



U.S. Department  
of Transportation

**Federal Railroad  
Administration**

1200 New Jersey Avenue, SE  
Washington, DC 20590

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Mr. Michael J. Rush  
Associate General Counsel  
Association of American Railroads  
425 Third Street SW, Suite 1000  
Washington, DC 20024

Mr. Keith T. Borman  
Vice President and General Counsel  
American Short Line and Regional Railroad Association  
50 F Street NW, Suite 7020  
Washington, DC 20001

Re: FRA Emergency Order No. 28; Partial Relief

Dear Mr. Rush and Mr. Borman:

This letter responds the two petitions for relief jointly submitted by the Association of American Railroads (AAR) and American Short Line and Regional Railroad Association (ASLRRA) (AAR/ASLRRA joint petitions) to the Federal Railroad Administration (FRA) on August 23, 2013, requesting relief from: certain requirements of FRA Emergency Order No. 28 (EO 28 or Order). The AAR/ASLRRA joint petitions, copies of which are enclosed with this letter, specifically requested relief from:

1. The dispatcher communication requirement in EO 28 during certain limited railroad switching operations, and
2. The applicability of the Order to rail cars containing a residue of specified hazardous materials.

For the reasons discussed below, FRA is granting these two requests for partial relief subject to certain conditions.

Background

FRA issued EO 28 on August 2, 2013, after conducting a re-examination of its securement regulations in light of the July 6, 2013, derailment in Lac-Mégantic, Quebec, Canada. See 78 FR 48218 (Aug. 7, 2013). The Order, a copy of which is also enclosed, established six requirements to eliminate the immediate hazard of death, personal injury, or significant harm

to the environment, related to the securement of certain unattended equipment. EO 28 is effective on September 1, 2013.

After publication of EO 28, FRA received inquiries requesting interpretation of the provisions of the Order. Subsequently, on August 21, 2013, FRA issued a guidance document that is publicly available on FRA's Internet Web site. After publication of this guidance document, AAR and ASLRRA submitted the joint petitions that are the subject of this letter.

#### Petition for Partial Relief from Requirement No. 2

The first AAR/ASLRRA joint petition requested relief from the dispatcher communication provision of Requirement No. 2 of the Order. Requirement No. 2 specifically applies to the securement of trains or vehicles containing certain quantities and types of hazardous materials listed in Appendix A to EO 28 (Appendix A Materials),<sup>1</sup> and requires that after such trains or vehicles are secured that the train crew must communicate, and the dispatcher must record, specific information regarding the train and location characteristics. AAR requested relief from the dispatcher communication requirement for railroad operations involving the following actions:

- a. Picking up, setting off, or repositioning cars at an industry;
- b. Assembling cars from several tracks adjacent to the main track;
- c. Adding, removing, or swapping locomotives; and
- d. Moving part of a train when doubling a hill or cutting crossings.

AAR's petition stated that during these switching operations, which often take place at a high volume dependent on location and type of operation, EO 28's Requirement No. 2 regarding dispatcher communications could have adverse safety ramifications due to the amount of time dispatchers would have to devote to such communications rather than other safety-sensitive functions, and due to radio congestion that the requirement could cause in such instances. AAR's petition also stated that because locomotive power is detached from such unattended equipment, in addition to the protection provided by the existing Federal regulations governing securement at 49 CFR part 232 (and any additional securement measures implemented by railroads in response to Requirements Nos. 1 and 2 of the Order), by necessity, an emergency brake application is made to the remaining equipment from the

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<sup>1</sup> Requirement Nos. 1 and 2 of EO 28 apply to trains or vehicles containing the following:

- (1) Five or more tank car loads of any one or any combination of materials poisonous by inhalation as defined in 49 CFR 171.8, and including anhydrous ammonia (UN 1005) and ammonia solutions (UN 3318); or
- (2) 20 rail car loads or intermodal portable tank loads of any one or any combination of materials listed in (1) above, or, any Division 2.1 flammable gas, Class 3 flammable liquid or combustible liquid, Class 1.1 or 1.2 explosive, or hazardous substance listed in 49 CFR 173.31(f)(2).

train. Accordingly, there can be no unintended or intentional release of the equipment's air brakes by someone in a locomotive cab. Thus, there is an additional level of safety for unattended equipment in these circumstances versus when an entire train is left unattended.

#### Petition for Relief Related to Residue Cars

The second AAR/ASLRRA joint petition disagreed with FRA's August 21 guidance document regarding the treatment of tank cars containing a residue of hazardous material. FRA's guidance document indicated that the references to tank car, intermodal portable tank, and rail car "loads" respectively, included all placarded cars containing the hazardous materials specified in Appendix A to the Order. Thus, cars containing a "residue"<sup>2</sup> of the specified hazardous materials would trigger Requirement Nos. 1 and 2 of the Order. The AAR/ASLRRA joint petition stated that the decision to include residue cars within the scope of EO 28 could not be justified from an operational, safety, or legal perspective.

As evidence of this proposition, AAR and ASLRRA pointed to the definition of "residue" car at 49 CFR § 171.8 of the HMR, and to existing HMR provisions that treat loaded cars more strictly than residue cars. See 49 CFR §§174.85-174.86. The AAR/ASLRRA joint petition also asserted that the Lac-Mégantic accident would not have had such devastating consequences if residue shipments of crude oil had been involved rather than loaded tank cars. AAR and ASLRRA also stated that the decision to include residue cars within the scope of the Order would likely, at a minimum, double the number of hazardous materials trains subject to EO 28. The joint petition also asserted that railroads' existing computer systems are not currently configured to identify "key trains" on the basis of residue shipments, and railroads could not institute updates prior to the EO 28 implementation deadline of September 1. Thus, AAR argued there were significant implementation burdens with regard to the treatment of residue cars.

#### Authority for Providing Relief

EO 28 allows a party to submit a petition for relief requesting authority to take actions not in accordance with the Order. Any such petition for relief must be submitted to the Associate Administrator for Safety/Chief Safety Officer (Associate Administrator). The Associate Administrator is granted authority to dispose of such requests without amending EO 28. The Associate Administrator shall grant a petition for relief only when a petitioner "has clearly articulated an alternative action that will provide, in the Associate Administrator's judgment, at least a level of safety equivalent to that provided by this EO." See 78 FR 48222. FRA retains power under this provision to grant the requested relief in its entirety, grant partial relief subject to conditions identified by FRA, or deny the requested relief.

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<sup>2</sup> The term "residue" is defined at 49 CFR § 171.8 of the Pipeline and Hazardous Materials Administration's Hazardous Materials Regulations (HMR) as the "hazardous material remaining in a packaging, including a tank car, after its contents have been unloaded to the maximum extent practicable and before the packaging is either refilled or cleaned of hazardous material and purged to remove any hazardous vapors."

## Discussion

FRA has chosen to grant, with conditions, the relief sought by AAR/ASLRRA with regard to the dispatcher communication provision of Requirement No. 2, provided that the railroad employee(s) are actively engaged in one or more of the four railroad operations identified in the AAR/ASLRRA joint petition. FRA concurs with the safety rationale put forth in the AAR/ASLRRA joint petition, and the agency is aware that such railroad operations are normally completed within a relatively short time frame (generally two-three hours, and oftentimes less). Additionally, the unattended equipment will undergo an emergency air brake application when the locomotive power uncouples from the equipment, and handbrakes will also be applied to the unattended equipment as is required by existing Federal regulation. As a result, there is not a compelling safety justification for requiring a train crew to contact the dispatcher to relay the securement information for the unattended equipment. In light of the relief being granted, when checking for compliance with Requirement No. 2, FRA Inspectors will evaluate whether a crew is indeed actively engaged in switching operations when a train or vehicle transporting Appendix A materials is left unattended on mainline track or mainline sidings and the dispatcher is not contacted. If a train crew in such a situation exceeds the amount of time needed to reasonably conduct a switching operation and does not contact the dispatcher, FRA will investigate further to determine whether the crew properly utilized this relief, to include obtaining locomotive downloads if necessary.

Next, FRA is also granting the request for relief specified in the AAR/ASLRRA joint petitions regarding the treatment of cars containing only a residue of hazardous material. After considering the arguments in the AAR/ASLRRA joint petition, further reviewing existing regulations and statutes and the industry's use of the term "residue," the narrow scope of the Order, and the potential burdens being placed on the railroad industry, FRA believes that Appendix A to the Order should only be applicable to loaded tank cars, rail cars, and portable intermodal tanks containing the specified hazardous materials. Thus, Requirements Nos. 1 and 2 of EO 28 will apply to trains and equipment containing loaded cars of the quantity and types of materials identified in Appendix A of the Order. Requirements Nos. 3 through 6 of the Order will continue to apply to all trains and equipment, regardless of whether a railroad transports Appendix A Materials.

FRA believes that limiting the application of Appendix A of the Order to loaded cars is appropriate due to the limited impact and scope of any EO to the specific emergency situation it is intended to address, which in this instance is the significant hazard posed by unattended trains and equipment containing loaded cars of specified hazardous materials. Moreover, FRA's intention when identifying trains and equipment in Appendix A was to remain somewhat consistent with the industry concept of a "key train" in AAR's Circular No. OT-55-N (Circular), which does not include residue cars. Also, FRA acknowledges that loaded tank cars are, in certain instances, treated more rigorously by existing Federal safety regulations. *See, e.g.*, 49 CFR §§172.204(b)(2), 174.14, and 174.86(b). FRA is also aware that the members of both AAR and ASLRRA, which compose nearly all general system railroads in the United States, have voluntarily agreed to apply the restrictions contained in Requirement Nos. 1 and 2 of EO 28 to all commodities and quantities of hazardous materials specified by the AAR Circular, which is more inclusive than the types and quantities of

hazardous materials specified in Appendix A of the Order, to include a single tank car load or more of trains transporting material poisonous by inhalation (PIH) (versus the five tank car loads or more specified by Appendix A). FRA also acknowledges that additional voluntary safety measures contained in the AAR Circular, separate from those contained in EO 28 (e.g., train speed limit), have been extended to trains containing twenty or more car loads of *any* combination of hazardous material, this includes Class 3 flammable or combustible liquids which were involved in the Lac-Mégantic accident. Finally, FRA is always mindful of the burdens imposed on the industry when utilizing one of its most powerful and far reaching enforcement tools, and does not currently have information to refute the assertions in the AAR/ASLRRA joint petition regarding implementation burdens and the increase in the number of situations in which the Order would apply due to the movement of cars containing a residue of hazardous material.

### Decision

The first request in the AAR/ASLRRA joint petitions for relief from the dispatcher communication requirement is granted to each railroad that is subject to the requirements of EO 28, provided that the railroad complies with each of the following conditions:

1. The railroad employee leaving equipment unattended must be actively engaged in one of the following railroad operations (e.g., the employee cannot be on a break from his/her normal duties)—
  - a. Picking up, setting off, or repositioning cars at an industry;
  - b. Assembling cars from several tracks adjacent to the main track;
  - c. Adding, removing, or swapping locomotives; or
  - d. Moving part of a train when doubling a hill or cutting crossings.
2. There must be an emergency application of the air brakes on the unattended equipment as required in the railroad's rules and procedures.
3. The handbrakes must be set on the unattended equipment as required in 49 CFR § 232.103(n) and in accordance with a railroad's procedures adopted to comply with that section.
4. The railroad employee has demonstrated knowledge of FRA and railroad securement requirements.

In granting this relief in the above-listed circumstances, FRA emphasizes that to be in compliance with Requirement No. 2 of EO 28 a train crew must indeed be actively engaged in switching operations in order to not be required to contact the dispatcher when leaving Appendix A materials unattended. While conducting inspections, FRA Inspectors will evaluate whether this relief is being properly utilized in accordance with the discussion above.

The second request regarding the treatment of residue rail cars, tank cars, and intermodal portable tank cars is also granted. As such, cars containing a residue of Appendix A Materials will not trigger Requirement Nos. 1 and 2 of the Order. This partial relief is

granted to each railroad that is subject to the requirements of EO 28. This relief is being granted, in part, in light of the voluntary commitment being made by the AAR and ALSRRA members to advance safety by exceeding the scope of EO 28 by treating a train containing a single car load or more of PIH material as being governed by the requirements of EO 28, and also by voluntarily expanding the AAR Circular governing "key trains" to include all trains transporting Appendix A materials, or twenty or more car loads of any combination of hazardous materials. Should the industry not follow through on these voluntary commitments, FRA reserves the right to revisit this relief or amend the Order as appropriate.

In closing, a copy of this letter granting partial relief to railroads from the requirements of EO 28 discussed above will be distributed industry-wide because the relief is granted to all railroads subject to the Order. FRA will also post a copy of this letter and the accompanying attachments on FRA's Internet site: <http://www.fra.dot.gov>. If you have any questions or concerns, please contact Mr. Thomas Herrmann, FRA's Acting Director, Office of Safety Assurance and Compliance, Office of Railroad Safety, at (202) 493-6036.

Sincerely,



*for* Robert C. Lauby  
Acting Associate Administrator for Railroad Safety/Chief Safety Officer

Enclosures