

BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

FRA WAIVER PETITION DOCKET No. FRA-2010-0126

Brake System Safety Standards for Freight and Other Non-passenger
Trains Railroad and Freight Car Safety Standards
(49 C.F.R. Parts 232 and 215)

December 6, 2010

STATEMENT OF RICHARD A. JOHNSON, GENERAL PRESIDENT,
BROTHERHOOD OF RAILWAY CARMEN DIVISION
TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION

3 Research Place
Rockville, Maryland 20850

I. Introduction.

My name is Richard A. Johnson. I am the General President, Brotherhood Railway Carmen Division, Transportation•Communications International Union (BRC) and an International Vice President of the Transportation•Communications International Union (TCU). I have been a carman for 40 years, beginning in 1971 on the former Milwaukee Road at Bensonville, Illinois, and I am personally familiar with the Federal Railroad Administration's (FRA) regulations that set forth safety standards for rail equipment.

BRC appreciates this opportunity to participate in the regulatory process, and brings to that process an enormous wealth of experience and practical knowledge in the area of railroad safety. Our experience has taught us that full compliance with FRA's safety regulations is the surest way to improve railroad safety and, to that end, BRC will address the safety and other issues raised by this petition for waiver.

The Burlington Northern Santa Fe Railway Company (BNSF) and the Ferrocarril Mexican Railway Company (FXE) seek a test waiver of compliance from the requirements of 49 CFR 232.205 Class I Brake Test, Initial terminal inspection; 232.409--Inspection and testing of end-of-train devices; and 215.13--Pre-departure Inspection. This test waiver will allow tests and inspections conducted at Rio Escondido and El Torreon, Mexico, by FXE on northbound unit trains to be considered valid for run-through trains interchanged with BNSF at Eagle Pass, Texas, and bound for Temple, Texas. FXE claims its carmen will perform all Class 1 initial terminal inspections and repairs, and will comply with all parts of 49 CFR 232 and 215, as well as all applicable Association of American Railroads (AAR) interchange rules. With this test waiver, BNSF and FXE seek to establish to FRA's satisfaction that cross-border commerce can

be safely increased by eliminating the congestion of traffic that presently occurs at the border. For the reasons provided below, BRC requests that the petition for test waiver be denied.

II. The petition for test waiver should be denied.

The BNSF / FXE petition for test waiver should be denied because granting the test waiver may decrease the safety of both railroad employees and the general public and the carriers have not provided sufficient information to justify waiver. What is at stake in this matter is the safe operation of those trains that originate in Mexico and continue onward into the interior of the U.S. Safety is a common goal of all the parties involved in these proceedings, and all the necessary steps must be taken to assure safe operation of these trains.

BNSF and FXE are not the first U.S. / Mexican carrier partnership that have sought waiver from performing the required inspections and tests on the U.S. side of the U.S. / Mexico border. The Union Pacific Railroad Company (UP) attempted this same feat in 2004 and 2006, Dockets FRA-2004-18746 and FRA-2006-25765, respectively. In 2004, UP petitioned FRA to permit the Mexican rail carrier Transportacion Ferroviaria Mexicana (TFM) to perform the required tests and inspections in Mexico without these same tests and inspections being performed by UP on the U.S. side of the border. FRA denied this petition for waiver because it concluded that “UP failed to demonstrate that granting the petition would be consistent with safety at this time.” UP sought waiver again in 2006 with TFM which had now become the Kansas City Southern de Mexico (KCSM). However, UP withdrew the second petition for waiver shortly after it was published in the Federal Register. FRA’s decision in Docket FRA-2004-18746 is instructive on this matter and is discussed below.

BNSF and FXE claim that they can now show, with this test waiver, that there are no safety risks in allowing FXE to perform the required tests and inspections and allowing the trains designated as “bound for Temple, Texas” to be considered valid for run-through. However, there are several concerns with what BNSF and FXE are proposing.

First, the information provided in the BNSF / FXE petition for test waiver does not satisfy the requirements set forth in section 416 of the Rail Safety Improvement Act of October 16, 2008, P.L. 110-432, Div. A, Title IV, § 416, 122 Stat. 4890. Section 416 was specifically included in the Act because of the significance of this issue in the railroad industry. Section 416 provides that:

Mechanical and brake inspections of rail cars performed in Mexico shall not be treated as satisfying United States rail safety laws or regulations unless the Secretary of Transportation certifies that--

- (1) such inspections are being performed under regulations and standards equivalent to those applicable in the United States;
- (2) the inspections are being performed by employees that have received training similar to the training received by similar railroad employees in the United States;
- (3) inspection records that are required to be available to the crewmembers on board the train, including air slips and blue cards, are maintained in both English and Spanish, and such records are available to the Federal Railroad Administration for review; and
- (4) the Federal Railroad Administration is permitted to perform onsite inspections for the purpose of ensuring compliance with the requirements of this subsection.

The carriers do not reference or even mention section 416 in the petition for test waiver. Instead, BNSF and FXE offer “suggestions” that are, in some respects, similar to section 416. The carriers’ suggestions are as follows:

- (1) That FRA schedule regular audits during the test waiver period to confirm FXE compliance with CFR standards.
- (2) That BNSF will regularly audit for FRA and AAR compliance as well and will at FRA's discretion provide all documentation of the results of those inspection audits.
- (3) BNSF/FXE also suggest that training documentation and records be provided to FRA for all FXE carmen that inspect and repair these unit trains.
- (4) All FXE car inspectors will show compliance to CFR 232.203.

While the suggestions are similar to the conditions provided in section 416, there are some differences. The suggestions focus mainly on the carriers' intent to request audits from both FRA and AAR and how inspection documents and training documentation will be made available to FRA. However, the carriers have failed to address condition (3) of section 416 in its entirety while providing insufficient information concerning conditions (2) and (4). Condition (1) has presumably been satisfied because the carriers maintain that FXE carmen inspectors will be complying with the relevant regulatory provisions; however, without the proper audits and checks FRA will never know if this is the case.

Condition (3) of section 416 provides that all documentation going to FRA and the receiving BNSF crewmembers be made available in both English and Spanish. This condition is necessary for FRA to review all the documentation associated with this test waiver as well as ensuring that BNSF crews have all the information they need from the FXE crews when the trains are interchanged at the International Bridge. As such, section 416 cannot be satisfied unless the carriers provide further information regarding the translation of documentation as provided in condition (3).

In addition, the information provided by the carriers concerning conditions (2) and (4) is also insufficient to satisfy section 416. For example, the carriers have failed to provide any information as to the training actually received by FXE carmen. In fact, the only information BNSF and FXE provide is that “FXE car inspectors will show compliance to CFR 232.203.” Part 232.203, Training Requirements, requires all carriers operating in the U.S. to create a training program for all the carrier’s carmen inspectors.

Training of carmen inspectors is an extremely important issue for BRC. Carriers operating in the U. S. must provide extensive training to an employee aspiring to become a carmen inspector. For example, BNSF carmen must take courses from the National Academy of Railroad Sciences (NARS) and complete apprenticeship training. Apprenticeship training is a critical component of inspector training in the U.S. BNSF provides NARS to its apprentice inspectors as an introduction to further extensive training. BNSF carmen apprentices must work for 732 days with a journeyman and pass periodic tests to demonstrate their proficiency before becoming a journeyman. In addition, journeymen have to renew their training annually.

In contrast, no information has been provided that FXE inspectors receive training similar to the BNSF program training. Instead, BNSF and FXE simply maintain that FXE carmen inspectors will comply with part 232.203 without any specific details explaining what training program is currently in place and how it will operate if the petition for test waiver be granted.

There is also no mention of FXE inspectors’ training for safety appliance standards. 49 USCS § 20303 et. seq. and 49 CFR part 231. In the U.S., training on these provisions is extensive and includes apprenticeship training, classroom instruction and hands on training. In addition to this training, new inspectors working for American railroads have the benefit of

experienced co-workers and managers. In some instances, new inspectors have co-workers and managers who have been dealing with these safety provisions for 20 to 30 years. In contrast, FXE's employees are just now being notified of these laws and regulations. It is impossible for FXE's carmen inspectors to know these provisions with such little training and exposure to them.

Both FRA and interested parties need more specific information from the carriers to determine if the training program by FXE meets the training required by FRA. If FXE carmen inspectors do not receive training similar to that received by BNSF carmen inspectors, then condition (2) of section 416 has not been satisfied as well.

Another issue is how FRA will be able to enforce compliance under section 416. Condition (4) of section 416 provides that "[FRA] is permitted to perform onsite inspections for the purpose of ensuring compliance with the requirements of this subsection." The carriers' provide that "FRA schedule regular audits during the test waiver period to confirm FXE compliance with CFR standards." However, there are no specific guidelines on how compliance will be accomplished.

In the U.S., FRA has the authority to impose civil penalties against both the railroads and their employees for failure to comply with safety regulations. These penalties act as a deterrent against lax inspections and the use of non-compliant or unsafe equipment. FRA cannot enforce these penalties on FXE or its employees because it lacks jurisdiction in Mexico, and as far as BRC is aware, there is no formal agreement between FRA and its Mexican counterpart, the Secretaria de Comunicaciones y Transportes, to allow FRA to enforce compliance in Mexico. As a result, FXE and its employees cannot be held accountable for the inspections they perform. The ability of FRA officials to perform their functions and FRA's ability to impose civil

penalties are critical components of FRA's enforcement. Simply put, enforcement ensures accountability.

Due to the importance of this issue in this matter, BNSF and FXE need to provide more specific information on how compliance will occur. Although the carriers provide that they will request for regular FRA audits, there are no specific facts or guidelines on how the procedure will operate or which carrier will be accountable for any safety violations that may occur as a result of the FXE inspections. Audits should be performed at FRA's pleasure and without advance notice to the carriers. Otherwise, the carriers can prepare for the audits only at the time that the audit is announced.

However, this issue could be resolved if BNSF admits that FXE is acting as its agent when performing inspections in Mexico making BNSF accountable for any possible safety violation committed by FXE and its employees. The issue of agency and accountability was addressed by FRA in its denial of UP's first petition in Docket FRA-2004-18746. There, FRA found that UP should not be relieved of its responsibility to perform the required tests and inspections because it did not admit accountability for any enforcement actions taken against TFM (now KCSM). FRA specifically provided that:

any future relief considered in this area would need to be predicated on UP's admission that TFM is acting as an agent for the railroad when conducting such inspections on its behalf and that UP would be accountable for any enforcement actions taken with regard to the performance and quality of such inspections.

FRA further provided that UP would need "to actively oversee TFM's performance of inspections for UP."

While BNSF has not offered to undertake such responsibilities, these requirements can similarly be applied to BNSF in this matter. If BNSF admits that FXE is its agent when FXE conducts the applicable tests and inspections and accepts accountability for any enforcement actions taken against FXE with regards to the tests and inspections, then condition (4) could be satisfied. Moreover, active oversight by BNSF on FXE's performance of the tests and inspections should also be applied because it would enforce BNSF's adherence to the agency relationship and would allow BNSF to assist FXE with any issues it may have.

Based on the information provided above, BNSF and FXE have not satisfied their obligations under conditions (2), (3) and (4) of section 416. As such, FRA should not grant the carriers' petition for test waiver and the matter should not be further considered until the necessary information has been provided to FRA and interested parties to review.

Besides the fact that BNSF and FXE have failed to adequately address section 416, there are several other issues that also need to be addressed in these proceedings. For instance, the carriers have also failed to show that BNSF is unable to perform the required tests and inspections on the U.S. side of the border. In fact, BNSF is more than capable of performing the required tests and inspections at Ryan's Ruin, Texas. The carriers claim that the current conditions at Ryan's Ruin, Texas, create a "choke" point causing BNSF to lose three (3) million dollars annually and that the available inspection track on the U.S. side of the border is rudimentary with no option for expansion.

However, the information we have from our people in the field suggests that conditions at Ryan's Ruin, Texas, are sufficient. First, there is no "choke" point. BNSF itself provides that the yard receives only three (3) or four (4) trains a day at heavy traffic peaks. This means that

normally there could be one (1) to two (2) trains per day. In addition, the trains have been sufficiently staged across the border as to not create any back up on the U.S. side of the border. Moreover, the inspection track available to BNSF on the U.S. side is typical of numerous inspection tracks across the country. In fact, the inspection track is on flat, open land which is accessible by vehicle so that crews can easily traverse the area and inspect entire trains properly.

Furthermore, the information from our people in the field also indicates that the inspections performed in Mexico may decrease the safety of both railroad employees and the general public. There are two (2) factors which support this conclusion.

The first factor is the condition of the Rio Escondido and El Torreon facilities in Mexico. These are the facilities where tests and inspections are currently being performed in Mexico and the facilities to which the test waiver would apply. The only information the carriers have provided concerning the condition of either facility is that Rio Escondido “is a new modern World-Class complex built by FXE to facilitate international rail commerce,” which, “is being equipped with the latest in freight car repair technology and tooling and is staffed by trained and motivated employees.”

There are several problems with the information BNSF and FXE have provided here. First, the carriers provide only bare facts about the condition of Rio Escondido without discussing what the facility is actually capable of doing and there is absolutely no information provided concerning the condition of El Torreon. Moreover, the carriers also maintain that Rio Escondido “**is being equipped** with the latest in freight car repair technology and tooling.” (Emphasis added) This statement suggests that Rio Escondido may not even have the capabilities to perform the required tests and inspections currently or even in the near future.

Second, the information from our people in the field indicates that both facilities are generally not recognized as inspection facilities but rather as repair facilities. Repair facilities are generally used to repair or refurbish trains in units of one (1) to four (4) cars at a time. Repair facilities can perform some of the required tests and inspections but unless both Rio Escondido and El Torreon have inspection tracks, neither facility can perform an air continuity inspection on an entire train. A repair facility can test the air brakes of individual cars or units of cars but the result may be incorrect. Some cars have air brakes that will function individually but then won't function when placed back into the train. Indeed, the only way to perform the air continuity test is to put the entire train on an inspection track to conduct the test. However, there is no information provided in the petition for test waiver that either Rio Escondido or El Torreon have inspection track available.

Both FRA and interested parties need more information as to the condition of these facilities. Without such information, neither FRA nor interested parties have enough information to make determinations and comment on the possible safety implications of these facilities.

Another safety factor that militates against allowing the waiver is the distance and route these trains will travel after being inspected in Mexico. The trains to which this test waiver would apply may be traveling close to 1,000 miles after being inspected in Mexico. Neither Rio Escondido nor El Torreon are in close proximity to the U.S. / Mexico border and these trains may travel approximately 800 miles into the interior of the U.S. without the required tests and inspections being performed on the U.S. side of the border.

BNSF and FXE have used a slight of hand in the petition for test waiver to mask the actual distance and route the designated trains will travel. The carriers provide that the test

waiver will apply to trains designated as “bound for Temple, Texas.” This makes it sound as if Temple, Texas, is the destination of the designation and the location where the run-through trains will have the required tests and inspections performed. However, this is not the case. At the border, trains are interchanged between FXE and BNSF at the International Bridge. The trains then actually go from the border at Eagle’s Pass, Texas, to Ryan’s Ruin, Texas, then Temple, Texas, then to Alliance Fort Worth, Texas, and then on to Tulsa, Oklahoma. Tulsa, Oklahoma, is the final destination of these trains. Here, the cars of the remaining run-through trains are swapped out and tested for the first time in the U.S. The cars are then put into other trains that go to various destinations throughout the U.S. It is also important to note that San Antonio, Texas, is on the route in between Ryan’s Ruin, Texas, and Temple, Texas. However the trains do not stop in San Antonio, Texas. In any event, the total distance the run-through trains may traverse is approximately 800 miles from the border. Including the distance between Rio Escondido and El Torreon where the Mexican inspections take place and the distance between the border and Tulsa, Oklahoma, these trains could run somewhere close to 1,000 miles after being inspected in Mexico with the majority of the route on U.S. soil.

BRC carmen perform swap outs of the trains inspected at Rio Escondido and El Torreon in Mexico at Temple, Texas, Alliance Fort Worth, Texas, and Tulsa, Oklahoma. Only the swapped out cars are inspected because they are going to be put in another train. BRC carmen performing the required tests and inspections on the swap outs find a defect rate in excess of 20 percent at all locations where the tests and inspections are performed. In contrast, the BNSF system average is a mere three (3) percent.

Rio Escondido and El Torreon are the facilities which produce this unacceptable defect rate. These same trains then travel up to 800 miles in the interior of the U.S. through several

population centers such as San Antonio, Texas, Fort Worth, Texas, and Tulsa, Oklahoma. The excessive defect rate decreases the safety of both railroad employees and the general public due to possible derailments caused by improperly inspected rail equipment.

Such a high defect rate on trains being inspected by FXE in Mexico is telling, especially when the carriers express such high confidence for the potential test waiver. In fact, BNSF specifically notes in the petition for test waiver that “[it] is absolutely confident granting of this test waiver will have no adverse impact on safety of operations between the two railroads.” BNSF goes on to add that “[t]he progress FXE has made over the last several years in quality and consistency of repairs can no longer be legitimately be ignored.”

Based on the information provided above, BNSF and FXE have failed to show that granting this test waiver would not decrease the safety of both railroad employees and the general public. The carriers need to provide more evidence to support their claims of safety instead of blanket statements of confidence that do nothing to address the reality of this situation.

Another issue preventing waiver is that BNSF and FXE have failed to address hazmat inspections. Hazardous materials are an obvious safety concern because they have the potential to cause substantial harm to both railroad workers and the general public. There is even more concern in this case because the run-through trains to which the petition applies may continue up 800 miles into the interior of the U.S. after crossing the border. Rail cars undergoing less than rigorous hazmat inspections should not be permitted to enter and travel such a great distance into the U. S. without the required hazmat inspections.

Hazmat inspections are required by part 174.9 of Title 49 of the Code of Federal Regulations. Furthermore, FRA may enforce both civil penalties (49 CFR part 209.101) and

criminal penalties (49 CFR part 209.131) when a carrier violates the hazmat regulations. In fact, Part 209, Appendix B of Title 49 of the Code of Federal Regulations specifically proscribes the penalty of \$5,000 per loaded car for a violation of regulation 174.9 for “[f]ailure to properly inspect a rail car containing a hazardous material when accepted for transportation.”

UP similarly failed to discuss this issue in both of its two (2) previous petitions. FRA addressed UP’s failure to discuss hazmat inspections in its denial of UP’s first petition, Docket FRA-2004-18746. There, FRA found that hazardous materials inspections are required under part 174.9 of Title 49 of the Code of Federal Regulations and that “this inspection must be conducted by the **receiving** railroad with respect to any train originating in Mexico.” (Emphasis added) FRA further provided that UP made no request “to the Research and Special Programs Administration for relief from that requirement.” Despite FRA’s previous entususes of part 174.9, neither BNSF nor FXE provide how hazmat inspections will be conducted under part 174.9 in the petition for test waiver and to our knowledge the carriers have made no request for relief from this requirement.

Even if BNSF is permitted to not perform hazmat inspections when the carrier receives the designated trains when interchanged at the border, BNSF should then be accountable for any violation of the hazmat regulations. Appendix B of Title 49 of the Code of Federal Regulations specifically provides that part 174.9 may not always be triggered to require a train to be stopped and inspected. Appendix B goes on to add that:

in run-through train operations, the train crew of the receiving railroad simply assumes responsibility for the train from the delivering crew. Acceptance of responsibility includes the right to receive a penalty action for transporting a rail car with a non-complying condition.

BNSF's accountability for any hazmat violations was also not discussed in the carriers' petition for test waiver. If BNSF does not perform hazmat inspections at the border, then FXE must perform the hazmat inspections and BNSF must then accept responsibility for any hazmat violations that may occur due to the FXE hazmat inspections.

Based on the information provided above, BNSF and FXE have failed to address how hazmat inspections will be performed on the designated run-through trains and BNSF has not admitted accountability for any hazmat violation that may occur with these trains. As such, the carriers' petition for test waiver should also be denied for this reason as well.

BNSF and FXE also fail to address how the carriers will comply with statutes, regulations and other standards which were not identified in the petition. BNSF must comply with the standards set forth in these provisions regardless of waiver for parts 232.205, 232.409 and 215.13.

For instance, BNSF does not mention how either it or FXE will comply with the Safety Appliance Act (49 USCS § 20301 et. seq.) or the regulations regarding safety appliance standards (49 CFR part 231). These provisions proscribe the number of safety appliances required on trains, the dimensions of each safety appliance, the location of the safety appliances on each type of car and the manner of application for each safety appliance for each type of car.

A particular issue of concern under the Safety Appliance Act is where defective or insecure safety appliances will be repaired. 49 USCS § 20303(a). Section 20303(a) requires that when a defective or insecure safety appliance has been discovered, the car on which the appliance is located must be moved "from the place at which the defect or insecurity was first discovered to the nearest available place at which repairs can be made." Put simply, section

20303(a) provides that the geographic location of where a defect or insecurity is found will determine where it is corrected.

The place where a safety defect or insecurity is corrected is important because these run-through trains may be continuing up to 800 miles into the interior of the U.S. without further inspection. If these corrections are made in Mexico they will have substantial ramifications far beyond the Mexican border. Any defect or insecurity that is improperly addressed will endanger the lives of any train crew operating the run-through trains until the next inspection. It is hard to believe that BNSF and FXE would not specifically address this issue in the petition for test waiver given the possible consequences to the carriers' employees.

BNSF also fails to address how its crews will inspect the light of the marking devices when its crews take control of the FXE trains. 49 CFR part 221.15. Part 221.15 provides that the marking devices must be "examined at each crew change point to assure that the device is in proper operating condition." 49 CFR part 221.15(a). Accordingly, part 221.15(a) requires BNSF's crews to inspect the light of the marking devices when BNSF crews take over FXE's trains at the International Bridge.

Besides the applicable statutes and regulations, there are also technical bulletins issued by FRA that each American railroad must follow. FRA currently publishes technical bulletins every year as instructive interpretations of the federal regulations. BNSF has not provided any evidence that FXE receives these technical bulletins or whether FXE's employees have received and understand these bulletins.

Based on the information provided above, the BNSF / FXE petition for test waiver has not addressed how the carriers will comply with statutes, regulations and other standards which

were not identified in the petition. As such, the carriers' petition for test waiver should also be denied on this ground as well.

Finally, granting BNSF and FXE's petition for test waiver will diminish oversight and decrease safety. Eagle Pass, Texas, is not the only gateway for rail traffic into the U.S. and these are not the only trains coming from Mexico. Granting this petition could lead to greater reliance on Mexican facilities for the maintenance and repair of American railroads' rolling stock and locomotive fleets. This reliance will restrict and weaken oversight by the U.S. government. Relaxation of oversight will jeopardize the safety of both railroad employees and the general public.

III. Conclusion.

In summary, the BNSF / FXE petition for test waiver should be denied for the following reasons. First, the carriers have not satisfied the requirements set forth in section 416 of the Rail Safety Improvement Act. Second, BNSF is more than able to perform the required tests and inspections at Ryan's Ruin, Texas. Third, if the petition for test waiver is granted, the safety of railroad employees and the general public may decrease. Fourth, the carriers have failed to address hazmat inspections at the border. Fifth, BNSF and FXE do not explain how the carriers will comply with statutes, regulations and other standards not identified in the petition for test waiver. Finally, granting the BNSF / FXE petition for test waiver will diminish oversight by FRA ultimately leading to a decrease in safety in the railroad industry.

Due to the importance of this issue in the railroad industry and the lack of information provided by BNSF and FXE in the instant petition for test waiver, BRC further requests that a hearing be held concerning this Docket. A hearing was similarly held for UP's first attempt to

perform the required tests and inspections in Mexico without these same tests and inspections being performed by UP on the U.S. side of the border in Docket FRA-2004-18746. In addition, a hearing was also scheduled for UP's second attempt in 2006 in Docket FRA-2006-25765; however the scheduled hearing never transpired because UP withdrew its petition for test waiver prior to the hearing. The proposal set forth in the BNSF / FXE petition is substantially similar to what UP and KCSM proposed in Dockets FRA-2004-18746 and FRA-2006-25765, and accordingly, we believe a hearing should similarly be held in this Docket as well.