



March 24, 2011
(Via online at www.regulations.gov)

Docket Operations Facility
U. S. Department of Transportation
1200 New Jersey Avenue, SE, W12-140
Washington, DC 20590

Re: Hazardous Materials: Improving the Safety of Railroad Transportation of Hazardous Materials; Docket No. FRA-2011-0004

**Comments of the
American Train Dispatchers Association (ATDA)
Brotherhood of Locomotive Engineers and Trainmen (BLET/IBT)
Brotherhood of Maintenance of Way Employees Division (BMWED/IBT)
Brotherhood of Railroad Signalmen (BRS)
Transport Workers Union of America (TWU)
Transportation Communications Union (TCU)
United Transportation Union (UTU)**

The seven railroad labor organizations (“Labor Organizations”) identified above are the collective bargaining representatives of a significant majority of railroad industry workers engaged in train operations, train dispatching, and track, signal and mechanical maintenance, inspection, testing, and repair. The Labor Organizations and their collective membership have a vested interest in improving the safety of railroad transportation of hazardous materials, including the process for issuing movement approvals under 49 CFR § 174.50.

The Labor Organizations are filing these joint comments in response to the Federal Railroad Administration’s (“FRA”) Notice of Public Meeting published in the Federal Register on January 25, 2011. The notice announces that FRA has scheduled a public meeting in Washington, DC, to discuss its process of issuing movement approvals pursuant to 49 CFR § 174.50. Several rail unions signatory to these joint comments participated in said public meeting and provided oral

testimony to FRA regarding movement approval of non-conforming hazardous material tank cars and packages.

The Labor Organizations typically are not involved in the FRA approval process for the movement of tank cars and packages found in non-compliance with the Hazardous Materials Regulations (HMRs). However, our members are involved in the movement of such non-compliant cars, and work in proximity to such cars, once approval for movement is granted by FRA under the provisions of § 174.50.

FRA has been authorizing such movements since 1996 and we are unaware of any significant problems with the approval process. Generally, the Labor Organizations support the current process as a reasonable way to balance safety with the need to move non-compliant cars. We believe that FRA is best positioned to evaluate each request for movement approval and to impose specific conditions for the safety of each approved movement. Each approval of a non-conforming movement is issued on a case-by-case basis by FRA based upon the specific circumstances of non-compliance. Therefore, FRA is best positioned to evaluate each request for movement approval and to impose specific conditions for each approved movement. However, the notice includes information that is a concern to the Labor Organizations and we respectfully request FRA to address these issues as part of this regulatory review.

The number of movement approvals issued by FRA over the last several years has more than doubled

The notice states that the number of requests has steadily increased and the number of approvals has more than doubled since 2007. The notice also states that there have been no injuries or exposures during the 16 years that this approval process has been in place. We attribute the success of the approval process to the fact that each approval granted by FRA is specific and conditioned upon the particular circumstances of the request. FRA has indicated that FRA staffing levels are sufficient to handle the current volume of requests.

It is unclear if the cause of the current increase in approval requests is the result of improved inspection efforts, a decrease in the number of available repair facilities, an increase in certain types of recurring defects, greater shipper/industry awareness of the requirements of § 174.50, or previous non-compliance with the approval requirements of § 174.50. In any event, we contend that a doubling in the number of approvals over four years is a substantial increase and the underlying cause should be determined by FRA and appropriately addressed by shippers and carriers.

Given the current economic climate, it is unlikely that FRA will be provided increased appropriations to expand its staff. If the trend in requests for movement of non-conforming packages continues without a reciprocal increase in FRA staffing, it is inevitable that requests will outpace FRA's ability to timely handle approvals under § 174.50. The result will be non-conforming tank cars and containers left standing longer while awaiting movement approval at locations where our members or the public could be at risk of exposure to hazardous materials. The Labor Organizations are confident in the competence of the FRA staff; however, we are

concerned that overwhelming caseloads may cause the quality of the review to diminish due to the increasing volume of requests.

Railroads and shippers have a business interest in the timely review and approval of their movement requests. As soon as the backlog impacts their bottom line, railroads and shippers will pressure FRA to accelerate the approval process. Such acceleration will undoubtedly diminish the level of detail and due diligence now afforded each request, resulting in an increased probability of unintended consequences such as fire, explosion, or chemical exposure. The movement approval process under § 174.50 must continue to emphasize safety over expediency. As part of this regulatory review, FRA should fully investigate and address the underlying reasons for the increasing number of movement requests. Railroads and shippers must do more to reduce the incidence of non-conformance.

Approvals of one time movements to repair facilities for leaking or damaged containers

In FRA's Hazardous Materials Guidance Document, HMG-101, FRA discusses the history and development of the current rule. The movement approval authority prior to 49 CFR § 174.50 was the emergency exception provision contained in 49 CFR § 107.117, which was issued to *"prevent a significant economic loss, neutralize a condition that threatens national security, or prevent injury to persons or property."* In discussing the history and development of § 174.50 in the notice, FRA pointed out that the industry often claimed an economic loss as the reason it required emergency exception movements for non-conforming packages or tank cars when, in fact, the actual reason was because the container was damaged or leaking. It appears that the industry may have come full circle and now may be seeking approval for movement of damaged or leaking containers when indeed the actual reason for the request is to prevent economic loss. The notice states:

"Movement approvals have been issued for such non-conformances as service equipment, tank shell, or lining failures; overloaded packagings; jacket, tank car shell, or head damage; stub sill weld cracks; failures of heater coils or thermal protection systems; tank cars overdue for required tests; and other reasons."
See, 76 Fed. Reg. 4277 (Jan. 25, 2011).

We acknowledge that several conditions of non-conformance can be spontaneous and unpredictable, such as a tank shell, weld, or lining failure. However, some conditions are entirely predictable, such as tank cars overdue for required tests and overloaded packaging. We are concerned that railroads and shippers may be relying on the fact that approval for a non-compliant movement is an option, after creating the non-conforming condition in the first place. FRA could minimize or eliminate the number of these types of requests by penalizing shippers or railroads for failure to comply with existing regulations that result in entirely predictable non-conforming conditions.

Employees should be notified and provided protection

FRA should require notification and mandate appropriate protection for employees who will be moving and/or working in the vicinity of the non-conforming containers. The recently published Notice of Proposed Rulemaking for Emergency Escape Breathing Apparatus (“EEBA”) contained implementation dates that spanned three (3) years. The joint labor comments to that rule recommended that the implementation dates be advanced significantly so that Class I railroads would implement the EEBA requirements within three (3) months of the effective date of the rule and full implementation would occur within one year. The steadily increasing number of movement approvals provides a compelling reason to accept Labor’s recommendation to significantly advance the implementation date of the EEBA requirements.

The Labor Organizations are fully aware that the EEBA requirements would only apply to operating craft employees, leaving other railroad employees exposed to potential risk of inhalation or exposure to hazardous materials. FRA must require every request for movement of a non-conforming container or tank car – as specifically as possible – to identify populations of employees who potentially may be exposed. Also, each approval must be conditioned upon the notification and protection of those employees who will potentially be exposed to the hazardous material prior to when it is trans-loaded or moved to the repair facility.

For example, a particular pool of operating employees that regularly operates over the track, or engineering and mechanical employees scheduled to perform maintenance or inspections in proximity to that track or route, should be identified in the request. The specific individuals should be notified when they report for duty the day of the movement or trans-loading. Railroads have a number of communications options for conveying this information to employees, including but not limited to, bulletin orders, computerized notices, supervisory communications, job briefings, informational broadcasts via radio or data terminal, etc. Protection of such employees would include but not be limited to prohibiting the assignment of work in proximity of the approved movement or during trans-loading operations.

Also, 49 CFR § 174.26 requires that the train crew be provided a document indicating the current position of each rail car containing hazardous material. FRA should amend the regulation to require that each consist document not only identify the position of the hazardous material cars in the train, but also identify the existence and position of each non-conforming container moving under a § 174.50 approval. The approval and documentation should also specify any conditional limitations applicable to the movement such as maximum speed, clearances, buffer cars, etc.

Leaking containers and tank cars must be plugged, patched and stabilized prior to moving to the nearest repair facility

Currently, FRA asks for the planned destination of the move. 49 CFR 174.50 restricts the movement of leaking or damaged containers “...without repair or approval only so far as necessary to reduce or to eliminate an immediate threat or harm to human health or to the environment when it is determined its movement would provide greater safety than allowing the

package to remain in place.” Notwithstanding the fact that the regulation does not specify who makes such a determination, movement without approval is limited to “only so far as necessary to reduce or eliminate an immediate threat” to life, health or the environment.

Consistent with the concept of minimizing the risk of exposure embodied in 49 CFR § 174.50, leaking or unstable containers must be temporarily or permanently plugged, patched and stabilized prior to movement approval authority being granted, and then be required to be transported to the nearest repair facility. It makes little sense to move a damaged or non-conforming container hundreds of miles forward when a qualified repair facility may be much closer in the opposite direction; however, FRA cannot make an informed decision in this regard without the applicant identifying the nearest facility capable of making the necessary repairs. Therefore, we believe the request for approval should require the railroad to identify not simply the planned repair facility, but also the nearest repair facility. FRA must consider this additional information in issuing conditional movement approvals.

FRA also should require the application for movement approval to identify the date the nonconforming container was discovered. It is important to address defective and leaking containers as soon as they are discovered. A leaking, damaged, overloaded, or defective container remaining in regular service without timely notification to FRA and rail employees working in proximity to the non-conforming car unjustifiably delays mitigation and places employees and the public-at-large at risk.

Centralized communication network for approval requests

At the February 22, 2011, public hearing, the concept of a centralized web-based communication network for submitting approval requests was discussed. The Labor Organizations would not be opposed to the establishment of such a centralized web-based communications network provided that FRA closely monitors the site and expeditiously assigns each request for movement approval to the appropriate FRA personnel for investigation. Such a centralized process would make sense only if it improved response time and expedited the investigation and approval process.

Blanket movement approval for certain types of non-conforming tank cars or packaging

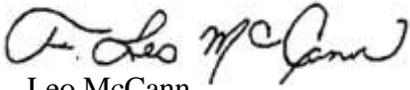
At the February 22, 2011, public hearing, the Chlorine Institute and the Association of American Railroads indicated that they would be submitting a document to FRA regarding the concept of “blanket movement approval” for certain types of non-conforming tank cars and packaging. The Labor Organizations are opposed to any “blanket” movement approvals that would be self-executing upon submission to FRA. The DOT/FRA has the enforcement authority and statutory responsibility to ensure the safe transportation of hazardous materials, including the issuance of movement approvals with appropriate limiting conditions for non-conforming tank cars and packages. FRA/DOT cannot abandon its statutory authority to investigate the safety implications of moving non-conforming cars and packages, nor can FRA/DOT process requests for

movement approvals without a detailed investigation of the circumstances and risks associated with each incident of non-conformance on a case-by-case basis.

If there is compelling evidence that certain non-conforming conditions should no longer be subject to the approval requirements of § 174.50, such conditions, if they do exist, should be addressed through the rulemaking and public comment process. The Labor Organizations are opposed to the concept of a blanket waiver for non-conforming conditions currently subject to approval under § 174.50. That subject would be more appropriately addressed through rulemaking.

The Labor Organizations appreciate FRA conducting the public hearing on February 22, 2011, and for providing this opportunity to submit comments to the public docket.

Respectfully submitted,



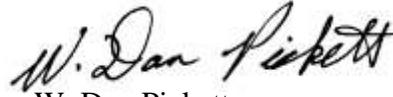
Leo McCann
President, ATDA



Dennis Pierce
National President, BLET/IBT



Freddie N. Simpson
President, BMWED/IBT



W. Dan Pickett
President, BRS



Gary E. Maslanka
International Vice President, TWU



Richard A. Johnson
General President, Carmen Division/TCU



Mike Futhey
International President, UTU