

Rail Labor and their individual and collective memberships, as well as the Transportation Trades Department, AFL-CIO (TTD)¹ have a direct interest in the safety and security of the United States Rail Network and appreciate the opportunity to comment. For those reasons as outlined herein, we collectively urge FRA to deny this waiver petition.

In 2003, the FRA solidified the importance of safety and security of the United States Rail Network through 49 C.F.R. part 241 (“Part 241”),² which ensured that all rail operations conducted in the United States were controlled by Train Dispatchers located in the United States. This Final Rule supplanted a similar interim rule instituted in the months following the September 11, 2001 terror attacks. In short, Part 241 mandated that the railroads, facilities, and individuals responsible for the dispatching of trains operating within the United States will be held to the stringent safety, security, and operational standards that have been instituted by the United States Government and its agencies that make the National Rail Network the safest in the world.

The requirement under Part 241 that the dispatching of U.S. rail operations is managed from within the country is in place in order to maintain a high level of safety and security for the transportation of goods and passengers. The continued allowance of Canadian Pacific to dispatch these operations from locations outside of the United States would undermine the safety and security of US rail operations. For the reasons outlined herein, Rail Labor strongly urges the FRA to reject CP’s request for relief as such relief would not be in the public’s interest. Accordingly, CP must be compelled to meet the obligations contained within 49 C.F.R. part 241 – United States Locational Requirement for Dispatching of United States Rail Operations.

1. Expansion of Petitioner’s 2018 Waiver to Include the Newport Subdivision Was Improper and Should Not Be Considered as Part of Any Waiver Extension

Initially, CP was granted a waiver for the 1.8-mile portion of territory extending from Windsor, Ontario, Canada into Detroit, Michigan in 2003. CP sought and was granted an extension of this waiver in 2008, 2013, and 2018. Then in 2020, after its acquisition of the Central Maine and Quebec Railway US Inc. (“CMQR”), the CP made an unprecedented request to modify its waiver for the Windsor Subdivision to include the extraterritorial dispatching of 23.44 miles of the CMQR Newport Subdivision. On July 22, 2020, the FRA granted the requested expansion of relief from Federal Regulations despite the fact that the territory exceeded the five-mile limit for fringe border dispatching under 241.7(c), was located over 500 miles away from the location initially approved for the waiver, and without responding to or acknowledging in its decision Rail Labor’s numerous safety concerns regarding such action which were filed with the agency on July 17, 2020 – all of which Rail Labor continues to maintain (copy attached).

While the 1.8-mile portion of the Windsor Subdivision was dispatched from Canada prior to the implementation of Part 241, at no point prior to the improper July 2020 waiver modification was the Newport Subdivision ever dispatched from outside the United States. In fact, the third-party contractor hired to dispatch the territory prior to CP’s acquisition, RailTerm, dispatched the entire

¹ TTD consists of 37 affiliated unions representing the totality of rail labor, including rail workers who operate on these lines.

² 67 FR 75937, final rule published on December 10, 2002.

Newport Subdivision, both the portions in the United States and Canada, from its U.S. based office in Rutland, Vermont. However, upon transfer of control from CMQR and RailTerm, CP chose to split control of the Newport Subdivision between the U.S. and Canada, then argued in its May 19, 2020 filing that having the line under the control of one operations center would allow for consistent operations over the entire line. Essentially, CP created a problem that did not exist prior to its acquisition, only to petition the FRA for relief from a regulation that otherwise would not have been needed. Thus, the 2020 improper expansion of the CP's waiver only served to further degrade the safety and security of the U.S. rail network.

If the Petitioner truly believes that having the line controlled from a single location would be in the public interest, it was and is still free to transfer control of the entire Newport Subdivision to its U.S. Operations Center in Minneapolis, MN. No restrictions exist under Canadian Law that would prevent Train Dispatchers located in the United States from controlling lines in Canada. This would satisfy CP's desire to have a single Train Dispatcher control the entire line while ensuring that the relevant Train Dispatcher is held to the higher standards of safe operating practices demanded by the rules and regulations of the Federal Railroad Administration and the U.S. Government.

2. Canadian Train Dispatching Operations Lack Necessary Regulatory Oversight

The regulatory and safety oversight systems in the United States and Canada differ in a number of ways. For example, Canadian Train Dispatchers are not subject to the same critical drug and alcohol testing mandate as their U.S. counterparts. Most notably, Canadian Train Dispatchers are not subject to random testing under Canadian Law. Given the potential impairment of cognitive function of an individual under the influence of drugs or alcohol, testing is an essential element in ensuring that railroads operate as safely as possible. As such, all U.S. railroad employees in safety sensitive positions, including Train Dispatchers, are subject to mandatory random drug and alcohol testing, as well as reasonable suspicion, reasonable cause, post-accident, and pre-employment testing under 49 C.F.R. part 219.

Another significant deficiency in Canadian regulation concerns the number of hours a Train Dispatcher may work in a given 24-hour period. Transport Canada currently has no restrictions on the number of hours a Train Dispatcher may work. This constitutes a serious and unacceptable safety risk that is forbidden under U.S. regulation. In the United States, Title 49 U.S.C. §21105(b) limits the total number of hours an employee in train dispatching service may work to no more than nine (9) hours in any continuous twenty-four (24) hour period. The purpose of these limitations is well established and necessary for the safe operation of a railroad. As the FRA itself stated in its reasoning for 49 C.F.R. part 241, fatigue can cause dispatchers to make mistakes which may lead to catastrophic railroad accidents, much the same as alcohol or drug impairment (67 Fed. Reg. 75948).

While the Canada Labour Code places a limit on the number of hours worked in weekly (48) and biweekly (80) periods, there are no protections in place ensuring that Canadian Train Dispatchers are not subject to excessively long hours and/or multiple contiguous tours of duty. This is of particular significance when considering this petitioner's request given its recent history of 49

U.S.C. §21105 violations at its U.S. based Minneapolis Operations Center where, in a period of just ninety (90) days (August – October 2022), the FRA documented **130 occurrences of excessive service**.³ Had such serious safety violations occurred outside of the U.S., the FRA would have no ability to intervene as it did then to halt such egregious violations.

3. Regulatory Waivers Are Not and Cannot Be Granted on a Permanent Basis

In 2018, the Association of American Railroads (AAR) submitted the following comments to the FRA regarding automation in the railroad industry:

AAR strongly encourages DOT to create regulatory certainty regarding long-standing waivers whose value has been proven through successful implementation by making the waivers permanent via rule. Many of these existing waivers promote the use of technology to improve safety. Further, FRA should issue waivers of indefinite duration and provide procedure (sic) for expedited conversion of time-limited waivers to permanent where equivalent or better level of safety is established.⁴

The rail industry has made it clear that it views waivers as a way to permanently evade safety regulations, without the full review afforded by a proposal to permanently change the Code of Federal Regulations (CFR). A proposed rule change would provide public notice, opportunity for comment, and – if finalized – would be publicly viewable easily in the CFR. In contrast, a permanent waiver would only be viewable in a docket with no note in the CFR to indicate that not every railroad was subject to the same rules. This would create ambiguity and would prevent the public from quickly being able to understand the operating and safety standards applicable to each railroad.

Further, the standard waiver process includes a number of important safeguards including periodic reviews. Removing the periodic review and renewal components of safety waivers would deprive the public of critical transparency and reporting structures. Often, the reporting that is required as part of waiver renewal is the most accurate information that is available about rail safety for a specific geographic area. If the railroad no longer had to provide this information in a publicly available docket, the public would be deprived of the opportunity to regularly review the ongoing safety and necessity of the waiver in question.

As CP and other carriers are keenly aware, requests for permanent waivers are akin to seeking permanent changes to regulations and only serve to circumvent the proper regulatory process. Allowing railroads to obtain permanent waivers would arbitrarily and capriciously remove transparency, accountability, and opportunity for public comment, likely violating the Administrative Procedures Act (APA).⁵

³ See attached November 18, 2022 letter from FRA to CP EVP Operations, Mark Redd

⁴ <https://www.regulations.gov/comment/FRA-2018-0027-3256>, page 9

⁵ 5 U.S. Code § 706 (2)

Waivers granted by the FRA should always provide an expiration date within no more than five years of approval to allow the waiver to be reviewed on a regular basis to ensure the waiver is still necessary and that the railroad is continuing to abide by all relevant safety and reporting requirements. Rail Labor strongly urges FRA to stick to current practice and deny CP's attempt to secure a permanent waiver.

CONCLUSION

49 C.F.R. Part 241 (67 FR 75937) was promulgated for the purpose of establishing a U.S. locational requirement for the dispatching of all U.S. Rail Operations. The position of the American Train Dispatchers Association in particular, and Rail Labor in general, is that the requirements of these regulations must not be waived as such waivers will only serve to erode the safety and security of the operations that the regulations were established to protect following the September 11 attacks that shook this country to its core. CP's request for a permanent waiver from these requirements, if granted, would not only degrade rail safety, but set a dangerous precedent that would open Pandora's box to all sorts of similar requests to sidestep and undermine the regulatory process. Therefore, we hereby formally oppose the relief sought by Canadian Pacific in its request for a waiver of compliance from the provisions of 49 C.F.R. part 241. The petition should be denied by FRA.

Thank you for your consideration.

Respectfully submitted,

Comments of the

American Train Dispatchers Association

Brotherhood of Locomotive Engineers and Trainmen - IBT

Brotherhood of Maintenance of Way Employees Division - IBT

Brotherhood of Railway Carmen

Brotherhood of Railroad Signalmen

International Association of Machinists and Aerospace Workers

**International Association of Sheet Metal, Air, Rail and Transportation Workers-
Mechanical Division**

**International Association of Sheet Metal, Air, Rail and Transportation Workers –
Transportation Division**

**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and
Helpers**

International Brotherhood of Electrical Workers

National Conference of Firemen & Oilers, SEIU

Transportation Communications Union

Transportation Trades Department, AFL-CIO

Transport Workers Union of America