

EMERGENCY ORDER
No. 13

[4910-06]

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration
[FRA Emergency Order No. 13]

NEW YORK AND LAKE ERIE RAILROAD

INDUSTRIAL DEVELOPMENT AGENCY OF CATTARAUGUS COUNTY

Emergency Order Prohibiting Passenger Service

The Federal Railroad Administration (FRA) of the United States Department of Transportation (DOT) has determined that public safety compels issuance of this Emergency Order prohibiting passenger service and hazardous materials transportation on a segment of the New York and Lake Erie Main Line (Main Line) owned by the Industrial Development Agency of Cattaraugus County (Development Agency) and operated by the New York and Lake Erie Railroad (NYLE) between Gowanda, New York, milepost 32.9, and Cherry Creek, New York, milepost 48.2.

Authority to enforce the Federal railroad safety laws has been delegated by the Secretary of Transportation to the Federal Railroad Administrator. See 49 CFR § 1.49. The New York and Lake Erie Railroad is a "railroad" subject to FRA's safety jurisdiction pursuant to the Federal Railroad Safety Act of 1970 (Safety Act), 45 U.S.C. §§ 421, 431(e), 438, as amended. The Development Authority is a "person" subject to the Safety Act's enforcement provisions. See 45 U.S.C. § 438. Under section 203(a) of the Safety Act, FRA is authorized to issue emergency orders where an unsafe condition or practice or a combination thereof, creates "an emergency situation involving a hazard of death or injury." This order may immediately impose "such restrictions or prohibitions as may be necessary to bring about the abatement of such emergency situation."

FRA's track safety regulations (49 CFR Part 213) prescribe minimum safety requirements for railroad track. There are six classifications of track defining maximum speed and minimum maintenance requirements. For example, Class 6 allows the highest speed and, correspondingly, requires adherence to the most stringent standards. By designating track as a certain class, a railroad commits to maintaining that track to the standards established in Part 213 for that class. However, if the segment of track does not at least meet the requirements of Class 1, it may be designated as "excepted" track under section 213.4 (i.e., track not maintained to meet the standards set for Class 1 in subparts B, C, D and E) so long as, among other things, no "passenger service" is operated over that segment (section 213.4(e)(2)).

The New York and Lake Erie Railroad's line of track between Gowanda, New York and Cherry Creek, New York, clearly fails to meet Class 1 standards, the lowest class of track over which passenger traffic is permitted. As of May 1990, however, the NYLE has been running daily passenger service, with one round trip excursion per weekday and two round trip excursions each Saturday and Sunday. (Freight traffic is anticipated to be 700 cars during 1990).

Since June of 1989, FRA and New York State personnel have performed five detailed inspections of this track, most recently on May 22 and 23, 1990. Each inspection disclosed hundreds of instances of noncompliance with Class 1 track standards which were later discussed at several meetings with NYLE's President, Robert O. Dingman. Although Mr. Dingman agreed at each meeting to initiate a track improvement program, subsequent FRA inspections disclosed numerous critical defects that were either inadequately repaired or not repaired at all. It is this record of serious defects, coupled with a history of noncompliance, that convinced FRA that operation of passenger trains over this line would pose an urgent and unacceptable threat to public safety.

On June 28, 1989, a "hy-rail" vehicle track inspection by FRA inspectors of the Main Line between Dayton, New York and Little Valley, New York, disclosed 119 defective conditions. Five of these were recommended for civil penalties.

By October 18, 1989, only two of the five violations found on June 28, 1989 had been repaired. Walking follow-up inspection of selected locations between Dayton and Little Valley revealed 155 conditions that failed to meet Class 1 track standards. Eight of the 155 conditions, including the three that had been discovered in June of 1989, were recommended for civil penalties.

A hy-rail inspection was conducted the following day, October 19, 1989, on Main Line track between Gowanda and South Dayton, New York. Defective crossties, excessively wide gage and loose joint bars were discovered at many critical points in the track structure. These conditions were reported to the railroad, as the lack of properly spaced nondefective crossties and the excessive gage width indicated a lack of lateral and vertical support to the rail, which is necessary to prevent train derailment. In addition, the loose joint bars had already caused actual mismatches between rail end sections.

Throughout the inspection period, however, NYLE continued to run freight service as well as various passenger excursion trains and failed to inform FRA as to whether it had corrected any of the reported defects.

As a result, FRA's Regional Director of Railroad Safety for Region 1, Rolf Mowatt-Larsen, and Region 1 Track Safety Specialist, A. H. McDowell, as well as New York State-DOT Track Inspector Keith McClain, met with Mr. Dingman on October 20, 1989. Mr. Dingman agreed at that time to conduct operations on NYLE trackage as follows:

- o All track from Gowanda to Dayton would be brought into compliance with Class 1 standards by November 12, 1989, or be designated excepted track as of November 13, 1989.
- o All track from Dayton to Cherry Creek would be brought into compliance with Class 1 standards by December 3, 1989, or be designated excepted track as of December 4, 1989.
- o All track from Dayton to Salamanca, New York, would be designated excepted track as of October 20, 1989. As required under the excepted track provision, 49 CFR § 213.4, all passenger train operations would cease at that time until and unless the track was brought into compliance with Class 1 standards. In addition, all instances of noncompliance that had been submitted to the NYLE by federal and state inspectors were to be corrected by December 5, 1989.

By March 27, 1990, it was clear that the NYLE had failed to comply with most of the agreed-upon conditions. Although the railroad had designated track between milepost 0 and just east of Cattaraugus, and track between Cherry Creek and Conewando, New York, as excepted, a three day walking inspection disclosed 591 instances of noncompliance on the remaining non-excepted track. Sixty-five of these conditions were identified as immediate hazards to safe train operation. Among the defects spotted were 250 defective crosstie locations, 23 defective gage locations, 37 center cracked or broken joint bars and 5 defective rails. One hundred fifty seven loose joint bar locations were also found, many of which had already caused severe rail end mismatches.

On May 22 and 23, 1990, FRA conducted another follow-up inspection, this time of trackage between Gowanda and Cherry Creek. The inspection focused on the 65 conditions that had been previously identified as critical. Of these, only seven had been fully repaired.

The inspection results from a four-mile section of track between Gowanda and Dayton were particularly important because of that segment's physical characteristics. Its ruling grade is approximately 2.7 percent, with 12 curves varying in curvature between one and five degrees. Moreover, its toe of

slope is bordered by a public highway and private homes at different locations. Twenty-two critical conditions were identified on this segment in the March 27, 1990 inspection. Seven had been repaired by May of 1990; no action had been taken on the remaining 15. The May inspection, in fact, disclosed an additional nine critical conditions.

A second meeting with Mr. Dingman therefore occurred on June 1, 1990. FRA's Associate Administrator for Safety, Joseph W. Walsh, and Assistant Chief Counsel for Safety, Gregory B. McBride, met with Mr. Dingman in Buffalo to discuss what immediate track repairs would be necessary if passenger traffic were to continue on the Gowanda to Cherry Creek portion of the Main Line.

Passenger service has continued on the NYLE. A flier distributed by the NYLE for the May through December 1990 season includes schedules for four different scenic rail excursions. One of these, the "Santa Claus Express," is designed specifically for small children, and would run during wintertime conditions in upstate New York. Moreover, NYLE's own flier describes its trackage as including "one of the steepest mainline grades east of the Mississippi." These physical characteristics, the track conditions described earlier, and the consistent lack of adequate railroad response have convinced FRA that this passenger service should not run until NYLE track safety is improved.

Order

FRA concludes that the continued transportation of passengers on this line poses an imminent and unacceptable threat to public safety. I find that the unsafe conditions discussed above create an emergency situation involving a hazard of death or injury to persons. Accordingly, pursuant to the authority of section 203 of the Federal Railroad Safety Act of 1970, delegated to me by the Secretary of Transportation (49 CFR § 1.49(m)), it is ordered:

1. That the Industrial Development Agency of Cattaraugus County shall not conduct or permit the operation of any passenger service of any kind over the line of track between Gowanda, New York (milepost 32.9) and Cherry Creek, New York (milepost 48.2) unless and until that track is maintained to FRA class 1 standards as set forth in 49 CFR Part 213.

2. That the New York and Lake Erie Railroad shall not conduct any passenger service of any kind over the line of track between Gowanda, New York (milepost 32.9) and Cherry Creek, New York (milepost 48.2) unless and until that track is maintained to FRA class 1 standards as set forth in 49 CFR Part 213.

3. That the Industrial Development Agency of Cattaraugus County shall not conduct or permit the transportation of any material that is required to be placarded as hazardous under 49 CFR Parts 171-179 over the line of track between Gowanda, New York (milepost 32.9) and Cherry Creek, New York (milepost 48.2) unless and until that track is designated "excepted" as provided in 49 CFR § 213.4 and only if such transport of hazardous materials complies with section 213.4(e)(3).

4. That the New York and Lake Erie Railroad shall not conduct or permit the transportation of any material that is required to be placarded as hazardous under 49 CFR Parts 171-179 over the line of track between Gowanda, New York (milepost 32.9) and Cherry Creek, New York (milepost 48.2) unless and until that track is designated "excepted" as provided in 49 CFR § 213.4 and only if such transport of hazardous materials complies with section 213.4(e)(3).

Relief

Relief from this order may be obtained by:

1. Properly designating the identified segment of New York and Lake Erie Main Line, or portions of that line, as excepted track under Section 213.4 and indicating this designation in writing to the FRA Administrator, with a copy to Regional Director Mowatt-Larsen. All conditions for such a designation must be met and adhered to by the NYLE. FRA will respond in writing within 7 days and, if FRA is satisfied that these conditions have been fully met, FRA will lift the Order as it pertains to hazardous materials transportation from the entire New York and Lake Erie Main Line or designated portions of that line; or

2. Informing the FRA Administrator in writing, with a copy to Regional Director Mowatt-Larsen, that the identified segment of New York and Lake Erie Main Line or portions of that line, are in compliance with Class 1 standards. Within 14 days of receipt of such notice, FRA will inspect the segment (or certified portions), and within 7 days of such inspection will inform the New York and Lake Erie in writing, whether this Order is lifted. If FRA does not lift the Order, the written response will specifically describe what additional measures must be taken to bring the track into compliance.

Penalties

Each train movement in violation of this Order shall subject the respondent committing such violation to a civil penalty of up to \$20,000. 45 U.S.C. §§ 432, 438, as amended.

Review

Opportunity for formal review of this Emergency Order will be provided in accordance with section 203(b) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 432(b), and section 554 of Title 5 of the United States Code.

Issued in Washington, D.C., on June 7, 1990.

A handwritten signature in cursive script, appearing to read "Gilbert E. Carmichael", followed by a period.

Gilbert E. Carmichael
Administrator