



Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference — International Brotherhood of Teamsters

NATIONAL LEGISLATIVE OFFICE

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*Vice President and
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VIA ELECTRONIC MAIL

March 14, 2008

Ms. Jo Strang
Associate Administrator for Safety
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Class III Brake Tests and 49 CFR Part 240

Dear Ms. Strang:

Beginning shortly after the first of the year, my office began receiving reports of locomotive engineers employed by Burlington Northern Santa Fe Railway (BNSF) in helper service having their certification suspended, pending revocation, for allegedly failing to conduct a Class III brake test after coupling to the train they were assigned to assist. I have been advised that BNSF's action was triggered by a recent informal FRA "interpretation" of 49 CFR Part 240. We strongly believe there is no basis for either the interpretation or for BNSF's responsive action, and I am writing to request a formal interpretation of the regulatory provisions relevant to this situation.

The applicable provision involved in these cases presently states as follows:

A railroad shall only consider violations of its operating rules and practices that involve ... failure to adhere to procedures for the safe use of train or engine brakes when the procedures are required for compliance with the initial terminal, intermediate terminal, or transfer train and yard test provisions of 49 CFR part 232 or when the procedures are required for compliance with the class 1, class 1A, class II, or running brake test provisions of 49 CFR part 238.

49 CFR § 240.117(e)(3).

This "cardinal sin" first became tied to Part 232 upon publication of the April 9, 1993 Interim Final Rule, when it was revised to state that "[a] railroad shall only consider violations of its operating rules and practices that involve ... failure to adhere to procedures for the safe use of train

or engine brakes when the procedures are required for compliance with the transfer, initial, or intermediate terminal test provisions of 49 CFR part 232 (see 49 CFR 232.12 and 232.13).” In the Preamble to that revision, FRA stated that it was

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*. The revised provision limits the procedures which will have certification consequences to those required for achieving compliance with Federal regulations in 49 CFR Part 232.

58 FR 18992 (emphasis added).

Thus, in the 1993 iteration of Section 240.117(e)(3), there was an explicit tie to only Sections 232.12 and 232.13. Section 232.12 at the time was titled “initial terminal road train airbrake tests,” and Section 232.13 was titled “road train and intermediate terminal train air brake tests.” The latter section also prescribed, in paragraph (e), the testing required for transfer train and yard train movements not exceeding 20 miles.

Our representatives have been told that Class III tests now fall under Section 240.117(e)(3) because a Section 232.13 intermediate terminal test included a “set and release” of the brakes, and that this portion of the test is now set forth in the Class III testing requirements. While it is true that the Class III test includes a “set and release,” this fact, alone, cannot serve as the basis for expanding the scope of Section 240.117(e)(3) for two reasons.

First, the intermediate terminal test, which now is designated as Section 232.209, always has included a “set and release” requirement. *See* 49 CFR § 232.209(b). Therefore, the intermediate terminal test has remained intact, and there is no need to expand the scope of Section 240.117(e)(3) to facilitate enforcement to ensure compliance with the former Section 232.13 requirements as they pertain to either brake tests performed at intermediate terminals, or brake tests performed in connection with transfer and/or yard train movements.

Second, the old Section 232.13 requirements that became the current Section 232.211 Class III test were far more rigorous than merely “a set and release.” They include the following specifics:

- The train brake system shall be charged to the pressure at which the train will be operated, and the pressure at the rear of the train shall not be less than 60 psi, as indicated at the rear of the train by an accurate gauge or end-of-train device. *Compare* old § 232.13(c)(1) and current § 232.211(b)(1).
- The brakes on the rear car of the train shall apply in response to a 20-psi brake pipe service reduction and shall remain applied until the release is initiated by the controlling locomotive. *Compare* old § 232.13(c)(1) and current § 232.211(b)(2).

- When the release is initiated, the brakes on the rear car of the train shall be inspected to verify that it did release. *Compare* old § 232.13(c)(1) and current § 232.211(b)(3).
- Before proceeding the operator of the train shall know that the brake pipe pressure at the rear of freight train is being restored. *Compare* old § 232.13(c)(1) and current § 232.211(b)(4).

Furthermore, neither the 1993 version of Section 240.117(e)(3) nor the current language refers to helpers, and the current language specifically does not include Class III brake tests. Accordingly, the evolution of what now is a Class III brake test is irrelevant to the scope of Section 240.117(e)(3). This is proven by comparing the prior and the current regulatory language governing helpers. At the time Section 240.117(e)(3) was amended in 1993, the following provision governed helper crews:

§232.215 Double heading and helper service.

(a) When more than one locomotive is attached to a train, the engineman of the leading locomotive shall operate the brakes. On all other motive power units in the train the brake pipe cutout cock to the brake valve must be closed, the maximum main reservoir pressure maintained and brake valve handles kept in the prescribed position. In case it becomes necessary for the leading locomotive to give up control of the train short of the destination of the train, a test of the brakes must be made to see that the brakes are operative from the automatic brake valve of the locomotive taking control of the train.

(b) The electro-pneumatic brake valve on all motive power units other than that which is handling the train must be cut out, handle of brake valve kept in the prescribed position, and air compressors kept running if practicable.

FRA's current regulation pertaining to helpers states, in pertinent part, as follows:

§232.219 Double heading and helper service.

(a) When more than one locomotive is attached to a train, the engineer of the controlling locomotive shall operate the brakes. In case it becomes necessary for the controlling locomotive to give up control of the train short of the destination of the train, a Class III brake test pursuant to § 232.211 shall be made to ensure that the brakes are operative from the automatic brake valve of the locomotive taking control of the train.

(b) When one or more helper locomotives are placed in a train, a visual inspection shall be made of each helper locomotive brake system to determine that the brake system operates as intended in response to a 20-psi reduction initiated from the controlling locomotive of the train. A helper locomotive with inoperative or ineffective brakes shall be repaired prior to use or removed from the train.

At the time Section 240.117(e)(3) was amended in 1993, there was no requirement that an intermediate terminal test be conducted pursuant to Section 232.13(c) whenever a helper was added to a train. The current requirement to conduct a Class III brake test as prescribed by Section 232.211 whenever a helper is added *and control of the air brake system is turned over to the helper* was not instituted until Part 232 was overhauled several years after Section 240.117(e)(3) was amended. The regulatory history of current Part 232 establishes both that FRA had at least four opportunities to include Class III brake tests in Section 240.117(e)(3), and that FRA did not do so.

In the September 9, 1998 Notice of Proposed Rulemaking (“NPRM”) overhauling FRA air brake regulations there is only one reference to Part 240. That reference pertains to the requirement in proposed Section 232.109(f) that a railroad operating a train with a brake system that includes dynamic brakes adopt, comply with, and incorporate into its locomotive engineer certification program pursuant to Part 240, specific knowledge, skill, and ability criteria to ensure that its locomotive engineers are fully trained in the operating rules governing use of dynamic brakes. *See* 63 FR 48335, 48361. Indeed, at that point, FRA did not even propose to amend Section 240.117(e)(3) to revise the references to former Sections 232.12 and 232.13.

The 1998 NPRM proposed the following inspection and tests:

- Class I brake tests — Initial terminal inspection (§ 232.205);
- Class IA brake tests — 1,000-mile inspection (§ 232.207);
- Class II brake tests — Intermediate inspection (§ 232.209);
- Class III brake tests — Trainline continuity inspection (§ 232.211);
- Extended haul trains (§ 232.213);
- Transfer train brake test (§ 232.215);
- Train brake system tests conducted using yard air (§ 232.217)1
- Double heading, helper service, and distributed power (§ 232.219).

See 63 FR 48362–48365. Of particular relevance to this situation is the fact that proposed Section 232.219(a) would require, in pertinent part, that “[i]n case it becomes necessary for the controlling locomotive to give up control of the train short of the destination of the train, a Class III brake test pursuant to § 232.211 shall be made to ensure that the brakes are operative from the automatic brake valve of the locomotive taking control of the train.” 63 FR 48365.

On September 22, 1998 — less than two weeks after the air brake NPRM — FRA published a Proposed Rule amending Part 240 consistent with recommendations made by FRA’s Railroad Safety Advisory Committee (“RSAC”). 63 FR 50626–50658. The only usage of the phrase “Class III” in the Proposed Rule pertains to the Surface Transportation Board (“STB”) classification of the smallest railroads in the industry. *See* 63 FR 50644, 50649–50650, 50657. At that time, FRA did not proposed to revise Section 240.117(e)(3) to reflect proposed changes to Part 232. *See* 63 FR 50654.

FRA's Final Rule relating to RSAC's review of Part 240 was published on November 8, 1999. 64 FR 60966–60997. As with the Proposed Rule, all usage of “Class III” pertained to the STB classification.¹ It was at this point, however, that FRA promulgated the current language of Section 240.117(e)(3). In this regard, FRA stated the following in the Preamble to the Final Rule:

FRA has made conforming changes to paragraph (e)(3) as necessary considering the Passenger Equipment Safety Standards final rule that was published at 49 CFR Part 238. See 64 FR 25540 (May 12, 1999). ***Paragraph (e)(3) was also modified to account for whatever changes, if any, are ever made to part 232.*** See 63 FR 48294 (Sept. 9, 1998) (proposing changes to part 232).

64 FR 60983 (emphasis added).

Thus, contrary to our understanding of the rationale for expanding the scope of Section 240.117(e)(3), Class III brake tests are not something that slipped through a crack when they were spun off from the old Part 232 intermediate terminal test. At the time FRA tied Section 240.117(e)(3) to Part 232, the “cardinal sin” pertained to transfer, initial, and intermediate terminal tests only; this was at a time when Section 232.15 did not require that a helper crew conduct a Section 232.13(c) air brake test if the crew took control of the train's braking system. When Section 240.117(e)(3) was revised, FRA clearly acknowledged the parallel air brake rule-making and adopted the specific nomenclature in the Part 232 NPRM that covered transfer, initial, and intermediate terminal tests.

That the 1999 Part 240 Final Rule was not intended to make a helper engineer who failed to conduct a Class III brake test subject to revocation is underscored by the post-1999 evolution of Part 232. In the Final Rule published on January 17, 2001, the requirement initially proposed as Section 232.109(f) was redesignated as Section 232.109(k). See 66 FR 4201. The only references to Part 240 in the 2001 Final Rule appear in FRA's responses to comments filed concerning this provision. See 66 FR 4130, 4132, 4163. Likewise, in the Final Rule published on April 10, 2002, there are four references to Part 240. All appear in a single paragraph in FRA's section-by-section analysis of changes proposed for the Section 232.203 requirements, rebutting an assertion in the Association of American Railroads' petition for reconsideration that locomotive engineer certification was “simply grandfathered” for all existing engineers at the time Part 240 became effective. See 67 FR 17571–17572.

All of the historical evidence supports the conclusion that Class III brake tests do not fall within the ambit of Section 240.117(e)(3). Indeed, nearly seven years have passed since the Part 232 Final Rule was published, and — to the best of our knowledge — FRA has taken no action consistent with the position it now maintains. Furthermore, ample evidence establishes that BNSF shared the opinion espoused in this letter. Until recently, the suspension of certification notice form did not include a box for Class III brake tests. Similarly, there are the just-released Kansas

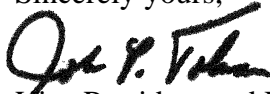
¹ See 64 FR 60969, 60973–60794, 60986–60987, 60994.

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Division Operating Practices Briefing and Safety Briefing SB-2008-01T, which were published on January 9th of this year, mere days after we were apprised of this new interpretation.

The problems created by this informal "interpretation" continue to mount, and we believe it would be wasteful of our resources and FRA's to resolve this matter in a series of appeals before the Locomotive Engineer Review Board. Accordingly, I respectfully request that this issue be formally considered and a formal interpretation be made. Thanking you in advance for your timely attention to this request, I remain

Sincerely yours,



Vice President and National Legislative Representative

cc: R. C. Gibbons, BNSF General Chairman
Brian Kelley, Missouri State Legislative Board Chairman
Thomas A. Pontolillo, Director of Regulatory Affairs