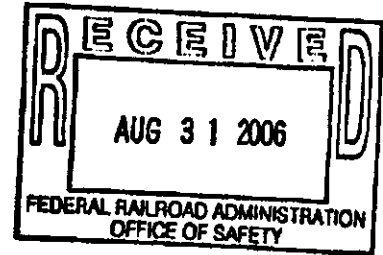


FRA 2006-25862



August 28, 2006

Mr. Grady Cothen  
Chairman, Federal Railroad Administration Safety Board  
1120 Vermont Avenue NW  
Washington, DC 20590

Re: Petition of waiver for relief of sanctions from selected portions of 49CFR, Part 240

Dear Mr. Cothen:

The Union Pacific Railroad (UPRR) and the employees of UPRR's North Platte Service Unit represented by the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the United Transportation Union (UTU) desire to participate in a Close Call Reporting System (C3RS) Demonstration Pilot Project sponsored by the Federal Railroad Administration (FRA) Office of Research and Development. The C3RS Demonstration Pilot Project is one of the action items included in the FRA's Rail Safety Action Plan announced on January 25, 2006 and excerpted below.

**Develop close call data to reveal reasons for human failures.**

In other industries such as aviation, implementation of "close call" reporting systems that shield the reporting employee from discipline (and the employer from punitive sanctions levied by the regulator) have contributed to major reductions in accidents. In March of 2005, FRA completed an overarching memorandum of understanding with railroad labor organizations and management to develop pilot programs to document close calls, i.e., unsafe events that do not result in a reportable accident but very well could have. Participating railroads will be expected to develop corrective actions to address the problems that may be revealed. The aggregate data may prove useful in FRA's decision-making concerning regulatory and other options to address human factor-caused accidents. Experiences on the Norwegian railway (Sernbaneverket), showed a 40 percent reduction in accidents after three years of implementation of a similar program. In a manufacturing environment, Syncrude, a mining company, experienced a 33 percent reduction in lost time frequency after one year of implementing a close call system."<sup>1</sup>

The UPRR, BLET and UTU have developed and signed an implementing memorandum of understanding (IMOU), based on the FRA's overarching memorandum of understanding, as a first step in commencing the demonstration pilot project. The demonstration pilot project would involve approximately 1,200 yard and road service employees headquartered in North Platte, Nebraska. This IMOU was sent to the FRA for consideration and acceptance on August 28, 2006. A copy of the IMOU, as submitted is included in this petition as Appendix B. As referenced in the IMOU, certain "close calls"

<sup>1</sup> Page 5 Rail Safety Action Plan released January 25, 2006

may be properly reported by the employee(s) involved and later discovered by the UPRR, for example, through subsequent retrospective analysis of event recorder data, etc. In order to encourage employee reporting of close calls, the IMOU contains provisions to shield the reporting employee from UPRR discipline. The UPRR, BLET and UTU also desire to shield the reporting employee(s) and UPRR from punitive sanctions that would otherwise arise as provided in selected sections of 49 C.F.R. Part 240 detailed below. Therefore, pursuant to 49 C.F.R. Part 211 and Part 240.9, the UPRR is petitioning for waiver of compliance of specified sections of 49 C.F.R. Part 240 for properly reported close call events as defined in the C3RS IMOU. The waiver petition is requested for the duration of the C3RS demonstration project (five years from implementation or until demonstration project is completed or parties to the IMOU withdraw as described in the IMOU, whichever is first).

The UPRR is petitioning for waiver from certain provisions of Part 240, as listed below, Part 240.305's prohibitions, and the procedural requirements of 240.307 that would potentially arise when revocation of engineer certificate is not initiated and/or effected for properly reported incidents (as defined in C3RS IMOU) that are not observed or discovered in real time or near real time that would otherwise be mandatory for incidents that involve the following violations of operating rules and practices:

**49CFR240.117(e)1-4;**

**49CFR240.305(a)1-4 and 6 excluding supervisors as indicated;**

**49CFR240.307**

The text of these referenced regulations is reproduced verbatim on Attachment A.

The UPRR and other parties signatory to the IMOU dated August 25, 2006 believe the data from these properly reported close call incidents as defined in the IMOU will be invaluable in analysis and development of effective corrective actions. Without the requested waiver of sanctions and exemption from mandatory revocation of engineer's certificate, the employee(s) involved in the incidents described above will not file report of the incident. The incident(s) will likely go undetected and there will be no opportunity for analysis, data trending or appropriate corrective actions. All parties signatory to the IMOU and participating in the demonstration pilot project believe that the close calls demonstration project and granting this waiver petition are in the public interest and consistent with improving railroad safety. All parties believe that the improvement in safety experienced in Norway as stated above: "the Norwegian railway (Sernbaneverket), showed a 40 percent reduction in accidents after three years of implementation of a similar program." These results of improved safety performance have also been observed in other modes of transportation and other industry following the implementation of a close calls reporting system. The FAA reports numerous safety benefits from their close calls reporting system compared to non-US flight operations (See FAA website). Example of close call reporting system benefits from the US Coast Guard have included: "Response costs decline 30% - 40% resulting in potential USCG

savings of \$12 - \$16 Million and potential shipping industry savings of \$39 - \$52 Million; potential reduction in seamen injuries and claims category savings range between 15% - 45%; potential % savings industry-wide scale = \$100's millions." <sup>2</sup>

In a manufacturing environment, Syncrude, a mining company, experienced a 33 percent reduction in lost time frequency after one year of implementing a close call system. We are confident that railroad operations will benefit from this demonstration pilot project and by full implementation of a close calls reporting system in the future resulting in improved public and railroad safety.

The UPRR and the parties signatory to the IMOU are respectfully requesting expedited handling of this petition in order to allow the demonstration pilot project to be implemented as soon as possible.

Sincerely,

*Robert M. Grimaila*

Robert M. Grimaila  
Senior AVP Safety, Environment and Security  
ph. (402) 544-4344 fx. (402) 501-0326  
grimaila@up.com

cc: Associate Administrator Jo Strang, Office of Safety

---

<sup>2</sup> From LCDR Scott J. Ferguson, USCG INTERNATIONAL MARITIME INFORMATION SAFETY SYSTEM (IMISS), April 13, 1999

## **Attachment A**

### **240.117(e)(1)**

(1) Failure to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

### **240.117(e)(2)**

(2) Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (i.e., the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter (i.e., employee injury/illness cases reportable exclusively because a physician or other licensed health care professional either made a one-time topical application of a prescription-strength medication to the employee's injury or made a written recommendation that the employee: Take one or more days away from work when the employee instead reports to work (or would have reported had he or she been scheduled) and takes no days away from work in connection with the injury or illness; work restricted duty for one or more days when the employee instead works unrestricted (or would have worked unrestricted had he or she been scheduled) and takes no other days of restricted work activity in connection with the injury or illness; or take over-the-counter medication at a dosage equal to or greater than the minimum prescription strength, whether or not the employee actually takes the medication, as instances of failure to adhere to this section;

### **240.117(e)(3)**

(3) Failure to adhere to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class I, class IA, class II, or running brake test provisions of 49 CFR part 238;

### **240.117(e)(4)**

(4) Occupying main track or a segment of main track without proper authority or permission;

## **240.305**

§240.305 Prohibited conduct.

After December 31, 1991,

### **240.305(a)**

(a) It shall be unlawful to:

#### **240.305(a)(1)**

(1) Operate a locomotive or train past a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it; or

**240.305(a)(2)**

(2) Operate a locomotive or train at a speed which exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, only those violations of the conditional clause of restricted speed rules (i.e., the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, shall be considered instances of failure to adhere to this section; or

**240.305(a)(3)**

(3) Operate a locomotive or train without adhering to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class 1, class 1A, class II, or running brake test provisions of 49 CFR part 238;

**240.305(a)(4)**

(4) Fail to comply with any mandatory directive concerning the movement of a locomotive or train by occupying main track or a segment of main track without proper authority or permission;

**240.305(a)(6)**

(6) Be a ~~Designated Supervisor of Locomotive Engineers~~, a certified locomotive engineer pilot or an instructor engineer who is monitoring, piloting or instructing a locomotive engineer and fails to take appropriate action to prevent a violation of paragraphs (a)(1) through (a)(5) of this section. Appropriate action does not mean that a supervisor, pilot or instructor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation. A Designated Supervisor of Locomotive Engineers will not be held culpable under this section when this monitoring event is conducted as part of the railroad's operational compliance tests as defined in §§ 217.9 and 240.303 of this chapter.

**240.307**

§240.307 Revocation of certification.

**240.307(a)**

(a) Except as provided for in § 240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and, during the period that certification is valid, acquires information which convinces the railroad that the person no longer meets the qualification requirements of this Part, shall revoke the person's certificate as a qualified locomotive engineer.

**240.307(b)**

(b) Pending a revocation determination under this section, the railroad shall:

**240.307(b)(1)**

(1) Upon receipt of reliable information indicating the person's lack of qualification under this part, immediately suspend the person's certificate;

**240.307(b)(2)**

(2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. The notice may initially be given

either orally or in writing. If given orally, it must be confirmed in writing and the written confirmation must be made promptly. Written confirmation which conforms to the notification provisions of an applicable collective bargaining agreement shall be deemed to satisfy the written confirmation requirements of this section. In the absence of an applicable collective bargaining agreement provision, the written confirmation must be made within 96 hours.

240.307(b)(3)

(3) Convene the hearing within the deadline prescribed by either paragraph (c)(1) of this section or the applicable collective bargaining agreement as permitted under paragraph (d) of this section;

240.307(b)(4)

(4) Determine, on the record of the hearing, whether the person no longer meets the qualification requirements of this part stating explicitly the basis for the conclusion reached;

240.307(b)(5)

(5) When appropriate, impose the pertinent period of revocation provided for in § 240.117 or § 240.119; and

240.307(b)(6)

(6) Retain the record of the hearing for 3 years after the date the decision is rendered.

240.307(c)

(c) Except as provided for in paragraphs (d), (f), (i) and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:

240.307(c)(1)

(1) The hearing shall be convened within 10 days of the date the certificate is suspended unless the locomotive engineer requests or consents to delay in the start of the hearing.

240.307(c)(2)

(2) The hearing shall be conducted by a presiding officer, who can be any qualified person authorized by the railroad other than the investigating officer.

240.307(c)(3)

(3) The presiding officer will exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

240.307(c)(4)

(4) The presiding officer shall convene and preside over the hearing.

240.307(c)(5)

(5) Testimony by witnesses at the hearing shall be recorded verbatim.

240.307(c)(6)

(6) All relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

240.307(c)(7)

(7) The presiding officer may:

240.307(c)(7)(i)

(i) Adopt any needed procedures for the submission of evidence in written form;

240.307(c)(7)(ii)

(ii) Examine witnesses at the hearing;

**240.307(c)(7)(iii)**

**(iii) Convene, recess, adjourn or otherwise regulate the course of the hearing; and**

**240.307(c)(7)(iv)**

**(iv) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.**

**240.307(c)(8)**

**(8) Parties may appear and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.**

**240.307(c)(9)**

**(9) The record in the proceeding shall be closed at conclusion of the hearing unless the presiding officer allows additional time for the submission of information. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.**

**240.307(c)(10)**

**(10) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.**

**240.307(c)(11)**

**(11) The decision shall:**

**240.307(c)(11)(i)**

**(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record; and**

**240.307(c)(11)(ii)**

**(ii) Be served on the employee.**

**240.307(c)(12)**

**(12) The railroad shall have the burden of proving that the locomotive engineer's conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.**

**240.307(d)**

**(d) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.**

**240.307(e)**

**(e) A hearing required under this section may be consolidated with any disciplinary or other hearing arising from the same facts, but in all instances a railroad official, other than the investigating officer, shall make separate findings as to the revocation required under this section.**

**240.307(f)**

**(f) A person may waive the right to the hearing provided under this section. That waiver shall:**

**240.307(f)(1)**

**(1) Be made in writing;**

**240.307(f)(2)**

**(2) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and**

**240.307(f)(3)**

**(3) Be signed by the person making the waiver.**

**240.307(g)**

**(g) A railroad that has relied on the certification by another railroad under the provisions of § 240.227 or § 240.229, shall revoke its certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked its certification after determining, in accordance with the provisions of this section, that the person no longer meets the qualification requirements of this part. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing and no additional hearing is required prior to a revocation by more than one railroad arising from the same facts.**

**240.307(h)**

**(h) The period of certificate suspension prior to the commencement of a hearing required under this section shall be credited towards satisfying any applicable revocation period imposed in accordance with the provisions of § 240.117.**

**240.307(i)**

**(i) A railroad:**

**240.307(i)(1)**

**(1) Shall not determine that the person failed to meet the qualification requirements of this part and shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under § 240.117(e)(1) through (e)(5) of this part; or**

**240.307(i)(2)**

**(2) May determine that the person meets the qualification requirements of this part and decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of § 240.117(e)(1) through (e)(5) of this part was of a minimal nature and had no direct or potential effect on rail safety.**

**240.307(j)**

**(j) The railroad shall place the relevant information in the records maintained in compliance with § 240.309 for Class I (including the National Railroad Passenger Corporation) and Class II railroads, and § 240.15 for Class III railroads if sufficient evidence meeting the criteria provided in paragraph (i) of this section, becomes available either:**

**240.307(j)(1)**

**(1) Prior to a railroad's action to suspend the certificate as provided for in paragraph (b)(1) of this section; or**

**240.307(j)(2)**

**(2) Prior to the convening of the hearing provided for in this section;**

**240.307(k)**

**(k) Provided that the railroad makes a good faith determination after a reasonable inquiry that the course of conduct provided for in paragraph (i) of this section is appropriate, the**

**railroad which does not suspend a locomotive engineer's certification, as provided for in paragraph (a) of this section, is not in violation of paragraph (a) of this section.**

**[58 FR 19004, Apr. 9, 1993; 60 FR 53133, Oct. 12, 1995; 64 FR 60966, November 08, 1999]**

**Appendix "B"**  
**IMOU**