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February 26, 2010

VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
Harrisburg, PA 17120

Re: *Pennsylvania State Legislative Board United Transportation Union v. Norfolk Southern Railway Company*, Docket No. C-00019522

Dear Secretary McNulty:

Enclosed for filing on behalf of Norfolk Southern Railway Company are the following:

1. The original and nine (9) copies of the *Main Brief of Norfolk Southern Railway Company.*

2. The original and three (3) copies of the *Motion of Norfolk Southern Railway Company for the Admission of Evidence of Documents Referenced in Testimony.*

Copies of the Main Brief and Motion have been served in accordance with the attached Certificate of Service.

Very truly yours,

Brian J. Knipe
For BUCHANAN INGERSOLL & ROONEY, P.C.

BJK/paf

Enclosures

cc: The Honorable Wayne L. Weismandel (via hand delivery and e-mail w/encl. (Brief in Word format))
Joseph P. Sirbak, II, Esq.
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania State Legislative Board United Transportation Union	:	
v.	:	Docket No. C-00019522
Norfolk Southern Railway Company	:	

MAIN BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY

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Dated: February 26, 2010

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I. INTRODUCTION / SUMMARY OF ARGUMENT

In its January 14, 2010 Order, the Commission referred this matter for hearing for the purpose of determining whether "our 1973 Order is preempted by the Federal Regulation at 49 C.F.R. § 218.99." The Commission further recognized that "the shoving regulations, promulgated at § 218.99, are governed by the preemption criteria established by 49 U.S.C. § 20106.

Under 49 U.S.C. § 20106, the predominate question is whether a federal rail safety regulation "covers the subject matter," or addresses the same generalized safety concerns, as the Commission's 1973 Order. So long as the federal regulation covers the subject matter of the 1973 Order, the 1973 Order is preempted, unless the party opposing preemption, in this case the Pennsylvania State Legislative Board, United Transportation Union (the "Union"), can fit within a narrow exception by proving that the 1973 Order is necessary to address an essentially local safety hazard, is not incompatible with federal law, and does not unreasonably burden interstate commerce.

The question posed by the Commission is strictly a question of federal law that has never previously been addressed by the Commission. Here, the 1973 Order and 49 C.F.R. § 218.99(e)(5), promulgated on June 16, 2008, cover precisely the same subject matter – "point protection" during "shove" movements at rail classification yards. Moreover, the 1973 Order and the 49 C.F.R. § 218.99(e)(5) are facially incompatible. The 1973 Order, as it has been interpreted by the Commission, **prohibits** Norfolk Southern Railway Company ("Norfolk Southern") from installing a modern "shove light" system **in lieu of** the outmoded and unnecessary practice of having a trainman mount and ride the "lead end" car during a shove movement at Conway Yard. By contrast, 49 C.F.R. § 218.99(e)(5) expressly **permits** Norfolk Southern to install a shove light system **in lieu of** having a trainman physically ride the lead end

of a shove movement. This facial incompatibility between the 1973 Order and 49 C.F.R. § 218.99(e)(5), standing alone and as a matter of federal law, excludes the 1973 Order from the protection of the narrow statutory exception to preemption.

The question is not whether it would be a good idea, or even a safety enhancement, to permit Norfolk Southern to use shove lights in lieu of trainmen riding the lead end of the shove. The Federal Railroad Administration (the "FRA") already has determined that it is, and under 49 U.S.C. § 20106, the Commission may not second guess the FRA's formal and carefully-studied rail safety regulations.

The Union has resorted to scare tactics in an attempt to distract the Commission from the clear-cut questions of law raised by its January 14, 2010 Order. Scare tactics have been used before in front of the Commission and are a weapon of choice among those who recognize that they simply cannot prevail on the law. The Union raises a parade of horribles supposedly awaiting Conway Yard if trainmen riding the lead end of a shove movement are reassigned to monitor shove lights instead. However, the truth is that Conway Yard is one of the safest rail yards on the Norfolk Southern system, and Norfolk Southern has been recognized every single year, for the past twenty years, as the safest large rail carrier in the county. Virtually all of the potential hazards alleged by the Union are naked speculation and, properly focusing on the nature of the alleged hazards, **none** could be "essentially local" to Conway Yard.

II. FACTUAL BACKGROUND

Conway Yard is one of fourteen classification, or hump, yards on the Norfolk Southern system. (Tr. at 67).[1] At classification yards, arriving trains are received at the

[1] The other classification yards on the Norfolk Southern system are located in Allentown, Pennsylvania; Bellevue, Ohio; Birmingham, Alabama; Chattanooga, Tennessee; Columbus, Ohio; Elkhart, Indiana; Enola, Pennsylvania; Knoxville, Tennessee; Linwood, North Carolina; Macon, Georgia; Norfolk, Virginia; Roanoke, Virginia; and Sheffield, Alabama. (Tr. at 73).

receiving yard. (Tr. at 67). The cars then are pushed over a "hump," at which point they are separated into "cuts" of one to four cars. (Tr. at 67). As the cuts of cars roll down the descending side of the hump, a computer control system routes them to the proper classification track and also ensures that the cars are traveling at a safe speed. (Tr. at 68). From there, an engine will attach to the cars in a classification track and pull them out of the classification track. (Tr. at 68-69). The engine then will push, or "shove", those cars into the departure yard. (Tr. at 69). This shoving movement along the long tracks of the departure yard is the subject of the instant proceeding. At the departure yard, engines are coupled to the trains, air brake tests are made, the outbound crew is provided, and the train departs for its next terminal. (Tr. at 71).

Norfolk Southern is the undisputed safest Class I railroad in the country, having won the Harriman Award, awarded to the safest railroad in the industry, for the last twenty (20) years in a row. (Tr. at 429). In recent years, Conway Yard has been among the safest yards in the Norfolk Southern system. (Tr. at 429). Conway Yard has gone hundreds of days without any reportable injuries in all of its major employee classifications. (Tr. at 428-29). Moreover, Conway Yard is one of the better maintained facilities on the entire Norfolk Southern system, having recently installed seamless ribbon rail and replaced the cross-ties track upgrades that ensure the smooth movement of trains over the tracks. (Tr. at 474).

To further enhance safety at Conway Yard – already one of the safest rail yards on the safest Class I rail carrier in the industry – Norfolk Southern seeks to eliminate the current practice of having a trainman ride the leading end of a shove movement. (Tr. at 450-51). Currently, pursuant to the Commission's 1973 Order, trainmen ride the leading end of the shove movement while hanging on the side of the leading rail car, approximately five feet off of the ground. (Tr. at 234). Simply mounting and dismounting the equipment can cause injuries (Tr. at

286-87) and in fact this practice was responsible for 10.9% of all Norfolk Southern transportation department reportable injuries in 2009. (NS Ex. E). An additional 24% of all Norfolk Southern transportation department injuries in 2009 occurred while employees were on or about equipment. (NS Ex. E). While riding a shove movement, the trainman is required to remove a hand from the ladder rung to operate a radio. (Tr. at 237-38). The metal ladders that trainman are required to ride may get slippery (Tr. at 259) and the trainman is at risk of being jolted by the natural train actions and slack actions of moving rail cars. (Tr. at 239, 308). At the hearing of this matter on February 18 and 19 (the "Hearing"), testimony was presented through the Union's witness Adam Kaufman concerning rail cars becoming detached from the engine during a shove movement, with the riding trainman left freely rolling down the departure track. (Tr. at 242). Fortunately, in the instance described, the trainman was able to bring that runaway draft of cars to a stop using a handbrake on the lead end of the rail car, although such handbrakes will not always be available. (Tr. at 334).[2]

When there are rail cars sitting on an adjacent track, the trainman riding the lead end of the shove movement "normally" comes within three (3) feet of rail cars sitting on an adjacent track. (Tr. at 238) However, it is not always possible to maintain a distance of 3 feet from the cars on an adjacent track. (Tr. at 438). As recently as January 29, 2010, a trainman riding the lead end of a shove movement had an accident in which he was struck by a 51-inch by 14-inch by 2-inch piece of scrap metal protruding from a railcar on an adjacent track. (Tr. at 445-50; NS Ex. G).

To eliminate the need to put trainmen at risk of injury during shove movements, Norfolk Southern seeks to replace its current practice with a system of "shove lights," the same

[2] Handbrakes typically are located only at one end of a rail car and there is no guarantee that the handbrake will be located on the end of the car that the trainman is riding. (Tr. at 334).

practice followed at numerous other rail yards. (Tr. at 450-51). Shove lights are used in the departure yard to permit train crews to know when the cars they are shoving have reached the end of the track. (Tr. at 73). At Conway Yard, Norfolk Southern intends to "circuit" the final 800 feet of the departure tracks. (Tr. at 76).[3] Most other Norfolk Southern classifications yards with shove light systems also use an 800 foot circuited stretch of track. (Tr. at 87).[4] The shove lights for each departure track will be located near the entrance to the departure tracks. (Tr. at 76-77). Before any shove movement is commenced, a trainman will physically inspect all of the switches to assure that they are properly lined and it is safe to proceed. (Tr. at 78). Additionally, each shove movement is under the exclusive control of the yardmaster, who knows that there are no other cars in the departure track to be shoved into. (Tr. at 84, 377).

The trainman will monitor the shove light as the shove movement commences. (Tr. at 78). When the circuited stretch of track is unoccupied, the shove light is continuously illuminated at a lunar white color. (Tr. at 78-79, 82). When the lead end of the shove movement reaches the circuited section of track, 800 feet from the "clear point," the shove light will begin flashing, indicating that the lead end of the train has 800 feet in which to come to a stop. (Tr. at 79). The trainman relays this information to the engineer operating the shove movement by radio. (Tr. at 79). Once the lead end reaches the second circuit located 400 feet from the clear point, the shove light will extinguish and the trainman monitoring the shove light will instruct the engineer, by radio, to bring the train to a safe stop. (Tr. at 80).

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[3] If it was determined to be necessary, a shove light system could circuit the entire length of the departure track. (Tr. at 451-52).

[4] The 800-foot standard used on most Norfolk Southern shove light systems is relatively long, by industry standards. When investigating the safety of shove lights, the FRA examined existing shove light operations having an **average** circuited section of track of **360 feet**. *See* Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails, 73 Fed. Reg. 33897, 33891 (Jun. 16, 2008).

In all of its classification yards, Norfolk Southern takes all reasonable and necessary precautions to assure the safety of its shove light systems. There was absolutely no evidence presented during the Hearing concerning any shove-related accidents or injuries at those yards where shove light systems currently are installed. Pursuant to its existing protocols, once every 90 days, Norfolk Southern will perform an inspection of the shove light system to ensure that it is functioning properly and in good mechanical condition. (Tr. at 93; NS Ex. B). Every 360 days, Norfolk Southern will perform a separate ".06 ohm shunt" test on the shove light system to ensure its functioning under a "worst case scenario." (Tr. at 94, NS Ex. B). Shove lights currently are in use on 11 of the 14 NS classification yards. (Tr. at 74). In many cases the shove light systems used by NS have been in operation for forty (40) years or more. (Tr. at 74, 169, NS Ex. C). Where shove lights are in operation, NS does not position a trainman to ride the lead end of the shove movement. (Tr. at 170).[5] Since shove lights have been in use at Allentown Yard, there have been no incidents involving cars running into each other. (Tr. at 420). Conway Yard Terminal Superintendent Darnell Wood (who previously worked at numerous rail yards using shove lights, including serving as Terminal Superintendent and Assistant Terminal Superintendent at Linwood Yard for six years) testified that he is not aware of a single reportable injury related to the use of shove lights and he has never seen a shove movement under the control of shove lights shove out beyond the designated clearance point. (Tr. at 424, 444, 465-66).

Even a cursory comparison of NS Exhibit F, depicting a trainman physically riding the leading end of a shove movement, often through close clearance, with NS Exhibit A,

[5] At the hearing, the Union's witness testified that trainmen are no longer permitted to ride the lead end of shove movements in Allentown Yard due to the danger of doing so. (Tr. at 417).

depicting the trainman monitoring the position of the lead end via an electronic shove light system, demonstrates the obvious safety advantage of a shove light system.

Central to the issue before this Commission is that it is undisputed that the shove light system installed at Conway Yard will comply with the applicable federal shove light regulation, 49 C.F.R. § 218.99(e)(5). (Tr. at 104) (statement of UTU counsel: "Our certainly rebuttable presumption is that if a shove light system is installed, it will, at a minimum, comply with existing federal regulatory framework"). Brian Sykes, Norfolk Southern's Chief Engineer, C&S Engineering, testified without dispute that the shove light system planned for Conway Yard will meet the safety requirements of § 218.99. It would (i) be designed and demonstrated to be failsafe (Tr. at 88); (ii) be continuously illuminated when the circuited section of the track is unoccupied and assume its "most restrictive state," indicating that the shove movement must be stopped, in the event of mechanical failure or if the circuited stretch of track is occupied (Tr. at 78-80, 82, 88); (iii) be accompanied by written procedures for determining track occupancy prior to the commencement of a shove movement and identifying tracks on which shove lights are used (Tr. at 99); (iv) continue the current practice of having the departure track under the exclusive control of a yardmaster (Tr. at 84); (v) require pre-shove job briefings and require that the trainman assigned to monitor the shove light shall have no unrelated tasks (Tr. at 77-78, 84, 86); and (vi) not include the use of remote control technology for the foreseeable future (Tr. at 87-88).[6]

[6] Although the Union devoted considerable time at the hearing to discussing remote control technology, the Terminal Superintendent confirmed Mr. Sykes' testimony that remote control technology at Conway Yard will be limited to hump operations and will not be used for shoving movements for the foreseeable future. (Tr. at 478).

III. STATEMENT OF THE QUESTIONS INVOLVED

A. **Does 49 C.F.R. § 218.99(e)(5), relating to the permissive use of shove light systems in lieu of physical point protection during shove movements, cover the subject matter of the 1973 Order?**

Suggested Answer: Yes

B. **Has the Union carried its burden of proving that 49 C.F.R. § 218.99(e)(5) and the 1973 Order are not incompatible?**

Suggested Answer: No

C. **Has the Union carried its burden of proving the existence of an essentially local safety hazard at Conway Yard?**

Suggested Answer: No.

D. **May the current operations at Conway Yard constitute an essentially local safety hazard?**

Suggested Answer: No.

E. **Has the Union carried its burden of proving that the 1973 Order does not impose an undue burden on interstate commerce?**

Suggested Answer: No.

IV. STATEMENT OF THE CASE

Effective June 16, 2008, the FRA issued 49 C.F.R. § 218.99(e)(5), a rule governing shove movements that permit a railroad yard to substitute a system of shove lights as a means of determining if a railroad track is clear before proceeding with a shove movement, in place of requiring an employee to ride the lead car.

On November 9, 2009 the Commission, on its own motion, issued a Reconsideration Order to determine if it is appropriate to amend or rescind the 1973 Order, which requires an employee to ride the lead car in shove moves in Conway Yard, due to federal preemption by 49 C.F.R. § 218.99. The Reconsideration Order directed that notice of the proceeding be provided to the successors in interest to the parties in the 1973 proceeding,

Norfolk Southern[7] and the Union. The Reconsideration Order further directed that Norfolk Southern and the Union, within twenty (20) days of the date of entry of the Reconsideration Order, file comments and affidavits with the Commission regarding whether an amendment or rescission of the 1973 Order is warranted.

On November 30, 2009, Norfolk Southern filed its comments.

On December 18, 2009, the Union filed a letter contending that it had not received notice, and requesting that the comment period be expanded for the Union until at least thirty (30) days subsequent to the provision of the required notice.

On December 24, 2009, the Commission, by Secretarial Letter, extended the comment period for the Union to December 31, 2009.

On December 28, 2009, the Union filed a letter maintaining that service of the notice still had not been effected, and requesting that the comment period be expanded for the Union until at least thirty (30) days subsequent to the provision of the required notice.

On January 5, 2010, the Commission, by Secretarial Letter extended the comment period for the Union to noon on January 11, 2010.

On January 11, 2010, the Union filed its comments.

On January 14, 2010, the Commission entered an Order referring this matter to the Office of Administrative Law Judge to determine whether the 1973 Order is preempted under federal law. The Order directed an expedited hearing and issuance of a Recommended Decision, to be presented for the Commission's consideration at the May 6, 2010 public meeting.

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[7] Norfolk Southern is the indirect successor in interest to the Trustees of the Property of the Penn Central Transportation Company (Penn Central), which was the operator of the Conway Yard in 1973.

On January 20, 2010, Administrative Law Judge Wayne L. Weismandel (the "ALJ") issued a Prehearing Conference Order which directed parties to file prehearing memoranda and set forth rules and a proposed schedule for the proceeding.

On February 1, 2010, Norfolk Southern and the Union filed prehearing conference memoranda.

On February 3, 2010, an Initial Prehearing Conference was held before the ALJ, who established a litigation schedule. Also on February 3, 2010, the ALJ issued an Order Amending Caption and a Scheduling and Briefing Order which set forth the schedule established at the Initial Prehearing Conference as well as briefing requirements.

Evidentiary hearings were held before the ALJ on February 18 and 19, 2010.

Pursuant to the February 3, 2010 Scheduling and Briefing Order, Norfolk Southern hereby submits this Main Brief, with Proposed Findings of Fact, Conclusions of Law and Ordering Paragraphs in the attached Appendix A.

V. ARGUMENT

A. Burdens of Proof

In Commission proceedings, the burden of proof is allocated by 66 Pa. C.S. § 332(a), which provides that **"[e]xcept as may be otherwise provided in** section 315 (relating to burden of proof) or other provisions of this part or **other relevant statute**, the proponent of a rule or order has the burden of proof." (emphasis added). In the present case, which the Commission initiated on its own Order and without a petition by either Norfolk Southern or the Union, the Commission has identified 49 U.S.C. § 20106 as the applicable "other relevant statute."

Pursuant to 49 U.S.C. § 20106, "[i]t is the burden of the party advocating preemption under § 20106(a)(2) to show that a federal law, regulation, or order covers the same

subject matter as the state law, regulation, or order it seeks to preempt." *Duluth, Winnipeg & Pacific Ry. Co. v. City of Orr*, 529 F.3d 794, 797 (8th Cir. 2008). Once that showing is made, "the burden shifts to the party resisting preemption to prove that the state law, regulation, or order meets all three requirements of the savings clause in § 20106(a)(2)." *Id.*; *BNSF Ry. Co. v. Swanson*, 533 F.3d 618, 621 (8th Cir. 2008). Stated differently, Norfolk Southern bears the burden of proving that 49 C.F.R. § 218.99(e)(5) and the 1973 Order cover the same subject matter and the Union bears the burden of proving (i) an essentially local safety hazard, (ii) that 49 C.F.R. § 218.99(e)(5) and the 1973 Order are not incompatible, **and** (iii) that continued operation of the 1973 Order would not unduly burden interstate commerce.

With respect to the issues on which each party bears the burden of proof, that party must prove each element of its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se-Ling Hosiery v. Marqulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

B. 49 C.F.R. § 218.99(e)(5), Which Explicitly Permits Shove Lights to be Used In Lieu of Physical Point Protection, Covers the Subject Matter of Point Protection During Shove Movements.

The Supremacy Clause of the United States Constitution recognizes that the laws of the United States "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Congress enacted the Federal Railroad Safety Act of 1970, 49 U.S.C. § 20101, *et seq.* (the "FRSA") "to

promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. To accomplish this objective, Congress declared "that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Congress concluded that rail safety would be better preserved by a set of nationally uniform standards and did "not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, H. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4109.

Congress delegated the regulation of railroad safety to the Secretary of Transportation, whose authority is exercised by the FRA. *See Burlington Northern R.R. Co. v. City of Connell*, 811 F. Supp. 1459, 1462, n.3 (E.D. Wash. 1993) (finding preempted municipality's regulation of railroad whistle); *Union Pacific R.R. Co. v. Public Utility Comm'n of Oregon*, 723 F. Supp. 523, 529 (D. Or. 1989) (finding preempted state regulation requiring cabooses in areas alleged to constitute a local safety hazard). The FRA is authorized to "prescribe regulations and issue orders for **every area** of railroad safety." 49 U.S.C. § 20103 (emphasis added). Once the FRA addresses a subject matter, all conflicting state laws and regulations are preempted. 49 U.S.C. § 20106. State laws regarding railroad safety are preempted where the FRA "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id. See also* 49 C.F.R. § 213.2 (providing that any FRA regulation "preempts any State law, regulation, or order covering the same subject matter").

In furtherance of its goal of creating nationally uniform safety standards for the railroad industry, Congress provided an **express** preemption provision. "[E]xpress preemption

... exists when Congress includes in a statute explicit language stating an intent to preempt conflicting state law." *Deweese v. National Railroad Passenger Corp.*, 590 F.3d 239, 245 (3d Cir. Dec. 22, 2009). 49 U.S.C. § 20106 is a model of Congress' power to expressly preempt state regulation. *See National Assoc. of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11, 13, 14 (3d Cir. 1976) (describing the identical, predecessor statute to 49 U.S.C. § 20106 as "evinc[ing] total preemptive intent" and an "overwhelming expression of congressional intent to preempt state rail safety standards once federal standards have been adopted").

"Regulations 'cover' the subject matter of a safety concern where they 'comprise, include, or embrace [that concern] in an effective scope of treatment or operation.'" *Swanson*, 533 F.3d at 621 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65 (1993)). For federal regulation to have preemptive effect, it must "substantially subsume," not merely "touch upon" or "relate to," the subject matter of relevant state law. *Easterwood*, 507 U.S. at 664-65. The question is whether the competing state and federal regulations cover the same **general** safety concerns. *See Burlington Northern & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790 (7th Cir. 1999):

> Generally, determining the safety concerns that a state or federal requirement is aimed at will necessarily involve some level of generalization that requires backing away somewhat from the specific provision at issue. Otherwise a state law could be preempted only if there were an identical federal regulation, and ... *Easterwood* teaches that this is not so.

Id. at 796. *See also Swanson*, 533 F.3d at 622 (holding that federal prohibition against harassment of any person calculated to discourage such person from receiving proper medical treatment covered the same subject matter as a state law prohibiting a rail carrier from delaying or interfering with medical treatment).

Section 218.99(e)(5) plainly "covers the subject matter" of the 1973 Order within the meaning of 49 U.S.C. § 20106. The FRA specifically regulates "shoving or pushing moves." *See* 49 C.F.R. § 218.99. On June 16, 2008, the FRA amended § 218.99 to permit shove light systems in place of alternate point protection requirements, *i.e.*, having a crewmember or other qualified employee visually determine that the track is clear before proceeding with a shove movement. *See id.* Before adopting § 218.99(e)(5), the FRA reviewed records over a twenty-six (26) month period and conducted direct observations at thirty-four (34) locations where shove light or radio systems were in place. *See* Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails, 73 Fed. Reg. 33888 at 33897 (Jun. 16, 2008).[8] The FRA considered numerous arguments for and against the use of shove lights, including the fact that shove lights do not cover the entire departure track, the risk of injury where there are close clearances, the risk of improperly lined switches, the relatively "fewer switches" on departure tracks than in other areas of a rail yard, the availability of "non-visual" processes (such as computer tracking) available to yardmasters to monitor the occupancy of the departure tracks, and the proper placement of any cars that may need to be left on the departure tracks. *Id.* at 33890-92. The FRA found that shove light systems were in use by five of the seven major U.S. rail carriers. *Id.* at 33890. The FRA's observations corroborated that "if employees were required to provide point protection by riding the side of a car or walking along the departure tracks, there would be an increased risk of injuries." *Id.* at 33892. In adopting § 218.99(e)(5), the FRA was unambiguous in its intent: "Paragraph (e)(5) is added to permit each railroad the option of using a shove light system in lieu

[8] Relevant portions of the administrative history cited in Norfolk Southern's Main Brief are attached as Appendix B.

of point protection under 49 C.F.R. § 218.99(b)(3), as long as certain specified conditions are met." *Id.* at 33897.

The primary safety hazards identified by the Union at the hearing – such as the hazards that may be encountered during a shove movement before the circuited portion of the track is reached, the possibility of shop cars left on the departure track, and the inability of the yardmaster to make a visual inspection of all departure tracks from his station – are precisely the arguments raised by rail labor, including the United Transportation Union, at the time the FRA was considering the adoption of § 218.99(e)(5). These arguments already have been considered, and rejected, by the FRA. If an FRA regulation covers the subject matter of a competing state regulation, the states are not permitted to second-guess the wisdom of the FRA's regulation. *See Coleman*, 542 F.2d at 14 ("[t]he only question presented ... is whether the FRA possesses the power to preempt [state] accident reporting regulations, not whether it has exercised its power in a prudent manner").

Here, the question of coverage is highly analogous to the Ninth Circuit Court of Appeals' decision in *Burlington Northern R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989), in which the Court struck down a Montana law requiring cabooses as preempted by recent FRA regulations "permitting the use of telemetry devices as substitutes for visual inspection at the rear of trains." "Visual inspection is no longer necessary, the FRA has decided, because electronic monitoring is an equally effective method of assuring train safety." *Id.* As in the present case, the federal regulation at issue in *Burlington Northern* allowed electronic monitoring "in lieu of" conducting a visual observation. *Id.* at 1105, 49 C.F.R. § 221.15(d). The State of Montana argued that "the FRA regulations leave open the possibility of state caboose requirements because the regulations 'neither encourage nor discourage' the use of cabooses." *Id.* at 1106.

The Court categorically rejected this contention as "miss[ing] the point," since the FRSA "does not merely preempt those state laws which impair or are inconsistent with FRA regulations" but "preempts all state regulations aimed at the same safety concerns addressed by FRA regulations." *Id.* Because the FRA "addressed the subject of monitoring safety conditions at the rear of trains and has concluded that telemetry devices are adequate for the purpose," the additional state requirement was preempted. *Id.* at 1106-08. Similarly, the FRA determined that shove light systems can maintain an acceptable degree of safety and expressly allowed the use of shove lights in lieu of physical point protection. *See* 73 Fed. Reg. at 33891. Section 218.99(e)(5) plainly covers the subject matter of the 1973 Order, which is therefore preempted.

C. The Union Is Unable To Satisfy Its Burden of Proving All Three Prongs Necessary to Fit Within the Narrow Exception to Federal Preemption.

Section 20106 provides a savings clause permitting a state to continue in force an additional state order if it (i) is necessary to eliminate or reduce an essentially local safety or security hazard; (ii) is not incompatible with a law, regulation, or order of the United States Government; **and** (iii) does not unreasonably burden interstate commerce. "The savings clause is to be narrowly construed." *Burlington Northern R.R. Co. v. Deatherage*, 1997 WL 33384269, * 3 (N.D. Miss. 1997). *See also Union Pacific R.R. Co. v. Louisiana*, 32 F. Supp. 2d 377, 380-81 (M.D. La. 1999) (describing exceptions to federal preemption as "narrow"). To fall within the narrow exception to federal preemption, § 20106 articulates a conjunctive test. In other words, if the Union cannot satisfy **all three** of the prongs required for the exception, federal preemption must apply. *See Burlington Northern R.R. Co. v. State of Montana*, 805 F. Supp. 1522, 1528 (D. Mont. 1992) (holding that to "survive the fires of preemption" the state law "must satisfy three requirements to fall under the exception").

1. The Commission Need Not Even Reach the Question of an Essentially Local Safety Hazard at Conway Yard Because the 1973 Order is Incompatible with § 218.99(e)(5).

Although the parties devoted much of the hearing to alleged safety hazards at Conway Yard, the Commission may summarily find the 1973 Order preempted, strictly as a matter of law, without even reaching the question of an essentially local safety hazard. Regardless of the existence of an essentially local safety hazard at Conway Yard, the 1973 Order is preempted because it is incompatible with 49 C.F.R. § 218.99(e)(5). *See Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas*, 948 F.2d 179, 186 (5th Cir. 1991) (recognizing "incompatibility" as a legitimate alternate basis for striking down a state regulation covering the same subject matter as a federal regulation).

Section 218.99(e)(5) grants Norfolk Southern the flexibility to install a shove light system at Conway Yard **in lieu of** having a trainman ride the leading end of a shove movement. The 1973 Order, particularly as it has been interpreted by the Commission in the intervening decades, denies NS that flexibility and therefore is incompatible with § 218.99(e)(5). *See CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (holding that a D.C. law restricting the transport of hazardous materials near the Capitol Building is "incompatible" with the "flexible regime" established by the corresponding federal regulation, since "[t]he D.C. Act's routing restriction does not allow a carrier ... to exercise the discretion expressly conferred by [the federal regulation]").

During the Hearing, the Union offered no evidence that would permit it to carry its burden of proving that the 1973 Order is not incompatible with § 218.99(e)(5). Certainly, the mere fact that it is not literally impossible to comply with both § 218.99 and the 1973 Order does not render the competing regulations "not incompatible." Numerous courts to have considered the issue, including the United States Supreme Court, have found lower state train speed limits to

be incompatible with higher federal speed limits, even though railroads technically could comply with both sets of regulations by operating at the lower speed. *See Easterwood*, 507 U.S. at 674 ("the [federal] speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation ..."); *Burlington Northern & Santa Fe Ry. Co. v. City of Sedgwick*, 1997 WL 807872, * 2 (D. Kansas 1997) (holding, without any discussion of local safety hazards, that municipality's more restrictive speed limit is "preempted because it is incompatible with the federal regulations"). *See also Union Pacific R.R. Co. v. Louisiana*, 32 F. Supp. 2d 377, 382 (M.D. La. 1999) (holding that state statute was "inconsistent" with federal regulation for purposes of § 20106 exception where state statute imposed different requirements for the reporting of spills of hazardous materials but where compliance with both federal and state requirements was not impossible).

Section 218.99(e)(5) expressly permits rail carriers to replace trainmen riding the lead end of shove movements with shove lights. The 1973 Order prohibits Norfolk Southern this flexibility. Because § 218.99(e)(5) and the 1973 Order do not merely cover the same subject matter, but in fact are incompatible as a matter of law, the Union cannot fit within § 20106's narrow savings clause.

2. The Existence of an Essentially Local Safety Hazard at Conway Yard is a Question of First Impression Before the Commission.

Section 218.99(e)(5) was only adopted in 2008, and this Commission has never before adjudicated whether, for federal preemption purposes, there exists "an essentially local safety or security hazard" under 49 U.S.C. § 20106 at Conway Yard. Rather, the Commission has always determined whether the 1973 Order should be modified based upon "new and novel arguments not previously considered" or considerations which appear to have been overlooked or not addressed by the Commission in the 1973 Order, in accordance with the standard of *Duick*

v. PG&W, 56 Pa. PUC 553, 559 (1982) (*Duick*). The § 20106 "essentially local safety hazard" exception to federal preemption, as explained above, involves a completely different analysis than the *Duick* standard.

However, during the Hearing, counsel for the Union argued at length that the Commission has previously determined that there is an essentially local safety hazard at Conway Yard, and that the Commission previously found essentially local safety hazards at Conway Yard in proceedings litigated in 1973, 1974, 1980, and from 1995 to 2001:

> Based on the case that's been put forward, we don't believe the railroad has met that burden, and **we believe that the conditions that gave rise to the original 1973 order**, its modification in 1974, the rejection in 1980 by the Commission of a then-petition to eliminate or modify the existing requirement of an individual on leading end of the shove, and ultimately the relatively protracted proceedings in the nature of an application that went forward before Administrative Law Judge Porterfield for an initial recommended decision, a remand by the Commission to Judge Porterfield, and a second decision on remand that was ultimately adopted by the Commission **amply demonstrate the unique conditions at Conway that give rise to the need for a man on the leading end of a shove**, a train person, if you will, not to be demonstrative of any gender bias.
>
> We believe that this simple but important burden has not been met. **We believe that the conditions, based on the testimony we've heard so far, have not materially changed with respect to what gave rise to that order in a fashion that would give a basis for modification of that order regarding the local safety conditions at Conway**. That having been said, and in the spirit of not wasting the Commission's time or Your Honor's time, and in not utilizing the opportunity to make clear the unique safety conditions associated with shoving operations in the Conway yard, we will proceed to put forth some testimony, oral testimony, today in an attempt to clarify the specifics of the operation regarding shoving in Conway with or without shove lights. Based upon that, we think that it will be abundantly clear that **there has been no change in circumstances** that would give rise to a modification of the existing order.

Tr. at 185:20 to 187:1 (emphasis added).

Contrary to the Union's arguments, which echo the *Duick* standard, the Commission has never before adjudicated, for federal preemption purposes, whether there is "an essentially local safety or security hazard" under 49 U.S.C. § 20106 at Conway Yard. In the proceeding giving rise to the 1973 Order, the Commission never considered federal preemption, much less made any finding of an essentially local safety hazard necessary for the exception to federal preemption.

Nor was federal preemption ever an issue in 1974, when the Commission issued an order (the "1974 Order") merely granting a joint letter-petition of Penn Central and the Union filed at C-00019522, and modifying the 1973 Order by eliminating the requirement that Penn Central plan and install track signals and color light indicator signals on various tracks at Conway Yard.

The Commission's files indicate that the proceedings in the 1980s were never litigated beyond a Petition filed by Conrail seeking Rescission or Modification of the Commission's 1973 Order and 1974 Order, and an Answer in opposition filed by the Union. There was no adjudication, and neither the Commission nor either party raised the issue of federal preemption.

In the initial Recommended Decision issued by the Honorable James D. Porterfield on January 15, 1999 at Docket No. A-00112630, there was no preemption analysis either. ALJ Porterfield declared at the outset that "[c]learly, the Commission has asserted jurisdiction over the involved matters, and such jurisdiction has not been preempted by federal law or regulation." 1999 R.D., slip op. at 26. The actual question considered by the ALJ was, "[d]oes the proposed shove light system (if installed for the departure tracks only) compared to the current system of performing shove movements into the departure yards, increase the safety

of Conrail's personnel or increase safety to the general public?" 1999 R.D., slip op. at 36. In its Opinion and Order vacating the Recommended Decision, remanding the matter to the ALJ, and reopening the record, the Commission rejected Conrail's contention that the Commission is without jurisdiction, citing Conrail's failure to provide any authority for the contention, as well as Conrail's initiation of the Commission proceedings itself through its Application. Opinion and Order entered June 29, 1999, slip op. at 4. The Commission remanded the matter to the ALJ to apply the *Duick* standard. 1999 Opinion and Order, slip op. at 8.

To this point there had been no mention of federal preemption in connection with Conway Yard shoving operations.

The first discussion of federal preemption under 49 U.S.C. § 20106 in connection with Conway Yard shove movements, and whether there was an "essentially local safety hazard," occurred on remand in 2000 and was limited to the arguments of the parties. *See* Conrail Main Br. on Remand at 22-23; Union Reply Br. on Remand at 3, 11. The Union's principal argument was that Conrail had waived the preemption issue because it had only raised it for the first time in its main brief on remand. *See* Union Reply Br. on Remand at 3, 9. For this reason, in his Recommended Decision on Remand, the ALJ expressly declined to adjudicate the preemption arguments:

> Now, on brief and for the first time in this proceeding, Conrail argues the jurisdictional issue using two federal statutes [the Locomotive Boiler Inspection Act (LBIA), 49 U.S.C. § 20701, *et seq.* and the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101, *et seq.*]. The Commission expressly denied Conrail's exception regarding the Commission's jurisdiction. By the Commission's 1999 Order, the record was opened only for the purpose of considering the incidents occurring on February 5 and 6, 1999; therefore, a recommendation to the Commission on the jurisdictional issue will not be offered in this Recommended Decision on Remand. The arguments offered by Conrail are hereafter only briefly summarized and citations are omitted.

R.D. on Remand, slip op. at 13 (citations and footnote omitted). Instead, the ALJ, pursuant to the Commission's directions, applied the *Duick* standard, and concluded that "Conrail has not offered any new or novel arguments or pointed out any considerations that were not overlooked or not addressed by the Commission in the complaint proceeding that resulted in the 1973 Order." R.D. on Remand, slip op. at 20. The Commission denied Conrail's Exception to the ALJ's conclusion that the Commission had jurisdiction. In its Opinion and Order entered March 12, 2001, the Commission merely quoted the discussion of jurisdiction from its 1999 Opinion and Order — which was entered before Conrail had ever raised the question of federal preemption — and further noted that the record had been reopened "for the limited purpose of addressing the February 5, and 6, 1999 incidents." 2001 Opinion and Order, slip op. at 5-6.

On appeal, the Commonwealth Court, in an unreported opinion at Docket No. 852 C.D. 2001, declined to consider federal preemption under the FRSA, and limited its analysis to federal preemption under the LBIA which involves a starkly different analysis. Accordingly, examination of the record reveals that at no time has the Commission, an ALJ, or the Commonwealth Court considered whether, for federal preemption purposes, there exists "an essentially local safety or security hazard" under 49 U.S.C. § 20106 at Conway Yard.

3. Conway Yard is an Ordinary Classification Yard and Presents No Essentially Local Safety Hazards.

The proper analysis of whether a hazard presents an "essentially local safety hazard" focuses on the essentially local **nature** of the hazard – not on the severity or frequency of the hazard. An essentially local safety hazard is one that is "not capable of being encompassed in uniform national standards." *Williams*, 406 F.3d at 672 (quoting *Norfolk & Western Ry. Co. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 571 (6th Cir. 1991));

Coleman, 542 F.2d at 14-15.[9] *See also State of Montana*, 805 F. Supp. at 1528 (holding that state regulation applicable only to "mountain grade" territory did not fall within the exception because "[c]ertainly, 'mountain grades' are not unique [because] [t]hey occur in many places of Montana and throughout the nation and are not peculiar to a particular locality"). For purposes of deciding whether a hazard is an essentially local safety hazard, it is irrelevant that the FRA has not actually issued a regulation covering the hazard at issue, so long as the hazard is **capable** of being adequately addressed by national standards. *See Williams*, 406 F.3d at 672.

Certainly, no two rail yards will ever be completely identical in all respects and are necessarily, in that limited sense, "unique." Natural variations in yard geography and operations, however, are insufficient to establish hazards that are "essentially local." *See Easterwood*, 507 U.S. at 675 (finding that preemption applied to a state law that was "concerned with local hazards only in the sense that its application turns on the facts of each case"). *See also Deatherage*, 1997 WL 33384269 at * 3 (finding that opponent of preemption failed to produce evidence that limited sight distance at grade crossing was "in any way a purely local hazard").

During the Hearing, the Union presented scattershot subjectively alleged hazards at Conway Yard. First and foremost, Norfolk Southern vigorously denies that Conway Yard – recognized as one of the safest rail yards on the undisputed safest Class I rail carrier in the county – in any way resembles the disorganized and even dangerous operation described by some of the Union's witnesses at the hearing. Ultimately, however, any disputes of fact concerning the **existence** of particular hazards at Conway Yard are legally irrelevant, since the

[9] To satisfy the definition of an essentially local safety hazard, a hazard also must not be statewide in character. *See, e.g., Coleman*, 542 F.2d at 14.

Union utterly failed to carry its burden of proving the **essentially local nature** of any of the alleged hazards.[10]

[10] Although the question of federal preemption pursuant to 49 U.S.C. § 20106 is governed by federal law and typically decided in the federal court system, Norfolk Southern addresses the Pennsylvania Commonwealth Court's ruling in *Monongahela Connecting R.R. Co. v. Pa. P.U.C.*, 404 A.2d 1376 (1979) at the request of the ALJ. (Tr. at 532). That case involved a Commission order requiring the rail carrier to install an occupational block signal in response to a particular head-on collision by two trains. *Id.* at 1377. With respect to the issue of coverage under 45 U.S.C. § 434, the predecessor statute to § 20106, the Court noted that there was no preemption because the applicable federal regulations "make no specific reference to block signals or to their use on blind curves." *Id.* at 1379. As applied to the facts of this case, the Court's reasoning plainly dictates a holding that the 1973 Order is preempted by § 218.99, since the federal regulation at issue here does make specific reference to shove lights and to their use on the departure tracks of rail classification yards.

The Court's analysis of the essentially local safety hazard prong of the § 20106 exception consists of one terse paragraph, without a single citation to state or federal case law. *Id.* at 1379-80. The Court found that, because the order addressed a single site, it was necessarily "purely local." *Id.* The Court's extremely dated reasoning in *Monongahela* would permit the states to enforce conflicting rail safety regulations concerning **any** possible hazard, so long as the state regulated one geographic site at a time. At least with respect to its reasoning concerning essentially local safety hazards, the *Monongahela* decision has been superseded by subsequent decisions of the state and federal courts. For example, in *Mastocola v. Southeastern Pennsylvania Transp. Authority*, 941 A.2d 81 (Pa. Commw. 2008), the Court, relying on the United States Supreme Court's teaching in *Easterwood*, as well as other federal case law, conducted an analysis thoroughly updated from the 30-year old analysis of *Monongahela*. At issue in *Mastocola* was whether a temporary commuter rail track, allegedly to have been negligently constructed, constituted an "essentially local safety hazard." *Id.* at 94. After a review of the relevant case law, the Court concluded:

> [T]here is no evidence establishing that the interaction between the temporary tracks and the schist rock under the Melrose Park state is something that is "essentially local." This type of rock **may exist** in many placed throughout the Commonwealth in proximity to homes and railroad tracks. Further, Homeowners have not alleged that this is the **type of hazard** that the Secretary **could not have taken into account** when promulgating the regulations under the FRSA. As such, the situation fails to fulfill the criteria required to show an essentially local hazard.

Id. at 94 (emphasis added). The Court did not focus exclusively on the fact that the alleged hazard existed at only one temporary track in the Commonwealth. Instead, the Court properly analyzed the **nature** of the hazard and, because the hazard **could** exist at other sites and **could** be addressed through federal regulation, concluded that the hazard was not of an essentially local

Based on the testimony of the Union's witnesses and the questioning and argument of the Union's counsel during the Hearing, Norfolk Southern anticipates that the Union will argue that one or more of the following alleged hazards at Conway Yard constitutes an "essentially local safety hazard" and addresses each below.

i. Conway Yard is not unique in its size or scope.

By any measure, Conway Yard falls within the average range of rail classification yards on the Norfolk Southern system. Conway currently has approximately fifty-three (53) classification tracks, allowing it in theory to construct a maximum of fifty-three outbound trains at one time, making it smaller than Elkhart Yard, which has seventy-two (72) classification tracks and larger than Buckeye Yard, which has approximately forty-two (42) or forty-six (46) classification tracks. (Tr. at 173-75). System-wide, Norfolk Southern's classification yards have between thirty (30) and seventy-two (72) classification tracks. (Tr. at 67).

The length of trains built at a classification yard depends on the length of the departure tracks. (Tr. at 152). Conway Yard's **longest** departure track is 7,500 feet long and witnesses testified consistently that the longest trains built at Conway Yard are approximately one and one-half miles long. (Tr. at 111, 153, 194). Of eleven Norfolk Southern classification yards currently operating with shove lights, eight yards (Bellevue, Birmingham, Chattanooga, Columbus, Knoxville, Linwood, Macon, and Sheffield) contain departure tracks longer than 7,500 feet and five yards (Bellevue, Columbus, Linwood, Macon, and Sheffield) have departure yards longer than 7,500 feet **on average**. (Tr. at 152-54; NS Ex. C).

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nature. In light of more recent proclamations by the state and federal courts, the Commonwealth Court's dated, and largely unsupported, analysis in *Monongahela* is of limited precedential value today.

The Union also has suggested that Conway is an unusually busy yard with heavy congestion, attributed at least in part to the 2003 closure of the original second hump at Conway Yard. (Tr. at 113, 136, 226, 300).[11] In fact, numerous factors have resulted in drops in traffic at Conway Yard in recent years, including the relocation of traffic to other classification yards in proximity to Conway Yard. (Tr. at 136). The 1973 Order characterized Conway Yard as "the key" to Norfolk Southern's predecessor's transportation system. (1973 Order at 2). Today, however, Conway Yard falls squarely within the average range of Norfolk Southern classification yards in terms of rail cars handled. (NS Ex. H). In 2009, Conway Yard handled fewer cars than Norfolk Southern's classification yards in Bellevue, Birmingham, Chattanooga, Elkhart, and Macon, ranking sixth among the thirteen classification yards for which data was submitted at the hearing. (NS Ex. H). All of the classification yards with greater volume than Conway Yard operate with a single hump. (Tr. at 464).

There is no evidence that Conway Yard is unique in terms of its size and scope. To the contrary, the unrefuted evidence adduced at the hearing proves that Conway Yard falls squarely within the average range for rail yards of its type across the country. To the extent that the size and scope of a rail yard could constitute a hazard, the Union has failed to prove how such a hazard is "essentially local" or not capable of being addressed through national standards.

ii. The close proximity of Conway Yard to residential communities on the other side of Ohio River Boulevard does not present any hazards unique to Conway Yard.

During the Hearing, the Union suggested that Conway Yard is in close proximity to residential communities that could be threatened if some parade of horribles were to occur at

[11] The parties have stipulated that Enola Yard also was originally designed as a two-hump yard and currently operates as a single hump yard. (Tr. at 530-31; *see also* Tr. at 114). The mere closure of the second hump, as distinguished from its alleged effects, is not unique to Conway Yard.

Conway Yard. (Tr. at 112, 215-18). First, the record is completely devoid of any evidence that members of the community have been injured or have suffered any harm whatsoever as a result of Conway Yard's nearby operations throughout the significant history of its operations and the Union's fear mongering is based purely on nothing more than wild speculation.

The record does contain, however, considerable evidence that the proximity between Conway Yard and its neighboring community is actually quite common in the industry. Both the Enola and Elkhart classification yards are in close proximity to residential developments and, at a Norfolk Southern terminal in Atlanta, houses abut right next to the railroad tracks. (Tr. at 145, 148, 444). Buckeye Yard in Columbus, Ohio is not only close to residential neighborhoods, but those neighborhoods are in the direction of the shove movements on the Buckeye departure tracks (presumably the site of greatest risk if a train were to shove out beyond the designated stopping point). (Tr. at 160).

Moreover, the residential community near Conway Yard is separated from the yard by Ohio River Boulevard, a four-lane road plus turning lanes, with no homes or businesses on the same side of Ohio River Boulevard as Conway Yard. (Tr. at 246, 258). By way of contrast, Norfolk Southern's classification yard in Allentown, Pennsylvania is located in a "suburb," with a new residential complex recently built "just on the other side of the [two-lane] street" from yard trackage. (Tr. at 418, 420).

Assuming, strictly *arguendo*, that proximity to residential developments creates a safety hazard, such a hazard would not be "essentially local" to Conway Yard and would be capable of being addressed through regulation at the federal level.

iii. The close proximity of Conway Yard to the Ohio River does not present any environmental or weather hazards unique to Conway Yard.

During the Hearing, the Union suggested that the Ohio River may present a safety hazard, insofar as the river could become contaminated by hazardous materials handled at Conway Yard or insofar as the river could create fog. (Tr. at 146, 148, 218, 228-29, 314).[12] Regarding environmental contamination, the Union is again resorting to scare tactics, as there is no evidence in the record that activities at Conway Yard have contaminated the Ohio River or are likely to do so.

Again, the record is replete with evidence that Conway Yard's positioning along the Ohio River is not unique. Norfolk Southern yards in Chattanooga, Knoxville, and Macon are located very close to the Tennessee, Holston, and Ocmulgee Rivers, respectively. (Tr. at 162).[13] Allentown Yard directly abuts the Lehigh River. (Tr. at 412, 417). Enola Yard is on the Susquehanna River and fog certainly is not unique to Conway Yard. (Tr. at 326).

Similarly, hazardous materials are handled at numerous NS yards and are in no way particular to Conway. (Tr. at 383). Hazardous materials travel through Allentown (Tr. at 412) and hazardous materials, including hydrocyanide acid, described as "probably the worst thing in the railroad industry," are handled at Linwood. (Tr. at 473).

The Union presented no evidence that hazardous materials, or the purely speculative risk that they pose to nearby waterways, are unique to Conway Yard. Likewise,

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[12] To the extent that the Union suggests that hazardous materials at Conway Yard pose a threat to neighboring communities as well as the Ohio River, Norfolk Southern incorporates herein the preceding section describing how the close proximity of rail yards and residential communities is far from unique to Conway Yard.

[13] Norfolk Southern suggests that the Commission properly may take judicial notice of the fact that riverside locations, where industries historically have flourished and where land grades are relatively flat, are economically ideal locations for high-volume rail classification yards.

while the record contains passing references to the occasional existence of fog at Conway Yard, the Union put forward no evidence which could infer that fog creates a hazard and, in any event, the Union concedes that fog is not unique to Conway Yard. To the extent that nearby waterways, or related concerns about fog or hazardous materials, present any hazard at all, they are not hazards "essentially local" to Conway Yard that are incapable of being addressed through federal regulation.

iv. The core duties of the remaining yardmasters at Conway Yard have not changed over time and the workload of the yardmasters is not an essentially local safety hazard.

During the Hearing, the Union suggested that the yardmasters at Conway Yard, who are represented by the Union, are overworked. (Tr. at 368-69). However, while the number of yardmasters has undeniably decreased since Norfolk Southern closed the second hump at Conway Yard in 2003, the core duties of the remaining yardmasters have not substantially changed. After the closure of the second hump, there continues to be one yardmaster assigned to the one remaining hump and one yardmaster assigned to the one remaining departure track. (Tr. at 388). The yardmasters continue to be supervised by an employee – the trainmaster – positioned in a tower. (Tr. at 369-70).

Yardmasters also currently have the use of one, and often two, computers to keep track of cars that are on the tracks under the yardmasters' control. (Tr. at 383-84). Critically, the FRA actually has analyzed the ability of yardmasters to monitor the status of the departure tracks where shove lights would be installed, including detailed "turn over" reports when one yardmaster takes over for another and computer tools that permit yardmasters to track movements of each car through the yard complex. *See* 73 Fed. Reg. at 33891. Most fatal to the Union's possible theory that overworked yardmasters might create a hazard, however, is the fact

that the Union's witness could provide no information whatsoever to suggest that duties assigned to yardmasters at Conway Yard are unique:

> Q. ... Do you know whether yardmasters at other major classification yards on the NS system have responsibilities similar to yours?
>
> A. I don't know.
>
> Q. So, you can't tell us whether Conway is unique in that regard or, conversely, similar to the other yards in the NS system?
>
> A. I'm not qualified on any other yard, so I don't know.

(Tr. at 389). The FRA is clearly capable of restricting the responsibilities of employees where it deems additional duties to potentially constitute an unsafe distraction. *See, e.g.*, 49 C.F.R. § 218.99(b)(2) (directing that "[d]uring the shoving or pushing movement, the employee directing the movement shall not engage in any task unrelated to the oversight of the shoving or pushing movement"). Assuming, strictly *arguendo*, that yardmasters at Conway Yard are overworked and that somehow might create a hazard, the nature of that hazard simply is not "essentially local" to Conway Yard.

v. "Rusty rail" is not a legitimate hazard at Conway Yard or any other high-volume classification yard.

During the Hearing, the Union suggested that "rusty rail" might compromise the integrity of a shove light system. (Tr. at 139). Rusty rail is caused by disuse and therefore is not generally a problem on highly-trafficked tracks such as are found at classification yards, like Conway Yard. (Tr. at 163). Inspectors check for rusty rail during the quarterly and annual inspections pursuant to Norfolk Southern's system-wide protocol for inspecting and maintaining shove light systems. (Tr. at 93; NS Ex. B). In any event, there is nothing particular to Conway Yard that would make the risk of the occurrence of rusty rail greater than at any other

classification yard and rusty rail therefore cannot be an essentially local safety hazard. (Tr. at 163).

vi. The curvature of the departure tracks at Conway Yard are not an essentially local safety hazard.

During the Hearing, the Union suggested that the curvature of the departure tracks at Conway Yard could present a hazard by restricting sight lines. (Tr. at 117, 119). Specifically, the Union's witness identified two (2) "bends" on the departure tracks at Conway Yard. (Tr. at 195-96). Again, the Union failed to present any evidence as to how a curved departure track creates a hazard that is essentially local to Conway Yard, or indeed any hazard at all as the record contains no evidence of accidents or injuries related to the curvature of the departure track. Instead, the record demonstrates, without contradiction, that the departure tracks at Linwood, North Carolina also are curved (Tr. at 466) and that Buckeye Yard in Columbus Ohio has three (3), instead of two, curves in its departure track. (Tr. at 160-61, NS Ex. D). Absent any evidence that this design feature is peculiar to Conway Yard, the curvature of the departure track cannot be an essentially local safety hazard.

vii. The contradictory testimony of the Union's witnesses concerning shop cars being regularly left on the departure track without the knowledge of the yardmaster is not credible, but in any event would not be unique to Conway Yard.

During the Hearing, the Union's witness Adam Kaufman testified that rail cars are left on the departure track without the knowledge of the responsible yardmaster twice per week. (Tr. at 199). On cross-examination, Mr. Kaufman admitted that the cars he was referring to were "shop" cars in need of mechanical repair that the responsible yardmaster directed onto the departure track. (Tr. at 230). Mr. Kaufman alleged that shop cars may be left at any point along the departure track, but upon further questioning was able to explain only how shop cars might end up at the east end of the departure track where, after completing the shove movement the

road crew would leave a shop car before pulling out onto the main line. (Tr. at 233-34). Upon further cross-examination, Mr. Kaufman acknowledged that, when shop cars are left on the departure tracks, they are usually within the knowledge of the yardmaster and Mr. Kaufman could not identify with specificity any instances in which a car was left on the departure track without the knowledge of a yardmaster other than his belief that it happened "within the last probably three weeks, I would imagine." (Tr. at 255-57). Robert Kroskey testified that he last had to stop a shove movement due to cars on the tracks "within the last four months, maybe." (Tr. at 332). The inconsistent and equivocal testimony of the Union's witnesses is not credible.

In stark contrast, Darnell Wood, the Superintendent of Conway Yard, simply does not believe the allegations of the Union's witnesses that cars are regularly left on the departure tracks without the knowledge of the yardmaster. (Tr. at 427). He was "shocked" and "disgusted" by allegations, which were **never** reported to Mr. Wood by Mr. Kaufman or anyone else. (Tr. at 425, 426, 525). Mr. Kaufman is President of the local affiliate of the Union and it is unfathomable that he would not speak up and report such a hazard prior to the hearing.[14] Additionally, the FRA conducts frequent inspections at Conway Yard and Conway Yard has never been cited for having a car on a departure track without the knowledge of the yardmaster. (Tr. at 469-70). Based on the total evidence presented at the hearing, the suggestion that rail cars are left on the departure tracks without the knowledge of the yardmaster at Conway Yard – one of the safest rail yards on the safest rail carrier in the county – simply cannot be believed.

[14] Mr. Wood testified that Norfolk Southern rules require employees to promptly report unsafe conditions at Conway Yard. To the extent that Norfolk Southern's contemporaneously-filed Motion for the Admission of Documents Referenced in Testimony is granted, *see also* Operating Rulebook, Rule 99(b) (requiring a prompt report of any known condition that may interfere with safe passage); General Notice, Rule F (requiring a prompt report of any unusual condition that may affect the safe and efficient operation of the railroad).

However, regardless of how this direct question of credibility is resolved, the Union has failed to prove that the **nature** of this alleged hazard is "essentially local." Absolutely fatal to the Union's allegation is the testimony of its own witness, yardmaster Gregory Murphy, that there are no factors at Conway Yard that make it more likely for cars to be left inadvertently on the departure tracks without the knowledge of the yardmaster than at any other rail classification yard:

> Q. Are you aware of any factors at Conway that make the trainman running the departure tracks more likely to leave a car on the track and not tell you about it than their brothers working at another classification yard on the NS system?
>
> A. No.

(Tr. at 396). Union witness Charles Wehr, a yard foreman at Allentown Yard (Tr. at 405), further acknowledged that cars may be left on the track at Allentown Yard (Tr. at 414) and that this happens, without the yardmaster's knowledge, once or twice per month at Allentown Yard (Tr. at 419). Shove lights have been used at Allentown Yard since 2008 and Mr. Wehr was not aware of any derailments involving shove movements, or indeed **any** incidents of rail cars running into each other within the last two years. (Tr. at 414, 420).

The Union makes the unsubstantiated allegation that shop cars are left on the departure tracks without the knowledge of the yardmaster. That such a hazard would continue and not be reported to management is incredible. Nevertheless, the Union has failed to prove that this alleged hazard is essentially local. The Union's own witnesses testified that this hazard is just as likely to occur at any other rail classification yard and that, at least at Allentown Yard, this hazard has occurred but, with shove lights in place to help monitor the track, has not resulted

in any accidents.[15] Because this alleged hazard is not essentially local, it is irrelevant, as a matter of law, to the 49 U.S.C. § 20106 preemption issue currently pending before the Commission.

viii. The FRA already has determined that the relatively few switches in the departure tracks of classification yards "promote a safe operation" conducive to the use of shove lights.

During the Hearing, the Union suggested that switches in the departure yard may create a hazard if not properly aligned. (Tr. at 199-200). Today, all switches at the departure yard, including the Freedom Interlock switches, are "lined," or visually inspected from the ground to ensure that they are properly aligned, immediately prior to commencing a shove move. (Tr. at 245, 329). Installation of shove lights will not impact the current practice of "lining the track." (Tr. at 78, 470-71). In other words, even after installation of the shove lights, a trainman will walk the departure track as necessary to inspect all of the switches that the shove movement may traverse. Switches are located predominantly at the western portion of the departure yard, where the shove movement commences (Union Ex. A) and the shove lights would be physically placed at that western portion of the departure track, after the switches. (Tr. at 78). The trainman monitoring the shove movement will be able to visually watch as the lead end of the shove travels back to the shove light, through the switches. (Tr. at 78). With respect to switches, there simply is no hazard associated with removing the trainman from riding the lead end of the shove movement to watch the switches because, in the shove light system contemplated at Conway Yard, the switches each will have been visually inspected from the ground – not from a moving train – immediately prior to the shove movement commencing.

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[15] *Accord* Tr. at 396 (Q: As the yardmaster responsible for that track, would you find it helpful to have an electronic system monitoring at least a portion of that track to let you know if a car may have been inadvertently left on the track? A: Yes").

To the extent that switches might present any hazard at all, it is a hazard that is not only **capable** of being addressed by uniform federal standards, but actually has been addressed by the FRA in adopting § 218.99(e)(5). At the time it adopted § 218.99(e)(5), the FRA noted:

> FRA's observations revealed that shove light systems can maintain an acceptable degree of safety. Our review suggests that, in addition to the establishment of non-visual procedures, **several factors collectively promote a safe operation**. ... Compared to other yard operations, there is typically less danger on departure tracks with shove light systems in that **fewer switches are operated in the departure yard** and there are no free rolling cars.

73 Fed. Reg. at 33891 (emphasis added). The FRA expressly recognized that there will be switches in the departure yard over which shove movements traverse. Like the yards studied by the FRA, there are relatively few switches in the departure yard at Conway Yard (Union Exhibit A) and the FRA cited this condition as "promot[ing] a safe operation." In suggesting that switches might constitute a hazard, the Union is asking the Commission to exceed its role and second guess the FRA on a subject already specifically addressed by the FRA. The limited switches in the departure yard are not a hazard and certainly not a hazard that is "essentially local" to Conway Yard.

ix. Car inspectors working in the departure yard are not an essentially local safety hazard.

During the Hearing, the Union suggested that car inspectors working in the departure yard may be at risk if a trainman is not riding the lead end of a shoving movement. (Tr. at 202, 228). The Union's argument ignores the multiple, redundant protections already in place to protect car inspectors. First, car inspectors are trained not to "foul" a track other than the track on which they are working and are required to treat all tracks as "live," with a responsibility to watch out for themselves. (Tr. at 249, 466-67). Second, before going to work on a departure

track, car inspectors are required to get authorization from the yardmaster. (Tr. at 468). Third, car inspectors will physically lock the switches on **both ends** of a track before beginning to work on that track. (Tr. at 385, 468). Other employees at Conway Yard do not even have keys to the locks installed by the car inspectors on the switches. (Tr. at 469). At the time of the hearing, car inspectors at Conway Yard had gone for 790 consecutive days without a single injury. (Tr. at 467). The suggestion that car inspectors would be at risk of serious injury if the trainman is removed from the lead end of the shove movement is simply another scare tactic.[16]

In any event, the Union offered no evidence that car inspectors pose an "essentially local" threat at Conway Yard. Car inspectors are required to work the departure tracks of every classification yard, nationwide. *See* 49 C.F.R. § 215.13(a) (requiring each car to be inspected before it departs over the road). To the extent that car inspectors do pose a hazard, the nature of the hazard is no different from that posed at other classification yards, such as Allentown Yard. (Tr. at 419). Accordingly, the presence of car inspectors on the departure tracks at Conway Yard cannot constitute an essentially local safety hazard.

x. Snow is not unique to Conway Yard.

During the Hearing, the Union suggested that snow could create a hazard if shove lights were in operation, either by obscuring the shove lights until they could be cleared of snow or by creating a potential tripping hazard. (Tr. at 130, 407). The Union's argument ignores the

[16] To the extent that Norfolk Southern's contemporaneously-filed Motion for the Admission of Documents Referenced in Testimony is granted, *see also* Operating Rulebook, GR-32(b)(6) (requiring all employees to maintain a vigilant lookout for and detect the approach of a train, locomotive or other railroad equipment moving in either direction before fouling a track); Safety and General Conduct Rulebook, Rule 1051 (requiring employees working adjacent to a track upon which movements are being made to maintain a vigilant lookout for approaching movements); Safety and General Conduct Rulebook, Rule 1300, *et seq.* (detailing extensive procedures in place to protect car inspectors from injury).

fact that the shove light design planned for Conway Yard would be of "a height that would accommodate snow on the ground." (Tr. at 130-31).

More importantly, snow is not local to Conway Yard. Norfolk Southern yards in Allentown, Enola, Linwood, and Chattanooga all have experienced snow very recently (Tr. at 162) and yards in Bellevue and Elkhart are in areas prone to snowfall. (Tr. at 131). Obviously, other areas of the county, such as the Mountain West, the Upper Midwest, Upstate New York, and New England, typically receive more snowfall than Pennsylvania. The Union's own witness described recent snow at Conway Yard as "the same weather you'd get anywhere." (Tr. at 314).

Because any hazards associated with snow plainly are not unique to Conway Yard, they cannot constitute essentially local safety hazards.

4. A General Finding of Unsafe Operations at Conway Yard Is Insufficient to Constitute an Essentially Local Safety Hazard.[17]

The preemption analysis, including the possibility of an essentially local safety hazard, does not depend on whether Conway Yard is, in some general sense, unsafe today or possibly could be made safer through more restrictive state regulation. The United States Supreme Court addressed this question in *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658 (1993). At issue in *Easterwood* was whether a state common law cause of action for excessive speed could survive in light of a federal regulation prescribing maximum train speeds for various classes of track. *See Easterwood*, 507 U.S. at 673. With respect to the issue of essentially local safety hazards, the Supreme Court explicitly distinguished between "a general rule to address all hazards caused by lack of due care" and those "owing to unique local conditions." *Id.* at 675. Imposing liability on a rail carrier on the basis of the former would be "[a]t the least...

[17] The record does not support a finding that operations at Conway Yard are unsafe. Norfolk Southern offers this argument, in the alternative, solely in deference to the request of the ALJ. (Tr. 532-33).

'incompatible with' FRSA..." *Id.* In other words, mere "hazards caused by lack of due care" are insufficient, as a matter of law, to defeat federal preemption. Other courts interpreting § 20106 have adopted the same analysis.

> [T]he train's engineer has testified that the grade crossing in question was a **dangerous crossing** at which he had experience **numerous close calls** as well as **some accidents**, and that the speed the railroad required him to operate was in **excess of a safe rate of speed**. Said testimony does nothing to avoid federal preemption. ... [W]hether or not the railroad **should** have imposed a more restrictive speed limit upon its trains is **irrelevant to the issue of preemption**.

Deatherage, 1997 WL 33384269, * 3 (emphasis added).

In *Wright v. Illinois Central R.R. Co.*, 868 F. Supp. 183, 187 (S.D. Miss. 1994), the party opposing preemption argued that a grade crossing was "extrahazardous" because of "vegetation, grade and angle of the crossing, and inadequate warnings." Likewise, in *Bowman v. Norfolk Southern Ry. Co.*, 832 F. Supp. 1014, 1017 (D.S.C. 1993), the party opposing preemption claimed a grade crossing was "ultrahazardous" because "(1) the crossing is used by trucks transporting hazardous materials to and from the two chemical plants adjacent to the tracks; (2) the location of the crossing in an industrial area created heavy automobile traffic when plant workers change shifts; and (3) the defendant railroad had notice of a previous accident that occurred at the same crossing [recently]." Both courts found that the "extrahazardous" and "ultrahazardous" grade crossings were not essentially local safety hazards, since permitting a litany of such non-local hazards to defeat preemption "would swallow" the FRSA's "clear intent to preempt state law." *See Wright*, 868 F. Supp. at 187; *Bowman*, 832 F. Supp. at 1018.

In *City of Orr*, 529 F.3d at 797-98, the Court conducted a similar analysis. The lower court had found that a combination of five factors – (i) the track's proximity to a lake which could cause contamination in the event of spillage, (ii) swampy soil upon which the track

is built, (iii) the location of propane tanks close to the tracks creating a risk of explosion, (iv) churches and businesses dangerously located between 67 and 278 feet from tracks, and (v) extreme seasonal temperature changes in northern Minnesota – together could constitute an essentially local safety hazard. *Id.* at 797. The Court observed that none of the alleged hazards alone could constitute an essentially local safety hazard since "many towns have propane tanks and buildings close to railroad tracks," "thousands of miles of track runs through cold climates," and "more than 10,000 miles of track are adjacent to waterways in North America and it is fair to assume that a significant amount of that track closest to the water runs on swampy soil." *Id.* at 798 (internal citations omitted). Overturning the lower court, the Court "conclude[d] that because **each particular condition** cited by the district court is **capable** of being covered by the national track safety standards, **the combination of these conditions is also**." *Id.* at 799 (emphasis added).

A history of near-misses or even serious accidents may be evidence of an existing hazard, but says nothing about the nature of the hazard itself. Thus, the issue here is not whether Conway Yard is dangerous (or even "ultrahazardous"), but whether those hazards that have been put forth by the Union are "essentially local," or incapable of being regulated at the national level. As explained above, none of the hazards identified by the Union constitute essentially local safety hazards and, as the case law clearly teaches, the Commission may not find the existence of an "essentially local safety hazard" through cobbling together a series of alleged non-local hazards, including "hazards caused by lack of due care."

D. The Union is Unable to Satisfy Its Burden of Proving that the 1973 Order Does Not Unreasonably Burden Interstate Commerce

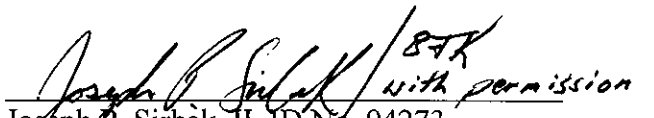
The potential for exposing a rail carrier to differing obligations and potential liabilities in all fifty states is itself an unreasonable burden on interstate commerce. *See Union*

Pacific R.R. Co. v. Louisiana, 32 F. Supp. 2d 377, 383 (M.D. La. 1999). In the Commonwealth of Pennsylvania alone there are three major Norfolk Southern classification yards, upon each of which the Commission could seek to impose differing rules to govern shoving operations. Through § 20106, Congress expresses its strong preference for national uniformity of rail safety regulation. If the Commission were permitted to separately regulate each of the three Pennsylvania classification yards, and sister PUCs likewise attempted to regulate Norfolk Southern's classification yards in other states, it would place an unreasonable burden on NS' ability to operate successfully and efficiently its interstate rail system. Because the Union fails to carry its burden of proving that the 1973 Order does not unreasonably burden interstate commerce, it must be stricken as preempted by § 218.99(e)(5). *See Michigan Southern R.R. Co. v. City of Kendallville*, 251 F.3d 1152, 1155 (7th Cir. 2001) (finding municipal weed control ordinance preempted by narrower federal regulation on the ground that the municipal ordinance posed an unreasonable burden on interstate commerce).

VI. CONCLUSION

Norfolk Southern has demonstrated that 49 C.F.R. § 218.99 and the 1973 Order cover the same subject matter – point protection during shove moves – and the 1973 Order therefore is presumptively preempted. The Union has failed to satisfy its burden of proving any one of the three elements necessary to fit within the narrow statutory exception to federal preemption. Because 49 C.F.R. § 218.99 and the 1973 Order are facially incompatible, the Commission need not even reach the issue of essentially local safety hazards. However, if any of the speculative hazards were found to actually exist at Conway Yard, none are of a nature that is "essentially local" to Conway Yard. For the reasons explained herein, Norfolk Southern respectfully requests that the 1973 Order be rescinded as preempted by 49 C.F.R. § 20106.

BUCHANAN INGERSOLL & ROONEY PC



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Dated: February 26, 2010

APPENDIX A

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania State Legislative Board United Transportation Union	:	
v.	:	Docket No. C-00019522
Norfolk Southern Railway Company	:	

NORFOLK SOUTHERN RAILWAY COMPANY'S
PROPOSED FINDINGS OF FACT

1. Conway Yard is one of fourteen classification, or hump, yards on the Norfolk Southern system. (Tr. at 67).

2. At classification yards, arriving trains are received at the receiving yard, pushed over a "hump," at which point they are separated into "cuts" of one to four cars, and then roll down the descending side of the hump, with a computer control system routing them to the proper classification track at a safe speed. (Tr. at 67-68).

3. An engine will attach to the coupled "draft" of cars in a classification track, pull them out of the classification track, and then proceed to push, or "shove", those cars into the departure yard. (Tr. at 68-69).

4. At the departure yard, engines are coupled to the trains, air brake tests are made, the outbound crew is provided, and the train departs for its next terminal. (Tr. at 71).

5. Norfolk Southern is the undisputed safest Class I railroad in the country, having won the Harriman Award, awarded to the safest railroad in the industry, for the last twenty (20) years in a row and, in recent years, Conway Yard has been among the safest yards in the Norfolk Southern system. (Tr. at 429).

6. Conway Yard has gone hundreds of days without any reportable injuries in all of its major employee classifications and is one of the better maintained facilities on the entire Norfolk Southern system, having recently installed seamless ribbon rail and replaced the cross-ties to ensure the smooth movement of trains over the tracks. (Tr. at 428-29, 474).

7. To further enhance safety at Conway Yard Norfolk Southern seeks to eliminate the current practice of having a trainman ride the leading end of a shove movement. (Tr. at 450-51).

8. Currently, trainmen ride the leading end of the shove movement while hanging on the side of the leading rail car, approximately five feet off of the ground. (Tr. at 234).

9. Simply mounting and dismounting the equipment can cause injuries and in fact were responsible for 10.9% of all Norfolk Southern transportation department reportable injuries in 2009. (Tr. at 286-87, NS Ex. E).

10. An additional 24% of all Norfolk Southern transportation department injuries in 2009 occurred while employees were on or about equipment. (NS Ex. E).

11. While riding a shove movement, the trainman is required to remove a hand from the ladder rung to operate a radio. (Tr. at 237-38).

12. The metal ladders that trainman are required to ride may get slippery and the trainman is at risk of being jolted by the natural train actions and slack actions of moving rail cars. (Tr. at 239, 259, 308).

13. When there are rail cars sitting on an adjacent track, the trainman riding the lead end of the shove movement normally comes within three (3) feet of rail cars sitting on an adjacent track but it is not always possible to maintain a distance of 3 feet from the cars on an adjacent track. (Tr. at 238, 438).

14. On January 29, 2010, a trainman riding the lead end of a shove movement had an accident in which he was struck by a 51-inch by 14-inch by 2-inch piece of scrap metal protruding from a railcar on an adjacent track. (Tr. at 445-50; NS Ex. G).

15. Norfolk Southern seeks to replace its current practice with a system of "shove lights," which are used in the departure yard to permit train crews to know when they have reached the end of the track. (Tr. at 73, 450-51).

16. At Conway Yard, Norfolk Southern intends to "circuit" the final 800 feet of the departure tracks, which is the Norfolk Southern standard length for the circuited stretch of track and significantly longer than the industry average. (Tr. at 76, 87; 73 Fed. Reg. 33897, 33891).

17. The shove lights for each departure track would be located near the entrance to the departure tracks. (Tr. at 76-77).

18. Before any shove movement is commenced, the trainman will physically inspect all of the switches to assure that they are properly lined and it is safe to proceed. (Tr. at 78).

19. Additionally, each shove movement is under the exclusive control of the yardmaster, who knows that there are no other cars in the departure track to be shoved into. (Tr. at 84, 377).

20. The trainman will monitor the shove light as the shove movement commences. (Tr. at 78).

21. When the circuited stretch of track is unoccupied, the shove light is continuously illuminated at a lunar white color. (Tr. at 78-79, 82).

22. When the lead end of the shove movement reaches the circuited section of track, 800 feet from the "clear point," the shove light will begin flashing, indicating that the lead end of

the train has 800 feet in which to come to a stop and the trainman will relay this information to the engineer operating the shove movement by radio. (Tr. at 79).

23. Once the lead end reaches the second circuit located 400 feet from the clear point, the shove light will extinguish and the trainman monitoring the shove light will instruct the engineer, by radio, to bring the train to a safe stop. (Tr. at 80).

24. Pursuant to its existing protocols, once every 90 days, Norfolk Southern will perform an inspection of the shove light system to ensure that it is functioning properly and in good mechanical condition and, every 360 days, will perform a separate ".06 ohm shunt" test designed to replicate a "worst case scenario." (Tr. at 93-94; NS Ex. B).

25. Shove lights currently are in use on 11 of the 14 NS classification yards and in many cases have been in operation for forty (40) years or more, with no shove-related accidents or injuries appearing in the record. (Tr. at 74, 169, 420, 424, 444, 465-66, NS Ex. C).

26. Shove lights enjoy an obvious safety advantage over the existing practice of having a trainman physically ride the leading end of a shove movement, often through close clearances. (NS Ex. A, NS Ex. F).

27. The shove light system installed at Conway Yard will comply with the applicable federal shove light regulation, 49 C.F.R. § 218.99(e)(5). (Tr. at 77-80, 82, 84, 86-88, 99, 104, 478).

28. System-wide, Norfolk Southern's classification yards have between thirty (30) and seventy-two (72) classification tracks and Conway Yard, which has fifty-three (53) classification tracks falls squarely within the average on the Norfolk Southern system. (Tr. at 67, 173-75).

29. Of eleven Norfolk Southern classification yards currently operating with shove lights, eight yards (Bellevue, Birmingham, Chattanooga, Columbus, Knoxville, Linwood, Macon, and Sheffield) contain departure tracks longer than 7,500 feet and therefore are able to build trains longer than the longest trains built at Conway Yard. (Tr. at 111, 152-54, 194, NS Ex. C).

30. Numerous factors have resulted in drops in traffic at Conway Yard in recent years, including the relocation of traffic to other classification yards in proximity to Conway Yard. (Tr. at 136).

31. Today, Conway Yard falls squarely within the average range of Norfolk Southern classification yards in terms of rail cars handled, handling fewer cars in 2009 than Norfolk Southern's classification yards in Bellevue, Birmingham, Chattanooga, Elkhart, and Macon, each of which operates with a single hump. (Tr. at 464, NS Ex. H).

32. The proximity between Conway Yard and its neighboring community is very common, with yards in Enola, Elkhart, Atlanta, Columbus, and Allentown located as close or closer to neighboring residential communities. (Tr. at 145, 148, 160, 246, 258, 418, 420, 444).

33. Conway Yard's positioning along the Ohio River is similar to numerous other Norfolk Southern classification yard, such as Chattanooga, Knoxville, Macon, Allentown, and Enola. (Tr. at 162, 326, 412, 417).

34. Hazardous materials are handled at numerous NS yards and are in no way particular to Conway. (Tr. at 383, 412, 473).

35. The core duties of the Conway Yard yardmasters have not substantially changed after the closure of the second hump, as there continues to be one yardmaster assigned to the one

remaining hump and one yardmaster assigned to the one remaining departure track, both supervised by an employee – the trainmaster – positioned in a tower. (Tr. at 369-70, 388).

36. Yardmasters currently have the use of one, and oftentimes two, computers to keep track of cars that are on the tracks under the yardmasters' control. (Tr. at 383-84).

37. The job duties of yardmasters at Conway Yard have not been shown to be different than the job duties assigned to yardmasters at other classification yards. (Tr. at 389).

38. Rusty rail generally is not a problem on highly-trafficked tracks such as are found at classification yards, but is checked during quarterly and annual inspections. (Tr. at 93, 163, NS Ex. B).

39. There is nothing particular to Conway Yard that would make the risk of rusty rail greater than at any other classification yard. (Tr. at 163).

40. Two bends on the departure tracks at Conway Yard are not a design feature peculiar to Conway Yard, as other classification yards also have curved departure tracks and Buckeye Yard, for example, has three curves in its departure tracks. (Tr. at 160-61, 195-96, 466, NS Ex. D).

41. Given the inconsistent testimony of the Union's witnesses, the credible testimony of Conway Yard Superintendent Darnell Wood, and the lack of any FRA citations, the allegation that rail cars are regularly left on the departure track without the knowledge of the yardmaster is not credible. (Tr. at 199, 230, 233-34, 255-57, 332, 425-27, 469-70, 525

42. There are no factors at Conway Yard that make it more likely for cars to be left inadvertently on the departure tracks without the knowledge of the yardmaster than at any other rail classification yard. (Tr. at 405, 414, 419).

43. The installation of shove lights will not affect the current practice of "lining the track" in which all switches to be traversed by a shove movement in the departure yard, including the Freedom Interlock switches, are visually inspected from the ground to ensure that they are properly aligned, immediately prior to commencing a shove move. (Tr. at 78, 245, 329, 470-71).

44. Switches are located predominantly at the western portion of the departure yard, where the shove movement commences and the shove lights would be physically placed at that western portion of the departure track, after the switches, so that the trainman monitoring the shove movement will be able to visually watch as the lead end of the shove travels back to the shove light, through the switches. (Tr. at 78, Union Ex. A).

45. Norfolk Southern employs multiple, redundant protections for car inspectors working in the departure track, such as (i) car inspectors being trained not to "foul" a track other than the track on which they are working and to treat all tracks as "live," with a responsibility to watch out for themselves, (ii) the requirement that car inspectors receive authorization from the yardmaster before going to work on a departure track, and (iii) physical locks on the switches on **both ends** of a track before car inspectors begin to work on that track. (Tr. at 249, 385, 466-69).

46. Snow is common at many Norfolk Southern classification yards, such as Allentown, Enola, Linwood, Chattanooga, Bellevue, and Elkhart and the shove light design planned for Conway Yard would be of "a height that would accommodate snow on the ground." (Tr. at 130-31, 162, 314).

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania State Legislative Board United Transportation Union	:	
v.	:	Docket No. C-00019522
Norfolk Southern Railway Company	:	

NORFOLK SOUTHERN RAILWAY COMPANY'S
PROPOSED CONCLUSIONS OF LAW

1. The burden of proof in this case is established by "relevant statute" under consideration, 49 U.S.C. § 20106. *See* 66 Pa. C.S. § 332(a).

2. Pursuant to 49 U.S.C. § 20106, "[i]t is the burden of the party advocating preemption under § 20106(a)(2) to show that a federal law, regulation, or order covers the same subject matter as the state law, regulation, or order it seeks to preempt." *Duluth, Winnipeg & Pacific Ry. Co. v. City of Orr*, 529 F.3d 794, 797 (8th Cir. 2008).

3. Once that showing is made, "the burden shifts to the party resisting preemption to prove that the state law, regulation, or order meets all three requirements of the savings clause in § 20106(a)(2)." *Id.*; *BNSF Ry. Co. v. Swanson*, 533 F.3d 618, 621 (8th Cir. 2008).

4. Norfolk Southern bears the burden of proving that 49 C.F.R. § 218.99(e)(5) and the 1973 Order cover the same subject matter and the Union bears the burden of proving (i) an essentially local safety hazard, (ii) that 49 C.F.R. § 218.99(e)(5) and the 1973 Order are not incompatible, and (iii) that continued operation of the 1973 Order would not unduly burden interstate commerce.

5. With respect to the issues on which each party bears the burden of proof, that party must prove each element of its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990).

6. A preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se-Ling Hosiery v. Marqulies*, 364 Pa. 45, 70 A.2d 854 (1950).

7. Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

8. The Supremacy Clause of the United States Constitution recognizes that the laws of the United States "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

9. Congress enacted the Federal Railroad Safety Act of 1970, 49 U.S.C. §§ 20101, *et seq.* (the "FRSA") "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents," 49 U.S.C. §§ 20101, and to accomplish this objective, declared "that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106.

10. Congress concluded that rail safety would be better preserved by a set of nationally uniform standards and did "not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." Federal Railroad Safety and Hazardous Materials

Transportation Control Act of 1970, H. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4109.

11. Congress delegated the regulation of railroad safety to the Secretary of Transportation, whose authority is exercised by the FRA. *See Burlington Northern R.R. Co. v. City of Connell*, 811 F. Supp. 1459, 1462, n.3 (E.D. Wash. 1993); *Union Pacific R.R. Co. v. Public Utility Comm'n of Oregon*, 723 F. Supp. 523, 529 (D. Or. 1989).

12. The FRA is authorized to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103.

13. Once the FRA "prescribes a regulation or issues an order covering the subject matter of the State requirement," all conflicting state laws and regulations are preempted. 49 U.S.C. § 20106.

14. "Regulations 'cover' the subject matter of a safety concern where they 'comprise, include, or embrace [that concern] in an effective scope of treatment or operation.'" *Swanson*, 533 F.3d at 621 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65 (1993)).

15. For federal regulation to have preemptive effect, it must "substantially subsume," not merely "touch upon" or "relate to," the subject matter of relevant state law. *Easterwood*, 507 U.S. at 664-65.

16. The question is whether the competing state and federal regulations cover the same safety concerns at a necessary level of generalization. *See Burlington Northern & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999).

17. Section 218.99(e)(5) "covers the subject matter" of the 1973 Order within the meaning of 49 U.S.C. § 20106. *See* Railroad Operating Rules: Program of Operational Tests and

Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails, 73 Fed. Reg. 33888 at 33897 (Jun. 16, 2008).

18. Where an FRA regulation covers the subject matter of a competing state regulation, the courts are not permitted to second-guess the wisdom of the FRA's regulation. *See Coleman*, 542 F.2d at 14; *Burlington Northern R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989).

19. Section 20106 provides a savings clause permitting a state to continue in force an additional state order if it (i) is necessary to eliminate or reduce an essentially local safety or security hazard; (ii) is not incompatible with a law, regulation, or order of the United States Government; **and** (iii) does not unreasonably burden interstate commerce.

20. "The savings clause is to be narrowly construed." *Burlington Northern R.R. Co. v. Deatherage*, 1997 WL 33384269, * 3 (N.D. Miss. 1997); *Union Pacific R.R. Co. v. Louisiana*, 32 F. Supp. 2d 377, 380-81 (M.D. La. 1999).

21. To fall within the narrow exception to federal preemption, § 20106 articulates a conjunctive test so that, if the Union cannot satisfy all three of the prongs required for the exception, federal preemption must apply. *See Burlington Northern R.R. Co. v. State of Montana*, 805 F. Supp. 1522, 1528 (D. Mont. 1992).

22. The 1973 Order is preempted because it is incompatible with 49 C.F.R. 218.99(e)(5). *See* 49 U.S.C. § 20106; *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005).

23. The fact that it is not literally impossible to comply with both § 218.99 and the 1973 Order does not render the competing regulations "not incompatible." *See Easterwood*, 507 U.S. at 674; *Burlington Northern & Santa Fe Ry. Co. v. City of Sedgwick*, 1997 WL 807872, * 2

(D. Kansas 1997); *Union Pacific R.R. Co. v. Louisiana*, 32 F. Supp. 2d 377, 382 (M.D. La. 1999).

24. An essentially local safety hazard is one that is "not capable of being encompassed in uniform national standards." *Williams*, 406 F.3d at 672; *Norfolk & Western Ry. Co. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 571 (6th Cir. 1991)); *Coleman*, 542 F.2d at 14-15; *State of Montana*, 805 F. Supp. at 1528.

25. For purposes of deciding whether a hazard is an essentially local safety hazard, it is irrelevant that the FRA has not actually issued a regulation covering the hazard at issue, so long as the hazard is capable of being adequately addressed by national standards. *See Williams*, 406 F.3d at 672.

26. Natural variations in yard geography and operations, however, are insufficient to establish hazards that are "essentially local." *See Easterwood*, 507 U.S. at 675; *Deatherage*, 1997 WL 33384269 at * 3.

27. The size and scope of Conway Yard's operations do not constitute an essentially local safety hazard.

28. The proximity between Conway Yard and neighboring residential communities does not constitute an essentially local safety hazard.

29. Conway Yard's proximity to the Ohio River, insofar as it might result in fog or create a risk of contamination of the Ohio River, is not an essentially local safety hazard.

30. The allegation that yardmasters are overworked at Conway Yard cannot amount to an essentially local safety hazard.

31. Rusty rail is not an essentially local safety hazard at Conway Yard.

32. The curvature of the departure track at Conway Yard is not an essentially local safety hazard.

33. Even if accepted as true, the allegation that cars are left on the departure tracks of Conway Yard without the knowledge of the yardmaster cannot constitute an essentially local safety hazard.

34. The relatively few switches on the departure tracks at Conway Yard do not constitute an essentially local safety hazard.

35. Car inspectors are required to work the departure tracks of every classification yard, nationwide, and any hazard they may pose at Conway Yard is no different from that posed at other classification yards, such as Allentown Yard. *See* 49 C.F.R. § 215.13(a).

36. The presence of car inspectors on the departure tracks at Conway Yard is not an essentially local safety hazard.

37. Snow is not an essentially local safety hazard.

38. Hazards caused by lack of due care cannot be essentially local safety hazards and are insufficient, as a matter of law, to defeat federal preemption. *See CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 675 (1993).

39. Divorced from any true essentially local safety hazards, a general finding that operations at Conway Yard are unsafe cannot constitute an essentially local safety hazard. *See Deatherage*, 1997 WL 33384269, * 3; *Wright v. Illinois Central R.R. Co.*, 868 F. Supp. 183, 187 (S.D. Miss. 1994); *Bowman v. Norfolk Southern Ry. Co.*, 832 F. Supp. 1014, 1017-18 (D.S.C. 1993); *City of Orr*, 529 F.3d at 797-99.

40. The Union is unable to satisfy its burden of proving that the 1973 Order does not constitute an unreasonable burden on interstate commerce. *See Michigan Southern R.R. Co. v.*

City of Kendallville, 251 F.3d 1152, 1155 (7th Cir. 2001); *Union Pacific R.R. Co. v. Louisiana*, 32 F. Supp. 2d 377, 383 (M.D. La. 1999).

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania State Legislative Board United Transportation Union	:	
v.	:	Docket No. C-00019522
Norfolk Southern Railway Company	:	

NORFOLK SOUTHERN RAILWAY COMPANY'S
PROPOSED ORDERING PARAGRAPHS

Norfolk Southern Railway Company proposes the following ordering paragraphs:

1. The order issued by the Commission in 1973 at Docket No. 19522 (Order entered August 1, 1973) is hereby rescinded.

2. The Commission's Secretary shall mark Docket No. C-00019522 closed.

APPENDIX B

EXCERPTS FROM:

RAILROAD OPERATING RULES: PROGRAM OF OPERATIONAL TESTS AND INSPECTIONS; RAILROAD OPERATING PRACTICES: HANDLING EQUIPMENT, SWITCHES AND FIXED DERAILS,

73 FED. REG. 33888 (JUNE 16, 2008)

productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 22, 2008.

Thomas D. Shope,

Regional Director, Applachian Region.

■ For the reasons set out in the preamble, 30 CFR part 948 is amended as set forth below:

PART 948—WEST VIRGINIA

■ 1. The authority citation for part 948 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 948.15 is amended by adding a new entry to the table in chronological order by "Date of publication of final rule" to read as follows:

§ 948.15 Approval of West Virginia regulatory program amendments.

* * * * *

Original amendment submission date	Date of publication of final rule	Citation/description of approved provisions
*	*	*
April 17, 2008	June 16, 2008	W. Va. Code 22–3–11(g) (interim approval), 11(h)(1) (interim approval).

[FR Doc. E8–13456 Filed 6–13–08; 8:45 am]
BILLING CODE 4310–05–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 217 and 218

[Docket No. FRA–2006–25267]

RIN 2130–AB76

Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule; response to petitions for reconsideration.

SUMMARY: This document responds to four petitions for reconsideration of FRA's final rule which was published on February 13, 2008. The rule mandated certain changes to a railroad's program of operational tests and inspections and mandated new requirements for the handling of equipment, switches, and fixed derails.

DATES: This regulation is effective on June 16, 2008.

FOR FURTHER INFORMATION CONTACT: Douglas H. Taylor, Staff Director, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS–11, Mail Stop 25, Washington, DC 20590 (telephone 202–493–6255); or Alan H. Nagler, Senior Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., RCC–11, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6038).

SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

I. Background

On May 18, 2005, the FRA's Railroad Safety Advisory Committee (RSAC) accepted a task statement and agreed to establish the Railroad Operating Rules Working Group (Working Group) whose overall purpose was to recommend to the full committee how to reduce the number of human factor caused train accidents/incidents and related employee injuries. After consideration of the Working Group's recommendations, FRA published a Notice of Proposed Rulemaking (NPRM) on October 12, 2006 to establish greater accountability on the part of railroad management for administration of railroad programs of operational tests and inspections, and greater accountability on the part of railroad supervisors and employees for compliance with those railroad operating rules that are responsible for approximately half of the train accidents related to human factors. *See* 71 FR 60372. FRA received written comment on the NPRM as well as advice from its Working Group in preparing a final rule, which was published on February 13, 2008. *See* 73 FR 8442.

Following publication of the final rule, parties filed petitions seeking FRA's reconsideration of the rule's requirements. These petitions principally related to the following subject areas: the implementation dates; shove lights; the need for individual liability and enforcement; good faith challenge procedures; the point protection technology standard for remote control locomotive operations; and FRA's rulemaking authority.

This document responds to all the issues raised in the petitions for reconsideration except the issue pertaining to FRA's rulemaking authority which is being addressed in a separate letter to that specific petitioner. FRA will make that response part of the public docket related to this proceeding. The amendments contained in this document in response to the petitions for reconsideration generally clarify the requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, and are within the scope of the issues and

options discussed, considered, or raised in the NPRM.

The specific issues and recommendations raised by the petitioners, and FRA's response to those petitions, are discussed below. The discussion will aid the regulated community in understanding the requirements of the rule.

II. Major Issues Raised by Petitions

A. Implementation Dates

Petitioner Concern: Dates Do Not Provide Sufficient Time To Comply

The Association of American Railroads (AAR) and the American Public Transportation Association (APTA) each submitted a petition for reconsideration requesting delays for the implementation of training and program deadlines found in 49 CFR 217.9 and 218.95. AAR is a trade association whose membership includes freight railroads that operate 72 percent of the line-haul mileage, employ 92 percent of the workers, and account for 95 percent of the freight revenue of all railroads in the United States. AAR's membership also includes passenger railroads that operate intercity passenger trains and provide commuter rail service. APTA's members include commuter railroads. The National Railroad Passenger Corporation (Amtrak) is a member of both AAR and APTA.

AAR and APTA raised similar concerns and requested the same action. Both associations requested that each implementation date contained in 49 CFR 217.9 and 218.95 be extended by six months.

Both petitions for reconsideration explained that railroads will need to overcome certain obstacles to establish a program of operational tests and inspections under 49 CFR 217.9. For example, AAR stated that the recent amendments to this section require each railroad to conduct specific types of periodic reviews and that some railroads have not been using any formal periodic reviews. In addition, those railroads implementing periodic reviews for the first time will need time to craft and implement a carefully thought out and worthwhile program. AAR also pointed out that oversight of the program will require a recordkeeping system that will aid in implementation and tracking compliance and that it is unaware of any railroad having such a recordkeeping system currently in place. Similarly, APTA stated that four months is not enough time for passenger railroads to review accident/incident records, determine which operating rules require particular emphasis in the testing and inspection program, develop the additional testing and inspection procedures, and qualify railroad testing officers on how to properly conduct the tests and inspections. APTA emphasized that passenger railroads are requesting additional time to do the job right rather than just quickly.

Both associations raised concerns with the requirements in § 217.9(b) that pertain to qualifying railroad testing officers and keeping written records documenting each railroad testing officer's qualification. APTA pointed out that the requirements pertaining to railroad testing officers are new, and implied that each railroad would need to expend additional resources to confirm that each railroad testing officer is qualified and to maintain records supporting each qualification decision. AAR stated that the July 1, 2008 deadline for implementing paragraph (b) is unrealistic because it does not provide a railroad with sufficient time to qualify supervisors on the new requirements. AAR also suggested that many railroads will want to maintain an electronic recordkeeping system for tracking the qualifications of supervisors; and the applicability deadline of July 1, 2008 does not provide sufficient time to establish a new recordkeeping system. AAR also disliked FRA's suggestion that "if a railroad has not previously kept a record of whether an officer is qualified on the operational testing program, that the railroad create a short survey which would allow an officer to acknowledge whether the officer considers himself/herself qualified on the various aspects of the program, as well as qualified (either through experience or prior instruction, training, and examination) on the various types of tests and inspections that the officer may be asked to conduct." 73 FR 8457. AAR asserts that if training took place before the establishment of a recordkeeping system, FRA and a railroad could be reliant on oral testimony, which could well result in controversial enforcement citations. Implied in AAR's concern is that some railroad testing officers may believe they know how to conduct certain tests or inspections, but the officer's ability to conduct a particular test or inspection has not been confirmed by the railroad. Consequently, AAR is concerned that a railroad testing officer that exaggerates his or her abilities could potentially subject a railroad to liability if the officer were to conduct an improper test. *See* § 217.9(b)(1).

Both AAR and APTA are members of RSAC and were told by FRA that the agency's goal was to publish the final rule by the fall of 2007. APTA states that had FRA published the rule in the fall of 2007, its members could have complied with the training in the 2008 training cycle. AAR and APTA both requested that FRA consider that a consequence of publishing the final rule in the first quarter of 2008 was that the vast majority of railroads that typically conduct the bulk of training during the first quarter of the year are now thwarted from doing so. Both associations argued that it would be too difficult to alter training programs by July 1, 2008 pursuant to § 218.95(a) because new training course material is usually developed in the second half of the year. Railroads primarily allocate the first quarter of each year to training employees, but often that training continues into the second quarter. The trainers are typically the same people employed to revise the training programs in the second half of the year. Thus, it would be difficult for the railroads to finish the training already planned for 2008 while revising the training required by the final rule. AAR and APTA also argued that it would be difficult and costly to qualify employees in accordance with 49 CFR part 218, subpart F, by January 1, 2009 because employees are not as available as they are during the first quarter of the year due to personal and business obligations.

FRA's Response

When FRA published the final rule, the agency did not fully appreciate the difficulties most railroads would face in trying to comply with the implementation dates. FRA was under the impression that it was providing a sufficient amount of time for a railroad to comply and that the implementation dates would not be controversial. FRA understood that by publishing the rule in mid-February, each railroad would need to qualify its employees and supervisors, as well as implement the new and revised programs outside of the railroads regular schedule for such actions. FRA perceived the actions needed for compliance to be not that much different than existing railroad programs relating to operating rules.

Now that FRA has reviewed AAR and APTA's petitions for reconsideration, we agree with the associations that delayed implementation is warranted for the reasons expressed in the petitions. It is important that each railroad effectively qualify its railroad testing officers and implement a meaningful program of tests and inspections under 49 CFR 217.9. The associations are certainly correct that

ensuring railroad testing officers are qualified is an important aspect of the revised section and that keeping accurate records of the qualifications of each railroad testing officer is an integral component of that requirement. Thus, FRA is granting AAR and APTA's requests to amend the applicability dates in 49 CFR 217.9, the logistics of which are described in the section-by-section analysis for that section.

FRA also agrees with AAR and APTA's requests to amend the applicability dates in 49 CFR 218.95. The associations' petitions for reconsideration helped FRA understand the full extent of the burden the final rule will place on each railroad. FRA certainly prefers providing each railroad with the additional time it needs to fully implement 49 CFR part 218, subpart F than have a situation where many railroad programs are put together so quickly that the programs contain mistakes or fall short in some way, or training is rushed to the extent that employees do not fully understand the operating rules and the importance of them. Thus, FRA is granting AAR and APTA's requests to amend the applicability dates in 49 CFR 218.95, the logistics of which are described in the section-by-section analysis for that section.

B. Shove Lights

AAR Petition

AAR's petition requested reconsideration of FRA's decision to exclude shove lights as an acceptable technological alternative to visually protecting the point pursuant to the requirements in 49 CFR 218.99(b)(3)(i) unless either: (1) The track is completely circuited to indicate occupancy; or, (2) a visual determination is made that the track is clear to the beginning of the circuited section of the track. 73 FR 8478. Shove lights are lights that are sequentially circuited on the ends of departure tracks in classification yards to indicate a shoving movement's approach to the opposite end of a track. There are a variety of different shove light arrangements, some using a single aspect/light and others using multiple aspects that have the ability to provide greater information regarding how much room is left in the circuited portion of the track. At some locations, radio messages are generated, instead of lights, to indicate when the cars being shoved have reached the bonded or circuited section of track.

AAR acknowledges that "since shove lights or radios technically provide protection only for the length of the bonded track, not the entire length of the departure track, they arguably do not provide the equivalent of direct visual observation." Despite this acknowledgment, AAR's petition requests that FRA reconsider the shove light issue as a permitted operational exception under § 218.99(e). AAR makes two arguments in support of permitting shove lights and radio signal arrangements. One argument is that there is no evidence that the use of shove lights has caused accidents or injuries despite having been used for over thirty years. A second argument is that a prohibition on shove lights and radio arrangements creates an increased risk of injuries and thus does not justify the prohibition. AAR attributes the potential for an increase in injuries to the risks employees would need to take to visually determine the departure track is clear. For example, an employee who undertakes the riding of a long shove move or chooses to walk along the track would be at risk of a slip and fall injury due to the need to mount and dismount equipment or the need to walk carefully—especially in inclement weather. Another added risk to riding the shove move or walking the track is the danger posed by the close proximity to other tracks, i.e., close clearances. An employee riding a shove move where there are close clearances is at risk of being struck by equipment on an adjacent track.

Joint Labor Petition Response Opposing AAR's Petition

A joint response to AAR's petition was filed by the presidents of six labor organizations (Joint Labor Petition): the American Train Dispatchers Association (ATDA); the Brotherhood of Locomotive Engineers and Trainmen, a division of the Rail Conference of the International Brotherhood of Teamsters (BLET); the Brotherhood of Maintenance of Way Employes Division of the Rail Conference of the International Brotherhood of Teamsters (BMWED); the Brotherhood of Railway Carmen Division of the Transportation Communications International Union (BRC); the Brotherhood of Railroad Signalmen (BRS); and the United Transportation Union (UTU). These labor organizations represent over 140,000 railroad workers engaged in train and engine service, train dispatching operations, equipment inspection, maintenance and repair, roadway worker activities, and signal construction, maintenance and repair. The Transportation Trades Department, AFL–CIO (TTD) filed a separate comment in support of the Joint Labor Petition.

The Joint Labor Petition opposes AAR's request for reconsideration of the shove light exception. This opposition is based on the fact that the track, unless completely circuited, will not be determined to be clear. The Joint Labor Petition points out that the final rule permits technology to substitute for a direct visual determination and thus one option is for a railroad to add additional indicator circuits. FRA notes that the Joint Labor Petition did not respond to AAR's assertions that there is no evidence that the use of shove lights has caused accidents or injuries despite having been used for over thirty years and that a prohibition on shove lights and radio arrangements creates an increased risk of injuries that does not justify the prohibition. The Joint Labor Petition argues that AAR seeks to institutionalize a practice that is dangerous and will lead to an increase in accidents, incidents, and injuries, but the response does not elaborate on this conclusion.

FRA's Response

In response to AAR's petition, and after considering the Joint Labor Petition's comments, FRA has decided to grant AAR's petition for reconsideration in part and deny it in part. FRA agrees to add an operational exception under § 218.99(e)(5) for shoving or pushing movements made in the direction of the circuited end of a designated departure track equipped with a shove light system under certain specified conditions. The operational exception and the specified conditions are described in the section-by-section analysis. Many railroads with existing shove light systems should find that few changes, if any, will be necessary to comply with the requirements for the exception in new paragraph (e)(5).

After publication of the final rule, FRA received feedback that some railroads were disappointed with FRA's position on shove lights. As the issue did not initiate much discussion during the Working Group meetings, FRA had not compiled much information on it. In anticipation that a petition for reconsideration on the shove light issue might be filed, FRA conducted a review of shove light systems utilized by the major railroads.

Between February 25 and March 21, 2008, FRA reviewed procedures and observed operations on departure tracks with shove light systems throughout the country. FRA surveyed the major railroads to find out where shove lights were used and received information that five of the seven major railroads used shove light systems at thirty-four major classification yards in seventeen states.

FRA confirmed through inspections that the railroads did not utilize shove light systems at any other major yard. The thirty-four yards contained a total of 356 departure tracks equipped with shove lights. Only seven of the thirty-four yards were found to provide point protection by having the departure tracks entirely circuited or by using cameras to determine that the track is clear. Thus, FRA focused its attention on whether the remaining twenty-seven yards that did not already meet FRA's new requirement for point protection under § 218.99(b)(3) were safe operations nonetheless.

For instance, FRA conducted a review of accident/incident data that supports AAR's position that departure tracks that use shove light systems are reasonably safe operations. FRA reviewed data for the twenty-seven departure yard operations that utilize shove lights for the twenty-six month period from January 2006 through February 2008. The total number of tracks available for use as departure tracks at these twenty-seven yards is 291. FRA's review included railroad records of all reportable and accountable rail equipment accidents/incidents, and thus FRA's review included minor incidents that would not have met FRA's reportable threshold for an accident/incident. See 49 CFR 225.5 (defining "accident/incident" and "accountable rail equipment accident/incident"); 225.19 (defining the three groups of railroad accidents/incidents that are reportable); and 225.21(i) (requiring that a record of initial rail equipment accidents/incidents be completed and maintained). If FRA's review had included only reportable accidents/incidents, and not accountable rail equipment accidents/incidents, the scope of the review would have been significantly more limited and would not have included derailments and collisions that caused minor damage to track or on-track equipment.

The records revealed that eighteen of the twenty-seven departure yard operations, *i.e.*, 67 percent of the yards, did not have any human factor caused reportable or accountable rail equipment accidents/incidents during the twenty-six month period, and only one yard had recorded more than two accidents/incidents. Nine departure yard operations recorded a total of nineteen human factor caused reportable or accountable rail equipment accidents/incidents during the review period. Although FRA did not conduct investigations to determine whether the primary cause listed by each railroad is accurate, the records suggest that five of these nineteen accidents/incidents would not have been prevented through compliance with the point protection requirement of § 218.99(b)(3) or any of the requirements in 49 CFR part 218, subpart F; *i.e.*, four accidents/incidents were caused by some form of train handling error and one accident/incident was caused by a remote control operator's failure to hear a radio transmission to stop the movement. In addition, five accidents/incidents were caused by either improperly lining, locking, or latching switches, which are concerns addressed by requirements found in subpart F. Thus, FRA finds that, during the twenty-six month review period, only nine human factor caused reportable or accountable rail equipment accidents/incidents might have been prevented through compliance with point protection requirements rather than relying on shove light systems and attendant procedures.

FRA found fair to good illumination throughout the departure yard tracks, particularly at the entry and departure ends of each track. The circuited portion of the departure tracks ranged from 150 feet to a little over 500 feet, with an average of 360 feet.

At all twenty-seven yards, non-visual procedures were in place that provided yardmasters with a high degree of confidence with respect to the status of any of the departure tracks. One procedure common to all twenty-seven yards included a "turn-over" report, i.e., a job briefing, given verbally from one yardmaster to the next, based on the information logged on a written turn-over sheet. In addition to the turnover report, at many yards, the yardmaster had access to a computer generated inventory allowing the yardmaster to monitor each car from the moment it arrived onto the receiving yard tracks. Many of these yardmasters were also able to track by computer the movements of each car through the yard complex. Some yardmasters also received information about each transfer job that brought cars from the classification yard to the departure yard. At some yards, railroads instituted standard instructions that required any car cut-off a departing train to be left on the circuited section of the track on which it was to be placed. Thus, if a car was left on the circuited section of track, a person observing the shove light would know that some equipment was left there and would be required to take appropriate action to determine what was left on the departure track prior to initiating a shoving or pushing movement. Meanwhile, other yards maintained similar instructions that any car to be cut-off a departing train must be left as close as possible to the end of the track opposite the circuited end of the departure track without fouling another track. This instruction permitted the person directing the movement to readily observe that the track was not clear and to take appropriate action to protect the shoving or pushing movement.

The descriptions of these different non-visual procedures is not intended to be an exhaustive list of all the types of procedures that have been or could be implemented. FRA is describing these types of procedures because our recent review suggests that having these types of procedures help establish a reliable means of determining track occupancy. As each departure yard may have its own set of safety concerns and already established procedures, FRA is not requiring that all railroads adopt a particular set of non-visual procedures. However, as these types of procedures contribute to the overall safety record of departure tracks utilizing shove lights, the final rule contains a requirement that the types of procedures which provide for a reliable means of determining track occupancy prior to commencing a shoving or pushing movement must be adopted in writing so that yardmasters and other employees can fully understand the operation. *See* § 218.99(e)(5)(iii).

FRA's observations revealed that shove light systems can maintain an acceptable degree of safety. Our review suggests that, in addition to the establishment of non-visual procedures, several factors collectively promote a safe operation. For instance, there is a relatively small number of moves onto and off of the departure tracks. Compared to other yard operations, there is typically less danger on departure tracks with shove light systems in that fewer switches are operated in the departure yard and there are no free rolling cars. Furthermore, FRA noticed that each of the twenty-seven departure yards were well supervised by either a yardmaster or other qualified employee.

FRA's observations at the twenty-seven departure yards with shove light systems also revealed that some of the departure tracks evaluated have close clearances that could potentially pose a risk of an accident or injury to a rail employee attempting to make a visual determination that the departure track is clear. FRA found five of the departure yards had at least some tracks with close clearances that pose a significant potential risk of an injury to an employee protecting the point. While some departure yards had tracks with

very good clearances, most tracks were found to have normal clearances—which could still pose injury hazards due to the amount of clearance. Furthermore, it could be difficult for an employee riding the point of the move to see that a derail is applied and that employee could be seriously injured if the movement were to operate over the derail. In addition, FRA noted that departure tracks were generally long yard tracks. The length of the departure tracks is a factor in deciding whether to allow shove light systems to be used in lieu of point protection because employees would probably walk or ride the side of a car to provide point protection and lengthy departure tracks would expose employees to injury risk for a longer period than if the tracks were shorter. In conclusion, FRA's observations corroborated AAR's assertion that if employees were required to provide point protection by riding the side of a car or walking along the departure tracks, there would be an increased risk of injuries.

FRA is granting AAR's petition for reconsideration in part, and will allow a shove light system under certain conditions to substitute for point protection, because the recent accident/incident histories at eighteen out of the twenty-seven major railroad departure yards have been excellent. FRA's decision is not based on AAR's concern that employees need to be protected from the dangers posed by protecting the point where there are close clearances. FRA believes that the risks of employees suffering injuries could be avoided greatly if more departure tracks equipped with shove light systems were either completely circuited or had cameras added that could be remotely viewed to determine the track is clear. In fact, FRA found five major railroad departure yards that maintain such cameras and two major railroad departure yards that maintain shove light systems with completely circuited departure tracks. Although FRA is promulgating an operational exception for shove light systems, we encourage each railroad to consider installing cameras or fully circuiting the departure tracks—especially in departure yards where non-compliance with yard procedures adopted under § 218.99(e)(5)(iii) are found on a regular basis. Meanwhile, FRA has concluded that under certain conditions, a shove light system is a safe operation. Therefore, a railroad may utilize a shove light system, under the conditions specified in § 218.99(e)(5), as an alternative to having a qualified employee make a visual determination that the departure track is clear.

FRA is, however, denying that portion of AAR's petition that requests the inclusion of shove warning systems that rely solely on radio signal warnings because radio signals offer a lower level of safety to that of a shove light system. One of the essential conditions considered in partially granting AAR's petition allowing shove light systems to substitute for a qualified employee visually determining the track is clear, is that the shove light system must be demonstrated to be failsafe. Shove warning systems that rely solely on radio signal warnings are not considered failsafe and FRA is skeptical that a system based on radio signals alone can ever be made failsafe.

Radio signal based shove systems are designed to send radio signal warnings when the movement is occupying the circuited track. The radio warning typically states how much room is left in the departure track for the shoving or pushing movement by indicating a number of car lengths. If the shoving or pushing movement has not reached the circuited end of the departure track, the system will be silent. Thus, the train crewmember or other qualified employee listening to the radio and directing the move will interpret silence to mean the track is clear to continue the shoving or pushing movement. Silence may not always mean that the movement is not occupying the circuited end of the track. For example, the radio may be silent because it is malfunctioning. A radio may be silent if its battery is expired. Also, a person listening to a radio may not hear a radio warning for a variety of reasons including, but not limited to, a weak transmission signal; static; the radio's volume is too low; or, a radio signal is blocked by a competing transmission because it is not broadcast on a dedicated channel. Finally, unlike shove light systems which remain continuously illuminated until the circuited section of track is occupied, FRA observed that the radio signal based shove system does not continuously send radio warnings that help monitor the departure end of the track once the movement has completely occupied the circuited section of track.

FRA might be willing to reconsider this decision or grant a waiver for a shove warning system that relies solely on radio signal warnings if it can be demonstrated to be failsafe. However, given the logistical hurdles of arranging such a system, it would probably be easier to switch to a shove light system or add some kind of light component to the existing radio signal based shove system. As FRA found only one major railroad departure yard that solely used radio signals as a shove system, FRA does not anticipate that this denial decision will have any significant impact on that railroad or on the industry.

C. Individual Liability and Enforcement

1. Petitioner Concern: Accident Data Does Not Support Individual Civil Penalties

The Joint Labor Petition requested reconsideration of the willful civil penalties published in the penalty schedule at 49 CFR part 218, app. A and the need for individual liability for willful violations; TTD's comment supported the Joint Labor Petition. The Joint Labor Petition analyzed the accident data showing that there has been a reduction in both the raw number of accidents/incidents and the corresponding rates for the period 2005 through 2007 that exceeded the increase for the period 2000 through 2004. Based on the analysis of that data, the Joint Labor Petition concludes that "[w]hile Petitioners concur that discipline—on the part of both our members and their supervisors—is an essential element in rule compliance, our analysis of FRA's data establishes beyond question that the spikes in the number of human factor accidents/incidents and the frequency with which they occurred were not due to any industry-wide breakdown in rules compliance discipline." Thus, on this first issue, the petition contends that the empirical basis no longer exists for FRA's decision to include individual liability for civil penalties in the final rule.

FRA's Response

The labor filing is a model of railroad safety scholarship, describing in broad strokes the major changes in the industry that, in the view of the writers, may have influenced safety trends. The resulting explanations attempt to fit safety data within a multi-factor analysis and lay the foundation for the requested relief. The history of a major industry is complex; and this proceeding is not the proper venue to agree or disagree about such theorems, however interesting that discussion might be.

Rather, it is necessary to state that the central premise of the joint labor filing is incorrect, because it is not FRA actions that invoke the potential for civil penalty sanctions. Rather, civil penalty sanctions are a statutorily-imposed consequence of regulatory non-compliance. 49 U.S.C. 21301. Labor

organizations have been among the more strenuous advocates of strong civil penalties as an answer to non-compliance by railroads and rail contractors, and even if FRA were at liberty to provide blanket immunity from statutory sanctions, there is nothing in the filing to support the conclusion that such sanctions would be less successful in influencing the intentional actions of individual employees than the unintentional or intentional actions of railroads and rail contractors. Indeed, individual employees are already accountable for personal compliance with a significant number of FRA regulations; and FRA is satisfied that the deterrent effect associated with the availability of a monetary sanction is helpful in preventing accidents that might occur through sloth or knowing reckless behavior. FRA has seldom found it necessary to invoke these sanctions against individuals, and in many cases where such action has been taken the targets have been railroad officers, rather than rank and file employees.

Whether or not one subscribes to the proposition that penalties are necessary, giving the subject rules the status of Federal law should without question promote awareness among officers and employees regarding their responsibilities to one another and to the public. The labor filing (at page 5) acknowledges that "a more substantial framework of regulations" (FRA's phrase) should be helpful in maintaining discipline during the current period of change in the railroad industry. The potential for civil penalties follows automatically, based on congressional action.

Although FRA agrees with the Joint Labor Petition that the number of human factor incidents has declined over the past few years, we do not agree that this trend diminishes the need for a regulation containing the potential to demand payment of civil money penalties from individuals for willful violations. There are a variety of reasons for the recent downward trend including, but not limited to, FRA's focus on the increase in human factor caused accidents/incidents from 2000 through 2004 in the RSAC and Working Group meetings. By bringing this issue to the railroad industry's attention, railroads have placed increased emphasis on compliance with the operating rules FRA expressed an intention to consider regulating. Focused compliance reviews by FRA and aggressive, direct contacts with responsible railroad operating officers have no doubt contributed to this good result. Historically, FRA has noted previous positive trends after raising a safety concern with the industry, but prior to promulgation of a regulation. These trend lines do not always continue positively, and, without a regulation, FRA would be left with fewer options if accidents/incidents were to suddenly increase. Further, it would be fundamentally wrong to assume that major additional advances in the safety of railroad operations are not achievable. Rules compliance requires clear and unambiguous rules and procedures, common expectations for compliance that are modeled by line supervisors, excellent training, and regular verification that rules and procedures are being followed. This is the foundation for acceptable safety performance, and on that foundation can be built truly outstanding safety performance if the culture of the organization and the processes in place support open and productive communication to identify hazards, enhance crew performance, and refine work processes. FRA appreciates that this regulation cannot construct the entire edifice, but it can and must provide the foundation.

As FRA has statutory authority to issue penalties against individuals for willful violations, FRA would retain this authority.even if it deleted the willful penalties in the schedule of civil penalties (which section 49 U.S.C. 21301(a)(2) directs us to provide). As FRA explained in its "Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws" found at 49 CFR part 209, app. A, the Rail Safety Improvement Act of 1988 (*see* 49 U.S.C 21304) made individuals liable for willful violations of the Federal railroad safety statutes that FRA enforces under delegation from the Secretary of Transportation. *See* 49 CFR 1.49(c), (d), (f), (g), and (m). In that published policy statement, FRA explains how the agency intends to decide if an individual has acted willfully and how it will consider whether enforcement action is warranted against an individual. In the preamble to the final rule, FRA also explained that it did not single this regulation out for individual liability enforcement, but that "[e]ach of FRA's rail safety regulations permit enforcement against any person who violates a regulatory requirement or causes the violation of any requirement." 73 FR 8452–53. The publishing of the schedule amounts are merely meant to provide guidance as to FRA's policy in predictable situations, not to bind FRA from using the full range of penalty authority where extraordinary circumstances warrant it. FRA will continue to exercise appropriate discretion with regard to individual liability enforcement matters as it does in all civil penalty matters cited against railroads.

2. Petitioner Concern: Individual Liability Produces a Chilling Effect on Safety

The Joint Labor Petition's second request in this area was that FRA should eliminate the willful civil penalties published in the penalty schedule at 49 CFR part 218, app. A and FRA should not seek civil penalty enforcement against individuals under 49 CFR part 218. The petitioner contends that individual liability produces a chilling effect that will diminish, rather than enhance, safety. The Joint Labor Petition disagreed with FRA's position that an employee would have an incentive to self-report noncompliance because such self-reporting would likely be considered a reason for FRA to exercise its enforcement discretion not to take enforcement action against the individual. Instead, the Joint Labor Petition focused on FRA's statement that "[s]elf-reporting is not * * * a defense to a potential individual liability action, and self-reporting does not absolutely preclude FRA from taking enforcement action against an individual." 73 FR 8453. The Joint Labor Petition concludes that an employee has a disincentive to self-report as the employee is likely to face a railroad disciplinary sanction and an FRA civil penalty.

FRA's Response

In FRA's view, the Joint Labor Petition did not acknowledge FRA's caveat that "FRA would consider self-reporting a strong reason for mitigation of the civil penalty, disqualification order, or other enforcement remedy." 73 FR 8453. The flip side of that argument is also true in that FRA would consider the failure to self-report non-compliance immediately after the non-compliance is discovered to be an aggravating factor justifying a higher penalty or longer period of disqualification. In the preamble, FRA emphasized that when each railroad instructs its employees on its operating rules, it should emphasize this incentive to self-report. FRA continues to encourage each railroad to reconsider its own discipline policy so that it does not discourage self-reporting of inadvertent noncompliance. For example, FRA continues to fund and promote the Confidential Close Call Reporting System Demonstration Project, which permits participating employees to self-report certain types of

non-compliance without fear of railroad discipline or FRA enforcement. FRA believes that by encouraging self-reporting, an analysis of the data may reveal the identification of accident precursors or suggest ways to reduce the likelihood of future non-complying incidents that have the potential to cause accidents/incidents.

FRA also expects that most individuals would self-report because it is the safe course of action. An individual who chooses not to self-report after realizing he or she failed to comply with an important operating rule is likely to be putting him or her self, or colleagues, at risk of serious injury or death. Thus, FRA would expect that individuals who discover their own non-compliance would find the risks associated with choosing not to self-report far worse than the potential of being disciplined or fined for failing to comply, especially if the risk of a more severe disciplinary action or greater penalty is likely for a violation discovered and not immediately reported.

The Joint Labor Petition also raised the issue that an innocent employee could be held liable for a civil penalty under the final rule if the employee was the last person recorded as handling a switch that was later found misaligned. The petition explained that it might be possible, on some railroads, for a roadway worker to manipulate main track switches in non-signaled territory without track authority or permission from the train dispatcher or control operator. The petition stated that FRA could end up enforcing a civil penalty against the wrong individual, and thus FRA should not cite individuals for civil penalties. FRA's response is that this issue raises an evidentiary proof matter and a concern FRA will need to address on a case-by-case basis. However, FRA does not view this issue as a reason to completely forgo the agency's statutory authority to cite individuals for civil penalties.

In the conclusion section of the Joint Labor Petition, the petition suggests that FRA forgo the agency's statutory authority to cite individuals for civil penalties in favor of FRA's disqualification procedures. *See* 49 CFR part 209, subpart D. The petition argued that disqualifying an individual from performing safety sensitive service is a "more than sufficient means available to enforce [part 218,] subpart F" and that "there is neither a sound basis, nor a public interest, in the creation of individual liability for civil penalties." We disagree. These are two different enforcement mechanisms and there may be instances where a disqualification is not warranted, and the less drastic response of a reasonable civil penalty is more appropriate. For instance, there may be instances where a person has a long work history of complying with operating rules but is found to have committed a willful violation one time. In these instances, it is likely more appropriate to demand a one-time civil penalty and allow the person to continue working in safety sensitive service than to initiate disqualification proceedings. In other circumstances, a person with or without a good history of compliance may be found to have committed a willful violation but there are aggravating circumstances that suggest the more extreme penalty of disqualification is unwarranted. Thus, in order to permit FRA to consider the appropriate enforcement mechanism and to provide maximum flexibility in its enforcement actions, FRA is denying the Joint Labor Petition's requests to eliminate the willful civil penalties published in the penalty schedule at 49 CFR part 218, app. A and for FRA to pledge not to seek civil penalty enforcement against individuals under 49 CFR part 218, subpart F.

D. Good Faith Challenge

1. Request To Eliminate Provision

AAR's petition for reconsideration requests that FRA reconsider the need for any good faith challenge regulation. *See* 49 CFR 218.97. According to AAR, employees have statutory protection under 49 U.S.C. 20109 against retaliation for refusing to comply with a directive to violate a Federal regulation and thus it is puzzling why FRA is promulgating a regulation which has the potential to interfere significantly with railroad operations. In addition, AAR objects to a good faith challenge regulation because the final rule did not adequately create a record for suspecting that employees have been, or will be, asked to engage in tasks that violate Federal regulations or these types of railroad operating rules. The Joint Labor Petition and TTD's comment disagreed with AAR's position on this issue.

FRA's Position

FRA disagrees with AAR and finds that there is a need for the good faith challenge regulation. The driving force for much of the final rule was the data showing significant increases in human factor caused accidents, and the high number of violations FRA found when it conducted inspections and investigations related to certain human factor cause codes. Prior to the effective date of the final rule, each railroad maintained similar operating rules governing the safe operation of shoving or pushing movements, leaving cars out to foul, and handling switches and fixed derails; meanwhile, over the first five years of this decade, human factor caused accidents accounted for 38 percent of all train accidents, and, in 2004, violations of the operating rules required in 49 CFR part 218, subpart F accounted for nearly 48 percent of all human factor accidents. Considering the mandatory nature of these railroad operating rules, it seems that there has been a high disregard for them either intentionally or unintentionally. Although we agree that FRA did not cite to specific examples of intentional non-compliance with railroad operating rules, FRA is aware of the pressure to occasionally shortcut an operating rule in order to maintain or increase production. FRA's awareness is derived from inspections and investigations, as well as shared experiences from FRA personnel who have previously worked for one or more railroads. The good faith challenge procedures are intended to empower employees who choose to abide by the railroad's operating rules but are either intentionally or unintentionally given a non-complying directive. The procedures are necessary to ensure that employees may challenge potentially non-complying directives immediately while the statutory protections in 49 U.S.C. 20109 primarily protect an employee from retaliation for refusing to comply with non-complying directives. Thus, the good faith challenge regulation has a different purpose than the statutory protections.

2. Request To Amend Provision

In the alternative, AAR's petition for reconsideration requests that FRA amend the good faith challenge procedures required by 49 CFR 218.97 so that they more closely resemble the roadway worker good faith challenge provisions. AAR states that FRA has departed from past precedent by issuing good faith challenge procedures that are different from those required for roadway workers. In AAR's view, the roadway worker regulations are clear and easily implemented, while the procedures in § 218.97 are complex and could result in delaying railroad operations. For example, AAR states that there may be situations when a supervisor and employee cannot resolve a challenge, and a suitable railroad officer is not available to provide for immediate review under paragraph (d)(1). (It appears that AAR might also be asking FRA to reconsider or make an exception to the immediate review required in paragraph (d)(1) for any

railroad regardless of size.) The Joint Labor Petition disagreed with AAR's position on this issue.

FRA's Response

FRA acknowledges that when it first began discussing this issue with the RSAC Working Group, FRA suggested that good faith challenge procedures similar to those promulgated for roadway workers might be appropriate. Discussions within the Working Group, especially with members representing labor organizations, revealed that roadway workers generally share a more cooperative working relationship with their supervisors than operating employees do with yardmasters, trainmasters and their other railroad officer supervisors. A supervisor of roadway workers is likely to be out at the work site and may share in the danger if the work gang is not adequately protected because the group failed to comply with a rule. A railroad officer supervising operating employees will likely not be at risk of injury to himself/herself through the issuance of a non-complying order but may be putting the operating employees executing the order, or other employees in the vicinity of the operation, in peril. For these reasons, a different approach, permitting a good faith challenge, is necessary.

With regard to the request that FRA should eliminate the requirement for immediate review under § 218.97(d)(1), FRA is denying the request. Any railroad with 400,000 or more total employee work hours annually should employ at least one railroad officer who can be on call in case a challenge requires immediate review. Each railroad should consider whether to address in its program the issues of who can be contacted and what protocol should be followed if the person issuing the challenged directive has difficulty finding an officer suitable for immediate review. FRA suggests that AAR ask its members to voluntarily keep track of problems associated with implementing the good faith challenge procedures so that it can be raised as a future task for the RSAC or in a future petition for rulemaking.

3. Implementation in Joint Operations

After publication of the final rule, FRA met with labor organizations and railroad associations to discuss issues related to implementation. During those meetings, several parties raised the fact that the rule does not address how the good faith challenge is required to be implemented in joint operations territory. For example, FRA has been asked what happens if employees from Railroad #1 are directed to perform a shoving or pushing movement in a yard on Railroad #2 and the employees believe they are being asked to violate a rule because the point is not being properly protected. FRA has been asked which railroad's good faith challenge procedures apply, and if Railroad #2's procedures apply, then are Railroad #1's employees required to be trained on Railroad #2's procedures.

FRA's Response

FRA acknowledges that the rule is silent on these issues. Generally, we would expect that the host railroad, i.e., Railroad #2 in the example, would want to maintain control of challenges made on its property and would therefore provide all reviews required. Although we expect quite a bit of uniformity among railroads, railroads who operate in joint operations will need to ensure that its employees know which railroad's procedures apply and what those procedures require. Meanwhile, as the rule is silent on this issue, we would not object to railroads engaged in joint operations making other arrangements as long as those arrangements are explained to its employees during the required training and provided for in its procedures. In conclusion, unless otherwise specified in a railroad's procedures, the host railroad's procedures will apply and it will be the host railroad's obligation to provide review of the alleged non-complying order and to maintain a record when necessary.

E. The Point Protection Technology Standard for Remote Control Zones

Requests for Clarification

AAR's petition explains that § 218.99(c)(2) provides that if technology is relied on to provide pull-out protection by preventing the movement from exceeding the limits of a remote control zone, the technology must be demonstrated to be failsafe or provide suitable redundancy. AAR does not object to the regulatory text. Instead, AAR's petition for reconsideration raises the question of whether a particular discussion in the preamble regarding the point protection technology standard for remote control zones is intended to be a requirement.

AAR is concerned that the preamble language will be read as a requirement. The preamble states that "[w]hen determining whether the technology, such as transponders backed up by a global positioning system (GPS) with a facility database is acceptable, FRA finds that 49 CFR part 236, subpart H and the corresponding appendix C to part 236 ("Safety Assurance Criteria and Processes") contains appropriate safety analysis principles." 73 FR 8479. AAR requests confirmation that the preamble reference to the safety analysis principles is meant to illustrate one way of determining if a technology is acceptable and the citation to part 236 is not meant to be a requirement. (Presumably, if FRA disagrees with AAR's understanding, AAR's petition is meant to request an amendment to this section as AAR implies that it objects to this reference if it is a requirement.).

The Joint Labor Petition responded to AAR's petition. First, the Joint Labor Petition points out that the final rule preamble contained an error when it stated that no comments were received in response to the NPRM concerning this issue. BLET specifically responded to FRA's request for comments by recommending that (1) the technologies used to "fence" remote control zones should be at least fail-safe and (2) to the extent that any of these technologies are not currently in use, they should be required to meet the criteria for processor-based signal and train control systems found in 49 CFR part 236, subpart H. The Joint Labor Petition reiterated BLET's recommendations and stated that remote control zone pull-out protection technology is, by definition, a train control system.

FRA's Response

FRA agrees with AAR that the preamble language reference to 49 CFR part 236, subpart H is intended to illustrate one way of determining if a technology is acceptable and the citation to part 236 is not meant to be a requirement.

In response to the Joint Labor Petition, FRA offers the following clarification. First, FRA wishes to thank BLET for reminding FRA that BLET had commented on the NPRM preamble language. Second, although FRA has provided that remote control zone pull-out protection technology must be demonstrated to be failsafe or provide suitable redundancy to prevent unsafe failure, a result consistent with the general approach of 49 CFR part 236, subpart H, FRA does not believe that this is the appropriate forum within which to determine the formal applicability of part 236. Although pullout protection arrangements are provided to restrict the movement of rolling equipment, they are not employed to authorize to control train movements; accordingly, using traditional interpretations they would not fall within the concept of a train control system. Nor do they resemble in function block signal systems. FRA is

aware of views of some that a variety of innovative technologies that perform functions analogous to traditional signal and train control systems should be regulated under part 236; however, FRA strongly believes that such issues should not be addressed piecemeal. Accordingly, FRA declines in this forum to assert the applicability of part 236 to systems used to prevent shoving movements from exceeding the intended boundaries.

Based on the discussion contained above, FRA is not amending the regulatory text as suggested in either AAR's petition or the Joint Labor Petition.

III. Section-by-Section Analysis

Part 217—[AMENDED]

Section 217.9 Program of Operational Tests and Inspections; Recordkeeping

FRA is amending four paragraphs of this section to delay certain applicability dates. In the preamble section titled "Implementation Dates," FRA explains the basis for amending each of these compliance deadlines. In summary, FRA considered the petitions which suggested that, due to the routine most railroads use to schedule training during the first quarter of each calendar year, many railroads might have rushed through implementation merely to meet the deadline without regard for the program's likely effectiveness. FRA is amending the applicability dates in this section because we would prefer to provide each railroad with a reasonable opportunity to come into compliance with an effective amended program of operational tests and inspections, rather than to have compliance that is technically timely but ineffective.

The introductory text of paragraph (b) is amended to make the requirements contained in this paragraph (b) applicable beginning January 1, 2009. As the applicability date was previously July 1, 2008, the amendment extends the deadline for compliance by six months.

Paragraph (c)(1) requires the program to provide for operational testing and inspection under the various operating conditions on the railroad. The applicability date of this paragraph has been amended, so that on or after January 1, 2009, each railroad shall be required to amend its program to "address with particular emphasis those operating rules that cause or are likely to cause the most accidents or incidents, such as those accidents or incidents identified in the quarterly reviews, six month reviews, and the annual summaries as required under paragraphs (e) and (f) of this section, as applicable." As the applicability date was previously July 1, 2008, the amendment extends the deadline for compliance by six months.

Paragraph (c)(6) requires the program show the railroad's designation of an officer to manage the program at each level of responsibility (division or system, as applicable). The applicability date of this paragraph has been amended, so that compliance with it is not required until January 1, 2009. As the applicability date was previously July 1, 2008, the amendment extends the deadline for compliance by six months.

Paragraph (e) requires each railroad to do reviews of its program of operational tests and inspections at certain specified periodic intervals. There are two applicability dates in introductory paragraph (e) and both dates have been amended to provide railroads with additional time to comply. Introductory paragraph (e) is amended so that the requirements in paragraph (e) apply to each Class I railroad and the National Railroad Passenger Corporation beginning April 1, 2009, and to all other railroads subject to this paragraph beginning July 1, 2009. Thus, each Class I railroad and the National Railroad Passenger Corporation are being provided an additional ten months to comply with the requirements in paragraph (e) and all other railroads subject to this paragraph are being provided an additional six months to comply.

Part 218—[AMENDED]

Section 218.93 Definitions

A definition of *departure track* is added to this section because this term is used in added paragraph (e)(5) to § 218.99. A departure track is a track located in a classification yard where rolling equipment is placed and made ready for an outgoing train movement. Thus, a departure track is typically the last type of track that cars will be on in the yard before the cars are completely assembled as a train and are ready to leave the confines of the classification yard. The "classification yard" is a term used to describe the greater yard area that contains, but is not limited to, run-through tracks, van yard tracks that are used for trailers on flat cars or containers on flat cars (tofc/cofc), car repair tracks, locomotive servicing tracks, repair-in-place (rip) tracks, receiving tracks, bowl or classification tracks, and departure tracks. Some railroads have added shove light systems to departure tracks to aid train crews shoving or pushing large cuts of cars onto departure tracks; i.e., a person observing the shove light will be notified when the circuited end of the track is occupied without actually viewing the circuited end of the track.

Section 218.95 Instruction, Training, and Examination

Paragraph (a) requires that each railroad maintain a written program that will qualify its employees for compliance with operating rules implementing the requirements of this subpart to the extent these requirements are pertinent to the employee's duties. FRA is amending this paragraph to require establishment and continued maintenance of the program beginning no later than January 1, 2009. As the applicability date was previously July 1, 2008, the amendment extends the deadline for compliance by six months.

Paragraphs (a)(3) and (a)(4) are also being amended to provide additional time to implement this subpart. Paragraph (a)(3) is amended to require that each employee performing duties subject to the requirements in this subpart shall be initially qualified prior to July 1, 2009. As the applicability date for paragraph (a)(3) was previously January 1, 2009, the amendment extends the deadline for compliance by six months. Paragraph (a)(3) is also amended by eliminating the requirement that "employees hired between April 14, 2008 and January 1, 2009, and all employees thereafter required to perform duties subject to the requirements in this subpart shall be qualified before performing duties subject to the requirements in this subpart." The elimination of this requirement follows from the decision to delay implementation of the program in paragraph (a) to January 1, 2009. The program implementation date is being delayed so that railroads will have time to adequately prepare a written program of training. As FRA has accepted AAR and APTA's reasons for delaying implementation of the program, it seems logical to provide railroads additional time to train both the employees hired prior to the effective date of the rule as well as the newly hired employees.

Similarly, the applicability date in paragraph (a)(4) is amended to require that, beginning July 1, 2009, no employee shall perform work requiring compliance with the operating rules implementing the requirements of this subpart unless qualified on these rules within the previous three years. As the applicability date for paragraph (a)(4) was previously January 1, 2009, the amendment extends the deadline for compliance by six months. Thus, as of July 1, 2009, each employee performing work subject to this subpart is required

to be qualified regardless of when the employee was hired.

Section 218.99 Shoving or Pushing Movements

Paragraph (e)(5) is added to permit each railroad the option of using a shove light system in lieu of point protection under 49 CFR 218.99(b)(3), as long as certain specified conditions are met. In section II. B. of the preamble, titled "Shove Lights," FRA explains why it is permitting railroads to choose this option. In summary, FRA reviewed initial rail equipment accident/incident records over a recent twenty-six month period that suggested railroads have safely conducted shoving or pushing movements on departure tracks that utilize shove light systems without a point protection requirement. FRA conducted observations of 34 locations where shove light or radio systems were in operation and found that certain best practices increased the likelihood that the operation could be conducted safely. FRA has promulgated the best practices into requirements that allow a railroad to exercise this operational exception. In addition, FRA has determined that systems based on radio signals alone are not as safe as those that contain a visual display. Consequently, the operational exception uses the term "shove light system" which is intended to descriptively exclude the use of a radio system that does not utilize a light.

Paragraph (e)(5)(i) requires that the shove light system is demonstrated to be failsafe. The safety concern is that, without a specific requirement, some railroads might try to implement technology that is not demonstrated to be safe and therefore provides a false sense of protection to rail employees. Fortunately, most shove light arrangements appear to utilize traditional signal circuits which by design fail safe. (For analogous requirements applicable to track circuits and occupancy display in block signal territory see, *e.g.*, 49 CFR 236.5, 236.51.) Although the present rule in no way dictates the technology employed, it does require that it be failsafe in operation. (For principles pertinent to evaluating innovative detection technologies, see Appendix C to part 236.) In order to demonstrate that the system is failsafe, FRA would expect that when the system is not working properly, it would produce the least favorable aspect—indicating that the movement should immediately be stopped or, if not yet begun, not started.

Paragraph (e)(5)(ii) requires that the shove light system be arranged to display a less favorable aspect when the circuited section of the track is occupied. If the shove light system has only a single light, the light will turn off, i.e., go dark, when the circuited section of the track is occupied. If the shove light system has multiple lights or a single light with the ability to display multiple aspects or colors, the light will turn from a favorable aspect to a less favorable aspect when the circuit is first occupied, and later turn to a more restrictive aspect as the circuited track reaches full occupancy. Of course, shove light systems with multiple lights may simply go from a favorable aspect, e.g., green, to a less favorable aspect, e.g., red, in order to meet the requirement of this paragraph.

Paragraph (e)(5)(iii) requires that written procedures be adopted and complied with that provide for a reliable means of determining track occupancy prior to commencing a shoving or pushing movement. The preamble section titled *"Shove Lights"* contains a description of various procedures many railroads have already established for departure tracks within departure yards equipped with shove light systems. The establishment of procedures is a way to create a uniform method of leaving a car or cut of cars on a departure track safely, thus permitting the yardmaster or next crew entering to know that the entire length of a particular departure track is not clear. Some railroads may choose to institute procedures that aid in tracking cars, either in writing, computer inventory, GPS tracking, or other electronic tracking. FRA is not requiring that all railroads must adopt and comply with a particular set of procedures. However, FRA believes these types of procedures contribute to the overall safety record of departure tracks utilizing shove lights and that such procedures must be established in writing so that all employees working in the departure yard can be expected to fully understand the operation. When FRA conducts inspections of these departure yards, we intend to review these procedures to ensure that any particular procedure, or lack thereof, does not create an undue safety risk and that the departure yard operation utilizing the shove light system is managed in a safe manner.

Paragraph (e)(5)(iv) requires that the departure track be designated in writing. This is an important requirement because it is an exception to providing point protection and it is therefore imperative that employees know specifically on which tracks the exception applies. FRA is promulgating this requirement even though we are unaware of shove light systems being installed on other than designated departure tracks. The requirement in this paragraph is intended to prevent a railroad from installing shove lights on yard tracks that are not departure tracks and attempting to circumvent the point protection requirements under paragraph (b)(3) of this section.

Paragraph (e)(5)(v) requires that the track be under the exclusive and continuous control of a yardmaster or other qualified employee. FRA's recent observations of departure tracks at major railroad classification yards, described above, found that a universal best practice is to have an employee, typically a yardmaster, who controls all movements in and out of the departure tracks. Without such an employee, there would likely not be any person who would be tracking movements into or out of the departure tracks, and there would not be anyone who could reliably relay information to train crewmembers who need to know the status of a particular departure track.

The operational exception in paragraph (e)(5) differs from the other numbered exceptions in paragraph (e) because, although introductory paragraph (e) states that "[a] railroad does not need to comply with *paragraphs (b) through (d) of this* section in the following circumstances," the rule excepting shove lights does include some requirements within paragraphs (b) through (d). For instance, paragraph (e)(5)(vi) requires that "[t]he train crewmember or other qualified employee directing the shoving or pushing movement complies with the general movement requirements contained in paragraphs (b)(1) and(b)(2) of this section." Thus, even though a shove light system may be used, this paragraph requires that employees conduct a proper job briefing under paragraph (b)(1) and that the employee directing the movement not engage in any task unrelated to the oversight of the shoving or pushing movement under paragraph (b)(2). Similarly, paragraph (e)(5)(vii) requires that "[a]ll remote control shoving or pushing movements comply with the requirements contained in paragraph (c)(1) of this section." Hence, remote control operations utilizing shove lights are not excused from the requirement that either the remote control operator or a crewmember visually determine the direction the equipment moves, and, in the case of a crewmember making the observation, that the operator is promptly informed before continuing the movement.

Paragraph (e)(5)(viii) requires that the shove light system be continuously illuminated when the circuited section of the track is unoccupied. FRA is including this requirement to ensure

that the employee observing the shove light is always viewing a lit aspect when the circuited section of the track is unoccupied. To allow otherwise would mean that a shove light system with a single aspect shove light could remain dark until it lit up when the circuited section of the track is occupied. Such an arrangement would not be failsafe if the light bulb failed. In arranging a failsafe system, railroads that utilize a multiple aspect shove light system will need to address each possible scenario for one or more light bulb or aspect failures. If the system has multiple aspects and a bulb or aspect failed, an employee viewing the shove light should be able to tell that the system is not continuously illuminating a proper aspect. If the system fails to continuously illuminate, the operational exception under paragraph (e)(5) would no longer be available and the movement would be required to stop immediately. Thus, the safest course of action is required when there is a technological failure such as the system fails to continuously illuminate.

IV. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This action has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). The original final rule was determined to be non-significant. Furthermore, the amendments contained in this action are not considered significant because they generally clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule. These amendments, additions, and clarifications will have a minimal net effect on FRA's original analysis of the costs and benefits associated with the final rule.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA certifies that this action is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act or Executive Order 13272. Because the amendments contained in this document generally clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, FRA has concluded that there are no substantial economic impacts on small units of government, businesses, or other organizations resulting from this action.

C. Paperwork Reduction Act

The information collection requirements in the agency's response to petitions of reconsideration of 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 information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
217.7—Operating Rules; Filing and Recordkeeping:					
—Filing rules, timetables, and special instructions.	1 New Railroad	1 submission	1 hour	1	$43
—Amendments to operating rules, timetables, and timetable special instructions by Class I, Class II, Amtrak, and Commuter Railroads.	55 Railroads	165 amendments	20 minutes	55	2,365
—Class III and Other Railroads: Copy of Current Operating Rules, Timetables, and Special Instructions.	20 New Railroads	20 submissions	55 minutes	18	774
—Class III Railroads: Amendments to operating rules.	632 Railroads	1,896 amendments	15 minutes	474	20,382
217.9—Program of Operational Tests:					
—Railroad and railroad officer testing responsibilities: Field Training.	687 Railroads	4,732 training sessions.	8	37,856	1,892,800
—Written records of officer testing qualifications.	687 Railroads	4,732 records	2 minutes	158	0 (Incl. RIA)
—Written program of operational tests/inspections.	20 New Railroads	20 programs	9.92	198	8,514
—Amendments to operational tests/insp. programs.	55 Railroads	165 amendments	1.92	317	13,631
—Records of individual tests/inspections.	687 Railroads	9,180,000 rcds	5 minutes	765,000	38,250,000
—Review of tests/inspections/adjustments to the program of operational tests—Quarterly reviews.	687 Railroads	37 reviews	1 hour	37	0 (Incl. RIA)
—Officer designations & Six Month reviews.	687 Railroads	37 designations + 74 reviews.	5 seconds + 1 hour.	74	0 (Incl. RIA)
—*Passenger Railroads:* Officer designations & Six-month reviews.	20 Railroads	20 designation + 34 reviews.	5 seconds + 1 hour.	34	0 (Incl. RIA)
—Records retention: Periodic reviews.	687 Railroads	589 review rcds	1 minute	10	0 (Incl. RIA)

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
—Annual summary on operational rests/inspections—Summary records.	37 Railroads	37 summary rcds.	61 minutes	38	1,634
—FRA disapproval of operational testing/insp. program: Railroad response to disapproval.	687 Railroads	20 responses	1 hour	20	1,460
—Amended programs as a result of FRA.	687 Railroads	20 amended	30	10	730
217.11—Program of Instructions on Operating Rules					
—Railroads instructions of employees.	687 Railroads	130,000 instr. employees.	8	1,040,000	52,000,000
—Current copy of employee periodic instruction prog.	20 New Railroads	20 programs	8	160	6,880
—Amendments to current employee instruction prog.	687 Railroads	220 amendments	.92 hour	202	8,686
218.95—Instruction, Training, and Examination:					
—Records of instruction, training, examination.	687 Railroads	98,000 records	5 minutes	8,167	351,181
—FRA disapproval of program: Railroad responses.	687 Railroads	50 submissions	1 hour	50	2,150
—Amended programs	687 Railroads	20 amended docs	30 minutes	10	730
218.97—Good Faith Challenge Procedure:	687 Railroads	687 procedures	2 hours	1,374	0 (Incl. RIA)
—Copies to employees of good *faith procedures.*	687 Railroads	130,000 copies	6 minutes	13,000	0 (Incl. RIA)
—Copies of amendments to good faith procedures.	687 Railroads	130,000 copies	3 minutes	6,500	0 (Incl. RIA)
—Good faith challenges to railroad directives.	98,000 employees	15 challenges	10 minutes	3	0 (RIA)
—Resolution of challenges	687 Railroads	15 responses	5 minutes	1	0 (RIA)
—Direct order to proceed procedures: Immediate review by railroad testing officer/employer.	687 Railroads	5 reviews	15 minutes	1	0 (RIA)
—Documentation of employee protests to direct order.	687 Railroads	10 protest docs	15 minutes	3	0 (RIA)
—Copies of protest documentation	687 Railroads	20 copies	1 minute	.33	0 (RIA)
—Further review by designated railroad officer.	687 Railroads	3 reviews	15 minutes	1	0 (RIA)
—Employee requested written verification decisions.	687 Railroads	10 decisions	10 minutes	2	88
—Recordkeeping/Retention—Copies of written procedures.	687 Railroads	760 copies	5 minutes	63	2,709
—Copies of good faith challenge verification decisions.	687 Railroads	20 copies	5 minutes	2	86
218.99—Shoving or Pushing Movements:					
—Required operating rule compliant with this section.	687 Railroads	687 rule modific	1 hour	687	0 (Incl. RIA)
—General Movement Requirements: Job briefings.	100,000 RR employees.	60,000 briefings	1 minute	1,000	50,000
—Point Protection: Visual determination of clear track and corresponding signals or instructions.	100,000 RR employees.	87,600,000 deter/instructions + 87,600,000 signals.	1 minute	2,920,000	128,480,000
—Remote Control Movements: Confirmations by Crew.	100,000 RR employees.	876,000 confirm	1 minute	14,600	642,400
—Remote Control zone, exceptions to point protection: Determination/Communication track is clear.	100,000 RR employees.	876,000 deter/communication.	1 minute	14,600	642,400
—*Operational exceptions:*					
—Dispatcher permitted movements that are verified.	6,000 RR Dispatchers.	30,000 permitted movements.	1 minute	500	22,000
[NEW REQUIREMENTS]					

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
—Written procedures that are adopted/complied with to determinutee track occupancy prior to shoving/pushing movement.	687 Railroads	41 procedures	30 minutes	42	903
—The track is designated in writing	687 Railroads	41 designated track locations.	30 minutes	42	903
218.101—Leaving Equipment in the Clear:					
—Operating Rule that Complies with this section.	687 Railroads	687 amended op. rules.	30 minutes	344	0 (Incl. RIA)
218.103—Hand-Operated Switches and Derails:					
—Operating Rule that Complies with this section.	687 Railroads	687 amended op. rules.	60 minutes	687	0 (Incl. RIA)
—Minimum requirements for adequate job briefing.	632 Railroads	632 modif rules	60 minutes	632	0 (RIA)
—Actual job briefings conducted by employees operating hand-operated main track switches.	632 Railroads	1,125,000 brfngs	1 minute	18,750	825,000
218.105—Additional Job Briefings for hand-operated main track switches:	687 Railroads	60,000 briefings	1 minute	1,000	0 (Incl. RIA)
—Exclusive track occupancy: Report of position of main track switches and conveyance of switch position.	687 Railroads	100,000 reports + 100,000 convey.	1 minute	3,334	0 (RIA)
—Releasing authority limits: Acknowledgments and verbal confirmations of hand-operated main track switches.	6,000 RR Dispatchers.	60,000 reports + 60,000 confirm.	30 sec. + 5 sec	583	0 (Incl. RIA)
218.109—Hand-operated fixed derails—Job.	687 Railroads	562,500 brfngs	30 seconds	4,688	234,400

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 at 202–493–6073, or via e-mail at *robert.brogan@dot.gov* or *nakia.poston@dot.gov*.

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. Any comments should be sent to: The Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, att: FRA Desk Officer. Comments may also be sent via e-mail to OMB at the following address: *oira_submissions@omb.eop.gov*.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which 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**.

D. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the proposed regulation. Where a regulation has Federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This is an action with preemptive effect. Subject to a limited exception for essentially local safety hazards, its requirements will establish a uniform Federal safety standard that must be met, and State requirements covering the same subject are displaced, whether those standards are in the form of State statutes, regulations, local ordinances, or other forms of state law, including State common law. Preemption is addressed in §§ 217.2 and 218.4, both titled "Preemptive effect." As stated in the corresponding preamble language for §§ 217.2 and 218.4 in the original final rule, section 20106 of Title 49 of the United States Code provides that all

regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. This is consistent with past practice at FRA, and within the Department of Transportation.

FRA has analyzed this action in accordance with the principles and criteria contained in Executive Order 13132. FRA notes that the above factors have been considered throughout the development of this rulemaking both internally and through consultation within the RSAC forum, as described in Section I of this preamble. After the Railroad Operating Rules Working Group failed to reach a consensus recommendation on the NPRM, FRA reported the Working Group's unofficial areas of agreement and disagreement to the RSAC. After publication of the NPRM, FRA permitted the Working Group to meet and discuss the comments received; some consensus on the comments was derived and forwarded to the RSAC where it was ratified as a recommendation to the FRA. The RSAC has as permanent voting members two organizations representing State and local interests: AASHTO and ASRSM. The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative. States and other governments were afforded opportunity to consult by virtue of the NPRM and comment period, and the agency's procedures permitting petitions for reconsideration.

For the foregoing reasons, FRA believes that this action is in accordance with the principles and criteria contained in Executive Order 13132.

E. Environmental Impact

FRA has evaluated this action in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this action is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Act of 1995

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 expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) currently $128,100,000 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 action would not result in the expenditure, in the aggregate, of $128,100,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this action in accordance with Executive Order 13211. FRA has determined that this action is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

H. Public Proceedings

FRA has not provided additional notice and request for public comment prior to making the amendments contained in this rule. FRA concluded that such notice and comment were impractical, unnecessary and contrary to the public interest since FRA is, for the most part, only making minor technical changes in response to requests for reconsideration of issues that were previously the subject of detailed notice and extensive comment in the development of the initial final rule in this proceeding.

Certain of the amendments are so critical to the effective implementation of this rule that the delay that a notice and comment period would cause would clearly be contrary to the public interest in railroad safety. For example, the amendments delaying certain implementation of the rule need to go into effect immediately or some of the implementation dates in the initial final rule would go into effect before the amendments would. If the amendments were not allowed to go into effect immediately, many railroads would be rushing to develop and implement training and testing programs, and the quality of the programs and the training would suffer. In addition, an exemption or relief from a restriction is provided by allowing railroads to utilize existing shove light systems without establishing point protection. If this exemption is not immediately placed in effect, some railroads may require an employee to ride the side of a car or walk along a departure track equipped with shove lights, thereby increasing the employee's risk of an injury. Under these circumstances, FRA has concluded that the rule may be made effective immediately. 5 U.S.C. 553(d).

I. Privacy Act

Anyone is able to search the electronic form of all comments or petitions for reconsideration received into any of FRA's dockets by the name of the individual submitting the comment or petition for reconsideration (or signing the comment or petition for

reconsideration, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

List of Subjects

49 CFR Part 217

Penalties, Railroad safety, and Reporting and recordkeeping requirements.

49 CFR Part 218

Occupational safety and health, Penalties, Railroad employees, Railroad safety, and Reporting and recordkeeping requirements.

The Final Rule

■ For the reasons discussed in the preamble, FRA amends parts 217 and 218 of Title 49, Code of Federal Regulations as follows:

PART 217—[AMENDED]

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Section 217.9 is amended by revising the introductory text of paragraph (b), paragraphs (c)(1), (c)(6), and the introductory text of paragraph (e) to read as follows:

§ 217.9 Program of operational tests and inspections; recordkeeping.

* * * * *

(b) *Railroad and railroad testing officer responsibilities.* The requirements of this paragraph (b) are applicable beginning January 1, 2009.

* * * * *

(c) * * *

(1) Provide for operational testing and inspection under the various operating conditions on the railroad. As of January 1, 2009, the program shall address with particular emphasis those operating rules that cause or are likely to cause the most accidents or incidents, such as those accidents or incidents identified in the quarterly reviews, six month reviews, and the annual summaries as required under paragraphs (e) and (f) of this section, as applicable;

* * * * *

(6) As of January 1, 2009, identify the officer(s) by name, job title, and, division or system, who shall be responsible for ensuring that the program of operational tests and inspections is properly implemented. The responsibilities of such officer(s) shall include, but not be limited to, ensuring that the railroad's testing officers are directing their efforts in an appropriate manner to reduce accidents/incidents and that all required reviews and summaries are completed. A railroad with divisions shall identify at least one officer at the system headquarters who is responsible for overseeing the entire program and the implementation by each division.

* * * * *

(e) *Reviews of tests and inspections and adjustments to the program of operational tests.* This paragraph (e) shall apply to each Class I railroad and the National Railroad Passenger Corporation beginning April 1, 2009 and to all other railroads subject to this paragraph beginning July 1, 2009.

* * * * *

PART 218—[AMENDED]

■ 3. The authority citation for part 218 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 4. Section 218.93 is amended by adding a definition of "departure track" in alphabetical order to read as follows:

§ 218.93 Definitions.

* * * * *

Departure track means a track located in a classification yard where rolling equipment is placed and made ready for an outgoing train movement.

* * * * *

■ 5. Section 218.95 is amended by revising the introductory text of paragraph (a), and paragraphs (a)(3) and (a)(4) to read as follows:

§ 218.95 Instruction, training, and examination.

(a) *Program.* Beginning January 1, 2009, each railroad shall maintain a written program of instruction, training, and examination of employees for compliance with operating rules implementing the requirements of this subpart to the extent these requirements are pertinent to the employee's duties. If all requirements of this subpart are satisfied, a railroad may consolidate any portion of the instruction, training or examination required by this subpart with the program of instruction required under § 217.11 of this chapter. An employee who successfully completes all instruction, training, and examination required by this written program shall be considered qualified.

* * * * *

(3) *Implementation schedule for employees, generally.* Each employee performing duties subject to the requirements in this subpart shall be initially qualified prior to July 1, 2009.

(4) Beginning July 1, 2009, no employee shall perform work requiring compliance with the operating rules implementing the requirements of this subpart unless qualified on these rules within the previous three years.

* * * * *

■ 6. Section 218.99 is amended by adding a new paragraph (e)(5) to read as follows:

§ 218.99 Shoving or pushing movements.

* * * * *

(e) * * *

(5) Shoving or pushing movements made in the direction of the circuited end of a designated departure track equipped with a shove light system, if all of the following conditions are met:

(i) The shove light system is demonstrated to be failsafe;

(ii) The shove light system is arranged to display a less favorable aspect when the circuited section of the track is occupied;

(iii) Written procedures are adopted and complied with that provide for a reliable means of determining track occupancy prior to commencing a shoving or pushing movement;

(iv) The track is designated in writing;

(v) The track is under the exclusive and continuous control of a yardmaster or other qualified employee;

(vi) The train crewmember or other qualified employee directing the shoving or pushing movement complies with the general movement requirements contained in paragraphs (b)(1) and (b)(2) of this section;

(vii) All remote control shoving or pushing movements comply with the requirements contained in paragraph (c)(1) of this section; and

(viii) The shove light system is continuously illuminated when the circuited section of the track is unoccupied.

Issued in Washington, DC on June 10, 2008.

Joseph H. Boardman,

Administrator.

[FR Doc. 08–1354 Filed 6–11–08; 11:24 am]

BILLING CODE 4910–06–P

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania State Legislative Board United Transportation Union	:	
v.	:	Docket No. C-00019522
Norfolk Southern Railway Company	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

Via Hand Delivery and E-mail

Irwin W. Aronson, Esq.
Willig Williams & Davidson
Suite 504
212 Locust Street
Harrisburg PA 17101

Dated: February 26, 2010

Brian J. Knipe