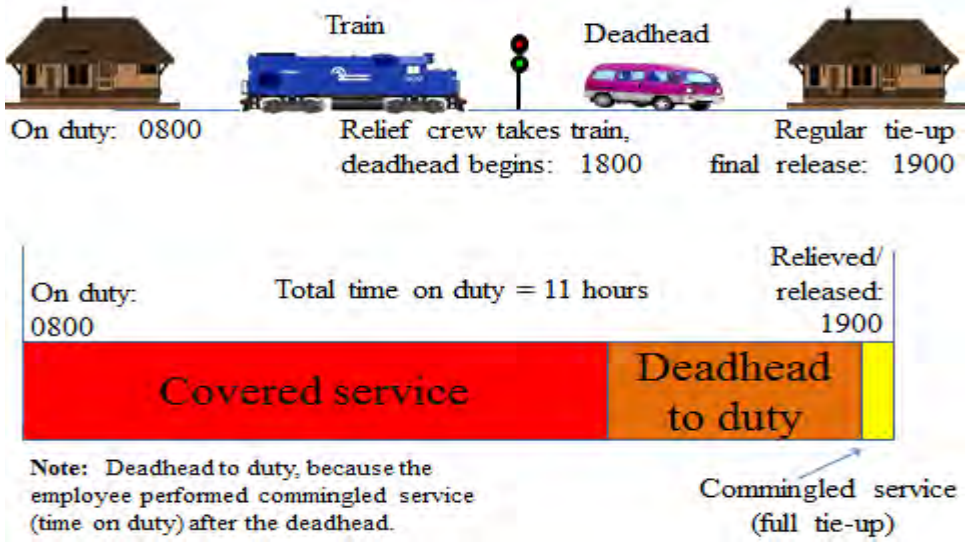
Deadhead to duty

- A deadhead to duty counts as time on duty and only exists as part of a duty tour. (HSL § 21103(b))
- A deadhead becomes a deadhead to duty when the employee performs either covered service or commingled service at the end of the deadhead. See Chapter 9, *Examples 3 and 4.*

Deadhead to duty



Deadhead to duty

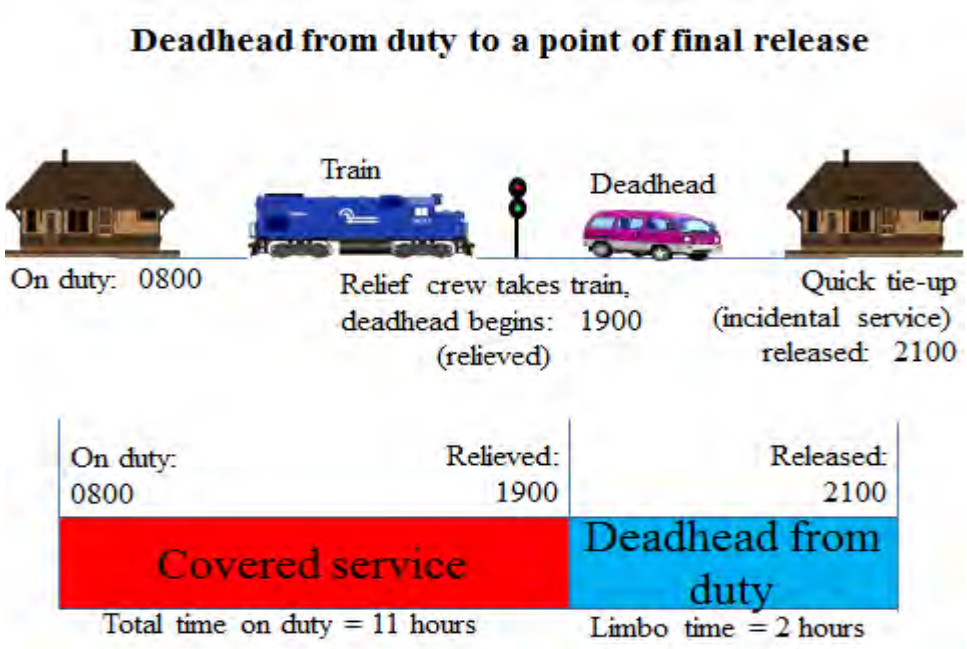


Deadhead from duty to a point of final release

- A deadhead from duty counts as neither time on duty nor time off duty (**limbo time**) and only exists when it is the last activity in a duty tour. See Chapter 9, *Example 5*. (HSL § 21103(b)).
- A deadhead is defined as a deadhead from duty when the employee does **not** perform an activity at the end of the deadhead that can count as time on duty (covered service or commingled service).
- Waiting for deadhead transportation from duty to a point of final release also counts as limbo time.
- A train crew is **not** waiting for deadhead transportation when:
  - Transportation has not been ordered for the crew, or transportation is available but the crew is required to remain with the train.
    - In these circumstances, the crew is considered to be monitoring the train (which is commingled service), not waiting for deadhead transportation, and this time will count as time on duty.

Note: Waiting for and in deadhead transportation from duty to a point of final release is the only railroad-required activity in a duty tour that will count as limbo time, with the exception of a few minor activities identified as incidental service.

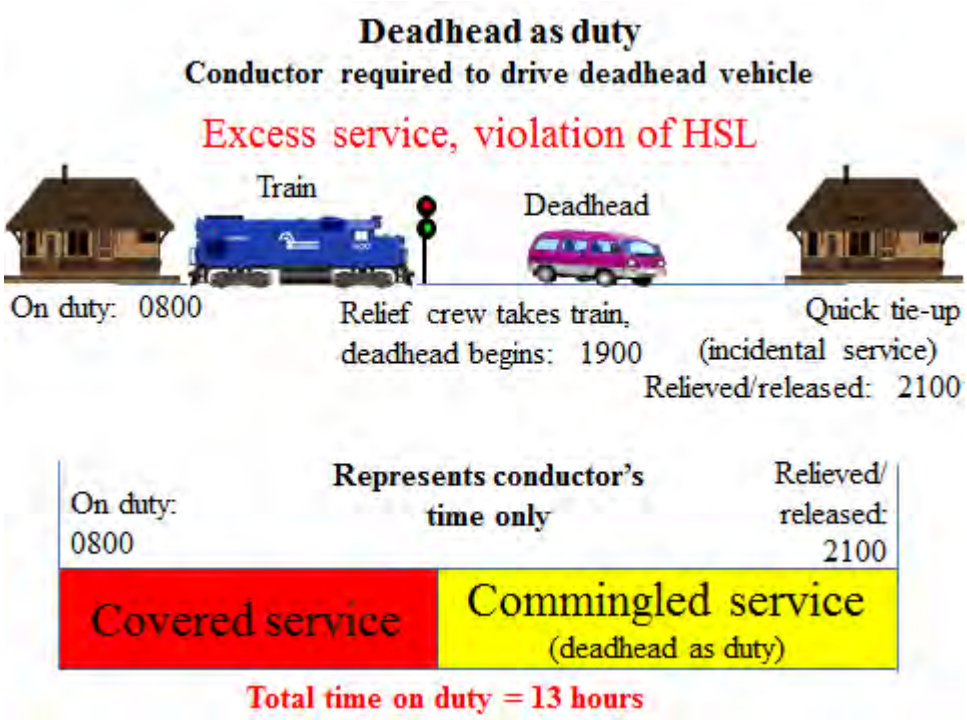
Note: Relieved time, as defined at Title 49 Code of Federal Regulations § 228.5, exists for one reason only: to establish the beginning of time spent waiting for and in a deadhead from duty to a point of final release. To report a deadhead from duty on an hours of duty record, an employee must report relieved location, date, and time, separate from and before the final release location, date, and time. (49 CFR § 228.11)



Deadhead as duty

- A deadhead as duty involves an employee driving the deadhead vehicle and requires the time spent driving the vehicle to count as time on duty because it is considered commingled service. See Chapter 2, *Commingled service*, and Chapter 9, *Example 6*. (OP-04-04)
    - If a railroad requires an employee to drive the deadhead vehicle from duty to a point of final release, that deadhead cannot count as limbo time, but must count as time on duty (commingled service).

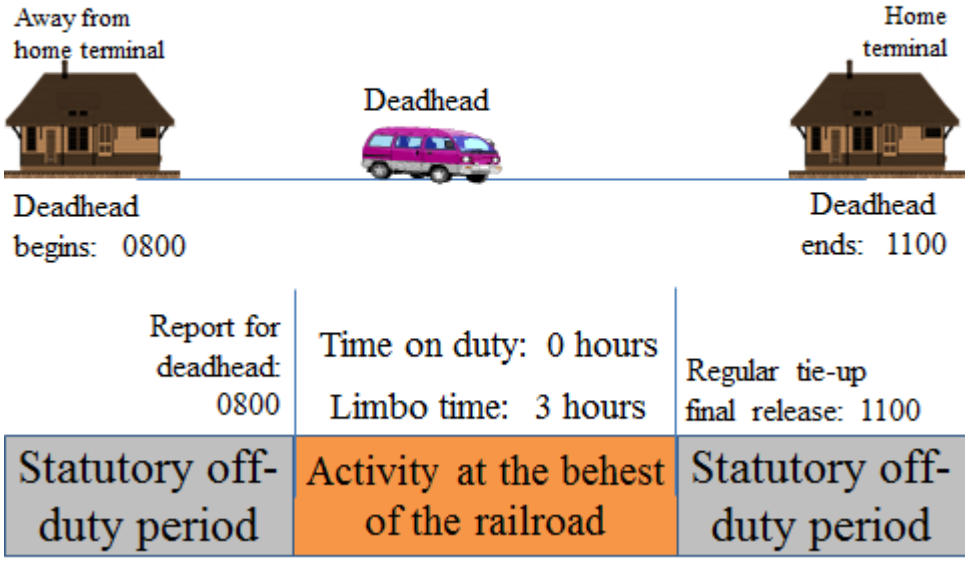
Note: In cases where a railroad offers to provide deadhead transportation, or lodging for the employee, but the employee voluntarily drives his or her vehicle for the deadhead, this deadhead may be considered a deadhead from duty to a point of final release and count as limbo time.



Deadhead separate and apart

A deadhead separate and apart involves a deadhead that is separated from covered service by a statutory off-duty period before and after the deadhead. This is typically associated with a railroad repositioning an employee to a different designated terminal. See Chapter 9, *Example 15.*

Deadhead separate and apart



PART I: TRAIN EMPLOYEES

Chapter 5: Designated terminals and railroad-provided sleeping quarters

DESIGNATED TERMINALS

- "Designated terminal" means a terminal that is designated in or under a collective bargaining agreement as the "home" or "away from home" terminal for a particular crew assignment and that has suitable facilities for food and lodging. (49 CFR Part 228, Appendix A)
- Railroad and union representatives may agree to establish additional designated terminals having such facilities as points of effective release under the hours of service laws (HSL).
- Agreements to establish additional terminals for purposes of release under the HSL should be in writing and should make reference to the HSL.
- A designated terminal is a geographical location for a railroad's operation and can be a yard, terminal, city, or defined geographical point.
- A designated terminal must be identified in or under the authority of a collective bargaining agreement as the home, away from home, or additional terminal for a specific run (train assignment).
- It must have suitable facilities for food and lodging for the crews of that run.
- A designated terminal should **not** be confused with a reporting point.
    - A designated terminal only establishes where an employee may be released to receive a statutory off-duty period or an interim period of release.
    - A designated terminal may include one or more on-duty locations or reporting points.
- Designated terminals determine final or interim release points for qualifying off-duty purposes.
    - Any period available for rest that is of 4 or more hours and is at a designated terminal is time off duty. All other periods available for rest, including periods of less than 4 hours, or periods available for rest at a location that is not a designated terminal regardless of the duration of the rest period, must be counted as time on duty under the HSL. (HSL § 21103 (b))

Emergencies

- An interim period available for at least 4 hours' rest at a place with suitable facilities for food and lodging that is not a designated terminal is **not** time on duty when the employee is prevented from getting to his or her designated terminal by any of the following:
    - A casualty.
    - A track obstruction.
    - An act of God.
    - A derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee when that employee left the designated terminal. (HSL § 21103 (b)(7))

Suitable food and lodging at the away from home terminal

- The HSL require only that suitable facilities for food and lodging be available; they do not indicate who must pay for the accommodations. Railroad labor and management may negotiate an agreement for the payment of lodging or meals through the collective bargaining process.
- When facilities for suitable food and lodging are not within a reasonable walking distance of the release point, the railroad must provide transportation to and from the facilities.
    - The provisions defining reasonable walking distance in the respective collective bargaining agreements will govern, where applicable. Otherwise, reasonable walking distance takes into consideration not only distance per se, but such factors as time, location, weather, and safety. (Congressional Record, 1978)
    - Providing transportation may include hotel vans, but they must be available for the employees.
    - If the railroad provides a taxi, it is a matter of collective bargaining as to whether the railroad or the employee pays the fare.

Suitable food and lodging at the home terminal

- The purpose of the designated terminal provision of the HSL is to ensure that suitable facilities for food and lodging are available in connection with a release at a point other than a crew's home terminal.
- There is no requirement that such facilities be provided at or near the home terminal because it is presumed that suitable facilities are available there in the form of the employee's own residence.

Suitable food

- The apparent basis for references in the legislative history to "suitable facilities for food" was to ensure the availability of nutritionally adequate and palatable food that could be consumed with appropriate utensils in a reasonably clean environment. (OP-04-03)
- The suitability of canned, prepackaged, and frozen fast foods such as canned soup, cold sandwiches, and frozen pizza depends on the overall circumstances involved, including the length of the work or rest time during which such items are the only food available.
- Disputes about the relative desirability of various types of meals, all of which have nutritional value, can best be handled through the collective bargaining process.
- Another issue is whether it is necessary that facilities for food be available continuously throughout the rest period.
    - The legislative history of the HSL nowhere implies such a burden; indeed, it assumes that much of the rest period will be used for sleeping.

- As long as suitable facilities for food are available when needed for nutritional purposes (i.e., at the beginning and end of a rest period), an opportunity for meaningful rest has been provided per the HSL.
- For instance, if a crew reaches its destination at 12 midnight and immediately obtains an adequate meal, with the expectation of obtaining breakfast just before returning to duty at 8 a.m. the next morning, the fact that food is unavailable between 1 a.m. and 7 a.m. would be irrelevant to the fitness of the crew. (OP-04-03)

Suitable lodging

- Under the 1976 amendment to the HSL, railroad-provided sleeping quarters, including dormitories, trailers, and bunk cars, must be "clean, safe, and sanitary" and "free from interruptions caused by noise under the control of the railroad." The "clean, safe, and sanitary" provision does not apply to commercial facilities. (FR Vol. 42, No. 104 and OP-04-03)

- Guidance for determining suitable lodging is also derived from the legislative history. In discussing the phrase, "a place where suitable facilities for food and lodging are available" at other than a designated terminal as minimally required, the Congressional Record provides the following: "where reasonably available, single occupancy sleeping rooms, containing adequate furniture and accessories, temperature controls, and toilet and shower facilities." (Congressional Record, 1978)
  - FRA concludes that the same standards apply to designated terminals.

RAILROAD-PROVIDED SLEEPING QUARTERS

- A railroad carrier and its officers and agents:
  - May provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier.
  - May not begin, after July 7, 1976, construction or reconstruction of sleeping quarters in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed. (HSL § 21106)

Sleeping quarters

- Under the 1976 amendments to the HSL, it is unlawful for any common carrier to provide sleeping quarters for persons covered by the HSL that do not afford such persons an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters. (49 CFR Part 228, Appendix A)

- Such sleeping quarters include crew quarters, camp or bunk cars, and trailers.
- Sleeping quarters are not considered to be "free from interruptions caused by noise under the control of the railroad" if noise levels attributable to noise sources under the control of the railroad exceed an Leq(8) value of 55dB(A).
- Sleeping quarters constructed or reconstructed (at a cost of more than half the value of the facility), after July 8, 1976, are covered by Title 49 Code of Federal Regulations (CFR) Part 228, Subpart C.
- All sleeping quarters constructed or reconstructed after July 8, 1976, must not be in the "immediate vicinity" (one-half mile from the nearest rail of the nearest trackage) of railroad switching or humping operations.

Note: See 49 CFR Part 228, Subpart C, for the regulation on construction of employee sleeping quarters.

Leasing of rooms by the railroad

- In general, the provision of the HSL relating to sleeping quarters applies to facilities provided directly by the railroads. The actions of innkeepers are not regulated by the HSL.
- A railroad may be viewed as a participant in the construction or reconstruction of sleeping quarters in a number of circumstances—for instance, if it controls site selection or if, before or after the facility is constructed, it obtains a possessory interest in the realty.
    - If the railroad is deemed an acting party and the site of the facility is within one-half mile of any area where placarded hazardous materials cars are switched, the railroad must obtain approval of the site before occupancy.
- For such arrangements to fall outside the scope of the HSL, the following specific tests must be met. (FR Vol. 43, No. 139)
    - The lodging must be a place of public accommodation.
    - The railroad may not own any interest in the concern operating the motel or hotel.
    - The site selection determination must be made by the innkeeper (e.g., the facility may not be built on land owned by or sold by the railroad.)
    - The railroad may not acquire any legal possessory interest in the facility (a long-term contract for occupancy of a certain number of rooms need not give rise to a possessory interest, but a lease of a portion of the building would.)
    - Any arrangement for provision of accommodations by the railroad on its employees' behalf should be through an arms-length transaction in which the railroad contracts for essentially the same services provided to other guests of the establishment (occupancy, linen service, cleaning, etc.)

- The non-railroad business of the establishment should contribute significantly to its commercial viability. A motel may not be created as a front for the railroad to evade the sleeping quarters provision of the HSL. If arrangements with the builder or operator of the lodging facility meet the tests above, there is no requirement for FRA site approval.

PART I: TRAIN EMPLOYEES

Chapter 6: Emergency provision and wreck-train relief

EMERGENCY PROVISION

- From § 21102 of the Federal hours of service laws (HSL), when any of the following occur, the HSL do not apply.
  - A casualty.
  - An unavoidable accident.
  - An act of God.
  - A delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.
- This provision is commonly referred to as the "emergency provision" and FRA policy concerning the emergency provision is found at Title 49 Code of Federal Regulations (CFR) Part 228, Appendix A.

Use of the emergency provision

- Judicial construction of this provision has limited the relief that it grants to situations that are **truly unusual and exceptional**.
- Even where an extraordinary event or combination of events occurs that, by itself, would be sufficient to permit excess service, the **railroad must still employ due diligence to avoid or limit such excess service.**
- The burden of proof rests with the railroad to establish both that an emergency existed and that excess service could **not** have been avoided.

Circumstances that do not warrant use of the emergency provision

- The courts have recognized that delays and operational difficulties are common in the industry and must be regarded as entirely foreseeable; otherwise, the HSL will provide no protection whatsoever.
- Common operational difficulties that the emergency provision does **not** provide relief from include, but are not limited to:
  - Broken drawbars.
  - Locomotive malfunctions.
  - Equipment failures.
  - Brake system failures.
  - Hot boxes.
  - Unexpected switching.
  - Doubling hills.
  - Meeting trains.

- The need to clear a main track or cut a crossing also does **not** justify disregard of the limitations of the HSL.
- Such contingencies must normally be anticipated and met within the 12 hours.

WRECK-TRAIN RELIEF

- Section 21103(d) of the HSL provides that the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. An emergency ends when the track is cleared and the railroad line is open to traffic.
- The following is additional guidance provided in 49 CFR Part 228, Appendix A.
  - A crew could work up to 16 hours, rather than 12.
  - The HSL specify that an emergency ceases to exist for purposes of this provision when the track is cleared and the line is open for traffic.
  - An "emergency" for purposes of wreck or relief service may be a less extraordinary or catastrophic event than an unavoidable accident or an act of God under the emergency provision of the HSL.

Example: The crew of a wreck train is dispatched to clear the site of a derailment that has just occurred on a main track. The wreck crew rerails or clears the last car, and the maintenance-of-way department releases the track to the operating department 14 hours and 30 minutes into the duty tour. Since the line is not clear until the wreck train is out of the way, the crew may operate the wreck train to its terminal, provided this can be accomplished within the total of 16 hours on duty.

Note: The emergency provision for wreck and relief trains applies without regard to the availability of relief employees. (FR Vol. 42, No. 104)

PART I: TRAIN EMPLOYEES

Chapter 7: Yardmasters, hostlers, and other crafts

YARDMASTERS

FRA's approach to yardmaster hours of service applications is functional. When a yardmaster is engaged in or connected with the movement of trains, he or she is performing covered service as a train employee and is subject to § 21103 of the Federal hours of service laws (HSL).

- Yardmasters performing covered service as train employees include those who perform the following activities:
  - Lining switches either remotely or manually to accommodate the movement of trains or switching moves.

    Note: Usually, the repositioning of main track switches or yard track switches, either remotely or manually, brings the yardmaster under the train employee provisions of the law as either a trainman or switch-tender. However, if a main track switch is lined remotely as a result of a yardmaster granting a train main track authority by a signal indication at a manual interlocking, the dispatching service employee requirements at § 21105 of the HSL apply.

  - A yardmaster functionally becomes a member of a train or yard crew on a temporary basis by relaying signals, making couplings or cuts, lining switches ahead or behind, or protecting a shoving movement. (OP-04-27)
  - Persons operating a remotely-controlled switching machine in a hump yard are covered under the train employees section of the HSL.

    Note: FRA does not consider the duties of inputting switching data into a computer that lines switches automatically as covered service.

HOSTLERS

A hostler is any railroad employee who operates a locomotive without cars.

Explanation: Hostler activities are usually identified as either inside or outside. Inside hostlers move locomotives within the Blue Signal Protection of a repair or servicing facility. Inside hostlers, as a rule, do not leave the repair or servicing facility. Usually, inside hostlers are mechanical employees tasked with moving locomotives. Outside hostlers usually move locomotives to and from trains and mechanical or servicing facilities within a yard or on a main track. Outside hostlers are engine service employees and must be certified under Title 49 Code of Federal Regulations Part 240. Employees who perform duties related to assisting a hostler are known as hostler helpers. Generally, hostler helpers line switches and give signals for locomotive movements, which constitute train employee covered service. (OP-04-26)

- The 1976 amendments to the HSL brought inside hostlers within the category of employees "engaged in or connected with the movement of any train." For the purpose of this statute, Congress defined inside hostler moves as train movements, i.e., the

movement of one or more locomotives, with or without coupled cars. It follows necessarily that inside hostler helpers are as much "connected with the movement of trains" as outside hostler helpers. In short, by defining train movements to include inside hostlers, Congress expanded covered service to include both locomotive operators and their helpers.

- FRA's interpretation is, and has been since 1977, that employees performing inside hostler duties (e.g., moving a locomotive or locomotive consist under its own power within the Blue Signal Protection of a mechanical facility for the purpose of fueling, sanding, or general servicing duties or moving a locomotive under its own power to repair or test cab signal or automatic train control equipment) are as much "connected with the movement of a train" as outside hostlers. Since outside hostler helpers are connected with the movements they assist, so too are inside helpers performing covered service.
- FRA also believes that in the 1976 amendments, Congress did not intend to cover all railroad employees. Persons performing the job duties of machinists, electricians, laborers, and similar occupations not generally associated with responsibilities covered by the HSL, who are not "engaged in or connected with the movement of trains," are **not** covered. To regard as covered service job functions performed by mechanical department personnel–functions not traditionally performed by hostlers and hostler helpers at the time Congress passed the 1976 amendments–would be inconsistent with the statutory purpose.
    - An employee, who repositions a locomotive for the purpose of performing maintenance, repair, or inspections, is **not** "engaged in or connected with the movement of any train" and is, therefore, not performing service covered by the HSL. Similarly, a helper who assists in such movements would not be covered.
- In determining whether the movement of a locomotive is covered service, the following will apply:
    - All locomotive movements outside the Blue Signal Protection of a mechanical or servicing facility are considered train employee covered service, with the following exception.
        - Locomotive movements of 100 feet or less protected by Blue Signals for the purpose of repairing, maintaining, or inspecting the locomotive are considered non-covered service.
    - Locomotive movements inside the Blue Signal Protection of a mechanical or servicing facility.
        - If a locomotive is moved for the purpose of servicing, such as fueling, sanding, or adding water or oil to the locomotive, or moving a locomotive under its own power to repair or test cab signal or automatic train control equipment, the employees moving the locomotive have performed train employee covered service and § 21103 of the HSL applies.

- Mechanical department employees moving a locomotive for the purpose of repairing, maintaining, or inspecting that locomotive are **not** performing train employee covered service.

FLAGMEN

- Railroad employees traditionally referred to as "flagmen" (f1aggers) perform a variety of duties that may or may not bring them under the provisions of the HSL.
- Flaggers may be assigned from a variety of crafts and perform functions that include non-covered service, train employee covered service, or dispatching service employee covered service.
- Railroad employees are considered performing train employee covered service when their duties involve lining switches for the movement of trains or engines. (OP-04-27)

Example: Two employees (flaggers) are assigned to protect an out-of-service work area in double track automatic block system territory and are stationed at manual switches several miles apart. The first employee is tasked with contacting trains in both directions by radio to grant them authority for movement against the current of traffic. The second employee, at the direction of the first employee, positions the switch in his or her charge for train movements, but is not responsible for communicating with trains.

FRA views the first employee granting main track movement authorities as issuing orders affecting train movement, which means that the employee is performing functions that constitute covered service as a dispatching service employee, and the employee is subject to the limitations of § 21105 of the HSL. See Chapter 10. The second employee did not issue trains' main track authority, but he or she was engaged in the movement of trains by lining switches and is covered by the train employee requirements of § 21103 of the HSL.

- One of the most common assignments for flagmen is providing protection for roadway workers. Typically, maintenance-of-way employees are assigned these tasks, but train employees may also perform such duties. In most cases, the flagman communicates with trains and gives them permission to enter maintenance-of-way working limits. Because main track authority is typically granted to trains by a train dispatcher (not the flagman) in these circumstances, and the flagman usually does not line switches for trains, this activity does **not** rise to the level of covered service as either a train employee or a train dispatcher.

LEVERMEN AND SWITCH-TENDERS

- Levermen and switch-tenders are generally subject to the train employee provisions of the HSL, because their common duty is to line switches to accommodate train movements.

BRIDGE TENDERS

Again, FRA's application of the HSL concerning bridge tenders is functional. Therefore, if a bridge tender performs service that is connected with or affects the movement of a train, he or she is subject to the constraints of either the train employee or dispatching service employee provisions of the HSL.

- A bridge tender is performing covered service as a train employee when he or she lines switches that accommodate train movements.
- A bridge tender is performing covered service as a dispatching service employee when he or she grants main track authority to a train. See Chapter 10.
    - In such cases, the bridge tender usually controls the aspect of a signal authorizing train movement on a main track across a bridge. The bridge tender may also grant main track authority by communicating "orders," such as train orders, track warrants, manual block authority, or verbal authority to pass a stop indication.

Note: In automatic block signal territory, electrical switches used by a bridge tender to time out (run time) the opposing signal before unlocking a bridge for repositioning is **not** considered covered service under the HSL's dispatching service employee provisions. (OP-04-27)

PART I: TRAIN EMPLOYEES

Chapter 8: Hours of service records

HOURS OF SERVICE RECORDKEEPING

Title 49 Code of Federal Regulations (CFR) Part 228 prescribes reporting and recordkeeping requirements for the hours of duty of train employees (freight operations), dispatching service employees, and signal employees who are covered under the Federal hours of service laws (HSL) at 49 U.S.C. Chapter 211, and for train employees engaged in commuter and intercity passenger rail transportation covered under 49 CFR Part 228, Subpart F. This chapter only addresses hours of service recordkeeping requirements for train employees engaged in freight operations covered by the HSL.

HOURS OF DUTY RECORDS

General requirements as outlined at 49 CFR § 228.9

Manual (paper) records

- Signed by the individual employee or ranking crewmember.
- Retained for 2 years, at a location identified by the carrier.
- Available to FRA upon request during regular business hours.

Electronic records

- Certified by the individual employee or by the reporting employee for the crew whose time is being recorded.
- Electronically stamped with the certifying employee's name and the date and time of the certification.
- Retained for 2 years in a secured file that prevents alteration after certification.
- Accessible by FRA through a railroad-provided computer, using a railroad-provided login name and password.
- Reproducible using a printer at the location where records are accessed.

Hours of duty record requirements at 49 CFR § 228.11(a)

- In general, each railroad, or a contractor or a subcontractor of a railroad, must keep a record, either manually or electronically, concerning the hours of duty of each employee. Each contractor or subcontractor of a railroad must also record the name of the railroad for which its employee performed covered service during the duty tour covered by the record. Employees who perform covered service assignments in a single duty tour that are subject to the recordkeeping requirements of more than one paragraph of this section must complete the record applicable to the covered service position for which they were called, and record other covered service as an activity constituting other service at the behest of the railroad.

Train employee hours of duty record requirements at 49 CFR § 228.11(b)

- Each hours of duty record for a train employee must include the following information:
  - Identification of the employee (initials and last name, or if the last name is not the employee's surname, provide the employee's initials and surname).
  - Each covered service position in a duty tour (engineer, conductor, switchman, etc.).
  - Amount of time off duty before beginning a new covered service assignment or resuming a duty tour.
  - Train identification for each assignment required to be reported by this part, except for the following employees who may instead report the unique job or train identification identifying their assignment:
    - Utility employees assigned to perform covered service who are identified as such by a unique job or train identification.
    - Employees assigned to yard jobs, except that employees assigned to perform yard jobs on all or parts of consecutive shifts must at least report the yard assignment for each shift.
    - Assignments, either regular or extra, that are specifically established to shuttle trains into and out of a terminal during a single duty tour that are identified by a unique job or train symbol as such an assignment.
  - Location, date, and beginning time of the first assignment in a duty tour and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. § 21103(b), the location, date, and beginning time of the assignment immediately following the interim release.
  - Location, date, and time relieved for the last assignment in a duty tour and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. § 21103(b), the location, date, and time relieved for the assignment immediately preceding the interim release.
  - Location, date, and time released from the last assignment in a duty tour and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. § 21103(b), the location, date, and time released from the assignment immediately preceding the interim release.
  - Beginning and ending location, date, and time for periods spent in transportation, other than any personal commuting, to the first assignment in a duty tour, from an assignment to the location of a period of interim release, from a period of interim release to the next assignment, or from the last assignment in a duty tour to the point of final release, including the mode of transportation (train, track car, railroad-provided motor vehicle, personal automobile, etc.).
  - Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

- Identification (code) of service type for any other service performed at the behest of the railroad.
- Total time on duty for the duty tour.
- Reason for any service that exceeds 12 hours' total time on duty for the duty tour.
- The total amount of time by which the sum of total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours.
- The cumulative total for the calendar month of:
  - Time spent in covered service.
  - Time spent awaiting or in deadhead transportation from a duty assignment to the place of final release.
  - Time spent in any other service at the behest of the railroad.
- The cumulative total for the calendar month of time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty.
- Number of consecutive days in which a period of time on duty was initiated.

Train employee tie-ups after maximum statutory time on duty

A full or regular tie-up is considered commingled service counting as time on duty when performed at the end of a duty tour. When a full tie-up is performed after the maximum statutory time on duty, it will result in excess service and a violation of the hours of service laws. To allow an employee to communicate limited, but essential, information to a railroad after the maximum statutory time on duty in a duty tour, a quick tie-up is allowed.

- A quick tie-up may be performed by calling or faxing information to a crew caller, or by completing a quick tie-up on a computer. An employee is limited to providing the following information during a quick tie-up. (49 CFR § 228.5)
  - 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, where applicable.
  - Basic payroll information, related only to the duty tour being tied up.
  - Employee certification.

REPORTING REQUIREMENTS

- **Actual times** must be reported on an employee's hours of duty record. Actual time is the specific time of day or the precise period of time being calculated.

Explanation: 49 CFR Part 228 requires the use of actual time for all hours of duty records. The starting and ending times for the on-duty period are actual occurrence times for these events. The precise period being calculated is the period between the starting and ending times.

- **Prior time off** is the actual time off duty between identifiable periods of service for the railroad.

Explanation: Generally, prior time off reflects the actual time off between duty tours. However, in duty tours involving interim periods of release and commingled service, prior time off may also be involved within a duty tour. The prior time-off entry for the beginning of a duty tour is the total off-duty period, calculated from the final release time of the previous duty tour to the beginning time of the current duty tour. Prior time off can also be from the end of an activity at the behest of the railroad (non-covered service), such as a rules class or a deadhead separate and apart, and the beginning of a duty tour. When more than one activity occurs in a duty tour, with or without actual time off duty, a prior time-off entry must precede the following activity. In cases where no off-duty period exists between activities, an entry of zero time off between the two activities should be reported.

For paper and electronic HOD records, FRA requires the actual number of consecutive hours off duty before going on duty, including those hours in excess of 24 hours. Entries such as "10+" are not acceptable. For paper records, entries such as "24+" are not routinely acceptable; however, they may be acceptable if there is an extended absence for vacation, sick leave, etc. FRA would not expect an employee to make extensive calculations in such situations. For electronic records, FRA allows an employee to report a prior time off of 99 hours and 59 minutes when the actual prior time off is 100 hours or more.

- **Total time on duty** is the sum of all time spent in on-duty activities (covered and commingled) in a duty tour.

Explanation: Total time on duty for a train employee includes all covered service, commingled service, deadheads to duty, and time off duty of less than 4 hours at a designated terminal and any amount of time off duty at a non-designated terminal. Total time on duty does not include arbitrary time claims for pay purposes that can be different from actual times, time spent waiting for and in deadheads from duty (limbo time), or qualifying interim periods of release of 4 hours or more at a designated terminal (time off duty).

CENTRALIZATION OF RECORDS

FRA's position regarding the maintenance of railroad hours of duty records:

- A railroad may elect to retain FRA-required records at a central location or at its system headquarters. This policy covers manually generated records required by 49 CFR Part 228.
- Electronic records generated under 49 CFR Part 228, Subpart D, must be accessible and reproducible at most railroad locations, using a railroad-provided computer and printer.
- All hours of duty records must be available for inspection and copying by the Administrator of FRA, or the Administrator's agent, during the railroad's normal business hours at its centralized recordkeeping location. Electronic records maintained under this section must be accessible for inspection, review, and printing at established locations during the railroad's normal business hours.

Electronic hours of duty recordkeeping systems

- FRA requirements for an electronic hours of duty recordkeeping system became effective in July 2009 and are found at 49 CFR Part 228, Subpart D. As such, a waiver is no longer required for a railroad to keep electronic hours of duty records.
- Because of the complexities of the electronic hours of duty recordkeeping system requirements, FRA strongly encourages any organization that wants to develop an electronic hours of duty recordkeeping system to contact FRA's hours of service subject matter expert for guidance.

REPORTING REQUIREMENTS WITH HOURS OF DUTY RECORDS EXAMPLES

This section identifies information that must be reported by a train employee on the hours of duty record and demonstrates how this information can be reported using two examples of hours of duty records. The requirements of 49 CFR § 228.9 are identified with a letter, and the requirements of 49 CFR § 228.11 are identified with a number. The information reported on the two records is identified by the corresponding number or letter from the list of requirements.

Title 49 CFR § 228.9 requires an employee's hours of duty record to contain one of the following:

Manual Records

(A) Signature of individual employee or ranking crewmember.

Electronic Records

(B) Electronic stamp with the certifying employee's name and the date and time of certification.

Title 49 CFR § 228.11 requires an employee to report the following information on his or her hours of duty record:

1. Identification of employee (initials and last name).

2. Each covered service position held by an employee during a duty tour (engineer, conductor, hostler, etc.).

3. The amount of time off duty before beginning the initial activity in a duty tour, or any new activity in a duty tour.

4. Train identification or job identification. Train identification must be reported for items 5, 6, and 7 as defined. A unique job identification or single train identification may be used for utility employees, employees assigned to yard jobs, or employees assigned to shuttle several trains in and out of a terminal during a duty tour.

5. Location, date, and beginning time of the **first covered service assignment** (on-duty time). **On-duty time** is the actual time an employee reports for duty to begin a covered service assignment. (49 CFR § 228.5) If an employee is instructed to report for a deadhead to be transported to a covered service assignment (combined service), then the on-duty time will be at the end of the deadhead when the employee actually arrives at the on-duty location for the covered service assignment. When a duty tour exceeds 12 hours and involves an interim period of release, the beginning location, date, and time of the assignment following the interim release must be reported.

6. Location, date, and time relieved from the last activity. As defined at 49 CFR § 228.5, relieved time is the actual time that a train employee stops performing a covered service assignment or commingled service. Relieved time exists for one reason only: to establish the beginning of waiting for or in deadhead transportation from duty to a point of final release, which counts as neither time on duty nor time off duty (limbo time). When an employee does not deadhead at the end of a duty tour, or when an employee performs commingled service after a deadhead, relieved time will be the same as released time. When a duty tour exceeds 12 hours and involves an interim period of release, the relieved location, date, and time of the assignment preceding the interim release must be reported. See Chapter 4, *Deadhead from duty to a point of final release.*

7. Location, date, and time released from the last assignment (final release). As defined at 49 CFR § 228.5, **final release** is the time that a train employee is released from all activities at the behest of the railroad and begins his or her statutory off-duty period. Release time comes after the completion of all required activity at the behest of the railroad and establishes the beginning of an off-duty period. In most cases, this time will be at the end of completing necessary administrative duties (pay claims, paperwork associated with the train or job, and FRA HOS reporting). For duty tours over 12 hours, this time will usually be at the end of a quick tie-up (incidental service) following a deadhead from duty to a point of final release. When a duty tour exceeds 12 hours and involves an interim period of release, the released location, date, and time of the assignment preceding the interim release must be reported.

8 Beginning and ending location, date, and time deadheading, including the mode of transportation (taxi, train, bus, etc.). If an employee is at or beyond the 12-hour point in a duty tour at a designated terminal, he or she may report an in-terminal deadhead and report the time over 12 hours as limbo time, if the employee is actually relieved (waiting for and in deadhead transportation) at or before the 12-hour point. In these cases, the beginning and ending location will be the same.

9 Beginning and ending location, date, and time performing any other activity at the behest of the railroad (activity that can commingle, such as rules class or investigation).

10 Identification code for other activity at the behest of the railroad (i.e., "RC" for rules class, "TR" for training, or "OT" for other).

11 Total time on duty. The total of all time spent in a duty tour that counts as time on duty, including covered service, deadheads to duty, commingled service, and off-duty periods of less than 4 hours or for any amount of time at a non-designated terminal. Exclude from this calculation any time spent waiting for and in deadhead transportation from duty to a point of final release (limbo time) and qualifying interim periods of release (time off duty within a duty tour).

12 Reason for service exceeding 12 hours of time on duty. An employee is required to give an explanation of why he or she exceeded the statutory maximum time on duty.

13 The sum total of time on duty and time waiting for or in deadhead transportation to a point of final release exceeding 12 hours (time required to be added to the statutory off-duty period).

The following three items may be reported separately from the individual hours of duty record.

14 The cumulative total time for a calendar month performing any service for the railroad (time toward the 276-hour monthly maximum).

15 The cumulative total for a calendar month of time spent waiting for or in deadhead transportation to a point of final release over 12 hours. To calculate the time for this requirement, add the time on duty and the time spent waiting for or in deadhead transportation to a point of final release for the duty tour. Report all time spent waiting for and in deadhead transportation from duty to a point of final release in excess of 12 hours from this calculation (time toward the 30-hour monthly limbo cap).

16 The number of consecutive days an employee has initiated an on-duty period. See Chapter 1, *Consecutive day limitation—initiating on-duty periods.*

HOURS OF DUTY RECORD

EMPLOYEE NAME: WF YOUNG (1)

COVERED SERVICE POSITION: ENGINEER (2)

PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
(3) 14 hours	(9) BEGINNING	TR (10)	A	11-Feb	9:00
	(9) ENDING	TR	A	11-Feb	10:00
(3) 0 hours	(5) ON DUTY	Z21 (4)	A	11-Feb	10:00
(3) 0 hours	(8) BEGINNING	DH-X (8)	B	11-Feb	17:00
	(8) ENDING	DH-X (8)	C	11-Feb	18:50
	(6) RELIEVED	Z21	C	11-Feb	19:00
	(7) RELEASED	Z21	C	11-Feb	19:00

TOTAL TIME ON-DUTY: 10 hours (11)

TOTAL TIME OVER 12 HOURS: 0 hours (13)

SIGNATURE:_____(A)_____ DATE:_____

COMMENTS:_____(12)_____

In this example, to comply with the reporting requirements for deadheading and providing the mode of transportation, the activity code for deadheading is "DH," and the mode of transportation code for taxi is "X" (DH-X). In addition, the code "TR" is used in these two examples to represent training. If the railroad uses codes to represent activities and modes of transportation, a list of the codes must be made available to employees and FRA officials for reference.

Note: This hours of duty record is used as an example only and is not intended to represent FRA approval or endorsement of this record style or format.

HOURS OF DUTY RECORD

Job or train	Z21 (4)

Employee	EMP OCC	Prior Time Off	On Duty (5)			Relieved (6)			Released (7)			Total time on duty	Time over 12 hours
			Location	Date	Time	Location	Date	Time	Location	Date	Time		
WF YOUNG	ENG	0 hours	A	2/11	10:00	C	2/11	19:00	C	2/11	19:00	10 hours	0 hours
IJ TOOLONG	CON	0 hours	A	2/11	10:00	C	2/11	19:00	C	2/11	19:00	10 hours	0 hours
(1)	(2)	(3)										(11)	(13)

Activity

(Deadhead, Comingled Service, Seniority Move or Error Reporting)

Employee occupation	Mode of transport	Act. Code	Prior Time Off	Beginning			Ending			Remarks
				Location	Date	Time	Location	Date	Time	
ENG	(9)	TR	14 hours	A	2/11	09:00	A	2/11	10:00	Radio rules training
CON		TR	14 hours	A	2/11	09:00	A	2/11	10:00	
ENG	X (8)	DH	0 hours	B	2/11	17:00	C	2/11	18:50	Deadhead to home terminal
CON	X	DH	0 hours	B	2/11	17:00	C	2/11	18:50	
		(10)	(3)							

Certification: WF YOUNG 2/11/11 19:00; IJ TOOLONG 2/11/11 18:58 (B)

COMMENTS: (12)

(14) (15) (16) The railroad has the option of reporting these three requirements on a separate record or on each hours of duty record, but this information must be made available on request from the employee or an FRA representative.

Note: This hours of duty record is used here as an example only, and is not intended to represent FRA approval or endorsement of this record style or format.

MONTHLY REPORTS OF EXCESS SERVICE

- In general, each railroad, or a contractor or a subcontractor of a railroad, must report to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, each instance of train employee excess service listed at 49 CFR § 228.19(b).
- Excess service must be reported to FRA within 30 days after the end of the calendar month in which it occurs.
- When mailing reports of excess service to FRA, an FRA Form 6180.3–Hours of Service Report must be used.
- For train employees, the following instances of excess service must be reported to FRA:
    - When a train employee is on duty for more than 12 consecutive hours.
    - When a train employee continues on duty without at least 10 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 10 consecutive hours off duty and the duty tours that constitute more than a total of 12 hours of time on duty must be reported.
    - When a train employee returns to duty without at least 10 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 10 consecutive hours off duty and constitute more than a total of 12 hours of time on duty must be reported.
    - When a train employee returns to duty without additional time off duty, equal to the total amount of time by which the employee's sum of total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours.

Note: The first four bullet points basically require a railroad to report any instance of a train employee exceeding 12 hours of time on duty in a duty tour, or any instance of a train employee being on duty after the 24-hour point in a duty tour.

- When a train employee exceeds a cumulative total of 276 hours in the following activities in a calendar month:
    - Time spent in covered service.
    - Time spent awaiting or in deadhead transportation from a duty assignment to the place of final release.
    - Time spent in any other service at the behest of the railroad.
- When a train employee initiates an on-duty period on more than 6 consecutive days, when the on-duty period on the sixth consecutive day ended at the employee's home terminal, and the seventh consecutive day is not allowed per a collective bargaining agreement or pilot project.

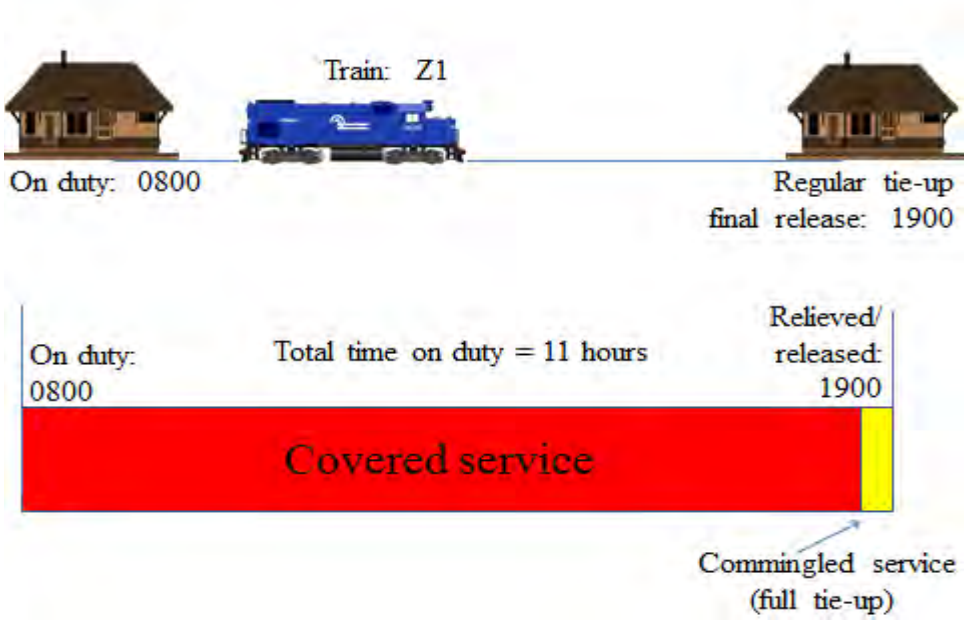
- When a train employee returns to duty after initiating an on-duty period on 6 consecutive days, without 48 consecutive hours off duty at the employee's home terminal.
- When a train employee initiates an on-duty period on more than 7 consecutive days.
- When a train employee returns to duty after initiating an on-duty period on 7 consecutive days, without 72 consecutive hours off duty at the employee's home terminal.
- When a train employee exceeds 30 hours in any calendar month of time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty.

PART I: TRAIN EMPLOYEES

Chapter 9: Examples of duty tours with hours of duty records

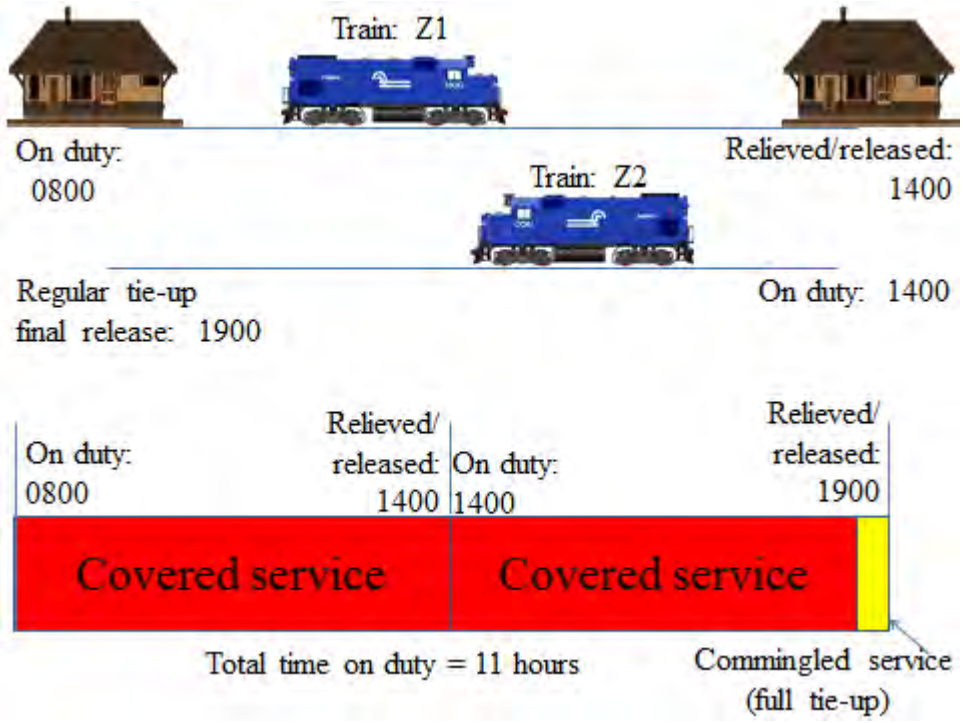
This chapter gives examples of common train employee work assignments, defines each period of time within the work assignments, and gives examples of how those times must be reported on an hours of duty record. The hours of duty records presented in this chapter do not represent an endorsed hours of duty record format and do not contain all required information, such as signatures, employee names, covered service positions, or modes of transportation with reported deadheads. See Chapter 8 for hours of duty record requirements.

EXAMPLE 1: DUTY TOUR WITH COVERED SERVICE ASSIGNMENT ONLY



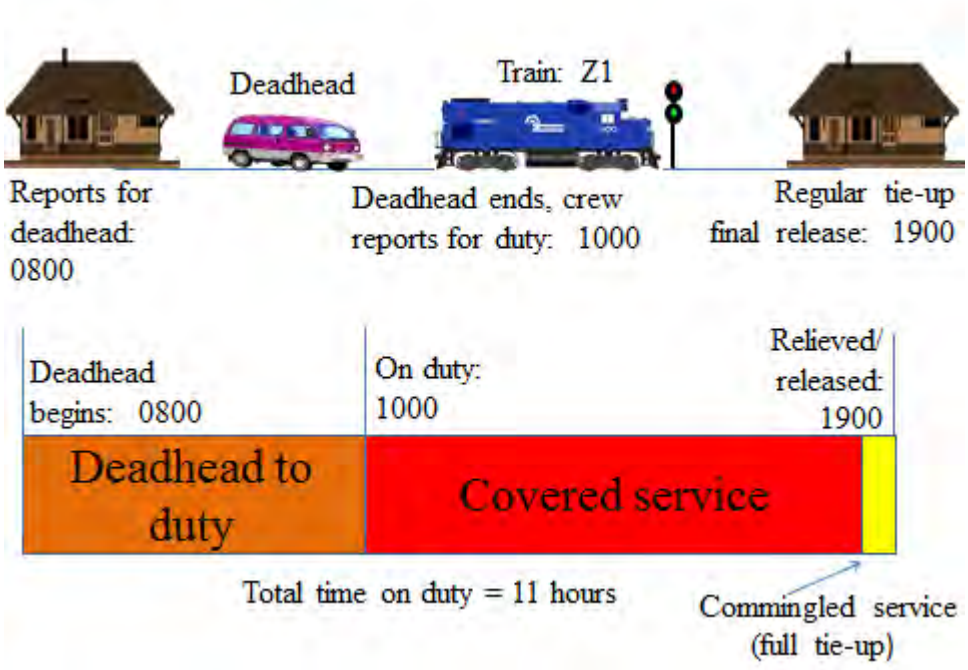
HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On duty	Z1	A	12-21-2012	08:00
	Relieved/released	Z1	B	12-21-2012	19:00
TOTAL TIME ON DUTY: 11 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 11 hours					
Time added to 30-hour monthly limbo limit: 0 hours					

EXAMPLE 2: DUTY TOUR WITH TWO COVERED SERVICE ASSIGNMENTS



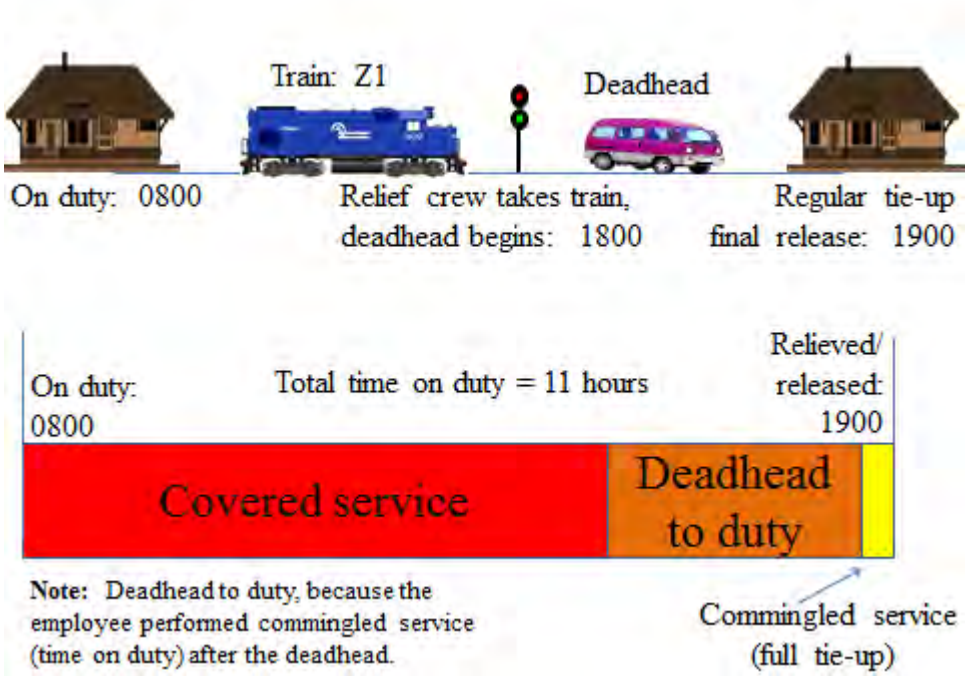
HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On duty	Z1	A	12-21-2012	08:00
	Relieved/released	Z2	A	12-21-2012	19:00
TOTAL TIME ON DUTY: 11 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 11 hours					
Time added to 30-hour monthly limbo limit: 0 hours					
Note: In this scenario an employee is only required to report the **on duty** location, date, and time of the first covered service assignment, and the **relieved and released** location, date, and time of the last covered service assignment on his or her hours of duty record. (49 CFR § 228.11(b))					

EXAMPLE 3: DUTY TOUR WITH DEADHEAD TO THE COVERED SERVICE ASSIGNMENT



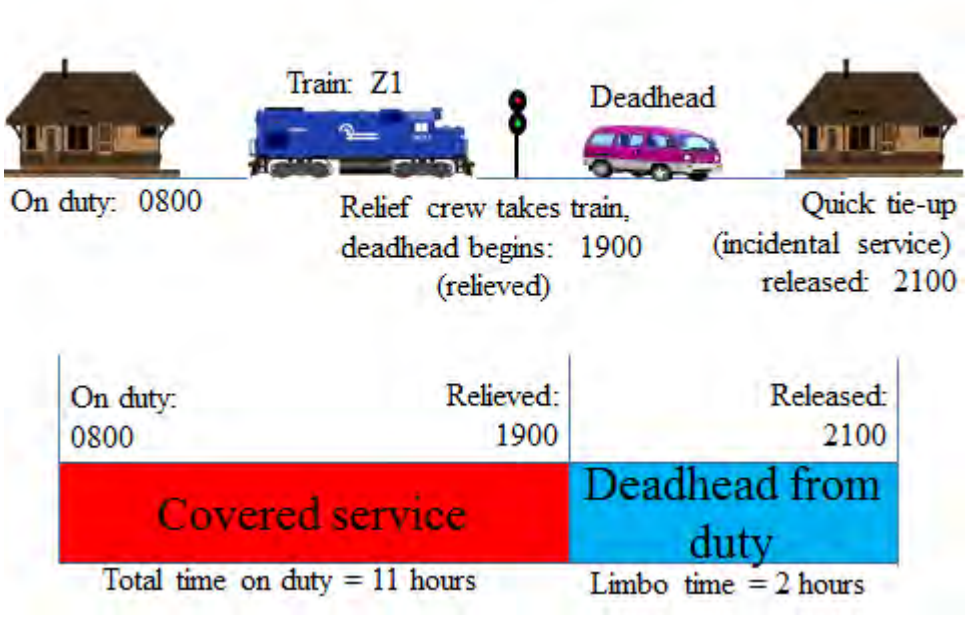
HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	Beginning	Deadhead	A	12-21-2012	08:00
	Ending	Deadhead	B	12-21-2012	10:00
0 hours	On duty	Z1	B	12-21-2012	10:00
	Relieved/released	Z1	C	12-21-2012	19:00
TOTAL TIME ON DUTY: 11 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 11 hours					
Time added to 30-hour monthly limbo limit: 0 hours					

EXAMPLE 4: DUTY TOUR WITH DEADHEAD AFTER COVERED SERVICE ASSIGNMENT



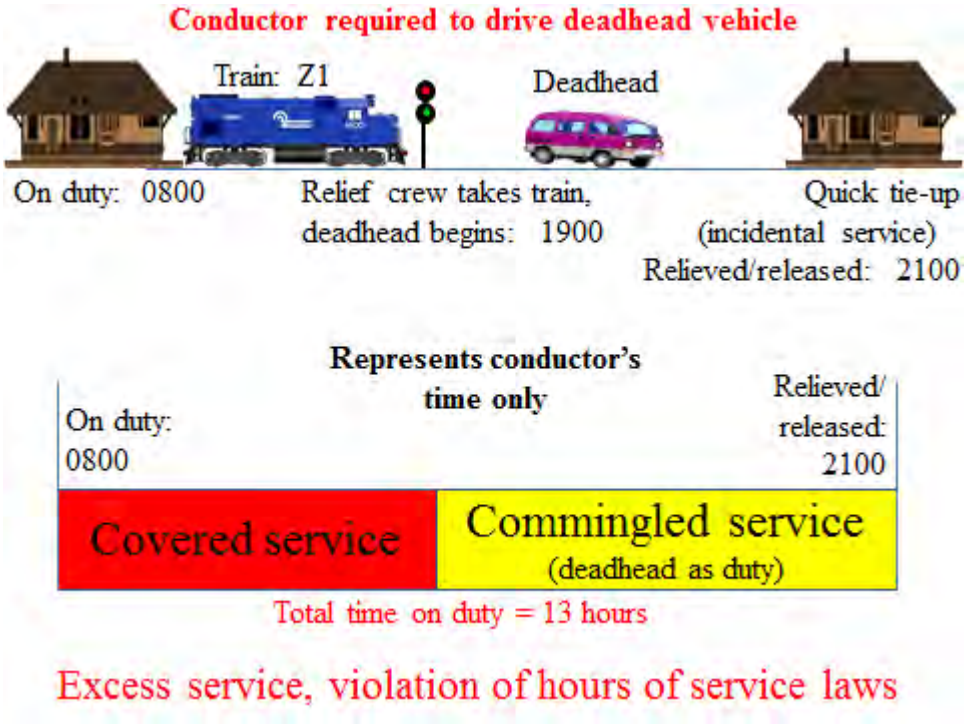
HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On duty	Z1	A	12-21-2012	08:00
0 hours	Beginning	Deadhead	B	12-21-2012	18:00
	Ending	Deadhead	C	12-21-2012	19:00
	Relieved/released	Z1	C	12-21-2012	19:00
TOTAL TIME ON DUTY: 11 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 11 hours					
Time added to 30-hour monthly limbo limit: 0 hours					

EXAMPLE 5: DUTY TOUR WITH DEADHEAD FROM DUTY TO A POINT OF FINAL RELEASE



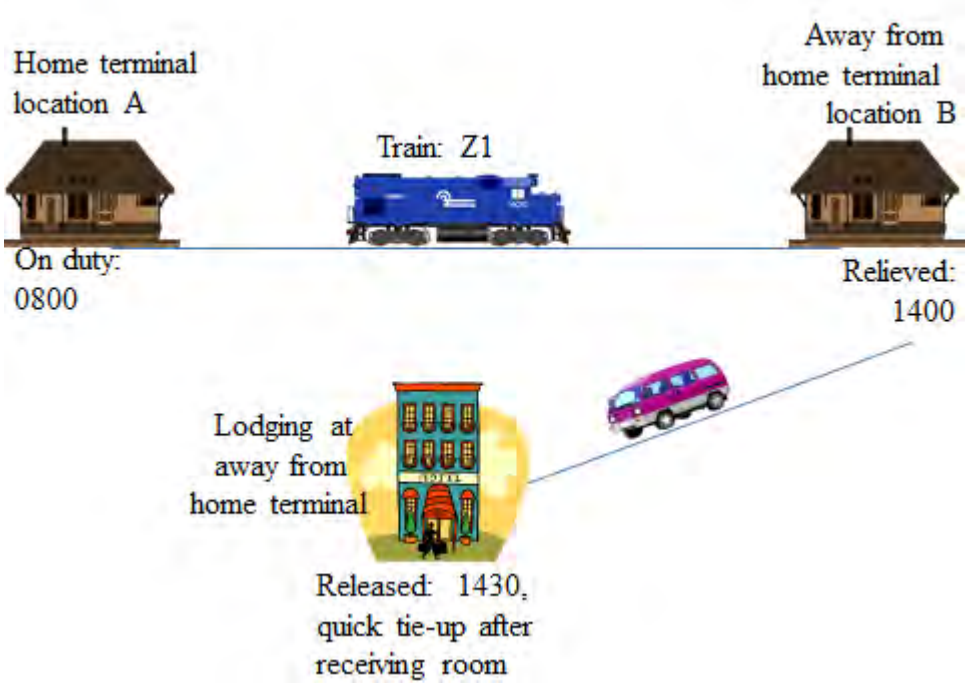
HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On duty	Z1	A	12-21-2012	08:00
	Relieved	Z1	B	12-21-2012	19:00
0 hours	Beginning	Deadhead	B	12-21-2012	19:00
	Ending	Deadhead	C	12-21-2012	21:00
	Released	Z1	C	12-21-2012	21:00
TOTAL TIME ON DUTY: 11 hours			**TOTAL TIME OVER 12 HOURS: 1 hour**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 13 hours					
Time added to 30-hour monthly limbo limit: 1 hour					

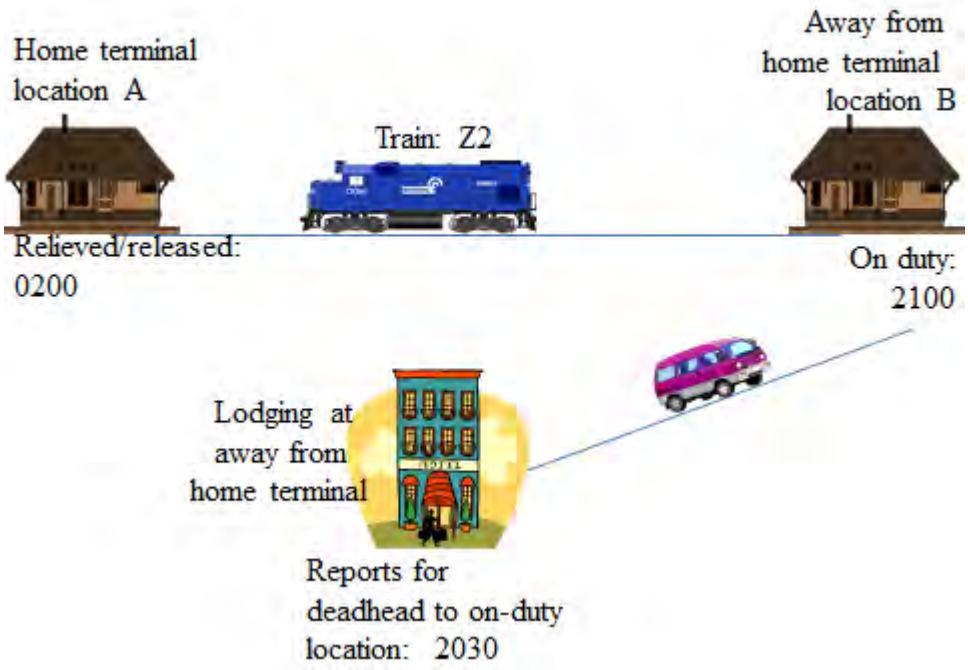
EXAMPLE 6: DUTY TOUR WITH DEADHEAD AFTER COVERED SERVICE ASSIGNMENT

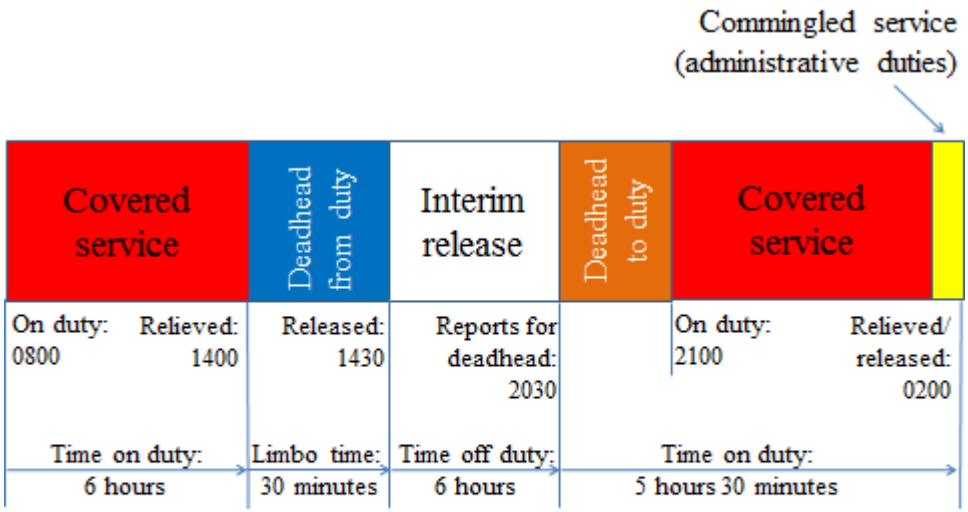


HOURS OF DUTY RECORD					
COVERED SERVICE POSITION: CONDUCTOR					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On duty	Z1	A	12-21-2012	08:00
0 hours	Beginning	Deadhead	B	12-21-2012	19:00
	Ending	Deadhead	C	12-21-2012	21:00
	Relieved/released	Z1	C	12-21-2012	21:00
TOTAL TIME ON DUTY: 13 hours			**TOTAL TIME OVER 12 HOURS: 1 hour**		
COMMENTS: Reason for time on duty in excess of 12 hours: I was required to drive deadhead vehicle to off-duty location, commingled service.					
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 13 hours					
Time added to 30-hour monthly limbo limit: 0 hours					

EXAMPLE 7: DUTY TOUR WITH INTERIM PERIOD OF RELEASE AT AWAY FROM HOME TERMINAL



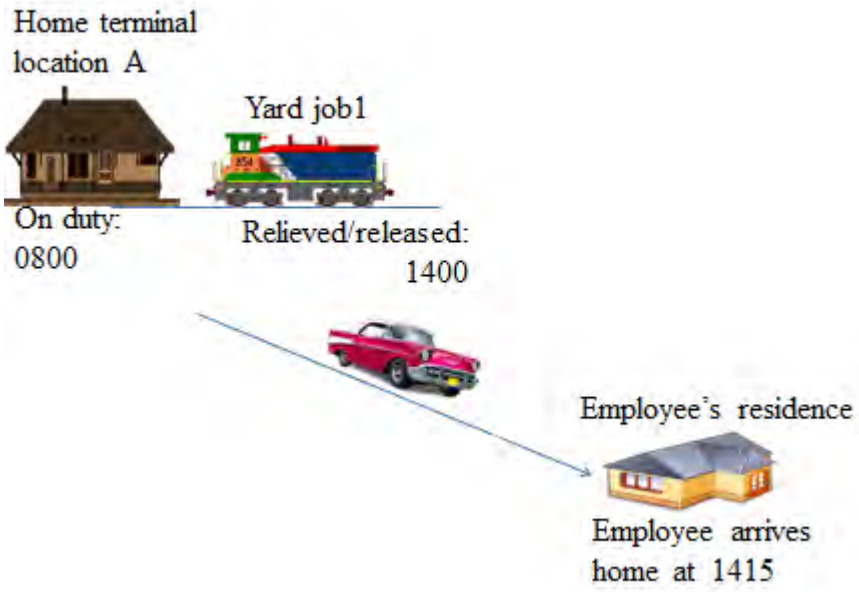


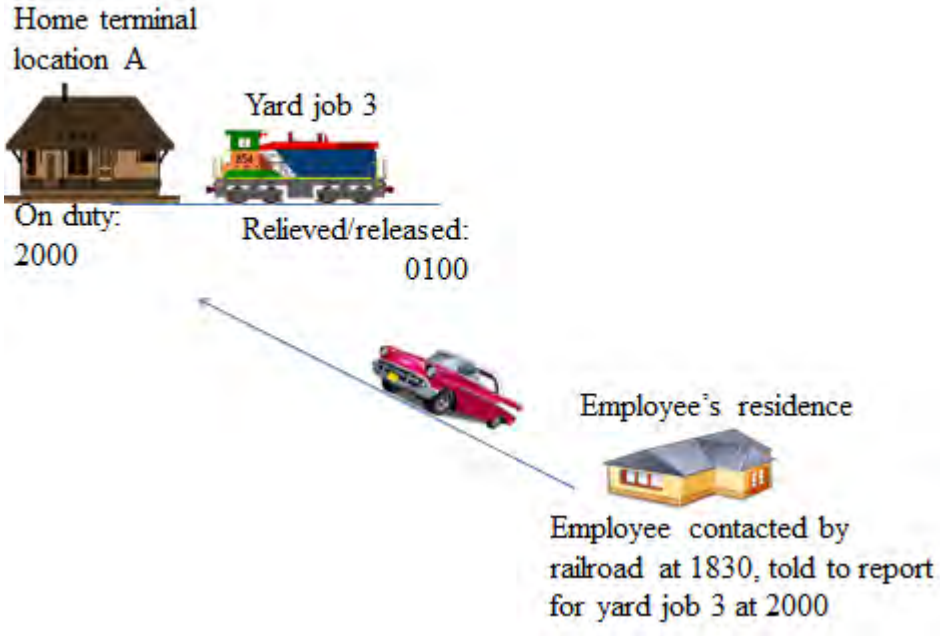


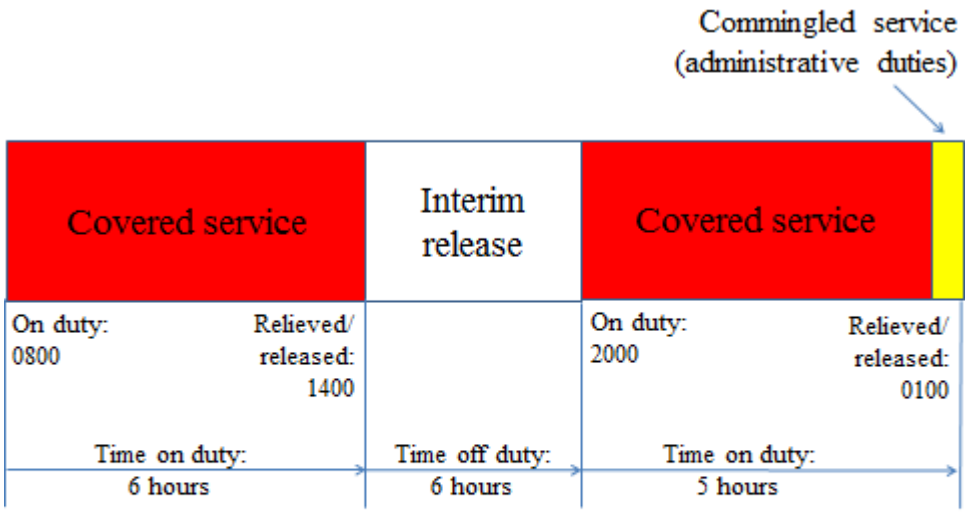
Total time on duty: 11 hours 30 minutes
Total time in duty tour: 18 hours

HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On Duty	Z1	A	12-21-2012	08:00
	Relieved	Z1	B	12-21-2012	14:00
0 hours	Beginning	Deadhead	B	12-21-2012	14:00
	Ending	Deadhead	HOTEL	12-21-2012	14:30
	Released	Z1	HOTEL	12-21-2012	14:30
6 hours	Beginning	Deadhead	HOTEL	12-21-2012	20:30
	Ending	Deadhead	B	12-21-2012	21:00
0 hours	On Duty	Z2	B	12-21-2012	21:00
	Relieved/released	Z2	A	12-22-2012	02:00
TOTAL TIME ON DUTY: 11 hours 30 minutes			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 12 hours					
Time added to 30-hour monthly limbo limit: 0 hours					
Note: In this scenario **the relieved and released** location, date, and time must be reported for the covered service assignment before the interim period of release, and the **on duty** location, date, and time must be reported for the covered service assignment following the interim period of release. (49 CFR § 228.11(b))					

EXAMPLE 8: DUTY TOUR WITH INTERIM PERIOD OF RELEASE AT HOME TERMINAL



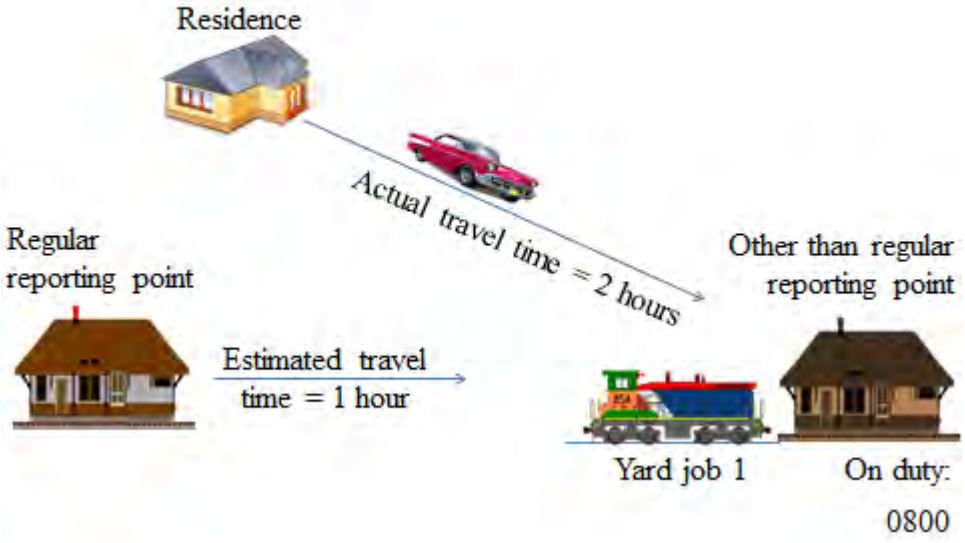


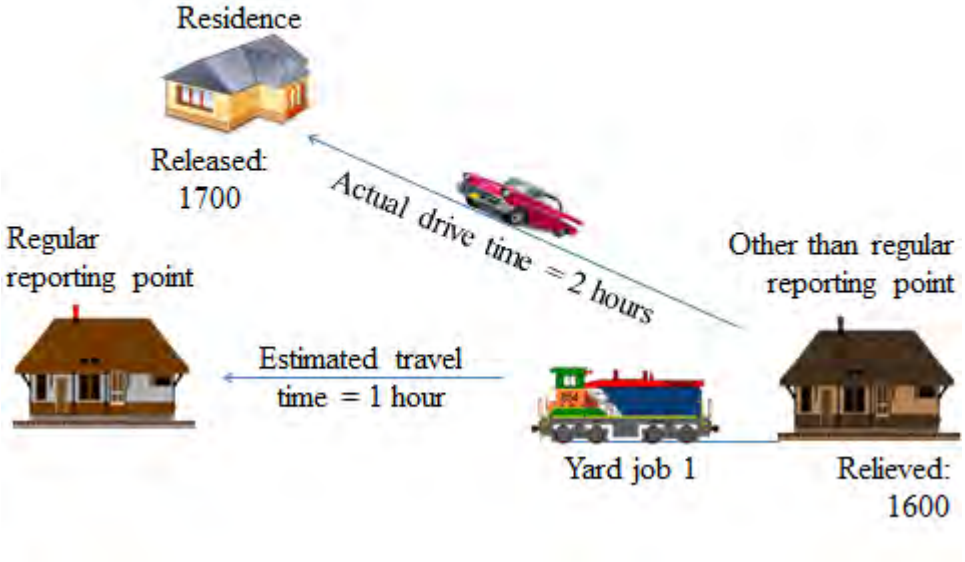


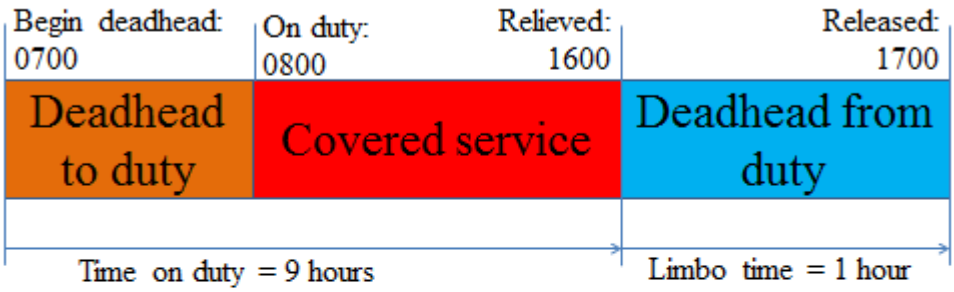
Total time on duty: 11 hours
Total time in duty tour: 17 hours

HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On Duty	Yard Job 1	A	12-21-2012	08:00
	Relieved/released	Yard Job 1	A	12-21-2012	14:00
6 hours	On Duty	Yard Job 3	A	12-21-2012	20:00
	Relieved/released	Yard Job 3	A	12-22-2012	01:00
TOTAL TIME ON DUTY: 11 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 11 hours					
Time added to 30-hour monthly limbo limit: 0 hours					
Note: In this scenario **the relieved and released** location, date, and time must be reported for the covered service assignment before the interim period of release, and the **on duty** location, date, and time must be reported for the covered service assignment following the interim period of release. (49 CFR § 228.11(b))					

EXAMPLE 9: DUTY TOUR WITH DEADHEAD TO OTHER THAN REGULAR REPORTING POINT (EMPLOYEE VOLUNTARILY DRIVES DEADHEAD VEHICLE)





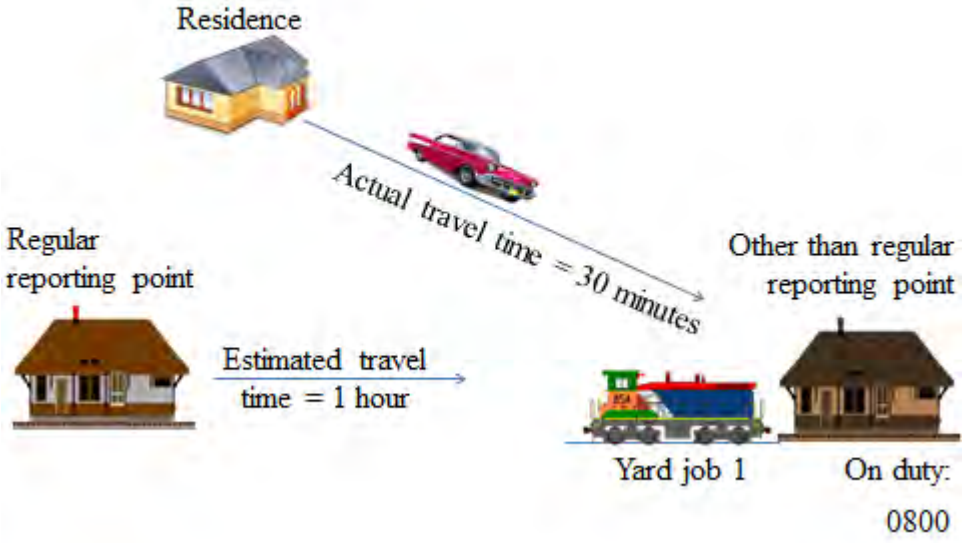


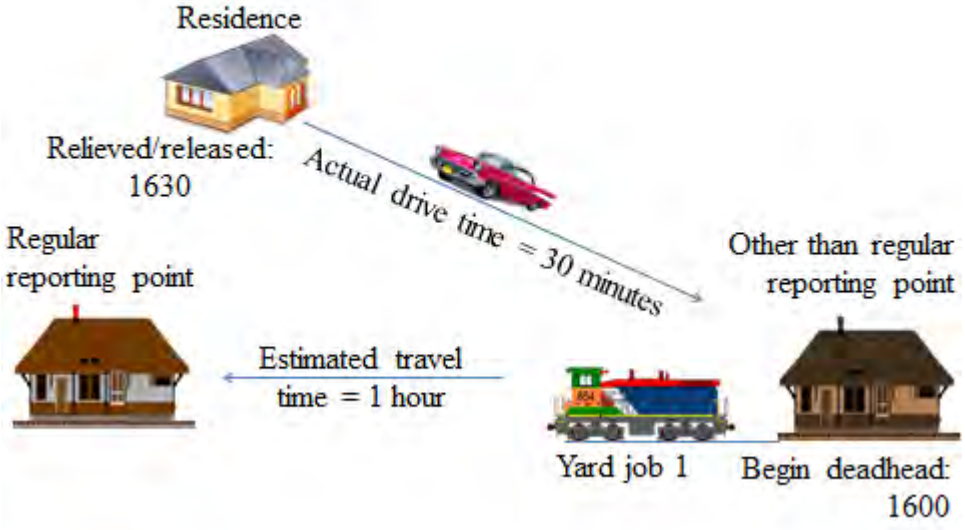
Note: To determine deadhead time, the employee compares the actual driving time between his or her home and the other than regular reporting point with the estimated driving time between the regular reporting point and the other than regular reporting point and reports the lesser of the two as time spent deadheading.

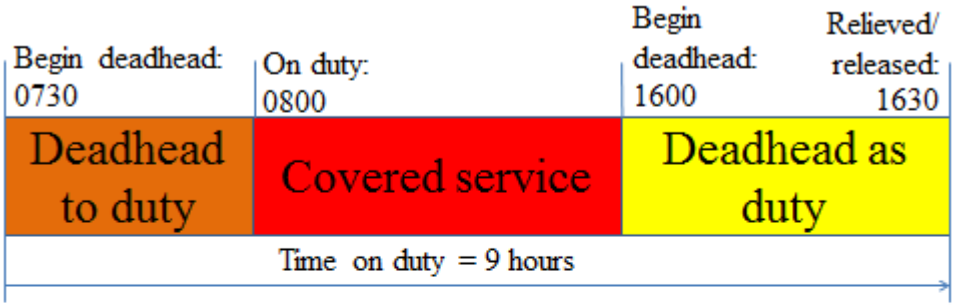
After arriving home at the end of the duty tour, a brief call to the railroad to report the release time is considered a quick tie-up (incidental service).

HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	Beginning	Deadhead	Home	12-21-2012	07:00
	Ending	Deadhead	A	12-21-2012	08:00
0 hours	On Duty	Yard job 1	A	12-21-2012	08:00
	Relieved	Yard job 1	A	12-21-2012	16:00
0 hours	Beginning	Deadhead	A	12-21-2012	16:00
	Ending	Deadhead	Home	12-21-2012	17:00
	Released	Yard job 1	Home	12-21-2012	17:00
TOTAL TIME ON DUTY: 9 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 07:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 10 hours					
Time added to 30-hour monthly limbo limit: 0 hours					
Note: FRA views a reported location of the "home" on an hours of duty record as being the same as the employee's regular reporting point.					

EXAMPLE 10: DUTY TOUR WITH DEADHEAD TO OTHER THAN REGULAR REPORTING POINT (RAILROAD REQUIRES EMPLOYEE TO DRIVE DEADHEAD VEHICLE)





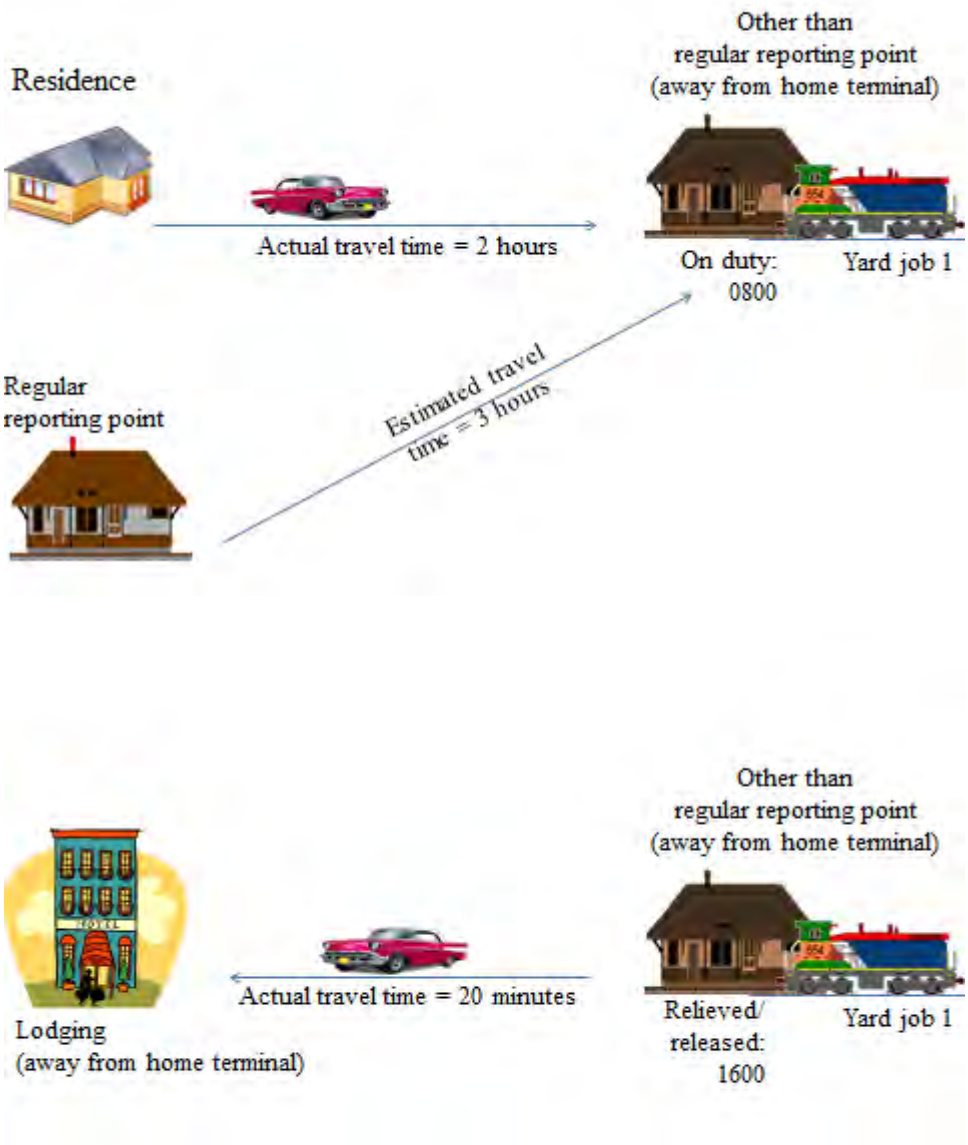


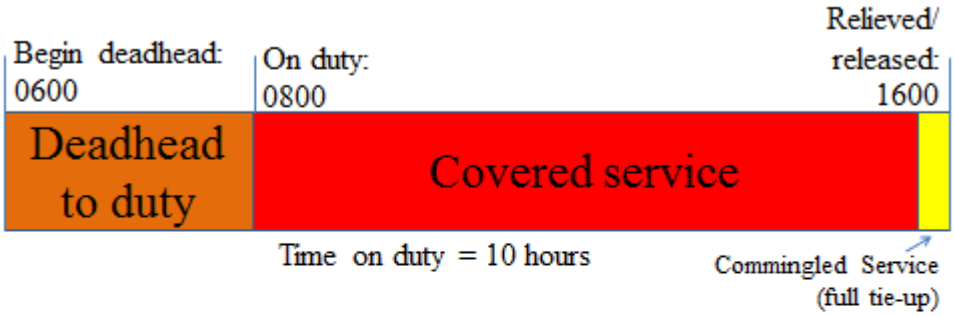
Note: To determine deadhead time, the employee compares the actual driving time between his or her home and the other than regular reporting point with the estimated driving time between the regular reporting point and the other than regular reporting point and reports the lesser of the two as time spent deadheading.

After arriving home at the end of the duty tour, a brief call to the railroad to report the release time is considered a quick tie-up (incidental service).

HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	Beginning	Deadhead	Home	12-21-2012	07:30
	Ending	Deadhead	A	12-21-2012	08:00
0 hours	On duty	Yard job 1	A	12-21-2012	08:00
0 hours	Beginning	Deadhead	A	12-21-2012	16:00
	Ending	Deadhead	Home	12-21-2012	16:30
	Relieved/released	Yard job 1	Home	12-21-2012	16:30
TOTAL TIME ON DUTY: 9 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 07:30 on 12-21-2012					
Time added to 276-hour monthly activity limit: 9 hours					
Time added to 30-hour monthly limbo limit: 0 hours					
Note: FRA views a reported location of the "home" on an hours of duty record as being the same as the employee's regular reporting point.					

EXAMPLE 11: DUTY TOUR WITH DEADHEAD TO OTHER THAN REGULAR REPORTING POINT (RAILROAD REQUIRES EMPLOYEE TO DRIVE DEADHEAD VEHICLE)



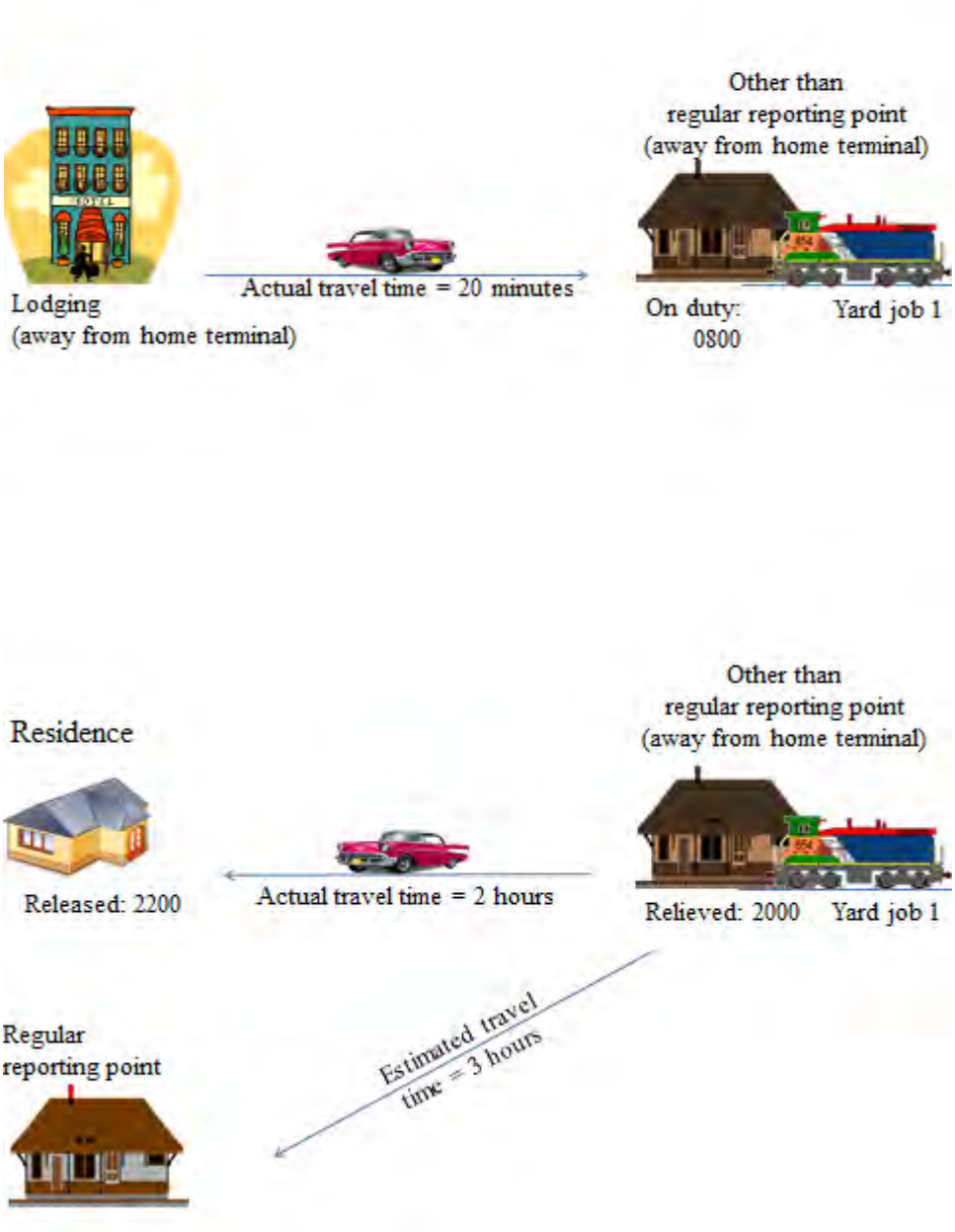


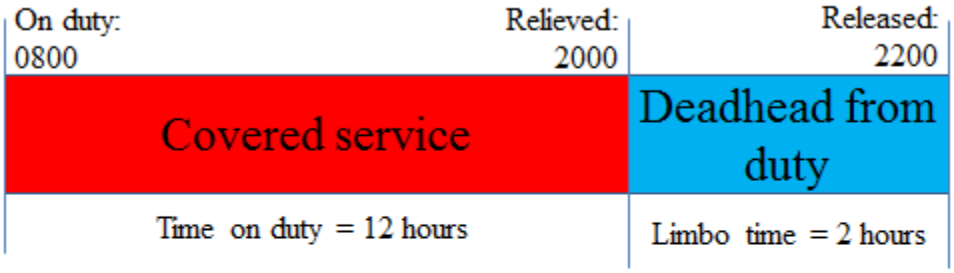
Note: This duty tour represents an employee taking a temporary hold-down, or an extra-board employee required to protect a job at an away from home terminal. Travel to the temporary assignment must be reported as a deadhead.

When assigned for multiple days at the away from home terminal, travel between the duty location and lodging of 30 minutes or less is considered commuting and counts as time off duty.

HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	Beginning	Deadhead	Home	12-21-2012	06:00
	Ending	Deadhead	B	12-21-2012	08:00
0 hours	On duty	Yard job 1	B	12-21-2012	08:00
	Relieved/released	Yard job 1	B	12-21-2012	16:00
TOTAL TIME ON DUTY: 10 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 06:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 10 hours					
Time added to 30-hour monthly limbo limit: 0 hours					
Note: FRA views a reported location of the "home" on an hours of duty record as being the same as the employee's regular reporting point.					

EXAMPLE 12: DUTY TOUR WITH DEADHEAD FROM OTHER THAN REGULAR REPORTING POINT (EMPLOYEE GIVEN OPTION TO RECEIVE STATUTORY OFF-DUTY PERIOD AT LODGING BEFORE DEADHEAD)





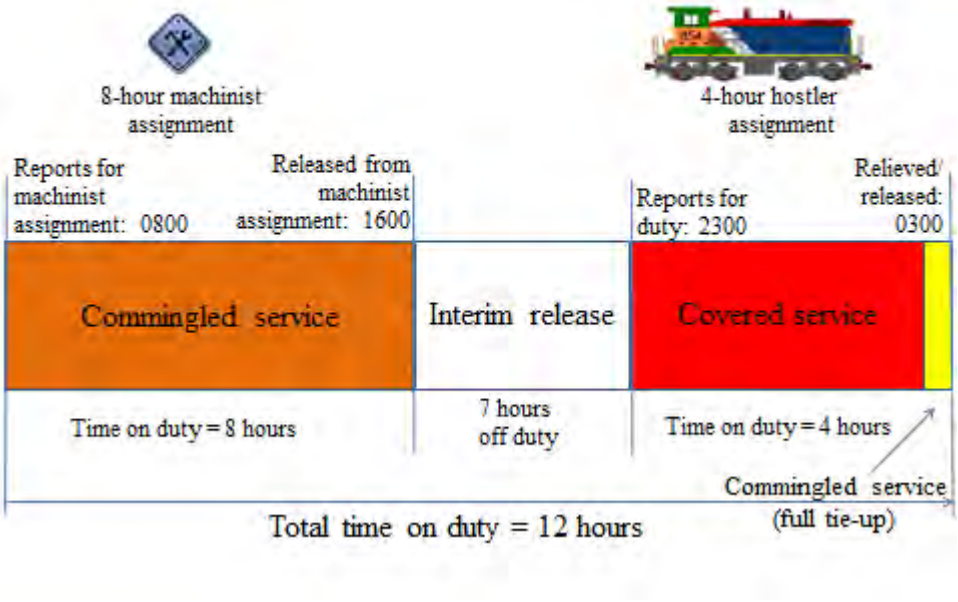
Note: This duty tour represents an employee taking a temporary hold-down, or an extra-board employee required to protect a job at an away from home terminal. Travel from the temporary assignment back to the employee's home can count as a deadhead from duty to a point of final release (limbo time), if the employee is not required to drive the deadhead vehicle or perform commingled service after the deadhead.

When assigned for multiple days at an away from home terminal, travel between the duty location and lodging of 30 minutes or less counts as time off duty.

HOURS OF DUTY RECORD

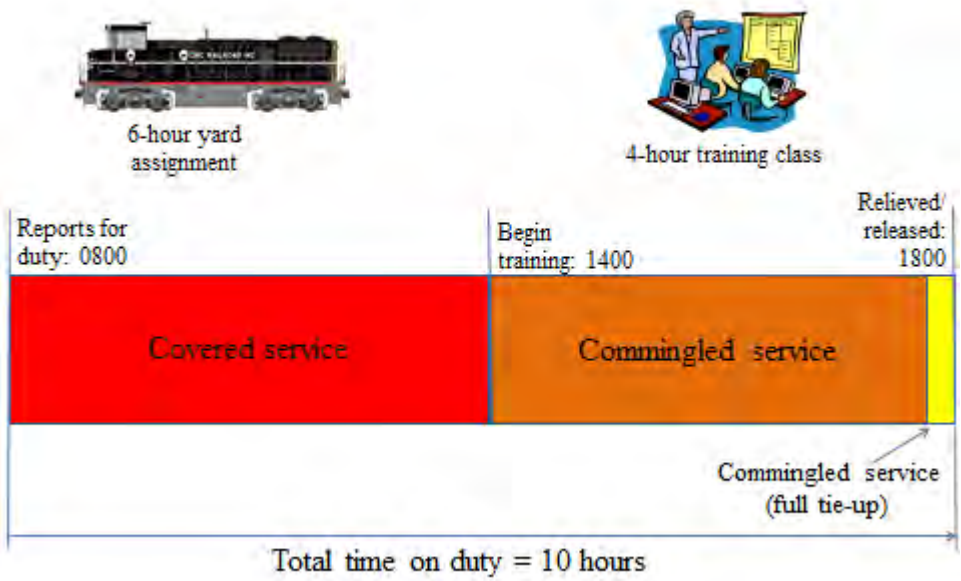
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On duty	Yard job 1	B	12-21-2012	08:00
	Relieved	Yard job 1	B	12-21-2012	20:00
0 hours	Beginning	Deadhead	B	12-21-2012	20:00
	Ending	Deadhead	Home	12-21-2012	22:00
	Released	Yard job 1	Home	12-21-2012	22:00
TOTAL TIME ON DUTY: 12 hours			**TOTAL TIME OVER 12 HOURS: 2 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 14 hours					
Time added to 30-hour monthly limbo limit: 2 hours					
Note: FRA views a reported location of the "home" on an hours of duty record as being the same as the employee's regular reporting point.					

EXAMPLE 13: DUTY TOUR WITH COMMINGLED SERVICE (SCENARIO 1)



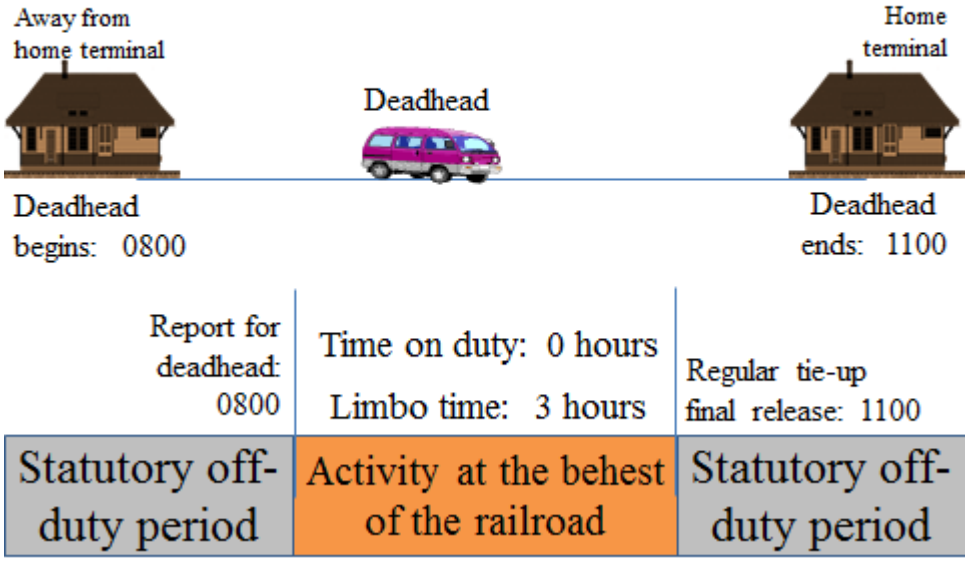
HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	Beginning	Mechanical duties	A	12-21-2012	08:00
	Ending	Mechanical duties	A	12-21-2012	16:00
7 hours	On Duty	Hostler job 1	A	12-21-2012	23:00
	Relieved/Released	Hostler job 1	A	12-22-2012	03:00
TOTAL TIME ON DUTY: 12 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 12 hours					
Time added to 30-hour monthly limbo limit: 0 hours					

EXAMPLE 14: DUTY TOUR WITH COMMINGLED SERVICE (SCENARIO 2)



HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	On duty	Yard Job 1	A	12-21-2012	08:00
0 hours	Beginning	Training class	A	12-21-2012	14:00
	Ending	Training class	A	12-21-2012	18:00
	Relieved/Released	Yard job 1	A	12-21-2012	18:00
TOTAL TIME ON DUTY: 10 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: 08:00 on 12-21-2012					
Time added to 276-hour monthly activity limit: 10 hours					
Time added to 30-hour monthly limbo limit: 0 hours					

EXAMPLE 15: NON-COVERED SERVICE (DEADHEAD SEPARATE AND APART)



HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	Beginning	Deadhead	B	12-21-2012	08:00
	Ending	Deadhead	A	12-21-2012	11:00
TOTAL TIME ON DUTY: 0 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: N/A					
Time added to 276-hour monthly activity limit: 3 hours					
Time added to 30-hour monthly limbo limit: 0 hours					
Note: Many railroads with electronic hours of service recordkeeping systems create records of non-covered service so that the following hours of duty record will have an accurately reported prior time off and to ensure the time spent in the non-covered service is added to the monthly 276-hour activity time limit.					

EXAMPLE 16: NON-COVERED SERVICE (RULES CLASS)

Report for rules class: 0800	Time on duty: 0 hours Limbo time: 8 hours	Regular tie-up final release: 1600
Statutory off-duty period	Activity at the behest of the railroad	Statutory off-duty period

HOURS OF DUTY RECORD					
PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
14 hours	Beginning	Rules class	A	12-21-2012	08:00
	Ending	Rules class	A	12-21-2012	16:00
TOTAL TIME ON DUTY: 0 hours			**TOTAL TIME OVER 12 HOURS: 0 hours**		
On-duty period initiated: N/A					
Time added to 276-hour monthly activity limit: 8 hours					
Time added to 30-hour monthly limbo limit: 0 hours					
Note: Many railroads with electronic hours of service recordkeeping systems create records of non-covered service so that the following hours of duty record will have an accurately reported prior time off and to ensure the time spent in the non-covered service is added to the monthly 276-hour activity time limit.					

PART II: DISPATCHING SERVICE EMPLOYEES

PART II: DISPATCHING SERVICE EMPLOYEES

Chapter 10: Dispatching service employee requirements

COVERED SERVICE

From the Federal hours of service laws' (HSL) definition, a dispatching service employee means an operator, train dispatcher, or other train employee who, by the use of an electrical or mechanical device, dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements. (HSL § 21101(2))

- The handling of orders governing the movement of trains is the second type of covered service. This provision of the HSL applies to any operator, train dispatcher, or other employee who, by the use of telegraph, telephone, radio, or any other electrical or mechanical device, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements. (49 CFR Part 228, Appendix A)
- FRA interprets "orders" to mean main track authority affecting the movement of trains and includes track warrants, track bulletins, track and time, direct traffic control, and any other methods of conveying authority for trains and engines to operate on a main track or controlled siding. (OP-04-27)

Limitations on hours

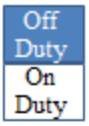
- A dispatching service employee may not be required or allowed to remain or go on duty for more than:
  - A total of 9 hours during a 24-hour period in a tower, office, station, or place at which at least 2 shifts are employed.
  - A total of 12 hours during a 24-hour period in a tower, office, station, or place at which only 1 shift is employed.

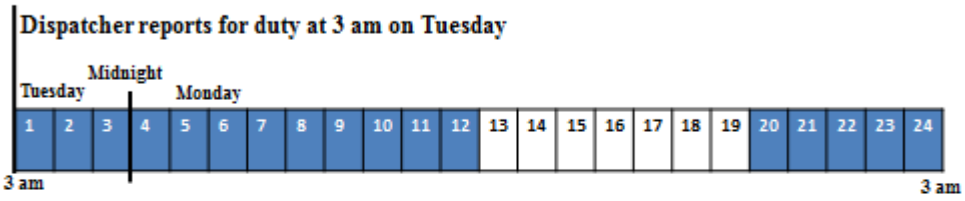
Duty tour

- A duty tour is the total of all periods of covered and/or commingled service occurring within any 24-hour period.

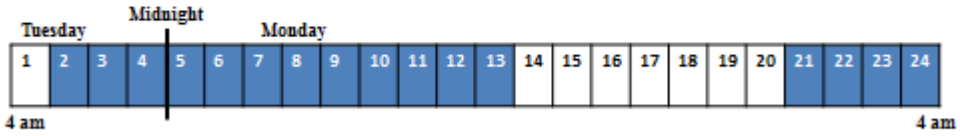
Explanation: The HSL do not mandate a minimum statutory off-duty period for dispatching service employees as they do for train employees and signal employees. Rather, maximum covered service limitations are imposed for the total time of all activities—covered and commingled service—within any 24-hour period. The 24-hour period is a "sliding window" that moves with actual time covering the previous 24 hours. At any given time, a dispatching service employee may accumulate up to the maximum allowable statutory on-duty time of 9 or 12 hours in this window. The window may include multiple on-duty periods of covered and commingled service, the sum of which must not exceed the statutory limit. Release periods less than 1 hour within the 24-hour period are considered time on duty when calculating total time on duty for the 24-hour period. Thus, for time to be considered time off duty, the employee must have at least 1 consecutive hour off duty.

Limitation of 9 or 12 hours time on duty in a 24-hour period

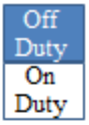


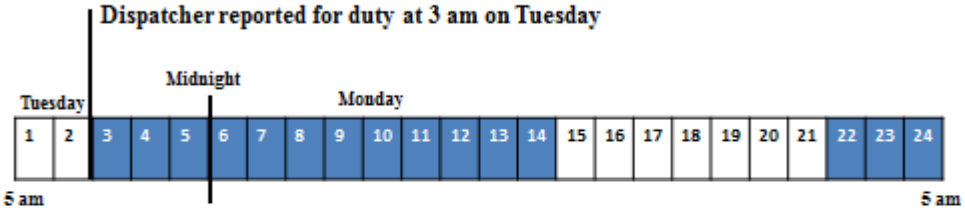


At 3 am on Tuesday, this dispatcher has 7 hours of time on duty in a 24-hour period

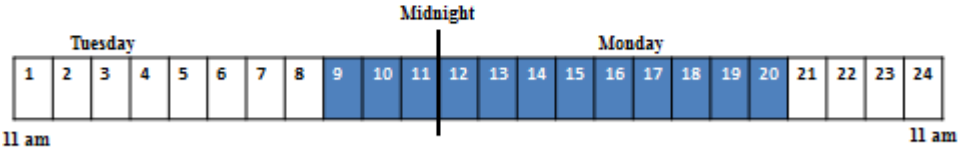


At 4 am on Tuesday, this dispatcher has 8 hours of time on duty in a 24-hour period



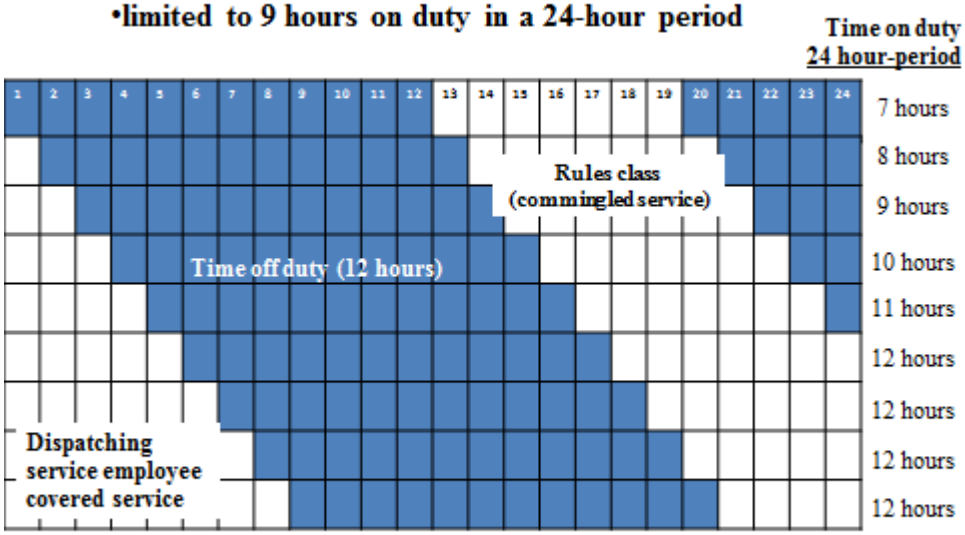


At 5 am on Tuesday, this dispatcher has 9 hours of time on duty in a 24-hour period



At 11 am on Tuesday, this dispatcher has 12 hours of time on duty in a 24-hour period

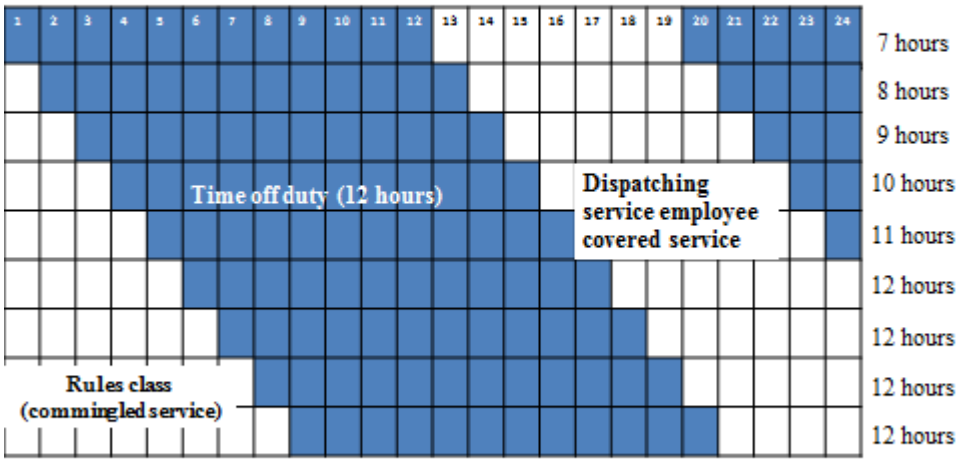
2 or more shifts at an office, tower, or station
•limited to 9 hours on duty in a 24-hour period



1 shift at an office, tower, or station
•limited to 12 hours on duty in a 24-hour period

Off Duty | On Duty

2 or more shifts at an office, tower, or station
•limited to 9 hours on duty in a 24-hour period



1 shift at an office, tower, or station
•limited to 12 hours on duty in a 24-hour period

Off Duty | On Duty

Release periods

- A minimum release of 1 hour is considered as a qualifying release that temporarily suspends the accumulation of time on duty for the preceding 24-hour period.

Explanation: A release period is considered time off duty if it provides a meaningful period of relaxation and if the employee is free of all responsibilities to the carrier. One hour is the minimum acceptable release period for this type of covered service. (49 CFR Part 228, Appendix A)

Time on duty

- Time on duty is the point in time when an employee moves from off-duty status to either covered service or service that will commingle.

Explanation: For a dispatching service employee, time on duty begins when the employee begins his or her mandatory "turnover" process or begins performing any other non-covered service in a 24-hour period that includes covered service.

Shift

- The term "shift" is not defined by the HSL, but the legislative history of the 1969 amendments indicates that it means a tour of duty constituting a day's work for one or more employees performing the same class of work at the same station who are scheduled to begin and end work at the same time.
- Per the preamble to the Statement of Agency Policy and Interpretation on the Hours of Service Act, as Amended (1977), "To recognize staggered starting times as a feature of a single 'shift' would be to invite confusion and result in the HSL being unevenly applied." (FR Vol. 42, No. 104)

Shift clarification

7 a.m. to 3 p.m..... 1 shift

7 a.m. to 12:30 p.m., 1:30 p.m. to 8 p.m. (Schedule for one employee including 1-hour lunch period) ..... 1 shift

7 a.m. to 3 p.m., 7 a.m. to 3 p.m. (Two employees scheduled) ..... 1 shift

7 a.m. to 3 p.m., 8 a.m. to 4 p.m. (Two employees scheduled) ..... 2 shifts

Travel

- When an employee is required to perform duties at other places during a duty tour, time spent traveling between these locations in the course of a duty tour is considered time on duty. (49 CFR Part 228, Appendix A)
- Traditionally, other travel time for such covered employees has not been considered time on duty, nor have such employees been considered subject to the provisions on deadheading. (49 CFR Part 228, Appendix A)
    - Other periods of transportation are viewed as personal commuting and count as time off duty. (FR Vol. 42, No. 104)

Emergency provision

- The HSL allow that when an emergency exists, a dispatching service employee may be allowed to remain or go on duty for not more than 4 additional hours during a period of 24 consecutive hours, and that they may be subject to such additional service for not more than 3 days during a period of 7 consecutive days. (HSL § 21105 (d))
- Title 49 Code of Federal Regulations Part 228, Appendix A, further clarifies the emergency provision for dispatching service employees as follows:
    - In case of emergency, an employee subject to the 9- or 12-hour limitation is permitted to work an additional 4 hours in any 24-hour period, but only for a maximum of 3 days in any period of 7 consecutive days.
    - Even in an emergency situation, the railroad must make reasonable efforts to relieve the employee.
- The emergency provision of the HSL generally permits dispatching service employees to exceed the HSL's duty limitations by 4 additional hours in any 24-hour period in case of emergency.
- In interpreting this section, FRA has consistently taken the position that an emergency cannot exist within the meaning of that section if relief employees who have not worked their total allowable hours under the HSL are available and are capable of traveling to the on-duty location.
- It should be recognized, however, that this interpretation was compelled by the fact that the only conceivable emergency situation involving dispatching service employees would be where such employees were forced to continue working solely because of the unforeseeable absence of rested relief employees.

OTHER RAILROAD EMPLOYEES

Relaying orders between railroad employees

- Relaying an order means electrically or mechanically receiving an order from a dispatching service employee and then transmitting that order to the train employees whose train movement is affected by the order.
- This clarification addresses the provision of the HSL that is applicable to any dispatching service employee or other employee who, by the use of telegraph, telephone, radio, or any other electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements.
- When an employee performs duty as a train employee or a signal employee and also relays orders, the provisions of the law applicable to dispatching service employees apply to all on-duty and off-duty periods during such aggregate time. The only exception is for train crewmembers that copy train orders affecting the movement of their own train and therefore are not subject to the more restrictive dispatcher provisions of the HSL. (OP-04-27)
- When an employee in non-covered service is used to relay an order by radio or other means of telecommunication during a tour of duty, that person is subject to the limitations of the HSL for dispatching service employees during that person's entire tour of duty.
- When an employee who is not normally covered by the provisions of the HSL uses an electrical or mechanical device to dispatch, report, transmit, receive, or deliver orders relating to or affecting train movements, that employee has performed service as a dispatching service employee. (OP-04-27)

Example: The train dispatcher of a railroad is unable to make radio contact with a train crew; however, the train dispatcher is able to contact a trainmaster at an intermediate station by telephone. The trainmaster confirms to the dispatcher that he is able to contact the train by radio. The train dispatcher issues main track authority to the trainmaster to be relayed to the train. The trainmaster copies the main track authority on the prescribed form, repeats it to the train dispatcher, and receives both a complete time and the dispatcher's initials. The trainmaster then repeats this process by relaying the main track authority to a crewmember on the train.

By relaying an order affecting the movement of a train (main track authority), the trainmaster has performed covered service as a dispatching service employee, with all attendant limitations on that class of service. Under this example, the trainmaster is subject to the dispatching service "one shift" provision and is limited to 12 hours of time on duty in a 24-hour period consistent with § 21105 of the HSL.

- If a dispatcher directs a non-covered employee to remove a train order from a printer or a fax machine and hand-carry it to a train crew, the non-covered employee has **not** performed covered service. The employee did not receive or transmit the train order and could not have materially affected the contents of the order. (OP-04-27)

Yardmasters

- If a yardmaster performs service either affecting or connected with the movement of trains, the yardmaster is subject to the constraints of either the dispatcher service section or train employee section of the HSL. See Chapter 8, *Yardmasters.* (OP-04-27)
    - Yardmaster positions will be considered as performing covered service under the dispatching service employee provisions when their duties involve:
        - Granting main track authority to trains by providing a proceed indication at a control signal or by giving verbal authority past a stop indication in centralized traffic control (CTC) territory or at a manual interlocking.
        - Issuing or relaying a mandatory directive to a train that grants main track authority.
        - Granting a train authority against the current of traffic where rules for current of traffic apply in double track territory.

Note: Usually, the repositioning of main track or yard track switches brings the yardmaster under the train employee provisions of the laws. However, if a main track switch is lined remotely as a result of a yardmaster granting a train main track authority by a signal indication at a manual interlocking, the dispatching service employee requirements at § 21105 of the HSL apply.

Yardmaster instructions that are not covered service

- An order, as it relates to affecting train movement and resulting in covered service as a dispatching service employee, is an order granting main track authority to a train.
- Confusion exists about mandatory directives being orders affecting train movement (dispatching service employee covered service). Most, but not all, orders that grant main track authority are mandatory directives, such as track warrants, track permits, etc. Some mandatory directives are not orders affecting train movement as it relates to § 21105 of the HSL, such as temporary speed restrictions.
- The following are some examples of yardmaster duties that are not considered dispatching service employee covered service:
    - Instructions (either verbal or written) issued to facilitate the routine flow of yard movements are not considered orders affecting train movement.
    - A yardmaster granting a train permission to enter a main track inside yard limit territory is not issuing an order affecting train movement, since main track authority is granted by a railroad operating rule in yard limit territory. (OP-04-27)
    - Removal of an order, such as a track warrant granting main track authority, from a printer or fax machine and delivering it to the addressed crewmember is **not** considered covered service. (OP-04-27)

Bridgetenders

FRA's application of the HSL concerning bridgetenders is functional. Therefore, if a bridgetender performs service that is connected with or affects the movement of a train, he or she is subject to the constraints of either the train employee or dispatching service employee provisions of the HSL.

- A bridgetender is performing covered service as a train employee when he or she lines switches that accommodate train movement.
- A bridgetender is performing covered service as a dispatching service employee when he or she grants main track authority to a train.
    - In such cases, the bridgetender usually controls the aspect of a signal authorizing train movement on a main track across a bridge. The bridgetender may also grant main track authority by communicating "orders," such as train orders, track warrants, manual block authority, or verbal authority to pass a stop indication.

Note: In automatic block signal territory, electrical switches used by a bridgetender to time out (run time) the opposing signal before unlocking a bridge for repositioning is **not** considered covered service under the HSL's dispatching service employee provisions. (OP-04-27)

Flagmen

- Railroad employees traditionally referred to as "flagmen" (f1aggers) perform a variety of duties that may or may not bring them under the provisions of the HSL.
- Flaggers may be assigned from a variety of crafts and may perform service that includes non-covered service, train employee covered service, or dispatching service employee covered service.
- Railroad employees will be considered as performing covered service as train employees when their duties involve lining switches for the movement of trains or engines. (OP-04-27)
- Flagmen will be considered performing covered service as dispatching service employees when they issue main track authority to trains.
    - An example is during a signal suspension in CTC territory. In these cases, a flagman at each end of the main track where the signal system has been suspended usually grants trains main track authority over that portion of the main track with suspended signals.
- One of the most common assignments for flagmen is providing protection for roadway workers. Typically, maintenance-of-way employees are assigned these tasks, but train employees may also perform such duties. In most cases, the flagman communicates with trains giving them permission to enter maintenance-of-way working limits. Because main track authority is granted to trains by a train dispatcher, not the flagman, and the flagman typically does not line switches for trains, this activity does **not** rise to the level of covered service as a train employee or a train dispatcher.

Levermen

- Levermen are ordinarily covered by the train employee provisions of the HSL.
- When levermen, by the use of telegraph, telephone, radio, or any other electrical or mechanical device, dispatch, report, transmit, receive, or deliver orders pertaining to or affecting train movements, they would of course be working within the scope of the dispatching service employees provisions.

Dispatchers in foreign countries

- Train dispatchers located in a foreign country are not subject to the HSL, even though they are dispatching trains in the United States.
  - In all but a few limited cases, foreign train dispatchers are prohibited from dispatching trains in the United States. (49 CFR Part 241)
  - Currently, there are a few railroads that have waivers allowing dispatchers in Canada to dispatch trains on a limited amount of main track territory in the United States close to the Canadian border.

PART II: DISPATCHING SERVICE EMPLOYEES

Chapter 11: Hours of service records

HOURS OF SERVICE RECORDKEEPING

Title 49 Code of Federal Regulations (CFR) Part 228 prescribes reporting and recordkeeping requirements for the hours of duty of certain railroad employees.

HOURS OF DUTY RECORDS

General requirements as outlined at 49 CFR § 228.9

Manual (paper) records

- Signed by the individual employee or ranking crewmember.
  - Train dispatchers are only required to sign the dispatcher's record of train movements if the sheet is being used as an hours of service record for the train dispatchers.
- Retained for 2 years, at a location identified by the carrier.
- Available to FRA upon request during regular business hours.

Electronic records

- Certified by the individual employee or by the reporting employee for the crew whose time is being recorded.
- Electronically stamped with the certifying employee's name and the date and time of the certification.
- Retained for 2 years in a secured file that prevents alteration after certification.
- Accessible by FRA through a railroad-provided computer, using a railroad-provided login name and password.
- Reproducible using a printer at the location where records are accessed.

Hours of duty record requirements at 49 CFR § 228.11(a)

- In general, each railroad, or a contractor or a subcontractor of a railroad, must keep a record, either manually or electronically, of the hours of duty of each employee. Each contractor or subcontractor of a railroad must also record the name of the railroad for which its employee performed covered service during the duty tour covered by the record. Employees who perform covered service assignments in a single duty tour that are subject to the recordkeeping requirements of more than one paragraph of this section must complete the record applicable to the covered service position for which they were called, and they also must record other covered service as an activity constituting other service at the behest of the railroad.

Dispatcher hours of duty record requirements at 49 CFR § 228.11(d)

- For dispatching service employees, each hours of duty record for a dispatching service employee must include the following information about the employee:
  - Identification of the employee (initials and last name, or if the last name is not the employee's surname, provide the employee's initials and surname).
  - Each covered service position in a duty tour.
  - Amount of time off duty before going on duty or returning to duty in a duty tour.
  - Location, date, and beginning time of each covered service assignment in a duty tour.
  - Location, date, and time released from each covered service assignment in a duty tour.
  - Beginning and ending location, date, and time of any other service performed at the behest of the railroad.
  - Total time on duty for the duty tour.

REPORTING REQUIREMENTS

- **Actual times** must be reported for on an employee's hours of duty record. Actual time is the specific time of day or the precise period of time being calculated.

Explanation: 49 CFR Part 228 requires the use of actual time for all hours of duty records. The starting and ending times for the on-duty period are actual occurrence times for these events. The precise period being calculated is the period between the starting and ending times.

- **Prior time off** is the actual time off duty between identifiable periods of service for the railroad.

Explanation: Generally, prior time off reflects the actual time off between duty tours. However, in duty tours involving periods of release and commingled service, prior time off may also be involved within a duty tour. The prior time-off entry for the beginning of a duty tour is the total off-duty period, calculated from the final release time of the previous duty tour to the beginning time of the current duty tour. Prior time off can also be from the end of an activity at the behest of the railroad (non-covered service), such as a rules class and the beginning of a duty tour. When more than one activity occurs in a duty tour, with or without actual time off duty, a prior time-off entry must precede the following activity. In cases where no off-duty period exists between activities, an entry of zero time off between the two activities should be reported. For written records, FRA requires the actual number of consecutive hours off duty before going on duty, including those hours in excess of 24 hours. Entries such as "10+" are not acceptable. Entries such as "24+" are not routinely acceptable; however, they may be acceptable if there is an extended absence for vacation, sick leave, etc. FRA would not expect an employee to make extensive calculations in such situations.

- **Total time on duty** is the sum of all time spent in on-duty activities (covered and commingled) in a duty tour.

Explanation: Total time on duty for a dispatcher includes all covered service, commingled service, and time off duty of less than 1 hour within a duty tour.

CENTRALIZATION OF RECORDS

FRA's position regarding the maintenance of railroad hours of duty records:

- A railroad may elect to retain FRA-required records at a central location or at its system headquarters. This policy statement covers manually generated records required by 49 CFR Part 228.

- Electronic records generated under 49 CFR Part 228, Subpart D, should be accessible and reproducible at most railroad locations using a railroad-provided computer and printer.

- All hours of duty records must be available for inspection and copying by the Administrator of FRA, or the Administrator's agent, during the railroad's normal business hours at its centralized recordkeeping location. Electronic records maintained under this section must be accessible for inspection, review, and printing at established locations during the railroad's normal business hours.

Electronic hours of duty recordkeeping systems

- Title 49 CFR Part 228, Subpart D, became effective in July 2009 and provides FRA requirements for an electronic hours of duty recordkeeping system. As such, a waiver is no longer required for a railroad to keep electronic hours of duty records.

- Because of the complexities of the electronic recordkeeping system requirements, FRA strongly encourages any organization desiring to develop a complying electronic hours of duty recordkeeping system to contact FRA's hours of service subject matter expert for guidance.

REPORTING REQUIREMENTS WITH HOURS OF DUTY RECORD EXAMPLE

This section identifies information that must be reported by a dispatching service employee on the hours of duty record and demonstrates how this information can be reported using an example of an hours of duty record. The requirements of 49 CFR § 228.9 are identified with a letter, and the requirements of 49 CFR § 228.11 are identified with a number. The information reported on the record is identified by the corresponding number or letter from the list of requirements.

Title 49 CFR § 228.9 requires an employee's hours of duty record to contain one of the following:

Manual records

A Signature; individual employee, or ranking crewmember

Electronic records

B Electronically stamped with the certifying employee's name and the date and time of certification

Title 49 CFR § 228.11 requires an employee to report the following information on his or her hours of duty record:

1. Identification of the employee (initials and last name).
2. Each covered service position held by an employee during a duty tour (dispatcher, operator, etc.).
3. Amount of time off duty before going on duty or returning to duty in a duty tour (prior time off).
4. Location, date, and beginning time of each assignment in a duty tour.
5. Location, date, and time released from each assignment in a duty tour.
6. Beginning and ending location, date, and time of any other service performed at the behest of the railroad.
7. Total time on duty for the duty tour.

HOURS OF DUTY RECORD

NAME OF EMPLOYEE: IJ TOOLONG (1)

COVERED SERVICE POSIITION: DISPATCHER (2)

PRIOR TIME OFF	HOS FUNCTION	TRAIN/JOB ID ACTIVITY	LOCATION	DATE	TIME
(3) 15 hours	BEGINNING (6)	TRAINING	DISPATCHING CENTER NORTH	11-Feb	7:00
	ENDING (6)	TRAINING	DISPATCHING CENTER NORTH	11-Feb	7:30
(3) 0 hours	ON DUTY (4)	DESK 2 JONES SUBDIVISION	DISPATCHING CENTER NORTH	11-Feb	7:30
	RELEASED (5)	DESK 2 JONES SUBDIVISION	DISPATCHING CENTER NORTH	11-Feb	16:00

TOTAL TIME ON-DUTY: 9 hours (7)

SIGNATURE/CERTIFICATION STAMP:_____ (A) (B) DATE:_____

COMMENTS:_____

Note: This hours of duty record is used as an example only and is not intended to represent FRA approval or endorsement of this record style or format.

MONTHLY REPORTS OF EXCESS SERVICE

- In general, each railroad, or a contractor or a subcontractor of a railroad, must report to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, Washington, DC 20590, each instance of dispatching service employee excess service listed at 49 CFR § 228.19(d).
- Excess service must be reported to FRA within 30 days after the end of the calendar month in which it occurs.
- When mailing reports of excess service to FRA, an FRA Form 6180.3–Hours of Service Report must be used.

- For dispatching service employees, the following instances of excess service must be reported to FRA:
  - When a dispatching service employee is on duty for more than 9 hours in any 24-hour period at an office where two or more shifts are employed.
  - When a dispatching service employee is on duty for more than 12 hours in any 24-hour period at any office where one shift is employed.

DISPATCHER'S RECORD OF TRAIN MOVEMENTS

- Each carrier must keep, for each dispatching district, a record of train movements made under the direction and control of a dispatcher who uses telegraph, telephone, radio, or any other electrical or mechanical device to dispatch, report, transmit, receive, or deliver orders pertaining to train movements. (49 CFR § 228.17)
- Generally, FRA has accepted the computerization of dispatchers' records of train movements (train sheets), as long as all of the requirements are maintained and the record can be produced by the railroad.
- Generally, FRA has not taken exception to the train sheet being in multiple sections as long as it is easily accessible.
- The following information must be included in the record:
  - Identification of the timetable in effect.
  - Location and date.
  - Identification of dispatchers and their times on duty.
  - Weather conditions at 6-hour intervals.
    - With the closure of operator stations and advances in technology, entering weather conditions at 6-hour intervals for a given location is not always practical. As such, FRA considers a railroad's continual broadcast of weather information with emergency notification of imminent adverse weather conditions that is directly accessible to the train dispatchers an acceptable alternative.
  - Identification of enginemen and conductors and their times on duty.
    - "Times on duty" refers to the beginning of their duty tour and does not include a requirement for their off-duty time.
  - Identification of trains and engines.
  - Station names and office designations.
  - Distances between stations.
  - Direction of movement and the time each train passes all reporting stations.

- Arrival and departure times of trains at all reporting stations.
- Unusual events affecting movement of trains and identification of trains affected.

PART III: SIGNAL EMPLOYEES

This part is reserved for future content.

REFERENCES

49 CFR Part 228	Title 49 Code of Federal Regulations Part 228–Hours of Service of Railroad Employees; Recordkeeping and Reporting; Sleeping Quarters.
49 CFR Part 241	Title 49 Code of Federal Regulations Part 241–United States Locational Requirement for Dispatching of United States Rail Operations.
Alcohol/Drug Manual	Part 219 Alcohol/Drug Program Compliance Manual, June 2002, Second Edition.
Congressional Record, 1978	124th Congressional Record—House of Representatives, October 13, 1978, Page 36951, adequate food and lodging at an away from home terminal.
FR Vol. 42, No. 104	Federal Register, Vol. 42, No. 104, Tuesday, May 31, 1977, Rules and Regulations.
FR Vol. 43, No. 139	Federal Register, Vol. 43, No. 139, Wednesday, July 19, 1978, Rules and Regulations.
FR Vol. 74, No. 100	Federal Register, Vol. 74, No. 100, Wednesday, May 27, 2009, Rules and Regulations.
FR Vol. 77, No. 40	Federal Register, Vol. 77, No. 40, Wednesday, February 29, 2012, Rules and Regulations.
FR Vol. 78, No. 185	Federal Register, Vol. 78, No. 185, Tuesday, September 24, 2013, Rules and Regulations.
HSL	Title 49 United States Code Chapter 211–Hours of Service (as amended by the Rail Safety Improvement Act of 2008, Public Law 110-432, signed October 16, 2008).
OP-04-03	Operating Practices Technical Bulletin OP-04-03, Suitable Food and Lodging at Designated Terminals; Hours of Service Act Interpretation, February 3, 2004.
OP-04-04	Operating Practices Technical Bulletin OP-04-04, Commingled Service Provisions; Hours of Service Interpretations, February 3, 2004.

OP-04-26	Operating Practices Technical Bulletin OP-04-26, Coverage of Inside Hostlers and their Helpers under the Hours of Service Act, February 3, 2004.
OP-04-27	Operating Practices Technical Bulletin OP-04-27, Hours of Service Interpretations (yardmasters, bridgetenders, flaggers, and relaying orders between railroad employees), February 3, 2004.
OP-04-28	Operating Practices Technical Bulletin OP-04-28, FRA's Application of the Interim Release Provisions of the Federal Hours of Service Laws, February 3, 2004.
OP-04-29	Operating Practices Technical Bulletin OP-04-29, Hours of Service Interpretations (call and release, interrupted off-duty period, reporting points, and travel time), February 3, 2004.

APPENDICES

Appendix A: Title 49 Code of Federal Regulations Part 228

Hours of Service of Railroad Employees; Recordkeeping and Reporting; Sleeping Quarters

Title 49: Transportation

PART 228—HOURS OF SERVICE OF RAILROAD EMPLOYEES; RECORDKEEPING AND REPORTING; SLEEPING QUARTERS

Contents

AUTHORITY: 49 U.S.C. 20103, 20107, 21101-21109; Sec. 108, Div. A, Public Law 110-432, 122 Stat. 4860-4866, 4893-4894; 49 U.S.C. 21301, 21303, 21304, 21311; 28 U.S.C. 2461, note; 49 CFR 1.49; and 49 U.S.C. 103.

SOURCE: 37 FR 12234, June 21, 1972, unless otherwise noted.

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Subpart A—General

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§ 228.1 Scope.

This part—

(a) Prescribes reporting and recordkeeping requirements with respect to the hours of service of certain railroad employees and certain employees of railroad contractors and subcontractors;

(b) Establishes standards and procedures concerning the construction or reconstruction of sleeping quarters;

(c) Establishes minimum safety and health standards for camp cars provided by a railroad as sleeping quarters for its employees and individuals employed to maintain its rights of way; and

(d) Prescribes substantive hours of service requirements for train employees engaged in commuter or intercity rail passenger transportation.

[43 FR 31012, July 19, 1978, as amended at 74 FR 25345, May 27, 2009; 76 FR 50396, Aug. 12, 2011; 76 FR 67087, Oct. 31, 2011]

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§ 228.3 Application and responsibility for compliance.

(a) Except as provided in paragraph (b) of this section, subparts B and D of this part apply to all railroads, all contractors for railroads, and all subcontractors for railroads. Except as provided in paragraph (b) of this section, subparts C and E of this part apply only to all railroads.

(b) Subparts B through E of this part do not apply to:

(1) A railroad, a contractor for a railroad, or a subcontractor for a railroad that operates only on track inside an installation that is not part of the general railroad system of transportation (*i.e.,* a plant railroad as defined in § 228.5);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 228.5, except as provided in § 228.413(d)(2); or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(c) The application of subpart F of this part is set forth in § 228.401.

[76 FR 67087, Oct. 31, 2011]

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§ 228.5 Definitions.

As used in this part—

Actual time means either the specific time of day, to the hour and minute, or the precise amount of time spent in an activity, in hours and minutes, that must be included in the hours of duty record, including, where appropriate, reference to the applicable time zone and either standard time or daylight savings time.

Administrator means the Administrator of the Federal Railroad Administration or any person to whom the Administrator has delegated authority in the matter concerned.

Administrative duties means any activities required by the railroad as a condition of employment, related to reporting, recording, or providing an oral or written statement related to a current, previous, or future duty tour. Such activities are considered service for the railroad, and time spent in these activities must be included in the *total time on duty* for any *duty tour* with which it may commingle.

Associate Administrator means the Associate Administrator for Railroad Safety/Chief Safety Officer, Office of Railroad Safety, Federal Railroad Administration, or any person to whom he or she has delegated authority in the matter concerned.

At the behest of the employee refers to time spent by an employee in a railroad-related activity that is not required by the railroad as a condition of employment, in which the employee voluntarily participates.

At the behest of the railroad refers to time spent by an employee in a railroad-required activity that compels an employee to perform service for the railroad as a condition of employment.

Broken (aggregate) service means one or more periods of time on duty within a single *duty tour* separated by one or more qualifying interim releases.

Call and release occurs when an employing railroad issues an employee a *report-for-duty time,* and then releases the employee from the requirement to report prior to the *report-for-duty time* .

Camp car means a trailer and/or on-track vehicle, including an outfit, camp, bunk car, or modular home mounted on a flatcar, or any other mobile vehicle or mobile structure used to house or accommodate an employee or MOW worker. An office car, inspection car, specialized maintenance equipment, or wreck train is not included.

Carrier , *common carrier* , and *common carrier engaged in interstate or foreign commerce by railroad* mean *railroad* .

Commingled service means—

(1) For a train employee or a signal employee, any non-covered service at the behest of the railroad and performed for the railroad that is not separated from *covered service* by a qualifying statutory off-duty period of 8 or 10 hours or more. Such commingled service is counted as time on duty pursuant to 49 U.S.C. 21103(b)(3) (for train employees) or 49 U.S.C. 21104(b)(2) (for signal employees).

(2) For a dispatching service employee, any non-covered service mandated by the railroad and performed for the railroad within any 24-hour period containing *covered service* . Such commingled service is counted as time on duty pursuant to 49 U.S.C. 21105(c).

Commuting means—

(1) For a train employee, the time spent in travel—

(i) Between the employee's residence and the employee's *regular reporting point* , and

(ii) In railroad-provided or authorized transportation to and from the lodging facility at the away-from-home terminal (excluding travel for purposes of an interim release), where such time (including travel delays and room availability) does not exceed 30 minutes.

(2) For a signal employee, the time spent in travel between the employee's residence and the employee's *headquarters* .

(3) For a dispatching service employee, the time spent in travel between the employee's residence and any reporting point.

Consecutive service is a period of unbroken *total time on duty* during a *duty tour* .

Covered service means—

(1) For a train employee, the portion of the employee's time on duty during which the employee is engaged in, or connected with, the movement of a train.

(2) For a dispatching service employee, the portion of the employee's time on duty during which the employee, by the use of an electrical or mechanical device, dispatches, reports, transmits, receives, or delivers an order related to or affecting the movement of a train.

(3) For a signal employee, the portion of the employee's time on duty during which the employee is engaged in installing, repairing, or maintaining a signal system.

Covered service assignment means—

(1) For a train employee, each unique assignment of the employee during a period of *covered service* that is associated with either a specific train or a specific yard job.

(2) For a signal employee, the assigned duty hours of the employee, including overtime, or unique trouble call assignments occurring outside the employee's assigned duty hours.

(3) For a dispatching service employee, each unique assignment for the employee that occurs within any 24-hour period in which the employee, by the use of an electrical or mechanical device, dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

Deadheading means the physical relocation of a train employee from one point to another as a result of a railroad-issued verbal or written directive.

Designated terminal means the home or away-from-home terminal for the assignment of a particular train crew.

Dispatching service employee means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

Duty location for a signal employee is the employee's *headquarters* or the precise location where the employee is expected to begin performing service for the railroad as defined in 49 U.S.C. 21104(b)(1) and (2).

Duty tour means—

(1) The total of all periods of *covered service* and *commingled service* for a train employee or a signal employee occurring between two *statutory off-duty periods* (i.e., off-duty periods of a minimum of 8 or 10 hours); or

(2) The total of all periods of *covered service* and *commingled service* for a dispatching service employee occurring in any 24-hour period.

Employee means an individual employed by a railroad or a contractor or subcontractor to a railroad who—

(1) Is actually engaged in or connected with the movement of any train, including a person who performs the duties of a hostler;

(2) Dispatches, reports, transmits, receives, or delivers an order pertaining to a train movement by the use of telegraph, telephone, radio, or any other electrical or mechanical device; or

(3) Is engaged in installing, repairing, or maintaining a signal system.

Final release is the time that a train employee or a signal employee is released from all activities at the behest of the railroad and begins his or her *statutory off-duty period* .

FRA means the Federal Railroad Administration.

Headquarters means the regular assigned on-duty location for signal employees, or the lodging facility or crew quarters where traveling signal gangs reside when working at various system locations.

Interim release means an off-duty period applied to train employees only, of at least 4 hours but less than the required *statutory off-duty period* at a *designated terminal,* which off-duty period temporarily suspends the accumulation of time on duty, but does not start a new *duty tour.*

Limbo time means a period of time treated as neither time on duty nor time off duty in 49 U.S.C. 21103 and 21104, and any other period of service for the railroad that does not qualify as either covered service or commingled service.

MOW worker means an individual employed to inspect, install, construct, repair, or maintain track, roadbed, bridges, buildings, roadway facilities, roadway maintenance machines, electric traction systems, and right of way of a railroad.

On-duty time means the actual time that an employee reports for duty to begin a *covered service assignment.*

Other-than-regular reporting point means any location where a train employee reports to begin or restart a *duty tour,* that is not the employee's *regular reporting point.*

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Prior time off means the *amount of time* that an employee has been off duty between identifiable periods of service *at the behest of the railroad.*

Program edits are filters contained in the logic of an hours of service recordkeeping program that detect identifiable reporting errors made by a reporting employee at the time of data entry, and prevent the employee from submitting a record without first correcting or explaining any identified errors or anomalies.

Quick tie-up is a data entry process used only when an employee is within 3 minutes of, or is beyond, his or her statutory maximum on-duty period, which process allows an employee to enter only the basic information necessary for the railroad to identify the beginning of an employee's *statutory off-duty period,* to avoid the excess service that would otherwise be incurred in completing the full record for the *duty tour.* The information permitted in a quick tie-up process is limited to, at a maximum:

(1) Board placement time;

(2) Relieved location, date, and time;

(3) Final release location, date, and time;

(4) Contact information for the employee during the statutory off-duty period;

(5) Request for rest in addition to the statutory minimum, if provided by collective bargaining agreement or local practice;

(6) The employee may be provided an option to enter basic payroll information, related only to the duty tour being tied up; and

(7) Employee certification of the tie-up information provided.

Railroad means a person providing *railroad transportation.*

Railroad transportation means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including commuter or other short-haul rail passenger service in a metropolitan or suburban area, and high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Regular reporting point means the permanent on-duty location of a train employee's regular assignment that is established through a job bulletin assignment (either a job award or a forced assignment) or through an employee's exercise of seniority to be placed in an assignment. The assigned regular reporting point is a single fixed location identified by the railroad, even for extra board and pool crew employees.

Release means—

(1) For a train employee,

(i) The time within the *duty tour* that the employee begins an *interim release;*

(ii) The time that an employee completes a *covered service assignment* and begins another *covered service assignment* on a different train or job, or

(iii) The time that an employee completes a *covered service assignment* to begin another activity that counts as time on duty (including waiting for deadhead transportation to another duty location at which the employee will perform *covered service,* deadheading to duty, or any other *commingled service).*

(2) For a signal employee, the time within a *duty tour* that the employee—

(i) Completes his or her regular assigned hours and begins an off-duty period of at least one hour but less than a *statutory off-duty period;* or

(ii) Completes his or her return travel from a trouble call or other unscheduled duty and begins an off-duty period of at least one hour, but less than a *statutory off-duty period.*

(3) For a dispatching service employee, when he or she stops performing *covered service* and *commingled service* within any 24-hour period and begins an *off-duty period* of at least one hour.

Relieved time means—

(1) The actual time that a train employee stops performing a *covered service assignment* or *commingled service.*

(2) The actual time that a signal employee:

(i) Completes his or her assigned duty hours, or stops performing *covered service* or *commingled service,* whichever is later; or

(ii) Stops performing *covered service* associated with a trouble call or other unscheduled duty outside of normally assigned duty hours.

Reports for duty means that an employee—

(i) Presents himself or herself at the location established by the railroad at the time the railroad established for the employee to be present; and

(ii) Is ready to perform *covered service.*

Report-for-duty time means—

(1) For a train employee, the actual time that the employee is required to be present at a *reporting point* and prepared to start a *covered service assignment.*

(2) For a signal employee, the assigned starting time of an employee's scheduled shift, or the time that he or she receives a trouble call or a call for any other unscheduled duty during an off-duty period.

(3) For a dispatching service employee, when the employee begins the turn-over process at or before the beginning of his or her assigned shift, or begins any other activity at the behest of the railroad during any 24-hour period in which covered service is performed.

Reporting point means any location where an employee is required to begin *or restart a* duty tour.

Seniority move means a repositioning *at the behest of the employee,* usually a repositioning from a regular assignment or extra board to a different regularly assigned position or extra board, as the result of the employee's selection of a bulletin assignment or the employee's exercise of seniority over a junior employee.

Signal employee means an individual who is engaged in installing, repairing, or maintaining signal systems.

Station, office or tower means the precise location where a dispatching service employee is expected to perform service for the railroad as defined in 49 U.S.C. 21105(b) and (c).

Statutory off-duty period means the period of 8 or 10 consecutive hours or more time, that is the minimum off-duty period required under the hours of service laws for a train employee or a signal employee to begin a new 24-hour period for the purposes of calculating his or her *total time on duty.*

Total off-duty period means the actual amount of time that a train employee or a signal employee is off duty between duty tours after the previous final release and before the beginning of the next duty tour. This time may differ from the expected prior time off that will be generated by the recordkeeping system, if the employee performed service at the behest of the railroad between the duty tours.

Total time on duty (TTOD) means the total accumulation of time spent in periods of *covered service* and *commingled service* between qualifying *statutory off-duty periods* of 8 or 10 hours or more. Mandatory activities that do not constitute *covered service,* such as rules classes, when they may not attach to *covered service,* are counted as *limbo time,* rather than *commingled service,* which limbo time is not counted toward the calculation of *total time on duty.*

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

Train employee means an individual engaged in or connected with the movement of a train, including a hostler.

Travel time means—

(1) For a signal employee, the time spent in transportation between the employee's *headquarters* and an outlying duty point or between the employee's residence and an outlying duty point, or, between duty locations, including both on-track and on-highway vehicular travel.

(2) For a dispatching service employee, the time spent in travel between *stations, offices, or towers* during the employee's time on duty.

Type 1 assignment means an assignment to be worked by a train employee who is engaged in commuter or intercity rail passenger transportation that requires the employee to report for duty no earlier than 4 a.m. on a calendar day and be released from duty no later than 8 p.m. on the same calendar day, and that complies with the provisions of § 228.405. For the purposes of this part, FRA considers a Type 1 assignment to present an acceptable level of risk for fatigue that does not violate the defined fatigue threshold under a scientifically valid, biomathematical model of human performance and fatigue specified by FRA at § 228.407(c)(1) or approved by FRA under the procedures at § 228.407(c)(2). However, a Type 1 assignment that is delayed such that the schedule actually worked includes any period of time between midnight and 4 a.m. is considered a Type 2 assignment for the purposes of compliance with § 228.405.

Type 2 assignment . (1) *Type 2 assignment* means an assignment to be worked by a train employee who is engaged in commuter or intercity rail passenger transportation that requires the employee to be on duty for any period of time between 8:01 p.m. on a calendar day and 3:59 a.m. on the next calendar day, or that otherwise fails to qualify as a Type 1 assignment. A Type 2 assignment is considered a Type 1 assignment if—

(i) It does not violate the defined fatigue threshold under a scientifically valid biomathematical model of human performance and fatigue specified by FRA at 228.407(c)(2) or approved by FRA under the procedures at § 228.407(c)(1);

(ii) It complies with the provisions of § 228.405; and

(iii) It does not require the employee to be on duty for any period of time between midnight and 4 a.m.

(2) If a Type 2 assignment that would normally qualify to be treated as a Type 1 assignment is delayed so that the schedule actually worked includes any period of time between midnight and 4 a.m., the assignment is considered a Type 2 assignment for the purposes of compliance with § 228.405.

[74 FR 25346, May 27, 2009, as amended at 76 FR 50396, Aug. 12, 2011; 76 FR 67087, Oct. 31, 2011]

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§ 228.6 Penalties.

(a) *Civil penalties.* Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $650 and not more than $25,000 per violation, except that: penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $105,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix B to this part for a statement of agency civil penalty policy. Violations of the hours of service laws themselves (*e.g.,* requiring an employee to work excessive hours or beginning construction of sleeping quarters subject to approval under subpart C of this part without prior approval) are subject to penalty under 49 U.S.C. 21303.

(b) *Criminal penalties.* Any person who knowingly and willfully falsifies a report or record required to be kept under this part or otherwise knowingly and willfully violates any requirement of this part may be liable for criminal penalties of a fine under title 18 of the U.S. Code, imprisonment for up to two years, or both, in accordance with 49 U.S.C. 21311(a).

[76 FR 67087, Oct. 31, 2011, as amended at 77 FR 26704, May 7, 2012]

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Subpart B—Records and Reporting

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§ 228.7 Hours of duty.

(a) For purposes of this part, time on duty of an employee actually engaged in or connected with the movement of any train, including a hostler, begins when he reports for duty and ends when he is finally released from duty, and includes—

(1) Time engaged in or connected with the movement of any train;

(2) Any interim period available for rest at a location that is not a designated terminal;

(3) Any interim period of less than 4 hours available for rest at a designated terminal;

(4) Time spent in deadhead transportation en route to a duty assignment; and

(5) Time engaged in any other service for the carrier.

Time spent in deadhead transportation by an employee returning from duty to his point of final release may not be counted in computing time off duty or time on duty.

(b) For purposes of this part, time on duty of an employee who dispatches, reports, transmits, receives, or delivers orders pertaining to train movements by use of telegraph, telephone, radio, or any other electrical or mechanical device includes all time on duty in other service performed for the common carrier during the 24-hour period involved.

(c) For purposes of this part, time on duty of an employee who is engaged in installing, repairing or maintaining signal systems includes all time on duty in other service performed for a common carrier during the 24-hour period involved.

[37 FR 12234, June 21, 1972, as amended at 43 FR 3124, Jan. 23, 1978]

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§ 228.9 Records; general.

(a) Each manual record maintained under this part shall be—

(1) Signed by the employee whose time on duty is being recorded or, in the case of a train and engine crew or a signal employee gang, signed by the ranking crewmember;

(2) Retained for two years at locations identified by the carrier; and

(3) Available upon request at the identified location for inspection and copying by the Administrator during regular business hours.

(b) Each electronic record maintained under this part shall be—

(1) Certified by the employee whose time on duty is being recorded or, in the case of a train and engine crew or a signal employee gang, certified by the reporting employee who is a member of the train crew or signal gang whose time is being recorded;

(2) Electronically stamped with the certifying employee's name and the date and time of certification;

(3) Retained for 2 years in a secured file that prevents alteration after certification;

(4) Accessible by the Administrator through a computer terminal of the railroad, using a railroad-provided identification code and a unique password.

(5) Reproducible using the printing capability at the location where records are accessed.

[74 FR 25348, May 27, 2009]

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§ 228.11 Hours of duty records.

(a) *In general.* Each railroad, or a contractor or a subcontractor of a railroad, shall keep a record, either manually or electronically, concerning the hours of duty of each employee. Each contractor or subcontractor of a railroad shall also record the name of the railroad for whom its employee performed covered service during the duty tour covered by the record. Employees who perform covered service assignments in a single duty tour that are subject to the recordkeeping requirements of more than one paragraph of this section, must complete the record applicable to the covered service position for which they were called, and record other covered service as an activity constituting other service at the behest of the railroad.

(b) *For train employees.* Except as provided by paragraph (c) of this section, each hours of duty record for a train employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

(2) Each covered service position in a duty tour.

(3) Amount of time off duty before beginning a new covered service assignment or resuming a duty tour.

(4) Train ID for each assignment required to be reported by this part, except for the following employees, who may instead report the unique job or train ID identifying their assignment:

(i) Utility employees assigned to perform covered service, who are identified as such by a unique job or train ID;

(ii) Employees assigned to yard jobs, except that employees assigned to perform yard jobs on all or parts of consecutive shifts must at least report the yard assignment for each shift;

(iii) Assignments, either regular or extra, that are specifically established to shuttle trains into and out of a terminal during a single duty tour that are identified by a unique job or train symbol as such an assignment.

(5) Location, date, and beginning time of the first assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and beginning time of the assignment immediately following the interim release.

(6) Location, date, and time relieved for the last assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and time relieved for the assignment immediately preceding the interim release.

(7) Location, date, and time released from the last assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and time released from the assignment immediately preceding the interim release.

(8) Beginning and ending location, date, and time for periods spent in transportation, other than personal commuting, if any, to the first assignment in a duty tour, from an assignment to the location of a period of interim release, from a period of interim release to the next assignment, or from the last assignment in a duty tour to the point of final release, including the mode of transportation (train, track car, railroad-provided motor vehicle, personal automobile, etc.).

(9) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

(10) Identification (code) of service type for any other service performed at the behest of the railroad.

(11) Total time on duty for the duty tour.

(12) Reason for any service that exceeds 12 hours total time on duty for the duty tour.

(13) The total amount of time by which the sum of total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours.

(14) The cumulative total for the calendar month of—

(i) Time spent in covered service;

(ii) Time spent awaiting or in deadhead transportation from a duty assignment to the place of final release; and

(iii) Time spent in any other service at the behest of the railroad.

(15) The cumulative total for the calendar month of time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty.

(16) Number of consecutive days in which a period of time on duty was initiated.

(c) *Exceptions to requirements for train employees.* Paragraphs (b)(13) through (b)(16) of this section do not apply to the hours of duty records of train employees providing commuter rail passenger transportation or intercity rail passenger transportation. In addition to the information required by paragraphs (b)(1) through (b)(12) of this section, each hours of duty record for a train employee providing commuter rail passenger transportation or intercity rail passenger transportation shall include the following information:

(1) For train employees providing commuter rail passenger transportation or intercity rail passenger transportation, the date on which the series of at most 14 consecutive calendar days began for the duty tour.

(2) For train employees providing commuter rail passenger transportation or intercity rail passenger transportation, any date prior to the duty tour and during the series of at most 14 consecutive calendar days on which the employee did not initiate an on-duty period, if any.

(d) *For dispatching service employees.* Each hours of duty record for a dispatching service employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

(2) Each covered service position in a duty tour.

(3) Amount of time off duty before going on duty or returning to duty in a duty tour.

(4) Location, date, and beginning time of each assignment in a duty tour.

(5) Location, date, and time released from each assignment in a duty tour.

(6) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

(7) Total time on duty for the duty tour.

(e) *For signal employees.* Each hours of duty record for a signal employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

(2) Each covered service position in a duty tour.

(3) Headquarters location for the employee.

(4) Amount of time off duty before going on duty or resuming a duty tour.

(5) Location, date, and beginning time of each covered service assignment in a duty tour.

(6) Location, date, and time relieved for each covered service assignment in a duty tour.

(7) Location, date, and time released from each covered service assignment in a duty tour.

(8) Beginning and ending location, date, and time for periods spent in transportation, other than personal commuting, to or from a duty assignment, and mode of transportation (train, track car, railroad-provided motor vehicle, personal automobile, etc.).

(9) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

(10) Total time on duty for the duty tour.

(11) Reason for any service that exceeds 12 hours total time on duty for the duty tour.

[74 FR 25348, May 27, 2009, as amended at 76 FR 50397, Aug. 12, 2011]

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§ 228.13 [Reserved]

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§ 228.17 Dispatcher's record of train movements.

(a) Each carrier shall keep, for each dispatching district, a record of train movements made under the direction and control of a dispatcher who uses telegraph, telephone, radio, or any other electrical or mechanical device to dispatch, report, transmit, receive, or deliver orders pertaining to train movements. The following information shall be included in the record:

(1) Identification of timetable in effect.

(2) Location and date.

(3) Identification of dispatchers and their times on duty.

(4) Weather conditions at 6-hour intervals.

(5) Identification of enginemen and conductors and their times on duty.

(6) Identification of trains and engines.

(7) Station names and office designations.

(8) Distances between stations.

(9) Direction of movement and the time each train passes all reporting stations.

(10) Arrival and departure times of trains at all reporting stations.

(11) Unusual events affecting movement of trains and identification of trains affected.

(b) [Reserved]

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§ 228.19 Monthly reports of excess service.

(a) *In general.* Except as provided in paragraph (h) of this section, each railroad, or a contractor or a subcontractor of a railroad, shall report to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, Washington, DC 20590, each instance of excess service listed in paragraphs (b) through (e) of this section, in the manner provided by paragraph (f) of this section, within 30 days after the calendar month in which the instance occurs.

(b) *For train employees.* Except as provided in paragraph (c) of this section, the following instances of excess service by train employees must be reported to FRA as required by this section:

(1) A train employee is on duty for more than 12 consecutive hours.

(2) A train employee continues on duty without at least 10 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 10 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.[1]

(3) A train employee returns to duty without at least 10 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 10 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.[1]

[1] Instances involving duty tours that are broken by four or more consecutive hours of off duty time at a designated terminal which duty tours do not constitute more than a total of 12 hours time on duty are not required to be reported, provided such duty tours are immediately preceded by 10 or more consecutive hours of off-duty time.

(4) A train employee returns to duty without additional time off duty, equal to the total amount of time by which the employee's sum of total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours.

(5) A train employee exceeds a cumulative total of 276 hours in the following activities in a calendar month:

(i) Time spent in covered service;

(ii) Time spent awaiting or in deadhead transportation from a duty assignment to the place of final release; and

(iii) Time spent in any other service at the behest of the railroad.

(6) A train employee initiates an on-duty period on more than 6 consecutive days, when the on-duty period on the sixth consecutive day ended at the employee's home terminal, and the seventh consecutive day is not allowed pursuant to a collective bargaining agreement or pilot project.

(7) A train employee returns to duty after initiating an on-duty period on 6 consecutive days, without 48 consecutive hours off duty at the employee's home terminal.

(8) A train employee initiates an on-duty period on more than 7 consecutive days.

(9) A train employee returns to duty after initiating an on-duty period on 7 consecutive days, without 72 consecutive hours off duty at the employee's home terminal.

(10) A train employee exceeds the following limitations on time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty:

(i) 40 hours in any calendar month completed prior to October 1, 2009;

(ii) 20 hours in the transition period from October 1, 2009-October 15, 2009;

(iii) 15 hours in the transition period from October 16, 2009-October 31, 2009; and

(iv) 30 hours in any calendar month completed after October 31, 2009.

(c) *Exception to requirements for train employees.* For train employees who provide commuter rail passenger transportation or intercity rail passenger transportation during a duty tour, the following instances of excess service must be reported to FRA as required by this section:

(1) A train employee is on duty for more than 12 consecutive hours.

(2) A train employee returns to duty after 12 consecutive hours of service without at least 10 consecutive hours off duty.

(3) A train employee continues on duty without at least 8 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 8 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.[2]

(4) A train employee returns to duty without at least 8 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 8 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.[2]

[2] Instances involving duty tours that are broken by four or more consecutive hours of off-duty time at a designated terminal which duty tours do not constitute more than a total of 12 hours time on duty are not required to be reported, provided such duty tours are immediately preceded by 8 or more consecutive hours of off-duty time.

(5) A train employee, after first initiating an on-duty period each day for 6 or more consecutive calendar days including one or more Type 2 assignments, the last on-duty period of which ended at the employee's home terminal, initiates an on-duty period without having had 24 consecutive hours off duty at the employee's home terminal.

(6) A train employee, after first initiating an on-duty period each day for 6 or more consecutive days including one or more Type 2 assignments, initiates two or more on-duty periods without having had 24 consecutive hours off duty at the employee's home terminal.

(7) A train employee, after initiating on-duty periods on 13 or more calendar days during a series of at most 14 consecutive calendar days as defined in § 228.405(a)(3)(i), the last of which ended at the employee's home terminal, then initiates an on-duty period without having had at least two consecutive calendar days off duty at the employee's home terminal.

(8) A train employee, after initiating an on-duty periods on 13 or more calendar days during a series of at most 14 consecutive calendar days as defined in § 228.405(a)(3)(i), then initiates two or more on-duty periods without having had at least two consecutive calendar days off duty at the employee's home terminal.

(d) *For dispatching service employees.* The following instances of excess service by dispatching service employees must be reported to FRA as required by this section:

(1) A dispatching service employee is on duty for more than 9 hours in any 24-hour period at an office where two or more shifts are employed.

(2) A dispatching service employee is on duty for more than 12 hours in any 24-hour period at any office where one shift is employed.

(e) *For signal employees.* The following instances of excess service by signal employees must be reported to FRA as required by this section:

(1) A signal employee is on duty for more than 12 consecutive hours.

(2) A signal employee continues on duty without at least 10 consecutive hours off duty during the preceding 24 hours.

(3) A signal employee returns to duty without at least 10 consecutive hours off duty during the preceding 24 hours.

(f) Except as provided in paragraph (h) of this section, reports required by paragraphs (b) through (e) of this section shall be filed in writing on FRA Form F-6180-3 [3] with the Office of Railroad Safety, Federal Railroad Administration, Washington, DC 20590. A separate form shall be used for each instance reported.

[3] Form may be obtained from the Office of Railroad Safety, Federal Railroad Administration, Washington, DC 20590. Reproduction is authorized.

(g) *Use of electronic signature.* For the purpose of complying with paragraph (f) of this section, the signature required on Form FRA F-6180-3 may be provided to FRA by means of an electronic signature provided that:

(1) The record contains the printed name of the signer and the date and actual time that the signature was executed, and the meaning (such as authorship, review, or approval), associated with the signature;

(2) Each electronic signature shall be unique to one individual and shall not be used by, or assigned to, anyone else;

(3) Before a railroad, or a contractor or subcontractor to a railroad, establishes, assigns, certifies, or otherwise sanctions an individual's electronic signature, or any element of such electronic signature, the organization shall verify the identity of the individual;

(4) Persons using electronic signatures shall, prior to or at the time of such use, certify to the agency that the electronic signatures in their system, used on or after the effective date of this regulation, are the legally binding equivalent of traditional handwritten signatures;

(5) The certification shall be submitted, in paper form and signed with a traditional handwritten signature, to the Associate Administrator for Railroad Safety/Chief Safety Officer; and

(6) Persons using electronic signatures shall, upon agency request, provide additional certification or testimony that a specific electronic signature is the legally binding equivalent of the signer's handwritten signature.

(h) *Exception.* A railroad, or a contractor or subcontractor to a railroad, is excused from the requirements of paragraphs (a) and (f) of this section as to any employees for which—

(1) The railroad, or a contractor or subcontractor to a railroad, maintains hours of service records using an electronic recordkeeping system that complies with the requirements of subpart D of this part; and

(2) The electronic recordkeeping system referred to in paragraph (h)(1) of this section requires—

(i) The employee to enter an explanation for any excess service certified by the employee; and

(ii) The railroad, or a contractor or subcontractor of a railroad, to analyze each instance of excess service certified by one of its employees, make a determination as to whether each instance of excess service would be reportable under the provisions of paragraphs (b) through (e) of this section, and allows the railroad, or a contractor or subcontractor to a railroad, to append its analysis to its employee's electronic record; and

(iii) Allows FRA inspectors and State inspectors participating under 49 CFR part 212 access to employee reports of excess service and any explanations provided.

[74 FR 25349, May 27, 2009, as amended at 76 FR 50397, Aug. 12, 2011]

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§ 228.21 [Reserved]

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§ 228.23 [Reserved]

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Subpart C—Construction of Railroad-Provided Sleeping Quarters

SOURCE: 43 FR 31012, July 19, 1978, unless otherwise noted.

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§ 228.101 Distance requirement for employee sleeping quarters; definitions used in this subpart.

(a) The Hours of Service Act, as amended (45 U.S.C. 61-64b), makes it unlawful for any common carrier engaged in interstate or foreign commerce by railroad to begin, on or after July 8, 1976, the construction or reconstruction of sleeping quarters for employees who perform duties covered by the act "within or in the immediate vicinity (as determined in accordance with rules prescribed by the Secretary of Transportation) of any area where railroad switching or humping operations are performed." 45 U.S.C. 62(a)(4). This subpart sets forth (1) a general definition of "immediate vicinity" (§ 228.101(b)), (2) procedures under which a carrier may request a determination by the Federal Railroad Administration that a particular proposed site is not within the "immediate vicinity" of railroad switching or humping operations (§§ 228.103 and 228.105), and (3) the basic criteria utilized in evaluating proposed sites (§ 228.107).

(b) Except as determined in accordance with the provisions of this subpart, the 'immediate vicinity' shall mean the area within one-half mile (2,640 feet) (804 meters) of switching or humping operations as measured from the nearest rail of the nearest trackage where switching or humping operations are performed to the point on the site where the carrier proposes to construct or reconstruct the exterior wall of the structure, or portion of such wall, which is closest to such operations.

(c) As used in this subpart—

(1) *Construction* shall refer to the—

(i) Creation of a new facility;

(ii) Expansion of an existing facility;

(iii) Placement of a mobile or modular facility; or

(iv) Acquisition and use of an existing building.

(2) *Reconstruction* shall refer to the—

(i) Replacement of an existing facility with a new facility on the same site; or

(ii) Rehabilitation or improvement of an existing facility (normal periodic maintenance excepted) involving the expenditure of an amount representing more than 50 percent of the cost of replacing such facility on the same site at the time the work of rehabilitation or improvement began, the replacement cost to be estimated on the basis of contemporary construction methods and materials.

(3) *Switching or humping operations* includes the classification of placarded railroad cars according to commodity or destination, assembling of placarded cars for train movements, changing the position of placarded cars for purposes of loading, unloading, or weighing, and the placing of placarded cars for repair. However, the term does not include the moving of rail equipment in connection

with work service, the moving of a train or part of a train within yard limits by a road locomotive or placing locomotives or cars in a train or removing them from a train by a road locomotive while en route to the train's destination. The term does include operations within this definition which are conducted by any railroad; it is not limited to the operations of the carrier contemplating construction or reconstruction of railroad employee sleeping quarters.

(4) *Placarded car* shall mean a railroad car required to be placarded by the Department of Transportation hazardous materials regulations (49 CFR 172.504).

(5) The term L_{eq} (8) shall mean the equivalent steady state sound level which in 8 hours would contain the same acoustic energy as the time-varying sound level during the same time period.

[43 FR 31012, July 19, 1978, as amended at 76 FR 67088, Oct. 31, 2011]

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§ 228.102 Distance requirement for camp cars provided as sleeping quarters exclusively to MOW workers.

(a) The hours of service laws at 49 U.S.C. 21106(b) provide that a railroad that uses camp cars must comply with 49 U.S.C. 21106(a) no later than December 31, 2009. Accordingly, on or after December 31, 2009, a railroad shall not begin construction or reconstruction of a camp car provided by the railroad as sleeping quarters exclusively for MOW workers within or in the immediate vicinity of any area where railroad switching or humping of placarded cars is performed.

(b) This subpart includes definitions of most of the relevant terms (§ 228.101(b) and (c)), the procedures under which a railroad may request a determination by the Federal Railroad Administration that a particular proposed site for the camp car is not within the "immediate vicinity" of railroad switching or humping operations (§§ 228.103 and 228.105), and the basic criteria utilized in evaluating proposed sites. *See* § 228.5 for definitions of other terms. For purposes of this § 228.102, references to "employees" in §§ 228.103 through 228.107 shall be read to include MOW workers.

[76 FR 67088, Oct. 31, 2011]

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§ 228.103 Approval procedure: construction within one-half mile (2,640 feet) (804 meters).

(a) A common carrier that has developed plans for the construction or reconstruction of sleeping quarters subject to this subpart and which is considering a site less than one-half mile (2,640 feet) (804 meters) from any area where switching or humping operations are performed, measured from the nearest rail of the nearest trackage utilized on a regular or intermittent basis for switching or humping operations to the point on the site where the carrier proposes to construct or reconstruct the exterior wall of the structure, or portion of such wall, which is closest to such operations, must obtain the approval of the Federal Railroad Administration before commencing construction or reconstruction on that site. Approval may be requested by filing a petition conforming to the requirements of this subpart.

(b) A carrier is deemed to have conducted switching or humping operations on particular trackage within the meaning of this subpart if placarded cars are subjected to the operations described in § 228.101(c)(3) within the 365-day period immediately preceding the date construction or reconstruction is commenced or if such operations are to be permitted on such trackage after such date. If the carrier does not have reliable records concerning the traffic handled on the trackage within the specified period, it shall be presumed that switching of placarded cars is conducted at the location and construction or reconstruction of sleeping quarters within one-half mile shall be subject to the approval procedures of this subpart.

(c) A petition shall be filed in accordance with the requirements of § 211.7(b)(1) of this chapter and shall contain the following:

(1) A brief description of the type of construction planned, including materials to be employed, means of egress from the quarters, and actual and projected exterior noise levels and projected interior noise levels;

(2) The number of employees expected to utilize the quarters at full capacity;

(3) A brief description of the site, including:

(i) Distance from trackage where switching or humping operations are performed, specifying distances from particular functions such as classification, repair, assembling of trains from large groups of cars, etc. cetera;

(ii) Topography within a general area consisting of the site and all of the rail facilities close to the site;

(iii) Location of other physical improvements situated between the site and areas where railroad operations are conducted;

(4) A blueprint or other drawing showing the relationship of the site to trackage and other planned and existing facilities;

(5) The proposed or estimated date for commencement of construction;

(6) A description of the average number and variety of rail operations in the areas within one-half mile (2,640 feet) (804 meters) of the site (e.g., number of cars classified in 24-hour period; number of train movements);

(7) An estimate of the average daily number of placarded rail cars transporting hazardous materials through the railroad facility (where practicable, based on a 365-day period sample, that period not having ended more than 120 days prior to the date of filing the petition), specifying the—

(i) Number of such cars transporting class A explosives and poison gases; and

(ii) Number of DOT Specification 112A and 114A tank cars transporting flammable gas subject to FRA emergency order No. 5;

(8) A statement certified by a corporate officer of the carrier possessing authority over the subject matter explaining any plans of that carrier for utilization of existing trackage, or for the construction of new trackage, which may impact on the location of switching or humping operations within one-half mile of the proposed site (if there are no plans, the carrier official must so certify); and

(9) Any further information which is necessary for evaluation of the site.

(d) A petition filed under this section must contain a statement that the petition has been served on the recognized representatives of the railroad employees who will be utilizing the proposed sleeping quarters, together with a list of the employee representatives served.

[43 FR 31012, July 19, 1978, as amended at 74 FR 25173, May 27, 2009]

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§ 228.105 Additional requirements; construction within one-third mile (1,760 feet) (536 meters) of certain switching.

(a) In addition to providing the information specified by § 228.103, a carrier seeking approval of a site located within one-third mile (1,760 feet) (536 meters) of any area where railroad switching or humping operations are performed involving any cars required to be placarded “EXPLOSIVES A” or “POISON GAS” or any DOT Specification 112A or 114A tank cars transporting flammable gas subject to FRA emergency order No. 5 shall establish by a supplementary statement certified by a corporate officer possessing authority over the subject matter that—

(1) No feasible alternate site located at or beyond one-third mile from switching or humping operations is either presently available to the railroad or is obtainable within 3 miles (15,840 feet) (4,827 meters) of the reporting point for the employees who are to be housed in the sleeping quarters;

(2) Natural or other barriers exist or will be created prior to occupancy of the proposed facility between the proposed site and any areas in which switching or humping operations are performed which will be adequate to shield the facility from the direct and severe effects of a hazardous materials accident/incident arising in an area of switching or humping operations;

(3) The topography of the property is such as most likely to cause any hazardous materials unintentionally released during switching or humping to flow away from the proposed site; and

(4) Precautions for ensuring employee safety from toxic gases or explosions such as employee training and evacuation plans, availability of appropriate respiratory protection, and measures for fire protection, have been considered.

(b) In the absence of reliable records concerning traffic handled on trackage within the one-third mile area, it shall be presumed that the types of cars enumerated in paragraph (a) of this section are switched on that trackage; and the additional requirements of this section shall be met by the petitioning carrier, unless the carrier establishes that the switching of the enumerated cars will be effectively barred from the trackage if the petition is approved.

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§ 228.107 Action on petition.

(a) Each petition for approval filed under § 228.103 is referred to the Railroad Safety Board for action in accordance with the provisions of part 211, title 49, CFR, concerning the processing of requests for special approvals.

(b) In considering a petition for approval filed under this subpart, the Railroad Safety Board evaluates the material factors bearing on—

(1) The safety of employees utilizing the proposed facility in the event of a hazardous materials accident/incident and in light of other relevant safety factors; and

(2) Interior noise levels in the facility.

(c) The Railroad Safety Board will not approve an application submitted under this subpart if it appears from the available information that the proposed sleeping quarters will be so situated and constructed as to permit interior noise levels due to noise under the control of the railroad to exceed an L_{eq} (8) value of 55dB(A). If individual air conditioning and heating systems are to be utilized, projections may relate to noise levels with such units turned off.

(d) Approval of a petition filed under this subpart may be withdrawn or modified at any time if it is ascertained, after opportunity for a hearing, that any representation of fact or intent made by a carrier in materials submitted in support of a petition was not accurate or truthful at the time such representation was made.

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Subpart D—Electronic Recordkeeping

SOURCE: 74 FR 25350, May 27, 2009, unless otherwise noted.

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§ 228.201 Electronic recordkeeping; general.

For purposes of compliance with the recordkeeping requirements of subpart B, a railroad, or a contractor or a subcontractor to a railroad may create and maintain any of the records required by subpart B through electronic transmission, storage, and retrieval provided that all of the following conditions are met:

(1) The system used to generate the electronic record meets all requirements of this subpart;

(2) The electronically generated record contains the information required by § 228.11;

(3) The railroad, or contractor or subcontractor to the railroad, monitors its electronic database of employee hours of duty records through sufficient number of monitoring indicators to ensure a high degree of accuracy of these records; and

(4) The railroad, or contractor or subcontractor to the railroad, trains its employees on the proper use of the electronic recordkeeping system to enter the information necessary to create their hours of service record, as required by § 228.207.

(5) The railroad, or contractor or subcontractor to the railroad, maintains an information technology security program adequate to ensure the integrity of the system, including the prevention of unauthorized access to the program logic or individual records.

(6) FRA's Associate Administrator for Railroad Safety/Chief Safety Officer may prohibit or revoke the authority to use an electronic system if FRA finds the system is not properly secure, is inaccessible to FRA, or fails to record and store the information adequately and accurately. FRA will record such a determination in writing, including the basis for such action, and will provide a copy of its determination to the affected railroad, or contractor or subcontractor to a railroad.

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§ 228.203 Program components.

(a) *System security.* The integrity of the program and database must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(1) Data input is restricted to the employee or train crew or signal gang whose time is being recorded, with the following exceptions:

(i) A railroad, or a contractor or subcontractor to a railroad, may allow its recordkeeping system to pre-populate fields of the hours of service record provided that—

(A) The recordkeeping system pre-populates fields of the hours of service record with information known to the railroad, or contractor or subcontractor to the railroad, to be factually accurate for a specific employee.

(B) The recordkeeping system may also provide the ability for employees to copy data from one field of a record into another field, where applicable.

(C) Estimated, historical, or arbitrary data are not used to pre-populate any field of an hours of service record.

(D) A railroad, or a contractor or a subcontractor to a railroad, is not in violation of this paragraph if it makes a good faith judgment

as to the factual accuracy of the data for a specific employee but nevertheless errs in pre-populating a data field.

(E) The employee may make any necessary changes to the data by typing into the field, without having to access another screen or obtain clearance from the railroad, or a contractor or subcontractor to a railroad.

(ii) A railroad, or a contractor or a subcontractor to a railroad, shall allow employees to complete a verbal quick tie-up, or to transmit by facsimile or other electronic means the information necessary for a quick tie-up, if—

(A) The employee is released from duty at a location at which there is no terminal available;

(B) Computer systems are unavailable as a result of technical issues; or

(C) Access to computer terminals is delayed and the employee has exceeded his or her maximum allowed time on duty.

(2) No two individuals have the same electronic identity.

(3) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record.

(4) Any amendment to a record is either—

(i) Electronically stored apart from the record that it amends, or

(ii) Electronically attached to the record as information without changing the original record.

(5) Each amendment to a record uniquely identifies the individual making the amendment.

(6) The electronic system provides for the maintenance of inspection records as originally submitted without corruption or loss of data.

(7) Supervisors and crew management officials can access, but cannot delete or alter the records of any employee after the report-for-duty time of the employee or after the record has been certified by the reporting employee.

(b) *Identification of the individual entering data.* The program must be capable of identifying each individual who entered data for a given record. If a given record contains data entered by more than one individual, the program must be capable of identifying each individual who entered specific information within the record.

(c) *Capabilities of program logic.* The program logic must have the ability to—

(1) Calculate the total time on duty for each employee, using data entered by the employee and treating each identified period as defined in § 228.5;

(2) Identify input errors through the use of program edits;

(3) Require records, including outstanding records, the completion of which was delayed, to be completed in chronological order;

(4) Require reconciliation when the known (system-generated) prior time off differs from the prior time off reported by an employee;

(5) Require explanation if the total time on duty reflected in the certified record exceeds the statutory maximum for the employee;

(6) Require the use of a quick tie-up process when the employee has exceeded or is within three minutes of his or her statutory maximum time on duty;

(7) Require that the employee's certified final release be not more than three minutes in the future, and that the employee may not certify a final release time for a current duty tour that is in the past, compared to the clock time of the computer system at the time that the record is certified, allowing for changes in time zones;

(8) Require automatic modification to prevent miscalculation of an employee's total time on duty for a duty tour that spans changes from and to daylight savings time;

(9) For train employees, require completion of a full record at the end of a duty tour when the employee initiates a tie-up with less than the statutory maximum time on duty and a quick tie-up is not mandated;

(10) For train employees, disallow use of a quick tie-up when the employee has time remaining to complete a full record, except as provided in paragraph (a)(1)(ii) of this section.

(11) Disallow any manipulation of the tie-up process that precludes compliance with any of the requirements specified by paragraphs (c)(1) through (c)(10) of this section.

(d) *Search capabilities.* The program must contain sufficient search criteria to allow any record to be retrieved through a search of any one or more of the following data fields, by specific date or by a date range not exceeding 30 days for the data fields specified by paragraphs (d)(1) and (d)(2) of this section, and not exceeding one day for the data fields specified by paragraphs (d)(3) through (d)(7) of this section:

(1) Employee, by name or identification number;

(2) Train or job symbol;

(3) Origin location, either yard or station;

(4) Released location, either yard or station;

(5) Operating territory (i.e., division or service unit, subdivision, or railroad-identified line segment);

(6) Certified records containing one or more instances of excess service; and

(7) Certified records containing duty tours in excess of 12 hours.

(e) The program must display individually each train or job assignment within a duty tour that is required to be reported by this part.

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§ 228.205 Access to electronic records.

(a) FRA inspectors and State inspectors participating under 49 CFR Part 212 must have access to hours of service records created and maintained electronically that is obtained as required by § 228.9(b)(4).

(b) Railroads must establish and comply with procedures for providing an FRA inspector or participating State inspector with an identification number and temporary password for access to the system upon request, which access will be valid for a period not to exceed seven days. Access to the system must be provided as soon as possible and no later than 24 hours after a request for access.

(c) The inspection screen provided to FRA inspectors and participating State inspectors for searching employee hours of duty records must be formatted so that—

(1) Each data field entered by an employee on the input screen is visible to the FRA inspector or participating State inspector; and

(2) The data fields are searchable as described in § 228.203(d) and yield access to all records matching criteria specified in a search.

(3) Records are displayed in a manner that is both crew-based and duty tour oriented, so that the data pertaining to all employees who worked together as part of a crew or signal gang will be displayed together, and the record will include all of the assignments and activities of a given duty tour that are required to be recorded by this part.

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§ 228.207 Training.

(a) *In general.* A railroad, or a contractor or subcontractor to a railroad, shall provide its train employees, signal employees, and dispatching service employees and its supervisors of these employees with initial training and refresher training as provided in this section.

(b) *Initial training.* (1) Initial training shall include the following:

(i) Instructional components presented in a classroom setting or by electronic means; and

(ii) Experiential (“hands-on”) components; and

(iii) Training on—

(A) The aspects of the hours of service laws relevant to the employee's position that are necessary to understanding the proper completion of the hours of service record required by this part, and

(B) The entry of hours of service data, into the electronic system or on the appropriate paper records used by the railroad or contractor or subcontractor to a railroad for whom the employee performs covered service; and

(iv) Testing to ensure that the objectives of training are met.

(2) Initial training shall be provided—

(i) To each current employee and supervisor of an employee as soon after May 27, 2009 as practicable; and

(ii) To new employees and supervisors prior to the time that they will be required to complete an hours of service record or supervise an employee required to complete an hours of service record.

(c) *Refresher training.* (1) The content and level of formality of refresher training should be tailored to the needs of the location and employees involved, except that the training shall—

(i) Emphasize any relevant changes to the hours of service laws, the reporting requirements in this part, or the carrier's electronic or other recordkeeping system since the employee last received training; and

(ii) Cover any areas in which supervisors or other railroad managers are finding recurrent errors in the employees' records through the monitoring indicators.

(2) Refresher training shall be provided to each employee any time that recurrent errors in records prepared by the employee, discovered through the monitoring indicators, suggest, for example, the employee's lack of understanding of how to complete hours of service records.

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Subpart E—Safety and Health Requirements for Camp Cars Provided by Railroads as Sleeping Quarters

SOURCE: 76 FR 67088, Oct. 31, 2011, unless otherwise noted.

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§ 228.301 Purpose and scope.

The purpose of this subpart is to prescribe standards for the design, operation, and maintenance of camp cars that a railroad uses as sleeping quarters for its employees or MOW workers or both so as to protect the safety and health of those employees and MOW workers and give them an opportunity for rest free from the interruptions caused by noise under the control of the railroad, and provide indoor toilet facilities, potable water, and other features to protect the health and safety of the employees and MOW workers.

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§ 228.303 Application and responsibility for compliance.

(a) This subpart applies to all railroads except the following:

(1) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.,* plant railroads, as defined in § 228.5);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 228.5; or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this subpart are generally stated in terms of the duty of a railroad, each person, including a contractor or subcontractor for a railroad, who performs any task or provides camp cars covered by this subpart, shall do so in accordance with this subpart.

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§ 228.305 Compliance date.

On and after December 30, 2011, a railroad shall not provide a camp car for use as sleeping quarters by an employee or MOW worker unless the camp car complies with all requirements of this subpart.

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§ 228.307 Definitions.

As used in this subpart—

dB(A) means the sound pressure level in decibels measured on the A-weighted scale.

Decibel (dB) means a logarithmic unit of measurement that expresses the magnitude of a physical quantity (usually power or intensity) relative to a specified reference level. For the measurement of noise in this subpart, the reference level for the intensity of sound pressure in air is 20 micropascals.

Foot-candle means a one lumen of light density per square foot.

HVAC means heating, ventilation, and air conditioning.

Lavatory means a basin or similar vessel used primarily for washing of the hands, arms, face, and head.

L_{eq} *(8)* means the equivalent steady state sound level that in 8 hours would contain the same acoustic energy as the time-varying sound level during the same time period.

Nonwater carriage toilet means a toilet not connected to a sewer.

Occupant means an employee or an MOW worker (both as defined in § 228.5) whose sleeping quarters are a camp car.

Ppm means parts per million.

Potable water means water that meets the quality standards prescribed in the U.S. Environmental Protection Agency's National Primary Drinking Water Standards set forth in 40 CFR part 141.

Potable water system means the containers, tanks, and associated plumbing lines and valves that hold, convey, and dispense potable water within a camp car.

Toilet means a chemical toilet, a recirculating toilet, a combustion toilet, or a toilet that is flushed with water; however, a urinal is not a toilet.

Toilet room means a room containing a toilet.

Toxic material means a material in concentration or amount of such toxicity as to constitute a recognized hazard that is causing or is likely to cause death or serious physical harm.

Watering means the act of filling potable water systems.

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§ 228.309 Structure, emergency egress, lighting, temperature, and noise-level standards.

(a) *General.* Each camp car must be constructed in a manner that will provide protection against the elements.

(b) *Floors.* Floors must be of smooth and tight construction and must be kept in good repair.

(c) *Windows and other openings.* (1) All camp cars must be provided with windows the total area of which must be not less than 10 percent of the floor area. At least one-half of each window designed to be opened must be so constructed that it can be opened for purposes of ventilation. Durable opaque window coverings must be provided to reduce the entrance of light during sleeping hours.

(2) All exterior openings must be effectively screened with 16-mesh material. All screen doors must be equipped with self-closing devices.

(d) *Steps, entry ways, passageways, and corridors.* All steps, entry ways, passageways, and corridors providing normal entry to or between camp cars must be constructed of durable weather-resistant material and properly maintained. Any broken or unsafe fixtures or components in need of repair must be repaired or replaced promptly.

(e) *Emergency egress.* Each camp car must be constructed in a manner to provide adequate means of egress in an emergency situation. At a minimum, a means of emergency egress must be located in at least two places in camp car for emergency exits.

(f) *Lighting.* Each habitable room in a camp car including but not limited to a toilet room, that is provided to an occupant must be provided with adequate lighting as specified below:

(1) When occupants are present, the pathway to any exit not immediately accessible to occupants, such as through an interior corridor, shall be illuminated at all times to values of at least 1 foot-candle measured at the floor, provided that where the pathway passes through a sleeping compartment, the pathway up to the compartment will be illuminated, but illumination is not required inside the sleeping compartment.

(2) Toilet and shower rooms shall have controlled lighting that will illuminate the room to values of at least 10 foot-candles measured at the floor.

(3) Other areas shall have controlled lighting that will illuminate the room area to values of at least 30 foot-candles measured at the floor.

(g) *Temperature.* Each camp car must be provided with equipment capable of maintaining a temperature of at least 68 degrees Fahrenheit (F.) during cold weather and no greater than 75 degrees F. during hot weather. A temperature of at least 68 degrees F. during cold weather and no greater than 75 degrees F. during hot weather must be maintained within an occupied camp car unless the equipment is individually controlled by its occupant(s).

(h) *Noise control.* Noise levels attributable to noise sources under the control of the railroad shall not exceed an L_{eq} (8) value of 55 dB(A), with windows and doors closed and exclusive of noise from cooling, heating, and ventilating equipment, for any 480-minute period during which the facility is occupied.

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§ 228.311 Minimum space requirements, beds, storage, and sanitary facilities.

(a) Each camp car used for sleeping purposes must contain at least 80 square feet of floor space for each occupant, with a maximum of four occupants per car. At least a 7-foot ceiling, measured at the entrance to the car, must be provided.

(b) A bed, cot, or bunk for each occupant and suitable lockable storage facility, such as a lockable wall locker, or space for a lockable foot locker for each occupant's clothing and personal articles must be provided in every room used for sleeping purposes. Except where partitions are provided, such beds or similar facilities must be spaced not closer than 36 inches laterally (except in rail-mounted modular units, where the beds shall be spaced not closer than 30 inches, and highway trailer units, where the beds shall be spaced not closer than 26 inches) and 30 inches end to end, and must be elevated at least 12 inches from the floor. Multi-deck bunks, multi-deck bunk beds, and multi-deck similar facilities may not be used.

(c) Unless otherwise provided by a collective bargaining agreement, clean linens must be provided to each occupant.

(d) In a camp car where occupants cook, live, and sleep, a minimum of 120 square feet of floor space per occupants must be provided. Sanitary facilities must be provided for storing and preparing food. *See also* § 228.325.

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§ 228.313 Electrical system requirements.

(a) All heating, cooking, ventilation, air conditioning, and water heating equipment must be installed in accordance with an industry-recognized standard. Upon request by FRA, the railroad must identify the industry-recognized standard that it utilizes and establish its compliance with that standard.

(b) All electrical systems installed, including external electrical supply connections, must be compliant with an industry-recognized standard. Upon request by FRA, the railroad must identify the industry-recognized standard that it utilizes and establish its compliance with that standard.

(c) Each occupied camp car shall be equipped with or serviced by a safe and working HVAC system.

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§ 228.315 Vermin control.

Camp cars shall be constructed, equipped, and maintained to prevent the entrance or harborage of rodents, insects, or other vermin. A continuing and effective extermination program shall be instituted where the presence of vermin is detected.

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§ 228.317 Toilets.

(a) *Number of toilets provided.* Each individual camp car that provides sleeping facilities must have one room with a functional toilet for a total of one or two occupants, and one additional room with a functional toilet if there are a total of three or four occupants.

(b) *Construction of toilet rooms.* Each toilet room must occupy a separate compartment with a door that latches and have walls or partitions between fixtures sufficient to assure privacy.

(c) *Supplies and sanitation.* (1) An adequate supply of toilet paper must be provided in each toilet room, unless provided to the occupants individually.

(2) Each toilet must be kept in a clean and sanitary condition and cleaned regularly when the camp car is being used. In the case of a non-water carriage toilet facility, it must be cleaned and changed regularly when the camp car is being used.

(d) *Sewage disposal facilities.* (1) All sanitary sewer lines and floor drains from a camp car toilet facility must be connected to a public sewer where available and practical, unless the car is equipped with a holding tank that is emptied in a sanitary manner.

(2) The sewage disposal method must not endanger the health of occupants.

(3) For toilet facilities connected to a holding tank, the tank must be constructed in a manner that prevents vermin from entry and odors from escaping into the camp car.

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§ 228.319 Lavatories.

(a) *Number.* Each camp car that provides a sleeping facility must contain at least one functioning lavatory for a total of one or two occupants and an additional functional lavatory if there is a total of three or four occupants.

(b) *Water.* Each lavatory must be provided with hot and cold potable running water. The water supplied to a lavatory must be from a potable water source supplied through a system maintained as required in § 228.323.

(c) *Soap.* Unless otherwise provided by a collective bargaining agreement, hand soap or similar cleansing agents must be provided.

(d) *Means of drying.* Unless otherwise provided by a collective bargaining agreement, individual hand towels, of cloth or paper, warm air blowers, or clean sections of continuous cloth toweling must be provided near the lavatories.

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§ 228.321 Showering facilities.

(a) *Number.* Each individual camp car that provides sleeping facilities must contain a minimum of one shower for a total of one or two occupants and an additional functional shower if the camp car contains a total of three or four occupants.

(b) *Floors.* (1) Shower floors must be constructed of non-slippery materials;

(2) Floor drains must be provided in all shower baths and shower rooms to remove waste water and facilitate cleaning;

(3) All junctions of the curbing and the floor must be sealed; and

(4) There shall be no fixed grate or other instrument on the shower floor significantly hindering the cleaning of the shower floor or drain.

(c) *Walls and partitions.* The walls and partitions of a shower room must be smooth and impervious to the height of splash.

(d) *Water.* An adequate supply of hot and cold running potable water must be provided for showering purposes. The water supplied to a shower must be from a potable water source supplied through a system maintained as required in § 228.323.

(e) *Showering necessities.* (1) Unless otherwise provided by a collective bargaining agreement, body soap or other appropriate cleansing agent convenient to the showers must be provided.

(2) Showers must be provided with hot and cold water feeding a common discharge line.

(3) Unless otherwise provided by a collective bargaining agreement, each occupant who uses a shower must be provided with an individual clean towel.

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§ 228.323 Potable water.

(a) *General requirements.* (1) Potable water shall be adequately and conveniently provided to all occupants of a camp car for drinking, personal oral hygiene, washing of person, cooking, washing of foods, washing of cooking or eating utensils, and washing of premises for food preparation or processing.

(2) Open containers such as barrels, pails, or tanks for drinking water from which the water must be dipped or poured, whether or not they are fitted with a cover, are prohibited.

(3) A common drinking cup and other common utensils are prohibited.

(b) *Potable water source.* (1) If potable water is provided in bottled form, it shall be stored in a manner recommended by the supplier in order to prevent contamination in storage. Bottled water shall not be provided as a substitute for the hot and cold running potable water required to be supplied in lavatories, showers, and sinks under this section. Bottled water shall contain a label identifying the packager and the source of the water.

(2) If potable water is drawn from a local source, the source must meet the drinking water standards established by the U.S. Environmental Protection Agency under 40 CFR part 141, National Primary Drinking Water Regulations.

(3) All equipment and construction used for supplying potable water to a camp car water system (*e.g.,* a hose, nozzle, or back-flow prevention) shall be approved by the Food and Drug Administration.

(4) *Water hydrants.* Each water hydrant, hose, or nozzle used for supplying potable water to a camp car water system shall be inspected prior to use. Each such hose or nozzle used shall be cleaned and sanitized as part of the inspection. A signed, dated record of this inspection shall be kept within the camp for the period of the connection. When the connection is terminated, a copy of each of these records must be submitted promptly to a centralized location for the railroad and maintained for one year from the date the connection was terminated.

(5) *Training.* Only a trained individual is permitted to fill the potable water systems. Each individual who fills a potable water system shall be trained in—

(i) The approved method of inspecting, cleaning, and sanitizing hydrants, hoses, and nozzles used for filling potable water systems; and

(ii) The approved procedures to prevent contamination during watering.

(6) *Certification.* Each time that potable water is drawn from a different local source, the railroad shall obtain a certificate from a State or local health authority indicating that the water from this source is of a quality not less than that prescribed in 40 CFR part 141, National Primary Drinking Water Regulations promulgated by the U.S. Environmental Protection Agency, or obtain such a certificate by a certified laboratory following testing for compliance with those standards. The current certification shall be kept within the camp for the duration of the connection. When the connection is terminated, a copy of each of these records must be submitted promptly to a centralized location for the railroad and maintained for one year from the date the connection was terminated.

(c) *Storage and distribution system.* (1) *Storage.* Potable water shall be stored in sanitary containers that prevent external contaminants from entering the potable water supply. Such contaminants include biological agents or materials and substances that can alter the taste or color or are toxic.

(2) *Dispensers.* Potable drinking water dispensers shall be designed, constructed, and serviced so that sanitary conditions are maintained, must be capable of being closed, and shall be equipped with a tap.

(3) *Distribution lines.* The distribution lines must be capable of supplying water at sufficient operating pressures to all taps for normal simultaneous operation.

(4) *Flushing.* Each potable water system shall be drained and flushed with a disinfecting solution at least once every 120 days. The railroad shall maintain a record of the draining and flushing of each separate system within the camp for the last two drain and flush cycles. The record shall contain the date of the work and the name(s) of the individual(s) performing the work. The original record shall be maintained with the camp. A copy of each of these records shall be sent to a centralized location for the railroad and maintained for one year.

(i) The solution used for flushing and disinfection shall be a 100 parts per million by volume (ppm) chlorine solution.

(ii) The chlorine solution shall be held for one hour in all parts of the system to ensure disinfection.

(iii) The chlorine solution shall be purged from the system by a complete refilling and draining with fresh potable water.

(iv) The draining and flushing shall be done more frequently if an occupant reports a taste or health problem associated with the water, or following any plumbing repair.

(5) *Reported problems.* Following any report of a taste problem with the water from a system or a health problem resulting from the water in a system, samples of water from each tap or dispensing location on the system shall be collected and sent to a laboratory approved by the U.S. Environmental Protection Agency for testing for heterotrophic plate counts, total coliform, and fecal coliform. If a single sample fails any of these tests, the system must be treated as follows:

(i) Heterotrophic plate count. Drain and flush the system within two days, and then return it to service.

(ii) Total coliform. Remove the system from service, drain and flush system, resample the system, and then return the system to service.

(iii) Fecal coliform. Remove the system from service, drain and flush the system, resample the system, and do not return the system to service until a satisfactory result on the test of the samples is obtained from the laboratory.

(6) *Reports.* All laboratory reports pertaining to the water system of the camp car shall be maintained with the car. Within 15 days of the receipt of such a laboratory report, a copy of the report shall be posted for a minimum of 10 calendar days at a conspicuous location within the camp car or cars affected for review by occupants. The report shall be maintained in the camp for the duration of the same connection. When the connection is terminated, the certification must be submitted promptly to a centralized location for the railroad and maintained for one year from the date the connection was terminated.

(d) *Signage.* Any water outlet/faucet within the camp car facility that supplies water not from a potable source or that is from a potable source but supplied through a system that is not maintained as required in this section, the outlet/faucet must be labeled with a sign, visible to the user and bearing a message to the following effect: “The water is not suitable for human consumption. Do not drink the water.”

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§ 228.325 Food service in a camp car or separate kitchen or dining facility in a camp.

(a) *Sanitary storage.* No food or beverage may be stored in a toilet room or in an area exposed to a toxic material.

(b) *Consumption of food or beverage on the premises.* No occupant shall be allowed to consume a food or beverage in a toilet room or in any area exposed to a toxic material.

(c) *Kitchens, dining halls, and feeding facilities.* (1) In each camp car where central dining operations are provided by the railroad or its contractor(s) or subcontractor(s), the food handling facilities shall be maintained in a clean and sanitary condition. *See* § 228.323, Potable water, generally.

(i) All surfaces used for food preparation shall be disinfected after each use.

(ii) The disinfection process shall include removal of chemical disinfectants that would adulterate foods prepared subsequent to disinfection.

(2) All perishable food shall be stored either under refrigeration or in a freezer. Refrigeration and freezer facilities shall be provided with a means to monitor temperature to ensure proper temperatures are maintained. The temperature of refrigerators shall be maintained at 40 °F or below; the temperature of freezers shall be maintained at 0 °F or below at all times.

(3) All non-perishable food shall be stored to prevent vermin and insect infestation.

(4) All food waste disposal containers shall be constructed to prevent vermin and insect infestation.

(i) All food waste disposal containers used within a camp car shall be emptied after each meal, or at least every four hours, whichever period is less.

(ii) All food waste disposal containers used outside a camp car shall be located to prevent offensive odors from entering the sleeping quarters.

(iii) All kitchen area camp car sinks used for food washing and preparation and all kitchen area floor drains shall be connected to a public sewer where available and practicable, unless the car is equipped with a holding tank that is emptied in a sanitary manner. For kitchen area sinks and floor drains identified in this paragraph (c)(4)(iii) connected to a holding tank, the tank must be constructed in a manner that prevents vermin from entry into the tank or odors from escaping into any camp car.

(iv) The sewage disposal method must not endanger the health of occupants.

(5) When a separate kitchen or dining hall car is provided, there must be a closeable door between the living or sleeping quarters into a kitchen or dining hall car.

(d) *Food handling.* (1) All food service facilities and operations for occupants of a camp car by the railroad or its contractor(s) or subcontractor(s) shall be carried out in accordance with sound hygienic principles. In all places of employment where all or part of the food service is provided, the food dispensed must be wholesome, free from spoilage, and must be processed, prepared, handled, and stored in such a manner as to be protected against contamination. See *§ 228.323,* Potable water, generally.

(2) No person with any disease communicable through contact with food or a food preparation item may be employed or permitted

to work in the preparation, cooking, serving, or other handling of food, foodstuffs, or a material used therein, in a kitchen or dining facility operated in or in connection with a camp car.

(e) The limitations of paragraphs (c) and (d) of this section do not apply to food service from restaurants near the camp car consist that are subject to State law.

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§ 228.327 Waste collection and disposal.

(a) *General disposal requirements.* All sweepings, solid or liquid wastes, refuse, and garbage in a camp must be removed in such a manner as to avoid creating a menace to health and as often as necessary or appropriate to maintain a sanitary condition.

(b) *General waste receptacles.* Any exterior receptacle used for putrescible solid or liquid waste or refuse in a camp shall be so constructed that it does not leak and may be thoroughly cleaned and maintained in a sanitary condition. Such a receptacle must be equipped with a solid tight-fitting cover, unless it can be maintained in a sanitary condition without a cover. This requirement does not prohibit the use of receptacles designed to permit the maintenance of a sanitary condition without regard to the aforementioned requirements.

(c) *Food waste disposal containers provided for the interior of camp cars.* An adequate number of receptacles constructed of smooth, corrosion resistant, easily cleanable, or disposable materials, must be provided and used for the disposal of waste food. Receptacles must be provided with a solid, tight-fitting cover unless sanitary conditions can be maintained without use of a cover. The number, size, and location of such receptacles must encourage their use and not result in overfilling. They must be emptied regularly and maintained in a clean, safe, and sanitary condition.

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§ 228.329 Housekeeping.

(a) A camp car must be kept clean to the extent allowed by the nature of the work performed by the occupants of the camp car.

(b) To facilitate cleaning, every floor, working place, and passageway must be kept free from protruding nails, splinters, loose boards, and unnecessary holes and openings.

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§ 228.331 First aid and life safety.

(a) An adequate first aid kit must be maintained and made available for occupants of a camp car for the emergency treatment of an injured person.

(b) The contents of the first aid kit shall be placed in a weatherproof container with individual sealed packages for each type of item, and shall be checked at least weekly when the camp car is occupied to ensure that the expended items are replaced. The first aid kit shall contain, at a minimum, the following:

(1) Two small gauze pads (at least 4 × 4 inches);

(2) Two large gauze pads (at least 8 × 10 inches);

(3) Two adhesive bandages;

(4) Two triangular bandages;

(5) One package of gauge roller bandage that is at least 2 inches wide;

(6) Wound cleaning agent, such as sealed moistened towelettes;

(7) One pair of scissors;

(8) One set of tweezers;

(9) One roll of adhesive tape;

(10) Two pairs of latex gloves; and

(11) One resuscitation mask.

(c) Each sleeping room shall be equipped with the following:

(1) A functional portable Type ABC fire extinguisher; and

(2) Either a functional smoke alarm and a carbon monoxide alarm, or a functional combined smoke-carbon-monoxide alarm.

(d) Each camp car consist shall have an emergency preparedness plan prominently displayed so all occupants of the camp car consist can view it at their convenience. The plan shall address the following subjects for each location where the camp car consist is used to house railroad employees or MOW workers:

(1) The means used to be aware of and notify all occupants of impending weather threats, including thunderstorms, tornados, hurricanes, floods, and other major weather-related risks;

(2) Shelter-in-place and emergency and evacuation instructions for each of the specific threats identified; and

(3) The address and telephone number of the nearest emergency medical facility and directions on how to get there from the camp car consist.

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§ 228.333 Remedial action.

A railroad shall, within 24 hours after receiving a good faith notice from a camp car occupant or an employee labor organization representing camp car occupants or notice from a Federal Railroad Administration inspector, including a certified State inspector under part 212 of this chapter, of noncompliance with this subpart, correct each non-complying condition on the camp car or cease use of the camp car as sleeping quarters for each occupant. In the event that such a condition affects the safety or health of an occupant, such as, but not limited to, water, cooling, heating, or eating facilities, sanitation issues related to food storage, food handling or sewage disposal, vermin or pest infestation, or electrical hazards, the railroad must immediately upon notice provide alternative arrangements for housing and providing food to the employee or MOW worker until the condition adverse to the safety or health of the occupant(s) is corrected.

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§ 228.335 Electronic recordkeeping.

(a) Each railroad shall keep records as required by § 228.323 either—

(1) On paper forms provided by the railroad, or

(2) By electronic means that conform with the requirements of subpart D of this part.

(b) Records required to be kept shall be made available to the Federal Railroad Administration as provided by 49 U.S.C. 20107.

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Subpart F—Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation

SOURCE: 76 FR 50397, Aug. 12, 2011, unless otherwise noted.

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§ 228.401 Applicability.

(a) Except as provided in paragraph (b) of this section, the requirements of this subpart apply to railroads and their officers and agents, with respect to their train employees who are engaged in commuter or intercity rail passenger transportation, including train employees who are engaged in tourist, scenic, historic, or excursion rail passenger transportation.

(b) This subpart does not apply to rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

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§ 228.403 Nonapplication, exemption, and definitions.

(a) *General.* This subpart does not apply to a situation involving any of the following:

(1) A casualty;

(2) An unavoidable accident;

(3) An act of God; or

(4) A delay resulting from a cause unknown and unforeseeable to a railroad or its officer or agent in charge of the employee when the employee left a terminal.

(b) *Exemption.* The Administrator may exempt a railroad having not more than a total of 15 train employees, signal employees, and dispatching service employees from the limitations imposed by this subpart on the railroad's train employees who are engaged in commuter or intercity rail passenger transportation. The Administrator may allow the exemption from this subpart after a full hearing, for good cause shown, and on deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a railroad to require or allow its train employees to be on duty more than a total of 16 hours in a 24-hour period.

(c) *Definitions.* In this subpart—

Commuter or intercity rail passenger transportation has the meaning assigned by section 24102 of title 49, United States Code, to the terms “commuter rail passenger transportation” or “intercity rail passenger transportation.”

Train employee who is engaged in commuter or intercity rail passenger transportation includes a train employee who is engaged in commuter or intercity rail passenger transportation regardless of the nature of the entity by whom the employee is employed and any other train employee who is employed by a commuter railroad or an intercity passenger railroad. The term excludes a train employee of another type of railroad who is engaged in work train service even though that work train service might be related to providing commuter or intercity rail passenger transportation, and a train employee of another type of railroad who serves as a pilot on a train operated by a commuter railroad or intercity passenger railroad.

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§ 228.405 Limitations on duty hours of train employees engaged in commuter or intercity rail passenger transportation.

(a) *General.* Except as provided in paragraph (c) of this section, a railroad and its officers and agents may not require or allow a train employee engaged in commuter or intercity rail passenger transportation to remain or go on duty—

(1) Unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or

(2) After that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty; or

(3) In a series of at most 14 consecutive calendar days, in excess of the following limitations:

(i) That employee's first series of at most 14 consecutive calendar days begins on the first calendar day that the employee initiates an on-duty period on or after the compliance date for this paragraph (a)(3), as specified in § 228.413. A series of at most 14 consecutive calendar days either ends on the 14th consecutive day or may last for less than 14 days if an employee has accumulated a total of two calendar days on which the employee has not initiated an on-duty period before the beginning of the 14th day of the series. After the employee has accumulated a total of two calendar days on which the employee has not initiated an on-duty period, including at least 24 consecutive hours off duty as required by paragraph (a)(3)(ii) or two consecutive calendar days without initiating an on-duty period as required by paragraph (a)(3)(iii) of this section, during the employee's current series of at most 14 consecutive calendar days, a new series of at most 14 consecutive calendar days begins on the calendar day in which the employee next initiates an on-duty period. Only calendar days after the starting date of a series are counted toward the accumulation of a total of two calendar days on which the employee did not initiate an on-duty period. A calendar day on which an on-duty period was not initiated that occurred prior to the start of the new series, does not count toward refreshing the new series.

(ii) If the employee initiates an on-duty period each day on any six or more consecutive calendar days during the series of at most 14 consecutive calendar days, and at least one of the on-duty periods is defined as a Type 2 assignment, that employee must have at least 24 consecutive hours off duty prior to next initiating an on-duty period, except as provided in paragraph (a)(3)(v) of this section.

(iii) If the employee has initiated an on-duty period each day on 13 or more calendar days in the series of at most 14 consecutive calendar days, that employee must have at least two consecutive calendar days on which the employee does not initiate an on-duty period prior to next initiating an on-duty period, except as provided in paragraph (a)(3)(v) of this section.

(iv) The minimum time off duty required by paragraph (a)(3)(ii) of this section and the at least two consecutive calendar days in which the employee does not initiate an on-duty period required by paragraph (a)(3)(iii) of this section must be at the employee's home

terminal, and during such periods, the employee shall be unavailable for any service for any railroad.

(v) Paragraphs (a)(3)(ii)-(iii) of this section notwithstanding, if the employee is not at the employee's home terminal when time off duty is required by paragraph (a)(3)(ii) of this section or calendar days in which the employee does not initiate an on-duty period are required by paragraph (a)(3)(iii) of this section, the employee may either deadhead to the point of final release at the employee's home terminal or initiate an on-duty period in order to return to the employee's home terminal either on the same calendar day or the next consecutive calendar day after the completion of the duty tour triggering the requirements of paragraph (a)(3)(ii) or paragraph (a)(3)(iii) of this section.

(vi) If the employee is required to have at least 24 consecutive hours off duty under paragraph (a)(3)(ii) of this section and not to initiate an on-duty period for at least two consecutive calendar days under paragraph (a)(3)(iii) of this section, both requirements shall be observed. The required periods run concurrently, to the extent that they overlap.

(b) *Determining time on duty.* In determining under paragraph (a) of this section the time that a train employee subject to this subpart is on or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty;

(2) Time the employee is engaged in or connected with the movement of a train is time on duty;

(3) Time spent performing any other service for the railroad during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty;

(4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty;

(5) An interim period available for rest at a place other than a designated terminal is time on duty;

(6) An interim period available for less than four hours rest at a designated terminal is time on duty; and

(7) An interim period available for at least four hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:

(i) A casualty;

(ii) A track obstruction;

(iii) An act of God; or

(iv) A derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad or its officer or agent in charge of that employee when that employee left the designated terminal.

(c) *Emergencies.* A train employee subject to this subpart who is on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than four additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. In this paragraph, an emergency ends when the track is cleared and the railroad line is open for traffic.

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§ 228.407 Analysis of work schedules; submissions; FRA review and approval of submissions; fatigue mitigation plans.

(a) *Analysis of work schedules.* Each railroad subject to this subpart must perform an analysis of one cycle of the work schedules (the period within which the work schedule repeats) of its train employees engaged in commuter or intercity rail passenger transportation and identify those work schedules intended to be assigned to its train employees, that, if worked by such a train employee, put the train employee at risk for a level of fatigue at which safety may be compromised. Schedules identified in paragraph (g) of this section do not have to be analyzed. A level of fatigue at which safety may be compromised, hereafter called “the fatigue threshold,” shall be determined by procedures that use a scientifically valid, biomathematical model of human performance and fatigue that has been approved by the Associate Administrator pursuant to paragraph (c)(1) of this section, or previously accepted pursuant to paragraph (c)(2) of this section. Each work schedule that violates the fatigue threshold must be—

(1) Reported to the Associate Administrator as provided in paragraph (b) of this section, no later than April 12, 2012;

(2) Either—

(i) Mitigated by action in compliance with the railroad's fatigue mitigation plan that has been approved by the Associate Administrator as specified in paragraph (b) of this section, no later than April 12, 2012; or

(ii) Supported by a determination that the schedule is operationally necessary, and that the fatigue risk cannot be sufficiently mitigated by the use of fatigue mitigation tools to reduce the risk for fatigue to a level that does not violate the fatigue threshold, no later than April 12, 2012; or

(iii) Both, no later than April 12, 2012; and

(3) Approved by FRA for use in accordance with paragraph (b) of this section.

(b) *Submissions of certain work schedules and any fatigue mitigation plans and determinations of operational necessity or declarations; FRA review and approval.* (1) No later than April 12, 2012, the railroad shall submit for approval to the Associate Administrator the work schedules described in paragraph (b)(1)(i) and (ii) of this section. The railroad shall identify and group the work schedules as follows:

(i) Work schedules that the railroad has found, using a validated model (as specified in paragraph (c)(1) of this section or approved by FRA in accordance with paragraph (c)(2) of this section) to present a risk for a level of fatigue that violates the applicable fatigue threshold, but that the railroad has determined can be mitigated by the use of fatigue mitigation tools so as to present a risk for a level of fatigue that does not violate the applicable fatigue threshold. The fatigue mitigation tools that will be used to mitigate the fatigue risk presented by the schedule must also be submitted.

(ii) Work schedules that the railroad has found, using a validated model (as specified in paragraph (c)(1) of this section or approved by FRA in accordance with paragraph (c)(2) of this section), to present a risk for a level of fatigue that violates the applicable fatigue threshold, but that the railroad has determined cannot be mitigated so as to present a risk for a level of fatigue that does not violate the applicable fatigue threshold by the use of fatigue mitigation tools, and that the railroad has determined are operationally necessary. The basis for the determination must also be submitted.

(2) If a railroad performs the analysis of its schedules required by paragraph (a) of this section, and determines that none of them violates the applicable fatigue threshold, and therefore none of them presents a risk for fatigue that requires it to be submitted to the Associate Administrator pursuant to this paragraph, that railroad shall, no later than April 12, 2012, submit to the Associate Administrator a written declaration, signed by an officer of the railroad, that the railroad has performed the required analysis and determined that it has no schedule that is required to be submitted.

(3) FRA will review submitted work schedules, proposed fatigue mitigation tools, and determinations of operational necessity. If FRA identifies any exceptions to the submitted information, the agency will notify the railroad within 120 days of receipt of the railroad's submission. Railroads are required to correct any deficiencies identified by FRA within the time frame specified by FRA.

(4) FRA will audit railroad work schedules and fatigue mitigation tools every two years to ensure compliance with this section.

(c) *Submission of models for FRA approval; validated models already accepted by FRA.* (1) If a railroad subject to this subpart wishes to use a model of human performance and fatigue, not previously approved by FRA, for the purpose of making part or all of the analysis required by paragraph (a) or (d) of this section, the railroad shall submit the model and evidence in support of its scientific validation, for the approval of the Associate Administrator. Decisions of the Associate Administrator regarding the validity of a model are subject to review under § 211.55 of this chapter.

(2) A railroad may use a model that is already accepted by FRA. FRA has approved the Fatigue Avoidance Scheduling Tool™ (FAST) issued on July 15, 2009, by Fatigue Science, Inc. (with a fatigue threshold for the purpose of this regulation less than or equal to 70 for 20 percent or more of the time worked in a duty tour), and Fatigue Audit InterDyne™ (FAID) version 2, issued in September 2007 by InterDynamics Pty Ltd. (Australian Company Number (ACN) 057 037 635) (with a fatigue threshold for the purpose of this regulation greater than or equal to 72 for 20 percent or more of the time worked in a duty tour) as scientifically valid, biomathematical models of human performance and fatigue for the purpose of making the analysis required by paragraph (a) or (d) of this section. Other versions of the models identified in this paragraph must be submitted to FRA for approval prior to use as provided by paragraph (c)(1) of this section.

(3) If a new model is submitted to FRA for approval, pursuant to paragraph (c)(1) of this section, FRA will publish notice of the submission in the FEDERAL REGISTER, and will provide an opportunity for comment, prior to the Associate Administrator's making a final determination as to its disposition. If the Associate Administrator approves a new model as having been validated and calibrated, so that it can be used for schedule analysis in compliance with this regulation, FRA will also publish notice of this determination in the FEDERAL REGISTER .

(d) *Analysis of certain later changes in work schedules.* (1) Additional follow-up analysis must be performed each time that the railroad changes one of its work schedules in a manner—

(i) That would differ from the FRA-approved parameters for hours of duty of any work schedule previously analyzed pursuant to paragraph (a) of this section; or

(ii) That would alter the work schedule to the extent that train employees who work the schedule may be at risk of experiencing a level of fatigue that violates the FRA-approved fatigue threshold established by paragraph (a) of this section.

(2) Such additional follow-up analysis must be submitted for FRA approval as provided under paragraph (b) of this section, as soon as practicable, prior to the use of the new schedule for an employee subject to this subpart. FRA approval is not necessary before a new schedule may be used; however, a schedule that has been disapproved by FRA may not be used.

(3) FRA will review submitted revised work schedules, and any accompanying fatigue mitigation tools, and determinations of operational necessity. If FRA identifies any exceptions to the submitted information, the agency will notify the railroad as soon as possible. Railroads are required to correct any deficiencies identified by FRA within the time frame specified by FRA.

(e) *Fatigue mitigation plans.* A written plan must be developed and adopted by the railroad to mitigate the potential for fatigue for any work schedule identified through the analysis required by paragraph (a) or (d) of this section as at risk, including potential fatigue caused by unscheduled work assignments. Compliance with the fatigue mitigation plan is mandatory. The railroad shall review and, if necessary, update the plan at least once every two years after adopting the plan.

(f) *Consultation.* (1) Each railroad subject to this subpart shall consult with, employ good faith, and use its best efforts to reach agreement with, all of its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad, on the following subjects:

(i) The railroad's review of work schedules found to be at risk for a level of fatigue at which safety may be compromised (as described by paragraph (a) of this section;

(ii) The railroad's selection of appropriate fatigue mitigation tools; and

(iii) All submissions by the railroad to the Associate Administrator for approval that are required by this section.

(2) For purposes of this section, the term “directly affected employee” means an employee to whom one of the work schedules applies or would apply if approved.

(3) If the railroad and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad, cannot reach consensus on any area described in paragraph (f)(1) of this section, then directly affected employees and any such organization may file a statement with the Associate Administrator explaining their views on any issue on which consensus was not reached. The Associate Administrator shall consider such views during review and approval of items required by this section.

(g) *Schedules not requiring analysis.* The types of schedules described in paragraphs (1) and (2) of this paragraph do not require the analysis described in paragraphs (a) or (d) of this section.

(1) Schedules consisting solely of Type 1 assignments do not have to be analyzed.

(2) Schedules containing Type 2 assignments do not have be analyzed if—

(i) The Type 2 assignment is no longer in duration than, and fully contained within, the schedule of another Type 2 assignment that has already been determined to present an acceptable level of risk for fatigue that does not violate the fatigue threshold; and

(ii) If the longer Type 2 schedule within which another Type 2 schedule is contained requires mitigations to be applied in order to achieve an acceptable level of risk for fatigue that does not violate the fatigue threshold, the same or more effective mitigations must be applied to the shorter Type 2 schedule that is fully contained within the already acceptable Type 2 schedule.

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§ 228.409 Requirements for railroad-provided employee sleeping quarters during interim releases and other periods available for rest within a duty tour.

(a) If a railroad subject to this subpart provides sleeping quarters for the use of a train employee subject to this subpart during interim periods of release as a method of mitigating fatigue identified by the analysis of work schedules required by § 228.407(a) and (d), such sleeping quarters must be “clean, safe, and sanitary,” and give the employee “an opportunity for rest free from the interruptions caused by noise under the control of the” railroad within the meaning of section 21106(a)(1) of title 49 of the United States Code.

(b) Any sleeping quarters provided by a railroad that are proposed as a fatigue mitigation tool pursuant to § 228.407(b)(1)(i), are subject to the requirements of § 228.407(f), Consultation.

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§ 228.411 Training.

(a) *Individuals to be trained.* Except as provided by paragraph (f) of this section, each railroad subject to this subpart shall provide

training for its employees subject to this subpart, and the immediate supervisors of its employees subject to this subpart.

(b) *Subjects to be covered.* The training shall provide, at a minimum, information on the following subjects that is based on the most current available scientific and medical research literature:

(1) Physiological and human factors that affect fatigue, as well as strategies to reduce or mitigate the effects of fatigue;

(2) Opportunities for identification, diagnosis, and treatment of any medical condition that may affect alertness or fatigue, including sleep disorders;

(3) Alertness strategies, such as policies on napping, to address acute drowsiness and fatigue while an employee is on duty;

(4) Opportunities to obtain restful sleep at lodging facilities, including employee sleeping quarters provided by the railroad; and

(5) The effects of abrupt changes in rest cycles for employees.

(c) *Timing of initial training.* Initial training shall be provided to affected current employees not later than December 31, 2012, and to new employees subject to this subpart before the employee first works a schedule subject to analysis under this subpart, or not later than December 31, 2012, whichever occurs later.

(d) *Timing of refresher training.* (1) At a minimum, refresher training shall be provided every three calendar years.

(2) Additional refresher training shall also be provided when significant changes are made to the railroad's fatigue mitigation plan or to the available fatigue mitigation tools applied to an employee's assignment or assignments at the location where he or she works.

(e) *Records of training.* A railroad shall maintain a record of each employee provided training in compliance with this section and shall retain these records for three years.

(f) *Conditional exclusion.* A railroad engaged in tourist, scenic, historic, or excursion rail passenger transportation, may be excluded from the requirements of this section, if its train employees subject to this rule are assigned to work only schedules wholly within the hours of 4 a.m. and 8 p.m. on the same calendar day that comply with the provisions of § 228.405, upon that railroad's submission to the Associate Administrator of a written declaration, signed by an officer of the railroad, indicating that the railroad meets the limitations established in this paragraph.

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§ 228.413 Compliance date for regulations; exemption from compliance with statute.

(a) *General.* Except as provided by paragraph (d) of this section or as provided in § 228.411, on and after April 12, 2012, railroads subject to this subpart shall comply with this subpart and §§ 228.11(c)(1)-(2) and 228.19(c)(5)-(c)(8) with respect to their train employees who are engaged in commuter or intercity rail passenger transportation.

(b) *Exemption from compliance with statute.* On and after October 15, 2011, railroads subject to this subpart or any provision of this subpart shall be exempt from complying with the provisions of old section 21103 and new section 21103 for such employees.

(c) *Definitions.* In this section—

(1) The term “new section 21103” means section 21103 of title 49, United States Code, as amended by the Rail Safety Improvement Act of 2008 (RSIA) effective July 16, 2009.

(2) The term “old section 21103” means section 21103 of title 49, United States Code, as it was in effect on the day before the enactment of the RSIA.

(d) *Exceptions.* (1) On and after October 15, 2011, railroads subject to this subpart shall comply with §§ 228.401, 228.403, 228.405(a)(1), (a)(2), (b), and (c), and 228.409(a).

(2) Railroads engaged in tourist, scenic, historic, or excursion rail passenger transportation, subject to this subpart, must comply with the sections listed in paragraph (d)(1) of this section on and after October 15, 2011, but are not required to comply with the other provisions of this subpart and §§ 228.11(c)(1)-(2) and 228.19(c)(5)-(c)(8) until April 12, 2013.

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Appendix A to Part 228—Requirements of the Hours of Service Act: Statement of Agency Policy and Interpretation

First enacted in 1907, the Hours of Service Act was substantially revised in 1969 by Public Law 91-169. Further amendments were enacted as part of the Federal Railroad Safety Authorization Act of 1976, Public Law 94-348 and by the Rail Safety Improvement Act of 1988, Public Law 100-342. The purpose of the law is “to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees * * *." This appendix is designed to explain the effect of the law in commonly-encountered situations.

The Act governs the maximum work hours of employees engaged in one or more of the basic categories of covered service treated below. If an individual performs more than one kind of covered service during a tour of duty, then the most restrictive of the applicable limitations control.

The act applies to any railroad, as that term is defined in 45 U.S.C. 431(e). It governs the carrier's operations over its own railroad and all lines of road which it uses.

TRAIN AND ENGINE SERVICE

Covered Service. Train or engine service refers to the actual assembling or operation of trains. Employees who perform this type of service commonly include locomotive engineers, firemen, conductors, trainmen, switchmen, switchtenders (unless their duties come under the provisions of section 3) and hostlers. With the passage of the 1976 amendments, both inside and outside hostlers are considered to be connected with the movement of trains. Previously, only outside hostlers were covered. Any other employee who is actually engaged in or connected with the movement of any train is also covered, regardless of his job title.

Limitations on Hours. The Act establishes two limitations on hours of service. First, no employee engaged in train or engine service may be required or permitted to work in excess of twelve consecutive hours. After working a full twelve consecutive hours, an employee must be given at least ten consecutive hours off duty before being permitted to return to work.

Second, no employee engaged in train or engine service may be required or permitted to continue on duty or go on duty unless he has had at least eight consecutive hours off duty within the preceding twenty-four hours. This latter limitation, when read in conjunction with the requirements with respect to computation of duty time (discussed below) results in several conclusions:

(1) When an employee's work tour is broken or interrupted by a valid period of interim release (4 hours or more at a designated terminal), he may return to duty for the balance of the total 12-hour work tour during a 24-hour period.

(2) After completing the 12 hours of broken duty, or at the end of the 24-hour period, whichever occurs first, the employee may not be required or permitted to continue on duty or to go on duty until he has had at least 8 consecutive hours off duty.

(3) The 24-hour period referred to in paragraphs 1 and 2 above shall begin upon the commencement of a work tour by the employee immediately after his having received a statutory off-duty period of 8 or 10 hours as appropriate.

Duty time and effective periods of release. On-duty time commences when an employee reports at the time and place specified by the railroad and terminates when the employee is finally released of all responsibilities. (Time spent in deadhead transportation to a duty assignment is also counted as time on duty. See discussion below.) Any period available for rest that is of four or more hours and is at a designated terminal is off-duty time. All other periods available for rest must be counted as time on duty under the law, regardless of their duration.

The term "designated terminal" means a terminal (1) which is designated in or under a collective bargaining agreement as the "home" or "away-from-home" terminal for a particular crew assignment and (2) which has suitable facilities for food and lodging. Carrier and union representatives may agree to establish additional designated terminals having such facilities as points of effective release under the Act. Agreements to designate additional terminals for purposes of release under the Act should be reduced to writing and should make reference to the particular assignments affected and to the Hours of Service Act. The following are common situations illustrating the designated terminal concept:

(1) A freight or passenger road crew operates a train from home terminal "A" to away-from-home terminal "B" (or the reverse). Terminals "A" and "B" would normally be the designated terminals for this specific crew assignment. However, carrier and employee representatives may agree to designate additional terminals having suitable facilities for food and lodging as appropriate points of release under the Hours of Service Act.

(2) A road crew operates a train in turn-around service from home terminal "A" to turn-around point "B" and back to "A". Terminal "A" is the only designated terminal for this specific crew assignment, unless carrier and employee representatives have agreed to designate additional terminals having suitable facilities for food and lodging.

(3) A crew is assigned to operate a maintenance-of-way work train from home terminal "A", work on line of road and tie up for rest along the line of road at point "B". Home terminal "A" and tie-up point "B" both qualify as designated terminals for this specific work train crew assignment. Of course, suitable facilities for food and lodging must be available at tie-up point "B".

Deadheading. Under the Act time spent in deadhead transportation receives special treatment. Time spent in deadhead transportation to a duty assignment by a train or engine service employee is considered on-duty time. Time spent in deadhead transportation from the final duty assignment of the work tour to the point of final release is not computed as either time on duty or time off duty. Thus, the period of deadhead transportation to point of final release may not be included in the required 8- or 10-hour off-duty period. Time spent in deadhead transportation to a duty assignment is calculated from the time the employee reports for deadhead until he reaches his duty assignment.

All time spent awaiting the arrival of a deadhead vehicle for transportation from the final duty assignment of the work tour to the point of final release is considered limbo time, *i.e.,* neither time on duty nor time off duty, provided that the employee is given no specific responsibilities to perform during this time. However, if an employee is required to perform service of any kind during that period (*e.g.,* protecting the train against vandalism, observing passing trains for any defects or unsafe conditions, flagging, shutting down locomotives, checking fluid levels, or communicating train consist information via radio), he or she will be considered as on duty until all such service is completed. Of course, where a railroad carrier's operating rules clearly relieve the employee of all duties during the waiting period and no duties are specifically assigned, the waiting time is not computed as either time on duty or time off duty.

Transit time from the employee's residence to his regular reporting point is not considered deadhead time.

If an employee utilizes personal automobile transportation to a point of duty assignment other than the regular reporting point in lieu of deadhead transportation provided by the carrier, such actual travel time is considered as deadheading time. However, if the actual travel time from his home to the point of duty assignment exceeds a reasonable travel time from the regular reporting point to the point of duty assignment, then only the latter period is counted. Of course, actual travel time must be reasonable and must not include diversions for personal reasons.

Example: Employee A receives an assignment from an “extra board” located at his home terminal to protect a job one hour's drive from the home terminal. In lieu of transporting the employee by carrier conveyance, the railroad pays the employee a fixed amount to provide his own transportation to and from the outlying point. The employee is permitted to go directly from his home to the outlying point, a drive which takes 40 minutes. The normal driving time between his regular reporting point at his home terminal and the outlying point is 60 minutes. The actual driving time, 40 minutes is considered deadhead time and is counted as time on duty under the Act.

Employee A performs local switching service at the outlying point. When the employee returns from the outlying point that evening, and receives an “arbitrary” payment for his making the return trip by private automobile, 40 minutes of his time in transportation home is considered deadheading to point of final release and is not counted as either time on duty or time off duty.

Wreck and relief trains. Prior to the 1976 amendments, crews of wreck and relief trains were exempted entirely from the limitations on hours of service. Under present law that is no longer the case. The crew of a wreck or relief train may be permitted to be on duty for not to exceed 4 additional hours in any period of 24 consecutive hours whenever an actual emergency exists and the work of the crew is related to that emergency. Thus, a crew could work up to 16 hours, rather than 12. The Act specifies that an emergency ceases to exist for purposes of this provision when the track is cleared and the line is open for traffic. An “emergency” for purposes of wreck or relief service may be a less extraordinary or catastrophic event than an “unavoidable accident or Act of God” under section 5(d) of the Act.

Example: The crew of a wreck train is dispatched to clear the site of a derailment which has just occurred on a main line. The wreck crew re-rails or clears the last car and the maintenance of way department releases the track to the operating department 14 hours and 30 minutes into the duty tour. Since the line is not clear until the wreck train is itself out of the way, the crew may operate the wreck train to its terminal, provided this can be accomplished within the total of 16 hours on duty.

Emergencies. The Act contains no general exception using the term “emergency” with respect to train or engine service or related work. See “casualties,” etc., under “General Provisions”.

COMMUNICATION OF TRAIN ORDERS

Covered Service. The handling of orders governing the movement of trains is the second type of covered service. This provision of the Act applies to any operator, train dispatcher or other employee who by the use of the telegraph, telephone, radio, or any other electical or mechanical device dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements.

The approach of the law is functional. Thus, though a yardmaster normally is not covered by this provision, a yardmaster or other employee who performs any of the specified service during a duty tour is subject to the limitations on service for that entire tour.

Limitations on hours. No employee who performs covered service involving communication of train orders may be required or permitted to remain on duty for more than nine hours, whether consecutive or in the aggregate, in any 24-hour period in any office, tower, station or place where two or more shifts are employed. Where only one shift is employed, the employee is restricted to 12 hours consecutively or in the aggregate during any 24-hour period.

The provision on emergencies, discussed below, may extend the permissible hours of employees performing this type of service.

Shifts. The term “shift” is not defined by the Act, but the legislative history of the 1969 amendments indicates that it means a tour of duty constituting a day's work for one or more employee performing the same class of work at the same station who are scheduled to begin and end work at the same time. The following are examples of this principle:

Scheduled Hours	Classification
7 a.m. to 3 p.m	1 shift.
7 a.m. to 12:30 p.m. 1:30 p.m. to 8 p.m. (Schedule for one employee including one hour lunch period)	Do.
7 a.m. to 3 p.m. 7 a.m. to 3 p.m. (Two employees scheduled)	Do.
7 a.m. to 3 p.m. 8 a.m. to 4 p.m. (Two employees scheduled)	2 shifts.

Duty time and effective periods of release. If, after reporting to his place of duty, an employee is required to perform duties at other places during this same tour of duty, the time spent traveling between such places is considered as time on duty. Under the traditional administrative interpretation of section 3, other periods of transportation are viewed as personal commuting and, thus, off-duty time.

A release period is considered off-duty time if it provides a meaningful period of relaxation and if the employee is free of all responsibilities to the carrier. One hour is the minimum acceptable release period for this type of covered service.

Emergencies. The section of the Act dealing with dispatchers, operators, and others who transmit or receive train orders contains its own emergency provision. In case of emergency, an employee subject to the 9 or 12-hour limitation is permitted to work an additional four hours in any 24-hour period, but only for a maximum of three days in any period of seven consecutive days. However, even in an emergency situation the carrier must make reasonable efforts to relieve the employee.

General Provisions

(applicable to all covered service)

Commingled Service. All duty time for a railroad even though not otherwise subject to the Act must be included when computing total on-duty time of an individual who performs one or more of the type of service covered by the Act. This is known as the principle of “commingled service”.

For example, if an employee performs duty for 8 hours as a trainman and then is used as a trackman (not covered by the law) in the same 24-hour period, total on-duty time is determined by adding the duty time as trackman to that as trainman. The law does not distinguish treatment of situations in which non-covered service follows, rather than precedes, covered service. The limitations on total hours apply on both cases. It should be remembered that attendance at required rules classes is duty time subject to the provisions on “commingling”. Similarly, where a carrier compels attendance at a disciplinary proceeding, time spent in attendance is subject to the provisions on commingling.

When an employee performs service covered by more than one restrictive provision, the most restrictive provision determines the total lawful on-duty time. Thus, when an employee performs duty in train or engine service and also as an operator, the provisions of the law applicable to operators apply to all on-duty and off-duty periods during such aggregate time. However, an employee subject to the 12 hour provision of section 2 of the law does not become subject to the 9 or 12-hour provisions of section 3 merely because he receives, transmits or delivers orders pertaining to or affecting the movement of his train in the course of his duties as a trainman.

Casualties, Unavoidable Accidents, Acts of God. Section 5(d) of the Act states the following: “The provisions of this Act shall not apply in any case of casualty or unavoidable accident or the Act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of the employee at the time said employee left a terminal, and which could not have been foreseen.” This passage is commonly referred to as the “emergency provision”. Judicial construction of this sentence has limited the relief which it grants to situations which are truly unusual and exceptional. The courts have recognized that delays and operational difficulties are common in the industry and must be regarded as entirely foreseeable; otherwise, the Act will provide no protection whatsoever. Common operational difficulties which do not provide relief from the Act include, but are not limited to, broken draw bars, locomotive malfunctions, equipment failures, brake system failures, hot boxes, unexpected switching, doubling hills and meeting trains. Nor does the need to clear a main line or cut a crossing justify disregard of the limitations of the Act. Such contingencies must normally be anticipated and met within the 12 hours. Even where an extraordinary event or combination of events occurs which, by itself, would be sufficient to permit excess service, the carrier must still employ due diligence to avoid or limit such excess service. The burden of proof rests with the carrier to establish that excess service could not have been avoided.

Sleeping Quarters. Under the 1976 amendments to the Act it is unlawful for any common carrier to provide sleeping quarters for persons covered by the Hours of Service Act which do not afford such persons an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters. Such sleeping quarters include crew quarters, camp or bunk cars, and trailers.

Sleeping quarters are not considered to be “free from interruptions caused by noise under the control of the railroad” if noise levels attributable to noise sources under the control of the railroad exceed an L_{eq} (8) value of 55dB(A).

Collective Bargaining. The Hours of Service Act prescribes the maximum permissible hours of service consistent with safety. However, the Act does not prohibit collective bargaining for shorter hours of service and time on duty.

Penalty. As amended by the Rail Safety Improvement Act of 1988 and the Rail Safety Enforcement and Review Act of 1992, the penalty provisions of the law apply to any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor), except that a penalty may be assessed against an individual only for a willful violation. See appendix A to 49 CFR part 209. For violations that occurred on September 3, 1992, a person who violates the Act is liable for a civil penalty, as the Secretary of Transportation deems reasonable, in an amount not less than $500 nor more than $11,000, except that where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 may be assessed. The Federal

Civil Penalties Inflation Adjustment Act of 1990 as amended by the Debt Collection Improvement Act of 1996 required agencies to increase the maximum civil monetary penalty for inflation. The amounts increased from $10,000 to $11,000 and from $20,000 to $22,000 respectively. According to the same law, in 2004, the minimum penalty of $500 was raised to $550, and the maximum penalty for a grossly negligent violation or a pattern of repeated violations that has caused an imminent hazard of death or injury to individuals or has caused death or injury, was increased from $22,000 to $27,000. The $11,000 maximum penalty was not adjusted. Effective October 9, 2007, the ordinary maximum penalty of $11,000 was raised to $16,000 as required under law. Effective March 2, 2009, the minimum penalty, ordinary maximum penalty and aggravated maximum penalty were raised again. The minimum penalty was increased from $550 to $650 pursuant to the law's requirement. Meanwhile, the ordinary maximum penalty was increased from $16,000 to $25,000 and the aggravated maximum was increased from $27,000 to $100,000 in accordance with the authority provided under the Rail Safety Improvement Act of 2008. Meanwhile, the ordinary maximum penalty was increased from $16,000 to $25,000 and the aggravated maximum was increased from $27,000 to $100,000 in accordance with the authority provided under the Rail Safety Improvement Act of 2008. See sec. 302, Div. A, Public Law 110-432, 122 Stat. 4848, 4878, Oct. 16, 2008; 49 U.S.C. 21301-21303. Effective June 25, 2012, the aggravated maximum penalty was raised from $100,000 to $105,000 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990. Public Law 101-410, 104 Stat. 890, 28 U.S.C. 2461, note, as amended by Sec. 31001(s)(1) of the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321-373, Apr. 16, 1996.

Each employee who is required or permitted to be on duty for a longer period than prescribed by law or who does not receive a required period of rest represents a separate and distinct violation and subjects the railroad to a separate civil penalty. In the case of a violation of section 2(a)(3) or (a)(4) of the Act, each day a facility is in noncompliance constitutes a separate offense and subjects the railroad to a separate civil penalty.

In compromising a civil penalty assessed under the Act, FRA takes into account the nature, circumstances, extent, and gravity of the violation committed, and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior or subsequent offenses, ability to pay, effect on ability to continue to do business and such other matters as justice may require.

Statute of limitations. No suit may be brought after the expiration of two years from the date of violation unless administrative notification of the violation has been provided to the person to be charged within that two year period. In no event may a suit be brought after expiration of the period specified in 28 U.S.C. 2462.

Exemptions. A railroad which employs not more than 15 persons covered by the Hours of Service Act (including signalmen and hostlers) may be exempted from the law's requirements by the FRA after hearing and for good cause shown. The exemption must be supported by a finding that it is in the public interest and will not adversely affect safety. The exemption need not relate to all carrier employees. In no event may any employee of an exempt railroad be required or permitted to work beyond 16 hours continuously or in the aggregate within any 24-hour period. Any exemption is subject to review at least annually.

[42 FR 27596, May 31, 1977, as amended at 43 FR 30804, July 18, 1978; 53 FR 28601, July 28, 1988; 55 FR 30893, July 27, 1990; 58 FR 18165, Apr. 8, 1993; 61 FR 20495, May 7, 1996; 63 FR 11622, Mar. 10, 1998; 69 FR 30594, May 28, 2004; 72 FR 51197, Sept. 6, 2007; 73 FR 79703, Dec. 30, 2008; 76 FR 67092, Oct. 31, 2011; 77 FR 24421, Apr. 24, 2012]

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Appendix B to Part 228—Schedule of Civil Penalties [1]

Section	Violation	Willful violation
Subpart B—Records and Reporting:		
228.9 Railroad records	$1,000	$2,000
228.11 Hours of duty records	1,000	2,000
228.17 Dispatcher's record	1,000	2,000
228.19 Monthly reports of excess service	1,000	2,000

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $105,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

[53 FR 52931, Dec. 29, 1988, as amended at 69 FR 30594, May 28, 2004; 73 FR 79703, Dec. 30, 2008; 77 FR 24421, Apr. 24, 2012]

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Appendix C to Part 228 [Reserved]

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Appendix D to Part 228—Guidance on Fatigue Management Plans

(a) Railroads subject to subpart F of this part, Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation, may wish to consider adopting a written fatigue management plan that is

designed to reduce the fatigue experienced by their train employees subject to that subpart and to reduce the likelihood of accidents, incidents, injuries, and fatalities caused by the fatigue of these employees. If a railroad is required to have a fatigue mitigation plan under § 228.407 (containing the fatigue mitigation tools that the railroad has determined will mitigate the risk posed by a particular work schedule for a level of fatigue at or above the fatigue threshold), then the railroad's fatigue management plan could include the railroad's written fatigue mitigation plan, designated as such to distinguish it from the part of the plan that is optional, or could be a separate document. As provided in § 228.407(a)(2) and (e), compliance with the fatigue mitigation plan itself is mandatory.

(b) A good fatigue management plan contains targeted fatigue countermeasures for the particular railroad. In other words, the plan takes into account varying circumstances of operations by the railroad on different parts of its system, and should prescribe appropriate fatigue countermeasures to address those varying circumstances. In addition, the plan addresses each of the following items, as applicable:

(1) Employee education and training on the physiological and human factors that affect fatigue, as well as strategies to reduce or mitigate the effects of fatigue, based on the most current scientific and medical research and literature;

(2) Opportunities for identification, diagnosis, and treatment of any medical condition that may affect alertness or fatigue, including sleep disorders;

(3) Effects on employee fatigue of an employee's short-term or sustained response to emergency situations, such as derailments and natural disasters, or engagement in other intensive working conditions;

(4) Scheduling practices for employees, including innovative scheduling practices, on-duty call practices, work and rest cycles, increased consecutive days off for employees, changes in shift patterns, appropriate scheduling practices for varying types of work, and other aspects of employee scheduling that would reduce employee fatigue and cumulative sleep loss;

(5) Methods to minimize accidents and incidents that occur as a result of working at times when scientific and medical research has shown that increased fatigue disrupts employees' circadian rhythm;

(6) Alertness strategies, such as policies on napping, to address acute drowsiness and fatigue while an employee is on duty;

(7) Opportunities to obtain restful sleep at lodging facilities, including employee sleeping quarters provided by the railroad;

(8) The increase of the number of consecutive hours of off-duty rest, during which an employee receives no communication from the employing railroad or its managers, supervisors, officers, or agents; and

(9) Avoidance of abrupt changes in rest cycles for employees.

(c) Finally, if a railroad chooses to adopt a fatigue management plan, FRA suggests that the railroad review the plan and update it periodically as the railroad sees fit if changes are warranted.

[76 FR 50400, Aug. 12, 2011]

Appendix B: 124th Congressional Record

House of Representatives, October 13, 1978, Page 36951,
adequate food and lodging at an away from home terminal

to the Senate bill, as amended, were concurred in.

A motion to reconsider was laid on the table.

RAILWAY SAFETY AUTHORIZATIONS

Mr. ROONEY. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 12577) to amend the Federal Railroad Safety Act of 1970 to authorize additional appropriations, and for other purposes, as amended.

The Clerk read as follows:

H.R. 12577

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Railroad Safety Authorization Act of 1978".

AUTHORIZATION FOR APPROPRIATIONS

SEC. 2. Section 212 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 441) is amended to read as follows:

"SEC. 212. AUTHORIZATION FOR APPROPRIATIONS

"(a) There are authorized to be appropriated to carry out the provisions of this Act not to exceed $37,725,000 for the fiscal year ending September 30, 1979, and not to exceed $37,725,000 for the fiscal year ending September 30, 1980.

"(b) The amounts appropriated under subsection (a) of this section for a fiscal year shall be available for expenditure in such fiscal year as follows:

"(1) For the Office of Safety, including salaries and expenses for not more than (A) 600 safety inspectors, (B) 45 signal and train control inspectors, and (C) 125 clerical personnel, not to exceed $20,725,000. Such funds shall be available for travel expenses of safety inspectors for not less than 20 days per month.

"(2) To carry out the provisions of section 206(d) of this Act, relating to State safety programs, not to exceed $3,500,000.

"(3) For the Federal Railroad Administration, for salaries and expenses not otherwise provided for, not to exceed $3,500,000.

"(4) For conducting safety research and development activities under this Act, not to exceed $10,000,000.

Sums appropriated under this section for research and development, automated track inspection, and the State safety grant program are authorized to remain available until expended.".

LIMITATIONS ON FUNDING

SEC. 3. Not less than 50 percent of the funds appropriated to the Secretary of Transportation for any fiscal year to conduct railroad research and development programs under the Federal Railroad Safety Act of 1970 or any other Act shall be available for safety research, improved track inspection and data acquisition technology, improved rail freight service, and improved rail passenger systems.

HOURS OF SERVICE OF SIGNAL SYSTEM EMPLOYEES

SEC. 4. (a) Section 3A(a) of the Hours of Service Act (45 U.S.C. 63a(a)) is amended by adding at the end thereof, without paragraph indention, the following:

"Whenever the time on duty of an individual is broken or interrupted by any period of time off duty of less than eight consecutive hours, such individual may be on duty for not more than twelve hours during a twenty-four-hour period, if such individual has had at least eight consecutive hours off duty immediately before reporting for duty, or, where required by paragraph (1) of this subsection, at least ten consecutive hours off duty immediately before so reporting. After an individual has been on duty for a total of twelve hours during a period of twenty-four hours as permitted by the foregoing sentence, or at the end of such twenty-four-hour period, whichever occurs first, such individual shall not be required or permitted to continue on duty or to go on duty until he has had at least eight consecutive hours off duty. For purposes of this subsection, a twenty-four-hour period shall begin when an individual reports for duty immediately after he has had at least eight consecutive hours off duty or, where required by paragraph (1) of this subsection, at least ten consecutive hours off duty.".

(b) Section 3A(c) of the Hours of Service Act (45 U.S.C. 63a(c)) is amended to read as follows:

"(c) For purposes of this section, time on duty shall commence when an individual reports for duty and terminate when an individual is finally released from duty, except that—

"(1) time spent in travel on return from a trouble call, whether directly to the individual's residence or by way of the individual's headquarters, shall be considered neither time on duty nor time off duty, except that up to sixty minutes of such time on return from the final trouble call of a period of continuous or broken service shall be considered time off duty;

"(2) if, at the expiration of scheduled duty hours, an individual has not completed the trip from the final outlying worksite of the duty period to the individual's headquarters or from the final outlying worksite directly to the individual's residence, then the time spent in travel outside the scheduled duty hours which is required to complete the trip to such headquarters or directly to such residence, as the case may be, shall be considered neither time on duty nor time off duty;

"(3) if an individual is released from duty at an outlying worksite prior to the end of such individual's scheduled duty hours in order to comply with this section, the period of time required for the trip from the outlying worksite to the individual's headquarters, or the period of time required for the trip from the outlying worksite direct to the individual's residence, as the case may be, shall be considered neither time on duty nor time off duty;

"(4) all time spent in transportation on an outrack vehicle, including time referred to in paragraphs (1), (2), and (3) of this subsection, shall be considered time on duty; and

"(5)(A) regularly scheduled meal periods and other release periods of thirty minutes or more up to sixty minutes shall be considered time off duty but shall not break an individual's continuity of service for purposes of this section, and (B) release periods of more than one hour shall be considered time off duty and shall break an individual's continuity of service for purposes of this section.".

(c) The amendments made by this section shall be effective as of July 8, 1976, except that no action or conduct which occurred during the period beginning on such date and ending on the date of enactment of this Act and which was lawful under the Hours of Service Act as in effect on July 8, 1976, shall be deemed to be unlawful under such Act as amended by this Act.

HOURS OF SERVICE ACT; INTERSTATE COMMERCE REQUIREMENT

SEC. 5. Subsection (a) of the first section of the Hours of Service Act (45 U.S.C. 61(a)) is amended to read as follows: "(a) this Act shall apply to any common carrier engaged in interstate or foreign commerce by railroad.".

DESIGNATED TERMINAL

SEC. 6. Subsection (b) of the first section of the Hours of Service Act (45 U.S.C. 61(b)) is amended by adding at the end thereof the following new paragraph:

"(4) The term 'designated terminal' means the home terminal and the away from home terminal for the assignment of a particular crew. Time on duty shall not include interim rest periods of four or more hours between designated terminals where the employee is prevented from reaching his or her designated terminal by act of God, track obstruction, casualty, derailment or major disabling equipment failure, which derailment or disabling equipment failure was the result of a cause not known to the carrier or its officer or agent in charge of the employee at the time such employee left the designated terminal, and which could not have been foreseen, and only then at a place where suitable facilities for food and lodging are available."

ASSESSMENT OF PENALTIES

SEC. 7. (a) Section 6 of the Act of March 2, 1893 (45 U.S.C. 6) is amended by inserting "assessed by the Secretary of Transportation and" immediately after "shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be".

(b) Section 4 of the Act of April 14, 1910 (45 U.S.C. 13) is amended by inserting "assessed by the Secretary of Transportation and" immediately after "shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be".

(c) Section 9 of the Act of February 17, 1911 (45 U.S.C. 34) is amended by inserting "assessed by the Secretary of Transportation and" immediately after "shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be".

(d) Section 25(h) of part I of the Interstate Commerce Act (49 U.S.C. 26(h)), is amended by inserting "assessed by the Secretary of Transportation and" immediately after "shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every day such violation, refusal, or neglect continues, to be".

NOTICE OF VIOLATIONS

SEC. 8. The first sentence of section 207 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 436) is amended to read as follows: "In any case in which the Secretary has failed to assess the civil penalty applicable under section 209 of this title, or no civil action has been commenced to obtain injunctive relief under section 210 of this title, with respect to a violation of any railroad safety rule, regulation, order, or standard issued under this title, within 90 days after the date on which notification was received by the Secretary from a State agency participating in investigative and surveillance activities under the provisions of section 206 of this title, that State agency may apply to the district court of the United States within the jurisdiction of which the violation occurred for the enforcement of such rule, regulation, order, or standard.".

ROLE OF DEPARTMENT OF TRANSPORTATION IN RAILROAD ACCIDENT INVESTIGATIONS; LIABILITY OF DEPARTMENT OF TRANSPORTATION'S AGENTS

SEC. 9. Section 208 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 437) is amended—

(1) by striking out subsection (b) and redesignating subsections (c) and (d) as subsections (b) and (c), respectively, and

(2) by amending subsection (b), as so redesignated, to read as follows:

"(b) To carry out the Secretary's responsibilities under this title, officers, employees,

or agents of the Secretary are authorized to enter upon, inspect, and examine rail facilities, equipment, rolling stock, operations, and pertinent records at reasonable times and in a reasonable manner. Such officers, employees, or agents shall display proper credentials when requested, and during the course of such inspection or examination shall be considered employees of the Federal Government for purposes of chapter 171 of title 28 of the United States Code.".

RAIL TRANSPORTATION SAFETY AND EFFICIENCY STUDY

SEC. 10. (a) The Secretary of Transportation shall conduct a study and evaluation concerning the safety and efficiency of rail transportation. Such study and evaluation shall include—

(1) a determination of the relationship of the size, weight, and length of railroad cars (other than those contained in unit trains) to the safety and efficiency of rail transportation; and

(2) a determination of the effect of the exclusive ownership and control of rights-of-way by individual railroads on the safety and efficiency of rail transportation, considering, among other things, whether or not such rights-of-way might be better employed under new structures of ownership or other conditions for joint usage.

(b) Within one year after the date of enactment of this Act, the Secretary of Transportation shall complete the portion of the study described in subsection (a)(1) of this section.

Within two years after the date of enactment of this Act, the Secretary of Transportation shall complete the portion of the study described in subsection (a)(2) of this section and submit a report to the Congress setting forth the results of such study, together with recommendations for such legislative or other action as the Secretary deems appropriate.

The SPEAKER pro tempore. Is a second demanded?

Mr. CARTER. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER pro tempore. The gentleman from Pennsylvania (Mr. ROONEY) will be recognized for 20 minutes, and the gentleman from Kentucky (Mr. CARTER) will be recognized for 20 minutes.

The Chair recognizes the gentleman from Pennsylvania (Mr. ROONEY).

Mr. ROONEY. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, my amendment in the nature of a substitute contains parts of H.R. 12577 as reported and S. 3081, as passed by the Senate. The substitute is a 2-year authorization for the Federal Railroad Administration. The substitute authorizes $37,725,000 for fiscal years 1979 and 1980 and authorizes an additional 100 safety inspectors. I believe these additional safety inspectors should begin to make inroads on the disturbingly high number of accidents and derailments on our Nation's rails. The substitute retains the provision contained in the House-passed bill which limits the Secretary to committing not less than 50 percent of appropriated funds to research and development programs for safety research, improved track inspection, and data acquisition technology, improved rail freight service, and improved rail passenger systems.

The substitute amends section 5 of H.R. 12577, which section deals with the designated terminal provisions under the Hours of Service Act. This amendment has been agreed upon by rail labor and the Association of American Railroads.

The amendment is designed to clarify the meaning of the term "designated terminal" as used in the Hours of Service Act. The amendment achieves this goal by providing a specific definition of the term.

The Hours of Service Act established limitations on the number of hours during which certain classes of railroad employees may remain on duty. The act specifies that "time on duty" shall include "interim periods available for rest at other than a designated terminal". The 1969 amendments to the act did not define "designated terminal." Uncertainty about the term's meaning has generated considerable litigation. FRA has stated that because of the different interpretations given by the courts, it will be forced to decline enforcement of additional alleged violations involving certain improper points of release until Congress defines the term.

To correct this situation and to prevent further litigation the amendment provides that a place shall be considered a designated terminal only if that place is the "home" or "away from home" terminal for the particular crew assignment involved. However, it is the intent of the amendment to permit, but not require, the carrier and employee representatives to mutually agree upon other release points as "designated terminals." To be valid, any such agreement would, of course, have to clearly indicate that the parties intended to establish the point in question as a "designated terminal" for purposes of the Hours of Service Act.

The amendment permits employees to be released for rest periods of 4 hours or more at points which are not designated terminals only if: First, such a point has suitable food and lodging available, and second, the employees are prevented from reaching their "designated terminal" within the time requirements of this act by act of God, track obstruction, casualty, derailment or major disabling equipment failures. The "act of God, track obstruction, casualty, derailment, or major disabling equipment failure" are the only conditions which permit carriers to release crews at other than a designated terminal. That is, the railroads under this amendment may release a crew at interim points under the following circumstances for 4 or more hours and it shall not be counted as time on duty.

Track obstruction, such as that caused by a highway grade crossing accident, but not other traffic ahead of the train (unless that traffic is itself affected by a cause identified in the amendment, such as a derailment).

Casualties: Act of God which is intended to include floods, washouts, snowstorms, hurricanes, et cetera.

Derailments: Major disabling equipment failures, which are intended to include conditions such as broken wheels, engine failures, journal failures, broken rail which halts traffic, track which is out of alignment and halts traffic, complete signal or electrical system failure, and other conditions where corrections cannot be made in time for the crew to complete its trip to the designated terminal within the time requirements of the act. This provision does not include minor malfunctions such as broken air hoses, pulled drawbars, train separations, slow orders or individual signal (or electrical) failures. Also, yard congestion is not a condition which would permit the railroad to release the crew at an interim release point under this amendment.

Furthermore, a derailment or major disabling equipment failure will justify releasing an employee between designated terminals only if it is the result of a cause not known to or foreseeable by the carrier or its officer or agent in charge of the employee at the time that employee left the designated terminal. Title 45 U.S.C. 64 a(d) contains a similar requirement.

The above five conditions are the only ones under which a carrier could release a crew at other than a designated terminal. Under all circumstances, if a condition can be corrected, and the crew can reasonably be expected to reach the designated terminal within the time requirements of the act, then the carrier shall not relieve the crew at the interim release point.

Some of the terms in the amendment are similar to terms employed in 45 U.S.C. 64 a(d). But the purpose of the latter section—total lifting of the requirements of the Hours of Service Act—is quite different from the much more limited purpose of the new paragraph 1(b)(4). It is the intent that the new paragraph 1(b)(4) be given a common sense interpretation geared to its purpose and that it be interpreted independently of the decisions construing section 64 a(d). Thus, for example, whereas some court decisions have held that section 64a(d) does not come into play where a relief crew can be dispatched, that consideration would not be relevant to the application of paragraph 1(b)(4).

The phrase "a place where suitable facilities for food and lodging are available" at other than a designated terminal requires as a minimum:

First. Where reasonably available, single occupancy sleeping rooms, containing adequate furniture and accessories, temperature controls, and toilet and shower facilities.

Second. Transportation will be furnished where lodging is located an unreasonable walking distance from the on and off duty points and will also be furnished to a restaurant if no restaurant is within reasonable walking distance from the lodging facility. Provisions defining reasonable distance in the respective collective bargaining agreements will govern where applicable. Otherwise, reasonable distance takes into consideration not only distance per se, but such factors as time, location, weather, and safety.

If the release point is at a "designated terminal" for other crews, the lodging facilities accepted as suitable for such other crews will likewise be considered as

suitable for interim rest periods. Transportation will be furnished as provided for such other crews.

Finally, this amendment is not intended in any way to affect the other provisions of the hours of service law relating to maximum hours an employee may be on duty.

The substitute amends section 7 of H.R. 12577 which provides for a study of rail transportation safety and efficiency. That section now requires, among other things, that the Secretary of Transportation conduct a study relating to, first, size, weight, and length of cars and trains as well as, second, the effect of exclusive ownership and control of rights-of-way by railroads on safety.

The Association of American Railroads and the Railway Labor Executives Association have requested that the aforesaid studies be amended and limited to, first, the size, weight, and length of railroad cars only, and second, whether the railroad right-of-way might be better employed under new structures of ownership or other conditions for joint usage. They have also requested that the cars contained in unit trains be excluded entirely from that portion of the study dealing with car size, weight, and length.

The substitute amendment I am proposing would accomplish what rail labor and the Association of American Railroads have requested. I know of no opposition to the amendment in the nature of a substitute and urge its adoption.

Mr. Speaker, I reserve the balance of my time.

Mr. CARTER. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, the amendment in this bill is virtually the same as one to the Senate version of this legislation, S. 2981, offered by the junior Senator from my State, the honorable WENDELL FORD.

The only changes were minor ones to clarify the first paragraph and to add a clause ensuring that notice be given of any Interstate Commerce Commission hearing under this provision.

These nonsubstantive changes were made with the knowledge of Senator FORD, and he concurs with them.

The background of this amendment lies in a critical situation in two of the eastern Kentucky coalfields in the area I represent.

Because of either the inability or the refusal of the single railroad serving the Harlan and Hazard coalfields to provide adequate service, the entire coal industry there is being jeopardized because the railroad is unable to move but a fraction of the coal being produced.

The economic disruption wrought by the failure of the railroad to provide safe and adequate service to the coal shippers in eastern Kentucky has widespread ramifications.

It endangers the economy of Kentucky—which is inextricably linked to coal—and it endangers this country's energy future by holding down production of coal in the country's leading coal-producing State.

Under this amendment, if the ICC were to find that a railroad had failed to provide safe and adequate service as it is required by law to do—then the ICC would have the means to compel the railroad to make investments in facilities or equipment sufficient to allow the railroad to live up to its statutory obligations.

The amendment has been carefully worked out to protect against ICC action bankrupting a railroad by mandating investments which are neither prudent nor reasonable.

However, where a railroad could provide safe and adequate service at recoverable cost—but fails to do so to the detriment of the shippers—then the shippers harmed by the railroad's inadequate service could go before the ICC to seek relief.

No railroad which is properly executing its obligation to the public—and which is being run in a businesslike fashion with proper attention to adequate investment in facilities, equipment, or maintenance in order to maintain adequate service—should fear this legislation.

I have received a letter from the Chairman of the ICC, A. Daniel O'Neil, in which he endorses this amendment.

I should like to quote a portion of it at this time.

Chairman O'Neal has written:

> Passage of this legislation would give the Commission greater powers to deal with rail car shortages than exist under present law. I believe that the amendment would give the Commission an important tool to deal with problems of rail car shortage and utilization, and I fully support its adoption.

Mr. SKUBITZ. Mr. Speaker, I rise in support of the Rooney amendment to H.R. 12577.

This amendment changes the bill as reported by the Interstate and Foreign Commerce Committee in the following ways:

First. It makes the authorization for 2 years rather than one to conform with the action previously taken by the other body.

Second. It substitutes language for the "designated terminal" definition contained in the bill reported by the Interstate and Foreign Commerce Committee to reflect a negotiated agreement between railroad management and the brotherhoods.

Third. It substitutes language for two study provisions relating to railroad car and train sizes and Government ownership of railroad rights-of-way to reflect agreement reached by committee members, railroads, and rail labor organizations.

Fourth. It contains a number of technical amendments contained in the Senate bill and requested by the Department of Transportation.

Mr. Speaker, I include a full explanation of the "designated terminal" provisions and the study provisions in my remarks:

The amendment is designed to clarify the meaning of the term "designated terminal" as used in the Hours of Service Act. The amendment achieves this goal by providing a specific definition of the term.

The Hours of Service Act establishes limitations on the number of hours during which certain classes of railroad employees may remain on duty. The act specifies that "time on duty" shall include "interim periods available for rest at other than a designated terminal." The 1969 amendments to the act did not define "designated terminal." Uncertainty about the term's meaning has generated considerable litigation. FRA has stated that because of the different interpretations given by the courts, it will be forced to decline enforcement of additional alleged violations involving certain improper points of release until Congress defines the term.

To correct this situation and to prevent further litigation the amendment provides that a place shall be considered a designated terminal only if that place is the "home" or "away from home" terminal for the particular crew assignment involved. However, it is the intent of the amendment to permit, but not require, the carrier and employee representatives to mutually agree upon other release points as "designated terminals." To be valid, any such agreement would, of course, have to clearly indicate that the parties intended to establish the point in question as a "designated terminal" for purposes of the Hours of Service Act.

The amendment permits employees to be released for rest periods of 4 hours or more at points which are not designated terminals only if: First, such a point has suitable food and lodging available; and second, the employees are prevented from reaching their "designated terminal" within the time requirements of this act by act of God, track obstruction, casualty, derailment, or major disabling equipment failure. The "act of God, track obstruction, casualty, derailment, or major disabling equipment failure" are the only conditions which permit carriers to release crews at other than a designated terminal. That is, the railroads under this amendment may release a crew at interim points under the following circumstances for 4 or more hours and it shall not be counted as time on duty.

Track obstruction, such as that caused by a highway grade crossing accident, but not other traffic ahead of the train (unless that traffic is itself affected by a cause identified in the amendment, such as a derailment).

Casualties: Act of God which is intended to include floods, washouts, snowstorms, hurricanes, and so forth.

Derailment: Major disabling equipment failure, which are intended to include conditions such as broken wheels, engine failures, journal failures, broken rail which halts traffic, track which is out of alinement and halts traffic, complete signal or electrical system failure, and other conditions where corrections cannot be made in time for the crew to complete its trip to the designated terminal within the time requirements of the act. This provision does not include minor malfunctions such as broken air hoses, pulled drawbars, train separations, slow orders or individual signal—or electrical—failure. Also, yard congestion is not a condition which would permit the railroad to release the crew at an interim release point under this amendment.

Furthermore, a derailment or major disabling equipment failure will justify releasing an employee between designated terminals only if it is the result of a cause not known to or foreseeable by the carrier or its officer or agent in charge of the employee at the time that employee left the designated terminal. Title 45 United States Code 64a(d) contains a similar requirement.

The above five conditions are the only ones under which a carrier could release a crew at other than a designated terminal Under all circumstances, if a condition can be corrected, and the crew can reasonably be expected to reach the designated terminal within the time requirements of the act, then the carrier shall not relieve the crew at the interim release point.

Some of the terms in the amendment are similar to terms employed in 45 U.S.C. 64a(d). But the purpose of the latter section—total lifting of the requirements of the Hours of Service Act—is quite different from the much more limited purpose of the new paragraph 1(b)(4). It is the intent that the new paragraph 1(b)(4) be given a commonsense interpretation geared to its purpose and that it be interpreted independently of the decisions construing section 64a(d). Thus, for example, whereas some court decisions have held that section 64a(d) does not come into play where a relief crew can be dispatched, that consideration would not be relevant to the application of paragraph 1(b)(4).

The phrase "a place where suitable facilities for food and lodging are available" at other than a designated terminal requires as a minimum—

First. Where reasonably available, single occupancy sleeping rooms, containing adequate furniture and accessories, temperature controls and toilet and shower facilities.

Second. Transportation will be furnished where lodging is located an unreasonable walking distance from the on and off duty points and will also be furnished to a restaurant if no restaurant is within reasonable walking distance from the lodging facility. Provisions defining reasonable distance in the respective collective bargaining agreements will govern where applicable. Otherwise, reasonable distance takes into consideration not only distance per se, but such factors as time, location, weather, and safety.

If the release point is at a "designated terminal" for other crews, the lodging facilities accepted as suitable for such other crews will likewise be considered as suitable for interim rest periods. Transportation will be furnished as provided for such other crews.

Finally, this amendment is not intended in any way to affect the other provisions of the Hours of Service law relating to maximum hours an employee may be on duty.

Third. Mr. Speaker, this amendment will provide funding for the assurance of a continued railroad safety program and clears up the definition of "designated terminal" used in the Hours of Service Act. I urge its adoption and the passage of the bill.

Fourth. I should add, however, that we will not achieve significant improvements in our railroad safety record until we change our basic approach from our present haphazard regulatory system to one based on performance standards and certified safety plans submitted by each railroad. Mr. MADIGAN and I have introduced a bill today, the Rail Safety Incentive Act of 1980, which embodies a better approach to railroad safety. I hope that the next Congress will give our new approach to this very old problem careful consideration.

Fifth. At this time, Mr. Speaker, I urge support of the pending amendment which will provide money for railroad safety programs in fiscal years 1979 and 1980 and initiate important railroad safety related studies and provide certainty for the term "designated terminal under the Hours of Service Act.

● Mr. STAGGERS. I rise in support of H.R. 12577; the Federal Railroad Safety Act of 1978, as amended. This bill authorizes appropriations of $37,725,000 for each of fiscal years 1979 and 1980 to implement and enforce the Federal Railroad Safety Act of 1970. That act is administered by the Federal Railroad Administration within the Department of Transportation. The bill increases the number of authorized safety inspectors from 500 to 600 and requires that at least 50 percent of the funds available to the Secretary of Transportation for railroad research and development programs be expended in specific programs directly related to improved rail safety.

The bill also clarifies the meaning of the term "designated terminal" used in the Hours of Service Act, which governs maximum permissible employees' hours for certain classes of railroad employees. That act specifies that computation of time on duty shall include interim rest periods of less than 4 hours at a designated terminal and interim rest periods not spent at a designated terminal. The term is not defined in the Hours of Service Act, and confusion about its meaning has arisen.

Two studies concerning the safety and efficiency of rail transportation to be conducted by the Secretary of Transportation are also mandated by the bill. One study entails a determination of the safety impact of the size, weight, and length of certain railroad cars. The other study involves a determination of the safety impact of the exclusive ownership of railroad rights-of-way by the individual railroads and whether other forms of ownership might improve safety.

These compromise amendments defining "designated terminals" and requiring studies to be conducted by the Secretary of Transportation are the product of lengthy negotiations between rail labor and rail management, and represents a constructive approach to solving serious rail safety problems.

Finally, the bill also makes minor and technical amendments to existing law to enhance the administration and enforcement of the railroad safety program and improve railroad safety generally.

Mr. Speaker, the growing dimensions of the railroad safety problem are of considerable national concern. This bill is essential if we are to address those problems and solve them, and I strongly urge the passage of the bill.●

Mr. CONABLE. Mr. Speaker, it was my intention to offer an amendment to the Railway Safety Act legislation correcting a provision in the companion Safety Appliances Act which now hampers timely repair of railroad cars. This unfortunate provision contributed to the drastic shortage last year of railroad cars for hauling the products of the salt mine in my area. As a result, shipping of the salt was hampered severely in one of the worst winters on record, when cities in the Northeast had a need for larger than ever supplies of road salt.

The Safety Appliances Act and court interpretations of almost 40 years ago require that repair of safety appliances on rail cars must be provided on the railroad which has possession of the cars at the time the defect is discovered, even though a connecting railroad may have the facilities, the time, and willingness to repair those cars much more promptly. However, such cars cannot be interchanged with the connecting carrier under present restrictions. This is particularly ironic when the cars must be transported long distances to repair shops when the facilities of a connecting line are available nearby. This requirement caused serious delays in repairs and added to shortages of cars in western New York last year.

It has been my intention to offer an amendment today to correct this defect in the Safety Appliances Act. This would bring these kinds of safety defects into the same kind of repair program as presently authorized for the repair of major defects, such as bad wheels or axles under the Railway Safety Act. The Railway Safety Act has recognized the practical necessity of interchanging cars in order to get them repaired in a timely manner and enhance car utilization.

Because we are late in the session and realize that amendments can jeopardize the final passage of any piece of legislation, I discussed the amendment with all the parties involved in an effort to obtain agreement on it. Congressman FRED ROONEY, chairman of the Subcommittee on Commerce and Transportation, agreed that this is a matter requiring correction and that my amendment was very much in order. He agreed to accept it during the consideration of the bill. A check was made with representatives of the Association of American Railroads, who felt it would be a good step toward increasing car utilization throughout the national rail system. However, a representative of the United Transportation Union expressed concern about an amendment at this late hour. He indicated a willingness to cooperate in resolving the problem but did not wish to jeopardize in any way final passage of the Railway Safety Act. Rather than proceeding with the amendment at this time, he suggested instead that the concerned parties meet with the Federal Railroad Administration to work out this problem administratively, and he offered support. If that is unsuccessful, he agreed to cooperate on seeking passage of appropriate legislation in the next Congress.

Because I understand the concern for the passage of the Railway Safety bill, I have agreed not to offer my amendment today. I pledge that I will seek to have this problem resolved administratively with the help of all the parties; if we find this impossible, however, I will seek correction of this defect by Congress next year. I appreciate the cooperation of Chairman ROONEY on this issue. His concern for improving rail transportation is clear and I look forward to working with him to resolve this issue.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Pennsylvania (Mr. ROONEY) that the House suspend the rules and pass the bill H.R. 12577 as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

Mr. ROONEY. Mr. Speaker, I ask unanimous consent to take from the Speaker's table a similar Senate bill (S. 3081) to amend the Federal Railroad Safety Act of 1970 to provide the Secretary of Transportation a longer period within which to assess civil penalties for certain violations, to extend authorizations of appropriations for fiscal year 1979 and 1980 for the rail safety program, and for other purposes, and ask for its immediate consideration.

The Clerk read the title of the Senate bill.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

The Clerk read the Senate bill, as follows:

S. 3081

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Railroad Safety Act Amendments Act of 1978".

NOTICE OF VIOLATIONS

SEC. 2. The first sentence of section 207 of the Federal Railroad Safety Act of 1970 (hereinafter in this Act referred to as the "Safety Act") (45 U.S.C. 436) is amended to read as follows: "In any case in which the Secretary has failed to assess the civil penalty applicable under section 209 of this title, or no civil action has been commenced to obtain injunctive relief under section 210 of this title, with respect to a violation of any railroad safety rule, regulation, order, or standard issued under this title, within 90 days after the date on which notification was received by the Secretary from a State agency participating in investigative and surveillance activities under the provisions of section 206 of this title, that State agency may apply to the district court of the United States within the jurisdiction of which the violation occurred for the enforcement of such rule, regulation, order or standard.".

ROLE OF DEPARTMENT OF TRANSPORTATION IN RAILROAD ACCIDENT INVESTIGATIONS; LIABILITY OF DEPARTMENT OF TRANSPORTATION'S AGENTS

SEC. 3. Section 208 of the Safety Act (45 U.S.C. 437) is amended—

(1) by deleting subsection (b) and redesignating subsections (c) and (d) as subsections (b) and (c) respectively; and

(2) by amending newly designated subsection (b) to read as follows:

"(b) To carry out the Secretary's responsibilities under the title, officers, employees, or agents of the Secretary are authorized to enter upon, inspect, and examine rail facilities, equipment, rolling stock, operations and pertinent records at reasonable times and in a reasonable manner. Such officers, employees, or agents shall display proper credentials when requested, and during the course of such inspection or examination shall be considered employees of the Government for the purposes of the Federal Tort Claims Act (28 U.S.C. 2671 et seq.)".

AUTHORIZATION OF APPROPRIATIONS

SEC. 4. Section 212 of the Safety Act (45 U.S.C. 441) is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 212. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $35,000,000 for the fiscal year ending September 30, 1979, and not to exceed $35,000,000 for the fiscal year ending September 30, 1980. Sums appropriated for research and development, automated track inspection and the State safety grant program shall remain available until expended.".

HOURS OF SERVICE ACT; INTERSTATE COMMERCE REQUIREMENT

SEC. 5. Subsection (a) of the first section of the Act of March 4, 1907, as amended (45 U.S.C. 61), is amended to read as follows:

"(a) This Act shall apply to any common carrier engaged in interstate or foreign commerce by railroad.".

SEC. 6. (a) Section 4 of the Act of April 14, 1910, as amended (45 U.S.C. 13), and section 9 of the Act of February 17, 1911, as amended (45 U.S.C. 34), are each amended by inserting "assessed by the Secretary of Transportation and" after "shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be", where those words appear in the respective sections.

(b) Section 25(h) of part I of the Interstate Commerce Act (49 U.S.C. 26(h)), is amended by inserting "assessed by the Secretary of Transportation and" after "shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every day such violation, refusal, or neglect continues, to be".

AMENDMENTS TO THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

SEC. 7. Section 505 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 825) is amended by (a) striking the last sentence of subsection (d)(3) thereof; and (b) striking "purchase under this title after September 30, 1978," and inserting in lieu thereof ", after September 30, 1979, make commitments to purchase under this title" in subsection (e) thereof.

MOTION OFFERED BY MR. ROONEY

Mr. ROONEY. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. ROONEY moves to strike out all after the enacting clause of the Senate bill, S. 3081, and insert in lieu thereof the text of H.R. 12577, as passed by the House.

The motion was agreed to.

The Senate bill was ordered to be read a third time, was read the third time, and passed.

The title was amended so as to read: "A bill to amend the Federal Railroad Safety Act of 1970 to authorize additional appropriations, and for other purposes."

A motion to reconsider was laid on the table.

A similar House bill (H.R. 12577) was laid on the table.

LOCAL RAIL SERVICE ASSISTANCE ACT OF 1978

Mr. ROONEY. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 11979) to amend section 5 of the Department of Transportation Act, relating to local rail service assistance, as amended.

The Clerk read as follows:

H.R. 11979

Be in enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—LOCAL RAIL SERVICE ASSISTANCE

SHORT TITLE

SEC. 101. This title may be cited as the "Local Rail Service Assistance Act of 1978".

EXPANSION OF ASSISTANCE

SEC. 102. Section 5(f) of the Department of Transportation Act (49 U.S.C. 1654(f)) is amended—

(1) in paragraph (2), by striking out "purchasing a line of railroad or other rail properties" and inserting in lieu thereof "acquiring, by purchase, lease, or in such other manner as the State considers appropriate, a line of railroad or other rail properties, or any interest therein.";

(2) in paragraph (3), by striking out "and" immediately after the semicolon;

(3) in paragraph (4), by striking out the period and inserting in lieu thereof "; and"; and

(4) by adding at the end thereof the following new paragraph:

"(5) the cost of constructing rail or rail related facilities (including new connections between two or more existing lines of railroad, intermodal freight terminals, sidings, and relocation of existing lines) for the purpose of improving the quality and efficiency of rail freight service.".

COST SHARING

SEC. 103. Section 5(g) of the Department of Transportation Act (49 U.S.C. 1654(g)) is amended to read as follows:

"(g) The Federal share of the costs of any rail service assistance program shall be 80 per centum, except that the Federal share of costs for financial assistance under paragraph (1) of subsection (f) of this section for any project described in subsection (k)(1) of this section shall be 80 per centum for the first and second years such project is conducted and 70 per centum for the third year such project is conducted. The State share of the costs may be provided in cash or through any of the following benefits, to the extent that such benefits would not otherwise be provided: (1) forgiveness of taxes imposed on a common carrier by railroad or on its properties; (2) the provision by the State or by any person or entity on behalf of such State, for use in its rail service assistance program, of real property or tangible personal property of the kind necessary for the safe and efficient operation of rail freight service; (3) trackage rights secured by the State for a common carrier by railroad; or (4) the cash equivalent of State salaries for State public employees working in the State rail service assistance program, but not including overhead and general administrative costs. If a State, or any person or entity on behalf of a State, provides more than such State's percentage share of the cost of its rail service assistance program during any fiscal year, the amount in excess of such share shall be applied toward such State's share of the costs of its program for subsequent fiscal years.".

FORMULA ALLOCATION

SEC. 104. Section 5(h) of the Department of Transportation Act (49 U.S.C. 1654(h)) is amended to read as follows:

"(h)(1) For the period beginning October 1, 1978, and ending September 30, 1979.

each State which is eligible to receive rail service assistance under this section is entitled to an amount equal to the total amount authorized and appropriated for such purposes, multiplied by a fraction the numerator of which is the rail mileage in such State which was eligible for rail service assistance under this section prior to October 1, 1978, and the denominator of which is the rail mileage in all of the States which was eligible for rail service assistance under this section prior to such date. Notwithstanding the provisions of the preceding sentence, the entitlement of each State shall not be less than 1 percent of the funds appropriated

"(2) Effective October 1, 1979, each State which is eligible to receive rail service assistance under this section is entitled annually to a sum from available funds as determined pursuant to this subsection. Available funds are funds appropriated for rail service assistance for that fiscal year and any funds to be reallocated for that fiscal year in accordance with this subsection. Subject to the limitations set forth in paragraph (3) of this subsection, the Secretary shall calculate each State's entitlement as follows:

"(A) two-thirds of the available funds, multiplied by a fraction (i) the numerator of which is the sum of the rail mileage in the State which, in accordance with section 1a(5)(a) of the Interstate Commerce Act (49 U.S.C. 1a(5)(a)), is either 'potentially subject to abandonment' or with respect to which a carrier plans to submit, but has not yet submitted, an application for a certificate of abandonment or discontinuance, and (ii) the denominator of which is the total of such rail mileage in all the States; and

"(B) one-third of available funds, multiplied by a fraction (i) the numerator of which is the rail mileage in the State with respect to which the Interstate Commerce Commission, within 3 years prior to the first day of the fiscal year for which funds are allocated or reallocated under this section, has found that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, such rail mileage (including, until September 30, 1981, the rail mileage which was eligible for assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762), and all rail mileage in the State which has, prior to October 1, 1978, been included for formula allocation purposes under this section); and (ii) the denominator of which is the total rail mileage in all the States eligible for rail service assistance under this section which the Interstate Commerce Commission has made such a finding (including, until September 30, 1981, the rail mileage in all the States which was eligible for financial assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762), and the rail mileage in all the States which has, prior to October 1, 1978, been included for formula allocation purposes under this section).

Notwithstanding the preceding provisions of this paragraph, the entitlement of each State in a fiscal year shall not be less than 1 percent of the funds appropriated for such fiscal year.

"(3)(A) For purposes of paragraphs (1) and (2) of this subsection, rail mileage shall be measured by the Secretary as of the first day of each fiscal year. In making calculations under this subsection, no rail mileage shall be included more than once in either the numerator or the denominator of a fraction.

"(B) Entitlement funds are available to a State during the fiscal year for which the funds are appropriated. In accordance with the formula stated in this subsection, the Secretary shall reallocate, to each State which is eligible to receive rail service assistance under this section, a share of any entitlement funds which have not been the subject of an executed grant agreement between the Secretary and the State before the end of the fiscal year for which the funds were appropriated. Reallocated funds are available to the State for the same purpose and for the same time period as an original allocation and are subject to reallocation if not made the subject of an executed grant agreement between the Secretary and the State before the end of the fiscal year for which the funds were reallocated. Funds appropriated in fiscal year 1978 and prior years which are not the subject of an executed grant agreement as of October 1, 1978, shall remain available to the States during fiscal year 1979.

"(4) Two or more States which are eligible to receive rail service assistance under this section may, where not in violation of State law, enter into an agreement to combine any portion of their respective Federal entitlements under this subsection for purposes of conducting any project which is eligible for assistance under subsection (k) of this section and which will benefit each State which is a party to such agreement.".

PLANNING ASSISTANCE

SEC. 105. Section 5(1) of the Department of Transportation Act (49 U.S.C. 1654(1)) is amended to read as follows:

"(1) During each fiscal year, a State may expend not to exceed $100,000, or 5 percent, whichever is greater, of its annual entitlement under subsection (h) of this section to meet the cost of establishing, implementing, revising, and updating the State rail plan required by subsection (j) of this section.".

STATE ELIGIBILITY

SEC. 106. (a) Paragraph (2) of section 5(j) of the Department of Transportation Act (49 U.S.C. 1654(j)(1)) is amended—

(1) by inserting "(A)" immediately after "(2)"; and

(2) by adding immediately before the semicolon at the end thereof the following: ", and (B) such State plan includes, as soon as practicable after the date of enactment of the Local Rail Service Assistance Act of 1978, a methodology for determining the ratio of benefits to costs of projects which are proposed to be initiated after such date of enactment and which are eligible for assistance under paragraphs (2) through (4) of subsection (k) of this section".

(b) During the period prior to the inclusion in a State rail plan of the methodology referred to in the amendment made by subsection (a) of this section, the Secretary of Transportation shall continue to fund projects on a case-by-case basis where he has determined, based upon analysis performed and documented by the State, that the public benefits associated with the project outweigh the public costs of such project.

PROJECT ELIGIBILITY

SEC. 107. Section 5(k) of the Department of Transportation Act (49 U.S.C. 1654(k)) is amended to read as follows:

"(k)(1) A project is eligible for financial assistance under paragraph (1) of subsection (f) of this section only if—

"(A)(i) the Interstate Commerce Commission has found, since February 5, 1976, that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the line of railroad which is related to the project; or (ii) the line of railroad or related project was eligible for assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762); and

"(B) the line of railroad or related project has not previously received financial assistance under paragraph (1) of subsection (f) of this section for more than 36 months, except that a line of railroad or related project which was eligible for financial assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762) or under this section prior to October 1, 1978, shall be eligible only until September 30, 1981.

"(2) A project is eligible for financial assistance under paragraph (2) of subsection (f) of this section only if—

"(A) the Interstate Commerce Commission has found, since February 5, 1976, that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the line of railroad related to the project;

"(B) the line of railroad related to the project is listed for possible inclusion in a rail bank in part III, section C of the Final System Plan issued by the United States Railway Association under section 207 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 717); or

"(C) the line of railroad related to the project was eligible to be acquired under section 402(c)(3) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762(c)(3)), except that a line of railroad or related project which was eligible for financial assistance under such section 402 or under this section prior to October 1, 1978, shall be eligible only until September 30, 1981.

"(3) A project is eligible for financial assistance under paragraphs (3) and (5) of subsection (f) of this section only if—

(A) the line of railroad related to the project is certified by the railroad as having carried 3 million gross ton miles of freight or less per mile during the prior years;

"(B) the line of railroad related to the project is certified by the railroad as having carried less than 5 million gross ton miles of freight per mile during the prior year and the Secretary has determined that the project is essential to carry out proposals made under authority of subsections (a) through (e) of this section;

"(C) an application for a certificate of abandonment or discontinuance with respect to the line of railroad related to the project has been filed with the Interstate Commerce Commission prior to January 1, 1979 (whether or not such application has been granted);

"(D) the line of railroad related to the project is listed for possible inclusion in a rail bank in part III, section C of the Final System Plan issued by the United States Railway Association under section 207 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 717); or

"(E) the line of railroad related to the project was eligible to be acquired under section 402(c)(3) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762(c)(3)).

Any project involving a line of railroad described in subparagraph (C), (D), or (E) of this paragraph shall only be eligible for financial assistance until September 30, 1981.

"(4) A project is eligible for financial assistance under paragraph (4) of subsection (f) of this section only if—

"(A) the Interstate Commerce Commission has found, since February 5, 1976, that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the line of railroad which is related to the project; or

"(B) the line of railroad or related project was eligible for financial assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762), except that a line of railroad or related project which was eligible for assistance under such section 402 or under this section prior to October 1, 1978, shall be eligible only until September 30, 1981.

"(5) On or before August 1 of each year, each common carrier by railroad subject to part I of the Interstate Commerce Act shall prepare, update, and submit to the Secretary

a listing of those rail lines of such carrier which, based on level of usage, carried 3 million gross ton miles of freight or less per mile during the prior year.".

REHABILITATION ASSISTANCE

SEC. 108. Section 5 of the Department of Transportation Act (49 U.S.C. 1654) is amended by redesignating subsection (o) as subsection (p), and by inserting immediately after subsection (n) the following new subsection:

"(o) A State shall use financial assistance provided under paragraph (3) of subsection (f) of this section in accordance with the following provisions:

"(1) The financial assistance shall be used to rehabilitate or improve rail properties in order to improve rail freight service within the State.

"(2) The State shall, in its discretion, grant or loan funds to the owner of rail properties or operator of rail service related to the project.

"(3) The State shall determine all financial terms and conditions of a grant or loan, except that the timing of all advances with respect to grants in and under this subsection shall be in accordance with Department of Treasury regulations.

"(4) The State shall place the Federal share of repaid funds in an interest-bearing account or, with the approval of the Secretary, permit any borrower to place such funds, for the benefit and use of the State, in a bank which has been designated by the Secretary of the Treasury in accordance with section 10 of the Act of June 11, 1942 (12 U.S.C. 265). The State shall use such funds and all accumulated interest to make further loans or grants under paragraph (3) of subsection (f) of this section in the same manner and under the same conditions as if they were originally granted to the State by the Secretary. The State may, at any time, pay to the Secretary the Federal share of any unused funds and accumulated interest. After the termination of a State's participation in the rail service assistance program established by this section, such State shall pay the Federal share of any unused funds and accumulated interest to the Secretary."

TECHNICAL AMENDMENTS

SEC. 109. (a) Section 5 of the Department of Transportation Act (49 U.S.C. 1654) is amended—

(1) in subsection (g), subsection (m)(1), and the first sentence of subsection (p) (as redesignated by section 108 of this title), by striking out "(o)" each place it appears and inserting in lieu thereof "(p)"; and

(2) by amending the third sentence of subsection (p) (as so redesignated) to read as follows: "In addition, any appropriated sums ranging after the repeal of section 402 of the Regional Rail Reorganization Act of 1973 and of section 810 of the Railroad Revitalization and Regulatory Reform Act of 1976 are authorized to remain available to the Secretary for purposes of subsections (f) through (p) of this section.". (c)(1) Section 810 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. 1653a) is repealed.

(2) The table of contents for title VIII of the Railroad Revitalization and Regulatory Reform Act of 1976 is amended by striking out "Sec. 810. Rail bank.".

EFFECTIVE DATE

SEC. 110. The provisions of this title shall take effect on October 1, 1978.

TITLE II—AMENDMENTS TO THE REGIONAL RAIL REORGANIZATION ACT OP 1973

AMENDMENTS TO THE REGIONAL RAIL REORGANIZATION ACT OF 1973

SEC. 201. Section 304(e) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 744(e)) is amended—

(1) by striking out the comma at the end of paragraph (4)(B) and inserting in lieu thereof "; or"; and

(2) by adding immediately after paragraph (4)(B) the following new subparagraph:

"(C) offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of this section and regulations issued by the Office pursuant to section 205(d)(5) of this Act, for the operation of rail passenger service provided under an agreement or lease pursuant to section 303(b)(2) of this title or subsection (c)(2)(B) of this section where such offer is made for the continuation of the service beyond the period required by such agreement or lease, except that such services shall not be eligible for assistance under section 17(a)(2) of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1613(a)(2))."; and

(3) by adding at the end thereof the following new paragraphs:

"(7)(A) If a State (or a local or regional transportation authority) in the region offers to provide payment for the provision of additional rail passenger service, the Corporation shall undertake to provide such service pursuant to this subsection (including the discontinuance provisions of paragraph (2) of this subsection). An offer to provide payment for the provision of additional rail passenger service shall be made in accordance with subsection (c)(2)(A) of this section and under regulations issued by the Office pursuant to section 205(a)(5) of this Act, and shall be designed to avoid any additional costs to the Corporation arising from the construction or modification of capital facilities or from any additional operating delays or costs arising from the absence of such construction or modification. The State (or local or regional transportation authority) shall demonstrate that it has acquired, leased, or otherwise obtained access to all rail properties, other than those designated for conveyance to the National Railroad Passenger Corporation pursuant to sections 206(c)(1)(C) and 206(c)(1)(D) of this Act and to the Corporation pursuant to section 303(b)(1) of this title, necessary to provide the additional rail passenger service and that it has completed, or will complete prior to the inception of the additional rail service, all capital improvements necessary to avoid significant costs which cannot be avoided by improved scheduling or other means on other existing rail services (including rail freight service) and to assure that the additional service will not detract from the level and quality of existing rail passenger and freight service.

"(B) As used in this paragraph, the term 'additional rail passenger service' means rail passenger service (other than rail passenger service provided pursuant to the provisions of paragraphs (2) and (4) of this subsection), including extended or expanded service and modified routings, which is to be provided over rail properties conveyed to the Corporation pursuant to section 303(b)(1) of this title, or over (i) rail properties contiguous thereto conveyed to the National Railroad Passenger Corporation pursuant to this Act, or (ii) any other rail properties contiguous thereto to which a State (or local or regional transportation authority) has obtained access.

"(C) Notwithstanding any other provision of this paragraph, the Corporation shall not be required to operate additional rail passenger service over rail properties leased or acquired from or owned or leased by a profitable railroad in the region.

"(8) The Secretary shall, in consultation with the Association, conduct a study to determine the best means of compensating the Corporation for liabilities which it may incur for damages to persons or property, resulting from the operation of rail passenger service required to be operated pursuant to this subsection or section 303(b)(2) of this title, which are not underwritten by private insurance carriers or are not indemnified by a State (or local or regional transportation authority). Such study shall identify the nature of the risks to the Corporation, the probable degree of uninsurability of such risks, and the desirability and feasibility of various indemnification programs, including subsidy offers made pursuant to this section, self insurance through a passenger tax or other mechanism, or government indemnification for such liabilities. Within one year after the date of enactment of this paragraph, the Secretary shall prepare a report with appropriate recommendations and shall submit such report to the Congress. Such report shall specify the most appropriate means of indemnifying the Corporation for such liabilities in a manner which shall prevent the cross-subsidization of passenger services with revenues from freight services operated by the Corporation.".

TITLE III—AMENDMENTS TO THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976; RELATED PROVISIONS

INCREASE IN FUNDING LIMITATION ON PURCHASE OF TRUSTEE CERTIFICATES; EXTENSIONS OF AUTHORITY TO ISSUE AND SELL FUND ANTICIPATION NOTES

SEC. 301. (a) Section 505 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 825) is amended—

(1) in subsection (d)(3), by striking out the last sentence; and

(2) in subsection (e), by striking out "purchase under this title after September 30, 1978," and inserting in lieu thereof ", after September 30, 1979, make commitments to purchase under this title,".

(b) Sections 507(a) and 507(d) of the Railroad

Revitalization and Regulatory Reform Act of 1976 (7 U.S.C. 827(a) and (d)) are amended by striking out "1978" and inserting in lieu thereof "1979".

(c) Section 509 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 829) is amended by striking out "March 31" each place it appears and inserting in lieu thereof "September 30".

SECURITY FOR TRUSTEE CERTIFICATES

SEC. 302. Section 505(d)(2) of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 825(d)(2)) is amended—

(1) in the last sentence of subparagraph (B), by striking out "No certificate" and inserting in lieu thereof "Except as provided in subparagraph (C) of this paragraph, no certificate"; and

(2) by adding at the end thereof the following new subparagraph:

"(C) The Secretary may purchase certificates under this section without making the finding referred to in clause (iii) of subparagraph (B) only if such certificates are senior in rights to all outstanding capital stock, common and preferred, of the debtor corporation, and all unsecured debt incurred before the date of commencement of railroad reorganization proceedings pursuant to section 77 of the Bankruptcy Act, but subordinate to all senior debt of the debtor corporation whenever such senior debt is incurred. As used in this subparagraph, the term 'senior debt' means—

"(i) all costs of administration, incurred or to be incurred by a trustee, and secured debt assumed by a trustee, in connection with the reorganization proceedings and the operation of a debtor's business by a trustee during the pendency of such proceedings; and

"(ii) all secured debt incurred before the date of commencement of railroad reorganization proceedings pursuant to section 77 of the Bankruptcy Act and determined by the court to be a proper claim against the estate and an obligation of the debtor corporation.".

FRA REVIEW

SEC. 303. The Federal Railroad Administration shall promptly review the condition of the Chicago, Milwaukee, and Saint Paul Railroad and consider assisting such railroad with loans for roadbed and track improvement.

TITLE IV—AMENDMENTS TO THE INTERSTATE COMMERCE ACT RENEWAL

SEC. 401. (a) Section 15(8)(c) of the Interstate Commerce Act (49 U.S.C. 15(8)(c)) is amended—

(1) in clause (i), by striking out "within 2 years after the date of the enactment of this subdivision" and inserting in lieu thereof "prior to July 1, 1980";

(2) in clause (ii), by inserting "and" after the semicolon; and

(3) by striking out clauses (iii) and (iv) and inserting in lieu thereof a new clause (iii) to read as follows:

"(iii) the aggregate of increases or decreases in any rate filed pursuant to clause (i) or (ii) of this subdivision during any calendar year is not greater than 7 per centum of the rate in effect on January 1 of that year.".

(b) The last sentence of section 15(8)(d) of the Interstate Commerce Act (49 U.S.C. 25(8)(d)) is amended by striking out "clauses (iii) or (iv)" and inserting in lieu thereof "clause (iii)".

CAR SERVICE

SEC. 402. Section 1(14) of the Interstate Commerce Act (49 U.S.C. 1(14)) is amended by redesignating subdivision (b) as subdivision (c), and by inserting immediately after subdivision (a) the following new subdivision:

"(b) If the Commission finds, upon the petition of an interested party and after notice and a hearing on the record, that a common carrier by railroad subject to this part has materially failed to furnish safe and adequate car service as required by paragraph (11) of this section, the Commission may require such carrier to provide itself with such facilities and equipment as may be reasonably necessary to furnish such service, if the evidence of record establishes, and the Commission affirmatively finds, that—

"(i) the provision of such facilities or equipment will not materially and adversely affect the ability of such carrier to otherwise provide safe and adequate transportation services;

"(ii) the expenditure required for such facilities or equipment, including a return which equals such carrier's current cost of capital, will be recovered; and

"(iii) the provision of such facilities or equipment will not impair the ability of such carrier to attract adequate capital.".

The SPEAKER pro tempore. Is a second demanded?

Mr. CARTER. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER pro tempore. The gentleman from Pennsylvania (Mr. ROONEY) will be recognized for 20 minutes, and the gentleman from Kentucky (Mr. CARTER) will be recognized for 20 minutes.

The Chair recognizes the gentleman from Pennsylvania (Mr. ROONEY).

Mr. ROONEY. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I would like to explain why I have introduced this substitute and also give a brief explanation as to its contents.

Although I am offering a substitute, in essence the differences between this amendment and the bill reported by the committee are not overwhelmingly significant. The substitute that I am offering represents a consensus of all parties interested in the original bill. That is, due to the fact that we will be adjourning shortly, and do not have time to have formal conferences with the Senate, I have attempted to work out a compromise bill with my counterparts in the Senate as well as with the administration, the Association of American Railroads, the Railway Labor Executives Association, the National Industrial Traffic League, State representatives and others. I am pleased to state that all of these parties wholeheartedly endorse the substitute bill I am offering.

In order to best utilize Government funds, the bill approved by the committee provided that branch lines would be eligible for assistance if they had been scheduled for abandonment, or were potentially subject to abandonment. The Senate bill, on the other hand, provided that all branch lines which carried 5 million gross tons of freight or less per mile during the preceding year, would be eligible for assistance. A compromise has now been reached which is acceptable to all parties, whereby a branch line will be eligible for assistance if it carried 3 million gross tons of freight or less per mile during the preceding year. Also with regard to eligibility, a compromise was reached whereby all abandoned or discontinued lines receive assistance for 3 years, except for lines excluded by the United States Railway Association from ConRail which will receive assistance through fiscal year 1981.

I would also like to assure my friend from Kentucky, Dr. CARTER, that the substitute that I am offering includes the provision which he intended to offer as an amendment to the committee bill.

Dr. CARTER was rightfully concerned that certain railroads have failed to furnish safe and adequate car service as required by the Interstate Commerce Act. I would like to call to his attention that section 402 of this substitute pertains to the amendment that he intended to offer. This section permits the ICC to require railroads to use safe and adequate facilities and equipment as determined by the ICC.

Another change in the bill pertains to the formula for allocating the available funds. As I stated during the general debate, emphasis is now to be placed on rehabilitation of lines, rather than operating subsidies for abandoned lines. Therefore, commencing in fiscal year 1980, two-thirds of the funds available will be allocated on the basis of a State's percentage of rail mileage which is potentially subject to abandonment or which carriers plan to abandon. That is, the so-called categories 1 and 2. One-third of the funds will be allocated on the basis of the State's percentage of rail mileage which has been authorized for abandonment, or excluded from the ConRail system.

Nevertheless, each State will continue to be entitled to a minimum of 1 percent of the funds appropriated, notwithstanding the foregoing formulas.

Understandably, the change in the allocation formula will have different effects among the various States. The exact amount of differences are not known at the present time, because there can be variations in the number of miles summitted by various railroads. Nevertheless, the administration has furnished a fairly accurate estimate. Moreover, in order to compensate for the reduction in funds that some States may realize as a result of this formula change, and in addition, in an effect to expedite the rehabilitation program, the administration has promised that commencing with fiscal year 1980, it will request an appropriation increase of $23 million. That is, the current appropriation for fiscal year 1979 is $67 million, and they have indicated that they will request $100 million. In this way, those States which would receive a smaller amount due to the change in the formula allocation, due to the increased total funding would receive approximately the same amount of funds.

Other than these changes, in my opinion, there are no other material differences between the substitute and the bill reported by the committee. I would like to assure you that the bill contains no nongermane, no additional funding, nor does it contain any special interest matters.

Mr. VOLKMER. Mr. Speaker, will the gentleman yield?

Mr. ROONEY. I yield to the genleman from Missouri.

Mr. VOLKMER. I thank the gentleman for yielding.

Does the substitute which the gentleman is now proposing to the House contain any language on recyclable materials?

Mr. ROONEY. Will the gentleman repeat the question?

Mr. VOLKMER. Does it contain any language or provision with regard to cyclable materials?

Mr. ROONEY. No, it does not.

Mr. VOLKMER. So that is a matter that still would have to be considered by the committee next year?

Mr. ROONEY. That is correct.

Mr. VOLKMER. What is the difference between the substitute the gentleman now offers and the bill as reported out of committee? Will the gentleman tell me briefly the actual changes that were made?

Mr. ROONEY. As I said in my explanatory remarks, one of the principle differences in the substitute pertains to eligibility. In order to best utilize the Government funds, the bill approved by the committee provided that branch lines would be eligible for assistance if they were scheduled for abandonment or potentially subject to abandonment. The Senate bill, on the other hand, provided that all branch lines which carried 5 million gross tons of freight or less per mile during the preceding year would be eligible. The compromise follows the Senate provision except that it reduces the tonnage to 3 million gross tons of freight or less per mile during the preceding year

Mr. VOLKMER. Is this assistance also in the gentleman's substitute providing for 80 percent?

Mr. ROONEY. Yes.

Mr. VOLKMER. That does not vary

from the bill, but the gentleman took the Senate language instead of the House language, is that correct?

Mr. ROONEY. No. We compromised, as I originally stated.

Mr. VOLKMER. What is the compromise? Does it mean that we have both provisions in, or either one, on a local branch line?

Mr. ROONEY. We went from 5 million to 3 million gross tons of freight.

Mr. VOLKMER. Then the gentleman is using the Senate language with a 3 million figure instead of a 5 million figure as to those branch lines that would qualify for assistance?

Mr. ROONEY. That is correct.

Mr. VOLKMER. So that if the branch line was somewhat under that figure——

Mr. ROONEY. It is 3 million or less.

Mr. VOLKMER. So if it is a little bit over the figure but is scheduled for reduction in service or taken off altogether, it would not be eligible for assistance?

Mr. ROONEY. Yes, it would be eligible if, as the substitute provides in section 107, the Secretary has determined that this project is essential to carry out proposals made under authority of subsections (a) through (e) of this section.

If it satisfies this additional criteria.

Mr. VOLKMER. If it is on their list it would still be eligible for assistance. I thank the gentleman.

Mr. ROONEY. I would also like to again assure my friend and colleague from Kentucky (Mr. CARTER) that the substitute bill I am offering includes a provision which he intended to offer as an amendment to the committee amendment. The gentleman may recall that I assured him that I would take care of this provision in the committee, and I certainly thank him for his cooperation.

Mr. CARTER. Mr. Speaker, will the gentleman yield?

Mr. ROONEY. I yield to the gentleman from Kentucky.

Mr. CARTER. Mr. Speaker, I want to thank the gentleman for his cooperation in this matter. It certainly will be helpful to some of the smaller branch lines there in the district I represent. I thank him very kindly.

Mr. BAUMAN. Mr. Speaker, will the gentleman yield?

Mr. ROONEY. I will be happy to yield to the gentleman from Maryland.

Mr. BAUMAN. I thank the gentleman from Pennsylvania for yielding, and for all the interest he has shown in the rail problems nationally, and in those in the Delmarva Peninsula of Delaware, Maryland, and Virginia.

Having testified before his committee many times, most recently a few months ago, I know that he is aware of the great concern expressed by the short line operators in the Delmarva Peninsula. They have said that changes in the funding formula could take place to their disservice, substantially reducing not only the amount of support they might have, but also their ability to operate at all since they are existing lessees of the Penn Central successor companies and not yet in a profitable situation.

What has the compromise done in a general sort of way to meet these concerns that were expressed to the gentleman's committee?

Mr. ROONEY. Well, understandably the change in the application formula will have significant effect upon the various States, of which the Delmarva Peninsula is a part.

The exact amount of the differences at this time are not known because there may be variations in the number of miles submitted by the various railroads, but nevertheless the administration has promised to request an appropriation in the amount of $100 million next year—an increase of $23 million—for this program. Thus, hopefully, we will be able to work out this problem.

Mr. BAUMAN. Am I correct that there will be no change for the coming year in the funding levels now in the law?

Mr. ROONEY. That is correct. These changes take effect commencing in fiscal year 1980.

Mr. BAUMAN. So that at the very least this will give us an additional 12 months to try to work out the problems the short line operators now have?

Mr. ROONEY. That is correct.

Mr. SIMON. Mr. Speaker, will the gentleman yield?

Mr. ROONEY. I yield to the gentleman from Illinois.

Mr. SIMON. Mr. Speaker, since we are on railroad legislation, let me mention one thing I have discussed with the gentleman from Pennsylvania (Mr. ROONEY) before and that is the ponderously slow movement of the Federal Railroad Administration toward moving on safety devices. I am specifically talking about strobe lights or oscillating lights to be required on the front of locomotives. There have been three studies which have been made by the FRA which have indicated that such things will save lives and save money for the railroads. We are—I hope—gradually getting there, but I am unimpressed by the way they move so slowly. I hope we can get some assistance from the chairman of the subcommittee in moving them in the right direction.

Mr. ROONEY. Know the gentleman's concern and I commend him for his interest in safety on railroads. I have been informed by the FRA that regulations on this matter should be issued this fall which will satisfactorily resolve the matter.

Mr. CARTER. Mr. Speaker, I yield such time as he may consume to the ranking minority member of the subcommittee, the gentleman from Kansas (Mr. SKUBITZ).

Mr. SKUBITZ. Mr. Speaker, I deeply appreciate that.

Mr. Speaker, the gentleman from Pennsylvania (Mr. ROONEY) has done an excellent job explaining this bill to the House. I know that everybody is happy with it.

Mr. Speaker, if my distinguished colleague, the gentleman from Kentucky (Mr. CARTER), will yield to the distinguished gentleman from Massachusetts (Mr. CONTE), I will appreciate it.

Mr. CARTER. Mr. Speaker, since the gentleman from Kansas has been such a close friend of mine over the years and the gentleman from Massachusetts is also quite a good friend, I yield to the gentleman from Massachusetts such time as he may consume.

Mr. CONTE. Mr. Speaker, at the outset I want to take this opportunity to commend the gentleman from Pennsylvania (Mr. ROONEY) not only for his leadership on this particular legislation but also for his leadership down through the years on railroad legislation. He has been one who has done his homework well, studied the problems, and knows the problems of the railroads in our country. He has come forth with monumental railroad legislation which will benefit this Nation for many, many years. Also I would commend the gentleman from Kansas (Mr. SKUBITZ), my good friend the ranking minority member of the subcommittee, who will no longer be with us after this Congress adjourns sine die. He has been a bulwark of strength here not only on the subcommittee but also in the Congress, and also on my baseball team. Many years ago he was one of the finest baseball players I ever coached on the congressional baseball team on the Republican side.

Mr. ROONEY. If the gentleman will yield, was the gentleman from Kansas an active player or a back bench one?

Mr. CONTE. He was a really outstanding player and an active player and a guy with a hell of a glove. If I ever were to award the golden glove to anybody, it would be to the gentleman from Kansas.

Mr. SKUBITZ. Mr. Speaker, if the gentleman will yield, I appreciate those kind remarks, but as I recall that was the first and the last time that the Republicans lost and I think it was my presence on the field that brought about that defeat.

Mr. CONTE. Mr. Speaker, we are going to miss the gentleman from Kansas. As he said in the fine letter he sent to some of his colleagues, we are not saying goodbye because we are going to have the gentleman back here in the next decade or two and we want him to come back because we love him and respect him and we are going to miss him greatly.

Mr. Speaker, I am pleased to rise in support of this legislation. It will make a major improvement in the State rail assistance program and it is in the interests of better transportation throughout the nation.

In the past I have, at times, been critical of the Federal Railroad Administration because of the relative slowness with which funds were committed to the Nation's railroads. However, I am convinced that the Federal Railroad Administration officials were very sincere in their efforts to administer the program in the interests of the overall transportation program of the Nation. I have been particularly impressed with the efforts of the FRA in recent weeks to conclude agreements with a number of railroads and to commit practically all of their appropriated funds before the end of the fiscal year. They worked hard and long to assure that the funds available to them were put into critical track projects throughout the nation.

I was particularly pleased, of course, that their negotiations with the Boston & Maine Railroad were concluded in a $26 million trustee certificate for important trackwork on the B. & M. main line. Much of the work to be performed under this funding will be in my congressional district and will create new jobs, not only on the railroad, but in industries served by the railroad as well. The FRA showed great flexibility and concern in their efforts in dealing with difficult problems involved in the B. & M.'s present position of reorganization under the bankruptcy courts.

Today the bill which is before us contains language which I very strongly support which will give the FRA additional room for flexibility for dealing with railroads such as the Boston & Maine. This language will allow them to waive the "liquidation finding" when a project which is clearly in the public interest is pegged in the hierarchy of debt of a bankrupt corporation in such a way as to give the Government adequate security. This amendment is a greatly scaled-down version of a fine proposal put forth by Congressman MARTIN RUSSO. It is not as presently a cure-all for all of the administrative problems faced by bankrupt carriers and at least one of them, the Rock Island, feels that it will not be applicable to resolving their difficulties in seeking Federal financing. However, the Boston & Maine feels that it potentially could be of great assistance in resolving their own security position with the FRA. I believe it could potentially also be of assistance to the Milwaukee and to the Delaware & Hudson as well, should they be forced to declare bankruptcy in the future. It gives the FRA additional flexibility and, given the indications we have received of their willingness to work hard to get money into track projects, I believe that it will be helpful in working with applications of bankrupt carriers. I understand that this language has been checked with the Federal Railroad Administration and, while they do not officially endorse it, it is completely consistent with the capital needs report released by the FRA report earlier this week.

Mr. CARTER. Mr. Speaker, I yield 2 minutes to the distinguished gentleman from Montana (Mr. MARLENEE) and, in addition, I yield the balance of my time to the ranking member, the gentlman from Kansas (Mr. SKUBITZ).

Mr. MARLENEE. Mr. Speaker, I rise in order to make it known that my vote in favor of this bill in no way lessens my enthusiasm for the amendment that I had planned to offer, designed to provide up to $135 million in loans for the Milwaukee Railroad, to be used for rehabilitation of the roadbed west of Minneapolis, Minn. I regret that the chairman has decided to bring this bill up under suspension of the rules.

At a meeting held yesterday in Montana, the trustee of the railroad stated that the line cannot operate in its present condition and that there is no money to rehabilitate it in the manner it should be. The importance of this transcontinental railroad cannot be overstated. The Milwaukee Railroad is currently considering the abandonment of its Pacific coast extension which runs from Minneapolis to the west coast. The economic potential of the agricultural States through which the Milwaukee runs with their huge, untapped energy resources, will be severely limited should the railroad be allowed to deteriorate and eventually be abandoned. In Montana alone it is estimated the coal reserves are over 100 billion tons—one-third of the Nation's supply. The most efficient way to move that coal is by train.

Jobs, more than 2,000 railroad employees of all classes and crafts, will be lost if the railroad is not financially helped. Hundreds of shippers in cities and towns completely dependent on continued rail service will be adversely impacted unless something is done immediately.

Present and future economic considerations must be realized for the seven States directly affected, as well as the rest of the Nation. The Milwaukee provides a vital link between the food and fuel of the northern tier and the rest of the country.

I hope that the importance of the Milwaukee is not lost sight of and that it will be able to remain a potent transportation route. I firmly believe the continuation of the Milwaukee is an important factor for the Nation's transportation, industry, agricultural, and future energy needs.

Mr. SKUBITZ. Mr. Speaker, I yield back the balance of my time.

Mr. ROONEY. Mr. Speaker, I yield such time as he may consume to the distinguished chairman of the Committee on Interstate and Foreign Commerce, the gentleman from West Virginia (Mr. STAGGERS).

Mr. STAGGERS. Mr. Speaker, the primary purpose of H.R. 11979 is to improve existing financial assistance programs to enable the States to preserve and enhance essential rail freight services within their borders. The bill does not contain any new authorizations.

Mr. Speaker, in many instances, it is uneconomical for private railroads to continue service to shippers on light density branch lines, although these lines are essential to shippers as an outlet to markets and to the economic health and employment stability of the communities served. With infusion of financial assistance in appropriate forms, many deteriorated branch lines in a poor financial posture can be successfully rehabilitated, both physically and financially. The Federal branch line assistance program, established on a cost-sharing basis with the States, encourages the States to make responsible decisions about the allocation of finite resources to address their branch line problems This bill gives the States additional flexibility within defined guidelines to deal with those problems.

Under existing law, financial assistance can only be channeled into abandoned and similar lines. This bill permits rehabilitation assistance to be used for lines, which, although not yet abandoned, appear to be likely candidates for abandonment. Timely infusion of assistance can prevent further deterioration, while a permanent solution to a particular branch line problem is set in motion. Often, these solutions will involve cooperation among States, communities, shippers, and carriers, all of whom will benefit by revitalized service.

The bill also extends for 1 year the railroad rehabilitation and improvement financing fund established in the Railroad Revitalization and Regulatory Reform Act of 1976 and liberalizes certain restrictive funding conditions in existing law. Additionally, the bill amends the Interstate Commerce Act to renew until July 1, 1980, an expired provision in existing law permitting railroad ratemaking flexibility within a 7-percent zone of reasonableness.

Mr. Speaker, this bill makes many important improvements to programs that are vital to many communities and shippers dependent on rail service. It will materially assist in solving many pressing problems confronting these communities and shippers. Therefore, I urge the passage of the bill.

Mr. BEDELL. Mr. Speaker, I rise in support of H.R. 11979, the Local Rail Service Assistance Act of 1979, and ask permission to revise and extend my remarks.

Mr. Speaker, in testimony presented last July before the Subcommittee on Transportation and Commerce, I voiced my strong support for the key provisions embodied in H.R. 11979. I firmly believed then, as I still do today, that the changes made by this bill will do much to remedy some of the critical problems which plague railroad rehabilitation today. These changes include: Streamlining procedures by which States receive Federal funding for railroad branch line rehabilitation, giving the States greater flexibility in allocating these funds to prioritize projects by minimizing Federal involvement, and allowing the distressed lines to remain under private ownership.

In that same testimony, I also urged the subcommittee to rectify a major shortcoming in the Local Rail Assistance Act of 1979 by adding a provision to broaden the scope of the project eligibility criteria in order to allow States more discretion in utilizing Federal funds on branch lines that are economically viable and that have not gone through abandonment or been classified as category 1 or 2 lines. I am pleased that, after much delicate negotiating by the principals involved, this needed change has been made in the final version of H.R. 11979, and I would like to take this opportunity to commend both the distinguished chairman of the committee, Mr. STAGGERS, and the chairman of the Transportation Subcommittee, Mr. ROONEY, for their diligent effort in making its inclusion a reality.

Under current law, only the most debilitated and least-needed lines can be assisted. H.R. 11979, as originally drafted, acknowledged the need for expansion in project eligibility criteria, but it did not go far enough in meeting this need. The bill which we are considering today has been improved by allowing the States to

use Federal funds on lines other than category 1 and 2 lines that carry up to 3 million gross ton-miles of freight annually. The measure would further provide that such eligibility could be expanded up to 5 million gross ton-miles—which is what the Senate version contains—if the Secretary of Transportation were to determine that it was in the public interest.

Let me take a moment at this point to explain why such a provision is so badly needed. A good example comes from my own State of Iowa which, I am proud to say, has one of the most progressive and capable State departments of transportation in the Nation. The Iowa rail system plan has identified nearly 1,200 miles of branch line track as priority projects for branch line rehabilitation. The estimated price tag of these projects is $52 million. Had the provision to expand branch line eligibility criteria not been included in this bill, virtually none of these projects could have been funded because none have been designated as either category 1 or 2 lines. Such a development would have been a terrible waste, since the opportunity to prevent further deterioration of these branch lines, before the cost effectiveness of salvaging them is severely reduced, would have been lost.

Simply put, Mr. Speaker, the new eligibility expansion language makes operative the old adage, "an ounce of prevention is worth a pound of cure." And, it is significant to note, the new language would not result in any increase or shift in the allocation of appropriated funds. It merely allows the States to use these funds more wisely.

This Nation is finding out the hard way that its rail industry is a vital cog in the national economic machine. We are now paying for years of abuse and benign neglect. Legislation like H.R. 11979 signals our readiness to reverse that ill-advised approach and to get down to the business of making our railroads responsive to the demands being placed upon them.

I urge my colleagues to support this important piece of legislation.

● Mr. ABDNOR. Mr. Speaker, I wish to associate myself with the remarks made earlier by Messrs. ROONEY, SKUBITZ, and MADIGAN in support of H.R. 11979, the Local Rail Service Assistance Act of 1978.

Earlier this year I testified before the Interstate and Foreign Commerce Subcommittee on Transportation and Commerce. At that time I stressed the importance of continued Federal assistance to the States so that they may make full use of the provisions stated in the Railroad Revitalization and Regulatory Reform Act of 1976.

In order to maximize the benefits accrued from the 4–R Act, more flexibility is needed to allow individual States to funnel funds into lines they deem as top priority. This is important because of the emphasis placed on rehabilitation of branch lines before they have deteriorated to a point at which abandonment becomes necessary.

The 4–R Act resulted in the establishment of State railroad planning offices. These offices have developed a good working relationship between Federal, State, and local units of government, as well as the railroads and shippers. State rail plans have been formulated to implement this program. I am proud to note that my State of South Dakota was the first in the Nation to accomplish its State rail plan.

Mr. Speaker, this legislation modifies the 4–R Act to provide for a more efficient means of implementing a good local rail program. H.R. 11979 provides flexibility to the States, allowing distressed lines to remain under private ownership.

Funds for rehabilitation projects will be available on an 80–20 basis—the same as highway and urban mass transit funds.

Mr. Speaker, now is the time for enactment of this legislation. Recently, the trustee for the bankrupt Milwaukee Railroad announced the possibility of the abandonment of all lines running west from Minneapolis to the Pacific coast. Its operation affects seven northern-tier States whose communities depend on rail transportation. In South Dakota, more than 1,500 miles of track, representing 51 percent of the total trackage, is classified as potentially subject to abandonment. If all Milwaukee lines in my State are abandoned, these figures will escalate tremendously.

The Local Rail Service Assistance Act will save many of these lines from being abandoned. Economic assistance must be available early enough to avoid deterioration of service. As a result, railroads will continue to provide a fast, economical and energy-efficient method of transportation.●

● Mr. FLORIO. Mr. Speaker, there is a serious problem which threatens our Nation's rail transportation which we cannot ignore. From July 10, 1978, until September 27, 1978, the Brotherhood of Railway and Airline Clerks struck the Norfolk & Western Railroad after failing in nearly 2 years of negotiations, to reach an agreement.

This strike had a disasterous economic result in the 17 States through which the Norfolk & Western runs. Eventually, the strike expanded to nearly all railroads in the country other than ConRail, Amtrak, and a few others. It was only after the strike paralyzed our Nation's rail traffic that the administration quickly intervened. The administration first attempted marathon, round the clock bargaining, which failed, and finally, President Carter named a Presidential Emergency Board to deal with the dispute.

It has been alleged that one of the reasons the Norfolk & Western did not reach agreement was because the railroad was receiving $800,000 per day under an insured mutual aid pact. The pact is called a "service interruption policy" and is financed by 73 railroads. Its effect is to not only shield a struck carrier against loss, but they also receive economic benefits during a work stoppage. A carrier under the "service interruption policy" can receive payments for 400 some days. Whereas workers strike benefits are limited to 130 days during a benefit year. Since the creation of the Presidential Emergency Board there is now a 60-day cooling-off period, covering 30 days of emergency board proceedings and an additional 30 day status quo period thereafter. But the Board so far has not settled the dispute. If the strike resumed after the 60-day cooling-off period the Norfolk and Western would be able to obtain its $800,000 per day in mutual aid pact benefits for approximately 320 additional days. This could impede the parties from agreeing to the recommendations of the Board, which are not binding, and we could be back to a nationwide rail strike at a time when Congress probably will not be in session—late November or early December.

Mr. ROONEY, chairman of the Transportation and Commerce Subcommittee scheduled hearings for September 29 on the ramifications of the railroad mutual aid pact. However, hearings were postponed since most of the scheduled witnesses were tied up in the strike action in one way or another and could not testify. It is my judgment that even if we are adjourned sine die at the time the chairman may want to schedule hearings to answer the many questions we have as to the effect of the mutual aid pacts.●

● Mr. RUSSO. Mr. Speaker, I concur with the remarks of the gentleman from New Jersey (Mr. FLORIO) about the national rail strike.

Through more than 2 months, there were more than 25,000 people out of work directly as a result of the Norfolk & Western strike, and 100,000 other workers—mine workers, construction workers, and automobile workers—were laid off. When the strike went nationwide, millions of workers—including 500,000 railroad workers—were not working. In addition, the effect on the economy of our Nation and the railroad industry, which is so vital to our Nation's recovering economy demands we take some action to learn more about this mutual aid pact; and then, armed with the facts, we can decide what if anything should be done about it.

I have received information that BRAC strikers received large benefits from unemployment compensation and union strike funds. I would like to examine this in light of the rail mutual aid pact.

The strikers did receive railroad unemployment benefits of $25 a day, as well as an additional $20 per week in strike benefits from the union. The law provides these unemployment benefits do not begin until the eighth day of a strike. Rail labor, some time ago, negotiated with the carriers and presented to Congress a package providing for the $25 per day unemployment benefits. This was an increase over the previous $12.50 per day. The Interstate and Foreign Commerce Committee presented H.R. 8714 to the 94th Congress, in July of 1975. The committee stated the package was the result of collective bargaining between rail unions and the carriers. The unions negotiated these unemployments for their members in lieu of other benefits such as wages and other fringes. It should be noted that H.R. 8714 passed this body by a recorded vote of 420 yeas to 0 nays.

And lastly, these strike benefits are not paid unless a strike is legal. I think it is

also important to point out, by the way, as I did in connection with an amendment offered by Congressman OBERSTAR dealing with the mutual aid pact in the airline industry, that comparing these two types of benefits is like a comparison of apples and oranges. The apples being the ability of a large corporation to continue during a strike to make a profit; and the oranges being an individual head of household who must meet basic food and housing needs, and must dip into his savings to exist. This difference in apples and oranges has severely complicated collective bargaining in both the railroad and airline industries.

The airline industry, during the pre-mutual-aid-pact era, averaged strikes of only 15 days. Now the average is more than double that amount. In fact, the last strike against Northwest Orient Airlines lasted 109 days.

It was unfortunate that the Subcommittee on Transportation and Commerce did not conduct their hearings as scheduled. However, I suggest that the chairman, Mr. ROONEY, may still want to schedule hearings for the subcommittee to determine whether such pacts should be permitted to exist or should be modified; and the effect they have on collective bargaining.●

Mr. ROONEY. Mr. Speaker, I have no further requests for time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Pennsylvania (Mr. ROONEY) that the House suspend the rules and pass the bill H.R. 11979, as amended.

The question was taken; and (two-thirds having voted in favor thereof), the rules were suspended and the bill, as amended, was passed.

The title was amended so as to read: "A bill to amend section 5 of the Department of Transportation Act, relating to rail service assistance, and for other purposes."

A moton to reconsider was laid on the table.

Mr. ROONEY. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the Senate bill (S. 2981) to amend the Department of Transportation Act as it relates to the local rail services assistance program, and for other purposes, and ask for its immediate consideration.

The Clerk read the title of the Senate bill.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

The Clerk read the Senate bill as follows:

S. 2981

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Rail Services Act of 1978".

DECLARATION OF POLICY

SEC. 2. It is declared to be the policy of Congress in this Act that the Government shall assist in the provision of adequate transportation service to shippers and communities now served by light density lines. Federal funds shall be used to assist transportation services where such assistance provides economic benefits to the affected communities without placing a financial drain on the carriers providing that service.

Congress believes, however, that the parties benefiting from a Federal investment on a light density line must act to preserve the benefits of the Federal investment. Accordingly, Congress expects the States and local communities, shippers, and all elements of the railroad industry to commit themselves to long-term solutions which will enable the continued provision of adequate transportation service after the completion of the federally assisted projects.

EXPANSION OF ASSISTANCE

SEC. 3. Section 5(f) of the Department of Transportation Act (hereinafter referred to as the "DOT Act") (49 U.S.C. 1654(f)) is amended—

(1) by striking "purchasing a line of railroad or other rail properties" in paragraph (2) and inserting in lieu thereof "acquiring, by purchase, lease or in such other manner as the State considers appropriate, a line of railroad or other rail properties or any interest therein";

(2) by striking "and" immediately after the semicolon in paragraph (3);

(3) by striking the period at the end of paragraph (4) and inserting in lieu thereof a semicolon; and

(4) by adding the following new paragraphs at the end thereof:

"(5) the cost of constructing rail- or rail-related facilities (including new connections between two or more existing lines of railroad, intermodal freight terminals, and sidings), for the purpose of improving the quality and efficiency of local rail freight service; and

"(6) the cost of developing, administering, and evaluating innovative experimental programs that are designed to improve the quality and efficiency of service on lines of railroad eligible for assistance under this section and which involve cooperative action between State and local communities and railroad industry representatives or shippers.".

COST SHARING

SEC. 4. Section (5)(g) of the DOT Act (49 U.S.C. 1654 (g)) is amended to read as follows:

"(g) The Federal share of the costs of any rail service assistance program for any fiscal year is 80 percent. The State share of the costs may be provided in cash or through the following benefits, to the extent the benefit would not otherwise be provided: (1) forgiveness of taxes imposed on a common carrier by railroad or on its properties; (2) the provision by the State or by any person or entity on behalf of a State, for use in its rail service assistance program, of realty or tangible personal property of the kind necessary for the safe and efficient operation of rail freight service by the State; or (3) the cash equivalent of State salaries for State public employees working in the State rail services assistance program, but not including overhead and general administrative cost. If a State provides more than 20 percent of the cost of its rail service assistance program during any fiscal year, the amount in excess of the 20 percent contribution shall be applied toward the State's share of the costs of its program for subsequent fiscal years.".

FORMULA ALLOCATION

SEC. 5. Section 5(h) of the DOT Act (49 U.S.C. 1654(h)) is amended to read as follows:

"(h)(1) For the period October 1, 1978, through September 30, 1979, each State which is, pursuant to subsection (j) of this section, eligible to receive rail service assistance is entitled to an amount equal to the total amount authorized and appropriated for such purposes, multiplied by a fraction whose numerator is the rail mileage in such State which is eligible for rail service assistance under this subsection and whose denominator is the rail mileage in all of the States which are eligible for rail service assistance under this subsection. Notwithstanding the provisions of the preceding sentence, the entitlement of each State shall not be less than 1 percent of the funds appropriated. For purposes of this subsection, rail mileage shall be measured by the Secretary, in consultation with the Interstate Commerce Commission. For the purpose of calculating the formula under this subsection, the rail mileage which is eligible shall be that for which the Commission has found that (A) the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the line of railroad which is related to such project; or (B) the line of railroad or related project was eligible for assistance under title IV of the Regional Rail Reorganization Act of 1973; and such line or related projects has not previously been the subject of Federal rail service assistance under this section for more than 5 fiscal years.

"(2) Effective October 1, 1979, every State which is eligible to receive rail service assistance pursuant to subsection (j) of this section is entitled annually to a sum from available funds as determined pursuant to this subsection. Available funds are funds appropriated for rail service assistance for that fiscal year and any funds to be reallocated for that fiscal year in accordance with this paragraph. Subject to the limitations contained in paragraph (3) of this subsection, the Secretary shall calculate each State's entitlement as follows:

"(A) two-thirds of the available funds multiplied by a fraction whose numerator is the sum of the rail mileage in the State which, in accordance with section 1a(5)(a) of the Interstate Commerce Act (49 U.S.C. 1a(5)(a)), is either 'potentially subject to abandonment' or with respect to which a carrier plans to submit, but has not yet submitted, an application for a certificate of abandonment or discontinuance; and whose denominator equals the total of such rail mileage in all the States; and

"(B) one-third of available funds remaining after completion of the calculations under paragraph (1)(A) of this subsection multiplied by a fraction whose numerator equals the rail mileage in the State for which the Interstate Commerce Commission, within 2 years prior to the first day of the fiscal year for which funds are allocated or reallocated under this section, has found that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the rail mileage, and including, until September 30, 1981, (1) the rail mileage which was eligible for assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762) and (2) all rail mileage in the State which has, prior to October 1, 1978, been included for formula allocation purposes under this section; and whose denominator equals the total rail mileage in all the States eligible for rail service assistance under this section for which the Interstate Commerce Commission has made such a finding and including, until September 30, 1981, (1) the rail mileage in all the States which was eligible for financial assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762) and (2) the rail mileage in all the States which had been, prior to the enactment of this amendment, included for formula allocation purposes under this section. For purposes of the calculation directed by this paragraph, no rail mileage shall be included more than once in either the numerator or the denominator. Notwithstanding the provisions of this subsection, each State is entitled to receive pursuant to this subsection not less than 1 percent of the total appropriation under subsection (q) of this section for that fiscal year.

"(3) For purposes of paragraphs (1) and (2) of this subsection, rail mileage shall be measured by the Secretary as of the first day of each fiscal year. Entitlement funds are available to a State during the fiscal year for which the funds are appropriated. In accordance with the formula stated in this subsection, the Secretary shall reallocate to each State eligible to receive rail service assistance under subsection (j) of this section a share of any entitlement funds which have not been the subject of an executed grant agreement between the Secretary and the State before the end of the fiscal year for which the funds were appropriated. Reallocated funds are available to the State for the same purpose and for the same time period as an original allocation and are subject to reallocation if not made the subject of an executed grant agreement between the Secretary and the State before the end of the fiscal year for which the funds were reallocated. Funds appropriated in fiscal year 1978 and prior years which are not the subject of a grant agreement when this bill becomes effective will remain available to the States during fiscal year 1979.".

PLANNING ASSISTANCE

SEC. 6. Section 5(i) of the DOT Act (49 U.S.C. 1654(i)) is amended to read as follows:

"(i) During each fiscal year, a State may expend not to exceed $100,000, or a percent, whichever is greater, of it annual entitlement under subsection (h) of this section to meet the cost of establishing, implementing, revising, and updating the State rail plan required by subsection (j) of this section.".

PROJECT ELIGIBILITY

SEC. 7. Section 5(k) of the DOT Act (49 U.S.C. 1654(k)) is amended to read as follows:

"(k)(1) On August 1 of each year, each carrier by railroad subject to part I of the Interstate Commerce Act, shall prepare, update, and submit to the Secretary a listing of those rail lines which, based on a level of usage, carried 5 million gross tons of freight or less per mile during the prior year.

"(2) A project is eligible for financial assistance under paragraph (1) of subsection (f) of this section only if—

"(A)(i) the Interstate Commerce Commission has found, since February 5, 1976, that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the line of railroad which is related to the project; or (ii) the line of railroad or related project was eligible for assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762); and

"(B) the line of railroad or related project has not previously received financial assistance under paragraph (1) of subsection (f) of this section for more than 36 month: *Provided, however*, That a line of railroad or related project which was eligible for financial assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762) or under this section prior to October 1, 1978, is eligible only until September 30, 1981.

"(3) A project is eligible for financial assistance under paragraph (2) of subsection (f) of this section only if—

"(A)(i) the Interstate Commerce Commission has found, since February 5, 1976, that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the line of railroad related to the project; or (ii) the line of railroad related to the project is listed for possible inclusion in a rail bank in part III, section C of the Final System Plan issued by the United States Railway Association under section 207 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 7[illegible]); or (iii) the line of railroad related to the project was eligible to be acquired under section 402(c)(3) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762(c)(3)). A line of railroad or related project which was eligible for financial assistance under such section 402 or under this section prior to October 1, 1978, is eligible only until September 30, 1981; and

"(B) the Secretary finds that the project satisfies benefit cost criteria developed by the Secretary under subsection (o) of this section.

"(4) A project is eligible for financial assistance under paragraphs (3) and (5) of subsection (f) of this section only if—

"(A) the line of railroad related to the project is contained in the most recent submission under paragraph (1) of this subsection, and the project has been approved by the affected railroad; and

"(B) the Secretary finds that the project satisfies benefit/cost criteria developed by the Secretary under subsection (o) of this section.

"(5) A project is eligible for financial assistance under paragraph (4) of section (f) of this section only if—

"(A)(i) the Interstate Commerce Commission has found, since February 5, 1976, that the public convenience and necessity permit the abandonment of, or the discontinuance of rail service on, the line of railroad which is related to the project; or (ii) the line of railroad or related project was eligible for financial assistance under section 402 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 762); *Provided*, That a line of railroad or related project which was eligible for assistance under this section or such section 402 prior to October 1, 1978, shall remain eligible for financial assistance only until September 30, 1981; and

"(B) the Secretary finds that the project satisfies benefit/cost criteria developed by the Secretary under subsection (o) of this section.

"(6) A project is eligible for financial assistance under paragraph (6) of subsection (f) of this section only if—

"(A) there is a reasonable likelihood that it will improve the quality and efficiency of local rail freight service by increasing operating efficiency, reducing the cross subsidization of unprofitable portions of a system by profitable portions of a system, or increasing productivity of workers; and

"(B) the cooperative action project shall not exceed 18 months in duration.".

TECHNICAL AMENDMENTS

SEC. 8. (a)(1) Section 5(o) of the DOT Act (49 U.S.C. 1654(o)) is redesignated as section 5(q).

(2) The first sentence of subsection (m)(1) of section 5 of the DOT Act (49 U.S.C. 1654(m)(1)) is amended by striking "(o)" and inserting in lieu thereof "(q)".

(b) The third sentence of subsection (q) of section 5 of the DOT Act, as redesignated by subsection (a) of this section, is amended to read as follows: "In addition, any appropriated sums ranging after the repeal of section 402 of the Regional Rail Reorganization Act of 1973 and of section 810 of the Railroad Revitalization and Regulatory Reform Act of 1976 are authorized to remain available to the Secretary for purposes of subsections (f) through (q) of this section.".

(c) Section 810 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. 1653a) is repealed.

BENEFIT-COST CRITERIA

SEC. 9. Section 5 of the DOT Act (49 U.S.C. 1654) is further amended by adding after subsection (n) thereof a new subsection (o) as follows:

"(o) The Secretary, in cooperation with representatives chosen by the States, shall, within 60 days of the effective date of this subsection, promulgate regulations establishing criteria to be used by the Secretary to determine the ratio of benefits to costs of proposed projects eligible for assistance under paragraphs (2) through (5) of subsection (k) of this section. During the period prior to the Secretary's promulgation of such a methodology, the Secretary shall continue to fund projects on a case-by-case basis where he has determined, based upon analysis performed and documented by the States, that the public benefits associated with the project outweigh the public costs of that project.".

REHABILITATION ASSISTANCE

SEC. 10. Section 5 of the DOT Act (49 U.S.C. 1654) is further amended by adding after subsection (o), as added by section 9 of this Act, a new subsection (p) as follows:

"(p) A State shall use financial assistance provided under paragraph (3) of subsection (f) of this section as follows:

"(1) The funds shall be used to rehabilitate or improve rail properties in order to improve local rail freight service within the State.

"(2) The State, in its discretion, shall grant or loan funds to the owner of rail properties or operator of rail service related to the project.

"(3) The State shall determine the financial terms and conditions of a grant or loan.

"(4) The State shall place the Federal share of repaid funds in an interest-bearing account, or with the approval of the Secretary, permit any borrower to place such funds for the benefit and use of the State, in a bank which has been designated by the Secretary of the Treasury, in accordance with section 265 of title 12, United States Code. The State shall use such funds and all accumulated interest to make further loans or grants under paragraph (3) of subsection (f) of this section in the same manner and under the same conditions as if they were originally granted to the Secretary. The State may at any time pay to the Secretary the Federal share of any unused funds and accumulated interest. After the termination of a State's participation in the local rail service assistance program established by this section, it shall pay the Federal share of any unused funds and accumulated interest to the Secretary.".

COMBINATION OF ENTITLEMENTS

SEC. 11. Section 5 of the DOT Act (49 U.S.C. 1654) is further amended by adding after subsection (q) as redesignated by section 8 of this Act, a new section (r) as follows:

"(r) Two more States that are eligible for local rail assistance under this section may, subject to agreement between or among them, combine their respective Federal entitlements under subsection (h) of this section in order to improve rail properties within their respective States or regions. Such combination of entitlements, where not violative of State law, shall be permitted, except that—

"(A) combined funds may be expended only for purposes listed in this section; and

"(B) combined funds that are expended in one State subject to the agreement entered into by the involved States, and which exceed what the State could have expended absent any agreement, must be found by the Secretary to provide benefits to eligible rail services within one or more of the States which is party to the agreement.".

AMENDMENTS TO THE INTERSTATE COMMERCE ACT

SEC. 12. (a) Section 1(14) of the Interstate Commerce Act (49 U.S.C. 1(14)) is amended—

(1) by designating subsection (b) thereof as subsection (c); and

(2) by adding a new subsection (b), as follows:

"(b) The Commission may, upon petition and after a hearing on the record, and upon

finding that a carrier by railroad subject to this part has materially failed to furnish safe and adequate car service as required by subsection 1(11), require such railroad to provide itself with such facilities or equipment as may be reasonably necessary to meet such obligation, provided the evidence of record establishes, and the Commission affirmatively finds, that—

"(1) The provision of such facilities or equipment will not materially and adversely affect the railroad's ability to otherwise provide safe and adequate transportation services;

"(2) The expenditure required for such facilities or equipment, including a return which equals or exceeds the railroad's current cost of capital, will be recovered; and

"(3) The provision of such facilities or equipment will not impair the railroad's ability to attract adequate capital.".

(b) Section 1a(4) of the Interstate Commerce Act (49 U.S.C. 1a(4)) is amended by adding at the end thereof the following new sentence: "The terms and conditions referred to in subsection (b) of this paragraph may include a direction, where the Commission finds it to be in the public interest to do so, awarding trackage rights to another common carrier by railroad or to a State, or a political subdivision thereof, over all or any portion of the lines of the applicant's railroad, solely for the purpose of moving equipment and crews in nonrevenue service between any lines operated by such other carrier, State, or political subdivision. In making such determination, the Commission shall consider the views of any State or other party directly affected by such abandonment or discontinuance and shall fix just and reasonable compensation, in accordance with section 3(5) of this part, for such trackage rights.".

AMENDMENTS TO THE REGIONAL RAIL REORGANIZATION ACT OF 1973

SEC. 13. Section 304(e) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 744(e)) is amended—

(1) by—

(A) striking the comma at the end of paragraph (4)(B), and inserting in lieu thereof "; or"; and

(B) adding the following new subparagraph after paragraph (4)(B):

"(C) offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of this section and regulations issued by the Office pursuant to section 205(d)(5) of this Act, for the operation of rail passenger service provided under an agreement or lease pursuant to section 303(b)(2) of this title or subsection (c)(2)(B) of this section where such offer is made for the continuation of the service beyond the period required by such agreement or lease: *Provided*, That such services shall not be eligible for assistance under section 17(a)(2) of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1613(a)(2), as amended;"; and

(2) by adding at the end thereof the following new paragraphs:

"(7) If a State (or a local or regional transportation authority) in the region offers to provide payment for the provision of additional rail passenger service (as hereinafter defined), the Corporation shall undertake to provide such service pursuant to this subsection (including the discontinuance provisions of paragraph (2) hereof). An offer to provide payment for the provision of additional rail passenger service shall be made in accordance with subsection (c)(2)(A) of this section and under regulations issued by the Office pursuant to section 205(d)(5) of this Act, and shall be designed to avoid any additional costs to the Corporation arising from the construction or modification of capital facilities or from any additional operating delays or costs arising from the absence of such construction or modification. The State (or local or regional transportation authority) shall demonstrate that it has acquired, leased, or otherwise obtained access to all rail properties other than those designated for conveyance to the National Railroad Passenger Corporation pursuant to sections 206(c)(1)(C) and 206(c)(1)(D) of this Act and to the Corporation pursuant to section 303(b)(1) of this title necessary to provide the additional rail passenger service and that it has completed, or will complete prior to the inception of the additional rail service, all capital improvements necessary to avoid significant costs which cannot be avoided by improved scheduling or other means on other existing rail services, including rail freight service and to assure that the additional service will not detract from the level and quality of existing rail passenger and freight service. As used in this section, "additional rail passenger service" shall mean rail passenger service (other than rail passenger service provided pursuant to the provisions of paragraphs (2) and (4) of this subsection) including extended or expanded service and modified routings, which is to be provided over rail properties conveyed to the Corporation pursuant to section 303(b)(1) of this title, or over (A) rail properties contiguous thereto conveyed to the National Railroad Passenger Corporation pursuant to this Act or (B) any other rail properties contiguous thereto to which a State (or local or regional transportation authority) has obtained access. Any provision of this paragraph to the contrary notwithstanding, the Corporation shall not be required to operate additional rail passenger service over rail properties leased or acquired from or owned or leased by a profitable railroad in the region.

"(8) The Secretary, in consultation with the Association, shall undertake a study to determine the best means of compensating the Corporation for liabilities which it may incur for damages to persons or property resulting from the operation of rail passenger service required to be operated pursuant to this subsection, or section 303(b)(2) of this title which are not underwritten by private insurance carriers or are not indemnified by a State (or local or regional transportation authority). The study shall identify the nature of the risk to the Corporation, the probable degree of uninsurability of such risks, the desirability and feasibility of various indemnification programs including subsidy offers made pursuant to this section, self insurance through a passenger tax or other mechanism or government indemnification for such liabilities. Within one year of the date of enactment of this paragraph, the Secretary shall prepare a report with appropriate recommendations and shall submit the report to Congress. Such report shall specify the most appropriate means of indemnifying the Corporation for such liabilities in a manner which shall prevent the cross-subsidization of passenger services with revenues from freight services operated by the Corporation.".

CHICAGO, MILWAUKEE, AND SAINT PAUL RAILROAD, REVIEW OF

SEC. 14. The Federal Railroad Administration is required to promptly review the condition of the Chicago, Milwaukee, and Saint Paul Railroad and to consider assisting the railroad in loans for roadbed and track improvement.

EFFECTIVE DATE

SEC. 14. This Act shall take effect on October 1, 1978.

MOTION OFFERED BY MR. ROONEY

Mr. ROONEY. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. ROONEY moves to strike out all after the enacting clause of the Senate bill S. 2981, and insert in lieu thereof provisions of H.R. 11979, as passed by the House.

The motion was agreed to.

The Senate bill was ordered to be read a third time, was read the third time, and passed and a motion to reconsider was laid on the table.

The title was amended so as to read: "A bill to amend section [illegible] of the Department of Transportation Act, relating to rail service assistance, and for other purposes.".

A motion to reconsider was laid on the table.

A similar House bill (H.R. 11979) was laid on the table.

AMENDING SENATE AMENDMENTS TO USRA AUTHORIZATION

Mr. ROONEY. Mr. Speaker, I move to suspend the rules and agree to the resolution (H. Res. 1433), to provide that the bill (H.R. 10898) to amend the Regional Rail Reorganization Act of 1973 to authorize appropriations for the United States Railway Association for fiscal year 1979, with the Senate amendments thereto, be taken from the Speaker's table, and that the Senate amendments be agreed to with amendments.

The Clerk read as follows:

H. RES. 1433

Resolved, That upon the adoption of this resolution, the bill (H.R. 10898) to amend the Regional Rail Reorganization Act of 1973 to authorize appropriations for the United States Railway Association for fiscal year 1979, with the Senate amendments thereto, be, and the same is hereby, taken from the Speaker's table to the end that—

(1) Senate amendments numbered 1, 2, and 4 be, and the same are hereby, agreed to;

(2) Senate amendment numbered 3 be, and the same is hereby agreed to with an amendment as follows:

In lieu of the matter inserted by Senate amendment numbered 3, insert the following:

SEC. 3. (a) Section 211(d) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 721(d)) is amended by adding at the end thereof the following: "Notwithstanding any other provision of this section, in the case of a loan made under subsection (a) of this section to a railroad in the region, the Association may, upon the request of such railroad—

"(1) continue to make advances to such railroad pursuant to such loan, up to the total principal provided, as of the date of enactment of this sentence, under the agreement between such railroad and the Association under this section, upon finding only that (A) a good faith effort has been commenced by such railroad toward the establishment of an employee stock ownership plan, and (B) such continued advances will permit the continuation of rail service determined by the Association, in the Final System Plan or under the goals of this Act, to be desirable; and

"(2) increase the principal amount of such loan to such railroad, in an amount not to exceed $2,000,000, only if the Association makes the finding referred to in paragraph (1)(B) of this subsection and such railroad has in effect an employee stock ownership plan which has been approved by the Association.

"The Association may not take any action pursuant to the preceding sentence of this subsection after December 31, 1979.".

(b) Section 3(a) of the Emergency Rail Services Act of 1970 (45 U.S.C. 662(a)) is

amended by adding at the end thereof the following new sentence: "Notwithstanding any other provision of this section, the Secretary, in guaranteeing certificates under this section, is authorized to waive the findings required by paragraphs (1), (5), and (6) of this subsection upon a finding that the guarantee of certificates is necessary in order for a railroad which has received continued loan advances, pursuant to section 211(d)(1) of the Regional Rail Reorganization Act of 1973, to maintain rail services in the region (as such term is defined in section 102('5) of such Act). The Secretary may not make any waiver under the preceding sentence after December 31, 1979."; and

(3) Senate amendment numbered 5 be, and the same is hereby, agreed to with an amendment as follows:

In lieu of the matter inserted by Senate amendment numbered 5, insert the following:

SEC. 5. Section 17(9)(f)(1) of the Interstate Commerce Act (49 U.S.C. 17(9)(f)(1)) is amended to read as follows:

"(1) a majority of the Commissioners, by public vote, agree to such further extension; and".

SEC. 6. (a) The Secretary of Transportation shall conduct an investigation and study for purposes of determining equitable rates to be charged for the rental of Alaska Railroad lands. In carrying out such investigation and study, the Secretary shall consider—

(1) the per centum increase in such rates proposed after 1977 as compared with rates in effect on January 1, 1977;

(2) the services and the quality thereof provided by the rentors of such land and the services and the quality thereof received by such rentors from such railroad;

(3) the burden on commerce which may result from such proposed rate increase; and

(4) such other factors as may be appropriate.

The Secretary shall report the results of such investigation and study to the Congress not later than one year after the date of enactment of this Act.

(b) Prior to 180 days after the date on which the Secretary's report pursuant to subsection (a) is received by the Congress, rental charges on lands rented by the Alaska Railroad shall not be increased by more than 100 per centum of the amount charged for such land on January 1, 1977.

The SPEAKER pro tempore. Is a second demanded?

Mr. SKUBITZ. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER pro tempore. The gentleman from Pennsylvania (Mr. ROONEY) and the gentleman from Kansas (Mr. SKUBITZ) will be recognized for 20 minutes each.

The Chair recognizes the gentleman from Pennsylvania (Mr. ROONEY).

Mr. ROONEY. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, when the House passed the USRA authorization, it included an amendment designed to assist the Delaware & Hudson Railroad. The U.S. Railway Association had determined that it was unable to permit an additional drawdown of funds on a previously approved loan because in its opinion, the railroad was unable to satisfy the criteria for such loans included in section 211 of the Regional Rail Reorganization Act of 1973.

The House, in an effort to provide sufficient funds to the D. & H. while the Federal Railroad Administration completes its section 401 study and for the USRA and the New England Regional Commission to complete their study, amended the 3–R Act to permit USRA to modify the findings in section 211 so as to allow the D. & H. to make further drawdowns of the funds. The Senate, however, provided that Secretary of Transportation could guarantee trustee certificates for a bankrupt railroad in the region to maintain services until December 31, 1979.

The Department of Transportation stated at the Transportation and Commerce Subcommittee's hearing on August 15, 1978, that in the event the D. & H. filed a petition for bankruptcy, it would be unable to provide it with funds from the Emergency Rail Services Act of 1970, because this act also contained a provision which would preclude assistance to the D. & H.

The amendment has now been drafted to provide that a railroad in the region which has been loaned funds pursuant to section 211(a) may request USRA to continue payments of such loan, but not to exceed the existing loan commitment, if USRA finds only that a good faith effort has been commenced to establish an employee stock ownership plan by such railroad and such continued payments will permit the continuation of rail service determined by the USRA in the final system plan in order for the goals of the 3–R Act to be desirable. This provision permits USRA to continue payments under the original loan commitment without making the findings heretofore required in section 211 (e) and (f), however, still subject to the necessary prerequisite in section 210(b), USRA may still provide an additional $2 million to such railroad upon its request, if USRA makes the same finding as in section 211 (d)(1)(B), and such railroad has in effect an employee stock ownership plan.

The second part of the amendment provides that the Secretary of Transportation, in guaranteeing trust certificates, may waive the findings in paragraphs (1), (5), and (6), if he finds that the guarantee of certificates is necessary in order for a railroad which has received continued payments of a loan under section 211(d)(1) of the 3–R Act to maintain services in the region, until December 31, 1979.

In short, the amendment that I am proposing basically includes the provisions both of the House bill and the Senate bill, with the added condition that an Employee Stock Ownership Plan be established. In this way, the railroad and the USRA board will have an option to attempt to solve the railroad's financial problems in the best available means at the time the funds are required. The amendment does not mandate that the railroad file for bankruptcy before becoming eligible for assistance. By the same token, the USRA is not obliged to provide further drawdowns of the loan funds. Rather, what Congress is doing is removing the barriers in the 3–R Act and the Emergency Rail Services Act which the USRA and the Department indicated prevented providing assistance to the D. & H.

I believe that this arrangement is eminently fair in that it provides the mechanism for the best chance for the railroad to continue the services which are essential to the region it serves.

Mr. Speaker, I would like to take a moment to thank my colleagues on both sides of the aisle for the assistance they have rendered in preparing this legislation, in particular Representatives HANLEY, STRATTON, MCDADE, and CONTE, who provided my staff and me invaluable time and effort on this important legislation.

Mr. SKUBITZ. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 10898, the authorization for U.S. Railway Association.

As you know this bill passed the House on August 17 with an amendment. The amendment was a simple provision that would have facilitated additional money for the Delaware & Hudson Railroad.

At that time it was pointed out that the Delaware & Hudson had become involved in Government-originated expansion as a result of the final system plan.

In short the Delaware & Hudson had doubled its operating territory while falling prey to a considerable loss in bridge traffic as a result of the elimination of the Erie Lackawanna & Lehigh Valley Railroads once they were folded into ConRail.

The Senate passed the bill on September 14—but instead of accepting the House amendment to assist the Delaware & Hudson Railroad—the Senate substituted an amendment which would make loans easier under the Emergency Rail Services Act.

Unfortunately, loans under the Emergency Rail Services Act can be made only to bankrupt railroads. At this point in time, the Delaware & Hudson Railroad is not bankrupt.

Mr. Speaker, during the last several weeks, numerous discussions have been held with the other body and an amendment agreeable to the leadership of both the House committee and the Senate committee has been worked out.

Simply stated, the amendment will include—both the House provision and the Senate provision, with slight modification.

The modification in the House provision will be that a ceiling will be put on the amount of money the D. & H. can receive from USRA.

That ceiling will be the remaining loan commitment payment of $2.7 million and a possible additional $2 million.

In addition, there will be conditions precedent to the payment of either amount.

With respect to the first amount of $2.7 million, the D. & H. must show that they have begun the establishment of an employee stock option plan. With respect to the second amount of $2 million, the Delaware & Hudson must demonstrate that the stock option plan has been set up and that there is a reasonable expectation that it will be undertaken.

Finally, Mr. Speaker, there is also a provision in the bill relating to the payment of moving expenses for the new president of the Alaska Railroad.

The Federal Railroad Administration, the railroad itself, and the Department of Transportation had made a commitment to pay moving expenses only to find that present law precludes such payment for an employee entering the Federal service.

The provision in this bill which originated in the other body is just and equitable and while involving only a few thousand dollars eliminates an unwarranted hardship for the gentleman who relied upon the commitments made to him before moving from St. Louis to Alaska.

I believe that the agreements worked out with respect to this bill are good ones and urge the passage of this bill as it will be amended by the chairman of the subcommittee.

● Mr. YOUNG of Alaska. Mr. Speaker, I rise in support of the substitute amendment.

Mr. Speaker, the section of the substitute was drafted by Senator STEVENS, the gentleman from Pennsylvania (Mr. ROONEY), the gentleman from Kansas (Mr. SKUBITZ) and myself. It would authorize the Secretary of Transportation to recommend to Congress equitable rates to be charged for the rental of Alaska Railroad lands.

The Federal Government owns the Alaska Railroad, with direct responsibility for the railroad vested in the Federal Railroad Administration of the Department of Transportation. Many Alaskan businesses presently lease lands from the railroad.

In May 1977, the railroad notified its leaseholders of rental rate increases ranging from 100 to 1,800 percent. Although the railroad allowed proration of these increases over a 3-year period, the leaseholders face annual rental rate increases ranging from 33 to 500 percent.

These rental rate increases threaten the viability of the many businesses that lease land from the railroad. Some of these businesses operate under long-term contracts with fixed costs. Others must compete with businesses outside of Alaska. These leaseholders cannot pass along the rate increases to their customers. Facing increased operating costs, these leaseholders may be forced to cease doing business in Alaska. The Alaska Railroad would then suffer the loss of freight revenue that it presently receives from this source.

A few businesses that lease from the Alaska Railroad could pass along the increased operating costs to their customers. Although these businesses may continue doing business in Alaska, the consumer would bear the burden of the inflationary rate increases.

While the leaseholders demand relief from these increases, the Comptroller General has recognized that the rates effective prior to the May 1977 increases were below the rental rates for comparable Alaska lands. To resolve the dilemma faced by the railroad and the leaseholders, this amendment authorizes the Secretary to recommend an equitable rental rate schedule. It includes protection against inflationary rate increases pending congressional consideration of the Secretary's recommendations. Total increases are limited to only 100 percent of pre-1977. rents. This seems an entirely fair approach until the Secretary has had a chance to make his study. No refunds of rents paid would be issued. Rent increases in excess of the limit set out in the amendment would be reduced as of the next payment period.●

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Pennsylvania (Mr. ROONEY) that the House suspend the rules and agree to the resolution (H. Res. 1433).

The question was taken; and (two-thirds having voted in favor thereof), the rules were suspended and the resolution was agreed to.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. ROONEY. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on House Resolution 1433 and the other bills just agreed to.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Debate has been concluded on all motions to suspend the rules.

Pursuant to clause 3, rule XXVII, the Chair will now put the question on each motion on which further proceedings were postponed in the order in which that motion was entertained.

Votes will be taken in the following order: House Resolution 1432 by the yeas and nays, and H.R. 13047, de novo.

The Chair will reduce to 5 minutes the time for any electronic vote after the first such vote in this series.

IRC AMENDMENTS FOR STATE-OPERATED BINGO GAMES (LOCK AND DAM 26)

The SPEAKER pro tempore. The unfinished business is the question of suspending the rules and agreeing to the resolution (H. Res. 1432).

The Clerk read the title of the resolution.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Oregon (Mr. ULLMAN) that the House suspend the rules and agree to the resolution (H. Res. 1432) on which the yeas and nays are ordered.

The vote was taken by electronic device, and there were—yeas 287, nays 123, not voting 20, as follows:

[Roll No. 911]

YEAS—287

Abdnor	Ford, Tenn.	Myers, John
Akaka	Forsythe	Myers, Michael
Alexander	Fountain	Natcher
Anderson, Calif.	Fowler	Neal
	Fraser	Nichols
Anderson, Ill.	Frenzel	Nolan
Andrews, N.C.	Gammage	Nowak
Andrews, N. Dak.	Gephardt	O'Brien
	Giaimo	Oberstar
Annunzio	Gibbons	Obey
Archer	Gilman	Panetta
Ashbrook	Ginn	Patten
Ashley	Glickman	Patterson
Aspin	Goldwater	Pease
AuCoin	Gonzalez	Pepper
Bafalis	Goodling	Perkins
Baldus	Gore	Pike
Barnard	Gradison	Poage
Baucus	Grassley	Pressler
Bauman	Green	Preyer
Beard, R.I.	Gudger	Price
Beard, Tenn.	Guyer	Quayle
Bennett	Hagedorn	Rahall
Bevill	Hall	Railsback
Bingham	Hamilton	Reuss
Blouin	Hammer-schmidt	Rhodes
Boggs		Roberts
Boland	Harkin	Robinson
Bolling	Harsha	Roe
Bonker	Hawkins	Rogers
Bowen	Hefner	Roncalio
Brademas	Heftel	Rose
Breaux	Hightower	Rousselot
Breckinridge	Hillis	Roybal
Brinkley	Holland	Runnels
Brooks	Hollenbeck	Ruppe
Broomfield	Horton	Ryan
Brown, Calif.	Howard	Santini
Brown, Ohio	Hubbard	Satterfield
Broyhill	Huckaby	Sawyer
Buchanan	Hyde	Sebelius
Burgener	Ichord	Sharp
Burke, Fla.	Jeffords	Shuster
Burke, Mass.	Jenkins	Sikes
Burlison, Mo.	Jenrette	Simon
Butler	Johnson, Calif.	Sisk
Caputo	Jones, N.C.	Skelton
Carney	Jones, Okla.	Slack
Carter	Jones, Tenn.	Smith, Iowa
Cederberg	Jordan	Smith, Nebr.
Chappell	Kasten	Snyder
Chisholm	Kastenmeier	Spellman
Clausen, Don H.	Kazen	Spence
	Kelly	St Germain
Clawson, Del	Kemp	Stangeland
Clay	Keys	Stanton
Coleman	Kindness	Steed
Collins, Ill.	Krueger	Steiger
Conable	LaFalce	Stokes
Corcoran	Lagomarsino	Stratton
Corman	Latta	Stump
Cornell	Leach	Taylor
Cornwell	Lederer	Thone
Cotter	Lehman	Traxler
Coughlin	Lent	Treen
Cunningham	Levitas	Trible
Daniel, Dan	Livingston	Udall
Daniel, R. W.	Lloyd, Calif.	Ullman
Danielson	Lloyd, Tenn.	Van Deerlin
Davis	Lott	Vander Jagt
de la Garza	Luken	Vento
Delaney	McClory	Volkmer
Devine	McCloskey	Waggonner
Dicks	McCormack	Walker
Dornan	McEwen	Walsh
Duncan, Oreg.	McFall	Wampler
Duncan, Tenn.	McKay	Watkins
Eckhardt	McKinney	Whalen
Edwards, Ala.	Madigan	White
Edwards, Okla.	Mann	Whitehurst
Eilberg	Marks	Whitley
Emery	Marriott	Whitten
English	Martin	Wiggins
Erlenborn	Mazzoli	Wilson, Bob
Ertel	Meeds	Wilson, C. H.
Evans, Colo.	Michel	Wilson, Tex.
Evans, Del.	Mikulski	Winn
Evans, Ind.	Milford	Wolff
Fary	Miller, Ohio	Wright
Pascell	Mineta	Wylie
Findley	Mitchell, Md.	Young, Alaska
Fish	Mitchell, N.Y.	Young, Fla.
Fisher	Mollohan	Young, Mo.
Fithian	Montgomery	Young, Tex.
Flippo	Moorhead, Calif.	Zablocki
Flowers		Zeferetti
Flynt	Moorhead, Pa.	
Foley	Murphy, N.Y.	

Appendix C: Federal Register, Vol. 42, No. 104

Tuesday, May 31, 1977, Rules and Regulations

(Secs. 6, 9, 80 Stat. 937, 944 (49 U.S.C. 1655, 1657); the statutes referred to in sec. 6(e)(1), (2), (3), 80 Stat. 939 (49 U.S.C. 1655); sec. 202, 84 Stat. 971 as amended by sec. 5(a) of Pub. L. 94-348 (45 U.S.C. 431); and § 149 of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49.)

Issued in Washington, D.C., on May 23, 1977.

BRUCE M. FLOHR,
Deputy Administrator.

[FR Doc.77-15315 Filed 5-27-77;8:45 am]

[Docket No. HS-4, Notice No. 7]

PART 228—HOURS OF SERVICE OF RAILROAD EMPLOYEES

Statement of Agency Policy and Interpretation on the Hours of Service Act, as Amended

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final statement of agency policy and interpretation.

SUMMARY: This document amends Part 228 of Title 49, Code of Federal Regulations by adding at the end thereof an appendix setting forth the position of FRA on the requirements of the Hours of Service Act. The appendix is being published at this time for the following reasons: (1) To explain the position of FRA on certain of the amendments to the Act contained in the Federal Railroad Safety Authorization Act of 1976, Pub. L. No. 94-348; (2) to give the broadest possible notice concerning the policy of FRA on issues of construction and interpretation; and (3) to provide an educational tool for the use of those subject to the Act. Publication of this statement will apprise the public concerning the circumstances under which the agency will seek civil penalties against carriers subject to the Act.

EFFECTIVE DATE: This document is effective on May 31, 1977.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On September 28, 1976, the Federal Railroad Administration (FRA) published in the FEDERAL REGISTER (41 FR 42692) a proposed statement of agency policy and interpretation concerning the Hours of Service Act, as amended, 45 U.S.C. 61-64b (hereinafter "Act"). Public comments were requested to be submitted by October 29, 1976. Subsequent notices extended the comment period through December 17, 1976 (see 41 FR 48163, November 2, 1976; 41 FR 52351, November 29, 1976; 41 FR 54047, December 10, 1976). FRA administers and enforces the Act under section 6(f)(3)(A) of the Department of Transportation Act (49 U.S.C. 1655(f)(3)(A)) and a delegation from the Secretary of Transportation (49 CFR 1.49(d)).

Having analyzed the comments received in light of the express purpose of the Act, its legislative history, case law, and prior administrative interpretations, FRA has decided to issue a final statement of agency policy and interpretations addressing two of the three broad categories of service covered by the Act, as well those provisions of the Act which apply to all covered service. The policy statement is issued in the form of an appendix to Part 228 of Title 49, Code of Federal Regulations. Part 228 consists of FRA regulations implementing the Hours of Service Act. The categories of service addressed in the final statement which appears below are (1) train and engine service (section 2 of the Act) and (2) the communication of train orders (section 3 of the Act).

FRA has issued a separate document setting forth interim interpretations concerning limitations on the hours of service of individuals engaged in installing, repairing or maintaining signal systems (section 3A of the Act) (42 FR 4464; January 25, 1977). The limitations on signal service were added by the Federal Railroad Safety Authorization Act of 1976. FRA believes that the unique circumstances associated with this new category of covered service raise a sufficient number of questions to warrant continued study.

Thirteen individuals or organizations submitted comments on Docket No. HS-4 which addressed topics within the scope of the present document. Many of the comments expressed disagreement with positions which are necessitated by long-standing administrative practice, by case law, by the explicit language of the statute, or by a combination of these factors. Therefore, the discussion of those comments will be brief and direct.

Several commenters noted that the function of interpretations is to provide guidance to persons subject to the Act and to the courts based on the informed judgment and experience of the agency. As the commenters pointed out, the issuance of interpretations is not an act of substantive or "legislative" rulemaking. However, it should be noted that in areas requiring the application of special knowledge and expertise the courts give significant weight to the agency judgment.

One commenter objected to publication of the interpretations in the Code of Federal Regulations based on the fact that they do not constitute an affirmative imposition of new substantive obligations. Appendix A as revised for final publication is clearly identified as a statement of agency policy and interpretation. FRA has decided to publish these interpretations in the Code as a means of achieving wider circulation and availability.

Another commenter raised the question of the applicability of the Act to service in Canada. The Act is offended at any time a carrier requires or permits an employee "to go, be, or remain on duty" in violation of the stated requirements. However, the United States has no jurisdiction to control conduct on foreign soil, as such. Thus, when a train crosses the Canadian border, its crew ceases to be subject to limitations on service imposed by United States law. However, when a train enters the United States from Canada, the train crew is immediately subject to the Act and all time spent on duty in Canada is counted in computing the appropriate periods of service and release. For example, if, on entering the United States while performing service as a brakeman, an employee had been on duty for 14 hours, the carrier would immediately become liable for a civil penalty for permitting the employee to remain on duty within the United States in contravention of the 12-hour limitation. The commenter suggested that FRA seek to resolve the issue of hours of service regulation in Canada through agreement with Canadian authorities or by recommending that industry and labor resolve the matter through collective bargaining. It is within the power and discretion of the Canadian government to provide for railroad safety within Canada, and it would be inappropriate for FRA to address this matter absent some demonstrated impact on railroad safety within the United States.

The following discussion relates to comments on the portion of the text entitled "Train and Engine Service":

Covered service. Several commenters challenged the proposed interpretation on covered service, with most of the objections centering on the issue of what is meant by the term "hostlers". The Act now provides for coverage of any "individual actually engaged in or connected with the movement of any train, including hostlers". Employees known as "outside hostlers" generally move locomotives between shops or engine terminals and other yard areas. Employees known as "inside hostlers" generally move locomotives within shop or repair areas. Since outside hostlers were considered by the Interstate Commerce Commission, FRA and the industry to be covered by the Act prior to the 1976 amendment which added the words "including hostlers", it is evident that Congress wished to establish as a matter of law that inside hostlers should be considered to be "connected with" the movement of trains.

The legislative materials on the coverage of hostlers and individuals engaged in signal service are not extensive, since no hearings were conducted on that aspect of the legislation. However, the House Committee on Interstate and Foreign Commerce stated:

> Section 4(c) of the bill adds two more crafts of employees under the hours of service protection. The two crafts are hostlers and signalmen. The primary functions of hostlers are to move engines into and out of the shop areas and to service the locomotives by adding water, sand, and fuel to them. H.R. Rep. No. 94-1166, 94th Cong., 2nd Sess. (1976) at page 12.

The dictionary definition of "hostler" includes "one who services a vehicle (as a locomotive or truck) or machine (as a crane)". "Webster's Seventh New Collegiate Dictionary" (Merriam-Webster 1967). Clearly Congress intended to

limit the hours of persons who move locomotives in association with servicing and repair. To argue that only outside hostlers are covered by the Act is to ignore these considerations: (1) Outside hostlers were covered prior to the 1976 amendment; (2) the common meaning of "hostler" includes inside hostlers; (3) all employees engaged in "hostling" have a direct role in the safety of railroad operations, i.e., the safe movement of rolling equipment.

Clearly persons who perform the usual functions associated with the title "inside hostler" are covered by the Act.

Limitations on hours. Several commenters expressed difficulty with the 24-hour concept as it is applied to aggregate service and required periods of release. The position set forth in the proposed interpretations is merely a recital of the position of FRA, the industry and railroad labor since revision of the Act in 1969. A very literal reading of the statute would require that the required 8-hour release period be within the "preceding twenty-four hours" described in section 2(a)(2) of the statute (45 U.S.C. 62(a)(2)) in every instance. That would mean that broken service would have to be distributed within the remaining 16 hours in every instance. (For instance, 4 hours on duty, 4 hours off duty—the minimum permitted—and 4 hours on duty.) After passage of the 1969 revision to the Act it was agreed by all interested parties that such a construction was unnecessarily restrictive and was not intended by Congress. In light of prior administration of the Act, the legislative body seemed to have had two objectives: (1) To prohibit service in excess of 12 hours either consecutively or in the aggregate and (2) to assure that an employee not be worked in broken service for more than 24 hours without receiving at least 8 consecutive hours off duty. Thus, FRA adopted a less restrictive reading of the statute which achieves those objectives. The only alternative to this reading is the literal, more restrictive reading.

One commenter noted that under the longstanding interpretation, which is repeated in the text below, an employee can be required to work a cycle of 8 hours on duty and 8 hours off duty for an indefinite period. FRA appreciates that this is the case. In fact, that kind of flexibility is the feature which, on a practical level, commended this approach to labor and the industry some years ago. It should be recalled that shorter hours are a proper subject for collective bargaining and that the 8-hour release affords what Congress deemed to be an appropriate period for rest after broken service or continuous service of less than 12 consecutive hours.

One commenter expressed concern at the use of the term "work tour". In the text below the term is used to describe a period of aggregate service preceded by and followed by a required 8 or 10-hour release. "Work tour" as used in the interpretations does not necessarily mean a discrete work assignment or "run". That is, for purposes of the interpretations a new work tour (and new 24-hour period) could begin after an 8 or 10-hour release at a designated terminal, even if more than one work assignment or run was accomplished during the work tour.

Duty time and effective periods of release: Designated terminals. Section 1 of the Act provides that train or engine service may be broken by a period of release of 4 or more hours at a designated terminal. Despite extensive correspondence and lengthy conferences between FRA and carrier officials over the past 5–6 years, a number of commenters persist in their view that the word "designated" either (1) is mere surplusage, (2) refers to unilateral action by the carrier, or (3) has no application to the commenter's own operating environment.

Construction of the term designated terminal has been the subject of litigation and it is the view of FRA that the matter has been definitely and finally resolved in the courts. As stated by the United States Court of Appeals for the Ninth Circuit, "we hold that the term 'designated terminal' as used in the Hours of Service Act, 45 U.S.C. 61(b)(3), refers to terminals designated in or under collective bargaining agreements." "United States v. The Atchison, Topeka and Santa Fe Ry.", 525 F. 2d 1184, 1190 (1975), cert denied 425 U.S. 992 (1976). Specifically, "the 'home' and 'away-from-home' terminals were the 'designated terminals' Congress had in mind", 552 F. 2d 1188. The appellate court specifically rejected the argument that if a terminal is designated as a release point for one or more crew assignments it is "designated" within the meaning of the Act for any crew assignment:

> "We think • • • that section 61(b)(3) refers to the "terminals" which are designated for the particular crew and run involved. The Santa Fe has advanced no reasons, and we can think of none, why a stop at any place with minimum facilities would be more conducive to rest just because it happened to be a "terminal" for other trains and other crews. And certainly to add that the place must be unilaterally designated by management would be to require a pointless formality. We think that Congress must have intended to require a bilateral designation process. 525 F. 2d 1189.

One commenter argued that this view might block the establishment of new runs, since the established points of release could not be inserted in collective bargaining agreements which are negotiated on a periodic basis. This concern ignores the language of the court and the FRA interpretation which explains that terminals may be designated "under" collective bargaining agreements. That is, employee representatives and carrier officials may agree by letter or memorandum what the proper points of release shall be. All that is required is that the terminals agreed upon by the parties, whether they be two or three or six in number, provide adequate facilities for food and lodging. To avoid confusion and unnecessary FRA involvement, such letters or memoranda executed in the future should explicitly refer to the fact that the designation process is intended to identify appropriate points of release under the Hours of Service Act for specific crew assignments.

One commenter was concerned that the FRA intends to displace the collective bargaining process with respect to the determination of which terminals provide suitable facilities for food and lodging. FRA is interested in this issue only with respect to compliance with the Hours of Service Act. Certainly the agreement of the affected parties on the issue of "suitability" will be persuasive (normally dispositive) evidence on the adequacy of the facilities under the Hours of Service Act, though FRA must reserve the right to make an independent judgment on the latter issue. It should be noted that, under a 1976 amendment to section 2 or the Act (45 U.S.C. 62), carrier-provided sleeping quarters, including dormitories, trailers, and bunk cars, must be "clean, safe, and sanitary" and "free from interruptions caused by noise under the control of the railroad". FRA is responsible for the administration of that provision, as well.

Deadheading. Two commenters suggested that the discussion of deadheading be revised to note that statutory language on deadheading does not apply to operators, dispatchers and other section 3 employees. The organization of both the proposed and revised documents is intended to reflect the fact that only train and engine service employees are said to engage in "deadhead transportation" within the meaning of the Act. This is explicitly confirmed in the revised text by reference to "train and engine service" employees.

Concerning deadheading of train or engine crews by private automobile, a commenter questioned the relevance of compensation through a fixed or "arbitrary" payment on the issue of whether transportation by private automobile is to be considered ordinary commuting or deadheading. FRA believes that, along with other factors, such compensation is a significant indicium of the nature of the period in question. The issue in each case is whether the employee is traveling to a point of duty assignment other than his normal reporting point or "base of operations" by personal vehicle in lieu of carrier-provided transportation.

Wreck and relief trains. The 1976 amendments to the Act make wreck and relief crews subject to the 12-hour limitation and the requirements for 8 or 10-hour release periods. However, a special-purpose emergency provision permits wreck and relief crews to work up to 16 hours if necessitated by the emergency. An emergency for these purposes must be read to include most accidents and derailments requiring the use of such crews. The emergency concept seems less strict than the "casualty or unavoidable accident or act of God" described in section 5(d) of the Act. The text reflects that distinction and has been further clarified at the request of a commenter. However the additional 4 hours are available only as

required to deal with an ongoing emergency.

The following discussion relates to comments on the portion of the text entitled "Communication of Train Orders":

Shifts. Several commenters questioned the definition of "shift" set forth in the notice, a definition which was contained in FRA's previous public memoranda on the Act. The rule that employees must be assigned the same starting time to be considered one "shift" is rooted in the legislative history of the 1969 revision to the Act (Pub. L. No. 91–169). See H.R. Rep. No. 604, 91st Cong., 1st Sess. 9 (1969). Two commenters submitted evidence suggesting a broader meaning for the term, based on National Railroad Adjustment Board awards and the wording of several collective bargaining agreements. FRA believes the Act should be given the reading anticipated by Congress, whether or not there may be disagreement concerning usage of the term in the industry. To recognize staggered starting times as a feature of a single "shift" would be to invite confusion and result in the Act being unevenly applied. Though most carriers with agreements allowing shifts to commence at different times within a specified range appear to limit that range of 1½ to 2 hours, one commenter suggested a one-shift example with one employee working 6:30 a.m.–3:00 p.m. and another working 10:00 a.m.–6:00 p.m. The logical extension of such a principle would treat any overlap whatsoever as creating a single shift, provided the collective bargaining agreement so provided. Again, FRA believes that the law should be construed in the simple manner anticipated by the Congress. Therefore, a "shift" is defined to mean a tour of duty constituting a day's work for one or more employees performing the same class of work at the same station who are scheduled to begin and end work at the same time.

Duty time and effective periods of release. Commenters expressed apprehension concerning treatment of travel time for employees engaged in the communication of train orders. FRA's informational memorandum of January 9, 1973 stated that time spent traveling between places in the course of a duty tour is considered time on duty. Traditionally other travel time for such covered employees has not been considered on-duty time. Nor have such employees been considered subject to the provisions on deadheading. FRA does not propose to adopt a new position at this time.

The following discussion relates to comments on the portion of the text entitled "General Provisions":

Commingled service. Two commenters objected to counting attendance at rules classes as on-duty time under the provisions on commingled service. Other commenters limited their objection to counting required rules classes where employees have the option to attend one of several sessions. Certain commenters also objected to counting time spent in compelled attendance at disciplinary proceedings. Others would count only those periods spent in other service which precede covered service.

The statute requires that all time spent in other service for the carrier be counted in computing the on-duty time of an employee performing covered service during the 24-hour period. It is immaterial that the specific scheduling of such service is left, in part, to the employee.

The carrier must assure that its employees do not exceed the limitations on hours through commingled service. Case law establishes that training sessions constitute "time on duty" ("United States v. Baltimore and Ohio R.R.," 328 F.Supp. 1102 (W.D. Pa. 1971)), and the same result must obtain with regard to attendance at disciplinary proceedings at the behest of the carrier.

The statute does not permit different treatment of situations in which noncovered service follows, rather than precedes, covered service. Even before the enactment of explicit language requiring that "all time on duty in other service" be counted in computing on-duty time, the courts had construed the law to require that subsequent noncovered service be counted. "See Atchison, Topeka and Santa Fe Ry. v. United States," 243 F. 114 (8th Cir. 1917); "San Pedro, L.A. & S.L. R.R. v. United States," 213 F. 326 (8th Cir. 1914); "Delano v. United States," 220 F. 635 (7th Cir. 1915).

One commenter suggested that time spent in jury duty and similar endeavors be subject to the rule of commingled service. The statute speaks only of "other service performed for the common carrier".

Casualty; unavoidable accident; Act of God. At the suggestion of several commenters, the discussion of subsection (d) of section 5 of the Act (45 U.S.C. 64a(d)) has been moved beneath the heading of "General Provisions". This reflects the fact that the subsection may provide relief from the requirements governing each of the three types of covered service.

Several commenters suggested that the proposed interpretations of section 5(d) were excessively restrictive. Based on judicial interpretations of this provision, FRA respectfully disagrees. The overwhelming view adopted by the courts is that most common operational difficulties do not excuse excess service. See, for example, "Atchison, Topeka and Santa Fe Ry. v. United States," 243 F. 114 (8th Cir. 1917); "United States v. Atchison, Topeka and Santa Fe Ry.," 302 F. Supp. 393 (D. N.M. 1969). Further, even when an extraordinary event occurs which might be regarded as involving the exemption, the carrier must still exercise "due diligence" to avoid or limit excess service. "Atchison, Topeka and Santa Fe Ry. v. United States," 244 U.S. 336 (1917). The carrier has the burden of establishing that the excess service could not have been avoided. "United States v. Lehigh Valley R.R.," 219 F. 532 (2nd Cir. 1914); "United States v. Great Northern Ry.," 220 F. 630 (7th Cir. 1915).

Sleeping quarters. No new comments were received on the application of paragraph (3) of subsection 2(a) of the Act (45 U.S.C. 62(a)(3)), which was added by section 4 of Pub. L. No. 94–348, 90 Stat. 817, 818. That paragraph makes it unlawful for a carrier to provide sleeping quarters for employees covered by the Act which do not afford an opportunity for rest, free from interruptions caused by noise under the control of the railroad, or which are not clean, safe, and sanitary. Paragraph (4) of subsection 2(a) provides that sleeping quarters may not be located "within or in the immediate vicinity" of switching or humping operations, as determined in accordance with rules prescribed by FRA (under a delegation from the Secretary of Transportation). See FRA interim rules at 41 FR 53028 (December 3, 1976) and a notice of proposed rulemaking on paragraph (4) determinations at 41 FR 53070 (December 3, 1976).

In the absence of comments addressing paragraph (3), FRA will administer that provision on a case-by-case basis until guidelines can be developed. Further opportunity to comment will be provided when proposed guidelines have been formulated. In preparing proposed guidelines, FRA will consider materials submitted in connection with FRA Rulemaking Petition 74–3 (see 40 FR 6701; February 13, 1975), which preceded the recent amendments to the Hours of Service Act and which has, therefore, been denied (see 41 FR 53030).

In consideration of the foregoing, Part 228, Title 49, Code of Federal Regulations is amended by the addition of the following appendix.

APPENDIX A—REQUIREMENTS OF THE HOURS OF SERVICE ACT: STATEMENT OF AGENCY POLICY AND INTERPRETATION

First enacted in 1907, the Hours of Service Act was substantially revised in 1969 by Pub. L. 91–169. Further amendments were enacted as part of the Federal Railroad Safety Authorization Act of 1976, Pub. L. 94–348. The purpose of the law is "to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees * * *." This appendix is designed to explain the effect of the law in commonly-encountered situations.

The Act governs the maximum work hours of employees engaged in one or more of the basic categories of covered service treated below. If an individual performs more than one kind of covered service during a tour of duty, then the most restrictive of the applicable limitations control.

The Act applies to any common carrier engaged in interstate or foreign commerce by railroad. It governs the carrier's operations over its own railroad and all lines of road which it uses.

TRAIN AND ENGINE SERVICE

Covered Service. Train or engine service refers to the actual assembling or operation of trains. Employees who perform this type of service commonly include locomotive engineers, firemen, conductors, trainmen, switchmen, switchtenders (unless their duties come under the provisions of section 3) and hostlers. With the passage of the 1976 amendments, both inside and outside hostlers are considered to be connected with the movement of trains. Previously, only outside hostlers were covered. Any other employee who is actually engaged in or con-

nected with the movement of any train is also covered, regardless of his job title.

Limitations on Hours. The Act establishes two limitations on hours of service. First, no employee engaged in train or engine service may be required or permitted to work in excess of twelve consecutive hours. After working a full twelve consecutive hours, an employee must be given at least ten consecutive hours off duty before being permitted to return to work.

Second, no employee engaged in train or engine service may be required or permitted to continue on duty or go on duty unless he has had at least eight consecutive hours off duty within the preceding twenty-four hours. This latter limitation, when read in conjunction with the requirements with respect to computation of duty time (discussed below) results in several conclusions:

(1) When an employee's work tour is broken or interrupted by a valid period of interim release (4 hours or more at a designated terminal), he may return to duty for the balance of the total 12-hour work tour during a 24-hour period.

(2) After completing the 12 hours of broken duty, or at the end of the 24-hour period, whichever occurs first, the employee may not be required or permitted to continue on duty or to go on duty until he has had at least 8 consecutive hours off duty.

(3) The 24-hour period referred to in paragraphs 1 and 2 above shall begin upon the commencement of a work tour by the employee immediately after his having received a statutory off-duty period of 8 or 10 hours as appropriate.

Duty time and effective periods of release. On-duty time commences when an employee reports at the time and place specified by the railroad and terminates when the employee is finally released of all responsibilities. (Time spent in deadhead transportation to a duty assignment is also counted as time on duty. See discussion below.) Any period available for rest that is of four or more hours and is at a designated terminal is off-duty time. All other periods available for rest must be counted as time on duty under the law, regardless of their duration.

The term "designated terminal" means a terminal (1) which is designated in or under a collective bargaining agreement as the "home" or "away-from-home" terminal for a particular crew assignment and (2) which has suitable facilities for food and lodging. Carrier and union representatives may agree to establish additional designated terminals having such facilities as points of effective release under the Act. Agreements to designate additional terminals for purposes of release under the Act should be reduced to writing and should make reference to the particular assignments affected and to the Hours of Service Act. The following are common situations illustrating the designated terminal concept:

(1) A freight or passenger road crew operates a train from home terminal "A" to away-from-home terminal "B" (or the reverse). Terminals "A" and "B" would normally be the designated terminals for this specific crew assignment. However, carrier and employee representatives may agree to designate additional terminals having suitable facilities for food and lodging as appropriate points of release under the Hours of Service Act.

(2) A road crew operates a train in turnaround service from home terminal "A" to turn-around point "B" and back to "A". Terminal "A" is the only designated terminal for this specific crew assignment, unless carrier and employee representatives have agreed to designate additional terminals having suitable facilities for food and lodging.

(3) A crew is assigned to operate a maintenance-of-way work train from home terminal "A", work on line of road and tie up for rest along the line of road at point "B". Home terminal "A" and tie-up point "B" both qualify as designated terminals for this specific work train crew assignment. Of course, suitable facilities for food and lodging must be available at tie-up point "B".

Deadheading. Under the Act time spent in deadhead transportation receives special treatment. Time spent in deadhead transportation to a duty assignment by a train or engine service employee is considered on-duty time. Time spent in deadhead transportation from the final duty assignment of the work tour to the point of final release is not computed as either time on duty or time off duty. Thus, the period of deadhead transportation to point of final release may not be included in the required 8- or 10-hour off-duty period. Time spent in deadhead transportation to a duty assignment is calculated from the time the employee reports for deadhead until he reaches his duty assignment.

Transit time from the employee's residence to his regular reporting point is not considered deadhead time.

If an employee utilizes personal automobile transportation to a point of duty assignment other than the regular reporting point in lieu of deadhead transportation provided by the carrier, such actual travel time is considered as deadheading time. However, if the actual travel time from his home to the point of duty assignment exceeds a reasonable travel time from the regular reporting point to the point of duty assignment, then only the latter period is counted. Of course, actual travel time must be reasonable and must not include diversions for personal reasons.

Example: Employee A receives an assignment from an "extra board" located at his home terminal to protect a job one hour's drive from the home terminal. In lieu of transporting the employee by carrier conveyance, the railroad pays the employee a fixed amount to provide his own transportation to and from the outlying point. The employee is permitted to go directly from his home to the outlying point, a drive which takes 40 minutes. The normal driving time between his regular reporting point at his home terminal and the outlying point is 60 minutes. The actual driving time, 40 minutes, is considered deadhead time and is counted as time on duty under the Act.

Employee A performs local switching service at the outlying point. When the employee returns from the outlying point that evening, and receives an "arbitrary" payment for his making the return trip by private automobile, 40 minutes of his time in transportation home is considered deadheading to point of final release and is not counted as either time on duty or time off duty.

Wreck and relief trains. Prior to the 1976 amendments, crews of wreck and relief trains were exempted entirely from the limitations on hours of service. Under present law that is no longer the case. The crew of a wreck or relief train may be permitted to be on duty for not to exceed 4 additional hours in any period of 24 consecutive hours whenever an actual emergency exists and the work of the crew is related to that emergency. Thus, a crew could work up to 16 hours, rather than 12. The Act specifies that an emergency ceases to exist for purposes of this provision when the track is cleared and the line is open for traffic. An "emergency" for purposes of wreck or relief service may be a less extraordinary or catastrophic event than an "unavoidable accident or Act of God" under section 5(d) of the Act.

Example: The crew of a wreck train is dispatched to clear the site of a derailment which has just occurred on a main line. The wreck crew re-rails or clears the last car and the maintenance of way department releases the track to the operating department 14 hours and 30 minutes into the duty tour. Since the line is not clear until the wreck train is itself out of the way, the crew may operate the wreck train to its terminal, provided this can be accomplished within the total of 16 hours on duty.

Emergencies. The Act contains no general exception using the term "emergency" with respect to train or engine service or related work. See "casualties," etc., under "General Provisions".

COMMUNICATION OF TRAIN ORDERS

Covered Service. The handling of orders governing the movement of trains is the second type of covered service. This provision of the Act applies to any operator, train dispatcher, or other employee who by the use of the telegraph, telephone, radio, or any other electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements.

The approach of the law is functional. Thus, though a yardmaster normally is not covered by this provision, a yardmaster or other employee who performs any of the specified service during a duty tour is subject to the limitations on service for that entire tour.

Limitations on hours. No employee who performs covered service involving communication of train orders may be required or permitted to remain on duty for more than nine hours, whether consecutive or in the aggregate, in any 24-hour period in any office, tower, station or place where two or more shifts are employed. Where only one shift is employed, the employee is restricted to 12 hours consecutively or in the aggregate during any 24-hour period.

The provision on emergencies, discussed below, may extend the permissible hours of employees performing this type of service.

Shifts. The term "shift" is not defined by the Act, but the legislative history of the 1969 amendments indicates that it means a tour of duty constituting a day's work for one or more employees performing the same class of work at the same station who are scheduled to begin and end work at the same time. The following are examples of this principle:

Scheduled Hours	*Classification*
7 a.m. to 3 p.m.	1 shift.
7 a.m. to 12:30 p.m. 1:30 p.m. to 8 p.m. (Schedule for one employee including one hour lunch period).	Do.
7 a.m. to 3 p.m. 7 a.m. to 3 p.m. (Two employees scheduled).	Do.
7 a.m. to 3 p.m. 8 a.m. to 4 p.m. (Two employees scheduled).	2 shifts.

Duty time and effective periods of release. If, after reporting to his place of duty, an employee is required to perform duties at other places during this same tour of duty, the time spent traveling between such places is considered as time on duty. Under the traditional administrative interpretation of section 3, other periods of transportation are viewed as personal commuting and, thus, off-duty time.

A release period is considered off-duty time if it provides a meaningful period of relaxation and if the employee is free of all responsibilities to the carrier. One hour is the minimum acceptable release period for this type of covered service.

Emergencies. The section of the Act dealing with dispatchers, operators, and others who transmit or receive train orders contains its own emergency provision. In case of emergency, an employee subject to the 9 or 12-hour limitation is permitted to work an additional four hours in any 24-hour period, but only for a maximum of three days in any period of seven consecutive days. However, even in an emergency situation the carrier must make reasonable efforts to relieve the employee.

GENERAL PROVISIONS

(APPLICABLE TO ALL COVERED SERVICE)

Commingled Service. All duty time for a railroad even though not otherwise subject to the Act must be included when computing total on-duty time of an individual who performs one or more of the types of service covered by the Act. This is known as the principle of "commingled service".

For example, if an employee performs duty for 8 hours as a trainman and then is used as a trackman (not covered by the law) in the same 24-hour period, total on-duty time is determined by adding the duty time as trackman to that as trainman. The law does not distinguish treatment of situations in which non-covered service follows, rather than precedes, covered service. The limitations on total hours apply on both cases. It should be remembered that attendance at required rules classes is duty time subject to the provisions on "commingling". Similarly, where a carrier compels attendance at a disciplinary proceeding, time spent in attendance is subject to the provisions on commingling.

When an employee performs service covered by more than one restrictive provision, the most restrictive provision determines the total lawful on-duty time. Thus, when an employee performs duty in train or engine service and also as an operator, the provisions of the law applicable to operators apply to all on-duty and off-duty periods during such aggregate time. However, an employee subject to the 12 hour provision of section 2 of the law does not become subject to the 9 or 12-hour provisions of section 3 merely because he receives, transmits or delivers orders pertaining to or affecting the movement of his train in the course of his duties as a trainman.

Casualties, Unavoidable Accidents, Acts of God. Section 5(d) of the Act states the following: "The provisions of this Act shall not apply in any case of casualty or unavoidable accident or the Act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of the employee at the time said employee left a terminal, and which could not have been foreseen." This passage is commonly referred to as the "emergency provision". Judicial construction of this sentence has limited the relief which it grants to situations which are truly unusual and exceptional. The courts have recognized that delays and operational difficulties are common in the industry and must be regarded as entirely foreseeable; otherwise, the Act will provide no protection whatsoever. Common operational difficulties which do not provide relief from the Act include, but are not limited to, broken draw bars, locomotive malfunctions, equipment failures, brake system failures, hot boxes, unexpected switching, doubling hills and meeting trains. Nor does the need to clear a main line or cut a crossing justify disregard of the limitations of the Act. Such contingencies must normally be anticipated and met within the 12 hours. Even where an extraordinary event or combination of events occurs which, by itself, would be sufficient to permit excess service, the carrier must still employ due diligence to avoid or limit such excess service. The burden of proof rests with the carrier to establish that excess service could not have been avoided.

Sleeping Quarters. Under the 1976 amendments to the Act it is unlawful for any common carrier to provide sleeping quarters for persons covered by the Hours of Service Act which do not afford such persons an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters. Such sleeping quarters include crew quarters, camp or bunk cars, and trailers.

Collective Bargaining. The Hours of Service Act prescribes the maximum permissible hours of service consistent with safety. However, the Act does not prohibit collective bargaining for shorter hours of service and time on duty.

Penalty. The penalty provisions of the law apply to the carriers and not their employees.

Each and every violation of the requirements of the Hours of Service Act subjects the offending railroad to a penalty of $500. Each employee who is required or permitted to be on duty for a longer period than prescribed by law or who does not receive a required period of rest represents a separate and distinct violation and subjects the railroad to the statutory penalty of $500.

Statute of limitations. No suit may be brought after the expiration of two years from the date of violation.

Exemptions. A railroad which employs not more than 15 persons covered by the Hours of Service Act (including signalmen and hostlers) may be exempted from the law's requirements by the FRA after hearing and for good cause shown. The exemption must be supported by a finding that it is in the public interest and will not adversely affect safety. The exemption need not relate to all carrier employees. In no event may any employee of an exempt railroad be required or permitted to work beyond 16 hours continuously or in the aggregate within any 24-hour period. Any exemption is subject to review at least annually.

Issued in Washington, D.C., on May 24, 1977.

BRUCE M. FLOHR,
Deputy Administrator.

[FR Doc.77-15413 Filed 5-27-77;8:45 am]

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER B—PRACTICE AND PROCEDURE

[Ex Parte No. 55 (Sub-No. 24)]

PART 1100—RULES OF PRACTICE

AGENCY: Interstate Commerce Commission.

ACTION: Correction.

SUMMARY: In the Report of the Commission in the above-entitled proceeding of April 28, 1977, served May 2, 1977, and published in the FEDERAL REGISTER at 42 FR 23806, May 11, 1977, clerical errors were made in §§ 1100.5(c), 1100.12 (e), and Appendix B to the rules of practice. They are hereby corrected as set forth under "Supplementary Information".

EFFECTIVE DATE: July 1, 1977.

FOR FURTHER INFORMATION CONTACT:

Janice M. Rosenak (Rates), (202-275-7245).

Philip Israel (Finance), (202-275-7245).

Michael Erenberg (Operating Rights), (202-275-7292).

SUPPLEMENTARY INFORMATION: (1) Section 1100.5(c) The term "complainant" means a person filing a complaint; "defendant" means a person against whom a complaint is filed; "applicant" means a person filing an application; "respondent" means a person designated in an investigation; "protestant" means a person opposed to the granting of an application, to any tariff or schedule becoming effective or to a tentative valuation; "intervener" means a person permitted to intervene as provided in Rule 70 or 71, and "petitioner" means any person seeking relief other than by complaint, protest or application.

(2) Section 1100.12(e) *Termination of joint board jurisdiction; subsequent procedure.* The jurisdiction of a joint board over a referred matter shall be terminated in the event of: (1) Service of an initial decision as provided in paragraph (d) of this section; (2) submission of the board's conclusions without a written initial decision; (3) waiver of action in writing by appropriate authority of each State from which a member is entitled to be appointed; (4) failure of all members of the board to appear at the hearing; (5) failure of a majority of the board to agree on substantive matters; or (6) entry of an initial decision is served as provided in paragraph (d) of this section, in which event the subsequent procedure will be as provided in Rules 96, 97, 98, and 99, a referred matter, after termination of joint board jurisdiction, will be decided by the Commission or be made the subject of another officer's initial decision on the record theretofore made or after such hearing or further hearing as may be required.

(3) Appendix B—(a) Table of Contents.

5. Form of reparation statement under Rule 95.

(b) Footnote 1—See Rules 24 to 31 inclusive.

(c) Footnote 3—Signature and verification by complainant unnecessary if complaint is signed by a practitioner—See Rule 15.

(d) Footnote 4—See Rules 33 to 35, inclusive.

(e) Footnote 5—See Rule 15.

(f) No. 3—Certificate of Service

I certify that I have this day served the forgoing document upon all parties of record in this proceeding, by (here state the precise manner of making service, which must be consistent with Rule 20).

(g) Footnote 6—See Rule 20.

(h) Footnote 7—See Rule 71.

(i) No. 5—Form Of Reparation Statement Under Rule 95.

(j) Footnote 8—See Rule 48.

ROBERT L. OSWALD,
Secretary.

[FR Doc.77-15407 Filed 5-27-77;8:45 am]

Appendix D: Federal Register, Vol. 43, No. 139

Wednesday, July 19, 1978, Rules and Regulations

[4310-84]

Title 43—Public Lands: Interior

CHAPTER II—BUREAU OF LAND MANAGEMENT

APPENDIX—PUBLIC LAND ORDERS

[Public Land Order 5645]
[F-13962]

ALASKA

Withdrawal for Customs and Immigration Station

AGENCY: Bureau of Land Management (Interior).

ACTION: Final rule.

SUMMARY: This order withdraws 10 acres of public lands for use of the Bureau of Customs, Department of the Treasury, and the Immigration and Naturalization Service, as a customs and immigration station on United States-Canadian border, between Alaska and Dawson, Yukon.

EFFECTIVE DATE: July 19, 1978.

FOR FURTHER INFORMATION CONTACT:

Eldon G. Hayes, 202-343-8731.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2751, 43 U.S.C. 1714), it is hereby ordered as follows:

1. Subject to valid existing rights, the following described land is hereby withdrawn from settlement, sale, location, or entry, under all of the general land laws including the mining laws (30 U.S.C., Ch. 2), and reserved as an administrative site for the maintenance of the Poker Creek Customs Station under the jurisdiction of the Bureau of Customs, Department of the Treasury, for a period of 20 years:

COPPER RIVER MERIDIAN

A tract of land in protracted sec. 25, T. 27 N., R. 22 E., described as follows:

Beginning at the intersection of the Alaska-Canada international boundary with the centerline of the road between Boundary, Alaska and Dawson, Yukon at approximate latitude 64°05.1" N., longitude 141°00" W.; thence south along the international boundary 330 feet to corner No. 1; thence west 660 feet to corner No. 2; thence north 660 feet to corner No. 3; thence east 660 feet to corner No. 4 on the Alaska-Canada international boundary; thence south on said international boundary 330 feet to the point of beginning.

The area described contains approximately 10 acres.

2. The withdrawal made by this order shall be superior to, but shall not otherwise affect the withdrawal of a 60-foot strip along the Alaska-Canada border established by Presidential Proclamation on May 3, 1912 (37 Stat. 1741).

Dated: July 6, 1978.

GUY R. MARTIN,
Assistant Secretary of the Interior.

[FR Doc. 78-19891 Filed 7-18-78; 8:45 am]

[4910-06]

Title 49—Transportation

CHAPTER II—FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

[Docket No. HS-2, Notice No. 6]

PART 228—HOURS OF SERVICE OF RAILROAD EMPLOYEES

Construction of Railroad Employee Sleeping Quarters; Final Rules

AGENCY: Federal Railroad Administration (FRA), Department of Transportation.

ACTION: Final rule.

SUMMARY: This document issues final rules under which the Federal Railroad Administration (FRA) will consider whether proposed sites for the construction or reconstruction of sleeping quarters for railroad employees subject to the Hours of Service Act are "within or in the immediate vicinity * * * of any area where railroad switching or humping operations are performed." The rules are responsive to section 2(a)(4) of the Hours of Service Act (hereafter act), as amended by section 4(a) of the Federal Railroad Safety Act of 1976, which prohibits the construction or reconstruction of quarters for such employees within the immediate vicinity of switching and humping. The rules establish which prospective sites are subject to FRA approval, outline the information required with requests for site approvals, and indicate the general policy considerations which FRA applies in ruling on requests for such approvals.

EFFECTIVE DATE: These rules shall become effective August 18, 1978. However, carriers which have filed petitions for approval pursuant to the interim rules (41 FR 53028 (1976)) may elect to proceed wholly under the interim rules or these permanent rules.

FOR FURTHER INFORMATION CONTACT:

Lawrence I. Wagner, Office of Chief Counsel (RCC-30), Federal Railroad Administration, 400 Seventh Street SW., Washington, D.C. 20590, 202-426-8836.

SUPPLEMENTARY INFORMATION: Section 2(a)(4) of the Hours of Service Act, as amended (45 U.S.C. 62(a)(4)), prohibits the construction or reconstruction of railroad employee sleeping quarters "within or in the immediate vicinity (as determined in accordance with rules prescribed by the Secretary of Transportation) of any area where switching or humping operations are performed." This provision of law became effective on July 8, 1976. (See 94-348, 90 Stat. 818.) FRA administers and enforces the Hours of Service Act under section 6(f)(3)(A) of the Department of Transportation Act (45 U.S.C. 1655(f)(3)(A)) and a delegation from the Secretary of Transportation (49 CFR 1.49(d)).

On December 3, 1976, FRA published in the FEDERAL REGISTER interim rules for making the required determinations (41 FR 53028). A minor amendment to the interim rules was published on June 1, 1977 (42 FR 27895). A notice of proposed rulemaking (NPRM) with respect to permanent rules was also issued on December 3, 1976 (41 FR 53070). The extended deadline for written comments was February 17, 1977 (42 FR 2994; January 14, 1977). A public hearing was convened on March 1, 1977, to receive additional oral and written comments (see 42 FR 5387; January 28, 1977).

All comments, both written and oral, have now been evaluated by FRA. In addition, FRA has acquired considerable experience through the application of the interim rules, which closely parallel those set forth in the NPRM. FRA has now decided to issue final rules responsive to the mandate of the Hours of Service Act which adopt an approach essentially similar to the proposed rules but which have been refined in certain significant respects.

DISCUSSION OF MAJOR COMMENTS AND MODIFICATIONS OF PROPOSED RULES

PRELIMINARY DISCUSSION

One commenter objected to FRA's determination that this rulemaking does not require an evaluation of the regulatory impact of the proposed rules in accordance with the policies of the Department of Transportation as stated in the FEDERAL REGISTER (41 FR 16200; April 16, 1976), since the issuance of these regulations is required by statute. The same commenter also questioned the apparent absence of consideration of environmental impact required by section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). Two commenters objected to the conclusion that the economic consequences of this rule are limited and therefore, do not require an economic impact statement.

The basic position stated by the commenter with respect to the Secretary's regulatory impact policies is that, notwithstanding the exemption of regulations expressly mandated by statute, the only instance in which a statutorily mandated rulemaking pro-

ceeding is exempt from the impact evaluation procedure required by the Secretary's policies is where the agency has no discretion in issuing the rules.

The FRA does not agree entirely with this narrow interpretation of the policies established by the Secretary. The purpose of the regulatory impact evaluation required by the Secretary's policies is to assure that all of the potential costs and benefits of a proposed rulemaking action are adequately assessed and considered by the agency in an effort to improve the effectiveness of the proposed regulation and minimize unnecessary burdens on affected parties. Where a statute requires the issuance of a rule on a particular matter, the Secretary does not have the discretion to withhold rulemaking action even if it were shown that the possible benefits of the rule would not outweigh its potential costs. The result or impact of the rulemaking at hand is, in effect, prescribed by law, while FRA is granted discretion only as to how the prescribed result of the rule might be most reasonably achieved through regulation. Neither FRA nor any commenter has been able to identify any approach to fulfilling the mandate of the statute which would be less burdensome than the approach embodied in these rules. The statute requires the Secretary to implement a direct prohibition rather than to fashion means of achieving a more general goal. Accordingly, FRA has attempted to examine the potential alternate means of fulfilling the statutory mandate and has opted for an administrative mechanism which will facilitate the implementation of the statutory prohibition at the least possible cost to the industry. As reflected in the preamble to the NPRM and in this preamble, FRA has considered and rejected other approaches to distance limitation as well as different noise levels and descriptors. A more complete analysis of the kind which would be undertaken in the absence of a specific statutory mandate is not appropriate in this context.

With respect to consideration of the environmental impact of the proposed regulations, the FRA has performed a general environmental assessment of the potential effects of safety regulatory actions and has determined that, as a class, they do not constitute major Federal actions significantly affecting the quality of the human environment. Furthermore, the FRA does not believe that the particular rules included in this document, as distinguished from the statutory mandate itself, will have a foreseeably significant impact upon the quality of the human environment. The commenter suggests that increased waste disposal requirements might arise in sparsely populated areas and that this effect of the rules should be taken into consideration. This commenter does not offer any evidence that this possible impact exists under the interim rules or would exist under permanent rules to such an extent that the quality of the human environment will be significantly impacted. Nor does the substantive law here implemented permit FRA to waive the statutory prohibition based on environmental considerations.

The commenter also criticized the FRA for not having evaluated the economic impact of this regulation. DOT order 2050.4 defines what actions are to be considered major proposals for purposes of determining whether an inflationary impact analysis must be undertaken pursuant to Executive Order 11821. For purposes of regulations which impact upon a single industry, the threshold level at which a particular action is to be considered "major" is an action which will result in increased expenses of $50 million in 1 year, or $75 million in any 2 consecutive years. The commenter stated that the additional cost to the railroads due to these regulations will exceed the threshold due to the increased use of commercial facilities, purchase price of land, and transportation costs necessitated by these regulations.

Again, the regulations merely implement the congressional mandate. Since the regulations do not go beyond the congressional mandate, and since no device has been proposed for fulfilling that mandate which would be faithful to the law and yet be less costly, it cannot be fairly asserted that the issuance of those rules will result in any economic impact.

The final rule permits the approval of sites under certain special conditions similar to those raised by the commenter. Through these provisions, FRA believes that the rules provide the broadest degree of flexibility which is possible within the meaning and intent of the statutory requirement. This flexibility should alleviate the more burdensome or costly impacts.

SECTION-BY-SECTION ANALYSIS

Section 228.101(a). One commenter suggests that all sleeping quarters now in use be removed a "safe distance" from areas where switching or humping operations are preformed. The only possible basis for requiring the relocation of existing facilities would be section 2(a)(3) of the Hours of Service Act (45 U.S.C. 62(a)(3)), which prohibits any carrier from providing sleeping quarters for employees which do not afford such employees "an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters". Nothing in the legislative history of this provision suggests a congressional intent to require a wholesale relocation of existing facilities, nor would known safety considerations support that result.

Since the Decatur accident of July 19, 1974 (discussed below) and another major explosion in a Houston, Tex. yard 2 months later, measures have been instituted by FRA, the Department of Transportation and the railroads which have already had a significant benefical effect. See FRA Emergency Order No. 5, 39 FR 33230 (1974); Specifications for Pressure Tank Cars, 42 FR 46306 (September 15, 1977). Indeed, since those two incidents there has not been a single inadvertent release of flammable compressed gas from a railroad tank car during a switching operation. While absolute safety is not possible in any field of endeavor, FRA does not believe that it was the intent of Congress to require that existing sleeping quarters be moved based on existing risks related to the switching of hazardous materials. Further, FRA site visits to existing facilities since publication of the NPRM in this docket have disclosed that noise levels can often be kept within acceptable limits by use of proper construction techniques and/or insulating materials even where quarters are quite close to railroad operations. FRA will continue to monitor conditions in existing facilities to insure that they comply with the law.

Another commenter argued that sleeping quarters for employees engaged in the communication of train orders, such as operators and train dispatchers, should not be included under the coverage of the rules. This contention was based on a belief that employees covered by section 3 of the act are not subject to section 2(a) as it applies to "employees" defined in sections 1 and 3A. It is clear that the "operator, train dispatcher, or other employee" referred to in section 3 of the act (45 U.S.C. 63) is an "employee" for purposes of the statute generally, although some of the subject matter of section 1 is not applicable to such an employee. The provisions of section 2(a) (3) and (4) purport to apply to employees covered by the law generally; and there is no basis in the legislative history for inferring a more limited interpretation.

Section 228.101(b) defines "immediate vicinity" to mean the area within one-half mile of switching or humping, except as determined otherwise by FRA under these rules. One commenter claimed that Congress did not intend for FRA to place any specific distance limitation on the location of facilities. This contention was based on the House committee report on the 1976 legislation, which does not specify a mileage limitation on the location of sleeping quarters and states an intent to give the railroads "some

flexibility" when constructing lodgings. H.R. Rep. No. 1166, 94th Cong., 2d. Sess. 11 (1976). The commenter suggested that "immediate vicinity" be defined to denote any area where an explosion occurring during switching or humping operations would cause death or injury to employees inside sleeping quarters. The railroads would then furnish the FRA the basis for their conclusion that their facilities are located in accordance with these principles. It is difficult to understand how this approach differs from the application process outlined in § 228.103, unless it is intended that FRA should accept without active review the conclusions of the carrier. Certainly FRA, as the administering agency, is responsible for making the judgment called for by the statute.

Another commenter suggested that FRA adopt an additional rule limiting "immediate vicinity" to no farther from tracks on which switching or humping operations are conducted than the closest home, business, school, or other frequently occupied community facility. FRA is not oblivious to the irony that the policy of the statute appears to require railroad employee sleeping quarters to be at a greater distance from switching operations than some homes and schools. However, accepting the evident congressional judgment that the level of risk from hazardous materials incidents is sufficient to warrant the location of newly-constructed quarters outside the zone of danger from a major open-air detonation or similar event, FRA has no practical alternative.

Distances of one-third mile, 2,000 feet, and 1 mile were offered as alternative definitions of "immediate vicinity" by different commenters. However, none of the commenters offered any evidence to support their recommendations. FRA believes that the proposed standard of one-half mile is fully warranted by available information concerning the major occurrences in railroad yards during the current decade.

One commenter disputed the vapor cloud phenomenon discussion in the NPRM and its applicability to the Decatur, Ill. accident on the basis that none of the fatalities occurred to persons who were inside the dormitory. However, the National Transportation Safety Board report states that most of the seriously injured employees were either in the dormitory or adjacent to it. Report No. NTSB-RAR-75-4 (1974). The fact that 316 persons other than railroad employees suffered "burns, lacerations, contusions, anxiety, eye injuries, and concussions" is also significant with respect to the level of hazard to persons at some distance from the point of ignition. The NTSB report goes on to say that "the location of the dormitory subjected those employees to known hazards". Most likely, the existence of the quarters in that particular location contributed to the congregation of persons and the increased exposed population. Many of the severe injuries suffered by the 230 residents of East St. Louis and 235 residents of Houston (similar vapor cloud detonation occurrences in 1972 and 1974, respectively) resulted from structural damage and heat effects at some distance from the point of ignition. Since vapor clouds may spread for hundreds of feet before encountering a source of ignition, any potential sleeping quarters site within one-half mile could be affected, depending on the overall circumstances.

In support of an absolute 1-mile limitation, one commenter urged that the nearly 5 percent of large fragments that fall between one-half and 1 mile in a major explosion or detonation present an unacceptable risk to a person sleeping in that area. See NPRM, 41 FR 53071. FRA does not believe that the gain in real safety at this distance adequately justifies such a determination. Nor would the legislative history of the provision appear to provide any support for the proposition that Congress anticipated a rule of such rigidity.

Section 228.101(c) (1), (2). Subparagraphs (1) and (2) of § 228.101(c) define the terms "construction" and "reconstruction". Since the actions prohibited by the statute are integrally related to the types of facilities covered, comments addressing both issures are discussed here.

One commenter suggested that a new section be added to the regulation which would prohibit the railroads from locating any movable sleeping quarters within an unsafe distance of railroad yards. The commenter amplified this suggestion to include not only trailers and rolling stock, but also hotels and motels selected by the railroads for use by their employees. FRA did not intend placement of mobile sleeping quarters such as trailers, camp cars, or modular units to be outside the scope of these regulation. Potential hazards to employees in these facilities are no less serious than those imposed on employees housed in permanent facilities. To clarify this intent, the definition of "construction" in § 228.101(c)(1) has been expanded to include the placement of mobile or modular units. In addition, the acquisition of an existing structure for use as sleeping quarters is listed as an event clearly within the purview of the statute and these regulations.

However, the regulation of places of public accommodation such as commercial hotels and motels is beyond the scope of FRA authority under the Hours of Service Act. It is clear from the language of the act read in light of the legislative history that quarters provided in places of public accommodation under an ordinary arms-length transaction are not governed by section 2(a) (3) and (4). See H.R. Rep. No. 1166, 94th Cong., 2d Sess. 11 (1976). Of course, if a railroad acquired ownership or control of a commercial hotel or motel for the purpose of housing employees, the fact that the facility or some portion thereof was open to the public would not avoid the applicability of the Hours of Service Act and the prohibition of section 2(a)(4). In such a case, the emloyer-employee relationship would clearly be more relevant than the innkeeper-guest relationship when viewed in the light of the statute.

Concern was expressed by one commenter whether these rules would apply only to sleeping quarters constructed or reconstructed by a railroad or its agent and owned by the railroad, and not to sleeping quarters owned by others and rented by the railroad. Again, FRA does not believe that the legal or equitable ownership of newly constructed sleeping quarters is relevant to railroad employee safety. The act makes it unlawful for a carrier "to begin construction or reconstruction" of sleeping quarters which are to be provided for covered employees. It makes no difference that the carrier may act through an intermediary or that the quarters may be constructed on the property of others, so long as the carrier is acting to provide sleeping quarters. These rules are coextensive with the statute with respect to their coverage.

One commenter suggested that reconstruction be redefined to include all activity involving an expenditure of 50 percent or more of the original cost of a facility as adjusted to account for inflation. FRA believes that the replacement cost is a more realistic criterion and capable of surer application over a long period of time, since building costs do not follow overall price trends and original cost may not be available. Additionally, newer facilities may use different design and material specifications which make them not readily comparable to the original construction.

Indeed, FRA has noted in its administration of the interim rules that the phrase "more than 50 percent of the replacement cost of such facility" (Rule 1(c)(2); 41 FR 53030) is susceptible to two constructions. Specifically, "replacement cost" could be read to refer either to (1) the cost of replicating an existing structure by use of the original design and materials specifications or (2) the cost of replacing the old structure with a contemporary structure of the same capacity built according to contemporary methods with materials customarily used for such a facility at the time the expendi-

tures are commenced. FRA intended the second meaning; but it is recognized that the interim rule could be read either way. The final rule clarifies this issue by stating that the replacement cost is to be estimated on the basis of contemporary construction methods and materials and use of the existing site.

Concern was also expressed by a commenter that, under the proposed definition, a carrier could possibly stagger its expenditures over a period greater than 18 months and eventually reconstruct a new facility without FRA approval of the site. FRA agrees that the proposed definition does open an unwarranted avenue for evasion of the statutory prohibition. Accordingly, the final rule has been modified to include any work involving the expenditure of the specified amount irregardless of a fixed time period. Routine maintenance would still be excluded from the computation.

Section 228.101(c)(3) defines the term "switching or humping operations". (Since "humping" is really a method by which cars are switched, a separate definition is not provided in the regulations.) This definition provoked the greatest number and variety of comments of any provision in the proposed regulations. FRA's basic approach to defining this term has been to identify substantially all of those circumstances in which there is a potential for the occurrence of high speed impacts of cars which might result in the release of dangerous hazardous materials. Since this potential exists in many situations other than the classification yard (the area of highest risk), FRA has attempted to construct a reasonably inclusive definition.

A number of commenters remarked that the proposed definition of switching operations (§ 228.101(c)(3)) was too broad because movement of non-hazardous material cars was included. This contention was based on the belief that the act was not meant to bar construction of sleeping quarters near areas where only non-hazardous commodities are handled, assuming the criteria of section 2(a)(3) are met.

FRA agrees that primary impetus behind the enactment of section 2(a)(4) was the accident that occurred at Decatur, Ill. on July 19, 1974. As a result of an accidental release and resultant explosion of a product which occurred during the switching of hazardous materials, seven employees were killed and another 33 were injured. According to the National Transportation Safety Board: "Most of the injured employees were either in the dormitory or adjacent to it. All of those who were fatally burned were outside of the dormitory." Report No. NTSB-RAR-75-4 (July 19, 1974).

Since the commenters generally agreed that the proposed definition of switching operations was unnecessarily broad, the final rule has been modified to include only the switching of cars required to be placarded in accordance with the Department of Transportation Hazardous Materials Regulations (49 CFR 172.504). In determining whether hazardous materials cars are switched or humped within the distance for which approvals are required, the rule requires the carriers to ascertain whether such cars have been switched on the given trackage within the past 365 days. In this way, traffic is surveyed over an entire seasonal cycle. In addition, a carrier seeking to determine whether a petition should be filed must consider its plans for future use of the trackage.

FRA is aware that this approach to defining "switching operations" will mean that most operations considered "switching" under the proposed definition will also be considered "switching" under this definition. However, given the strong language of the statute it appears that little latitude exists. The Secretary is required to determine the area of significant risk around switching and humping operations. Acting under a delegation from the Secretary (49 CFR 1.49(d)), FRA has decided that enlightened determinations can be made only by examining concrete circumstances in the light of the statute's intent. Within the area of presumed risk (one-half mile), the rules requires that specific approval be sought.

The approach of the final rule goes beyond the suggestions of two commenters concerning the categories of hazardous materials which should be comprehended by the definition of "switching".

One commenter would have included only the switching of cars requiring special handling under Federal regulations. Another would have included most placarded cars, but would have excepted those containing substances such as corrosives, irritating materials, combustible liquids, class C explosives, radioactive materials, etc. FRA believes that the safety of employees would be best served by a careful examination of any situation in which placarded cars are switched within one-half mile.

However, the commenters seem correct in challenging whether the stringent requirements of the proposed § 228.105 are necessary with respect to sites within one-third mile of areas where some types of placarded cars are handled.

FRA recognizes that there may be locations where some local or industrial switching is conducted but where the most volatile or dangerous materials are not switched. Therefore, in order to assure appropriate flexibility, §§ 228.103 and 228.105 have been restructed. Section 228.103 now specifies basic requirements for petitions relating to all sites within one-half mile of switching or humping operations involving any cars required to be placarded by the Department's hazardous materials regulations. Section 228.105 now specifies additional, more stringent requirements for those proposed sites which are within one-third mile of switching which involves cars requiring special handling under the hazardous materials regulations (49 CFR 174.83(b)) or FRA emergency order No. 5 (39 FR 38230 (1974)). This refinement eliminates any unnecessarily harsh effect of the proposed one-third mile rule by assuring that the more strict features of that proposed provision will apply only where they are clearly required.

Other suggestions which would reduce the reach of the definition have been rejected. One commenter suggested that the definition include only the classification of cars by humping or flat switching and the making up of cars into trains by a yard crew for train movements, but that it not include changing the position of cars for purposes of loading, unloading, or weighing and the placing of locomotives and cars for repair. It was also suggested that the qualifying words "while enroute to the train's destination" be deleted from the exemption on movement of cars by a road locomotive.

FRA does not entirely agree with these suggestions. As stated above, assurance of safety requires that all operations which occur in a railroad yard or similar facility that have a potential for excessive speed impact or other accident involving hazardous materials be included. Yard movements of hazardous materials cars for repair or for loading, unloading, or weighing satisfy this criterion.

The definition of switching operations excludes "placing locomotives or cars in a train or removing them from a train by a road locomotive while en route to the train's destination." The purpose of the exclusion as used in this context was to except incidental picking up or setting off of cars by a train on the line of haul. As used in these rules, the exclusion is not intended to except the assembling of trains or reblocking of trains by road locomotive at a yard where switching locomotives are not available or where, for whatever reasons road power is used for switching functions. Switching operations performed by a road locomotive are not sufficiently distinct from those performed by a yard locomotive to justify their exclusion. In either situation, the potential for overspeed impacts exists. Accordingly, this language has been retained in the definition.

Another commenter suggested that the definition should include the

repair of locomotives to ensure that sleeping quarters are not placed near potential fire hazards and sources of noise. The proposed rule did include the placement of locomotives for repair within the difinition of switching. However, the central intent of the act and of these rules is to minimize the hazard to railroad employees from movements of cars containing hazardous materials and to afford employees an opportunity for uninterrupted rest. FRA has no data at this time indicating that locomotive shops and engine houses as a whole present hazards of an equivalent magnitude. In any event, in virtually every situation where a proposed site is close to such structures there will also be some operation defined as switching conducted within one-half mile of the site. FRA can then consider special circumstances related to locomotive repair in association with other relevant factors. (See revision to § 228.107(b)). Noise due to locomotive repair operations is more appropriately addressed under § 228.107, which requires an evaluation of projected noise levels from all noise sources under the control of the railroad. Any noise component resulting from repair activities would be reflected in that calculation.

Section 228.101(c)(3) has been revised to emphasize the fact that proposed sites may fall within the statute and rules by virtue of proximity to the operations of other railroads, as well as those of the carrier which proposes to undertake construction of sleeping quarters.

Section 228.101(c)(4) defines "placarded car" to mean a car required to be placarded by the Department's Hazardous Materials Regulations (49 CFR 172.504).

Section 228.101(c)(5) defines the technical noise descriptor "L_{eq} (8)". See discussion of § 228.107, below.

Section 228.103 outlines the information required to be submitted to FRA in connection with a petition for approval of any site located within one-half mile of switching or humping operations. A new paragraph (b) has been added to the section clarifying the effect of the new definition of switching operations (§ 228.101(c)(3)) on the requirement of FRA approval. In the absence of carrier records concerning traffic switched within one-half mile of the site, the rule creates a presumption that some hazardous materials are switched at the facility and that, therefore, a petition must be filed. The presumption is fully warranted by common traffic patterns in the industry. Indeed, relatively few locations exist where hazardous materials are not handled at all.

Section 228.103(c) now provides that petitions shall be filed with the Secretary of FRA's Railroad Safety Board instead of the docket clerk. This change conforms these rules to FRA's procedural rule on special approvals (49 CFR 211.55). The only other departure from the NPRM in this paragraph is a revision to subparagraph (7), which requires that the carrier's estimate of hazardous materials cars be based on a full seasonal cycle of 365 days. The rule does not specify any particular sampling technique; however, a representative sample is intended.

One commenter criticized the certification requirement (§ 228.103(c)(8)) for apparently requiring representations concerning planned utilization of trackage or construction of trackage by both the applying carrier and any other railroad with nearby property or trackage. FRA intends that a carrier be required to certify only its existing plans for utilization of trackage or the construction of new trackage. Obviously, it would be impossible for a carrier to certify information concerning the present intent of another railroad. (However, it is expected that the existence of railroad employee sleeping quarters should be an important determinant of future track location plans by a railroad.) The provision has been modified accordingly to better express this intent.

Section 228.103(d) requires that the carrier serve a copy of the petition on employee representatives and so indicate to FRA. The purpose of this provision is to assure timely comment by the principal parties who would be affected by any FRA action on the petition. (As a matter of administrative routine, FRA will notify any other interested person who wishes to be kept informed of the filing of such petitions and FRA action thereon.) One commenter suggested that more formal procedures for employee participation should be adopted. FRA will, of course, receive and consider any written protest to a petition and will provide opportunities for oral presentations in appropriate instances. However, FRA believes that the general rules of practice (49 CFR Part 211; 41 FR 54181 (1976)) provide an adequate framework for administering these approval procedures.

Section 228.105, as restructured for final issuance, specifies additional information which must be submitted and additional conditions precedent to FRA consideration of a petition for approval of a site located within one-third mile of switching or humping operations involving hazardous materials cars which require special handling. Unlike the proposed rule and interim rule, the additional requirements of this section would not apply to sites within one-third mile of trackage on which the enumerated types of traffic are not switched. This relaxation of requirements may provide additional flexibility with respect to crew change points on certain branch lines and locations where only local switching is conducted. However, no detriment to safety will result. Assuming some hazardous materials traffic is switched within one-half mile of the proposed site, FRA will still review the concrete circumstances involved under § 228.103 and may approve or disapprove the site.

Three commenters suggested that the approval procedures for construction within one-third mile be entirely deleted, arguing that the information required under § 228.103 is sufficient for evaluation purposes. FRA does not agree. Appropriate combinations of additional precautions and physical restrictions identified under § 228.105 (favorable topography, existence of barriers, soundproof construction) should be present for approval of sites which are quite close to areas of potential hazard. Moreover, under the policy of the statute a carrier should be required to exhaust all potentially feasible alternatives before proposing construction on a site within one-third mile of switching which may involve the possibility of a major hazardous materials accident. The rule as adopted addresses these concerns.

A number of commenters objected to the requirement of the proposed rule that no feasible alternate site be available "at any cost" before FRA is requested to approve a site within one-third mile. FRA is inclined to agree that commercial feasibility offers a more realistic test of the efforts of the carrier to locate the planned sleeping quarters beyond one-third mile. Therefore, the final rule has been revised accordingly (§ 228.105(a)(1)). Problems with alternate sites similar to those suggested by the commenters involving factors such as unavailability of land, isolation of facilities, limited water and sanitation capacity, etc., will be evaluated on a case-by-case basis, in conjunction with a thorough review of safety protection at the proposed site.

Two commenters claimed that the existence of adequate natural or artificial barriers by itself obviates the need for establishment of unavailability of an alternate site or for the submission of additional data. The FRA does not agree with this contention. Reliance on the existence of a barrier as the sole criterion in judging the safety of a potential construction location is not prudent. To prevent the diffusion of a toxic or flammable gas into crew quarters and to allow for unanticipated ignition sources under all conceivable circumstances, a completely effective barrier would have to enclose completely the switching operations or the quarters. Obviously, it will be necessary for the carrier and FRA to evaluate a number of other factors before reaching an informed decision.

One commenter suggested that the section on approval procedures for construction within one-third mile be expanded to include additional precautions for insuring employee safety from explosions and the escape of poisonous gases. Additionally, requirements concerning respiratory protection and minimum strength and construction of barriers would be specified under the commenter's approach.

FRA agrees that additional precautions may be appropriate in individual circumstances and that FRA should evaluate the adequacy of barriers and the need for further safeguards. However, it appears from the wide variety of circumstances encountered by FRA in administering the interim rules that such concerns are best evaluated in the context of individual petitions. The final rules indicate that it is the carrier's responsibility to consider additional safeguards prior to filing a petition (§ 228.105(a)(4)). Under § 228.107, FRA will independently review the carrier's plans and may impose specific conditions on approval of the petition.

With the restructure of §§ 228.103 and 228.105, a further editorial change has been made in § 228.105. Subparagraph (b)(4) of the proposed § 228.105 has been deleted as redundant, since §§ 228.103(c)(1) and 228.107(c) of the final rules adequately address the question of projected noise levels.

A new paragraph (b) has been added to § 228.105 stating that, in the absence of records establishing the absence of certain hazardous materials activity on the nearby trackage or adequate plans to divert such traffic from the nearby trackage in the future, approval of the site shall be subject to the additional requirements of § 228.105.

Section 228.107 covers the procedures and fundamental criteria for FRA action on petitions filed under § 228.103. In reading the final rules as a whole and this section, in particular, it should be appreciated that FRA action on any petition is, in the final analysis, discretionary. That is, compliance with the rules by a petitioning carrier will not, by itself, entitle a petitioning carrier to favorable action. If the myriad circumstances bearing on individual situations were capable of automatic quantification and application, an approval procedure would not be necessary.

The two general criteria for FRA action are set forth in paragraph (b) of § 228.107. In weighing the "material factors" which impact on those criteria (employee safety and projected interior noise), FRA will consider the information provided by the carrier, information developed by an FRA field investigation, and any information provided by other interested parties.

Subparagraph (b)(1) of §228.107 has been amended in its final form to reflect the fact that, once a site becomes subject to FRA scrutiny under these rules, FRA must consider all factors bearing on the safety of the facility. That is, FRA cannot divorce its responsibilities under section 2(a)(3) of the act (45 U.S.C. 62(a)(3)), relating to the safety of all sleeping quarters, from its responsibility under section 2(a)(4), relating to construction or reconstruction of such quarters.

Paragraph (c) of § 228.107 addresses the issue of maximum noise levels. Two commenters claimed that FRA lacks jurisdiction to promulgate noise regulations under section 2(a) of the Hours of Service Act. The purpose of addressing maximum noise levels in these regulations is to assure that FRA will not approve construction of a facility under these rules and then be forced to seek remedial action under section 2(a)(3) of the act because noise levels are excessive. Therefore, to the extent possible FRA will seek to ascertain that carrriers have made proper allowances in building design to assure that noise levels will be within limits permitting uninterrupted rest.

The purpose of specifying an objective standard which FRA will utilize in evaluating potential noise levels is to assure fairness and to encourage intelligent carrier planning. FRA recognizes that a single objective standard will fall short of producing perfect rest conditions in all settings. However, an objective maximum level for noise within the control of the carrier is necessary as a tool for administration of the act and as a benchmark for the industry.

Another commenter suggested that the noise levels should apply to all new and old sleeping quarters, not just those new quarters constructed within one-half mile of switching or humping. While that specific suggestion is beyond the scope of this rulemaking, FRA agrees that action should be taken to declare what basic standard FRA will employ in administering section 2(a)(3) of the act. Therefore, in a separate document also issued on this date, FRA declares that the standard adopted herein for new or reconstructed facilities shall be employed by FRA as a guideline in administering section 2(a)(3) of the act.

Through the NPRM, comments were solicited on the ability of the industry to meet the Department of Housing and Urban Development (HUD) noise criteria specified in the proposed § 228.107 and on whether upper limits should be set on intermittent noises exceeding the proposed 45 dB(A) standard (41 FR53 072 (1976)). The commenters took issue both with the proposed noise levels and the descriptors used to calculate given levels over time.

The Environmental Protection Agency (EPA) disagreed with FRA's use of the HUD descriptors set forth in HUD Circular 1390.2. EPA's recommendation was that FRA employ an equivalent steady state sound level (L_{eq}) as the descriptor, with an 8-hour criteria level of 45 dB(A). EPA pointed out that the HUD standards were not to designed to accommodate sounds of the character found in railroad operations.

FRA agrees with EPA that the L_{eq} descriptor is more appropriate for the railroad environment. The HUD criteria limit noise levels from exceeding 55 dB(A) for more than 60 minutes in any 24-period ($L_{1/2}$) or 45 dB(A) for more than 30 minutes in any 8 hour period ($L_{8/3}$). However, the HUD criteria make use of only the quietest (93 or 96 percent) of the total exposure. There is no limitation on the maximum single event levels which make up the noisiest seven or four percent of the time. These periods potentially have the greatest influence on sleep disturbance. "L_{eq}", which is a time-weighted energy mean descriptor, gives proper and significant weighting to high intensity short-lived noises which might not be adequately accounted for in the $L_{1/2}$ or $L_{8/3}$ scheme.

In support of the decision, it may be noted that L_{eq} is now being widely used in the accoustical community. In particular, the Department of Defense has officially adopted the descriptor in its program to control noise at military airfields. The Federal Aviation Administration has accepted L_{eq} as one of the descriptors for evaluation of civilian airport noise impact. The Federal Highway Administration has accepted L_{eq} as an alternative descriptor in its regulation on planning and design of new highway projects.

However, FRA believes that, with the implementation of the L_{eq} descriptor, a 55 dB(A) level is more appropriate than the 45 dB(A) HUD level. Because railroads generally operate on a 24-hour "around the clock" basis, this design goal should be met during an 8-hour period.

A number of commenters believed that the HUD 45 dB(A) level was too stringent and was not necessarily indicative of a poor sleeping environment. Concern was also expressed that the establishment of a 45 dB(A) level would prohibit the use of individual air conditioning and heating units. All of the commenters, with the exception of EPA, agreed by the time of the public hearing that a 55 dB(A) level would be more appropriate to the railroad environment and would provide an adequate measure of the conditions necessary to permit uninterrupted rest. In developing these standards, FRA has attempted to strike a balance between that which is most desirable and that which is feasible. The final determinant has been the ability of railroad employees to obtain uninter-

rupted rest. FRA agrees with those commenters who suggest that 55 dB(A) provides an acceptable measure.

One commenter suggested that an upper limit of 60 dB(A) be specified for intermittent noises which were permitted to exceed the 45 dB(A) standard for less than 30 minutes in an 8 hour day under the NPRM. Unfortunately, at this time, there are serious questions concerning adequacy of current sleep disturbance data that would support the selection of specific single-event maximum. FRA will be closely monitoring the utility of the adopted criteria in evaluating the effect of particular noise events on the sleeping environment near railroad operations. The L_{eq} descriptor will, of course, mitigate the effects of loud single-event intrusions by including all single-event maxima in the energy calculation.

The unanimous opinion of the commenters on the inclusion of background noise from air conditioning and heating systems in noise calculations was that individual units, under the control of the individual employee, should not be considered. FRA concurs that the inclusion of background noise from these units in noise evaluations would be inappropriate. The rule has been changed accordingly.

The subject of noise generated by airports and traffic over highways was also raised in comment. One commenter cited the congressional committee report on the act and its statement that a railroad is responsibile only for the noise its operations are creating. H.R. Rep. No. 1166, 94th Cong., 2d Sess. 11 (1976). FRA agrees that Congress focused on noise created directly by the railroad in fashioning section 2(a)(3), which applies to existing and future sleeping quarters. Certainly a carrier does exercise a degree of control over environmental noise by virtue of its choice of site for lodging facilities. To the extent possible, FRA urges carriers, in their site selection plans, to consider such high noise sources and their effect on uninterrupted sleep for employees. However, given the unanimous view of the commenters on this issue, FRA will not consider noise which is not generated by railroad operations and associated railroad activities in making determinations under these rules. It should be noted that noises generated by railroad repair facilities, carrier public address systems, and central heating and cooling plants are "within the control of the railroad" and, thus, subject to the act.

These amendments are issued under authority of section 2(a)(4) of the Hours of Service Act (45 U.S.C. 62(a)(4)), as amended by section 4, Pub. L. No. 94-348, 90 Stat. 818, and § 1.49(d) of the regulations of the Office of the Secretary of Transportation (49 CFR 1.49(d)).

The principal program draftsman of this document was Stephen Urman of the Office of Safety. The principal legal draftsman was Grady Cothen, Jr., of the Office of Chief Counsel.

In consideration of the foregoing, part 228 is amended as follows:

1. By dividing Part 228 into three subparts and revising the table of contents to read as follows:

Subpart A—General

Sec.
228.1 Scope.
228.3 Application.
228.5 Definitions.

Subpart B—Records and Reporting

228.7 Hours of duty.
228.9 Railroad records; general.
228.11 Hours of duty records.
228.13 Train delay records.
228.15 Record of train movements kept at reporting station.
228.17 Dispatcher's record of train movements.
228.19 Monthly reports of excess service.
228.21 Civil penalty.
228.23 Criminal penalty.

Subpart C—Construction of Employee Sleeping Quarters

228.101 Distance requirement; definitions.
228.103 Approval procedure; construction within one-half mile (2,640 feet) (804 meters).
228.105 Additional requirements; construction within one-third mile (1,760 feet) (536 meters) of certain switching.
228.107 Action on petition.

AUTHORITY: Sec. 2(a)(4) of the Hours of Service Act (45 U.S.C. 62 (a)(4)), as amended by sec. 4. Pub. L. No. 94-348, 90 Stat. 818; § 1.49(d) of the regulations of the Office of the Secretary of Transportation (49 CFR 1.49(d)).

Subpart A—General

2. By inserting "Subpart A—General" as a centerhead immediately above § 228.1 and by revising § 228.1 to read as follows:

§ 228.1 Scope.

This part—

(a) Prescribes reporting and record keeping requirements with respect to the hours of service of certain railroad employees; and

(b) Establishes standards and procedures concerning the construction or reconstruction of employee sleeping quarters.

Subpart B—Records and Reporting

* * * * *

3. By inserting "Subpart B—Records and Reporting" as a centerhead immediately above § 228.7 and by adding the following new subpart:

Subpart C—Construction of Employee Sleeping Quarters

§ 228.101 Distance requirement; definitions.

(a) The Hours of Service Act, as amended (45 U.S.C. 61-64b), makes it unlawful for any common carrier engaged in interstate or foreign commerce by railroad to begin, on or after July 8, 1976, the construction or reconstruction of sleeping quarters for employees who perform duties covered by the act "within or in the immediate vicinity (as determined in accordance with rules prescribed by the Secretary of Transportation) of any area where railroad switching or humping operations are performed." 45 U.S.C. 62(a)(4). This subpart sets forth (1) a general definition of "immediate vicinity" (§ 228.101(b)), (2) procedures under which a carrier may request a determination by the Federal Railroad Administration that a particular proposed site is not within the "immediate vicinity" of railroad switching or humping operations (§§ 228.103 and 228.105), and (3) the basic criteria utilized in evaluating proposed sites (§ 228.107).

(b) Except as determined in accordance with the provisions of this subpart. "The immediate vicinity" shall mean the area within one-half mile (2,640 feet) (804 meters) of switching or humping operations as measured from the nearest rail of the nearest trackage where switching or humping operations are performed to the point on the site where the carrier proposes to construct or reconstruct the exterior wall of the structure, or portion of such wall, which is closest to such operations.

(c) As used in this subpart—

(1) "Construction" shall refer to the—

(i) Creation of a new facility;

(ii) Expansion of an existing facility;

(iii) Placement of a mobile or modular facility; or

(iv) Acquisition and use of an existing building.

(2) "Reconstruction" shall refer to the—

(i) Replacement of an existing facility with a new facility on the same site; or

(ii) Rehabilitation or improvement of an existing facility (normal periodic maintenance excepted) involving the expenditure of an amount representing more than 50 percent of the cost of replacing such facility on the same site at the time the work of rehabilitation or improvement began, the replacement cost to be estimated on the basis of contemporary construction methods and materials.

(3) "Switching or humping operations" includes the classification of placarded railroad cars according to commodity or destination, assembling

of placarded cars for train movements, changing the position of placarded cars for purposes of loading, unloading, or weighing, and the placing of placarded cars for repair. However, the term does not include the moving of rail equipment in connection with work service, the moving of a train or part of a train within yard limits by a road locomotive or placing locomotives or cars in a train or removing them from a train by a road locomotive while en route to the train's destination. The term does include operations within this definition which are conducted by any railroad; it is not limited to the operations of the carrier contemplating construction or reconstruction of railroad employee sleeping quarters.

(4) "Placarded car" shall mean a railroad car required to be placarded by the Department of Transportation hazardous materials regulations (49 CFR 172.504).

(5) The term "L_{eq} (8)" shall mean the equivalent steady state sound level which in 8 hours would contain the same acoustic energy as the time-varying sound level during the same time period.

§ 228.103 Approval procedure: construction within one-half mile (2,640 feet) (804 meters).

(a) A common carrier that has developed plans for the construction or reconstruction of sleeping quarters subject to this subpart and which is considering a site less than one-half mile (2,640 feet) (804 meters) from any area where switching or humping operations are performed, measured from the nearest rail of the nearest trackage utilized on a regular or intermittent basis for switching or humping operations to the point on the site where the carrier proposes to construct or reconstruct the exterior wall of the structure, or portion of such wall, which is closest to such operations, must obtain the approval of the Federal Railroad Administration before commencing construction or reconstruction on that site. Approval may be requested by filing a petition conforming to the requirements of this subpart.

(b) A carrier is deemed to have conducted switching or humping operations on particular trackage within the meaning of this subpart if placarded cars are subjected to the operations described in § 228.101(c)(3) within the 365-day period immediately preceding the date construction or reconstruction is commenced or if such operations are to be permitted on such trackage after such date. If the carrier does not have reliable records concerning the traffic handled on the trackage within the specified period, it shall be presumed that switching of placarded cars is conducted at the location and construction or reconstruction of sleeping quarters within one-half mile shall be subject to the approval procedures of this subpart.

(c) A petition shall be filed in triplicate with the Secretary, Railroad Safety Board, Federal Railroad Administration, Washington, D.C. 20590 and shall contain the following:

(1) A brief description of the type of construction planned, including materials to be employed, means of egress from the quarters, and actual and projected exterior noise levels and projected interior noise levels;

(2) The number of employees expected to utilize the quarters at full capacity;

(3) A brief description of the site, including:

(i) Distance from trackage where switching or humping operations are performed, specifying distances from particular functions such as classification, repair, assembling of trains from large groups of cars, etc. cetera;

(ii) Topography within a general area consisting of the site and all of the rail facilities close to the site;

(iii) Location of other physical improvements situated between the site and areas where railroad operations are conducted;

(4) A blueprint or other drawing showing the relationship of the site to trackage and other planned and existing facilities;

(5) The proposed or estimated date for commencement of construction;

(6) A description of the average number and variety of rail operations in the areas within one-half mile (2,640 feet) (804 meters) of the site (e.g., number of cars classified in 24-hour period; number of train movements);

(7) An estimate of the average daily number of placarded rail cars transporting hazardous materials through the railroad facility (where practicable, based on a 365-day period sample, that period not having ended more than 120 days prior to the date of filing the petition), specifying the—

(i) Number of such cars transporting class A explosives and poison gases; and

(ii) Number of DOT Specification 112A and 114A tank cars transporting flammable gas subject to FRA emergency order No. 5;

(8) A statement certified by a corporate officer of the carrier possessing authority over the subject matter explaining any plans of that carrier for utilization of existing trackage, or for the construction of new trackage, which may impact on the location of switching or humping operations within one-half mile of the proposed site (if there are no plans, the carrier official must so certify); and

(9) Any further information which is necessary for evaluation of the site.

(d) A petition filed under this section must contain a statement that the petition has been served on the recognized representatives of the railroad employees who will be utilizing the proposed sleeping quarters, together with a list of the employee representatives served.

§ 228.105 Additional requirements: construction within one-third mile (1,760 feet) (536 meters) of certain switching.

(a) In addition to providing the information specified by § 228.103, a carrier seeking approval of a site located within one-third mile (1,760 feet) (536 meters) of any area where railroad switching or humping operations are performed involving any cars required to be placarded "EXPLOSIVES A" or "POISON GAS" or any DOT Specification 112A or 114A tank cars transporting flammable gas subject to FRA emergency order No. 5 shall establish by a supplementary statement certified by a corporate officer possessing authority over the subject matter that—

(1) No feasible alternate site located at or beyond one-third mile from switching or humping operations is either presently available to the railroad or is obtainable within 3 miles (15,840 feet) (4,827 meters) of the reporting point for the employees who are to be housed in the sleeping quarters;

(2) Natural or other barriers exist or will be created prior to occupancy of the proposed facility between the proposed site and any areas in which switching or humping operations are performed which will be adequate to shield the facility from the direct and severe effects of a hazardous materials accident/incident arising in an area of switching or humping operations;

(3) The topography of the property is such as most likely to cause any hazardous materials unintentionally released during switching or humping to flow away from the proposed site; and

(4) Precautions for ensuring employee safety from toxic gases or explosions such as employee training and evacuation plans, availability of appropriate respiratory protection, and measures for fire protection, have been considered.

(b) In the absence of reliable records concerning traffic handled on trackage within the one-third mile area, it shall be presumed that the types of cars enumerated in paragraph (a) of this section are switched on that trackage; and the additional requirements of this section shall be met by the petitioning carrier, unless the carrier establishes that the switching of the enumerated cars will be effectively barred from the trackage if the petition is approved.

§ 228.107 Action on petition.

(a) Each petition for approval filed under § 228.103 is referred to the Rail-

road Safety Board for action in accordance with the provisions of part 211, Title 49, Code of Federal Regulations, concerning the processing of requests for special approvals.

(b) In considering a petition for approval filed under this subpart, the Railroad Safety Board evaluates the material factors bearing on—

(1) The safety of employees utilizing the proposed facility in the event of a hazardous materials accident/incident and in light of other relevant safety factors; and

(2) Interior noise levels in the facility.

(c) The Railroad Safety Board will not approve an application submitted under this subpart if it appears from the available information that the proposed sleeping quarters will be so situated and constructed as to permit interior noise levels due to noise under the control of the railroad to exceed an $L_{eq}(8)$ value of 55dB(A). If individual air conditioning and heating systems are to be utilized, projections may relate to noise levels with such units turned off.

(d) Approval of a petition filed under this subpart may be withdrawn or modified at any time if it is ascertained, after opportunity for a hearing, that any representation of fact or intent made by a carrier in materials submitted in support of a petition was not accurate or truthful at the time such representation was made.

Issued in Washington, D.C., on July 11, 1978.

JOHN M. SULLIVAN,
Administrator.

[FR Doc. 78-19903 Filed 7-18-78; 8:45 am]

[7035-01]

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

[S. O. No. 1275, Amdt. 2]

PART 1033—CAR SERVICE

Erie Western Railway Co. Authorized To Operate Over Tracks Abandoned by Consolidated Rail Corp.

AGENCY: Interstate Commerce Commission.

ACTION: Emergency Order, (Amendment No. 2 to Service Order No. 1275).

SUMMARY: Service Order No. 1275 authorizes Erie Western Railway Co. (EW) to operate over the former Erie Lackawanna (EL) line between Hammond and Decatur, Ind., via North Judson, Ind. Operation by the EW over these tracks of the former EL is necessary to provide rail service to shippers located adjacent to the line. Amendment No. 2 extends the order until January 15, 1979.

DATES: Effective 11:59 p.m., July 15, 1978. Expires 11:59 p.m., January 15, 1979.

FOR FURTHER INFORMATION CONTACT:

C. C. Robinson, Chief, Utilization and Distribution Branch, Interstate Commerce Commission, Washington, D.C. 20423, telephone 202-275-7840, telex 89-2742.

SUPPLEMENTARY INFORMATION: The Amendment is printed in full below.

Decided July 12, 1978.

Upon further consideration of Service Order No. 1275 (42 FR 48882 and 43 FR 2395), and good cause appearing therefor:

It is ordered,

§ 1033.1275 Service Order No. 1275

The Erie Western Railway Co., authorized to operate over tracks abandoned by Consolidated Rail Corp., is amended by substituting the following paragraph (f) for paragraph (f) thereof:

(f) Expiration Date. The provisions of this order shall expire at 11:59 p.m., January 15, 1979, unless otherwise modified, changed, or suspended by order of this Commission.

Effective Date. This amendment shall become effective at 11:59 p.m., July 15, 1978.

(49 U.S.C. 1(10-17))

A copy of this amendment shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association. Notice of this amendment shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board, members Joel E. Burns, Robert S. Turkington and John R. Michael. Member John R. Michael not participating.

NANCY L. WILSON,
Acting Secretary.

[FR Doc. 78-19949 Filed 7-18-78; 8:45 am]

[7035-01]

[S. O. No. 1270, Amdt. 2]

PART 1033—CAR SERVICE

Chesapeake & Ohio Railway Co. Authorized to Operate Over Tracks Abandoned by Grand Trunk Western Railroad Co.

AGENCY: Interstate Commerce Commission.

ACTION: Emergency Order (Amendment No. 2 to Service Order No. 1270).

SUMMARY: Service Order No. 1270 authorizes The Chesapeake & Ohio Railway Co. to operate over approximately 0.6 miles of track authorized to be abandoned by the Grand Trunk Western Railroad, between Ferrysburg, Mich., and Grand Haven, Mich. The trackage involved is owned by the Grand Trunk Western but is used as an integral part of the Chesapeake & Ohio's line between Holland, Mich., and Muskegon, Mich. The order also authorizes the Chesapeake & Ohio to operate over an additional 0.2 miles of tracks abandoned by the Grand Trunk Western in order to provide continued rail service to a shipper located adjacent to those tracks. The amendment extends the order until January 15, 1979.

DATES: Effective 11:59 p.m., July 15, 1978. Expires 11:59 p.m., January 15, 1979.

FOR FURTHER INFORMATION CONTACT:

C. C. Robinson, Chief, Utilization and Distribution Branch, Interstate Commerce Commission, Washington, D.C, 20423, telephone 202-275-5840, Telex 89-2742.

SUPPLEMENTARY INFORMATION: The amendment is printed in full below.

Decided July 12, 1978.

Upon further consideration of Service Order No. 1270 (42 FR 38379 and 43 FR 2725), and good cause appearing therefor:

It is ordered,

§ 1033.1270 Service Order No. 1270

The Chesapeake & Ohio Railway Co. authorized to operate over tracks abandoned by Grand Trunk Western Railroad Co. is amended by substituting the following paragraph (c) for paragraph (c) thereof:

(c) Expiration date. The provisions of this order shall expire at 11:59 p.m., January 15, 1979, unless otherwise modified, changed or suspended by order of this Commission.

Effective date. This amendment shall become effective at 11:59 p.m., July 15, 1978.

(49 U.S.C. 1(10-17))

A copy of this amendment shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association. Notice of this amendment shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board, members Joel E. Burns, Robert S. Turkington and John R. Michael.

NANCY L. WILSON,
Acting Secretary.

[FR Doc. 78-19950 Filed 7-18-78; 8:45 am]

[7035-01]

[Rev. S.O. No. 1182, Amdt. 3]

PART 1033—CAR SERVICE

Substitution of Stock Cars for Boxcars

AGENCY: Interstate Commerce Commission.

ACTION: Emergency Order (Amendment No. 3 to Revised Service Order No. 1182).

SUMMARY: Revised Service Order No. 1182 authorizes the Burlington Northern Inc. to substitute specially prepared stock cars for boxcars for shipments of grain originating on its line in order to augment the available supply of cars suitable for grain traffic. Amendment No. 3 extends the order for 5 months.

DATES: Effective 11:59 p.m., July 15, 1978. Expires 11:59 p.m., December 15, 1978.

FOR FURTHER INFORMATION CONTACT:

C. C. Robinson, Chief, Utilization and Distribution Branch, Interstate Commerce Commission, Washington, D.C. 20423, telephone 202-275-7840, Telex 89-2742.

SUPPLEMENTARY INFORMATION: The Amendment is printed in full below.

Decided July 11, 1978.

Upon further consideration of Revised Service Order No. 1182 (42 FR 3844, 37000, and 43 FR 2395), and good cause appearing therefor:

It is ordered,

§ 1033.1182 Revised Service Order No. 1182

Substitution of stock cars for boxcars is amended by substituting the following paragraph (h) for paragraph (h) thereof:

(h) Expiration date. The provisions of this order shall expire at 11:59 p.m., December 15, 1978, unless otherwise modified, changed or suspended by order of this Commission.

Effective date. This amendment shall become effective at 11:59 p.m., July 15, 1978.

(49 U.S.C. 1(10-17).)

A copy of this amendment shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association. Notice of this amendment shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board, members Joel E. Burns, Robert S. Turkington and John R. Michael.

NANCY L. WILSON,
Acting Secretary.

[FR Doc. 78-19951 Filed 7-18-78; 8:45 am]

[3510-22]

Title 50—Wildlife and Fisheries

CHAPTER VI—FISHERY CONSERVATION AND MANAGEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 651—ATLANTIC GROUNDFISH REGULATIONS

Emergency Amendments to Regulations and Proposed Rulemaking

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Emergency regulatory actions and proposed rulemaking implementing fishery management plan amendments.

SUMMARY: These amendments, most of which were recommended by the New England Fishery Management Council at its March 23, 1978 meeting, comprise a package designed to create an orderly and efficient groundfish fishery. The amendments to the fishery management plan are reflected in the regulatory sections noted:

(1) Require the mandatory retention of all cod, haddock, and yellowtail flounder (§ 651.4 of the regulations);

(2) Establish a minimum mesh size for bottom-tending gill nets (§ 651.6(c) of the regulations);

(3) Establish new "incidental catch" provisions for vessels not using groundfish gear (§ 651.6(b) of the regulations);

(4) Establish new fishery closure procedures (§ 651.8 of the regulations);

(5) Increase the optimum yield for haddock by 12,000 metric tons (§ 651.3(a) of the regulations);

(6) Realign the optimum yield for cod from Georges Bank and southern New England to include 4,000 metric tons for U.S. recreational and Canadian commercial fishing, thereby increasing the OY from 22,000 metric tons to 26,000 metric tons;

(7) Establish weekly landing restrictions for yellowtail flounder by vessel class (§ 651.7(b) of the regulations); and

(8) Increase the optimum yield for cod in the Gulf of Maine by 2,000 metric tons (§ 651.3(a) of the regulations).

EFFECTIVE DATE: These emergency regulations will take effect as follows: Section 651.3, on July 19, 1978; §§ 651.4, 651.6 (a) and (b), 651.7 and 651.8, on July 23, 1978; § 651.6(c), on August 1, 1978. They will remain in effect until August 30, 1978. These emergency regulations are also being published as proposed rulemaking; public comments are invited until August 30, 1978.

ADDRESS: Send comments to the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Washington, D.C. 20235. Mark "Groundfish Comments" on the outside of the envelope.

FOR FURTHER INFORMATION CONTACT:

Mr. William Gordon, Regional Director, Northeast Region, National Marine Fisheries Service, 14 Elm Street, Gloucester, Mass. 01930, 617-281-3600.

SUPPLEMENTARY INFORMATION: On March 31, 1978, the Secretary published in the FEDERAL REGISTER the Fishery Management Plan (FMP) for Atlantic Groundfish (cod, haddock, and yellowtail flounder), together with emergency regulations designed to implement that FMP, under authority of 16 U.S.C. 1801 et seq. That FMP was prepared by the New England Fishery Management Council. The implementing regulations are management measures which the Council had recommended. During the intervening 3 months, experience has shown that this fishery is less predictable and harder to control than was originally believed. Interim measures, such as more severe landing restrictions, have not been entirely effective, partly because of the unexpected influx of new vessels into this fishery. The number of Federal permits is 56 percent greater thus far in 1978 compared to the total number of permits issued in 1977 (1725 v. 1100). There

Appendix E: Federal Register, Vol. 74, No. 100

Wednesday, May 27, 2009, Rules and Regulations

Federal Register

Wednesday,
May 27, 2009

Part III

Department of Transportation

Federal Railroad Administration

49 CFR Part 228

Hours of Service of Railroad Employees; Amended Recordkeeping and Reporting Regulations; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 228

[Docket No. 2006–26176, Notice No. 1]

RIN 2130–AB85

Hours of Service of Railroad Employees; Amended Recordkeeping and Reporting Regulations

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is amending its hours of service recordkeeping and reporting regulations to ensure the creation of records that support compliance with the hours of service laws as amended by the Rail Safety Improvement Act of 2008 (RSIA of 2008). This regulation will also provide for electronic recordkeeping and reporting, and will require training of employees and supervisors of those employees, who are required to complete hours of service records, or are responsible for making determinations as to excess service and the reporting of excess service to FRA as required by the regulation. This regulation is required by Section 108(f) of the RSIA of 2008.

DATES: This final rule is effective July 16, 2009. Petitions for reconsideration must be received on or before July 6, 2009.

ADDRESSES: *Petitions for reconsideration:* Any petitions for reconsideration related to Docket No. FRA–2006–26176, may be submitted by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, *http://www.regulations.gov*. Follow the Web site's online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all petitions received will be posted without change to *http://www.regulations.gov* including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted petitions, comments, or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Daniel Norris, Operating Practices Specialist, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS–11, Mail Stop 25, Washington, DC 20590 (telephone 202–493–6242); or Colleen A. Brennan, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., RCC–12, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6028 or 202–493–6052).

SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

I. Background and History

A. Statutory History

Federal laws governing railroad employees' hours of service date back to 1907. *See* Public Law 59–274, 34 Stat. 1415 (1907). These laws, codified at 49 U.S.C. 21101 *et seq.* are intended to promote safe railroad operations by limiting the hours of service of certain railroad employees and ensuring that they receive adequate opportunities for rest in the course of performing their duties. The Secretary of Transportation (''Secretary'') is charged with the administration of those laws, 49 U.S.C. 103(a), now collectively referred to as the HSL. These functions have been delegated to the FRA Administrator. 49 U.S.C. 103(c); 49 CFR 1.49(d).

Congress substantially amended the HSL on two previous occasions. The first significant amendments occurred in 1969. Public Law 91–169, 83 Stat. 463. The 1969 amendments reduced the maximum time on duty for train employees from 16 hours to 14 hours effective immediately, with a further reduction to 12 hours automatically taking effect two years later. Congress also established provisions for determining, in the case of a train employee, whether a period of time is to be counted as time on duty. 49 U.S.C. 21103(b). In so doing, Congress also addressed the issue of deadhead transportation time, providing that ''[t]ime spent in deadhead transportation *to* a duty assignment'' is counted as time on duty. (Emphasis added). Although time spent in deadhead transportation *from* a duty assignment is not included within any of the categories of time on duty, Congress further provided that it shall be counted as neither time on duty nor time off duty. 49 U.S.C. 21103(b)(4). This provision effectively created a third category of time, known commonly as ''limbo time.''

In 1976, Congress again amended the hours of service laws in several important respects. Most significantly, Congress expanded the coverage of the laws, by including hostlers within the definition of a train employee, and adding the section providing hours of service requirements for signal employees, now codified at 49 U.S.C. 21104. Congress also added a provision that prohibited a railroad from providing sleeping quarters that are not free from interruptions of rest caused by noise under the control of the railroad, and that are not clean, safe, and sanitary, and prohibited the construction or reconstruction of sleeping quarters in an area or in the immediate vicinity of a rail yard in which humping or switching operations are performed. *See* Public Law 94–348, 90 Stat. 818 (1976).

B. History of Hours of Service Recordkeeping

With the formation of DOT and its regulatory agencies in 1966, the oversight and enforcement of the HSL was transferred from the Interstate Commerce Commission (ICC) to the newly established FRA. Prior to this transfer the ICC had enforced reporting requirements based on its May 2, 1921

order that established the records required to be maintained by carriers relating to the time on duty of employees who were involved in either the movement of trains (referred to in the current HSL as ''train employees'') or the issuance of movement authority (referred to in the current HSL as ''dispatching service employees''). The ICC Order mandated both the content and the format of the hours of service record for train employees and dispatching service employees.

The records required by the ICC Order included one titled ''Time Return and Delay Report of Engine and Train Employees.'' The format and required fields mandated for this record formed the basis for all train employee hours of service recordkeeping and reporting, and for the reporting requirements initially established by FRA for hours of service recordkeeping by railroad employees in 49 CFR part 228, and specifically § 228.11.

The ICC Order also mandated the format for a form titled ''Details of Service'', which was a required part of the train employee's hours of service record. This segment of the employee's record required the railroads to report operational data that included train number, engine number, the departure station, the time that the employee went on duty, the time the train departed, the arrival station, the time the train arrived, the time the employee went off duty, and the kind of service in which the employee was working, *i.e.*, passenger, freight, work train, or deadhead. The Details of Service form contained entries for each train with which an employee was associated during a duty tour.

As was discussed above, the 1969 amendments to the HSL addressed the issue of time spent by train employees in deadhead transportation from a duty assignment to the point of final release, establishing that such time is neither time on duty nor time off duty, which created a new category of time that has come to be known as ''limbo time.'' Following the 1969 amendments, the railroads continued to use the ICC recordkeeping formats. The ''Time Return'' portion of the recordkeeping document only provided a place to enter on-duty time and off-duty time, and could not accommodate the separate entry of limbo time. However, the railroads also continued to use the ''Details of Service'' portion, and this form became critical to proper recordkeeping. The ''Details of Service'' required train arrival and departure times, usually included comments as to when the crew had finished securing the train and therefore was relieved from covered service, and indicated the departure and arrival times of the deadhead vehicle and final release from service. With this information, it was possible to differentiate an employee's time spent on duty in covered service from time that was spent awaiting deadhead transportation and in deadhead transportation to the point of final release, which was limbo time.

The 1921 ICC Order also required records and provided recordkeeping formats for dispatching service employees, including records of dispatchers' time on duty, and records documenting train operation over the territory controlled by each dispatcher. The required records for dispatching service employees included the ''Daily Time Report of Dispatchers,'' the ''Dispatchers Record of Movement of Trains'', and for those dispatching service employees known as operators, in addition to the ''Daily Time Report of Dispatchers,'' a ''Station Record of Train Movements,'' a form that identified the operators by shift, and required the operator to list the train or engine number, along with the arrival and departure times for each train passing the specific station where the operator was located. Following the transfer of responsibilities, FRA adopted the ICC's established reporting requirements for dispatching service employees, but did not require its specific format. However, the formats and data fields are still used, even currently, by virtually all railroads that employ dispatching service employees.

As was discussed above, the Federal Railroad Safety Authorization Act of 1976 expanded coverage of the HSL to signal employees. Congress defined a signal employee as an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems. This, in effect, excluded contract signal employees from the coverage of the HSL. The statutory limitations for signal employees were very similar to those for train employees. Also, in both cases, the HSL treated the time these employees reported for duty as the time covered service began, irrespective of whether or not a covered function was actually performed. In addition, both train employees and signal employees had periods of time spent in travel to and from a duty location, some of which the HSL treated as limbo time. Also, in both cases, the HSL treated the time that one of these employees ''reports for duty'' as the time that time on duty began. Because of the similarities in their statutory provisions, the recordkeeping requirements for these two functions were also quite similar, and FRA did not need to revise its reporting requirements to establish distinct recordkeeping provisions for signal employees.

The 1921 ICC Order also stated, in part, that ''each carrier may at its option, and with the approval of the Commission, add to such records appropriate blanks for any additional information desired by it.'' Over time, railroads came to record information for employee pay claims, railroad operations and crew management on the same form that was used for hours of service recordkeeping. The combination of pay and hours of service information on the same document facilitated employee hours of service reporting practices that were greatly influenced by collective bargaining agreements and pay considerations, where differences existed between the activities for which a collective bargaining agreement required an employee to be paid, and those activities required to be reported for the purposes of the HSL. For example, an employee might report that he or she went off duty at the time that his or her paid activities ended. This would not be accurate reporting for the purposes of the HSL, if the duty tour included deadhead transportation to the point of final release. Regardless of whether an employee received additional pay for the deadhead transportation, the HSL required the time to be recorded, and the employee would not be off duty for the purposes of the HSL until after the completion of the deadhead transportation.

As technology expanded in the rail industry, some railroads in the 1980s became interested in electronically recording and reporting employee hours of service data. By the mid to late 1980s, the CSX Transportation, Inc. (CSX) had developed an automated program generated from its crew management system. CSX began using the program to generate and maintain hours of service records for its train employees. The program produced paper copies of the recorded entries for the employee's signature. Then, in 1991, CSX and the Union Pacific Railroad Company jointly presented a proposal to use an electronic record, without a signature, as the railroad's official train employee hours of service record. Section 228.9 of the existing hours of service recordkeeping regulations required that the hours of service record be signed. Therefore, it was necessary for FRA to waive the signature requirement, to allow for the development of a program that would allow the railroad and its train employees to electronically record and store hours of service information, with the employee electronically certifying the accuracy of the entered

data, so that this record would become the official hours of service record, in lieu of a signed paper record. As CSX worked to develop an electronic program for which FRA would grant a waiver, a number of issues became apparent. These issues had to be resolved to ensure that the system would have sufficient data fields to allow the employee to record the different events that occurred in his or her duty tour, to capture all of the data necessary for FRA to determine compliance with the HSL.

The concept of electronic recordkeeping presented a significant change in how employees were used to reporting their hours of service information. Data entry moved from a dynamic manual reporting method, in which a record was continually updated by the reporting employee during the course of his or her duty tour, to an automated end-of-trip report where all reporting related to a particular duty tour was made in after-the-fact entries into the railroad's computer system, after the completion of the duty tour. In addition, manual records afforded the employee flexibility to provide information about any activities that occurred during the duty tour, as well as any comments that might be necessary to understand any apparent anomalies in reported information. However, an electronic record would be limited to the data fields provided by the recordkeeping program, so it was essential that the programs were designed to provide sufficient data fields to accommodate the variety of reporting scenarios that an employee might encounter, so that the employee had the opportunity to record all relevant data for the events that occurred in his or her duty tour.

CSX's first attempt to develop an electronic recordkeeping system resulted in a program that functioned in much the same manner as a paper record, but without the comprehensive information provided by the ''Details of Service'' portion of the employee's record. It was on this portion of their record that employees recorded a number of items that were necessary for determining compliance with the HSL, including deadhead transportation either to or from a duty assignment, multiple covered service assignments, other activities performed for the carrier that constituted commingled service if not separated from covered service by a statutory off-duty period, and the distinct times that an employee was relieved from covered service, and then subsequently released from all service to begin a statutory off-duty period, which would not be the same times when limbo time was present at the end of the duty tour. In addition, the first attempt at an electronic recordkeeping system also had not considered the features of the system itself, that were necessary for ensuring the accuracy of the data and the ability of FRA to use the data to determine compliance with the HSL. These features included program logic that was necessary, for example, to calculate total time on duty from the appropriate data entered in the record, to require explanation when the total time on duty exceeded the statutory maximum, and to use program edits to identify obvious employee input errors. The mechanism for providing FRA with the ability to access the electronic records was also an issue that needed to be resolved. Because part 228, as drafted in 1972, did not contemplate the existence of electronic recordkeeping, it provided no framework for addressing these issues.

However, FRA and CSX pledged to work together through a ''test waiver'' process to develop a program with logic, edits, and access that would accommodate FRA oversight and enforcement of the current HSL provisions, and ultimately allow FRA to grant a waiver of the signature requirement, thereby allowing hours of service data to be both reported and recorded electronically. The FRA and CSX partnership eventually resulted in the development of a system containing sufficient data entry fields and system features to resolve many of the issues facing movement to electronic recordkeeping.

Another significant issue that arose in the development of electronic recordkeeping systems was providing sufficient data fields to differentiate limbo time from time spent performing covered service, which distinction was necessary to correctly determine an employee's total time on duty. The electronic programs that were initially devised required the employee to report only an on-duty time and an off-duty time, and the beginning and ending times of periods spent in transportation. The records did not include the features of the delay report that had been a part of the paper records, on which employees included their beginning and ending location, date, and time for periods spent in covered service assignments, and noted, for example, that the ending time was the time at which the employee secured the train, which completed his or her covered service on that train.

The railroads viewed this information as not being required by Part 228, but this information was regularly used by FRA in reviewing records for compliance with the HSL, and it was essential that the information continue to be captured in electronic records. Without an indication of the time that the employee stopped performing covered service, there was no way to determine when the employee stopped accumulating time on duty and when he or she began limbo time. Once the employee stopped performing covered service, limbo time began, as the time that the employee spent awaiting transportation to the point of final release, like the transportation itself, was limbo time. However, if the employee's record showed only the time that the employee reported for duty, the time spent in transportation, and the off-duty time, all of the time between reporting for duty and beginning deadhead to the point of final release would necessarily be calculated as time on duty, which could result in a record that incorrectly showed a total time on duty in excess of the statutory maximum, because limbo time was not properly reflected.

To resolve these complex issues, FRA developed a 3x3 matrix, in which an employee entered the location, date, and time for each time that he or she went on duty in covered service, the location, date, and time for each time that he or she was relieved from a covered service assignment, and the location, date, and time for each time that he or she was released from an assignment, to begin another assignment or activity, or to be released from all service to begin a period of off-duty time. This 3x3 matrix was eventually incorporated in all of the waiver-approved electronic programs.

However, deadhead transportation, and activities that constitute other service for the carrier (which may commingle with covered service) do not have relieved and released times in the activity. These activities have only a beginning and an ending time for each event. Thus, FRA also developed a second section of data entry, in which the employee reported the location, date, and time for the beginning and the ending of all non-covered service activities that are part of the employee's duty tour, but may or may not be calculated in the employee's total time on duty.

FRA and CSX continued to work together until these early issues were sufficiently resolved, and eventually, CSX was granted a waiver of the signature requirement in § 228.9. As a result, CSX was allowed to utilize an electronic recordkeeping program, in which its train employees reported their hours of service at the end of each duty tour, and those electronic records constituted the official hours of service

record for CSX train employees. As the use of electronic information systems further expanded in the industry, other railroads began developing, with assistance from FRA, electronic hours of service recordkeeping programs patterned somewhat after the original CSX program. During the development of the later programs, as well as audits of the CSX program after it was fully functioning, other issues began to surface, some of which remained topics of discussion during this rulemaking. Among those issues were the reporting of multiple covered service assignments in a duty tour, and administrative duties performed after the twelfth hour on duty.

Multiple-train duty tours have occurred in the railroad industry for decades. As was discussed above, employees used the ''Details of Service'' section of the paper hours of service record to provide the times spent in covered service on each train to which the employee was assigned, and on each train on which the employee may have been in deadhead transportation, whether that deadhead transportation was transportation to the first covered service assignment of a duty tour, transportation from one covered service assignment to another within a duty tour, or transportation to the point of final release at the end of a duty tour. For many years, employees diligently reported each train to which they were assigned or on which they deadheaded, because employees were paid for a minimum 100-mile day for each such train. However, as collective bargaining agreements evolved, and employees were instead paid on the basis of actual miles run, it became more common to use a single crew to handle multiple trains.

In the development of electronic programs, FRA was concerned that the programs initially lacked the ability to segment the employee's record by train, for data entry and program logic purposes, as well as for inspection and enforcement purposes. If an employee did not report individually the locations, dates, and times that he or she went on duty, was relieved, and was released for each covered service assignment in a multiple-train duty tour, the program read the data as if the employee had worked on one train with a lengthy and continuous period of time on duty, often in excess of the statutory 12-hour limit when a statutory interim release was present. In addition, FRA inspections yielded records that did not present all crew members assigned to a particular train, or in which trains appeared to disappear at one point on line-of-road and reappear at another point, suggesting that a record was missing in the database.

Because all of the existing and developing programs were tied to the railroad's crew management, FRA proposed that railroad crew management initiate a separate call for each assignment, so that each would have a data entry screen created to differentiate between multiple covered service assignments in a duty tour. The railroads resisted this proposal because the additional calls would increase the level of work for crew dispatchers. The railroads also expressed concerns about collective bargaining issues regarding pay claims for each call. FRA noted, however, that there was past historical precedent for employees completing a separate report for each assignment, although there were pay-related reasons for doing so which were not now always present. However, this dispute led to a solution which would not require additional crew dispatcher involvement. Programs were designed to allow the employee to use a function key to access additional reporting screens for reporting multiple trains or non-covered service activities. This feature of the programs mimicked the manner in which employees previously added additional forms to reflect multiple assignments prior to electronic recordkeeping. Once the crew dispatcher has called a crew to duty on one train or job and has established the employee's initial reporting screens, the employee may work multiple assignments at the discretion of the railroad and report the activities involved in each train without the crew dispatcher having to take any further action to create another call to establish the necessary additional reporting screens. This feature not only allows the employee to report the actual events of his or her duty tour, but also allows the program's FRA Inspection System to identify and present records based on train identification.

As was noted above, one of the many ways in which electronic recordkeeping represents a significant change in the way that employees report their time is that with electronic recordkeeping programs, all reporting is accomplished at time of tie-up, just prior to the employee's being released from all service to the carrier to begin a statutory off-duty period, the electronic record thereby becoming an ''end-of-trip report.'' In contrast, manual records maintained by the reporting employee allowed the employee to periodically add information to the record while continuing with the activities of his or her duty tour. Then, when the reporting employee reached his or her point of final release, he or she would complete the reporting, sign the record, and place it in the appropriate collection receptacle. Also, any other reporting or recording activities, including payroll, or other data beyond hours of service for the benefit of either the railroad or the employee, were completed at this time. As long as the reporting employee had not reached the statutory limits for the duty tour, he or she was allowed to take as long as necessary to complete any reporting, recording, and other administrative duties. However, in the event that the reporting employee was at or beyond his or her statutory limits, FRA had a long standing policy of exercising prosecutorial discretion to allow a few minutes for the reporting employee to complete his or her administrative duties.

However, as railroads moved to electronic recordkeeping, the reporting employee could not begin reporting any of his or her train operation, pay and hours of service data in an electronic program prior to arrival at his or her final terminal, so the time involved in completing the necessary reporting might exceed a few minutes, especially if a large amount of work order reporting or other documentation beyond hours of service was required. Railroad labor organizations challenged FRA's practice of allowing a few minutes in excess of the 12-hour statutory maximum time on duty to complete administrative duties. FRA recognized the validity of these concerns, but also recognized the need for certain information at the conclusion of the duty tour to ensure compliance with the HSL. The railroad must know both the time that an employee is relieved from covered service, and the time that the employee is released from all duties, in order to determine the minimum off-duty period that the employee required under the HSL, when to start the statutory off-duty period, and at what time the employee would have completed the minimum required rest to remain in compliance with the HSL. Because the employee is the one with first-hand knowledge of these times as applied to his or her own duty tour, FRA believed that the employee was best suited to certify the accuracy of these times.

FRA convened a Technical Resolution Committee (TRC) in 1996 to resolve this issue. Initially, the TRC leaned toward limiting the employee initiated tie-up to just a relieved time and a released time. Ultimately, however, two additional items were included, which were necessary to both the railroads and the employees from an operational perspective. Because many collective

bargaining agreements contained provisions for how and when an employee would be placed back in a pool or on an extra board following tie-up, both the railroad and the employee needed to be aware of the employee's placement time before the employee began the statutory off-duty period. Finally, FRA allowed the employee to enter information to provide a contact number, if different from the number on record, to ensure that the railroad could contact the employee regarding his or her next assignment.

With these four items (a relieved time, a released time, a board placement time, and a contact number, if different from that of record), FRA believed that the railroad would have sufficient information to know when the employee could legally next be called to duty. Although the HSL does not authorize performance of any administrative duties in the period beyond the employee's statutory maximum, FRA announced a policy that allowed an employee who was being released from a duty tour to begin a statutory off-duty period after more than 12 hours of total time on duty (including limbo time) to complete a ''quick tie-up'' limited to entering and certifying these four items. The quick tie-up was not intended for use when the employee had time remaining within the statutory limits to complete a full record at the end of the duty tour. The intention was to require the employee whose duty tour had reached or exceeded the statutory limits to perform only the minimum administrative duties necessary to determine when the employee would next be available to be called for duty. If the railroad did not require the employee to perform any other administrative duties in addition to the quick tie-up, FRA would exercise its prosecutorial discretion and not prosecute the railroad for requiring the employee to perform administrative duties beyond the employee's statutory limits. FRA allowed the completion of any record in which only quick tie-up information had been entered prior to the statutory off-duty period, when the employee returned to duty. FRA announced this policy in a Technical Bulletin OP No. 96–03 (since renumbered as OP 04–27). After this policy was announced, railroads developed data entry screens that allowed employees to enter and certify only the quick tie-up information when appropriate, allowing the completion of the record when the employee next reported for duty. Electronic recordkeeping systems were also designed to require completion of the full record before it could be certified if the employee had not reached the maximum statutory limit for the duty tour.

In addition to the many issues related to ensuring that the developing electronic recordkeeping systems allowed the employees to enter sufficient data to determine compliance with the HSL, there were also issues to be resolved as to how FRA would access the system and the records that it created. The initial proposal from CSX provided that an officer would log into the railroad's network using his or her identification number (ID) and password and access the employees' entry screens. The officer would then turn over the computer to the FRA Inspector, who would directly review all of the data entered by the employee. This procedure presented a security issue that FRA wanted to avoid. Instead, CSX developed an inspection system that was available only to FRA inspectors through the use of unique FRA IDs and passwords that allowed FRA inspectors to access and retrieve only hours of service records, using a combination of selection criteria to retrieve a specific record or group of records. Selection criteria for records searches were: By employee name or ID; by train or job; and by location (which could include a yard, a subdivision or division (service unit) or other railroad area), combined with a date or date range. Another option for the FRA or participating State inspector is to search for records reporting in excess of 12 hours total time on duty, combining this with a date or date range, and possibly other selection criteria. Combinations of the ''optional'' fields can narrow a selection to a precise time frame. This method of access allowed FRA to ensure that the hours of service records were protected from alteration and unauthorized access, which would not be possible if the same method of access allowed access to other railroad data, which FRA could not restrict.

The unique FRA IDs and passwords are not permanently assigned to a specific FRA Inspector, but are given out upon the request of an inspector prior to an inspection. Passwords are temporary, and expire in seven days or less. Upon arrival at the rail facility, the FRA Inspector contacts the local railroad officer and presents his or her credentials for verification. The inspector is then provided the necessary ID and password and assigned a computer terminal with printer capabilities for use during his or her inspection.

Using the selection criteria, FRA could retrieve records in a manner that was crew based and duty tour oriented, even if employees each reported individually. This meant that the records for all members of a requested train or job were displayed together. In addition, if a duty tour involved multiple covered service assignments, the whole crew would be displayed for each train or job ID, and all records for a given duty tour would be displayed together, with total time on duty for the entire duty tour displayed on the last record of a multiple covered service assignment duty tour.

In the early stages of program development with CSX, FRA began to develop a guide for electronic recordkeeping, which has been used for several years to assist railroads in developing electronic recordkeeping programs for which FRA might likely grant waiver approval. The guide has been used successfully for approximately 15 years. The requirements for electronic recordkeeping systems imposed by this regulation are largely based on the guide and the resulting waiver-approved programs currently in existence.

At present, four Class I carriers (CSX, Norfolk Southern Railway Company, Union Pacific Railroad Company, and Canadian National Railway) have waiver authority to use their existing electronic hours of service recordkeeping programs to record and report the official hours of service records for their train employees. There are no waiver-approved electronic recordkeeping programs for the records of signal employees or dispatching service employees, although there has been interest in moving to electronic recordkeeping for these employees, and there are some programs in various stages of development.

II. Rail Safety Improvement Act of 2008

Section 108 of the Rail Safety Improvement Act of 2008 (Pub. L. 110–432), substantively amends the HSL in a number of ways. It also provides the statutory mandate for this rulemaking, because it requires that FRA revise its hours of service recordkeeping requirements to take into account these substantive changes, as well as to provide for electronic recordkeeping and to require training.

A. Substantive Amendments to the HSL

Effective July 16, 2009, section 108(a) amends the definition of ''signal employee'', to eliminate the words ''employed by a railroad carrier.'' With this amendment, employees of contractors or subcontractors to a

railroad who are engaged in installing, repairing, or maintaining signal systems (the functions within the definition of signal employee in the HSL) will be covered by the HSL, because a signal employee under the HSL is no longer by definition only a railroad employee.

Section 108(b) amends the hours of service requirements for train employees in many ways, all of which are effective July 16, 2009. The provision limits train employees to 276 hours of time on-duty, awaiting or in deadhead transportation from a duty assignment to the place of final release, or in any other mandatory service for the carrier per calendar month. The provision retains the existing maximum of 12 consecutive hours on duty, but increases the minimum off-duty period to 10 hours consecutive hours during the prior 24-hour period.

Section 108(b) also requires that after an employee initiates an on-duty period each day for six consecutive days, the employee must receive at least 48 consecutive hours off duty at the employee's home terminal, during which the employee is unavailable for any service for any railroad; except that if the sixth on-duty period ends at a location other than the home terminal, the employee may initiate an on-duty period for a seventh consecutive day, but must then receive at least 72 consecutive hours off duty at the employee's home terminal, during which time the employee is unavailable for any service for any railroad.

Section 108(b) further provides that employees may also initiate an on-duty period for a seventh consecutive day and receive 72 consecutive hours off duty if such schedules are provided for in existing collective bargaining agreements for a period of 18 months, or after 18 months by collective bargaining agreements entered into during that period, or a pilot program that is either authorized by collective bargaining agreement, or related to work rest cycles under section 21108 of the HSL.

Section 108(b) also provides that the Secretary may waive the requirements of 48 and 72 consecutive hours off duty if a collective bargaining agreement provides a different arrangement that the Secretary determines is in the public interest and consistent with safety.

The RSIA of 2008 also significantly changes the hours of service requirements for train employees by establishing for the first time a limitation on the amount of time an employee may spend awaiting and in deadhead transportation. These new requirements, also found in section 108(b), provide that a railroad may not require or allow an employee to exceed 40 hours per month awaiting or in deadhead transportation from duty that is neither time on duty nor time off duty in the first year after the date of enactment, with that number decreasing to 30 hours per employee per month after the first year, except in situations involving casualty, accident, track obstruction, act of God including weather causing delay, derailment, equipment failure, or other delay from unforeseeable cause. Railroads are required to report to the Secretary all instances in which these limitations are exceeded. In addition, the railroad is required to provide the train employee with additional time off duty equal to the amount that combined on-duty time and time awaiting or in transportation to final release exceeds 12 hours.

Finally, section 108(b) restricts communication with train employees except in case of emergency during the minimum off-duty period, statutory periods of interim release, and periods of additional rest required equal to the amount that combined on-duty time and time awaiting or in transportation to final release exceeds 12 hours. However, the Secretary may waive this provision for train employees of commuter or intercity passenger railroads if the Secretary determines that a waiver would not reduce safety and is necessary to efficiency and on time performance.

However, section 108(d) of the RSIA of 2008 provides that the requirements described above for train employees will not go into effect on July 16, 2009 for train employees of commuter and intercity passenger railroads. This section provides the Secretary with the authority to issue hours of service rules and orders applicable to these train employees, which may be different than the statute applied to other train employees. It further provides that these train employees will continue to be governed by the HSL as it existed prior to the RSIA of 2008 until the effective date of regulations promulgated by the Secretary. However, if no new regulations have been promulgated before October 16, 2011, the provisions of section 108(b) would be extended to these employees at that time.

Section 108(c) of the RSIA of 2008 amends the hours of service requirements for signal employees in a number of ways, effective July 16, 2009. As was noted above, by amending the definition of ''signal employee,'' it extends the reach of the substantive requirements to a contractor or subcontractor to a railroad carrier and its officers and agents. In addition, as section 108(b) does for train employees, section 108(c) retains for signal employees the existing maximum of 12 consecutive hours on duty, but increases the minimum off-duty period to 10 consecutive hours during the prior 24-hour period.

Section 108(c) also eliminates language in the HSL stating that last hour of signal employee's return from final trouble call is time off duty, and defines ''emergency situations'' in which the HSL permits signal employees to work additional hours not to include routine repairs, maintenance, or inspection.

Section 108(c) also contains language virtually identical to that in section 108(b) for train employees, prohibiting railroad communication with signal employees during off-duty periods except for in an emergency situation.

Finally, section 108(c) provides that the hours of service, duty hours, and rest periods of signal employees are governed exclusively by the HSL, and that signal employees operating motor vehicles are not subject to other hours of service, duty hours, or rest period rules besides FRA's.

Section 108(e) specifically provides FRA a statutory mandate to issue hours of service regulations for train employees of commuter and intercity passenger railroads. It also provides FRA additional regulatory authority not relevant to the present rulemaking, and requires FRA to complete at least two pilot projects.

B. Rulemaking Mandate

Section 108(f) requires the Secretary to prescribe a regulation revising the requirements for recordkeeping and reporting for Hours of Service of Railroad Employees contained in part 228 of title 49, Code of Federal Regulations to adjust recordkeeping and reporting requirements to support compliance with chapter 211 of title 49, United States Code, as amended by the RSIA of 2008; to authorize electronic recordkeeping, and reporting of excess service, consistent with appropriate considerations for user interface; and to require training of affected employees and supervisors, including training of employees in the entry of hours of service data.

Section 108(f) further provides that the regulation must be issued not later than 180 days after October 16, 2008, and that in lieu of issuing a notice of proposed rulemaking as contemplated by 5 U.S.C. 553, the Secretary may utilize the Railroad Safety Advisory Committee (RSAC) to assist in development of the regulation.

III. Railroad Safety Advisory Committee Process

A. Overview of the RSAC

In March 1996, FRA established RSAC, which provides a forum for developing consensus recommendations to FRA's Administrator on rulemakings and other safety program issues. The Committee includes representation from all of the agency's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of member groups follows:

- American Association of Private Railroad Car Owners (AARPCO);
- American Association of State Highway and Transportation Officials (AASHTO);
- American Chemistry Council;
- American Petroleum Institute;
- American Public Transportation Association (APTA);
- American Short Line and Regional Railroad Association (ASLRRA);
- American Train Dispatchers' Association (ATDA);
- Association of American Railroads (AAR);
- Association of Railway Museums;
- Association of State Rail Safety Managers (ASRSM);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employees Division (BMWED);
- Brotherhood of Railroad Signalmen (BRS);
- Chlorine Institute;
- Federal Railroad Administration (FRA);
- Federal Transit Administration (FTA)*;
- Fertilizer Institute;
- High Speed Ground Transportation Association (HSGTA);
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers;
- International Brotherhood of Electrical Workers (IBEW);
- Labor Council for Latin American Advancement*;
- League of Railway Industry Women*;
- National Association of Railroad Passengers (NARP);
- National Association of Railway Business Women*;
- National Conference of Firemen & Oilers;
- National Railroad Construction and Maintenance Association (NRC);
- National Railroad Passenger Corporation (Amtrak);
- National Transportation Safety Board (NTSB)*;
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte*;
- Sheet Metal Workers International Association (SMWIA);
- Tourist Railway Association, Inc.;
- Transport Canada*;
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/BRC (TCIU/BRC);
- Transportation Security Administration (TSA)*; and
- United Transportation Union (UTU).

* Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The individual task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on a recommendation for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

B. RSAC Proceedings in This Rulemaking

Given the time constraints within which FRA was required to issue this regulation, FRA decided to request the assistance of the RSAC in developing it, in order to take advantage of the provisions of the statutory mandate which allowed FRA to proceed to a final rule, without having first issued a notice of proposed rulemaking. FRA proposed Task No. 08–06 to the RSAC on December 10, 2008. The RSAC accepted the task, and formed the Hours of Service Working Group (Working Group) for the purpose of developing the hours of service recordkeeping regulations required by section 108(f) of the RSIA of 2008.

The Working Group was comprised of members from the following organizations:

- AASHTO
- Amtrak;
- APTA;
- ASLRRA;
- ATDA;
- AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway Company (CN), Canadian Pacific Railway, Limited (CP), CSX Transportation, Inc. (CSXT), Iowa Interstate Railroad, Ltd. (IAIS), Kansas City Southern (KCS), Norfolk Southern Corporation (NS), and Union Pacific Railroad Company (UP);
- BLET;
- BRS;
- Federal Railroad Administration (FRA);
- IBEW
- Long Island Rail Road (LIRR);
- Metro-North Commuter Railroad Company (Metro-North);
- Southeastern Pennsylvania Transportation Authority (SEPTA);
- Tourist Railway Association; and
- UTU.

The Working Group completed its work after four meetings and two conference calls. The first meeting of the Working Group took place on January 22–23, 2009, in Washington, DC. Subsequent meetings were held on February 4–6, 2009, February 18–20, 2009, and March 23–24, 2009, each also in Washington, DC. Conference calls were held on March 30 and March 31, 2009. The Working Group achieved consensus on the rule text with the exception of one issue. The group's recommendation, including the one area of non-consensus, was presented to the full RSAC on April 2, 2009, and the full RSAC accepted its recommendation. This regulation is consistent with the recommendation of the Working Group, with the exception of the issue on

which the group failed to reach consensus.

Prior to the first meeting of the Working Group, FRA distributed draft rule text to provide a framework for the discussions. This enabled the group to focus its discussions on those issues with which the other members of the group disagreed or had concern. The issues that led to significant discussion and subsequent changes in the initial rule text can generally be characterized in one of four ways: (1) Disagreement of members of the Working Group with some aspects of FRA's current approach to electronic recordkeeping that had been mirrored in the draft rule text; (2) concern about making the requirements for electronic recordkeeping systems sufficiently flexible to accommodate the circumstances of those groups of employees who are not currently reporting and recording their hours of service electronically, but may do so in the future; (3) concern about the burden of some of the recordkeeping requirements on those railroads or contractors or subcontractors to a railroad who use paper records; and (4) concerns about FRA's interpretation of the substantive provisions of the HSL that have an effect on recordkeeping, including new issues arising from the RSIA of 2008, as well as other substantive interpretations that some members of the group wished to have clarified or urged FRA to change. The most significant of these issues will be discussed in this section. Other subjects of discussion within the working group will be discussed in the section-by-section analysis of the language to which they relate.

1. Multiple-Train Reporting

As was discussed in section IB, above, of the preamble, FRA required that electronic recordkeeping programs for which it granted a waiver would require the employee to report each assignment in a duty tour. In brief, FRA's reason for this approach was that it allowed FRA to search for records by the job or assignment, and to retrieve the full records of each employee on that assignment, so that they could be cross-referenced against each other. This approach also allowed the system to link the records for each assignment in a duty tour, so that an employee's prior time off before an assignment would indicate whether it was preceded by another assignment, or was the first assignment following a statutory off-duty period. Thus, the full duty tour would be represented, without gaps in the data that would suggest a missing record. This approach was also consistent with the way that FRA had historically reviewed paper records, because this information was available on the ''Details of Service'' portion of the form, which the railroads had since stopped using because of changes in pay structures and other operational issues, and which they, therefore, resisted incorporating in electronic recordkeeping.

AAR objected to the requirements initially included by FRA in § 228.11(b) of this rule, because FRA required the employee to report the beginning time, relieved time, and released time of each assignment in a duty tour, as it had in the waiver-approved electronic programs. AAR contended that FRA did not need this level of detail for each assignment because the time was all counted as time on duty, and also contended that the requirements were too burdensome because of the number of data fields that an employee would be required to enter, and the amount of time that this data entry could consume.

During the working group proceedings, FRA made a number of concessions from its original language. FRA excluded from the requirement to list each assignment employees having several kinds of assignments likely to result in their handling a large number of trains in a single duty tour. Specifically, FRA excluded utility employees, employees assigned to yard jobs, and assignments established to shuttle trains into and out of a terminal that are identified by a unique job or train symbol as such an assignment. When AAR continued to object to these requirements, FRA limited them further, by requiring only that the employee record the first train and the last train to which he or she was assigned, and any train immediately preceding or immediately following a period of interim release. FRA reasoned that information was needed regarding assignments before and after a period of interim release, so that the interim release period, which would not count toward total time on duty, could be determined. FRA agreed that it would not require the recording of trains in the middle of a duty tour that were not associated with an interim release, agreeing in those limited circumstances to resort to other methods of piecing together the duty tour if necessary.

Ultimately, however, AAR wanted FRA to require that the employee record only the beginning time of the first train and any train following a period of interim release, and only the relieved time and released time of any train preceding a period of interim release and the last train in a duty tour. The limited issue of the specific requirements to record the relieved time and released time for an employee for the first train in the employee's duty tour and for any train preceding a period of interim release by the employee, and the beginning time of the last train or any train following a period of interim release for the employee, was the only area of non-consensus during the working group proceedings and before the full RSAC.

Following the RSAC vote, FRA decided to further modify the requirements of section 228.11(b). This paragraph now requires that an employee record only the beginning time of the first train and any train following a period of interim release, and only the relieved time and released time of any train preceding a period of interim release and the last train in a duty tour, as requested by AAR. It also requires, however, that employees report the train ID for each train required to be reported. Utility employees, employees assigned to yard jobs, and assignments established to shuttle trains into and out of a terminal that are identified by a unique job or train symbol as such an assignment, are excluded from the requirement to report separate train IDs. In addition, this paragraph requires employees to report periods spent in deadhead transportation from a duty assignment to a period of interim release, and from a period of interim release to a duty assignment.

2. Pre-Population of Data

AAR proposed elimination of the concept of the quick tie-up. As was discussed above, the quick tie-up is a feature that allows an employee who is at or beyond the statutory maximum time on duty to report only the four items necessary for the employee and the railroad to determine the beginning of the statutory off-duty period and for the railroad to be allowed to call the employee for the next duty tour. The employee completes the remainder of the record for any duty tour ended with a quick tie-up when he or she next reports for duty. AAR suggested that the regulation instead limit those items required for a full tie-up, or a complete record, and allow those items that are required to be pre-populated on the record by the railroad, so that the time required for a full tie-up would be decreased. FRA could not agree to limit the required data as AAR suggested. In addition, there are a number of items not related to hours of service (such as pay claims and details as to the cars in the train) that are normally a part of a full tie-up, but which FRA does not believe should be required of an employee who is at or near the statutory

maximum time on duty. Therefore, the group agreed not to eliminate the quick tie-up, but continued to discuss the concept of pre-population of the data on the hours of service record.

FRA did not allow pre-population of data as electronic recordkeeping programs were developed during the waiver process, because when pre-population was attempted, records were pre-populated with data from sources not likely to be accurate reflections of the duty tour, such as payroll or other times related to collective bargaining. The Working Group spent substantial time discussing which data fields on the record might be pre-populated. However, the group could not agree on data fields that always may be pre-populated, or those that never should, as a wide variety of factors might affect whether pre-population of certain data is appropriate for a particular employee or assignment. It was generally agreed, however, that pre-population could reduce the time and effort required for completion of the record if the data was reliable.

The group reached a compromise, reflected in section 228.203(a)(1)(i) of this regulation. This paragraph provides that a record may be pre-populated with data known to be factually accurate for a specific employee. Estimated, historical, or arbitrary data are not to be used to pre-populate data in a record. However, a railroad, or a contractor or subcontractor to a railroad, is not in violation of this requirement if it makes a good faith judgment as to the factual accuracy of data for a specific employee but the pre-populated data turns out to be incorrect. In addition, the employee must be able to make any necessary changes to pre-populated data by simply typing into the data field, without having to access another screen or obtain clearance from the railroad. Finally, this paragraph also provides that an electronic recordkeeping system may provide the ability for an employee to copy data from one field of a record to another where appropriate.

3. Tie-Up Procedures for Signal Employees

Labor representatives in the Working Group, and particularly representatives of the Brotherhood of Railroad Signalmen, expressed concern that the requirements for electronic recordkeeping systems were not appropriate to the way that signal employees tie up at the end of a duty tour, and complete their records. Although there are currently no waiver-approved programs allowing electronic recordkeeping by signal employees, there are some systems currently under development, and railroads and signal employees are interested in moving to electronic recordkeeping. The requirements for electronic recordkeeping systems as originally drafted by FRA were based on the past experience of FRA and the industry with electronic recordkeeping, which was admittedly limited to train employees.

During the Working Group discussions, it was pointed out that signal employees tie up differently, and some of the limitations on the system that are appropriate for train employees would not allow signal employees to complete their records. Unlike train employees, signal employees are not usually released from their duty tour at a location where there is likely to be a computer available to complete a record, because they often travel home from their duty location, and do not go by way of a railroad headquarters. In addition, signal employees may not tie-up on a daily basis, rather, they may complete a number of records at one time, on a day when they have time in their schedule to prepare this paperwork. Signal employees do not generally need to do a quick tie-up to know when they are eligible to return to duty, because they have a scheduled eight-hour shift. They do call into the trouble desk if they work beyond their scheduled hours, or after returning from a trouble call. Although the primary purpose of this call is to report the nature of the trouble that was found and what was done to fix it, the employee also reports the time that he or she completed the work, and this allows the railroad to determine if the employee has enough time remaining to respond to another trouble call, or if a late trouble call causes the employee not to be rested for the beginning of the next scheduled shift.

FRA agrees that the regulation should establish requirements appropriate to all employees, so that the regulation will not need to be revised to reflect future systems that may be developed. To accommodate the differences in the reporting practices of signal employees, FRA modified several paragraphs of § 228.203(c). Paragraph (c)(7) of § 228.203 allows an employee to certify a release time in the past compared to the clock time of the computer, except for the current duty tour being concluded, so that a signal employee may complete multiple records at one time. This limitation is not a problem for train employees, who will have provided a release time through the quick tie-up for any record being completed that relates to a previous duty tour. The rule text also excludes signal employees from the scope of requirements in subparagraphs that provide that electronic recordkeeping systems must require employees to complete a full record, and disallow a quick tie-up at the end of any duty tour in which the employee has less than the statutory maximum time on duty. Even with less than the statutory maximum time on duty, a signal employee may not complete any record at the end of that duty tour, or may complete a form of quick tie-up through communication regarding trouble calls and how much time the employee has remaining to work.

FRA notes that railroads, contractors and subcontractors to railroads, and signal employees will need to have some way of keeping track of when the employee goes off duty, to ensure that they receive the 10 hours uninterrupted rest required by the RSIA of 2008.

4. Tracking Cumulative Totals Toward the 276-Hour Monthly Maximum Limitation

Section 228.11(b)(14) requires that a train employee record include the cumulative total for the calendar month of time spent in covered service, awaiting or in deadhead transportation from a duty assignment to the place of final release, and time spent in any other service at the behest of the railroad, the elements that make up the cumulative total for the month toward the 276-hour limitation. Members of the Working Group representing the Class III railroads pointed out that compliance with this requirement would be much more complicated for those employees completing paper records. Electronic recordkeeping systems will likely be programmed to calculate the cumulative monthly total, but it will be more difficult for an employee to have to keep track of the running total and note it on his or her signed record each day. FRA is persuaded that this could be burdensome, and could result in inaccurate reporting of the totals, and could possibly cause an employee to inadvertently exceed the monthly limitations by calculating it inaccurately and certifying that number. Therefore, FRA agreed to allow Class III railroads to track the cumulative total throughout the month, note it on the records, and make it available to FRA. The employee will be expected to certify the monthly total promptly after the end of the month.

5. Multiple Reporting Points

This regulation requires that each train employee have a regular reporting point. In numerous locations across the railroad system, railroads and their

employees have established more than one location within a designated terminal that the employees may directly report to, essentially treating multiple locations located near each other as one regular reporting point. In enforcing this regulation, FRA will continue to treat these multiple locations as constituting a single regular reporting point, provided that (a) it can reasonably be expected that doing so would not unduly affect fatigue and (b) if the railroad is unionized, the multiple reporting points have been agreed to under a collective bargaining agreement. When determining whether or not fatigue is unduly affected, FRA will take into account the distance between the multiple locations, traffic patterns (*e.g.,* rural vs. urban), and other relevant factors.

As has been discussed, the RSIA of 2008 amends the definition of ''signal employee'' so that employees of a contractor or a subcontractor to a railroad performing maintenance, inspection, or repair of signal systems are covered by the HSL. The railroads in the Working Group expressed concern that they would be responsible for keeping records for contract signal employees who perform work on their property. This would be particularly difficult if the contractors or subcontractors are hired for specific short-term assignments or projects. FRA expects that the contractor or subcontractor who employs the employee would be responsible for his or her records, because that company would know when the employee would be properly rested under the statute to begin a new assignment, which might be on a different railroad than the assignment just completed. It should be noted, however, that since the substantive provisions of the HSL still prohibit either requiring or allowing an employee to remain or go on duty, FRA may take enforcement action for violation of the statute against either the employer or the railroad for whom the employee is performing covered service, depending on the facts of the situation.

FRA has amended language throughout this part that imposes recordkeeping duties on a railroad, so that those duties are imposed on a railroad or a contractor or a subcontractor to a railroad. However, FRA recognizes that some railroads have kept hours of service records and reported excess service for contractors and subcontractors who were covered by the HSL prior to the RSIA of 2008, particularly as train employees. FRA does not intend to prohibit such practices, if the parties have contracted to have the railroad for which an employee performs covered service handle the recordkeeping and reporting responsibilities for that employee.

IV. Section-by-Section Analysis

Section 228.1 Scope

FRA has revised this section to reflect the fact that the regulation prescribes reporting and recordkeeping requirements for employees of railroad contractors and subcontractors as well as for railroad employees.

Section 228.3 Application

FRA has revised this section to reflect the fact that the regulation applies to railroad contractors and subcontractors as well as to railroads, and does not apply to the contractors and subcontractors of railroads to which the regulation does not apply.

Section 228.5 Definitions

This section is amended to add a large number of definitions relevant to compliance with the HSL, and the recordkeeping and reporting requirements of this part, including the data fields found on an hours of service record, the data required to be entered, and the proper calculation and representation of the periods of time which must be identified on a record. Most of these definitions have been used by FRA and the industry for many years and have a common understanding. Some are discussed in existing Operating Practices Technical Bulletins providing FRA's position on substantive issues of enforcement under the HSL. As a result, while the Working Group recommended minor revisions to a number of the definitions to clarify them, relatively few caused concern among Working Group members or required significant discussion.

The Working Group discussed the definition of ''actual time,'' which can refer to either a specific time of day, or a precise amount of time. FRA's intention with this definition is to make clear that any time related to an activity that is entered on an hours of service record should represent the actual time that the activity occurred or actual amount of time spent in the activity, rather than scheduled or estimated times or amounts of time that may be used for pay and collective-bargaining-related purposes. Records must also not show non-specific numbers in reference to data fields that correspond to specific statutory limitations. For example, it would not be correct simply to indicate ''10+'' in the prior time off field, rather than the actual amount of time in hours and minutes that the employee had been off before beginning an assignment, or ''12+'' for total time on duty, rather than the actual total amount of time that the employee was on duty.

The Working Group also discussed the definition of ''commuting,'' and specifically the portion of the definition that applies to train employees. The first part of the definition led to discussions related to an employee's regular reporting point, because only travel between an employee's residence and his or her regular reporting point is considered commuting. As was discussed in section III, above, of the preamble, FRA acknowledges that it will treat multiple locations within a designated terminal as a single reporting point in certain circumstances. However, the definition of ''commuting'' is not changed. The second part of this definition as applied to train employees provides that travel in railroad-provided transportation to a lodging facility at an away-from-home terminal is considered commuting if the time does not exceed 30 minutes. The ''30 minute rule'' is longstanding FRA policy, intended to provide railroads some flexibility to get their employees to lodging, but limiting the potential erosion of an employee's statutory off-duty period that could result from extended periods of travel to the away-from-home lodging facility. Nothing in the RSIA of 2008 would require FRA to change its position on this issue, and FRA declines to do so.

FRA defines designated terminal for purposes of this section by copying the definition of the term found in the HSL at 49 U.S.C. 21101. It is necessary to define this term because any period of interim release that a train employee has during a duty tour is considered off-duty time under the HSL only if the release occurs at a designated terminal. Otherwise, the time must be calculated as on-duty time. FRA's position regarding designated terminals has been previously published in Appendix A of this regulation, and further established through extensive litigation related to this issue. By including this definition, FRA does not intend to alter any of its previous statements related to this issue, including the fact that FRA does not exercise jurisdiction over any lodging facilities used to house railroad employees that are not railroad-provided, and are usually subject to collective bargaining.

This section defines the terms ''reporting point,'' ''regular reporting point'' and ''other than regular reporting point.'' As was discussed in section III, above, of the preamble, and in this section, in regard to the definition of commuting, an employee has only one regular reporting point at any given

time. Travel from the employee's regular reporting point to any other reporting point on the railroad is considered a deadhead to a duty assignment, in which the time spent deadheading to duty is time on duty, and if an employee travels directly from his or her residence to a reporting point that is other than his or her regular reporting point, any time spent in that travel exceeding the time that would have been spent in travel to the regular reporting point is also time on duty. As was discussed in section III, above, of the preamble, FRA will consider multiple locations within a designated terminal to be a single reporting point in certain circumstances. This interpretation does not change the definitions of the terms ''reporting point,'' ''regular reporting point,'' or ''other-than-regular reporting point,'' this simply means that if an employee's regular reporting point is any one of the locations that constitute a single reporting point, an assignment to report to any location that is considered part of that single reporting point would be considered reporting to the regular reporting point for that employee.

The Working Group discussed the definition of ''release'' as it applies to signal employees. A release is a period of more than an hour but less than a statutory off-duty period, after a signal employee completes regular assigned hours, or completes return travel from a trouble call. Members of the Working Group representing the interests of signal employees commented that a release should not just consist of an employee being told to go and wait at a nearby restaurant until he or she is needed for another assignment, but should allow an employee to come and go as he or she pleases in order to be considered off-duty time. FRA notes that the HSL does not define the release period for signal employees as ''interim release'' is defined for train employees, providing that the period of release constitutes off-duty time only if it is at a designated terminal. However, it is certainly consistent with the statutory purpose to require a railroad, or contractor or subcontractor to a railroad, to provide as much opportunity for food, rest, and freedom of activity for the employee as circumstances will allow during any release period that is to be considered off-duty time.

The Working Group also discussed the distinction between the defined terms, ''prior time off'' and total off-duty period. As indicated in the definition of ''total off-duty period,'' it may differ from a computer-generated prior time off, which would be calculated based on the release time of the previous duty tour, if the employee performed an activity between duty tours that was required to be reported as other service at the behest of the railroad. Under § 228.11(b)(8), (d)(6) and (e)(9), the employee must record any such service, and it would be recorded on the hours of service record created for the next duty tour as an activity at the behest of the railroad. Prior time off would be calculated as the sum of the time between the previous final release and the beginning of that activity and the time between the end of the activity and the beginning of the next duty tour. The total time spent in the activity, plus the prior time off before and after the activity should equal the system-known prior time off.

There were a number of questions discussed in the Working Group related to the definitions of ''dispatching service employee,'' ''signal employee,'' and ''train employee.'' These definitions are copied directly from the HSL at 49 U.S.C. 21101, and are included in this regulation simply for ease of reference, since the terms are used throughout the rule text. The questions surrounding these definitions related to whether employees with certain job titles, or who perform certain job functions, would be included within the scope of the definitions. These questions present issues of substantive interpretation of the HSL, and have been addressed in published interpretations in Appendix A of this rule and various Operating Practices Technical Bulletins. The only change in these definitions made by the RSIA of 2008 is to amend the definition of ''signal employee'' so that it applies to employees of contractors or subcontractors to a railroad who perform the functions of a signal employee. Therefore, FRA's position remains unchanged with respect to these issues, except to the extent that FRA has ever indicated prior to the enactment of the RSIA of 2008 that employees of contractors or subcontractors performing the functions of a signal employee are not covered by the HSL, because that would no longer be FRA's position, in light of the statutory changes.

In determining whether a given employee is covered by the HSL, FRA continues to take a functional approach, rather than one based on job or craft title. If an employee performs functions included within the definition of a dispatching service employee, a signal employee, or a train employee, that employee is covered under the HSL as that type of employee, and must observe the relevant statutory limitations and recordkeeping requirements, regardless of the employee's actual job title. For example, an employee whose job title is Yardmaster may be covered under the HSL as any one of three categories of covered employees, or he or she may not be covered by the HSL at all, depending on the functions performed. By the same token, if an employee performs functions that are typically performed by employees who are covered by the HSL, but the specific function is not itself covered, performing that function does not bring the employee under the coverage of the HSL. For example, if an employee removes orders from a printer, that function alone does not make the employee a dispatching service employee, even if that function is usually performed by a dispatcher, because this action alone does not constitute dispatching, reporting, transmitting, receiving or delivering an order affecting train movement.

Section 228.9 Records; General

This section is revised to eliminate the signature requirement for records maintained electronically. Paragraph (a) applies only to manual records, and retains the text of § 228.9 prior to this regulation. Paragraph (b), which is added to this section, provides that an electronic record must be certified and electronically stamped with the certifying employee's name and the date and time of certification. Both paragraphs contain requirements for retention of and access to the records. Finally, paragraph (b) requires that electronic records must be capable of being reproduced on railroad printers.

Section 228.11 Hours of Duty Records

This section establishes the requirement to keep hours of service records and sets forth what information the records must contain. The requirements have been clarified by being broken into separate paragraphs for the different types of employees, each containing the recordkeeping requirements specific to that kind of employee that FRA believes are necessary to determining whether the employee is in compliance with the HSL for the duty tour being reported. This includes requiring data related to the new substantive requirements of the RSIA of 2008.

Paragraph (a) of this section establishes the general recordkeeping requirement, and provides that contractors and subcontractors whose employees perform covered service should also record the name of the railroad for which the employee performed covered service. This paragraph also provides that if an employee performs covered service

within the same duty tour that is subject to different statutory requirements, and therefore, different recordkeeping requirements in this section, such as, performing both the functions of a train employee and a dispatching service employee, the employee should complete a record appropriate to the type of service to which he or she was called, and reflect other covered service as an activity that is other service at the behest of the railroad. However, the total time on duty must be governed by the most restrictive statutory provision.

Paragraph (b) of this section establishes the recordkeeping requirements for train employees, including subparagraphs (13) through (16), which relate to information required as a result of the statutory amendments in the RSIA of 2008. Subparagraph (13) requires that the record must indicate the total amount of time by which the combination of the total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours. Subparagraph (14) requires the record to reflect the cumulative total for the calendar month of time spent on duty, awaiting or in deadhead transportation, and in any other service for the carrier (in other words the cumulative total toward the 276-hour monthly maximum). Subparagraph (15) requires the record to indicate the cumulative total for the calendar month of time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty. Subparagraph (16) requires the record to indicate the number of consecutive days in which a period of time on duty was initiated.

Paragraph (b) of this section resulted in significant discussion in the working group, which resulted in a number of changes to the rule text. As was discussed in section III, above, of the preamble, AAR did not agree during the RSAC process with FRA's requirement to report the first train and the last train to which the employee was assigned, and any train immediately preceding or immediately following a period of interim release, even after utility employees, employees performing yard jobs and employees on shuttle assignments were excluded, and FRA subsequently made further modifications to this paragraph.

Subparagraph (4) requires train employees to report the train ID for each assignment required to be reported. Utility employees, employees assigned to yard jobs, and employees assigned to shuttle assignments identified as such by a unique job or train symbol are excluded from the requirements of this subparagraph. FRA expects, however, that railroads will take care to avoid designating as a shuttle assignment jobs that do not truly function in the manner suggested by the language.

Subparagraph (5) requires train employees to report the location, date, and beginning time of the first assignment in a duty tour, and any assignment immediately following a period of interim release.

Subparagraph (6) requires train employees to report the location, date, and time relieved for the last assignment in a duty tour and any assignment preceding a period of interim release.

Subparagraph (7) requires train employees to report the location, date, and time released for the last assignment in a duty tour and any assignment preceding a period of interim release.

Subparagraph (8) requires train employees to report the beginning and ending location, date, and time for periods spent in transportation to the first assignment in a duty tour, from an assignment to a period of interim release, from a period of interim release to the next assignment in a duty tour, and from the last assignment in a duty tour to the point of final release.

Also, as was discussed in section III, above, of the preamble, the requirement in subparagraph (14) to track the cumulative total toward the limitation of 276 hours in a calendar month was opposed as being too burdensome, especially for those employees completing paper records. In response, FRA will allow Class III railroads to track the cumulative total throughout the month, note it on the records, and make it available to FRA, provided that the employee certify the monthly total after the end of each month.

Paragraph (c) provides that subparagraphs (13) through (16) of paragraph (b) do not apply to the records of train employees providing commuter or intercity passenger rail transportation, because these subparagraphs relate to the new substantive provisions of the HSL in the RSIA of 2008, and those provisions do not apply to train employees of commuter and intercity passenger railroads at this time. This distinction led to some discussion as to how to apply the recordkeeping requirements to train employees who work in both freight and passenger service. FRA believes this issue is best addressed by the individual recordkeeping systems of railroads that have employees who work in both types of service. The railroad should ensure that the employee has the appropriate record to complete for the type of service that he or she performed in any given duty tour.

Paragraphs (d) and (e) provide the recordkeeping requirements for dispatching service employees and signal employees respectively.

Section 228.13 Preemptive Effect

This section sets forth the preemptive effect of this part. The preemption provision of the former Federal Railroad Safety Act of 1970 (FRSA), as amended, 49 U.S.C. 20106, governs the preemptive effect of this regulation, and the preemption provision of the regulation conforms to the terms of the statute. State and local requirements, both statutory and common law, are preempted when such non-Federal requirements cover the same subject matter as the requirements of this part. A State may adopt, or continue in force a law, regulation, or order covering the same subject matter as a DOT regulation or order applicable to railroad safety and security only when the additional or more stringent state law, regulation, or order is necessary to eliminate or reduce an essentially local safety or security hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not unreasonably burden interstate commerce.

Section 20106 also permits State tort actions arising from events or activities occurring on or after January 18, 2002 that allege a violation of the Federal standard of care established by regulation or order issued by the Secretary of Transportation (with respect to railroad safety) or the Secretary of Homeland Security (with respect to railroad security), a party's failure to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries, or a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulations, or order of the United States Government, and does not unreasonably burden interstate commerce.

Section 228.19 Monthly Reports of Excess Service

This section requires monthly reports of excess service, and indicates the instances of excess service that must be reported, in separate paragraphs for train employees, dispatching service employees, and signal employees, including requirements related to new substantive provisions of the HSL that were added by the RSIA of 2008. It also provides for excess service reports to be submitted electronically or appended to

and retained with the employee hours of service record to which the excess service being reported relates.

Paragraph (a) requires that the instances of excess service listed in this section be reported to FRA's Associate Administrator for Railroad Safety/Chief Safety Officer.

Paragraph (b) provides the instances of excess service which must be reported for train employees. Subparagraphs (1) through (3) correspond to requirements that were contained in this section as it existed prior to the enactment of the RSIA of 2008, with the exception that the new minimum statutory off-duty period of 10 hours is substituted. Subparagraphs (4) through (10) are instances of possible excess service related to new substantive limitations in the HSL. Paragraph (c) provides the instances of excess service that must be reported for train employees of commuter or intercity passenger railroads. Because these employees continue to be covered by the HSL as it existed prior to the enactment of the RSIA of 2008, the instances of excess service which must be reported for these employees are identical to those required by this section for train employees prior to this revision.

Paragraph (d) contains the instances of excess service which must be reported for dispatching service employees. Because there were no substantive changes to the HSL related to dispatching service employees other than the grant of authority to the Secretary to prescribe regulations more stringent than the statute, the instances of excess service that must be reported are identical to those required by this section for dispatching service employees by this section prior to this revision.

Paragraph (e) provides the instances of excess service that must be reported for signal employees, which were modified to reflect the new minimum statutory off-duty period.

Paragraph (f) provides the method for filing with FRA the instances of excess service required to be reported by this section, while paragraph (g) provides procedures for the use of an alternative method for filing instances of excess service using an electronic signature.

Paragraph (h) excepts any railroad, or contractor or subcontractor to a railroad that uses an electronic recordkeeping system that complies with this part from the requirement to file with FRA its monthly reports of excess service. The electronic recordkeeping system must require the employee to enter an explanation for any excess service that the employee certifies on his or her record, require the railroad, contractor, or subcontractor to make a determination as to whether each instance would be reportable, allow the railroad, contractor, or subcontractor to append its analysis to the electronic record, and allow FRA inspectors and participating State inspectors access to employee reports of excess service and any explanations provided.

Section 228.23 Criminal Penalty

This section is amended only to update the statutory citation to the penalty provision of the HSL to reflect the recodification of the Federal railroad safety laws, including the HSL, in 1994. Public Law 103–272, 108 Stat. 745.

Section 228.201 Electronic Recordkeeping; General

This section sets forth the basic requirements for the use of an electronic recordkeeping system to create and maintain the records required by this part. Any record required by this part may be created and stored electronically in such a system, and those records submitted to FRA may also be submitted electronically, consistent with the requirements of the Electronic Signatures in Global and National Commerce Act (Pub. L. 106–229, 114 Stat. 464, June 30, 2000).

The system must meet the requirements of this part, and the records created and stored in the system must contain the required information. The section further provides that a railroad, contractor, or subcontractor using an electronic recordkeeping system must sufficiently monitor the database to ensure a high degree of accuracy in the records, and train its employees on the proper use of the system. The information technology security program of the railroad, contractor, or subcontractor must also be adequate to prevent unauthorized access to the program logic or individual records. Finally, this section provides that FRA may prohibit or revoke the authority to use an electronic recordkeeping system if FRA finds that the system is not properly secured, is inaccessible to FRA, or fails to record and store the information adequately and accurately. If FRA makes such a determination, it will be issued in writing.

Section 228.203 Program Components

This section establishes the required components for electronic recordkeeping programs in the areas of system security, identification of the individual who entered specific data, capabilities of program logic, and system search capabilities.

Paragraph (a) provides the standards that the electronic recordkeeping system must meet in terms of system security. Subparagraph (a)(1) provides that data entry is restricted to the employee or train crew whose time is being reported. However, there are two exceptions to this requirement. The first is for pre-populated data, which was an area of significant discussion and eventual compromise in the working group, as discussed in section III above. The second exception applies to situations in which an employee has reached or exceeded his or her maximum allowed time on duty, and a quick tie-up is required. As was discussed in section IB, the idea behind a quick tie-up is that a few items of basic information are needed to determine the time at which the employee is beginning his or her statutory off-duty period, and when he or she will be rested to begin the next duty tour. However, the intention is for the employee to be able to complete this limited data entry very quickly in order to begin the statutory off-duty period and not extend a duty tour that is already at its maximum limit. Therefore, FRA has provided an additional exception to the requirement of employee-entered data, to allow an employee to provide quick tie-up information by telephone, by facsimile, or by other electronic means in situations where for any reason, a computer terminal is unavailable. FRA expects that in most situations, the employee will call a dispatcher, call desk, or trouble desk, to provide the quick tie-up information to those who need to know it to be able to call the employee for his or her next time on duty. However, situations may arise when it is difficult to reach someone by telephone, which could increase the time it will take to complete the process. The Working Group requested that FRA allow the use of other technology for electronic transmission of the information, and FRA revised the rule text accordingly. However, FRA cautions against the use of electronic means, such as e-mail, to enable an employee to tie up and officially begin a statutory off-duty period while in fact still performing service, awaiting transportation to final release, or otherwise still involved in the duty tour being tied up.

Subparagraph (a)(1) also provides that the system may not allow two individuals to have the same electronic identity, and that the system must be structured so that a record cannot be deleted or altered once it is certified, and that any amendment to a record must either be stored electronically

apart from the record it amends or electronically attached as information but without altering the record. Amendments must also identify the person making the amendment. Finally, the system must be capable of maintaining records as submitted without corruption or loss of data, and ensure that supervisors and crew management officials can access, but not delete or alter a record, once the employee has reported for duty, and once the employee has certified information that he or she entered on the record.

Paragraph (b) provides that the program must be capable of identifying each individual who entered data on a record, and which data items were entered by each individual if more than one person entered data on a given record.

Paragraph (c) provides the program logic features that an electronic recordkeeping system must contain in order to properly calculate total time on duty, to identify errors, to require reconciliation of differences in prior time off, which would indicate an activity or assignment not captured on a record, to require explanations when total time on duty exceeds the statutory maximum for the employee, and to require proper use of the quick tie-up. As was discussed in section III above, this section was the subject of discussion in the Working Group, and the rule text was modified to provide flexibility for future systems, and in particular for the recording and reporting of hours of service data by signal employees, who do not report in the same manner as train employees.

Paragraph (d) establishes the required search capabilities for an electronic recordkeeping system, establishing the specific data fields and other criteria by which the system must be capable of searching for and retrieving responsive records.

Section 228.205 Access to Electronic Records

Paragraph (a) of this section provides that access to electronic recordkeeping systems must be granted to FRA and State inspectors through the use of railroad computer terminals. Paragraph (b) requires the establishment of procedures for providing inspectors with an identification number and password to access the system.

Paragraph (c) provides that the inspection screen must be formatted so that each data field entered by an employee is visible, that the data fields must be searchable as described in § 228.203(d) and yield access to all records matching the specified search criteria, and that the records must be displayed in a manner that is crew-based and duty-tour-oriented, so that the records of all employees who worked together as part of a train crew or signal gang will be displayed together, and the record will include all of the assignments or activities required to be reported.

Section 228.207 Training

This section requires railroads and contractors and subcontractors to railroads to provide initial and refresher training to train employees, signal employees, and dispatching service employees, and the supervisors of these employees. Paragraph (b) provides that initial training must include classroom and hands-on components, and must cover the aspects of the HSL relevant to the employee's position, and proper entry of hours of service data. Testing is also required to ensure that the objectives of the training are met. This section requires that initial training be provided as soon as practicable. FRA would expect that some level of training, such as on the new statutory requirements, will be needed fairly quickly, to ensure proper recordkeeping. This may be done less formally, either in person with a supervisor, as ''on the job'' training, or through electronic media that may be provided to an employee. However, the more comprehensive initial training required by this section may be provided in combination with other training, such as that required by section 402 of the RSIA of 2008, and may be completed within the regular training cycle for the employee.

Paragraph (c) provides significant flexibility regarding refresher training. The paragraph does, however, require that the refresher training emphasize any relevant changes to the HSL or the recordkeeping system, as well as any areas in which supervisors or other railroad managers are noticing recurrent errors. No specific interval for refresher training is required, just that it must be provided when suggested by recurrent errors. FRA had initially proposed requiring refresher training every two years, but members of the Working Group objected, arguing that employees who complete records every day will not need training at a regular interval on how to do so, and that refresher training should be provided to those who are having difficulty. FRA revised the text of this section accordingly.

V. Regulatory Impact and Notices

A. Statutory Authority

Section 20103(a) of title 49 U.S. Code authorizes the Secretary to issue regulations governing all areas of railroad transportation safety, supplementing laws and regulations in effect on October 16, 1970. In addition, Section 108(f)(1) of the RSIA of 2008 requires the Secretary to prescribe a regulation revising the requirements for recordkeeping and reporting for hours of service of railroad employees contained in 49 CFR part 228 to adjust recordkeeping and reporting requirements to support compliance with 49 CFR ch. 211, as amended by the RSIA of 2008; to authorize electronic recordkeeping, and reporting of excess service, consistent with appropriate considerations for user interface; and to require training of affected employees and supervisors, including training of employees in the entry of hours of service data.

Section 108(f)(2) provides that in lieu of issuing a notice of proposed rulemaking as contemplated by 5 U.S.C. 553, the Secretary may use the RSAC to assist in development of the regulation.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures, and determined not to be economically significant under both Executive Order 12866 and DOT policies and procedures. *See* 44 FR 11034 (Feb. 26, 1979). This rule is a non-significant regulatory action under § 3(f) of Executive Order 12866 and the regulatory policies and procedures order issued by the DOT. Id. We have prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this rule.

This section summarizes the estimated economic impacts of the rule. The final rule is mandated by the RSIA of 2008, in order to revise the recordkeeping and reporting regulations in accordance with the substantive changes to employee work and rest periods that are specified in the RSIA of 2008. The impacts described are the impacts of the rule, distinct from the impacts of the RSIA of 2008.

The RIA contains a description of the costs of the rule. All railroads that operate on the general system of transportation are subject to the final rule. Train employees of commuter and intercity passenger railroads, however, are exempt from the new, specific limitations on employee work and rest periods in the RSIA of 2008. The RSIA

adds employees of contractors and subcontractors that perform signal work for railroads to those covered by the rule. The costs of the rule result from making required changes to existing recordkeeping systems to comply with the final rule. FRA establishes the standards for electronic recordkeeping systems for those railroads that wish to implement an electronic hours of service system. Four Class I railroads already use an electronic recordkeeping system by FRA waiver. The rule's specifications for electronic recordkeeping were based on FRA's experience with these waiver-approved systems to minimize the burden of the electronic recordkeeping option. The RSIA of 2008 also mandates that training be provided to employees on the hours of service law and recordkeeping system. FRA notes that training would be necessary even in the absence of FRA's rule, but accounts for training on the recordkeeping system to illustrate the type and extent of training a railroad, or a contractor or subcontractor to a railroad, would be expected to provide. Given the large number of employees subject to the rule, training costs are the biggest component of costs. For a 20 year period of analysis, the present value of costs attributable to the rule total about $11.2 million, using a discount rate of 7%, and $14 million using a discount rate of 3%. Of those costs, $9.2 million and $11.6 million are training costs respectively.

Members of the RSAC that helped develop the rule and the RIA stated that the primary benefit of the rule was a mechanism by which to comply with the hours of service law. The public welfare benefit of the rule is a method for effectively enforcing the substantive, new provisions in the RSIA of 2008. The benefit of training and recordkeeping is the ability of covered employees to comply with the requirements of the RSIA and thereby achieve the safety benefits intended by Congress. To the extent that railroads that are not currently using electronic recordkeeping take advantage of the option to use electronic recordkeeping, they may benefit from some efficiency gains. RSAC industry representatives indicated that there may be up to a 50% decrease in the time needed to complete an hours of service record, depending on the amount of information needed to be recorded. If the scale of time savings using an electronic system was a few minutes per individual entry, the savings could be significant when multiplied across the large number of employees covered by the RSIA of 2008 that perform daily or frequent recordkeeping. In addition, there may be indirect benefits of the rule, such as reduced storage needs for paper hours of service records.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This rule amends FRA's regulations regarding the reporting and recordkeeping requirements for railroad employees and employees of contractors and subcontractors of a railroad who are performing service covered by the HSL. State and local requirements on the same subject matter covered by FRA's regulation and the amendments proposed in this rule, including the standards of care applicable in certain State common law tort actions, are preempted by 49 U.S.C. 20106. The preemption provision in the regulation directly reflects the terms of the statute. At the same time, this final rule does not propose any regulation that would have direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Additionally, it would not impose any direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply. However, State and local officials were involved in developing this rule. The RSAC, which was used to assist in the development of this rule, has as permanent members, the AASHTO and the ASRSM.

D. Executive Order 13175

We analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). Because this rule does not significantly or uniquely affect tribes and does not impose substantial and direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

E. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, we developed this final rule in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), and have determined that the RFA does not apply to this rulemaking.

As was discussed above, this rulemaking is required by the section 108(f) of the RSIA of 2008, which provides that in lieu of issuing a notice of proposed rulemaking as contemplated by 5 U.S.C. 553, the Secretary may utilize the RSAC to assist in development of the regulation, and FRA chose to utilize the RSAC to assist in developing the regulation.

The Small Business Administration's *A Guide for Government Agencies: How To Comply With the Regulatory Flexibility Act* (2003), provides that:

> [i]f, under the APA or any rule of general applicability governing federal grants to state and local governments, the agency is required to publish a general notice of proposed rulemaking (NPRM), the RFA must be considered (citing 5 U.S.C. 604(a)). * * * If an NPRM is not required, the RFA does not apply.''

Because an NPRM was not required in this instance, the RFA does not apply.

F. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new and current information collection requirements and the estimated time to fulfill each requirement are as follows:

49 CFR section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
228.11—Hours of Duty Records (New Requirement now includes signal contractors and their employees).	720 railroads/signal contractors.	29,893,000 records	2 min./5 min./10 min. ...	3,049,210
228.17—Dispatchers Record of Train Movements.	150 Dispatch Offices	200,750 records	3 hours	602,250

49 CFR section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
228.19—Monthly Reports of Excess Service (New Report Requirement includes Limbo time and consecutive days on duty).	300 railroads	2,640 reports	2 hours	5,280
228.103—Construction of Employee Sleeping Quarters—Petitions to allow construction near work areas.	50 railroads	1 petition	16 hours	16
228.203—Program Components (New Requirement)—Electronic Recordkeeping—				
—Modifications for Daylight Savings Time ..	9 railroads	5 modifications	120 hours	600
—System Security/Individual User Identification/Program Logic Capabilities/Search Capabilities		1 program with security/ I.D./program logic & search capability.	720 hours	720
228.205—Access to Electronic Records—(New Requirement)—System Access Procedures for Inspectors.	632 railroads	100 electronic records access procedures.	30 minutes	50
228.207—Training in Use of Electronic System—(New Requirements)—Initial Training.	720 railroads/signal contractors.	47,000 train employees	1 hour	47,000
—Refresher Training	720 railroads/signal contractors.	2,200 train employees	1 hour	2,200
49 U.S.C. 21102(b)—The Federal hours of service laws:				
—Petitions for Exemption from Laws	10 railroads	2 petitions	10 hours	20

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Nakia Poston, Information Clearance Officer, at 202–493–6073.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

G. Regulation Identifier Number (RIN)

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that:

> ''Before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $141,100,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement''

detailing the effect on State, local, and tribal governments and the private sector.

This rule will not result in the expenditure of more than $141,100,000 (adjusted annually for inflation) by the public sector in any one year, and thus preparation of such a statement is not required.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that Federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. This rule will not have a significant impact on the human environment.

List of Subjects in 49 CFR Part 228

Administrative Practice and Procedures, Buildings and facilities, Hazardous materials transportation, Noise control, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

PART 228—[AMENDED]

The Rule

■ For the reasons discussed in the preamble, part 228 of chapter II, subtitle B of title 49, Code of Federal Regulations is amended as follows:

■ 1. The authority citation for part 228 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 21101–21109; Sec. 108, Div. A, Public Law 110–432, 122 Stat. 4*860–4866*; 49 U.S.C. 21301, 21303, 21304, 21311; 28 U.S.C. 2461, note; 49 CFR 1.49; and 49 U.S.C. 103.

■ 2. Section 228.1 is amended by revising paragraph (a) to read as follows:

§ 228.1 Scope.

* * * * *

(a) Prescribes reporting and recordkeeping requirements with respect to the hours of service of certain railroad employees and certain employees of railroad contractors and subcontractors; and

■ 3. Section 228.3 is revised to read as follows:

§ 228.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads and contractors and subcontractors of railroads.

(b) This part does not apply to:

(1) A railroad or a contractor or subcontractor of a railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

■ 4. Section 228.5 is revised to read as follows:

§ 228.5 Definitions.

As used in this part—

Actual time means either the specific time of day, to the hour and minute, or the precise amount of time spent in an activity, in hours and minutes, that must be included in the hours of duty record, including, where appropriate, reference to the applicable time zone and either standard time or daylight savings time.

Administrator means the Administrator of the Federal Railroad Administration or any person to whom the Administrator has delegated authority in the matter concerned.

Administrative duties means any activities required by the railroad as a condition of employment, related to reporting, recording, or providing an oral or written statement related to a current, previous, or future duty tour. Such activities are considered service for the railroad, and time spent in these activities must be included in the *total time on duty* for any *duty tour* with which it may commingle.

At the behest of the employee refers to time spent by an employee in a railroad-related activity that is not required by the railroad as a condition of employment, in which the employee voluntarily participates.

At the behest of the railroad refers to time spent by an employee in a railroad-required activity that compels an employee to perform service for the railroad as a condition of employment.

Broken (aggregate) service means one or more periods of time on duty within a single *duty tour* separated by one or more qualifying interim releases.

Call and release occurs when an employing railroad issues an employee a *report-for-duty time,* and then releases the employee from the requirement to report prior to the *report-for-duty time*.

Carrier, *common carrier*, and *common carrier engaged in interstate or foreign commerce by railroad* mean *railroad*.

Commingled service means—

(1) For a train employee or a signal employee, any non-covered service at the behest of the railroad and performed for the railroad that is not separated from *covered service* by a qualifying statutory off-duty period of 8 or 10 hours or more. Such commingled service is counted as time on duty pursuant to 49 U.S.C. 21103(b)(3) (for train employees) or 49 U.S.C. 21104(b)(2) (for signal employees).

(2) For a dispatching service employee, any non-covered service mandated by the railroad and performed for the railroad within any 24-hour period containing *covered service*. Such commingled service is counted as time on duty pursuant to 49 U.S.C. 21105(c).

Commuting means—

(1) For a train employee, the time spent in travel—

(i) Between the employee's residence and the employee's *regular reporting point*, and

(ii) In railroad-provided or authorized transportation to and from the lodging facility at the away-from-home terminal (excluding travel for purposes of an interim release), where such time (including travel delays and room availability) does not exceed 30 minutes.

(2) For a signal employee, the time spent in travel between the employee's residence and the employee's *headquarters*.

(3) For a dispatching service employee, the time spent in travel between the employee's residence and any reporting point.

Consecutive service is a period of unbroken *total time on duty* during a *duty tour*.

Covered service means—

(1) For a train employee, the portion of the employee's time on duty during which the employee is engaged in, or connected with, the movement of a train.

(2) For a dispatching service employee, the portion of the employee's time on duty during which the employee, by the use of an electrical or mechanical device, dispatches, reports, transmits, receives, or delivers an order related to or affecting the movement of a train.

(3) For a signal employee, the portion of the employee's time on duty during which the employee is engaged in installing, repairing, or maintaining a signal system.

Covered service assignment means—

(1) For a train employee, each unique assignment of the employee during a period of *covered service* that is associated with either a specific train or a specific yard job.

(2) For a signal employee, the assigned duty hours of the employee, including overtime, or unique trouble call assignments occurring outside the employee's assigned duty hours.

(3) For a dispatching service employee, each unique assignment for the employee that occurs within any 24-hour period in which the employee, by the use of an electrical or mechanical device, dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

Deadheading means the physical relocation of a train employee from one point to another as a result of a railroad-issued verbal or written directive.

Designated terminal means the home or away-from-home terminal for the assignment of a particular train crew.

Dispatching service employee means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

Duty location for a signal employee is the employee's *headquarters* or the precise location where the employee is expected to begin performing service for the railroad as defined in 49 U.S.C. 21104(b)(1) and (2).

Duty tour means—

(1) The total of all periods of *covered service* and *commingled service* for a train employee or a signal employee occurring between two *statutory off-duty periods* (i.e., off-duty periods of a minimum of 8 or 10 hours); or

(2) The total of all periods of *covered service* and *commingled service* for a dispatching service employee occurring in any 24-hour period.

Employee means an individual employed by a railroad or a contractor or subcontractor to a railroad who—

(1) Is actually engaged in or connected with the movement of any train, including a person who performs the duties of a hostler;

(2) Dispatches, reports, transmits, receives, or delivers an order pertaining to a train movement by the use of telegraph, telephone, radio, or any other electrical or mechanical device; or

(3) Is engaged in installing, repairing, or maintaining a signal system.

Final release is the time that a train employee or a signal employee is released from all activities at the behest of the railroad and begins his or her *statutory off-duty period*.

Headquarters means the regular assigned on-duty location for signal employees, or the lodging facility or crew quarters where traveling signal gangs reside when working at various system locations.

Interim release means an off-duty period applied to train employees only, of at least 4 hours but less than the required *statutory off-duty period* at a *designated terminal,* which off-duty period temporarily suspends the

accumulation of time on duty, but does not start a new *duty tour.*

Limbo time means a period of time treated as neither time on duty nor time off duty in 49 U.S.C. 21103 and 21104, and any other period of service for the railroad that does not qualify as either covered service or commingled service.

On-duty time means the actual time that an employee reports for duty to begin a *covered service assignment.*

Other-than-regular reporting point means any location where a train employee reports to begin or restart a *duty tour,* that is not the employee's *regular reporting point.*

Prior time off means the *amount of time* that an employee has been off duty between identifiable periods of service *at the behest of the railroad.*

Program edits are filters contained in the logic of an hours of service recordkeeping program that detect identifiable reporting errors made by a reporting employee at the time of data entry, and prevent the employee from submitting a record without first correcting or explaining any identified errors or anomalies.

Quick tie-up is a data entry process used only when an employee is within 3 minutes of, or is beyond, his or her statutory maximum on-duty period, which process allows an employee to enter only the basic information necessary for the railroad to identify the beginning of an employee's *statutory off-duty period,* to avoid the excess service that would otherwise be incurred in completing the full record for the *duty tour.* The information permitted in a quick tie-up process is limited to, at a maximum:

(1) Board placement time;

(2) Relieved location, date, and time;

(3) Final release location, date, and time;

(4) Contact information for the employee during the statutory off-duty period;

(5) Request for rest in addition to the statutory minimum, if provided by collective bargaining agreement or local practice;

(6) The employee may be provided an option to enter basic payroll information, related only to the duty tour being tied up; and

(7) Employee certification of the tie-up information provided.

Railroad means a person providing *railroad transportation.*

Railroad transportation means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including commuter or other short-haul rail passenger service in a metropolitan or suburban area, and high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Regular reporting point means the permanent on-duty location of a train employee's regular assignment that is established through a job bulletin assignment (either a job award or a forced assignment) or through an employee's exercise of seniority to be placed in an assignment. The assigned regular reporting point is a single fixed location identified by the railroad, even for extra board and pool crew employees.

Release means—

(1) For a train employee,

(i) The time within the *duty tour* that the employee begins an *interim release;*

(ii) The time that an employee completes a *covered service assignment* and begins another *covered service assignment* on a different train or job, or

(iii) The time that an employee completes a *covered service assignment* to begin another activity that counts as time on duty (including waiting for deadhead transportation to another duty location at which the employee will perform *covered service,* deadheading to duty, or any other *commingled service).*

(2) For a signal employee, the time within a *duty tour* that the employee—

(i) Completes his or her regular assigned hours and begins an off-duty period of at least one hour but less than a *statutory off-duty period;* or

(ii) Completes his or her return travel from a trouble call or other unscheduled duty and begins an off-duty period of at least one hour, but less than a *statutory off-duty period.*

(3) For a dispatching service employee, when he or she stops performing *covered service* and *commingled service* within any 24-hour period and begins an *off-duty period* of at least one hour.

Relieved time means—

(1) The actual time that a train employee stops performing a *covered service assignment* or *commingled service.*

(2) The actual time that a signal employee:

(i) Completes his or her assigned duty hours, or stops performing *covered service* or *commingled service,* whichever is later; or

(ii) Stops performing *covered service* associated with a trouble call or other unscheduled duty outside of normally assigned duty hours.

Reports for duty means that an employee—

(i) Presents himself or herself at the location established by the railroad at the time the railroad established for the employee to be present; and

(ii) Is ready to perform *covered service.*

Report-for-duty time means—

(1) For a train employee, the actual time that the employee is required to be present at a *reporting point* and prepared to start a *covered service assignment.*

(2) For a signal employee, the assigned starting time of an employee's scheduled shift, or the time that he or she receives a trouble call or a call for any other unscheduled duty during an off-duty period.

(3) For a dispatching service employee, when the employee begins the turn-over process at or before the beginning of his or her assigned shift, or begins any other activity at the behest of the railroad during any 24-hour period in which covered service is performed.

Reporting point means any location where an employee is required to begin *or restart a* duty tour.

Seniority move means a repositioning *at the behest of the employee,* usually a repositioning from a regular assignment or extra board to a different regularly assigned position or extra board, as the result of the employee's selection of a bulletin assignment or the employee's exercise of seniority over a junior employee.

Signal employee means an individual who is engaged in installing, repairing, or maintaining signal systems.

Station, office or tower means the precise location where a dispatching service employee is expected to perform service for the railroad as defined in 49 U.S.C. 21105(b) and (c).

Statutory off-duty period means the period of 8 or 10 consecutive hours or more time, that is the minimum off-duty period required under the hours of service laws for a train employee or a signal employee to begin a new 24-hour period for the purposes of calculating his or her *total time on duty.*

Total off-duty period means the actual amount of time that a train employee or a signal employee is off duty between duty tours after the previous final release and before the beginning of the next duty tour. This time may differ from the expected prior time off that will be generated by the recordkeeping system, if the employee performed service at the behest of the railroad between the duty tours.

Total time on duty (TTOD) means the total accumulation of time spent in periods of *covered service* and *commingled service* between qualifying *statutory off-duty periods* of 8 or 10

hours or more. Mandatory activities that do not constitute *covered service,* such as rules classes, when they may not attach to *covered service,* are counted as *limbo time,* rather than *commingled service,* which limbo time is not counted toward the calculation of *total time on duty.*

Train employee means an individual engaged in or connected with the movement of a train, including a hostler.

Travel time means—

(1) For a signal employee, the time spent in transportation between the employee's *headquarters* and an outlying duty point or between the employee's residence and an outlying duty point, or, between duty locations, including both on-track and on-highway vehicular travel.

(2) For a dispatching service employee, the time spent in travel between *stations, offices, or towers* during the employee's time on duty.

■ 5. Section 228.9 is amended by revising the section heading and paragraph (a) and adding paragraph (b), to read as follows:

§ 228.9 Records; general.

(a) Each manual record maintained under this part shall be—

(1) Signed by the employee whose time on duty is being recorded or, in the case of a train and engine crew or a signal employee gang, signed by the ranking crewmember;

(2) Retained for two years at locations identified by the carrier; and

(3) Available upon request at the identified location for inspection and copying by the Administrator during regular business hours.

(b) Each electronic record maintained under this part shall be—

(1) Certified by the employee whose time on duty is being recorded or, in the case of a train and engine crew or a signal employee gang, certified by the reporting employee who is a member of the train crew or signal gang whose time is being recorded;

(2) Electronically stamped with the certifying employee's name and the date and time of certification;

(3) Retained for 2 years in a secured file that prevents alteration after certification;

(4) Accessible by the Administrator through a computer terminal of the railroad, using a railroad-provided identification code and a unique password.

(5) Reproducible using the printing capability at the location where records are accessed.

■ 6. Section 228.11 is amended by revising paragraph (a) and adding paragraphs (b), (c), and (d) to read as follows:

§ 228.11 Hours of duty records.

(a) *In general.* Each railroad, or a contractor or a subcontractor of a railroad, shall keep a record, either manually or electronically, concerning the hours of duty of each employee. Each contractor or subcontractor of a railroad shall also record the name of the railroad for whom its employee performed covered service during the duty tour covered by the record. Employees who perform covered service assignments in a single duty tour that are subject to the recordkeeping requirements of more than one paragraph of this section, must complete the record applicable to the covered service position for which they were called, and record other covered service as an activity constituting other service at the behest of the railroad.

(b) *For train employees.* Except as provided by paragraph (c) of this section, each hours of duty record for a train employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

(2) Each covered service position in a duty tour.

(3) Amount of time off duty before beginning a new covered service assignment or resuming a duty tour.

(4) Train ID for each assignment required to be reported by this part, except for the following employees, who may instead report the unique job or train ID identifying their assignment:

(i) Utility employees assigned to perform covered service, who are identified as such by a unique job or train ID;

(ii) Employees assigned to yard jobs, except that employees assigned to perform yard jobs on all or parts of consecutive shifts must at least report the yard assignment for each shift;

(iii) Assignments, either regular or extra, that are specifically established to shuttle trains into and out of a terminal during a single duty tour that are identified by a unique job or train symbol as such an assignment.

(5) Location, date, and beginning time of the first assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and beginning time of the assignment immediately following the interim release.

(6) Location, date, and time relieved for the last assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and time relieved for the assignment immediately preceding the interim release.

(7) Location, date, and time released from the last assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and time released from the assignment immediately preceding the interim release.

(8) Beginning and ending location, date, and time for periods spent in transportation, other than personal commuting, if any, to the first assignment in a duty tour, from an assignment to the location of a period of interim release, from a period of interim release to the next assignment, or from the last assignment in a duty tour to the point of final release, including the mode of transportation (train, track car, railroad-provided motor vehicle, personal automobile, etc.).

(9) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

(10) Identification (code) of service type for any other service performed at the behest of the railroad.

(11) Total time on duty for the duty tour.

(12) Reason for any service that exceeds 12 hours total time on duty for the duty tour.

(13) The total amount of time by which the sum of total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours.

(14) The cumulative total for the calendar month of—

(i) Time spent in covered service;

(ii) Time spent awaiting or in deadhead transportation from a duty assignment to the place of final release; and

(iii) Time spent in any other service at the behest of the railroad.

(15) The cumulative total for the calendar month of time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty.

(16) Number of consecutive days in which a period of time on duty was initiated.

(c) *Exceptions to requirements for train employees.* Paragraphs (b)(13) through (b)(16) of this section do not apply to the hours of duty records of train employees providing commuter

rail passenger transportation or intercity rail passenger transportation.

(d) *For dispatching service employees.* Each hours of duty record for a dispatching service employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

(2) Each covered service position in a duty tour.

(3) Amount of time off duty before going on duty or returning to duty in a duty tour.

(4) Location, date, and beginning time of each assignment in a duty tour.

(5) Location, date, and time released from each assignment in a duty tour.

(6) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

(7) Total time on duty for the duty tour.

(e) *For signal employees.* Each hours of duty record for a signal employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

(2) Each covered service position in a duty tour.

(3) Headquarters location for the employee.

(4) Amount of time off duty before going on duty or resuming a duty tour.

(5) Location, date, and beginning time of each covered service assignment in a duty tour.

(6) Location, date, and time relieved for each covered service assignment in a duty tour.

(7) Location, date, and time released from each covered service assignment in a duty tour.

(8) Beginning and ending location, date, and time for periods spent in transportation, other than personal commuting, to or from a duty assignment, and mode of transportation (train, track car, railroad-provided motor vehicle, personal automobile, etc.).

(9) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

(10) Total time on duty for the duty tour.

(11) Reason for any service that exceeds 12 hours total time on duty for the duty tour.

■ 7. Add § 228.13 to read as follows:

§ 228.13 Preemptive effect.

Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except for a provision necessary to eliminate or reduce an essentially local safety hazard if that provision is not incompatible with a law, regulation, or order of the United States government and does not unreasonably burden interstate commerce. Nothing in this paragraph shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party has failed to comply with the Federal standard of care established by this part, has failed to comply with its own plan, rule, or standard that it created pursuant to this part, or has failed to comply with a State law, regulation, or order that is not incompatible with the first sentence of this paragraph.

■ 8. Section 228.19 is revised to read as follows:

§ 228.19 Monthly reports of excess service.

(a) *In general.* Except as provided in paragraph (h) of this section, each railroad, or a contractor or a subcontractor of a railroad, shall report to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, Washington, DC 20590, each instance of excess service listed in paragraphs (b) through (e) of this section, in the manner provided by paragraph (f) of this section, within 30 days after the calendar month in which the instance occurs.

(b) *For train employees.* Except as provided in paragraph (c) of this section, the following instances of excess service by train employees must be reported to FRA as required by this section:

(1) A train employee is on duty for more than 12 consecutive hours.

(2) A train employee continues on duty without at least 10 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 10 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.[1]

(3) A train employee returns to duty without at least 10 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 10 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.[1]

(4) A train employee returns to duty without additional time off duty, equal to the total amount of time by which the employee's sum of total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours.

(5) A train employee exceeds a cumulative total of 276 hours in the following activities in a calendar month:

(i) Time spent in covered service;

(ii) Time spent awaiting or in deadhead transportation from a duty assignment to the place of final release; and

(iii) Time spent in any other service at the behest of the railroad.

(6) A train employee initiates an on-duty period on more than 6 consecutive days, when the on-duty period on the sixth consecutive day ended at the employee's home terminal, and the seventh consecutive day is not allowed pursuant to a collective bargaining agreement or pilot project.

(7) A train employee returns to duty after initiating an on-duty period on 6 consecutive days, without 48 consecutive hours off duty at the employee's home terminal.

(8) A train employee initiates an on-duty period on more than 7 consecutive days.

(9) A train employee returns to duty after initiating an on-duty period on 7 consecutive days, without 72 consecutive hours off duty at the employee's home terminal.

(10) A train employee exceeds the following limitations on time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty:

(i) 40 hours in any calendar month completed prior to October 1, 2009;

(ii) 20 hours in the transition period from October 1, 2009–October 15, 2009;

(iii) 15 hours in the transition period from October 16, 2009–October 31, 2009; and

(iv) 30 hours in any calendar month completed after October 31, 2009.

(c) *Exception to requirements for train employees.* For train employees who provide commuter rail passenger transportation or intercity rail passenger transportation during a duty tour, the following instances of excess service must be reported to FRA as required by this section:

(1) A train employee is on duty for more than 12 consecutive hours.

(2) A train employee returns to duty after 12 consecutive hours of service without at least 10 consecutive hours off duty.

[1] Instances involving duty tours that are broken by four or more consecutive hours of off duty time at a designated terminal which duty tours do not constitute more than a total of 12 hours time on duty are not required to be reported, provided such duty tours are immediately preceded by 10 or more consecutive hours of off-duty time.

(3) A train employee continues on duty without at least 8 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 8 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.[2]

(4) A train employee returns to duty without at least 8 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 8 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.[2]

(d) *For dispatching service employees.* The following instances of excess service by dispatching service employees must be reported to FRA as required by this section:

(1) A dispatching service employee is on duty for more than 9 hours in any 24-hour period at an office where two or more shifts are employed.

(2) A dispatching service employee is on duty for more than 12 hours in any 24-hour period at any office where one shift is employed.

(e) *For signal employees.* The following instances of excess service by signal employees must be reported to FRA as required by this section:

(1) A signal employee is on duty for more than 12 consecutive hours.

(2) A signal employee continues on duty without at least 10 consecutive hours off duty during the preceding 24 hours.

(3) A signal employee returns to duty without at least 10 consecutive hours off duty during the preceding 24 hours.

(f) Except as provided in paragraph (h) of this section, reports required by paragraphs (b) through (e) of this section shall be filed in writing on FRA Form F–6180–3 [3] with the Office of Railroad Safety, Federal Railroad Administration, Washington, DC 20590. A separate form shall be used for each instance reported.

(g) *Use of electronic signature.* For the purpose of complying with paragraph (f) of this section, the signature required on Form FRA F–6180–3 may be provided to FRA by means of an electronic signature provided that:

(1) The record contains the printed name of the signer and the date and actual time that the signature was executed, and the meaning (such as authorship, review, or approval), associated with the signature;

(2) Each electronic signature shall be unique to one individual and shall not be used by, or assigned to, anyone else;

(3) Before a railroad, or a contractor or subcontractor to a railroad, establishes, assigns, certifies, or otherwise sanctions an individual's electronic signature, or any element of such electronic signature, the organization shall verify the identity of the individual;

(4) Persons using electronic signatures shall, prior to or at the time of such use, certify to the agency that the electronic signatures in their system, used on or after the effective date of this regulation, are the legally binding equivalent of traditional handwritten signatures;

(5) The certification shall be submitted, in paper form and signed with a traditional handwritten signature, to the Associate Administrator for Railroad Safety/Chief Safety Officer; and

(6) Persons using electronic signatures shall, upon agency request, provide additional certification or testimony that a specific electronic signature is the legally binding equivalent of the signer's handwritten signature.

(h) *Exception.* A railroad, or a contractor or subcontractor to a railroad, is excused from the requirements of paragraphs (a) and (f) of this section as to any employees for which—

(1) The railroad, or a contractor or subcontractor to a railroad, maintains hours of service records using an electronic recordkeeping system that complies with the requirements of subpart D of this part; and

(2) The electronic recordkeeping system referred to in paragraph (h)(1) of this section requires—

(i) The employee to enter an explanation for any excess service certified by the employee; and

(ii) The railroad, or a contractor or subcontractor of a railroad, to analyze each instance of excess service certified by one of its employees, make a determination as to whether each instance of excess service would be reportable under the provisions of paragraphs (b) through (e) of this section, and allows the railroad, or a contractor or subcontractor to a railroad, to append its analysis to its employee's electronic record; and

(iii) Allows FRA inspectors and State inspectors participating under 49 CFR Part 212 access to employee reports of excess service and any explanations provided.

■ 9. Section 228.23 is revised to read as follows:

§ 228.23 Criminal penalty.

Any person who knowingly and willfully falsifies a report or record required to be kept under this part or otherwise knowingly and willfully violates any requirement of this part may be liable for criminal penalties of a fine up to $5,000, imprisonment for up to two years, or both, in accordance with 49 U.S.C. 21311(a).

■ 10. Add subpart D to read as follows:

Subpart D—Electronic Recordkeeping

Sec.

Subpart D—Electronic Recordkeeping

§ 228.201 Electronic recordkeeping; general.

For purposes of compliance with the recordkeeping requirements of subpart B, a railroad, or a contractor or a subcontractor to a railroad may create and maintain any of the records required by subpart B through electronic transmission, storage, and retrieval provided that all of the following conditions are met:

(1) The system used to generate the electronic record meets all requirements of this subpart;

(2) The electronically generated record contains the information required by § 228.11;

(3) The railroad, or contractor or subcontractor to the railroad, monitors its electronic database of employee hours of duty records through sufficient number of monitoring indicators to ensure a high degree of accuracy of these records; and

(4) The railroad, or contractor or subcontractor to the railroad, trains its employees on the proper use of the electronic recordkeeping system to enter the information necessary to create their hours of service record, as required by § 228.207.

(5) The railroad, or contractor or subcontractor to the railroad, maintains an information technology security program adequate to ensure the integrity of the system, including the prevention of unauthorized access to the program logic or individual records.

(6) FRA's Associate Administrator for Railroad Safety/Chief Safety Officer may prohibit or revoke the authority to use an electronic system if FRA finds the system is not properly secure, is inaccessible to FRA, or fails to record and store the information adequately and accurately. FRA will record such a determination in writing, including the basis for such action, and will provide a copy of its determination to the

[2] Instances involving duty tours that are broken by four or more consecutive hours of off-duty time at a designated terminal which duty tours do not constitute more than a total of 12 hours time on duty are not required to be reported, provided such duty tours are immediately preceded by 8 or more consecutive hours of off-duty time.

[3] Form may be obtained from the Office of Railroad Safety, Federal Railroad Administration, Washington, DC 20590. Reproduction is authorized.

affected railroad, or contractor or subcontractor to a railroad.

§ 228.203 Program components.

(a) *System security.* The integrity of the program and database must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(1) Data input is restricted to the employee or train crew or signal gang whose time is being recorded, with the following exceptions:

(i) A railroad, or a contractor or subcontractor to a railroad, may allow its recordkeeping system to pre-populate fields of the hours of service record provided that—

(A) The recordkeeping system pre-populates fields of the hours of service record with information known to the railroad, or contractor or subcontractor to the railroad, to be factually accurate for a specific employee.

(B) The recordkeeping system may also provide the ability for employees to copy data from one field of a record into another field, where applicable.

(C) Estimated, historical, or arbitrary data are not used to pre-populate any field of an hours of service record.

(D) A railroad, or a contractor or a subcontractor to a railroad, is not in violation of this paragraph if it makes a good faith judgment as to the factual accuracy of the data for a specific employee but nevertheless errs in pre-populating a data field.

(E) The employee may make any necessary changes to the data by typing into the field, without having to access another screen or obtain clearance from the railroad, or a contractor or subcontractor to a railroad.

(ii) A railroad, or a contractor or a subcontractor to a railroad, shall allow employees to complete a verbal quick tie-up, or to transmit by facsimile or other electronic means the information necessary for a quick tie-up, if—

(A) The employee is released from duty at a location at which there is no terminal available;

(B) Computer systems are unavailable as a result of technical issues; or

(C) Access to computer terminals is delayed and the employee has exceeded his or her maximum allowed time on duty.

(2) No two individuals have the same electronic identity.

(3) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record.

(4) Any amendment to a record is either—

(i) Electronically stored apart from the record that it amends, or

(ii) Electronically attached to the record as information without changing the original record.

(5) Each amendment to a record uniquely identifies the individual making the amendment.

(6) The electronic system provides for the maintenance of inspection records as originally submitted without corruption or loss of data.

(7) Supervisors and crew management officials can access, but cannot delete or alter the records of any employee after the report-for-duty time of the employee or after the record has been certified by the reporting employee.

(b) *Identification of the individual entering data.* The program must be capable of identifying each individual who entered data for a given record. If a given record contains data entered by more than one individual, the program must be capable of identifying each individual who entered specific information within the record.

(c) *Capabilities of program logic.* The program logic must have the ability to—

(1) Calculate the total time on duty for each employee, using data entered by the employee and treating each identified period as defined in § 228.5;

(2) Identify input errors through the use of program edits;

(3) Require records, including outstanding records, the completion of which was delayed, to be completed in chronological order;

(4) Require reconciliation when the known (system-generated) prior time off differs from the prior time off reported by an employee;

(5) Require explanation if the total time on duty reflected in the certified record exceeds the statutory maximum for the employee;

(6) Require the use of a quick tie-up process when the employee has exceeded or is within three minutes of his or her statutory maximum time on duty;

(7) Require that the employee's certified final release be not more than three minutes in the future, and that the employee may not certify a final release time for a current duty tour that is in the past, compared to the clock time of the computer system at the time that the record is certified, allowing for changes in time zones;

(8) Require automatic modification to prevent miscalculation of an employee's total time on duty for a duty tour that spans changes from and to daylight savings time;

(9) For train employees, require completion of a full record at the end of a duty tour when the employee initiates a tie-up with less than the statutory maximum time on duty and a quick tie-up is not mandated;

(10) For train employees, disallow use of a quick tie-up when the employee has time remaining to complete a full record, except as provided in paragraph (a)(1)(ii) of this section.

(11) Disallow any manipulation of the tie-up process that precludes compliance with any of the requirements specified by paragraphs (c)(1) through (c)(10) of this section.

(d) *Search capabilities.* The program must contain sufficient search criteria to allow any record to be retrieved through a search of any one or more of the following data fields, by specific date or by a date range not exceeding 30 days for the data fields specified by paragraphs (d)(1) and (d)(2) of this section, and not exceeding one day for the data fields specified by paragraphs (d)(3) through (d)(7) of this section:

(1) Employee, by name or identification number;

(2) Train or job symbol;

(3) Origin location, either yard or station;

(4) Released location, either yard or station;

(5) Operating territory (i.e., division or service unit, subdivision, or railroad-identified line segment);

(6) Certified records containing one or more instances of excess service; and

(7) Certified records containing duty tours in excess of 12 hours.

(e) The program must display individually each train or job assignment within a duty tour that is required to be reported by this part.

§ 228.205 Access to electronic records.

(a) FRA inspectors and State inspectors participating under 49 CFR Part 212 must have access to hours of service records created and maintained electronically that is obtained as required by § 228.9(b)(4).

(b) Railroads must establish and comply with procedures for providing an FRA inspector or participating State inspector with an identification number and temporary password for access to the system upon request, which access will be valid for a period not to exceed seven days. Access to the system must be provided as soon as possible and no later than 24 hours after a request for access.

(c) The inspection screen provided to FRA inspectors and participating State inspectors for searching employee hours of duty records must be formatted so that—

(1) Each data field entered by an employee on the input screen is visible to the FRA inspector or participating State inspector; and

(2) The data fields are searchable as described in § 228.203(d) and yield access to all records matching criteria specified in a search.

(3) Records are displayed in a manner that is both crew-based and duty tour oriented, so that the data pertaining to all employees who worked together as part of a crew or signal gang will be displayed together, and the record will include all of the assignments and activities of a given duty tour that are required to be recorded by this part.

§ 228.207 Training.

(a) *In general.* A railroad, or a contractor or subcontractor to a railroad, shall provide its train employees, signal employees, and dispatching service employees and its supervisors of these employees with initial training and refresher training as provided in this section.

(b) *Initial training.* (1) Initial training shall include the following:

(i) Instructional components presented in a classroom setting or by electronic means; and

(ii) Experiential (''hands-on'') components; and

(iii) Training on—

(A) The aspects of the hours of service laws relevant to the employee's position that are necessary to understanding the proper completion of the hours of service record required by this part, and

(B) The entry of hours of service data, into the electronic system or on the appropriate paper records used by the railroad or contractor or subcontractor to a railroad for whom the employee performs covered service; and

(iv) Testing to ensure that the objectives of training are met.

(2) Initial training shall be provided—

(i) To each current employee and supervisor of an employee as soon after May 27, 2009 as practicable; and

(ii) To new employees and supervisors prior to the time that they will be required to complete an hours of service record or supervise an employee required to complete an hours of service record.

(c) *Refresher training.* (1) The content and level of formality of refresher training should be tailored to the needs of the location and employees involved, except that the training shall—

(i) Emphasize any relevant changes to the hours of service laws, the reporting requirements in this part, or the carrier's electronic or other recordkeeping system since the employee last received training; and

(ii) Cover any areas in which supervisors or other railroad managers are finding recurrent errors in the employees' records through the monitoring indicators.

(2) Refresher training shall be provided to each employee any time that recurrent errors in records prepared by the employee, discovered through the monitoring indicators, suggest, for example, the employee's lack of understanding of how to complete hours of service records.

Issued in Washington, DC, on May 19, 2009.

Karen J. Rae,

Deputy Administrator.

[FR Doc. E9–12059 Filed 5–21–09; 4:15 pm]

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Appendix F: Federal Register, Vol. 77, No. 40

Wednesday, February 29, 2012, Rules and Regulations

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Chapter II

[Docket No. 2009–0057, Notice No. 2]

Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended; Response to Public Comment

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Statement of agency policy and interpretation; response to public comment.

SUMMARY: In this document FRA states the agency's position on certain interpretive questions arising out of some of the complex and important amendments enacted in 2008 to the Federal railroad safety laws that govern such matters as how long a railroad may require or allow an employee in a certain category to remain on duty and how long the railroad must give the employee off duty before the employee may go on duty again. In issuing this interpretation, FRA has considered public comments that it received on its June 2009 document that contained the agency's interim interpretations of those amended laws.

DATES: This document is effective on May 29, 2012.

FOR FURTHER INFORMATION CONTACT: Colleen A. Brennan, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC–12, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6028 or 202–493–6052); Matthew T. Prince, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC–12, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6146 or 202–493–6052); Rich Connor, Operating Practices Specialist, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue SE., RRS–11, Mail Stop 25, Washington, DC 20590 (telephone 202–493–1351); or Thomas McFarlin, Office of Safety Assurance and Compliance, Staff Director, Signal & Train Control Division, FRA, Mail Stop 25, West Building 3rd Floor West, Room W35–332, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–6203).

SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

11. Is the additional rest required when on-duty time plus limbo time exceeds 12 hours (during which communication with an employee is prohibited) to be measured only in whole hours, so that the additional rest requirement is not a factor until the total reaches 13 hours?

B. Questions Related to the Requirements Applicable to Train Employees for 48 or 72 Hours Off at the Home Terminal

1. Is a ''Day'' a calendar day or a 24-hour period for the purposes of this provision?
2. If an employee is called for duty but does not work, has the employee initiated an on-duty period? If there is a call and release? What if the employee has reported?
3. Does deadheading from a duty assignment to the home terminal for final release on the 6th or 7th day count as a day that triggers the 48-hour or 72-hour rest period requirement?
4. Does attendance at a mandatory rules class or other mandatory activity that is not covered service but is non-covered service, count as initiating an on-duty period on a day?
5. If an employee is marked up (available for service) on an extra board for 6 days but only works 2 days out of the 6, is the 48-hour rest requirement triggered?
6. If an Employee initiates an on-duty period on 6 consecutive days, ending at an away-from-home terminal and then has 28 hours off at an away-from-home terminal, may the employee work back to the home terminal? The statute says that after initiating an on-duty period on 6 consecutive days the employee may work back to the home terminal on the 7th day and then must get 72 hours off, but what if the employee had a day off at the away-from-home terminal after the 6th day?
7. May an employee who works 6 consecutive days vacation relief at a ''Temporary Home Terminal'' work back to the regular home terminal on the 7th day?

C. Questions Related to the 276-Hour Monthly Maximum for Train Employees of Time on Duty, Waiting for or Being in Deadhead Transportation to Final Release, and in Other Mandatory Service for the Carrier

1. If an employee reaches or exceeds 276 hours for the calendar month during a trip that ends at the employee's away-from-home terminal, may the railroad deadhead the employee home during that month?
2. How will FRA apply the 276-hour cap to employees who only occasionally perform covered service as a train employee, but whose hours, when combined with their regular shifts in non-covered service, would exceed 276 hours?
3. Does the 276-hour count reset at midnight on the first day of a new month?
4. May an employee accept a call to report for duty when he or she knows there are not enough hours remaining in the employee's 276-hour monthly limitation to complete the assignment or the duty tour, and it is not the last day of the month, so the entire duty tour will be counted toward the total for the current month?
5. What activities constitute ''Other Mandatory Service for the Carrier,'' which counts towards the 276-hour monthly limitation?
6. Does time spent documenting transfer of hazardous materials (Transportation Security Administration requirement) count against the 276-hour monthly maximum?

D. Other Interpretive Questions Related to the RSIA Amendments to the Old Hours of Service Laws

1. Does the 30-hour monthly maximum limitation on time awaiting and in deadhead transportation to final release only apply to time awaiting and in deadhead transportation after 12 consecutive hours on duty?
2. Did the RSIA affect whether a railroad may obtain a waiver of the provisions of the new hours of service laws?

I. Executive Summary

Having considered public comments in response to FRA's June 26, 2009 interim statement of agency policy and interpretation (Interim Interpretations) and its proposed interpretation, 74 FR 30665, FRA issues this final statement of agency policy and interpretation.

Federal laws governing railroad employees' hours of service date back to 1907 with the enactment of the Hours of Service Act (Pub. L. 59–274, 34 Stat. 1415), and FRA, under delegations from the Secretary of Transportation (Secretary), has long administered statutory hours of service requirements for the three groups of employees now covered under the statute, namely employees performing the functions of train employees, signal employees, and dispatching service employees, as those terms are defined at 49 U.S.C. 21101. See 49 CFR 1.49; 49 U.S.C. 21101–21109, 21303. These requirements have been amended several times over the years, most recently in the Rail Safety Improvement Act of 2008 (Pub. L. 110–432, Div. A) (RSIA). The RSIA substantially amended the requirements of 49 U.S.C. 21103, applicable to train employees, defined as ''individual[s] engaged in or connected with the movement of a train, including a hostler,'' 49 U.S.C. 21101(5), and the requirements of 49 U.S.C. 21104, applicable to signal employees, defined as ''individual[s] who [are] engaged in installing, repairing, or maintaining signal systems.'' 49 U.S.C. 21101(4). FRA previously discussed these amendments in its Interim Interpretations, and now clarifies those interpretations and answers questions raised by commenters. The current hours of service laws are summarized very briefly below, divided by type of covered service.

	Train employees	Signal employees	Dispatching service employees
Citation	49 U.S.C. 21103	49 U.S.C. 21104	49 U.S.C. 21105
Covered Individuals	Individuals engaged in or connected with the movement of a train, including hostlers. Train employees who are engaged in commuter or intercity rail passenger transportation, as defined in 49 CFR part 228, subpart F, are instead subject to that regulation. See 49 U.S.C. 21102(c)(3).	Individuals engaged in installing, repairing, or maintaining signal systems.	Operators, train dispatchers, or any other employee who by use of an electrical or mechanical device dispatches, reports, transmits, receives or delivers orders related to or affecting train movements.
Limitations on Time on Duty in a Single Tour.	May not remain or go on duty in excess of 12 hours or if the employee has not had at least 10 consecutive hours off duty during the prior 24 hours.	May not remain or go on duty in excess of 12 hours or if the employee has not had at least 10 consecutive hours off duty during the prior 24 hours.	May not remain or go on duty for more than 9 or 12 hours in a 24-hour period, depending on the number of shifts employed at the tower, office station, or place the employee is on duty.

Citation	Train employees 49 U.S.C. 21103	Signal employees 49 U.S.C. 21104	Dispatching service employees 49 U.S.C. 21105
Minimum Off-Duty Period Between Duty Tours.	10 consecutive hours, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest. Additional time off duty is required when the total of time on duty and time waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release that is not time off duty exceeds 12 consecutive hours, which must also be uninterrupted.	10 consecutive hours, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest.	Not applicable.
Minimum Off-Duty Period Within a Duty Tour.	At least 4 hours of time off duty at a designated terminal, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest.	At least 30 minutes of time off duty	Not applicable.
Limitations on Consecutive Duty Tours.	May not remain or go on duty after initiating an on-duty period on six consecutive days without receiving 48 consecutive hours off duty and free from any service for any railroad carrier at the employee's home terminal. Employees are permitted to initiate a seventh consecutive day when the employee ends the sixth consecutive day at the away-from-home terminal, as part of a pilot project, or as part of a collectively bargained agreement entered into prior to April 16, 2010 that expressly provides for such a schedule. Employees performing service on this additional day must receive 72 consecutive hours free from any service for any railroad carrier at their home terminal before going on duty again as a train employee.	None	None.
Monthly Cumulative Limitations.	May not remain or go on duty, wait for or be in deadhead transportation to the point of final release, or be in any other mandatory service for the carrier in any calendar month where the employee has spent a total of 276 hours on duty, waiting for or in deadhead transportation from a duty assignment to the place of final release, or in any other mandatory service for the carrier. May not exceed a total of 30 hours per calendar month spent waiting for or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty that is neither time on duty nor time off duty, not including interim rest periods, except in the circumstances stated.	None	None.
Time Neither On Duty nor Off Duty As Defined by the Statute.	Time spent in deadhead transportation from a duty assignment to the place of final release.	Time spent returning from a trouble call, whether the employee goes directly to the employee's residence or by way of the employee's headquarters.	None.

Citation	Train employees 49 U.S.C. 21103	Signal employees 49 U.S.C. 21104	Dispatching service employees 49 U.S.C. 21105
		Time after scheduled duty hours necessarily spent in completing the trip directly to the employee's residence or to the employee's headquarters, if the employee has not completed the trip from the final outlying worksite of the duty period at the end of scheduled duty hours, or if the employee is released from duty at an outlying worksite before the end of the employee's scheduled duty hours to comply with 49 U.S.C. 21104. However, time spent in transportation on an on-track vehicle is time on duty.	
Emergencies in General.	A train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for no more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency.	A signal employee may be allowed to remain or go on duty for no more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of that employee is related to the emergency. Routine repairs, routine maintenance, or routine inspection of signal systems is not an emergency that allows for additional time on duty.	A dispatching service employee may be allowed to remain or go on duty for no more than 4 additional hours during a period of 24 consecutive hours for no more than 3 days during a period of 7 consecutive days.
End of Emergency	The emergency ends when the track is cleared and the railroad line is open for traffic.	The emergency ends when the signal system is restored to service.	Not Applicable.

In the proposed interpretation that appeared in the same document as the Interim Interpretations, FRA proposed a new interpretation of the new hours of service laws with respect to the 24-hour period within which a train employee or signal employee must have had the minimum 10-hour statutory off-duty period before the employee is allowed to go on duty or remain on duty. This proposed interpretation would have required that the train employee or signal employee have had the statutory minimum off-duty period in the 24 hours preceding any moment during which that employee is on duty, making the maximum work window 14 hours after the end of the statutory minimum off-duty period. In this final statement of agency policy, FRA rejects the proposed interpretation and maintains the longstanding ''fresh start'' interpretation, which requires only that the statutory minimum off-duty period be within the 24 hours before a train employee or signal employee initiates an on-duty period. As a result, there will be no change to the current interpretation that the statutory minimum off-duty period must only be within the 24 hours prior to the time when an employee initiates an on-duty period.

The other issues addressed by FRA largely fall into three categories: questions relating to the ''consecutive-days'' limitation, the prohibition on communication with train employees and signal employees during their statutory minimum off-duty periods, and the monthly limitation for train employees of 276 hours in time on duty, waiting for or in deadhead transportation, or performing any other mandatory service for the railroad carrier. Each issue is discussed in significantly more detail in the subsequent sections of this document; this summary provides only a brief overview of FRA's policy and interpretation.

In the Interim Interpretations, FRA defined the ''day'' in the consecutive-days limitation to be a calendar day, on the basis that such an interpretation would be administratively simpler. Experience with the application of this definition and public comments on the definition show that the ''calendar day'' interpretation was more complicated and provided less protection against fatigue than originally anticipated; as a result, FRA has revised its interpretation of ''day'' in the context of the ''consecutive-days'' limitation to refer to the 24-hour period following an employee's final release from duty. Under this interpretation, if an employee does not initiate an on-duty period within 24 hours of the employee's final release from the previous duty tour, this will count as a ''day'' in which the employee did not initiate an on-duty period, and the string of consecutive days will be broken.

Another source of confusion in the Interim Interpretations was FRA's definition of ''work'' in the ''consecutive-days'' limitation's allowance that an employee may ''work'' on a seventh consecutive day in certain circumstances. FRA has revised this interpretation to reduce confusion by clearly stating that ''work'' for the ''consecutive-days'' limitation is equivalent to ''initiate an on-duty period.'' This earlier definition of ''work'' also led some commenters to be confused about how stand-alone deadhead transportation would be treated with respect to the initiation of an on-duty period; FRA has clarified that a stand-alone deadhead is not time on duty, and is therefore not the initiation of an on-duty period. Therefore, a day in which an employee is in deadhead transportation but does not engage in any covered service with which the deadhead can commingle will not be counted as part of the series of consecutive days, and will break that series.

Similarly, if an employee is called to report for duty, but does not actually report for duty, such an employee has not initiated an on-duty period for the purposes of the consecutive-days

limitation. However, employees that do report for duty have initiated an on-duty period, even if they are released from duty shortly thereafter, before performing any covered service. FRA also clarifies that, while other service for the railroad may not be time on duty if it does not commingle with covered service, this fact does not prevent commingling if the other service is not separated from the covered service by a statutory minimum off-duty period. In response to a question relating to the interaction between the ''6-day'' limitation and the ''7-day'' limitation, FRA notes that an employee who is eligible to initiate an on-duty period for 7 consecutive days but only initiates an on-duty period on 6 consecutive days must have 48 hours of time off duty and free from any service for any railroad. FRA also provides clarification on the impact of the consecutive-days limitations on employees who choose to work for multiple railroads. Finally, in response to a question in the comments, FRA provides additional discussion of when an employee may be subject to individual liability enforcement action for deliberately misrepresenting his or her availability.

On the issue of the prohibition on communication by the railroad with train employees and signal employees, comments received in response to the Interim Interpretations indicated significant confusion over the period of time during which the prohibition applies. FRA explains that, because the prohibition applies only to certain off-duty periods such as the statutory minimum off-duty period, railroads are free to communicate with train employees and signal employees so long as there is sufficient undisturbed time off duty to complete the appropriate type of off-duty period. Similarly, because the prohibition only applies to certain off-duty periods, a violation of the prohibition does not occur unless a disruptive communication prevents an employee from having sufficient rest to avoid excess service. For example, if a railroad interrupted an employee's rest, but restarted the rest period and provided a full statutory off-duty period after the interruption before the employee was next called to report for duty, there would be no violation, because the employee had 10 hours uninterrupted rest between duty tours. Comments also indicated the tension between the Interim Interpretations addressing an employee's ability to contact the railroad and establishing a time to report during a statutory minimum off-duty period. FRA has resolved this issue by clearly stating that employees may call a railroad or contractor for any purpose during rest periods required to be free from disruptive communication, including establishing a time to report, while preserving the longstanding interpretation that some types of conversations are service for the railroad that would not be time off duty.

On a related topic, comments requested that employees be able to give advance permission to railroads to communicate during the prohibited time, such that employees would only need to allow communications once for all of their applicable off-duty periods. However, railroads and contractors are only permitted to contact employees during the prohibited times if the employee contacts the railroad or contractor during the prohibited time and specifically permits a return contact. Employees are not permitted to grant advance permission for all off-duty periods; a communication from an employee to a railroad or contractor applies only to the off-duty period in which the communication was made. Because the prohibition applies to ''communication,'' and not phone calls specifically, the prohibition applies to all forms of communication. However, because employees are permitted to initiate a communication, means of providing information that can be accessed at the employee's option, such as a railroad Web site or messages sent to a railroad-provided phone, do not violate the prohibition so long as employees have the option of whether or not to check for such messages.

FRA also received several questions concerning the 276-hour monthly limit on service for the railroad by train employees. Most of these questions discussed FRA's note that activities that an employee has the freedom to schedule, such as an appointment the employee makes for a vision exam, will not count towards the 276-hour limitation. This does not mean that time spent in such activities, which can also include activities like optional rules refresher classes or the acquisition of security access cards for hazardous materials facilities, no longer commingle with time on duty. FRA clarifies that if these activities are not separated from time on duty by a statutory minimum off-duty period, the time spent in these activities will commingle, become time on duty, and count toward the monthly limitation. FRA also explains that the 276-hour monthly limitation applies only to single railroads, such that an employee who chooses to work for multiple railroads will be subject to separate 276-hour limitations for each railroad.

Finally, FRA reiterates that merely reporting for duty is not an act of deliberately misrepresenting availability that would make an employee subject to individual liability for violations of the hours of service laws.

In addition to these topics, FRA also addresses several miscellaneous issues raised by commenters. This includes a discussion of the function-based interpretation of which employees are covered by the hours of service laws. As has long been the case, only employees who perform the functions described in the ''definitions'' section of the hours of service laws, 49 U.S.C. 21101, are covered under the hours of service laws. This may or may not include employees who are described as ''yardmasters'' or ''mechanical employees.'' FRA also maintains the longstanding interpretation that time spent commuting is time off duty, and accordingly an employee may commute during the uninterrupted rest period. One commenter asked if the statutory exceptions to the time counted towards the monthly limitation on limbo time apply to the requirement that an employee receive additional time off after exceeding 12 hours of time on duty and time waiting for or in deadhead transportation; because these exceptions explicitly state that they only apply to the monthly limit, the exceptions do not also apply to the additional rest requirement. Thus, an employee will still be required to receive additional rest, even if one of the exceptions to the monthly limitation occurred during the employee's duty tour and that situation may have contributed to extending the duty tour which resulted in the need for additional rest.

With respect to signal employees, FRA explains the application of the exclusivity provision; because it applies only to signal employees, and signal employees are covered by the ''signal employee'' provision of the hours of service laws (including the exclusivity provision), only an employee who is subject to FRA's hours of service laws is not subject to the Federal Motor Carrier Safety Administration's (FMCSA) hours of service regulations during the same duty tour as a result of the exclusivity provision. An individual who does not work as a signal employee during a particular duty tour may instead be subject to the FMCSA hours of service regulations during that tour if he or she performs functions covered by those regulations, such as driving a commercial motor vehicle.

Finally, the Interim Interpretations are reprinted for ease of reference. Where the interpretation has changed, the text has been replaced with a reference to

where in this document the new answer can be found.

II. Background

On October 16, 2008, the Rail Safety Improvement Act of 2008 (RSIA) was enacted. See Public Law 110–432, Div. A, 122 Stat. 4848. Section (Sec.) 108 of the RSIA made important changes to 49 U.S.C. ch. 211, Hours of service, as amended through October 15, 2008 (the old hours of service laws). See 122 Stat. 4860–4866. Some of these changes became effective immediately on the date of enactment, and others became effective nine months later, on July 16, 2009. In particular, under Sec. 108(g) of the RSIA, subsections (d), (e), (f), and (g) of the section became effective on the date of enactment of the RSIA, and subsections (a), (b), and (c) of the section became effective nine months later, on July 16, 2009. Because of the significance of the amendments to the old hours of service laws made by Sec. 108, on June 26, 2009, FRA published an interim statement of agency policy and interpretation (Interim Interpretations) to address questions of statutory interpretation that had arisen so far with respect to the hours of service laws as amended by the RSIA (the new hours of service laws). 74 FR 30665 (June 26, 2009). In the same document, FRA also proposed a new interpretation of the new hours of service laws with respect to the 24-hour period within which a train employee or signal employee must have had the minimum statutory off-duty period before the employee is allowed to go on duty or remain on duty (Proposed Interpretation).

As with the Interim Interpretations, FRA is not addressing the amendments to the old hours of service laws made by Sec. 420 of the RSIA, which changed 49 U.S.C. 21106, Limitations on employee sleeping quarters, effective October 16, 2008. See 76 FR 67073 (Oct. 31, 2011). Nor is FRA presently revising either appendix A of 49 CFR part 228, which contains FRA's previously published interpretations of the old hours of service laws, known until the 1994 recodification as the Hours of Service Act (see Pub. L. 103–272), nor FRA's previously published interpretations concerning the limitations on hours of service of individuals engaged in installing, repairing or maintaining signal systems, an interim statement of agency policy and interpretation at 42 FR 4464 (Jan. 25, 1977). FRA plans to make conforming changes and other changes to 49 CFR part 228, appendix A, and to previously existing technical bulletins, in the future.

III. Changes in the Old Hours of Service Laws Made by Sec. 108 of the RSIA

A. Extending Hours of Service Protections to Employees of Contractors and Subcontractors to Railroads Who Perform Certain Signal-Related Functions

Sec. 108(a) of the RSIA (Sec. 108(a)) amended the definition of ''signal employee'', to eliminate the words ''employed by a railroad carrier''. 49 U.S.C. 21101(4). With this amendment, employees of contractors or subcontractors to a railroad who are engaged in installing, repairing, or maintaining signal systems (the functions within the definition of signal employee in the old hours of service laws) are covered by the new hours of service laws, because a signal employee under the new hours of service laws is no longer by definition only a railroad employee.

It should be noted that an employee of a contractor or subcontractor to a railroad who is ''engaged in or connected with the movement of a train'' was considered a ''train employee'' under the old hours of service laws and continues to be considered a train employee under the new hours of service laws. 49 U.S.C. 21101(5). Likewise, an employee of a contractor or subcontractor to a railroad who ''by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements'' was considered a ''dispatching service employee'' under the old hours of service laws and continues to be considered a ''dispatching service employee'' under the new hours of service laws. 49 U.S.C. 21101(2).

B. Changing Hours of Service Requirements Related to Train Employees

Sec. 108(b) amended the old hours of service requirements for train employees in many ways, all of which amendments became effective July 16, 2009, except with respect to train employees providing commuter or intercity passenger rail service, whom Sec. 108(d) made subject initially to the old hours of service laws and then to regulations promulgated by FRA if issued timely, and, if not, to the new hours of service laws. 49 U.S.C. 21103 and 21102.[1] Sec. 108(b) limited train employees to 276 hours of time on-duty, awaiting or in deadhead transportation from a duty assignment to the place of final release, or in any other mandatory service for the carrier per calendar month. 49 U.S.C. 21103(a)(1). The provision retained the existing maximum of 12 consecutive hours on duty, but increased the minimum off-duty period to 10 consecutive hours during the prior 24-hour period. 49 U.S.C. 21103(a)(2), (3).

Sec. 108(b) also required that after an employee initiates an on-duty period each day for six consecutive days, the employee must receive at least 48 consecutive hours off duty at the employee's home terminal, during which the employee is unavailable for any service for any railroad; except that if the sixth on-duty period ends at a location other than the home terminal, the employee may initiate an on-duty period for a seventh consecutive day in order to reach the employee's home terminal, but must then receive at least 72 consecutive hours off duty at the employee's home terminal, during which time the employee is unavailable for any service for any railroad. 49 U.S.C. 21103(a)(4).

Sec. 108(b) further provided that employees may also initiate an on-duty period for a seventh consecutive day and must then receive 72 consecutive hours off duty if, for a period of 18 months after the enactment of the RSIA, such schedules are expressly provided for in an existing collective bargaining agreement, or after that 18-month period has ended, such schedules are expressly provided for by a collective bargaining agreement entered into during that period, or a pilot program that is either authorized by collective bargaining agreement, or related to work rest cycles under the hours of service laws at 49 U.S.C. 21108 (Sec. 21108). 49 U.S.C. 21103(a)(4).

Sec. 108(b) also provided that the Secretary may waive the requirements of 48 and 72 consecutive hours off duty if the procedures of 49 U.S.C. 20103 are followed (i.e., essentially, if public notice and an opportunity for an oral presentation are provided prior to issuing the waiver), if a collective bargaining agreement provides a different arrangement that the Secretary determines is in the public interest and consistent with safety. *Id.*

Sec. 108(b) also significantly changed the old hours of service requirements for train employees by establishing for the first time a limitation on the amount of time an employee may spend awaiting and in deadhead transportation. 49 U.S.C. 21103(c)(1). In particular, it provided that a railroad may not require or allow an employee to exceed 40 hours per month awaiting and in

[1] FRA has promulgated regulations effective October 15, 2011 establishing hours of service requirements for train employees providing commuter or intercity passenger rail service. 76 FR 50360 (August 12, 2011).

deadhead transportation from duty that is neither time on duty nor time off duty from the July 16, 2009 effective date of the provision through October 15, 2009,[2] with that number decreasing to 30 hours per employee per month beginning October 16, 2009, except in certain situations. These monthly limits do not apply if the train carrying the employee is directly delayed by casualty, accident, act of God, derailment, major equipment failure that keeps the train from moving forward, or other delay from unforeseeable cause. 49 U.S.C. 21103(c)(2). Railroads are required to report to the Secretary all instances in which these limitations are exceeded. 49 U.S.C. 21103(c)(3). See also 49 CFR 228.19. In addition, the railroad is required to provide the train employee with additional time off duty equal to the amount that the combination of the total time on duty and time spent awaiting or in transportation to final release exceeds 12 hours for a particular duty tour. 49 U.S.C. 21103(c)(4).

Finally, Sec. 108(b) restricted railroads' communication with their train employees, except in case of emergency, during the minimum statutory 10-hour off-duty period, statutory periods of interim release, and periods of additional rest required equal to the amount that combined on-duty time and time awaiting or in transportation to final release exceeds 12 hours. 49 U.S.C. 21103(e). Further, the Secretary may waive this provision for train employees of commuter or intercity passenger railroads if the Secretary determines that a waiver would not reduce safety and is necessary to efficiency and on time performance. *Id.* However, because train employees of commuter and intercity passenger railroads are no longer subject to the statutory hours of service limitations, such waivers are no longer applicable to these employees.

As was alluded to earlier, Sec. 108(d) provided that the requirements described above for train employees did not go into effect on July 16, 2009, for train employees of commuter and intercity passenger railroads. 49 U.S.C. 21102(c). Sec. 108(d) provided the Secretary with the authority to issue hours of service rules and orders applicable to these train employees, which may be different than the statute applied to other train employees. 49 U.S.C. 21109(b). Sec. 108(d) further provided that these train employees who provide commuter or intercity passenger rail service would continue to be governed by the old hours of service laws (as they existed immediately prior to the enactment of the RSIA) until the effective date of regulations promulgated by the Secretary. 49 U.S.C. 21102(c). If no new regulations had been promulgated before October 16, 2011, the provisions of Sec. 108(b) would have been extended to these employees at that time. *Id.* Such regulations have since been timely promulgated, 76 FR 50360 (August 12, 2011), to be codified at 49 CFR part 228, subpart F, with an effective date of October 15, 2011. Accordingly, the hours of service of train employees who provide commuter and intercity passenger rail service are not governed by the statutory hours of service laws at 49 U.S.C. 21103, but by those regulations.

C. Changing Hours of Service Requirements Related to Signal Employees

Sec. 108(c) amended the hours of service requirements for signal employees in a number of ways. 49 U.S.C. 21104. As was noted above, by amending the definition of ''signal employee,'' Sec. 108(a) extended the reach of the substantive requirements of Sec. 108(c) to a contractor or subcontractor to a railroad carrier and its officers and agents. 49 U.S.C. 21101(4). In addition, as Sec. 108(b) did for train employees, Sec. 108(c) retained for signal employees the existing maximum of 12 consecutive hours on duty, but increased the minimum off-duty period to 10 consecutive hours during the prior 24-hour period. 49 U.S.C. 21104(a)(1), (2). Further, Sec. 108(c) deleted the prohibition in the old hours of service laws at 49 U.S.C. 21104(a)(2)(C) against requiring or allowing a signal employee to remain or go on duty ''after that employee has been on duty a total of 12 hours during a 24-hour period, or after the end of that 24-hour period, whichever occurs first, until that employee has had at least 8 consecutive hours off duty.''

Sec. 108(c) also eliminated language in the old hours of service laws stating that the last hour of signal employee's return from final trouble call was time off duty, and defined ''emergency situations'' in which the new hours of service laws permit signal employees to work additional hours to exclude routine repairs, maintenance, or inspection. 49 U.S.C. 21104(b), (c).

Sec. 108(c) also contained language virtually identical to that in Sec. 108(b) for train employees, prohibiting railroad communication with signal employees during off-duty periods except for in an emergency situation. 49 U.S.C. 21104(d).

Finally, Sec. 108(c) provided that the hours of service, duty hours, and rest periods of signal employees are governed exclusively by the new hours of service laws, and that signal employees operating motor vehicles are not subject to other hours of service, duty hours, or rest period rules besides FRA's. 49 U.S.C. 21104(e).

The requirements of the old hours of service laws for dispatching service employees (49 U.S.C. 21105) were not modified by the RSIA.

IV. Response to Public Comments on FRA's Proposed Interpretation and Interim Interpretations

FRA received 62 sets of comments addressing either the proposed interpretation or the Interim Interpretations, or both, from the representatives of a total of nine organizations and from 45 individuals, with some individuals and organizations filing multiple sets of comments. The groups that submitted comments were as follows: the American Public Transportation Association (APTA); the Association of American Railroads (AAR); the Brotherhood of Railroad Signalmen (BRS); the Brotherhood of Locomotive Engineers and Trainmen (BLET); the United Transportation Union (UTU); the Nevada and Georgia State Legislative Boards of the BLET; and the Tennessee and Nebraska State boards of the UTU.

A. FRA's Decision To Retain its Longstanding ''Fresh Start'' Interpretation and Not To Adopt the Proposed ''Continuous Lookback'' Interpretation

In the **Federal Register** document that included the Interim Interpretations, FRA proposed a new interpretation of what constitutes ''during the prior 24 hours'' for the purposes of the prohibition against requiring or permitting a train employee or a signal employee to remain on duty without having had a certain minimum number of consecutive hours off duty during the prior 24 hours. This prohibition is currently found in 49 U.S.C. 21103(a)(3) and 21104(a)(2) (Sec. 21103(a)(3) and 21104(a)(2)).

Under FRA's current ''fresh start'' interpretation of this prohibition, ''the prior 24 hours'' end when an employee reports for a new duty tour. At the instant that the employee reports for duty, FRA looks back at the single 24-hour period before the employee reported for duty to see that the employee had at least 10 consecutive hours off following the prior duty

[2] The language of Sec. 108(b) must be read in conjunction with the language of Sec. 108(g), which provides that Sec. 108(b) becomes effective on July 16, 2009.

assignment. If so, then the employee may be required or permitted to work a maximum of 12 consecutive hours or a total of 12 hours, in broken service, in the next 24 hours, and must get 10 hours off either after working that 12 hours or at the end of the 24-hour period that began when the employee went on duty, whichever occurs first, before the employee is allowed to go on duty again. If an employee had a duty tour involving broken service, including an interim release of at least 4 hours, but less than the 10 hours required for a statutory minimum off-duty period, between two periods of service within the same duty tour, some or all of the employee's eventual statutory minimum off-duty period would come after the 24-hour period that began when the employee reported for duty. The following example illustrates the application of FRA's current, ''fresh start'' interpretation of ''the prior 24 hours'':

• An employee reports for duty at 10 a.m. on a Monday. If the employee had had 10 consecutive hours off duty at any time between 10 a.m. on the preceding day (Sunday) to 10 a.m. on that Monday, FRA would consider the employee as having had the minimum off-duty period during ''prior 24 hours'' because the ''prior 24 hours'' is defined as the 24 hours prior to the employee's act of reporting for duty. The employee would then be permitted to remain on duty for up to 12 hours in the following 24 hours, such that the employee must no longer accrue time on duty after 10 a.m. on Tuesday.

Conversely, under the Proposed Interpretation (which takes the ''continuous lookback'' approach to identifying the statutory minimum off-duty period during ''the prior 24 hours''), the statutory minimum off-duty period would have to be within each of the floating 24-hour periods not only starting when an employee begins a new duty tour, but also during the employee's duty tour, and ending when the employee is relieved from duty, meaning that upon reporting for duty, the employee would have a maximum of 14 hours within which to work a maximum of 12 hours, before the employee would be required to be finally released to have a statutory minimum off-duty period.

The following two examples illustrate the application of the proposed ''continuous lookback'' interpretation.

1. If an employee is off duty from 1 a.m. Monday until 11 a.m. on Monday and then reports for duty at 11 a.m. and works until 11 p.m. on Monday, the 10-hour statutory minimum off-duty period is within the prior 24 hours from any moment while the employee is on duty, up to the time of the employee's final release at 11 p.m. on Monday.

2. However, if the same employee, who was off duty from 1 a.m. Monday until 11 a.m. on Monday and went on duty at 11 a.m. on Monday, then worked for 6 hours and had an interim release from 5 p.m. until 11 p.m. on Monday before returning to duty from 11 p.m. and worked for six more hours until being finally released at 5 a.m. on Tuesday, the employee's time on duty after 1 a.m. on Tuesday would violate the statute because the required full statutory off-duty period would not be within the 24 hours prior to any moment after 1 a.m. on Tuesday). In other words, in this scenario, the employee must no longer accrue time on duty after 1 a.m. on Tuesday.

In discussing the Proposed Interpretation, FRA stated that the ''fresh start'' interpretation of the law (the interpretation issued more than 30 years prior to the enactment of RSIA, at 42 FR 4464, Jan. 25, 1977, which has remained FRA's interpretation since that time) may no longer be consistent with the plain language of the statute. By the terms of the statute as amended by the RSIA, a railroad may not require or allow a train employee to ''remain or go on duty unless that employee has had at least 10 consecutive hours off duty during the prior 24 hours.'' As explained above, under the ''fresh start'' interpretation, a new 24-hour period begins when an employee reports for duty after having had at least the minimum required off-duty period of 10 consecutive hours, and the 24-hour period within which the employee is required to have had the required off-duty period is a single, static prior period, looking only at the 24-hour period prior to when the employee goes on duty for the first time in the new duty tour. Accordingly, when determining if an employee may continue on duty (''remain on duty'') after any point in time later in the duty tour, FRA would not look to find the required 10-hour rest period within the 24 hours prior to that later point in time; instead, FRA would look for the required rest period only during the single 24-hour period immediately prior to the initiation of the duty tour. The RSIA added 49 U.S.C. 21103(e) and 21104(d), which prohibit communication with train employees and signal employees respectively during the 10 hour statutory minimum off-duty period. (FRA's interpretations of these provisions are discussed in Sections IV.C and V.A of this document.) Under the ''fresh start'' approach, since the statutory minimum off-duty period must simply be found in the 24 hours prior to the employee reporting for duty, an employee whose off-duty period was longer than 10 hours could be subject to unlimited communication once the employee had received the required 10 hours uninterrupted, which would reduce or eliminate the benefits of the requirement of an uninterrupted rest period.

By contrast, under the Proposed Interpretation, FRA would instead look for a statutory rest period that is within each 24-hour period prior to any moment during the employee's duty tour. This Proposed Interpretation is referred to as ''continuous lookback'' or the '''continuous lookback' approach.'' This approach would require the uninterrupted 10 hours to be closer to the time that the employee reports for a new duty tour, so that it could still be found within the 24-hour period at any point in the new duty tour.

Reaction to this Proposed Interpretation largely favors rejecting it, with BRS, BLET, UTU, AAR, and APTA lined up on one side opposing the proposal and several individuals and two State boards of rail labor unions on the other side supporting the proposal. Of the commenters that favor the proposed ''continuous lookback approach,'' a substantial number express concern over a railroad practice of repeatedly calling an employee as soon as he or she has met the threshold for minimum hours off duty, even though that employee has a scheduled assignment well afterwards. In so doing, commenters contend the practice prevents an employee from being able to rest immediately prior to his or her assignment and thereby increases that employee's fatigue while performing his or her duties. These commenters uniformly hope that the ''continuous lookback'' approach would increase the train employees' and signal employees' opportunity for rest by giving them at least 10 hours of notice prior to beginning an on-duty period and, therefore, enabling them to schedule their rest accordingly, though FRA believes this is unlikely to be the case for the reasons discussed below.

Comments that oppose the ''continuous lookback'' interpretation are summarized in turn, by commenter. BRS expresses several concerns. First, BRS argues that the ''continuous lookback'' is overly complex, in that a signal employee may no longer simply look for a rest period ending within the 24 hours prior to starting a new duty tour. Second, BRS argues that because the ''continuous lookback'' approach would limit signal employees to working within a period of 14 hours after the completion of their required off-duty period, within which to accumulate up to the maximum of 12

hours on duty, the interpretation would substantially limit the ability of signal employees to work after their scheduled hours, including response to trouble calls or on rest days. Finally, BRS asserts that the interpretation prevents the ''emergency'' provision of the statute (49 U.S.C. 21104(c) (Sec. 21104(c)), i.e., permission to work up to 4 additional hours within the 24-hour period, which was unchanged by the RSIA, from being effective.

Another commenter, AAR, argues that the option of taking the ''continuous lookback'' approach has been foreclosed through Congressional inaction in the face of FRA's longstanding interpretation. Next, AAR echoes the BRS's argument regarding the emergency provision in 49 U.S.C. 21104(c). Further, AAR claims that, because the ''continuous lookback'' approach would limit the number of hours available to an employee in which to accumulate time on duty before the statutory off-duty period is required, the approach would prohibit employees from working as many hours as they are permitted under the current ''fresh start'' interpretation, which would harm both management and employees in a number of ways. For example, AAR expresses concern that call times[3] of greater than 2 hours and less than 10 hours, would prevent an employee from working a full 12 hours, and that increasing call times to 10 hours to avoid this problem would lead to unacceptable train delays. AAR also points out that the decreased period available for employees to accrue time on duty would limit the railroads' ability to make use of periods of interim release within a duty tour, which could mean that employees would more often instead have to spend a statutory off-duty period at an away-from-home terminal. Likewise, if the ''continuous lookback'' interpretation were extended to passenger railroads, AAR noted that the time available to work would be significantly reduced for passenger railroad employees working split-shifts, such that this common scheduling practice would not be possible in many circumstances. Finally, AAR discusses how a ''continuous lookback'' approach would make current practices, such as setting back calls (either through a call-and-release or an early release) or calling a large number of employees to find one willing to take an earlier assignment, such as when an employee marks off sick, infeasible.

BLET and UTU submitted a joint comment arguing that the ''continuous lookback'' approach would negatively affect both safety and the financial well-being of employees. Because the Proposed Interpretation would include call times in the 14-hour period following 10 hours of rest, BLET and UTU argue that railroads would be given an incentive to minimize call times and thereby reduce an employee's ability to schedule his or her rest. Employees would stand to lose substantial earning potential, BLET and UTU assert, because the maximum number of hours the employees may work would be limited to effectively less than the 12 consecutive or aggregate hours authorized by the statute, especially when taking into consideration call times, and the possible use of periods of interim release. The unions also assert that the ''continuous lookback'' approach does not resolve the problem that they see with railroads continually calling employees who have regular times to report for duty. Finally, BLET and UTU echo the concerns expressed by BRS and AAR that the ''continuous lookback'' approach would be too difficult to administer, both in terms of compliance and enforcement.

APTA's comment agrees with the views expressed by BRS, AAR, BLET and UTU discussed above, arguing that the ''fresh start'' interpretation is now the only valid interpretation due to Congressional inaction, and repeating the argument that Sec. 21104(c), which deals with emergencies, would be voided by the ''continuous lookback'' approach.

Commenters in favor of the ''continuous lookback'' approach note that an employee can be more rested if that individual has the information to know when he or she will next be expected to report for duty. The hope of these commenters is that the ''continuous lookback'' approach would induce railroad carriers to provide employees with a 10-hour call time and therefore allow those employees to appropriately plan their rest so that they are rested immediately prior to the coming on-duty period. However, in light of the comments received from AAR, APTA, BLET, and UTU, FRA is deeply concerned that railroads would instead shorten call times as much as practicable in order to maintain flexibility in scheduling crews in spite of the ''continuous lookback.'' Shortened call times would leave employees in the same informational deficit as presently exists, but with even less of an opportunity to engage in strategic napping to mitigate fatigue. This outcome would result in more fatigue for railroad workers, and is therefore inconsistent with Congress's clear goal of improving railroad safety by reducing fatigue among railroad employees.

Several commenters in favor of the ''continuous lookback'' further suggest that FRA act to prohibit railroad carriers from making optional duty calls to employees who do not wish to accept an assignment other than their regularly-scheduled assignment. That idea would require FRA to promulgate a new regulation, and is therefore outside the scope of FRA's present effort to interpret the text of the statute as most recently amended by the RSIA.

As was discussed above, commenters also highlighted a number of implementation issues in the potential use of the ''continuous lookback'' interpretation. While these difficulties are not insurmountable, they are nonetheless important to consider. FRA has an interest in keeping the burden of complying with the hours of service laws as low as possible while achieving the safety goals mandated by Congress. Given the uncertain effect of the ''continuous lookback'' on railroad safety, FRA believes it is not currently reasonable to impose such a significant burden on the regulated community.

In addition, minor changes to the statute over time also demonstrate Congress's acceptance of FRA's ''fresh start'' interpretation. In the 1978 amendments to the Hours of Service Act, Congress added a definition of the ''24 hour period'' within which a signal employee may work. The statute explicitly defined the period as beginning ''when an individual reports for duty immediately after he has had at least eight consecutive hours off duty.'' Federal Railroad Safety Authorization Act of 1978, Public Law 95–578, 92 Stat. 2459 (Nov. 2, 1978). The amendment adding the language was referred to in the relevant committee report as ''principally * * * technical amendments which would have the effect of making the statute more certain of application.'' H.R. Rep. No. 95–1176, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5499, 5505. This addition reflects Congressional approval of FRA's pre-existing interpretation of a parallel provision in the section applicable to train employees, then codified at 45 U.S.C. 62, to apply in a similar manner. This language was stripped from the statute in the RSIA. This change is best understood as a reflection of Congress's judgment that the paragraph was redundant given the 1994

[3] ''Call time'' is the amount of prior notice that an employee receives from the railroad concerning when he or she must next report to duty. The minimum necessary call time is usually the subject of collective bargaining.

recodification's increased symmetry between the ''train employee'' section, now codified at 49 U.S.C. 21103, and the ''signal employee'' section, now codified at 49 U.S.C. 21104. The plain language continues to be ambiguous on the question of within which period the required rest time may be found. In light of FRA's longstanding and consistent construction of the hours of service laws as requiring rest at some point in the 24 hours prior to initiating an on-duty period, leaving that ambiguity intact signals Congressional approval for FRA's interpretation. Additionally, nothing in the legislative history of the RSIA reflects an intent to upset the existing interpretation, and the ''fresh start'' interpretation remains a reasonable reading of the plain language of the statute.

FRA has decided that these arguments against the ''continuous lookback'' approach discussed above merit remaining with the current ''fresh start'' interpretation. At this time, it appears from the comments that the effect of a ''continuous lookback'' on safety may well be to increase fatigue. The proposed interpretation is therefore less consistent with the goals of Congress in enacting the original Hours of Service Act, subsequent amendments, recodification, and the RSIA amendments to increase railroad safety by reducing fatigue. Additionally, small changes to the statute support the position that Congress has given its imprimatur to FRA's existing ''fresh start'' interpretation. Finally, implementation of the ''continuous lookback'' at this time would be so difficult as to make the interpretation unjustified in light of its speculative safety benefits. For all of these reasons, FRA concludes that under the current circumstances, its longstanding interpretation of ''the prior 24 hours'' as a reference to a 24-hour period prior to reporting for duty, the ''fresh start'' interpretation, remains the most reasonable reading of the statute, and thus FRA will keep that interpretation in place.

B. Questions Regarding the ''Consecutive-Days'' Limitations for Train Employees and Requirement of 48 or 72 Hours Off Duty at the Home Terminal

1. What constitutes a ''Day'' for the purpose of sec. 21103(a)(4)?

In general, Sec. 21103(a)(4) prohibits a railroad from requiring or allowing a train employee to go on duty or remain on duty after an employee has ''initiated an on-duty period each day for * * * six consecutive days'' until the employee has had 48 hours at his or her home terminal unavailable for any service for any railroad carrier. In limited circumstances, the employee is instead allowed to work seven consecutive days, but must then have 72 hours at the employee's home terminal unavailable for any service for any railroad carrier before going on duty as a train employee. *Id.* As presented, the word ''day'' is sufficiently ambiguous that the statute is unclear as to whether this requirement for extended rest (48 consecutive hours) is triggered by initiating an on-duty period on six consecutive calendar days or six consecutive 24-hour periods. In the Interim Interpretation IV.B.1,[4] FRA stated that ''[a]lthough arguments could be made for either interpretation of this language, FRA interprets this provision as related to initiating an on-duty period on 6 or 7 consecutive calendar days.''

In consideration of the comments received on this Interim Interpretation, the nature of the railroad industry, and additional fatigue considerations that have become more apparent with the implementation of this Interim Interpretation, FRA has determined that the negative consequences flowing from defining ''day'' as a calendar day for the purpose of Sec. 21103(a)(4) overcome the minor administrative benefits noted by FRA in the Interim Interpretation. Accordingly, for the reasons described below, effective May 29, 2012, FRA will construe ''day'' in this section to refer to a 24-hour period. Specifically, FRA will view the statutory ''day'' to be the 24-hour period that ends when the employee is finally released from duty and begins his or her statutory minimum off-duty period; any new initiation of an on-duty period at any point during the 24-hour period following the employee's prior final release will have been initiated on a day consecutive to the prior duty tour, which will continue the series of consecutive days. On the other hand, if the employee does not initiate an on-duty period during the 24-hour period following the employee's prior release, then that 24-hour period breaks the consecutiveness of the days in the series.

As described above, the statutory provision requires that, when an employee ''has initiated an on-duty period each day for * * * 6 consecutive days,'' that employee must have 48 hours of time off duty, with some exceptions allowing for a seventh consecutive day. FRA's Interim Interpretation of the provision established the period that would constitute a day for purposes of determining whether an on-duty period had been initiated on consecutive days as synchronized with the calendar day, such that each statutory day would begin and end at midnight. Having eliminated this reference point, FRA considered two options for reference points for the beginning and ending of a 24-hour day as related to an employee's duty tour and statutory minimum off-duty period: Either (1) having the day begin at the initiation of the employee's duty tour or (2) having the day end at the conclusion of the employee's duty tour.

The implication of the choice lies in what it means for initiations of on-duty periods to be ''consecutive'' with one another. In the former possible definition (where the day begins with the initiation of an on-duty period), the next consecutive day would begin 24 hours after the employee's initiation, and continue for another 24 hours, such that an employee's duty tours would be deemed ''consecutive'' whenever the initiations of the respective on-duty tours were separated by less than 48 hours (regardless of how much of the period was time on duty, time off duty, or time that is neither on duty nor off duty (i.e., limbo time)). By contrast, in the latter possible definition (where the day ends with the employee's final release and the conclusion of the duty tour), the next consecutive day would begin at the employee's final release and continue for another 24 hours, such that an employee's duty tours would have been initiated on consecutive days when the initiation of an on-duty period is less than 24 hours from the employee's prior final release from duty.

FRA believes both of these understandings of a 24-hour day to be reasonable understandings of what ''day'' means in this context. In choosing between the two definitions, FRA noted that the amount of time necessary to end a series of consecutive days if the day began with the initiation of an on-duty period would be highly variable. In particular, the length of time not on duty that would be required to break a series of consecutive days would range from 47 hours and 59 minutes to 24 hours (depending on the length of the prior duty tour), with the peculiar result that the amount of off-duty time necessary to end the series would decrease as the prior duty tour length increased. Although the end of the consecutive day would be fixed as soon as an employee returned to work as 48 hours later, the variable length of time not initiating an on-duty period that would be required to avoid continuing the series of consecutive days, which

[4] 74 FR 30665, 30673 (June 26, 2009).

would not be known until the duty tour ended, would likely lead to employee confusion as to the application of the laws. If the day instead ends with the employee's final release, a period of 24 hours not on duty is always both necessary and sufficient to end the series of consecutive days, providing some level of administrative efficiency while avoiding the negative consequences that result from the use of a calendar day, that were discussed in comments on the interim definition of ''day'' as a calendar day.

The vast majority of commenters, including the BLET and UTU in their joint comment, argue against the ''calendar day'' interpretation as inconsistent with existing railroad practice and harmful to railroad workers who will be unable to work previously acceptable schedules, and, as a result, they will earn less money.[5] BLET and UTU argue that a 24-hour period of time off duty should be considered a break in the count of consecutive days, due to ''the severe effects that will flow from the current interim interpretation.''

The economic effects of the Interim Interpretation are discussed in detail in a comment submitted by an individual, which includes a schedule of trains for one crew in Needles, CA. The schedule appears to demonstrate that an individual working on a regular pool job may lose as much as $1,140 in an average month by operation of the ''calendar day'' interpretation, though this chart does not take into account the new requirement of having 10 hours of uninterrupted rest, rather than 8 hours of rest, as was the requirement prior to the RSIA. In addition, many individual commenters note that railroads grant personal leave ''days'' as a 24-hour block of time, rather than a calendar day. Other commenters note that a ''day'' can refer to any continuous 24-hour period. Another commenter describes how railroad carriers can adjust call times slightly so that an on-duty period is not initiated until the next calendar day, thus breaking the string of consecutive days, in order to prevent employees from being required to have the mandatory rest. Commenters also express concern about how the ''calendar day'' interpretation impacts employees whose service falls on two calendar days, such that they have initiated an on-duty period on one calendar day, while performing substantial service on the next calendar day, in which they may not initiate an on-duty period, which would end the string of consecutive days.

The comments, as well as FRA's oversight of compliance with the hours of service laws since the RSIA's effective date, also raise fatigue concerns with the ''calendar day'' interpretation. Railroads, as well as some train employees, may seek to maximize employees' availability to perform service by scheduling such that the employee never reaches the point of having initiated an on-duty period on six consecutive days, and, therefore, 48 hours of time off duty is never required. In some cases, such practices can limit cumulative fatigue by allowing employees to have significant amounts of time off prior to reaching six consecutive days initiating an on-duty period. In some cases, however, the calendar day interpretation allows for a break in the series of consecutive days by shifting an employee's initiation of an on-duty period relatively slightly. For example, if an employee would normally be available for service at 11 p.m., and had not previously initiated an on-duty period on that calendar day, a railroad may rationally decide that it is in its interest to delay calling that employee to report for duty, allowing that employee to report for duty at least an hour later, so that the employee does not initiate an on-duty period on that calendar day, thereby restarting the count of consecutive days before that employee is required to have 48 hours of time off duty.

Because the statutory text clearly refers to the ''initiation'' of an on-duty period rather than the breadth of an on-duty period, it is possible for an employee to be within a duty tour for the majority of a calendar day and yet not have initiated an on-duty period on that calendar day. For instance, an employee who initiates an on-duty period on Monday evening at 11:15 p.m., is on duty for 12 hours, and then has a 2-hour deadhead to final release would be finally released at 1:15 p.m. on Tuesday afternoon. With a statutory minimum off-duty period of 12 hours (as a result of the additional rest required by Sec. 21103(c)(4)), such an employee could lawfully next initiate an on-duty period no earlier than 1:15 a.m. on Wednesday. Despite spending the majority of Tuesday in a duty tour for the railroad, this employee would be deemed to have broken his or her series of consecutive days, and could lawfully initiate a duty tour on at least another six consecutive days before being provided with the required 48 hours of time off duty. This consequence is all the more pernicious when considering that the transition from one calendar day to the next occurs overnight, when individuals are generally at the greatest risk for fatigue. The result is that the ''calendar day'' interpretation of Sec. 21103(a)(4) as presently written would provide the greatest latitude for minor changes in an employee's report for duty time to dramatically reduce the required rest for precisely those employees who are at the greatest risk for fatigue. While FRA continues to believe that defining ''day'' as ''calendar day'' remains reasonable in the abstract, these fatigue concerns, in addition to the issues described above, lead FRA to conclude that defining ''day'' as the 24-hour period measured from the time of the employee's prior final release is not only reasonable but preferable.

Finally, FRA notes that the ''24-hour day'' interpretation of Sec. 21103(a)(4) described above is distinct from the recently issued final rule governing the hours of service for train employees providing intercity and commuter passenger rail transportation (passenger train employees). 76 FR 50360 (August 12, 2011). The cumulative fatigue limitations for passenger train employees are explicitly defined such that the relevant series of days are ''consecutive calendar days.'' 49 CFR 228.405(a)(3). This distinction is appropriate given the different structure of passenger and freight rail transportation as well as the specific characteristics of the passenger train employees' hours of service regulation. Passenger rail transportation tends to have more regular schedules than freight rail transportation, with many passenger train employees working during the day for five to six days a week. FRA would also expect that passenger trains would be less susceptible to having their schedules adjusted on an ad-hoc basis in a way that would affect the application of the regulation to a specific employee with respect to a consecutive-day limitation. Additionally, the structure of the passenger train employees' hours of service regulation provides additional rest requirements for employees working in the transition from one calendar day to the next. Any duty tour including time on duty between 8 p.m. and 4 a.m. is considered a Type 2 assignment, which requires a more stringent limitation on the number of days within a series on which an on-duty period may be initiated, unless the schedule is analyzed using a biomathematical model of performance and fatigue and is thereby shown not to present an unacceptable level of risk for fatigue, and the schedule otherwise meets the criteria to be a Type 1

[5] In contrast, in a separate comment, the Georgia State Legislative Board of BLET favored the ''calendar day'' interpretation, though its comment does not provide any additional detail beyond its statement of support.

assignment. In addition, any duty tour including time on duty between midnight and 4 a.m. is categorically a Type 2 assignment. Therefore, assignments that cover a period of time spanning two calendar days will be subject to the additional limitations of Type 2 assignments. These factors made the use of calendar days appropriate in the overall regulatory scheme for passenger train employees' hours of service, but do not favor the reading of ''day'' to mean calendar day in the statutory provision applicable to freight rail transportation.

2. What ''Work'' may an employee do on a seventh consecutive day under sec. 21103(a)(4)(A)?

The statute provides that a train employee may ''work a seventh consecutive day'' under certain limited circumstances, and requires that employee to have 72 hours off duty at the employee's home terminal before returning to duty after ''working'' the seventh day. In Interim Interpretation IV.B.3,[6] FRA asserted that Congress's choice of a different word (''work''), rather than continuing to use the ''initiate an on-duty period'' construction, implied a different meaning for that word, so that if an employee did not initiate an on-duty period, but performed other service for the carrier on the seventh consecutive day, after six consecutive days of initiating an on-duty period, the string of consecutive days would not have been broken, and the employee would be required to have the 72 hours off duty that would be required after seven consecutive days. In response to comments received on this Interim Interpretation, and in consideration of the confusion caused by this interpretation, FRA now interprets ''works'' in Sec. 21103(a)(4)(A)(ii) to be synonymous with ''initiates an on-duty period.''

The BLET and UTU joint comment argues against the Interim Interpretation that considered ''work'' as a different word with a different meaning. The unions assert that, because time spent deadheading from a duty assignment to the point of final release is neither time on duty nor time off duty, FRA's including such deadheading in the definition of ''work'' is inconsistent with the clear statutory provision, at 49 U.S.C. 21103(b)(4) (unchanged by the RSIA) defining ''time spent in deadhead transportation from a duty assignment to the place of final release'' as ''neither time on duty nor time off duty.'' Thus, BLET and UTU contend that if the only service an employee performs on the seventh consecutive day is deadheading, separate from any covered service, the string of consecutive days should be broken, just as it would if the deadhead transportation had occurred on the sixth consecutive day [7] or any other day in the sequence of consecutive days. The comment also notes FRA's admission of construction problems in other portions of the statute.[8] Finally, the comment claims that this interpretation leads to absurd results when combined with Interim Interpretation IV.B.6,[9] which allows rest at an away-from-home terminal to break consecutiveness and thereby require only 48 hours of rest after a deadhead home. The Georgia Legislative Board of the BLET concurs, arguing that such deadheading should categorically not be counted as a ''day'' for the purpose of this section.

Despite the interpretive canon that statutes should be construed with attention to Congress's choice to use different words in the same statute, FRA concludes, for the reasons described in this section, that to ''work'' and to ''be on duty'' are sufficiently related concepts to infer that Congress chose the former over the latter out of stylistic preference (to avoid repetitive language) and not to adjust the substantive scope of the provision. This reading of the text preserves the parallelism between Sec. 21103(a)(4)(A)(i) and subsection (a)(4) generally, in that subsection (a)(4)(A)(i) allows an employee to ''work'' a seventh consecutive day notwithstanding subsection (a)(4)(A)'s rest requirement after initiating an ''on duty period'' for the prior six consecutive days. This interpretation of the text is also supported by FRA's interest in avoiding a needlessly complex reading of the statute. FRA notes that there has been confusion among railroads and employees, about the fact that under the Interim Interpretation, deadheads were treated differently on different days.

3. Does a day spent deadheading, with no other covered service performed on that day, constitute an ''Initiation of an On-Duty Period'' for the purposes of sec. 21103(a)(4)?

In order for an employee to be required to have 48 consecutive hours off duty at the employee's home terminal, that employee must first have initiated an on-duty period each day for six consecutive days. Several commenters express concerns over how this language will be interpreted with regard to days on which the only service performed for the carrier is deadhead transportation. Because such time is not time on duty, it cannot be considered the ''initiation of an on-duty period'' and therefore does not independently count toward the continuation of a series of consecutive days.

The statute defines two types of deadheading relating to time on duty as a train employee. In Sec. 21103(b)(4), the hours of service laws establish that time spent in deadhead transportation to a duty assignment, i.e. a ''deadhead to duty,'' is time on duty, but that deadhead transportation from a duty assignment to the place of final release, i.e., ''deadhead from duty,'' is neither time on duty nor time off duty. However, because these definitions are only in reference to determining time on duty, the statute is silent about a third type of deadheading, where the deadhead transportation is separated from any covered service by at least a statutory minimum off-duty period both prior to and following the deadhead transportation. Such ''stand-alone deadheads'' are not time on duty as an employee in such a deadhead is not engaged in or connected with the movement of a train, nor is the time spent in such deadhead transportation within the same 24-hour period as other covered service with which it could commingle.

The Nebraska State Legislative Board of the UTU argues that FRA's understanding of deadheading as not ''initiating an on-duty period'' for the purpose of Sec. 21103(a)(4) is inconsistent with the intent of the RSIA, and therefore should be replaced by a regulation that classifies all deadheading as time on duty and therefore prevents a railroad from deadheading an employee to break the contiguousness of workdays. Individuals commenting on the matter agree, arguing that permitting deadheading to interrupt the counting of consecutive days will allow railroads to strategically use deadheading to prevent train employees from having a day off; however, the promulgation of new

[6] 74 FR 30665, 30673–74 (June 26, 2009).

[7] BLET and UTU point out that FRA acknowledged this outcome on the sixth consecutive day in the interim interpretations. 74 FR 30665, 30673 (June 26, 2009).

[8] Specifically, the comment refers to the fact that the language of the statute would not allow an employee to be deadheaded back to his or her home terminal, if that employee had exceeded the 276-hour monthly cap in 49 U.S.C. 21103(a)(1), which includes time spent awaiting and in deadhead transportation from a duty assignment to the place of final release.

[9] 74 FR 30665, 30674 (June 26, 2009).

regulations is outside the scope of this interpretation.

The lone commenter speaking to the issue and arguing against considering deadheading to count as initiating an on-duty period, the Georgia State Legislative Board of the BLET notes that the definition of ''time on duty'' in the statute categorically excludes deadheading to a place of final release, and therefore would preclude FRA from considering deadheading that is the only service performed on a given day to count as initiating an ''on-duty period.''

FRA will continue to apply its longstanding interpretation of deadheading that commingles with a period of covered service, which is consistent with the language of the statute at 49 U.S.C. 21103(b)(4). If an employee deadheads to duty at the beginning of a duty tour, time spent in the deadhead is time on duty, and therefore the beginning time of the deadhead to duty constitutes the initiation of an on-duty period for the purposes of Sec. 21103(a)(4). In contrast, where an employee deadheads to a point of final release as the last activity in a duty tour, the deadhead remains neither time on duty nor time off duty. However, because the deadhead follows other service within the duty tour, the employee would necessarily have initiated an on-duty period earlier that day when beginning to perform covered service or commingled service.

In circumstances where an employee has a stand-alone deadhead, there must necessarily be no time on duty associated with the deadhead transportation; if there were time on duty not separated from the deadhead by at least a statutory minimum off-duty period, the deadhead would therefore have to be either a deadhead to duty or a deadhead from duty. Because stand-alone deadhead transportation is most comparable to other service outside the definition of covered service, the time spent in stand-alone deadhead transportation will be treated as any other non-covered service for the carrier, and therefore will not constitute the initiation of an on-duty period under Sec. 21103(a)(4) when not commingled with covered service. In light of FRA's interpretation in section IV.B.2, above, such stand-alone deadheads will be treated consistently, as breaking the continuity of the consecutive days, regardless of the day in the string of consecutive days on which the deadhead occurs.

4. Does the initiation of an on-duty period incident to an early release qualify as an initiation for the purposes of sec. 21103(a)(4)?

Yes. The statute provides (unchanged by the RSIA) that ''[t]ime on duty begins when the employee reports for duty, and ends when the employee is finally released from duty.'' 49 U.S.C. 21103(b)(1). Consistent with this language, longstanding FRA interpretations provide that, if a railroad calls an employee to report to perform covered service and the employee reports for that covered service assignment, the act of reporting is itself time on duty. Federal Railroad Administration, Hours of Service Interpretations, Operating Practices Technical Bulletin OP–04–29 (Feb. 3, 2004). It follows that a train employee who reports for duty but is then released before performing any substantial duties is still considered to have accrued time on duty. Accordingly, as FRA stated in the Interim Interpretation, such an employee has ''initiated an on-duty period'' under Sec. 21103(a)(4). In the case where an employee is released from the call to perform duty (that is, the employee is no longer expected to report for duty at the previously established report time) prior to the time that the employee is scheduled to report, then the employee has not reported, regardless of whether the employee is at the location to which he or she was called to report, and, if the employee has not performed any covered service, the employee will not have accrued any time on duty or initiated an on-duty period.[10] FRA sees nothing in the statute that would support a change in this interpretation. As a result, an employee who reports for duty and is immediately released has initiated an on-duty period, and that duty tour will not end until the employee is finally released to a statutory minimum off-duty period.

The BLET and UTU joint comment notes a supposed consequence of FRA's longstanding interpretation of the statute. On days one through five, an employee would be considered to have initiated an on-duty period for that day, regardless of whether the employee actually performed covered service. On day six or seven, the comment argues, a train employee who reports for duty to perform covered service and is released from duty shortly thereafter would not have the opportunity to be called to perform additional service within that 24-hour period, because of the requirement for 48 or 72 hours of rest. The comment implicitly raises the issue of when the 48 or 72 hours of rest would begin for employees who have an early release after initiating an on-duty period on their sixth or seventh consecutive day.

The unions seek an interpretive rule that would not further limit a train employee's availability under the law to work, on the grounds that such extended rest is not warranted due to the minimal amount of time spent on duty on the sixth consecutive day. The unions argue, as does the Georgia State Legislative Board of BLET, that it is ''manifestly unjust'' for a train employee to be forced into the 48 or 72 hours of mandatory rest after an on-duty period lasting only minutes. Instead, they hope for FRA to interpret ''initiate an on-duty period'' not to include a small period of duty time. The joint BLET/UTU comment notes that in these situations, ''little if any covered service is actually performed, except, perhaps, for a limited amount of administrative duties.''

The unions are correct that the language of Sec. 21103(a)(4) could be read to prohibit a railroad from requiring or allowing an employee to return to work after an early release on his or her sixth consecutive day of initiating an on-duty period, unless the employee has had 48 consecutive hours off duty unavailable for any service for any railroad carrier. If FRA were to take a very literal reading of Sec. 21103(a)(4), then if a train employee is immediately released after initiating an on-duty period for a sixth consecutive day, the train employee would not be allowed to return to duty until the 48-hour rest requirement had been fulfilled. FRA believes that this is obviously not the proper reading of the statute.

As was noted above, Sec. 21103(b)(1), which defines time on duty generally, provides that ''[*t]ime on duty* * * * ends when the employee is finally released from duty.'' (Emphasis added.) In addition, Sec. 21103(a)(4)(A)(i) allows an employee to ''work a seventh consecutive day if that employee completed his or her final period of on-duty time on his or her sixth consecutive day at a terminal other than his or her home terminal.'' This would not be possible if the 48 hours off duty were required immediately after the initiation of an on-duty period on the sixth consecutive day. The plain language of the statute clearly permits an employee to perform service on his or her sixth consecutive day, demonstrating that the very literal interpretation is flawed. As demonstrated by Congress's treatment of the provision, the other statutory

[10] 74 FR 30665, 30673 (June 26, 2009).

language, and the interpretation of all commenters, the restriction of Sec. 21103(a)(4) does not apply until the employee is finally released from duty; that is, an employee may continue to perform covered service until the end of the relevant duty tour, including any periods of interim release (because, during an interim release, the employee is not ''finally'' released from duty). Having established when the extended-rest requirement is activated, an employee subject to an early release may return to work without violating Sec. 21103(a)(4) so long as he or she has not ''finally'' been released from duty. If the employee returns to work, whether in a single period of time on duty or after an interim release period, that employee has not been ''finally'' released from duty and, therefore, is not yet subject to the extended-rest requirement. When the employee is finally released from duty, the employee must be given the statutory minimum off-duty period (normally, 10 consecutive hours) as well as the extended-rest period, both of which will begin to run concurrently.[11]

With respect to the request for an exception for employees who perform little covered service after reporting for duty, these employees will continue to be considered to have initiated an on-duty period, even if they did not perform any substantial amount of covered service within that period. Time on duty begins when an employee reports for duty; therefore, when an employee reports for a covered service assignment as a train employee, he or she has reported for duty, thus initiating an on-duty period, even if he or she does not perform any additional covered service in that on-duty period. Accordingly, the amount of covered service performed within the period is irrelevant for determining whether the employee initiated an on-duty period.

5. If an employee is called for duty but does not work, has the employee initiated an on-duty period? If there is a call and release? What if the employee has reported?

As discussed above, an employee only initiates an on-duty period if the employee accrues time on duty. As such, if the employee is called for duty but does not report, such as if the employee is released prior to the report time in a call and release, the employee has not initiated an on-duty period. However, if the employee has reported for duty, the employee has accrued time on duty and therefore has initiated an on-duty period.

6. Does an employee's performance of ''Other Mandatory Activity for the Carrier'' that is not covered service ever count as the initiation of an on-duty period under sec. 21103(a)(4)?

Yes, but only if the non-covered service commingles with covered service. In Interim Interpretation IV.B.4, FRA asked the question, ''Does Attendance at a Mandatory Rules Class or Other Mandatory Activity That Is Not Covered Service But Is Non-Covered Service, Count as Initiating an On-Duty Period on a Day?'' FRA answered that question in the negative, but did note if this non-covered service were to commingle with covered service (meaning it was not separated from covered service by a statutory minimum off-duty period) then initiation of the non-covered service activity would qualify as initiation of an on-duty period, because the commingled service, in this case, becomes time on duty.[12]

The Nebraska State Legislative Board of the UTU expresses concern that, by not counting as a ''day'' attendance at mandatory rules classes or other similar mandatory activity that is non-covered service for the purposes of determining whether a train employee initiated an on-duty period, train employees may be required to participate in a rules class for several hours and then immediately be pressed into 12 hours of covered service.

The above-described scenario is not an implication of not counting ''other mandatory activity'' as ''initiating an on-duty period'' under Sec. 21103(a)(4), and is not permissible under the hours of service laws, neither as they existed before the RSIA, nor as amended by the RSIA. The commenter appears to be under the impression that, by not treating non-covered service as an ''initiation'' for the purposes of Sec. 21103(a)(4), that implies that time spent in non-covered service does not commingle with covered service if not separated from it by at least a statutory minimum off-duty period; however, this is not the case. As stated in the Interim Interpretations, the commingling of covered and non-covered service continues to function as it did prior to the RSIA. This interpretation, that attendance at a rules class, or other non-covered service may break a string of consecutive days, will only apply if an employee has a statutory minimum off-duty period between the non-covered service and the covered service both preceding and following it, meaning that there is no covered service to commingle with the non-covered service; in such a situation, the non-covered service would not constitute the initiation of an on-duty period because no ''time on duty,'' as defined in Sec. 21103(b), was incurred. However, when there is not a statutory minimum off-duty period between non-covered service and covered service, the non-covered service commingles and is time on duty that can be considered as an initiation of an on-duty period.

7. How much rest must an employee have after initiating an on-duty period for six consecutive days, if permitted to do so for seven consecutive days by sec. 21103(a)(4)(B)?

As a general rule, Sec. 21103(a)(4) allows a train employee to initiate an on-duty period on only six consecutive days. However, Sec. 21103(a)(4)(B) (Subparagraph (B)) allows an employee to initiate an on-duty period on a seventh consecutive day under limited circumstances as provided in clauses (i) through (iii) of Subparagraph (B). The structure of the statute does not make it readily apparent to some readers how Subparagraph (B) interacts with Sec. 21103(a)(4)(A) (Subparagraph (A)). FRA reads these subparagraphs to apply jointly, so that a train employee who is permitted to initiate on-duty periods on 7 consecutive days must have 48 hours of time unavailable for any service for any railroad carrier if that employee instead initiates on-duty periods on only 6 consecutive days.

One commenter expresses concern over the interaction between Subparagraphs (A) and (B). He argues that employees who meet one of the conditions in Subparagraph (B)(i)–(iii) are exempt from Subparagraph (A) and, therefore, may work six consecutive days without being required to receive 48 hours off.

Congress did not specifically indicate whether Subparagraph (B) is intended to be an additional rule alongside Subparagraph (A), or instead is a replacement for Subparagraph (A) when Subparagraph (B) is applicable. The comment asserts that, because Subparagraph (B) does not specifically apply Subparagraph (A) to those employees who are permitted to initiate an on-duty period on a seventh consecutive day, the two were intended to be construed as distinct alternative regimes. The statute does, however, contain some language suggesting both provisions should apply in parallel. In addition, nothing in the legislative

[11] In a separate future publication in which FRA adopts several new interim interpretations and requests comment on the new interim interpretations, FRA plans to include a more detailed discussion of the idea of that multiple required off-duty periods run concurrently as opposed to consecutively.

[12] 74 FR 30665, 30674 (June 26, 2009).

history demonstrates an intention for Subparagraph (B) to trump Subparagraph (A), and policy considerations support the application of both subparagraphs to individuals.

Had Congress intended for Subparagraph (B) to be an exception from Subparagraph (A), the effect of Subparagraph (B) could be to allow employees to initiate six consecutive on-duty periods without requiring a 48-hour mandatory rest period (sometimes referred to as a ''6/1 schedule''), as well as allowing those employees to work a seventh consecutive day with a longer mandatory rest period to follow before returning to train service as provided by the statute. Congress specifically included a separate waiver process in Sec. 21103(a)(4), suggesting that Subparagraph (B) should be read as something other than an exemption from the general rule of Subparagraph (A), and in some instances FRA has used this waiver authority to allow employees to initiate an on-duty period on six consecutive days followed by one day free of initiation of an on-duty period. In addition, the introductory clause of Subparagraph (B) (''except as provided in subparagraph (A)'') contemplates both paragraphs applying to individual employees, by allowing some individuals to initiate a seventh consecutive day despite not meeting the requirements of Subparagraph (B). The clause would not be necessary if the statute were structured with Subparagraphs (A) and (B) as mutually exclusive.

The paragraph structure of the statute could instead be viewed as a basis for reading their ''or'' disjunction as exclusive, meaning that only one subparagraph or the other could apply to a single employee, but not both, but this argument is unpersuasive. While there may have been more straightforward ways of structuring the requirements of Subsection (a)(4), the structure is consistent with the style of Subsection (a) of Sec. 21103 as a whole. While Subparagraphs (A) and (B) (in Section 21103(a)(4)) are certainly more complicated than Subsection (a)(1)(A) through (C), the logical arrangement of the disjunction is the same. In both, related statements are split into multiple subparagraphs, joined by the word ''or.'' It is readily apparent that the types of service listed in Subsection (a)(1)(A) through (C) are not mutually exclusive; for instance, counting time on duty as part of the 276-hour limit does not prevent also counting time waiting for deadhead transportation as part of that limit. Subparagraphs (A) and (B), despite their additional complexity, should be read similarly. This understanding is furthered by stripping the separate paragraphs of their designations and then combining their text into the one extremely long sentence that they comprise. That sentence reads, in relevant part, ''a railroad carrier * * * may not require or allow a train employee to * * * remain or go on duty after that employee has initiated an on-duty period each day for 6 consecutive days, unless that employee has had at least 48 consecutive hours off duty * * * or, except as provided in subparagraph (A), 7 consecutive days, unless that employee has had at least 72 consecutive hours off duty * * *.'' When read in context, the clauses lend themselves to an inclusive disjunction (including one of the subparagraphs, the other, or both) rather than exclusive disjunction (either one of the subparagraphs or the other, but not both), indicating that both clauses may apply to a single individual.

Considering all of these factors, the most reasonable reading of the statute is that Sec. 21103(a)(4)(A) continues to apply to a train employee who is permitted to initiate seven consecutive on-duty periods by Sec. 21103(a)(4)(B). Therefore, any train employee who initiates six consecutive on-duty periods will be required to have had at least 48 hours unavailable for any service for any railroad carrier at the employee's home terminal before being allowed to go on duty again as a train employee, though a train employee in certain circumstances is permitted to initiate a seventh consecutive on-duty period and afterwards must have 72 hours unavailable for any service for any railroad carrier at the employee's home terminal before returning to duty as a train employee.

8. How are initiations of on-duty periods for multiple railroad carriers treated under sec. 21103(a)(4)?

Prior to the RSIA, the hours of service laws did not restrict, in any way, an employee's activities during periods of off-duty time. Thus, FRA did not have the statutory authority to penalize either a railroad, or an employee, if an employee worked at a second job during his or her statutory off-duty period. The employee was not required under the hours of service laws to report time spent in the second job to the railroad, regardless of whether the second job was for another railroad, or outside the railroad industry, and the railroad was only responsible for ensuring that the employee did not perform service for the railroad during the required statutory off-duty period. FRA recommended legislative amendments to address situations of dual employment, but they were not adopted.[13]

The RSIA did not change the application of the hours of service laws to employees working for multiple railroads, except as to the provision that it added to the statute requiring an extended off-duty period of 48 hours after an employee has initiated an on-duty period for six consecutive days. Section 21103(a)(4) specifies that during the 48- or 72-hour off-duty period at the employee's home terminal, ''the employee is unavailable for any service for any railroad carrier.'' The language indicating that the employee must be unavailable for any service for any railroad carrier was not added to any of the other periods of off-duty time provided for in the statute.

AAR, in its comment, requests that FRA clarify the hours of service reporting and recordkeeping obligations as to service performed for other railroads, arguing that only service performed for other railroads during the extended rest period required by Sec. 21103(a)(4) needs to be reported. In addition, one individual commenter asks whether an employee will be required to provide information to each railroad for which he or she performs service, regarding consecutive days of covered service or service towards the 276-hour monthly limitation. Another individual commenter asks if a train employee may indefinitely work a schedule of five days for one railroad carrier and two days for a different railroad carrier.

With respect to the reporting and recordkeeping requirements for service for other railroads, FRA disagrees with AAR's statement that information on service for other railroads is ''irrelevant from the perspective of railroad compliance with the hours-of-service requirements.'' The hours of service laws impose duties directly on railroad carriers and their officers and agents; ''a railroad carrier and its officers and agents may not require or allow a train employee'' to go or remain on duty in the circumstances stated in the statute

[13] On April 1, 1998, the Secretary submitted to the 105th Congress proposed legislation entitled the Federal Railroad Safety Authorization Act of 1998, which included provisions that would amend the hours of service laws to address train, signal, and dispatching service employees employed by more than one railroad. The legislation was introduced by request in the House of Representatives on May 7, 1998 as H.R. 3805 and in the Senate as S. 2063 on May 12, 1998, and was not adopted. On July 26, 1999, the Secretary submitted to the 106th Congress proposed legislation entitled the Federal Railroad Safety Authorization Act of 1999, which also included provisions on such dual employment. This legislation was never introduced and lapsed at the end of that Congress.

and unless the stated conditions are met. Sec. 21103(a). In order to comply with the hours of service laws, a railroad must inquire of each of its train employees as whether he or she has performed any service for any other railroad, during any 48 or 72 hours between the employee's final release from the duty tour triggering the rest requirement and the next time the employee reports for duty as a train employee.

If a railroad does not seek to collect information from its employees indicating when they perform service for other railroad carriers, that railroad will be unable to fulfill its obligation not to require or allow an employee who has initiated on-duty periods on six or seven consecutive days to remain or go on duty without the 48 or 72 hours free of any service for any railroad. Therefore, as indicated in the Interim Interpretations, ''[i]t will be the responsibility of the railroad to require employees to report any service for another railroad. It will be the responsibility of the employee to report to inform each railroad for which the employee works of its service for another railroad.'' [14]

With regard to the question of whether employees will be required to provide information to each railroad for which they perform service, regarding consecutive days of covered service or service counted toward the 276-hour monthly limitation, as FRA stated in the Interim Interpretation, ''[t]he employee will be required to record service for Railroad A on the hours of service record for Railroad B, and vice versa.'' [15]

However, as also indicated in the Interim Interpretations, FRA will only consider enforcement action for excess service where service for another railroad is performed during the 48 or 72 hours off duty that an employee must receive after initiating an on-duty period each day for six or seven consecutive days, because the hours of service laws do not address service for another carrier during the other required off-duty periods.[16] For this reason, when an employee chooses of his or her own volition to perform covered service as a train employee for multiple railroads, the only time the service for the second railroad will be relevant to the first (and vice versa) will be when that employee reaches six or seven consecutive days of initiating an on-duty period for one railroad.

Therefore, an employee would not need to provide a cumulative total of time spent on multiple railroads for the purpose of compliance with the 276-hour monthly limitation. Likewise, an employee whose schedule required him to work five days followed by two days off could choose to work for another railroad during the two days off, because the employee had not yet initiated an on-duty period on six consecutive days, which would require a period of 48 hours during which the employee is unavailable for any service for any railroad carrier. Because the statute does not address employees working for multiple railroads, except during the required extended-rest period of 48 hours, it would not prohibit an employee's choice to work for a second railroad during off duty periods prior to triggering the extended rest requirement.

Finally, it should be noted that the statutory provision on hours of service civil penalties (49 U.S.C. 21303(a)(1)) provides that ''[a]n act by an individual that causes a railroad carrier to be in violation is a violation.'' An employee of Railroad A who works for Railroad B as a train employee during the required 48- or 72-hour rest period and who then goes on duty as a train employee for Railroad A causes Railroad A to be in violation of Sec. 21103(a)(4) and is individually liable for causing the violation by Railroad A and therefore subject to enforcement actions, including disqualification from safety-sensitive service if the violation is found to demonstrate that the individual is unfit for such service. See 49 CFR part 209, appendix A. If the employee willfully caused the railroad to be in violation, the employee would be subject to liability for a civil penalty. 49 U.S.C. 21304. Additionally, an employee may be held individually liable for willful failures to maintain accurate hours of service records under 49 CFR 228.9 and 228.11, including records documenting service for multiple railroads.

9. Does an employee ''Deliberately Misrepresent His or Her Availability'' simply by reporting for duty on a consecutive day in violation of sec. 21103(a)(4)?

In the Interim Interpretations, FRA states that, in general, an employee will not face enforcement action from FRA for accepting a call to report for duty when the employee knows he or she is close to the 276-hour monthly limitation on service and may not have sufficient time remaining to complete the assignment or duty tour. This enforcement policy does not apply, however, where there is ''evidence that the employee deliberately misrepresented his or her availability.'' [17] In its comment, AAR asks that FRA hold employees jointly responsible for violating the hours of service laws when accepting a call to report in excess of the ''consecutive-days'' limitations. FRA declines to adopt AAR's proposal.

Given that FRA's enforcement policy with regard to its hours of service recordkeeping regulations allows railroads to keep data related to the limitations on consecutive days, monthly service, and limbo time in a separate administrative ledger, rather than tracking the information daily on the record for each individual duty tour, railroads are in the best position to know whether or not an employee may report for duty. In addition, an employee who refused to report for duty when called to do so could be subjected to discipline by the railroad, if, for example, the employee incorrectly calculated or misunderstood the application of the provision to his or her current sequence of consecutive days, and believed that the statute prohibited the employee from reporting for duty. Furthermore, while the penalty provision of the hours of service laws provides for individual liability in violations of the hours of service laws, the substantive restrictions operate on ''a railroad carrier and its officers and agents.'' Employees have the obligation to provide accurate information to railroads regarding their service, and FRA will consider action as appropriate under the agency's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, 49 CFR part 209, appendix A, when employees fail to meet this obligation. Nonetheless, simply reporting for duty is insufficient to demonstrate that an employee ''deliberately misrepresented his or her availability.''

C. Questions Regarding the Prohibition on Communication by the Railroad With Train Employees and Signal Employees

In addition to increasing the statutory minimum off-duty period for train employees and signal employees to 10 hours, the RSIA requires that those 10 hours be uninterrupted by communication from the railroad by telephone, pager, or in any other way that could reasonably be expected to disrupt the employee's rest, except to notify an employee of an emergency situation. 49 U.S.C. 21103(e) (Sec. 21103(e)); 49 U.S.C. 21104(d) (Sec. 21104(d)). This requirement also applies to the interim releases of train employees. In addition, when a train

[14] 74 FR 30665, 30674 (June 26, 2009).

[15] *Id.*

[16] *Id.*

[17] 74 FR 30665, 30675 (June 26, 2009).

employee's statutory minimum off-duty period is longer than 10 hours as a result of time on duty and limbo time in excess of 12 hours, the additional time off duty is also subject to the prohibition.

1. Does the prohibition protect employees from any communication for the entirety of the off-duty period?

A number of comments express concern that, despite the new requirement that the statutory minimum off-duty periods for train employees and signal employees, and any period of interim release for train employees, must be free from communication likely to disturb rest, railroads may persist in repeatedly contacting the employee and disrupting the employee's rest.

The statute establishes that time off duty only qualifies as a statutory minimum off-duty period or period of interim release when the required minimum time is undisturbed. Because the statute does not require the statutory minimum off-duty period or interim release to be so designated in advance, the result is that an employee needs only 10 hours or more of time off duty and undisturbed by railroad communications at any point in the 24 hours prior to reporting for duty in order to be in compliance with the hours of service laws. Accordingly, a railroad may communicate with the employee at times between the end of the statutory minimum off-duty period and the initiation of the employee's on-duty period without violating the hours of service laws. FRA is aware that such practices may contribute to employee fatigue, and expects railroads to exercise discretion when contacting employees in this intermediate period. The RSIA provided FRA with limited regulatory authority, which FRA may consider exercising if substantial scientific evidence demonstrates that such communication is posing an unacceptable risk to railroad safety from employee fatigue.[18]

2. Is it a violation for a railroad to intentionally call an employee to delay that employee's ability to report for duty?

No, provided that the employee at some point has at least a statutory minimum off-duty period that is free from communication, before being required to report for duty. So long as an employee receives a statutory minimum off-duty period in the 24 hours prior to reporting for duty, communications outside of that period do not violate the prohibition on communication. Accordingly, it is not a violation for a railroad to contact an employee during other periods, as discussed above. The BLET and UTU joint comment argues that intentionally calling an employee in order to disrupt his or her off-duty period and require a new period to start violates Sec. 21103(e). As discussed above, only the statutory minimum off-duty period and periods of interim release for train employees are required to be uninterrupted by communications likely to disturb rest. Because the statutory minimum off-duty period does not need to be designated as such, the hours of service laws are not violated by these types of calls. For example, if an employee is called 8 hours after being released from duty, the statute will not be violated, but the employee must be provided 10 or more hours off duty (depending on the minimum statutory off duty period required for the employee) without such communication, beginning at the time the contact ended, to successfully complete a statutory off duty period and prevent any future activity for the railroad from commingling with the previous duty tour . If situations arise in which employees believe that a railroad is intentionally contacting an employee so that the employee's rest will have to be restarted (which restart delays the employee's eligibility to report for duty, increases the required off-duty period, and decreases the employee's income), such issues are a matter to be resolved between railroads and their employees through other mechanisms. So long as the rest period is restarted and the employee has 10 hours of uninterrupted rest before being called to report for duty, there is no violation of the statute.

3. For what purposes may an employee contact a railroad during the uninterrupted rest period?

In the Interim Interpretations, FRA stated that employees may choose to contact the railroad during the uninterrupted rest period, but that the railroad may only respond to the issues raised by the employee. However, FRA also flatly stated that railroads may not contact employees to delay an employee's assignment, with no reference to the preceding exception.[19] In their joint comment, BLET and UTU ask FRA to resolve the apparent contradiction between these two interpretations.

FRA recognizes that the prohibition extends to communication by the railroad, not to communication by the employee. Therefore, FRA concludes that an employee may contact a railroad about any issue, including issues related to establishing or delaying a time for the employee to report, without the communication from the employee interrupting the rest period. In addition, a railroad may return the employee's call, if requested to do so by the employee, for the employee's convenience and to prevent the employee having to make repeated phone calls; these calls also do not interrupt the employee's rest period. However, any return phone call made by the railroad must be limited to the terms established by the employee. For example, an employee may indicate when he or she wishes to be called back (such as, within the next hour, or, in 6 hours, if the employee were planning to go to sleep and preferred to have the return call after waking up). Further, absent an emergency, the return call must be limited to the subject of the employee's call. For example, if an employee calls during the statutory minimum off-duty period to schedule a vacation day, the railroad returns that call, and the railroad raises an issue not discussed by the employee, such as establishing a report for duty time, the employee's rest period has been interrupted, and the employee must have a new statutory minimum off-duty period in order to separate any subsequent service from the prior duty tour.

Additionally, the time spent in calls that do not interrupt the off-duty period as described above will not be time off duty and may commingle with a prior or subsequent duty tour if the content of the call is service for the railroad carrier. For instance, a call from an employee discussing the circumstances of the on-duty injury of one of his or her crewmembers is considered service for the railroad carrier, and therefore is service that is not time off duty and may commingle with a prior or subsequent duty tour. *See* Federal Railroad Administration, Hours of Service Interpretations, Operating Practices Technical Bulletin OP–04–29 (Feb. 3, 2004). To avoid having the time spent on the call commingling and therefore becoming time on duty, the employee must have a statutory minimum off-duty period between the call and any time on duty.

FRA has historically recognized that some types of communication between a railroad and an employee are ''at the behest of the railroad'' and are therefore properly considered to be service for the carrier that is not time off duty. In recognition of the realities of railroad

[18] As will be discussed below, a railroad may contact an employee in certain limited circumstances even during the portion of an off-duty period that is required to be undisturbed.

[19] 74 FR 30665, 30672 (June 26, 2009).

operations and the desirability of maximizing the employee's ability to know his or her next reporting time and therefore that employee's ability to plan his or her rest during the off-duty period, FRA has also provided an exception from this general rule for calls to establish or delay an employee's time to report. In enforcing the new prohibition on communication by the railroad with train employees and signal employees during certain of their off-duty periods, FRA will continue to abide by this longstanding interpretation, if the calls are initiated by the employee, and any call made by the railroad is in return of a call made by the employee, as requested by the employee and limited to the terms of the employee's request. While the establishment of a time to report for duty is service, FRA will extend its prior interpretation so that such communications are permitted and do not interrupt an off-duty period when the calls are initiated by the employee, and any call made by the railroad is in return of a call made by the employee, as requested by the employee and limited to the terms of the employee's request. As a result, employees may call a railroad during their statutory minimum off-duty period to establish or delay a time to report, and railroads may return these calls, if an employee requests a return call and the return call is limited to any terms established by the employee as to the time and the content of the call, and that contact will not be considered to have interrupted the rest period or to require that it be restarted, provided that the time at which the employee is required to report is after the required period of uninterrupted rest.

This interpretation, which FRA has articulated in part and communicated in correspondence already, allows employees to have greater predictability as to when they will go to work, and a greater opportunity to plan their off-duty time to obtain adequate rest and handle other personal tasks and activities. Employees are able to take assignments when their statutory minimum off-duty period will have been completed at or prior to the report time, even if they would not have been fully rested at the time of the call to report. Conversely, in some cases, employees may be able to schedule themselves for an assignment that will allow them some additional time off duty to obtain additional rest or attend to personal activities. However, this interpretation should not be read as allowing any railroad to adopt a policy that requires employees to call the railroad, or requires employees to grant the railroad permission to call the employee during the statutory off-duty period. Employees who do not call the railroad, and do not choose to receive communication from the railroad, during the period of uninterrupted rest, must not be called by the railroad to establish a report time until after 10 hours of uninterrupted rest, and the employee must not be disciplined or otherwise penalized for that decision.

FRA is aware that, having provided employees with an avenue for receiving information relating to their time to report during their statutory minimum off-duty period, there may be instances where a railroad, or an individual railroad manager, may seek to require that the employee contact the railroad during his or her statutory off-duty period to obtain the employee's next assignment. In circumstances where a railroad discriminates against an employee for refusing to violate a railroad safety law by failing to report after a disruption of rest caused the employee to not have a statutory minimum off-duty period, that action could constitute a violation of 49 U.S.C. 20109, enforced by the U.S. Department of Labor. Where credible evidence indicates that a railroad disrupted an employee's statutory minimum off-duty period without the employee having initiated the communication and requested a return call and yet allowed the employee to report, without restarting the rest period and providing the required uninterrupted rest, FRA will consider appropriate enforcement action. FRA expects that railroads will not attempt to coerce employees into authorizing communications that disrupted an employee's rest. Where evidence shows that a railroad made prohibited communications to an employee, because the employee did not initiate the communication, FRA may consider appropriate enforcement action under 49 U.S.C. 21103 and 21104. Employees must report unauthorized communications as an activity on their hours of service record for the duty tour following the communication. 49 CFR 228.11(b)(9).

4. May the railroad return an employee's communication during the rest period without violating the prohibition on communication?

As discussed above in section IV.C.3, the railroad may return an employee's communication during the rest period without violating the prohibition on communication, so long as the return communication is authorized by the employee and on the same topic as the employee's communication.

5. May the railroad call to alert an employee to a delay (set back) or displacement?

As discussed above in section IV.C.3, the railroad may only communicate with an employee if it is in reply to a communication from the employee, is authorized by the employee, and is on the same topic as the employee's communication. Accordingly, the railroad may only call to alert an employee to a delay (set back) or displacement if the employee previously communicated with the railroad on that issue during the rest period and authorized a return communication.

6. May an employee provide advance permission for railroad communications?

The BLET and UTU joint comment, as well as an individual commenter, ask if FRA will permit an employee to preemptively grant his or her employing railroad the authorization to contact the employee on certain matters. As was discussed in the previous response, employees may contact a railroad for any purpose, including establishing a time to report, and the railroad may return a call initiated by the employee, if the employee requests a return call, subject to the conditions discussed above. Because communication by the railroad is only allowed in response to specific communication initiated by the employee, an employee may not consent in advance to communication from the railroad.

It is important to note, however, that if a railroad communicates with an employee when not requested to do so by the employee, or discusses with the employee matters beyond the subject of the employee's initial call, the employee's rest period has been disturbed, but it is not necessarily a violation of the statute. If an unauthorized communication is made, railroads have the option of providing a new statutory minimum off-duty period to avoid violating the statute.

Additionally, railroads are not required under the statute to communicate with their employees during the period of uninterrupted rest. If a railroad concludes that it is too burdensome to determine in each instance the specific times within which an employee has requested a return call, and any limitations on the subject matter of the call, that railroad may decide simply not to contact any train employees or signal employees during their statutory minimum off-duty periods or periods of interim release.

7. Does the prohibition on communication apply to the extended rest required after 6 or more consecutive days initiating an on-duty period?

No. The statute is clear that the prohibition applies only to the statutory minimum off-duty period for signal employees and train employees as well as to interim releases and additional time off duty required by subsection (c)(4) for train employees. While one commenter requests that FRA extend the prohibition to the extended rest required by Sec. 21103(a)(4), FRA is unable to do so through the interpretation of the statute, because the statutory language itself specifically identifies those periods of rest when the railroad must not communicate with an employee in a way that could reasonably be expected to disrupt the employee's rest, and the 48- and 72-hour extended-rest periods are not included within the prohibition.

8. Does the prohibition on communication apply differently to forms of communication other than phone calls?

No. The prohibition on communication applies equally to any form of communication, including but not limited to phone calls, emails, text messages, voicemail, leaving a message at a hotel, or messages placed under the door of a hotel room by hotel staff.

9. May the railroad provide information that can be accessed at the employee's option?

Yes. FRA encourages provision of information that can be accessed at the employee's option, especially in the case of unscheduled or uncertain assignments, so that the employee can plan rest.

Because the alerts provided by most devices when an email or text message is received might reasonably be expected to disturb an employee who may be trying to obtain rest, such communications are generally prohibited communications. However, where the device in question is railroad-provided, such that it is only used for railroad business, employees have the option of turning the device off without impeding their ability to receive personal messages that they would want to receive even during rest. Therefore, the provision of information by text message or email to such a device is not a prohibited communication. Likewise, a railroad-provided Web site that the employee may voluntarily access could provide similar information. However, the employee may not be required to receive any communication of any sort, to access information of any kind, or to respond in any way to the information provided.

D. Questions Regarding the 276-Hour Monthly Limit on Service for the Railroad by Train Employees

BLET and UTU request clarification on the 276-hour limit on time spent on duty, waiting for or in deadhead transportation to the place of final release, or in any other mandatory service for the railroad during a calendar month. The comment notes FRA's discussion of the issue in Section IV.C.6 of the Interim Interpretations, in which FRA stated that completing hazardous materials records is a task that falls within the category of ''other mandatory service for the carrier[.]'' [20] The unions request clarification that all Federal recordkeeping requirements are considered ''other mandatory service'' and, therefore, will be counted towards an employee's 276-hour limitation for each month. FRA confirms that if an employee has the duty to carry out a Federal recordkeeping requirement applicable to a railroad, action by the employee to carry out the requirement is to be considered ''other mandatory service'' and, therefore, will be counted towards the employee's 276-hour limitation for each month. In the Interim Interpretations, FRA provided the act of completing a record on the transfer of hazardous material, as required by Transportation Security Administration regulations, as one example of ''other mandatory service for a railroad carrier[.]'' This example is simply illustrative of the sort of activities that are included as ''other mandatory service,'' and not an exception from FRA's general interpretation.

The BLET and UTU joint comment then asks if attendance at a rules class can avoid being considered as other mandatory service for the carrier if the employee is given the discretion on when to schedule and complete the training and the railroad simply provides a deadline date for completion of the training. FRA confirms that this arrangement is consistent with FRA's position taken in the Interim Interpretations, and remains FRA's interpretation: if an employee has the opportunity to schedule such training at a time that is convenient for him or her, then the time spent training in these circumstances would not be counted for the purposes of the 276-hour limitation.[21] Although training under the given circumstances can be excluded from the 276-hour monthly limitation, it is nonetheless service for the railroad carrier and can commingle with covered service. As such, an employee must communicate the beginning and ending times of such activities with the railroad, and if a statutory off duty period does not exist between the activity and covered service the time spent in these activities will commingle becoming time on duty which will be included in the 276-hour monthly limitation.

Another commenter, AAR, seeks clarification with respect to an employee's responsibility to comply with the 276-hour monthly limitation, and asks that FRA consider an employee to have ''deliberately misrepresented his or her availability'' when ''accepting a full-duty tour after completing an hours of service record for a prior duty tour showing that the employee does not have sufficient hours for another full duty tour.'' FRA declines to do so. As was discussed in Section IV.B.10, above, in response to AAR's similar comment regarding the ''consecutive-days'' limitations, given that FRA's enforcement policy with regard to its hours of service recordkeeping regulation allows railroads to keep ''consecutive-days'' limitation and monthly-service and limbo-time limitation data in a separate administrative ledger, rather than tracking the data daily on the record for each individual duty tour, railroads are in the best position to know whether or not an employee may report to perform service for the railroad. Additionally, while the penalty provision of the hours of service laws provides for individual liability for violation of the hours of service laws, the substantive restrictions operate on ''a railroad carrier and its officers and agents.'' Employees have the obligation to provide accurate information to railroads regarding their service, and FRA will consider action as appropriate under the agency's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, 49 CFR part 209, appendix A, when employees fail to meet this obligation. However, simply reporting to perform service for the railroad is insufficient to demonstrate that an employee ''deliberately misrepresented his or her availability.''

One individual commenter asks if an individual who works for multiple railroads will be required to total all service for all of these railroads to calculate whether that individual has reached the 276-hour limitation. Because the hours of service laws do not restrict an employee's choice, of his or her own volition, to perform covered service for multiple railroad carriers

[20] 74 FR 30665, 30676 (June 26, 2009).

[21] See 74 FR 30665, 30675 (June 26, 2009).

(with the exception of Sec. 21103(a)(4), as discussed above in the interpretations governing that provision), the 276-hour limitation applies only to the employee's service for each railroad. Such an employee would not need to total all service for all of these railroads, but instead would be subject to a separate 276-hour limitation for each railroad for which he or she performs covered service as a train employee. However, as discussed in Section IV.B.7 above, for the purposes of compliance with Sec. 21103(a)(4), employees are responsible for reporting all service for any railroad carrier to each of their railroad carrier employers. While FRA has previously acknowledged its lack of authority to regulate employees who choose to be employed by multiple railroads, except with regard to Sec. 21103(a)(4), FRA notes that an employee working for multiple railroads may nonetheless be subject to an excessive risk of human factors accidents caused by fatigue. Further, FRA does have the authority to pursue individual liability enforcement action against individuals who willfully fail to report all service for any railroad carrier or individuals who perform service for any railroad carrier during the extended rest required by Sec. 21103(a)(4).

E. Additional Issues Raised by Commenters

1. Statutory Changes

A large number of individual commenters wrote to express displeasure with the RSIA and its changes to the previous hours of service requirements. While FRA was granted some limited regulatory authority to address hours of service issues, any possible future FRA regulations, that might adjust the existing limitations or otherwise alter the application of the new laws, are outside the scope of these final interpretations of the existing statute.

2. Waivers

Several commenters seek waivers of the mandatory rest requirement in Sec. 21103(a)(4) for specific subsets of the rail industry. Whatever the merits of these waiver requests, they are beyond the scope of this notice. Petitions for the waivers provided for in Sec. 21103(a)(4), like petitions for waiver of FRA's safety regulations, are handled by FRA's Railroad Safety Board. 49 U.S.C. 20103(d); 49 CFR 211.41.

3. Definition of ''Covered Service''

The BLET and UTU joint comment requests FRA consider all ''yardmaster and similar positions'' covered service. ''Covered service'' refers to the functions performed by train employees, signal employees, and dispatching service employees. See 49 U.S.C. 21101, which defines these functions, and 49 CFR part 228, appendix A, which defines covered service in reference to these functions. Regardless of job title, an individual only performs covered service to the extent that the individual performs a function within one of the three statutory definitions. Therefore, FRA may not mandate that service outside of those three functions is covered service, or that employees with a certain job title will automatically be considered to have performed covered service.

The BRS comment requests clarification on what constitutes covered service for a signal employee. The comment suggests that FRA has been interpreting the statute to apply only to signal employees who work with ''energized conductors.'' However, this understanding is incorrect. While a prior technical bulletin (Federal Railroad Administration, The Federal Hours of Service Law and Signal Service, Technical Bulletin G–00–02 (2000)) did refer to ''energized conductors,'' it did so in the context of demonstrating types of activities that are and are not covered service, comparing work on those conductors to work laying cable on a new system. The sentence in the bulletin was not exclusive, and does not indicate an interpretation by FRA that a signal system must be ''energized'' in order for work installing, repairing, or maintaining that system to be considered covered service.

One individual commenter asks whether ''mechanical employees'' are subject to the hours of service requirements. While the statute changed the definition of ''signal employee'' to include those who are not employees of a railroad carrier, it did not alter the scope of what constitutes covered service that would subject an individual to the limitations within the statute. Accordingly, if service was considered covered service prior to the passage of the RSIA, that service remains covered service under the new statute. Additionally, some employees previously not subject to the hours of service laws that perform functions considered to be signal covered service but are not employed by a railroad carrier will now be covered by the hours of service laws. Employees who are generally considered to be ''mechanical employees'' may perform covered service within any of the three functional definitions, depending on the functions that the employee actually performs. For example, a mechanical employee who performs the functions of a hostler is subject to the hours of service limitations for train employees in 49 U.S.C. 21103, while a mechanical employee who performs cab signal tests is subject to the hours of service limitations for signal employees in 49 U.S.C. 21104 (Sec. 21104).

4. Exclusivity of Signal Service Hours of Service

The BRS expresses concern that, in categorically exempting signal employees from any hours of service rules promulgated by any Federal authority other than FRA, Congress created a ''loophole'' allowing a vehicle requiring a commercial driver's license to be driven by a ''signal employee'' who does not perform any covered service, with the result that such an employee is not covered by any hours of service limitations. The comment correctly notes that Congress did not intend to remove such individuals entirely from non-FRA Federal hours of service restrictions.

The solution is found within the statutory text at Sec. 21104(e), which states that ''*signal employees* operating motor vehicles shall not be subject to any hours of service rules, duty hours, or rest period rules promulgated by any Federal authority, including the Federal Motor Carrier Safety Administration, other than the Federal Railroad Administration.'' (Emphasis added.) The subsection headed ''Exclusivity'' applies only to *signal employees*, and signal employees are subject to the restrictions on hours of service provided in Sec. 21104(a). Therefore, the statute does not allow an individual subject to the exemption granted at Sec. 21104(e) not to be subject to Sec. 21104(a). FRA recognizes that this application may result in some difficulty for an employee who generally works as a signal employee (''installing, repairing, or maintaining signal systems'') but happens in a particular duty tour only to drive a vehicle requiring a commercial driver's license, without performing any functions within the definition of a ''signal employee'' in that duty tour, because such an employee remains subject to Federal Motor Carrier Safety Administration (FMCSA) limitations and recordkeeping requirements. Sec. 21104(a). FRA is open to working with FMCSA in the future to limit or eliminate this overlap, but such efforts are outside the scope of this interpretation of the statute.

5. Commuting Time

The BLET and UTU joint comment requests clarification of how FRA's prior

treatment of time spent commuting will continue in light of changes to the statute. FRA allows a 30-minute period for commuting at the away-from-home terminal, from an employee's point of final release to railroad-provided lodging, that will not be considered a deadhead, but rather, commuting time that is part of the statutory off-duty period, provided that the travel time is 30 minutes or less, including any time the employee spends waiting for transportation at the point of release or for a room upon arrival at the lodging location. *See* Federal Railroad Administration, Hours of Service Interpretations, Operating Practice Technical Bulletin OP–04–03 (Feb. 3, 2004). The hypothetical situation presented in the comment involves a train employee, finally released at the away-from-home terminal, being instructed to report 10 hours after the time of final release with no further communication from the railroad. In the hypothetical, the travel time to the railroad-provided lodging is less than 30 minutes, and the room for the employee is ready at the time the employee arrives. FRA sees no reason to depart from the prior interpretation of this situation. Accordingly, travel time of 30 minutes or less to railroad-provided lodging will be considered commuting, not deadheading, and therefore the employee's final release time will be established before the employee is transported to lodging. Similarly, in this hypothetical, an employee may depart for his or her reporting point in order to arrive at the reporting point 10 hours after his or her final release, so long as the travel time from the place of railroad-provided lodging to the reporting point is 30 minutes or less and so long as there is no additional communication from the railroad which interrupts the employee's off-duty period. Commuting time is considered part of the statutory off-duty period.

6. Application of Exception to Limitation on Certain Limbo Time

The RSIA's amendments to Sec. 21103 added a limitation, effective October 16, 2009, of 30 hours per calendar month, on the amount of time each employee may spend in a particular category of limbo time—that is, time that is neither on-duty nor off-duty; namely, when the total of time on duty time and time spent either waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release exceeds 12 consecutive hours. 49 U.S.C. 21103(c)(1)(B). However, the amendments also include an exception from the limitation at Sec. 21103(c)(2), which excludes delays caused by casualty, accident, act of God, derailment, major equipment failure preventing the train from advancing, or other delays caused by a source unknown and unforeseeable to the railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.

In their joint comment, BLET and UTU request clarification on whether this exception also applies to Sec. 21103(c)(4), which requires additional rest for train employees if time spent on duty, waiting for deadhead transportation to a point of final release, and in deadhead transportation to a point of final release exceeds 12 hours. By the express language of the statute, the exception does not apply to Sec. 21103(c)(4). The language introducing the exception expressly states that it applies to ''paragraph (1)'' (i.e., Sec. 21103(c)(1)) and therefore presumably does not apply to paragraph (4) (i.e., Sec. 21103(c)(4)); had Congress wished for the exception to apply to paragraph (4), it would have written the law accordingly.

V. Portions of FRA's Interim Interpretations of the Hours of Service Laws on Which Comments Were Not Received and Which Are Incorporated in This Final Interpretation Essentially Without Change [22]

Several of FRA's Interim Interpretations received no comments and are not being revised in these final interpretations. Therefore, they are still applicable as previously published. These policies and interpretations are reprinted below for convenience. Those interim interpretations which are no longer effective as a result of these final interpretations have been replaced in this section with a reference to the section in this document where the relevant final interpretation is discussed. In some cases, the discussion of these policies and interpretations has been revised to reflect other changes in FRA's policies and interpretations discussed in this document, or in light of FRA's subsequent promulgation of its regulations governing the hours of service for employees providing intercity or commuter passenger rail transportation. More information relating to the justification for these policies may be found in FRA's Interim Interpretations. 74 FR 30665 (June 26, 2009).

A. Questions Related to the Prohibition on Communication by the Railroad With Train Employees and Signal Employees

1. Does the prohibition on communication with train employees and signal employees apply to every statutory off-duty period no matter how long the employee worked?

Yes, except for the 48- or 72-hour rest requirement. This prohibition on communication applies to every off-duty period of at least 10 hours under Sec. 21103(a)(3) or 21104(a)(2) and to any additional rest required for a train employee when the sum of on-duty time and limbo time exceeds 12 hours under Sec. 21103(c)(4). For train employees, it also applies to every lesser off-duty period that qualifies as an interim release.

2. Is the additional rest for a train employee when on-duty time plus limbo time exceeds 12 hours mandatory, or may the employee decline it?

The additional rest is mandatory and may not be declined.

3. If an employee is called to report for duty after having 10 hours of uninterrupted time off duty, but then receives a call canceling the call to report before he or she leaves the place of rest, is a new period of 10 uninterrupted hours off duty required?

If the employee has not left the place of rest, the employee has not accrued on-duty time and would still be off duty, with the exception that the time spent in multiple calls could in certain circumstances commingle with a future duty tour.

4. What if the call is cancelled just one minute before report-for-duty time?

Although the employee will almost certainly have left the place of rest, the result to this scenario is the same as the result in the preceding question, in that the employee will not have accrued any time on duty.

5. What if the employee was told before going off duty to report at the end of required rest (either 10 hours or 48 or 72 hours after working 6 or 7 days), and is released from that call prior to the report-for-duty time?

The answer to this scenario is the same as the answer to the two preceding questions.

[22] For the present iteration, FRA made a few minor changes to the text that appeared in the Interim Interpretations. For example, FRA deleted material that had become obsolete, e.g., references to the 40-hour per month limit on certain limbo time since that limit expired on October 15, 2009. In addition, it was necessary to add language in parentheses to reflect that a reference to sections ''above'' meant sections of the Interim Interpretations. Further, FRA sometimes added a short ''yes'' or ''no'' answer before the previously published longer answer.

6. Are text messages or email permitted during the rest period?

(This question is answered in section IV.C.7 and IV.C.8 above.)

7. May the railroad return an employee's call during the rest period without violating the prohibition on communication?

(This question is answered in section IV.C.4 above.)

8. May the railroad call to alert an employee to a delay (set back) or displacement?

(This question is answered in section IV.C.5 above.)

9. If the railroad violates the requirement of undisturbed rest, is the undisturbed rest period restarted from the beginning?

Yes. (But see section IV.C.1, describing the time to which the prohibition on communication applies.)

10. Should any violation of undisturbed rest be documented by a record?

Yes. The communication and the time involved in it must be recorded as an activity on the employee's hours of service record, as required by 49 CFR 228.11(b)(9) for train employees and 49 CFR 228.11(e)(9) for signal employees.

(This question is discussed in more detail in section IV.C.1 and IV.C.2 above.)

11. Is the additional rest required when on-duty time plus limbo time exceeds 12 hours (during which communication with an employee is prohibited) to be measured only in whole hours, so that the additional rest requirement is not a factor until the total reaches 13 hours?

No. The additional undisturbed time off that an employee must receive includes any fraction of an hour that is in excess of 12 hours.

B. Questions Related to the Requirements Applicable to Train Employees for 48 or 72 Hours Off at the Home Terminal

1. Is a ''Day'' a calendar day or a 24-hour period for the purposes of this provision?

(This question is answered in section IV.B.1 above.)

2. If an employee is called for duty but does not work, has the employee initiated an on-duty period? If there is a call and release? What if the employee has reported?

(This question is answered in section IV.B.5 above.)

3. Does deadheading from a duty assignment to the home terminal for final release on the 6th or 7th day count as a day that triggers the 48-hour or 72-hour rest period requirement?

(This question is answered in section IV.B.2 and IV.B.3 above.)

4. Does attendance at a mandatory rules class or other mandatory activity that is not covered service but is non-covered service, count as initiating an on-duty period on a day?

No. As in the previous question, the rules class or other mandatory activity is other service for the carrier (non-covered service) that is not time on duty and would not constitute initiating an on-duty period if it is preceded and followed by a statutory off-duty period.

Likewise, if the rules class or other mandatory activity commingled with covered service during either the previous duty tour or the next duty tour after the rules class (because there was not a statutory off-duty period between them), the rules class or other mandatory activity would not itself constitute initiating a separate on-duty period, but would be part of the same on-duty period with which it is commingled.

This question is discussed in more detail in section IV.B.6 above.

5. If an employee is marked up (available for service) on an extra board for 6 days but only works 2 days out of the 6, is the 48-hour rest requirement triggered?

No. The employee must actually initiate an on-duty period. Being marked up does not accomplish this unless the employee actually reports for duty.

6. If an employee initiates an on-duty period on 6 consecutive days, ending at an away-from-home terminal and then has 28 hours off at an away-from-home terminal, may the employee work back to the home terminal? The statute says that after initiating an on-duty period on 6 consecutive days the employee may work back to the home terminal on the 7th day and then must get 72 hours off, but what if the employee had a day off at the away-from-home terminal after the 6th day?

The statute says that the employee may work on the 7th day if the sixth duty tour ends at the away-from-home terminal, but that the employee must then have 72 hours of time at the home terminal in which he or she is unavailable for any service for any railroad carrier. If the employee first has at least 24 hours off at the away-from-home terminal, the consecutiveness is broken, and the employee has not initiated an on-duty period for 7 consecutive days and would not be entitled to 72 hours off duty after getting back to the home terminal. However, the time off at the away-from-home terminal would not count toward the 48 hours off duty that the employee must receive after getting back to the home terminal.

7. May an employee who works 6 consecutive days vacation relief at a ''Temporary Home Terminal'' work back to the regular home terminal on the 7th day?

Yes, the employee may initiate an on-duty period on the seventh day and then receive 72 hours off at the home terminal. FRA believes this is consistent with the statutory purpose of allowing the employee to have the extended rest period at home. To that end, although the statute refers to the home terminal, FRA expects that in areas in which large terminals include many different reporting points at which employees go on and off duty, the railroad would make every effort to return an employee to his or her regular reporting point, so that the rest period is spent at home.

C. Questions Related to the 276-Hour Monthly Maximum for Train Employees of Time on Duty, Waiting for or Being in Deadhead Transportation to Final Release, and in Other Mandatory Service for the Carrier

1. If an employee reaches or exceeds 276 hours for the calendar month during a trip that ends at the employee's away-from-home terminal, may the railroad deadhead the employee home during that month?

The literal language of the statute might seem to prohibit deadheading an employee who has already reached or exceeded the 276-hour monthly maximum, because time spent in deadhead transportation to final release is part of the time to be calculated toward the 276-hour maximum, and one of the activities not allowed after the employee reaches 276 hours. However, the intent of the statute seems to favor providing extended periods of rest at an employee's home terminal. Therefore, in most cases, FRA would allow the railroad to deadhead the employee home in this circumstance, rather than requiring the employee to remain at an away-from-home terminal until the end of the month.

FRA expects the railroad to make every effort to plan an employee's work so that this situation would not regularly arise, and FRA reserves the right to take enforcement action if a pattern of abuse is apparent.

2. How will FRA apply the 276-hour cap to employees who only occasionally perform covered service as a train employee, but whose hours, when combined with their regular shifts in non-covered service, would exceed 276 hours?

This provision in the RSIA does not specifically provide any flexibility for employees who only occasionally perform covered service as a train employee. Such employees would still be required, as they are now, to complete an hours of service record for every 24-hour period in which the employee performed covered service, and the employee's hours will continue to be limited as required by the statute for that 24-hour period. See 74 FR 25330, 25348 (May 27, 2009), 49 CFR 228.11(a).

FRA will likely exercise some discretion in enforcing the 276-hour monthly limitation with regard to employees whose primary job is not to perform covered service as a train employee, as most of the hours for such employees would be comprised of the hours spent in the employee's regular ''non-covered service'' position, which hours are not otherwise subject to the limitations of the statute. However, FRA will enforce the 276-hour limitation with regard to such employees if there is a perception that a railroad is abusing it.

3. Does the 276-hour count reset at midnight on the first day of a new month?

Yes. The statute refers to a calendar month, so when the month changes, the count resets immediately, as in the following example:

Employee goes on duty at 6 p.m. on the last day of the month, having previously accumulated 270 hours for that calendar month. By midnight, when the month changes, he has worked an additional 6 hours, for a total of 276 hours. The remaining hours of this duty tour occur in the new month and begin the count toward the 276-hour maximum for that month, so the railroad is not in violation for allowing the employee to continue to work.

4. May an employee accept a call to report for duty when he or she knows there are not enough hours remaining in the employee's 276-hour monthly limitation to complete the assignment or the duty tour, and it is not the last day of the month, so the entire duty tour will be counted toward the total for the current month?

It is the responsibility of the railroad to track an employee's hours toward the monthly limitation, so the employee is not the one in the best position to determine whether he or she has sufficient time remaining in the monthly limitation to complete a duty tour for which he or she is called. Therefore, the employee would generally not be in trouble with FRA for accepting the call, absent evidence that the employee deliberately misrepresented his or her availability. The railroad will be in violation of the new hours of service laws if an employee's cumulative monthly total exceeds 276 hours. However, it could be a mitigating factor in some situations if the railroad reasonably believed the employee might be able to complete the assignment before reaching the 276-hour limitation.

- *Scenario 1:* Employee is called for duty with 275 hours already accumulated. It is only the 27th day of the month, so the entire period will be in the current month. It was probably not reasonable to assume that any assignment could be completed in the remaining time.
- *Scenario 2:* Again the 27th day of the month. This time the employee has only accumulated 264 hours toward the 276-hour monthly limitation. In this instance, the railroad may have expected that the employee could complete the covered service and deadhead to the home terminal within the remaining time. If that does not happen, the railroad is in violation, but enforcement discretion or mitigation of any penalties assessed will be considered if the railroad made a reasonable decision.

5. What activities constitute ''Other Mandatory Service for the Carrier,'' which counts towards the 276-hour monthly limitation?

FRA recognizes that if every activity in which an employee participates as part of his or her position with the railroad is counted toward the 276-hour monthly maximum, it could significantly limit the ability of both the railroad to use the employee, and the employee to be available for assignments that he or she would wish to take, especially in the final days of a month. This has been raised as a matter of concern since enactment of the RSIA.

In particular, there are activities that may indirectly benefit a railroad but that are in the first instance necessary for an employee to maintain the status of prepared and qualified to do the work in question. In some cases these activities are compensated in some way, and in some cases not. These activities tend not to be weekly or monthly requirements, but rather activities that occur at longer intervals, such as audiograms, vision tests, optional rules refresher classes, and acquisition of security access cards for hazardous materials facilities. Most of these activities can be planned by employees within broad windows to avoid conflicts with work assignments and maintain alertness. Railroads are most often not aware of when the employee will accomplish the activity.

Therefore, for the purposes of this provision, FRA will require that railroads and employees count toward the monthly maximum those activities that the railroad not only requires the employee to perform but also requires the employee to complete immediately or to report at an assigned time and place to complete, without any discretion in scheduling on the part of the employee.

Those activities over which the employee has some discretion and flexibility of scheduling would not be counted for the purposes of the 276-hour provision, because the employee would be able to schedule them when he or she is appropriately rested. FRA expects that railroads will work with their employees as necessary so that they can schedule such activities and still obtain adequate rest before their next assignment.

When any service for a railroad carrier is not separated from covered service by a statutory minimum off-duty period, the other service will commingle with the covered service, and therefore be included as time on duty. As time on duty, such time will count towards the monthly limit of 276 hours.

6. Does time spent documenting transfer of hazardous materials (Transportation Security Administration requirement) count against the 276-hour monthly maximum?

Yes. This example is a specific application of the previous question and response concerning ''other mandatory service for the carrier.'' The activity of documenting the transfer of a hazardous material pursuant to a Transportation Security Administration requirement is mandatory service for the carrier, and a mandatory requirement of the position for employees whose jobs involve this function. Although the requirement is Federal, compliance with it is a normal part of an employee's duty tour, which must be completed as part of the duty tour, and the employee does not have discretion in when and where to complete this requirement. Time spent in fulfilling this requirement is part of the maximum allowed toward the 276-hour monthly maximum.

D. Other Interpretive Questions Related to the RSIA Amendments to the Old Hours of Service Laws

1. Does the 30-hour monthly maximum limitation on time awaiting and in deadhead transportation to final release only apply to time awaiting and in deadhead transportation after 12 consecutive hours on duty?

No. Sec. 21103(c)(1)(B) provides that ''[a] railroad may not require or allow an employee * * * to exceed 30 hours per month—(i) waiting for deadhead transportation; or (ii) in deadhead transportation from a duty assignment to a place of final release, following a period of 12 consecutive hours on duty * * *.'' The intent of this provision is to prevent situations in which employees are left waiting on trains for extended periods of time awaiting deadhead transportation, and then in the deadhead transportation. This purpose would be frustrated if none of the limbo time is counted toward the limitation unless the on-duty time for the duty tour is already at or exceeding 12 hours, as an employee who has accumulated 11 hours and 59 minutes in his or her duty tour could be subjected to limitless time awaiting and in deadhead transportation.

FRA will interpret this provision to include all time spent awaiting or in deadhead transportation to a place of final release that occurs more than 12 hours after the beginning of the duty tour, minus any time spent in statutory interim periods of release. For example, if an employee is on duty for 11 hours 30 minutes, and then spends an additional 3 hours awaiting and in deadhead transportation to the point of final release, for a total duty tour of 14 hours and 30 minutes, 2 hours and 30 minutes of the time spent awaiting or in deadhead transportation will be counted toward the 30-hour monthly limit.

2. Did the RSIA affect whether a railroad may obtain a waiver of the provisions of the new hours of service laws?

Yes, but FRA's authority, delegated from the Secretary, to waive provisions of the hours of service laws as amended by the RSIA remains extremely limited. 49 CFR 1.49.

The RSIA left intact the longstanding, though limited, waiver authority at 49 U.S.C. 21102(b), which authorizes the exemption of railroads ''having not more than 15 employees covered by'' the hours of service laws ''[a]fter a full hearing, for good cause shown, and on deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a carrier to require or allow its employees to be on duty more than a total of 16 hours in a 24-hour period.''

The RSIA amended the one other, even narrower waiver provision in the old hours of service laws and added three more equally narrow new waiver provisions. In particular, the RSIA revised 49 U.S.C. 21108, Pilot projects, originally enacted in 1994, involving joint petitions for waivers related to pilot projects under 49 U.S.C. 21108, primarily to provide for waivers of the hours of service laws both as in effect on the date of enactment of the RSIA and as in effect nine months after the date of enactment. Waivers under this section are intended to enable the establishment of one or more pilot projects to demonstrate the possible benefits of implementing alternatives to the strict application of the requirements of the hours of service laws, including requirements concerning maximum on-duty and minimum off-duty periods. The Secretary may, after notice and opportunity for comment, approve such waivers for a period not to exceed two years, if the Secretary determines that such a waiver is in the public interest and is consistent with railroad safety. Any such waiver, based on a new petition, may be extended for additional periods of up to two years, after notice and opportunity for comment. An explanation of any waiver granted under this section shall be published in the **Federal Register**.

The first of the three new waiver provisions, 49 U.S.C. 21109(e)(2), authorizes temporary waivers of that section in order ''if necessary, to complete'' a pilot project mandated by that subsection. To date, FRA has not conducted either of the specific pilot projects mandated by that section, because FRA has not received any waiver requests from a railroad, and its relevant labor organizations or affected employees, seeking to participate in these projects. FRA still seeks to complete these projects, if a railroad were willing to implement the necessary procedures, and the appropriate waiver could be designed.

The second new waiver provision, 49 U.S.C. 21103(a)(4), provides limited authority to grant a waiver of one provision that it adds to the old hours of service laws. That provision is the requirement that an employee receive 48 hours off duty at the employee's home terminal after initiating an on-duty period on 6 consecutive days, 72 hours off duty at the employee's home terminal after initiating an on-duty period on 7 consecutive days, etc. This provision was discussed in section IV.B of the Interim Interpretations as well as section IV.B and V.B, above. FRA may waive this provision, and has done so in a number of instances in response to petitions received, if a collective bargaining agreement provides for a different arrangement and that arrangement is in the public interest and consistent with railroad safety. A railroad and its labor organization(s) or affected employees should jointly submit information regarding schedules allowed under their collective bargaining agreements that would not be permitted under this provision, and supporting evidence for the conclusion that it is in the interest of safety. Of course, a waiver is not needed for a schedule that would not violate this provision. For example, if a schedule provides that an employee works 4 consecutive days and then has one day off, the schedule would not violate the new hours of service laws, because the employee would not have initiated an on-duty period on 6 consecutive days, so 48 hours off duty would not be required.

The third and last new waiver provision authorizes waivers of the prohibition on communication during off-duty periods with respect to train employees of commuter or intercity passenger railroads if it is determined that a waiver will not reduce safety and is necessary to maintain such a railroad's efficient operation and on-time performance. This waiver provision is no longer applicable, because such employees are now subject to FRA's hours of service regulation for train employees providing commuter or intercity rail passenger transportation, and are therefore no longer subject to the statutory uninterrupted rest requirement. 49 CFR 228.413.

Issued in Washington, DC, on February 22, 2012.

Joseph C. Szabo,

Administrator.

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Appendix G: Federal Register, Vol. 78, No. 185

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Part VI

Department of Transportation

Federal Railroad Administration

49 CFR Part 228

Second Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended in 2008; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 228

[Docket No. 2013–0011, Notice No. 1]

Second Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended in 2008

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Interim statement of agency policy and interpretation, hours of service laws as amended in 2008; request for public comment.

SUMMARY: The hours of service laws are Federal railroad safety laws that govern such matters as the maximum on-duty periods and minimum off-duty periods for railroad employees performing certain functions. In this document FRA supplements its existing interpretations of the hours of service laws by stating the agency's interim position on some additional interpretive questions primarily involving two provisions of those laws that were added in 2008. First, this document further interprets the hours of service laws related to train employees, particularly the ''consecutive-days'' provision of those laws. Although the consecutive-days provision was also discussed in FRA's June 2009 interim interpretations and February 2012 final interpretations, this document addresses the application of that provision to certain circumstances that were not specifically addressed in those interpretations. Second, this document further interprets the provision of the hours of service laws that makes signal employees operating motor vehicles subject to the hours of service laws and other hours of service requirements administered by FRA and exempt from the hours of service requirements promulgated by any other Federal authority. FRA invites public comment on these additional interim interpretations.

DATES: This document is effective October 24, 2013. Comments on the interim interpretations are due by November 25, 2013. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments on the interim interpretations set forth in this document, identified as Docket No. FRA–2013–0011, by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, *http://www.regulations.gov*. Follow the Web site's online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this interim statement of agency policy and interpretation. Note that all submissions received will be posted without change to *http://www.regulations.gov* including any personal information.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Colleen A. Brennan, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC–12, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6028 or 202–493–6052); Matthew T. Prince, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC–12, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6146 or 202–493–6052); Rich Connor, Operating Practices Specialist, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue SE., RRS–11, Mail Stop 25, Washington, DC 20590 (telephone 202–493–1351); or George C. Hartman, Acting Staff Director, Signal and Train Control Division, Office of Safety Assurance and Compliance, FRA, Mail Stop 25, West Building 3rd Floor West, Room W35–333, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–6225).

SUPPLEMENTARY INFORMATION:

Abbreviations of Terms Frequently Used in This Document

AAR Association of American Railroads
BRS Brotherhood of Railroad Signalmen
CFR Code of Federal Regulations
ch. chapter
FMCSA Federal Motor Carrier Safety Administration
FRA Federal Railroad Administration
HS hours of service (when the term is used as an adjective, except as part of the name of an Act of Congress or the title of a document, and not when the term is used as a noun)
RSIA Rail Safety Improvement Act of 2008, Public Law 110–432, Div. A, 122 Stat. 4848
Sec. Section (Unless otherwise noted, all references to a ''Sec.'' are to a section in title 49 of the U.S. Code.)
U.S.C. United States Code

Definitions of Terms Frequently Used in This Document [1]

Consecutive-days provision of the HS laws means 49 U.S.C. 21103(a)(4).

Consecutive-days provision of the Passenger Train Employee HS Regulations means 49 CFR 228.405(a)(3).

Extended-rest provision of the HS laws means 49 U.S.C. 21103(a)(4).

Extended-rest provision of the Passenger Train Employee HS Regulations means 49 CFR 228.405(a)(3).

Final Interpretations means FRA's ''Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended; Response to Public Comment'' published at 77 FR 12408–31 (February 29, 2012).

Freight train employee means a train employee who is not a passenger train employee.

June 2009 Interim Interpretations means FRA's ''Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended; Proposed Interpretation; Request for Public Comment'' published at 74 FR 30665–77 (June 26, 2009).

Passenger train employee means a *train employee who is engaged in commuter or intercity rail passenger transportation,* as defined by 49 CFR 228.403(c).

Passenger Train Employee HS Regulations means the passenger train employee hours of service regulations codified at 49 CFR part 228, subpart F.

Second Interim Interpretations means this document, FRA's ''Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended in 2008; Request for Public Comment'' published on September 24, 2013.

''Signal employee exclusivity'' provision means 49 U.S.C. 21104(e).

Secretary means the Secretary of Transportation.

Table of Contents for Supplementary Information

[1] See also Appendix A to this document for a table briefly summarizing the Federal hours of service requirements. Many terms frequently used in this document are defined in FRA's regulations at 49 CFR 228.5.

I. Executive Summary of the Second Interim Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended in 2008 (Second Interim Interpretations)

A. Statutory and Regulatory Background and FRA's Previous Interpretations (Section II and Section III.A of the Second Interim Interpretations)

Federal laws governing railroad employees' hours of service date back to 1907 [2] and are presently codified as positive law at Secs. 21101–21109 [3] and 21303.[4] FRA, under delegations from the Secretary of Transportation,[5] has long administered the statutory HS requirements for the three groups of employees now covered by the statute; namely, employees performing the functions of a train employee, signal employee, or dispatching service employee, as those terms are defined at Sec. 21101. These terms are also defined for purposes of FRA's HS recordkeeping and reporting regulations (49 CFR part 228, subpart B) at 49 CFR 228.5 and discussed in FRA's ''Requirements of the Hours of Service Act; Statement of Agency Policy and Interpretation'' at 49 CFR part 228, appendix A, most of which was issued in the 1970s.

The HS statutory requirements have been amended several times over the years, most recently by the Rail Safety Improvement Act of 2008 [6] (RSIA). The RSIA substantially amended the requirements of Sec. 21103, applicable to a train employee, defined as an ''individual engaged in or connected with the movement of a train, including a hostler,'' [7] and the requirements of Sec. 21104, applicable to a signal employee, defined as an ''individual who is engaged in installing, repairing, or maintaining signal systems.'' [8] The RSIA also added new provisions at Secs. 21102(c) and 21109 that together made train employees providing rail passenger transportation subject not to Sec. 21103 but to HS regulations, if issued timely by the Secretary. Subsequently, FRA, as the Secretary's delegate, issued those regulations, codified at 49 CFR part 228, subpart F (Passenger Train Employee HS Regulations), which became effective on October 15, 2011. Until those regulations were issued, train employees providing commuter rail passenger transportation or intercity rail passenger transportation were subject to Sec. 21103 as it existed immediately before the RSIA amendments.

Following the enactment of the RSIA, FRA published an interim statement of agency policy and interpretation (June 2009 Interim Interpretations) to address questions of statutory interpretation that

[2] See the Hours of Service Act (Pub. L. 59–274, 34 Stat. 1415 (1907)). Effective July 5, 1994, Public Law 103–272, 108 Stat. 745 (1994), repealed the Hours of Service Act as amended, then codified at 45 U.S.C. 61–64b, and also revised and reenacted its provisions, without substantive change, as positive law at Sec. 21101–21108 and 21303.

[3] These sections may also be cited as 49 U.S.C. chapter 211.

[4] For a table comparing and contrasting the current Federal hours of service (HS) requirements with respect to freight train employees, passenger train employees, signal employees, and dispatching service employees, please see Appendix A to the Second Interim Interpretations.

[5] See 49 CFR 1.89.

[6] Public Law 110–432, Div. A, 122 Stat. 4848.

[7] Sec. 21101(5).

[8] Sec. 21101(4). The RSIA also amended the definition of ''signal employee'' effective October 16, 2008. Before the RSIA, the term meant ''an individual *employed by a railroad carrier* who is engaged in installing, repairing, or maintaining signal systems.'' Emphasis added.

had arisen so far with respect to the HS laws as amended by the RSIA (the new HS laws). 74 FR 30665 (June 26, 2009). Subsequently FRA published final interpretations that responded to public comments on the June 2009 Interim Interpretations and made certain revisions. 77 FR 12408 (February 29, 2012) (Final Interpretations). In responding to those comments, FRA recognized that the commenters had raised some important issues on which FRA had not taken a position in the June 2009 Interim Interpretations. Section III of the Second Interim Interpretations, below, addresses several such issues, each related primarily to the consecutive-days limitations and extended-rest requirements of Sec. 21103(a)(4), but also touching on other requirements of Sec. 21103 and on the extended-rest requirements of the Passenger Train Employee HS Regulations (49 CFR 228.405(a)(3)). Further, following the publication of the Final Interpretations, in responding to a letter dated April 9, 2012, from the Association of American Railroads (AAR), FRA agreed in a letter dated June 22, 2012, to address the agency's exclusive Federal jurisdiction over the HS of signal employees in a notice to be published in the **Federal Register**. This issue is discussed in Section IV of the Second Interim Interpretations, below. For these reasons, FRA has decided to publish the Second Interim Interpretations to deal with these important issues, and to seek public comment on these issues, so that FRA will be able to speak to the concerns raised by the industry with full understanding of the positions of the various parts of the industry, and the practical implications of these interpretations.

B. Unavailability for Service for Purposes of the Statutory Consecutive-Days Provision (Sec. 21103(a)(4)) (Section III.B of the Second Interim Interpretations)

The extended-rest requirement of Sec. 21103(a)(4) is for a minimum of 48 or 72 ''consecutive hours off duty at the employee's home terminal *during which time the employee is unavailable for any service for any railroad carrier.''* Emphasis added. The question of what it means to be ''unavailable for service'' under Sec. 21103(a)(4) and, therefore, when an employee begins his or her required minimum 48 or 72 consecutive hours off duty at the employee's home terminal, was not addressed in the June 2009 Interim Interpretations. Rather, the issue was raised by implication in public comments on the June 2009 Interim Interpretations addressing the application of Sec. 21103(a)(4) with respect to employees who are released immediately after reporting for duty, if this release occurs on the sixth or seventh consecutive day on which the employee has initiated an on-duty period. FRA concludes that an employee who has worked less than the maximum of 12 consecutive hours or 12 hours in the aggregate under the HS laws, is considered to have received sufficient rest to comply with Sec. 21103(a)(4) if that employee in fact performs no further service for any railroad (''de facto unavailability'') during a 48- or 72-hour rest period at the employee's home terminal. The merely theoretical, legal availability of the employee to be required or allowed to return to work all or part of the remainder of the employee's maximum duty tour [9] does not in itself negate the employee's unavailability for purposes of Sec. 21103(a)(4). In addition, notification of the employee that the 48- or 72-hour rest period has begun is not required. Likewise, an employee who has reached the maximum of 12 hours of time on duty also may begin both the statutory minimum off-duty period and the 48- or 72-hour extended-rest period concurrently. FRA considered two alternatives to its interim interpretation. Under one alternative, an employee would not be deemed unavailable for service and subject to the extended rest required by Sec. 21103(a)(4) until the employee is legally unavailable for further service. The other alternative would base an employee's unavailability for service on the notice provided to the employee as to the nature and duration of the off-duty period at the time that the employee began the off-duty period. For reasons described below, FRA rejected both of these alternative interpretations.

C. Primarily, Initiating an On-duty Period for Purposes of Sec. 21103(a)(4); Secondarily, Application of Subsections (a)(1), (a)(3), (c)(1), (c)(4), and (e) of Sec. 21103 (Section III.C of the Second Interim Interpretations)

With certain exceptions, Sec. 21103(a)(4) prohibits a railroad from requiring or allowing an employee to go or remain on duty as a train employee after the employee has initiated an on-duty period each day on six consecutive days unless that employee has received the 48-hour rest period described above. If one of the exceptions applies, after the employee has initiated an on-duty period each day as a train employee on seven consecutive days, a 72-hour rest period is required before the employee goes on duty again as a train employee. The application of Sec. 21103(a)(4) to an employee who works in multiple types of covered service, either on a single day or during a period of six or seven consecutive days, was also not addressed in the June 2009 Interim Interpretations, but was raised in BLET and UTU's joint comment on those Interim Interpretations, in which they asked for clarification on how Sec. 21103 and Sec. 21105 (which provides the HS limitations for dispatching service employees) interact.

For reasons discussed in detail below, in Section III.C. 2.a–e of the Second Interim Interpretations, FRA interprets the relevant scope of ''on-duty period'' for purposes of Sec. 21103(a)(4) to extend only to on-duty periods as a train employee, including on-duty periods as either a freight train employee or a passenger train employee; accordingly, only when an individual performs train employee functions (i.e., is engaged in or connected with the movement of a train) will such an individual be considered to have ''initiated an on-duty period'' for the purposes of Sec. 21103(a)(4). Examples applying these principles are found primarily at Section III.C.2.h of the Second Interim Interpretations. FRA also considered an interpretation that would have counted all forms of covered service as initiating an on-duty period for the purposes of Sec. 21103(a)(4), so that even duty tours consisting only of service as a signal employee or a dispatching service employee, without any service as a train employee, would count toward the consecutive-days limitation of Sec. 21103(a)(4). This alternate interim interpretation was rejected for reasons explained in detail below in Section III.C. 2.a–c of the Second Interim Interpretations.

Section III.C.2.f–g of the Second Interim Interpretations provides further clarification and examples of how the various statutory and regulatory limitations work together, and the application of the respective commingled service provisions (Secs. 21103(b)(3), 21104(b)(2), and 21105(c) and 49 CFR 228.405(b)(3)) to individual duty tours in which multiple types of covered service are performed. When an employee performs service that is governed by more than one HS requirement, the railroad must comply with all of the requirements governing that service during the relevant period

[9] *Duty tour* means—(1) The total of all periods of *covered service* and *commingled service* for a train employee or a signal employee occurring between two *statutory off-duty periods* (i.e., off-duty periods of a minimum of 8 to 10 hours); or (2) The total of all periods of *covered service* and *commingled service* for a dispatching service employee occurring in any 24-hour period. 49 CFR 228.5.

of time, including the most stringent of the requirements governing that service.

As discussed in Section III.C. 2.e, for similar reasons, on an interim basis, FRA also interprets appropriate periods of time accrued in a passenger-train-employee duty tour to count toward the respective limitations of Sec. 21103(a)(1) (limiting on-duty time and certain other service for the railroad to 276 hours per calendar month) and Sec. 21103(c)(1) (limiting certain limbo time per calendar month) if the employee engages in freight-train-employee duty tours in the same calendar month. Likewise, as discussed in Section III.C.2.f–g, although a duty tour that does not include any time spent as a freight train employee does not trigger the 10-hour statutory minimum off-duty period between duty tours required by Sec. 21103(a)(3), uninterrupted as required by Sec. 21103(e), or the requirement for ''additional rest'' under Sec. 21103(c)(4), once these requirements have been triggered by a duty tour including service as a freight train employee, the required off-duty period, including any necessary ''additional rest,'' must be provided before the employee performs any other service for the railroad, or else that subsequent service will commingle with the previous duty tour under Sec. 21103(b)(3).

D. Requirements After Final Release at the Away-From-Home Terminal After the Employee Has Initiated an On-Duty Period on Six Consecutive Days (Section III.D of the Second Interim Interpretations)

FRA has also not previously addressed the following question, which involves an exception to Sec. 21103(a)(4): May an employee initiate a seventh on-duty period 24 hours or more after the employee is finally released from his or her sixth consecutive duty tour at the employee's away-from-home terminal, or does Sec. 21103(a)(4)(A)(i)–(ii) authorize a train employee to initiate an on-duty period only if it is consecutive to the sixth consecutive day? Under FRA's interim interpretation, the railroad may not require or allow a train employee to initiate an on-duty period after the employee has initiated an on-duty period each day for six consecutive days, has been finally released at the away-from-home terminal, and then has spent more than 24 hours off duty there. Rather, as described below, the railroad may require or allow the employee to engage in non-covered service at the away-from-home terminal, if desired, but must deadhead the employee to his or her home terminal and must then give the employee 48 hours off duty at the home terminal before requiring or allowing the employee to report for duty again to perform service as a freight train employee. In addition, if the railroad has nevertheless required or allowed the employee to initiate an on-duty period at the away-from-home terminal after the seventh consecutive day, the railroad must give the employee 72 hours off duty at the home terminal before requiring or allowing the employee to report for duty again to perform as a freight train employee. FRA considered, but rejected for reasons discussed below, an alternative reading of the text, that would understand the authorization to ''work a seventh consecutive day'' as allowing one final initiation of an on-duty period when the employee ends the sixth consecutive on-duty period at the away-from-home terminal, even if the initiation of that final on-duty period occurs after the seventh consecutive day.

E. ''Signal Employee Exclusivity'' Provision (Section IV of the Second Interim Interpretations)

Finally, the ''signal employee exclusivity'' provision (Section 21104(e)) states that the ''hours of service, duty hours, and rest periods of signal employees shall be governed exclusively by [the HS laws]. Signal employees operating motor vehicles shall not be subject to any [HS] rules, duty hours or rest period rules promulgated by any Federal authority, including the [FMCSA] other than the [FRA].'' FRA revises its prior interpretation of that provision. In the Final Interpretations, FRA took the position that driving a motor vehicle itself was noncovered service that would not count as time on duty; only if the driving occurred within a duty tour that included time when the employee was engaged in installing, repairing or maintaining signal systems, would the time spent driving commingle under the commingling provision at Section 21104(b)(2) and count as time on duty. As a consequence, the time spent driving that was separate from a duty tour that contained covered service was not time on duty as a signal employee that was governed by Sec. 21104, and could be subject to the HS regulations of the Federal Motor Carrier Safety Administration (FMCSA HS regulations). For the reasons described below, FRA's new interim interpretation views an individual's operation of a motor vehicle, when such driving is for the purpose of allowing that individual to install, repair, or maintain signal systems, to be a function that is time on duty under the ''signal employee'' provisions of the HS laws, regardless of whether the operation of the motor vehicle is within the same duty tour as the direct work on the signal system, or is separated from it by at least 10 hours off duty. As a result, such operation of a motor vehicle for that purpose is itself subject to the limitations of the HS laws, and to the exclusivity provision that exempts the operation from other Federal requirements concerning HS, duty hours, or rest periods, including FMCSA's HS Regulations. It should be noted, however, that many of FRA's longstanding interpretations of travel time for signal employees are unchanged. For example, normal commuting between the individual's home and his or her regular reporting point is not time on duty. Those existing interpretations are briefly reiterated.

II. Background on the Hours of Service Laws and FRA's Previous Publications Interpreting the Hours of Service Laws as Amended in 2008

FRA is the agency of DOT that administers the Federal railroad safety laws.[10] Federal laws governing railroad employees' hours of service date back to 1907 [11] and are presently codified as positive law at Secs. 21101–21109 [12] and 21303.[13] FRA, under delegations from the Secretary of Transportation (Secretary), has long administered the statutory HS requirements for the three groups of employees now covered by the statute; namely, employees performing the functions of a train employee, signal employee, or dispatching service employee, as those terms are defined at Sec. 21101. These terms are also defined for purposes of FRA's hours of service recordkeeping and reporting regulations (49 CFR part 228, subpart B) at 49 CFR 228.5 and discussed in FRA's ''Requirements of the Hours of Service Act; Statement of

[10] See 49 U.S.C. 103 (the statutory provision establishing FRA and conferring on the Administrator of FRA the duties and powers to carry out certain Federal railroad safety laws, including the hours of service (HS) laws) and 49 CFR 1.89 (the delegation from the Secretary of Transportation to the Administrator of FRA to carry out all the Federal railroad safety laws).

[11] See the Hours of Service Act (Pub. L. 59–274, 34 Stat. 1415 (1907)). Effective July 5, 1994, Public Law 103–272, 108 Stat. 745 (1994), repealed the Hours of Service Act as amended, then codified at 45 U.S.C. 61–64b, and also revised and reenacted its provisions, without substantive change, as positive law at Sec. 21101–21108 and 21303.

[12] These sections may also be cited as 49 U.S.C. chapter 211.

[13] For a table comparing and contrasting the current Federal HS requirements with respect to freight train employees, passenger train employees, signal employees, and dispatching service employees, please see Appendix A to the Second Interim Interpretations.

Agency Policy and Interpretation'' at 49 CFR part 228, appendix A, most of which was issued in the 1970s.

The HS statutory requirements have been amended several times over the years, most recently by the Rail Safety Improvement Act of 2008 (RSIA). See Public Law 110–432, Div. A, 122 Stat. 4848, enacted October 16, 2008. Section 108 of the RSIA, captioned ''Hours-of-service reform,'' made important changes to 49 U.S.C. chapter (ch.) 211, Hours of Service, as amended through October 15, 2008 (the old HS laws). See 122 Stat. 4860–4866. Because of the significance of the amendments to the old HS laws made by Sec. 108 of the RSIA, FRA published an interim statement of agency policy and interpretation (June 2009 Interim Interpretations) to address questions of statutory interpretation that had arisen so far with respect to the HS laws as amended by the RSIA (the new HS laws). 74 FR 30665 (June 26, 2009). FRA also invited comment on the June 2009 Interim Interpretations.

Subsequently FRA published final interpretations that responded to public comments on the June 2009 Interim Interpretations and made certain revisions. 77 FR 12408 (February 29, 2012) (Final Interpretations). In responding to those comments, FRA recognized that the commenters had raised some important issues on which FRA had not taken a position in the June 2009 Interim Interpretations. Further, responding to a letter dated April 9, 2012, from AAR, about the Final Interpretations, FRA agreed in a letter dated June 22, 2012, to address the agency's exclusive Federal jurisdiction over the hours of service of signal employees in a notice to be published in the **Federal Register**. For these reasons, FRA has decided to publish these additional interim interpretations (Second Interim Interpretations) dealing with these important issues, and to seek public comment, so that FRA will be able to speak to the concerns raised by the industry with full understanding of the positions of the various parts of the industry on these issues.

III. Additional Questions Primarily Regarding the Consecutive-Days Limitation for Freight Train Employees and the Requirement of at Least 48 or 72 Hours Off Duty at the Home Terminal During Which Time the Employee Is Unavailable for Service for Any Railroad

A. Legislative, Statutory, and Regulatory Background on the Hours of Service Requirements Related to Train Employees

Sec. 108 of the RSIA amended in various ways the then-existing limitations in the old HS laws on the duty hours of ''train employees'' at 49 U.S.C. 21103 and added new provisions at 49 U.S.C. 21102(c) and 21109 that as a group reformed the Federal scheme for the hours of service of train employees. The RSIA did not amend the definition of ''train employee'' at 49 U.S.C. 21101(5) (which continues to read ''an individual engaged in or connected with the movement of a train, including a hostler'') and did not amend the rules for determining ''time on duty'' under 49 U.S.C. 21103 (which continues to provide for counting as ''time on duty'' any other type of service for the railroad that occurred within the same duty tour as the train-employee covered service).[14] However, the new provision at 49 U.S.C. 21102(c) created two separate sets of HS requirements for train employees based on the type of train service that the employees were performing at the relevant point in time.

In particular, train employees when not providing commuter rail passenger transportation or intercity rail passenger transportation but otherwise engaged in or connected with the movement of a train (described in this document as ''freight train employees'') became subject to Sec. 21103 as amended by the RSIA (new Sec. 21103 or [unmodified] Sec. 21103). In contrast, train employees ''when providing commuter rail passenger transportation or intercity rail passenger transportation'' (described in this document as ''passenger train employees'') instead remained subject to 49 U.S.C. Sec. 21103 as it existed on the day before the enactment of the RSIA (old Sec. 21103) until October 15, 2011 and then on October 15, 2011, became subject to FRA's regulations at 49 CFR part 228, subpart F, entitled ''Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation'' (Passenger Train Employee HS Regulations). 76 FR 50397 (Aug. 12, 2011). Those regulations define a ''train employee who is engaged in commuter or intercity rail transportation'' to include all train employees engaged in commuter or intercity rail passenger transportation, and any other train employee who is employed by a commuter railroad or an intercity passenger railroad. 49 CFR 228.403(c). FRA intended by this language to clarify that train employees employed by passenger railroads who perform service such as work train service, or other such ancillary train service, as part of their employment for the commuter railroad or intercity passenger railroad, would be covered by the Passenger Train Employee HS Regulations, rather than the requirements of Sec. 21103. The definition also specifically excluded from the coverage of the Passenger Train Employee HS Regulations those train employees employed by other kinds of railroads who perform work train service or pilot service. 49 CFR 228.403(c).

The Passenger Train Employee HS Regulations establish rules for determining ''time on duty'' that are identical to the rules in Sec. 21103(b), but contain a somewhat different set of HS requirements for passenger train employees. See 49 CFR 228.401 and 228.405. For example, under these regulations, 12 hours on duty not consecutively but in aggregate service in a 24-hour period as a passenger train employee triggers a requirement for only 8 consecutive hours off duty, whereas under Sec. 21103(a)(3), 12 hours on duty in a 24-hour period (even if not 12 consecutive hours) as a freight train employee must be followed by 10 hours off duty, and under Sec. 21103(e) those hours must not be interrupted by a communication from the railroad ''that could reasonably be expected to disrupt the employee's rest[,]'' except in an emergency. In addition, the Passenger Train Employee HS Regulations contain no equivalent to several of the limitations added by the RSIA for freight train employees, such as Sec. 21103(e)'s requirement that minimum off-duty periods and periods of interim release must be uninterrupted by communications from the railroad ''that could reasonably be expected to disrupt the employee's rest,'' or Sec. 21103(a)(1)'s limit for freight train employees of 276 hours per calendar month spent either on duty, awaiting or in deadhead transportation from a duty assignment to the employee's point of final release, or in other mandatory service for the railroad.

[14] See 49 U.S.C. 21103(b)(3). See also definitions of ''commingled service'' and ''duty tour'' for purposes of FRA's HS recordkeeping regulations at 49 CFR 228.5.

Among the amendments to old Sec. 21103 made by Sec. 108(b) of the RSIA was the addition of a provision, codified at 49 U.S.C. 21103(a)(4) (Sec. 21103(a)(4)), that requires that, as a general rule, after a train employee initiates an on-duty period each day for six consecutive days,[15] the employee must have received ''at least 48 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier'' before the employee may go on duty again. Sec. 21103(a)(4)(A) provides an exception to this general rule: that if the on-duty period that was initiated on the sixth consecutive day ends at a location other than the employee's home terminal, the employee may initiate an on-duty period for a seventh consecutive day, but must then receive ''at least 72 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier . . . .''

Sec. 21103(a)(4)(B) provides that employees may also initiate an on-duty period for a seventh consecutive day and must then receive 72 consecutive hours off duty at the employee's home terminal if, for a period of 18 months after the enactment of the RSIA, such schedules are expressly provided for in an existing collective bargaining agreement, or after that 18-month period has ended, such schedules are expressly provided for either by a collective bargaining agreement entered into during that period or provided for by a pilot program that is authorized by collective bargaining agreement or by a pilot program under the HS laws at Sec. 21108 related to work and rest cycles.

Sec. 21103(a)(4) also provides that the Secretary may waive the requirements of 48 and 72 consecutive hours off duty (extended rest) if all of the following requirements are met: (1) The procedures of Sec. 20103 are followed (i.e., essentially, public notice and an opportunity for an oral presentation are provided prior to issuing the waiver); (2) a collective bargaining agreement provides a different arrangement; and (3) the Secretary determines that the arrangement is in the public interest and consistent with safety. See the undesignated last sentence of Sec. 21103(a)(4).

In the Final Interpretations, FRA construed ''day'' for the purposes of Sec. 21103(a)(4) to refer to the 24-hour period during which a duty tour takes place. Given that redefinition of ''day,'' two initiations of an on-duty period are on consecutive days where they are separated by less than 24 hours of time off duty, measured from the time of the employee's final release from duty until the time that the employee next reports for duty.[16]

B. When is a train employee unavailable for service for any railroad such that the extended rest of 48 or 72 hours required by sec. 21103(a)(4) may begin to run?

1. Summary of Issue and Interim Interpretation

The question of what it means to be ''unavailable for service'' under Sec. 21103(a)(4) and, therefore, when an employee begins his or her required minimum 48 or 72 hours off duty at his or her home terminal, was not addressed in the June 2009 Interim Interpretations. Rather, the issue was raised by implication in public comments on the June 2009 Interim Interpretations addressing the application of Sec. 21103(a)(4) with respect to employees who are released immediately after reporting for duty, if this release occurs on the sixth or seventh consecutive day on which the employee has initiated an on-duty period. See, e.g., comments of the Brotherhood of Locomotive Engineers and Trainmen and the United Transportation Union, Docket No. FRA–2009–0057–0044, at 6. For the reasons discussed below, FRA concludes that an employee who has worked less than the maximum of 12 consecutive hours or 12 hours in the aggregate under the HS laws, will be considered to have received sufficient rest for the railroad to comply with Sec. 21103(a)(4) if that employee in fact is not required or permitted to perform further service (de facto unavailability'') during a 48- or 72-hour rest period. Furthermore, the merely theoretical, legal availability of the employee to be required or allowed to return to work all or part of the remainder of the employee's maximum duty tour, does not in itself negate the employee's unavailability for purposes of Sec. 21103(a)(4). and that notification of the employee that the 48- or 72-hour rest period has begun is not required. Naturally, an employee who has reached the maximum of 12 hours of time on duty also may begin both the statutory minimum off-duty period and the 48- or 72-hour extended rest period concurrently.

The language of Sec. 21103(a)(4)(A) and (B) states repeatedly that during the 48- or 72-hour off-duty period, the employee must be ''unavailable for any service for any railroad carrier.'' As was discussed in the Final Interpretations in section IV.B.1, 77 FR at 12420–21, FRA understands this statutory language to mean that the extended-rest period required by Sec. 21103(a)(4) begins when a train employee is ''finally released from duty'' within the meaning of Sec. 21103(b), which establishes the rules for determining under subsection (a) of this section the time a train employee is on or off duty[,]'' and that when the employee is finally released from duty, both the minimum extended-rest period required by Sec. 21103(a)(4) (48 or 72 hours as appropriate) and the other statutory minimum off-duty periods[17] begin to run concurrently, not consecutively. In the event that the railroad calls the employee back to perform additional covered service,[18] or other service for the carrier (such as to deadhead to a new point of final release prior to the completion of a statutory off-duty period), this additional service within the 24-hour period that began when the employee reported for duty is classified as ''time on duty'' or ''neither time on duty nor time off duty'' for purposes of Sec. 21103(a). as those terms are discussed in Sec. 21103(b), that will attach to and extend the prior duty tour. As a result, the required rest periods would both start anew at the point in time of the subsequent release from duty, and the period of time previously considered to be accruing towards the statutory minimum off-duty period before the employee was called for additional service would become either time on duty or an interim

[15] For additional discussion of the meaning of ''consecutive day'' in this context, see Final Interpretations, section IV.B.1, 77 FR at 12417–19.

[16] Note, however, that due to the nature of passenger train employee assignments and the time-specific limitations of the Passenger Train Employee HS Regulations, the consecutive-days limitation for passenger train employees considers the initiation of on-duty periods on a specified number of calendar days rather than 24-hour periods. See 49 CFR 228.405(a)(3).

[17] For train employees providing freight train service, the ''statutory minimum off-duty period'' is defined by Sec. 21103(a)(3) to be a minimum of 10 consecutive hours, as potentially extended by Sec. 21103(c)(4) if the combination of an employee's time on duty and time spent waiting for or in deadhead transportation to the point of final release exceeds 12 hours, with any time in excess of 12 hours added to the statutory minimum off-duty period. See also 49 CFR 228.5. While it is true that other rest periods required by the statute, such as the 48- or 72-hour rest period required by Sec. 21103(a)(4) and the additional rest that may be required under Sec. 21103(c)(4), are also ''statutory minimum'' rest periods, the term ''statutory minimum off-duty period'' has been defined in FRA's HS recordkeeping regulation at 49 CFR 228.5 to refer to the off-duty period required to begin a new 24-hour period for the purpose of calculating total time on duty.

[18] For train employees, ''covered service'' is service ''engaged in or connected with the movement of a train,'' as described in 49 U.S.C. 21101(5). See also definition of ''covered service'' at 49 CFR 228.5.

release.[19] Once an employee is finally released from duty after having initiated an on-duty period on a sixth or seventh consecutive day, the employee is required to receive a statutory minimum off-duty period of at least 10 hours, and the 48- or 72-hour extended rest period, respectively, either (1) when he or she has accumulated 12 or more hours of time on duty within the meaning of Sec. 21103(b), or (2) when the duty tour is at the 24-hour point from the beginning of the duty tour, therefore ending the employee's availability to accrue additional time on duty within the duty tour due to Sec. 21103(a)(3), whichever event occurs first. This is necessary in order to ensure the employee receives sufficient rest before being required or allowed to go on duty again as a freight train employee. If neither of these events occurs, an employee could lawfully (under the HS laws) be called back to perform further covered service or other service for the railroad within the same duty tour, regardless of the expectation of either the employee or the railroad at the time that the employee was released.

As will be described below, this retrospective determination of an employee's unavailability, such that an employee is deemed to have been unavailable for service during the times in which the employee does not, in fact, perform service, is consistent with the text of the HS laws and prior FRA interpretations of those laws, takes heed of the structure of railroad operations, and provides clarity to both employees and railroads. FRA seeks comment on this interim interpretation that ''unavailable'' for the purposes of Sec. 21103(a)(4) means de-facto unavailability.

2. Detailed Discussion of Interim Interpretation

Historically, FRA has not required employees or railroads to contemporaneously declare for what type of off-duty period the employee is being released, as there is no statutory requirement to provide such notification.[20] Rather, the classification of a duty period (and any periods of release within or following a duty tour) is determined by a retrospective look at the actions of the employee and the railroad to determine whether in fact the railroad required or allowed the employee to go or remain on duty during the purported period of release. Although a railroad may intend to provide an employee with an interim release, that release will ripen into a statutory minimum off-duty period as soon as the employee has had a sufficient number of hours off duty. Likewise, an employee may be released from duty and assume that the release is a final release that will be followed by a statutory minimum off-duty period, but be called back to resume the previous duty tour prior to or after an interim release of 4 hours or more, if the employee had not reached either the statutory maximum number of 12 hours of time on duty or the 24-hour point from the beginning of the duty tour. Nothing in the text of the RSIA compels FRA to change this interpretation of the laws, nor do the changes made to the statute by the RSIA reveal Congressional intent to modify this aspect of FRA's application of the laws. Congress could have required a railroad to specify at the time of release whether a period of off-duty time would be an interim release or a statutory minimum off-duty period, but has not chosen to do so.

Before arriving at the decision that the determination of unavailability should be made retrospectively and be based on the employee's de-facto unavailability, FRA considered two alternative interpretations of the requirement that the employee be unavailable for service for any railroad during the extended-rest period. FRA declines to adopt either of these alternative interpretations for the reasons explained below.

First, FRA could instead have established a formalistic, bright-line rule that if an employee is legally available (under the HS laws) to perform additional service for the railroad then the employee is not yet unavailable, for purposes of Sec. 21103(a)(4), to begin his or her 48 or 72 hours off duty. Take the example of an employee who has begun a duty tour and then is released from duty without having accumulated a total of 12 hours of time on duty in the duty tour. The employee is legally available to perform additional service for the railroad until the earlier of three circumstances—until (1) the employee completes the remainder of his or her 12 hours of time on duty in the duty tour; (2) the expiration of the 24-hour period that began at the commencement of the employee's duty tour; or (3) the completion of a statutory minimum off-duty period after the employee's release from duty, which would also cut short the maximum 24-hour period that began at the commencement of the duty tour and begin a new 24-hour period in which the employee will accrue time on duty in the next duty tour, regardless of whether any additional service is actually performed after the employee is released. In the first circumstance, the employee is no longer legally permitted to perform service under Sec. 21103(a)(2) because the employee has served the maximum of 12 hours in the duty tour. In the second circumstance (the expiration of the 24-hours period that began when the employee started the duty tour), the employee is no longer legally permitted to perform service under Sec. 21103(a)(3) and must be given 10 consecutive hours off duty because the employee has not had at least 10 consecutive hours off duty during the prior 24 hours. In the third circumstance, the employee's completion of the statutory minimum off-duty period has ended the employee's duty tour, and the employee's availability for service in that duty tour, and the employee is, therefore, no longer legally permitted to perform service under Sec. 21103(a)(4). Under this approach, the 48- or 72-hour off-duty period required by Sec. 21103(a)(4) would not begin to run until either the expiration of the 24-hour period that began when the employee reported for duty, or the beginning of a new 24-hour period by virtue of the employee's having had a statutory minimum off-duty period The employee may have already been off duty for several hours or even a statutory minimum off-duty period, from the time of the employee's release that ultimately became the employee's final release from that duty tour, to the end of the 24-hour period. In cases where the employee is off duty prior to the end of the 24-hour period, the practical effect of this approach would be to extend the 48- or 72-hour required off-duty period.

Second, FRA could have taken a situational/notice-focused approach to the interpretation of unavailability, in which the agency would analyze the actual circumstances of each period of off-duty time, and the expectations of the employee and the railroad when the period began, to determine if the employee was made aware that he or she was ''unavailable'' during a given period of time, such that the period of

[19] An interim release for train employees is a period available for rest lasting at least 4 hours within a duty tour, as described in Sec. 21103(b)(5)–(b)(7). If an employee receives 10 or more hours of time off duty, the time off duty becomes a statutory minimum off-duty period rather than an interim release (unless additional time off is required under Sec. 21103(c)(4)). See also 49 CFR 228.5.

[20] See Sec. 21103(b). See also, 49 CFR part 228, appendix A: ''Any period available for rest that is of four or more hours and is at a designated terminal is off-duty time.'' The appendix makes no reference to a requirement to notify an employee that the time available for rest is either an interim release or a statutory minimum off-duty period. See also S. Rep. 91–604 (1969), reprinted in 1969 U.S.C.C.A.N. 1636, 1640 (not identifying any expectation that employees would be informed of the length of an upcoming rest period).

time would count toward the 48- or 72-hour off-duty period. If the employee were not explicitly told he or she would no longer be available for service, the employee would remain available during the off-duty time until the expiration of the 24-hour period or until the employee had received a statutory minimum off-duty period.

Both of these alternative interpretations share a maximal interpretation of the word ''unavailable'' in the statutory language, by construing an employee as available during a period simply because service during the given period would not violate the HS laws (i.e., the railroad is not prohibited from requiring or allowing the employee to perform the service), even if the employee did not actually perform service during the given period. However, the implications of these maximal interpretations are inconsistent with FRA's existing interpretations.

For example, to adopt the situational/notice-focused interpretation, FRA would have to impose on railroads the burdensome new steps of (1) determining in advance whether a rest period provided to an employee who has not accrued 12 hours total time on duty within the duty tour is intended to be an interim release, or whether it will be a statutory minimum off-duty period of at least 10 hours that will render the employee unavailable for service, and (2) notifying the employee of this determination. Where such notification was not provided and the employee remained off duty, the ''situational'' analysis would result in an outcome identical to the broader bright-line rule; because the employee was not given notice that he or she would be made unavailable for additional service, the duty tour would not end until the end of the 24-hour period or the completion of a statutory minimum off-duty period. FRA would also be forced to determine how to handle situations in which a railroad requires further service from an employee who had not reached 12 hours total time on duty, after having notified the employee at the time of the release that he or she was being released for a statutory minimum off-duty period, and not available for subsequent service, given the lack of statutory or regulatory provisions to restrict such a practice, as discussed above.

For related reasons, the bright-line, formalistic rule also would require sharp deviation from past interpretations and other provisions in the statutory text. If FRA were to adopt a bright-line rule, generally requiring an employee to have had a statutory minimum off-duty period of 10 hours before the period of extended rest of 48 or 72 hours during which the employee is unavailable for service could begin, the total duration of the rest period required by new Sec. 21103 would, in effect, be extended by 10 hours. Nothing in the text of the RSIA requires explicitly that the extended-rest period and the statutory minimum off-duty period must run consecutively rather than concurrently. In contrast with Sec. 21103(a)(4), Sec. 21103(c) explicitly describes the time off duty required by that subsection as ''additional time off duty'' based on what has occurred in the preceding duty tour. Sec. 21103(a)(4)(A) simply describes the required time off as ''at least 48 consecutive hours off duty . . . [,]'' which is required after a series of duty tours. See also S. Rep. 110–270 at 20, which describes Sec. 21103(a)(4) as requiring an employee ''to be given 48 consecutive hours of rest'' immediately after discussing the statutory minimum off-duty period; had the rest periods been intended to run consecutively, the rest period required by Sec. 21103(a)(4) would have been described as ''additional'' or otherwise distinguished. The legislative history similarly lacks any discussion of the off-duty periods running consecutively. With scant support for broadening the total required rest period to 58 or 82 hours, FRA is reluctant to do so, absent a compelling reason to read the statute in such a manner.

Furthermore, both the situational/notice-focused approach and the bright-line, formalistic rule also apply poorly to the realities of the railroad industry. Because train employees are legally permitted to perform covered service for 12 hours in a 24-hour period, an employee who is released from duty after having performed less than 12 hours of service in a given duty tour is subject to being called for further service in that same duty tour. The situational/notice-focused approach would require employees to be notified in advance that they were not subject to being called for service after a release, contrary to past practice, in order to begin their extended-rest period prior to the end of the 24-hour period. The bright-line, formalistic rule, by instead stipulating that the extended-rest period may not begin until the 24-hour period is extinguished or exhausted, similarly does not account for the nature of railroad operations. Although a train employee who has performed 11 hours and 30 minutes of service may still theoretically return to perform service for another half hour, such brief service is exceedingly unlikely. FRA believes that requiring an employee in this situation to have a statutory minimum off-duty period or reach the end of the 24-hour period before he or she may begin the extended-rest period required by Sec. 21103(a)(4) takes an excessively formalist position on what it means for an employee to be ''unavailable.''

Finally, both the situational/notice-focused approach and the bright-line, formalistic rule would serve to create confusion as to how much rest is required. Because the extended-rest period would begin only when the employee became legally unavailable for further covered service, the start of the 48- or 72-hour period would generally be at the end of the 24-hour period that began when the employee initiated his or her sixth or seventh consecutive duty tour. However, if the employee were finally released from duty for a statutory minimum off-duty period less than 14 hours after initiating the on-duty period, then the extended-rest period would instead begin at the end of the employee's statutory minimum off-duty period. As such, under both of these alternative rules (except under the situational approach in which the employee is notified of his or her unavailability at the time of the employee's release, and does not in fact perform further service), the 48- or 72-hour extended-rest period could be lengthened by 10 hours or more beyond the statutory requirement. In addition, the required length of the aggregate minimum rest period will vary depending on the length of the employee's most recent duty tour, including interim releases and limbo time resulting from deadheading from a duty assignment to the place of final release, and whether the employee has reached his or her maximum of 276 hours for the calendar month under Sec. 21103(a)(1). In order for an employee to know when he or she may next be called to report for duty, the employee would have to be far more familiar with the intricacies of the HS laws then had previously been required.

Of the three possible interpretations, FRA believes that its chosen interpretation, discussed above, which treats employees as unavailable for service when they are not in fact required or allowed to perform service (regardless of whether the employee might legally have been called to perform further service or whether the employee was notified in advance that the release would be for 48 or 72 hours), hews most closely to the language and intent of the statute. In addition to requiring more rest than specifically required by the statutory language, both of the alternative interpretations would also require significant changes to the railroad industry beyond those

contemplated by Congress. The complexity of both of the alternative interpretations, in conjunction with those changes, would also create a significant risk of confusion in the industry, possibly leading to decreased compliance with the HS laws. Accordingly, FRA will interpret the extended-rest period as running concurrently with the statutory minimum off-duty period, with both beginning at the time an employee is finally released from his or her sixth or seventh consecutive duty tour. FRA seeks comment on this interim interpretation.

C. How does Sec. 21103(a)(4) apply to an employee who initiates an on-duty period performing multiple types of covered service during one duty tour or within a period of six or seven consecutive days? How do subsections (a)(1), (a)(3), (c)(1), (c)(4), and (e) of Sec. 21103 apply to an employee performing multiple types of covered service within the relevant time periods?

1. Summary of Issues and Interim Interpretation

The application of Sec. 21103(a)(4) to an employee who works in multiple types of covered service,[21] either on a single day or during a period of six or seven consecutive days, was not addressed in the June 2009 Interim Interpretations. The issue was raised in BLET and UTU's joint comment on the June 2009 Interim Interpretations, in which they asked for clarification on how Sec. 21103 and Sec. 21105 (which provides the HS limitations for dispatching-service employees) interact. The unions described an employee who regularly performs covered service as a train employee, but who occasionally works in a yardmaster position that may or may not include covered service as a dispatching service employee.

The language of Sec. 21103(a)(4) is ambiguous and susceptible to several reasonable interpretations. Sec. 21103(b) establishes the various rules to apply ''[i]n determining under subsection (a) of this section the time a train employee is on or off duty. . . .'' It is arguable, however, that, even though Sec. 21103(b) determines what is ''time on duty'' or ''time off duty'' for purposes of Section 21103(a), Sec. 21103(b) does not determine what is an ''on-duty period'' for purposes of Sec. 21103(a)(4). For the reasons discussed below, on an interim basis, FRA interprets the relevant scope of ''on-duty period'' for purposes of Sec. 21103(a)(4) to extend only to on-duty periods as a train employee, including on-duty periods as either a freight train employee or a passenger train employee; accordingly, only when an individual performs train employee functions (i.e., is engaged in or connected with the movement of a train) will such an individual be considered to have ''initiated an on-duty period'' for the purposes of Sec. 21103(a)(4). Therefore, only an on-duty period that includes service as either a freight train employee or a passenger train employee is counted as the initiation of an on-duty period for the purposes of Sec. 21103(a)(4).

FRA does not consider an on-duty period including only signal-employee covered service or only dispatching-service-employee covered service or a combination of these two types of service to constitute the initiation of an ''on-duty period'' under Sec. 21103(a)(4). FRA seeks comment on this interim interpretation.

Further, because the limitation of Sec. 21103(a)(4) prohibits only going or remaining on duty as a freight train employee,[22] FRA's interim interpretation is that once the extended-rest requirement is triggered (by an employee initiating on-duty periods as a freight train employee or a passenger train employee each day on six or seven consecutive days), the employee is barred from performing covered service as a freight train employee until he or she has had the extended rest required by Sec. 21103(a)(4), but he or she is not barred by Sec. 21103(a)(4) from reporting for duty as a passenger train employee.[23] Nor is the employee barred by Sec. 21103(a)(4) from reporting for duty as either a signal employee or a dispatching service employee, because neither of these types of covered service is subject to a consecutive-days limitation. FRA likewise seeks comment on this interim interpretation.

FRA also invites comment on its interim interpretation that appropriate periods of time accrued in a passenger-train-employee duty tour count towards the respective limitations of Sec. 21103(a)(1) (limiting on-duty time and certain other service for the railroad to 276 hours per calendar month) and Sec. 21103(c)(1) (limiting certain limbo time per calendar month) if the employee also engages in freight-train-employee duty tours in the same calendar month. FRA also requests comment on its related interim interpretation that while a duty tour that does not include any time spent as a freight train employee may not trigger the requirement for additional rest under Sec. 21103(c)(4), once the additional rest requirement has been triggered, the additional rest is added to the statutory minimum off- duty period that must be provided before the employee performs any other service, or that subsequent service will commingle with the previous duty tour.

2. Detailed Discussion of Interim Interpretation

In general, the function-based nature of the HS laws requires a contemporaneous determination of what covered service, if any, an individual has performed or is performing within relevant time periods, rather than considering any individual employee as always a covered-service employee based on the employee's job title, or the functions that the employee is qualified to perform, regardless of the actual functions performed by the employee during a given period of time. For example, to ascertain if a locomotive engineer who has been performing freight-train-employee covered service is in violation of the 12-hour limitation on total time on duty in a duty tour at a given moment, one would look to the characteristics of that individual's service for the railroad and decide, using Sec. 21103(b) as the guide for determining which periods of time were time on duty, whether the individual had accrued more than 12 hours of total time on duty, and therefore whether the railroad would violate Sec. 21103(a)(2) by allowing the individual to remain on duty. This application of the statute was relatively simple for the HS limitations that existed prior to the enactment of the RSIA, because both the limitations on total time on duty and minimum off-duty periods were fairly easily applied and, most importantly, only affected the immediate duty tour. Under old Sec. 21103(a), after 12 hours on duty as a train employee, the employee was required to have 10 hours off duty prior to performing any additional service; after less than 12 hours on duty as a train employee, the employee was required to have 8 hours off duty prior to perform any additional service. However, the RSIA's amendments to the HS laws now include limitations on service as a train employee that apply to much longer periods of time than a single duty tour.

[21] ''Covered service'' refers to any service subject to either Sec. 21103 (applicable to freight train employees), Sec. 21104 (applicable to signal employees), Sec. 21105 (applicable to dispatching service employees), or FRA's Passenger Train Employee HS Regulations (applicable to passenger train employees). See also 49 CFR 228.5, definition of ''Covered service.''

[22] See 49 U.S.C. 21102(c)(3); see also 49 CFR 228.405.

[23] However, if the employee had also reached the consecutive-days limitation in 49 CFR 228.405(a)(3), the employee would be barred by that regulatory provision from performing covered service as a passenger train employee.

In applying these limitations that look back and are applied to an employee's activities either during a number of previous, consecutive days as in Sec. 21103(a)(4), or during an entire calendar month as in Sec. 21103(a)(1) and (c)(1), this temporal frame of reference becomes much more important.[24] Each of the limitations of Sec. 21103(a) is phrased in the equivalent of the present tense[25] with the prior conduct discussed in the present perfect tense, indicating that the appropriate frame of reference is in the moment that a train employee is potentially required or allowed to engage in some activity—generally[26] remaining on duty or going on duty.[27]

With respect to the consecutive-days limitation, the result is that the limitation applies in the context of determining whether a train employee may be required or allowed to report for duty at a particular time, based on the employee's prior history of initiating on-duty periods. At the time that the employee reports for duty, the employee must necessarily be a train employee subject to Sec. 21103. Of course, if the employee were not subject to Sec. 21103 at a given time, he or she would not need to determine if Sec. 21103(a)(4) would prohibit the railroad from requiring or allowing him or her to report for duty.

In determining the proper application of the consecutive-days limitation, the operative question is as follows: When a train employee looks back upon his or her prior service for the railroad in light of Sec. 21103(a)(4), does ''an on-duty period'' refer to (1) any form of on-duty period under 49 U.S.C. ch. 211 or FRA's HS regulations for passenger train employees authorized by that chapter; or (2) ''the time a train employee is on duty'' under Sec. 21103(b)(2), meaning as either a freight train employee or a passenger train employee?

a. Option 1: Broad Reading—All Forms of Covered Service Count as Initiating an On-Duty Period Under Sec. 21103(a)(4)

A broad reading of ''on-duty period'' recognizes that Congress chose to distinguish between the terms ''time on duty'' and ''on-duty period,'' and incorporates that distinction into the understanding of which on-duty periods should be included in the determination of whether a train employee may report for duty without violating Sec. 21103(a)(4). The broad reading is consistent with the canon of statutory interpretation that distinctions in terms used by Congress should be given effect.[28] In addition, FRA has previously acknowledged, in a contemporaneous interpretation of Sec. 21103(a)(4) that ''on-duty period'' cannot be synonymous with ''time on duty.'' See FRA's Final Interpretations, section IV.B.4, ''Does the initiation of an on-duty period incident to an early release qualify as an initiation for the purposes of sec. 21103(a)(4)?'' Final Interpretations, 77 FR at 12420–21. In order to avoid the peculiar outcome of an employee's forced release from duty immediately after reporting for duty on a sixth consecutive day, FRA linked the concept of the ''on-duty period'' in this particular context to duty tours, with the ''on-duty period'' ending only at the end of the duty tour when the employee is finally released from duty.[29]

There is also statutory support for understanding ''on-duty period'' in the context of 49 U.S.C. ch. 211 as a whole, rather than consisting of only duty tours that include ''time on duty'' as defined in Sec. 21103(b). Prior to the 1994 recodification of the HS laws, which changed only the form of the laws but not their meaning,[30] ''time on duty'' specifically included ''[s]uch period of time as is otherwise provided by this Act.'' Sec. 1(b)(3)(E) of the Hours of Service Act, then codified at 45 U.S.C. 61 (1994); repealed, revised, and reenacted without substantive change by Public Law 103–272. Although the current provisions governing signal employees and dispatching service employees govern the maximum time on duty in a duty tour and minimum off-duty periods of such individuals, as the more specifically applicable sections of the chapter, this definition of the term ''on duty period'' would nonetheless include time on duty in both of the other forms of covered service as within the scope of the ''on-duty period'' referenced in Sec. 21103(a)(4). In the current text of the HS laws, 49 U.S.C. 21102(b) and 21109(a)(1) make reference to ''on duty'' generally to apply to all forms of covered service. Hereinafter, any reference to a subsection is to subsection of Sec. 21103. Additionally, the ''signal employee exclusivity'' provision, discussed in more detail in Section IV of this document, below, requires that the hours of service of signal employees ''shall be governed exclusively by this *chapter*'' (emphasis added), suggesting a broader scope. Each of these factors provides intrinsic textual support to the broad interpretation of Sec. 21103(a)(4), which would include all forms of on-duty periods subject to 49 U.S.C. ch. 211 or FRA's Passenger Train Employee HS Regulations authorized by that chapter (meaning as a freight train employee, a passenger train employee, a signal employee, or a dispatching service employee), as within the scope of Sec. 21103(a)(4)'s counting of consecutive days.

b. Option 2: Narrow Reading—Only Duty Tours Including Time Engaged in or Connected With the Movement of a Train Counts as Initiating an On-Duty Period Under Sec. 21103(a)(4)

Alternatively to Option 1 above, a narrow reading of ''on-duty period'' starts from the premise that Secs. 21103,

[24] Sec. 21103(a)(1) institutes a monthly 276-hour limitation on total time on duty, time spent waiting for or in deadhead transportation to the place of final release, and any other mandatory service for the carrier.

[25] Literally, the limitations set forth at Sec. 21103(a) are written as prohibitions against the railroad requiring or allowing one of its train employees to commit a certain act (i.e., generally, to go or remain on duty) after certain prior conduct by the employee. The relevant provisions read: ''a railroad carrier and its officers and agents may not require or allow a train employee to . . . remain or go on duty after that employee has initiated an on-duty period each day. . . .''

[26] Sec. 21103(a)(1) also prohibits a railroad from requiring or allowing a train employee to ''*be in any other mandatory service for the carrier* in any calendar month where the employee has spent a total of 276 hours [in specified service for the railroad] . . .'' Emphasis added.

[27] See, e.g., *Carr* v. *U.S.*, 130 S.Ct. 2229, 2236 (2010) (''Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach.'')

[28] See Sutherland § 46:6 (''[C]ourts do not construe different terms within a statute to embody the same meaning. However, it is possible to interpret an imprecise term differently in two separate sections of a statute which have different purposes. Yet when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'')

[29] ''[T]he restriction of Sec. 21103(a)(4) does not apply until the employee is finally released from duty; that is, an employee may continue to perform covered service until the end of the relevant duty tour, including any periods of interim release (because, during an interim release, the employee is not 'finally' released from duty).'' If FRA had instead considered an on-duty period to be something less than a duty tour, an employee who reported for duty on his or her sixth consecutive day, but was released from duty because, for example, the train for which the employee was called was not in fact available, that release would trigger the 48-hour rest requirement, because the employee had reported for duty, thereby initiating the on-duty period. However, as interpreted by FRA, the employee may be released for an interim release, with the possibility of being called to perform further service within the same duty tour, and the 48-hour rest requirement of Sec. 21103(a)(4) would not be triggered until the employee's final release from that duty tour. *Id.* at 12421.

[30] See Sutherland 28:11 (''Inasmuch as the function of a code is principally to reorganize the law and to state it in simpler form, the presumption is that a change in language is for purposes of clarity rather than for a change in meaning.'') The legislative history of the 1994 recodification also makes clear that the legislation did not create any substantive change to the application of any of the recodified laws, including the application of the HS laws. H. Rep. No. 1758, at 1, 3, 104–108 (1993).

21104, and 21105 are distinct entities. Because each of the sections refers to time performing the respective forms of covered service as ''time on duty,'' the narrow reading implies that the sections must be read as wholly exclusive from one another. Under this reading, the fact that a form of covered service is recognized as time on duty under one section is irrelevant to its treatment under another section. This implication leads to the interpretation that, because Sec. 21103(b) defines ''the time a train employee is on or off duty,'' and because the employee is generally only subject to Sec. 21103 when he or she is on duty as a train employee, only time that is time on duty under Sec. 21103(b) should be considered a period of time on duty (i.e., an ''on-duty period'') for the purposes of Sec. 21103(a)(4). As such, only a duty tour including ''time the employee is engaged in or connected with the movement of a train,'' as specified by Sec. 21103(b)(2), is counted as a duty tour including the initiation of an on-duty period for the purposes of Sec. 21103(a)(4). Neither covered service solely as a signal employee as defined in Sec. 21104, nor covered service solely as a dispatching service employee as defined in Sec. 21105, is time engaged in or connected with the movement of a train. Without time, in the course of a duty tour, during which the individual is engaged in or connected with the movement of a train, the individual is not on duty under Sec. 21103(a), including Sec. 21103(a)(4), and therefore, under the narrow reading, the individual has not initiated an ''on-duty period.''

c. Decision: FRA Chooses the Narrow Reading of ''On-Duty Period'' for Purposes of Sec. 21103(a)(4)

Although FRA views both of these readings of ''on-duty period'' as reasonable, the narrow reading of ''on-duty period'' is more consistent with FRA's existing interpretations, which treat Secs. 21103, 21104, and 21105 as analytically distinct from one another. FRA also recognizes the potential for confusion that could result from applying the consecutive-days limitation to individuals for duty tours in which no train-employee covered service was performed. Prior agency interpretations noted that—''[w]hen an employee performs service covered by more than one restrictive provision, the most restrictive provision determines the total lawful on-duty-time.'' See discussion at 49 CFR part 228, app. A, under the heading ''General Provisions (Applicable to All Covered Service),'' ''Commingled Service.'' The narrow reading maintains that understanding by counting days toward the consecutive-days limitation only when an individual performs train-employee covered service, regardless of what other activities the individual may perform during such duty tours. See, below, Section III.C.2.d–h of this document for further discussion and application of this principle.

FRA recognizes that duty tours that contain only covered service as a signal employee or a dispatching service employee may contribute to the fatigue of the employees who perform such service, and that Congress established other limitations on the hours of service of employees performing these functions. In addition, an employee's service for a railroad that is not covered service under the hours of service laws could also contribute to fatigue. FRA believes that the most logical reading of the statutory language would apply the consecutive-days limitation of Sec. 21103(a)(4) only to duty tours including covered service as a train employee, for the reasons described above. However, FRA will monitor the situation, and may consider revising this interpretation in the future if the fatigue implications warrant it.

d. Further Clarification: Service as a Passenger Train Employee Is Within the Scope of ''On-Duty Period'' Under Sec. 21103(a)(4), Despite the Sec. 21102(c) Exemption

With the adoption of the narrow reading of ''on-duty period,'' which includes only periods of time on duty as a train employee within the scope of that term in Sec. 21103(a)(4), an additional question is presented: does a period of time on duty spent exclusively as a passenger train employee (who is subject to the limitations of the Passenger Train Employee HS Regulations, rather than Sec. 21103, according to Sec. 21102(c)(3)) count as an ''on-duty period'' for the purposes of Sec. 21103(a)(4)? FRA believes that to include periods of time on duty as a passenger train employee as an on-duty period for the purposes of Sec. 21103(a)(4) is most consistent with the text of the statute as a whole and with the Passenger Train Employee HS Regulations as a whole.

In the RSIA, Congress did not disturb the longstanding functional approach to determining when a train employee would be subject to the new Sec. 21103, and when a train employee would be subject first to old Sec. 21103, and ultimately to FRA's regulations governing train employees engaged in commuter or intercity rail passenger transportation. Employees performing both kinds of service continue to be called ''train employees[,]'' and the term ''train employee'' continues to be defined, for the purposes of both sets of applicable requirements, as an individual engaged in or connected with the movement of a train.

Congress could have separately created the terms ''freight train employee'' and ''passenger train employee'' and defined the new terms to make clear that covered service as one kind of train employee does not count as covered service for the other kind of train employee. Similarly, Congress could have amended Sec. 21103(b)(2) and (3) by inserting ''freight'' in front of ''train'' to narrow the time counted toward ''time on duty'' for purposes of Sec. 21103(a). Likewise, Congress also could have written the language of Sec. 21103(a)(4) to limit it expressly, so that it only applied to initiating an on-duty period as a freight train employee, or as a train employee subject only to the requirements of this section in the particular duty tour. Congress did not do any of these. For that matter, Congress did not even expressly limit the language of Sec. 21103(a)(4) to initiating an on-duty period as a train employee, though FRA does so limit the provision for the purposes of this interim interpretation, for the reasons described in this Section III.C.2.b–c.

By contrast, in the RSIA, Congress amended the definition of ''signal employee,'' so that it no longer applied only to railroad employees performing the functions of a signal employee. See Sec. 108(a) of the RSIA and Sec. 21101(4). However, the definition of ''train employee'' in the very next paragraph of the statute was not changed, and no distinction was created functionally between train employees in freight or passenger service. See 49 U.S.C. 21101(5). Each is still simply called ''train employee[,]'' and that term should be interpreted to mean the same thing in all places that it is used in the statute, and the provisions applicable to that type of employee must apply to all employees so defined.

In addition, the functional approach to determining when an individual becomes a covered service employee of one form or another means that the individual is a passenger train employee for purposes of the Passenger Train Employee HS Regulations only during those periods of time within which he or she is a train employee who is engaged in commuter or intercity rail passenger transportation, as detailed in 49 CFR 228.405(b) (''Determining time on duty), e.g., being engaged in or connected with the movement of a train, including being a hostler, providing

commuter or intercity rail passenger transportation. Note that under 49 CFR 228.405(b)(3) periods spent performing other types of covered service and noncovered service count as on-duty time as a passenger train employee if they occur in the same duty tour as passenger-train-employee covered service.

However, Sec. 21102(c)(3)(B) exempts railroads from compliance with Sec. 21103 for ''train employees with respect to the provision of commuter rail passenger transportation or intercity rail passenger transportation''; i.e., passenger train employees. Therefore, individuals are subject to the Sec. 21102(c)(3)(B) exemption only while they are performing covered service as a passenger train employee. Any individual who is not a train employee who is engaged in commuter or intercity rail passenger transportation is not subject to the Sec. 21102(c)(3)(B) exemption. Because Sec. 21102(c)(3)(B) exempts railroads from compliance with Sec. 21103 with respect to all passenger train employees, an individual who is subject to Sec. 21103 is necessarily not within the scope of the exemption provided by Sec. 21102(c)(3)(B) and is not a passenger train employee at the time when the individual is subject to Sec. 21103.

Because any individual who is subject to Sec. 21103 is not subject to Sec. 21102(c)(3)(B), the distinction between service as a passenger train employee and freight train service is irrelevant when applying Sec. 21103. The text of Sec. 21103 makes no distinction between freight trains and passenger trains. Recalling that the definitions in Sec. 21103(b)(2) and (3) of ''time on duty'' for purposes of Sec. 21103(a)(4) are phrased in the present tense and that all limitations of Sec. 21103(a) are phrased in the equivalent of the present tense, with prior conduct discussed in the present perfect tense, the appropriate frame of reference for determining whether Sec. 21103(a)(4) precludes the employee from being on duty is the time when the employee seeks to go on duty, including only those exemptions or exclusions that apply to the employee at that moment. Therefore, when an employee reports for duty as a freight train employee subject to Sec. 21103, any prior time on duty ''engaged in or connected with the movement of a train,'' regardless of whether it was as a passenger train employee or freight train employee, is counted when determining whether Sec. 21103(a)(4) precludes the employee from being on duty.

When a railroad seeks to determine whether an employee is permitted to remain or go on duty with respect to the limitation of Sec. 21103(a)(4), the determination of whether the employee has initiated an on-duty period on each of the prior 6 or more consecutive days is made within the context of Sec. 21103(b), which defines what constitutes ''time on duty.'' Sec. 21103(b)(2) includes any time ''engaged in or connected with the movement of a train'' to be ''time on duty.'' Duty tours as a passenger train employee include some time ''engaged in or connected with the movement of a train,'' and are therefore time on duty under Sec. 21103(b)(2). Although those duty tours are exempt by Sec. 21102(c)(3)(B) from the limits and requirements of Sec. 21103 at the time when the duty tours occur, an employee subject to Sec. 21103 is no longer subject to that exemption, as discussed above. Thus, at the moment that a railroad or a train employee looks back to see whether the employee may be required or allowed to go on duty as a freight train employee, the employee's assignment is to work as a freight train employee, and in looking back at the employee's prior duty tours, should view them as subject to, rather than exempt from, Sec. 21103, even if some of the duty tours involved service engaged in or connected with the movement of a passenger train.

In the context of determining whether the individual has initiated an on-duty period each day on prior consecutive days, ''time the employee is engaged in or connected with the movement of a train is time on duty.'' Sec. 21103(b)(2). Since time on duty as a passenger train employee is unequivocally time ''engaged in or connected with the movement of a train,'' and, as discussed above, the statute does not differentiate between time spent engaged in or connected with the movement of a passenger train from time spent engaged in or connected with the movement of a freight train, on-duty periods including train service providing commuter or intercity rail passenger transportation constitute on-duty periods for the purpose of Sec. 21103(a)(4).

In addition to maintaining fidelity both to the statutory language and to FRA's functional approach to applying the HS laws, the principle of including on-duty periods in passenger-train-employee covered service within the scope of Sec. 21103(a)(4) avoids the safety risks resulting from allowing an individual to initiate an on-duty period as a train employee each day for an indefinite number of days without triggering the consecutive-days limitation, simply because he or she occasionally initiates an on-duty period as a passenger train employee instead of as a freight train employee.

FRA's interim interpretation is also consistent with both informal guidance FRA has provided on this question and FRA's response to an AAR comment on FRA's notice of proposed rulemaking on passenger train employee hours of service, in which AAR suggested that train employees employed by freight railroads who may occasionally perform service as a passenger train employee should be covered only by Sec. 21103, and should be excluded from the scope of FRA's regulation. See comments of AAR, Docket No. FRA–2009–0043. FRA declined AAR's suggestion to extend the work train and pilot exceptions for train employees employed by freight railroads to all train employees employed by freight railroads,[31] believing that train employees engaged in or connected with commuter or intercity rail passenger transportation should be covered by its regulation, regardless of the nature of the railroad by which the employee is employed. FRA's decision in the rulemaking was based in part on the same policy concerns just discussed, the need to protect an individual who sometimes performs freight train employee service and sometimes performs passenger train employee service, from the safety risks of cumulative fatigue. Under this interim interpretation, employees performing both kinds of service are subject to both sets of requirements, as appropriate. For employees who perform duty tours both as a passenger train employee and as a freight train employee, it is necessary for railroads to track both types of duty tours and perform the appropriate consecutive-days limitation analyses to determine whether the employee may legally be required or allowed to go on duty in a particular kind of service. The analyses are separate: only the freight consecutive-days limitation analysis (Sec. 21103(a)(4)) must be applied to determine if an employee may report for duty as a freight train employee, and only the passenger consecutive-days limitation analysis (49 CFR 228.405(a)(3)) must be performed to

[31] FRA's definition of ''Train employee who is engaged in commuter or intercity rail passenger transportation'' excludes a train employee of a freight railroad ''who is engaged in work train service even though that work train service might be related to providing commuter or intercity rail passenger transportation, and a train employee of'' a freight ''railroad who serves as a pilot on a train operated by a commuter railroad or intercity passenger railroad.'' 49 CFR 228.403(c).

determine if an employee may report for duty as a passenger train employee.[32]

e. Further Clarification: Service as a Passenger Train Employee Is Within the Scope of the Calendar Monthly Limits Set by Sec. 21103(a)(1) and (c)(1)

As previously noted in passing in the discussions above, FRA wishes to highlight that, like subsection (a)(4) of Sec. 21103 and for similar reasons,[33] other provisions of Sec. 21103 count toward their respective limitations or requirements, appropriate periods of time accrued during passenger-train-employee duty tours and related activity. Some of these limitations apply to a calendar month, and some of the limitations and requirements apply to a single duty tour.

In particular, the monthly limitations are Sec. 21103(a)(1) (limiting the combined total of time on duty, time spent awaiting or in deadhead transportation from a duty assignment to the point of final release, and time spent in any other mandatory service for the railroad to 276 hours per calendar month) and Sec. 21103(c)(1) (limiting certain limbo time per calendar month). FRA does not, however, expect the cumulative monthly limitations of either Sec. 21103(a)(1) or Sec. 21103(c)(1) to be reached in fact for individuals who sometimes serve as passenger train employees, based on the existing nature of such duty tours. Additionally, a railroad could violate Sec. 21103(c)(1) with respect to a particular employee only at a time when that employee was subject to Sec. 21103(c)(1); i.e., during a duty tour including service as a freight train employee. If an employee reaches more than 30 hours of time countable towards the 30-hour monthly limitation during a passenger train employee duty tour, and proceeds to go on duty only as a passenger train employee for the rest of the calendar month, then no violation of Sec. 21103(c)(1) has occurred.

[32] The passenger train employee consecutive-days limitation analysis depends on the type of the assignments performed on each of the consecutive days. A *Type 1 assignment* means an assignment that requires the employee to report for duty no earlier than 4 a.m. on a calendar day and be released from duty no later than 8 p.m. on the same calendar day. Any other assignment is Type 2, except that a Type 2 assignment may be considered a Type 1 assignment if it is analyzed and shown to not pose an excess risk of fatigue and does not require the employee to be on duty for any period of time between midnight and 4 a.m. See 49 CFR 228.5; see also 76 FR 50360 (Aug. 12, 2011).

[33] In addition, of course, any mandatory service for the railroad (not just passenger train employee service or freight train employee service) counts toward the 276-hour monthly maximum set by Sec. 21103(a)(1), but passenger train employee service counts as time ''on duty'' for purposes of Sec. 21103(a)(1)(i).

f. Further Clarification: Requirements for Rest Set by Sec. 21103(a)(3), (c)(4), and (e), After a Single Duty Tour That Includes Service as a Freight Train Employee, Must Also Be Met Before Performing Any Service for the Railroad or Else the Additional Service Will Commingle

Statutory requirements for minimum amounts of undisturbed rest apply only to performing a single duty tour that includes at least some service as a freight train employee. These requirements are the following: (1) Sec. 21103(a)(3) (which requires that an individual have had 10 consecutive hours off duty in the 24 hours prior to remaining or going on duty as a freight train employee); (2) Sec. 21103(c)(4) (additional rest requirement) (which requires extra time off duty in addition to the 10 consecutive hours for freight train employees after reaching more than 12 consecutive hours of combined time on duty and time waiting for or in deadhead transportation to the point of final release); and (3) Sec. 21103(e) (which requires that these off-duty periods be free from communication that could reasonably be expected to interrupt the freight train employee's rest (free from communication)).

Of course, a duty tour as a passenger train employee that did not include covered service as a freight train employee would not trigger the requirement for 10 consecutive hours off duty unless the employee had been on duty for 12 consecutive hours, in which case 10 consecutive hours off duty would be required under the Passenger Train Employee HS Regulations at 49 CFR 228.403(a)(2), not because of Sec. 21103(a)(3). Likewise, a duty tour as a passenger train employee that did not include covered service as a freight train employee would not trigger the requirement that the off-duty period be free from communication, or the requirement for additional rest. However, if the rest requirement of Sec. 21103(a)(3) for 10 consecutive hours off duty and the requirement of Sec. 21103(e) that the rest period be free from communication are triggered by a duty tour that included covered service as a freight train employee, then the statutory minimum off-duty period following that duty tour must comply with those requirements before the employee performs any other service for the railroad, or else the subsequent service for the railroad will commingle, even if that subsequent service does not include covered service as a freight train employee. See Sec. 21103(b)(3).[34] Likewise, if the additional rest requirement is triggered by a duty tour that included covered service as a freight train employee that encompasses a total of more than 12 hours of time on duty and time waiting for or in deadhead transportation, then the statutory minimum off-duty period following that duty tour must also include the additional rest prior to the employee performing any other service for the railroad, even if that subsequent service does not include covered service as a freight train employee.

g. Further Clarification: Single Duty Tours Performing Multiple Types of Covered Service

The longstanding statutory provisions regarding commingled service (Sec. 21103(b)(3), Sec. 21104(b)(2), and Sec. 21105(c)) and the more recent regulatory provision regarding commingled service (49 CFR 228.405(b)(3)), respectively, continue to govern a duty tour in which an individual performs the duties of a freight train employee, signal employee, dispatching service employee, or passenger train employee, respectively. For example, any time spent performing service for a railroad that is not separated by at least 10 uninterrupted hours off duty from subsequent service defined as ''time on duty'' by Sec. 21103(b) is commingled service under Sec. 21103(b)(3), because it occurs within the same ''24-hour period'' as the covered service subject to Sec. 21103(b). As a result, a duty tour as a passenger train employee that is followed by a duty tour as a freight train employee must be separated by at least 10 uninterrupted hours off duty to avoid their commingling. If the duty tour as a freight train employee triggers Sec. 21103(c)(4)'s additional uninterrupted rest requirement, that additional rest must also be completed before the employee next reports for duty as a passenger train employee in order to avoid the possible commingling of the subsequent duty tour as a passenger train employee with the prior triggering duty tour as a freight train employee.

FRA requests comment on the implications of its interim interpretation of Sec. 21103(a)(4) on other provisions of Sec. 21103. As a result of adopting the narrower interpretation, excluding

[34] Sec. 21103(b)(3) reads as follows: ''(b) Determining time on duty.—In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply: * * * (3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train time is time on duty.''

signal-employee covered service and dispatching-service-employee covered service for the purposes of the consecutive-days limitation, FRA views duty tours containing only signal-employee covered service or dispatching-service-employee covered service as equivalent to periods that are neither time on duty nor time off duty for purposes of Sec. 21103(a)(4), where the individual is performing non-covered service. For example, if an employee were to report for duty each day from 9 a.m. to 5 p.m. Monday through Saturday, with Monday's through Wednesday's time on duty including train-employee covered service and Thursday's through Saturday's time on duty not including train-employee covered service but including signal-employee covered service, that employee would not have triggered the ''consecutive-days'' limitation and could lawfully report again at 9 a.m. on Monday. FRA recognizes that Congress identified signal-employee covered service and dispatching-service-employee covered service as fatiguing; however, these forms of covered service do not constitute time on duty for the purposes of Sec. 21103 unless they commingle with train-employee covered service as provided in Sec. 21103(b)(3), and therefore, employees who perform these functions, but do not perform covered service as a train employee during the same duty tour, are not considered to have initiated on-duty periods for the purposes of the ''consecutive-days'' limitation.

If an employee performs multiple types of covered service in a single duty tour, including train-employee covered service, the time spent by the employee in carrying out functions other than covered service as a train employee is ''[t]ime spent performing other service for the railroad during a 24-hour period in which the employee is engaged in or connected with the movement of a train,'' which, in turn, is defined as ''time on duty'' for purposes of Sec. 21103 by Sec. 21103(b)(3). As a result, this time spent in service for the railroad other than train-employee covered service is defined by Sec. 21103(b)(3) as ''time on duty'' for purposes of Sec. 21103(a) and, therefore, counts as initiating an on-duty period for the purposes of Sec. 21103(a)(4). Performing signal-employee covered service or dispatching-service-employee covered service, which brings the employee under Sec. 21104 or Sec. 21105, respectively, during the performance of the particular type of service, does not negate the train-employee covered service also performed by the employee.

In the case of dispatching-service-employee covered service, Sec. 21105(a) provides that it applies, rather than Sec. 21103 or Sec. 21104, ''during any period of time the employee is performing duties of a dispatching service employee.'' At ''a tower, office, station, or place at which at least 2 shifts are employed, an individual performing dispatching service may not be required or allowed to remain or go on duty for more than a total of 9 hours during a 24-hour period.'' Sec. 21105(b)(1). At a one-shift location, such an individual is limited to a total of 12 hours on duty during a 24-hour period. Sec. 21105(b)(2). Unlike the 24-hour period relevant for the statutory provisions governing train employees and signal employees, Sec. 21105(b)'s ''24-hour period'' does not reset after an individual has had a certain amount of rest and then reports to perform duty governed by the section. Instead, Sec. 21105(b)(1) requires a continuous look back during the dispatching service employee's duty tour to determine whether the individual has been on duty for a total of 9 hours in any 24-hour period.

FRA does not interpret Sec. 21105(a) literally as an exemption from Sec. 21103 and Sec. 21104 with respect to periods of time performing the duties of a dispatching service employee and periods of time performing other service for the railroad within a 24-hour period in which the duties of a dispatching service are performed. Rather, FRA interprets Sec. 21105(a) as establishing an extra set of limitations that must be met, in addition to the limitations and requirements imposed by any other applicable HS requirement. The following two examples illustrate this interpretation.

Example 1

Facts: Individual X has been off duty Saturday and Sunday and then goes on duty as a dispatching service employee at a 2-shift tower at 12 noon on Monday and works for 4 hours, is then off duty for 12 hours, and finally reports for duty at 4 a.m. on Tuesday as a freight train employee.

Effect of law: Individual X may report and work as a freight train employee for only 5 hours prior to noon on Tuesday, for a grand total of the maximum 9 hours of service under Sec. 21105, without violating Sec. 21105, because X's service as a freight train employee commingles with his or her dispatching service. Note that X may report and work as a freight train employee at all only if during the 12 hours off duty, at least 10 consecutive hours were uninterrupted by communications from the railroad that could reasonably be expected to disrupt that rest (see Sec. 21103(e)) and if no other limitation or requirement in Sec. 21103 is violated (e.g., the 276-hour monthly maximum and the consecutive-days provision). After 4 p.m. on Tuesday, X's subsequent service is no longer within any 24-hour period that would include any of his or her time spent as a dispatching service employee from 12 noon to 4 p.m. on Monday, and is no longer limited to only 9 hours of time on duty for the remainder of his or her duty tour as a freight train employee.

Example 2

Facts: Individual Y returns from a long vacation, goes on duty as a freight train employee for 8 hours, and then immediately reports as a dispatching service employee at a 2-shift tower.

Effect of law: Individual Y may work at the 2-shift tower as a dispatching service employee for only one hour without violating Sec. 21105 because Y's 8 hours working as a freight train employee must be added to the 1 hour Y worked as a dispatching service employee. After working a total of 9 hours in a 24-hour period, Y has reached the Sec. 21105(b)(1) maximum of 9 hours on duty in a 24-hour period in a tower with 2 or more shifts.

Once the rest requirement of Sec. 21103(a)(4) is triggered because a duty tour includes performance of freight-train-employee functions to which the limitations of Sec. 21103 apply, the rest requirement of the consecutive-days limitation does not prevent an individual from lawfully reporting for covered service to which Sec. 21103 does not apply, or for noncovered service. When an individual's duty tour does not include his or her performance of freight-train-employee functions, that individual is not subject to Sec. 21103 during the duty tour, and, therefore, the consecutive-days limitation of Sec. 21103(a)(4) does not apply to the duty tour and prevent the individual from lawfully performing such other service.

On the other hand, in duty tours subject to multiple sections of the HS laws or the Passenger Train Employee HS Regulations, each of the applicable sections applies to the entire duty tour, due to commingled-service provisions, and a railroad must comply with all of the provisions applicable to a given duty tour. In particular, the consecutive-days limitation of Sec. 21103(a)(4) applies to such duty tours if those duty tours contain any time in which the employee is engaged in or connected with the movement of a train, whether

as a passenger train employee or as a freight train employee. Although both the dispatching-service-employee provision (Sec. 21105) and the Passenger Train Employee HS Regulations contain applicability sections, these applicability sections state that the substantive provision applies only to the time when the individual is performing a function of a dispatching service employee or a passenger train employee, respectively, including times in other service for the railroad that commingle during the single tour of duty, as noted above.[35] Section 21105(a) states that it applies ''during any period of time the employee is performing duties of a dispatching service employee,'' and 49 CFR 228.413, the regulatory exemption from Sec. 21103 for passenger train employees, states that the exemption applies with respect to ''train employees who *are* engaged in commuter or intercity rail passenger transportation.'' Emphasis added. In other words, if an individual's duty tour includes multiple types of covered service, the railroad must comply with all of the limitations and requirements applicable to each type of covered service throughout the duty tour.

Longstanding guidance from FRA in the context of commingled service during a single duty tour provides that ''[w]hen an employee performs service covered by more than one restrictive provision, the most restrictive provision determines the total lawful on-duty time.'' 49 CFR part 228, app. A, ''Commingled Service.'' Although this principle requires compliance with the most exacting and stringent of the applicable standards, the principle in effect ensures compliance with all of the HS provisions applicable to the service performed because complying with the most stringent standard will prevent violation of the less stringent standards, thus resulting in compliance with all of the HS provisions applicable to the service performed. Consistent with that traditional guidance, the interim interpretation maintains that when an employee performs service governed by more than one HS requirement for the minimum amount of off-duty time, the most generous provision determines the total amount of required off-duty time. Similarly, when an employee performs service covered by one provision that requires that the off-duty time be uninterrupted (i.e., Sec. 21103(e)) and other service covered by a provision that does not require that the off-duty time be uninterrupted, the higher standard determines whether the off-duty time be uninterrupted. FRA's interim interpretation maintains the underlying principle of applying to the service in question all relevant sections of the HS laws and the Passenger Train Employee HS Regulations and requiring compliance with the most stringent of those relevant sections.

h. More Examples of the Application of the Statutory or the Regulatory Consecutive-Days Provision, or Both, to a Single Duty Tour or to Several Duty Tours Involving Performance of One or More Types of Covered Service

The following additional examples illustrate the application of principles for interpreting Sec. 21103(a)(4) and the consecutive-days provision of the Passenger Train Employee HS Regulations (49 CFR 228.405(a)(3)) that have been discussed above in this Section III.C of this document.

Example 3

Facts: An individual reports for duty at 8:00 a.m. each day Monday through Saturday, performing only signal-employee or dispatching-service-employee covered service each day.

Effect of law: On Sunday, the individual has zero prior consecutive days counted for the purpose of Sec. 21103(a)(4) and, therefore, may report for duty as a freight train employee without violating Sec. 21103(a)(4).

Example 4

Facts: An individual reports for duty at 8:00 a.m. each day Monday through Saturday, performing both signal-employee covered service, or dispatching-service-employee covered service, and freight-train-employee covered service in a single duty tour each day.

Effect of law: On Sunday, the individual has initiated an on-duty period each day for six consecutive days for the purpose of Sec. 21103(a)(4), and must not perform freight-train-employee covered service subject to Sec. 21103 until he or she has had 48 hours at his or her home terminal free from any service for any railroad unless one or more of the exceptions of Sec. 21103(a)(4)(A)(i) or (a)(4)(B) apply. On Sunday, the individual may report for duty to perform signal-employee or dispatching-service-employee covered service, without violating Sec. 21103(a)(4), but he or she is nonetheless required to have had the 48 hours of time off duty at the employee's home terminal under Sec. 21103(a)(4) before next performing freight-train-employee covered service subject to Sec. 21103.

Example 5

Facts: An individual reports for duty at 8:00 a.m. each day Monday through Saturday performing passenger-train-employee covered service each day and is finally released at 6:00 p.m.

Effect of regulations and law: On Sunday, the individual has initiated an on-duty period each day for six consecutive days for the purpose of Sec. 21103(a)(4), and must not perform freight-train-employee covered service subject to Sec. 21103 until he or she has had 48 hours at his or her home terminal free from any service for any railroad unless one or more of the exceptions of Sec. 21103(a)(4)(A)(i) or (a)(4)(B) apply. However, a duty tour as a passenger train employee is subject to the Passenger Train Employee HS Regulations. Those regulations impose two requirements. First, the regulations require that the employee have had at least 8 consecutive hours off duty before going on duty as a passenger train employee. Second, the regulations include a provision that addresses cumulative fatigue in a somewhat different way than Sec. 21103(a)(4). Here, because the individual's duty tours as a passenger train employee did not include any Type 2 assignments (duty tours including any time on duty between 8 p.m. and 4 a.m. that either include time on duty between 12:00 a.m. and 4:00 a.m. or have not been analyzed and shown to not pose an excess risk of fatigue), they did not trigger the rest requirement of the consecutive-days limitation in the Passenger Train Employee HS Regulations (49 CFR 228.405(a)(3)). Accordingly, the individual may be required or allowed to report for duty as a passenger train employee.

Example 6

Facts: An individual reports for duty at 8:00 a.m. each day Monday through Wednesday, performing freight-train-employee covered service each day until 8 p.m., and then the individual reports for duty at 8:00 a.m. each day Thursday through Saturday, performing only dispatching-service-employee covered service each day until 5 p.m.

Effect of law: On Sunday, the individual has initiated an on-duty period for zero prior consecutive days counted for the purpose of Sec. 21103(a)(4), and may perform freight-train-employee covered service without violating Sec. 21103(a)(4).

[35] In addition, as discussed above, even a duty tour containing only service as a passenger train employee would count toward the consecutive-day limitation of Sec. 21103(a)(4).

Example 7

Facts: An individual reports for duty at 9:00 a.m. each day Monday through Wednesday performing passenger-train-employee covered service for eight hours each day (with final release at 5:00 p.m.), and then reports for duty at 9:00 a.m. each day Thursday through Saturday performing freight-train-employee covered service for eight hours each day (with final release at 5:00 p.m.).

Effect of regulations and law: For the purposes of determining whether the individual may report for duty on Sunday as a freight train employee without violating Sec. 21103(a)(4), the individual has initiated an on-duty period for six consecutive days, and must not perform freight-train-employee covered service subject to Sec. 21103 until he or she has had 48 hours at his or her home terminal free from any service for any railroad unless one or more of the exceptions of Sec. 21103(a)(4)(A)(i) or (a)(4)(B) apply. For the purposes of determining whether the individual may report for duty on Sunday as a passenger train employee, the individual has initiated an on-duty period for six consecutive calendar days. However, because these on-duty periods do not include any Type 2 assignments (duty tours including any time on duty between 8 p.m. and 4 a.m. that either include time on duty between 12:00 a.m. and 4:00 a.m. or have not been analyzed and shown to not pose an excess risk of fatigue), the individual may report for duty on Sunday as a passenger train employee without violating the consecutive-days provision of the Passenger Train HS Regulations.

Example 8

Facts: An individual reports for duty at 9:00 a.m. each day Monday through Wednesday performing passenger-train-employee covered service for eight hours each day (with final release at 5:00 p.m.), and then reports for duty at 1:00 p.m. each day Thursday through Saturday performing freight-train-employee covered service for eight hours each day (with final release at 9:00 p.m.).

Effect of regulations and law: For the purposes of determining whether Sec. 21103(a)(4) prohibits the railroad from requiring or allowing the individual to report for duty on Sunday as a freight train employee, the individual has initiated an on-duty period for six consecutive days and must not perform freight-train-employee covered service subject to Sec. 21103 until he or she has had 48 hours at his or her home terminal free from any service for any railroad unless one or more of the exceptions of Sec. 21103(a)(4)(A)(i) or (a)(4)(B) apply. For the purposes of determining whether the railroad may require or allow the individual to report for duty on Sunday as a passenger train employee without violating Sec. 21103(a)(4), the individual has initiated an on-duty period for six consecutive calendar days. Because several of these on-duty periods included duty tours with time on duty between the hours of 8 p.m. and 4 a.m. and the duty tours were not analyzed and shown not to pose an excess risk of fatigue, the individual has initiated an on-duty period for six consecutive days including one or more Type 2 assignments. As a result, the employee must have 24 hours of time off duty and free from any service for any railroad before next reporting for duty as a passenger train employee.

Example 9

Facts: An individual reports for duty each day at 8 a.m. for 8 hours of service as a passenger train employee, with the duty tour ending at 4 p.m., beginning on Monday, for 5 consecutive days, ending on Friday. On Saturday, the individual reports for duty at 6 p.m. for 8 hours of service as a freight train employee, with the duty tour ending at 2 a.m. on Sunday.

Effect of regulations and law: For the purposes of determining whether the individual may report for duty on or after 2 p.m. on Sunday, as a freight train employee, the individual has initiated an on-duty period for one prior consecutive day, and may report for duty to perform freight-train-employee covered service without violating Sec. 21103(a)(4). Specifically, because the individual was off duty for 26 hours between Friday at 4 p.m. and Saturday at 6 p.m., and 24 hours of time off duty is sufficient to end a series of consecutive days for Sec. 21103(a)(4), the duty tours prior to Saturday are not consecutive to the Saturday duty tour. For the purposes of determining whether the individual may report for duty on or after 2 p.m. on Sunday as a passenger train employee, the individual has initiated an on-duty period each day for 6 consecutive calendar days, including one Type 2 assignment–the Saturday duty tour, which extended into the hours between midnight and 4 a.m. and is therefore necessarily Type 2 regardless of any fatigue analysis that could have been performed on an assignment including the Saturday duty tour. As a result, the individual must have had at least 24 hours of time off duty and free from any service for any railroad before next reporting for duty as a passenger train employee.

D. Under Sec. 21103(a)(4), a Railroad May Not Require or Allow a Train Employee To Initiate an On-Duty Period After the Employee Has Initiated an On-Duty Period Each Day for Six Consecutive Days Followed By More Than 24 Hours Off Duty at the Away-From-Home Terminal. Following Such Service, When That Employee Returns to the Home Terminal, the Employee Must Remain Unavailable for Service at the Home Terminal for at Least 48 Hours

1. Summary of Issue and Interim Interpretation

Under Sec. 21103(a)(4), the railroad may not require or allow a train employee to initiate an on-duty period after the employee has an initiated an on-duty period each day for six consecutive days, has been finally released at the away-from-home terminal, and then has spent more than 24 hours off duty there. Rather, the railroad may require or allow the employee to engage in non-covered service at the away-from-home terminal, if desired, but must deadhead the employee to his or her home terminal and must then give the employee 48 consecutive hours off duty at the home terminal before requiring or allowing the employee to report for duty again to perform service as a freight train employee. If the railroad has required or allowed the employee to initiate an on-duty period at the away-from-home terminal after the seventh consecutive day, then railroad must give the employee 72 hours off duty before requiring or allowing the employee to report for duty again to perform service as a freight train employee.

2. Detailed Discussion of Interim Interpretation

When a train employee initiates an on-duty period each day for six consecutive days and the final period of on-duty time ends at the away-from-home terminal, Sec. 21103(a)(4)(A)(i) permits the employee to ''work a seventh consecutive day.'' Emphasis added. In the event that a railroad takes advantage of this allowance and has its employee work on a seventh consecutive day, Sec. 21103(a)(4)(A)(ii) requires that ''any employee who works a seventh consecutive day pursuant to subparagraph (i) shall have at least 72 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier.'' FRA

has not previously addressed the question of whether an employee may initiate a seventh on-duty period 24 hours or more [36] after the employee is finally released from his or her sixth consecutive duty tour, or if Sec. 21103(a)(4)(A)(i)–(ii) only authorizes a train employee to initiate an on-duty period that is consecutive to the sixth consecutive day.

The structure of Sec. 21103(a)(4) generally prohibits a train employee from remaining on duty or going on duty after the employee has initiated on-duty periods for six consecutive days, until the employee has at least 48 hours of time off duty at the home terminal unavailable for any service for any railroad. Sec. 21103(a)(4)(A) provides an exception to this general prohibition in subsection (a)(4)(A)(i), allowing an employee to initiate an on-duty period [37] on a ''seventh consecutive day.'' Subsection (a)(4)(A)(ii) requires that ''any employee who works a seventh consecutive day pursuant to subparagraph (i)'' have, instead of 48 hours, 72 hours of time off duty at the home terminal during which the employee is unavailable for any service for any railroad. Similarly, subsection (a)(4)(B) allows employees to initiate on-duty periods on seven consecutive days under collective bargaining agreements or authorized pilot programs; these employees must also have 72 hours of time off duty at the home terminal unavailable for any service for any railroad. Outside of these two exceptions, there is a violation of Sec. 21103(a)(4) if the railroad requires or allows a train employee to initiate an on-duty period after having required or allowed the employee to do so on six prior consecutive days and before having given the employee the 48 hours of time off duty.

FRA is aware that some railroads have scheduled employees to initiate on-duty periods each day for six consecutive days followed by more than a day spent off duty at the away-from-home terminal, and then, after the employee initiates an additional on-duty period and returns to his or her home terminal, have allowed the employee to initiate a new on-duty period after having only 48 hours off duty at the home terminal. Such a practice is plainly inconsistent with the language of the statute; as discussed above, any allowance that the statute provides for an employee to initiate an on-duty period after having already done so on six consecutive days is contingent upon that employee's receiving 72 hours of time off duty after the employee is finally released at the home terminal from the additional on-duty period that is allowed under one of the exceptions to the general six-day limitation. Specifically, when an employee is at the away-from-home terminal at the end of the duty tour initiated on the sixth consecutive day, he or she is permitted to initiate an on-duty period on ''the seventh consecutive day'' under Sec. 21103(a)(4)(A)(i), and an employee who initiates an on-duty period on this seventh consecutive day pursuant to that section must have the 72 hours of time off duty required by Sec. 21103(a)(4)(A)(ii) after the employee is finally released from the duty tour initiated on the seventh consecutive day. However, this does not resolve the question of what period of time constitutes ''the seventh consecutive day.''

Because the exception of paragraphs (a)(4)(A)(i) and (ii) discusses the additional on-duty period in the context of ''a seventh consecutive day,'' a literal reading of the statute, which FRA is adopting, would preclude the initiation of an on-duty period by an employee who had done so for six consecutive days, ending the final on-duty period at the away-from-home terminal, but did not initiate another on-duty period until more than 24 hours later, because at that time the initiation of the on-duty period would no longer fall on the ''seventh consecutive day.'' Under FRA's limited interpretation, after 24 hours at the away-from-home terminal (or more than a calendar day at the away-from-home terminal for a railroad that had not yet transitioned to FRA's final interpretation of ''day''), the authority of the railroad to require or allow an employee to initiate an on-duty period as a train employee under subsection (a)(4)(A)(i) disappears. As a result, the railroad's only choice in this circumstance would be that the employee must be deadheaded to his or her home terminal and receive at least 48 hours free from any service for any railroad before next initiating an on-duty period, though the employee could perform non-covered service before receiving the 48 hours of time off duty. Although this construction of the subsection has the virtue of hewing closely to the express terms of the statute, it results in the odd outcome that a railroad loses the authority to require or allow an employee to perform covered service because the employee has been off duty for too long.

FRA considered but rejected an alternative reading of the text that would avoid this incongruous result by understanding the authorization to ''work a seventh consecutive day'' as allowing one final initiation of an on-duty period when the employee ends the sixth consecutive on-duty period at the away-from-home terminal. This final on-duty period would generally be initiated within the seventh consecutive day, but in unusual circumstances where the employee remained off duty at the away-from-home terminal for more than 24 hours (or more than a calendar day for a railroad that had not yet transitioned to FRA's final interpretation), the final on-duty period would be authorized despite falling outside of the 24 hours (or calendar day) that constitute the seventh consecutive day. However, adoption of this alternative interpretation would have raised new questions concerning the time spent at the away-from-home terminal. Under that rejected reading, an employee could lawfully remain at the away-from-home terminal to engage in non-covered service for several days before next initiating an on-duty period, and the alternative broader interpretation would require determining whether this non-covered service would preclude subsequent covered service before having the required 48 hours of time off duty.

Although both of these interpretations are reasonable constructions of the statute given the nature of railroad operations, FRA views the limited interpretation, where an employee is not permitted to initiate an on-duty period after the end of the seventh consecutive day, as superior. In addition to being a more direct construction of the text of the statute, and providing more clarity to railroads and employees, the limited interpretation avoids the question of what, if any, non-covered service would be permitted between the sixth consecutive on-duty period and the final on-duty period, which could occur beyond the seventh consecutive day. Under the limited interpretation, an employee may engage in non-covered service separate from a duty tour at the away-from-home terminal after initiating an on-duty period on six consecutive days, but may not initiate a seventh duty tour prior to having the 48 hours of time off duty at the home terminal unless the duty tour is initiated within 24 hours, of the employee's final release from the duty tour initiated on the sixth consecutive day. Under the interpretation of ''day'' as a 24-hour period (24-hour-day interpretation), this non-covered service is necessarily limited to four hours if it is to avoid commingling with either the duty tour

[36] See Final Interpretations, 77 FR 12417–19 (defining ''day'' in this context to refer to a 24-hour period).

[37] See Final Interpretations, 77 FR 12419 (interpreting ''work'' in this context to refer to the initiation of an on-duty period).

initiated on the sixth consecutive day or the duty tour that follows the non-covered service on the seventh consecutive day, since there must be at least 10 hours of time off duty between the non-covered service and the duty tours before and after the non-covered service, and the duty tour following the non-covered service must be initiated 24 hours or less after the employee's final release from the duty tour initiated on the sixth consecutive day, for the seventh duty tour to be consecutive to it. As an example, if an employee were finally released at midnight, the following duty tour would have to begin prior to midnight of the following day in order to be on a consecutive day. In order to avoid commingling with both the prior and subsequent duty tours, the non-covered service must fall between 10 a.m., 10 hours after the midnight final release, and 2 p.m., 10 hours prior to the subsequent initiation of the on- duty period. This leaves only four hours of time for non-covered service outside of both duty tours; any greater amount of service would either commingle with the prior duty tour, commingle with the subsequent duty tour, or cause the subsequent duty tour to be initiated outside of the 24 hours that constitutes the ''seventh consecutive day.''

FRA seeks comment on the impact of this interpretation on railroad operations. Commenters arguing in favor of the broader interpretation, allowing for the initiation of an on-duty period under Sec. 21103(a)(4)(A)(i) more than 24 hours (or more than a calendar day for a railroad that had not yet transitioned to FRA's final interpretation), after the employee's final release from the duty tour initiated on the sixth consecutive day, are encouraged to discuss potential resolutions for the issue of intervening non-covered service separated from a duty tour.

IV. Application of the ''Signal Employee Exclusivity'' Provision to Individuals Who Drive Commercial Motor Vehicles for the Purpose of Themselves Installing, Maintaining, or Repairing Signal Systems

A. Summary of Issue and Interim Interpretation

The ''signal employee exclusivity'' provision, which was added by the RSIA and codified at Sec. 21104(e) (exclusivity provision), reads as follows:

> The hours of service, duty hours, and rest periods of signal employees shall be governed exclusively by this chapter. Signal employees operating motor vehicles shall not be subject to any hours of service rules, duty hours or rest period rules promulgated by any Federal authority, including the Federal Motor Carrier Safety Administration, other than the Federal Railroad Administration.

FRA has previously explained that there is no gap between the statutory HS limitations with respect to the installation, repair, and maintenance of signal systems, which are administered by FRA, and the regulatory HS limitations with respect to the operation of commercial motor vehicles, which are promulgated and administered by FMCSA. Final Interpretations, 77 FR at 12427–28. However, FRA's prior discussion of the issue allowed FMCSA's HS regulations (49 CFR part 395) (FMCSA's HS Regulations) to reach employees who generally performed signal covered service and were, therefore, generally considered ''signal employees'' on the occasions when those employees were driving a commercial motor vehicle during a period of time that was not within a duty tour that included any time spent performing covered service as a signal employee.

Both labor organizations and railroad industry organizations have identified the potential application of FMCSA's HS Regulations, including cumulative limitations that could reach into duty tours that are clearly governed by the FRA-enforced statutory HS limitations.[38] Although FRA previously interpreted the exclusivity provision in light of the definition of ''signal employee'' as ''an individual who is engaged in installing, repairing, or maintaining signal systems'' in Sec. 21101(4), FRA did not previously consider reinterpreting the definition of ''signal employee'' in light of the new exclusivity provision.

Now construing the whole statute, in accordance with traditional canons of statutory interpretation, FRA views the exclusivity provision as broadening the scope of what activity is denoted by the words ''engaged in installing, repairing, or maintaining signal systems.'' Specifically, as described in detail below, FRA views an individual's operation of a motor vehicle for the purpose of allowing that individual to install, repair, or maintain signal systems to be a function that is time on duty under the ''signal employee'' provisions of the HS laws, regardless of whether the operation of the motor vehicle is within the same duty tour as the direct work on the signal system, or is separated from it by at least 10 hours off duty. As a result, that operation of a motor vehicle for that purpose is itself subject to the limitations of the HS laws and to the exclusivity provision that exempts the operation from other Federal requirements concerning hours of service, duty hours, or rest periods, including FMCSA's HS Regulations.

It is important to note that this interpretation does not affect FRA's preexisting interpretations governing a signal employee's commuting time (i.e., time spent commuting by motor vehicle between the signal employee's residence and his or her headquarters), which remains classified as time off duty for purposes of Sec. 21104. In addition, as provided by Sec. 21104, travel time returning from a trouble call or an outlying work site to the employee's headquarters or residence at the end of a duty period, remains neither time on duty nor time off duty (except where such time is in transportation in an on-track vehicle). FRA seeks comment on this interim interpretation.

B. Detailed Discussion of Issue and Interim Interpretation

In response to the June 2009 Interim Interpretations, the Brotherhood of Railroad Signalmen (BRS) submitted a comment relating to several issues. Among the issues addressed by BRS was the exclusivity provision. BRS expressed concern that individuals generally performing signal covered service, who are, therefore, generally signal employees, might be excluded from FMCSA's HS Regulations as a result of this provision, but also would not be subject to the FRA-administered statutory HS limitations if they did not perform covered service installing repairing or maintaining signal systems that commingled under Sec. 21104(b)(2)[39] with the time that they spent driving a commercial motor vehicle to an outlying work site. BRS's proposed solution to this apparent issue was for FRA to classify driving commercial motor vehicles for the purposes of installing, maintaining, or repairing signal systems to be signal-employee covered service.

In the Final Interpretations, FRA responded to BRS's stated concern, that there was an apparent gap in the HS limitations of FRA and FMCSA, by explaining that the exclusivity provision applies only where other FRA-

[38] FRA notes that Sec. 21104(e) would preclude the application of any of FMCSA's HS Regulations to any duty tour of a signal employee, including cumulative limitations. See also 49 CFR 395.1(r), excluding signal employees from the application of 49 CFR part 395.

[39] Sec. 21104(b)(2) reads, ''(b) Determining time on duty.—In determining under subsection (a) of this section the time a signal employee is on duty or off duty, the following rules apply: * * * (2) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in installing, repairing, or maintaining signal systems is time on duty.''

administered HS limitations apply. The Final Interpretations stated, ''the statute does not allow an individual subject to the exemption granted at Sec. 21104(e) not to be subject to Sec. 21104(a).'' Final Interpretations, 77 FR at 12427. However, FRA noted that the interpretation would not completely preclude the application of FMCSA's HS Regulations to individuals who generally perform signal covered service, since there are circumstances where such an individual may drive a commercial motor vehicle to an outlying work site and then be provided with a statutory minimum off-duty period of at least 10 hours before beginning to perform covered service at the work site. Under these circumstances, FRA's position in the Final Interpretations was that if driving the commercial motor vehicle is not covered service, then the individual is not performing signal-employee functions, is not a signal employee during the time spent driving, and is not subject to Sec. 21104, including the exclusivity provision. FRA expressed a willingness to work with FMCSA to address the issue, but viewed those efforts as outside the scope of interpreting the statute.

In addressing the purported gap between the HS limitations, FRA's Final Interpretations simply applied the preexisting understanding of what activities are classified as ''engaged in installing, repairing, or maintaining signal systems'' under the old, pre-RSIA HS laws. However, labor organizations and railroad industry organizations have implicitly suggested that FRA's understanding of covered service should be revised in light of the statutory changes. Having considered the statute in light of these arguments, FRA agrees that the exclusivity provision at Sec. 21104(e) broadens the definition of signal-employee covered service that brings an individual within the scope of Sec. 21104.

Following the 1976 amendment of the HS laws [40] to cover ''an individual employed by the carrier who is engaged in installing, repairing or maintaining signal systems,'' FRA published an interim statement of agency policy and interpretation for signal service. 42 FR 4464 (Jan. 25, 1977) (1977 Signal Interim Interpretations). See Sec. 4(d) of Public Law 94–348 (July 8, 1976), adding new Sec. 3A to the Hours of Service Act, then codified at 45 U.S.C. 64; 42 FR 4464, January 25, 1977. In that contemporaneous interpretation, FRA noted that ''[p]erhaps the most difficult problem posed by the general language of [the statutory provisions governing such individuals] is the definition of time on duty. Individuals who work on signal systems often spend much of their compensated time traveling for the carrier's purposes.'' FRA ultimately determined that travel time devoted to the carrier's work was to be considered commingling service (other service for the carrier during a 24-hour period in which the employee is engaged in installing, maintaining, or repairing signal systems), such that the travel time would be considered time on duty if not separated by a statutory minimum off-duty period from direct work to install, repair, or maintain signal systems. Time spent returning from trouble calls or an outlying work site at the end of scheduled hours, was considered neither time on duty nor time off duty, an interpretation subsequently ratified by Congress in the 1978 amendments to the HS laws. Sec. 4 of Public Law 95–574 (November 2, 1978). Commuting time between an employee's residence and the employee's regular reporting point, which is determined by an employee in his or her decision of where to live, was considered time off duty.

Based in part on the nature of the statute as it existed in 1977, FRA stated that the functional approach of the HS laws meant that ''driving signal department vehicles is not covered service under the [HS laws].'' 1977 Signal Interim Interpretations, 42 FR at 4466. At the time that FRA published the 1977 Signal Interim Interpretations, the limitations of the HS laws applied only to individual duty tours, so there was little concern with individuals moving into and out of the classification ''signal employee'' based upon the functions performed at any given moment or within or outside of any individual duty tour.

As noted above, in Section III.B of this document, the RSIA amendments to the HS laws have attached more significance to the classification of an individual as a covered service employee beyond the boundaries of a particular duty tour. Although the functional approach is inherent to the HS laws as they currently exist, and a change from that approach to a status-based approach would require additional statutory amendments, FRA nonetheless recognizes that the functions that bring an individual employee within the scope of Sec. 21104 must be construed ''in connection with every other part or section of the statute to produce a harmonious whole.'' [41]

In the RSIA, Congress added to Sec. 21104 new subsection (e), which specifically references FMCSA's rules related to hours of service, duty hours, and rest periods as not applying to signal employees. Although the exclusivity provision can bear an interpretation of signal-employee covered service as it existed prior to the RSIA, such a narrow interpretation would allow individuals who often perform the functions of signal employees to be subject to the regulations of FMCSA, which seems to be contrary to the purpose of the exclusivity provision. Or, to the extent that FMCSA has excluded such individuals from the scope of its regulations, such employees could have no substantive Federal limitation on the time that could be spent in the driving function, provided that it is separated from the work of installing, repairing, or maintaining signal systems by at least a statutory minimum off-duty period of 10 hours, a result that is equally untenable. An alternative reading of the exclusivity provision recognizes that Congress expressly excluded signal employees from the application of FMCSA's regulations, and interprets what is necessary for an individual to be a signal employee in light of that exclusion.

As discussed above, FRA has long understood that driving a motor vehicle is often an integral part of performing work on signal systems. Much of signal system installation, maintenance, and repair will necessarily occur at track wayside locations, requiring significant amounts of travel to and from those locations for the individuals performing such work. Because of the immense scale of the rail network in the United States, this driving time may sometimes be sufficiently long that the driving is separated from the direct work on a signal system by a statutory minimum off-duty period of 10 consecutive hours. Under earlier FRA interpretations, FRA viewed the HS laws as not reaching the period of time spent driving for the purposes of a railroad if it was separated from the period of covered service by a statutory minimum off-duty period and, therefore, not within the duty tour.[42] When outside of a duty tour, time spent driving by individuals who generally

[40] In 1976 the statute was still called the Hours of Service Act. See note 2.

[41] *United States* v. *Uvalle-Patricio,* 478 F.3d 699 (5th Cir. 2007) (internal citations omitted). See also, *e.g., Bilski* v. *Kappos,* 130 S.Ct. 3218 (2010); Sutherland § 46:5.

[42] As discussed above, normal commuting time between an employee's residence and his or her normal headquarters or regular reporting point was and is considered time off duty. 42 FR 4466.

perform signal covered service was only regulated if it fell within the regulatory jurisdiction of FMCSA and FMCSA's HS Regulations. However, the RSIA rejected this status quo, and unequivocally stated that ''signal employees operating motor vehicles shall not be subject to any hours of service rules . . . promulgated by any Federal authority, including the Federal Motor Carrier Safety Administration, other than the Federal Railroad Administration.'' Maintaining FRA's prior narrow reading of what constitutes covered service would not fully exclude signal employees from the reach of FMCSA's HS Regulations, since such regulations include cumulative limits on total on-duty time and include all compensated time as time on duty, even when not connected with time spent driving.[43] Congress specifically identified ''signal employees operating motor vehicles'' as subject to the HS laws and under the authority of FRA, and understanding the operation of a motor vehicle for the purpose of installing, repairing, or maintaining signal systems to be service that is ''engaged in'' those activities brings such individuals entirely within the scope of Sec. 21104, consistent with the statutory mandate.

Such an interpretation is also consistent with FRA's prior understanding of the activities generally within the scope of a signal employee's employment. In construing the statutory definition of what an individual must do to be considered a ''signal employee,'' it is appropriate to consider the actual duties generally performed by such individuals, giving deference to the words that Congress chose to define as well as to the definition Congress provided.[44] Both Congress and FRA have recognized that signal employees ''spend much of their compensated time traveling for the carrier's purposes.'' [45] In discussing this issue previously, FRA noted that this fact created difficulties in interpreting what constituted time on duty for signal employees, and ultimately concluded that such time should be considered potentially commingling: Time on duty if commingled with other time on duty; and otherwise neither time on duty nor time off duty. FRA concludes that Congress intended Sec. 21104(e) to mean unequivocally that when these individuals are operating motor vehicles for the purpose of installing, repairing, or maintaining signal systems, these individuals shall be subject to the HS laws and not to FMCSA's HS Regulations; FRA's prior construction of the term ''signal employee'' and therefore the activities performed by an individual that make the individual subject to the HS laws, is not consistent with that congressional intent. Although FRA's prior reading of the statutory language was reasonable given the context of the HS laws as a whole, that context has now changed, and FRA's construction of the term ''signal employee'' must change with it.

Operating a motor vehicle from work site to work site is an integral part of the duty tour for many signal employees. Failing to recognize such operation as time on duty for signal employees, independent of whether the operation is immediately connected with the duty tour for which the vehicle is operated, would fail to account for Congress's clear statement that such activity should be governed by the HS laws. Accordingly, FRA understands an individual's operation of a motor vehicle for the purposes of that individual's installing, repairing, or maintaining signal systems to be service that is ''engaged in'' those activities and, therefore, signal-employee covered service. As a consequence, such driving time by the individual is time on duty for the purposes of Sec. 21104, regardless of whether the individual installs, repairs, or maintains a signal system during the same duty tour as the individual operated the motor vehicle.

However, as clarification, individuals who do not perform installation, repair, or maintenance of signal systems do not become signal employees simply by virtue of operating a motor vehicle transporting a signal employee. For instance, a driver contracted by a railroad solely to transport signal employees would not be performing covered service while driving, because the driver is not operating the motor vehicle for the purpose of himself or herself installing, repairing, or maintaining signal systems. Although operating a motor vehicle is a frequent component of signal employee duties, it is, of course, not exclusive to such employees. FRA also notes that an individual's operation of any motor vehicle for the purpose of himself or herself installing, repairing, or maintaining signal systems constitutes signal-employee covered service; the interpretation is not limited only to instances where the motor vehicle is a ''commercial motor vehicle'' within the meaning of FMCSA's HS Regulations. This distinction is relevant only to the extent that FMCSA's HS Regulations ever apply to individuals who ordinarily perform the functions of signal employees. As explained above, however, Congress specifically excluded signal employees from the application of HS rules promulgated by FMCSA, which would include FMCSA distinctions between motor vehicles.

FRA is aware that signal employees may sometimes drive themselves to outlying work sites and engage in activities that are not classified as signal-employee covered service prior to performing signal-employee covered service. Two examples follow that illustrate the application of FRA's new interim interpretation of ''signal employee.''

Example 10

Facts: An individual drives himself or herself to, and attends, a rules class at the outlying work site during one duty tour, and then performs signal-employee covered service at the same outlying work site during the next duty tour.

Effect of law: Despite the intervening rules class, the individual's drive to the outlying work site facilitated his or her subsequent performance of signal-employee covered service, and accordingly the driving time is time on duty subject to the FRA-administered HS laws rather than FMCSA's HS Regulations.

However, because the definition of ''signal employee'' is functional, there must be some connection, even if attenuated by intervening other activities or time off duty, between the time spent driving and the driver's performance of other signal employee functions in order for the time spent driving to be covered service and subject to the HS laws rather than FMCSA's HS Regulations. Only when the employee is driving a motor vehicle with no plausible connection to his or her future service installing, repairing, or maintaining signal systems is the driving time not time on duty as a signal employee. FRA recognizes the need for clarity in terms of what time spent in such driving is, and is not, considered time on duty; ambiguous travel time is time on duty, whereas travel time that is clearly and definitively not connected with proximate performance of signal employee functions is not signal-employee covered service.

Example 11

Facts: An individual drives from his or her headquarters at Location A to a rules class at Location B, attends the rules class, and then drives from Location B to Location C, where he or she repairs signal systems at Location C.

[43] 49 CFR 395.2, ''On-duty time.''

[44] See, e.g., *Johnson* v. *U.S.*, 130 S.Ct. 1265, 1271 (2010) (noting that Congress's choice of the words ''violent felony'' is relevant to interpreting the meaning of the definition of ''violent felony'' provided by Congress).

[45] FRA's 1977 Signal Interim Interpretations, 42 FR at 4464.

Effect of law: The time spent driving from the employee's headquarters to the rules class is not signal-employee covered service, unless it commingled with the eventual signal-employee covered service (i.e., the drive from Location B to Location C and the repair of the signal system at Location C), because the travel to the rules class location is not clearly connected to the performance of signal-employee covered service, since the employee is required to travel from the rules class location to another location in order for the employee to perform the covered service. In other words, assuming that neither the drive from Location B to Location C nor the signal-employee covered service at Location C was in the same duty tour as the rules class at Location A, the time that the employee spent driving to the rules class is not covered by the HS laws and is not covered by FMCSA's HS Regulations.

FRA acknowledges this gap in coverage for such drive times referenced in Example 12, but believes such instances are rare. FRA seeks comment on this aspect of its interim interpretation as well as on all other aspects of its interim interpretation.

C. Reiteration of FRA's Longstanding Interpretations of Travel Time Involving Signal Employees

As a result of this interim interpretation, the treatment of the time that signal employees spend operating motor vehicles is changing, but, as noted above, many of the other applications of the HS laws with respect to travel time for signal employees remain unchanged in the statutory text and in FRA interpretations. For the sake of clarity, FRA is briefly reiterating the agency's (and the statute's) prior and continuing treatment of these travel times as they apply to the new interpretation and providing any applicable supporting statutory references.

Travel on an on-track vehicle: Any time spent in transportation on an on-track vehicle, including any other type of travel time discussed below, is categorically time on duty as provided by Sec. 21104(b)(6).

Commuting time: FRA's longstanding interpretation, which remains unchanged, has been that normal commuting between the individual's residence and his or her regular reporting point or headquarters connected with the regular workday is not time on duty. Because employees choose where to reside with respect to their regular reporting point or headquarters, time spent commuting from the residence to that location is not service for a railroad. Note, however, that when an employee instead travels directly from his or her residence to a location other than his or her regular reporting point or headquarters, the travel time, minus the normal length of the individual's commuting time to the regular reporting point or headquarters, is service and, therefore, time on duty.

Travel time following the end of scheduled duty hours: As provided by Sec. 21104(b)(4) and (b)(5), travel time that begins either at the end of scheduled duty hours, or when the employee is released prior to the end of scheduled duty hours in order to comply with the HS laws, is neither time on duty nor time off duty, regardless of whether the employee returns to his or her headquarters or directly to his or her residence, and regardless of whether the employee operates a motor vehicle as part of such transportation. However, if the employee returns to duty less than 30 minutes after the completion of travel, the travel time is instead considered travel time during a duty tour governed by Sec. 21104(b)(7), as discussed below.

Travel time returning from a trouble call: As provided by Sec. 21104(b)(3), travel time returning from a trouble call is neither time on duty nor time off duty, regardless of whether the employee returns to his or her headquarters or directly to his or her residence, and regardless of whether the employee operates a motor vehicle as part of such transportation. However, if the employee returns to duty less than 30 minutes after the completion of travel, the travel time is instead considered travel time during a duty tour as provided by Sec. 21104(b)(7).

Other travel time: As discussed above, under FRA's new interim interpretation, any time spent by an individual operating a motor vehicle in order for the individual to engage in installing, repairing, or maintaining a signal system is time on duty, regardless of whether the period of time operating the motor vehicle is connected with the individual's duty tour. Any other travel time, such as time spent by an individual riding in a motor vehicle operated by someone else, during the individual's duty tour, is potentially commingling service, consistent with FRA's preexisting interpretation. This time spent by an individual riding in the motor vehicle commingles with time on duty that the individual accrued within the same duty tour and becomes time on duty. If there is no time on duty with which the travel time can commingle, such travel time instead becomes neither time on duty nor time off duty.

Joseph C. Szabo,

Administrator.

Appendix A

Appendix A: Brief Summary of Major Federal Hours of Service (HS) Requirements With Respect to Employees Who Perform One or More Types of Covered Service: Freight Train Employees, Passenger Train Employees, Signal Employees, and Dispatching Service Employees

	Freight train employees	Passenger train employees	Signal employees	Dispatching service employees
Citation	49 U.S.C. 21103	49 CFR part 228, subpart F	49 U.S.C. 21104	49 U.S.C. 21105.
Individuals Protected by the Federal HS Requirements because of the Type of Covered Service They Perform.	Train employees (individuals engaged in or connected with the movement of a train, including hostlers), except for train employees who are engaged in commuter or intercity rail passenger transportation, as defined in 49 CFR part 228, subpart F, who are instead subject to that regulation. See 49 U.S.C. 21102(c)(3).	Train employees who are engaged in commuter or intercity rail passenger transportation. (Includes a train employee who is engaged in commuter or intercity rail passenger transportation regardless of the nature of the entity by whom the employee is employed and any other train employee who is employed by a commuter railroad or an intercity passenger railroad. Excludes a train employee of another type of railroad who is engaged in work train service even though that work train service might be related to providing commuter or intercity rail passenger transportation, and a train employee of another type of railroad who serves as a pilot on a train operated by a commuter railroad or intercity passenger railroad.) See 49 CFR 228.403(c) and discussion under III.A of the Second Interim Interpretations.	Signal employees (individuals engaged in installing, repairing, or maintaining signal systems). See 49 U.S.C. 21101(4).	Dispatching service employees (operators, train dispatchers, or any other individual who by use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements). See 49 U.S.C. 21101(2).
Limitations on Time on Duty in a Single Tour.	A railroad may not require or allow an individual to remain or go on duty as a freight train employee in excess of 12 hours or if the individual has not had at least 10 consecutive hours off duty during the prior 24 hours.	A railroad may not require or allow an individual to remain or go on duty as a passenger train employee in excess of 12 hours or if the individual has not had at least 8 consecutive hours off duty during the prior 24 hours, or 10 consecutive hours off duty during the prior 24 hours if the individual has been on duty for 12 consecutive hours.	A railroad may not require or allow an individual to remain or go on duty as a signal employee in excess of 12 hours or if the individual has not had at least 10 consecutive hours off duty during the prior 24 hours.	A railroad may not require or allow an individual to remain or go on duty as a dispatching service employee for more than 9 hours in a 24-hour period at a place at which at least 2 shifts are employed or for more than 12 hours in a 24-hour period at a place where only one shift is employed.
End of Duty Tour	Duty tour ends at beginning of statutory minimum off-duty period.	Duty tour ends at beginning of statutory minimum off-duty period.	Duty tour ends at beginning of statutory minimum off-duty period.	Not applicable; any service for the railroad within 24 hours of time on duty will commingle with that time on duty.
Duration and Any Other Conditions of Minimum Off-Duty Period Between Two Duty Tours.	10 consecutive hours, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest. Additional time off duty is required when the total of time on duty and time waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release that is not time off duty exceeds 12 consecutive hours, which must also be uninterrupted.	8 consecutive hours; 10 consecutive hours if the employee has been on duty for 12 consecutive hours.	10 consecutive hours, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest.	No express minimum.
Duration and Any Other Conditions of Minimum Off-Duty Period Within a Duty Tour.	At least 4 hours of time off duty at the individual's designated terminal, required to be uninterrupted by any communication by the railroad reasonably expected to disrupt the employee's rest.	At least 4 hours of time off duty at the individual's designated terminal.	At least 30 minutes of time off duty.	At least 1 hour of time off duty.

	Freight train employees	Passenger train employees	Signal employees	Dispatching service employees
Limitations on Consecutive Duty Tours and Requirements for Extended Rest.	A railroad may not require or allow an individual to remain or go on duty as a freight train employee after initiating an on-duty period on six consecutive days without receiving 48 consecutive hours off duty and free from any service for any railroad at the individual's home terminal. (See definition of ''day'' and explanation of ''consecutive day'' below.) Individuals are permitted to initiate an on-duty period as a freight train employee on a seventh consecutive day when the individual ends the sixth consecutive day at the away-from-home terminal, as part of a pilot project, or as part of a collectively bargained agreement entered into prior to April 16, 2010 that expressly provides for such a schedule. An individual performing service on this additional day must receive 72 consecutive hours free from any service for any railroad at his or her home terminal before going on duty again as a freight train employee.	A railroad may not require or allow an individual to remain or go on duty as a passenger train employee if the individual has initiated an on-duty period each day on 13 or more consecutive calendar days in the series of at most 14 consecutive calendar days until the individual has had at least two consecutive calendar days on which he or she does not initiate an on-duty period. May not remain or go on duty as a passenger train employee if the individual has initiated an on-duty period each day on six or more consecutive calendar days including one or more Type 2 assignments until the individual has had at least 24 consecutive hours of time off duty. For definition of ''Type 2 assignment,'' see 49 CFR 228.5 or footnote 32 of the Second Interim Interpretations. During this time off duty, the individual must be at his or her home terminal and unavailable for any service for any railroad. If the employee is not at his or her home terminal when this time off duty is required, the employee may either deadhead to the point of final release at the employee's home terminal or initiate an on-duty period in order to return to the employee's home terminal either on the same calendar day or the next consecutive calendar day after the completion of the duty tour triggering the rest requirement.	None	None.
Monthly Cumulative Limitations	A railroad may not require or allow an individual to remain or go on duty, wait for or be in deadhead transportation to the point of final release, or be in any other mandatory service for the carrier in any calendar month where the employee has spent a total of 276 hours on duty, waiting for or in deadhead transportation from a duty assignment to the place of final release, or in any other mandatory service for the carrier. A railroad may not require or allow an individual to exceed a total of 30 hours per calendar month spent waiting for or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty that is neither time on duty nor time off duty, not including interim rest periods, except in the circumstances stated.	None	None	None.

	Freight train employees	Passenger train employees	Signal employees	Dispatching service employees
Definition of ''Time Neither On Duty nor Off Duty''.	Time spent in deadhead transportation from a duty assignment to the place of final release.	Time spent in deadhead transportation from a duty assignment to the place of final release.	Time spent returning from a trouble call, whether the individual goes directly to the employee's residence or by way of the employee's headquarters. Time after scheduled duty hours necessarily spent in completing the trip directly to the individual's residence or to the individual's headquarters, if the individual has not completed the trip from the final outlying worksite of the duty period at the end of scheduled duty hours, or if the individual is released from duty at an outlying worksite before the end of the individual's scheduled duty hours to comply with 49 U.S.C. 21104. However, time spent in transportation on an on-track vehicle is time on duty.	None.
Emergencies in General	A freight train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for no more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency.	A passenger train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for no more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency.	A signal employee may be allowed to remain or go on duty for no more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of that employee is related to the emergency. Routine repairs, routine maintenance, or routine inspection of signal systems is not an emergency that allows for additional time on duty.	A dispatching service employee may be allowed to remain or go on duty for no more than 4 additional hours during a period of 24 consecutive hours for no more than 3 days during a period of 7 consecutive days.
Explanation of the End of an Emergency.	The emergency ends when the track is cleared and the railroad line is open for traffic.	The emergency ends when the track is cleared and the railroad line is open for traffic.	The emergency ends when the signal system is restored to service.	None.
Definition of ''Day'' and ''Consecutive Day''.	24 consecutive hours; two initiations of an on-duty period are on consecutive days where they are separated by less than 24 hours of time off duty, measured from the time of the employee's final release from duty until the time that the employee next reports for duty.	Calendar days; two calendar days are consecutive if adjacent to one another.	Not Applicable	Not Applicable Except in Context of Emergency Provision.
Explicit Use of Fatigue Science	None	Passenger train employees' work schedules must be analyzed under an FRA-approved validated biomathematical fatigue model, with the exception of certain schedules deemed as categorically presenting an acceptable level of risk for fatigue that does not violate the defined fatigue threshold.	None	None.
Specific Rules for Nighttime Operations.	None	Schedules that include any time on duty between 8 p.m. and 4 a.m. must be analyzed using a validated biomathematical model of human performance and fatigue approved by FRA. Schedules with excess risk of fatigue must be mitigated or supported by a determination that mitigation is not possible and the schedule is operationally necessary and approved by FRA.	None	None.

	Freight train employees	Passenger train employees	Signal employees	Dispatching service employees
Specific Rules for Unscheduled Assignments.	None	The potential for fatigue presented by unscheduled work assignments must be mitigated as part of a railroad's FRA-approved fatigue mitigation plan. Plans must be submitted for FRA review and approval, along with the associated schedules requiring mitigation.	None	None.

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Appendix H: Title 49 United States Code Chapter 211

Hours of Service (as amended by the Rail Safety Improvement Act of 2008, Public Law 110-432, signed October 16, 2008)

49 USC CHAPTER 211 — HOURS OF SERVICE
(as amended by the Rail Safety Improvement Act of 2008 ("RSIA 2008"), Public Law 110–432, signed October 16, 2008)[1]

§ 21101. Definitions

In this chapter—

(1) —designated terminal" means the home or away-from-home terminal for the assignment of a particular crew.

(2) —dispatching service employee" means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

(3) —employee" means a dispatching service employee, a signal employee, or a train employee.

(4) —signal employee" means an individual who is engaged in installing, repairing, or maintaining signal systems.

(5) —train employee" means an individual engaged in or connected with the movement of a train, including a hostler.

§ 21102. Nonapplication, exemption, and alternate hours of service regime

(a) GENERAL.— This chapter does not apply to a situation involving any of the following:

(1) a casualty.

(2) an unavoidable accident.

(3) an act of God.

(4) a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.

(b) EXEMPTION.— The Secretary of Transportation may exempt a railroad carrier having not more than 15 employees covered by this chapter from the limitations imposed by this chapter.

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[1] The changes to Section 21101(4), 21103, and 21104 take effect nine (9) months after the date of enactment. *See* RSIA 2008 at § 108(g). Not later than 180 days after the date of enactment, the FRA shall revise 49 CFR Part 228 of title 49, Code of Federal Regulations (A) to adjust record keeping and reporting requirements to reflect the new requirements; (B) to authorize electronic record keeping; and (C) to require training of affected employees and supervisors, including training of employees in the entry of hours of service data. *See* RSIA 2008 at § 108(f)(1). The FRA may utilize the Railroad Safety Advisory Committee to assist in development of the regulation. *See* RSIA 2008 at § 108(f)(2).

The Secretary may allow the exemption after a full hearing, for good cause shown, and on deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a carrier to require or allow its employees to be on duty more than a total of 16 hours in a 24-hour period.

(c) APPLICATION OF HOURS OF SERVICE REGIME TO COMMUTER AND INTERCITY PASSENGER RAILROAD TRAIN EMPLOYEES.—

(1) When providing commuter rail passenger transportation or intercity rail passenger transportation, the limitations on duty hours for train employees of railroad carriers, including public authorities operating passenger service, shall be solely governed by old section 21103 until the earlier of—

(A) the effective date of regulations prescribed by the Secretary under section 21109(b) of this chapter; or

(B) the date that is 3 years following the date of enactment of the Rail Safety Improvement Act of 2008.

(2) After the date on which old section 21103 ceases to apply, pursuant to paragraph (1), to the limitations on duty hours for train employees of railroad carriers with respect to the provision of commuter rail passenger transportation or intercity rail passenger transportation, the limitations on duty hours for train employees of such railroad carriers shall be governed by new section 21103, except as provided in paragraph (3).

(3) After the effective date of the regulations prescribed by the Secretary under section 21109(b) of this title, such carriers shall—

(A) comply with the limitations on duty hours for train employees with respect to the provision of commuter rail passenger transportation or intercity rail passenger transportation as prescribed by such regulations; and

(B) be exempt from complying with the provisions of old section 21103 and new section 21103 for such employees.

(4) In this subsection:

(A) The terms ~~"c~~ommuter rail passenger transportation" and ~~"i~~ntercity rail passenger transportation" have the meaning given those terms in section 24102 of this title.

(C) The term ~~"n~~ew section 21103" means section 21103 of this chapter as amended by the Rail Safety Improvement Act of 2008.

(D) The term ~~"o~~ld section 21103" means section 21103 of this chapter as it was in effect on the day before the enactment of that Act."

§ 21103. Limitations on duty hours of train employees

(a) IN GENERAL.—Except as provided in subsection (d) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to—

(1) remain on duty, go on duty, wait for deadhead transportation, be in deadhead transportation from a duty assignment to the place of final release, or be in any other mandatory service for the carrier in any calendar month where the employee has spent a total of 276 hours—

(A) on duty;

(B) waiting for deadhead transportation, or in deadhead transportation from a duty assignment to the place of final release; or

(C) in any other mandatory service for the carrier;

(2) remain or go on duty for a period in excess of 12 consecutive hours;

(3) remain or go on duty unless that employee has had at least 10 consecutive hours off duty during the prior 24 hours; or

(4) remain or go on duty after that employee has initiated an on-duty period each day for—

(A) 6 consecutive days, unless that employee has had at least 48 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier except that—

(i) an employee may work a seventh consecutive day if that employee completed his or her final period of on-duty time on his or her sixth consecutive day at a terminal other than his or her home terminal; and

(ii) any employee who works a seventh consecutive day pursuant to subparagraph (i) shall have at least 72 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier; or

(B) except as provided in subparagraph (A), 7 consecutive days, unless that employee has had at least 72 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier, if—

(i) for a period of 18 months following the date of enactment of the Rail Safety Improvement Act of 2008, an existing collective bargaining agreement expressly provides for such a schedule or, following the expiration of 18 months after the date of enactment of the Rail Safety Improvement Act of 2008, collective bargaining agreements entered into during such period expressly provide for such a schedule;

(ii) such a schedule is provided for by a pilot program authorized by a collective bargaining agreement; or

(iii) such a schedule is provided for by a pilot program under section 21108 of this chapter related to employees' work and rest cycles.

The Secretary may waive paragraph (4), consistent with the procedural requirements of section 20103, if a collective bargaining agreement provides a different arrangement and such an arrangement is in the public interest and consistent with railroad safety.

(b) DETERMINING TIME ON DUTY.— In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time the employee is engaged in or connected with the movement of a train is time on duty.

(3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.

(4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.

(5) An interim period available for rest at a place other than a designated terminal is time on duty.

(6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.

(7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:

(A) a casualty.

(B) a track obstruction.

(C) an act of God.

(D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee when that employee left the designated terminal.

(c) LIMBO TIME LIMITATION AND ADDITIONAL REST REQUIREMENT.—

(1) A railroad carrier may not require or allow an employee—

(A) to exceed a total of 40 hours per calendar month spent—

(i) waiting for deadhead transportation; or

(ii) in deadhead transportation from a duty assignment to the place of final release,

following a period of 12 consecutive hours on duty that is neither time on duty nor time off duty, not including interim rest periods, during the period from the date of enactment of the Rail Safety Improvement Act of 2008 to one year after such date of enactment; and

(B) to exceed a total of 30 hours per calendar month spent—

(i) waiting for deadhead transportation; or

(ii) in deadhead transportation from a duty assignment to the place of final release,

following a period of 12 consecutive hours on duty that is neither time on duty nor time off duty, not including interim rest periods, during the period beginning one year after the date of enactment of the Rail Safety Improvement Act of 2008 except that the Secretary may further limit the monthly limitation pursuant to regulations prescribed under section 21109.

(2) The limitations in paragraph (1) shall apply unless the train carrying the employee is directly delayed by—

(A) a casualty;

(B) an accident;

(C) an act of God;

(D) a derailment;

(E) a major equipment failure that prevents the train from advancing; or

(F) a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.

(3) Each railroad carrier shall report to the Secretary, in accordance with procedures established by the Secretary, each instance where an employee subject to this section spends time waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release in excess of the requirements of paragraph (1).

(4) If—

(A) the time spent waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release that is not time on duty, plus

(B) the time on duty,

exceeds 12 consecutive hours, the railroad carrier and its officers and agents shall provide the employee with additional time off duty equal to the number of hours by which such sum exceeds 12 hours.

(d) EMERGENCIES.— A train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. In this subsection, an emergency ends when the track is cleared and the railroad line is open for traffic.

(e) COMMUNICATION DURING TIME OFF DUTY.— During a train employee's minimum off-duty period of 10 consecutive hours, as provided under subsection (a) or during an interim period of at least 4 consecutive hours available for rest under subsection (b)(7) or during additional off-duty hours under subsection (c)(4), a railroad carrier, and its officers and agents, shall not communicate with the train employee by telephone, by pager, or in any other manner that could reasonably be expected to disrupt the employee's rest. Nothing in this subsection shall prohibit communication necessary to notify an employee of an emergency situation, as defined by the Secretary. The Secretary may waive the requirements of this paragraph for commuter or intercity passenger railroads if the Secretary determines that such a waiver will not reduce safety and is necessary to maintain such railroads' efficient operations and on-time performance of its trains.

§ 21104. Limitations on duty hours of signal employees

(a) IN GENERAL.—Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow its signal employees to remain or go on duty and a contractor or subcontractor to a railroad carrier and its officers and agents may not require or allow its signal employees to remain or go on duty —

(1) for a period in excess of 12 consecutive hours; or

(2) unless that employee has had at least 10 consecutive hours off duty during the prior 24 hours.

(b) DETERMINING TIME ON DUTY.— In determining under subsection (a) of this section the time a signal employee is on duty or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in installing, repairing, or maintaining signal systems is time on duty.

(3) Time spent returning from a trouble call, whether the employee goes directly to the employee's residence or by way of the employee's headquarters, is neither time on duty nor time off duty.

(4) If, at the end of scheduled duty hours, an employee has not completed the trip from the final outlying worksite of the duty period to the employee's headquarters or directly to the employee's residence, the time after the scheduled duty hours necessarily spent in completing the trip to the residence or headquarters is neither time on duty nor time off duty.

(5) If an employee is released from duty at an outlying worksite before the end of the employee's scheduled duty hours to comply with this section, the time necessary for the trip from the worksite to the employee's headquarters or directly to the employee's residence is neither time on duty nor time off duty.

(6) Time spent in transportation on an ontrack vehicle, including time referred to in paragraphs (3)–(5) of this subsection, is time on duty.

(7) A regularly scheduled meal period or another release period of at least 30 minutes but not more than one hour is time off duty and does not break the continuity of service of the employee under this section, but a release period of more than one hour is time off duty and does break the continuity of service.

(c) EMERGENCIES.— A signal employee may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of that employee is related to the emergency. In this subsection, an emergency ends when the signal system is restored to service. A signal employee may not be allowed to remain or go on duty under the emergency authority provided under this subsection to conduct routine repairs, routine maintenance, or routine inspection of signal systems.

(d) COMMUNICATION DURING TIME OFF DUTY.— During a signal employee's minimum off-duty period of 10 consecutive hours, as provided under subsection (a), a railroad carrier or a contractor or subcontractor to a railroad carrier, and its officers and agents, shall not communicate with the signal employee by telephone, by pager, or in any other manner that could reasonably be expected to disrupt the employee's rest. Nothing in this subsection shall prohibit communication necessary to notify an employee of an emergency situation, as defined by the Secretary.

(e) EXCLUSIVITY.—The hours of service, duty hours, and rest periods of signal employees shall be governed exclusively by this chapter. Signal employees operating motor vehicles shall not be subject to any hours of service rules, duty hours or rest period rules promulgated by any Federal authority, including the Federal Motor Carrier Safety Administration, other than the Federal Railroad Administration.

§ 21105. Limitations on duty hours of dispatching service employees

(a) APPLICATION.— This section applies, rather than section 21103 or 21104 of this title, to a train employee or signal employee during any period of time the employee is performing duties of a dispatching service employee.

(b) GENERAL.— Except as provided in subsection (d) of this section, a dispatching service employee may not be required or allowed to remain or go on duty for more than—

(1) a total of 9 hours during a 24-hour period in a tower, office, station, or place at which at least 2 shifts are employed; or

(2) a total of 12 hours during a 24-hour period in a tower, office, station, or place at which only one shift is employed.

(c) DETERMINING TIME ON DUTY.— Under subsection (b) of this section, time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is on duty in a tower, office, station, or other place is time on duty in that tower, office, station, or place.

(d) EMERGENCIES.— When an emergency exists, a dispatching service employee may be allowed to remain or go on duty for not more than 4 additional hours during a period of 24 consecutive hours for not more than 3 days during a period of 7 consecutive days.

§ 21106. Limitations on employee sleeping quarters

A railroad carrier and its officers and agents—

(1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees

and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and

(2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

§ 21107. Maximum duty hours and subjects of collective bargaining

The number of hours established by this chapter that an employee may be required or allowed to be on duty is the maximum number of hours consistent with safety. Shorter hours of service and time on duty of an employee are proper subjects for collective bargaining between a railroad carrier and its employees.

§ 21108. Pilot projects

(a) WAIVER.— A railroad carrier or railroad carriers and all labor organizations representing any class or craft of directly affected covered service employees of the railroad carrier or railroad carriers, may jointly petition the Secretary of Transportation for approval of a waiver, in whole or in part, of compliance with this chapter, to enable the establishment of one or more pilot projects to demonstrate the possible benefits of implementing alternatives to the strict application of the requirements of this chapter to such class or craft of employees, including requirements concerning maximum on-duty and minimum off-duty periods. Based on such a joint petition, the Secretary may, after notice and opportunity for comment, waive in whole or in part compliance with this chapter for a period of no more than two years, if the Secretary determines that such waiver of compliance is in the public interest and is consistent with railroad safety. Any such waiver may, based on a new petition, be extended for additional periods of up to two years, after notice and opportunity for comment. An explanation of any waiver granted under this section shall be published in the Federal Register.

(b) REPORT.— The Secretary of Transportation shall submit to Congress, no later than January 1, 1997, a report that—

(1) explains and analyzes the effectiveness of all pilot projects established pursuant to a waiver granted under subsection (a);

(2) describes the status of all other waivers granted under subsection (a) and their related pilot projects, if any; and

(3) recommends appropriate legislative changes to this chapter.

(c) DEFINITION.— For purposes of this section, the term —directly affected covered service employees" means covered service employees to whose hours of service the terms of the waiver petitioned for specifically apply.

§ 21109. Regulatory authority

(a) IN GENERAL.—In order to improve safety and reduce employee fatigue, the Secretary may prescribe regulations—

(1) to reduce the maximum hours an employee may be required or allowed to go or remain on duty to a level less than the level established under this chapter;

(2) to increase the minimum hours an employee may be required or allowed to rest to a level greater than the level established under this chapter;

(3) to limit or eliminate the amount of time an employee spends waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release that is considered neither on duty nor off duty under this chapter;

(4) for signal employees—

(A) to limit or eliminate the amount of time that is considered to be neither on duty nor off duty under this chapter that an employee spends returning from an outlying worksite after scheduled duty hours or returning from a trouble call to the employee's headquarters or directly to the employee's residence; and

(B) to increase the amount of time that constitutes a release period, that does not break the continuity of service and is considered time off duty; and

(5) to require other changes to railroad operating and scheduling practices, including unscheduled duty calls, that could affect employee fatigue and railroad safety.

(b) REGULATIONS GOVERNING THE HOURS OF SERVICE OF TRAIN EMPLOYEES OF COMMUTER AND INTERCITY PASSENGER RAILROAD CARRIERS.—Within 3 years after the date of enactment of the Rail Safety Improvement Act of 2008, the Secretary shall prescribe regulations and issue orders to establish hours of service requirements for train employees engaged in commuter rail passenger transportation and intercity rail passenger transportation (as defined in section 24102 of this title) that may differ from the requirements of this chapter. Such regulations and orders may address railroad operating and scheduling practices, including unscheduled duty calls, communications during time off duty, and time spent waiting for deadhead transportation or in deadhead transportation from a duty assignment to the place of final release, that could affect employee fatigue and railroad safety.

(c) CONSIDERATIONS.—In issuing regulations under subsection (a) the Secretary shall consider scientific and medical research related to fatigue and fatigue abatement, railroad scheduling and operating practices that improve safety or reduce employee fatigue, a railroad's use of new or novel technology intended to reduce or eliminate human error, the variations in freight and passenger railroad scheduling practices and operating conditions, the variations in duties and operating conditions for employees subject to this chapter, a railroad's required or voluntary use of fatigue management plans covering employees subject to this chapter, and any other relevant factors.

(d) TIME LIMITS.—

(1) If the Secretary determines that regulations are necessary under subsection (a), the Secretary shall first request that the Railroad Safety Advisory Committee develop proposed regulations and, if the Committee accepts the task, provide the Committee with a reasonable time period in which to complete the task.

(2) If the Secretary requests that the Railroad Safety Advisory Committee accept the task of developing regulations under subsection (b) and the Committee accepts the task, the Committee shall reach consensus on the rulemaking within 18 months after accepting the task. If the Committee does not reach consensus within 18 months after the Secretary makes the request, the Secretary shall prescribe appropriate regulations within 18 months.

(3) If the Secretary does not request that the Railroad Safety Advisory Committee accept the task of developing regulations under subsection (b), the Secretary shall prescribe regulations within 3 years after the date of enactment of the Rail Safety Improvement Act of 2008.

(e) PILOT PROJECTS.—

(1) IN GENERAL.—Not later than 2 years after the date of enactment of the Rail Safety Improvement Act of 2008, the Secretary shall conduct at least 2 pilot projects of sufficient

size and scope to analyze specific practices which may be used to reduce fatigue for train and engine and other railroad employees as follows:

(A) A pilot project at a railroad or railroad facility to evaluate the efficacy of communicating to employees notice of their assigned shift time 10 hours prior to the beginning of their assigned shift as a method for reducing employee fatigue.

(B) A pilot project at a railroad or railroad facility to evaluate the efficacy of requiring railroads who use employee scheduling practices that subject employees to periods of unscheduled duty calls to assign employees to defined or specific unscheduled call shifts that are followed by shifts not subject to call, as a method for reducing employee fatigue.

(2) WAIVER.—The Secretary may temporarily waive the requirements of this section, if necessary, to complete a pilot project under this subsection.

(f) DUTY CALL DEFINED.—In this section the term ~~"d~~duty call" means a telephone call that a railroad places to an employee to notify the employee of his or her assigned shift time.

Appendix I: Operating Practices Technical Bulletin OP-04-03

Suitable Food and Lodging at Designated Terminals;
Hours of Service Act Interpretation, February 3, 2004

U.S. Department
of Transportation

Federal Railroad Administration

Memorandum

Date: February 3, 2004 Reply to Attn of: OP-04-03

Subject: Suitable Food and Lodging at Designated Terminals;
Hours of Service Act Interpretation

From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

The Hours of Service Act requires that, in order for a period of interim release to be valid, it must be for a period of 4 or more hours at a designated terminal. The intent of Congress in enacting and amending the designated terminal provision was to assure that railroad employees in train and engine service should be afforded an opportunity for meaningful rest. This provision requires that suitable facilities for food and lodging be available in connection with a release at a designated terminal.

In that connection the apparent basis for references in the legislative history to "suitable facilities for food" was to assure the availability of nutritionally adequate and palatable food which could be consumed with appropriate utensils in a reasonably clean environment.

Another issue is whether it is necessary that facilities for food be available continuously throughout the rest period. The legislative history of the Act nowhere implies such a burden; indeed, it assumes that much of the rest period will be used for sleeping. As long as suitable facilities for food are available when needed for nutritional purposes (i.e., normally at the beginning and end of rest period), an opportunity for meaningful rest has been provided in keeping with the purposes of the Act. For instance, if a crew reaches its destination at 12 midnight and immediately obtains an adequate meal, with the expectation of obtaining breakfast just before returning to duty at 8 a.m. the next morning, the fact that food is unavailable between 1 a.m. and 7 a.m. would be irrelevant to the fitness of the crew.

The suitability of canned, prepackaged, and frozen fast-foods such as canned soup, cold or microwave sandwiches, and frozen pizza depends on the overall circumstances involved, including the length of the work or rest time during which such items are the only food available. Disputes about the relative desirability of various types of meals, all of which have nutritional value, can best be handled through collective bargaining.

As for transportation to eating facilities, the legislative history suggests that transportation must be furnished if the restaurant is beyond a reasonable walking distance. But that is not to say that the railroad must pay for the transportation-only that it be made available. If, for instance, the railroad provides a taxi, it is a matter of collective bargaining, not railroad safety, as to whether the railroad or the employee pays the fare.

The Act requires only that suitable facilities for food and lodging be available. The Act does not indicate who must pay for the accommodations. Railroad labor and management may negotiate an agreement for the payment of lodging or meals through the collective bargaining process.

Section 2 of the Act requires that railroad-provided sleeping quarters, including crew quarters, camp or bunk cars, and trailers must afford train and engine service employees an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters. FRA is responsible for the administration of that provision, as well.

Questions have arisen with regard to categorizing time spent deadheading at away-from-home terminals. If, as we construe the Act, Congress did not intend that commuting time be considered time on-duty at home terminals, Congress had similar intent at away-from-home terminals. However, since travel time at away-from-home terminals is usually outside employee control, Congress presumable did not intend such commuting would exceed a reasonable period. Given Congressional silence on what a “reasonable time” might be, FRA was forced to define one. FRA solicited comments from representatives of rail management and labor, and after analysis established 30 minutes as a reasonable “rule of thumb” commute period for away-from-home terminal situations. Therefore, at away-from-home terminals:

- If 30 minutes or less, time spent traveling to lodging after final release or time spent traveling from lodging to duty at the conclusion of rest is considered time off-duty.

- When travel time to lodging from point of final release exceeds 30 minutes, the entire travel time is considered as limbo time (neither time on-duty nor time off-duty). In addition, a travel period from lodging to a duty point that exceeds 30 minutes is considered time on-duty.

Another aspect of the problem deals with time spent awaiting the preparation of accommodations at a lodging facility or time spent awaiting transportation to lodging after final release. Both such situations must be included in “travel to lodging” time computations. The rationale is the same: such time is really not time on-duty, but it is also not time available for rest (except, of course, for the 30-minute commuting allowance discussed above).

The total disappearance of the allowance for commuting time at away-from-home terminals in instances where travel exceeds 30 minutes provides an incentive to minimize such travel which helps ease the effects of cumulative fatigue individuals working irregular schedules frequently encounter.

Should a crew decide to have dinner across the street from their final release point (away-from-home terminal) before being transported to the lodging facility, absent any special circumstances, FRA would typically consider this as a discretionary action by the employees. As such, their rest time would commence at the point they voluntarily left the away-from-home terminal for dinner, in lieu of being transported to the lodging facility to rest.

It should be noted that transporting employees to facilities at some distance from the designated terminal does not violate the Hours of Service Act. A violation occurs in this situation only if the employees are given an inadequate number of consecutive hours off-duty when released at a designated terminal.

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Appendix J: Operating Practices Technical Bulletin OP-04-04

Commingled Service Provisions; Hours of Service Interpretations, February 3, 2004

U.S. Department of Transportation

Federal Railroad Administration

Memorandum

Date: February 3, 2004 Reply to Attn of: OP-04-04

Subject: Commingled Service Provisions;
Hours of Service Interpretations

Original Signed By:
From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

This technical bulletin is to reaffirm the Federal Railroad Administration's interpretation of the Hours of Service Act commingled service provision as it pertains to employee attendance at required rules classes, railroad investigation hearings, safety committees, administrative duties, familiarization trips, and physical examinations. Additional issues regarding time spent providing information about railroad accidents, time spent deadheading from a duty assignment in a privately-owned vehicle, and onboard observations made by railroad officials are also addressed.

Section 2(b) of the Hours of Service Act states, in part: "In determining . . . the number of hours an employee is on duty, there shall be counted, in addition to the time such employee is actually engaged in or connected with the movement of any train, all time on duty in other service performed for the railroad during the 24-hour period involved."

ATTENDANCE AT RULES CLASSES

The Federal Railroad Administration (FRA) has not changed its position since its published interpretations of the Act in 1977, where we said "It should be remembered that attendance at required rules classes is duty time subject to the provisions of commingling" [49 CFR Part 228, Appendix A (emphasis added)].

When attendance at a rules class fulfills a condition of employment, such attendance is "required." This is true even where employees have the option to attend one of several sessions, and it is immaterial that specific scheduling of such service is left, in part, to the employee (42 FR 27596, May 31, 1977). For example, consider a system that permits an employee to attend any of six sessions within a given period or to attend one final session held for those who missed an earlier one.

Whether the employee attends one of the first six or the last one, his attendance fulfills a condition of employment, and his time spent in the class is therefore time on-duty.

One could make a reasonable argument that insofar as safety is concerned, required rules class attendance should be treated differently depending on whether it occurs before or after covered service. However, Congress did not draw such a distinction. Commingled service is defined to include "all time on-duty in other service performed for the common carrier during the 24-hour period involved" [45 U.S.C 62 (b)]. This flat statutory language precludes any such disparate treatment for enforcement purposes.

ATTENDANCE AT RAILROAD INVESTIGATION HEARINGS

When an employee is required by the railroad to attend a hearing as a principal under charge, or as a witness on behalf of the railroad, time so spent would be considered as time on duty under the commingled service provisions of the Act. When an employee and/or union representative voluntarily attends a hearing as a witness on behalf of an employee, such service is not required by the carrier, and therefore, not considered time on duty under the commingled service provisions.

Under these circumstances, if an employee attends a hearing because he or she is required to do so by the railroad in the same 24-hour period as having performed service subject to the limitations of the Act, the time spent in the hearing is included when computing the total time on duty. The Act does not distinguish between commingled service performed before covered service and that performed after covered service. If there is less than a 4-hour interval between such a hearing and service performed in the movement of a train, then the time is counted as continuous time.

The Act generally prohibits service in excess of 12 hours, absent an unforeseen event beyond the railroad's control. Required attendance at a disciplinary hearing is clearly foreseeable. Thus, the railroad will be in violation of the Act if it requires or permits such service beyond the time limits prescribed for total time on-duty.

PARTICIPATION IN RAILROAD SAFETY COMMITTEES

As long as participation in railroad safety committee activities is a voluntary act by an employee, and not a condition of continued employment, such service is not normally considered "covered" under the commingled provisions of the Act. Time occupied in such endeavors, if truly voluntary, is usually done during an employee's discretionary time. As such, since an employee is presumably free to come and go, this activity may be included in "rest time."

FAMILIARIZATION TRIPS

An employee who rides a train for the sole purpose of qualifying on the physical characteristics of the railroad is subject to the constraints of the Act if such trips are required as part of the qualification process and are made in the same 24-hour period as covered service. Such time is considered commingled service and must be computed in determining total time on-duty.

PHYSICAL EXAMINATIONS

If an employee is required to report for a physical examination as a condition of continued employment, he would be subject to the commingled service provisions of the Act. The issue of payment for services rendered or contract requirements is not recognized or covered by the Act.

PROVIDING INFORMATION CONCERNING RAILROAD ACCIDENTS

If a train crew is explicitly required by railroad officials to remain on railroad property to provide information regarding an accident, the time spent waiting to give, and giving, such information is "on-duty" time for purposes of the Hours of Service Act. This time would be added to the time spent by the crewmember in train or engine service in computing total time on-duty by that employee.

DEADHEADING FROM A DUTY ASSIGNMENT IN A PRIVATELY-OWNED VEHICLE

In general, FRA's position is that if a railroad requires an employee to deadhead to a home terminal in a privately-owned vehicle without the opportunity to obtain rest and without the opportunity to be transported (i.e., required the employee to drive his own vehicle), this activity could be considered commingled service. By offering to transport an employee or allow him the opportunity to obtain rest before deadheading back to the home terminal, the railroad would be in compliance even if the employee elected to drive his own vehicle.

ONBOARD OBSERVATIONS CONDUCTED BY RAILROAD OFFICIALS

A common scenario is a railroad official that rides a train for the purpose of performing onboard observations of crewmembers and railroad operations. In general, FRA's position is that the railroad official is acting in a supervisory capacity and therefore not subject to the commingled service provisions. However, if he takes over control of the train by operating the controls of the locomotive(s), the time spent operating the train would subject him to the 12-hour duty limitations. Likewise, if the railroad official replaces a train crewmember and assumes the normal duties of that crewmember, his role would no longer be considered that of a supervisor and he would become subject to the commingled service provisions of the Act.

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Appendix K: Operating Practices Technical Bulletin OP-04-26

Coverage of Inside Hostlers and their Helpers under the Hours of Service Act, February 3, 2004

U.S. Department
of Transportation

Federal Railroad Administration

Memorandum

Date: February 3, 2004 Reply to Attn of: OP-04-26

Subject: Coverage of Inside Hostlers and their Helpers under the Hours of Service Act

Original Signed By:
From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

This discussion clarified the applicability of the Hours of Service Act (the Act) as it pertains to employees who move locomotives in or around repair shops or assist such movements. The Hours of Service Act regulates duty hours of employees "actually engaged in or connected with the movement of any train, including hostlers." [45 U.S.C. Section 61(b) (2)]. However, the law does not address every situation in which railroad rolling equipment is moved. In our analysis, we make distinctions between "train movements" and other equipment movements not directly related to transportation (e.g., for maintenance, repair, or troubleshooting inspections).

The 1976 amendments to the Act brought "inside" hostlers within the category of employees "engaged in or connected with the movement of any train." For the purpose of this statute, Congress defined inside hostling moves as train movements, i.e., the movement of one or more locomotives, with or without coupled cars. It follows necessarily that inside hostler helpers are as much "connected with the movement of trains" as outside hostler helpers. In short, by defining train movements to include inside hostling, Congress expanded covered service to include both locomotive operators and their helpers.

FRA takes a functional approach to coverage, that is, we consider the type of work performed, not the craft or job title of the person doing the work. In 1977, FRA addressed this issue in an agency statement of policy and interpretation:

> "With the passage of the 1976 amendments, both inside and outside hostlers are considered to be connected with the movement of trains. Previously, only outside hostlers were covered. Any other employee who is actually engaged in or connected with the movement of any train is also covered, regardless of his job title." [Emphasis added.] 49 CFR Part 228, Appendix A.

Thus, FRA's interpretation is, and has been since 1977, that employees performing inside hostler duties (e.g., moving a locomotive under its own power to or from a repair shop for fueling, sanding, or general servicing duties or moving a locomotive under its own power to repair or test cab signal or automatic train control equipment) are as much "connected with the movement of a train" as outside hostlers. Since outside hostler helpers are connected with the movements they assist, so too are inside helpers performing covered service.

In explaining its issuance of this interpretation, FRA stated:

> "Employees known as 'outside hostlers' generally move locomotives between shops or engine terminals and other yard areas. Employees known as 'inside hostlers' generally move locomotives within shop or repair areas. Since outside hostlers were considered by the Interstate Commerce Commission, FRA, and the industry to be covered, by the Act prior go the 1976 amendments which added the words 'including hostlers,' it is evident that Congress wished to establish as a matter of law that inside hostlers should be considered to be 'connected with' the movement of trains.' " 42 FR 27594, May 31, 1977.

Although FRA concludes that all individuals who perform the duties of hostlers and hostler helpers, whether outside or inside, are covered by the Act, we believe that in the 1976 amendments, Congress did not intend to cover all railroad employees. Persons performing the job duties of machinists, electricians, laborers, and similar occupations not generally associated with responsibilities covered by the Hours of Service Act, who are not "engaged in or connected with the movement of trains," are not covered. To regard as covered service job functions performed by mechanical department personnel – functions not traditionally performed by hostlers and hostler helpers at the time Congress passed the 1976 amendments – would be inconsistent with the statutory purpose.

An employee who, in the course of performing maintenance, repair, or troubleshooting inspections, repositions a locomotive (to a limited extent, as indicated by the examples given in "II. Noncovered Service" below), is not "engaged in or connected with the movement of any train" and is, therefore, not performing service covered by the Hours of Service Act. Similarly, a helper who assists such a movement would not be covered.

(Continued on next page)

EXAMPLES

I. Covered Service

- A road crew pulls a locomotive up to the blue signal and detrains. Sometime later, a mechanical department employee drops the blue flag and moves the locomotive into the repair area and then to the fueling station for servicing prior to taking it into the shop for maintenance.
    - Same situation as above. Now, the servicing is complete, and the employee moves the locomotive from the servicing location to the shop for repairs.
    - Same situation as above except the employee moves the locomotive directly from outside the area to the shop and positions it for repairs, bypassing the servicing area.
    - In any of the above scenarios, a trackmobile (defined by the regulations as a “locomotive”) is utilized to move the locomotive instead of the prime mover.
- A locomotive enters the repair area for a routine inspection, including a 92-day inspection.
- An employee operates a locomotive under its own power to repair or test cab signal, train stop or automatic train control equipment, regardless of distance.
- Locomotive repairs have been completed, delayed, cancelled or deferred, and an employee moves a locomotive out of the shop to a location elsewhere inside the repair area; moves it to the servicing area; or moves it outside the blue signals.

II. Noncovered Service

- Moving a locomotive on a wheel trueing machine to inspect or turn the next wheel.
- Moving a locomotive so that its mechanical parts can be repaired or for purposes of “troubleshooting” inspections.

- Moving any locomotive (including passenger multiple-unit electric cars, freight locomotives or conventional passenger locomotives) in a repair shop by use of a winch.

- Separating multiple-unit electric passenger cars inside a repair shop to allow for inspection or repair.

- Once a locomotive is in the shop and spotted for maintenance or repair, an employee repositions the locomotive to another location inside the shop area (regardless of time or distance) to complete a specific task directly related to the repair, maintenance, or troubleshooting inspection underway. This would include "load-testing" immediately after repair.

- After a locomotive is spotted inside the shop for maintenance or repair, an employee utilizes a trackmobile to reposition the locomotive to another location inside the shop area (regardless of time or distance) to complete a specific task directly related to the repair, maintenance, or troubleshooting inspection underway.

    - Once a locomotive is in the shop, an employee utilizes a remote excitation switch from beside or on the locomotive to energize a traction motor to move it, under either of the two immediately above examples.

- Once a locomotive is in the shop and spotted for maintenance or repair, an employee repositions the locomotive to another location inside the shop area (regardless of time or distance) to complete a specific task directly related to the repair, maintenance, or troubleshooting inspection underway. This would include "load-testing" immediately after repair. Enroute to the other location, the same employee during the same tour of duty stops the locomotive short and waits while another locomotive clears the area ahead. (This applies even if the locomotive operator leaves the locomotive sitting unoccupied for a given period of time. As long as the trip is directly related the "maintenance" function, it is not a "train movement" function).

- An employee moves freight or passenger cars inside a car repair shop area or RIP track by means of a winch, mechanical mule, or trackmobile.

III. Commingled Covered Service

- Once a locomotive is in the shop and spotted for maintenance or repair, an employee repositions the locomotive to another location

inside the shop area (regardless of time or distance) to complete a specific task directly related to the repair, maintenance, or troubleshooting inspection underway, as previously illustrated in "II. Noncovered Service" above. This would include "load-testing" immediately after repair. None of these activities alone would be covered. Enroute to the other location inside the shop area, the same employee during the same tour of duty, stops to fuel and sand the locomotive, or perform any other general servicing duties. (In other words, the principle of commingled service applies. See 45 U.S.C. Section 62 (b). In any case in which, during the course of repairing, maintaining, or servicing a locomotive, an employee performs one or more covered job functions along with one or more job functions that do not constitute covered service, the more restrictive job function classification will apply, and, therefore, the employee will be considered to be in covered service).

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Appendix L: FRA Operating Practices Technical Bulletin OP-04-27

Hours of Service Interpretations (yardmasters, bridgetenders, flaggers, and relaying orders between railroad employees), February 3, 2004

U.S. Department
of Transportation

Federal Railroad Administration

Memorandum

Date: February 3, 2004

Reply to Attn of: OP-04-27

Subject: TRC - Hours of Service Interpretations

From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

Attached is Operating Practices Technical Bulletin OP-04-27, which is also OPSA-96-03, which contains FRA's, application of the Federal hours of service laws concerning train service employees for the following issues:

1. Yardmasters
2. Train and Engine Service Employee Tie-ups After Maximum Statutory On-duty Time
3. Bridgetenders
4. Relaying "Orders" between Railroad Employees
5. Flaggers

FRA Inspectors are to utilize the contents of this bulletin as guidance in their inspection and compliance-assurance efforts. It must be understood that enforcement actions involving recommendations for the assessment of civil penalties by FRA's Office of Chief Counsel cannot be initiated against a railroad or an individual based solely upon information contained in this bulletin. Civil penalty recommendations to FRA's Office of Chief Counsel must reference one or more of the following:

1. A statutory provision of the Federal hours of service laws (i.e., 49 U.S.C. Sub-sections 21101 - 21108), wherein the "plain meaning" of the words of the provision establish the basis for the alleged violation;

2. An interpretation published in Appendix A to 49 CFR Part 228; or

3. Prior correspondence to that railroad or individual, wherein FRA explained the basis for its interpretation that the conduct in question constitutes a violation of the Federal hours of service laws.

Federal Railroad Administration
Operating Practices Technical Bulletin (OP-04-27)
Operating Practices Safety Advisory (OPSA-96-03)
(Revised February 3, 2004)

49 USC Chapter 211
Hours of Service

Yardmasters

FRA's application of the Federal Hours of Service Laws concerning Yardmasters is functional. Therefore, if a yardmaster performs service either connected with or affecting the movement of a train, the yardmaster is subject to the constraints of either the train employee or dispatching service employee provisions of the Federal Hours of Service Laws (HSL). See 49 U.S.C. Sub-sections 21101(2 and 5), 21103, and 21105.

FRA Policy: Yardmaster positions will be considered as performing covered service when their duties involve:

1. Activities that affect the repositioning of switches either remotely or manually [See 49 U.S.C. Sub-sections 21101(5) and 21103].

NOTE: Usually, the repositioning of main track or yard track switches, either remotely or manually, brings the Yardmaster under the HSL's train employee provisions as either a trainman or switchtender. However, when both main track switches and signals are remotely repositioned by a yardmaster, the HSL's dispatching service employee requirements apply.

2. Activities in which the yardmaster functionally becomes a member of a train or yard crew on a temporary basis [See 49 U.S.C. Sub-sections 21101(5) and 21103].

NOTE: These activities include, but are not limited to, relaying signals, making couplings or uncouplings, lining switches ahead or behind, or protecting a shoving movement.

3. Activities that control the aspect of a signal authorizing train movement [See 49 U.S.C. Sub-section 21105].

4. Activities in which the Yardmaster is functionally involved in the communication of "orders", i.e., Train Orders, Track Warrants, Manual Block Authority, and verbal authority to pass a Stop Signal, that affects the movement of a train [See 49 U.S.C. Sub-section 21105].

NOTE: "Functionally involved" means the Yardmaster is either creating or relaying an "order." Removal of an "order" from a printer or facsimile machine and delivering the directive to an addressed crewmember is **not** considered covered service. In addition, instructions (either verbal or written), issued to facilitate the routine flow of yard movements are not considered as "orders." These instructions may involve train movements on a main track inside Yard Limits where movement is authorized and restricted by railroad operating rules.

An exception occurs in multiple track scenarios where current of traffic is established and train movements are authorized by either signal indication or rule. Should the Yardmaster elect to operate a yard movement against the current of traffic without signal protection, the Yardmaster's instructions contravene signal and rule authority, and therefore become an "order." This action would bring the Yardmaster under the HSL's "dispatching service employee" provisions. Obviously, other procedures to ensure safe operation must be initiated by the Yardmaster prior to the move against the current of traffic. Most of those activities would also bring the Yardmaster under the HSL's dispatching service employee provisions.

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Train and Engine Service Employee Tie-ups After Maximum Statutory On-Duty Time.

This issue involves the performance of limited incidental service relative to tie-up, as compared to required administrative duties usually associated with timekeeping, crew management, and train delay reporting by train and engine crews after the expiration of the 12-hour duty limitation. Out of necessity in this instance, crewmembers must accomplish some tasks after arrival at their tie-up point. FRA recognizes that a certain amount of data exchange is necessary for the benefit of both the employee and the railroad carrier. To that end, FRA has traditionally "permitted" incidental service such as a brief tie-up call to inform the railroad carrier when to start the employee's Statutory Off-Duty Period and make the railroad aware of when the employee may return to duty. As an alternative to a brief tie-up telephone call, FRA has "permitted" the faxing of a completed timeslip/delay report to either a train dispatcher or crew management.

Today, technological advancements have eliminated many handwritten records pertaining to a train crew's duty tour. It is also becoming customary for a conductor and/or engineer to use a computer terminal to input train/crew related information. The input of this data is considered vital to the operations of some railroad carriers, particularly for crew management and payroll functions. However, some railroad carriers have begun to require the conductor and/or engineer to input more and more data prior to being released from duty. This has resulted in increased instances in which excess service is performed under the HSL's commingled service provisions [See 49 U.S.C. Sub-section 21103(b)(3)].

Since technology is driving the evolution in tie-up procedures, the solution, out of necessity, must be applicable to railroad controlled environments such as the electronic hours of duty recordkeeping systems utilizing a "quick tie-up screen." In this environment, the railroad carriers are responsible for providing adequate resources, such as, telephones, FAX machines or computer terminals, to facilitate an **immediate** tie-up on crew arrival.

FRA Policy: FRA will consider as "incidental service" the transmission of the following information (either in person, via telephone, fax, or quick tie-up screen in electronic systems) by a crewmember that has reached his/her statutory on duty limit of 12 hours:

- **Relieved time** (time employee stopped performing covered or commingled service) **OR** the amount of **statutory off-duty time required** (8 or 10 hours) before the employee can return to duty. (On some railroad carriers, the employee has the right to request an off-duty period in excess of the statutory minimum. In these cases, the requested off-duty time period may be transmitted);

- **Released time** (time employee begins his or her Statutory or Interim Release Off-Duty period);

- **Board positioning/placement time**; and

- **Telephone number/contact location**, if different from the number listed with crew management.

FRA has consistently maintained that even limited administrative duties, despite their de minimis nature, are considered as time on duty under the HSL. And, in the event that even limited administrative duties are performed after the expiration of 12 hours of on-duty time, FRA will continue to exercise its prosecutorial discretion in deciding which cases warrant recommendations for the assessment of civil penalties (See 49 CFR Part 209 Appendix A).

However, a railroad's procedures that **exceed** the scope of the above defined "incidental" service **and** unavailability of immediate tie-up facilities to provide tie-up information **will** be viewed by FRA as mandatory "administrative" duties. Therefore, time spent performing these administrative duties **and/or** waiting on tie-up facilities will be considered as time on duty under the HSL's commingled service provisions and subject the railroad carrier to possible civil penalty liability and the excess service reporting requirements under 49 CFR Part 228 relative to Form 6180.3.

Administrative duties include:

1. Preparing or submitting work reports or accident reports;

2. Any administrative tasks required of an employee by a railroad in conjunction with a covered service duty tour, other than that defined above as "incidental" service; and

3. All waiting periods associated with the unavailability of tie-up facilities, such as, telephone, FAX machine or computer terminal.

Normally, time spent in deadhead transportation from covered service to a point of final release is considered as neither on-duty nor off-duty time, but instead as "limbo time." When administrative duties follow limbo time, the time spent deadheading must be reclassified as deadheading **to duty**. Therefore, the time spent in deadhead travel plus the time spent performing administrative duties must be considered as time on duty in calculating an employee's Total Time On Duty.

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Bridgetenders:

FRA's application of the Federal Hours of Service Laws (HSL) concerning bridgetenders is functional. Therefore, if a bridgetender performs service that is connected with or affects the movement of a train, the bridgetender is subject to the constraints of either the train employee or dispatching service employee provisions of the Federal hours of service laws (HSL).

FRA Policy: A bridgetender will be considered as performing covered service when his or her duties involve:

1. Activities that affect the repositioning of switches either remotely or manually [See 49 U.S.C. Sub-sections 21101(5) and 21103].

2. Activities in which the bridgetender gives hand signals associated with a required visual inspection of switches and bridge locking devices to indicate the bridge is properly aligned and secured for train movement [See 49 U.S.C. Sub-sections 21101(2) and 21105].

3. Control of the aspect of a signal authorizing train movement [See 49 U.S.C. Sub-sections 21101(2) and 21105].

NOTE: In Automatic Block Signal systems, electrical switches used by a bridgetender to "run time" on the opposing signals prior to being able to unlock a bridge for repositioning is not considered covered service under the HSL's dispatching service provisions.

4. Activities in which a bridgetender is functionally involved in the communication of "orders", i.e., Train Orders, Track Warrants, Manual Block Authority, and verbal authority to pass a Stop Signal, that affect the movement of a train [See 49 U.S.C. Sub-sections 21101(2) and 21105].

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Relaying "Orders" Between Railroad Employees

This clarification addresses the HSL provision applicable to any individual relaying "orders" from a dispatching service employee to a train employee whose train movement is affected by the "orders."

A "dispatching service employee" is defined by the HSL as:

> an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, **transmits, receives, or delivers orders** related to or affecting train movements. [Emphasis added] [See U.S.C. Sub-section 21101(2)].

FRA interprets "orders" to mean:

> directives affecting the movement of trains, i.e., Track Warrants, Track Bulletins, Track and Time Authority, Direct Traffic Control Authorities, and any other method of conveying authority for trains and engines to operate on a main track, controlled siding, or other track controlled by a dispatching service employee.

Relaying an "order" means:

> Electronically or mechanically receiving an "order" from a dispatching service employee and then transmitting that order to a train service employee(s) whose train movement is affected by the "order."

FRA's application of the HSL to individuals relaying "orders" is functional. When an employee performs duty as a train service employee or a signal service employee and also relays "orders," the HSL provisions applicable to dispatching service employees apply to all time on-duty during the 24-hour period involved. When an employee in non-covered service is utilized to relay an "order" by an electrical or mechanical device during a tour of duty, that person is subject to the limitations of the HSL's dispatching service employee provisions during the 24-hour period involved.

FRA Policy: When an individual, who is not normally covered by the HSL's dispatching service employee provisions, uses an electrical or mechanical device to dispatch, report, transmit, receive, or deliver orders related to or affecting train movements, that individual has performed service as a dispatching service employee.

> **NOTE:** Train employees who copy train orders affecting the movement of their train are not subject to the HSL's more restrictive dispatcher/operator provisions.

The following are examples of situations that inspectors may encounter while in the performance of their duties. These are only some examples of the various different situations which may occur on a daily or periodic basis.

Example No. 1:

The train dispatcher of XYZ Railroad is unable to make radio contact with the crew of XYZ Train No. 20. However, the train dispatcher is able to communicate with the crew of XYZ Train No. 51, and Train Nos. 20 and 51 are able to communicate with each other. The train dispatcher issues an "order" for Train No. 20 to the conductor on Train No. 51. The conductor of Train No. 51 receives the "order" for Train No. 20 from the train dispatcher and then transmits the "order" for Train No. 20 to the conductor on Train No. 20.

FRA Position on Example 1:

> The conductor of Train No. 51's hours of service status changes from that of a train employee to a dispatching service employee. Under this example, the conductor is subject to the dispatching service "one shift" provision, and is limited to 12 hours on duty in a 24-hour period consistent with 49 U.S.C. Sub-section 21105(b)(2).

Example No. 2:

The train dispatcher of XYZ Railroad is unable to make radio contact with the crew of XYZ Train No. 20; however the train dispatcher is able to send an "order" to Station ABC by facsimile. The dispatcher directs a non-covered service railroad employee at Station ABC to remove the "order" from the facsimile machine and hand carry it to the crew of Train No. 20. As directed, the employee hand delivers the "order" to the crew of Train No. 20 who reads and acts on the "order."

FRA Position on Example 2:

> The employee who hand delivered the "order" has not performed covered service. The employee <u>did not receive nor transmit</u> the "order", nor could the employee have materially affected the contents of the "order."

Example No. 3:

The train dispatcher of XYZ Railroad is unable to make radio contact with the crew of XYZ Train No. 20; however, the train dispatcher is able to make telephone contact with an Officer of the railroad located at an intermediate station. The Officer confirms with the dispatcher that he is able to contact the train by radio. The train dispatcher issues

an "order" for Train No. 20 to the Officer to be relayed to Train No. 20. The Officer copies the "order" on the prescribed form, repeats the "order" to the train dispatcher, and receives both a complete time and the dispatcher's initials. The Officer then repeats this process in relaying the "order" to a crew member of XYZ Train No. 20.

FRA Position on Example 3:

The railroad Officer has performed service covered by the HSL's dispatching service employee provisions. Under this example, the Officer is subject to the dispatching service "one shift" provision, and is limited to 12 hours on duty in the affected 24-hour period including all other service for the railroad consistent with 49 U.S.C. Sub-section 21105(b)(2).

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(Continued on next page)

Flaggers

As a result of changes within the railroad industry over the past several years, traditional craft lines have become less distinguishable. Employees, who in the past were traditionally not covered by the provisions of the HSL due to craft restrictions, are now considered covered when FRA applies its HSL functional approach across craft lines. Flagging is one such area that now may include railroad carrier employees not previously considered to be in covered service. FRA considers the function of covered flaggers important to railroad employee safety and the safe operation of trains.

Railroad carrier employees traditionally referred to as "flagmen" (flaggers) perform a variety of duties which may or may not bring them under the HSL's provisions. Flaggers may be assigned from a variety of crafts, and perform functions which range from non-covered service to train employee, to dispatching service employee functions.

FRA Policy: Railroad employees will be considered as performing covered service as "Flaggers" when their duties involve:

1. Activities that affect the repositioning of switches for the movement of trains or engines [See U.S.C. Sub-sections 21101(5) and 21103].

2. Activities in which the employee (Flagger) is functionally involved in the communication of "orders" that affect the movement of a train [See U.S.C. Sub-sections 21101(2) and 21105].

3. Conveying information to a train dispatcher/operator that is necessary for the issuance of an "order," i.e., "OS Trains", e.g. reporting trains clear of affected portion of track.

The following examples are furnished to assist in the understanding of the above listed functional qualifiers.

(Continued on next page)

Example 1:

A Flagger is assigned to protect a work gang performing maintenance activities, which do not affect the stability of the track, but require the gang to occasionally "foul" a main track. Trains operate through the work area at normal speed and are not required to communicate with the Flagger. The Flagger's principal responsibility is to notify the work gang when he observes or is aware of an approaching train, in order for the workers to clear or remain in the clear of the affected track.

FRA position on Example 1:

This activity is NOT covered service under the HSL provisions.

Example 2:

Two Flaggers are assigned to protect an out of service work area in double track automatic block system territory. The employees are stationed at manual switches several miles apart. Employee No. 1 contacts trains in both directions by radio to grant authority for movement by or through the work area. At the direction of Employee No. 1, Employee No. 2 positions the switch in his charge for train movements, but is not responsible for contacting trains.

FRA position on Example 2:

FRA views the granting of main track movement authorities conveyed by radio by Employee No. 1 to be the issuance of an "order." Therefore, Employee No. 1 is covered by the HSL's dispatching service employee requirements. On the other hand, since Employee No. 2 did not convey directives, he or she is not covered by the HSL dispatching service employee provisions, but is covered by the HSL's train employee provisions as a switchtender.

Example 3:

A Flagger is assigned to report to the train dispatcher the departure or passage of trains (OS trains) from a fixed location to facilitate the issuance of "orders" to opposing or following trains through the Flaggers location.

FRA position on Example 3:

The employee is covered by the HSL's dispatching service provisions.

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Appendix M: FRA Operating Practices Technical Bulletin OP-04-28

FRA's Application of the Interim Release Provisions
of the Federal Hours of Service Laws, February 3, 2004

OP-04-28
Federal Railroad Administration
Technical Bulletin

Date: February 3, 2004 Reply to Attn of: OP-04-28

Subject: FRA's Application of the Interim Release Provisions of the Federal Hours of Service Laws

Original Signed By:
From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

The following is a clarification of FRA's application of the Federal hours of service laws (HSL) with respect to interim releases. (Note: this Technical Bulletin is also OPSA 96-06).

Operating Practices Technical Bulletin (OP-04-28)
Operating Practices Safety Adivsory (OPSA 96-06)
Revised February 3, 2004

In the event a railroad either schedules an interim release for regularly assigned crews, or elects to employ an interim release on an occasional basis when service warrants, the following FRA application of the HSL will apply.

1. Interim releases are valid at designated terminals only. The term "designated terminal" is defined in 49 CFR Part 228, Appendix A, as:

"a terminal that is (1) designated in or under a collective bargaining agreement as the "home" or "away-from-home" terminal for a particular crew assignment; and (2) which has suitable facilities for food and lodging. Carrier and union representatives may agree to establish additional designated terminals having such facilities as points of effective release under the [HSL] Act." [Emphasis added]

2. FRA has determined through its review of Congressional testimony and the legislative history that when food and/or lodging are not within a reasonable walking distance at the designated terminal, railroad-provided or arranged transportation must be available to transport the crewmember(s) to the location of the suitable food and lodging. It is important to note that the HSL does not stipulate which party, either the railroad carrier or the employee, will pay for the food or lodging. The payment issue is best handled through the collective bargaining process.

3. In order to address the cumulative fatigue factor involved in an aggregated tour of duty, FRA reaffirms its position regarding how to classify travel time incurred when food and/or lodging is not within a reasonable walking distance. When transportation is

required, all time spent waiting for transportation and the travel time itself from the duty point to the location of the food and lodging is considered as "limbo" time, neither on- nor off-duty time. Conversely, the return travel to the duty point is considered deadheading to duty, and therefore is treated as on-duty time for hours of service purposes. Any time between the return arrival time at the duty point and the start of covered service is also time on duty. As always, the actual time involved in these activities determine the amount of time charged to "limbo" or on-duty time. Arbitrary or average times charged to these periods should not be used in the calculation.

4. When transportation is required, all interim releases will begin when the employee(s) arrive at the location of food and/or lodging and end when transportation is available to begin the return trip to the duty point. The time between these two events must be a minimum of 4 hours and cannot be eroded by travel. Periods of less than four hours between travel will not break the accumulation of on-duty time, and FRA will consider the crewmember(s) in continuous service from the start of his/her duty tour.

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Appendix N: Operating Practices Technical Bulletin OP-04-29

Hours of Service Interpretations (call and release, interrupted off-duty period, reporting points, and travel time), February 3, 2004

OP-04-29
Federal Railroad Administration
Technical Bulletin

Date: February 3, 2004 Reply to Attn of: OP-04-29

Subject: Hours of Service Interpretations

Original Signed By:
From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

Attached is Operating Practices Technical Bulletin OP-04-29, which is also identified as Operating Practices Agency Interpretation OPAI-98-01, which cancels Operating Practices Technical Bulletin OP-97-31 (formerly OP-96-01, which was also formerly Safety Advisory SA-96-01). This bulletin contains FRA's application of the Federal hours of service laws concerning train service employees for the following issues:

1. Call and Release
2. Interrupted Off Duty Period
3. Reporting Points
4. Travel Time - Railroad Provided or Authorized Transportation for Train, Engine and Yard employees

FRA Inspectors are to utilize this bulletin as guidance in their inspection and compliance-assurance efforts. It must be understood that enforcement actions involving recommendations for the assessment of civil penalties by FRA's Office of Chief Counsel cannot be initiated against a railroad or an individual based solely upon information contained in this bulletin. Civil penalty recommendations to FRA's Office of Chief Counsel must reference one or more of the following:

1. A statutory provision of the Federal hours of service laws (i.e., 49 U.S.C. Sub-sections 21101 - 21108), wherein the "plain meaning" of the words of the provision establish the basis for the alleged violation;
2. An interpretation published in Appendix A to 49 CFR Part 228; or
3. Prior correspondence to that railroad or individual, wherein FRA explained the basis for its interpretation that the conduct in question constitutes a violation of the Federal hours of service laws.

This Technical Bulletin, is being distributed to our rail industry customers through the Association of American Railroads, the United Transportation Union, the Brotherhood of Locomotive Engineers (including the American Train Dispatcher's Department), and the American Short Line and Regional Railroad Association.

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Federal Railroad Administration
Operating Practices Technical Bulletin (OP-04-29)
Operating Practices Agency Interpretation (OPAI-98-01)

49 USC Chapter 211
Hours of Service

The Federal Railroad Administration (FRA) hereby cancels Technical Bulletin OP-97-31 (formerly OP-96-01) and Operating Practices Safety Advisory SA-96-01. This document clarifies FRA's application of the Federal hours of service laws concerning issues previously addressed in the cancelled publications.

This document is divided into the following four parts and pertains only to train service employees.

Part A Call and Release
Part B Interrupted Off Duty Period
Part C Reporting Points
Part D Travel Time - Railroad Provided or Authorized Transportation for Train Service Employees

TABLE OF CONTENTS

PART A

CALL AND RELEASE

Call and Release is the railroad act of issuing an employee a Report-for-Duty Time, then Releasing the employee from the requirement to report PRIOR to the Report-for-Duty Time.

Call and Release is known by other names, such as "Busted Call" and "Set Back." In all cases, both the call and the release occur prior to the Report-for-Duty Time.

A release, busted call, or set back occurring on or after the Report-for-Duty Time is an EARLY Release from duty.

FRA Policy:

FRA will generally view a brief call from the railroad to the employee that establishes a Report-for-Duty Time as incidental, i.e., not a material disruption of the employee's off-duty period. In addition, FRA will generally view as incidental a brief call to CHANGE the original Report-for-Duty Time, or to RELEASE the employee from the original Report-for-Duty Call, provided the employee RECEIVES the call PRIOR to DEPARTURE from his or her place of rest.

When the railroad changes or releases the employee from his or her original Report-for-Duty Time after the employee has arrived at the duty location, but prior to the Report-for-Duty Time, FRA will view the travel time to the duty point as LIMBO TIME (neither on- nor off-duty time). If all or part of the limbo time occurs during the employee's statutory off-duty period, FRA will view the limbo time as a material disruption of the employee's opportunity to secure meaningful rest.

Railroad Options:

Generally, the railroad may utilize one of the following options when notifying a train service employee of a release from a Report-for-Duty Call after his or her arrival at the duty point but before the Report-for-Duty Time:

Option 1: The employee may be released to begin a new 8- or 10-hour statutory off-duty period.
NOTE: The off-duty period will begin when the employee completes the required duty record and establishes a Final Release time with the railroad. Although the original call no longer exists, the railroad is required to maintain a record of the employee's activity under the COMMINGLED SERVICE provisions of the Federal hours of service laws. See 49 U.S.C. Sub-section21103(b)(3). As a result of considering travel time as limbo time, the administrative duties involved in establishing a new release time may commingle with the previous covered service to produce excess service. In these cases, the "quick tie-up" process described in Operating Practices Safety Advisory OPSA-96-03 and Technical Bulletin OP-97-34 should be used to avoid excess service.

Option 2: The employee may be allowed to begin duty at the original Report-for-Duty Time and immediately be given a qualifying interim release.
NOTE: The release period is subject to the provisions of the Federal hours of service laws, and FRA's interpretation set forth in Operating Practices Safety Advisory OPSA 96-06 and Technical Bulletin OP-97-37. Also, the release will not begin until the employee has established a new Release Time with the railroad.

Option 3: The railroad may maintain the original Report-for-Duty Time and utilize the employee in service for which he or she is qualified.
A release, busted call, or set back occurring at or after the Report-for-Duty Time is an EARLY Release that is subject to the reporting requirements for covered service and future Total Time On-Duty considerations imposed by the Federal hours of service laws. In this scenario, the following will apply.
1. A new Report-for-Duty Time issued to take effect within four hours of the release will continue the employee in CONTINUOUS On-Duty Status calculated from the ORIGINAL Report-for-Duty Time.

2. A new Report-for-Duty Time issued to take effect on or after 4 hours but not more than 7 hours and 59 minutes from the release will constitute a valid Interim Release and continue the employee in AGGREGATE On-Duty Status calculated from the ORIGINAL Report for Duty Time.
3. A release of eight hours or more qualifies as a Statutory Off-Duty Period that resets the employee's subsequent on-duty availability to the maximum 12 hours.

APPENDIX TO PART A

The following scenarios are provided as examples of how FRA will apply the Federal hours of service laws with respect to Call and Release (C&R) issues covered in Operating Practices Agency Interpretations OPAI-98-01, Part A. While FRA cannot foresee all possible scenarios, the examples presented are intended to aid the understanding of the reader. Any changes in the specifics of a scenario MAY or MAY NOT change FRA's application of the laws as applied to the original example. Where doubt as to FRA's application to an actual issue is present, the reader is encouraged to contact FRA for further analysis and policy guidance.

Call and Release Examples for Train Service Employees

C&R #1: At 10 p.m., Engineer A and Conductor B are called and given a Report-for-Duty time of 12:01 a.m. for train XYZ. At the Report-for-Duty Time, Engineer A would have 17 hours and 36 minutes of time off duty, while Conductor B would have completed her Statutory Off-Duty Period at 11:30 p.m. Shortly after the Report-for-Duty Call was issued, the railroad became aware of operating problems that would delay departure of Train XYZ by several hours, whereupon, the railroad decided to terminate the 12:01 a.m. Report-for-Duty Time. Crew Management contacted Engineer A at 10:25 p.m. and Conductor B at 10:28 p.m., prior to departure from their respective residences (places of rest) and informed each person that the Report-for-Duty Time had been cancelled.

FRA Application: FRA will view the Report-for-Duty Call as incidental. The Release Call is also viewed as incidental and an effective release that does not break the continuity of each employee's off-duty period. Each employee may be re-called at a later time without acquiring an additional Statutory Off-Duty Period.

C&R #2: Same scenario as C&R #1 except the railroad attempted, but was unable to contact Engineer A at 11:20 p.m. and Conductor B at 11:22 p.m. to give them an effective release. Due to driving distances, Engineer A departed his place of rest at 10:55 p.m. and Conductor B departed her place of rest at 11:05 p.m. Engineer A arrived at the on-duty location at 11:40 p.m. Conductor B arrived at the on-duty location at 11:45 p.m. On arrival at the on-duty location each employee was informed that the Report-for-Duty Time of 12:01 a.m. had been cancelled. Since the notification of the cancelled Report-for-Duty Time was delivered after the employees arrived at the on-duty site but BEFORE the original Report For Duty Time, FRA will apply the Federal hours of service laws in the following manner.

FRA Application relative to Engineer A: While FRA considers Engineer A's travel time of 45 minutes as LIMBO, it did not erode the Statutory Off-Duty Period that had been acquired earlier. Therefore, the railroad may employ any one of the THREE options listed in this advisory.

FRA Application relative to Conductor B: Since part of Conductor B's travel (11:05 p.m. to 11:30 p.m.) occurred during her Statutory Off-Duty Period, FRA considers the total travel time as both LIMBO and an EROSION of her Statutory Off-Duty Period below the minimum required by the Federal hours of service laws. Therefore, the railroad must consider Conductor B's previous Total Time On Duty prior to determining which of the three options are available. In this application, Conductor B's Previous Off-Duty Period becomes an Interim Release of 7 hours and 35 minutes, which will commingle ALL previous activities with any activity that

occurs within a new Statutory Off-Duty Period beginning when Conductor B establishes a new Final Release Time with the railroad's crew management.

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PART B

INTERRUPTED OFF-DUTY PERIOD

Statutory Off-Duty Period
Train Service Employees

The statutory off-duty period, either eight or 10 consecutive hours, is the minimum time required to start a new duty tour.
The statutory off-duty period, either eight or 10 consecutive hours, is determined by the length of the previous duty tour, i.e., the total amount of covered and commingled service for the ending duty tour. The statutory period will always begin at the time the employee is finally released from duty and will consume the first eight or 10 hours of the total off-duty period.

Total Off-Duty Period
Train Service Employees

The total off-duty period is the amount of off-duty time between duty tours.
The total off-duty period is a period equal to or greater than the required statutory off-duty period. This period will always start at the time of the employee's final release and terminate when the employee begins covered or commingled service.

Duty Tour
Train Service Employees

A duty tour is the period(s) of covered and commingled service occurring between TWO qualifying statutory off-duty periods.
A duty tour is the total time consumed in one or more railroad-required activities, one of which must be covered service, that occurs between two statutory off-duty periods. All activity occurring between statutory off-duty periods, regardless of the time or number of runs, trains, jobs or shifts worked, is considered ONE duty tour. A duty tour may also contain one or more interim releases. All activity occurring in a duty tour, covered and commingled, contributes to the calculation of Total Hours On Duty.

FRA Policy:

1. A brief call to report and a brief call to release are viewed by FRA as calls "at the behest of the railroad" that require the employee to perform service for the benefit of the railroad. As such, these calls represent the only calls initiated by the railroad during the employee's total off-duty period that FRA will generally treat within its prosecutorial discretion as incidental events. Therefore, the time spent receiving the calls would not be treated as commingled with previous or future duty tours.
2. All other calls "at the behest of the railroad" beyond the scope of these calls will be considered on a case-by-case basis to determine the impact on the total off-duty period.
3. Calls initiated by the railroad or the employee that do not require the employee to perform duty or service "at the behest of the railroad" will be considered incidental and not a material disruption. Examples are notification of a seniority displacement or notification of a bulletin-awarded position.
4. Calls generated by the employee to determine board placement, train line up, or pay issues are considered "at the behest of the EMPLOYEE" and do not disrupt the off-duty period.

5. Any material disruption of the opportunity to secure "meaningful rest" intended by the statute will be viewed by FRA as a disruption of the consecutiveness requirements of the statutory off-duty period. In establishing the existence of a material disruption, FRA will consider the purpose, frequency and duration of calls initiated by the railroad during an employee's total off-duty period.

EXPLANATION OF FRA'S APPLICATION

The Federal hours of service laws require a minimum statutory off-duty period of either eight or 10 consecutive hours off duty for Train Service employees to provide them an opportunity to secure meaningful rest.

Train Service statutory off-duty periods reset the employee's maximum allowable time available for duty to 12 hours. The Federal hours of service laws are silent regarding undisturbed statutory off-duty periods, but by mandating specific periods of consecutive hours off duty, FRA interprets the laws as requiring railroads to give employees meaningful rest opportunities.

FRA will utilize its prosecutorial discretion on a case-by-case basis to determine if the railroad's activity has broken or interrupted the consecutiveness of the applicable employee's minimum statutory requirement. In most instances, these railroad-initiated activities involve a call to report for duty at or soon after the employee's statutory off-duty period has expired. FRA has traditionally treated a brief call to report for duty as incidental and not a material disruption of the statutory off-duty period.

In other instances, calls to determine operational issues relative to previous duty tours may be initiated by representatives of the railroad during any part of the employee's off-duty period. FRA views the calls as "at the behest of the railroad" and the time spent by the employee in responding to these calls will commingle with previous or future covered service, IF POSSIBLE. The call cannot commingle for Train Service and Signal Service employees if a statutory off-duty period exists prior to and after the call. In the event that a call can commingle for Train Service, the amount of time between the call and covered service will determine the existence of CONTINUOUS or AGGREGATE duty tours.

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APPENDIX TO PART B

The following scenarios are provided as examples of how FRA will apply the Federal hours of service laws with respect to Interrupted Off-Duty Period (IODP) issues covered in Operating Practices Agency Interpretation OPAI-98-01, Part B. While FRA cannot foresee all possible scenarios, the examples presented are intended to aid the understanding of the reader. Any changes to the specifics of a scenario MAY or MAY NOT change FRA's application of the Federal hours of service laws as applied to the original example. Where doubt as to FRA's application to an actual issue is present, the reader is encouraged to contact FRA for further analysis and policy guidance.

Interrupted Off-Duty Period Examples

Train Service Employees

IODP #1: After having been in Off-Duty status for 11 hours and 40 minutes, Engineer A is called by the railroad's Road Foreman of Engines. The call began at 9:42 a.m. and terminated at 9:54 a.m., during which the engineer was questioned regarding his operation of the locomotive consist for the previous duty tour.

FRA Application: FRA will consider this call "at the behest of the railroad" and an activity that MAY commingle with future COVERED SERVICE provided the covered service occurs before ~~5:54 p.m.~~ Since the call occurred after the engineer's Statutory Off-Duty Period, it CANNOT COMMINGLE with the previous duty tour.

IODP #2: After having been in Off-Duty status for six hours and 15 minutes, Conductor B is called by the railroad's Road Trainmaster. The call began at 7:14 a.m. and terminated at 7:31 a.m. during which the Trainmaster questioned Conductor B about the circumstances involved in an on-duty injury to one of Conductor B's crew members.

FRA Application: FRA will consider this call "at the behest of the railroad" and an activity that WILL commingle with the previous covered service and restart the previous duty tour to add an additional 17 minutes in commingled service to the Total On-Duty Time for Conductor B. Also, the consecutiveness of Conductor B's Statutory Off-Duty Period has been broken, necessitating a revised Release Time with the railroad and a restart of Conductor B's Statutory Off-Duty Period. If the additional 17 minutes results in a Total-On-Duty-Time in excess of 12 hours, the railroad is required to report the event to FRA under 49 C.F.R. Part 228.

NOTE: If this call had occurred during the first three hours and 59 minutes of Conductor B's Off Duty Period, the 17 minutes would commingle with the previous covered service to produce CONTINUOUS on-duty time for Conductor B.

IODP #3: After having been in Off-Duty status for six hours and 40 minutes, Conductor C is called by a Crew Dispatcher who informs Conductor C that she has been displaced by a senior conductor via a seniority move. The conductor is asked if she wishes to exercise her seniority over junior conductors. Conductor C declines for the present time and advises crew management that she will exercise her seniority within the collective bargaining agreement time limits.

FRA Application: FRA will consider this call "at the behest of the railroad." However, since the call is of an "informative" nature and does not require the conductor to perform duty for the railroad, the call WILL NOT COMMINGLE with PREVIOUS or FUTURE covered service.

NOTE: When Conductor C places the future call to exercise her seniority, FRA will consider that call "at the behest of the employee" and its duration will not commingle with previous or future covered service.

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PART C

REPORTING POINTS

Train Service Employees

A Reporting Point is a precise physical location where an employee reports for duty to begin or restart a duty tour.

Reporting points are further defined as regular and other-than-regular.

A regular reporting point is the permanent on-duty location of the employee's regular assignment that is established through a job bulletin assignment (job award or forced assignment) or seniority placement. The assigned regular reporting point for extraboard and pool crew employees will always be a single fixed location identified by the railroad.

Other-than-regular reporting point(s) are all other on-duty reporting points within a railroad-defined geographic area, usually established under the collective bargaining process.

NOTE: Reporting Points should not be confused with Designated Terminals. Reporting points are employee specific, and identify one or more on-duty locations for all covered service employees. Designated terminals apply only to Train Service employees, are job or run oriented, and refer to the terminal (city or area) where employees may be released for statutory off duty purposes. A designated terminal may contain multiple reporting points.

Deadheading is an employee relocation (or repositioning) activity primarily related to train and engine personnel. It identifies the physical nonworking relocation of the employee from one point to another as a result of carrier-issued verbal or written directives.

FRA Policy:

1. TRAIN SERVICE employees may have only one regular reporting point.
   a. assigned employee: the assigned on-duty location for the job or run is the regular reporting point for the assigned (incumbent) employees.
   b. extraboard employee: the precise assigned location of the extraboard is the regular reporting point for every employee assigned to that extraboard.

   NOTE: An extraboard may supply employees to multiple on-duty locations other than the assigned regular reporting point for the extraboard. In this instance, travel time to the extraboard's assigned regular reporting point is considered commuting time. Travel time to the other-than-regular reporting point(s) is considered on-duty within the context of FRA's application of the Federal hours of service law.
2. Regular reporting points may change, but must always change through either bulletin or seniority placement that establishes the employee as an incumbent on a job or run rather than on a temporary assignment.
3. For purposes of calculating Total Time On Duty under the Federal hours of service laws, the following will apply:

   All travel time between the employee's residence and his or her regular reporting point is considered as commuting time and, therefore, part of the employee's off-duty period; and

   Travel time between the employee's residence and ALL other-than-regular points is given special treatment in calculating Total Time On Duty (See Total Time On Duty Calculations, page 15 in this Part).

EXPLANATION OF FRA'S APPLICATION

The following is an explanation of FRA's application of the Federal hours of service laws regarding temporary assignments involving extraboards and extended vacancy hold downs for train service employees plus Train Service Employee pool crews. Certain forced assignments are treated as regular assignments.

TEMPORARY ASSIGNMENTS

1. Extraboard - Extraboard employees receive temporary assignments on a daily basis. If the temporary assignment is at the assigned location of the extraboard, all travel time between the employee's residence and the regular reporting point is commuting time and is considered part of the off-duty period. If the temporary assignment is at a location other than the assigned regular reporting point, travel time is subject to the provisions of the appropriate section of the Federal hours of service laws. Normally, the railroad should identify one of the reporting points as the regular reporting point for all incumbents of the extraboard. If the railroad does not establish one regular reporting point location, travel time to all reporting points served by the extraboard is subject to the on-duty provisions of the Federal hours of service laws.
2. Hold Downs - train service extraboard employees may receive more long-term temporary assignments generally referred to as "hold downs." Hold downs are temporary assignments made "at the behest of the railroad" for a period of time greater than one shift. The length of a hold down is usually determined by a collective bargaining agreement. The length of the hold down does not affect its temporary status. In these

temporary assignments, FRA considers the employee an incumbent of the extraboard and its fixed location as the employee's regular reporting point. Travel time is considered in the same context as a temporary one-day assignment.

3. Pool Crew - Pool Crew is unique to Train Service Employee assignments and is the crew version of a craft extraboard. A train pool crew or an engine pool crew operates as a unit on a "first in, first out" basis similar to extraboards for individual train and engine personnel. While employees may be assigned to a specifically identified Pool Crew, this assignment does not constitute a regular assignment in the context of this advisory. Pool crews may receive calls for varied start times and locations. As in the explanation for extraboard employees, all travel time between a pool crew member's residence and his or her Regular Reporting Point is considered commuting time. Conversely, all travel time to other-than-regular reporting points is subject to FRA's application of the deadheading provisions of the Federal hours of service laws.

FORCED ASSIGNMENTS

Unlike temporary assignments, a covered service extraboard employee, junior in seniority, may be force assigned to a job or run as the result of no senior applicants to a bulletin announcement. The junior employee, once force assigned, must remain on the assignment until he or she is: (1) displaced (bumped) by a senior employee; or (2) "bids on" and acquires another position through seniority rights. In this scenario, FRA considers the force assigned employee to be an incumbent of the newly assigned job or run and will have the job or run's assigned on-duty location as his or her regular reporting point. As such, all travel time between the force assigned employee's residence and the new reporting point is considered commuting time.

TRAVEL

In many cases an employee's travel to an other-than-regular point is through his or her regular reporting point. In this scenario, that part of the travel from the employee's residence to his or her regular reporting point is commuting time. Further travel to the other-than-regular reporting point will be on-duty time.

When the employee either chooses or is instructed to travel directly from his or her residence to an other-than-regular reporting point, part or all of the actual travel time is considered on-duty. If covered service is performed within eight hours after arrival, the travel is considered deadheading to duty, and the travel time is counted in calculating Total-Time-On-Duty.

TOTAL TIME ON DUTY CALCULATIONS

1. If the travel time from the employee's residence to the other-than-regular reporting point is less than the travel time from his or her regular reporting point to the other-than-regular reporting point, then the total travel time from his or her residence to the other-than-regular reporting point is considered deadheading.

2. If the travel time from the employee's residence to the other-than-regular reporting point is greater than the travel time from the employee's regular reporting point to the other-than-regular reporting point, then only the travel time from the regular reporting point is considered as deadheading. In this application, a reasonable estimate of the travel time under existing conditions (considering weather and time of day) should be used for the travel time from the employee's regular reporting point to the other-than-regular reporting point. Collective bargaining times used for pay purposes should not be used.

3. In the event a regular reporting point is not established by the railroad for an extraboard or pool crew employee, all travel between the employee's residence and all his or her on-duty locations is considered deadheading.

4. In certain instances, the return travel from the other-than-regular reporting point to the employee's off-duty location may be treated as part of the Total Time On Duty [See: Title 49 Code of Federal Regulations, Part 228, Appendix A, regarding use of Privately Owned Vehicle (POV)].

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APPENDIX TO PART C

The following scenarios are provided as examples of how FRA will apply the Federal hours of service laws with respect to Reporting Point (RP) issues covered in Operating Practices Agency Interpretation (OPAI) 98-01, Part C. While FRA cannot foresee all possible scenarios, those presented are intended to aid the understanding of the reader. Any changes to the specifics of a scenario MAY or MAY NOT change FRA's application of the Federal hours of service laws as applied to the original example. Where doubt, as to FRA's application to an actual issue is present, the reader is encouraged to contact FRA for further analysis and policy guidance.

Reporting Point Examples
Train Service Employees

RP #1: Conductor C, previously displaced by a senior conductor, called the railroad's Crew Management and advised that she would exercise her seniority as conductor on outlying job YABC. The new assignment is approximately 20 miles from her previous regular assignment.

FRA Application: FRA considers the conductor as an assigned employee on job YABC with a regular reporting point at the outlying location. FRA will consider all travel between her residence and the new reporting point as commuting.

NOTE: Since the change in reporting points is accomplished through either a seniority move or a bulletin assignment, a Deadhead record is NOT required to reposition the conductor from the former assignment to the new assignment.

RP #2: The railroad's Train Service employee extraboards are located at Reporting Point Z, from which temporary vacancies at Reporting Points Z, X, and Y are filled. On Monday morning at 3:00 a.m., extraboard Brakeman C is called to fill a "five day hold down" at Reporting Point Y, approximately 3 hours and 30 minutes travel time from Reporting Point Z and 2 hours and 45 minutes from Brakeman C's residence. On Friday, after being released from the hold down, Brakeman C returns to Reporting Point Z.

FRA Application: FRA considers Brakeman C an "incumbent" of the extraboard at Reporting Point Z during the five day hold down. The duration of the hold down does not change the "extraboard incumbency" status of Brakeman C, because a bulletined assignment was not made. The employee was called "at the behest of the railroad" and will return to the extraboard at Z after the five day hold down. At the end of Brakeman C's duty tour on Monday, Brakeman C will "remain" at Reporting Point Y for hours of duty recordkeeping purposes. All travel from Z to Y on Monday and from Y to Z on Friday is deadheading and subject to the Federal hours of service laws.

NOTE 1: Since the hold down is at a location a significant distance from Brakeman C's home terminal, food and lodging becomes an issue. It is assumed that Reporting Point Y is IN a designated terminal with suitable food and lodging. As such, if the food and lodging is not within a reasonable walking distance of the release point, the railroad IS REQUIRED to provide transportation between the duty site and the location of suitable food and lodging. The Federal hours of service laws are silent on who pays for food and lodging in these cases. If the travel time to or from food and lodging is 30 minutes or less, it is considered commuting time. If the travel time is more than 30 minutes, it is subject to the deadhead provisions and FRA's application of the Federal hours of service laws.

NOTE 2: If Reporting Point Y is not a designated terminal, Brakeman C, and the remainder of the crew, cannot be released for off-duty purposes at Y. In this case, Brakeman C and the remainder of the crew may be Relieved at Y and Deadheaded to a designated terminal for Statutory Off-Duty purposes.

NOTE 3: The railroad is not compelled to deadhead Brakeman C back and forth between Z and Y on a daily basis because he is an incumbent of the extraboard at Z. The railroad is only required to furnish transportation to food and lodging. In addition, a collective bargaining agreement may exist that gives Brakeman C the choice of using his privately-owned vehicle in transportation between Z and Y in lieu of carrier-provided transportation. In most cases, FRA considers this action to be voluntary on the part of the employee, and therefore the return trip from Y to Z will not commingle with Friday's covered service to extend the duty tour's Total-Time-On-Duty period, unless Administrative Duties associated with the tie-up process are performed after arriving at Z.

NOTE 4: The duty tour for the first day, Monday, must include: (1) a deadhead record from Z to Y; (2) the service trip; and (3) any deadheading (Limbo) time associated with travel to food and lodging. Friday's duty tour must include: (1) any deadheading (to duty) associated with travel from food and lodging; (2) the service trip; and (3) deadhead from Y to Z, if applicable. If travel to and from suitable food and lodging is more than 30 minutes, the duty tours for Tuesday, Wednesday and Thursday must include: (1) travel from food and lodging as deadheading to duty; (2) the service trip; and (3) travel to food and lodging as deadheading from duty.

RP #3: Engineer D was certified and assigned to the engineer's extraboard at Reporting Point U on March 31. As such, Engineer D is the junior engineer on the extraboard at U. The extraboard at U supplies engineers for jobs working at Reporting Points S, T, U, and W. On April 1, Engineer D receives a Report-for-Duty Time for Job J554 at Reporting Point U.

FRA Application: Since the extraboard and Job J554 are both located at Reporting Point U, all travel between Engineer D's residence and Reporting Point U is considered as commuting.

RP #4: On April 2, Engineer D received a Report-for-Duty Time for Job K263 at Reporting Point T. Reporting Point T is 45 minutes travel time (under existing conditions) from Regular Reporting Point U and 55 minutes (under existing conditions) from Engineer D's residence.

FRA Application: Since Reporting Point U is the regular reporting point for Engineer D, travel to and from Reporting Point T is considered deadheading.

NOTE: If Engineer D travels to Reporting Point U and then to Reporting Point T, 45 minutes is considered as deadheading to duty. If Engineer D elects to drive his privately-owned vehicle (POV) directly from his residence to Reporting Point T, 45 minutes of the 55 minute travel is considered as deadheading to duty.

RP # 5: On April 3, Engineer D receives a Report-for-Duty Time for Job B116 at Reporting Point S. Reporting Point S is 40 minutes travel time (under existing conditions) from Regular Reporting Point U and 25 minutes travel time (under existing conditions) from Engineer D's residence.

FRA Application: Since Reporting Point U is the regular reporting point for Engineer D, travel to and from Reporting Point S is considered deadheading.

NOTE: If Engineer D travels to Reporting Point U and then to Reporting Point S, 40 minutes is considered as deadheading to duty. If Engineer D elects to drive his personally owned vehicle (POV) directly from his residence to Reporting Point S, 25 minutes travel time is considered as deadheading to duty.

RP #6: Using the same Engineer D and his status as the junior engineer on the extraboard at U, the engineer's current collective bargaining agreement with this railroad permits the railroad to assign the junior engineer to a job in the event that no applicants (bids) are received on a bulletin advertising an engineer's job. At 12:01 p.m.,

on April 4, railroad Job Bulletin 10, advertising the engineer position for Job R633 at Reporting Point W, closed. The railroad did not receive "bids" from any applicants for this position. Under the provisions of the current collective bargaining agreement, the railroad may FORCE assign Engineer D to Job R633 at Reporting Point W.

FRA Application: Prior to the bulletin assignment, Engineer D was considered an "incumbent" of the engineer's extraboard at Reporting Point U, with U as the engineer's regular reporting point. After the forced assignment as the result of a bulletin notice, FRA will consider Engineer D as the incumbent engineer on Job R633 at Reporting Point W. W becomes the regular reporting point for Engineer D.

NOTE: Engineer D assumes the location, start time and job frequency of Job R633. The assignment exhibits the permanency as if Engineer D had "bid" on Job R633. The test of permanence is that Engineer D cannot leave this position without being displaced (bumped) or bidding on and acquiring another position through seniority rights. Since the engineer is no longer an incumbent of the extraboard, Engineer D is immune to any further forced assignments.

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PART D

TRAVEL TIME
RAILROAD-PROVIDED OR AUTHORIZED TRANSPORTATION
Train Service Employees

Deadheading is an employee relocation (or repositioning) activity primarily related to train and engine personnel. It identifies the physical nonworking relocation of the employee from one point to another as a result of carrier-issued verbal or written directives.

Commuting is the time spent by an employee in travel between his or her residence and the employee's Regular Reporting Point. In certain instances it is also the time spent by the employee in carrier provided or authorized transportation between his or her release point and the lodging facilities at the away-from-home terminal.

The Federal hours of service laws require that deadhead travel time to duty (covered service), not commuting time, is counted as time on duty and generally, deadheading from duty is treated as limbo time. These applications usually involve departures and arrivals at the employee's home or away-from-home terminals. However, travel circumstances at the away-from-home terminal are unique and warrant special consideration.

Title 49 Code of Federal Regulations, Part 228, Appendix A states:

Transit time from the employee's residence to his regular reporting point is not considered deadhead time.

An employee with a regular reporting point is free to select a residence either near to or far away from the reporting point, and thereby control the amount of off-duty time consumed by travel. Because the Federal hours of service laws do not authorize FRA to dictate where an employee must live in relation to his or her regular reporting point, time spent in travel to and from that point is a matter of employee choice and properly considered time off duty.

At the away-from-home terminal, the employee is not free to select lodging, and thereby cannot control the travel time between the release point and the lodging facility. Historically, the railroads have provided employees with lodging facilities at the away-from-home terminals. At first, the lodging was in the form of assigned cabooses in which the crew was housed at the away-from-home terminal. Later, on-site "dormitory" style lodging and nearby hotel facilities under contracts were provided by the railroads. Competitive hotel

contracts evolved through economics and collective bargaining agreements, and they are now prevalent in the industry. However, many of the contracted hotels are a significant distance from the crew's release point, thus requiring transportation in both directions. Although the employee may have a voice in the selection of the hotel through his or her union representative, the employee has limited control, if any, over the travel time and distance to these hotels.

FRA recognizes the unique circumstances of away-from-home terminal travel and the potential for eroding the statutory off duty period. While this travel is not specifically addressed in the Federal hours of service laws, FRA will utilize the deadheading provisions of the Federal hours of service laws to limit away-from-home terminal commuting time.

The following is FRA's application of the Federal hours of service laws in situations where railroad provided or authorized transportation is employed.

TRAVEL TIME AT THE AWAY-FROM-HOME TERMINAL

FRA Policy:

FRA will continue to utilize a "thirty-minute commuting time" application of the laws to travel between the away-from-home release/on duty point and the crew's lodging facilities. One way travel time of thirty minutes or less, including delays associated with transportation availability and reliability and lodging availability, will be considered as COMMUTING. Any one-way travel time in excess of thirty minutes, including delays associated with the availability of transportation (e.g., time spent awaiting the arrival of the transportation vehicle) and/or lodging will be considered as either On-Duty or Limbo Time, as specified in the laws.

Travel From The Off-Duty Location To The Lodging Facility

- Travel time is calculated from Final Release Time to the arrival time at the hotel or lodging facility.
- If the travel time is thirty minutes or less, the entire period is considered commuting time and is part of the off-duty period.
- If the travel time is more than thirty minutes, the entire period is considered Limbo Time, i.e., neither time on- nor off-duty, and the Final Release Time must be readjusted to reflect the employee's arrival time.
- In the event room accommodations are not readily available after arrival at the lodging facility, all time spent waiting for room availability will be considered part of the travel time. If room availability occurs more than thirty minutes after the Final Release Time, the entire period is considered Limbo Time and the Final Release Time must be readjusted to reflect the room availability time.

Travel From The Hotel Or Lodging Facility To The On-Duty Location

- Travel time is calculated from departure or required to-be-ready time at the hotel or lodging facility to the Report-for-Duty Time at the on-duty location.
- If the travel time is thirty minutes or less, then the entire period is considered part of the off-duty period.
- If the travel time is more than thirty minutes, then the entire period is deadheading to duty and included in the calculation of Total On-Duty Time.

TRAVEL FROM AN ON-LINE-OF-ROAD LOCATION DIRECTLY TO THE HOTEL OR LODGING FACILITY

Generally, this scenario involves employees who have reached their statutory on-duty limits of the Federal hours of service laws while on line-of-road and are deadheading to their point of Final Release.

FRA Policy:

- If after arriving at the lodging facility, the employee utilizes the "quick tie-up" process outlined in FRA Industry Advisory OPSA-96-03, dated May 14, 1996, the entire deadhead is considered Limbo Time.
- If after arriving at the lodging facility, the employee is required to complete administrative or other activities that exceed the scope of OPSA-96-03, the entire period converts to deadheading-to-duty time and must be included in the calculation of Total Time On Duty.

TRAVEL VIA A CIRCUITOUS ROUTE TO THE POINT OF FINAL RELEASE

FRA Policy:

The railroad should exercise "due diligence" in the transporting of employees from the Relieved point on line-of-road to the Final Release point. While transporting employees via a circuitous route would not, in and of itself, subject railroads to violations of the Federal hours of service laws, and would therefore not subject the railroads to the imposition of civil penalties, FRA expects the railroads to employ due diligence in order to provide the most suitable means and route available. While certain situations may warrant a circuitous route, the railroad officials should favor reducing the effects of fatigue on employees instead of only considering railroad operating conveniences.

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Appendix O: FRA Operating Practices Technical Bulletin OP-04-24

Deadhead Transportation to a Point of Final Release;
Hours of Service Interpretations, February 3, 2004

U.S. Department
of Transportation

Federal Railroad Administration

Memorandum

Date: February 3, 2004 Reply to Attn of: OP-04-24

Subject: Deadhead Transportation to a Point of Final Release;
Hours of Service Interpretations

Original Signed By:
From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

A railroad's election to interrupt an employee's rest period at one designated terminal in order to place him in deadhead transportation to another designated terminal for the purpose of obtaining his statutory off-duty period, is not prohibited by the Hours of Service Act.

The hours of service regulations state, "Time spent in deadhead transportation by an employee returning from duty to his point of final release may not be counted in computing time off-duty or time on-duty." The "point of final release" is that point where the employee receives the required 8 or 10 hours off-duty period prior to the start of a new 24-hour period. The time spent in deadhead transportation to that point is not computed as time on-duty or time off-duty.

From this, it is apparent that the nature of deadhead transportation is determined by the action of the employee after arrival at the designated terminal. If the employee is required to go on duty without having had a required 8 or 10 hours off-duty period, then the employee was in deadhead transportation to a duty assignment, and the time so spent is considered time on-duty. On the other hand, if the employee has the required 8 or 10 hours off-duty after arrival at the designated terminal, then the employee was in deadhead transportation to the point of final release, and the time spent is neither time on-duty nor time off-duty.

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