under the Clean Water Act, 33 U.S.C. 1321(b)(6)(B)(ii); Coast Guard class II penalty proceedings under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9609(b); suspension and revocation of Certificates of Registry proceedings for Great Lakes Pilots pursuant to 46 CFR Part 401; National Highway Traffic Safety Administration (NHTSA) automotive fuel economy enforcement under 49 U.S.C. Chapter 329 (49 CFR Part 511); Federal Highway Administration (FHWA) enforcement of motor carrier safety regulations under 49 U.S.C. 521 and 5123 (49 CFR 386); the Department's aviation economic enforcement proceedings conducted by its Office of Aviation Enforcement and Proceedings pursuant to 49 U.S.C. Subtitle VII, 14 CFR Chapter II. Also covered are any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), any hearing conducted under Chapter 38 of title 31, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq.

* * * * *

5. In § 6.7, paragraph (a) is amended by removing the citation ''5 U.S.C. 551(3)'' and adding the citation ''5 U.S.C. 504(b)(1)(B)''; paragraph (b)(1) is amended by removing the words ''1 million'' and adding the words ''2 million''; paragraphs (b)(2) and (b)(5) are amended by removing the words ''5 million'' and adding the words ''7 million''; and paragraph (b)(6) is added to read as follows:

**§ 6.7 Eligibility of applications.**

* * * * *

(b)(6) For the purposes of § 6.9(b), eligible applicants include small entities as defined in 5 U.S.C. 601.

* * * * *

6. In § 6.9, paragraphs (a) and (b) are revised and paragraphs (c) and (d) are added to read as follows:

**§ 6.9 Standards for awards.**

(a) An eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant in a proceeding covered by this Part, unless the position of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust. The burden of proof that an award should not be made to an eligible applicant is on the Department where it has initiated the proceeding. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail. Whether or not the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, in the adversary adjudication for which fees and other expenses are sought. The ''position of the Department'' means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication may be based.

(b) In the context of a Departmental proceeding to enforce a party's compliance with a statutory or regulatory requirement, if the demand by the Department is substantially in excess of the amount awarded to the government pursuant to the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to an eligible applicant party the fees and expenses related to defending against the excessive demand, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance. As used in this section, ''demand'' means the express demand of the Department which led to the adversary adjudication, but does not include a recitation by the Department of the maximum statutory penalty (I) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(c) The decision of the Department on the application for fees and other expenses shall be the final administrative decision under this section.

(d) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

**§ 6.11 [Amended]**

7. In § 6.11, paragraph (b) is amended by removing the figure ''$75.00'' and adding the figure ''$125.00''.

**§ 6.25 [Amended]**

8. In § 6.25, paragraph (c) is amended by removing the words ''an identify'' and adding words ''and identify''.

Issued this 24th day of March 1997 at Washington, DC.

**Rodney E. Slater,**

*Secretary of Transportation.*

[FR Doc. 97–10192 Filed 4–18–97; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

## Federal Railroad Administration

## 49 CFR Part 214

**[FRA Docket No. RSOR 13, Notice No. 10]**

**RIN 2130–AA86**

## Roadway Worker Protection

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

**ACTION:** Final rule; response to petitions for reconsideration.

**SUMMARY:** On December 16, 1996, FRA published its Final Rule on Roadway Worker Protection (61 FR 65959), which was the product of the agency's first regulatory negotiation. This rule promulgates standards to protect roadway workers while working on or near railroad tracks. In this document, FRA responds to concerns raised by two parties in petitions for reconsideration of the final rule.

**EFFECTIVE DATE:** January 15, 1997.

**FOR FURTHER INFORMATION CONTACT:** Gordon A. Davids, P.E., Bridge Engineer, Office of Safety, FRA, 400 Seventh Street S.W., Room 8326, Washington, D.C. 20590 (telephone: 202–632–3340); Grady Cothen, Deputy Associate Administrator for Safety Standards and Program Development, FRA, 400 Seventh Street S.W., Washington, D.C. 20590 (telephone: 202–632–3309); or Cynthia Walters, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street S.W., Room 8201, Washington, D.C. 20590 (telephone 202–632–3188).

**SUPPLEMENTARY INFORMATION:** On December 16, 1996, FRA published its final rule on Roadway Worker Protection which established standards for the protection of roadway workers who are working on or about railroad track. This rule represents the efforts of an Advisory Committee chartered to conduct FRA's first negotiated rulemaking. On January 6, 1997, the Association of American Railroads filed a petition for reconsideration of the final rule. The AAR's petition specifically alleges:

- Section 214.337 of the final rule imposes significant additional costs on the railroad industry without commensurate safety gains;
- The Advisory Committee did not participate in the economic evaluation of the final rule; and
- FRA has failed to provide a reasoned response to a significant concern raised on the record by AAR and its members.

On February 11, 1997, the American Public Transit Association also filed a petition for reconsideration of the final rule. APTA's petition specifically alleges:

- APTA's commuter rail members will not be able to comply with the regulations by the March 15, compliance date and urges FRA to extend the date to September 15 for commuter railroads.
- APTA urges FRA to reconsider the use of restricted speed in yards and interlockings as a form of on track safety protection; and
- APTA urges FRA to reconsider section 214.337 by allowing lone workers to perform visual inspections within interlockings and control point limits when trains are operating at restricted speed.

**A. Procedural Issues**

Petitions for reconsideration to the Administrator must be filed in accordance with 49 CFR 211.29(a), which requires:

> Except for good cause shown, such a petition must be submitted not later than 60 days after publication of the rule in the **Federal Register**, or 10 days prior to the effective date of the rule, whichever is the earlier. (49 CFR 211.29(a)).

The effective date for this rule was January 15, 1997, making the appropriate filing deadline January 5, 1997, 10 days prior to the effective date. Since the filing deadline fell on a weekend, all petitions were to be filed by the next business day, Monday, January 6. APTA's petition, was filed on February 11, more than 30 days after the appropriate filing deadline. In accordance with the regulation, late filers are expected to show good cause. APTA's petition, however, fails to set forth an argument for such good cause. Despite APTA's untimely filing and lack of good cause shown, FRA is addressing the substance of the petition in this response.

**B. The AAR's Concerns**

The petition submitted by the AAR addressed 3 major concerns which require reconsideration of one provision, § 214.337, On Track Safety Procedures for Lone Workers. The AAR asserts the following:

*1. The Final Rule Imposes Significant Additional Costs on the Railroad Industry Without Commensurate Safety Gains*

This allegation is in reference to § 214.337's prohibition on the use of individual train detection as protection for lone workers in interlockings, controlled points, and remotely controlled hump yards. The AAR contends that the final rule should be modified to allow lone workers to perform inspections and minor correction work within controlled points, manual interlockings or remotely controlled hump yards while using individual train detection at locations where sight distance, background noise and adjacent track constraints pose no threat to safety. The AAR's argument essentially reiterates the argument set forth by Norfolk Southern Railway (Norfolk Southern) in its comment to the docket. This comment was addressed during the Advisory Committee's final meeting which was dedicated to the discussion of comments to the NPRM. During that meeting, the Advisory Committee could not reach consensus to reopen this issue despite Norfolk Southern's explanation of its concern.

The AAR acknowledges sending an August 23rd letter to the docket, after the committee met. In that letter, the AAR articulated the same arguments that it now presents in its petition. The AAR maintains that this prohibition will create situations where roadway workers will simply forgo inspection. The AAR also contends that this prohibition is unnecessary, since lone workers have a right to get more restrictive protection when they believe it is necessary. The AAR also argues that any railroad is generally free to adopt more restrictive measures making it unnecessary and excessive to include such measures in the final rule. Finally, the AAR contends that there are no fatality data involving a lone worker, trained in roadway worker protection, inspecting in a controlled point, manual interlocking or remotely controlled hump yard.

FRA independently analyzed the claims presented by the AAR in that letter and the cost data used to support them. FRA agreed with the Advisory Committee, which reached consensus after much debate that there are sound safety reasons to restrict a lone worker's use of individual train detection, and articulated that reasoning in the preamble to the final rule. Since individual train detection does not ensure that a train will not operate over the track, FRA has limited the use of this method of on-track safety to instances where the risks associated with the roadway work environment are minimal. FRA provided data indicating that manual interlockings, controlled points and remote controlled hump yards are not locations of low risk for roadway workers. Eleven (11) fatalities occurred between 1989 and 1995, in these locations and in situations virtually analogous to lone workers utilizing individual train detection. Although these workers were technically members of a work group, they were performing tasks by themselves and responsible for protecting themselves. Many of these roadway workers had recently undergone rules training and had the option to request additional forms of protection. Despite recent training and the option for more protection, 11 roadway workers were killed. The AAR is simply mistaken when it contends that there are no safety gains flowing from this restriction.

The AAR further contends that due to the burdensome nature of these restrictions, the frequency of inspections will decrease in interlockings and controlled points. It is important to note that there are Federal regulations requiring both track and signal inspections. These regulations establish minimum inspection frequencies and safety standards for track and signal.

In addition to Federal standards, railroads often have their own internal mandates requiring certain track and signal inspections. FRA believes that the new roadway worker protection standards will have no impact on these inspections, since they are required by either Federal regulation or railroad rule in order to maintain a minimum level of safety. However, as always, FRA will not hesitate to employ enforcement measures for any of its regulations, if non-compliance is discovered.

Finally, the AAR's petition included a cost analysis asserting that this provision is far too expensive. FRA did not find this assertion persuasive. First, the AAR did not provide critical assumptions used in conducting its analysis, making it difficult to provide a reasoned response to the AAR's contentions. For example, FRA's calculations used in the Regulatory Impact Analysis pertained to additional cost burdens. In many instances, railroads are already providing some sort of protection. It is not clear that the AAR has calculated only costs associated with providing additional on-track safety protection. The enormity of the number the AAR used in connection with lone workers would seem to indicate that the figure represents the cost of total man hours to provide on-track safety for lone workers at interlockings, controlled points and remotely controlled hump yards, not the additional cost of man hours for providing on-track safety for lone workers at interlockings and controlled points. The AAR's petition did not specify which method of protection was

used for their cost estimate. It appears that the AAR calculated their costs by using more expensive methods of on-track safety protection than FRA used. Perhaps the most puzzling portion of this cost analysis is the sparse detail offered to explain how the cost of this provision increased from $2,847,586 for one railroad to $12,000,000 for the industry. Given the AAR's cost estimate, one railroad represents 24 percent of the industry's costs. This figure defies FRA's understanding of the industry, since no railroad represents such a significant share. After careful consideration and for the reasons set forth above, FRA has decided not to modify this provision.

*2. The Advisory Committee Did Not Participate in the Economic Evaluation of the Final Rule*

FRA finds puzzling the AAR's desire to have its economic concern addressed in a petition for reconsideration to the final rule. The AAR seems to take issue with the conclusions reached in the analysis. The AAR concludes that the rule is based fully or partially on false premises. The AAR expresses the belief that had they participated in the development, methodology, or assumptions used in the Regulatory Impact Analysis, the resulting document would have been more accurate.

FRA contends that the Regulatory Impact Analysis was never intended to be part of this Regulatory Negotiation. FRA's Notice proposing the formation of a negotiated rulemaking committee discussed ''key issues for negotiation.'' (59 FR 42203) FRA did not anticipate the Regulatory Impact Analysis itself being a topic for negotiation. Nor did FRA receive any comments to the initial notice suggesting that the analysis be considered a key issue for negotiation.

Most important, FRA stands firmly behind the methodology and conclusions reached in its analysis. The methodology used is consistently employed by this agency and renders accurate results. In addition, Advisory Committee members were included in surveys providing information which formed the basis of significant portions of the analysis. FRA also used data that are routinely provided to the agency by the various railroads themselves.

Lastly, FRA believes that each railroad is in the best position to determine how proposed safety standards will affect them. Committee members were expected to independently weigh the benefits and burdens of proposed standards for the interests that they represent, during the course of the negotiations. Participation in formulating FRA's regulatory impact analysis should not have had a significant effect on any party warranting reconsideration of the rule. Negotiated rulemaking theory assumes that parties will examine the impact of rule provisions on their interest as they negotiate and it assumes that given that self-examination, no party would reach consensus on issues that have a severe detrimental impact on them. The consensus reached at the NPRM stage was not a consensus pending review of the Regulatory Impact Analysis, but a solid consensus on recommended rule text for minimum standards in the area of Roadway Worker Protection.

*3. FRA has Failed To Provide a Reasoned Response to a Significant Concern Raised on the Record by the AAR and its Members*

FRA addressed all comments to the docket in the preamble to the Final Rule. The AAR is mistaken when it asserts that FRA did not provide a reasoned response to its concerns. There was an entire section of the preamble dedicated to the issues of *Restricted Speed and Lone Workers.* FRA considered the AAR's comment and did not find it persuasive for safety reasons. FRA also determined that the provision would not be modified in accordance with the AAR's suggestion. In addition, a portion of the Regulatory Impact Analysis was devoted to the economic concerns presented by the AAR. FRA has clearly provided a reasoned response for its decision against incorporating changes suggested by the AAR.

**C. APTA's Concerns**

APTA's petition addressed 3 major concerns also. APTA asserts the following:

*1. APTA Requests to Extend the Compliance Date for Commuter Railroads to September 15*

APTA expressed concern regarding meeting the March 15 compliance date for commuter railroads. APTA's petition acknowledges full participation in the regulatory negotiation process. APTA members had a good understanding of the NPRM recommended by the Advisory Committee and participated in the discussion regarding suggested changes that had been submitted in the form of comments to the docket. In fact, APTA members were fully aware that beginning last spring, many class 1 railroads had voluntarily implemented on-track safety measures similar to those recommended in the NPRM. Despite full participation in the process, and full knowledge of the standards that were likely to get published, it appears as though these measures come unexpectedly to some commuter railroads. FRA finds surprising the need for a 6-month extension for a significant portion of the railroad industry on the basis of training when at least portions of the on-track safety program can be implemented with very little training. In addition, FRA has received correspondence from at least one commuter railroad indicating that it would be in full compliance by March 15. FRA believes that issues regarding the compliance date are best handled through the waiver process, since there is no compelling reason to change the compliance date for all commuter railroads. At present, FRA has received waiver petitions from several commuter railroads and is committed to provide expedited service on these petitions. After careful consideration and for the reasons set forth above, FRA has decided not to extend the compliance date for all commuter railroads and will address the individual requests for extension through the waiver process.

*2. APTA Requests that Restricted Speed be as a Form of On-Track Safety Protection in Yards and Interlockings*

The issue of whether the use of restricted speed, alone, would constitute on-track safety surfaced during the regulatory negotiation. The parties to the negotiation determined that restricted speed would not constitute on-track safety protection. FRA articulated its belief that unusual circumstances in certain locations where this measure or others might be considered sufficient to constitute on-track safety protection, would have to be addressed by the waiver process. FRA felt that it would be necessary to consider the unique qualities of each operation in order to determine the merits of a waiver petition regarding whether restricted speed could be considered on-track safety protection. After careful consideration and for the sound safety reasons, FRA has also decided not to consider restricted speed a form of on-track safety protection and to also address this issue through the waiver process.

*3. APTA Requests That Lone Workers Be Allowed to use Individual Train Detection as a Form of Protection While Conducting Visual Inspections Within Interlockings and Controlled Points When Trains are Operating at Restricted Speed*

APTA's concern regarding lone workers was discussed during the regulatory negotiation and the comment period following publication of the NPRM. FRA included a detailed

discussion of these comments in the preamble to the final rule. (61 FR 65062) APTA's request also pertains to § 214.337, but is slightly different than the AAR's, since trains in this instance will be operating at restricted speed. Despite this difference, FRA's safety reasoning is the same. FRA and the committee were not willing to carve out an exception for lone workers using individual train detection at interlockings and controlled points, even if trains are operating at restricted speed. FRA continues to believe that sound safety principles limit the use of individual train detection. APTA members have also addressed this issue through waiver petitions, which is again the best forum for such concerns. After careful consideration and for the reasons set forth above, FRA has decided not to change § 214.337's prohibition on the use of individual train detection.

Issued this 15th day of April 1997.

**Jolene M. Molitoris,**

*Administrator, Federal Railroad Administration.*

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