Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference — International Brotherhood of Teamsters

NATIONAL LEGISLATIVE OFFICE
25 Louisiana Avenue, NW, 7th Floor Annex • Washington, DC 20001
Phone: (202) 624-8776 • Fax: (202) 624-3086 • holmes@ble-t.org

RAYMOND A. HOLMES
Vice President and
National Legislative Representative

February 16, 2006

Docket Clerk
DOT Central Docket Management Facility
Room PL-401
400 7th Street, SW (Plaza Level)
Washington, DC 20590-0001

Re: Docket No. FRA-2005-23107

Dear Docket Clerk:

On November 16, 2005, the American Association of Railroads ("AAR") petitioned the Federal Railroad Administration ("FRA") for a waiver from compliance with the requirements of 49 C.F.R. Section 229.125 as they relate to operation of a locomotive on which one of the two 350-watt headlight lamps is inoperative. *See* DOT DMS FRA-2005-23107-2 ("AAR Petition"). FRA acknowledged receipt of the petition on November 29, 2005. *See* FRA-2005-23107-1. By notice dated January 18, 2006, FRA published the waiver request and solicited comments from interested parties. *See* FRA-2005-23107-3.

These comments are submitted by the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters ("BLET"), which is the duly designated and recognized collective bargaining representative for the craft or class of Locomotive Engineer employed on the vast majority of AAR member railroads. Consequently, AAR's petition would have a substantial impact upon our members. For the reasons set forth below, BLET opposes granting the requested relief.

As an initial, procedural matter, BLET takes issue with AAR's characterization of its petition as "noncontroversial" and worthy of "expedited consideration." Indeed, a review of the recent history of FRA regulation of headlights establishes that the agency rejected an almost identical request less than two years ago. On August 19, 2003, FRA published an interim final rule making a technical clarification to the locomotive headlight and auxiliary light provisions contained in 49 C.F.R. Sections 229.125(a) and (d). *See* 68 Fed. Reg. 49713.

During the rulemaking, AAR and the Long Island Rail Road ("LIRR") sought "relief from the requirements related to the handling of a locomotive that experiences the failure of one lamp in a dual 350-watt lamp headlight." *See* 69 Fed. Reg. 12532. Specifically, AAR sought "to have the

provisions related to movement of locomotives with defective auxiliary lights contained at § 229.125(g) applied to locomotives that experience the failure of one or more of the 350-watt lamps utilized in a locomotive's headlight," and LIRR sought similar relief. 69 Fed. Reg. 12533. FRA responded to these requests for relief as follows:

> In FRA's opinion, the additional latitude sought by the AAR and LIRR regarding the handling of a locomotive with a headlight fixture not capable of producing 200,000 candela would constitute a substantive change to the existing regulation. … ***FRA believes that to make such a substantive change in a rulemaking proceeding, intended to be a technical clarification of the existing regulation, would clearly violate the Administrative Procedure Act.*** Thus, although there may be some merit to the requests made by the AAR and the LIRR, FRA does not believe this rulemaking is the proper forum in which to address the issues. While their comments may have merit when considering locomotives with auxiliary lights aimed parallel to the centerline of the locomotive and burning steadily, Part 229 permits auxiliary lights to be aimed up to 15 degrees of the centerline and permits auxiliary lights to flash. *See* 49 CFR 229.125(d)(3) and (e)(1). Further, auxiliary lights may be extinguished or dimmed when trains are passing and under certain other conditions. *See* 49 CFR 229.125(f). ***FRA believes that changes in these provisions would be beyond the scope of this rulemaking proceeding. The relief sought by AAR and LIRR also raises a number of technical and operational issues that would need to be fully explored and evaluated before any action could be considered by FRA.*** Consequently, FRA is denying the requests made by AAR and LIRR in their comments to this proceeding. ***AAR and LIRR can of course file a petition under 49 C.F.R. part 211 seeking an FRA rulemaking to address the additional latitude they favor.***

Id. (emphasis added).

When FRA last considered AAR's request, it concluded that the subject could not be addressed within the rulemaking occurring at that time without running afoul of the Administrative Procedures Act. Further, FRA stated that no consideration could be given absent exploration and evaluation of a number of technical and operational issues. Finally, FRA informed AAR of its option to file a "petition … **seeking an FRA rulemaking**" on the subject (id., emphasis added); significantly, FRA **did not** "note[] that AAR could petition for relief." *See* AAR Petition at p. 2. Clearly, if the waiver subject could not properly be considered within the context of the 2003-2004 rulemaking, the matter is not one appropriate for handling under the waiver process, much less on an expedited basis, as AAR proposes. Accordingly, BLET respectfully requests that FRA reaffirm its prior ruling, and deny the petition on the ground that the matter must be handled within a rulemaking proceeding.

Without retreating from the above, Section 229.125 prescribes the standards for (1) headlights on lead locomotives used in road service, (2) headlights on locomotives used in yard service, and (3) auxiliary lights, for lead locomotives operated at a speed greater than 20 miles per hour over

one or more public highway-rail crossings. Relevant to AAR's petition is the following provision:

> (a) Each lead locomotive used in road service shall have a headlight that produces a peak intensity of at least 200,000 candela. If a locomotive or locomotive consist in road service is regularly required to run backward for any portion of its trip other than to pick up a detached portion of its train or to make terminal movements, it shall also have on its rear a headlight that produces at least 200,000 candela. Each headlight shall be arranged to illuminate a person at least 800 feet ahead and in front of the headlight. For purposes of this section, a headlight shall be comprised of either one or two lamps.
> *** * ***
> (2) If a locomotive is equipped with a dual-lamp headlight, a peak intensity of at least 200,000 candela shall be produced by the headlight based either on a single lamp capable of individually producing the required peak intensity or on the candela produced by the headlight with both lamps illuminated. If both lamps are needed to produce the required peak intensity, then both lamps in the headlight shall be operational. The following lamps meet the standard set forth in this paragraph (a)(2): a single operative PAR-56, 200-watt, 30-volt lamp; two operative PAR-56, 350-watt, 75-volt lamps; or operative lamp(s) of equivalent design and intensity.

49 C.F.R. § 229.125.[1]

At the present time, when one of the two 350-watt lamps fails enroute, a railroad may only continue the locomotive in service until the earlier of the next calendar day inspection, or reaching the nearest forward point where the repairs necessary to bring it into compliance can be made. 49 C.F.R. § 229.9(b). AAR's petition seeks to parallel the latitude provided for auxiliary lights in Section 229(g), which permits operation in service until the next calendar day inspection, irrespective of whether a train first reaches the nearest forward point where the repairs necessary to bring the locomotive into compliance can be made, based on the following rationale:

- "[T]he 200,000 candela requirement is not the result of scientific analysis of the amount of light necessary for public safety. Rather, in 1980 FRA adopted the 200,000 candela requirement because the previous standard requiring that headlights enable an engineer to see a dark object the size of a person 800 feet ahead was vague. The 200,000 candela requirement was chosen because the 200-watt lamp universally used by the industry at that time produced 200,000 candela. Thus, the 200,000 candela requirement describes in scientific terms the lamp that is required, but is not the result

[1] AAR's petition does not make explicit reference either to subsection (a)(2) or to locomotives used in road service. However, the specific relief sought implicates the quoted provision.

> of scientific analysis of the minimum amount of light needed for safety purposes."
>
> - "Since no scientific study has been done showing the minimum amount of light needed for safety purposes, no adverse safety conclusions can be drawn about either lamp."
>
> - "There is no scientific evidence that would support an assertion that the candela difference between the 200-watt and 350-watt lamps is meaningful. Thus, there is no rational basis for the regulatory structure providing that a locomotive with only one functioning 200-watt lamp in the headlight can be moved without restriction, while a locomotive with only one functioning 350-watt lamp in the headlight can be moved only pursuant to section 229.9."
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> - "Significantly, in 1980, when FRA promulgated the 200,000 candela requirement, it could not take into consideration the light produced by auxiliary lights because they were not required. Today, there is light in front of a locomotive produced by both the headlight and the auxiliary lights."
>
> - "AAR also is willing to abide by a waiver condition that the auxiliary lamps burn steadily, although this will restrict the extent to which this waiver can be used."
>
> - "FRA implied that in the future, were it to permit a locomotive to operate with a failed 350-watt lamp under the same conditions applicable to locomotives with failed auxiliary lights, it might require that auxiliary lights be aimed parallel to the centerline and prohibit the dimming or extinguishing of auxiliary lights when trains are passing. … AAR believes that these limitations should not be imposed …."

AAR Petition at pp. 3-4.

AAR's position provides an insufficient basis for granting the relief sought for several reasons. First, AAR's description of the evolution of the 200,000 candela standard misconstrues its history. The original performance standard developed by the Interstate Commerce Commission prior to 1972, which was set forth in Section 230.231 prior to promulgation of the 1980 Final Rule, was that a locomotive must be equipped with "a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a

man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight." *See* 69 Fed. Reg. 12534. The 200,000 candela standard was adopted because (a) it was the minimum standard that could be met by the existing fleet and (b) the existing fleet was in compliance with Section 230.231. Thus, it was not — as AAR suggests — a number plucked from thin air that was wholly lacking in operational context. Rather, it is AAR's argument that seeks to erode a decades-old standard through clever wordsmithing.

Second, with respect to AAR's complaints concerning a lack of "scientific study" and "scientific evidence," we would point out that FRA also addressed this issue in 2004:

> AAR's comments also urge FRA to convene a group of technical experts to develop a permanent illumination standard for headlights and auxiliary lights that is based on sound scientific analysis. … AAR states that it is eager to participate in such a review. FRA agrees that such an endeavor may be useful. FRA welcomes any additional details, information, suggestions, and views related to such a review from AAR and any other interested party. FRA also notes that AAR enjoys custody and control of the Transportation Technology Center, where controlled tests could be readily accomplished.

Id.

BLET submits that — as the moving party seeking a waiver from compliance — AAR has the burden of establishing that a single 350-watt lamp satisfies the performance standard underlying the 200,000 candela requirement, since it cannot meet the requirement itself. Instead, AAR attempts to shift the burden to FRA by suggesting that FRA cannot demonstrate a qualitative difference between the illumination provided by a single 200-watt lamp and that provided by a single 350-watt lamp. However, AAR has not provided a scintilla of scientific evidence to support its arguments, and adoption of AAR's rationale would set a dangerous precedent, because it could serve as a basis to undermine other FRA performance standards on the basis of simple attack, as opposed to contrary scientific evidence.

Third, BLET believes that auxiliary lights do not provide a sufficient margin of safety to enable extended operation with a single 350-watt lamp. As previously noted, the purpose of the headlight is to provide illumination of the right-of-way for the benefit of the locomotive engineer, the conductor, and any other occupant of a locomotive. FRA has mandated the use of auxiliary lights for precisely the opposite purpose:

> The primary purpose of locomotive auxiliary lights is to ***enhance the visibility of the front-end locomotive of a train from the perspective of a driver of a motor vehicle approaching a grade crossing***. *See* 61 FR 8881.

69 Fed. Reg. 12535 (emphasis added).

Because they serve a different purpose, auxiliary lights are focused differently than headlights. 49 C.F.R. § 229.125(d)(3). They also may be set to flash, or to burn steadily. 49 C.F.R. § 229.125(e). The mere assertion by AAR that auxiliary lights, intended to provide locomotive conspicuity for motorists, would provide sufficient additional illumination for a locomotive being operated with a single 350-watt lamp is not substantiated by any scientific evidence, much less scientific proof, and cannot serve as a legitimate basis for granting the petition.

Fourth, even if auxiliary lights could be considered sufficient on a limited, temporary basis, AAR's reluctance concerning a "no flashing" requirement and its opposition to alignment and dimming conditions raise serious safety concerns. AAR's rationale for this aspect of its position is a concern that such conditions would "restrict the extent" to which the waiver could be used. Taken in context, what AAR really seeks is to be able to continue a locomotive in service after a 350-watt lamp has failed, with no additional safeguards required. This is precisely the operational scenario FRA rejected in 2004.

In summary, FRA should deny AAR's petition for several reasons. The subject matter of the petition is something that must be handled in a rulemaking, and cannot properly be handled via the waiver process, as FRA previously ruled. AAR has made no showing that the current regulation imposes any substantial burden on the operations of its member railroads; indeed, AAR's proposal actually would erode a performance standard that has been in effect for over 35 years. Nor has AAR provided any scientific evidence in support of its position. AAR's claim that sufficient additional illumination is provided by auxiliary lights is contrary to the purpose served by those lights, and its refusal to abide configuration limitations on auxiliary lights that supplement a single 350-watt lamp was previously found unacceptable by FRA.

At the time these comments were drafted only the first four pages of AAR's petition were available on the DOT DMS website. BLET reserves the right to supplement these comments when the remainder of the petition is posted.

Respectfully submitted,

Raymond Holmes

Vice President and National Legislative Representative

cc: Advisory Board
All General Chairmen
All State Legislative Board Chairmen
John P. Tolman, Chief of Staff / Legislative & Political Director
Thomas A. Pontolillo, Director of Regulatory Affairs