

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 228**

**[Docket No. 2006-26176, Notice No. 1]**

**RIN 2130-AB85**

**Hours of Service of Railroad Employees; Amended Recordkeeping and Reporting Regulations**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule.

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**SUMMARY:** FRA is amending its hours of service recordkeeping and reporting regulations to ensure the creation of records that support compliance with the hours of service laws as amended by the Rail Safety Improvement Act of 2008(RSIA of 2008). This regulation will also provide for electronic recordkeeping and reporting, and will require training of employees and supervisors of those employees, who are required to complete hours of service records, or are responsible for making determinations as to excess service and the reporting of excess service to FRA as required by the regulation. This regulation is required by Section 108(f) of the RSIA of 2008.

**DATES:** This final rule is effective July 16, 2009. Petitions for reconsideration must be received on or before July 6, 2009.

**ADDRESSES:** Petitions for reconsideration: Any petitions for reconsideration related to

Docket No. FRA-2006-26176, may be submitted by any of the following methods:

- Website: The Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the website's online instructions for submitting comments.
- Fax: 202-493-2251.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12-140, Washington, DC 20590.
- Hand Delivery: Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all petitions received will be posted without change to <http://www.regulations.gov> including any personal information. Please see the Privacy Act heading in the "Supplementary Information" section of this document for Privacy Act information related to any submitted petitions, comments, or materials.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or to Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

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**I. Background and History**

A. Statutory History

Federal laws governing railroad employees' hours of service date back to 1907. See Pub. L. 59-274, 34 Stat. 1415 (1907). These laws, codified at 49 U.S.C. 21101 et seq. are intended to promote safe railroad operations by limiting the hours of service of certain railroad employees and ensuring that they receive adequate opportunities for rest in the course of performing their duties. The Secretary of Transportation ("Secretary") is charged with the administration of those laws, 49 U.S.C. 103(a), now collectively referred to as the HSL. These functions have been delegated to the FRA Administrator. 49 U.S.C. 103(c); 49 CFR 1.49(d).

Congress substantially amended the HSL on two previous occasions. The first significant amendments occurred in 1969. Pub. L. 91-169, 83 Stat. 463. The 1969 amendments reduced the maximum time on duty for train employees from 16 hours to 14 hours effective immediately, with a further reduction to 12 hours automatically taking effect two years later. Congress also established provisions for determining, in the case

of a train employee, whether a period of time is to be counted as time on duty. 49 U.S.C. 21103(b). In so doing, Congress also addressed the issue of deadhead transportation time, providing that “[t]ime spent in deadhead transportation to a duty assignment” is counted as time on duty. (Emphasis added). Although time spent in deadhead transportation from a duty assignment is not included within any of the categories of time on duty, Congress further provided that it shall be counted as neither time on duty nor time off duty. 49 U.S.C. 21103(b)(4). This provision effectively created a third category of time, known commonly as “limbo time.”

In 1976, Congress again amended the hours of service laws in several important respects. Most significantly, Congress expanded the coverage of the laws, by including hostlers within the definition of a train employee, and adding the section providing hours of service requirements for signal employees, now codified at 49 U.S.C. 21104. Congress also added a provision that prohibited a railroad from providing sleeping quarters that are not free from interruptions of rest caused by noise under the control of the railroad, and that are not clean, safe, and sanitary, and prohibited the construction or reconstruction of sleeping quarters in an area or in the immediate vicinity of a rail yard in which humping or switching operations are performed. See Pub. L. 94-348, 90 Stat. 818 (1976).

B. History of Hours of Service Recordkeeping

With the formation of DOT and its regulatory agencies in 1966, the oversight and enforcement of the HSL was transferred from the Interstate Commerce Commission (ICC) to the newly established FRA. Prior to this transfer the ICC had enforced reporting

requirements based on its May 2, 1921 order that established the records required to be maintained by carriers relating to the time on duty of employees who were involved in either the movement of trains (referred to in the current HSL as “train employees”) or the issuance of movement authority (referred to in the current HSL as “dispatching service employees”). The ICC Order mandated both the content and the format of the hours of service record for train employees and dispatching service employees.

The records required by the ICC Order included one titled “Time Return and Delay Report of Engine and Train Employees.” The format and required fields mandated for this record formed the basis for all train employee hours of service recordkeeping and reporting, and for the reporting requirements initially established by FRA for hours of service recordkeeping by railroad employees in 49 CFR part 228, and specifically § 228.11.

The ICC Order also mandated the format for a form titled “Details of Service”, which was a required part of the train employee’s hours of service record. This segment of the employee’s record required the railroads to report operational data that included train number, engine number, the departure station, the time that the employee went on duty, the time the train departed, the arrival station, the time the train arrived, the time the employee went off duty, and the kind of service in which the employee was working, i.e., passenger, freight, work train, or deadhead. The Details of Service form contained entries for each train with which an employee was associated during a duty tour.

As was discussed above, the 1969 amendments to the HSL addressed the issue of time spent by train employees in deadhead transportation from a duty assignment to the

point of final release, establishing that such time is neither time on duty nor time off duty, which created a new category of time that has come to be known as “limbo time.”

Following the 1969 amendments, the railroads continued to use the ICC recordkeeping formats. The “Time Return” portion of the recordkeeping document only provided a place to enter on-duty time and off-duty time, and could not accommodate the separate entry of limbo time. However, the railroads also continued to use the “Details of Service” portion, and this form became critical to proper recordkeeping. The “Details of Service” required train arrival and departure times, usually included comments as to when the crew had finished securing the train and therefore was relieved from covered service, and indicated the departure and arrival times of the deadhead vehicle and final release from service. With this information, it was possible to differentiate an employee’s time spent on duty in covered service from time that was spent awaiting deadhead transportation and in deadhead transportation to the point of final release, which was limbo time.

The 1921 ICC Order also required records and provided recordkeeping formats for dispatching service employees, including records of dispatchers’ time on duty, and records documenting train operation over the territory controlled by each dispatcher. The required records for dispatching service employees included the “Daily Time Report of Dispatchers,” the “Dispatchers Record of Movement of Trains”, and for those dispatching service employees known as operators, in addition to the “Daily Time Report of Dispatchers,” a “Station Record of Train Movements,” a form that identified the operators by shift, and required the operator to list the train or engine number, along with the arrival and departure times for each train passing the specific station where the

operator was located. Following the transfer of responsibilities, FRA adopted the ICC's established reporting requirements for dispatching service employees, but did not require its specific format. However, the formats and data fields are still used, even currently, by virtually all railroads that employ dispatching service employees.

As was discussed above, the Federal Railroad Safety Authorization Act of 1976 expanded coverage of the HSL to signal employees. Congress defined a signal employee as an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems. This, in effect, excluded contract signal employees from the coverage of the HSL. The statutory limitations for signal employees were very similar to those for train employees. Also, in both cases, the HSL treated the time these employees reported for duty as the time covered service began, irrespective of whether or not a covered function was actually performed. In addition, both train employees and signal employees had periods of time spent in travel to and from a duty location, some of which the HSL treated as limbo time. Also, in both cases, the HSL treated the time that one of these employees "reports for duty" as the time that time on duty began. Because of the similarities in their statutory provisions, the recordkeeping requirements for these two functions were also quite similar, and FRA did not need to revise its reporting requirements to establish distinct recordkeeping provisions for signal employees.

The 1921 ICC Order also stated, in part, that "each carrier may at its option, and with the approval of the Commission, add to such records appropriate blanks for any additional information desired by it." Over time, railroads came to record information for employee pay claims, railroad operations and crew management on the same form that

was used for hours of service recordkeeping. The combination of pay and hours of service information on the same document facilitated employee hours of service reporting practices that were greatly influenced by collective bargaining agreements and pay considerations, where differences existed between the activities for which a collective bargaining agreement required an employee to be paid, and those activities required to be reported for the purposes of the HSL. For example, an employee might report that he or she went off duty at the time that his or her paid activities ended. This would not be accurate reporting for the purposes of the HSL, if the duty tour included deadhead transportation to the point of final release. Regardless of whether an employee received additional pay for the deadhead transportation, the HSL required the time to be recorded, and the employee would not be off duty for the purposes of the HSL until after the completion of the deadhead transportation.

As technology expanded in the rail industry, some railroads in the 1980s became interested in electronically recording and reporting employee hours of service data. By the mid to late 1980s, the CSX Transportation, Inc. (CSX) had developed an automated program generated from its crew management system. CSX began using the program to generate and maintain hours of service records for its train employees. The program produced paper copies of the recorded entries for the employee's signature. Then, in 1991, CSX and the Union Pacific Railroad Company jointly presented a proposal to use an electronic record, without a signature, as the railroad's official train employee hours of service record. Section 228.9 of the existing hours of service recordkeeping regulations required that the hours of service record be signed. Therefore, it was necessary for FRA

to waive the signature requirement, to allow for the development of a program that would allow the railroad and its train employees to electronically record and store hours of service information, with the employee electronically certifying the accuracy of the entered data, so that this record would become the official hours of service record, in lieu of a signed paper record. As CSX worked to develop an electronic program for which FRA would grant a waiver, a number of issues became apparent. These issues had to be resolved to ensure that the system would have sufficient data fields to allow the employee to record the different events that occurred in his or her duty tour, to capture all of the data necessary for FRA to determine compliance with the HSL.

The concept of electronic recordkeeping presented a significant change in how employees were used to reporting their hours of service information. Data entry moved from a dynamic manual reporting method, in which a record was continually updated by the reporting employee during the course of his or her duty tour, to an automated end-of-trip report where all reporting related to a particular duty tour was made in after-the-fact entries into the railroad's computer system, after the completion of the duty tour. In addition, manual records afforded the employee flexibility to provide information about any activities that occurred during the duty tour, as well as any comments that might be necessary to understand any apparent anomalies in reported information. However, an electronic record would be limited to the data fields provided by the recordkeeping program, so it was essential that the programs were designed to provide sufficient data fields to accommodate the variety of reporting scenarios that an employee might encounter, so that the employee had the opportunity to record all relevant data for the

events that occurred in his or her duty tour.

CSX's first attempt to develop an electronic recordkeeping system resulted in a program that functioned in much the same manner as a paper record, but without the comprehensive information provided by the "Details of Service" portion of the employee's record. It was on this portion of their record that employees recorded a number of items that were necessary for determining compliance with the HSL, including deadhead transportation either to or from a duty assignment, multiple covered service assignments, other activities performed for the carrier that constituted commingled service if not separated from covered service by a statutory off-duty period, and the distinct times that an employee was relieved from covered service, and then subsequently released from all service to begin a statutory off-duty period, which would not be the same times when limbo time was present at the end of the duty tour. In addition, the first attempt at an electronic recordkeeping system also had not considered the features of the system itself, that were necessary for ensuring the accuracy of the data and the ability of FRA to use the data to determine compliance with the HSL. These features included program logic that was necessary, for example, to calculate total time on duty from the appropriate data entered in the record, to require explanation when the total time on duty exceeded the statutory maximum, and to use program edits to identify obvious employee input errors. The mechanism for providing FRA with the ability to access the electronic records was also an issue that needed to be resolved. Because part 228, as drafted in 1972, did not contemplate the existence of electronic recordkeeping, it provided no framework for addressing these issues.

However, FRA and CSX pledged to work together through a “test waiver” process to develop a program with logic, edits, and access that would accommodate FRA oversight and enforcement of the current HSL provisions, and ultimately allow FRA to grant a waiver of the signature requirement, thereby allowing hours of service data to be both reported and recorded electronically. The FRA and CSX partnership eventually resulted in the development of a system containing sufficient data entry fields and system features to resolve many of the issues facing movement to electronic recordkeeping.

Another significant issue that arose in the development of electronic recordkeeping systems was providing sufficient data fields to differentiate limbo time from time spent performing covered service, which distinction was necessary to correctly determine an employee’s total time on duty. The electronic programs that were initially devised required the employee to report only an on-duty time and an off-duty time, and the beginning and ending times of periods spent in transportation. The records did not include the features of the delay report that had been a part of the paper records, on which employees included their beginning and ending location, date, and time for periods spent in covered service assignments, and noted, for example, that the ending time was the time at which the employee secured the train, which completed his or her covered service on that train.

The railroads viewed this information as not being required by Part 228, but this information was regularly used by FRA in reviewing records for compliance with the HSL, and it was essential that the information continue to be captured in electronic records. Without an indication of the time that the employee stopped performing covered

service, there was no way to determine when the employee stopped accumulating time on duty and when he or she began limbo time. Once the employee stopped performing covered service, limbo time began, as the time that the employee spent awaiting transportation to the point of final release, like the transportation itself, was limbo time. However, if the employee's record showed only the time that the employee reported for duty, the time spent in transportation, and the off-duty time, all of the time between reporting for duty and beginning deadhead to the point of final release would necessarily be calculated as time on duty, which could result in a record that incorrectly showed a total time on duty in excess of the statutory maximum, because limbo time was not properly reflected.

To resolve these complex issues, FRA developed a 3X3 matrix, in which an employee entered the location, date, and time for each time that he or she went on duty in covered service, the location, date, and time for each time that he or she was relieved from a covered service assignment, and the location, date, and time for each time that he or she was released from an assignment, to begin another assignment or activity, or to be released from all service to begin a period of off-duty time. This 3X3 matrix was eventually incorporated in all of the waiver-approved electronic programs.

However, deadhead transportation, and activities that constitute other service for the carrier (which may commingle with covered service) do not have relieved and released times in the activity. These activities have only a beginning and an ending time for each event. Thus, FRA also developed a second section of data entry, in which the employee reported the location, date, and time for the beginning and the ending of all

non-covered service activities that are part of the employee's duty tour, but may or may not be calculated in the employee's total time on duty.

FRA and CSX continued to work together until these early issues were sufficiently resolved, and eventually, CSX was granted a waiver of the signature requirement in § 228.9. As a result, CSX was allowed to utilize an electronic recordkeeping program, in which its train employees reported their hours of service at the end of each duty tour, and those electronic records constituted the official hours of service record for CSX train employees. As the use of electronic information systems further expanded in the industry, other railroads began developing, with assistance from FRA, electronic hours of service recordkeeping programs patterned somewhat after the original CSX program. During the development of the later programs, as well as audits of the CSX program after it was fully functioning, other issues began to surface, some of which remained topics of discussion during this rulemaking. Among those issues were the reporting of multiple covered service assignments in a duty tour, and administrative duties performed after the twelfth hour on duty.

Multiple-train duty tours have occurred in the railroad industry for decades. As was discussed above, employees used the "Details of Service" section of the paper hours of service record to provide the times spent in covered service on each train to which the employee was assigned, and on each train on which the employee may have been in deadhead transportation, whether that deadhead transportation was transportation to the first covered service assignment of a duty tour, transportation from one covered service assignment to another within a duty tour, or transportation to the point of final release at

the end of a duty tour. For many years, employees diligently reported each train to which they were assigned or on which they deadheaded, because employees were paid for a minimum 100-mile day for each such train. However, as collective bargaining agreements evolved, and employees were instead paid on the basis of actual miles run, it became more common to use a single crew to handle multiple trains.

In the development of electronic programs, FRA was concerned that the programs initially lacked the ability to segment the employee's record by train, for data entry and program logic purposes, as well as for inspection and enforcement purposes. If an employee did not report individually the locations, dates, and times that he or she went on duty, was relieved, and was released for each covered service assignment in a multiple-train duty tour, the program read the data as if the employee had worked on one train with a lengthy and continuous period of time on duty, often in excess of the statutory 12-hour limit when a statutory interim release was present. In addition, FRA inspections yielded records that did not present all crew members assigned to a particular train, or in which trains appeared to disappear at one point on line-of-road and reappear at another point, suggesting that a record was missing in the database.

Because all of the existing and developing programs were tied to the railroad's crew management, FRA proposed that railroad crew management initiate a separate call for each assignment, so that each would have a data entry screen created to differentiate between multiple covered service assignments in a duty tour. The railroads resisted this proposal because the additional calls would increase the level of work for crew dispatchers. The railroads also expressed concerns about collective bargaining issues

regarding pay claims for each call. FRA noted, however, that there was past historical precedent for employees completing a separate report for each assignment, although there were pay-related reasons for doing so which were not now always present. However, this dispute led to a solution which would not require additional crew dispatcher involvement. Programs were designed to allow the employee to use a function key to access additional reporting screens for reporting multiple trains or non-covered service activities. This feature of the programs mimicked the manner in which employees previously added additional forms to reflect multiple assignments prior to electronic recordkeeping. Once the crew dispatcher has called a crew to duty on one train or job and has established the employee's initial reporting screens, the employee may work multiple assignments at the discretion of the railroad and report the activities involved in each train without the crew dispatcher having to take any further action to create another call to establish the necessary additional reporting screens. This feature not only allows the employee to report the actual events of his or her duty tour, but also allows the program's FRA Inspection System to identify and present records based on train identification.

As was noted above, one of the many ways in which electronic recordkeeping represents a significant change in the way that employees report their time is that with electronic recordkeeping programs, all reporting is accomplished at time of tie-up, just prior to the employee's being released from all service to the carrier to begin a statutory off-duty period, the electronic record thereby becoming an "end-of-trip report." In contrast, manual records maintained by the reporting employee allowed the employee to periodically add information to the record while continuing with the activities of his or

her duty tour. Then, when the reporting employee reached his or her point of final release, he or she would complete the reporting, sign the record, and place it in the appropriate collection receptacle. Also, any other reporting or recording activities, including payroll, or other data beyond hours of service for the benefit of either the railroad or the employee, were completed at this time. As long as the reporting employee had not reached the statutory limits for the duty tour, he or she was allowed to take as long as necessary to complete any reporting, recording, and other administrative duties. However, in the event that the reporting employee was at or beyond his or her statutory limits, FRA had a long standing policy of exercising prosecutorial discretion to allow a few minutes for the reporting employee to complete his or her administrative duties.

However, as railroads moved to electronic recordkeeping, the reporting employee could not begin reporting any of his or her train operation, pay and hours of service data in an electronic program prior to arrival at his or her final terminal, so the time involved in completing the necessary reporting might exceed a few minutes, especially if a large amount of work order reporting or other documentation beyond hours of service was required. Railroad labor organizations challenged FRA's practice of allowing a few minutes in excess of the 12-hour statutory maximum time on duty to complete administrative duties. FRA recognized the validity of these concerns, but also recognized the need for certain information at the conclusion of the duty tour to ensure compliance with the HSL. The railroad must know both the time that an employee is relieved from covered service, and the time that the employee is released from all duties, in order to determine the minimum off-duty period that the employee required under the HSL, when

to start the statutory off-duty period, and at what time the employee would have completed the minimum required rest to remain in compliance with the HSL. Because the employee is the one with first-hand knowledge of these times as applied to his or her own duty tour, FRA believed that the employee was best suited to certify the accuracy of these times.

FRA convened a Technical Resolution Committee (TRC) in 1996 to resolve this issue. Initially, the TRC leaned toward limiting the employee initiated tie-up to just a relieved time and a released time. Ultimately, however, two additional items were included, which were necessary to both the railroads and the employees from an operational perspective. Because many collective bargaining agreements contained provisions for how and when an employee would be placed back in a pool or on an extra board following tie-up, both the railroad and the employee needed to be aware of the employee's placement time before the employee began the statutory off-duty period. Finally, FRA allowed the employee to enter information to provide a contact number, if different from the number on record, to ensure that the railroad could contact the employee regarding his or her next assignment.

With these four items, (a relieved time, a released time, a board placement time, and a contact number, if different from that of record), FRA believed that the railroad would have sufficient information to know when the employee could legally next be called to duty. Although the HSL does not authorize performance of any administrative duties in the period beyond the employee's statutory maximum, FRA announced a policy that allowed an employee who was being released from a duty tour to begin a statutory

off-duty period after more than 12 hours of total time on duty (including limbo time) to complete a “quick tie-up” limited to entering and certifying these four items. The quick tie-up was not intended for use when the employee had time remaining within the statutory limits to complete a full record at the end of the duty tour. The intention was to require the employee whose duty tour had reached or exceeded the statutory limits to perform only the minimum administrative duties necessary to determine when the employee would next be available to be called for duty. If the railroad did not require the employee to perform any other administrative duties in addition to the quick tie-up, FRA would exercise its prosecutorial discretion and not prosecute the railroad for requiring the employee to perform administrative duties beyond the employee’s statutory limits. FRA allowed the completion of any record in which only quick tie-up information had been entered prior to the statutory off-duty period, when the employee returned to duty. FRA announced this policy in a Technical Bulletin OP No. 96-03 (since renumbered as OP 04-27). After this policy was announced, railroads developed data entry screens that allowed employees to enter and certify only the quick tie-up information when appropriate, allowing the completion of the record when the employee next reported for duty. Electronic recordkeeping systems were also designed to require completion of the full record before it could be certified if the employee had not reached the maximum statutory limit for the duty tour.

In addition to the many issues related to ensuring that the developing electronic recordkeeping systems allowed the employees to enter sufficient data to determine compliance with the HSL, there were also issues to be resolved as to how FRA would

access the system and the records that it created. The initial proposal from CSX provided that an officer would log into the railroad's network using his or her identification number (ID) and password and access the employees' entry screens. The officer would then turn over the computer to the FRA Inspector, who would directly review all of the data entered by the employee. This procedure presented a security issue that FRA wanted to avoid. Instead, CSX developed an inspection system that was available only to FRA inspectors through the use of unique FRA IDs and passwords that allowed FRA inspectors to access and retrieve only hours of service records, using a combination of selection criteria to retrieve a specific record or group of records. Selection criteria for records searches were: by employee name or ID; by train or job; and by location (which could include a yard, a subdivision or division (service unit) or other railroad area), combined with a date or date range. Another option for the FRA or participating State inspector is to search for records reporting in excess of 12 hours total time on duty, combining this with a date or date range, and possibly other selection criteria. Combinations of the "optional" fields can narrow a selection to a precise time frame. This method of access allowed FRA to ensure that the hours of service records were protected from alteration and unauthorized access, which would not be possible if the same method of access allowed access to other railroad data, which FRA could not restrict.

The unique FRA IDs and passwords are not permanently assigned to a specific FRA Inspector, but are given out upon the request of an inspector prior to an inspection. Passwords are temporary, and expire in seven days or less. Upon arrival at the rail

facility, the FRA Inspector contacts the local railroad officer and presents his or her credentials for verification. The inspector is then provided the necessary ID and password and assigned a computer terminal with printer capabilities for use during his or her inspection.

Using the selection criteria, FRA could retrieve records in a manner that was crew based and duty tour oriented, even if employees each reported individually. This meant that the records for all members of a requested train or job were displayed together. In addition, if a duty tour involved multiple covered service assignments, the whole crew would be displayed for each train or job ID, and all records for a given duty tour would be displayed together, with total time on duty for the entire duty tour displayed on the last record of a multiple covered service assignment duty tour.

In the early stages of program development with CSX, FRA began to develop a guide for electronic recordkeeping, which has been used for several years to assist railroads in developing electronic recordkeeping programs for which FRA might likely grant waiver approval. The guide has been used successfully for approximately 15 years. The requirements for electronic recordkeeping systems imposed by this regulation are largely based on the guide and the resulting waiver-approved programs currently in existence.

At present, four Class I carriers (CSX, Norfolk Southern Railway Company, Union Pacific Railroad Company, and Canadian National Railway) have waiver authority to use their existing electronic hours of service recordkeeping programs to record and report the official hours of service records for their train employees. There are no waiver-

approved electronic recordkeeping programs for the records of signal employees or dispatching service employees, although there has been interest in moving to electronic recordkeeping for these employees, and there are some programs in various stages of development.

## **II. Rail Safety Improvement Act of 2008**

Section 108 of the Rail Safety Improvement Act of 2008 (Pub. L. 110-432), substantively amends the HSL in a number of ways. It also provides the statutory mandate for this rulemaking, because it requires that FRA revise its hours of service recordkeeping requirements to take into account these substantive changes, as well as to provide for electronic recordkeeping and to require training.

### **A. Substantive Amendments to the HSL**

Effective July 16, 2009, section 108(a) amends the definition of “signal employee”, to eliminate the words “employed by a railroad carrier.” With this amendment, employees of contractors or subcontractors to a railroad who are engaged in installing, repairing, or maintaining signal systems (the functions within the definition of signal employee in the HSL) will be covered by the HSL, because a signal employee under the HSL is no longer by definition only a railroad employee.

Section 108(b) amends the hours of service requirements for train employees in many ways, all of which are effective July 16, 2009. The provision limits train employees to 276 hours of time on-duty, awaiting or in deadhead transportation from a duty assignment to the place of final release, or in any other mandatory service for the carrier per calendar month. The provision retains the existing maximum of 12

consecutive hours on duty, but increases the minimum off-duty period to 10 hours consecutive hours during the prior 24-hour period.

Section 108(b) also requires that after an employee initiates an on-duty period each day for six consecutive days, the employee must receive at least 48 consecutive hours off duty at the employee's home terminal, during which the employee is unavailable for any service for any railroad; except that if the sixth on-duty period ends at a location other than the home terminal, the employee may initiate an on-duty period for a seventh consecutive day, but must then receive at least 72 consecutive hours off duty at the employee's home terminal, during which time the employee is unavailable for any service for any railroad.

Section 108(b) further provides that employees may also initiate an on-duty period for a seventh consecutive day and receive 72 consecutive hours off duty if such schedules are provided for in existing collective bargaining agreements for a period of 18 months, or after 18 months by collective bargaining agreements entered into during that period, or a pilot program that is either authorized by collective bargaining agreement, or related to work rest cycles under section 21108 of the HSL.

Section 108(b) also provides that the Secretary may waive the requirements of 48 and 72 consecutive hours off duty if a collective bargaining agreement provides a different arrangement that the Secretary determines is in the public interest and consistent with safety.

The RSIA of 2008 also significantly changes the hours of service requirements for train employees by establishing for the first time a limitation on the amount of time an

employee may spend awaiting and in deadhead transportation. These new requirements, also found in section 108(b), provide that a railroad may not require or allow an employee to exceed 40 hours per month awaiting or in deadhead transportation from duty that is neither time on duty nor time off duty in the first year after the date of enactment, with that number decreasing to 30 hours per employee per month after the first year, except in situations involving casualty, accident, track obstruction, act of God including weather causing delay, derailment, equipment failure, or other delay from unforeseeable cause. Railroads are required to report to the Secretary all instances in which these limitations are exceeded. In addition, the railroad is required to provide the train employee with additional time off duty equal to the amount that combined on-duty time and time awaiting or in transportation to final release exceeds 12 hours.

Finally, section 108(b) restricts communication with train employees except in case of emergency during the minimum off-duty period, statutory periods of interim release, and periods of additional rest required equal to the amount that combined on-duty time and time awaiting or in transportation to final release exceeds 12 hours. However, the Secretary may waive this provision for train employees of commuter or intercity passenger railroads if the Secretary determines that a waiver would not reduce safety and is necessary to efficiency and on time performance.

However, section 108(d) of the RSIA of 2008 provides that the requirements described above for train employees will not go into effect on July 16, 2009 for train employees of commuter and intercity passenger railroads. This section provides the Secretary with the authority to issue hours of service rules and orders applicable to these

train employees, which may be different than the statute applied to other train employees. It further provides that these train employees will continue to be governed by the HSL as it existed prior to the RSIA of 2008 until the effective date of regulations promulgated by the Secretary. However, if no new regulations have been promulgated before October 16, 2011, the provisions of section 108(b) would be extended to these employees at that time.

Section 108(c) of the RSIA of 2008 amends the hours of service requirements for signal employees in a number of ways, effective July 16, 2009. As was noted above, by amending the definition of “signal employee,” it extends the reach of the substantive requirements to a contractor or subcontractor to a railroad carrier and its officers and agents. In addition, as section 108(b) does for train employees, section 108(c) retains for signal employees the existing maximum of 12 consecutive hours on duty, but increases the minimum off-duty period to 10 hours consecutive hours during the prior 24-hour period.

Section 108(c) also eliminates language in the HSL stating that last hour of signal employee’s return from final trouble call is time off duty, and defines “emergency situations” in which the HSL permits signal employees to work additional hours not to include routine repairs, maintenance, or inspection.

Section 108(c) also contains language virtually identical to that in section 108(b) for train employees, prohibiting railroad communication with signal employees during off-duty periods except for in an emergency situation.

Finally, section 108(c) provides that the hours of service, duty hours, and rest periods of signal employees are governed exclusively by the HSL, and that signal

employees operating motor vehicles are not subject to other hours of service, duty hours, or rest period rules besides FRA's.

Section 108(e) specifically provides FRA a statutory mandate to issue hours of service regulations for train employees of commuter and intercity passenger railroads. It also provides FRA additional regulatory authority not relevant to the present rulemaking, and requires FRA to complete at least two pilot projects.

**B. Rulemaking Mandate**

Section 108(f) requires the Secretary to prescribe a regulation revising the requirements for recordkeeping and reporting for Hours of Service of Railroad Employees contained in part 228 of title 49, Code of Federal Regulations to adjust record keeping and reporting requirements to support compliance with chapter 211 of title 49, United States Code, as amended by the RSIA of 2008; to authorize electronic record keeping, and reporting of excess service, consistent with appropriate considerations for user interface; and to require training of affected employees and supervisors, including training of employees in the entry of hours of service data.

Section 108(f) further provides that the regulation must be issued not later than 180 days after October 16, 2008, and that in lieu of issuing a notice of proposed rulemaking as contemplated by 5 U.S.C. 553, the Secretary may utilize the Railroad Safety Advisory Committee (RSAC) to assist in development of the regulation.

**III. Railroad Safety Advisory Committee Process**

**A. Overview of the RSAC**

In March 1996, FRA established RSAC, which provides a forum for developing

consensus recommendations to FRA's Administrator on rulemakings and other safety program issues. The Committee includes representation from all of the agency's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of member groups follows:

- American Association of Private Railroad Car Owners (AARPCO);
- American Association of State Highway and Transportation Officials (AASHTO);
- American Chemistry Council;
- American Petroleum Institute;
- American Public Transportation Association (APTA);
- American Short Line and Regional Railroad Association (ASLRRA);
- American Train Dispatchers' Association (ATDA);
- Association of American Railroads (AAR);
- Association of Railway Museums;
- Association of State Rail Safety Managers (ASRSM);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employees Division (BMWED);
- Brotherhood of Railroad Signalmen (BRS);
- Chlorine Institute;
- Federal Railroad Administration (FRA);
- Federal Transit Administration (FTA)\*;

- Fertilizer Institute;
- High Speed Ground Transportation Association (HSGTA);
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers;
- International Brotherhood of Electrical Workers (IBEW);
- Labor Council for Latin American Advancement\*;
- League of Railway Industry Women\*;
- National Association of Railroad Passengers (NARP);
- National Association of Railway Business Women\*;
- National Conference of Firemen & Oilers;
- National Railroad Construction and Maintenance Association (NRC);
- National Railroad Passenger Corporation (Amtrak);
- National Transportation Safety Board (NTSB)\*;
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte\*;
- Sheet Metal Workers International Association (SMWIA);
- Tourist Railway Association, Inc.;
- Transport Canada\*;
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/BRC

(TCIU/BRC);

- Transportation Security Administration (TSA)\*; and
- United Transportation Union (UTU).

\*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The individual task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be

noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on a recommendation for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

B. RSAC Proceedings in this Rulemaking

Given the time constraints within which FRA was required to issue this regulation, FRA decided to request the assistance of the RSAC in developing it, in order to take advantage of the provisions of the statutory mandate which allowed FRA to proceed to a final rule, without having first issued a notice of proposed rulemaking. FRA proposed Task No. 08-06 to the RSAC on December 10, 2008. The RSAC accepted the task, and formed the Hours of Service Working Group (Working Group) for the purpose of developing the hours of service recordkeeping regulations required by section 108(f) of the RSIA of 2008.

The Working Group was comprised of members from the following organizations:

- AASHTO
- Amtrak;
- APTA;
- ASLRRRA;
- ATDA;
- AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway Company (CN), Canadian Pacific Railway, Limited (CP), CSX Transportation, Inc. (CSXT), Iowa Interstate Railroad, Ltd. (IAIS), Kansas City

Southern (KCS), Norfolk Southern Corporation (NS), and Union Pacific Railroad Company (UP);

- BLET;
- BRS;
- Federal Railroad Administration (FRA);
- IBEW
- Long Island Rail Road (LIRR);
- Metro-North Commuter Railroad Company (Metro-North);
- Southeastern Pennsylvania Transportation Authority (SEPTA);
- Tourist Railway Association; and
- UTU.

The Working Group completed its work after four meetings and two conference calls. The first meeting of the Working Group took place on January 22-23, 2009, in Washington, DC. Subsequent meetings were held on February 4-6, 2009, February 18-20, 2009, and March 23-24, 2009, each also in Washington, DC. Conference calls were held on March 30 and March 31, 2009. The Working Group achieved consensus on the rule text with the exception of one issue. The group's recommendation, including the one area of non-consensus, was presented to the full RSAC on April 2, 2009, and the full RSAC accepted its recommendation. This regulation is consistent with the recommendation of the Working Group, with the exception of the issue on which the group failed to reach consensus.

Prior to the first meeting of the Working Group, FRA distributed draft rule text to

provide a framework for the discussions. This enabled the group to focus its discussions on those issues with which the other members of the group disagreed or had concern. The issues that led to significant discussion and subsequent changes in the initial rule text can generally be characterized in one of four ways: (1) disagreement of members of the Working Group with some aspects of FRA's current approach to electronic recordkeeping that had been mirrored in the draft rule text; (2) concern about making the requirements for electronic recordkeeping systems sufficiently flexible to accommodate the circumstances of those groups of employees who are not currently reporting and recording their hours of service electronically, but may do so in the future; (3) concern about the burden of some of the recordkeeping requirements on those railroads or contractors or subcontractors to a railroad who use paper records; and (4) concerns about FRA's interpretation of the substantive provisions of the HSL that have an effect on recordkeeping, including new issues arising from the RSIA of 2008, as well as other substantive interpretations that some members of the group wished to have clarified or urged FRA to change. The most significant of these issues will be discussed in this section. Other subjects of discussion within the working group will be discussed in the section-by-section analysis of the language to which they relate.

1. Multiple-Train Reporting

As was discussed in section IB, above, of the preamble, FRA required that electronic recordkeeping programs for which it granted a waiver would require the employee to report each assignment in a duty tour. In brief, FRA's reason for this approach was that it allowed FRA to search for records by the job or assignment, and to

retrieve the full records of each employee on that assignment, so that they could be cross-referenced against each other. This approach also allowed the system to link the records for each assignment in a duty tour, so that an employee's prior time off before an assignment would indicate whether it was preceded by another assignment, or was the first assignment following a statutory off-duty period. Thus, the full duty tour would be represented, without gaps in the data that would suggest a missing record. This approach was also consistent with the way that FRA had historically reviewed paper records, because this information was available on the "Details of Service" portion of the form, which the railroads had since stopped using because of changes in pay structures and other operational issues, and which they, therefore, resisted incorporating in electronic recordkeeping.

AAR objected to the requirements initially included by FRA in § 228.11(b) of this rule, because FRA required the employee to report the beginning time, relieved time, and released time of each assignment in a duty tour, as it had in the waiver-approved electronic programs. AAR contended that FRA did not need this level of detail for each assignment because the time was all counted as time on duty, and also contended that the requirements were too burdensome because of the number of data fields that an employee would be required to enter, and the amount of time that this data entry could consume.

During the working group proceedings, FRA made a number of concessions from its original language. FRA excluded from the requirement to list each assignment employees having several kinds of assignments likely to result in their handling a large number of trains in a single duty tour. Specifically, FRA excluded utility employees,

employees assigned to yard jobs, and assignments established to shuttle trains into and out of a terminal that are identified by a unique job or train symbol as such an assignment. When AAR continued to object to these requirements, FRA limited them further, by requiring only that the employee record the first train and the last train to which he or she was assigned, and any train immediately preceding or immediately following a period of interim release. FRA reasoned that information was needed regarding assignments before and after a period of interim release, so that the interim release period, which would not count toward total time on duty, could be determined. FRA agreed that it would not require the recording of trains in the middle of a duty tour that were not associated with an interim release, agreeing in those limited circumstances to resort to other methods of piecing together the duty tour if necessary.

Ultimately, however, AAR wanted FRA to require that the employee record only the beginning time of the first train and any train following a period of interim release, and only the relieved time and released time of any train preceding a period of interim release and the last train in a duty tour. The limited issue of the specific requirements to record the relieved time and released time for an employee for the first train in the employee's duty tour and for any train preceding a period of interim release by the employee, and the beginning time of the last train or any train following a period of interim release for the employee, was the only area of non-consensus during the working group proceedings and before the full RSAC.

Following the RSAC vote, FRA decided to further modify the requirements of section 228.11(b). This paragraph now requires that an employee record only the

beginning time of the first train and any train following a period of interim release, and only the relieved time and released time of any train preceding a period of interim release and the last train in a duty tour, as requested by AAR. It also requires, however, that employees report the train ID for each train required to be reported. Utility employees, employees assigned to yard jobs, and assignments established to shuttle trains into and out of a terminal that are identified by a unique job or train symbol as such an assignment, are excluded from the requirement to report separate train IDs. In addition, this paragraph requires employees to report periods spent in deadhead transportation from a duty assignment to a period of interim release, and from a period of interim release to a duty assignment.

## 2. Pre-population of Data

AAR proposed elimination of the concept of the quick tie-up. As was discussed above, the quick tie-up is a feature that allows an employee who is at or beyond the statutory maximum time on duty to report only the four items necessary for the employee and the railroad to determine the beginning of the statutory off-duty period and for the railroad to be allowed to call the employee for the next duty tour. The employee completes the remainder of the record for any duty tour ended with a quick tie-up when he or she next reports for duty. AAR suggested that the regulation instead limit those items required for a full tie-up, or a complete record, and allow those items that are required to be pre-populated on the record by the railroad, so that the time required for a full tie-up would be decreased. FRA could not agree to limit the required data as AAR suggested. In addition, there are a number of items not related to hours of service (such

as pay claims and details as to the cars in the train) that are normally a part of a full tie-up, but which FRA does not believe should be required of an employee who is at or near the statutory maximum time on duty. Therefore, the group agreed not to eliminate the quick tie-up, but continued to discuss the concept of pre-population of the data on the hours of service record.

FRA did not allow pre-population of data as electronic recordkeeping programs were developed during the waiver process, because when pre-population was attempted, records were pre-populated with data from sources not likely to be accurate reflections of the duty tour, such as payroll or other times related to collective bargaining. The Working Group spent substantial time discussing which data fields on the record might be pre-populated. However, the group could not agree on data fields that always may be pre-populated, or those that never should, as a wide variety of factors might affect whether pre-population of certain data is appropriate for a particular employee or assignment. It was generally agreed, however, that pre-population could reduce the time and effort required for completion of the record if the data was reliable.

The group reached a compromise, reflected in section 228.203(a)(1)(i) of this regulation. This paragraph provides that a record may be pre-populated with data known to be factually accurate for a specific employee. Estimated, historical, or arbitrary data are not to be used to pre-populate data in a record. However, a railroad, or a contractor or subcontractor to a railroad, is not in violation of this requirement if it makes a good faith judgment as to the factual accuracy of data for a specific employee but the pre-populated data turns out to be incorrect. In addition, the employee must be able to make any

necessary changes to pre-populated data by simply typing into the data field, without having to access another screen or obtain clearance from the railroad. Finally, this paragraph also provides that an electronic recordkeeping system may provide the ability for an employee to copy data from one field of a record to another where appropriate.

### 3. Tie-up Procedures for Signal Employees

Labor representatives in the Working Group, and particularly representatives of the Brotherhood of Railroad Signalmen, expressed concern that the requirements for electronic recordkeeping systems were not appropriate to the way that signal employees tie up at the end of a duty tour, and complete their records. Although there are currently no waiver-approved programs allowing electronic recordkeeping by signal employees, there are some systems currently under development, and railroads and signal employees are interested in moving to electronic recordkeeping. The requirements for electronic recordkeeping systems as originally drafted by FRA were based on the past experience of FRA and the industry with electronic recordkeeping, which was admittedly limited to train employees.

During the Working Group discussions, it was pointed out that signal employees tie up differently, and some of the limitations on the system that are appropriate for train employees would not allow signal employees to complete their records. Unlike train employees, signal employees are not usually released from their duty tour at a location where there is likely to be a computer available to complete a record, because they often travel home from their duty location, and do not go by way of a railroad headquarters. In addition, signal employees may not tie-up on a daily basis, rather, they may complete a

number of records at one time, on a day when they have time in their schedule to prepare this paperwork. Signal employees do not generally need to do a quick tie-up to know when they are eligible to return to duty, because they have a scheduled eight-hour shift. They do call into the trouble desk if they work beyond their scheduled hours, or after returning from a trouble call. Although the primary purpose of this call is to report the nature of the trouble that was found and what was done to fix it, the employee also reports the time that he or she completed the work, and this allows the railroad to determine if the employee has enough time remaining to respond to another trouble call, or if a late trouble call causes the employee not to be rested for the beginning of the next scheduled shift.

FRA agrees that the regulation should establish requirements appropriate to all employees, so that the regulation will not need to be revised to reflect future systems that may be developed. To accommodate the differences in the reporting practices of signal employees, FRA modified several paragraphs of § 228.203(c). Paragraph (c)(7) of § 228.203 allows an employee to certify a release time in the past compared to the clock time of the computer, except for the current duty tour being concluded, so that a signal employee may complete multiple records at one time. This limitation is not a problem for train employees, who will have provided a release time through the quick tie-up for any record being completed that relates to a previous duty tour. The rule text also excludes signal employees from the scope of requirements in subparagraphs that provide that electronic recordkeeping systems must require employees to complete a full record, and disallow a quick tie-up at the end of any duty tour in which the employee has less than the

statutory maximum time on duty. Even with less than the statutory maximum time on duty, a signal employee may not complete any record at the end of that duty tour, or may complete a form of quick tie-up through communication regarding trouble calls and how much time the employee has remaining to work.

FRA notes that railroads, contractors and subcontractors to railroads, and signal employees will need to have some way of keeping track of when the employee goes off duty, to ensure that they receive the 10 hours uninterrupted rest required by the RSIA of 2008.

#### 4. Tracking Cumulative Totals Toward the 276-Hour Monthly Maximum Limitation

Section 228.11(b)(14) requires that a train employee record include the cumulative total for the calendar month of time spent in covered service, awaiting or in deadhead transportation from a duty assignment to the place of final release, and time spent in any other service at the behest of the railroad, the elements that make up the cumulative total for the month toward the 276-hour limitation. Members of the Working Group representing the Class III railroads pointed out that compliance with this requirement would be much more complicated for those employees completing paper records. Electronic recordkeeping systems will likely be programmed to calculate the cumulative monthly total, but it will be more difficult for an employee to have to keep track of the running total and note it on his or her signed record each day. FRA is persuaded that this could be burdensome, and could result in inaccurate reporting of the totals, and could possibly cause an employee to inadvertently exceed the monthly limitations by calculating it inaccurately and certifying that number. Therefore, FRA

agreed to allow Class III railroads to track the cumulative total throughout the month, note it on the records, and make it available to FRA. The employee will be expected to certify the monthly total promptly after the end of the month.

#### 5. Multiple Reporting Points

This regulation requires that each train employee have a regular reporting point. In numerous locations across the railroad system, railroads and their employees have established more than one location within a designated terminal that the employees may directly report to, essentially treating multiple locations located near each other as one regular reporting point. In enforcing this regulation, FRA will continue to treat these multiple locations as constituting a single regular reporting point, provided that (a) it can reasonably be expected that doing so would not unduly affect fatigue and (b) if the railroad is unionized, the multiple reporting points have been agreed to under a collective bargaining agreement. When determining whether or not fatigue is unduly affected, FRA will take into account the distance between the multiple locations, traffic patterns (e.g., rural vs. urban), and other relevant factors.

As has been discussed, the RSIA of 2008 amends the definition of “signal employee” so that employees of a contractor or a subcontractor to a railroad performing maintenance, inspection, or repair of signal systems are covered by the HSL. The railroads in the Working Group expressed concern that they would be responsible for keeping records for contract signal employees who perform work on their property. This would be particularly difficult if the contractors or subcontractors are hired for specific short-term assignments or projects. FRA expects that the contractor or subcontractor who

employs the employee would be responsible for his or her records, because that company would know when the employee would be properly rested under the statute to begin a new assignment, which might be on a different railroad than the assignment just completed. It should be noted, however, that since the substantive provisions of the HSL still prohibit either requiring or allowing an employee to remain or go on duty, FRA may take enforcement action for violation of the statute against either the employer or the railroad for whom the employee is performing covered service, depending on the facts of the situation.

FRA has amended language throughout this part that imposes recordkeeping duties on a railroad, so that those duties are imposed on a railroad or a contractor or a subcontractor to a railroad. However, FRA recognizes that some railroads have kept hours of service records and reported excess service for contractors and subcontractors who were covered by the HSL prior to the RSIA of 2008, particularly as train employees. FRA does not intend to prohibit such practices, if the parties have contracted to have the railroad for which an employee performs covered service handle the recordkeeping and reporting responsibilities for that employee.

#### **IV. Section-by-Section Analysis**

##### § 228.1 Scope.

FRA has revised this section to reflect the fact that the regulation prescribes reporting and recordkeeping requirements for employees of railroad contractors and subcontractors as well as for railroad employees.

##### § 228.3 Application

FRA has revised this section to reflect the fact that the regulation applies to railroad contractors and subcontractors as well as to railroads, and does not apply to the contractors and subcontractors of railroads to which the regulation does not apply.

§ 228.5 Definitions.

This section is amended to add a large number of definitions relevant to compliance with the HSL, and the recordkeeping and reporting requirements of this part, including the data fields found on an hours of service record, the data required to be entered, and the proper calculation and representation of the periods of time which must be identified on a record. Most of these definitions have been used by FRA and the industry for many years and have a common understanding. Some are discussed in existing Operating Practices Technical Bulletins providing FRA's position on substantive issues of enforcement under the HSL. As a result, while the Working Group recommended minor revisions to a number of the definitions to clarify them, relatively few caused concern among Working Group members or required significant discussion.

The Working Group discussed the definition of "actual time," which can refer to either a specific time of day, or a precise amount of time. FRA's intention with this definition is to make clear that any time related to an activity that is entered on an hours of service record should represent the actual time that the activity occurred or actual amount of time spent in the activity, rather than scheduled or estimated times or amounts of time that may be used for pay and collective-bargaining-related purposes. Records must also not show non-specific

numbers in reference to data fields that correspond to specific statutory limitations. For example, it would not be correct simply to indicate “10+” in the prior time off field, rather than the actual amount of time in hours and minutes that the employee had been off before beginning an assignment, or “12+” for total time on duty, rather than the actual total amount of time that the employee was on duty.

The Working Group also discussed the definition of “commuting,” and specifically the portion of the definition that applies to train employees. The first part of the definition led to discussions related to an employee’s regular reporting point, because only travel between an employee’s residence and his or her regular reporting point is considered commuting. As was discussed in section III, above, of the preamble, FRA acknowledges that it will treat multiple locations within a designated terminal as a single reporting point in certain circumstances. However, the definition of “commuting” is not changed. The second part of this definition as applied to train employees provides that travel in railroad-provided transportation to a lodging facility at an away-from-home terminal is considered commuting if the time does not exceed 30 minutes. The “30 minute rule” is longstanding FRA policy, intended to provide railroads some flexibility to get their employees to lodging, but limiting the potential erosion of an employee’s statutory off-duty period that could result from extended periods of travel to the away-from-home lodging facility. Nothing in the RSIA of 2008 would require FRA to change its position on this issue, and FRA declines to do so.

FRA defines designated terminal for purposes of this section by copying the definition of the term found in the HSL at 49 U.S.C. 21101. It is necessary to define this term because any period of interim release that a train employee has during a duty tour is considered off-duty time under the HSL only if the release occurs at a designated terminal. Otherwise, the time must be calculated as on-duty time. FRA's position regarding designated terminals has been previously published in Appendix A of this regulation, and further established through extensive litigation related to this issue. By including this definition, FRA does not intend to alter any of its previous statements related to this issue, including the fact that FRA does not exercise jurisdiction over any lodging facilities used to house railroad employees that are not railroad-provided, and are usually subject to collective bargaining.

This section defines the terms "reporting point," "regular reporting point" and "other than regular reporting point." As was discussed in section III, above, of the preamble, and in this section, in regard to the definition of commuting, an employee has only one regular reporting point at any given time. Travel from the employee's regular reporting point to any other reporting point on the railroad is considered a deadhead to a duty assignment, in which the time spent deadheading to duty is time on duty, and if an employee travels directly from his or her residence to a reporting point that is other than his or her regular reporting point, any time spent in that travel exceeding the time that would have been spent in travel to the regular reporting point is also time on duty. As was discussed in

section III, above, of the preamble, FRA will consider multiple locations within a designated terminal to be a single reporting point in certain circumstances. This interpretation does not change the definitions of the terms “reporting point,” “regular reporting point,” or “other-than-regular reporting point,” this simply means that if an employee’s regular reporting point is any one of the locations that constitute a single reporting point, an assignment to report to any location that is considered part of that single reporting point would be considered reporting to the regular reporting point for that employee.

The Working Group discussed the definition of “release” as it applies to signal employees. A release is a period of more than an hour but less than a statutory off-duty period, after a signal employee completes regular assigned hours, or completes return travel from a trouble call. Members of the Working Group representing the interests of signal employees commented that a release should not just consist of an employee being told to go and wait at a nearby restaurant until he or she is needed for another assignment, but should allow an employee to come and go as he or she pleases in order to be considered off-duty time. FRA notes that the HSL does not define the release period for signal employees as “interim release” is defined for train employees, providing that the period of release constitutes off-duty time only if it is at a designated terminal. However, it is certainly consistent with the statutory purpose to require a railroad, or contractor or subcontractor to a railroad, to provide as much opportunity for food, rest, and freedom of activity for the employee as circumstances will allow

during any release period that is to be considered off-duty time.

The Working Group also discussed the distinction between the defined terms, “prior time off” and total off-duty period. As indicated in the definition of “total off-duty period,” it may differ from a computer-generated prior time off, which would be calculated based on the release time of the previous duty tour, if the employee performed an activity between duty tours that was required to be reported as other service at the behest of the railroad. Under § 228.11(b)(8), (d)(6) and (e)(9), the employee must record any such service, and it would be recorded on the hours of service record created for the next duty tour as an activity at the behest of the railroad. Prior time off would be calculated as the sum of the time between the previous final release and the beginning of that activity and the time between the end of the activity and the beginning of the next duty tour. The total time spent in the activity, plus the prior time off before and after the activity should equal the system-known prior time off.

There were a number of questions discussed in the Working Group related to the definitions of “dispatching service employee,” “signal employee,” and “train employee.” These definitions are copied directly from the HSL at 49 U.S.C. 21101, and are included in this regulation simply for ease of reference, since the terms are used throughout the rule text. The questions surrounding these definitions related to whether employees with certain job titles, or who perform certain job functions, would be included within the scope of the definitions.

These questions present issues of substantive interpretation of the HSL, and have been addressed in published interpretations in Appendix A of this rule and various Operating Practices Technical Bulletins. The only change in these definitions made by the RSIA of 2008 is to amend the definition of “signal employee” so that it applies to employees of contractors or subcontractors to a railroad who perform the functions of a signal employee. Therefore, FRA’s position remains unchanged with respect to these issues, except to the extent that FRA has ever indicated prior to the enactment of the RSIA of 2008 that employees of contractors or subcontractors performing the functions of a signal employee are not covered by the HSL, because that would no longer be FRA’s position, in light of the statutory changes.

In determining whether a given employee is covered by the HSL, FRA continues to take a functional approach, rather than one based on job or craft title. If an employee performs functions included within the definition of a dispatching service employee, a signal employee, or a train employee, that employee is covered under the HSL as that type of employee, and must observe the relevant statutory limitations and recordkeeping requirements, regardless of the employee’s actual job title. For example, an employee whose job title is Yardmaster may be covered under the HSL as any one of three categories of covered employees, or he or she may not be covered by the HSL at all, depending on the functions performed. By the same token, if an employee performs functions that are typically performed by employees who are covered by the HSL, but the specific

function is not itself covered, performing that function does not bring the employee under the coverage of the HSL. For example, if an employee removes orders from a printer, that function alone does not make the employee a dispatching service employee, even if that function is usually performed by a dispatcher, because this action alone does not constitute dispatching, reporting, transmitting, receiving or delivering an order affecting train movement.

§ 228.9 Records; general.

This section is revised to eliminate the signature requirement for records maintained electronically. Paragraph (a) applies only to manual records, and retains the text of § 228.9 prior to this regulation. Paragraph (b), which is added to this section, provides that an electronic record must be certified and electronically stamped with the certifying employee's name and the date and time of certification. Both paragraphs contain requirements for retention of and access to the records. Finally, paragraph (b) requires that electronic records must be capable of being reproduced on railroad printers.

§ 228.11 – Hours of duty records.

This section establishes the requirement to keep hours of service records and sets forth what information the records must contain. The requirements have been clarified by being broken into separate paragraphs for the different types of employees, each containing the recordkeeping requirements specific to that kind of employee that FRA believes are necessary to determining whether the employee is in compliance with the HSL for the duty tour being reported. This

includes requiring data related to the new substantive requirements of the RSIA of 2008.

Paragraph (a) of this section establishes the general recordkeeping requirement, and provides that contractors and subcontractors whose employees perform covered service should also record the name of the railroad for which the employee performed covered service. This paragraph also provides that if an employee performs covered service within the same duty tour that is subject to different statutory requirements, and therefore, different recordkeeping requirements in this section, such as, performing both the functions of a train employee and a dispatching service employee, the employee should complete a record appropriate to the type of service to which he or she was called, and reflect other covered service as an activity that is other service at the behest of the railroad. However, the total time on duty must be governed by the most restrictive statutory provision.

Paragraph (b) of this section establishes the recordkeeping requirements for train employees, including subparagraphs (13) through (16), which relate to information required as a result of the statutory amendments in the RSIA of 2008. Subparagraph (13) requires that the record must indicate the total amount of time by which the combination of the total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours. Subparagraph (14) requires the record to reflect the cumulative total for the calendar month of time spent on duty, awaiting or in deadhead transportation, and

in any other service for the carrier (in other words the cumulative total toward the 276-hour monthly maximum). Subparagraph (15) requires the record to indicate the cumulative total for the calendar month of time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty. Subparagraph (16) requires the record to indicate the number of consecutive days in which a period of time on duty was initiated.

Paragraph (b) of this section resulted in significant discussion in the working group, which resulted in a number of changes to the rule text. As was discussed in section III, above, of the preamble, AAR did not agree during the RSAC process with FRA's requirement to report the first train and the last train to which the employee was assigned, and any train immediately preceding or immediately following a period of interim release, even after utility employees, employees performing yard jobs and employees on shuttle assignments were excluded, and FRA subsequently made further modifications to this paragraph.

Subparagraph (4) requires train employees to report the train ID for each assignment required to be reported. Utility employees, employees assigned to yard jobs, and employees assigned to shuttle assignments identified as such by a unique job or train symbol are excluded from the requirements of this subparagraph. FRA expects, however, that railroads will take care to avoid designating as a shuttle assignment jobs that do not truly function in the manner suggested by the language.

Subparagraph (5) requires train employees to report the location, date, and beginning time of the first assignment in a duty tour, and any assignment immediately following a period of interim release.

Subparagraph (6) requires train employees to report the location, date, and time relieved for the last assignment in a duty tour and any assignment preceding a period of interim release.

Subparagraph (7) requires train employees to report the location, date, and time released for the last assignment in a duty tour and any assignment preceding a period of interim release.

Subparagraph (8) requires train employees to report the beginning and ending location, date, and time for periods spent in transportation to the first assignment in a duty tour, from an assignment to a period of interim release, from a period of interim release to the next assignment in a duty tour, and from the last assignment in a duty tour to the point of final release.

Also, as was discussed in section III, above, of the preamble, the requirement in subparagraph (14) to track the cumulative total toward the limitation of 276 hours in a calendar month was opposed as being too burdensome, especially for those employees completing paper records. In response, FRA will allow Class III railroads to track the cumulative total throughout the month, note it on the records, and make it available to FRA, provided that the employee certify the monthly total after the end of each month.

Paragraph (c) provides that subparagraphs (13) through (16) of paragraph (b) do not apply to the records of train employees providing commuter or intercity passenger rail

transportation, because these subparagraphs relate to the new substantive provisions of the HSL in the RSIA of 2008, and those provisions do not apply to train employees of commuter and intercity passenger railroads at this time. This distinction led to some discussion as to how to apply the recordkeeping requirements to train employees who work in both freight and passenger service. FRA believes this issue is best addressed by the individual recordkeeping systems of railroads that have employees who work in both types of service. The railroad should ensure that the employee has the appropriate record to complete for the type of service that he or she performed in any given duty tour.

Paragraphs (d) and (e) provide the recordkeeping requirements for dispatching service employees and signal employees respectively.

#### 228.13 – Preemptive effect.

This section sets forth the preemptive effect of this part. The preemption provision of the former Federal Railroad Safety Act of 1970 (FRSA), as amended, 49 U.S.C. 20106, governs the preemptive effect of this regulation, and the preemption provision of the regulation conforms to the terms of the statute. State and local requirements, both statutory and common law, are preempted when such non-Federal requirements cover the same subject matter as the requirements of this part. A State may adopt, or continue in force a law, regulation, or order covering the same subject matter as a DOT regulation or order applicable to railroad safety and security only when the additional or more stringent state law, regulation, or order is necessary to eliminate or reduce an essentially local safety or security hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not unreasonably burden

interstate commerce.

Section 20106 also permits State tort actions arising from events or activities occurring on or after January 18, 2002 that allege a violation of the Federal standard of care established by regulation or order issued by the Secretary of Transportation (with respect to railroad safety) or the Secretary of Homeland Security (with respect to railroad security), a party's failure to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries, or a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulations, or order of the United States Government, and does not unreasonably burden interstate commerce.

228.19 – Monthly reports of excess service.

This section requires monthly reports of excess service, and indicates the instances of excess service that must be reported, in separate paragraphs for train employees, dispatching service employees, and signal employees, including requirements related to new substantive provisions of the HSL that were added by the RSIA of 2008. It also provides for excess service reports to be submitted electronically or appended to and retained with the employee hours of service record to which the excess service being reported relates.

Paragraph (a) requires that the instances of excess service listed in this section be reported to FRA's Associate Administrator for Railroad Safety/Chief Safety Officer.

Paragraph (b) provides the instances of excess service which must be

reported for train employees. Subparagraphs (1) through (3) correspond to requirements that were contained in this section as it existed prior to the enactment of the RSIA of 2008, with the exception that the new minimum statutory off-duty period of 10 hours is substituted. Subparagraphs (4) through (10) are instances of possible excess service related to new substantive limitations in the HSL. Paragraph (c) provides the instances of excess service that must be reported for train employees of commuter or intercity passenger railroads. Because these employees continue to be covered by the HSL as it existed prior to the enactment of the RSIA of 2008, the instances of excess service which must be reported for these employees are identical to those required by this section for train employees prior to this revision.

Paragraph (d) contains the instances of excess service which must be reported for dispatching service employees. Because there were no substantive changes to the HSL related to dispatching service employees other than the grant of authority to the Secretary to prescribe regulations more stringent than the statute, the instances of excess service that must be reported are identical to those required by this section for dispatching service employees by this section prior to this revision.

Paragraph (e) provides the instances of excess service that must be reported for signal employees, which were modified to reflect the new minimum statutory off-duty period.

Paragraph (f) provides the method for filing with FRA the instances of excess

service required to be reported by this section, while paragraph (g) provides procedures for the use of an alternative method for filing instances of excess service using an electronic signature.

Paragraph (h) excepts any railroad, or contractor or subcontractor to a railroad that uses an electronic recordkeeping system that complies with this part from the requirement to file with FRA its monthly reports of excess service. The electronic recordkeeping system must require the employee to enter an explanation for any excess service that the employee certifies on his or her record, require the railroad, contractor, or subcontractor to make a determination as to whether each instance would be reportable, allow the railroad, contractor, or subcontractor to append its analysis to the electronic record, and allow FRA inspectors and participating State inspectors access to employee reports of excess service and any explanations provided.

§ 228.23 Criminal penalty.

This section is amended only to update the statutory citation to the penalty provision of the HSL to reflect the recodification of the Federal railroad safety laws, including the HSL, in 1994. Pub. L. 103-272, 108 Stat. 745.

§ 228.201 Electronic recordkeeping; general

This section sets forth the basic requirements for the use of an electronic recordkeeping system to create and maintain the records required by this part. Any record required by this part may be created and stored electronically in such a system, and those records submitted to FRA may also be submitted electronically, consistent with the requirements of the Electronic Signatures in Global and National Commerce Act (Pub. L.

106-229, 114 Stat. 464, June 30, 2000).

The system must meet the requirements of this part, and the records created and stored in the system must contain the required information. The section further provides that a railroad, contractor, or subcontractor using an electronic recordkeeping system must sufficiently monitor the database to ensure a high degree of accuracy in the records, and train its employees on the proper use of the system. The information technology security program of the railroad, contractor, or subcontractor must also be adequate to prevent unauthorized access to the program logic or individual records. Finally, this section provides that FRA may prohibit or revoke the authority to use an electronic recordkeeping system if FRA finds that the system is not properly secured, is inaccessible to FRA, or fails to record and store the information adequately and accurately. If FRA makes such a determination, it will be issued in writing.

§ 228.203 Program components.

This section establishes the required components for electronic recordkeeping programs in the areas of system security, identification of the individual who entered specific data, capabilities of program logic, and system search capabilities.

Paragraph (a) provides the standards that the electronic recordkeeping system must meet in terms of system security. Subparagraph (a)(1) provides that data entry is restricted to the employee or train crew whose time is being reported. However, there are two exceptions to this requirement. The first is for pre-populated data, which was an area of significant discussion and eventual compromise in the working group, as discussed in section III above. The second exception applies to situations in which an employee has

reached or exceeded his or her maximum allowed time on duty, and a quick tie-up is required. As was discussed in section IB, the idea behind a quick tie-up is that a few items of basic information are needed to determine the time at which the employee is beginning his or her statutory off-duty period, and when he or she will be rested to begin the next duty tour. However, the intention is for the employee to be able to complete this limited data entry very quickly in order to begin the statutory off-duty period and not extend a duty tour that is already at its maximum limit. Therefore, FRA has provided an additional exception to the requirement of employee-entered data, to allow an employee to provide quick tie-up information by telephone, by facsimile, or by other electronic means in situations where for any reason, a computer terminal is unavailable. FRA expects that in most situations, the employee will call a dispatcher, call desk, or trouble desk, to provide the quick tie-up information to those who need to know it to be able to call the employee for his or her next time on duty. However, situations may arise when it is difficult to reach someone by telephone, which could increase the time it will take to complete the process. The Working Group requested that FRA allow the use of other technology for electronic transmission of the information, and FRA revised the rule text accordingly. However, FRA cautions against the use of electronic means, such as e-mail, to enable an employee to tie up and officially begin a statutory off-duty period while in fact still performing service, awaiting transportation to final release, or otherwise still involved in the duty tour being tied up.

Subparagraph (a)(1) also provides that the system may not allow two individuals to have the same electronic identity, and that the system must be structured so that a

record cannot be deleted or altered once it is certified, and that any amendment to a record must either be stored electronically apart from the record it amends or electronically attached as information but without altering the record. Amendments must also identify the person making the amendment. Finally, the system must be capable of maintaining records as submitted without corruption or loss of data, and ensure that supervisors and crew management officials can access, but not delete or alter a record, once the employee has reported for duty, and once the employee has certified information that he or she entered on the record.

Paragraph (b) provides that the program must be capable of identifying each individual who entered data on a record, and which data items were entered by each individual if more than one person entered data on a given record.

Paragraph (c) provides the program logic features that an electronic recordkeeping system must contain in order to properly calculate total time on duty, to identify errors, to require reconciliation of differences in prior time off, which would indicate an activity or assignment not captured on a record, to require explanations when total time on duty exceeds the statutory maximum for the employee, and to require proper use of the quick tie-up. As was discussed in section III above, this section was the subject of discussion in the Working Group, and the rule text was modified to provide flexibility for future systems, and in particular for the recording and reporting of hours of service data by signal employees, who do not report in the same manner as train employees.

Paragraph (d) establishes the required search capabilities for an electronic recordkeeping system, establishing the specific data fields and other criteria by which the

system must be capable of searching for and retrieving responsive records.

§ 228.205 Access to electronic records.

Paragraph (a) of this section provides that access to electronic recordkeeping systems must be granted to FRA and State inspectors through the use of railroad computer terminals. Paragraph (b) requires the establishment of procedures for providing inspectors with an identification number and password to access the system.

Paragraph (c) provides that the inspection screen must be formatted so that each data field entered by an employee is visible, that the data fields must be searchable as described in § 228.203(d) and yield access to all records matching the specified search criteria, and that the records must be displayed in a manner that is crew-based and duty-tour-oriented, so that the records of all employees who worked together as part of a train crew or signal gang will be displayed together, and the record will include all of the assignments or activities required to be reported.

§ 228.207 Training.

This section requires railroads and contractors and subcontractors to railroads to provide initial and refresher training to train employees, signal employees, and dispatching service employees, and the supervisors of these employees. Paragraph (b) provides that initial training must include classroom and hands-on components, and must cover the aspects of the HSL relevant to the employee's position, and proper entry of hours of service data. Testing is also required to ensure that the objectives of the training are met. This section requires that initial training be provided as soon as practicable. FRA would expect that some level of training, such as on the new statutory requirements,

will be needed fairly quickly, to ensure proper recordkeeping. This may be done less formally, either in person with a supervisor, as “on the job” training, or through electronic media that may be provided to an employee. However, the more comprehensive initial training required by this section may be provided in combination with other training, such as that required by section 402 of the RSIA of 2008, and may be completed within the regular training cycle for the employee.

Paragraph (c) provides significant flexibility regarding refresher training. The paragraph does, however, require that the refresher training emphasize any relevant changes to the HSL or the recordkeeping system, as well as any areas in which supervisors or other railroad managers are noticing recurrent errors. No specific interval for refresher training is required, just that it must be provided when suggested by recurrent errors. FRA had initially proposed requiring refresher training every two years, but members of the Working Group objected, arguing that employees who complete records every day will not need training at a regular interval on how to do so, and that refresher training should be provided to those who are having difficulty. FRA revised the text of this section accordingly.

## **V. Regulatory Impact and Notices**

### **A. Statutory Authority**

Section 20103(a) of title 49 U.S. Code authorizes the Secretary to issue regulations governing all areas of railroad transportation safety, supplementing laws and regulations in effect on October 16, 1970. In addition, Section 108(f)(1) of the RSIA of 2008 requires the Secretary to prescribe a regulation revising the requirements for

recordkeeping and reporting for hours of service of railroad employees contained in 49 CFR part 228 to adjust recordkeeping and reporting requirements to support compliance with 49 CFR ch. 211, as amended by the RSIA of 2008; to authorize electronic record keeping, and reporting of excess service, consistent with appropriate considerations for user interface; and to require training of affected employees and supervisors, including training of employees in the entry of hours of service data.

Section 108(f)(2) provides that in lieu of issuing a notice of proposed rulemaking as contemplated by 5 U.S.C. 553, the Secretary may use the RSAC to assist in development of the regulation.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures, and determined not to be economically significant under both Executive Order 12866 and DOT policies and procedures. See 44 FR 11034 (Feb. 26, 1979). This rule is a non-significant regulatory action under § 3(f) of Executive Order 12866 and the regulatory policies and procedures order issued by the DOT. *Id.* We have prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this rule.

This section summarizes the estimated economic impacts of the rule. The final rule is mandated by the RSIA of 2008, in order to revise the recordkeeping and reporting regulations in accordance with the substantive changes to employee work and rest periods that are specified in the RSIA of 2008. The impacts described are the impacts of the rule, distinct from the impacts of the RSIA of 2008.

The RIA contains a description of the costs of the rule. All railroads that operate on the general system of transportation are subject to the final rule. Train employees of commuter and intercity passenger railroads, however, are exempt from the new, specific limitations on employee work and rest periods in the RSIA of 2008. The RSIA adds employees of contractors and subcontractors that perform signal work for railroads to those covered by the rule. The costs of the rule result from making required changes to existing recordkeeping systems to comply with the final rule. FRA establishes the standards for electronic recordkeeping systems for those railroads that wish to implement an electronic hours of service system. Four Class I railroads already use an electronic recordkeeping system by FRA waiver. The rule's specifications for electronic recordkeeping were based on FRA's experience with these waiver-approved systems to minimize the burden of the electronic recordkeeping option. The RSIA of 2008 also mandates that training be provided to employees on the hours of service law and recordkeeping system. FRA notes that training would be necessary even in the absence of FRA's rule, but accounts for training on the recordkeeping system to illustrate the type and extent of training a railroad, or a contractor or subcontractor to a railroad, would be expected to provide. Given the large number of employees subject to the rule, training costs are the biggest component of costs. For a 20 year period of analysis, the present value of costs attributable to the rule total about \$11.2 million, using a discount rate of 7%, and \$14 million using a discount rate of 3%. Of those costs, \$9.2 million and \$11.6 million are training costs respectively.

Members of the RSAC that helped develop the rule and the RIA stated that the

primary benefit of the rule was a mechanism by which to comply with the hours of service law. The public welfare benefit of the rule is a method for effectively enforcing the substantive, new provisions in the RSIA of 2008. The benefit of training and recordkeeping is the ability of covered employees to comply with the requirements of the RSIA and thereby achieve the safety benefits intended by Congress. To the extent that railroads that are not currently using electronic recordkeeping take advantage of the option to use electronic recordkeeping, they may benefit from some efficiency gains. RSAC industry representatives indicated that there may be up to a 50% decrease in the time needed to complete an hours of service record, depending on the amount of information needed to be recorded. If the scale of time savings using an electronic system was a few minutes per individual entry, the savings could be significant when multiplied across the large number of employees covered by the RSIA of 2008 that perform daily or frequent recordkeeping. In addition, there may be indirect benefits of the rule, such as reduced storage needs for paper hours of service records.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This rule amends FRA's regulations regarding the reporting and recordkeeping requirements for railroad employees and employees of contractors and subcontractors of a railroad who are performing service covered by the HSL. State and local requirements on the same subject matter covered by FRA's regulation and the amendments proposed in this rule, including the standards of care applicable in certain State common law tort actions, are preempted by 49 U.S.C.

20106. The preemption provision in the regulation directly reflects the terms of the statute. At the same time, this final rule does not propose any regulation that would have direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Additionally, it would not impose any direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply. However, State and local officials were involved in developing this rule. The RSAC, which was used to assist in the development of this rule, has as permanent members, the AASHTO and the ASRSM.

D. Executive Order 13175

We analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this rule does not significantly or uniquely affect tribes and does not impose substantial and direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

E. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, we developed this final rule in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA), and have determined that the RFA does not apply to this rulemaking

As was discussed above, this rulemaking is required by the section 108(f) of the RSIA of 2008, which provides that in lieu of issuing a notice of proposed rulemaking as contemplated by 5 U.S.C. 553, the Secretary may utilize the RSAC to assist in development of the regulation, and FRA chose to utilize the RSAC to assist in developing the regulation.

The Small Business Administration’s *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (2003), provides that:

[i]f, under the APA or any rule of general applicability governing federal grants to state and local governments, the agency is required to publish a general notice of proposed rulemaking (NPRM), the RFA must be considered (citing 5 U.S.C. 604(a)). . . . If an NPRM is not required, the RFA does not apply.”

Because an NPRM was not required in this instance, the RFA does not apply.

F. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. The sections that contain the new and current information collection requirements and the estimated time to fulfill each requirement are as follows:

49 CFR Section or Statutory Provision	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours
228.11 - Hours of Duty Records ( <b>New Requirement now includes signal contractors and their employees</b> )	720 railroads/signal contractors	29,893,000 records	2 min./5 min./10 min.	3,049,210 hours
228.17 – Dispatchers Record of Train Movements	150 Dispatch Offices	200,750 records	3 hours	602,250 hours

228.19 - Monthly Reports of Excess Service ( <b>New Report Requirement includes Limbo time and consecutive days on duty</b> )	300 railroads	2,640 reports	2 hours	5,280 hours
228.103 - Construction of Employee Sleeping Quarters – Petitions to allow construction near work areas	50 railroads	1 petition	16 hours	16 hours
228.203 - Program Components ( <b>New Requirement</b> ) – Electronic Recordkeeping – - Modifications for Daylight Savings Time -System Security/Individual User Identification/Program Logic Capabilities/ Search Capabilities	9 railroads	5 modifications 1 program with security/I.D./ program logic & search capability	120 hours 720 hours	600 hours 720 hours
228.205 - Access to Electronic Records – ( <b>New Requirement</b> ) – System Access Procedures for Inspectors	632 railroads	100 electronic records access procedures	30 minutes	50 hours
228.207 – Training in Use of Electronic System – ( <b>New Requirements</b> ) – Initial Training – Refresher Training	720 railroads/signal contractors 720 railroads/signal contractors	47,000 train. employees 2,200 train. employees	1 hour 1 hour	47,000 hours 2,200 hours
49 U.S.C. 21102(b) – The Federal hours of service laws - Petitions for Exemption from Laws	10 railroads	2 petitions	10 hours	20 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202-493-6292, or Ms. Nakia Poston, Information Clearance Officer, at 202-493-6073.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

G. Regulation Identifier Number (RIN)

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that:

before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$141,100,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement”

detailing the effect on State, local, and tribal governments and the private sector.

This rule will not result in the expenditure of more than \$141,100,000 (adjusted annually for inflation) by the public sector in any one year, and thus preparation of such a statement is not required.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321-4375, requires that Federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. This rule will not have a significant impact on the human environment.

List of subjects in 49 CFR Part 228

Administrative Practice and Procedures, Buildings and facilities, Hazardous materials transportation, Noise control, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

**PART 228 – [AMENDED]**

**The Rule**

For the reasons discussed in the preamble, part 228 of chapter II, subtitle B of title 49, Code of Federal Regulations is amended as follows:

1. The authority citation for part 228 is revised to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 21101-21109; Sec. 108, Div. A, Pub. L. 110-432, 122 Stat. 4860-4866; 49 U.S.C. 21301, 21303, 21304, 21311; 28 U.S.C. 2461, note; 49 CFR 1.49; and 49 U.S.C. 103.

2. Section 228.1 is amended by revising paragraph (a) to read as follows:

**§ 228.1 Scope.**

\* \* \* \* \*

(a) Prescribes reporting and recordkeeping requirements with respect to the hours of service of certain railroad employees and certain employees of railroad contractors and subcontractors; and

\* \* \* \* \*

3. Section 228.3 is revised to read as follows:

**§ 228.3 Application.**

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads and contractors and subcontractors of railroads.

(b) This part does not apply to:

(1) A railroad or a contractor or subcontractor of a railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

4. Section 228.5 is revised to read as follows:

**§ 228.5 Definitions.**

As used in this part--

Actual time means either the specific time of day, to the hour and minute, or the precise amount of time spent in an activity, in hours and minutes, that must be included in the hours of duty record, including, where appropriate, reference to the applicable time zone and either standard time or daylight savings time.

Administrator means the Administrator of the Federal Railroad Administration or any person to whom the Administrator has delegated authority in the matter concerned.

Administrative duties means any activities required by the railroad as a condition of employment, related to reporting, recording, or providing an oral or written statement related to a current, previous, or future duty tour. Such activities are considered service for the railroad, and time spent in these activities must be included in the total time on duty for any duty tour with which it may commingle.

At the behest of the employee refers to time spent by an employee in a railroad-related activity that is not required by the railroad as a condition of employment, in which the employee voluntarily participates.

At the behest of the railroad refers to time spent by an employee in a railroad-required activity that compels an employee to perform service for the railroad as a condition of employment.

Broken (aggregate) service means one or more periods of time on duty within a single duty tour separated by one or more qualifying interim releases.

Call and release occurs when an employing railroad issues an employee a report-

for-duty time, and then releases the employee from the requirement to report prior to the report-for-duty time.

Carrier, common carrier, and common carrier engaged in interstate or foreign commerce by railroad mean railroad.

Commingled service means--

(1) For a train employee or a signal employee, any non-covered service at the behest of the railroad and performed for the railroad that is not separated from covered service by a qualifying statutory off-duty period of 8 or 10 hours or more. Such commingled service is counted as time on duty pursuant to 49 U.S.C. 21103(b)(3) (for train employees) or 49 U.S.C. 21104(b)(2) (for signal employees).

(2) For a dispatching service employee, any non-covered service mandated by the railroad and performed for the railroad within any 24-hour period containing covered service. Such commingled service is counted as time on duty pursuant to 49 U.S.C. 21105(c).

Commuting means--

(1) For a train employee, the time spent in travel ---

(i) Between the employee's residence and the employee's regular reporting point, and

(ii) In railroad-provided or authorized transportation to and from the lodging facility at the away-from-home terminal (excluding travel for purposes of an interim release), where such time (including travel delays and room availability) does not exceed 30 minutes.

(2) For a signal employee, the time spent in travel between the employee's residence and the employee's headquarters.

(3) For a dispatching service employee, the time spent in travel between the employee's residence and any reporting point.

Consecutive service is a period of unbroken total time on duty during a duty tour.

Covered service means--

(1) For a train employee, the portion of the employee's time on duty during which the employee is engaged in, or connected with, the movement of a train.

(2) For a dispatching service employee, the portion of the employee's time on duty during which the employee, by the use of an electrical or mechanical device, dispatches, reports, transmits, receives, or delivers an order related to or affecting the movement of a train.

(3) For a signal employee, the portion of the employee's time on duty during which the employee is engaged in installing, repairing, or maintaining a signal system.

Covered service assignment means--

(1) For a train employee, each unique assignment of the employee during a period of covered service that is associated with either a specific train or a specific yard job.

(2) For a signal employee, the assigned duty hours of the employee, including overtime, or unique trouble call assignments occurring outside the employee's assigned duty hours.

(3) For a dispatching service employee, each unique assignment for the

employee that occurs within any 24-hour period in which the employee, by the use of an electrical or mechanical device, dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

Deadheading means the physical relocation of a train employee from one point to another as a result of a railroad-issued verbal or written directive.

Designated terminal means the home or away-from-home terminal for the assignment of a particular train crew.

Dispatching service employee means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

Duty location for a signal employee is the employee's headquarters or the precise location where the employee is expected to begin performing service for the railroad as defined in 49 U.S.C. 21104(b)(1) and (2).

Duty tour means--

(1) The total of all periods of covered service and commingled service for a train employee or a signal employee occurring between two statutory off-duty periods (i.e., off-duty periods of a minimum of 8 or 10 hours); or

(2) The total of all periods of covered service and commingled service for a dispatching service employee occurring in any 24-hour period.

Employee means an individual employed by a railroad or a contractor or subcontractor to a railroad who--

(1) Is actually engaged in or connected with the movement of any train,

including a person who performs the duties of a hostler;

(2) Dispatches, reports, transmits, receives, or delivers an order pertaining to a train movement by the use of telegraph, telephone, radio, or any other electrical or mechanical device; or

(3) Is engaged in installing, repairing, or maintaining a signal system.

Final release is the time that a train employee or a signal employee is released from all activities at the behest of the railroad and begins his or her statutory off-duty period.

Headquarters means the regular assigned on-duty location for signal employees, or the lodging facility or crew quarters where traveling signal gangs reside when working at various system locations.

Interim release means an off-duty period applied to train employees only, of at least 4 hours but less than the required statutory off-duty period at a designated terminal, which off-duty period temporarily suspends the accumulation of time on duty, but does not start a new duty tour.

Limbo time means a period of time treated as neither time on duty nor time off duty in 49 U.S.C. 21103 and 21104, and any other period of service for the railroad that does not qualify as either covered service or commingled service.

On-duty time means the actual time that an employee reports for duty to begin a covered service assignment.

Other-than-regular reporting point means any location where a train employee reports to begin or restart a duty tour, that is not the employee's regular reporting point.

Prior time off means the amount of time that an employee has been off duty between identifiable periods of service at the behest of the railroad.

Program edits are filters contained in the logic of an hours of service recordkeeping program that detect identifiable reporting errors made by a reporting employee at the time of data entry, and prevent the employee from submitting a record without first correcting or explaining any identified errors or anomalies.

Quick tie-up is a data entry process used only when an employee is within 3 minutes of, or is beyond, his or her statutory maximum on-duty period, which process allows an employee to enter only the basic information necessary for the railroad to identify the beginning of an employee's statutory off-duty period, to avoid the excess service that would otherwise be incurred in completing the full record for the duty tour.

The information permitted in a quick tie-up process is limited to, at a maximum:

- (1) Board placement time;
- (2) Relieved location, date, and time;
- (3) Final release location, date, and time;
- (4) Contact information for the employee during the statutory off-duty period;
- (5) Request for rest in addition to the statutory minimum, if provided by collective bargaining agreement or local practice;
- (6) The employee may be provided an option to enter basic payroll information, related only to the duty tour being tied up; and
- (7) Employee certification of the tie-up information provided.

Railroad means a person providing railroad transportation.

Railroad transportation means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including commuter or other short-haul rail passenger service in a metropolitan or suburban area, and high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Regular reporting point means the permanent on-duty location of a train employee's regular assignment that is established through a job bulletin assignment (either a job award or a forced assignment) or through an employee's exercise of seniority to be placed in an assignment. The assigned regular reporting point is a single fixed location identified by the railroad, even for extra board and pool crew employees.

Release means--

- (1) For a train employee,
  - (i) The time within the duty tour that the employee begins an interim release;
  - (ii) The time that an employee completes a covered service assignment and begins another covered service assignment on a different train or job, or
  - (iii) The time that an employee completes a covered service assignment to begin another activity that counts as time on duty (including waiting for deadhead transportation to another duty location at which the employee will perform covered service, deadheading to duty, or any other commingled service).
- (2) For a signal employee, the time within a duty tour that the employee--

(i) Completes his or her regular assigned hours and begins an off-duty period of at least one hour but less than a statutory off-duty period; or

(ii) Completes his or her return travel from a trouble call or other unscheduled duty and begins an off-duty period of at least one hour, but less than a statutory off-duty period.

(3) For a dispatching service employee, when he or she stops performing covered service and commingled service within any 24-hour period and begins an off-duty period of at least one hour.

Relieved time means--

(1) The actual time that a train employee stops performing a covered service assignment or commingled service.

(2) The actual time that a signal employee:

(i) Completes his or her assigned duty hours, or stops performing covered service or commingled service, whichever is later; or

(ii) Stops performing covered service associated with a trouble call or other unscheduled duty outside of normally assigned duty hours.

Reports for duty means that an employee--

(i) Presents himself or herself at the location established by the railroad at the time the railroad established for the employee to be present; and

(ii) Is ready to perform covered service.

Report-for-duty time means--

(1) For a train employee, the actual time that the employee is required to be

present at a reporting point and prepared to start a covered service assignment.

(2) For a signal employee, the assigned starting time of an employee's scheduled shift, or the time that he or she receives a trouble call or a call for any other unscheduled duty during an off-duty period.

(3) For a dispatching service employee, when the employee begins the turn-over process at or before the beginning of his or her assigned shift, or begins any other activity at the behest of the railroad during any 24-hour period in which covered service is performed.

Reporting point means any location where an employee is required to begin or restart a duty tour.

Seniority move means a repositioning at the behest of the employee, usually a repositioning from a regular assignment or extra board to a different regularly assigned position or extra board, as the result of the employee's selection of a bulletin assignment or the employee's exercise of seniority over a junior employee.

Signal employee means an individual who is engaged in installing, repairing, or maintaining signal systems.

Station, office or tower means the precise location where a dispatching service employee is expected to perform service for the railroad as defined in 49 U.S.C. 21105(b) and (c).

Statutory off-duty period means the period of 8 or 10 consecutive hours or more time, that is the minimum off-duty period required under the hours of service laws for a train employee or a signal employee to begin a new 24-hour period for the purposes of

calculating his or her total time on duty.

Total off-duty period means the actual amount of time that a train employee or a signal employee is off duty between duty tours after the previous final release and before the beginning of the next duty tour. This time may differ from the expected prior time off that will be generated by the recordkeeping system, if the employee performed service at the behest of the railroad between the duty tours.

Total time on duty (TTOD) means the total accumulation of time spent in periods of covered service and commingled service between qualifying statutory off-duty periods of 8 or 10 hours or more. Mandatory activities that do not constitute covered service, such as rules classes, when they may not attach to covered service, are counted as limbo time, rather than commingled service, which limbo time is not counted toward the calculation of total time on duty.

Train employee means an individual engaged in or connected with the movement of a train, including a hostler.

Travel time means--

(1) For a signal employee, the time spent in transportation between the employee's headquarters and an outlying duty point or between the employee's residence and an outlying duty point, or, between duty locations, including both on-track and on-highway vehicular travel.

(2) For a dispatching service employee, the time spent in travel between stations, offices, or towers during the employee's time on duty.

5. Section 228.9 is amended by revising the section heading and paragraph

(a) and adding paragraph (b), to read as follows:

**§ 228.9       Records; general.**

(a) Each manual record maintained under this part shall be--

(1) Signed by the employee whose time on duty is being recorded or, in the case of a train and engine crew or a signal employee gang, signed by the ranking crewmember;

(2) Retained for two years at locations identified by the carrier; and

(3) Available upon request at the identified location for inspection and copying by the Administrator during regular business hours.

(b) Each electronic record maintained under this part shall be--

(1) Certified by the employee whose time on duty is being recorded or, in the case of a train and engine crew or a signal employee gang, certified by the reporting employee who is a member of the train crew or signal gang whose time is being recorded;

(2) Electronically stamped with the certifying employee's name and the date and time of certification;

(3) Retained for 2 years in a secured file that prevents alteration after certification;

(4) Accessible by the Administrator through a computer terminal of the railroad, using a railroad-provided identification code and a unique password.

(5) Reproducible using the printing capability at the location where records are accessed.

6. Section 228.11 is amended by revising paragraph (a) and adding

paragraphs (b), (c), and (d) to read as follows:

**§ 228.11 Hours of duty records.**

(a) In general. Each railroad, or a contractor or a subcontractor of a railroad, shall keep a record, either manually or electronically, concerning the hours of duty of each employee. Each contractor or subcontractor of a railroad shall also record the name of the railroad for whom its employee performed covered service during the duty tour covered by the record. Employees who perform covered service assignments in a single duty tour that are subject to the recordkeeping requirements of more than one paragraph of this section, must complete the record applicable to the covered service position for which they were called, and record other covered service as an activity constituting other service at the behest of the railroad.

(b) For train employees. Except as provided by paragraph (c) of this section, each hours of duty record for a train employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

(2) Each covered service position in a duty tour.

(3) Amount of time off duty before beginning a new covered service assignment or resuming a duty tour.

(4) Train ID for each assignment required to be reported by this part, except for the following employees, who may instead report the unique job or train ID identifying their assignment:

(i) utility employees assigned to perform covered service, who are identified as such by a unique job or train ID;

(ii) employees assigned to yard jobs, except that employees assigned to perform yard jobs on all or parts of consecutive shifts must at least report the yard assignment for each shift;

(iii) assignments, either regular or extra, that are specifically established to shuttle trains into and out of a terminal during a single duty tour that are identified by a unique job or train symbol as such an assignment.

(5) Location, date, and beginning time of the first assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and beginning time of the assignment immediately following the interim release.

(6) Location, date, and time relieved for the last assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and time relieved for the assignment immediately preceding the interim release.

(7) Location, date, and time released from the last assignment in a duty tour, and, if the duty tour exceeds 12 hours and includes a qualifying period of interim release as provided by 49 U.S.C. 21103(b), the location, date, and time released from the assignment immediately preceding the interim release.

(8) Beginning and ending location, date, and time for periods spent in transportation, other than personal commuting, if any, to the first assignment in a duty

tour, from an assignment to the location of a period of interim release, from a period of interim release to the next assignment, or from the last assignment in a duty tour to the point of final release, including the mode of transportation (train, track car, railroad-provided motor vehicle, personal automobile, etc.).

(9) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

(10) Identification (code) of service type for any other service performed at the behest of the railroad.

(11) Total time on duty for the duty tour.

(12) Reason for any service that exceeds 12 hours total time on duty for the duty tour.

(13) The total amount of time by which the sum of total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours.

(14) The cumulative total for the calendar month of--

(i) Time spent in covered service;

(ii) Time spent awaiting or in deadhead transportation from a duty assignment to the place of final release; and

(iii) Time spent in any other service at the behest of the railroad.

(15) The cumulative total for the calendar month of time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty.

(16) Number of consecutive days in which a period of time on duty was initiated.

(c) Exceptions to requirements for train employees. Paragraphs (b)(13) through (b)(16) of this section do not apply to the hours of duty records of train employees providing commuter rail passenger transportation or intercity rail passenger transportation.

(d) For dispatching service employees. Each hours of duty record for a dispatching service employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

(2) Each covered service position in a duty tour.

(3) Amount of time off duty before going on duty or returning to duty in a duty tour.

(4) Location, date, and beginning time of each assignment in a duty tour.

(5) Location, date, and time released from each assignment in a duty tour.

(6) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.

(7) Total time on duty for the duty tour.

(e) For signal employees. Each hours of duty record for a signal employee shall include the following information about the employee:

(1) Identification of the employee (initials and last name; or if last name is not the employee's surname, provide the employee's initials and surname).

- (2) Each covered service position in a duty tour.
- (3) Headquarters location for the employee.
- (4) Amount of time off duty before going on duty or resuming a duty tour.
- (5) Location, date, and beginning time of each covered service assignment in a duty tour.
- (6) Location, date, and time relieved for each covered service assignment in a duty tour.
- (7) Location, date, and time released from each covered service assignment in a duty tour.
- (8) Beginning and ending location, date, and time for periods spent in transportation, other than personal commuting, to or from a duty assignment, and mode of transportation (train, track car, railroad-provided motor vehicle, personal automobile, etc.).
- (9) Beginning and ending location, date, and time of any other service performed at the behest of the railroad.
- (10) Total time on duty for the duty tour.
- (11) Reason for any service that exceeds 12 hours total time on duty for the duty tour.

7. Add § 228.13 to read as follows:

**§ 228.13 Preemptive effect.**

Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except for a provision

necessary to eliminate or reduce an essentially local safety hazard if that provision is not incompatible with a law, regulation, or order of the United States government and does not unreasonably burden interstate commerce. Nothing in this paragraph shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party has failed to comply with the Federal standard of care established by this part, has failed to comply with its own plan, rule, or standard that it created pursuant to this part, or has failed to comply with a State law, regulation, or order that is not incompatible with the first sentence of this paragraph.

8. Section 228.19 is revised to read as follows:

**§ 228.19 Monthly reports of excess service.**

(a) In general. Except as provided in paragraph (h) of this section, each railroad, or a contractor or a subcontractor of a railroad, shall report to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, Washington, DC 20590, each instance of excess service listed in paragraphs (b) through (e) of this section, in the manner provided by paragraph (f) of this section, within 30 days after the calendar month in which the instance occurs.

(b) For train employees. Except as provided in paragraph (c) of this section, the following instances of excess service by train employees must be reported to FRA as required by this section:

(1) A train employee is on duty for more than 12 consecutive hours.

(2) A train employee continues on duty without at least 10 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by

less than 10 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.<sup>1</sup>

(3) A train employee returns to duty without at least 10 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 10 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.<sup>1</sup>

(4) A train employee returns to duty without additional time off duty, equal to the total amount of time by which the employee's sum of total time on duty and time spent awaiting or in deadhead transportation to the point of final release exceeds 12 hours.

(5) A train employee exceeds a cumulative total of 276 hours in the following activities in a calendar month:

(i) Time spent in covered service;

(ii) Time spent awaiting or in deadhead transportation from a duty assignment to the place of final release; and

(iii) Time spent in any other service at the behest of the railroad.

(6) A train employee initiates an on-duty period on more than 6 consecutive days, when the on-duty period on the sixth consecutive day ended at the employee's home terminal, and the seventh consecutive day is not allowed pursuant to a collective bargaining agreement or pilot project.

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<sup>1</sup>Instances involving duty tours that are broken by four or more consecutive hours of off duty time at a designated terminal which duty tours do not constitute more than a total of 12 hours time on duty are not required to be reported, provided such duty tours are

(7) A train employee returns to duty after initiating an on-duty period on 6 consecutive days, without 48 consecutive hours off duty at the employee's home terminal.

(8) A train employee initiates an on-duty period on more than 7 consecutive days.

(9) A train employee returns to duty after initiating an on-duty period on 7 consecutive days, without 72 consecutive hours off duty at the employee's home terminal.

(10) A train employee exceeds the following limitations on time spent awaiting or in deadhead transportation from a duty assignment to the place of final release following a period of 12 consecutive hours on duty:

- (i) 40 hours in any calendar month completed prior to October 1, 2009;
- (ii) 20 hours in the transition period from October 1, 2009-October 15, 2009;
- (iii) 15 hours in the transition period from October 16, 2009-October 31, 2009;

and

- (iv) 30 hours in any calendar month completed after October 31, 2009.

(c) Exception to requirements for train employees. For train employees who provide commuter rail passenger transportation or intercity rail passenger transportation during a duty tour, the following instances of excess service must be reported to FRA as required by this section:

- (1) A train employee is on duty for more than 12 consecutive hours.
- (2) A train employee returns to duty after 12 consecutive hours of service

without at least 10 consecutive hours off duty.

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immediately preceded by 10 or more consecutive hours of off-duty time.

(3) A train employee continues on duty without at least 8 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 8 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.<sup>2</sup>

(4) A train employee returns to duty without at least 8 consecutive hours off duty during the preceding 24 hours. Instances involving duty tours that are broken by less than 8 consecutive hours off duty which duty tours constitute more than a total of 12 hours time on duty must be reported.<sup>2</sup>

(d) For dispatching service employees. The following instances of excess service by dispatching service employees must be reported to FRA as required by this section:

(1) A dispatching service employee is on duty for more than 9 hours in any 24-hour period at an office where two or more shifts are employed.

(2) A dispatching service employee is on duty for more than 12 hours in any 24-hour period at any office where one shift is employed.

(e) For signal employees. The following instances of excess service by signal employees must be reported to FRA as required by this section:

(1) A signal employee is on duty for more than 12 consecutive hours.

(2) A signal employee continues on duty without at least 10 consecutive hours off duty during the preceding 24 hours.

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<sup>2</sup>Instances involving duty tours that are broken by four or more consecutive hours of off-duty time at a designated terminal which duty tours do not constitute more than a total of 12 hours time on duty are not required to be reported, provided such duty tours are

(3) A signal employee returns to duty without at least 10 consecutive hours off duty during the preceding 24 hours.

(f) Except as provided in paragraph (h) of this section, reports required by paragraphs (b) through (e) of this section shall be filed in writing on FRA Form F-6180-3<sup>3</sup> with the Office of Railroad Safety, Federal Railroad Administration, Washington, DC 20590. A separate form shall be used for each instance reported.

(g) Use of electronic signature. For the purpose of complying with paragraph (f) of this section, the signature required on Form FRA F-6180-3 may be provided to FRA by means of an electronic signature provided that:

(1) The record contains the printed name of the signer and the date and actual time that the signature was executed, and the meaning (such as authorship, review, or approval), associated with the signature;

(2) Each electronic signature shall be unique to one individual and shall not be used by, or assigned to, anyone else;

(3) Before a railroad, or a contractor or subcontractor to a railroad, establishes, assigns, certifies, or otherwise sanctions an individual's electronic signature, or any element of such electronic signature, the organization shall verify the identity of the individual;

(4) Persons using electronic signatures shall, prior to or at the time of such use, certify to the agency that the electronic signatures in their system, used on or after the

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immediately preceded by 8 or more consecutive hours off-duty time.

<sup>3</sup>Form may be obtained from the Office of Railroad Safety, Federal Railroad Administration, Washington, DC 20590. Reproduction is authorized.

effective date of this regulation, are the legally binding equivalent of traditional handwritten signatures;

(5) The certification shall be submitted, in paper form and signed with a traditional handwritten signature, to the Associate Administrator for Railroad Safety/Chief Safety Officer; and

(6) Persons using electronic signatures shall, upon agency request, provide additional certification or testimony that a specific electronic signature is the legally binding equivalent of the signer's handwritten signature.

(h) Exception. A railroad, or a contractor or subcontractor to a railroad, is excused from the requirements of paragraphs (a) and (f) of this section as to any employees for which--

(1) The railroad, or a contractor or subcontractor to a railroad, maintains hours of service records using an electronic recordkeeping system that complies with the requirements of subpart D of this part; and

(2) The electronic recordkeeping system referred to in paragraph (h)(1) of this section requires--

(i) the employee to enter an explanation for any excess service certified by the employee; and

(ii) the railroad, or a contractor or subcontractor of a railroad, to analyze each instance of excess service certified by one of its employees, make a determination as to whether each instance of excess service would be reportable under the provisions of

paragraphs (b) through (e) of this section, and allows the railroad, or a contractor or subcontractor to a railroad, to append its analysis to its employee's electronic record; and

(iii) allows FRA inspectors and State inspectors participating under 49 CFR Part 212 access to employee reports of excess service and any explanations provided.

9. Section 228.23 is revised to read as follows:

**§ 228.23 Criminal penalty.**

Any person who knowingly and willfully falsifies a report or record required to be kept under this part or otherwise knowingly and willfully violates any requirement of this part may be liable for criminal penalties of a fine up to \$5,000, imprisonment for up to two years, or both, in accordance with 49 U.S.C. 21311(a).

10. Add subpart D to read as follows:

**Subpart D—Electronic Recordkeeping**

Sec.

228.201 Electronic recordkeeping; general.

228.203 Program components.

228.205 Access to electronic records.

228.207 Training.

**Subpart D--Electronic Recordkeeping.**

**§ 228.201 Electronic recordkeeping; general.**

For purposes of compliance with the recordkeeping requirements of subpart B, a railroad, or a contractor or a subcontractor to a railroad may create and maintain any of

the records required by subpart B through electronic transmission, storage, and retrieval provided that all of the following conditions are met:

(1) The system used to generate the electronic record meets all requirements of this subpart;

(2) The electronically generated record contains the information required by § 228.11;

(3) The railroad, or contractor or subcontractor to the railroad, monitors its electronic database of employee hours of duty records through sufficient number of monitoring indicators to ensure a high degree of accuracy of these records; and

(4) The railroad, or contractor or subcontractor to the railroad, trains its employees on the proper use of the electronic recordkeeping system to enter the information necessary to create their hours of service record, as required by § 228.207.

(5) The railroad, or contractor or subcontractor to the railroad, maintains an information technology security program adequate to ensure the integrity of the system, including the prevention of unauthorized access to the program logic or individual records.

(6) FRA's Associate Administrator for Railroad Safety/Chief Safety Officer may prohibit or revoke the authority to use an electronic system if FRA finds the system is not properly secure, is inaccessible to FRA, or fails to record and store the information adequately and accurately. FRA will record such a determination in writing, including the basis for such action, and will provide a copy of its determination to the affected railroad, or contractor or subcontractor to a railroad.

**§ 228.203 Program components.**

(a) System security. The integrity of the program and database must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(1) Data input is restricted to the employee or train crew or signal gang whose time is being recorded, with the following exceptions:

(i) A railroad, or a contractor or subcontractor to a railroad, may allow its recordkeeping system to pre-populate fields of the hours of service record provided that--

(A) The recordkeeping system pre-populates fields of the hours of service record with information known to the railroad, or contractor or subcontractor to the railroad, to be factually accurate for a specific employee.

(B) The recordkeeping system may also provide the ability for employees to copy data from one field of a record into another field, where applicable.

(C) Estimated, historical, or arbitrary data are not used to pre-populate any field of an hours of service record.

(D) A railroad, or a contractor or a subcontractor to a railroad, is not in violation of this paragraph if it makes a good faith judgment as to the factual accuracy of the data for a specific employee but nevertheless errs in pre-populating a data field.

(E) The employee may make any necessary changes to the data by typing into the field, without having to access another screen or obtain clearance from the railroad, or a contractor or subcontractor to a railroad.

(ii) A railroad, or a contractor or a subcontractor to a railroad, shall allow employees to complete a verbal quick tie-up, or to transmit by facsimile or other electronic means the information necessary for a quick tie-up, if--

(A) The employee is released from duty at a location at which there is no terminal available;

(B) Computer systems are unavailable as a result of technical issues; or

(C) Access to computer terminals is delayed and the employee has exceeded his or her maximum allowed time on duty.

(2) No two individuals have the same electronic identity.

(3) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record.

(4) Any amendment to a record is either--

(i) Electronically stored apart from the record that it amends, or

(ii) Electronically attached to the record as information without changing the original record.

(5) Each amendment to a record uniquely identifies the individual making the amendment.

(6) The electronic system provides for the maintenance of inspection records as originally submitted without corruption or loss of data.

(7) Supervisors and crew management officials can access, but cannot delete or alter the records of any employee after the report-for-duty time of the employee or after the record has been certified by the reporting employee.

(b) Identification of the individual entering data. The program must be capable of identifying each individual who entered data for a given record. If a given record contains data entered by more than one individual, the program must be capable of identifying each individual who entered specific information within the record.

(c) Capabilities of program logic. The program logic must have the ability to--

- (1) Calculate the total time on duty for each employee, using data entered by the employee and treating each identified period as defined in § 228.5;
- (2) Identify input errors through the use of program edits;
- (3) Require records, including outstanding records, the completion of which was delayed, to be completed in chronological order;
- (4) Require reconciliation when the known (system-generated) prior time off differs from the prior time off reported by an employee;
- (5) Require explanation if the total time on duty reflected in the certified record exceeds the statutory maximum for the employee;
- (6) Require the use of a quick tie-up process when the employee has exceeded or is within three minutes of his or her statutory maximum time on duty;
- (7) Require that the employee's certified final release be not more than three minutes in the future, and that the employee may not certify a final release time for a current duty tour that is in the past, compared to the clock time of the computer system at the time that the record is certified, allowing for changes in time zones;
- (8) Require automatic modification to prevent miscalculation of an employee's total time on duty for a duty tour that spans changes from and to daylight

savings time;

(9) For train employees, require completion of a full record at the end of a duty tour when the employee initiates a tie-up with less than the statutory maximum time on duty and a quick tie-up is not mandated;

(10) For train employees, disallow use of a quick tie-up when the employee has time remaining to complete a full record, except as provided in paragraph (a)(1)(ii) of this section.

(11) Disallow any manipulation of the tie-up process that precludes compliance with any of the requirements specified by paragraphs (c)(1) through (c)(10) of this section.

(d) Search capabilities. The program must contain sufficient search criteria to allow any record to be retrieved through a search of any one or more of the following data fields, by specific date or by a date range not exceeding 30 days for the data fields specified by paragraphs (d) (1) and (d) (2) of this section, and not exceeding one day for the data fields specified by paragraphs (d)(3) through (d)(7) of this section:

- (1) Employee, by name or identification number;
- (2) Train or job symbol;
- (3) Origin location, either yard or station;
- (4) Released location, either yard or station;
- (5) Operating territory (i.e., division or service unit, subdivision, or railroad-identified line segment);
- (6) Certified records containing one or more instances of excess service; and

(7) Certified records containing duty tours in excess of 12 hours.

(e) The program must display individually each train or job assignment within a duty tour that is required to be reported by this part.

**§ 228.205 Access to electronic records.**

(a) FRA inspectors and State inspectors participating under 49 CFR Part 212 must have access to hours of service records created and maintained electronically that is obtained as required by § 228.9(b)(4).

(b) Railroads must establish and comply with procedures for providing an FRA inspector or participating State inspector with an identification number and temporary password for access to the system upon request, which access will be valid for a period not to exceed seven days. Access to the system must be provided as soon as possible and no later than 24 hours after a request for access.

(c) The inspection screen provided to FRA inspectors and participating State inspectors for searching employee hours of duty records must be formatted so that--

(1) Each data field entered by an employee on the input screen is visible to the FRA inspector or participating State inspector; and

(2) The data fields are searchable as described in § 228.203(d) and yield access to all records matching criteria specified in a search.

(3) Records are displayed in a manner that is both crew-based and duty tour oriented, so that the data pertaining to all employees who worked together as part of a crew or signal gang will be displayed together, and the record will include all of the assignments and activities of a given duty tour that are required to be recorded by this

part.

**§ 228.207 Training.**

(a) In general. A railroad, or a contractor or subcontractor to a railroad, shall provide its train employees, signal employees, and dispatching service employees and its supervisors of these employees with initial training and refresher training as provided in this section.

(b) Initial training. (1) Initial training shall include the following:

(i) Instructional components presented in a classroom setting or by electronic means; and

(ii) Experiential (“hands-on”) components; and

(iii) Training on--

(A) The aspects of the hours of service laws relevant to the employee’s position that are necessary to understanding the proper completion of the hours of service record required by this part, and

(B) The entry of hours of service data, into the electronic system or on the appropriate paper records used by the railroad or contractor or subcontractor to a railroad for whom the employee performs covered service; and

(iv) Testing to ensure that the objectives of training are met.

(2) Initial training shall be provided--

(i) To each current employee and supervisor of an employee as soon after

[INSERT DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER] as practicable; and

(ii) To new employees and supervisors prior to the time that they will be required to complete an hours of service record or supervise an employee required to complete an hours of service record.

(c) Refresher training. (1) The content and level of formality of refresher training should be tailored to the needs of the location and employees involved, except that the training shall--

(i) Emphasize any relevant changes to the hours of service laws, the reporting requirements in this part, or the carrier's electronic or other recordkeeping system since the employee last received training; and

(ii) Cover any areas in which supervisors or other railroad managers are finding recurrent errors in the employees' records through the monitoring indicators.

(2) Refresher training shall be provided to each employee any time that recurrent errors in records prepared by the employee, discovered through the monitoring indicators, suggest, for example, the employee's lack of understanding of how to complete hours of service records.

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