

## Chapter 8B

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## Train Employees – Hours of Service Law

### Covered Service:

Application: Train or Engine Service: The Federal hours of service laws (HSL) define "train employee" as an individual engaged in or connected with the movement of a train, including a hostler. Train or engine service refers to the actual assembling or operation of trains or engines. Employees who perform this type of service commonly include locomotive engineers, firemen, conductors, trainmen, switchmen, switchtenders [unless their duties come under the provisions of section 211.05 (dispatching service)] and hostlers. Any other employee who is actually engaged in or connected with the movement of any train is also covered, regardless of his/her job title.

Application: Inside and Outside Hostlers and their Helpers: This discussion clarifies the applicability of the HSL as it pertains to employees who move locomotives in or around repair shops or assist such movements. The HSL regulates duty hours of employees "actually engaged in or connected with the movement of any train, including hostlers." However, the law does not address every situation in which railroad rolling equipment is moved. In FRA's analysis, we make distinctions between "train movements" and other equipment movements not directly related to transportation (e.g., for maintenance, repair, or troubleshooting inspections).

The 1976 amendments to the law brought "inside" hostlers within the category of employees "engaged in or connected with the movement of any train." For the purpose of this statute, Congress defined inside hostling moves as train movements, i.e., the movement of one or more locomotives, with or without coupled cars. It follows necessarily that inside hostler helpers are as much connected with the movement of trains as outside hostler helpers. In short, by defining train movements to include inside hostling, Congress expanded covered service to include both locomotive operators and their helpers.

FRA takes a functional approach to coverage, that is, we consider the type of work performed, not the craft or job title of the person doing the work. In 1977, FRA addressed this issue in an agency statement of policy and interpretation, in Appendix A to Part 228:

With the passage of the 1976 amendments, both inside and outside hostlers are considered to be connected with the movement of trains. Previously, only outside hostlers were covered. Any other employee who is actually engaged in or connected with the movement of any train is also covered, regardless of his job title.

Thus, FRA's interpretation is, and has been since 1977, that employees performing inside hostler duties (e.g., moving a locomotive under its own power to or from a repair shop for fueling, sanding, or general servicing duties or moving a locomotive under its own power to repair or test cab signal or automatic train control equipment) are as much "connected with" the movement of a train as outside hostlers. Since outside hostler helpers are connected with the movements they assist, so too are inside helpers performing covered service.

In explaining its issuance of this interpretation, FRA stated:

Employees known as "outside hostlers" generally move locomotives between shops or engine terminals and other yard areas. Employees known as "inside hostlers" generally move locomotives within shop or repair areas. Since outside hostlers were considered by the Interstate Commerce Commission, FRA, and the industry to be covered by the law prior to the 1976 amendment, which added the words "including hostlers," it is evident that Congress wished to establish as a matter of law that inside hostlers should be considered to be "connected with" the movement of trains. (42 Fed. Reg. 27594, May 31, 1977)

Although FRA concludes that all individuals who perform the duties of hostlers and hostler helpers, whether outside or inside, are covered by the HSL, we believe that in the 1976 amendments, Congress did not intend to cover all railroad employees. Persons performing the job duties of machinists, electricians, laborers, and similar occupations not generally associated with responsibilities covered by the HSL, who are not engaged in or connected with the movement of trains, are not covered. To regard as covered service job functions performed by mechanical department personnel --functions not traditionally performed by hostlers and hostler helpers at the time Congress passed the 1976 amendments--would be inconsistent with the statutory purpose.

An employee who, in the course of performing maintenance, repair, or troubleshooting inspections, repositions a locomotive (to a limited extent, as indicated by the examples given in "II. Noncovered Service" below), is not "engaged in or connected with the movement of any train" and is, therefore, not performing service covered by the law. Similarly, a helper who assists such a movement would not be covered.

Examples:

I. Covered Service:

A road crew pulls a locomotive up to the blue signal and detrains. Sometime later, a mechanical department employee drops the blue flag and moves the locomotive into the repair area and then to the fueling station for servicing prior to taking it into the shop for maintenance.

- o Same situation as above. Now, the servicing is complete, and the employee moves the locomotive from the servicing location to the shop for repairs.
- o Same situation as above, except the employee moves the locomotive directly from outside the area to the shop and positions it for repairs, bypassing the servicing area.
- o In any of the above scenarios, a trackmobile (defined by the regulations as a "locomotive") is utilized to move the locomotive instead of the prime mover.

A locomotive enters the repair area for a routine inspection, including a 92-day inspection.

An employee operates a locomotive under its own power to repair or test cab signal, train stop or automatic train control equipment, regardless of distance.

Locomotive repairs have been completed, delayed, cancelled, or deferred, and an employee moves a locomotive out of the shop to a location elsewhere inside the repair area, moves it to the servicing area, or moves it outside the blue signals.

II. Noncovered Service:

Moving a locomotive on a wheel-truing machine to inspect or turn the next wheel.

Moving a locomotive so that its mechanical parts can be repaired or for purposes of "troubleshooting" inspections.

Moving any locomotive (including passenger multiple-unit electric cars, freight locomotives or conventional passenger locomotives) in a repair shop by use of a winch.

Separating multiple-unit electric passenger cars inside a repair shop to allow for inspection or repair.

Once a locomotive is in the shop and spotted for maintenance or repair, an employee repositions the locomotive to another location inside the shop area (regardless of time or distance) to complete a specific task directly related to the repair, maintenance, or troubleshooting inspection underway. This would include "load-testing" immediately after repair.

After a locomotive is spotted inside the shop for maintenance or repair, an employee utilizes a trackmobile to reposition the locomotive to another location inside the shop area (regardless of time or distance) to complete a specific task directly related to the repair, maintenance, or troubleshooting inspection underway.

- o Once a locomotive is in the shop, an employee utilizes a remote excitation switch from beside or on the locomotive to energize a traction motor to move it, under either of the two immediately above examples.

Once a locomotive is in the shop and spotted for maintenance or repair, an employee repositions the locomotive to another location inside the shop area (regardless of time or distance) to complete a specific task directly related to the repair, maintenance, or troubleshooting inspection underway. This would include "load-testing" immediately after repair. En route to the other location, the same employee during the same tour of duty stops the locomotive short and waits while another locomotive clears the area ahead. (This applies even if the locomotive operator leaves the locomotive sitting unoccupied for a given period of time. As long as the trip is directly related to the "maintenance" function, it is not a "train movement" function.)

An employee moves freight or passenger cars inside a car repair shop area or RIP track by means of a winch, mechanical mule, or trackmobile.

### III. Commingled Covered Service:

Once a locomotive is in the shop and spotted for maintenance or repair, an employee repositions the locomotive to another location inside the shop area (regardless of time or distance) to complete a specific task directly related to the repair, maintenance, or troubleshooting inspection underway, as previously illustrated in "II. Noncovered Service" above. This would include "load-testing" immediately after repair. None of these activities alone would be covered. En route to the other location inside the shop area, the same employee during the same tour of duty stops to fuel and sand the locomotive, or perform any other general servicing duties. (In other words, the principle of commingled service applies. In any case in which, during the course of repairing, maintaining, or servicing a locomotive, an employee performs one or more covered job functions along with one or more job functions that do not constitute covered service, the more restrictive job function classification will apply, and, therefore, the employee will be considered to be in covered service.)

Application: Train Crewmembers of Foreign Countries: Per preamble language to Appendix A to Part 228, FRA has no jurisdiction to control conduct on foreign soil. Thus, when a train crosses the border and enters Canada or Mexico, its crew ceases to be subject to the limitations on service imposed by United States law. However, when a train enters the United States from Canada or Mexico, the train crew is immediately subject to the HSL and all time spent in Canada or Mexico is counted in computing the appropriate periods of service and release. For example, if, upon entering the United States, an employee had been on duty for 14 hours, the railroad immediately becomes liable for a civil penalty for permitting the employee to remain on duty within the United States in contravention of the 12-hour limitation. It is within the power and discretion of the Canadian and Mexican governments to provide for railroad safety within their countries, and it would be inappropriate for the FRA to address this matter absent some demonstrated impact on railroad safety within the United States.

## Duty Time and Effective Periods of Release

Application: 11 Hours 59 Minutes On-Duty Time: It is a practice on many railroads to require employees to arrange their work so that duty time does not exceed 11 hours and 59 minutes. These types of management instructions are common on many railroads and are not prohibited by the HSL. A train crew that ceases to perform any duties after working 11 hours and 59 minutes is no longer on duty under the HSL, and would require only an 8-hour off-duty period. However, if a railroad instructs an employee who has been on duty 12 hours to falsify their time return by showing less than the actual time on-duty, then this would constitute a violation of Federal regulations.

## Reporting Points

### FRA's Policy on Reporting Points

1. All covered service employees may have only one regular reporting point.
  - a. assigned employee: the assigned on-duty location for the job or run is the regular reporting point for the assigned (incumbent) employees.
  - b. extraboard employee: the precise assigned location of the extraboard is the regular reporting point for every employee assigned to that extraboard.

Note: An extraboard may supply employees to multiple on-duty locations other than the assigned regular reporting point for the extraboard. In this instance, travel time to the extraboard's assigned regular reporting point is considered commuting time. Travel time to the other-than-regular reporting point(s) is considered on-duty within the context of FRA's application of the HSL.

2. Regular reporting points may change, but must always change through either bulletin or seniority placement that establishes the employee as an incumbent on a job or run rather than on a temporary assignment.
3. For purposes of calculating total time on duty under the HSL, the following will apply:

All travel time between the employee's residence and his or her regular reporting point is considered as commuting time and, therefore, part of the employee's off-duty period; and travel time between the employee's residence and ALL other-than-regular points is given special treatment in calculating total time on duty.

Explanation of FRA's Application of Reporting Points: The following is an explanation of FRA's application of the HSL regarding temporary assignments involving extraboards and extended vacancy hold downs for all covered service employees plus train employee pool crews. Certain forced assignments are treated as regular assignments.

### Temporary Assignments

1. Extraboard - Extraboard employees receive temporary assignments on a daily basis. If the temporary assignment is at the assigned location of the extraboard, all travel time between the employee's residence and the regular reporting point is commuting time and is considered part of the off-duty period. If the temporary assignment is at a location other than the assigned regular reporting point, travel time is subject to the provisions of the appropriate section of the HSL. Normally, the railroad should identify **one** of the reporting points as the regular reporting point for all incumbents of the extraboard. If the

railroad does not establish one regular reporting point location, travel time to all reporting points served by the extraboard is subject to the on-duty provisions of the HSL.

2. **Hold Downs** - Any covered service extraboard employee may receive more long-term temporary assignments generally referred to as "hold downs." Hold downs are temporary assignments made "at the behest of the railroad" for a period of time greater than one shift. The length of a hold down is usually determined by a collective bargaining agreement. The length of the hold down does not affect its temporary status. In these temporary assignments, FRA considers the employee an incumbent of the extraboard and its fixed location as the employee's regular reporting point. Travel time is considered in the same context as a temporary one-day assignment (deadheading).
3. **Pool Crew** - Pool Crew is unique to train employees' assignments and is the crew version of a craft extraboard. A train pool crew or an engine pool crew operates as a unit on a "first in, first out" basis similar to extraboards for individual train and engine personnel. While employees may be assigned to a specifically identified Pool Crew, this assignment does not constitute a regular assignment in the context of this advisory. Pool crews may receive calls for varied start times and locations. As in the explanation for extraboard employees, all travel time between a pool crewmember's residence and his or her Regular Reporting Point is considered commuting time. Conversely, all travel time to other-than-regular reporting points is subject to FRA's application of the deadheading provisions of the HSL.

### **Forced Assignments**

Unlike temporary assignments, a covered service extraboard employee, junior in seniority, may be force assigned to a job or run as the result of no senior applicants to a bulletin announcement. The junior employee, once force assigned, must remain on the assignment until he or she is: (1) displaced (bumped) by a senior employee; or (2) "bids on" and acquires another position through seniority rights. In this scenario, FRA considers the force assigned employee to be an incumbent of the newly assigned job or run and will have the job or run's assigned on-duty location as his or her regular reporting point. As such, all travel time between the force assigned employee's residence and the new reporting point is considered commuting time.

### **Travel**

In many cases an employee's travel to an other-than-regular point is through his or her regular reporting point. In this scenario, that part of the travel from the employee's residence to his or her regular reporting point is commuting time. Further travel to the other-than-regular reporting point will be on-duty time.

When the employee either chooses or is instructed to travel directly from his or her residence to an other-than-regular reporting point, part or all of the actual travel time is considered on-duty. In the case of train employees, if covered service is performed within 8 hours after arrival, the travel is considered deadheading to duty, and the travel time is counted in calculating total time on duty.

### **Total Time On Duty Calculations**

1. If the travel time from the employee's residence to the other-than-regular reporting point is less than the travel time from the employee's residence to his or her regular reporting point, then the total travel time to the other-than-regular reporting point is considered deadheading for train service employees.
2. If the travel time from the employee's residence to the other-than-regular reporting point is greater than the travel time from the employee's regular reporting point to the other-

- than-regular reporting point, then only the travel time from the regular reporting point is considered as deadheading for train employees. In this application, a reasonable estimate of the travel time under existing conditions (considering weather and time of day) should be used for the travel time from the employee's regular reporting point to the other-than-regular reporting point. Collective bargaining times used for pay purposes should not be used.
3. In the event a regular reporting point is not established by the railroad for an extraboard or pool crew employee, all travel between the employee's residence and his or her on-duty location is considered deadheading for train employees.
  4. In certain instances for train employees, the return travel from the other-than-regular reporting point to the employee's off-duty location may be treated as part of the total time on duty [See: Title 49 Code of Federal Regulations, Part 228, Appendix A, regarding use of Privately Owned Vehicle (POV)].

### Reporting Point Examples

Example 1: Conductor C, previously displaced by a senior conductor, called the railroad's crew management and advised that she would exercise her seniority as conductor on outlying job YABC. The new assignment is approximately 20 miles from her previous regular assignment.

FRA Applications: FRA considers the conductor as an assigned employee on job YABC with a regular reporting point at the outlying location. FRA will consider all travel between her residence and the new reporting point as commuting.

Note: Since the change in reporting points is accomplished through either a seniority move or a bulletin assignment, a deadhead record is not required to reposition the conductor from the former assignment to the new assignment.

Example 2: The railroad's train employee extraboards are located at Reporting Point Z, from which temporary vacancies at Reporting Points Z, X, and Y are filled. On Monday morning at 3:00 a.m., extraboard Brakeman C is called to fill a "five day hold down" at Reporting Point Y, approximately 3 hours and 30 minutes travel time from Reporting Point Z and 2 hours and 45 minutes from Brakeman C's residence. On Friday, after being released from the hold down, Brakeman C returns to Reporting Point Z.

FRA Application: FRA considers Brakeman C an "incumbent" of the extraboard at Reporting Point Z during the five-day hold down. The duration of the hold down does not change the "extraboard incumbency" status of Brakeman C, because a bulletined assignment was not made. The employee was called "at the behest of the railroad" and will return to the extraboard at Z after the five-day hold down. At the end of Brakeman C's duty tour on Monday, Brakeman C will "remain" at Reporting Point Y for hours of duty recordkeeping purposes. All travel from Z to Y on Monday and from Y to Z on Friday is deadheading and subject to the HSL.

Note 1: Since the hold down is at a location a significant distance from Brakeman C's home terminal, food and lodging becomes an issue. It is assumed that Reporting Point Y is IN a designated terminal with suitable food and lodging. As such, if the food and lodging is not within a reasonable walking distance of the release point, the railroad is required to provide transportation between the duty site and the location of suitable food and lodging. The Federal hours of service laws are silent on who pays for food and lodging in these cases. If the travel time to or from food and lodging is 30 minutes or less, it is considered commuting time. If the travel time is more than 30 minutes, it is subject to the deadhead provisions and FRA's application of the HSL.

Note 2: If Reporting Point Y is not a designated terminal, Brakeman C, and the remainder of the crew, cannot be released for off-duty purposes at Y. In this case, Brakeman C and the remainder of the crew may be relieved at Y and deadheaded to a designated terminal for statutory off-duty purposes.

Note 3: The railroad is not compelled to deadhead Brakeman C back and forth between Z and Y on a daily basis because he is an incumbent of the extraboard at Z. The railroad is only required to furnish transportation to food and lodging. In addition, a collective bargaining agreement may exist that gives Brakeman C the choice of using his privately owned vehicle in transportation between Z and Y in lieu of railroad-provided transportation. In most cases, FRA considers this action to be voluntary on the part of the employee, and therefore the return trip from Y to Z will not commingle with Friday's covered service to extend the duty tour's total time on duty period, unless administrative duties associated with the tie-up process are performed after arriving at Z.

Note 4: The duty tour for the first day, Monday, must include: (1) a deadhead record from Z to Y; (2) the service trip; and (3) any deadheading (Limbo) time associated with travel to food and lodging. Friday's duty tour must include: (1) any deadheading (to duty) associated with travel from food and lodging; (2) the service trip; and (3) deadhead from Y to Z, if applicable. If travel to and from suitable food and lodging is more than 30 minutes, the duty tours for Tuesday, Wednesday and Thursday must include: (1) travel from food and lodging as deadheading to duty; (2) the service trip; and (3) travel to food and lodging as deadheading from duty.

Example 3: Engineer D was certified and assigned to the engineer's extraboard at Reporting Point U on March 31. As such, Engineer D is the junior engineer on the extraboard at U. The extraboard at U supplies engineers for jobs working at Reporting Points S, T, U, and W. On April 1, Engineer D receives a Report-for-Duty Time for Job J554 at Reporting Point U.

FRA Application: Since the extraboard and Job J554 are both located at Reporting Point U, all travel between Engineer D's residence and Reporting Point U is considered as commuting.

Example 4: On April 2, Engineer D received a Report-for-Duty Time for Job K263 at Reporting Point T. Reporting Point T is 45 minutes travel time (under existing conditions) from Regular Reporting Point U and 55 minutes (under existing conditions) from Engineer D's residence.

FRA Application: Since Reporting Point U is the regular reporting point for Engineer D, travel to and from Reporting Point T is considered deadheading.

Note: If Engineer D travels to Reporting Point U and then to Reporting Point T, 45 minutes is considered as deadheading to duty. If Engineer D elects to drive his privately owned vehicle (POV) directly from his residence to Reporting Point T, 45 minutes of the 55 minute travel is considered as deadheading to duty.

Example 5: On April 3, Engineer D receives a Report-for-Duty Time for Job B116 at Reporting Point S. Reporting Point S is 40 minutes travel time (under existing conditions) from Regular Reporting Point U and 25 minutes travel time (under existing conditions) from Engineer D's residence.

FRA Application: Since Reporting Point U is the regular reporting point for Engineer D, travel to and from Reporting Point S is considered deadheading.

Note: If Engineer D travels to Reporting Point U and then to Reporting Point S, 40 minutes is considered as deadheading to duty. If Engineer D elects to drive his privately owned vehicle (POV) directly from his residence to Reporting Point S, 25 minutes travel time is considered as deadheading to duty.

Example 6: Using the same Engineer D and his status as the junior engineer on the extraboard at U, the engineer's current collective bargaining agreement with this railroad permits the railroad to assign the junior engineer to a job in the event that no applicants (bids) are received on a bulletin advertising an engineer's job. At 12:01 p.m., on April 4, railroad Job Bulletin 10, advertising the engineer position for Job R633 at Reporting Point W, closed. The railroad did not receive "bids" from any applicants for this position. Under the provisions of the current collective bargaining agreement, the railroad may force assign Engineer D to Job R633 at Reporting Point W.

FRA Application: Prior to the bulletin assignment, Engineer D was considered an "incumbent" of the engineer's extraboard at Reporting Point U, with U as the engineer's regular reporting point. After the forced assignment as the result of a bulletin notice, FRA will consider Engineer D as the incumbent engineer on Job R633 at Reporting Point W. W becomes the regular reporting point for Engineer D.

Note: Engineer D assumes the location, start time and job frequency of Job R633. The assignment exhibits the permanency as if Engineer D had "bid" on Job R633. The test of permanence is that Engineer D cannot leave this position without being displaced (bumped) or bidding on and acquiring another position through seniority rights. Since the engineer is no longer an incumbent of the extraboard, Engineer D is immune to any further forced assignments.

## Interrupted Off-Duty Periods

A statutory off-duty period resets the employee's maximum allowable time available for duty to 12 hours. The HSL is silent regarding undisturbed statutory off-duty periods, but by mandating specific periods of consecutive hours off duty, FRA interprets the laws as requiring railroads to give employees meaningful rest opportunities.

FRA will utilize its prosecutorial discretion on a case-by-case basis to determine if the railroad's activity has broken or interrupted the consecutiveness of the applicable employee's minimum statutory requirement. In most instances, these railroad-initiated activities involve a call to report for duty at or soon after the employee's statutory off-duty period has expired. FRA has traditionally treated a brief call to report for duty as incidental and not a material disruption of the statutory off-duty period.

In other instances, calls to determine operational issues relative to previous duty tours may be initiated by representatives of the railroad during any part of the employee's off-duty period. FRA views the calls as "at the behest of the railroad" and the time spent by the employee in responding to these calls will commingle with previous or future covered service, if possible. The call cannot commingle (for train employees) if a statutory off-duty period exists prior to and after the call. In the event that a call can commingle, the amount of time between the call and covered service will determine the existence of continuous or aggregate duty tours.

The following is FRA's policy regarding interrupted off-duty periods for covered employees:

1. A brief call to report and a brief call to release are viewed by FRA as calls "at the behest of the railroad" that require the employee to perform service for the benefit of the railroad. As such, these calls represent the only calls initiated by the railroad during the employee's total off-duty period that FRA will generally treat within its prosecutorial discretion as incidental events. Therefore, the time spent receiving the calls would not be treated as commingled with previous or future duty tours.
2. All other calls "at the behest of the railroad" beyond the scope of these calls will be considered on a case-by-case basis to determine the impact on the total off-duty period.

3. Calls initiated by the railroad or the employee that do not require the employee to perform duty or service "at the behest of the railroad" will be considered incidental and not a material disruption. Examples are notification of a seniority displacement or notification of a bulletin-awarded position.
4. Calls generated by the employee to determine board placement, train line-up, or pay issues are considered "at the behest of the employee" and do not disrupt the off-duty period.
5. Any material disruption of the opportunity to secure "meaningful rest" intended by the statute will be viewed by FRA as a disruption of the consecutiveness requirements of the statutory off-duty period. In establishing the existence of a material disruption, FRA will consider the purpose, frequency, and duration of calls initiated by the railroad during an employee's total off-duty period.

Examples:

Example 1: After having been in off-duty status for 11 hours and 40 minutes, Engineer A is called by the railroad's Road Foreman of Engines. The call began at 9:42 a.m. and terminated at 9:54 a.m., during which the engineer was questioned regarding his operation of the locomotive consist for the previous duty tour.

FRA Application: FRA will consider this call "at the behest of the railroad" and an activity that may commingle with future covered service provided the covered service occurs before 5:54 p.m. Since the call occurred after the engineer's statutory off-duty period, it cannot commingle with the previous duty tour.

Example 2: After having been in off-duty status for 6 hours 15 minutes, Conductor B is called by the railroad's Trainmaster. The call began at 7:14 a.m. and terminated at 7:31 a.m. during which the Trainmaster questioned Conductor B about the circumstances involved in an on-duty injury to one of Conductor B's crewmembers.

FRA's Application: FRA will consider this call "at the behest of the railroad" and an activity that will commingle with the previous covered service and restart the previous duty tour to add an additional 17 minutes in commingled service to the total on-duty time for Conductor B. Also, the consecutiveness of Conductor B's statutory off-duty period has been broken, necessitating a revised release time with the railroad and a restart of Conductor B's statutory off-duty period. If the additional 17 minutes results in a total on-duty time in excess of 12 hours, the railroad is required to report the event to FRA under 49 CFR Part 228.

Note: If this call had occurred during the first 3 hours and 59 minutes of Conductor B's off-duty period, the 17 minutes would commingle with the previous covered service to produce continuous on-duty time for Conductor B.

Example 3: After having been in off-duty status for 6 hours 40 minutes, Conductor C is called by a Crew Dispatcher who informs Conductor C that she has been displaced by a senior conductor via a seniority move. The conductor is asked if she wishes to exercise her seniority over junior conductors. Conductor C declines for the present time and advises crew management that she will exercise her seniority within the collective bargaining agreement time limits.

FRA Application: FRA will consider this call "at the behest of the railroad." However, since the call is of an "informative" nature and does not require the conductor to perform duty for the railroad, the call will not commingle with previous or future covered service.

Note: When Conductor C places the future call to exercise her seniority, FRA will consider that call "at the behest of the employee" and its duration will not commingle with previous or future covered service.

## Designated Terminals and Suitable Food and Lodging

The term "designated terminal" means a terminal (1) which is designated in or under a collective bargaining agreement as the "home" or "away-from-home" terminal for a particular crew assignment and (2) which has suitable facilities for food and lodging. Railroad and union representatives may agree to establish additional designated terminals having such facilities as points of effective release under the law. Agreements to designate additional terminals for purposes of release under the HSL should be reduced to writing and should make reference to the particular assignments affected and to the HSL. See Appendix A to Part 228 for common situations illustrating the designated terminal concept.

The further defining of a designated terminal was developed from FRA's review of the legislative history including congressional testimony when the designated terminal provision was included in the HSL. Suitable food and lodging is further addressed based on the same congressional testimony and FRA's understanding of Congress' intent.

A common misconception is to confuse designated terminals with reporting points. A designated terminal is usually a geographic area, such as a metropolitan area. One or several reporting points may be within the geographic or metropolitan area, identified as a designated terminal. Examples of this are seen in major metropolitan areas such as Boston, Chicago, Philadelphia, Houston, and Los Angeles. A railroad operating in any of these cities may have one or more on-duty points within the metropolitan area of these cities. The on-duty point, i.e., yard, office, tower, or station, are reporting points for the jobs/trains that originate at that point. The metropolitan area is the designated terminal for crews released for rest purposes at any of the reporting (on-duty/off-duty) points.

Application: Suitable Food and Lodging: The HSL requires that, in order for a period of interim release to be valid, it must be for a period of 4 or more hours at a designated terminal. The intent of Congress in enacting and amending the designated terminal provision was to ensure that railroad employees in train and engine service are afforded an opportunity for meaningful rest. This provision requires that suitable facilities for food and lodging be available in connection with a release at a designated terminal.

The HSL requires only that suitable facilities for food and lodging be available. It does not indicate who must pay for the accommodations. Railroad labor and management may negotiate an agreement for the payment of lodging or meals through the collective bargaining process. However, when facilities for suitable food and lodging are not within a reasonable walking distance of the release point, the railroad must provide transportation to and from the facilities. Providing transportation may include hotel vans, but they must be available for the employees.

Suitable Food: The apparent basis for references in the legislative history to "suitable facilities for food" was to assure the availability of nutritionally adequate and palatable food, which could be consumed with appropriate utensils in a reasonably clean environment.

The suitability of canned, prepackaged, and frozen fast foods such as canned soup, cold or microwave sandwiches, and frozen pizza depends on the overall circumstances involved, including the length of the work or rest time during which such items are the only food available. Disputes about the relative desirability of various types of meals, all of which have nutritional value, can best be handled through the collective bargaining process.

Another issue is whether it is necessary that facilities for food be available continuously throughout the rest period. The legislative history of the HSL nowhere implies such a burden; indeed, it assumes that much of the rest period will be used for sleeping. As long as suitable facilities for food are available when needed for nutritional purposes (i.e., normally at the beginning and end of a rest period), an opportunity for meaningful rest has been provided in keeping with the purposes of the HSL. For instance, if a crew reaches its destination at 12 midnight and immediately obtains an adequate meal, with the expectation of obtaining breakfast just before returning to duty at 8 a.m. the next morning, the fact that food is unavailable between 1 a.m. and 7 a.m. would be irrelevant to the fitness of the crew.

**Suitable Lodging:** Guidance for determining suitable lodging is also derived from the legislative history. In discussing the phrase "a place where suitable facilities for food and lodging are available" at other than a designated terminal at a minimum requires, Congressman Rooney stated the following:

First. Where reasonably available, single occupancy sleeping rooms, containing adequate furniture and accessories, temperature controls, and toilet and shower facilities.

Second. Transportation will be furnished where lodging is located an unreasonable walking distance from the on and off-duty points and will also be furnished to a restaurant if no restaurant is within reasonable walking distance from the lodging facility. Provisions defining reasonable distance in the respective collective bargaining agreements will govern where applicable. Otherwise, reasonable distance takes into consideration not only distance per se, but such factors as time, location, weather, and safety.

If the release point is at a "designated terminal," for other crews, the lodging facilities accepted as suitable for such other crews will likewise be considered as suitable for interim rest periods. Transportation will be furnished as provided for such other crews.

Although the above quoted language relates to a release at a location other than a designated terminal, FRA assumes that if the two parties have voluntarily collectively bargained to contractually designate a certain location as a designated terminal under the HSL, the conditions of the location must be presumably suitable. This being the case, the employees should, at a minimum, be entitled to the same consideration that Congress intended for employees released between the home and designated terminals. Accordingly, FRA concludes that the same standards for suitability must be applied.

The concept that food and lodging must be available during release periods derives from the original designated terminal provision enacted in 1969 (Pub. L. No. 91-189); FRA's administration of the original provision and its practice under the 1978 amendment (§ 6, Pub. L. No. 95-574) have recognized that facilities may be located at some distance from the release-on-duty point, so long as they are reasonably available to crews provided an opportunity for rest at that point.

The HSL, however, requires only that suitable facilities for food and lodging be available, but does not indicate who must pay for the accommodations. Railroad labor and management may negotiate an agreement for the payment of lodging or meals through the collective bargaining process.

**Application: Leasing of Rooms by the Railroad:** In general, the provisions of the HSL relating to sleeping quarters apply to facilities provided directly by the railroads. The actions of innkeepers are not regulated by the HSL. However, a railroad may be viewed as a participant in the construction or reconstruction of sleeping quarters in a number of circumstances -- for instance, if it controls site selection or if, before or after the facility is constructed, it obtains a possessory interest in the realty. If the railroad is deemed an acting party and the site of the facility is within one-half mile of any area where placarded hazardous materials cars are switched, the railroad must obtain approval of the site before occupancy.

In order for such arrangements to fall outside the scope of the HSL, the following specific tests must be met:

1. The lodging must be a place of public accommodation.
2. The railroad may not own any interest in the concern operating the motel or hotel.
3. The site selection determination must be made by the innkeeper (e.g., the facility may not be built on land-owned by or sold by the railroad).
4. The railroad may not acquire any legal possessory interest in the facility. (A long-term contract for occupancy of a certain number of rooms need not give rise to a possessory interest, but a lease of a portion of the building would.)
5. Any arrangement for provision of accommodations by the railroad on its employees' behalf should be through an arms-length transaction in which the railroad contracts for essentially the same services provided to other guests of the establishment (occupancy, linen service, cleaning, etc.).
6. The non-railroad business of the establishment should contribute significantly to its commercial viability. (A motel may not be created as a "front" for the railroad to evade the sleeping quarters provisions of the HSL.)

If arrangements with the builder/operator of the lodging meet the aforementioned tests, there is no requirement for FRA site approval.

## **Travel Time (Railroad Provided or Authorized Transportation)**

Time spent traveling between an employee's home and residence and the employee's regular reporting point is considered commuting time. An employee with a regular reporting point is free to select a residence either near to or far away from the reporting point, and thereby control the amount of off-duty time consumed by travel. Because the HSL does not authorize FRA to dictate where an employee must live in relation to his or her regular reporting point, time spent in travel to and from that point is a matter of employee choice and properly considered time off duty.

Application: Deadheading: Time spent in deadhead transportation to a duty assignment by a train or engine service employee is considered on-duty time. Also, regardless of any agreement between a railroad and its employees, to the contrary, traveling to a point of duty assignment other than the regular reporting point constitutes deadheading to duty, and accordingly, is considered time on duty under the HSL.

Time spent in deadhead transportation from the final duty assignment of the work tour to the point of final release is not computed as either time on duty or time off duty. This time is considered limbo time. Thus, the period of deadhead transportation to the point of final release may not be included in the required minimum 8- or 10-hour off-duty period. See the glossary of terms for additional explanations of deadheading.

Application: Travel Time at the Away-From-Home Terminal: At the away-from-home terminal, the employee is not free to select lodging, and thereby cannot control the travel time between the release point and the lodging facility. Historically, the railroads have provided employees with lodging facilities at the away-from-home terminals. At first, the lodging was in the form of assigned cabooses in which the crew was housed at the away-from-home terminal. Later, on-site "dormitory" style lodging and nearby hotel facilities under contracts were provided by the railroads. Competitive hotel contracts evolved through economics and collective bargaining

agreements, and they are now prevalent in the industry. However, many of the contracted hotels are a significant distance from the crew's release point, thus requiring transportation in both directions. Although the employee may have a voice in the selection of the hotel through his or her union representative, the employee has limited control, if any, over the travel time and distance to these hotels.

FRA recognizes the unique circumstances of away-from-home terminal travel and the potential for eroding the statutory off-duty period. While this travel is not specifically addressed in the HSL, FRA will utilize the deadheading provisions of the HSL to limit away-from-home terminal commuting time.

**30-Minute Commuting Time:** FRA will continue to utilize a "30-minute commuting time" application of the laws to travel between the away-from-home release/on duty point and the crew's lodging facilities. One-way travel time of 30 minutes or less, including delays associated with transportation availability and reliability and lodging availability will be considered as commuting. Any one-way travel time in excess of 30 minutes, including delays, will be considered as either on-duty or limbo time, as specified in the laws.

**Application: Travel From the Off-Duty Location to the Lodging Facility:**

Travel time is calculated from final release time to the arrival time at the hotel or lodging facility. If the travel time is 30 minutes or less, the entire period is considered commuting time and is part of the off-duty period.

If the travel time is more than 30 minutes, the entire period is considered limbo time, i.e., neither time on- nor off-duty, and the employee's final release time must be readjusted to reflect the employee's arrival time. That is, the statutory off-duty period does not begin until the employee's arrival time.

In the event room accommodations are not readily available after arrival at the lodging facility, all time spent waiting for room availability will be considered part of the travel time. If room availability occurs more than 30 minutes after the final release time, the entire period is considered limbo time and the final release time must be readjusted to reflect the room availability time. That is, the statutory off-duty time does not begin until the room availability time.

It should be noted that transporting employees to facilities at some distance from the release point does not violate the HSL. A violation occurs in this situation only if the employees are given an inadequate number of consecutive hours off-duty when they are released at a designated terminal.

Should a crew decide to have dinner across the street from their final release point (away-from-home terminal) before being transported to the lodging facility, absent any special circumstances, FRA would typically consider this as a discretionary action by the employees. As such, their statutory off-duty period would commence at the point they voluntarily left the away-from-home terminal for dinner, in lieu of being transported to the lodging facility for rest.

**Note:** See exception (below) for application on Interim Release Periods (4 Hours or More) at Away-From-Home Terminals.

**Application: Interim Release (4 Hours But Less Than 8 Hours) at an Away-From-Home Terminal:** The following is a clarification of FRA's application of the Federal hours of service laws with respect to interim releases.

In the event a railroad either schedules an interim release for regularly assigned crews, or elects to employ an interim release on an occasional basis when service warrants, the following FRA application of the HSL will apply:

1. Interim releases are valid at designated terminals only. The term "designated terminal" is defined in Appendix A to Part 228.
2. FRA has determined through its review of Congressional testimony and the legislative history that when food and/or lodging are not within a reasonable walking distance at the designated terminal, railroad-provided or arranged transportation must be available to transport the crewmember(s) to the location of the suitable food and lodging. It is important to note that the HSL does not stipulate which part, either the railroad carrier or the employee, will pay for the food and lodging. The payment issue is best handled through the collective bargaining process.
3. In order to address the cumulative fatigue factor involved in an aggregated tour of duty, FRA reaffirms its position regarding how to classify travel time incurred when food and/or lodging is not within a reasonable walking distance. When transportation is required, all time spent waiting for transportation, and the travel time itself from the duty point to the location of the food and lodging, is considered as "limbo" time, neither on- nor off-duty time. Conversely, the return travel to the duty point is considered deadheading to duty, and therefore is treated as on-duty time for hours of service purposes. Any time between the return arrival time at the duty point and the start of covered service is also time on duty. As always, the actual time involved in these activities determine the amount of time charged to "limbo" or on-duty time. Arbitrary or average times charged to these periods should not be used in the calculation.
4. When transportation is required, all interim releases will begin when the employee(s) arrive at the location of food and/or lodging and end when transportation is available to begin the return trip to the duty point. The time between these two events must be a minimum of four hours and cannot be eroded by travel. Periods of less than four hours between travels will not break the accumulation of on-duty time, and FRA will consider the crewmember(s) in continuous service from the start of his/her duty tour.

Note: This provision applies only during "interim periods of release."

Application: Transportation to Eating Facilities: The legislative history suggests that transportation must be furnished if the restaurant is beyond a reasonable walking distance. But, that is not to say that the railroad must pay for the transportation, only that it be made available. If, for instance, the railroad provides a taxi, it is a matter of collective bargaining, not railroad safety, as to whether the railroad or the employee pays the fare.

Application: Travel From the Hotel or Lodging Facility to the On-Duty Location:

Travel time is calculated from departure or required to-be ready time at the hotel or lodging facility to the report-for-duty time at the on-duty location.

If the travel time is 30 minutes or less, then the entire period is considered part of the off- duty period.

If the travel time is more than 30 minutes, then the entire period is deadheading to duty and included in the calculation of total on-duty time.

Application: Travel From an On-Line-of-Road Location Directly to the Hotel or Lodging Facility: Generally, this scenario involves employees who have reached their statutory on-duty limits of the HSL while on line-of-road and are deadheading to their point of final release.

If after arriving at the lodging facility, the employee utilizes the "quick tie-up" process (see application on Commingled Service -Train and Engine Service Employee Tie-Ups After Maximum Statutory On-Duty Time), the entire deadhead is considered limbo time.

If after arriving at the lodging facility, the employee is required to complete administrative or other activities that exceed the scope of the "quick tie-up" process, the entire period converts to deadheading-to-duty time and must be included in the calculation of total time on duty.

**Application: Deadheading and Use of a Privately-Owned Vehicle (POV):** If an employee utilizes POV transportation to a point of duty assignment other than the regular reporting point in lieu of deadhead transportation provided by the railroad, such actual travel time is considered as deadheading time. However, if the actual travel time from his home to the point of duty assignment exceeds a reasonable travel time from the regular reporting point to the point of duty assignment, then only the latter period is counted. Of course, actual travel time must be reasonable and must not include diversions for personal reasons.

If a railroad requires an employee to deadhead from a duty assignment to a point of final release without the opportunity to obtain rest and without the opportunity to be transported (i.e., required the employee to operate any vehicle including his or her own), this activity is no longer considered "limbo time," but is considered to be other service for the railroad which commingles with covered service, and would be reclassified as "on duty" time under the HSL. By offering to transport an employee, or allowing him or her the opportunity to obtain rest before deadheading to the point of final release, the railroad would be in compliance even if the employee elects to operate his own vehicle. The following are examples:

An employee assigned to an "extra board" has a regular reporting point A. He receives a 5-day temporary assignment to protect an outlying duty assignment 1 hour's drive from point A. In lieu of transporting the employee by railroad conveyance, the railroad pays the employee a fixed amount to provide his own transportation to and from the outlying point. The employee is permitted to go directly from his home to the outlying point, a drive that takes 40 minutes. The normal driving time between his regular reporting point and the outlying point is 60 minutes. The actual driving time of 40 minutes is considered deadhead time and is counted as on-duty time under the statute. See the Deadheading section of Appendix A to Part 228.

On day one, the employee in the first example performs 11 hours 20 minutes yard switching service at the outlying point and is provided food and lodging (within 30 minutes distance) at the outlying point by the railroad. On days two through four, the employee may perform 12 hours yard switching service, since he is commuting from the lodging facility to his temporary reporting point. On day five, the employee completes his duty assignment, is released, and returns from the outlying point. In lieu of railroad-provided transportation or lodging, he elects to make the return trip by private automobile to his personal residence. Forty minutes of the time spent in transportation home is considered deadheading to the point of final release, and is not counted as either on-duty time nor off-duty time.

**Application: Deadheading to a Point of Final Release (Circuitous Route):** The railroad should exercise "due diligence" in the transporting of employees from the "relieved" point on line-of-road to the final release point. While transporting employees via a circuitous route would not, in and of itself, subject railroads to violations of the HSL, and would therefore not subject the railroads to the imposition of civil penalties, FRA expects the railroads to employ due diligence in order to provide the most suitable means and route available. While certain situations may warrant a circuitous route, the railroad officials should favor reducing the effects of fatigue on employees instead of only considering railroad operating conveniences.

**Application: Time Spent Awaiting Deadhead Transportation:** All time spent awaiting the arrival of a deadhead vehicle for transportation from the final duty assignment of the work tour to the point

of final release is considered limbo time, i.e., neither time on duty nor time off duty, provided that the employee is given no specific responsibilities to perform during this time. However, if an employee is required to perform service of any kind during that period (e.g., protecting the train against vandalism, observing passing trains for any defects or unsafe conditions, flagging, shutting down locomotives, checking fluid levels, or communicating train consist information via radio), he or she will be considered as on duty until all such service is completed. Of course, where a railroad carrier's operating rules clearly relieve the employee of all duties during the waiting period and no duties are specifically assigned, the waiting time is not computed as either time on duty or time off duty.

**Application: Interruption of a Train Crew's Off-Duty Period for Deadheading Purposes:** There is no prohibition against a railroad requiring an employee to deadhead from one release point to a second designated terminal prior to the employee having received the required off-duty period. Such deadhead would be deadhead transportation by an employee from duty to his point of final release under the HSL (as long as he received the required off-duty period at the second designated terminal). In such instances, neither the time before the deadhead nor time spent in deadhead transportation can be used in computing time off duty. This practice is common in the railroad industry and is used to balance the supply of employees between terminals or to have an employee fully rested before his next duty period.

**Application: Deadheading Following Urine Collections, and Other Non-Covered Service:** Deadhead transportation from a place where duty is performed to the place of final release is neither time on duty nor time off duty. No distinction has previously been made with respect to the character of the service last performed. That is, travel back to the point of final release has been treated as deadheading whether the last service performed was movement of a train or non-covered service such as safety training, required attendance at an investigation, etc. It follows that travel from a collection site back to the point of final release is not distinguishable from other situations involving deadhead transportation at the end of the duty tour. The period is therefore "limbo" time, and no violation is incurred if employees are promptly released at the destination and the required off-duty period is thereafter provided.

## **Wreck and Relief Trains**

**Application:** The crew of work or relief trains may be permitted to be on duty for a period not exceeding four additional hours (total of 16) in any period of 24 consecutive hours whenever an actual emergency exists and the work of the crew is related to that emergency. The HSL specifies that an emergency cease to exist for purposes of this provision when the track is cleared and the line is open for traffic. An emergency for these purposes may be a less extraordinary or catastrophic event than an "unavoidable accident or Act of God" under the emergency provision of the HSL. For example, if a wreck crew rerails or clears the last car and the maintenance of way department releases the track to the operating department 14 hours and 30 minutes into the duty tour, the crew may operate the wreck train to its terminal because the line is not clear until the wreck train is itself out of the way (provided this can be accomplished within the total of 16 hours on duty).

The availability of relief personnel, in and of itself, does not negate the existence of an emergency for the purposes of wreck and relief trains. The absence of rested relief employees does not play any part in the creation of the emergency.

## **Commingled Service (Applicable to All Covered Service)**

Time spent performing any other service for the railroad during any 24-hour period in which the employee is engaged in or connected with the movement of any train is time on duty for purposes of the HSL. The HSL requires that all time spent in other services for the railroad be counted in computing the on-duty time of an employee performing covered service during a 24-hour period. This is known as the principle of "commingled service." The railroad must assure that its employees do not exceed limitations on hours through commingled service. The presence or absence of specific monetary compensation does not determine the status of other service for the railroad.

The HSL does not distinguish treatment of situations in which non-covered service follows rather than precedes covered service. Even before the enactment of explicit language requiring that "all time on duty in other service" be counted in computing on-duty time, the courts had construed the HSL to require that subsequent non-covered service be counted.

Examples of service that may commingle with covered service include:

Attendance at rules classes: FRA has not changed its position since its published interpretations of the HSL in 1977, where we said in Appendix A to Part 228, "It should be remembered that attendance at required rules classes is duty time subject to the provisions of commingling. When attendance at a rules class fulfills a condition of employment, such attendance is "required." This is true even where employees have the option to attend one of several sessions, and it is immaterial that specific scheduling of such service is left, in part, to the employee. For example, consider a system that permits an employee to attend any of six sessions within a given period or to attend one final session held for those who missed an earlier one. Whether the employee attends one of the first six or the last one, his attendance fulfills a condition of employment, and his time spent in the class is therefore subject to commingled service.

If a railroad states in its program of instruction that attendance at rules review classes is voluntary, and in lieu of the rules review class, disseminates study guides, then time spent attending the rules review class does not count as on-duty time subject to commingled service. However, time spent writing the examination would be considered an element of commingled service since it is a directed activity required for continued employment.

Attendance at railroad investigative hearings: When an employee is required by the railroad to attend a hearing as a principal under charge, or as a witness on behalf of the railroad, time so spent would be considered as time on duty under the commingled service provisions of the HSL. However, when an employee and/or union representative voluntarily attends a hearing as a witness on behalf of an employee, such service is not required by the railroad, and therefore is not considered time on duty under the commingled service provisions. If there is less than a 4-hour interval between such a hearing and service performed in the movement of a train, then the time is counted as continuous on-duty time.

Participation in railroad safety committees: As long as participation in railroad safety committee activities is a voluntary act by an employee, and not a condition of continued employment, such service is not normally considered "covered" under the commingled provisions of the HSL. Time occupied by such endeavors, if truly voluntary, is usually done during an employee's discretionary time. As such, since an employee is presumably free to come and go, this activity may be included in "off-duty time."

Familiarization trips: An employee who rides a train for the sole purpose of qualifying on the physical characteristics of the railroad is subject to the constraints of the HSL if such trips are required as part of the qualification process and are made in the same 24-hour period as covered

service. Such time is considered commingled service and must be computed in determining total time on duty.

**Physical examinations:** If an employee is required to report for a physical examination as a condition of continued employment, he would be subject to the commingled service provisions of the HSL. The issue of monetary payment for services rendered or contract requirements is not recognized or covered by the HSL.

**Providing information concerning railroad accidents:** If a train crew is explicitly required by railroad officials to remain on railroad property to provide information regarding an accident, the time spent waiting to give, and giving, such information is "on-duty" time for purposes of the HSL. This time should be added to the time spent by the crewmember in train or engine service in computing total time on duty by that employee.

**Onboard observations conducted by railroad officials:** A common scenario is a railroad official that rides a train for the purpose of performing onboard observations of crewmembers and railroad operations. In general, FRA's position is that the railroad official is acting in a supervisory capacity and therefore not subject to the commingled service provisions. However, if he/she takes over control of the train by operating the controls of the locomotive, the time spent operating the train would subject him/her to the 12-hour duty limitations. Likewise, if the railroad official replaces a train crewmember and assumes the normal duties of that crewmember, his role would no longer be considered that of a supervisor and he would become subject to the commingled service provisions of the HSL.

**Application: Jury Duty:** Jury duty is not considered to be "other service for the railroad" and is therefore not subject to commingling. Other activities not required by the railroad as a condition of employment are not subject to commingling.

**Application: Meal Period at End of Duty Tour:** In general, it is the FRA's position that when a meal period is taken after the expiration of 12 hours of duty, and provided that it is at the election of the employee, it may not be considered commingled service. In most situations, participation is wholly discretionary on the part of the employee.

**Application: Alcohol and Drug Testing - FRA Post-Accident and Testing For Cause:** If a covered employee is involved in an event which would qualify for testing under the Testing For Cause provisions of the regulations at 49 CFR Part 219, and the railroad elects to subject the employee to tests for the presence of drugs and/or alcohol under the authority of railroad Rule G or policy, FRA would treat that the same as if the railroad had elected to conduct the tests under the authority of the regulations. That is, if the railroad makes a good faith effort to avoid or minimize the excess service, we would treat it as justifiable excess service. However, the railroad must report the incident as excess service, and we would consider all the circumstances in determining the validity of the railroad efforts at avoidance or minimization.

In discussing this with railroad officers or labor organization representatives or railroad employees, be very conservative in your statements. Emphasize that it must be a qualifying event, the railroad must make good faith efforts to avoid or minimize the excess service, and the railroad must report the excess service. The same holds true for FRA Post-Accident Toxicology Testing. Testing of an employee under Federal authority, for reasonable suspicion or reasonable cause, may be conducted after the expiration of the hours of service provided that documentable due diligence is demonstrated by the railroad.

**Application: Train and Engine Service Employee Tie-Ups After Maximum Statutory On- Duty Time:** This issue involves the performance of limited incidental service relative to tie-up, as compared to required administrative duties usually associated with timekeeping, crew management, and train delay reporting by train and engine crews after the expiration of the 12-hour duty limitation. Out of necessity in this instance, crewmembers must accomplish some tasks

after arrival at their tie-up point. FRA recognizes that a certain amount of data exchange is necessary for the benefit of both the employee and the railroad carrier. To that end, FRA has traditionally "permitted" incidental service such as a brief tie-up call to inform the railroad carrier when to start the employee's off-duty period and make it aware of when the employee may return to duty. As an alternative to a brief tie-up telephone call, FRA has "permitted" the faxing of a completed time slip/delay report to either a train dispatcher or crew management.

Today, technological advancements have eliminated many handwritten records pertaining to a train crew's duty tour, and it is becoming more customary for a conductor and/or engineer to use a computer terminal to input train/crew related information. The input of this data is considered vital to the operations of some railroad carriers, particularly for crew management and payroll functions. However, some railroad carriers have begun to require the conductor and/or engineer to input more and more data prior to being released from duty. This has resulted in increased instances in which excess service is performed under the commingled service provisions of the HSL. Since technology is driving the evolution of tie-up procedures, the solution, out of necessity, must be applicable to controlled environments such as the electronic hours of duty recordkeeping systems utilizing a "quick tie-up screen." In this environment, the railroad carriers are responsible for providing adequate resources, such as telephones, FAX machines or computer terminals, to facilitate an immediate tie-up on crew arrival.

FRA Policy: FRA will consider as "incidental service" the transmission of the following information (either in person, via telephone, fax, or quick tie-up screen in electronic systems) by a crewmember that has reached his/her statutory on-duty limit of 12 hours:

Relieved time (time employee stopped performing covered service) or the amount of statutory off-duty time required (8 or 10 hours) before the employee can return to duty. (On some railroad carriers, the employee has the right to request an off-duty period in excess of the statutory minimum. In these cases, the requested off-duty time period may be transmitted);

Released time (time employee begins the off-duty period);

Board positioning/placement time; and

Telephone number/contact location, if different from the number listed with crew management.

FRA has consistently maintained that even limited administrative duties, despite their de minimis nature, are considered as time on duty under the HSL. And, in the event that limited administrative duties are performed after the expiration of 12 hours of on-duty time, FRA will continue to exercise its prosecutorial discretion in deciding which cases warrant recommendations for the assessment of civil penalties. However, a railroad's procedures that exceed the scope of the above-defined "incidental" service and unavailability of immediate tie-up facilities to provide tie-up information will be viewed by FRA as mandatory "administrative" duties. Therefore, time spent performing these administrative duties and/or waiting on tie-up facilities will be considered as time on duty under the commingled service provisions of the Federal HSL and subject the railroad carrier to possible civil penalty liability and the excess service reporting requirements under Part 228 relative to Form 6180.3. Administrative duties include:

1. Preparing or submitting work reports or accident reports;
2. Any other administrative tasks required of an employee by a railroad in conjunction with a covered service duty tour, other than that defined above as "incidental" service; and
3. All waiting periods associated with the unavailability of tie-up facilities such as telephone, FAX machine or computer terminal.

Normally, time spent in deadhead transportation from covered service to a point of final release is considered as neither on-duty nor off-duty time, but instead as "limbo time." When administrative duties follow limbo time, the time spent deadheading must be reclassified as deadheading to duty and, therefore, must be considered as time on duty in calculating total on-duty time.

**Application: Relaying of Mandatory Directives Between Railroad Employees:** This clarification addresses the provision of the Federal HSL which is applicable to any dispatching service employee or other employee who by the use of the telegraph, telephone, radio, or any other electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders (mandatory directives) pertaining to or affecting train movements.

FRA interprets "orders" to mean: Mandatory directives affecting the movement of trains, including Track Warrants, Track Bulletins, Track and Time Authority, Direct Traffic Control Authorities, and any other methods of conveying authority for trains and engines to operate on a main track, controlled siding, or other track controlled by a dispatching service employee.

**Relaying a Mandatory Directive means:** Electrically or mechanically receiving an order from a dispatching service employee and then transmitting that order to the train service employee(s) whose train movement is affected by the order. FRA's approach to determining covered service in the relaying of mandatory directives is functional. When an employee performs duty as a train service employee or a signal service employee and also relays mandatory directives, the provisions of the HSL applicable to dispatching servicing employees apply to all on-duty and off-duty periods during such aggregate time. When an employee in non-covered service is utilized to relay a mandatory directive by radio or other means of telecommunication during a tour of duty, that person is subject to the limitations of the hours of duty for dispatching service employees during that person's entire tour of duty.

**FRA Policy:** When an employee who is not normally covered by the provisions of the Federal HSL uses an electrical or mechanical device to dispatch, report, transmit, receive, or deliver orders related to or affecting train movements, that employee has performed service as a dispatching service employee. **NOTE:** Train crewmembers who copy train orders affecting the movement of their train are not subject to the more restrictive dispatcher/operator provisions of the HSL.

The following are examples of situations that inspectors may encounter while in the performance of their duties. These are only examples of the various different situations, which may occur on a daily or periodic basis.

The train dispatcher of XYZ Railroad is unable to make radio contact with the train crew of XYZ Train No. 20. However, a train dispatcher is able to communicate with the train crew of XYZ Train No. 51, and Train Nos. 20 and 51 are able to communicate with each other. The train dispatcher issues a mandatory directive for Train No. 20 to the conductor on Train No. 51. The conductor of Train No. 51 receives the mandatory directive for Train No. 20 and the train dispatcher and then transmits the mandatory directive for Train No. 20 to the conductor on Train No. 20. **FRA Position:** The conductor of Train No. 51's hours of service status changes from that of a train service employee to a dispatching service employee, with all attendant limitations on that class of service. Under this example, the conductor is subject to the dispatching service "one shift" provision, and is limited to 12 hours on duty in a 24-hour period.

The train dispatcher of XYZ Railroad is unable to make radio contact with the train crew of XYZ Train No. 20; however, the train dispatcher is able to send a mandatory directive to Station ABC by facsimile. The dispatcher directs a non-covered service railroad employee at Station ABC to remove the mandatory directive from the facsimile machine and hand carry it to the crew of Train No. 20. As directed, the employee hand delivers it to the train crew who reads and acts on the mandatory directive. **FRA Position:** The employee who hand delivered the mandatory directive

has not performed covered service. The employee did not receive nor transmit the mandatory directive, nor could the employee have materially affected the contents of the order.

The train dispatcher of XYZ Railroad is unable to make radio contact with the crew of XYZ Train No. 20; however, the train dispatcher is able to contact a trainmaster at an intermediate station by telephone. The trainmaster confirms to the dispatcher that he is able to contact the train by radio. The train dispatcher issues a mandatory directive to the trainmaster to be relayed to Train No. 20. The trainmaster copies the mandatory directive on the prescribed form, repeats it to the train dispatcher, and receives both a complete time and the dispatcher's initials. The trainmaster then repeats the process in relaying the mandatory directive to a crewmember on Train No. 20. FRA Position: The trainmaster has performed covered service as a dispatching service employee, with all attendant limitations on that class of service. Under this example, the trainmaster is subject to the dispatching service "one shift" provision, and is limited to 12 hours on duty in a 24-hour period.

Note: Appendix A to Part 228 states that an employee subject to the 12 hour provisions of train employees does not become subject to the 9 or 12-hour provision of the dispatching service employee merely because he receives, transmits or delivers orders pertaining to or affecting the movement of his train in the course of his duties as a trainman.

Application: Floggers: As a result of changes within the railroad industry over the past several years, traditional craft lines have become less distinguishable. Employees, who in the past were not covered by the provisions of the Federal HSL, are now considered covered when FRA applies its functional approach to determining covered service. Flagging is one such area that now may include railroad carrier employees not previously considered to be in covered service.

FRA considers the function of covered floggers important to railroad employee safety and the safe operation of trains.

Railroad carrier employees traditionally referred to as "flagmen" (floggers) perform a variety of duties, which may or may not bring them under the provision of the HSL. Floggers may be assigned from a variety of crafts, and perform functions which range from non-covered service to train employee service, to dispatching employee service. FRA has not had, until now, any written interpretations regarding employees who perform such duties.

FRA Policy: Railroad carrier employees will be considered as performing covered service as "Flaggers" when their duties involve:

1. Activities that affect the repositioning of switches for the movement of trains or engines.
2. Activities in which the employee (Flagger) is functionally involved in the communication of mandatory directives that affect the movement of a train.
3. Conveying information from the employee (Flagger) to the train dispatcher/operator for the purpose of issuing a mandatory directive ("OS Trains," e.g., reporting trains clear of affected portion of track).

The following examples are furnished to assist in the understanding of the above listed functional qualifiers.

An employee (flagger) is assigned to protect a work gang performing maintenance activities, which do not affect the stability of the track, but require the gang to "foul" the tracks. Trains operate through the work area at normal speed and are not required to communicate with the flagger. The employee's (flagger) principal responsibility is to notify the work gang when he

observes an approaching train, in order for the gang to clear the track. FRA Position: This activity is not covered service.

Two employees (flaggers) are assigned to protect an out of service work area in double track automatic block system territory. The employees are stationed at manual switches several miles apart. Employee No. 1 contacts trains in both directions by radio to grant authority for movement. At the direction of Employee No. 1, Employee No. 2 positions the switch in his charge for train movements, but is not responsible for contacting trains. FRA Position: FRA views the granting of main track movement authorities conveyed by radio by Employee No. 1 to be issuance of mandatory directives, and Employee No. 1 is covered by the dispatching service requirements. On the other hand, Employee No. 2 did not convey directives, but was engaged in the movement of trains as a switchtender, and is covered by the train service employee requirements.

An employee (flagger) is assigned to report to the train dispatcher the departure or passage of trains (OS trains) from a fixed location in an absolute block system. FRA position: The employee is covered by the dispatching service hours of duty limitations.

## Call and Release

### FRA Policy

All Covered Service Employees: FRA will generally view a brief call from the railroad to the employee that establishes a Report-for-Duty Time as incidental, i.e., not a material disruption of the employee's off-duty period. In addition, FRA will generally view as incidental a brief call to CHANGE the original Report-for-Duty Time, or to release the employee from the original Report-for-Duty Call, provided the employee receives the call prior to departure from his or her place of rest.

Train Service Employees: When the railroad changes or releases the employee from his or her original Report-for-Duty Time after the employee has arrived at the duty location, but prior to the Report-for-Duty Time, FRA will view the travel time to the duty point as limbo time (neither on- nor off-duty time). If all or part of the limbo time occurs during the employee's statutory off-duty period, FRA will view the limbo time as a material disruption of the employee's opportunity to secure meaningful rest.

Railroad Options: Generally, the railroad may utilize one of the following options when notifying an employee of a release from a Report-for-Duty Call after his or her arrival at the duty point but before the Report-for-Duty Time:

Option 1: The employee may be released to begin a new 8- or 10-hour statutory off-duty period.

Note: The off-duty period will begin when the employee completes the required duty record and establishes a Final Release time with the railroad. Although the original call no longer exists, the railroad is required to maintain a record of the employee's activity under the commingled service provisions of the HSL. As a result of considering travel time as limbo time, the administrative duties involved in establishing a new release time may commingle with the previous covered service to produce excess service. In these cases, the "quick tie-up" process should be used to avoid excess service.

Option 2: The employee may be allowed to begin duty at the original Report-for-Duty Time and immediately be given a qualifying interim release. The release will not begin until the employee has established a new release time with the railroad.

Option 3: The railroad may maintain the original Report-for-Duty Time and utilize the employee in service for which he or she is qualified.

A release, busted call, or set back occurring at or after the Report-for-Duty Time is an early release that is subject to the restrictions imposed by the HSL.

A new Report-for-Duty Time issued to take effect within four hours of the release will continue the employee in continuous on-duty status calculated from the original Report-for-Duty Time.

A new Report-for-Duty Time issued to take effect between four, but not more than eight hours of the release will constitute a valid interim release and continue the employee in aggregate on-duty status calculated from the original Report-for-Duty Time.

A release of eight hours or more qualifies as a statutory off-duty period that resets the employee's subsequent on-duty availability to the maximum 12 hours.

### **Call and Release Examples for Train Service Employees**

Example 1: At 10 p.m., Engineer A and Conductor B are called and given a Report-for-Duty time of 12:01 a.m. for Train XYZ. At the Report-for-Duty Time, Engineer A would have 17 hours and 36 minutes of time off duty, while Conductor B would have completed her Statutory Off-Duty Period at 11:30 p.m. Shortly after the Report-for-Duty Call was issued, the railroad became aware of operating problems that would delay departure of Train XYZ by several hours, whereupon, the railroad decided to terminate the 12:01 a.m. Report-for-Duty Time. Crew Management contacted Engineer A at 10:25 p.m. and Conductor B at 10:28 p.m., prior to departure from their respective residences (places of rest) and informed each person that the Report-for-Duty Time had been cancelled.

FRA Application: FRA will view the Report-for-Duty Call as incidental. The Release Call is also viewed as incidental and an effective release that does not break the continuity of each employee's off-duty period. Each employee may be re-called at a later time without acquiring an additional Statutory Off-Duty Period.

Example 2: Same scenario as Example 1 except the railroad attempted, but was unable to contact Engineer A at 11:20 p.m. and Conductor B at 11:22 p.m. to give them an effective release. Due to driving distances, Engineer A departed his place of rest at 10:55 p.m. and Conductor B departed her place of rest at 11:05 p.m. Engineer A arrived at the on-duty location at 11:40 p.m. Conductor B arrived at the on-duty location at 11:45 p.m. On arrival at the on-duty location each employee was informed that the Report-for-Duty Time of 12:01 a.m. had been cancelled. Since the notification of the cancelled Report-for-Duty Time was delivered after the employees arrived at the on-duty site but before the original Report-for-Duty Time, FRA will apply the Federal hours of service laws in the following manner.

FRA Application Relative to Engineer A: While FRA considers Engineer A's travel time of 45 minutes as limbo, it did not erode the Statutory Off-Duty Period that had been acquired earlier. Therefore, the railroad may employ any one of the three options listed above.

FRA Application Relative to Conductor B: Since part of Conductor B's travel (11:05 p.m. to 11:30 p.m.) occurred during her Statutory-Off-Duty Period, FRA considers the total travel time as both limbo and an erosion of her Statutory Off-Duty Period below the minimum required by the HSL. Therefore, the railroad must consider Conductor B's previous Total Time On Duty prior to determining which of the three options are available. In this application, Conductor B's Previous Off-Duty Period becomes an Interim Release of 7 hours and 35 minutes, which will commingle ALL previous activities with any activity that occurs within a new Statutory Off-Duty Period beginning when Conductor B establishes a new Final Release Time with the railroad's crew management.

## **Emergency Provision (Applicable to all Covered Service)**

Application: Casualties; unavoidable accidents; Acts of God. According to the HSL, the provisions of the HSL shall not apply in any case of casualty or unavoidable accident or the Act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of the employee at the time said employee left a terminal, and which could not have been foreseen." This passage is commonly referred to as the "emergency provision." Judicial construction has limited the relief, which it grants to situations, which are truly unusual and exceptional. The courts have recognized that delays and operational difficulties are common in the industry and must be regarded as entirely foreseeable; otherwise, the HSL will provide no protection whatsoever. Common operational difficulties which do not provide relief from the HSL include, but are not limited to, broken drawbars, locomotive malfunctions, equipment failures, brake system failures, hot boxes, unexpected switching, doubling hills and meeting trains. Nor does the need to clear a main line or cut a crossing justify disregard of the limitations of the HSL. Such contingencies must normally be anticipated and met within the 12 hours. Even where an extraordinary event or combination of events occurs which, by itself, would be sufficient to permit excess service, the railroad must still employ due diligence to avoid or limit such excess service. The burden of proof rests with the railroad to establish that excess service could not have been avoided.

Refer to the emergency provisions section of the HSL for a complete discussion on the emergency provisions.

## **Statute of Limitations**

Application: A two-year statute of limitations exists on train and engine service hours of duty recordkeeping requirements. A two-year statute of limitations exists on notifying persons of violations of the substantive provisions of the Federal HSL violations - from the date of the incident to the date the penalty demand letter is transmitted from the Office of Chief Counsel to the railroad. However, provided that the 2-year transmittal deadline is met, FRA has a total of 5 years in which to either collect the civil penalty or initiate legal action.

## **Exemptions/Waivers**

**Application:** If a railroad which employs not more than 15 covered service persons applies for and is granted a waiver to work up to 16 hours, the railroad must still complete and submit an excess service report (F6180.3) to FRA.

## **Dispatching Service Employees – Hours of Service**

Application: Dispatchers in Foreign Countries: Train dispatchers located in a foreign country are not subject to the hours of service law, even though they are dispatching trains in the United States.

Application: Shifts: The term "shift" is not defined by the HSL, but the legislative history of the 1969 amendments indicates that it means a tour of duty constituting a day's work for one or more employees performing the same class of work at the same station who are scheduled to begin and end work at the same time. Examples are included in Appendix A to Part 228. Per the preamble to the final rule, "To recognize staggered starting times as a feature of a single "shift" would be to invite confusion and result in the HSL being unevenly applied."

Application: Travel Time: If, after reporting to his place of duty, an employee is required to perform duties at other places during this same tour of duty, the time spent traveling between such places is considered as time on duty. Other periods of transportation are viewed as personal commuting and, thus, off-duty time.

Application: Release Period: A release time is considered off-duty time if it provides a meaningful period of relaxation and if the employee is free of all responsibilities to the railroad. One hour is the minimum acceptable release period for this type of covered service.

Application: Call and Release: Although most dispatching service employees are regularly assigned, dispatching service extraboards or "lists" exist. The following options apply when these extraboard employees are given a release after arriving at the duty location and prior to the Report-for-Duty Time. These options will also apply when a regularly assigned dispatching service employee is called outside his or her regular assigned times. The options are:

Option 1: The dispatching service employee may be released without any covered service accumulated for this call, provided no activities beyond the time spent receiving the release are required of the employee. Penalty pay claims may exist, however, they do not affect the accumulation of on-duty time for hours of service purposes.

Note: Any activity required of the dispatching service employee, other than receiving the release, will be considered on duty and will require an hours of duty record.

Option 2: The employee may be released for a minimum of 1 hour and then be returned to duty at a new Report-for-Duty Time.

Note: If the dispatching service employee is not used on the second Report-for-Duty Time, the second release will constitute service performed for the railroad and will commingle with covered service performed in either the previous or future 24-hour period.

Application: Emergencies - Availability of Relief Personnel: In the case of emergency, an employee subject to the nine or 12-hour limitation is permitted to work an additional four hours in any 24-hour period, but only for a maximum of three days in any period of seven consecutive days. However, even in an emergency situation the railroad must make reasonable efforts to relieve the employee. In interpreting this provision, FRA has consistently taken the position that an emergency cannot exist within the meaning of this section if relief employees who have not worked their total allowable hours under the HSL are available. It should be recognized, however, that this application was compelled by the fact that the only conceivable emergency situation involving dispatching service employees would be where such employees were forced to continue working solely because of the unforeseeable absence of rested relief employees.

A train dispatcher that performs duties from 7 a.m. to 7 p.m. in associated with an emergency should not be allowed to return to duty at 7 a.m. the following morning when the emergency had ceased to exist. The 15-hour off-duty period is a good rule-of-thumb to follow. Using that rule, the dispatcher could legally return to duty at 10 a.m. and continue on duty for a maximum period of nine hours. If the emergency had ceased to exist, the dispatcher who went on duty at 7 p.m. should be relieved at the expiration of nine hours on-duty by an employee who could perform duty not exceeding nine hours during the 24-hour period involved.

Application: Yardmasters: FRA's approach to yardmaster hours of service applications is functional. If a yardmaster performs service either affecting or connected with the movement of trains, the yardmaster is subject to the constraints of either the dispatcher service section or train employee section of the Federal HSL.

FRA Policy: Yardmaster positions will be considered as performing covered service when their duties involve:

Activities that affect the repositioning of switches either remotely or manually. Note: Usually, the repositioning of main track or yard track switches, either remotely or manually, brings the Yardmaster under the Federal hours of service train employee provisions of the HSL as either a

trainman or switch tender. However, when both main track switches and signals are remotely repositioned by a yardmaster, the dispatching service employee requirements of the HSL apply.

Activities in which the yardmaster functionally becomes a member of a train or yard crew on a temporary basis. Note: These activities include, but are not limited to, relaying signals, making couplings or cuts, lining switches ahead or behind, or protecting a shoving movement.

Activities that affect the aspect of a signal authorizing train movement. (See note in first bullet)  
Activities in which the yardmaster is functionally involved in the communication of mandatory directives that affects the movement of a train.

Note: "Functionally involved" means the yardmaster is either creating or relaying a mandatory directive. Removal of a mandatory directive from a printer or facsimile machine and delivering the directive to an addressed crewmember is not considered covered service. In addition, instructions (either verbal or written), issued to facilitate the routine flow of yard movements are not considered as mandatory directives. These instructions may involve train movements on a main track inside yard limits since movement is authorized and restricted by railroad operating rules.

An exception occurs in multiple track scenarios where current of traffic is established and train movements are authorized by either signal indication or rule. Should the yardmaster elect to operate a yard movement against the current of traffic without signal protection, the yardmaster's instructions contravene signal and rule authority, and therefore become a mandatory directive. This action would bring the yardmaster under the "dispatching service employee" provisions of the HSL. Obviously, other procedures to ensure safe operation must be initiated by the yardmaster prior to the move against the current of traffic. Most of those activities would also bring the yardmaster under the Federal HSL.

Application: Bridgetenders: FRA's approach to bridgetenders is functional. If the bridgetender performs service that is related to or affects the movement of a train, the bridgetender is subject to the constraints of the dispatcher service section of the Federal HSL.

FRA Policy: Bridgetender positions will be considered as performing covered service when their duties involve:

Activities that affect the repositioning of switches either remotely or manually

Activities in which the bridgetender gives hand signals associated with the visual inspection of switches and bridge locking devices to indicate the bridge is properly aligned and secured for train movement

Activities that affect the aspect of a signal authorizing train movement

Activities in which the bridgetender is functionally involved in the communication of mandatory directives that affect the movement of a train.

Application: Levermen: Levermen are ordinarily covered by the train employees' section of the HSL. However, should such levermen, by the use of the telegraph, telephone, radio or any other electrical or mechanical device, dispatch, report, transmit, receive or deliver orders pertaining to or affecting train movements, they would, of course be working within the dispatching service employee provisions.

## **Part 228 – Hours of Service Recordkeeping**

## **228.1 – Scope**

This part prescribes reporting and recordkeeping requirements with respect to the hours of duty of certain railroad employees; and establishes standards and procedures concerning the construction or reconstruction of employee sleeping quarters.

## **228.9 - Railroad records; general**

Application: Centralization of Records: A railroad may elect to retain FRA-required records at a central location or at its system headquarters. This policy statement covers manually generated records required by Parts 217, 219, 225, 228 and 240. Electronic records generated under these CFR Parts, with the exception of 228.11 (hours of duty records), may also be retained at a central location. All records so maintained shall be available for inspection and copying by the Administrator of the FRA, or the Administrator's agent, during the railroad's normal business hours at its centralized recordkeeping location.

Electronic records required by 228.11 (hours of duty records) are maintained under the provisions of an approved waiver with availability established as part of the waiver review process. Records maintained under this part shall be accessible for inspection, review, and printing at the established locations during the railroad's normal business hours.

Centralized record retention systems shall be so designed, as to be capable of reproducing, electronically or mechanically, copies of records required by 217.9, 217.11, 225.25 (b), and 228 (except for Dispatcher's Records of Train Movements) for inspection upon request at each railroad carrier establishment, including but not limited to an operating division, general office, or major installation.

## **228.11 - Hours of duty records**

Application: Consecutive Hours Off-Duty: For written records, FRA requires the actual number of consecutive hours off-duty prior to going on duty, including those hours in excess of 24 hours. Entries such as "10+" are not acceptable. Entries such as "24+" are not routinely acceptable; however, may be acceptable if there is an extended absence for vacation, sick leave, etc. FRA would not expect an employee to make extensive calculations in such unusual situations.

Application: Railroad Taking over Train Dispatching and Supervisory Responsibilities of Another Railroad: A letter was written, requesting an explanation of reporting responsibility regarding hours of service, arising from the SP taking over the train dispatching and supervisory responsibilities on a subdivision of the UP. FRA's response was that, UP would remain legally responsible as the railroad carrier even though SP employees would be performing the train dispatching activities on UP's behalf. UP cannot delegate its responsibilities for compliance merely by entering into a contractual relationship with SP. In this situation, SP retained its identity as a railroad carrier with respect to the employees who perform covered service. Accordingly, even in the presence of a clear contractual delineation of responsibility by UP to SP, FRA can still hold both railroad carriers jointly liable for compliance. However, should violations occur and come to FRA's knowledge, FRA will, of course, continue to exercise its prosecutorial discretion in deciding which cases warrant civil penalties, and whether it should pursue enforcement action against one or both of the railroads.

As to the issue of recordkeeping, responsibility for compliance with the recordkeeping requirements of Part 228 may be fulfilled either directly by SP, or by UP treating the SP employees who perform covered service on its behalf as if they were its own employees.

## **228.17 - Dispatcher's record of train movements**

Application: Times on Duty: The dispatcher's record of train movements (train sheet) must include identification of enginemen and conductors and their times on duty. "Times on duty" refers to their on-duty time and does not include the requirement for their off-duty time.

Application: Signature: The train dispatchers are only required to sign the dispatcher's record of train movements if the sheet is being used as an hours of service record for the train dispatcher. The signature requirement may be accomplished by many different methods, including use of a logbook.

Application: Computerized Train Sheets: Generally, FRA has accepted the computerization of dispatcher's records of train movements, as long as all of the requirements are maintained and can be produced by the railroad. Generally, FRA has not taken exception to the train sheet being in multiple sections as long as it is easily accessible. With the closure of operator stations, in lieu of entering "weather conditions at 6-hour intervals," FRA has not taken exception to a railroad's continual broadcast of weather information that is directly accessible to the train dispatchers as long as the broadcast system has some type of emergency notification of imminent adverse weather conditions.

## **228.19 - Monthly reports of excess service**

Application: Each instance in which a covered employee performs excess service must be reported to the FRA on Form FRA F6180.3. The report must be submitted within 30 days after the calendar month in which the excess service occurred. A separate report must be submitted for each occurrence. Even if the excess service is not a violation of the HSL, (i.e., act of God, approved waiver) an excess service report must be submitted.

## **228.101 - Construction of employee sleeping quarters**

Only sleeping quarters constructed or reconstructed (more than half the value of the facility), after July 8, 1976, are covered by this regulation. All sleeping quarters constructed or reconstructed after July 8, 1976, must not be in the "immediate vicinity" (one-half mile from the nearest rail of the nearest trackage) of railroad switching or humping operations. Note: The HSL defines sleeping quarters to include crew quarters, camp or bunk cars, and trailers for employees, and any individuals employed to maintain the right of way of a railroad carrier, regarding the clean, safe, and sanitary provisions in order to give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier.

Inspector Guidance: The FRA's "Guidelines for Clean, Safe, and Sanitary Railroad Camp Cars" went into effect on July 27, 1990, as Appendix C to Part 228. To ensure compliance with these guidelines, OP and Track Inspectors have been assigned responsibility for performing routine inspections of railroad camp cars. The Track and OP Specialists should coordinate camp car inspections within the region to prevent duplication of effort. Although the inspections should be announced to the extent possible, an inspector must be accompanied by a railroad representative during such inspections. Inspections of camp cars should be made to determine compliance with housekeeping, waste disposal, vermin control, water supply, toilet facilities, lavatories, showering facilities, kitchen/dining hall/feeding facility, eating/drinking areas, sewage disposal facilities, waste disposal containers, sanitary storage, food handling, lighting, first aid, shelter guidelines, location, and general provisions. All such inspections must be recorded on an inspection report (F6180.96).

See applications for Suitable Food and Lodging.

## **Part 240 - Qualification and Certification of Locomotive Engineers**

### **240.1 - Purpose**

The purpose of this part is to ensure that only qualified persons operate a locomotive or train.

### **240.3 - Applicability**

In some cases, a plant railroad leases track immediately adjacent to its plant from a general system railroad for the purpose only of moving cars shipped to or from the plant. Under this specific condition, locomotive engineer certification is not required to operate on leased and plant trackage. However, if the plant railroad or a railroad not considered part of the general system, itself operates on the general system, its equipment, crew, and practices would be subject to FRA's regulations.

### **240.7 - Definitions**

Locomotive:

1991 Final Rule - Included service vehicles (preamble language).

In the 1991 Final Rule, FRA intended that engines coupled to rail grinding equipment, self-propelled track inspection equipment, rail flaw detection cars, and trackmobiles be operated by qualified locomotive engineers.

In December 1991, FRA responded to the AAR and Sperry Rail petitions for reconsideration for clarification of whether four service vehicles should be considered locomotives and also addressed these four problematic vehicles in its April 1993 Interim Final Rule - Four Service Vehicles:

- 1) Rubber-tired vehicles outfitted with standard couplers.
- 2) Self-propelled locomotive and burro cranes, capable of hauling multiple cars.
- 3) Self-propelled weed sprayer or rail grinder.
- 4) Rail bound, self-propelled detection equipment (Sperry, Track Geometry). FRA is handling the decision on the specialized equipment, through the RSAC process. In the interim, FRA will not enforce the rule as applying to the operators of these four types of service vehicles.

Locomotives that are being operated by remote control must be operated by a certified engineer. Locomotive Engineer: The regulation uses the term Locomotive Engineer to describe the individuals to whom it applies. The regulation pertains to any person who operates a locomotive regardless of the fact that the person may have a job classification title other than that of locomotive engineer.

### **240.107 - Criteria for designation of classes of service**

Application: Endorsement of Certificate: Several railroads questioned the proper way to proceed under this section when they have a qualified engineer and desire to upgrade that person's skills so that the person will be capable of becoming a train service engineer.

FRA Policy: FRA did not intend for railroads to issue two certification documents in this setting. An endorsement to the locomotive servicing certificate or its supplementary documents will be sufficient to reflect the person's status as a student train service engineer. The intent of the provision is being met when the locomotive servicing engineer, with the documentation just described, functions as student and operates under the immediate supervision of an instructor engineer.

A second set of interpretive questions was generated by the desire of some railroads to certify a person as a train service engineer but then impose significant limits or constraints on the operational authority of that person. This section permits railroads to take such action and can be employed by them to address issues such as utilizing persons who have sufficient skills to perform in terminal or yard service but lack the knowledge or skill to operate trains beyond terminal areas. Railroads that elect to follow this approach will of course need to structure their implementation program submissions to reflect any differences in the training and testing of these engineers that would flow from their more limited operating responsibilities.

There are two exceptions permitted by the regulation in relation to "when locomotive engineer certification is required:"

- (1) a person who moves a locomotive or group of locomotives within the confines of a locomotive repair or service area as provided for in 49 CFR 218.5(f) and 218.29(a)(1); or
- (2) a person who moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes.

Note: An employee who, in the course of performing maintenance, repair, or troubleshooting inspections, repositions a locomotive (to a limited extent of less than 100 feet) is not "engaged in or connected with the movement of any train" and is, therefore, not performing service covered by the HSL. Similarly, a helper who assists such a movement would not be covered.

The regulation gives the railroad latitude to impose additional conditions or operational restrictions on the service an engineer may perform beyond those identified in the regulation, provided those conditions or restrictions are in compliance with the regulation.

## **240.109 - General criteria for eligibility based on prior safety conduct**

Application: The preamble to the Interim Final Rule addresses a concern over situations in which an engineer is found to have engaged in operational misconduct while serving in the capacity of conductor or brakeman, by virtue of being the member of a crew involved in a rule violation. Parties have asked FRA to clarify whether such noncompliance incidents should be considered as events with 240.117 implications for the certification status of the conductor or brakeman.

The events listed in 240.117 are intended to hold locomotive engineers accountable for their conduct as engineers. It was not FRA's intent that they be held accountable, for certification purposes, for operational noncompliance incidents when they were not serving as an engineer. In FRA's judgment there are too many potential instances in which it is difficult for other train crewmembers to effectively intervene to prevent operational misconduct by the person at the controls of the locomotive.

Application: Leaving the controls: "Operation" of a locomotive: means that an individual is at the controls of a moving locomotive, in a position to control the locomotive should the need arise. It does not mean there has to be actual manipulation of a control. It is a violation of the rule for a non-certified person to "sit in the seat" and "watch" or "sound the horn" while the engineer is temporarily away, even if no controls are touched. This same rationale applies if nobody is at the controls. That is, an engineer leaves the seat vacant, and leaves the control compartment for any reason, while the locomotive is in motion. FRA considers this a violation of the rule. For example, an engineer may not vacate the seat to use the toilet in the cab nose. However, this does not prohibit an engineer from exiting the engineer's chair in order to move around the control compartment, but does require that he remain personally in charge of the operation of the locomotive at all times.

## **240.117 - Criteria for consideration of operating rules compliance data**

Application: Signals: The preamble to the Interim Final Rule, gives this guidance: This will eliminate confusion over whether failure to respond to signals requiring speed reduction have certification consequences under this section. FRA intends this section to apply to both active stop signals (e.g., wayside automatic block or cab signal indications) and passive stop signals (e.g., stop boards, flags or gates).

FRA Policy: It is FRA's view that unattended fuseses and banners used in operational tests are the functional equivalent of a flag and that passing an unattended fusee under circumstances which require a stop should be considered a violation of 240.117(e)(1). This definition does not include hand signals and radio signals.

FRA intended that the individual railroad operating rules and practices would control what devices or methods would be deemed signal indications. FRA did not intend to limit the term to wayside signals, which are subject to FRA's signal and train control regulations, but to take an expansive view.

Application: Speeding: An excerpt from the Interim Final Rule, states "This change will eliminate confusion that is predicated on the fact that FRA's locomotive safety regulations permit a variance of 3 to 5 mph between the speed depicted on a locomotive's speed indicator and the unit's actual rate of speed. It will also promote greater uniformity in how railroads respond, for certification purposes, to more limited and inadvertent over speed incidents ascribable to factors such as variations in topography."

Application: Restricted Speed: A major source of concern has become the proper application of 240.117(e)(2) to decertification of engineers for violations of restricted speed or the operational equivalent of restricted speed. Generally, restricted speed rules provide a maximum speed and a "conditional clause" stating that an engineer must be able to stop the train within one half the range of vision.

FRA Policy: Railroads shall consider only those violations of the conditional clause of restricted speed rules, or the operational equivalent thereof, which cause reportable accidents or incidents under Part 225 as instances of failure to adhere to the speed limitations.

Application: Use of Train or Engine Brakes: The Interim Final Rule states "FRA is revising the language so that it explicitly provides that only failure to comply with procedures for safe use of train and engine brakes when testing a train's air brakes at initial and intermediate terminals will have certification consequences to those required for achieving compliance with Federal regulations in Part 232. This change will eliminate confusion about which railroad procedures should be viewed as sufficiently safety related to warrant revocation under this provision."

Application: Mandatory Directive: This term is used in Part 240 as it has historically been used in Part 220: "authority for the conduct of a railroad operation." It includes all situations where a segment of main track is occupied without permission or authority in accordance with the railroad's operating rules. It does not include occupying a segment of track contrary to advisory information, such as that from a yardmaster relative to which track to use in a yard.

Application: Authority vs. Permission: The regulation was intended to ensure that the engineer complied with whatever prerequisite was required to operate on a main track regardless of nomenclature. There is no difference in the risk to safety flowing from the semantics. Further, the engineer's conduct or operational error does not change with the wording. Although there may be differences between authority and permission in a number of contexts depending on the railroad operating rules in question, they are functionally equivalent for decertification purposes.

### **240.119 - Criteria for consideration of data on substance abuse disorders and alcohol drug rules compliance**

Application: Co-Worker Report: The FRA fully supports voluntary peer prevention programs such as Operation Red Block. We recognize that Operation Red Block can provide an excellent means of promoting an alcohol and drug free workplace. The FRA's rules concerning the certification of locomotive engineers do not disrupt the functioning of Operation Red Block procedures. For example, the rules specifically except from the 9-month ineligibility period a violation of 219.101 that is brought to the railroad's attention through a formal co-worker report (see section 240.119). However, as pointed out in the preamble to the final rule, FRA believes it is important to have a standard period of revocation for 219.101 violations where individuals have not availed themselves of the options and counter measures currently in place.

Application: Canadian Alcohol/Drug Violation: Posed in the form of a question; can a person be in violation of 219.101 when found intoxicated on-duty in Canada? FRA in quoting an interpretation issued on May 31, 1977, concluded that FRA could not convince a judge that a particular Hours of Service violation that occurred beyond the U.S. Borders was an offending Hours of Service offense. The court held that the HSL outside the U.S. Border in itself did not offend the U.S. Hours of Service Law. FRA's Office of Chief Council determined that logically, if the HSL does not apply beyond the U.S. border, FRA does not reasonably expect to convince a judge that being intoxicated on railroad property outside the U.S. border is a violation of 219.101. If no violation of 219.101 occurred within the U.S. border, then there is no basis for saying that the 9-month period of ineligibility under 240.117 applies.

### **240.121 - Criteria for vision and hearing acuity data**

Application: Vision, Distant Vision Acuity: As noted in the first paragraph of the regulation there is an exception to the regulation. Paragraph (e) of this part provides that, if a candidate for certification does not meet the requirements of this part, a railroad is allowed to waive the regulation and certify the candidate nevertheless. Paragraph (e) allows a railroad's medical officer to determine that a candidate can safely operate a locomotive or train despite not meeting the threshold. If the medical officer so determines, the visual requirements are effectively waived. When this regulation was written, FRA envisioned a need to require all locomotive engineers to meet certain visual acuity standards. There are two compelling reasons why FRA believes periodic examination should be required: (1) FRA believes that any person who operates a locomotive or train must have sufficient vision if there is to be a reasonable expectation that trains will be operated safely by that person, and; (2) to require that all railroads require the visual acuity standard without exception. Therefore FRA felt it appropriate to require that an operator's visual acuity be checked periodically. When the regulation was written, commenter convinced FRA that some individuals, although not meeting the acuity threshold, may be able to compensate in other ways that will permit them to function at an appropriate safety level despite their physical

limitations. FRA therefore left it to the discretion of the individual railroads whether they would accept acuity levels below the regulated threshold.

Application: Hearing: The approach in promulgating section 240.121(e) was developed so as to be "consistent with the spirit of the recently enacted Americans with Disabilities Act." Considering both paragraphs (d) and (e) of section 240.121, it is possible for a railroad to certify a person whose hearing does not meet the qualifications set forth in paragraph (d), as a locomotive engineer. FRA does not believe the hearing acuity standard established in the locomotive engineer qualifications rule is prejudicial to hearing-impaired persons. However it should be stressed that the medical examiner determination in section 240.121(e) of the regulation is only an option if the railroad chooses to exercise it.

### **240.123 - Criteria for initial and continuing education**

Application: Type I or Type II Simulators: FRA takes no exception to the use of Type I or Type II simulators as a training tool and has made provisions for their use in the regulation. However, FRA does not consider the use of simulators to be an acceptable substitute for practical experience in the initial training of persons previously untrained. It is not the intent of the regulation to allow the certification of locomotive engineers who have never operated an actual train.

### **240.125 - Criteria for testing knowledge**

Application: Dividing and Conducting Knowledge Testing: Railroads may divide and conduct knowledge testing in sections and conduct those sections at different times. FRA recognizes that a railroad may have some need to administer portions of its testing activities at different points in time and the rule does not prohibit this.

Application: Specificity; Physical Characteristics Knowledge: Physical characteristic knowledge questions need to be route-specific, and limiting such a test to generic questioning will not be sufficient. Moreover, when testing a person who is authorized to operate over multiple routes, the person's knowledge concerning each route needs to be examined.

Application: Oral Versus Written Testing: Section 240.125(c)(3) requires that testing be administered in written form. The rule does not allow for the railroads to administer oral testing of locomotive engineers. Under the provisions of Section 240.219, certification or recertification can be denied by railroads based on a determination that the certification candidate lacks the knowledge and skills to perform the duties of an engineer.

### **240.127 - Criteria for examining skill performance**

Application: Use of Simulators: The regulation allows for the use of simulators Type I or Type II simulators for examining skill performance. The regulation prescribes only the minimum requirements a railroad must meet for examining skill performance. This part does not restrict a railroad from implementing additional or more stringent requirements for its locomotive engineers that are not inconsistent with the regulation [see 240.1(b)].

Application: Outside Training Organizations (Non-Railroad Contractors): 240.103 specifically allows a railroad to employ an outside training organization to provide the initial or student training. The outside organization is not prohibited from performing on-going or continual training, even though not addressed in the regulation. The railroad must declare in its submission to the FRA its intentions to employ an outside training organization. If the training is conducted away from the railroads own trackage, the submission must describe how the student will be taught physical characteristics of the railroad (Appendix D to Part 240).

## **240.129 - Criteria for monitoring operational performance of certified engineers**

Application: Operational Tests: FRA considers the failure of an engineer to pass a properly conducted operational test as subject to provisions of 240.117. FRA does not consider improper operational tests, such as the alleged "bucket test," to be legitimate tests of operational skills or knowledge for any purpose, and certainly not for purposes of decertification.

## **240.215 - Retaining information supporting determinations**

Application: Centralization of Records: A railroad may elect to retain FRA - required records at a central location or at its system headquarters. This policy statement covers manually generated records required by Parts 217, 219, 225, 228, and 240. Electronic records generated under these CFR Parts, with the exception of Part 228.11, may also be retained at a central location. All records so maintained shall be available for inspection and copying by the FRA during the railroad's normal business hours at its centralized recordkeeping location.

## **240.221 - Identification of qualified persons**

Application: The regulation, specifically 240.221, Identification of Qualified Persons, requires railroads to maintain a written record identifying each person designated as a certified locomotive engineer. That listing of certified engineers must indicate the class of service the railroad determines each person is qualified to perform and date of the railroad's certification decision. The railroads are also required to update the list at least annually.

Railroads have, since the inception of the regulation, considered the act of exchanging lists of their certified locomotive engineers to comply with these requirements. Under most circumstances this task is accomplished by merely providing a "seniority roster" of certified engineers to the controlling railroad. The controlling railroad must determine how these locomotive engineers meet the qualification requirements of the regulation. The simple exchange of engineer rosters does not comply with the requirements of 240.229.

FRA Policy: Although the regulation is silent on the procedures used to make these determinations and on the associated recordkeeping requirements, the railroads are required to demonstrate to FRA how these determinations are reached. FRA considers the exchange of rosters permissible in making the determination required in 240.229 (c)(1), that is, the person is a qualified engineer under the regulation. However, from this point, the exchange of rosters does not satisfy the railroads obligation to determine that the engineer has the necessary knowledge, the operating skills and the familiarity with the physical characteristics of the joint operations territory.

Consequently, FRA is advising the regulated community that compliance inspections will expect railroads to have some type of system in place for proving to FRA that these determinations have been made. Any list of qualified persons required under 240.221 (c) should only include those persons who operate on joint territory and their qualification determinations required under 240.229 (c).

## **240.229 - Requirements for joint operations territory**

Application: Per the preamble language to the interim final rule, FRA will hold the controlling railroad responsible for enforcement purposes.

Application: Information on New Railroads, New Territory: Questions have been raised concerning the certification of locomotive engineers on new railroads being created, or on portions of a railroad being reopened after years of non-use.

FRA Policy: The methods used by railroads for start up of a new railroad, or the opening of a long unused route must be described in the railroad's plan submission as described in Appendix B. If ownership of a railroad is being transferred from one company to another, the engineers(s) of the acquiring company could receive familiarization training from the selling company prior to the acquiring railroad commencing operation.

Failing to obtain familiarization training from the previous owner, opening a new rail line, or reopening an unused route would require that the engineers obtain familiarization through other methods. Suggested methods would be through the use of hi-rail trips or initial lite locomotive trips in compliance with what is specified in the Part 240 plan submission.

Application: Class 1 Acceptance of Class III Certification: Recent economic times have demanded increased employment for locomotive engineers on Class I railroads. Signing bonuses and other incentives, including higher pay have caused some engineers on Class III railroads to seek employment on Class I railroads utilizing their Class III railroad certificates. The regulation is structured on the premise that the operating environment on most Class III railroads is less complex than that of most Class I railroads. Class III railroad's training program are frequently far less substantial that Class I programs.

FRA Policy: The Class I railroad's plan submission should address how the railroad will handle this occurrence. Failure to address the subject in the plan submission would require the new engineer to take the class I railroad's training program.

Application: Guidance on the Use of Pilots: FRA requires that a certified locomotive engineer serve as a pilot for a locomotive engineer that is not qualified when operating in joint operations. Therefore, even if the engineer operating the controls is unfamiliar with the physical territory, the pilot in joint operations must be a certified locomotive engineer who has the requisite territorial knowledge.

FRA's traditional application was that a "home road" pilot needed only to be familiar with the road's physical characteristics. While FRA's preference was that all pilots, including "home road" pilots, be locomotive engineers, we did not limit a railroad from using a conductor pilot in such situations. Our rationale was that the engineer operating on his home road would be familiar with operating rules, train handling rules, and signal indications and therefore didn't necessarily need the added expertise of a pilot engineer.

### **240.303 - Operational monitoring requirements**

Application: Inspection Procedures: This procedure is performed by a DSLE and must be performed at least once each calendar year (January 1 to December 31). The operational monitoring observation date should appear on the engineer's certificate or in his supplemental documents (timetable, rule book, etc.) If this observation has not been conducted within the calendar year, a violation of Part 240.303(b) may have occurred.

### **240.307 - Revocation of certification**

Application: The railroad has the responsibility for determining whether a rules violation warrants suspension of an engineer's certificate. Because the railroad cannot always make that determination immediately, the regulation does not require that a railroad prohibit an engineer from operating a train immediately after the occurrence of a possible de-certifiable event.

Note: When approached by railroad employee's to assist them in completing their petition to present to the Locomotive Engineers Review Board (LERB), do not assist the person in completing the petition. Do assist the person/s with information on where to find the petition-submitting format and time limitations in Part 240, Subpart E - Dispute Resolution Procedures.