



BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION BURLINGTON NORTHERN SYSTEM FEDERATION

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March 30, 2023

On January 6, 2020, we sent a letter to many newspapers, city councils, and elected representatives in WI, IA, MN, ND, SD, MT, ID, WA, and OR, and a copy of that letter is attached. The letter addressed “a matter that we believe could have dire consequences for public safety, specifically in regard to the possibility of a serious train derailment.” Some newspapers ran articles based on the letter that our System Federation wrote. For example, on January 12, 2020, the Fargo Forum ran an article by Patrick Springer that was based on our letter.

During the three years since the last article was published, we have watched our membership dwindle in Seniority District 300, which includes Raymond, MN, where this latest derailment occurred. The chart below shows the decrease in membership in Seniority District 300:

YEAR	Total Membership Dist. 300
2016	1,052
2017	927
2018	839
2019	760
2020	725
2021	694
2022	635
2023	618

We are Union Representatives with The Brotherhood of Maintenance of Way Employees Division, representing the men and women who construct and maintain railroad tracks, bridges, and buildings on BNSF Railway. Our concern focuses on BNSF Railway’s continued plan to decrease the visual inspections made by our members and on the continuing decrease in our membership. As we stated in 2020, BNSF Railway reduced the number of visual track inspections that are crucial in catching any errors the new system makes. New technology may supplement visual track inspections, but it cannot replace what a track inspector can see and feel when he/she is actually on the tracks. It is also essential to ensure an adequate workforce in this age of Precision Scheduling Railroading (PSR) for railroads. That is clearly not the case at this point, just based on pure numbers. While we currently do not know what caused the derailment, we wanted to provide some information on the effects of PSR in the area and the visual inspections.

As we stated on April 1, 2019, BNSF Railway changed their own track safety standards. BNSF unilaterally changed their track inspection protocol, frequency, and key route definition. Not only has this affected the safety of BNSF employees but it has also put the general public at risk, and we cannot tolerate that. However, the rule remains unchanged, and that has resulted in fewer inspections, plain and simple. **For example, the Raymond, MN, area where this derailment happened used to be inspected seven (7) days a week, but then the inspections dropped to four (4) times per week, and now the inspections have dropped further with only two (2) inspections per week. The roadmaster in the area used to have seven (7) inspectors roll up to him, but now there are only four (4) inspectors.**

BNSF Railway made a change to their Engineering Instructions when they changed the definition of “key route” and inspection frequency, thus reducing the number of visual inspections or, put more simply, there are now fewer men and women who visually inspect and examine the tracks to look for problems that could derail the train. More details on this can be found in the attached letter. “Key routes” were described as:

“Note: Key routes have a total of 10,000 or more cars containing hazardous material traveling across them in a 12-month period.”

The Engineering Instructions used to read (in Revision: 10/1/18 & 12/1/14):

1. Track Inspection on Key Routes

Track inspection on all BNSF main tracks and sidings that have been designated as "key routes" will be conducted at twice the frequency required by the FRA Track Safety Standards (see the following link for the map of key routes).

Note: Key routes have a total of 10,000 or more cars containing hazardous material traveling across them in a 12-month period

The rule changed in BNSF Railway’s Engineering Instructions dated April 1, 2019, when that Note was removed, and the frequency rate dropped. It now reads:

1. Track Inspection on Key Routes

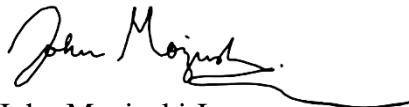
Track inspection on all BNSF main tracks and sidings that have been designated as "key routes" will be conducted in accordance with the FRA Track Safety Standards (see link for the map of key routes).

We had hoped BNSF would reverse their decision. But now we are waiting for the next derailment and waiting to see how BNSF will spin it when it does. It could happen in your community, or it could be the community down the tracks. We urge you act now to encourage your readers to contact their congressional representatives and to insist that they pass legislation that will keep the visual frequency of inspections, that will establish a set amount of BMWED workers per miles of railroad tracks, and that will eliminate Precision Scheduling Railroading (PSR) before it’s too late.

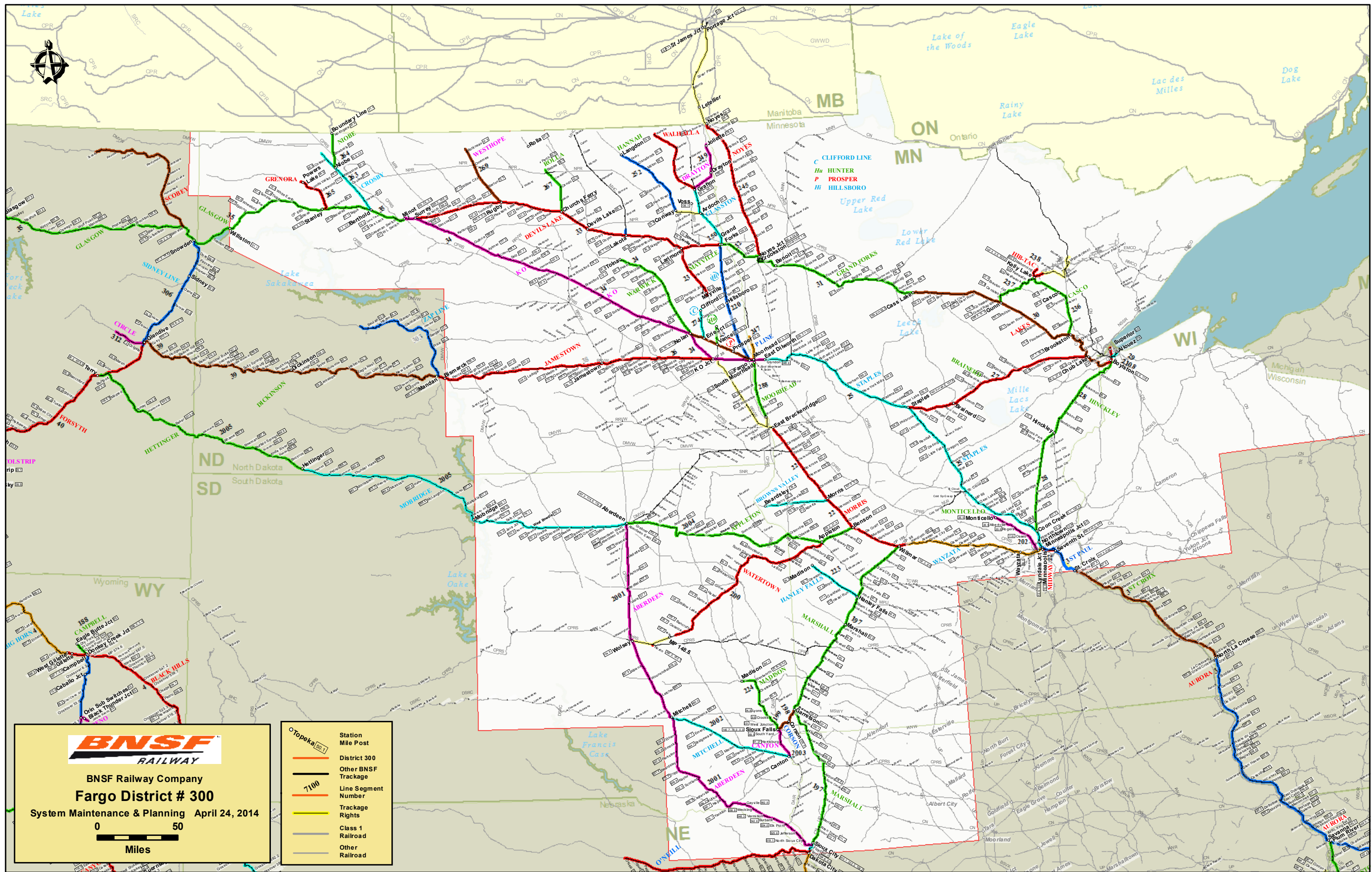
We have attached District 300 seniority map so you can better understand what we are talking about. This is a small sample size; as you saw in the testimony at the hearings in front of the Surface Transportation Board last year, employment on Railroads is down because of PSR.

On behalf of the Brotherhood of Maintenance of Way, we thank you in advance for taking action. Our contact information is on the letterhead if you have any questions or need further information.

Respectfully,

A handwritten signature in black ink, appearing to read "John Mozinski Jr.", with a long horizontal flourish extending to the right.

John Mozinski Jr.
General Chairman



BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

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January 6, 2020

The Forum of Fargo-Moorhead
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To the Editor:

We are writing to you concerning a matter that we believe could have dire consequences for public safety, specifically in regard to the possibility of a serious train derailment.

We are Union Representatives with The Brotherhood of Maintenance of Way Employees Division, representing the men and women who construct and maintain railroad tracks, bridges, and buildings on BNSF Railway. Our concern focuses on BNSF Railway's plan to begin testing a new, automated system for inspecting the railroad tracks across the state. While the Union fully supports new technology when it increases the safety for its members and for the general public, we are alarmed that the testing of this new automated system of track inspection could potentially fail because BNSF Railway has reduced the number of visual track inspections that are crucial in catching any errors the new system makes. New technology may supplement visual track inspections, but it cannot replace what a Track Inspector can see and feel when he/she is actually on the tracks. Because of this, the question to ask is not **if** a derailment will occur on the railroad tracks, but rather **when** a derailment will occur. This is a serious issue that requires your attention and review. We hope you will take the time to read this letter and the enclosed documents.

We had hoped that pursuing a legal route would be successful in stopping the Federal Railroad Administration (FRA) from allowing the Burlington Northern Santa Fe (BNSF) Railway to run a test program from Lincoln, Nebraska to Donkey Creek, Wyoming that suspends several track safety standards that mandate the minimum frequency of manual visual track inspections. We challenged the FRA's temporary suspension of this track safety standard. In a decision on October 11, 2019, the United States Court of Appeals allowed the FRA and BNSF to continue with their

test program. While this may be only a test program, it is actually another step in BNSF's intention to reduce several track safety standards, first from their own rules and now using the test program with the FRA. You see, when the test program reaches its final phase, the tracks will only be visually inspected two (2) times over thirty (30) days. BNSF Railway cares about safety until it doesn't. The two recent cases show that this is true, and this is the reason for our urgency in sending out this letter. The court case ended with a very disappointing decision because it "suspends several track safety standards." BNSF also implemented an internal rule change on April 1, 2019, which lowered the frequency of visual inspections significantly.

On April 1, 2019, BNSF Railway changed their own track safety standards. BNSF unilaterally changed their Track Inspection protocol, frequency, and key route definition. Not only has this affected the safety of BNSF employees but it has also put the General Public at risk, and we cannot stand for that. BNSF Railway made a change to their Engineering Instruction when they changed the definition of "key route" and inspection frequency, thus reducing the number of visual inspections or, put more simply, there are now fewer men and women who visually inspect and examine the tracks to look for problems that could derail the train. "Key routes" were described as:

"Note: Key routes have a total of 10,000 or more cars containing hazardous material traveling across them in a 12-month period."

The rule changed in BNSF Railway's Engineering Instructions dated April 1, 2019, when that Note was removed, and the frequency rate dropped. It now reads:

1. Track Inspection on Key Routes

Track inspection on all BNSF main tracks and sidings that have been designated as "key routes" will be conducted in accordance with the FRA Track Safety Standards (see link for the map of key routes).

The Engineering Instructions used to read in Revision: 10/1/18 & 12/1/14:

1. Track Inspection on Key Routes

Track inspection on all BNSF main tracks and sidings that have been designated as "key routes" will be conducted at twice the frequency required by the FRA Track Safety Standards (see the following link for the map of key routes).

Note: Key routes have a total of 10,000 or more cars containing hazardous material traveling across them in a 12-month period

Now BNSF is using a formula instead of a simple definition, which results in fewer inspections, plain and simple. For example, the Staples Subdivision, which runs from Dilworth, MN to Minneapolis, MN was a "Key Route" and was inspected four (4) times per week; now it is inspected two (2) times per week.

Perhaps the most notable change occurred on the KO Subdivision, which stretches across North Dakota at a diagonal line from Minot, ND to Moorhead, MN. It encompasses Casselton, ND where a catastrophic derailment happened in December 20, 2013. That area used to be inspected seven

(7) times per week but is now down to four (4) times per week and may be moving down to two (2) times per week. In our mind, this is equivalent to BNSF playing a game of Russian roulette with the general public's safety!

The railroad will refute that, saying that they have technology that now allows these inspections to be "ENHANCED." While technology is not a bad thing, BNSF uses it as a test to see how the inspectors are doing. With the technology the railroad uses, it is still necessary to double-check the inspections to verify the results from the technology.

When the ground freezes in these areas from November to March, the track does not move very much. However, the new technology only measures deviations, which means that their technology will not be able to detect the problems that occur when the ground is frozen. By reducing the frequency of inspections, a derailment is almost guaranteed to occur.

We had hoped BNSF would reverse their decision. But now we are waiting for the next derailment and seeing how the railroad will spin it when it does. It could happen in your community, or it could be the community down the tracks. We urge you act now to encourage your readers to contact their congressional representatives and insist that they pass legislation that will keep the frequency of inspections up before it's too late.

For your reference, contact information for BNSF is listed below:

Amy McBeth, Director Public Affairs
Manitoba, MN, ND, SD and WI
Tel: 763-782-3212; Fax: 763-782-3432

Any Williams
Director, Public Affairs
IL, IA, KS, KY, MO, NE
Tel: 817-867-6369; Fax: 817-352-7925

Maia LaSalle
Director Public Affairs
MT, WY
Tel: 406-399-0330

On behalf of the Brotherhood of Maintenance of Way, we thank you in advance for taking action. Our contact information is on the letterhead if you have any questions or need further information.

Sincerely,



David L. Carroll
General Chairman



John A. Mozinski, Jr.
Vice Chairman/Secretary-Treasurer

8. Current Roster Members and Prior Applicants

Current members of the Chapter 19 roster who remain interested in inclusion on the Chapter 19 roster only need to indicate that they are reapplying and submit updates (if any) to their applications on file. Current members do not need to resubmit their applications. Individuals who have previously applied but have not been selected must submit new applications to reapply. If an applicant, including a current or former roster member, has previously submitted materials referred to in item 9, such materials need not be resubmitted.

9. Public Disclosure

Applications are covered by a Privacy Act System of Records Notice and are not subject to public disclosure and will not be posted publicly on www.regulations.gov. They may be referred to other federal agencies and Congressional committees in the course of determining eligibility for the roster, and shared with foreign governments and the NAFTA Secretariat in the course of panel selection.

10. False Statements

Pursuant to section 402(a)(5) of the NAFTA Implementation Act, false statements by applicants regarding their personal or professional qualifications, or financial or other relevant interests that bear on the applicants' suitability for placement on the Chapter 19 roster or for appointment to binational panels, are subject to criminal sanctions under 18 U.S.C. 1001.

Juan Millan,

Assistant United States Trade Representative for Monitoring and Enforcement, Office of the U.S. Trade Representative.

[FR Doc. 2018-24119 Filed 11-2-18; 8:45 am]

BILLING CODE 3290-F9-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2018-0091]

Approval of BNSF Railway Company Test Program To Evaluate Automated Track Inspection Technologies

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

ACTION: Notice of approval.

SUMMARY: FRA is issuing this notice to explain its rationale for approving a BNSF Railway Company (BNSF) Test Program designed to evaluate the effectiveness of various types of automated track inspection technologies and for granting a limited, temporary suspension of one Federal railroad safety requirement necessary to facilitate the conduct of the Test Program.

FOR FURTHER INFORMATION CONTACT: Yu-Jiang Zhang, Staff Director, Track Division, Office of Railroad Safety, FRA, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone (202) 493-6460 or email yujiang.zhang@dot.gov; Aaron Moore, Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone (202) 493-7009 or email aaron.moore@dot.gov.

SUPPLEMENTARY INFORMATION: On July 31, 2018, BNSF petitioned FRA under Title 49 Code of Federal Regulations (CFR) Section 211.51 to suspend certain requirements of its track safety regulations to conduct a pilot program testing various types of automated track inspection methodologies on identified portions of BNSF's Powder River Division main line and siding tracks. BNSF also submitted a Test Program providing a description of the proposed pilot program and the geographic scope of the testing territory. After review and analysis of the Petition and Test

Program, on September 26, 2018, subject to certain conditions designed to ensure safety, FRA approved BNSF's Test Program and suspended the requirements of 49 CFR 213.233(c) as necessary to carry out the Test Program.¹ As required by 49 CFR 211.51(c), FRA is providing this explanatory statement describing the Test Program.

The Test Program specifies that the pilot program will be conducted on approximately 1,348 miles of main and siding tracks from Lincoln, Nebraska and Donkey Creek, Wyoming and back to Lincoln, Nebraska via BNSF's coal loop excluding the Orin Subdivision. Specifically, the Test Territory includes the following track segments spanning seven subdivisions of BNSF's Powder River Subdivision:

1. Ravenna (Milepost (MP) 11.082 to MP 128.200);
2. Sand Hills (MP 128.2 to MP 364.1);
3. Butte (MP 364.1 to MP 476.1);
4. Black Hills (MP 476.1 to MP 586.286);
5. Canyon (MP 90.4 to MP 133.2);
6. Valley (MP 0.00 to 90.4); and
7. Angora (MP 33.826 to MP 0.3).

The Test Program explains that tonnage over the Test Territory varies by subdivision from 105 million gross tons (MGT) to 198 MGT and that the primary traffic over the Test Territory is coal traffic. Further, BNSF indicates that 55 percent of the ties in the Test Territory are concrete and 45 percent are wood, with 520 control points, 292 bridges and 598 turnouts included within the territory.

The Test Program is designed to test the use of manned and unmanned track geometry cars for track inspection as a viable alternative to manual visual inspections and to implement and test an optical visual platform to supplement manual visual inspections. The Test Program will be carried out in four separate phases over the course of one year as detailed in Table 1 below:

Phase	Days	Inspection	Metric
1	1-60	<ul style="list-style-type: none"> • Maintain current manual visual inspection frequency. • Target of approximately weekly geometry car frequency. • Joint BNSF/FRA "baseline" manual field inspection 	Below 2014 baseline for: 1. Unprotected Red tags/100 miles = 6.95.
2	61-120	<ul style="list-style-type: none"> • Weekly mandated manual visual main line inspections; monthly sidings. • Target of approximately weekly mainline geometry car frequency; monthly sidings. • ATIP Inspection near end of phase 2 	Reduction from baseline: 1. Unprotected Red tags/100 miles = 5.0 or below measured quarterly (28% reduction).

¹ On October 24, 2018, in response to a request from BNSF, FRA modified the conditions of its September 26, 2018 approval.

Phase	Days	Inspection	Metric
3	121–300	<ul style="list-style-type: none"> • Data-driven focused manual visual inspections • Twice monthly mandated manual visual mainline inspections; monthly sidings. • Data driven geometry car frequency, with a minimum of two such tests per month. • Automated Optical inspection platform added at same frequency of track geometry testing. 	Reduction from baseline: 1. Unprotected Red tags/100 miles = 4.8 or below measured quarterly (31% reduction).
4	301–365	<ul style="list-style-type: none"> • ATIP Test end of phase 3 • Data-driven focused manual visual inspections • Twice monthly manual visual mainline inspections; monthly sidings. • Data driven geometry car testing frequency, with a minimum of two such tests per month. • Data driven optical testing frequency, with a minimum of two such tests per month. • Additional technology tested • Joint BNSF/FRA Manual Field Inspection 	Reduction from baseline: 1. Unprotected Red tags/100 miles = 4.6 or below measured quarterly (34% reduction).

Table 1: Phases of Test Program.

FRA approved the Test Program and granted BNSF's petition for a temporary suspension of 49 CFR 213.233(c) subject to certain conditions designed to ensure the safety of the Test Program. Among those conditions, BNSF must demonstrate to FRA how it will implement the "data driven focused manual visual inspections" in Phases 3 and 4 of the Test Program and the railroad must meet the metrics specified in the Test Program to monitor and measure the effectiveness of the technologies being tested. If those metrics cannot be met in any phase of the program, BNSF must revise the Test Program. A copy of FRA's letters approving BNSF's Test Program and granting the requested limited, temporary suspension of 49 CFR 213.233(c) is available in the public docket at www.regulations.gov (docket no. FRA–2018–0091).

FRA finds that the temporary, limited suspension of 49 CFR 213.233(c) is necessary to the conduct of the approved Test Program which is specifically designed to evaluate the effectiveness of various types of automated track inspection technologies. FRA also finds that the scope and application of the granted suspension of 49 CFR 213.233(c) as applied to the Test Program is limited to that necessary to facilitate the conduct of the Test Program.

Robert C. Lauby,

*Associate Administrator for Railroad Safety
Chief Safety Officer.*

[FR Doc. 2018–24111 Filed 11–2–18; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2018–0083]

Petition for Waiver of Compliance

Under part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that on October 4, 2018, the BNSF Railway Company (BNSF), petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR 225.25, *Recordkeeping*. FRA assigned the petition Docket Number FRA–2018–0083.

Specifically, BNSF seeks a waiver of compliance from 49 CFR 225.25(h) which states, in part, "Except as provided in paragraph (h)(15) of this section, a listing of all injuries and occupational illnesses reported to FRA as having occurred at an establishment shall be posted in a conspicuous location at that establishment, within 30 days after the expiration of the month during which the injuries and illnesses occurred, if the establishment has been in continual operation for a minimum of 90 calendar days."

BNSF requests a waiver regarding the actual posting of the monthly listing of employee reportable injuries, occupational illnesses, and fatalities, as reported to FRA that have occurred during the past 12-month period at each establishment. In lieu of physically posting a "paper" copy of the monthly listing at each establishment, BNSF has developed an electronic version that would be available to its employees by accessing this information on computer terminals located at company facilities and personal devices. BNSF would place posters on the notice boards at

each establishment indicating that the monthly listings are available to be viewed in two ways: electronically through access from a computer terminal, or through direct request of a manager.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- **Website:** <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- **Fax:** 202–493–2251.
- **Mail:** Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590.
- **Hand Delivery:** 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

END OF ATTACHMENT 1

COURT DECISION

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1048

September Term, 2019

FILED ON: OCTOBER 11, 2019

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT,
PETITIONER

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND FEDERAL RAILROAD ADMINISTRATION,
RESPONDENTS

ASSOCIATION OF AMERICAN RAILROADS,
INTERVENOR

On Petition for Review of a Decision of the
Federal Railroad Administration

Before: PILLARD and RAO, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

This appeal from a decision of the Federal Railroad Administration (“FRA”) was presented to the court and briefed and argued by counsel. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the following reasons, it is

ORDERED and **ADJUDGED** that the petition for review be denied.

In order to conduct a test of automated track inspection technologies and methodologies, BNSF Railway submitted a proposed Test Program and petition to FRA to suspend several track safety standards. After a lengthy back and forth, FRA approved BNSF’s Test Program and temporarily suspended 49 C.F.R. § 213.233(c), which mandates the minimum frequency of manual visual track inspections. The Brotherhood of Maintenance of Way Employees Division/International Brotherhood of Teamsters (the “Union”) challenges FRA’s temporary suspension of this track safety standard.

FRA has authority to “temporarily suspend compliance with a substantive rule” if suspension “is necessary to the conduct of a . . . test program,” “is limited in scope and application to such relief as may be necessary to facilitate the conduct of the test program,” and “is conditioned

on the observance of standards sufficient to assure safety.” 49 C.F.R. § 211.51 (“suspension regulation”). FRA approved the proposed Test Program by sending BNSF an Approval Letter setting out the Test Program’s parameters and publishing a notice in the Federal Register explaining its decision to temporarily suspend § 213.233(c). *See* Letter from Ronald Batory, Administrator, FRA, to John Cech, Vice President of Engineering, BNSF (Sept. 26, 2018) (“Approval Letter”); 83 Fed. Reg. 55,449 (Nov. 5, 2018) (“Notice”). In the Notice, FRA described the Test Program, which takes place over four phases. In each phase, automated track inspection technologies and targeted manual track inspection methods are introduced while the frequency of current manual track inspections is reduced. BNSF must meet increasingly stringent safety benchmarks at each phase of the Program in order to advance to the next. The purpose of the Test Program is to “test the use of manned and unmanned track geometry cars for track inspection as a viable alternative to manual visual inspections and to implement and test an optical visual platform to supplement manual visual inspections.” 83 Fed. Reg. at 55,449. The agency explained that the limited and temporary suspension of the manual inspection requirements was necessary to the Test Program because the Program “is specifically designed to evaluate the effectiveness of various types of automated track inspection technologies.” *Id.* at 55,450. FRA imposed on BNSF safety precautions and reporting requirements as a condition of approving the Test Program and reserved FRA’s right to require BNSF to revise the Program if it fails to meet the Test Program’s safety metrics. *See id.*

After FRA published the Notice, the Union filed a petition for reconsideration with the agency arguing that FRA failed to comply with the suspension regulation. In denying the petition, FRA expanded on the necessity and safety rationale of the Notice. *See* FRA, Response to Petition for Reconsideration filed in Docket No. FRA-2018-0091; Approval of BNSF Railway Company Test Program to Evaluate Automated Track Inspection Technologies (Feb. 8, 2019) (“Reconsideration Decision”). FRA explained that the Test Program is designed to “determine whether a specific combination of visual and automated inspections” enhances safety and that it is “not possible to test the effectiveness of such new methodologies if current inspection practices are conducted alongside the Test Program.” *Id.* at 7. FRA also explained how the safety conditions set out in the Approval Letter and the Notice adequately assure the Test Program’s safety. *See id.* at 7–8. Pursuant to the Hobbs Administrative Orders Review Act, the Union timely petitioned this court for review of FRA’s suspension of the manual inspection requirements. *See* 28 U.S.C. § 2342.

This court reviews Hobbs Act petitions under the standards set out in the Administrative Procedure Act. *See BNSF Ry. Co. v. U.S. Dep’t of Transp.*, 566 F.3d 200, 203 (D.C. Cir. 2009). The Union argues that FRA’s suspension must be vacated under the arbitrary and capricious standard of review. This standard requires the agency to demonstrate a “rational connection between the facts found and the choice made,” *id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)), but “forbids a court from substituting its judgment for that of the agency,” *Env’tl. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). Furthermore, “an agency action may be set aside as arbitrary and capricious if the agency fails to ‘comply with its own regulations.’” *Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (quoting *Environmental, LLC v. FCC*, 661 F.3d 80, 85 (D.C. Cir. 2011)).

In its petition for review, the Union again argues that FRA failed to comply with the suspension regulation’s necessity and safety requirements. First, the Union argues FRA did not provide a reasoned explanation for why it was “necessary” to suspend the current manual

inspections to facilitate the Test Program, relying in part on alleged inconsistencies between FRA's reasoning in the Reconsideration Decision and the Notice. Second, the Union argues that FRA did not adequately explain how the conditions imposed on the Test Program are "sufficient to assure safety."

We hold that FRA engaged in reasoned decisionmaking. First, FRA has maintained its rationale regarding necessity—that it is "not possible to test the effectiveness" of "new combinations of visual and automated inspections at different frequencies" without suspending the regulation—from its initial approval of the Test Program. Reconsideration Decision at 7; *see also* 83 Fed. Reg. at 55,449–55,450. In its petition for suspension, BNSF indicated that the Test Program seeks to evaluate a new inspection methodology that combines automated and manual inspections to allow human inspectors to "more effectively verify and focus on the identified track anomalies." BNSF Railway, Petition for a Temporary Suspension of 49 C.F.R. § 213.233(b) and (c) to Allow for the Testing of Automated Track Inspection Methodologies, at 1 (July 31, 2018). In the Notice, FRA set out the phased Test Program, including various adjustments to the frequency of manual and automated inspections and "[d]ata-driven focused manual visual inspections." 83 Fed. Reg. at 55,450. FRA also indicated the technology is being tested as an "alternative" and "supplement" to the current manual inspection method. *Id.* at 55,449. Finally, FRA advanced the same rationale in the Reconsideration Decision—the Test Program is designed to "help determine whether a specific combination of visual and automated inspections produces the greatest results for both safety and operational benefits." Reconsideration Decision at 7. The continuation of the current manual inspection schedule would preclude the Test Program from "provid[ing] the type of data it meant to provide" regarding the effectiveness of the automated inspection technology. *See id.*

FRA adequately and consistently explained this rationale in its Approval Letter, Notice, and Reconsideration Decision. *See Globalstar, Inc. v. FCC*, 564 F.3d 476, 479–80 (D.C. Cir. 2009) ("The 2007 Reconsideration Order was an outgrowth of the ongoing rulemaking."). FRA has reasonably explained why the temporary suspension is "necessary" to accomplish the purposes of the Test Program. *See* 49 C.F.R. § 211.51(a)(1); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Second, FRA has adequately explained how the Test Program is "conditioned on the observance of standards sufficient to assure safety." 49 C.F.R. § 211.51(a)(3). In the Notice and the Approval Letter, FRA explained how program conditions are "designed to ensure the safety of the Test Program." *See* 83 Fed. Reg. at 55,450; Approval Letter at 2–4. The Test Program can proceed only if BNSF meets safety benchmarks of increasing stringency at each phase. *See* 83 Fed. Reg. at 55,450. FRA employed this careful approach "to ensure that each phase of the Test Program results in continuous safety improvement before moving to the next phase." Reconsideration Decision at 7–8. FRA also responded to safety concerns raised by the Union's declarants. The Union's declarants testified that some defects can be spotted only by human inspectors. FRA rebutted this testimony by explaining that "automated inspections have proven to be significantly more effective at detecting and measuring geometry conditions" than human inspectors; the defects cited by the Union declarants "generally include a change in track geometry, which is detectable by the automated inspections;" and any remaining defects will be detectable by the continued manual inspections "before they pose a safety risk." *Id.* at 8. The agency thus "engage[d] the arguments raised before it," *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992), and reasonably explained how the temporary suspension of manual inspections is "conditioned on the observance of standards sufficient to assure safety." 49 C.F.R. § 211.51(a)(3);

see also Otis Elevator Co. v. Sec’y of Labor, 762 F.3d 116, 122–23 (D.C. Cir. 2014).¹

In sum, FRA has articulated “a rational connection between the facts found and the choice made.” *Nat’l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43). Because the agency’s decision to temporarily suspend § 213.233(c) was not arbitrary and capricious, we deny the Union’s petition for review and lift this court’s May 22, 2019, order granting in part the Union’s motion for stay pending judicial review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Deputy Clerk

¹ The Union also argues that FRA’s approval of the Test Program violated the § 213.233(d) remediation requirement, which was not suspended. The Union did not adequately raise this argument in its petition for reconsideration and it is therefore waived. *See Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012) (“[I]ssues not raised before an agency are waived and will not be considered by a court on review.” (quoting *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004))).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

PARTIAL STAY**No. 19-1048****September Term, 2018****FRA-83FR55449****Filed On: May 23, 2019**

Brotherhood of Maintenance of Way
Employes Division/IBT,

Petitioner

v.

United States Department of Transportation
and Federal Railroad Administration,

Respondents

Association of American Railroads,
Intervenor

BEFORE: Tatel, Millett, and Rao, Circuit Judges

ORDER

Upon consideration of the motion for stay pending judicial review, the responses thereto, and the reply, it is

ORDERED that the motion for stay pending judicial review be granted in part. The Federal Railroad Administration order dated November 5, 2018 (the “Order”), is hereby stayed to the extent it permits any reduction in the frequency of manual visual inspections mandated by 49 C.F.R. § 213.233(c) below the levels specified in Phase 2 of the test program approved in the Order (the “Test Program”). As to any such reduction below the levels authorized in Phase 2 of the Test Program, petitioner has satisfied the requirements for a stay pending court review. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2018). Petitioner has not satisfied those requirements as to Phases 1 or 2 of the Test Program.

Per Curiam**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Laura Chipley
Deputy Clerk

MAY - 9 2019

REPLY IN SUPPORT OF STAY

RECEIVED

No. 19-1048

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION/IBT**
Petitioner

v.

**UNITED STATES DEPARTMENT OF TRANSPORTATION
and
FEDERAL RAILROAD ADMINISTRATION**
Respondents

**On Petition For Review of A Decision of the
Federal Railroad Administration**

REPLY IN SUPPORT OF PETITION FOR STAY PENDING REVIEW

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May 9, 2019

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The Brotherhood of Maintenance of Way Employees Division/IBT (“BMWED” or “Union”) replies to the Department of Transportation and Federal Railroad Administration (“FRA” or “Agency”) and Association of American Railroads (“AAR”) and BNSF Railway Co. (“BNSF”) oppositions to BMWED’s petition for a stay of the FRA’s decision to suspend a Federal Track Safety regulation governing the frequency of manual visual track inspections.

I. BMWED HAS A STRONG CASE ON THE MERITS

A. SUSPENSION OF THE FREQUENCY OF TRACK INSPECTIONS IS NOT NECESSARY FOR THE TEST

The FRA argues that its necessity determination was based on evidence, expertise and specific aspects of the Test. FRA Opposition at 10. But the Agency’s Decision and Notice contained no explanation as to how that evidence, expertise and specific aspects of the Test support the conclusion that reduction in the manual visual inspections is necessary for evaluating the machines.¹

Neither the Agency nor the AAR and BNSF challenged BMWED’s assertion that the equipment can be evaluated without reducing the frequency of manual visual inspections. Instead, they seek to justify the necessity finding by asserting that the Test is actually to evaluate various combinations of manual visual and automated track inspections. FRA Opposition at 1, 3, 12; AAR/BNSF

¹ BMWED never objected to the testing of the new automated inspection equipment. BMWED objected to the reduction in the frequency of otherwise required manual visual track inspections during the Test.

Opposition at 12. But there is nothing in the Decision or Notice to support that contention; both referred to testing the effectiveness of the equipment, not to evaluating combinations of manual visual and automated inspections. The title of the Notice in the Federal Register described the Test as one to “Evaluate Automated Track Inspection Technologies”. Appendix at 62. The Notice stated that the “Test Program [is] designed to evaluate the effectiveness of various types of automated track inspection technologies”. *Id.* The FRA’s Decision described the program as “designed to specifically test the unmanned geometry car... as a viable alternative to manual visual inspections”, and to test it “as an optical visual platform”. App. at 55.

In arguing that the Test is actually about the mix of manual and automated inspections, the Agency and AAR/BNSF cite the Denial of Reconsideration (FRA Opposition at 12-13, AAR/BNSF at 12-13). But there was no such rationale offered in the Decision and Notice; nor was there anything in the BNSF filings and the correspondence between BNSF and FRA to support that characterization of the Agency’s rationale. *See e.g.* App at 47- the test program will “evaluate the effectiveness of the technology to be tested”. The 500+ pages of materials that preceded the Decision, are devoid of any reference to the purpose of the Test being assessment of the best combination of manual and automated inspections. BMWED made that point in its Petition (at 11-13) and neither the FRA nor

AAR/BNSF identified anything in the record prior to the Decision that supports their current characterizations of the Test.²

Because the necessity explanation relied on by the Agency and AAR/BNSF is not the one relied on in the Decision, they have not refuted BMWED's showing that the FRA's necessity finding was conclusory and unexplained and arbitrary and capricious.³

B. THE TEST HAS NOT BEEN SUBJECT TO CONDITIONS TO ASSURE SAFETY

FRA has repeated that conditions were imposed to assure safety; and that, based on its prior experience with "geometry cars", the Agency is confident that the machines will actually improve safety. FRA Opposition at 12, 14-15. But the FRA's own documents recognize that the test involves uses of the machines in new ways. *E.g.* App. at 2, 50, 52, 109-110, describing the development of geometry cars and the new capabilities to be evaluated. While the FRA has determined that

² AAR/BNSF assert that the Notice said that the Agency was attempting to "determine the best mix of automated and 'data driven focused manual visual inspections'". AAR/BNSF Opposition at 12, *citing* the Notice App. at 63. While the Notice did refer to "data driven focused manual visual inspections", there was no mention of assessing "the best mix" of manual and automated inspections.

³ AAR cites *Mississippi Commission on Environmental Quality v. EPA*, 790 F. 3d 138, 158 (D.C. Cir. 2015), as supporting the notion that a court will uphold an agency decision based on an explanation provided on reconsideration. AAR/BNSF Opposition at 13. But *Mississippi Commission* merely cited the reconsideration decision in that case as supporting the Agency's action. The Court did not hold that an agency decision will be sustained based on an entirely new rationale offered on reconsideration.

geometry cars have been effective for the uses to which they have previously been put, the purpose of the Test is to assess their performance for other uses; just because the geometry cars worked well in a particular function, does not mean that they will work well in the functions for which they will be used during the Test.

FRA and AAR/BNSF both cite the list of conditions imposed by the Agency as assuring safety. FRA Opposition at 14-15, 17; AAR BNSF Opposition at 14-15. But neither of them explained how those conditions will actually assure safety. In its opening brief, BMWED noted that only one of the conditions even concerns safety (the maximum 10 day interval between manual visual inspections- but it is inadequate as 10 days between inspections is simply not sufficient to assure safety (App. at 73, 96, 98, 105)). The other conditions are facially not safety conditions, but requirements related to the integrity and validity of the data collected during the Test; such as allowing FRA to use its own equipment for verification, requiring use of specific metrics, and mandating reporting of certain data and submission of certain reports. FRA also noted that it limited the Test to lines not used for passenger transportation. But derailments of freight trains can cause significant harm too, especially to railroad workers and communities along the lines.

AAR/BNSF say that BMWED erroneously argues that any time the FRA temporarily suspends a safety regulation, it is permitting unsafe practices, but they note that FRA has authority to suspend safety regulations for a test under Section

211.51. AAR/BNSF Opposition at 21-22. BNSF/AAR have caricatured BMWED's position. BMWED actually argues that the track safety regulations are the default minimum requirements for safe rail operations, railroads must comply with those requirements, and operations over lines that are not in compliance with those standards is therefore presumptively unsafe, unless the Agency has relieved a railroad of compliance with those requirements under the statute and regulations, and its action was not arbitrary, capricious or not in accordance with law. Here FRA is allowing BNSF to operate trains over lines that are not being inspected in accordance with the default minimum requirements of the track safety regulations, and the Agency's action was not in accordance with the Section 211.51 and therefore arbitrary and capricious.

C. THE DECISION IS CONTRARY TO THE REGULATION REQUIRING IMMEDIATE REMEDIATION OF DETECTED TRACK DEFECTS

49 C.F.R §213.223(d), provides that when an inspector discovers a defect, it must be immediately remediated. The Agency and AAR/BNSF do not dispute that this is a requirement, or that while a Track Inspector can perform immediate remediations, a machine cannot. Rather, they argue that there is no violation of this regulation because Section 213.233(d) only applies to human track inspectors, not machines. FRA Opposition at 15-17; AAR/BNSF Opposition at 4, 19-20. FRA further argues that in the absence of human track inspectors, Section 213.233(d) is

irrelevant, and the controlling regulation is 49 C.F.R. 213.5 which imposes a general obligation on all track owners to bring non-compliant track into compliance or to halt operations. FRA Opposition at 15.⁴

Section 213.233 is a regulation dealing specifically with track inspection. But here, machines are being substituted for human inspectors. Saying that immediate remediation of defects is required when the inspection is done by a person, but not when it is done by a machine, because the regulation was drafted when only people performed inspections, is to parse the words of Section 213.233(d) to a result that is at odds with its mandate, and is arbitrary and capricious. And if the FRA believed that immediate remediation was not necessary in the context of the Test, it could have invoked its authority under Section 211.51 to suspend Section 213.233(d) as it did with Section 233(c); but the Agency did not do that.

Additionally, if immediate remediation of a defect is a minimum requirement for safety when a person finds a defect, then FRA's response that Section 213.233(d) is irrelevant here contradicts its determination that the Test would be conducted under conditions that assure safety.

⁴ AAR/BNSF assert (Opposition at 19) that BMWED cannot rely on Section 213.233(d) in arguing for a stay from this Court because they say that BMWED did not rely on it at the Agency level. But BMWED did assert that the Decision violated Section 213.233(d) in seeking a stay from the FRA (App. at 84-85) and the Union raised it again in its comments in response to AAR's petition to rescind the stay (App. at 141).

FRA's contention that Section 213.233(d) is inapplicable because in the absence of track inspectors, inspection is governed by Section 213.5 is without merit. Section 213.5 is an overarching track safety mandate to all owners of rail lines that is not specific to track inspection; it certainly is not a regulation specifically governing machine-based track inspection. By the terms of both provisions, when human inspectors are used, the general mandate of Section 213.5 and the specific requirements of Section 213.233(d) apply. It is specious to assert that Section 213.233(d) is irrelevant because another regulation generally requires compliance with all track safety regulations.

II. BMWED'S MEMBERS WILL BE IRREPARABLY HARMED IN THE ABSENCE OF A STAY

The FRA and AAR/BNSF repeat that FRA has full confidence in the effectiveness of the machines and the conditions imposed on the Test. FRA Opposition at 17; AAR/BNSF Opposition at 21. They also note that data demonstrated to the Agency that geometry cars have identified more defects than Track Inspectors. But that data is based on the limited purposes for which the machines have been used before. The FRA and AAR/BNSF arguments assume the results of the Test itself, that the machines will be effective at detecting defects beyond those for which they have been used before. It makes no sense to say that maintenance of way employees who travel and work on the tracks will not be

harm by reduction in manual visual track inspections because machines are being substituted for track inspectors, when the point of the Test is to assess the effectiveness of the machines. And while the FRA is confident in the ability of the machines, the consequence for maintenance of way employees of reality falling short of FRA's expectations is serious injury or death.

AAR/BNSF argue that BMWED's claim of harm is undercut by the lapse of time between the effective date of the rescission of the administrative stay on April 15 and the filing of BMWED's petition. AAR/BNSF Opposition at 2, 22. But AAR/BNSF ignore the fact that this case is on an expedited briefing schedule under which BMWED's opening brief was due on April 15. BMWED was working on that brief when the FRA issued its decision on Friday April 5. Furthermore, this is not a situation where a stay can only be meaningful if issued before the Agency action becomes effective. The Court can stay the reduction in frequency of inspections after it has begun. Additionally, the harm caused by the reduction will worsen over time. Because the track was inspected as required prior to April 15, BMWED members will initially travel and work on track inspected in accordance with the minimum requirements, but the impact will worsen; and it will increase significantly after June 15 when the frequency of inspections can be further reduced. And while AAR/BNSF cite *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) in support of their argument that

BMWED waited impermissibly long to petition the Court for a stay, *Beame* is readily distinguishable. Whereas BMWED filed its petition a mere 10 days after the rescission of the stay went into effect, Justice Marshall criticized the applicant in *Beame* for waiting 5 months after the Second Circuit's decision to seek a stay of the order implementing it without any discernible excuse for doing so. 434 U.S. at 1313. And the applicant in *Beame* waited the "maximum time" to petition for certiorari, thereby ensuring that the Court would not resolve the matter during its 1976 term. (Justice Marshall also found that the applicants' "allegations themselves are not compelling," and that their "submissions contain little, if any, specific information as to the harm to be expected." *Id.*)

BMWED also believed it would be prudent to make a preliminary assessment of the effects of the reduction in inspections once Phase 2 began. Track Inspectors were queried and several responded with safety concerns that were described in their declarations. Their statements confirmed BMWED's concerns and supported seeking a stay from the court.⁵

⁵ AAR/BNSF assert that the declarations should not be considered because they were not in the record before the Agency. AAR/BNSF Opposition at 18, *citing IMS P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir 1997) and *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (DC Cir. 1987). BMWED's additional declarations were submitted to provide evidence of actual safety consequences of the reduction in manual visual inspections once the stay was rescinded, and to thereby support BMWED's assertions of irreparable harm to its members. Additionally, unlike in *IMS P.C.* and *AT&T Info Sys*, the additional declarations concern events that occurred after FRA rescinded the stay, so they could not have

BMWED would have preferred to file its petition earlier but it could not do so; that does not mean its members will not be harmed by the FRA's Decision; and the harm will certainly increase as time passes.

III. ISSUANCE OF A STAY IS IN THE PUBLIC INTEREST

FRA and AAR/BNSF dispute BMWED's argument that a stay would be in the public interest by touting the prior effectiveness of the machines; they claim the public would lose out if this new equipment cannot be tested. FRA Opposition at 20, AAR/BNSF Opposition at 23. But again, FRA and AAR/BNSF rely on data regarding the prior more limited use of this equipment, when it is now being used to assess a wider range of track conditions; they also presume the results of the Test. And they have again mischaracterized BMWED's position. BMWED does not seek to stop the Test of this equipment, it only challenges the reduction in frequency of the otherwise required manual visual inspections. Granting BMWED's petition would only prevent a reduction in the frequency of track inspections which are key safety inspections, so maintaining the regularly required frequencies of track inspections while the new technology is being evaluated is in the public interest.

been submitted to the Agency before its decision on whether to retain the stay. The responsive declaration of BNSF official John Cech does not undercut the declarations of BMWED's members. BMWED does not assert that the Test caused the defects found by the Inspectors, but rather that the machines did not detect these defects, which endangers members of the Union.

VI. CONCLUSION

BMWED respectfully submits that its petition for a stay pending review should be granted.

Respectfully submitted,

/s/ Richard S. Edelman

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May 9, 2019

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 27 (d)

Pursuant to Circuit Rule 27(d), I certify that Petitioner's Petition For Stay Pending Review was typed using Microsoft Word and that it complies with the requirements of Fed. R. App. P. 27(d)(2) in that it was typed in 14 point proportionally spaced type and contains 2584 words.

Respectfully submitted,

/s/ Richard S. Edelman
Richard S. Edelman

May 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused copies of the forgoing Reply In Support Of Petition For Stay Pending Review to be served through the Court's ECF system, and First Class Mail on the following:

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May 9, 2019

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