



Brotherhood of Maintenance of Way Employees Division
of the International Brotherhood of Teamsters

Freddie N. Simpson
President

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August 15, 2022

VIA FIRST CLASS MAIL AND FACSIMILE (202) 493-6068

FRA Docket Clerk,
Office of Chief Counsel
RCC-10
Mail Stop 10
1200 New Jersey Ave. SE.
Washington, DC 20590

Re: Petition to Repeal 49 CFR §213.4 - Excepted Track

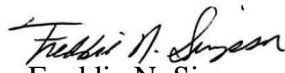
Dear Sir/Madam:

Enclosed for filing is the Brotherhood of Maintenance of Way Employees Division of the Teamster Rail Conference's (BMWED) Petition for the Repeal of 49 CFR §213.4.

Please confirm receipt and the assigned docket number.

Please let me know if you have any questions.

Sincerely,


Freddie N. Simpson
President

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA—

PETITION OF THE
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
OF THE TEAMSTER RAIL CONFERENCE
FOR THE REPEAL OF 49 CFR §213.4

August 15, 2022

Pursuant to 49 CFR § 211.07, the Brotherhood of Maintenance of Way Employees Division of the Teamster Rail Conference (BMWED) respectfully submits this Petition for Repeal of 49 CFR §213.4 – Excepted Track.

I. Introduction

The excepted track regulation at 49 CFR §213.4 permits railroads to designate track as effectively exempt from track safety standards. This regulation was meant to be a short-term solution to help railroads that were financially suffering 40 years ago. There is no excuse for its continued existence and BMWED seeks a repeal of 49 CFR §213.4.

II. Substance of the Regulation the Petitioner Seeks to Repeal

Under the current regulation at 49 CFR §213.4, a track owner may designate a segment of track as excepted track provided that certain conditional requirements are satisfied and operational restrictions are adhered to. Once excepted, the track is exempt from compliance with minimum safety requirements for roadbed, track geometry and track structure.¹ This exemption is an unacceptable safety risk, and it must be eliminated.

III. Interest of the Petitioner

BMWED is the recognized collective bargaining representative for more than 30,000 railroad maintenance of way employees who inspect, install, construct, repair and maintain railroad tracks, and railroad bridges on all Class I railroads in the United States. BMWED is also a member of the Federal Railroad Administration's (FRA) Railroad Safety Advisory Committee (RSAC) and works with the agency to develop regulatory standards through that collaborative process. As such, BMWED and its membership have a vested interest in railroad safety and the safety of rail workers and the public at large.

¹ <https://railroads.dot.gov/elibrary/fra-announces-new-track-safety-regulations>.

IV. History/Background

The origin of excepted track is as a short-term solution to a rail industry in financial crisis that could not afford to maintain its tracks. In an April 2017 paper titled “A Short History of U.S. Freight Railroads”, the Association of American Railroads (AAR) wrote that “[d]uring the 1970s, most major railroads in the Northeast and several major Midwestern railroads went bankrupt” and “[b]ankrupt railroads accounted for more than 21 percent of the nation’s rail mileage.” The AAR explained that railroads “lacked the funds to properly maintain their tracks” so that by 1976, “more than 47,000 miles of track had to be operated at reduced speeds because of unsafe conditions.” *Id.* The AAR stated that railroads had so many billions of dollars in deferred maintenance that the term “standing derailment” developed to describe the problem that railcars that were standing still simply fell off poorly maintained track.

Accordingly, “FRA added the excepted track provision (§ 213.4) to the regulations in 1982 in response to an industry outcry for regulatory relief on those rail lines producing little or no income.” 63 Fed. Reg. 33992, 33994 (1998). “FRA believed that without some relief for low density lines, railroads would accelerate abandonment of those lines rather than invest their slim resources where returns would be limited.” *Id.*

The excepted track “provision was intended to allow for limited periods of operation over track that was scheduled for abandonment or later improvement, and to permit operations over low-density branch lines and related yard tracks in areas where it is highly unlikely that a derailment would endanger persons along the right-of-way.” 62 Fed. Reg. 36138, 36141 (1997). Further, “FRA believed that the designated tracks would be located on comparatively level terrain in areas where the likelihood was remote that a derailment would endanger a train crew or the general public.” *Id.*

From the beginning, the excepted track regulation has been a game to railroads of all sizes to avoid track safety regulations. For an early example, in 1988, the Acting FRA Administrator issued an emergency order prohibiting the Boston and Maine Corporation/Berkshire Scenic Railway Museum, Inc. from transporting passengers on excepted track.² The administrator noted that “on 3.3 of the 3.5 miles of track in question, FRA has found a total of 475 defects keeping this track from qualifying for classification at FRA’s lowest class of track” but that “the Boston and Maine Corporation has designated this track as excepted track” so that “no maintenance requirements apply.” *Id.*

Congress recognized the serious problems with excepted track and passed the Rail Safety Enforcement and Review Act of 1992, Public Law 102–365 (September 3, 1992), now codified at 49 U.S.C. § 20142, which required the Secretary of Transportation to conduct a review of safety standards including “the need for revisions to regulations on track excepted from track safety standards.”

In a 1994 study by the GAO, the agency noted “One railroad classified about 80 percent of its 400 miles of track as excepted.”³ “Other railroads transported hazardous materials on excepted track through residential areas or intentionally designated track as excepted rather than comply with minimum safety standards.” *Id.* GAO’s report explained that excepted track “designations often occurred after the [FRA] advised the railroads that their track did not meet safety standards.” *Id.* at p. 5. GAO concluded that “the increase in the number of accidents and defects, together with the examples of abuse of the intent of the excepted track provision cited by FRA, provide strong evidence that changes to the track safety regulations are needed.” *Id.* at p. 39.

² https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/14892/EO_12.pdf

³ <https://www.gao.gov/assets/rced-94-56.pdf> (p. 5 & 36).

FRA noted in the 1998 revisions to track safety regulations that excepted track “traverses residential areas or exists within close proximity to major population centers, and hazardous materials frequently are moved over these tracks with some regularity.” 62 Fed. Reg. 36138, 36141 (1997). FRA cited “instances where railroads have taken advantage of the permissive language in the section to conduct operations in a manner not envisioned by the drafters of the provision” including “remov[ing] a segment of track from the excepted designation only long enough to move a train with more than five cars carrying hazardous materials, or to operate an excursion passenger train, and then replac[ing] the segment in excepted status as soon as the movement is completed.” *Id.* at 36142.

In a June 15, 1998, memo⁴, the Director of the Office of Safety Assurance and Compliance circulated a memo titled “Freight Cars Derailed/Damaged on Short Line Railroads” that stated “[m]any short line railroads operate over questionable or “Excepted Track” *that often is the cause of derailments.*” (Emphasis added).

In the 1998 revisions to 49 CFR §213.4, the FRA made very modest changes such as requiring that excepted track “meet a minimum gauge requirement, and railroads will be obligated to perform periodic inspections of switches on excepted track.”⁵ These the additions were an attempt to close loopholes in the regulations, but the entire concept of excepted track is an unacceptable safety loophole, and it must be closed entirely.

V. Need For the Action Requested

Forty years on, rail carriers continue to abuse excepted track regulations which were originally intended to be applied for limited periods of operation over track scheduled for abandonment or later improvement. The excepted track regulations at 49 CFR §213.4 encourage

⁴ https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1081/98_29.pdf

⁵ <https://railroads.dot.gov/elibrary/fra-announces-new-track-safety-regulations>

carriers to designate track as "excepted" to avoid track maintenance. These regulations encourage tolerance of dangerous track conditions, even on trackage producing revenue adequate to support track maintenance.

In 2010, FRA solicited input on how to determine whether a railroad has an "inadequate safety record" under 49 U.S.C. 20156(a)(1) and thus would be required to develop and implement a Risk Reduction Program. 75 Fed. Reg. 76345, 76348 (2010). One of the factors proposed as being an indicator of an inadequate safety record was the "proportion of the railroad's territory that is excepted track under 49 CFR 213.4." *Id.*

As a recent example of the severity of the issue, in a September 2020 Railroad Accident Brief issued by the NTSB following a 2017 derailment in Arlington, Texas that resulted in a railroad worker fatality, the NTSB wrote "[b]ecause of the excepted track designation, conditions were present at the POD [point of derailment] that otherwise would not be permitted if the track was designated as Class 1 or higher" and "[c]ontributing to the accident was the designation of the accident track as excepted track under the current FRA Track Safety Standards, which allowed inadequate track conditions to exist on track used regularly."⁶

FRA's 1998 revisions to excepted track was inadequate nibbling around the edges of a significant track safety problem. The "excepted track" loophole must be eliminated entirely, and track must be brought into compliance with FRA Class I track standards.

VI. Estimation of Costs and Benefits

There will be costs associated with bringing the track up to standard, but there is no justification for continuing a short-term solution from 40 years ago that was designed to help railroads dealing with a series of bankruptcies. The financial state of the railroads has completely

⁶ <https://www.nts.gov/investigations/AccidentReports/Reports/RAB2002.pdf>.

reversed. Railroad industry executives are calling 2021 the “most profitable year ever”⁷ and making headlines for posting “record earnings”.⁸ Since completion of the big merger and control transactions, the industry has been highly profitable.⁹ Operating ratios declined dramatically over this period; from 86.6 in 2004 to 64 in 2020, and 62 in 2021(partial); operating ratios in 2021 were the lowest since World War II. *Id* at 3. These trends continued through the pandemic. The Class I railroads can certainly afford to invest in maintaining their tracks to meet minimum safety standards and should have no excepted track.

Short Line and Regional Railroads should also have been able to raise their excepted track to FRA minimum standards since the excepted designation was created. “In a 1993 survey by the American Short Line Railroad Association [ASLRA], 110 railroads estimated that it would cost about \$182 million to upgrade their nearly 4,000 miles of excepted track.”¹⁰ In 1998, FRA reported that “ASLRA commented that the cost to short line railroads to upgrade and maintain excepted track would exceed \$230 million.” 63 Fed. Reg. 33992, 33995 (1998). In 2005, the Short Line Tax Credit, also known by its tax line-item reference 45G, was enacted by Congress. Now known as the American Short Line and Regional Railroad Association (ASLRRRA), the organization’s website currently touts that the 45G tax credit “has allowed short lines to privately invest over \$5B since its inception” and notes that the “tax credit was made permanent in December of 2020 as part of the Consolidated Appropriations Act.”¹¹ Short line railroads have had almost 30 years since that first survey estimating the cost to upgrade their excepted track, billions of dollars in tax credits,

⁷ <https://www.railwayage.com/freight/class-i/up-fritz-2021-most-profitable-year-ever/>

⁸ https://www.progressiverailroading.com/bnsf_railway/news/BNSF-posts-record-earnings-for-2021--66004#:~:text=For%20full%20year%202021%2C%20BNSF,according%20to%20Berkshire%20Hathaway%20Inc.

⁹ STB Docket No. EP 770, Comment 304357 (STB served Apr. 22, 2022) at Addendum A (prepared by Thomas Roth of the Labor Bureau, Inc.)

¹⁰ <https://www.gao.gov/assets/rced-94-56.pdf> (p.33)

¹¹ <https://www.aslrra.org/advocacy/45g-tax-credit/>

and the assurance that this tax credit has been made permanent. Short line railroads must similarly be required to bring all track up to minimally acceptable track safety standards.

VII. Conclusion

BMWED most sincerely appreciates FRA's commitment to railroad and public safety. For the reasons stated above, and in the interest of railroad and public safety, BMWED respectfully requests FRA to fully consider this Petition and given the original intention of the excepted track provision to provide short term relief to railroads at a time such relief was necessary for the American economy it is time to repeal this outdated class of track. The current regulation at 49 CFR §213.4, which allows some railroads to operate trains over excepted track for an unlimited period, defeats the intent of having track safety standards. After 40 years, it is time for repeal.

Submitted: August 15, 2022

Respectfully,

A handwritten signature in black ink, appearing to read "Freddie N. Jensen". The signature is written in a cursive style with a prominent initial "F".

President

cc: BMWED Vice Presidents and General Chairmen
Roy Morrison, BMWED Director of Safety